

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

OCTOBER 16, 2012

+ + + + +

The Regular Public Hearing
convened in the Jerrily R. Kress Memorial
Hearing Room, Room 220 South, 441 4th Street,
N.W., Washington, D.C., 20001, pursuant to
notice at 9:30 a.m., Lloyd Jordan,
Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

LLOYD JORDAN, Chairperson
NICOLE SORG, Vice-Chairperson
JEFF HINKLE, Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

PETER MAY, Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
JOHN NYARKU, Zoning Specialist
STEPHEN VARGA, Zoning Specialist

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D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

STEPHEN GYOR
STEPHEN MORDFIN
KAREN THOMAS
ARTHUR JACKSON

The transcript constitutes the minutes from the Public Hearing held on October 16, 2012.

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P-R-O-C-E-E-D-I-N-G-S

9:45 a.m.

CHAIRPERSON JORDAN: Good morning.

Would the hearing please come to order. We are located in the We're located at the Jerrily R. Kress Memorial Hearing Room at 441 4th Street, N.W. Today's date is October 16th and we're here for the public hearing of the Board of Zoning Adjustment of the District of Columbia.

My name is Lloyd Jordan, Chairperson. To my right is Jeffrey Hinkle, Board member. To my left Vice Chair Nicole Sorg. To her left Peter May, member of the Zoning Commission.

Please be advised that this proceeding is being recorded by a court reporter and is also being webcast live. Accordingly, we must ask that you refrain from any disruptive noises or actions in the hearing room. The Board's hearing procedures and processes are located on the table by the

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1 back by the door.

2 Let's begin today's docket. All
3 those who are to testify in a case, please
4 stand and take the oath or affirmation.

5 MR. MOY: Do you solemnly swear or
6 affirm that the testimony you're about to
7 present in this proceeding is the truth, the
8 whole truth, and nothing but the truth?

9 WITNESSES: I do.

10 MR. MOY: Ladies and gentlemen,
11 you may consider yourself under oath.

12 CHAIRPERSON JORDAN: Prior to your
13 testifying I'm going to ask that you complete
14 two witness cards and hand them to the court
15 reporter prior to testifying. That is two
16 witness cards each. Thank you.

17 Mr. Moy, call our first case.

18 MR. MOY: Yes, sir. Good morning,
19 Mr. Chairman.

20 CHAIRPERSON JORDAN: Are there any
21 preliminary matters?

22 MR. MOY: It's under control, sir.

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1 CHAIRPERSON JORDAN: It's under
2 control? Thank you.

3 MR. MOY: Good morning, Mr.
4 Chairman, and members of the Board. The first
5 application before the Board in this morning's
6 session is Application No. 18414. This is the
7 application of David Michaels and Juliet Macur
8 pursuant to 11 DCMR 3104.1.

9 This is for a special exception
10 for a rear addition to an existing one-family
11 row dwelling under Section 223, not meeting
12 the lot occupancy requirements under Section
13 403, side yard, Section 405, and nonconforming
14 structure provisions under Subsection 2001.3
15 in the R-4 District at premises 712 A Street,
16 S.E. Property located at Square 898, Lot 50.

17 CHAIRPERSON JORDAN: Very good.

18 Please introduce yourself for the
19 record.

20 MS. FOWLER: Good morning.
21 Jennifer Fowler from Fowler Architects.

22 CHAIRPERSON JORDAN: Before we

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1 begin, it's my understanding that with the
2 relief that is requested there is not any
3 necessary leave for the nonconforming. Would
4 that be correct? So we can proceed with --

5 MR. JACKSON: Correct.

6 CHAIRPERSON JORDAN: We can
7 proceed with just the relief from 403 and 405
8 and that would provide -- that would take care
9 of the nonconforming?

10 MR. JACKSON: That is correct, Mr.
11 Chairman.

12 CHAIRPERSON JORDAN: I believe
13 this record is pretty full in this matter.
14 I'm going to ask -- look at the Board and see
15 if there's any issues or questions we need to
16 ask of this Applicant. I see everyone shaking
17 their head.

18 If not, I'm going to turn back to
19 the architect and ask if there is something
20 you want to say to us. You don't have to. I
21 think the record is full. We think we have
22 enough to make a determination on this

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1 application for the relief that's been
2 requested.

3 MS. FOWLER: Thank you. I don't
4 have any additional comments. I just wanted
5 to thank the Office of Planning for their
6 thorough report. Thank you for your time.

7 CHAIRPERSON JORDAN: And I want to
8 note that we do have a favorable -- well, let
9 me turn to the Office of Planning and see if
10 there is anything they need to say in addition
11 to what's in the report.

12 MR. JACKSON: Mr. Chairman, Arthur
13 Jackson, D.C. Office of Planning. We'll rest
14 on the record.

15 Is anyone here from ANC-6B? I'm
16 sorry. Is anyone here from the Department of
17 Transportation? I don't believe so and I
18 don't think there's a report.

19 ANC-6B has submitted a letter
20 which we will give great weight to. By a vote
21 of 10 to zero they recommend approval of the
22 application. Is anyone else here in support

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1 of this application that needs to speak? We
2 have a letter from Capital Hill Restoration
3 Society that recommends approval. Is there
4 anyone here from there?

5 We have letters of support from
6 several neighbors. I think, if my vision is
7 correct, Feegel, Goodwin, and Jay, neighbors
8 who support the application. Is there anyone
9 else in the audience who wants to speak in
10 support of this application? Anyone want to
11 speak in opposition?

12 Then we'll move back to the
13 Applicant. I think the Applicant indicated
14 she said all she needs to say and so we will
15 close this hearing and move to deliberations.

16 I would move that we grant the
17 relief requested by the Applicant providing
18 the special exception from 403 and 405 lot
19 occupancy and side yard in this matter.

20 VICE CHAIRMAN SORG: I would
21 second that motion.

22 CHAIRPERSON JORDAN: Motion made

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1 and seconded. Any unreadiness? All those in
2 favor signify by saying aye.

3 MEMBERS: Aye.

4 CHAIRPERSON JORDAN: Those opposed
5 nay. The motion carries.

6 Mr. Moy.

7 MR. MOY: Yes, sir. Staff would
8 record the vote as four to zero to one. This
9 is on the motion of Chairman Jordan to approve
10 the application for special exception relief
11 under 223 not meeting lot occupancy
12 requirements under Section 403 and side yard
13 requirements under Section 405.

14 Seconding the motion Vice
15 Chairperson Sorg. Also in support of the
16 motion Mr. Peter May and Mr. Jeffrey Hinkle.
17 There's no other Board members sitting.
18 Again, the final vote is four to zero to one.
19 The motion carries, Mr. Chairman.

20 CHAIRPERSON JORDAN: Certainly a
21 summary order will be appropriate.

22 MR. MOY: Thank you.

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1 The next application for the Board
2 is Application No. 18406. This is the
3 application of Erin Murphy and Johanna Sears
4 pursuant to 11 DCMR 3103.2 for a variance from
5 the building on alley lot provisions under
6 subsection 2507.1.

7 This is to allow the continued use
8 of two residential apartments in a three unit
9 apartment building located on alley lots in
10 the DD/R-5-B District at premises rear of 1131
11 5th Street, N.W. Property located at Square
12 514, Lots 2214 and 2215, also known as Lots 48
13 through 50.

14 CHAIRPERSON JORDAN: Please
15 introduce yourselves.

16 MS. BATTIES: Good morning, Mr.
17 Chairman, members of the Board. Leita Batties
18 with the law firm of Holland & Knight. To my
19 right are two of the owners of the three units
20 that make up the subject property.

21 This is Ms. Johanna Sears. She's
22 the owner of Unit B. To her right is Erin

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1 Murphy who is the owner of Unit A. To my left
2 is Mr. Steven Sher from Holland & Knight who
3 I would like to proffer as an expert witness
4 in the area of land planning and zoning.

5 CHAIRPERSON JORDAN: Thank you.
6 We will accept Mr. Sher as an expert witness.
7 Let me turn to the Board for one second.

8 Let's begin so we can kind of
9 frame this. We don't need a complete
10 presentation. We know what's in the record.
11 I think there are some issues and questions
12 that the Board typically wants to get
13 addressed.

14 My question, and I'm going to ask
15 the Board members to give me their issues up
16 front so we can address them in the
17 presentation, is the undue hardship matter.

18 I understand that you have pled
19 that it just would be unfair, the economic
20 issue, if this relief is not granted.
21 Therefore, that creates the undue hardship.
22 That's what I'm understanding from the way

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1 that you've pled. If I'm wrong, please clear
2 that up.

3 Anything else from the Board? Any
4 other questions the Board might want to
5 address?

6 COMMISSIONER MAY: I think I need
7 the basic story of how this happened and who
8 is responsible. Here we are cleaning up
9 somebody else's mistake and it's really an
10 unfortunate circumstance.

11 It's very unfortunate for the
12 owners of the property but there were times
13 when this might have been caught earlier and
14 then the responsible party would have had to
15 deal with that. I want to understand the
16 picture of it and why we are here now dealing
17 with this because this is not an easy decision
18 to make.

19 The second thing I'm curious
20 about, and maybe it was contained in the
21 filing and I missed it, but is the sizes of
22 the alleys that access this property, so if

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1 you can address that in your presentation, I
2 would appreciate it.

3 MS. SEARS: Thank you, Mr.
4 Chairman. I agree with Mr. May, a sort of
5 better understanding of the history here.

6 From the filings I understand the
7 first EA notification came back in 2010 and
8 why are we just seeing this? Why would this
9 be just right for us now?

10 Also, there's implications
11 regarding HPRB. Then I think I recall a
12 mention of FEMS and whether or not they needed
13 to had weighed in. I think that's it for me.
14 Thank you.

15 CHAIRPERSON JORDAN: So if you
16 could curtail your presentation to that and
17 hit those salient points. We certainly don't
18 want to handcuff you but we definitely want
19 you to hit those points.

20 Mr. Hinkle, anything in addition
21 to that?

22 MEMBER HINKLE: No, thank you.

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1 MS. BATTIES: I do want to note
2 for the record that the third unit owner has
3 joined in on the application, Mr. Ali Terrei.
4 He is the owner of Unit C and is here today.

5 However, he's not at the table
6 because he does not have -- he was not the
7 original owner of this unit and doesn't have
8 first-hand history of the subject property and
9 the events that have transpired. He's here
10 and available to answer any questions that you
11 might have.

12 I just want to start with a couple
13 of things. First of all, this property is in
14 the Mt. Vernon Historic District. The
15 structure that is the subject property is
16 deemed a contributing structure.

17 They have not weighed in on this
18 but the one implication of the historic
19 designation is that no additional parking is
20 required in connection with the proposed use
21 of the -- the existing use that we are trying
22 to get this morning.

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1 Just by way of background, and I'm
2 glad Commissioner May and Member Sorg asked
3 about the history of the property. We are
4 going to kind of frame our presentation to go
5 through that background.

6 I've asked Ms. Murphy and Ms.
7 Sears to join me up here because I think their
8 story really goes to the first prong of the
9 test for granting the use variance, and that
10 is the exceptional situation and condition
11 that has brought us here this morning.

12 With regard to the undue hardship,
13 Mr. Jordan, just briefly I will state, and Mr.
14 Sher will address this more specifically in
15 his testimony, is that there is no other
16 practical use of the property. The existing
17 use, the residential use, is the most
18 reasonable use and the most compatible use
19 when you look at where the property is located
20 and the history of the property.

21 Mr. Sher will also in his remarks
22 address the third prong of the test and that's

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1 the substantial detriment, that no substantial
2 detriment to the public good or the zone plan
3 and the integrity of the zone plan will be
4 compromised with the granting of this
5 application.

6 I do want to note for the record
7 that ANC-2C has submitted a letter of support.
8 This application was presented to ANC-2C
9 twice; once in the spring and then most
10 recently in September and both times they
11 voted in support of this application.

12 Just by way of background, the
13 apartment building, again, is an existing
14 structure which, according to our research on
15 the atlas maps was constructed on the site as
16 early as 1957. A C of O was issued by the
17 District we know in 1971 and at that time the
18 property -- the use was identified as
19 warehouse use.

20 We looked at some aerial
21 photographs of the property. We reviewed, in
22 fact, a complaint filed against the developer

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1 in 2008. Those two items suggest that the
2 property was probably used as a carriage house
3 for the property at 456 M Street. This
4 property is located directly behind that.

5 In 2008 the developer of the
6 property and the previous owner, John Denning,
7 converted the structure from the carriage
8 house or warehouse use to the current
9 apartment building and the property is fitted
10 out as such. You can see that more
11 specifically in Exhibit K of our prehearing
12 statement.

13 Again, although the use was not
14 permitted on the property, when you look at
15 the surrounding uses, when you look at the
16 alley, again shown in our prehearing statement
17 at Exhibit K, the current use, the residential
18 use, is the most appropriate use for the
19 property. In fact, more compatible than any
20 other uses that would be permitted under the
21 Zoning Regulations either as a matter of right
22 or as a special exception.

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1 Then the final factor, as
2 Commissioner May as pointed out, with regard
3 to the exceptional situation and conditions
4 that the property and the illegal conversion
5 of the property to the apartment house was
6 related to or committed by bad acts by people
7 that were not related to the Applicant. The
8 situation today is not the result of any
9 actions caused by the Applicant. I would like
10 Ms. Sears and Ms. Murphy to go through
11 their --

12 CHAIRPERSON JORDAN: Let me ask
13 you what happened between 208 and today? Are
14 the Applicants the first owners of these
15 properties and were they -- when did their
16 ownership start?

17 MS. BATTIES: I'm going to ask
18 them to explain that to you. Because of the
19 background and the story is a little bit
20 convoluted, I'm going to just ask them
21 specific questions which will give -- will
22 kind of frame the story and the situation that

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1 is before you. That's really just to keep it
2 somewhat orderly. I'll start with Ms. Murphy
3 who is at the far end of the table.

4 Can you explain how you and Ms.
5 Sears learned about the sell of the
6 condominium unit in 2009 and how the
7 transaction for the purchase of your units
8 transpired.

9 MS. MURPHY: Good morning.

10 CHAIRPERSON JORDAN: Good morning.
11 Have you turned in witness cards?

12 MS. MURPHY: Yes. Good morning
13 and thank you for hearing our case. I began
14 looking for property because I wanted to
15 become a homeowner.

16 I was looking around and my real
17 estate agent that I contacted through just
18 looking at a different property found this
19 one, showed it to me in early 2009. We went
20 through the process of inspection, working out
21 mortgages.

22 I closed on the property on March

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1 31st. I entered into a contract in mid-
2 February, I believe it was February 18th. We
3 closed and I moved into the property in mid-
4 April of 2009.

5 MS. BATTIES: Ms. Murphy, the
6 title insurance policy, the plat of
7 condominium that was recorded with the
8 District listed your property at that time as
9 -- when you purchased the property it was
10 listed as 1131 5th Street, N.W.

11 When the property was originally
12 advertised, it was advertised as 456 M Street.
13 Can you explain when you found out about this
14 change of address and what was represented in
15 terms of the relationship between your
16 apartment building and the condominium at 456
17 M Street.

18 MS. MURPHY: Sure. The property
19 was marketed as part of 456 M Street
20 condominiums. It was described to me as a
21 carriage house developed with 456 M Street so
22 you had the main rowhouse and our carriage

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1 house attached.

2 When I went to go view the
3 property, which I viewed several times, we
4 walked through a shared corridor through 456
5 M Street and walked out the back.

6 It was presented to me that there was a common
7 area with shared trash facilities, that our
8 mailboxes would be on the front of 456 M
9 Street, our property, as well as 456 M Street.

10 I was told that when we moved in,
11 or we hit a quorum or majority in the carriage
12 house, that we would work out 456 M Street and
13 coming up with the condo association.

14 When I moved in in mid-April I had
15 -- sorry. When I closed on the property I
16 went to Stewart Title, signed all the
17 documents, received a clear title
18 and then received my keys and also the plant
19 condo docs. When I was signing it they said
20 it was 1131 5th Street.

21 I said, "What was the difference
22 with 456 M Street?". They said, "For tax

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1 purposes it's 1131 5th Street but your mailing
2 address is 456 M Street and that will be your
3 property address."

4 I thought that was a little
5 strange but I had real estate agents there.
6 The title insurance company was there. They
7 are the experts so I relied on them. I'm
8 certainly not a real estate expert, though
9 maybe all this whole process maybe I am.

10 So from April to October 2009 I
11 used the keys to use the common hallway. The
12 hallway -- the way that 456 M Street is built
13 there's four floors. There's a basement unit
14 and then the top three floors.

15 The common hallway didn't go
16 through anyone's property but it was through
17 the basement until October of 2009 when the
18 residents of 456 M Street changed the locks
19 and left a letter on our door saying that we
20 could no longer access the common hallway or
21 the trash facilities and that we were, in
22 fact, separate units.

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1 MS. BATTIES: And were you paying
2 condominium fees for your building at that
3 time?

4 MS. MURPHY: Yes. When I asked
5 the developer John Denning about the condo
6 fees he said to pay to Realty Pros. Realty
7 Pros, which I think is located near
8 Tenleytown, was managing both 456 and 1131 so
9 I made out checks for six months to Realty
10 Pros.

11 I thought everything was fine.
12 What Realty Pros was going to cover was our
13 insurance and our water bills and any other
14 maintenance that the condo association deemed
15 appropriate including trash facilities.

16 Also in that letter that told us
17 we were locked out of the common hallway also
18 said that they were no longer using Realty
19 Pros as a management company. When I
20 contacted the owners of 456 M Street and
21 inquired what happened with Realty Pros among
22 other issues in the letter they claim that

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1 Realty Pros was no longer paying their water
2 bills or any of their bills and there were
3 some serious issues.

4 Johanna and I contacted Realty
5 Pros, or, at least, attempted to and it would
6 appear that they also just took our money and
7 didn't pay our bills and we had to contact the
8 water and sewer authority and trash facilities
9 to try to make sure that we were current on
10 our payments. After that we no longer had a
11 management company.

12 MS. BATTIES: So, Ms. Sears,
13 that's the time that you learned about the
14 situation basically that you had no access to
15 456 M Street, that the condominium
16 association, or the management company, wasn't
17 paying your utility bills. You hired an
18 attorney and is that when you learned about
19 the permitting and zoning problems with your
20 current unit or building?

21 MS. SEARS: Yes, that's correct.
22 We had hired an attorney to try to prove that

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1 we had easement to the hallway that we could
2 all use as our common access. In looking into
3 this we found out there was no written
4 easement. Then looking further into it is
5 when we discovered the zoning and the other
6 issues that were problems with for the
7 property.

8 MS. BATTIES: And so on June 30,
9 2010 before Holland & Knight was engaged, you
10 received a letter from DCRA. How did you get
11 that letter?

12 MS. SEARS: The first attorney
13 that we had was trying to research and get as
14 much information as he could about the
15 situation so we filed a request with DCRA and
16 that's how that letter came about. It was at
17 that point that we realized the zoning was a
18 much bigger issue than the easement and tried
19 to pursue that instead.

20 MS. BATTIES: Just for the record,
21 there was a conflict of interest with the
22 first attorney they engaged. They hired a

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1 second attorney.

2 The second attorney, who still
3 represents them on the title issues, has
4 advised them that not only do they need zoning
5 counsel but their condominium association
6 documents were all filed improperly so they
7 have to go back and create a new condominium
8 association for their three-unit apartment
9 building. Is that on hold until we get
10 through this process?

11 MS. SEARS: Correct. He told us
12 that would be taken care of after the fact,
13 that we would do it then.

14 MS. BATTIES: Are you currently
15 paying condominium fees? How are your
16 utilities being paid in?

17 MS. MURPHY: We are not paying
18 condo fees. At this moment we are splitting
19 the fees that are associated with our condo.
20 As Johanna mentioned, we haven't recreated our
21 condo association. We've been advised to wait
22 until at least some of these issues are out of

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1 the way to even proceed that way.

2 Currently the shared bills are
3 water and insurance. Those bills come
4 directly to me. The water bill is in my name.
5 The condo insurance, master insurance, is in
6 the condo's name or, I think, by name but it
7 gets mailed to me. I contact all the owners
8 and we split the fees and turn them in. We
9 all have our own separate electric meters
10 through Pepco and pay those separately.

11 MS. BATTIES: And how do you
12 handle trash services?

13 MS. MURPHY: We do have a D.C.
14 trash can and we pull it to the curb.

15 MS. BATTIES: I don't know if you
16 can answer this question. Are you taxed as
17 individual residential units?

18 MS. MURPHY: Yes. We all have our
19 own tax IDs and at closing we'll give the
20 information that we have been keeping current
21 on our property taxes.

22 MS. BATTIES: What has been the

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1 developers response to this situation?

2 MS. MURPHY: The developer has
3 been -- he's kind of gone MIA. We believe he
4 went to California and filed bankruptcy but we
5 haven't really gotten confirmation on that.

6 MS. BATTIES: For the Board, just
7 to give you a sense of how bad an actor the
8 developer is, his mother-in-law in connection
9 with 456 M Street filed a lawsuit against him
10 on this property alleging a breach of contract
11 of sale, breach of fiduciary duty, fraud,
12 injunctive relief accounting.

13 This is someone who lied to his
14 mother-in-law so she would provide the
15 financing for 456 M Street. He put her into
16 a unit that wasn't finished that had thousands
17 of dollars of work that needed to be done and
18 told her he couldn't complete the work because
19 he had run out of funds. I mention that again
20 just to give you a sense of the type of person
21 they were dealing with when they purchased the
22 property as first-time homeowners.

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1 As it relates to the second and
2 third prongs of the variance test, I want to
3 just turn this portion of our presentation
4 over to Mr. Sher and he'll discuss how this
5 application meets the second and third prong.

6 MR. SHER: Mr. Chairman and
7 members of the Board, for the record my name
8 is Steven Sher, the Director of Zoning and
9 Land Use Services with the law firm of Holland
10 & Knight. I want to try and respond to some
11 of the individual questions that were asked
12 specifically.

13 One question was asked what is the
14 status or the width of the public allies. If
15 you turn to the plat that is beyond tab A in
16 our prehearing submission, the property is
17 shown here as tax lot 827 and it's shaded in.
18 You can see that the allies that actually run
19 up to the property are 30-foot wide in the
20 north/south direction, 25 feet wide as it
21 turns in the east/west direction.

22 The allies that actually lead out

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1 to the street get narrower so that the alley
2 that leads out to 5th Street is 15 feet wide
3 and the alley that leads out to M Street is
4 20-feet wide.

5 There are also allies that lead
6 out to the east end of the square on 4th
7 Street and to the south through New York
8 Avenue. But the immediate vicinity is 30
9 feet. The alleys that actually go out to the
10 street are smaller.

11 In terms of the description of the
12 property, again if you look at the condo plat
13 behind tab B in the statement that you have,
14 you will see on the second page there is the
15 plat and then there's a plan of the first
16 floor, the second floor, and then the roof
17 plan. This is a two-story alley building.

18 In total it has a little less than
19 4,000 square feet. There are the three
20 apartment units that you've heard described;
21 A, B, and C. There are two parking units
22 which are shown on the first-floor plan as P1

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1 and P2. The total amount of space in the
2 building is less than 4,000 square feet.

3 In terms of the hardship that
4 would occur to the owners if they were not
5 able to use these properties for residential
6 use, the court has basically said that if
7 there is -- in order to grant a use variance,
8 the Board has to be able to find that there is
9 no other reasonable use of the property.

10 In the statement that we submitted
11 we went through those uses. What I've done is
12 condensed that into one page and I would like
13 to hand that to the Board and go through that
14 with you quickly.

15 These are non-residential uses
16 permitted in an R-5-B district. As we know,
17 on an alley lot you are not normally allowed
18 to have a building for human habitation so
19 I've left out all of the residential uses that
20 would otherwise be permitted in an R-5
21 district.

22 Just starting with what is

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1 permitted in an R-1 district and working all
2 the way through R-5, both uses permitted as a
3 matter of right and uses permitted as a
4 special exception, if you look at that list of
5 uses, you say to yourself what is a reason --

6 I say to myself what is a
7 reasonable use of this property given its
8 location on the alley, given its size, and
9 given the fact that it is configured as it is
10 today, could you reasonably use it for a
11 church, a farm, a fire station, a mass transit
12 facility? And I won't read all the rest of
13 them.

14 If you go through that list, in my
15 view there is not an alternative non-
16 residential reasonable use of this specific
17 premises. That puts you back to what is it
18 being used for today or what other alternative
19 uses do you have. I think in our view
20 allowing the three residential uses to
21 continue would be the most appropriate answer
22 to that question.

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1 With respect to any potential
2 detriment that would occur if these uses were
3 continued in the building, again, you can see
4 from some of the photographs that are in tabs
5 0 and -- I guess it's tab 0 basically, and the
6 plats again, this is not a sort of crammed-in
7 situation.

8 Admittedly you've got to go
9 through some narrow allies to get back there.
10 Once you're back there, there is a fair amount
11 of space around this building. The square
12 which in the past had a significant amount of
13 non-residential including I almost want to
14 call it a heavy industrial use, i.e., the Yale
15 laundry, has been redeveloped and is now
16 almost exclusively residential.

17 In the past where you might have
18 looked at that lot and said, okay, a warehouse
19 on an alley lot in the middle of the square
20 might not have been a wrong thing. In fact,
21 the warehouse on an alley lot is permitted.

22 When you go to the current

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1 situation and look at the uses that surround
2 this property, having three additional
3 apartment units in this location in my view is
4 consistent with the tenor and the existing
5 condition of the surrounding properties.

6 It would be my view that approving
7 this application would not be inconsistent
8 with the intent and purposes of the
9 regulations. It follows on the correction of
10 what our clients have found to be the result
11 of a whole lot of things that maybe shouldn't
12 have happened but did. Part of those things
13 were acts that the District government
14 recognized.

15 In fact, by recording the
16 subdivision plat showing the three condo units
17 and the two apartments -- sorry, the
18 condominium plant, not subdivision plat --
19 showing the three apartment units and the two
20 parking spaces without that necessarily having
21 been approved.

22 In response to a question I think

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1 Mr. Jordan asked, or maybe it was Ms. Sorg, we
2 spent a fair amount of time working with the
3 District once our clients came to us to see if
4 we could find any evidence that permits had
5 been issued or that there were approvals given
6 by the city so that the Zoning Administrator
7 would have a basis to say, "Yeah, okay.
8 Eureka, we found it."

9 Well, unfortunately, eureka, we
10 didn't find it. We could find no records of
11 permits issued prior to the renovation, prior
12 to the time that our clients viewed the
13 properties and bought them.

14 We found some evidence of a permit
15 issued by the District, an electrical permit
16 that said it was a three-unit apartment
17 building but after having gone through all
18 that and having met with Matt LeGrant a number
19 of times and gone back and forth and Matt kept
20 saying, "Can't you find something? Go see the
21 tax people. Go here and go there."

22 We went everywhere and we couldn't

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1 find it. At the end of that when Matt finally
2 said, "Look, I don't think I have any
3 authority to approve a C of O here without
4 your having the Board approve it. Here we
5 are."

6 VICE CHAIRMAN SORG: There's no
7 permits from the conversion?

8 MR. SHER: I'm not going to say
9 they aren't there. We can't find them and
10 we're pretty good at finding that kind of
11 stuff.

12 CHAIRPERSON JORDAN: But the units
13 have been separately taxed. Is that correct?
14 They have the proper tax records.

15 MR. SHER: They have been
16 separately taxed. Matt thought that maybe
17 copies of the permit plans had gone to the tax
18 people in order for them to have realized that
19 it was no longer an apartment house, it was
20 three residential units. Couldn't find
21 anything there either.

22 MS. BATTIES: We've just submitted

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1 to the record an outline of events related to
2 this property. I will say with regard to the
3 electrical permit, that permit was for 1131
4 5th Street. We believe that the developer
5 used that permit to do work in the unit
6 improperly.

7 CHAIRPERSON JORDAN: Mr. Moy, I'll
8 accept these into the record. We'll just give
9 them exhibit numbers, both these two
10 documents.

11 MR. MOY: I will. Thank you, sir.

12 MR. SHER: I think I responded to
13 the specific questions but if I missed
14 something, please let me know.

15 COMMISSIONER MAY: Could you talk
16 more about the residential use on an alley and
17 the requirements when that can be accepted?

18 MR. SHER: In a single-family
19 dwelling on an alley lot that is 30-feet wide
20 and is 30-feet wide going all the way out to
21 the street is a permitted use. This is not a
22 single-family dwelling.

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1 It's a three-unit apartment house
2 so we need a variance under any circumstance
3 in order to put residential use on this
4 property. If it had been a one-family
5 dwelling, it would be one variance. If it was
6 as it is, it's the variance that we've asked
7 for.

8 The uses that I went through
9 before are all non-residential uses that are
10 otherwise permitted. They could go back there
11 but I don't believe any of them are suitable
12 or appropriate, or the building is suitable or
13 appropriate for those uses.

14 COMMISSIONER MAY: I mean, even
15 though it's on a 30-foot alley, none of those
16 -- there are no 30-foot alley connections to
17 a street?

18 MR. SHER: Correct. Even if there
19 were, that wouldn't be enough for an apartment
20 house.

21 COMMISSIONER MAY: I understand,
22 but it gets you closer to residential use than

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1 you are right now.

2 MR. SHER: Right. We're on 30-
3 foot alleys but then the alleys, as I said,
4 get down to 15 or 20 feet as they go out to
5 the street.

6 COMMISSIONER MAY: I mean, you
7 stopped reading uses before you got to private
8 garage and artist studio which are the only
9 two that seem to be somewhat reasonable. I
10 mean, why isn't an artist studio, for example,
11 a reasonable use?

12 MR. SHER: In this situation,
13 again, you've got two-story units that have a
14 stairway going up to each one of them. They
15 are not in any way configured -- I mean, I
16 guess if someone wanted to put an easel up
17 there and paint, anybody could do that but
18 they are not configured in any special way
19 that one would think of for an artist studio.

20 They don't have floor loads that
21 would accommodate sculpting or anything like
22 that. Frankly, they are apartment units and

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1 that's what they look like.

2 MS. BATTIES: I would just add to
3 that given the financial investments that the
4 Applicant has made into the property, any
5 conversion of the units to a private garage or
6 an artist studio at this point would result in
7 an undue financial hardship in that there
8 would be no reasonable expectation that they
9 would have any return on the conversion of the
10 apartment building to those uses.

11 COMMISSIONER MAY: Okay. I wanted
12 you to say that for the record.

13 I would not assume that it would
14 not be feasible to use it as an artist studio
15 because it was a warehouse before. Chances
16 are the loads -- it could handle loads that
17 you're talking about. But you don't know?
18 It's all speculation?

19 MR. SHER: I don't know.

20 COMMISSIONER MAY: I think the
21 fact of the conversion cost and the fact that
22 it's not going to be as valuable as an artist

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1 studio as it would be as apartments is a more
2 reasonable approach or argument.

3 Can I ask a couple other
4 questions, Mr. Chairman?

5 CHAIRPERSON JORDAN: Sure.

6 COMMISSIONER MAY: So in the
7 future do you anticipate having access to your
8 units through the passage in 456 M or is that
9 just a complete dead end? Can you acquire an
10 easement? Are you trying to do that?

11 MS. MURPHY: I'm not really sure.
12 We can certainly reach out to the owners again
13 but at the time we've been mostly distracted
14 in trying to zone the property rather than
15 find easement. We didn't have much success
16 prior so it would be speculation. I don't
17 know.

18 COMMISSIONER MAY: And how do you
19 access the units right now? Just walk in off
20 of 5th Street?

21 MS. MURPHY: Yes.

22 COMMISSIONER MAY: Okay. It seems

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1 like the idea of going after the developer at
2 this point is probably not going to be very
3 productive. Are you also pursuing the title
4 company? Do they have some responsibility for
5 this error?

6 Surely the fact that you didn't
7 have a secure easement to access your property
8 off of the street somebody should have been
9 aware of that. There is some error that has
10 been made, I think, even in allowing the sale
11 to go through without that being solidified at
12 closing.

13 MS. BATTIES: I'll answer. They
14 do have a pending claim against the title
15 company. Just so that you know, the third
16 unit owner just closed on their property in
17 July of this year and they got title insurance
18 from Chicago Title.

19 COMMISSIONER MAY: Okay. I'll go
20 to Chicago Title.

21 MS. BATTIES: Or Stewart Title.

22 COMMISSIONER MAY: I don't know

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1 them. I know Chicago. Anyway, I'm amazed
2 that that unit has so recently been sold.
3 Were they aware -- was that buyer aware of
4 this issue when they purchased?

5 MS. BATTIES: They were told that
6 there was an issue with the C of O but they
7 did not know the extent of the issue.

8 COMMISSIONER MAY: And was Chicago
9 Title aware there was no easement of access
10 and no right of access at that point?

11 MS. BATTIES: I reviewed the title
12 policy but I don't -- I mean, I don't know
13 actually.

14 COMMISSIONER MAY: Okay. It's
15 fairly astounding to me. That's it for my
16 questions at this moment.

17 CHAIRPERSON JORDAN: Anyone else?
18 Is there anything further you want
19 to present to us?

20 MS. BATTIES: We have nothing
21 further. Unless you have any additional
22 questions, we have nothing further.

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1 CHAIRPERSON JORDAN: Let's turn
2 now to Office of Planning.

3 MR. GOLDSTEIN: Good morning, Mr.
4 Chair, members of the Board. My name is Paul
5 Goldstein for the record. I'm going to just
6 quickly summarize our report and then try to
7 address some of the questions that came up
8 from the Board.

9 The Office of Planning originally
10 was having a little difficulty with this case
11 but after we heard more of the narrative, more
12 of this extremely unfortunate situation that
13 the Applicants are in, we agree with them that
14 this is really an exceptional condition.
15 There was a bad actor involved which is not
16 the Applicants in this case. The conversion
17 to a permitted use would just be an
18 unreasonable burden on the Applicants. We
19 don't see any detriment to the public good or
20 to the zone plan.

21 I heard a question about HP and
22 the historic nature. As the Applicants'

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1 attorney said, it is a contributing building
2 to the Historic District. I informally spoke
3 to a representative of Historic Preservation
4 and they said they had no concerns with the
5 building or the application.

6 I also heard Commissioner Sorg
7 mention FEMS. I did reach out to them. I was
8 expecting them to put a report into the
9 record. I guess it didn't arrive. I
10 informally heard that they have a preference
11 for sprinklers in these units. The units
12 currently are not sprinklered I understand.
13 That's informal. I haven't actually seen
14 anything in writing from FEMS to that effect.

15 Other than that, I'm happy to take
16 any questions that the Board may have.

17 CHAIRPERSON JORDAN: Any questions
18 for Planning?

19 Mr. May.

20 COMMISSIONER MAY: Yes. I'm going
21 back to the residential uses on an alley, or
22 a single-family unit on an alley in the

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1 circumstances where that is permitted when
2 there is a 30-foot access.

3 The principle there is that it's
4 almost like being on a street in essence.
5 There's good access to it and it's safe and
6 accessible and so on. Is this -- what I want
7 to know is that there is some parallel here
8 between these units and that kind of use and
9 that you regard this as a reasonable use of
10 the property and a reasonable way to get a
11 residential use on this alley. I mean, do you
12 see a parallel there?

13 MR. GOLDSTEIN: Well, I think that
14 the circumstances are a little more unusual.
15 There isn't the easement to get easily to
16 their property but this isn't -- I have seen
17 other alley cases where people have to wind
18 through a 30-foot wide alley to get to their
19 unit so it does exist.

20 I don't think -- I haven't had as
21 many cases that have had multiple units in a
22 building on an alley lot but certainly this is

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1 a somewhat exceptional situation. I'm not
2 sure if I'm sort of getting at -- I'll take a
3 follow-up if you --

4 COMMISSIONER MAY: I think that's
5 fine. Knowing a little bit more about your
6 past experience is helpful.

7 CHAIRPERSON JORDAN: Any other
8 questions of Planning?

9 Ms. Sorg.

10 VICE CHAIRMAN SORG: Thank you,
11 Mr. Chairman.

12 Just a follow-up. Although we've
13 heard from the Applicant that an easement is
14 pretty much not something that they're
15 pursuing, is that something that would
16 influence your perception with regard to the
17 lack of 30-foot access to the street?

18 MR. GOLDSTEIN: No, I don't think
19 that would change my opinion if I gave that
20 impression. I have seen other alley dwellings
21 where someone has to access their dwelling by
22 going down the alley and into it. It's

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1 unfortunate that is also the circumstance in
2 this case, that there could have been easier
3 access but that does not change my opinion in
4 reviewing this case.

5 CHAIRPERSON JORDAN: Any other
6 questions of planning?

7 Anyone here from the Department of
8 Transportation or any other government agency?
9 Anyone here from the ANC? Do we have an ANC
10 report? Oh, it came in this morning. Thank
11 you. One of those it-came-in-this-morning
12 things.

13 Mr. Moy, we got an ANC report this
14 morning on this?

15 MR. MOY: Yes, sir. Actually, it
16 arrived by email yesterday, Monday, October
17 15th.

18 CHAIRPERSON JORDAN: But it's
19 dated September 28th.

20 MR. MOY: I understand that
21 completely but the official receipt in the
22 office was yesterday, October 15th, sir.

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1 CHAIRPERSON JORDAN: Is there a
2 request here to accept it as being untimely?
3 We'll take it into consideration. Whether or
4 not it's subjected to great weight we don't
5 necessarily have to give it that but the ANC
6 did vote four in favor with no opposition so
7 we will just take a look at that. We received
8 that this morning.

9 Is there anyone in the audience
10 who wants to speak in support of this
11 application? Any opposition?

12 I'm sorry. Did I ask Planning --
13 if the Applicant had any questions for
14 Planning? Anyone in opposition want to speak?
15 Any closing statement from the Applicant?

16 MS. BATTIES: I do want to thank
17 Mr. Goldstein. We've worked very closely with
18 the Office of Planning on this case so I want
19 to thank him for working through a number of
20 issues as it relates to the variance test.

21 Given the Office of Planning
22 report, given that there are no objections to

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1 this application by any of the other agencies,
2 given the ANC's letter of support, we
3 respectfully request that the Board approve
4 this application today and issue an order as
5 expeditiously as possible. Thank you.

6 CHAIRPERSON JORDAN: Thank you.
7 We'll close this hearing. Let me see if the
8 Board is ready to move into deliberation.
9 Then we'll move into deliberation. Does
10 anyone want to start us off on this?

11 Mr. May.

12 COMMISSIONER MAY: Well, it's very
13 clear this is a very difficult situation. My
14 heart goes out to all the folks involved
15 because it's a mess to have to clean up. It
16 sounds like it's first ventures in real estate
17 so you don't really even know exactly what
18 you're dealing with.

19 In this circumstance it went very
20 badly. I think that on the merits of the case
21 that's in front of us I don't like the idea of
22 granting variances to the Zoning Regulations

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1 in order to fix a problem that someone created
2 wilfully and in defiance, if you will, of the
3 Zoning Regulations.

4 In this circumstance we're not
5 dealing with the person who committed the bad
6 acts. We're dealing with the folks who are
7 trying to clean it up afterwards. I think the
8 idea of undue hardship in this circumstance I
9 think does apply.

10 I'm a little nervous about the
11 prospect of this residential use and this
12 particular alley given the dead end alley with
13 a bunch of sort of shorter alleys and hiding
14 places and things like that. I'm concerned
15 about the safety of it.

16 I think that if the option of
17 acquiring an easement through 456 is still out
18 there, I think that would be very, very wise.
19 Not just for the safety of the current
20 occupants but I think it would help your
21 resale value to be able to have that access
22 directly off the street because I think it

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1 would be much safer than walking in through
2 the alley.

3 I'm familiar with many alley
4 dwellings and sometimes the circumstances are
5 perfectly fine and understandable and easy to
6 get to. In other circumstances it's a little
7 difficult and not necessarily the safest so I
8 think that's just the overriding concern that
9 I would have at this stage.

10 In any case, I feel that the
11 Applicant has made a strong case for the
12 relief that's been requested. It's
13 unfortunate that we're here but it does seem
14 that this is the only way to fix the problem.

15 CHAIRPERSON JORDAN: I would agree
16 with you, Mr. May. I think this is really
17 difficult for us to deal with, to be very
18 honest, but I think here is the problem that
19 I'm having, is begin to set precedence for
20 something like this and have a developer who
21 would intentionally or just doesn't care in
22 the future and just leave it to the other

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1 folks coming behind them to clean it up and
2 then cite the action we may take here today as
3 precedence for this type of behavior.

4 It's really unfortunate that it
5 happened. Really, really unfortunate that it
6 happened. I see that you've been diligent in
7 trying to at least take care of your part of
8 it and give it straight. The title company,
9 I'm sure you guys are going to see them again
10 and again, at least one good time, in this
11 matter because that should have been something
12 that should have been discovered at some
13 point.

14 I think this is not a self-created
15 hardship certainly because the Applicant's
16 were not part of this process. I think the
17 Clausen case and the Silverstone case talks
18 about self-imposed hardships and what have you
19 in regards to the applicant, and even the
20 applicant being involved in that process.

21 In your purchase you certainly
22 took it with good will with your hands being

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1 very clean. As I said, I think that we can
2 look a whole other way at that hardship issue.
3 This is going to put a whole other spin on the
4 hardship case. That's just my thought.
5 Anyone else?

6 VICE CHAIRMAN SORG: Mr. Chairman,
7 I would agree with Mr. May's comments and many
8 of your comments as well. I just want to
9 weight in a little bit on the self-imposed
10 hardship question. We have had cases prior
11 looking for variance where a homeowner has
12 come in, bought a house not knowing about a
13 zoning issue.

14 That in itself does not rise to
15 the level of a hardship that would be
16 something that we could consider here, though.
17 I think, as Mr. May may have been getting to,
18 is a very specific situation in which not only
19 is there a very unique and long history of
20 sort of not just improperly done acts with
21 regards to building and construction and real
22 estate sales, but also an effort to, it seems

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1 from the testimony we received, cover those
2 things over.

3 I think it goes beyond just a lack
4 of knowledge on the part of the Applicant when
5 they purchased their units. I think that
6 uniqueness here has been demonstrated in the
7 record.

8 I think also two small points that
9 I think contribute to the degree to which this
10 case is compelling for me is the particular
11 development activity in the square. This is,
12 I think, only one of two alley lots in the
13 area.

14 Also this is an area where
15 industrial uses have over the past several
16 years been converted to residential use so
17 that doesn't weigh in necessarily to the
18 issue.

19 Also, I think the fact that the
20 property itself is on a 30-foot space in the
21 alley in terms of the spirit of looking at
22 alley dwellings in terms of not creating bad

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1 conditions for a community or a close group of
2 property owners is met here in that sense even
3 if there is not the 30-foot alley as it meets
4 the street. That's all. Thank you.

5 CHAIRPERSON JORDAN: I guess I was
6 speaking on the issue of willful concealment,
7 not one where there is a public record and one
8 would take the responsibility himself. Here
9 we have what appears to be a willful
10 concealment of the violation.

11 Anyone else? I would move the
12 that we grant the variance requested --
13 use variance requested by the Applicant under
14 Section 2507 and that we grant the relief to
15 allow for the three-unit apartment building
16 located on the alley in this particular
17 district at 1131 5th Street, N.W.

18 VICE CHAIRMAN SORG: Second.

19 CHAIRPERSON JORDAN: Motion made
20 and seconded. Any unreadiness? All those in
21 favor signify by saying aye.

22 MEMBERS: Aye.

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1 CHAIRPERSON JORDAN: Those opposed
2 nay. The motion carries.

3 Mr. Moy.

4 MR. MOY: Yes. Staff would record
5 the vote as four to zero to one. This is on
6 the motion of Chairman Jordan to approve the
7 application for the use variance relief and
8 the relief under the lot area and lot width.

9 Seconding the motion Vice
10 Chairperson Sorg. Also in support of the
11 motion Mr. Peter May and Mr. Jeffrey Hinkle.
12 There is no other Board member sitting.
13 Again, the final vote is four to zero to one.
14 The motion carries.

15 CHAIRPERSON JORDAN: Mr. Moy, I
16 move we have a summary order in this case.

17 MR. MOY: Yes, sir.

18 CHAIRPERSON JORDAN: Thank you.

19 COMMISSIONER MAY: Mr. Chairman, I
20 just want to register a slight concern with a
21 summary order if we're concerned about
22 precedent. I just think it's something that

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1 needs to be spelled out, the very particular
2 reasons why this is acceptable when otherwise
3 it would not be.

4 CHAIRPERSON JORDAN: The reason
5 why I asked for one is kind of opposite. It's
6 for the same reason but kind of opposite, so
7 that we weren't building a record that someone
8 could put their hands on and say this is why
9 it's done. That's why I was saying summary
10 order.

11 Does OAG have any recommendation?
12 I just thought it was better that we would not
13 have --

14 MS. GLAZER: Well, I think the
15 Board was clear enough in its discussion about
16 the distinct facts that distinguished this
17 case from any others and that should be
18 sufficient and that a summary order would be
19 sufficient but it's up to the Board.

20 CHAIRPERSON JORDAN: Let's go
21 ahead and have a full order.

22 COMMISSIONER MAY: Is there a

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1 reason not to do a full order other than the
2 fact that it takes more time? I mean, I
3 think, one of the concerns I have is that
4 sometimes when precedents are thrown at the
5 BZA or the Zoning Commission, what happens is
6 that they look at the order that's made, the
7 decision that's made. They don't always go
8 into the transcript of the case, or the full
9 record of the case.

10 MS. GLAZER: Well, that may be
11 true but then it would be up to the Board at
12 that time to look at the case and --

13 COMMISSIONER MAY: It would be up
14 to the Board to know to look at the case.

15 MS. GLAZER: Well --

16 COMMISSIONER MAY: And I'm sure
17 that clever lawyers are going to spin it in
18 the most positive manner. Again, is there a
19 reason why we should not do --

20 MS. GLAZER: I think there's no --
21 you don't do a full order to prevent future
22 legal argument by lawyers.

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1 COMMISSIONER MAY: Okay.

2 MS. GLAZER: I don't think that
3 should --

4 COMMISSIONER MAY: Then I'm fine.

5 CHAIRPERSON JORDAN: That was my
6 whole intent by asking for a summary order, to
7 keep someone from trying to use it. Let's go
8 back to the summary order. Let's get it out
9 to these folks.

10 MS. BATTIES: Thank you very much.

11 MR. MOY: The next application
12 before the Board is Application No. 18413.
13 This is the application of Marcus A. Watkins
14 pursuant to 11 DCMR 3103.2.

15 This is for a variance from the
16 lot area and lot width requirements under
17 subsection 401.3 to allow the subdivision and
18 construction of two new flats (two-family
19 dwellings) in the R-4 district. This at
20 premises 257 Warren Street, N.E. Property
21 located in Square 1033, Lots 135, 136, and
22 137.

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1 CHAIRPERSON JORDAN: Thank you.

2 Please identify yourselves for the
3 record, please.

4 MR. WATKINS: Marcus Watkins,
5 owner.

6 MR. PICHON: Sean Pichon, PGN
7 Architects.

8 CHAIRPERSON JORDAN: What is your
9 last name again?

10 MR. PICHON: Pichon, P-I-C-H-O-N.

11 CHAIRPERSON JORDAN: Have the two
12 of you prepared witness cards and gave them to
13 the court reporter?

14 MR. WATKINS: Yes.

15 MR. PICHON: Yes.

16 CHAIRPERSON JORDAN: Mr. Moy, do
17 we have an ANC letter for this?

18 Did you do a presentation with the
19 ANC-6A?

20 MR. WATKINS: We did.

21 CHAIRPERSON JORDAN: And what
22 happened that day?

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1 MR. WATKINS: It was a split
2 decision.

3 CHAIRPERSON JORDAN: Split
4 decision?

5 MR. WATKINS: Out of six votes it
6 was three that were against it and three that
7 were for.

8 CHAIRPERSON JORDAN: But we have
9 not received anything from the ANC I don't
10 believe.

11 MR. PICHON: We met with the
12 Planning and Zoning Subcommittee twice and
13 also with the residents of the neighborhood.
14 They have forwarded the vote to the overall
15 ANC. When we went to the overall ANC they
16 voted not to report on the lot. They couldn't
17 agree on it.

18 CHAIRPERSON JORDAN: So that's why
19 we don't have it. Okay.

20 MR. MOY: For the record there is
21 no report.

22 CHAIRPERSON JORDAN: Mr. May, do

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1 you have any issues with this matter? This is
2 where they have the three small lots that they
3 converted.

4 COMMISSIONER MAY: Yes, I have
5 minor architectural questions. There are
6 implications that there's a penthouse level on
7 this to be able to access the roofdeck and
8 it's not shown in most of the drawings so I'm
9 wondering what that looks like. It's not, for
10 example, shown in the very front.

11 MR. PICHON: Yes. We have a
12 roofdeck off of the second floor roof, off of
13 the third floor, but not on the main deck.
14 Not on the very top of the building.

15 COMMISSIONER MAY: Not to the very
16 top?

17 MR. PICHON: No.

18 COMMISSIONER MAY: I assume these
19 are the most current plans. These are dated
20 May 17th. I'm looking at sheet A1.3 which
21 shows a roofdeck on the very top of the
22 building with storage and a stairway and an

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1 enclosure around the stairway.

2 CHAIRPERSON JORDAN: Mr. May,
3 again your question was?

4 COMMISSIONER MAY: The question is
5 is there a penthouse and what does it look
6 like. We do have a letter in the file from
7 somebody concerned about the impact on light
8 and air. It's already three stories in a
9 neighborhood that's two stories. How much
10 taller is it going to get?

11 MR. PICHON: There is no access.
12 I just conferred with the client. There is no
13 access to the main roof level of the third
14 floor.

15 COMMISSIONER MAY: Okay. So then
16 this drawing is in error, A1.3, which shows --

17 MR. PICHON: We submitted revised
18 -- yes, those drawings have been revised since
19 then. We submitted revised documents for the
20 record.

21 COMMISSIONER MAY: All my drawings
22 have the same date on them. I don't know what

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1 is the most current.

2 VICE CHAIRMAN SORG: Mr. May, I'll
3 just echo I'm looking at the revised plans
4 that were submitted and on the cover sheet the
5 perspective is what you've got there showing
6 a roof and addition. So does the site plan.

7 COMMISSIONER MAY: So is there no
8 roofdeck at all on the very top level?

9 MR. PICHON: There is no roofdeck.
10 The drawings that are on the screen right now
11 is the package that was recently submitted.
12 If you go to --

13 CHAIRPERSON JORDAN: When you use
14 the words recently submitted what do you
15 mean?S

16 MR. PICHON: Submitted
17 September --

18 COMMISSIONER MAY: October 4th is
19 what's stamped on here.

20 MR. PICHON: October 4th, yes.

21 COMMISSIONER MAY: That package in
22 itself contradicts itself because even in that

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1 we're seeing a roofdeck in that perspective
2 view on the very top which shows no access to
3 it.

4 Then we look at site plan A1.0 and
5 it's showing a roofdeck with a stairway that
6 leads up to it. I mean, even there we're
7 seeing a guardrail at the highest level
8 presumably around a roofdeck.

9 VICE CHAIRMAN SORG: Similarly in
10 the side elevations in the most recent package
11 you're seeing the same rail without the access
12 necessarily being shown. Actually, in all the
13 elevations.

14 MR. PICHON: The roofdeck was
15 removed from the previous submission. The
16 railing, yes, is still there as an error but
17 the access to stairs going up to that roofdeck
18 level have all been removed from the floor
19 plans.

20 COMMISSIONER MAY: So we don't
21 have an accurate depiction of that, the
22 drawings that we have, because the October 4th

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1 set still includes that roofdeck?

2 MR. PICHON: It still includes the
3 railing.

4 COMMISSIONER MAY: No, it includes
5 the roofdeck. A1.0 has a label on something
6 that says roofdeck and it shows a stairway.
7 There you go, roofdeck.

8 MR. PICHON: Yes. That was in
9 error.

10 COMMISSIONER MAY: Okay.

11 MR. PICHON: It was removed from
12 the actual floor plan. The site plan was in
13 error.

14 COMMISSIONER MAY: It wouldn't be
15 a violation of the Zoning Regulations to have
16 that penthouse and the roofdeck or any of that
17 sort of stuff. I just want to know what's in
18 here because it was inconsistent. Some places
19 it was shown and some places it was not.

20 MR. PICHON: Correct. Through the
21 discussions we had with the neighborhood, the
22 height and the air and light was a concern so

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1 we have limited the access to the roof only to
2 that third-level roofdeck off the front of the
3 building.

4 COMMISSIONER MAY: There's a lot
5 more I could say about the design of that
6 third level but I'm just going to hold back.
7 It's not relevant to the case.

8 CHAIRPERSON JORDAN: Any other
9 questions for the Applicant?

10 VICE CHAIRMAN SORG: Actually, if
11 you give me one second, I do have a follow-up
12 to Mr. May's comment which is in the Office of
13 Planning report that I would ask the Applicant
14 to respond to. Here we go. You read the
15 Office of Planning report obviously. Right?

16 MR. PICHON: Yes.

17 VICE CHAIRMAN SORG: Okay. So
18 they are recommending approval so that's good
19 for you. But they do also in the notes at the
20 beginning recommend to the Applicant that the
21 building be designed to be in character with
22 existing development on the block.

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1 Is that something -- did those
2 comments or discussions with the Office of
3 Planning and the neighbors lead you to any
4 other design changes except for taking out
5 that roofdeck? What is your response to this
6 comment?

7 MR. PICHON: Office of Planning
8 gave us suggestions for revising the design to
9 basically pull the third level to the front of
10 the building and making it a true three-story
11 rowhouse with a two-story bay. That was
12 presented from the Historic Preservation
13 Office.

14 Through discussions with the
15 neighborhood the two were in opposition to one
16 another. The neighborhood was more concerned
17 about the look of the facade of the houses
18 being consistent with the adjacent properties
19 which is what we presented.

20 The roof line or the cornice lines
21 of the houses that we are proposing are at the
22 same level of the neighboring properties which

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1 are all two-story properties and we have set
2 the third floor back for the appearance of
3 that third level not having intruded on the
4 two-story houses next door. From the site
5 lines you will not be able to see that third
6 floor from the street.

7 The comments that we heard from
8 the neighborhood and trying to work with them
9 to get their support for this project we felt
10 strongly that design, which was greater in
11 that direction, to keep the third floor
12 recessed back from the street front.

13 VICE CHAIRMAN SORG: Okay. Thank
14 you.

15 CHAIRPERSON JORDAN: Anyone else?

16 COMMISSIONER MAY: Mr. Chairman, I
17 was just going to follow up on that comment.
18 I understand the Office of Planning wanting it
19 to be more consistent with a three-story
20 building built all in one phase and what you
21 are showing is something that looks like it
22 was two stories and then you've added that

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1 third story and it's set back.

2 What I found more troubling than
3 the setback was just the fact that it's being
4 differentiated as if it was built as an
5 addition on top of the roof but it doesn't
6 need to be expressed that way. What you do
7 with that I think is really not that relevant
8 to the relief that is being requested.

9 I will say, though, that it would
10 really help to have a good set of drawings
11 that are internally consistent and is truly
12 representative of what you're building. There
13 are other flaws in the documents.

14 We see lots of views that don't
15 show basement windows and you've got a
16 basement unit. Surely there are windows on
17 this. They show up in the plans but they are
18 not shown in some of the perspectives and so
19 on. Just better drawings would be helpful.

20 CHAIRPERSON JORDAN: I think what
21 we need to do with this is give you time to
22 correct this before we have to move forward so

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1 that maybe we can work out if there are any
2 problems with this application making sure a
3 set of plans we have are up to date and that
4 what you're submitting is what we need in
5 light of this conversation.

6 But you can continue. I'm going
7 to give it to you if you want to continue
8 this, I think we have time in the next 30 days
9 to put it back on.

10 Mr. Moy, what are we looking at
11 for the next 30 days?

12 MR. MOY: If we're going 30 days
13 staff would suggest, well, the next hearing
14 prior to the Thanksgiving holiday would be
15 November 13th. After that the next hearing
16 would be November 27th.

17 CHAIRPERSON JORDAN: What does it
18 look like on the 13th?

19 MR. MOY: On the 13th we have
20 space either in the morning or 1:00 in the
21 afternoon. I think the morning would be fine.
22 There are only four cases in the morning.

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1 CHAIRPERSON JORDAN: All right. I
2 would suggest that we go ahead and continue
3 with the hearing and have you update the
4 plans. I don't believe any testimony is
5 necessary regarding the uniqueness of this
6 lot. You can present that if you want.

7 I think the Board has asked pretty
8 much questions on their concerns about this
9 matter. Is there anything else the Board
10 needs to hear from this Applicant? I think
11 we're good on that. There is just a concern
12 over these plans. The plans before we do
13 anything has to be updated and submitted.

14 Is there anything you want to say
15 to the Board in regards to your application?
16 You certainly can do any presentation that you
17 really want to present if you deem it's
18 necessary.

19 MR. PICHON: Well, with regards to
20 the drawings, we have revised the plans. The
21 basement units have been removed from the
22 documents. Therefore, the windows are not

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1 shown. That was part of the negotiation with
2 the residents. That basement unit was of
3 concern to them. The owner had agreed to
4 remove that from the plans.

5 The rooftop deck we will correct
6 that and get that resolved but the basement is
7 correct. There are no windows down there
8 because there is no unit there.

9 COMMISSIONER MAY: I appreciate
10 that clarification. Again, it's confusing for
11 us because we have two identically dated sets
12 of drawings. Your date on them is the same so
13 it's hard to know what was first and what was
14 second. The fact that the basement had been
15 removed is new information.

16 CHAIRPERSON JORDAN: Anything
17 else?

18 I'll turn to the Office of
19 Planning.

20 MR. MORDFIN: Good morning,
21 Chairman, members of the Board. I'm Stephen
22 Mordfin with the Office of Planning. This

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1 application conforms to the provisions for the
2 granting of variances because the property is
3 made up of three really small lots.

4 They are too small to be developed
5 individually and would be too large and out of
6 character with the neighborhood if combined
7 into one lot. A granting of the variances
8 would allow the Applicant to create two lots
9 similar to others within the neighborhood.

10 No substantial harm to the Zoning
11 Regulations would occur as the lots would be
12 sufficient size to permit the development of
13 either flats, rowhouses, uses permitted as a
14 matter of right within the R-4. Therefore,
15 the Office of Planning recommends that the
16 Board grant the requested variance.

17 OP would like to note that the
18 vote of the ANC report as documented in the
19 Office of Planning report is an error and that
20 no information was received by OP from the
21 ANC.

22 CHAIRPERSON JORDAN: Does the

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1 Board have any questions for the Office of
2 Planning? Does the Applicant have any
3 questions for the Office of Planning?

4 MR. PICHON: No.

5 CHAIRPERSON JORDAN: Do we have
6 any other government agencies present?

7 We did receive a letter from the
8 Department of Transportation stating no
9 objection to the relief being requested.

10 Is there anyone here from ANC-6A?
11 Are there any persons in the audience who wish
12 to testify in support of the application? Is
13 there anyone in the audience who wants to
14 testify in opposition to the application?

15 Turning back to the Applicant, is
16 there anything you might want to say and wrap
17 up in conclusion?

18 MR. WATKINS: No, thank you.

19 CHAIRPERSON JORDAN: We will close
20 this hearing and keep the record open for
21 submission of the updated plans.

22 Does the Board want to deliberate?

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1 VICE CHAIRMAN SORG: Mr. Chairman,
2 I think I would -- my preference would be to
3 wait to deliberate until we received the
4 corrected plans.

5 CHAIRPERSON JORDAN: All right
6 then. We will put this on a date when Mr. May
7 is here for decision.

8 MR. MOY: For the month of
9 November, Mr. Chairman, if this is going for
10 a decision, then the public meeting is
11 November 27th.

12 CHAIRPERSON JORDAN: Let's put it
13 on November 27th.

14 You need to get the plans in as
15 soon as possible.

16 With that we will conclude this
17 matter. The record will remain open in order
18 to receive the updated plans.

19 MR. MOY: Mr. Chairman, would the
20 Board care to set a deadline for the revised
21 drawings?

22 CHAIRPERSON JORDAN: We certainly

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1 need it before the 27th. We need to have
2 to --

3 Mr. Moy, when do you need to have
4 it so you have it all packaged up and
5 whatever --

6 MR. MOY: Staff would love to have
7 it by Monday the 19th of November.

8 CHAIRPERSON JORDAN: Okay.

9 MR. PICHON: That won't be a
10 problem.

11 CHAIRPERSON JORDAN: All right.
12 Very good. Thank you.

13 MR. MOY: The next application
14 before the Board is Application No. 18415.
15 This is the application of PT2S0, LLC pursuant
16 to 11 DCMR 3103.2 and 3104.1, for a variance
17 from the lot occupancy requirements under
18 Subsection 772.1, a variance from the rear
19 yard requirements under Subsection 774.7(b),
20 and a special exception from the roof
21 structure provisions under Subsection 411.3,
22 to allow the construction of a new mixed use

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1 nine (9) unit residential apartment house with
2 commercial and retail service establishments
3 in the Arts/C-2-B District at 1932 9th Street,
4 N.W. Property located in Square 361, Lot 134.

5 CHAIRPERSON JORDAN: Good morning.
6 Please identify yourselves for the record,
7 please.

8 MR. BELLO: Mr. Chairman, my name
9 is Toye Bello and I represent the owner on
10 this application.

11 MR. SO: Paul So, owner.

12 CHAIRPERSON JORDAN: Your name
13 again? I'm sorry.

14 MR. SO: Paul So. I'm the owner.

15 MR. KEARLEY: My name is Greg
16 Kearley. I'm the architect.

17 MR. SO: I do have the drawings
18 graphically if you need those. Just let me
19 know if you need to project those.

20 CHAIRPERSON JORDAN: Let me check
21 with the Board first and see what issues they
22 have, if any, with the application.

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1 Let's talk about it. I thought we
2 could just do it on our own. Actually, the
3 question is the relief granted whether or not
4 it's 774.7 or 774.1. The issue being one that
5 this is in a commercial district so you need
6 the relief from .1 as opposed to .7. Is that
7 acceptable to you?

8 MR. BELLO: That's acceptable.
9 We'll contend that.

10 CHAIRPERSON JORDAN: What is this,
11 Mr. Moy?

12 MR. MOY: Mr. Chairman, this is, I
13 believe, a letter from the Shaw Main Street
14 Organization.

15 CHAIRPERSON JORDAN: Are they here
16 to present? Is that why you gave it to us?

17 MR. MOY: It was entered into the
18 record this morning, Mr. Chairman.

19 CHAIRPERSON JORDAN: Well, okay.
20 I think the record is pretty full here. There
21 may be a few questions that we need to have
22 you address.

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1 Is there something you want to
2 ask, Ms. Sorg?

3 VICE CHAIRMAN SORG: Yes. Now,
4 this may just be for my own edification as I'm
5 very familiar with this location. I wanted to
6 hear a little bit about the rear of the
7 building and how it's interacting with 9 1/2
8 Street. What is your parking? You're not
9 here for relief on parking. Are you providing
10 it?

11 MR. KEARLEY: We are providing
12 parking for zoning. I can address a little
13 bit about the rear structure. That was worked
14 out with Historic. This is a through lot so
15 it's a bit unique. It front on 9th Street and
16 it fronts on 9 1/2 Street which is the only
17 through lot on that lot.

18 Through our communications with
19 Historic and through the design process, we
20 wanted to front both 9 1/2 Street and 9th
21 Street with structures as opposed to having
22 parking facilities on the 9 1/2 Street.

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1 We were able to -- we split the
2 building and because we split the building
3 into two structures, the front structure
4 fronting 9 1/2 Street and the rear structure
5 fronting -- excuse me, the front structure
6 fronting 9th Street and the rear structure
7 fronting 9 1/2 Street, we had to connect the
8 two structures through a breezeway or it would
9 be too separate buildings.

10 We lowered the scale on 9 1/2
11 Street to be more consistent with the alley
12 dwellings so we have a three-story structure
13 on the 9 1/2 Street. We have artist studios
14 and then spaces for artists in that rear
15 structure so it's consistent with arts
16 overlay. That was sort of the approach we had
17 by having two different buildings that fronted
18 both of the streets.

19 VICE CHAIRMAN SORG: And the
20 parking. How do you access the parking that
21 you're providing and how many spaces are
22 there?

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1 MR. KEARLEY: There is a public
2 alley that is parallel to 9 1/2 Street but
3 then perpendicular from that there is a public
4 alley that runs down the side of our property
5 and we are able to access a center courtyard
6 which we have the parking in there.

7 VICE CHAIRMAN SORG: Do you have a
8 site plan somewhere?

9 MR. KEARLEY: Yes. It should be
10 in the drawings that we submitted.

11 VICE CHAIRMAN SORG: I'm asking
12 these questions -- obviously I understand that
13 you are not looking for relief from parking
14 but I think in terms of -- what are we suppose
15 to do with this flash drive?

16 MR. MOY: I would need a laptop to
17 show a visual on the screen.

18 Did you bring a laptop?

19 VICE CHAIRMAN SORG: If you're
20 looking to take up 100 percent of the lot, I
21 think it's important to understand what is the
22 interaction with 9 1/2 Street.

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1 MR. KEARLEY: We weren't asking
2 for 100 percent. We're asking for 88 percent
3 which is an 8 percent relief over the 80
4 percent. We are asking for the 8 percent.

5 Part of that 8 percent is actually
6 the breezeway that has to connect the two
7 structures and that was because of our
8 discussions with Historic for having two
9 structures. The center courtyard is then in
10 reality 12 percent.

11 CHAIRPERSON JORDAN: Yes. You're
12 asking for -- it's going to be 88 percent.

13 MR. KEARLEY: 88 percent. About 2
14 percent is that breezeway that connects the
15 two properties.

16 CHAIRPERSON JORDAN: 88 percent is
17 the max relief.

18 MR. KEARLEY: Yes.

19 MR. BELLO: If I can just add to
20 that, I think page 3 of OP's report is a
21 little helpful. On that page you'll find a
22 series of lots that actually fronts on 9 1/2

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1 Street.

2 All of those lots are actually
3 constructed to property lot line. I believe
4 the effect the Historic Preservation Review
5 Board was looking for was the consistency and
6 uniformity of frontage on 9 1/2 Street.

7 If you have two stretches of
8 building, one on the front at 9th Street and
9 the other 9 1/2, in order to make that
10 building a single building on a single record,
11 we had to have a minimum. Everything derives
12 from that requirement by the Historic
13 Preservation Review Board.

14 VICE CHAIRMAN SORG: So to access
15 the parking -- I mean, look, I'm a neighbor
16 here just for the record. Yes, I know that 9
17 1/2 Street is paved with bricks and it's
18 called 9 1/2 Street but it acts like an alley.
19 Right?

20 MR. BELLO: Correct.

21 VICE CHAIRMAN SORG: And the
22 people that live there live on an alley even

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1 though it's called what it's called. The
2 access there in terms of the relief that
3 you're requesting for the rear yard I think is
4 important.

5 So to access the parking the
6 residents, and the artists and the visitors
7 and whomever, would drive into 9 1/2 Street
8 and then turn left after the parking lot that
9 is there?

10 MR. KEARLEY: Yes. If you are
11 coming from U Street you would be going down
12 9 1/2 Street. You would go left perpendicular
13 to the alley and that gives you access to the
14 parking which is in the center court.

15 VICE CHAIRMAN SORG: Which is in
16 the courtyard.

17 MR. KEARLEY: Yes.

18 VICE CHAIRMAN SORG: Okay.

19 MR. KEARLEY: And the parking
20 meets the zoning requirements.

21 COMMISSIONER MAY: It's in the
22 center court or it's off the center court

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1 having access to the center court?

2 MR. KEARLEY: Well, there's --

3 COMMISSIONER MAY: How many
4 parking spaces are there? I saw four.

5 MR. KEARLEY: Yes. There's two
6 that are tucked under the structure on 9 1/2
7 Street and then there's two --

8 COMMISSIONER MAY: In the open
9 court?

10 MR. KEARLEY: -- in the open
11 court.

12 COMMISSIONER MAY: What shows in
13 the plans that we have is two spaces located
14 under the structure of the portion of the
15 building that fronts 9 1/2 Street. Then the
16 other two are under --

17 MR. KEARLEY: That's correct.

18 COMMISSIONER MAY: That is
19 correct?

20 MR. KEARLEY: Yes.

21 COMMISSIONER MAY: We've heard the
22 whole case before this about consistency in

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1 drawings and just wanted to make sure.

2 MR. KEARLEY: That's correct.

3 COMMISSIONER MAY: And it's up to
4 date?

5 MR. KEARLEY: Yes.

6 COMMISSIONER MAY: Is there a
7 reason why you didn't align the back of the
8 9th Street portion of the building with the
9 backs of the other buildings along 9th Street?

10 MR. KEARLEY: That had to do with
11 the relief we're asking for in terms of the
12 extra 8 percent. A lot of it had to do with
13 the condensed volume of the building with our
14 dealings with Historic and trying to maximize
15 the envelope of the property.

16 COMMISSIONER MAY: Well,
17 maximizing the envelope is not a reason for a
18 variance. Maximizing it within the
19 constraints that HPRB is pressing on you?

20 MR. KEARLEY: Yes. We brought it
21 -- there's not necessarily -- there is some
22 consistency in the structures that are

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1 adjoining but they are not completely
2 consistent all the way down the block so they
3 jog back and forth.

4 COMMISSIONER MAY: All right. So
5 it's not inconsistent then.

6 MR. KEARLEY: We didn't feel it
7 was inconsistent so when you look at the
8 adjoining properties there's different depths
9 of all the properties. It just so happens
10 there's two that are the same. Then when you
11 look down it's an irregular pattern that moves
12 up and down the block so we didn't think that
13 was -- we thought the inconsistency was maybe
14 consistent with the rest of the block.

15 COMMISSIONER MAY: Got it. The
16 inconsistency was consistent. Okay. I
17 thought you heard you say that you were trying
18 to make the buildings that fronted on 9th
19 Street consistent with -- I'm sorry, 9 1/2
20 Street consistent with the other buildings on
21 9 1/2 Street. I heard two stories but I'm
22 seeing three.

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1 MR. KEARLEY: What I said was that
2 we brought the scale down to be more
3 consistent and compatible with the structures
4 on 9th Street, 9 1/2 Street, and the alley so
5 we brought that down from the four stories
6 that are on the front to three stories.

7 Our particular lot is twice as
8 wide as every other lot on the block. The
9 scale of the lot is somewhat different so the
10 proportions we felt even though we were an
11 addition story were compatible with 9 1/2
12 Street.

13 COMMISSIONER MAY: I wasn't
14 questioning it. I just thought I heard you
15 say two stories but I read too much into your
16 comment.

17 VICE CHAIRMAN SORG: But it is
18 true that there are no three-story buildings
19 surrounding the property. None of the
20 rowhouses on the alley are three stories.

21 MR. BELLO: Well, that is correct.

22 VICE CHAIRMAN SORG: Our building,

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1 which is across the street, is two stories as
2 is the African American Civil War Memorial
3 building which also has a rear face on that
4 alley.

5 MR. BELLO: I think the uniformity
6 here is with respect to having a lot line
7 building face. When you consider other
8 factors with respect to the additional
9 restriction on density, the density here is
10 way under what could otherwise be constructed
11 in the underlying district.

12 COMMISSIONER MAY: Can I ask one
13 last question? The relief for the roof
14 structures, is there a particular reason why
15 you didn't just clad the whole thing as a
16 single structure to avoid the need for that
17 roof?

18 MR. KEARLEY: We initially did
19 that and Historic would not approve that.
20 They wanted it broken down into three smaller
21 pieces.

22 COMMISSIONER MAY: Can't the

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1 Office of Planning tell them that is a zoning
2 rule and not Historic Preservation?

3 MR. KEARLEY: We made that same
4 argument. When we were moving through the
5 hearing the they dictated that to us that they
6 wanted that broken down into three smaller
7 pieces as opposed to one because we were happy
8 to clad it and have it one so we wouldn't have
9 to deal with the relief from zoning but that
10 was not an option as far as I understood from
11 HPRB.

12 COMMISSIONER MAY: Okay. I'll
13 speak with Ms. Steingasser about that, that
14 they are running people in circles and
15 controverting the Zoning Regulations. All
16 right. Thanks.

17 CHAIRPERSON JORDAN: Any other
18 questions for the Applicant?

19 Do you want to show us -- do you
20 have a site plan?

21 MR. KEARLEY: If you take that a
22 couple pages, Paul, I can show you the site

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1 plan. Go to the first floor plan that is a
2 bit larger. You can see 9 1/2 Street and then
3 the alley that runs perpendicular off of that.

4 That allows us access to the
5 center court which then the parking gets
6 tucked in underneath the buildings from the
7 center court. That is a public alley that
8 allows us to access that center court.

9 VICE CHAIRMAN SORG: I'm sorry. I
10 just want to understand and make sure I'm
11 looking at this correctly. So that is the
12 tiny bit of alley that is behind the
13 restaurant there and they think it belongs to
14 them.

15 MR. KEARLEY: Yes, but it's a
16 public alley.

17 VICE CHAIRMAN SORG: That's
18 interesting. Okay.

19 MR. KEARLEY: That gives us the
20 access that we needed in dealing with Historic
21 and wanting to have the consistency on the
22 frontage on the structures on 9 1/2 Street

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1 that would allow us to access the building and
2 the parking through that courtyard through
3 that public alley.

4 CHAIRPERSON JORDAN: How wide is
5 that alley at that point?

6 MR. BELLO: It is 15 feet wide.

7 CHAIRPERSON JORDAN: Mr. Moy, turn
8 the lights back on.

9 Any other questions for the
10 Applicant?

11 Anything else you want to present
12 that you feel is necessary to present?

13 MR. BELLO: Other than to say that
14 we believe we comply with all the standards
15 for the relief of the application we're
16 seeking and respectfully request the relief.

17 CHAIRPERSON JORDAN: Let's turn
18 now to the Office of Planning.

19 MR. GYOR: Good morning, members
20 of the Board. Stephen Gyor with the Office of
21 Planning. I would just note that the Office
22 of Planning feels that the Applicant's parking

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1 solution is a creative solution that meets the
2 zoning requirement while preserving that
3 street wall along 9 1/2 Street on the alley.

4 We would also note that the
5 Applicant is permitted by zoning 65 feet
6 height in this zone but is only building to 48
7 feet along 9th Street. Finally, I would just
8 note that in regard to the roof structures
9 that the Applicant is requesting the relief
10 from that requirement.

11 The roof structures will not be
12 visible from the street according to the
13 elevation provided by the Applicant. A single
14 structure might -- I think there were some
15 concerns that a single structure might be a
16 monolithic sort of structure that might be
17 intrusive. I'm open for any questions.

18 CHAIRPERSON JORDAN: Ms. Sorg.

19 VICE CHAIRMAN SORG: Thank you,
20 Mr. Chairman.

21 So the rear structures would not
22 be visible from which street, both?

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1 MR. GYOR: From 9th Street. And I
2 believe 9 1/2 Street as well.

3 VICE CHAIRMAN SORG: Okay.

4 CHAIRPERSON JORDAN: Mr. May.

5 COMMISSIONER MAY: The roof
6 structure is quite minimal even if it were all
7 joined together. It's no great monolith but
8 that's okay. We're in the middle of rewriting
9 the Zoning Regulations and we're going to
10 address this structure issue and hopefully
11 make it easier for folks to comply with HPRB
12 and Zoning Regulations.

13 I'm wondering whether the Office
14 of Planning have gotten what we received this
15 morning from Shaw Main Street and whether you
16 had a comment on that?

17 MR. GYOR: I had not received it.

18 COMMISSIONER MAY: I think maybe
19 I'll ask the Applicant to respond to that.

20 Have you received this?

21 MR. BELLO: No.

22 COMMISSIONER MAY: Can you give

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1 him a copy?

2 CHAIRPERSON JORDAN: I think in
3 the future, Mr. Moy, check with me before we
4 pass these out because I think it becomes an
5 unfair advantage. It's unfair for people to
6 get things and have to respond to them,
7 especially if we have not made a decision what
8 we're accepting into the record.

9 There is the issue of trash in the
10 letter. How is trash going to be handled and
11 what is going to be the effect upon trash.
12 What effect is this unit going to have with
13 the trash and how trash is going to be
14 handled. And then basically they are asking
15 in here how property owners should be handling
16 their trash. I think it becomes an issue that
17 is even bigger than you on how you handle
18 their trash.

19 MR. KEARLEY: You want me to
20 address that?

21 CHAIRPERSON JORDAN: Yes.

22 MR. KEARLEY: I can address that.

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1 I can maybe go up to the screen and show a
2 couple things or point out a couple things or
3 if there's a pointer.

4 VICE CHAIRMAN SORG: We do have a
5 mic that is mobile but I don't know where it
6 is.

7 MR. KEARLEY: In terms of trash we
8 have an area right here that is designated for
9 trash. Is that working?

10 CHAIRPERSON JORDAN: Yes, we can
11 hear you.

12 MR. KEARLEY: This area right here
13 is designated for trash for the building.
14 There is a door here and a gate here which
15 will allow trash to be taken off the property.
16 We actually created a door right here in the
17 complex that allows access to that pedestrian
18 alley which a lot of the businesses use.

19 They actually walk through Paul's
20 property to deal with trash. We have reached
21 out to them a number of times that we would
22 want to work with them to come to an agreement

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1 that they would have access at specific times.

2 Now, we don't want them -- you
3 know, we don't want 12 different businesses
4 moving through the property at 2:00, 3:00,
5 4:00 in the morning but we would set up some
6 guidelines that they would have access to this
7 door so that we would have -- they would be
8 able to move through it with their trash.

9 CHAIRPERSON JORDAN: So you are
10 managing the trash on the site and then
11 controlling the final disposition.

12 MR. KEARLEY: Yes. You know, I
13 don't know if it's Paul's responsibility as
14 the property owner to deal with someone else's
15 trash issues when they are doing that.

16 That being said, if we come to a
17 voluntary agreement with them, that's up to
18 Paul in terms of making that decision but we
19 have it on the table that we would talk to
20 them but we want to be able to orchestrate
21 that. We don't want them to orchestrate that.

22 If someone owns a business and

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1 doesn't have -- you know, is land locked, we
2 feel for them and we want to work with them
3 and we want to be a good neighbor but we also
4 don't want to be held responsible for their
5 dealings.

6 CHAIRPERSON JORDAN: Right. It's
7 not your responsibility. It seems like
8 there's a bigger trash issue overall there.

9 MR. KEARLEY: We have accommodated
10 the ability to work with them if we can come
11 up with some type of reasonable agreement with
12 them that works for Paul and is not a
13 detriment to his particular property.

14 COMMISSIONER MAY: You referred to
15 an alley behind the adjacent property?

16 MR. KEARLEY: I don't know if it's
17 an alley. It's a pedestrian -- I don't know
18 if it's actually an easement but there is an
19 agreement with the business owners here as it
20 goes down. If it goes south on 9th Street,
21 they move through each other's back yards to
22 bring trash through Paul's property in order

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1 to deal with those things.

2 There are a lot of restaurants and
3 businesses on that side of the street. I
4 think that is what these guys are talking
5 about here. Again, we want to be a good
6 neighbor but we don't want to be a good
7 neighbor to the detriment of the people that
8 are going to be inhabiting the project that
9 Paul's developing.

10 We did make accommodations by
11 putting a man door here so trash could be
12 moved through there into the alley for removal
13 for the adjoining businesses.

14 COMMISSIONER MAY: Okay. Thanks.

15 CHAIRPERSON JORDAN: We were
16 asking questions of Planning. I think we
17 finished that. Any other questions of
18 planning that we have?

19 Anyone else here from any other --
20 oh, any questions of the Applicant for
21 Planning?

22 MR. BELLO: None at all.

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1 CHAIRPERSON JORDAN: Any other
2 government agencies? We have a letter from
3 the Department of Transportation stating no
4 objection to the relief requested.

5 Anyone here from ANC-1B? We do
6 have a letter which we give great weight to
7 from ANC-1B which recommends approval of the
8 application.

9 Is there anyone in the audience
10 here in support of the application and wishes
11 to testify? Anyone in opposition?

12 Yes. Come forward, please. I
13 don't think you were here to be sworn in.

14 MR. LEWIS: Yes, I was.

15 CHAIRPERSON JORDAN: You were?
16 Okay. Did you complete a witness card?

17 MR. LEWIS: I did.

18 CHAIRPERSON JORDAN: Okay. Please
19 state your -- make sure your mic is on. The
20 green light should be on. Very good. State
21 your name, please.

22 MR. LEWIS: My name is William

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1 Lewis. I'm a property owner and I also
2 represent the 9th and U --

3 VICE CHAIRMAN SORG: Sir, I don't
4 think you're on the mic.

5 MR. LEWIS: The light is on.
6 Okay. Thank you. Again, my name is William
7 Lewis. I am a property owner, commercial
8 property owner on 9th Street. Have been for
9 17 years. Also, I am a resident of the
10 Westminster neighborhood.

11 I'm also a member of the
12 Westminster Neighborhood Association. I also
13 represent a newly created business
14 organization 9th and U which represents the
15 business owners on the block of 9th Street and
16 the contiguous blocks in the surrounding area.

17 May I proceed?

18 CHAIRPERSON JORDAN: Yes. You
19 have three minutes.

20 MR. LEWIS: Okay.

21 CHAIRPERSON JORDAN: Well, now
22 it's less than three minutes.

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1 MR. LEWIS: Well, first of all, we
2 have no idea -- personally we did not know
3 this project was coming. He said he's reached
4 out to us. I don't know when. I don't know
5 how but it surprises most property owners that
6 this is happening.

7 I am specifically talking about
8 more importantly for this particular incident
9 this so-called easement traffic place that
10 he's mentioning where we bring the traffic,
11 that is an essential piece of corridor for
12 maybe seven or eight businesses who deal with
13 food, liquor bottles, and lots of trash. If
14 they would have blocked that in, there would
15 be an infestation which would be a public
16 problem.

17 I don't know how he's reached out
18 to the people that access that alley but I can
19 tell you specifically we talked about it
20 yesterday and it's been a problem and
21 continues to be a problem. If he blocks that
22 alley off, we are already suffering from a rat

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1 problem, rodent infestation, and we do not
2 have another means.

3 There is not another means to get
4 the trash out except bring it through the
5 properties themselves, the restaurants, which
6 would be a health hazard to the food and the
7 other information.

8 We talked to the architect once
9 and gave him a call and asked if he would, in
10 fact, meet with us and talk to us about the
11 prospects of us going forward.

12 We understand that the residents
13 of 9th Street, the Westminster Association,
14 has included this new development as their --
15 extended their authority to this development
16 which hasn't even occurred.

17 What we see as business owners and
18 property owners is an encroachment of
19 residents dominating basically what's going on
20 with what is happening and has been happening
21 on this 2-C-B district.

22 It has been a commercial district

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1 and we want it to continue to be a commercial
2 district. What's happening is it's being
3 slowly turned into a residential commercial
4 district with the residents having the
5 dominant input.

6 We have not had an opportunity to
7 speak to this development and we would like if
8 possible to halt all development until we have
9 an opportunity to discuss it with them. Thank
10 you.

11 CHAIRPERSON JORDAN: Where is your
12 business located?

13 MR. LEWIS: My property is located
14 1905 9th Street. I'm southeast.

15 CHAIRPERSON JORDAN: Within 200
16 feet of this property?

17 MR. LEWIS: No, I'm not 200 feet
18 but, again, I represent the 9th and U Business
19 League. I'm the president and we have
20 business that is adjoining that property on
21 both sides.

22 There are several other people who

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1 would like to be here. In fact, they are on
2 their way but may not make it, who would like
3 to speak to this issue of the closing of this
4 corridor, this essential walkway, as he calls
5 it.

6 CHAIRPERSON JORDAN: It's my
7 understanding that they own that property
8 which people are walking through.

9 MR. LEWIS: Well, it's a parking
10 lot right now.

11 CHAIRPERSON JORDAN: Yes, they own
12 it.

13 MR. LEWIS: That's correct. I'm
14 saying there is a larger issue. We are --

15 CHAIRPERSON JORDAN: But they own
16 it. Right?

17 MR. LEWIS: Well, to my knowledge
18 they do but, I mean, I haven't spoken to the
19 owner.

20 CHAIRPERSON JORDAN: So nothing
21 would stop them from just -- if they didn't do
22 any development but put up a fence and fence

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1 in the area.

2 MR. LEWIS: Again, I say it's a
3 public property. They could do that but we
4 already have a rat infestation. We're trying
5 to work together. We welcome the development.

6 We welcome all the new development
7 because it adds to the value of our property.
8 However, we like to work in unison, in
9 conjunction with what is going on instead of
10 being put upon as a result of some new and
11 fresh ideas.

12 VICE CHAIRMAN SORG: Can I ask
13 just one question of the witness, Mr.
14 Chairman?

15 Sir, as a business owner in the
16 neighborhood I personally understand. Also as
17 a Board member I understand public concerns.
18 Your property is on the east side of 9th
19 Street. Is that correct?

20 MR. LEWIS: It is.

21 VICE CHAIRMAN SORG: Okay.

22 MR. LEWIS: Thank you.

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1 VICE CHAIRMAN SORG: And you today
2 are testifying as an individual so --

3 MR. LEWIS: I'm also testifying
4 for the 9th and U Business League which we've
5 created recently because, among other things,
6 encroachment of the commercial corridor. We
7 think that nobody is taking into consideration
8 the treasure and the ideas and all the
9 properties involved in the commercial
10 district.

11 VICE CHAIRMAN SORG: Well, I
12 didn't get an invitation.

13 CHAIRPERSON JORDAN: Any other
14 questions?

15 VICE CHAIRMAN SORG: I'm finished.
16 Thank you.

17 CHAIRPERSON JORDAN: Thank you.

18 Any questions of Mr. Lewis?

19 Does the Applicant have any
20 questions of Mr. Lewis?

21 MR. BELLO: No, Mr. Chairman.

22 CHAIRPERSON JORDAN: Thank you,

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1 Mr. Lewis.

2 MR. LEWIS: Thank you.

3 CHAIRPERSON JORDAN: Anyone else
4 here in opposition and wish to speak?

5 Then we'll turn back to the
6 Applicant for closing, rebuttal and closing
7 all mixed up into one.

8 MR. BELLO: Thank you, Mr. Chair.
9 I think we have quite a substantial and full
10 submission with respect to how this property
11 meets its burden of proof.

12 The property was the subject of
13 two public hearing processes, one with the
14 Historic Preservation Review Board and one
15 here today with the Board. All were duly and
16 properly noticed to the property owners
17 affected.

18 We believe that you can grant the
19 relief that we've sought without substantial
20 detriment to public good and the zone plan
21 that we respectfully request that you approve.

22 CHAIRPERSON JORDAN: Did you have

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1 a hearing with the ANC or a presentation with
2 the ANC-1B?

3 MR. BELLO: That's correct.

4 CHAIRPERSON JORDAN: So it was a
5 full presentation?

6 MR. BELLO: Full presentation.

7 MR. KEARLEY: There was both a
8 presentation for the Historic and a
9 presentation to ANC for this particular
10 hearing so we met with them twice so there was
11 two separate hearings.

12 CHAIRPERSON JORDAN: Anything
13 else?

14 COMMISSIONER MAY: I just have a
15 follow-up question on this use by others of
16 the property to remove trash. Is there any
17 kind of existing agreement with those property
18 owners or easements or anything like that
19 affecting the property that allow this use?

20 MR. SO: Not that I know of.
21 Currently I think they are just using the
22 parking lot. There is no written agreement.

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1 COMMISSIONER MAY: Right. And
2 their use of the parking lot to back in the
3 trash trucks right now.

4 MR. SO: I don't know how they
5 actually get the trash out honestly. I mean,
6 this is a parking lot and somebody else has
7 been in the parking lot for me so I don't know
8 actually how --

9 COMMISSIONER MAY: So it may be
10 their operation.

11 MR. SO: Right.

12 COMMISSIONER MAY: But there is no
13 agreement or there is no easements recorded?

14 MR. SO: There is no official
15 easement recorded. We are aware of the
16 problem. That's why we had to have that into
17 the design. We are willing to work with the
18 neighborhood to try and make sure their
19 business is not impacted. At the same time,
20 I'm not obligated.

21 COMMISSIONER MAY: I understand.
22 I appreciate the fact that you put in the door

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1 to access the court which allows access to an
2 alley.

3 MR. SO: Actually, the design of
4 the center court was designed for that purpose
5 as part of the consideration as well.

6 COMMISSIONER MAY: Okay. Thanks.

7 CHAIRPERSON JORDAN: Any
8 questions? Then we're going to close the
9 hearing. I'm going to ask the Board if they
10 are willing and ready for deliberations. I
11 see head shaking so let's move into
12 deliberations.

13 Ms. Sorg.

14 VICE CHAIRMAN SORG: I'm sorry. I
15 would like to begin the deliberations. I want
16 to say a couple of things. Obviously I've
17 indicated my knowledge of this site but I do
18 want to say a couple of things first from the
19 side of my observations and then I'll mention
20 the specific zoning request.

21 I want to mention that actually,
22 for the record, as a property owner in the

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1 neighborhood I've known about the ownership of
2 this property and its development potential
3 for, I think, at least two years, something of
4 that nature. Maybe a little bit less.
5 Nonetheless, a long time.

6 I'm also aware of Mr. So is a
7 current business owner in the U Street
8 Corridor. I'm aware of his very good works in
9 the community. I think I personally will be
10 very happy to have him as a neighbor.

11 I think that the quality of work
12 that I'm aware of that he's done in his
13 previous projects and his participation in the
14 arts community in Washington is something that
15 is a great thing for this arts district. That
16 is just my personal knowledge.

17 I think also the design itself,
18 although a little bit bigger than what I think
19 is there on the 9 1/2 Street alley, is modern.
20 We are happy to see -- I'm happy to see a
21 modern infill properties, although that is,
22 again, something that is specifically within

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1 the Zoning Regulations that we are dealing
2 with here today.

3 Also, I would applaud Mr. So and
4 his team for trying to work with the
5 neighborhood. The alley and the trash and the
6 access is a problem in this area. I think
7 while it's not part of these proceedings, I
8 certainly would applaud those efforts.

9 With regard to the variance
10 request, I do think that there is a uniqueness
11 here that is being shown specifically from the
12 fact of this through lot onto, you know,
13 streets and the way that's being managed from
14 a planning perspective with parking and within
15 the Historic District is a creative solution.

16 I actually think that is very
17 nice. That as well as the support of the ANC,
18 HPRB, DDOT, I would be in support of this
19 application and I would make a motion to
20 approve the variances from 772.1. Also I
21 think we've made a note of changing the
22 variance for the rear yard to 774.1, as well

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1 as the special exception for the roof
2 structure.

3 CHAIRPERSON JORDAN: Second.

4 Motion made and seconded to approve the
5 application for relief as amended. Any
6 unreadiness? All those in favor signify by
7 saying aye.

8 MEMBERS: Aye.

9 CHAIRPERSON JORDAN: Those opposed
10 nay. The motion carries.

11 Mr. Moy, please.

12 MR. MOY: Yes, sir. Staff would
13 record the vote as four to zero to one. This
14 is on the motion of Vice Chairperson Sorg to
15 approve the application for a variance relief
16 under 772.1 lot occupancy, special exception
17 under the roof structure provisions under
18 411.3, and amended for rear yard requirements
19 under 774.1.

20 Seconding the motion was Chairman
21 Jordan. Also in support of the motion Mr.
22 Peter May and Mr. Jeffrey Hinkle. No other

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1 Board members participating. Again, the final
2 vote is four to zero to one to approve.

3 Let's have a summary order for
4 this one.

5 MR. MOY: Yes, sir. Summary
6 order. Thank you.

7 MR. KEARLEY: Thank you.

8 MR. MOY: The next application and
9 final application of the morning session is
10 Application No. 18417. This is the
11 application of EAJ550 Penn St., LLC, pursuant
12 to 11 DCMR 3101.2.

13 This is for a variance from the
14 off-street parking requirements under
15 Subsection 2101.1, and a variance from the
16 loading requirements under Subsection 2201.1,
17 to allow the use of an existing building for
18 light manufacturing/processing in the C-M-1
19 District at premises 550 Penn Street, N.E.
20 Property located in Square 3594, Lot 2.

21 CHAIRPERSON JORDAN: All right.
22 Here we go, 18417.

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1 MS. SHIKER: Good morning,
2 Chairman and members of the Board. My name is
3 Christine Shiker with the law firm of Holland
4 & Knight representing the Applicant today.

5 I am joined today by Reynolds
6 Allen representing the Applicant, Dan Van
7 Pelt, our traffic consultant, Mr. Stephen Sher
8 from the law firm of Holland & Knight, and Mr.
9 John Cooney from JCA Architects. I would
10 proffer Mr. Cooney and Mr. Van Pelt, and Mr.
11 Sher as experts in their respective fields.

12 MR. MOY: Mr. Chairman, I think
13 your microphone is silent.

14 CHAIRPERSON JORDAN: Because I had
15 it way up in the sky. Okay. Here we go.

16 Mr. Van Pelt, Mr. Sher, but not
17 Mr. Cooney. Do we have the background
18 information on Mr. Cooney here?

19 MS. SHIKER: Yes. His resume is
20 attached to Exhibit 8. He has had more than
21 30 years of diversified experience in
22 architecture and he is working on the Regional

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1 medical site.

2 CHAIRPERSON JORDAN: And does the
3 Board see any problems with accepting him?

4 Mr. May.

5 COMMISSIONER MAY: Mr. Cooney, I
6 don't know how much the BZA typically asks for
7 in terms of qualifications but I know for the
8 Zoning Commission we would want to have a lot
9 more information before qualifying somebody as
10 an expert.

11 I would be comfortable if Mr.
12 Cooney could talk a little bit about projects
13 that he's done. I mean, having 30 years of
14 experience is a helpful fact not on the resume
15 that was submitted. Oh, it is here. Sorry.
16 I didn't see that. Anyway, more information
17 will be helpful about things that you've done
18 that are relevant here.

19 MR. COONEY: John Cooney,
20 President and CEO of JCA Architects located in
21 Reston, Virginia. Currently our firm just
22 finished the Candido Commons project which is

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1 at the corner of Wisconsin and Idaho. You may
2 be familiar with a mixed-use project that's
3 breaking ground actually this month.

4 We have done several projects in
5 D.C., residential, commercial. We are the
6 architects for the 550 Inn that is here today.
7 We are also the project architects for the
8 renovation of Union Market in the same area.
9 Therefore, I think I'm qualified.

10 VICE CHAIRMAN SORG: I'm sorry.
11 I'm just having a little bit of trouble
12 locating the resume that we received. Your
13 registration?

14 MR. COONEY: I'm licensed in
15 actually 17 states.

16 VICE CHAIRMAN SORG: Oh, okay.

17 MR. COONEY: Including the
18 District of Columbia. I have owned JCA
19 Architects for 25 years.

20 CHAIRPERSON JORDAN: Have you been
21 accepted as an expert any other place?

22 MR. COONEY: Yes, I have.

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1 CHAIRPERSON JORDAN: And where is
2 that?

3 MR. COONEY: That was in Prince
4 Georges County, Maryland.

5 COMMISSIONER MAY: That's fine for
6 me. It's always helpful to see on paper a
7 list of projects that are relevant. Certainly
8 registration in 17 states in itself is an
9 accomplishment.

10 MR. COONEY: Thank you.

11 COMMISSIONER MAY: Whether it
12 gives you expert status or not, I would like
13 to know more about the meat of what you do.
14 I'm satisfied.

15 VICE CHAIRMAN SORG: I have no
16 problem, Mr. Chairman.

17 CHAIRPERSON JORDAN: Mr. May, any
18 problems?

19 COMMISSIONER MAY: I'm good, Mr.
20 Chair.

21 CHAIRPERSON JORDAN: Then we will
22 accept Mr. Cooney as an expert for design.

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1 We already have a structure that
2 has already taken up 100 percent of the lot.
3 Correct?

4 MS. SHIKER: That is correct.
5 It's almost 100 percent, 26,097 of --

6 CHAIRPERSON JORDAN: You're not
7 expanding it any more?

8 MS. SHIKER: We are not. We are
9 using the existing warehouse one-story
10 structure.

11 CHAIRPERSON JORDAN: I think your
12 application is pretty full.

13 Does the Board have anything in
14 particular they want to ask this Applicant
15 about?

16 Seeing none, let me turn back to
17 the Applicant. You can make a presentation if
18 you want to. I don't suggest it but you can
19 make a presentation if you want to. I do
20 believe the record is very full. It's very
21 detailed and we appreciate that. You've got
22 a table full of experts. I don't think they

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1 are here just to twiddle their thumbs but we
2 think based upon what you submitted that it's
3 enough to get past the hurdles that you may
4 have.

5 MS. SHIKER: We would be happy to
6 stand on the record and just answer questions.
7 Thank you.

8 CHAIRPERSON JORDAN: Turning to
9 Office of Planning, is there anything
10 additional that you need to add?

11 MS. THOMAS: No. No comment.
12 Thank you.

13 CHAIRPERSON JORDAN: Is anyone
14 here from the Department of Transportation?
15 We do have a letter of no objection from the
16 Department of Transportation.

17 Anyone here from ANC-5B? We have
18 a letter which we'll give great weight to from
19 ANC-5B that supports this project.

20 Anyone in the audience in support
21 other than the people sitting here at this
22 table? Anyone in opposition?

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1 Then we'll turn back to you for
2 any wrap-up you may feel that you need to do.

3 MS. SHIKER: We believe that we
4 satisfied the standard and we would request
5 the Board to consider this at their earliest
6 convenience. Thank you.

7 CHAIRPERSON JORDAN: We will close
8 this hearing now and I will turn to the Board
9 for deliberations. Anyone?

10 I think the record is very full in
11 regards to the uniqueness of this property and
12 why relief would be necessary and the
13 difficulties that would be faced with the
14 zoning requirements and that all the other
15 requirements for this particular variance has
16 been shown through the application and through
17 the evidence already presented in the record.
18 I, therefore, would move that we approve the
19 request for relief that has been submitted by
20 the Applicant.

21 MEMBER HINKLE: Second.

22 COMMISSIONER MAY: Second.

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1 CHAIRPERSON JORDAN: We have a tie
2 for second. I'm going to go back to the clock
3 to see this in slow motion. We have a second
4 by Mr. Hinkle.

5 Any unreadiness? All those in
6 favor of the application signify by saying
7 aye.

8 MEMBERS: Aye.

9 CHAIRPERSON JORDAN: Those opposed
10 nay. The motion carries. Thank you.

11 MS. SHIKER: Thank you.

12 COMMISSIONER MAY: Mr. Moy.

13 MR. MOY: Yes, sir. Staff will
14 record the vote as four to zero to one. This
15 is on the motion of Chairman Jordan to approve
16 the application for the two variance relief
17 requested.

18 Seconding the motion Mr. Hinkle.
19 Also in support of the motion Mr. Peter May
20 and Vice Chairperson Sorg. No other Board
21 members participating. Again, the motion
22 carries four to zero to one.

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1 CHAIRPERSON JORDAN: I believe we
2 will have a summary order on this?

3 MR. MOY: Yes, sir.

4 CHAIRPERSON JORDAN: Thank you.
5 And thank you.

6 MS. SHIKER: Thank you very much.

7 CHAIRPERSON JORDAN: And that
8 concludes our morning. We will be in recess
9 until 1:00 p.m.

10 (Whereupon, at 11:53 a.m. off the
11 record for lunch to reconvene at 1:00 p.m.)

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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 1:23 p.m.

3 CHAIRPERSON JORDAN: Would the
4 hearing please come to order. Good afternoon,
5 ladies and gentleman. We are located at the
6 Jerrily R. Kress Memorial Hearing Room at 441
7 4th Street, N.W. Today's date is October 16th
8 and we're here for the public hearing of the
9 Board of Zoning Adjustment for the District of
10 Columbia.

11 My name is Lloyd Jordan,
12 Chairperson. To my right is Jeffrey Hinkle,
13 Board member. To my left Peter May, member of
14 the Zoning Commission.

15 Please be advised that this
16 proceeding is being recorded by a court
17 reporter and is also being webcast live.
18 Accordingly, we must ask that you refrain from
19 any disruptive noises or actions in the
20 hearing room. The Board's hearing procedures
21 and processes are located on the table by the
22 back by the door so you can pick it up and

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1 take a look at it.

2 Let's begin today's docket. If
3 there is going to be anyone testifying today
4 in any of the cases today, I'm going to ask
5 that you rise and take the oath or
6 affirmation, please, given by the secretary to
7 the Board, Mr. Moy.

8 MR. MOY: Do you solemnly swear or
9 affirm that the testimony you are about to
10 present in this proceeding is the truth, the
11 whole truth, and nothing but the truth?

12 WITNESSES: I do.

13 MR. MOY: Ladies and gentlemen,
14 you may consider yourself under oath.

15 CHAIRPERSON JORDAN: I will also
16 ask that those who are going to testify to
17 fill out two witness cards each and then hand
18 them to the court reporter prior to
19 testifying.

20 Mr. Moy, do we have any
21 preliminary matters before us today?

22 MR. MOY: We do on the last case

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1 of the afternoon, Mr. Chairman, but staff
2 would suggest that the Board address that when
3 I call the case.

4 CHAIRPERSON JORDAN: Okay.

5 MR. MOY: Other than that, I would
6 like to also announce that the scheduled
7 Appeal No. 18416 of Chaney Enterprises, LP was
8 withdrawn by the Applicant, Mr. Chairman.
9 That is no longer on the docket for the
10 afternoon.

11 CHAIRPERSON JORDAN: In fact, we
12 have a preliminary matter in the second case
13 also. Do we not?

14 MR. MOY: Okay. Then let me just
15 call that then.

16 Good afternoon, Mr. Chairman,
17 members of the Board. That application, or
18 rather appeal, is Appeal No. 18460.

19 That is the appeal of Ginia L.
20 Avery, et al, pursuant to 11 DCMR 3100 and
21 3101 from a decision by the Department of
22 Consumer and Regulatory Affairs to issue a

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1 building permit No. B1202925 allowing the
2 construction of a retail store in the C-3-A
3 District at premises 5929 Georgia Avenue, N.W.
4 Property located in Square 2986, Lot 38.

5 CHAIRPERSON JORDAN: Will the
6 parties for that case just announced please
7 come to the witness table. Would you
8 introduce yourselves, please.

9 MR. KRUPNIK: Good afternoon. My
10 name is Michael --

11 CHAIRPERSON JORDAN: I didn't hear
12 your last name.

13 MR. KRUPNIK: Good afternoon, Mr.
14 Chairman. My name is Michael Krupnik. I
15 represent the residents, the Appellants in
16 this case.

17 MS. GIORDANO: Cynthia Giordano
18 representing Walmart.

19 MR. FEOLA: Phil Feola with the
20 firm of Goulston and Storrs representing
21 Missouri Avenue Development Partners, the
22 property owner and permit holder.

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1 MR. LeGRANT: Good afternoon.
2 Matthew LeGrant. I'm the zoning
3 administrative with the Department of Consumer
4 and Regulatory Affairs.

5 MR. SURABIAN: Good afternoon.
6 Assistant Attorney General Jay Surabian on
7 behalf of DCRA.

8 CHAIRPERSON JORDAN: Very good. I
9 understand what we have before us as been a
10 motion filed by the property owner and also by
11 DCRA. I think -- and the basis of that motion
12 is that the Appellant's case has been centered
13 upon the fact that the ZA's administrative
14 error, alleged error, would have been in
15 violation of the comprehensive plan. Is that
16 correct?

17 MR. KRUPNIK: In part.

18 CHAIRPERSON JORDAN: All right.
19 What's the other part that I'm missing?

20 MR. KRUPNIK: We allege that the
21 large track review is inadequate. It was
22 inadequate because there are several

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1 violations of the comprehensive plan as well
2 as failure to adequately minimize traffic
3 impacts.

4 The broader -- the broader problem
5 is that the large track review is inadequate.
6 It was inadequate because there are violations
7 of the comprehensive plan. It was inadequate
8 because of their failure to address particular
9 goals of the comprehensive plan. And it was
10 inadequate because there was a failure to
11 minimize the traffic impacts.

12 CHAIRPERSON JORDAN: So you get me
13 right back to the comprehensive plan.

14 MR. KRUPNIK: In part but not
15 exclusively.

16 CHAIRPERSON JORDAN: Okay. Does
17 the Board have any questions of anyone?

18 I think this matter's been briefed
19 extensively by all parties. We did receive
20 certainly your response and we have received
21 all the parties' view on this. I don't know
22 if the Board has any questions on this but I

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1 think that it's pretty clear that this is
2 about the comprehensive plan and our hands are
3 tied in regards to the comprehensive plan.

4 This Board doesn't have
5 jurisdiction whatsoever to deal with the
6 comprehensive plan. There is a mechanism, and
7 I just think that you chose the wrong route
8 and the wrong Board to file your appeal with
9 in order to challenge the decision of the
10 zoning administrative.

11 That was prime for its action
12 required by the Zoning Commission at the Board
13 of Zoning Adjustment. We are limited in our
14 abilities to handle certain cases. I don't
15 know how often you practice in front of us and
16 I have not seen you before. We are bound by
17 the case law, both the precedence in this body
18 and also the precedence cited by -- controlled
19 by the Court of Appeals.

20 MR. KRUPNIK: Mr. Chairman, could
21 I add one thing?

22 CHAIRPERSON JORDAN: And so

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1 outside of that, I'll give you the opportunity
2 for one last word.

3 MR. KRUPNIK: I don't know if you
4 had an opportunity but we filed an opposition
5 to their motion yesterday. The thrust of our
6 motion is that we're not seeking a zoning
7 change. We're contesting the adequacy of
8 large track review.

9 In our opinion, we didn't think
10 that the Zoning Commission was the proper
11 forum and the cases that our adversaries cite
12 all those cases have to do where the Appellant
13 sought a zoning change and we don't seek a
14 zoning change here.

15 CHAIRPERSON JORDAN: Tell me right
16 now what Zoning Regulation are you appealing?

17 MR. KRUPNIK: Large track review
18 which is a Zoning Regulation.

19 CHAIRPERSON JORDAN: Okay. Strike
20 one, strike two, strike three. I gave you at
21 least three times to get me to where you
22 wanted to get me and you didn't get me there.

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1 MR. KRUPNIK: Fair enough.

2 CHAIRPERSON JORDAN: Does anybody
3 else on the Board have anything to say? Then
4 I'm going to move that we dismiss this appeal
5 for lack of jurisdiction by this Board. Is
6 there a second?

7 MEMBER HINKLE: I'll second that.

8 CHAIRPERSON JORDAN: Motion made
9 and seconded that the appeal is dismissed
10 based upon the motion to dismiss that this
11 Board lacks jurisdiction even to hear this
12 case. Just can't get you there. Tried to get
13 you there but you wouldn't go there. Motion
14 made and seconded. Any unreadiness? All
15 those in favor of the motion signify by saying
16 aye.

17 MEMBERS: Aye.

18 CHAIRPERSON JORDAN: Those
19 opposed? The motion is granted.

20 Mr. Moy.

21 MR. MOY: Yes, sir. Staff would
22 record the vote as three to zero to two. This

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1 is on the motion of Chairman Jordan to dismiss
2 the appeal for lack of jurisdiction.

3 Seconding the motion Mr. Hinkle.
4 Also in support of the motion Mr. May. No
5 other Board members participating this
6 afternoon. Again, the final vote, the motion
7 carries under a vote of three to zero to two.

8 CHAIRPERSON JORDAN: Thank you
9 very much. Appreciate it.

10 MR. MOY: The next appeal before
11 the Board is Appeal No. 18469. This is the
12 appeal of Susan L. Lynch pursuant to 11 DCMR
13 3100 and 3101 from a decision by the Zoning
14 Administrator to issue building permits
15 (RW1200113, RW1207072, B1207074 and B1207074)
16 approving the construction of two one-family
17 detached dwellings in the R-1-B District at
18 premises 2334 King Street, N.W., property
19 located in Square 1394, Lot 24; and 2338 King
20 Place, N.W., property located in Square 1394,
21 Lot 23.

22 CHAIRPERSON JORDAN: Good

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1 afternoon. Please identify yourselves.

2 MR. SULLIVAN: Good afternoon. My
3 name is Marty Sullivan from the law firm of
4 Sullivan and Barros here on behalf of the
5 Appellant Susan Lynch.

6 MS. BROWN: Carolyn Brown from
7 Holland & Knight on behalf of the property
8 owners and intervenors in the case for 2334
9 and 2338 King Place, N.W.

10 MR. LeGRANT: Matthew LeGrant,
11 Zoning Administrator DCRA.

12 MR. SURABIAN: Good afternoon.
13 This is Attorney General Jay Surabian on
14 behalf of DCRA.

15 MS. LYNCH: Good afternoon. I'm
16 Susan Lynch, the Appellant. I live at 2344
17 King Place, N.W.

18 CHAIRPERSON JORDAN: We understand
19 the basis of this matter, the underlying
20 matter. However, there has been a motion
21 filed to dismiss this based upon jurisdiction
22 of -- well, based upon timeliness of filing

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1 the application, the appeal.

2 Before we go forward we must try
3 to decide how to handle the timeliness issue.
4 I'm going to ask just for a brief summary from
5 the movers to bring us up to why you believe
6 this should be dismissed.

7 Mr. Moy, let's just do three
8 minutes.

9 MR. SULLIVAN: Mr. Chairman, if I
10 might, this morning I filed a response to
11 their motion to dismiss that they filed on
12 Friday. I don't know if you have that in
13 front of you or not.

14 CHAIRPERSON JORDAN: We do. We do
15 have that and we accept that in the record.

16 MR. SULLIVAN: Thank you.

17 CHAIRPERSON JORDAN: Please.

18 MS. BROWN: Thank you, Mr.
19 Chairman. Carolyn Brown again on behalf of
20 the property owners and intervenors. We have
21 filed a motion to dismiss because we believe
22 that the appeal is untimely.

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1 The Appellants waited over 87 days
2 to file their appeal. What we need to examine
3 here is the decision complained of, and that
4 is the Zoning Administrator determination to
5 issue the retaining wall permits on May 30,
6 2012.

7 On June 1 in the evidence that we
8 submitted to the record, we have an email from
9 the Appellant's counsel Mr. Sullivan inquiring
10 of Mr. LeGrant whether or not the decision --
11 he understood that the decision had been made.

12 In Mr. Sullivan's own filing that
13 was submitted this morning, he verifies that
14 his permit expeditor had knowledge that the
15 decision had been issued that he on June 15th
16 confirmed with the Zoning Administrator that
17 a decision had been issued.

18 Yet, he waited until August 28th
19 to file his appeal. While it was lodged
20 August 27th at 5:30 p.m. it was received
21 August 28th. It is clearly untimely.

22 Mr. Sullivan claims that he should

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1 only need to appeal the issuance of the
2 building permit but this Board and the courts
3 have clearly stated that the issuance of a
4 permit date is not the trigger for the clock
5 running on the timeliness.

6 It stems from the administrative
7 decision appeal that is directly from your
8 decisions in the Baskin case that was upheld
9 by the D.C. Court of Appeals, as well as the
10 more recent decision you had in case 18300
11 Ausubel appeal.

12 The decision made by the Zoning
13 Administrator was clear and unambitious.
14 While the confirmation of that decision was
15 made orally to Mr. Sullivan it, nevertheless,
16 was a written decision that was recorded in
17 the permit information verification system
18 that is readily available online.

19 CHAIRPERSON JORDAN: When was that
20 recorded?

21 MS. BROWN: Pardon me?

22 CHAIRPERSON JORDAN: When was that

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1 recorded?

2 MS. BROWN: Immediately

3 thereafter.

4 CHAIRPERSON JORDAN: On May 30th?

5 MS. BROWN: I don't have the exact

6 date of when it was issued but you can check

7 daily and clearly his --

8 CHAIRPERSON JORDAN: I need to

9 know that date. It's important for me to know

10 that date.

11 MR. SURABIAN: It's May 30th.

12 CHAIRPERSON JORDAN: May 30th. It

13 was entered into the official record?

14 MR. SURABIAN: Yes.

15 COMMISSIONER MAY: We have paper

16 relating to that that shows that the decision

17 was made on May 30th but there is nothing on

18 that piece of paper that indicates that's when

19 it was posted.

20 MR. SURABIAN: I can have the

21 Zoning Administrator testify to that.

22 CHAIRPERSON JORDAN: Okay.

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1 Please.

2 MR. LeGRANT: The way the process
3 works is once I signed off and approved a
4 building permit application in conformance
5 with the Zoning Regulations, that is entered
6 into what we call our Accela permit tracking
7 system.

8 Immediately as that is entered it
9 becomes public information through the PUD
10 system which has a public page. Normally it's
11 applicants tracking the progress of their
12 permit applications through the various
13 discipline reviews, but it is a public webpage
14 that allows the public and applicants to be
15 aware of decisions.

16 CHAIRPERSON JORDAN: It's
17 instantaneous so once you put it in in Accela,
18 then it interfaces with the public system at
19 that time?

20 MR. LeGRANT: Yes.

21 CHAIRPERSON JORDAN: And what did
22 you enter on that date?

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1 MR. LeGRANT: Well, all building
2 permit applications have a set of disciplines
3 they have to approve. Most relevant here is
4 zoning but structural, electrical, mechanical,
5 and so on. Each of those entries are called
6 disciplines. The website notes which
7 disciplines have approved and which ones are
8 still pending.

9 The one thing I will emphasize
10 applicants have an additional layer of
11 information. They can drill down into
12 comments. When an application is held for
13 correction, which is not the case here, but
14 when applications are held for correction,
15 there's comments. Applicants can look into
16 those comments but the public cannot.

17 CHAIRPERSON JORDAN: So when it
18 was entered in the system it was May 30th or
19 June 1st?

20 MR. LeGRANT: May 30th.

21 CHAIRPERSON JORDAN: May 30th.

22 And that's the same day you issued the email?

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1 MR. LeGRANT: I received an email
2 from Mr. Sullivan on June 1st.

3 CHAIRPERSON JORDAN: When did you
4 make your decision?

5 MR. LeGRANT: I made my decision
6 May 30th.

7 CHAIRPERSON JORDAN: May 30th.
8 Did you communicate that to anyone on May
9 30th?

10 MR. LeGRANT: No. I believe I
11 phoned the Applicant but then I received the
12 email from Mr. Sullivan and then I picked up
13 the phone and called him that the approval had
14 occurred.

15 CHAIRPERSON JORDAN: That was on
16 the same day that you entered it into the
17 system?

18 MR. LeGRANT: It was the next day.

19 CHAIRPERSON JORDAN: On June 1st?
20 You entered everything in the system on May
21 30th.

22 MR. LeGRANT: Yes.

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1 CHAIRPERSON JORDAN: The telephone
2 call and the email all happened on June 1st.

3 MR. LeGRANT: That's correct.

4 MS. BROWN: I think you could
5 probably get further clarification from Mr.
6 Sullivan on why he sent that email saying, "I
7 understand that you approved the permit." I
8 think that could help fill out the information
9 you need on when and how he discovered this
10 information.

11 CHAIRPERSON JORDAN: Anything
12 else?

13 MR. LeGRANT: One point of
14 clarification. My counsel reminded me that
15 the communication to the Applicant on May 30th
16 was not a phone call but it was an email that
17 was sent to Mr. Sher.

18 MS. BROWN: Just to wrap up, even
19 if Mr. Sullivan did not learn of the decision
20 until the permit was -- we know that he
21 clearly had knowledge of the approval but he
22 claims that he couldn't take any action until

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1 the permit was issued.

2 That didn't slow him down. He was
3 put on notice that the clock started running
4 June 1st, or even May 30th, because that's
5 when it was entered. The fact that he didn't
6 get the permit information until July didn't
7 prevent him from filing that appeal at the
8 beginning of August.

9 As this Board noted in the Ausubel
10 appeal, you get your appeal in and then if you
11 need to supplement, you've got up until two
12 weeks before the hearing to supplement and
13 fill out whatever you need to do. You're on
14 notice that an appeal needs to be filed.

15 Again, we are not dealing with an
16 unsophisticated or unknowledgeable citizen
17 that's not familiar with the zoning process.
18 Mr. Sullivan has been before this Board for
19 many years, probably 15 years.

20 I think he is quite familiar with
21 the process and had a duty to look at the case
22 law and the decisions of this Board. I don't

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1 know that we have any excuse really for
2 waiting until August 28th to file the appeal.
3 We believe that it's untimely and the appeal
4 should be dismissed accordingly. Thank you.

5 CHAIRPERSON JORDAN: Mr. May.

6 COMMISSIONER MAY: You stated that
7 Mr. Sullivan was put on notice on June 1st
8 that the 60-day clock had started.

9 MS. BROWN: He had knowledge of
10 the zoning approval and it was clear from the
11 Ausubel decision where you also have the
12 zoning approval --

13 COMMISSIONER MAY: So nobody told
14 him that the clock had started. You're just
15 saying that he should have known and he was
16 aware that the decision had been made.

17 MS. BROWN: Correct. He doesn't
18 need to be told.

19 COMMISSIONER MAY: Okay. I just
20 wanted to have that be clarified because you
21 said that he was told.

22 MS. BROWN: I misspoke. I

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1 apologize.

2 COMMISSIONER MAY: Okay.

3 CHAIRPERSON JORDAN: Mr. surabian,
4 let me have you because I know you joined in
5 the motion. Is there anything additional that
6 you need to say or talk about?

7 MR. SURABIAN: I would just add
8 that -- I want to respond to Mr. Sullivan's
9 claim that he was obstructed or somehow was
10 unable to get information from DCRA. I don't
11 believe that's true. I don't think there is
12 a record supporting that.

13 It's clear that he had knowledge
14 of the decision on June 1st. On that day the
15 Zoning Administrator had a phone call with him
16 that confirmed it. I guess, again, on June
17 12th they had another conversation where this
18 came up.

19 Mr. Sullivan at that time could
20 have asked the Zoning Administrator for any
21 piece of information. He could have asked any
22 question he wanted to about this and, I guess,

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1 did not.

2 Then he states that he didn't have
3 access to the plans until July 6th. That
4 still would have been within the 60-day appeal
5 period. An appeal could have been filed
6 within over three weeks of that and still
7 would have been timely.

8 I think there was no obstruction
9 here. I think there was full notice. I think
10 the Appellant waited to file to their
11 detriment.

12 CHAIRPERSON JORDAN: Any other
13 questions from the Board before I go to Mr.
14 Sullivan?

15 Mr. Sullivan, rebuttal, please.

16 MR. SULLIVAN: Thank you.

17 CHAIRPERSON JORDAN: Three
18 minutes.

19 MR. SULLIVAN: Thank you. The
20 issue of the phone call to my recollection and
21 my records did not take place but I don't
22 think that's material.

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1 There was a conversation on June
2 12th in relation -- not in relation to but as
3 part of a totally separate meeting where there
4 was a 10 or 12-second conversation where he
5 said, "Did you approve those permits?" He
6 said, "Yes. I thought I was in compliance
7 with the Economides decision." That's it.

8 I asked for more information many
9 times. I had a permit expeditor checking
10 weekly at least trying to get more
11 information. I'm not saying I was obstructed.

12 I'm saying the plans, the permit
13 application, anything that would give me any
14 knowledge of what might be a zoning violation
15 was not available to me, and that's been
16 typical in my experience, until after the
17 building permit was issued.

18 It's not for lack of trying. Not
19 withstanding the name calling and calling me
20 sophisticated, I had a permit expeditor that
21 used to work for Mr. LeGrant and she was not
22 able to have access to these plans as well.

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1 CHAIRPERSON JORDAN: Are you
2 saying plan or decision?

3 MR. SULLIVAN: Any information
4 about that decision. Yes, I know there was an
5 internal zoning approval. I'm not disputing
6 that. Obviously I knew that. That
7 information I got from my permit expeditor Ms.
8 Joseph because she was checking every day.

9 There's two ways I think the Board
10 can look at this. You can look at what is the
11 date of the administrative decision. I don't
12 agree necessarily that the day that Mr.
13 LeGrant decides to do his review and sign off
14 and that becomes -- even if it becomes public
15 is not necessarily the administrative
16 decision.

17 I don't know anything about that
18 decision. I don't know what that decision
19 means. There's no written determination
20 behind it. Typically this Board has pointed
21 to the building permit date as the official
22 administrative decision. The alternative to

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1 that is that it was not until July 6th that
2 out ability to file an appeal was no longer
3 impaired.

4 According to the case that they
5 site, Baskin, Baskin stood for the proposition
6 that the date when the 60 days begins to run
7 is the date that the ability to file an appeal
8 is no longer impaired. In that case the
9 building permit was issued eight months before
10 the deadline, before the Board said this is
11 the deadline.

12 So a building permit was issued
13 with the zoning approval but it was ambiguous.
14 Then a letter came from the director of DCRA
15 on a certain date where it was no longer
16 ambiguous even though that appellant had known
17 about this for six months.

18 They knew the issue. They knew
19 the zoning issue. They knew there was an
20 approval but there was some confusion about
21 it. The confusion ended on day one, May 26th,
22 and this Board said that's when the 60-day

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1 clock started. I think that's analogous to
2 the situation.

3 I think my client should have the
4 same ability and time to evaluate and review
5 whether or not she's wasting her time and her
6 money as well as the property owner's time and
7 money before they would file an appeal.

8 I think to follow this new
9 interpretation that a PIV's notification, even
10 with knowledge, is notice and begins the 60-
11 day clock is open to manipulation and problems
12 down the road because I think what they're
13 saying is even if the building permit was
14 issued on August 1st at that point I'd be late
15 and I couldn't file an appeal.

16 Or maybe I would have one day to
17 file an appeal, or have less than a certain
18 time to file an appeal. I think that complies
19 with the case that they cited with Baskin.
20 They didn't say, "Okay, now you know so we're
21 going to give you a little bit more time."
22 They said, "Now you know. Now the clock

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1 starts."

2 CHAIRPERSON JORDAN: Any questions
3 of Mr. Sullivan?

4 COMMISSIONER MAY: Your brief from
5 this morning, or your response, indicates that
6 essentially the issue here is that your
7 ability to file an appeal was impaired.

8 Based on what you've said
9 essentially it was impaired by the fact that
10 you don't really know what was approved. You
11 knew there was an approval at some point more
12 than 60 days out but you don't know what was
13 approved.

14 MR. SULLIVAN: That's correct. I
15 don't know if they had a two-foot wall or no
16 wall or a mound of dirt or a wall without
17 dirt.

18 COMMISSIONER MAY: Okay. I'm
19 sorry, Mr. Sullivan. Can you repeat that
20 point?

21 MR. SULLIVAN: I had no knowledge
22 exactly what was approved. I know there were

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1 permits issued which I had never seen. I
2 hadn't seen the applications until July 6th.
3 I know there was an approval of some kind.

4 I didn't know what was approved or
5 how it was approved, how high the wall was.
6 I asked for information. "How did you do
7 that? Did they get under four feet?" I got
8 no response to that.

9 COMMISSIONER MAY: Typically --
10 I'll ask your opinion of this but then I'll
11 also ask Mr. LeGrant. Typically when do the
12 actual plans that a permit is based on, when
13 do they become available?

14 MR. SULLIVAN: In my experience
15 and according to my permit expeditor they do
16 not become available until after the permit is
17 issued.

18 COMMISSIONER MAY: Okay.

19 MR. SULLIVAN: And if anybody
20 should have access to it, Rochelle Joseph
21 should have access to that but she's not
22 allowed to see the plans or get me a copy.

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1 COMMISSIONER MAY: Understood.

2 Mr. LeGrant, typically when do the
3 plans actually become public?

4 MR. LeGRANT: The plans are public
5 upon filing of the building permit
6 application. Once they've submitted that it
7 becomes public information.

8 In other cases if a neighbor or an
9 ANC commissioner comes to me and says, "I
10 would like to see the plans for the pending
11 permit," I direct them to the file room at
12 DCRA. If they have an issue that they can't
13 find the plans, I can intervene to help them
14 get the plans.

15 COMMISSIONER MAY: Okay. So can
16 you confirm for us that the plans upon which
17 you based your May 30th decision were publicly
18 available?

19 MR. LeGRANT: Yes.

20 COMMISSIONER MAY: And how can you
21 do that, just by saying that it was done? I
22 mean, they were in the plan. You know they

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1 were in the plan because Mr. Sullivan said
2 that he had somebody looking for them and they
3 couldn't find them.

4 MR. LeGRANT: Okay. They are
5 available. Now, these plans are circulating
6 through DCRA.

7 COMMISSIONER MAY: I understand.
8 I've been through that maze.

9 MR. LeGRANT: Mr. Sullivan comes
10 in and says, "I would like to look at the
11 plans." We would have to say, "Wait a
12 second." The mechanical engineer might be
13 reviewing them for example.

14 I tried to -- on occasion I've set
15 up appointments to find a time when the plans
16 are not in review and have been available to
17 the inspector to look at.

18 COMMISSIONER MAY: So they are
19 there and one could go and theoretically if
20 you can find whose desk they are sitting on
21 based on the tracking system, you probably can
22 review them.

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1 MR. LeGRANT: Yes.

2 COMMISSIONER MAY: But it's not
3 like -- they are not posted online. They are
4 not placed in a single room where everybody
5 can go and look at them.

6 MR. LeGRANT: That's correct.

7 COMMISSIONER MAY: You'd have to
8 chase them down.

9 MR. LeGRANT: You have to make an
10 appointment to locate them in my office or
11 other office where the DCRA can intervene to
12 arrange for --

13 COMMISSIONER MAY: Mr. Sullivan,
14 did you make attempts to actually locate those
15 drawings and can you tell us what they were?

16 MR. SULLIVAN: We certainly did.
17 I'm happy to, if the Board would leave the
18 record open, get an affidavit from the former
19 deputy zoning administrator. If she can't get
20 access to these plans through that so-called
21 public opportunity or public policy, I guess
22 I need to find somebody else that can. The

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1 fact of the matter is regardless of whether
2 it's policy, it's not policy and practice, at
3 least according to our attempts. And, in
4 reality, we didn't get them. I mean, we
5 tried.

6 COMMISSIONER MAY: You can't tell
7 us specific examples of when your permit
8 expeditor went and asked for them and could
9 not find them?

10 MR. SULLIVAN: Not at this time
11 but I certainly could provide that
12 information.

13 CHAIRPERSON JORDAN: When did you
14 find out that she couldn't find them?

15 MR. SULLIVAN: This is how it
16 works every time.

17 CHAIRPERSON JORDAN: That's not
18 what I'm asking. When did you find out that
19 she could not find them?

20 MR. SULLIVAN: Well, on a weekly -
21 - well, I know this process and I say, "See if
22 you can get some information. See if you can

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1 get a copy of the plans." She said, "The
2 plans have not been made available and I can't
3 get them." I would have known that at the
4 beginning when she first told me.

5 CHAIRPERSON JORDAN: And then what
6 did you do?

7 MR. SULLIVAN: Well, she continued
8 to look for the permit.

9 CHAIRPERSON JORDAN: She did? You
10 left it up to her?

11 MR. SULLIVAN: Yes.

12 CHAIRPERSON JORDAN: Did you call
13 Mr. LeGrant?

14 MR. SULLIVAN: Absolutely.

15 CHAIRPERSON JORDAN: Did you call
16 him to say, "My processor --

17 MR. SULLIVAN: I received no
18 response to my June 1st email or any other
19 email after.

20 CHAIRPERSON JORDAN: "My permit
21 processor can't find the plans. I need you to
22 intercede." Or, "Where are they?" Did you do

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1 that?

2 MR. SULLIVAN: I'm not sure if I
3 did or not but I had received no response at
4 all to my June 1st inquiry.

5 CHAIRPERSON JORDAN: You made an
6 inquiry to Mr. LeGrant about the building
7 permit?

8 MR. SULLIVAN: The one that is in
9 their exhibit on June 1st.

10 MS. BROWN: If I may speak to this
11 briefly. Actually, he did get a response from
12 Mr. LeGrant on June 12th when he met with him
13 on another matter and they talked about it.

14 COMMISSIONER MAY: Did he offer to
15 give him the plans?

16 MS. BROWN: He offered to tell him
17 that it was based on the Economides decision.

18 COMMISSIONER MAY: No, that's not
19 the point. The point is that he has to know
20 what is being proposed.

21 MS. BROWN: I can't speak to that
22 because --

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1 COMMISSIONER MAY: That's the
2 question.

3 MS. BROWN: I'm getting to a
4 second point that Mr. Sullivan had been bird
5 dogging this since February and he's been in
6 contact with our firm on settlement issues for
7 tree issues as well. So he's been in contact
8 with us and he certainly could have asked us
9 for a copy of the information and he never
10 did.

11 COMMISSIONER MAY: Is that
12 correct, Mr. Sullivan?

13 MR. SULLIVAN: I can show you the
14 letters from Holland & Knight's lawyer that is
15 working on this and is not cooperative. I'll
16 state that. No information would have been
17 forthcoming from him. In fact, it was
18 threatening saying, "You better stop doing
19 what you're doing or we'll sue you." That was
20 separate counsel than the zoning counsel. To
21 say all you've got to do is ask is inaccurate.
22 It's not true.

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1 MR. SURABIAN: I think the record
2 is that Mr. Sullivan did not ask Mr. LeGrant
3 for the plans or for any additional
4 information. He had an opportunity on June
5 12th and did not take it. They spoke on June
6 1st. He could have asked any question. He
7 could have asked for any document at that
8 time.

9 I also want to remind the Board
10 that the relevant standard is not what was the
11 date that you had all of the information but
12 what was the date of the decision. That was,
13 according to the best information we have,
14 June 1st.

15 COMMISSIONER MAY: How can you
16 argue that -- the information to which the
17 decision relates that's not available. How
18 can you argue that it doesn't matter? I mean,
19 I know there are past precedents about
20 decision making but, still, if you don't know
21 what the decision is, how can you argue that
22 it doesn't matter? He did not know what was

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1 proposed.

2 MR. SURABIAN: I think there was
3 opportunity where he could have found out. He
4 did find out on July 6th. There was still
5 time, over three weeks to file, and they did
6 not. As Ms. Brown correctly points out, Mr.
7 Sullivan and his client have been involved in
8 this since February. They were aware of all of
9 the construction including the wall in the
10 rear.

11 They knew what was approved before
12 they knew it had been -- those permits had
13 been revoked. Then they got word that it had
14 been reissued and that the Zoning
15 Administrator made an interpretation.

16 He could have met with -- he did
17 not ask the Zoning Administrator for a meeting
18 to find out why he made that decision. He
19 could have asked for any piece of information
20 and did not and made vague claims that a
21 permit expeditor may have gone to the file
22 room and asked for something.

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1 We don't know what was asked for
2 or when that was or how often. What we do
3 know is that on July 6th at the very earliest
4 is when you had the information. He still had
5 over three weeks to file and he did not.

6 MS. BROWN: I could also add that
7 the wall was under construction and already
8 virtually complete.

9 CHAIRPERSON JORDAN: When was
10 that?

11 MS. BROWN: I believe it was by
12 July 6th.

13 CHAIRPERSON JORDAN: When was it
14 started?

15 MS. BROWN: It was started under
16 the previous permit.

17 CHAIRPERSON JORDAN: And then it
18 stopped --

19 MS. BROWN: Then it stopped --

20 CHAIRPERSON JORDAN: -- and then
21 it started again?

22 MS. BROWN: -- and then resumed.

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1 CHAIRPERSON JORDAN: When did it
2 start again?

3 MS. BROWN: Once the permit was
4 issued.

5 MR. SULLIVAN: I might add that
6 the construction started after I informed the
7 property owner that they might want to proceed
8 at their own risk because we were going to
9 challenge this.

10 In fact, a notice to revoke was
11 later issued although it took a month for
12 that. In that month's time he went ahead full
13 blast hoping that it would be a fact at some
14 point, I guess, and that this wouldn't be
15 possible.

16 COMMISSIONER MAY: The fact was
17 that it had been partially built before it was
18 revoked is not really relevant because, again,
19 we don't know what was approved. What was
20 approved could well have been to take down the
21 wall or take down part of the wall.

22 They wouldn't have gotten started

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1 on construction of the new retaining wall
2 until after the permit was issued on June 29th
3 so I think the question -- that is a relevant
4 question for you, Mr. Sullivan, why was there
5 not an appeal immediately after July 6th,
6 particularly given that there's a reasonable
7 assumption that you would have known that the
8 60 days starts at the decision, not at the
9 permit?

10 MR. SULLIVAN: Well, I disagree.
11 I think the 60 days starts --

12 COMMISSIONER MAY: Don't argue
13 that. Just tell me why you didn't file it
14 right away.

15 MR. SULLIVAN: Okay. I mean,
16 there are several reasons. One is a matter of
17 resources. My client doesn't have unlimited
18 resources. \$1,000 is a significant amount of
19 money for her. There was also some hope that
20 there would be some sort of agreement with the
21 other side, although there really wasn't any
22 back and forth on that.

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1 It was a question of having the
2 time to review it and making the decision and
3 looking into whether or not we needed to hire
4 engineers, if that was something that was
5 possible or not.

6 I would like to address Mr.
7 Surabian's comments and Ms. Brown's because,
8 on one hand, one counsel says I was bird
9 dogging this and the other one says I didn't
10 ask any questions or didn't ask for any
11 information. I couldn't have done both.

12 In the June 1st email that was
13 submitted by them, I said, "You mentioned that
14 you would advise us of your determination on
15 this. We look forward to hearing more on
16 this, under what rationale the EPS is now
17 approved, and whether or not their current
18 situation is in compliance with this new
19 determination."

20 I got nothing. When I followed up
21 with the conversation I didn't get any
22 explanation as well on June 12th. We didn't

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1 have any reason to wait. We wanted the
2 information.

3 CHAIRPERSON JORDAN: I'm kind of
4 disagreeing with my colleague here. The fact
5 that you knew there was approval of a
6 retaining wall or elevated platform, you knew
7 there was a decision made.

8 MR. SULLIVAN: I knew there was an
9 internal decision made. There was no building
10 permit issued so DCRA did not make that
11 decision final. I don't know what the process
12 is. I don't know what you call a decision.

13 Typically when you start 60 days
14 before a permit is issued because usually you
15 go -- at least building permit or C of O, it's
16 when there is a clear and defined written
17 determination. I know it can be an oral
18 determination but it's not clear and defined
19 here.

20 I will point out again the case
21 that I cited in my response to their motion,
22 that the Court of Appeals has ruled that in

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1 situations where there is ambiguity, the
2 ambiguity should be resolved in favor of the
3 appellant.

4 CHAIRPERSON JORDAN: Mr. LeGrant,
5 on the date of May 30th what did you enter
6 into the computer system exactly? Did you
7 just check the box that said "zoning approved"
8 or did you put anything else about this?

9 MR. LeGRANT: I simply checked the
10 box that said "approved." There is a tracking
11 system called workflow and workflow turns to
12 an approved status.

13 CHAIRPERSON JORDAN: Mr. Sullivan,
14 prior to this date had you seen the plans on
15 this project? Prior to the May 30th date.

16 MR. SULLIVAN: No, I had not seen
17 it.

18 CHAIRPERSON JORDAN: When did you
19 first see the plans on the project?

20 MR. SULLIVAN: For these building
21 permits? On July 6th.

22 CHAIRPERSON JORDAN: No. Before

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1 that when the first challenge was made with
2 DCRA and the first entry was made.

3 MR. SULLIVAN: Probably February.

4 CHAIRPERSON JORDAN: How did you
5 get to see those documents?

6 MR. SULLIVAN: With the developer.

7 CHAIRPERSON JORDAN: With the
8 developer?

9 MR. SULLIVAN: With the builder,
10 yes.

11 CHAIRPERSON JORDAN: So you only
12 saw it one time?

13 MR. SULLIVAN: No. I probably had
14 copies of certain things.

15 CHAIRPERSON JORDAN: And you never
16 saw any other revisions to the document until
17 July sometime?

18 MR. SULLIVAN: No. From the time
19 that we lodged our challenge with a letter to
20 Mr. LeGrant saying we think this is a
21 violation of the Economides decision, we got
22 no further information. At that point --

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1 CHAIRPERSON JORDAN: You got no
2 further information or did you inquire about
3 whether or not plans had changed?

4 MR. SULLIVAN: We received no
5 further information until July 6th.

6 CHAIRPERSON JORDAN: No, I didn't
7 ask you that. Did you inquire --

8 MR. SULLIVAN: Absolutely.

9 CHAIRPERSON JORDAN: -- prior to
10 that time? Right after you get the first you
11 said this is a violation and then time was
12 passing. Did you make any more inquiries
13 prior to this May 30th date?

14 MR. SULLIVAN: Absolutely. I had
15 an expeditor looking all the time. I know I
16 made inquiries. I could produce emails if you
17 want to leave the record open to Mr. LeGrant.

18 CHAIRPERSON JORDAN: I'm
19 concerned. I'm concerned here because I think
20 we're making some assumptions that we don't
21 have in front of this Board here about whether
22 or not something was there or was not there.

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1 That gives me concern, especially
2 speaking for someone else that is not here and
3 being able to weigh the veracity of what they
4 might have reported and what they might have
5 done. It certainly seems like it's getting
6 down to a factual issue in that regard.

7 Mr. LeGrant, you said when you
8 entered the system you just simply checked a
9 box. You didn't put any notes or anything on
10 that, but you did generate an email to the
11 owner's counsel --

12 MR. LeGRANT: Yes.

13 CHAIRPERSON JORDAN: -- that gave
14 the basis of your decision.

15 MR. LeGRANT: Right, and
16 summarized that I had approved the building
17 permit application giving them notice that had
18 occurred.

19 CHAIRPERSON JORDAN: And the
20 actual permit issued on the 29th?

21 MR. LeGRANT: Yes.

22 CHAIRPERSON JORDAN: And then you

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1 didn't file until August 27th?

2 MR. SULLIVAN: I think that's
3 correct, yes.

4 COMMISSIONER MAY: What did you
5 have to do in order to actually see the plans
6 on July 6th?

7 MR. SULLIVAN: Myself and a lawyer
8 for another property owner met with Mr. Rohan
9 Reed, an assistant from Mr. LeGrant's office.

10 COMMISSIONER MAY: So it was
11 through the ZA's office?

12 MR. SULLIVAN: Yes. We were
13 allowed to review the plans and then I think
14 we received copies.

15 CHAIRPERSON JORDAN: You said you
16 were allowed. You were told you could not see
17 them?

18 MR. SULLIVAN: That's correct.

19 CHAIRPERSON JORDAN: Prior to that
20 DCRA told you you couldn't see the plans?

21 MR. SULLIVAN: That's correct.

22 CHAIRPERSON JORDAN: Who told you

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1 that?

2 MR. SULLIVAN: They told my
3 expeditor she could not see the plans. They
4 were not available. They were not available
5 to her.

6 CHAIRPERSON JORDAN: You can't see
7 the plans or that they were not available?

8 MR. SULLIVAN: Both. She couldn't
9 see them and we didn't see them.

10 MS. BROWN: Mr. Chairman, if I
11 could --

12 CHAIRPERSON JORDAN: Excuse me a
13 second. So the plans would have been --
14 you're assuming that the plans were available
15 to everybody but you, or are you saying that
16 the plans were just not available?

17 MR. SULLIVAN: I don't know
18 actually. I know they weren't available to
19 us. Or we were not successful in obtaining
20 any information behind this approval.

21 MS. BROWN: Mr. Chairman, I think
22 you have to look at the totality of the facts

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1 here. Number one, we had him challenge the
2 initial permit. A stop work order was issued
3 based on the Economides decision for a wall
4 that is under construction. The wall is very
5 far along in construction but they stopped.
6 They didn't finish it with the fill and the
7 geo grids.

8 They had further contacted Council
9 Member Chay, the Zoning Administrator's
10 office, saying that, "Work is continuing. We
11 see trucks full of dirt being pulled out.
12 They seem to be operating. They seem to be
13 working on that retaining wall of the back
14 yard fill when they shouldn't be."

15 We explained it was because of
16 excavation activities, that they were taking
17 away some bad dirt and bringing clean fill in
18 for the parts of the construction that were
19 permitted. That wall was still there. Once
20 that permit was issued on June 29th they
21 started and it never went lower.

22 Clearly they had permission to

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1 keep the height of the wall that was there so
2 that is notice in and of itself. If the wall
3 is not being deconstructed, he should have
4 been out there recognizing that the appeal was
5 good, that the wall never ever came down.

6 MR. SULLIVAN: I would add then
7 there's no prejudice at all to the property
8 owner. If the wall was already built, then he
9 didn't need to do any additional work after
10 June 29th. And his appeal was moved up by
11 three months so I really don't see any
12 prejudice to him. And the wall was lowered
13 from the original permit.

14 MS. BROWN: It's clear that the
15 decision was May 30th and the wall continued.

16 COMMISSIONER MAY: But what you
17 just told us is that it was clear that at the
18 very beginning a permit was issued in error
19 and that error had to be corrected.

20 MS. BROWN: Correct.

21 COMMISSIONER MAY: Work was
22 stopped in order to correct it. Someone in

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1 DCRA made an incorrect decision in approving
2 that permit the first time around.

3 MS. BROWN: We disagree with the
4 decision but it stands, yes.

5 COMMISSIONER MAY: Well, I'm
6 sorry. They are the ones who have the
7 authority. They made the decision once and
8 they corrected it later so it was a mistake in
9 the decision the first time around.

10 The point at which he learned --
11 Mr. Sullivan learned that essentially the wall
12 itself, the wall component of this system, was
13 upheld was when the building permit was
14 reissued on June 29th. Right?

15 MS. BROWN: No. He knew from Mr.
16 LeGrant's discussion with him on June 12th
17 that he said he approved it under Economides.

18 COMMISSIONER MAY: But he didn't
19 know what it was. He doesn't know what was
20 approved.

21 MS. BROWN: He didn't even
22 inquire.

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1 COMMISSIONER MAY: Okay. Well, he
2 claims to have tried to get the information.
3 I don't think we have enough information.

4 CHAIRPERSON JORDAN: The meeting
5 was June 12th. Am I correct?

6 MR. SULLIVAN: That's correct.
7 There was a meeting on June 12th.

8 CHAIRPERSON JORDAN: In the
9 meeting of June 12th did you ask on what basis
10 they made the decision?

11 MR. SULLIVAN: I did.

12 CHAIRPERSON JORDAN: And they
13 said, "I cannot tell you the basis."

14 MR. SULLIVAN: He didn't say, "I
15 cannot tell you." He said, "I just determined
16 that it was compliant with my interpretation
17 of Economides."

18 CHAIRPERSON JORDAN: That what was
19 compliant?

20 MR. SULLIVAN: The building permit
21 whether it's a structure or wall. I said, "Is
22 it no longer a retaining wall? Is it still a

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1 structure?" He said, "Well, whatever it was,
2 what they showed me, I determined to be
3 compliant with the Economides interpretation."

4 CHAIRPERSON JORDAN: And
5 Economides is a case that refers to what
6 issue?

7 MR. SULLIVAN: Economides is a
8 Court of Appeals case.

9 CHAIRPERSON JORDAN: But it
10 pertains to what? What issue?

11 MR. SULLIVAN: It pertains to the
12 retaining wall, whether or not it's a
13 retaining wall and whether or not it's
14 permitted and whether or not it is considered
15 to be in a side yard illegally or rear yard.

16 CHAIRPERSON JORDAN: In light of
17 the Economides case. I approved it in light
18 of.

19 MR. SULLIVAN: Well, he said --

20 CHAIRPERSON JORDAN: I didn't
21 disapprove it in light of.

22 MR. SULLIVAN: -- it complied with

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1 his interpretation of the Economides case is
2 what he said.

3 CHAIRPERSON JORDAN: Okay. I
4 think we're splitting hairs. There was still
5 nothing there that -- we wouldn't file an
6 appeal.

7 MR. SURABIAN: I think what's
8 important is also you remember that the
9 regulations is a should-have-known standard.
10 It's not actual knowledge. The meeting took
11 place on July 6th but it could have happened
12 on any day between June 1st and July 6th
13 excluding weekends.

14 He could have met with Mr. Reed,
15 the staff member in the Zoning Administrator's
16 office. He could have asked for a meeting
17 with Mr. LeGrant and did not do that.

18 MR. SULLIVAN: In addition to that
19 we're talking about extenuating circumstances
20 now under Baskin. When those extenuating
21 circumstances go away and my ability to file
22 is no longer impaired we begin the 60 days.

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1 The second part of that is there was no
2 prejudice to the property owner.

3 CHAIRPERSON JORDAN: Okay. Are
4 there any other questions you need to ask of
5 either persons? Then I'm going to bring this
6 to a conclusion in regards to this motion.

7 One second. I'm going to ask that
8 this record in regards to I'm keeping the
9 motion to dismiss alive. I would like to see
10 the affidavit and we'll work our way backwards
11 from a date when we can put this back on the
12 docket.

13 But I'm going to also continue
14 this particular matter on the hearing on the
15 underlying appeal just so we can take
16 arguments on it and ask you questions in
17 regards to it. I don't need to see your
18 presentation.

19 I think we just have questions
20 about it. Then we'll make a ruling on both
21 matters to save time of the Board, etc., and
22 everybody, parties coming back and forth for

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1 this matter.

2 Mr. Moy, if we are going to put
3 this for a decision, when would that date be?

4 MR. MOY: Mr. Chairman, I think
5 depending on how much time for the parties.

6 CHAIRPERSON JORDAN: It's going to
7 be a decision date.

8 MR. MOY: Okay. Well --

9 CHAIRPERSON JORDAN: I'm keeping
10 the record open for two things. One, the
11 affidavit from your process server and a
12 counter affidavit if necessary if one wants to
13 be produced by the appellee. That's going to
14 close the record on this, on this issue on the
15 motion to dismiss.

16 MR. MOY: Okay.

17 MS. GLAZER: Mr. Chair, excuse me.
18 Did you mean by the permit expeditor?

19 CHAIRPERSON JORDAN: Yes.

20 MS. GLAZER: Okay.

21 CHAIRPERSON JORDAN: What did I
22 say?

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1 MS. GLAZER: I thought you said
2 process server. Maybe everybody else
3 understood.

4 CHAIRPERSON JORDAN: Thank you for
5 the correction. You know where my mind is.
6 The expeditor.

7 MR. MOY: The earliest, Mr.
8 Chairman, depending on the amount of time for
9 the response would be a decision on the
10 morning of November 7th. The other
11 opportunity would be the decision on the
12 morning of November 27th. Again, either on
13 the 7th of November or the 27th of November.

14 CHAIRPERSON JORDAN: What does the
15 docket look like for those dates? Are we
16 heavy or light on one day or the other?

17 MR. MOY: I think they are equal,
18 Mr. Chairman.

19 CHAIRPERSON JORDAN: Let's do the
20 27th.

21 MS. BROWN: Mr. Chair, if I may,
22 if we could get the 7th of November. This is

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1 interfering with the ability to sell one of
2 the houses and we do need a solution to this
3 as quickly as possible.

4 CHAIRPERSON JORDAN: We can
5 accommodate that. The window for -- how long
6 would it take you to get the affidavit from
7 the permit?

8 MR. SULLIVAN: November 7th is
9 fine if I have a week, if I can file the week
10 before.

11 CHAIRPERSON JORDAN: No, no.
12 You're going to file a lot faster than that
13 because the 7th is when we are coming for our
14 decision. I want to give the appellees the
15 opportunity to file a counter affidavit so you
16 should have that much time. You should be
17 able to get it within a week's time from
18 today.

19 MR. SULLIVAN: I should as long as
20 she's not out of the country or anything, yes.
21 I don't think the timing will be a problem.

22 CHAIRPERSON JORDAN: So let's have

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1 it a week from today.

2 MR. MOY: That would be October
3 23rd.

4 CHAIRPERSON JORDAN: That the
5 affidavit should come in?

6 MR. MOY: That's right.

7 CHAIRPERSON JORDAN: Then you have
8 a week to produce the counter affidavit. When
9 is that?

10 MR. MOY: That would be October
11 30th.

12 CHAIRPERSON JORDAN: In that
13 affidavit I want to know from the appellees
14 whether or not the files are lost, was anybody
15 looking for files, was there a problem with
16 filing, all of that.

17 MR. MOY: And the decision would
18 be on the 7th.

19 CHAIRPERSON JORDAN: Let's move to
20 the underlying appeal. Are the parties
21 prepared and ready to -- well, basically you
22 filed an appeal. We've just got some

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1 questions for you. We don't necessarily need
2 a presentation but there's definitely some
3 questions that we have to ask regarding this.

4 MR. SULLIVAN: Okay. I would like
5 to make a case. I'm going to be brief and to
6 the point. I'm not taking testimony. I think
7 the facts are not really in dispute, the
8 critical facts. I have a handout that you
9 have in front of you. Ten minutes tops. I
10 just want to touch on the points real quickly.

11 CHAIRPERSON JORDAN: All right,
12 fine. Let's do ten. Let's begin, please.
13 You're on the clock.

14 MR. SULLIVAN: Thank you. So I
15 just want to point out briefly before you you
16 have a site and grading plan which shows the
17 height of the elevated platform structure at
18 certain points. It's 5.7 feet at the top left
19 corner which is the corner which abuts my
20 client's property.

21 It is 5 feet where it abuts the
22 property line of lot 24. This is on lot 23.

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1 Then on the other side of that line, so we are
2 now on lot 24, the height is 7.6. Then the
3 height is 6.4 on the corner on the far side of
4 the two properties from my client's property.

5 The definition of side yard is a
6 yard between any portion of a building or
7 other structure and the adjacent side lot line
8 extending for the full depth of the building
9 or structure.

10 There is a side yard requirement
11 here of eight feet. The distance between this
12 elevated platform structure, which is higher
13 than four feet, and the side lot line might be
14 one foot on each side and there is no distance
15 at all on the interior of the two lots so you
16 have a violation in four separate side yards.

17 In the BZA Appeal 17285, the
18 Carome case, which was the BZA case underlying
19 the Economides decision, the Board concluded
20 in there that elevated platform structure was
21 more than four feet above grade and not a
22 retaining wall and, therefore, it should not

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1 be in a side yard. That is identical to this
2 case.

3 I believe the other side is
4 stipulating that this is not a retaining wall,
5 it's an elevated platform structure. At least
6 they're stipulating that certain parts of it,
7 or certain portions of it, are.

8 I think it's obvious that the
9 portions where it's the highest height at the
10 end is where it has to be considered an
11 elevated platform structure because it is dirt
12 and geo grid filled up to make the back yard
13 flat retained by this retaining wall so the
14 conclusion is the same. We have a structure
15 over four feet and a side yard.

16 The rear yard violation they have
17 used Board's decisions in two prior cases to
18 say that their 25-yard requirement runs from
19 the back porch out towards the property line.
20 Then once you hit 25 feet you can do whatever
21 you want after that because now you have your
22 required rear yard.

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1 The definition of rear yard says
2 it's a yard between the rear line of a
3 building or other structure and the rear lot
4 line. There's two measuring points. There is
5 the back of the house or the back of the
6 structure and the back of the property. It's
7 A or B and C are your two measuring points.

8 COMMISSIONER MAY: Can you repeat
9 that again?

10 MR. SULLIVAN: According to the
11 definition of rear yard it's a yard between
12 the rear line of a building or other structure
13 and the rear lot line. Following my limited
14 understanding of the rules of logic, it's A or
15 B and C are your two measuring points.

16 In addition to that, 404.1, which
17 is the actual rear yard requirement, states,
18 "A rear yard shall be provided for each
19 structure located in a resident's district."
20 It doesn't limit it to the house so they need
21 a rear yard for this structure which is only
22 10 feet so the distance from the back.

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1 Now, there's two BZA cases, as
2 they've cited, that involved accessory
3 structures that were otherwise permitted in a
4 rear yard. I don't know if that had any
5 impact on how the Board decided, but the clear
6 language of both the definition and the
7 requirement under 404.1 provide that the rear
8 yard should be calculated between the back of
9 that structure and the rear lot line which
10 would be 10 feet.

11 Otherwise, you call it a mill
12 yard. I don't think anybody would suggest
13 that you could do this in the side yard. You
14 could have eight feet of side yard and then
15 you can put a giant wall up in your side yard
16 impacting your neighbor's house.

17 One of the purposes of the Zoning
18 Regulations is to protect neighboring
19 properties and to provide light and air for
20 neighboring properties. If your rear yard is
21 really internal, it doesn't really help. I'm
22 saying it's the plain language of the regs but

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1 it also makes sense.

2 I'll move on to lot occupancy. I
3 believe they have a lot occupancy violation on
4 the property when considered in conjunction
5 with the house. I don't know what the entire
6 calculation is but eyeballing it it's over 40
7 percent.

8 The calculation was not completed
9 for the second round of permits because it was
10 processed as a retaining wall permit so there
11 was no information on side yards or lot
12 occupancy for the entire lot, although this
13 would have obviously increased that lot
14 occupancy.

15 I understand what they're saying.
16 They are saying in Wesley Heights you count
17 this structure in lot occupancy in the Wesley
18 Heights Overlay. Otherwise, you don't. I
19 think that's a misreading of the Carome case.

20 It's stated in a footnote that in
21 the end the Wesley Heights Overlay
22 construction of your lot occupancy requirement

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1 and the general requirement for lot occupancy
2 were really no different.

3 It says it comports with the
4 language of the lot occupancy provision. What
5 they are saying is in Wesley Heights overlay
6 it said buildings and structures count against
7 lot occupancy, but everywhere else only
8 buildings count.

9 I disagree with that because of
10 the language in 403.2 which says, "No
11 structure shall occupy its lot in excess of
12 the percentage of lot occupancy set forth in
13 the following table."

14 Arguably in dispute with that is
15 the definition of building area which goes
16 into lot occupancy where it says, "The
17 projected area of a building and its accessory
18 buildings."

19 They are claiming that definition
20 overrules the specific requirement in 403.2.
21 I would argue that the specific requirement in
22 403.2 would clarify the definition because the

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1 definition is not clear.

2 The next sentence goes on to say,
3 "The terms shall not include any projections
4 into open spaces authorized elsewhere in this
5 title." That has typically meant structures
6 and buildings.

7 The error would be in not
8 providing a lot occupancy calculation which
9 would allow us to determine and providing
10 that, I think, it would be obvious that it
11 would be over 40 percent.

12 I don't agree that the Board in
13 Carome agreed with their contention there. I
14 think they left that open and instead in their
15 footnote they said that lot occupancy actually
16 does apply to all structures, not just
17 buildings.

18 I'm getting near the end. Our
19 position is that the whole elevated platform
20 structure should count in lot occupancy. It
21 should count against rear yard and any other
22 required yard that it happens to be located

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1 in.

2 Based on the language of 199.1 the
3 definition under rear yard is, "A yard
4 required by the provisions of this title shall
5 be open to the sky from the ground up."

6 An exception to that rule is
7 2503.2 which says, "A structure not including
8 a building, no part of which is more than four
9 feet above the grade at any point, may occupy
10 any yard required under the provisions of this
11 title."

12 That's complicated but to read it
13 without the exception it says, "A structure
14 may occupy any yard." The exception is that
15 doesn't include a building no part of which is
16 more than four feet above the grade.

17 If any part of the elevated
18 platform structure is above four feet, then
19 the entire structure is not accepted under
20 2503.2. That is the plain language of that.

21 I think the property owner's
22 counsel agrees with that, yes, that is the

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1 plain language, but they don't think the plain
2 language should be followed in this case
3 because they interpret that as an absurd
4 result. It might be a harmful result for them
5 in this case. That doesn't necessarily make
6 it absurd.

7 Finally, I would add, and I think
8 I have this in one of the photos, the starting
9 point for their grade elevation of the wall
10 was elevated artificially. It's academic.
11 It's a matter of degree because they are over
12 anyway.

13 I think they will stipulate to the
14 heights on that. The grade from which these
15 heights are measured on the back wall is
16 elevated. I have a photo in the file and I
17 can provide another photo that shows that. I
18 don't know if it's temporarily elevated and
19 then they will bring it back down to the
20 natural grade but I think they should also be
21 counting that.

22 Finally, one of their points is

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1 that some of this elevated platform structure
2 is elevated platform structure and some is
3 not. What they did is they said, "Since we're
4 allowed to put in dirt to a grade of two-to-
5 one ratio, then it's deemed to already be
6 there and we only have to measure the
7 additional dirt that we put in after we put
8 that dirt down."

9 I think that is a bit of fiction
10 that is made up. I don't think Economides or
11 Carome says that or allows that. Otherwise,
12 you could have flat yard and if you wanted to
13 raise it up, you could put half your dirt in
14 and then say, "Okay. Now we get to put this
15 in and only this part counts as our
16 structure."

17 The key thing is it still has the
18 same impact on the relative property because
19 my client's grade didn't get increased to the
20 two to one. It is what it is. The
21 relationship of her property to her neighbor's
22 property has increased by the amount of dirt

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1 that they put in there just as if it was a
2 wooden structure.

3 If they had put a wooden structure
4 in, nobody would say, "Oh, you're allowed to
5 put a wooden structure in until you get a
6 grade of two to one. Then after that we start
7 counting what the structure is." I think the
8 purpose of the Economides decision that this
9 Board made was to say that for all intents and
10 purposes this is a structure.

11 Just because it's dirt doesn't
12 mean that it doesn't have the same impacts
13 that a structure has on neighboring
14 properties. I think that follows the same
15 line of reasoning in that you shouldn't be
16 able to artificially add grade before you
17 start counting. That's all I have. I don't
18 believe that critical facts are in dispute and
19 I don't believe we need testimony.

20 CHAIRPERSON JORDAN: Any questions
21 of Mr. Sullivan?

22 COMMISSIONER MAY: So let's talk

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1 about the side aspect of this issue to start
2 with. Your contention is that the portion of
3 the side yard farthest to the rear where the
4 wall is 5 1/2 feet or something, 5.7, that's
5 in the side yard?

6 MR. SULLIVAN: That's correct.

7 COMMISSIONER MAY: Your
8 understanding of side yard is side yard is
9 everything between the building and the side
10 lot line extended from the front line to the
11 rear.

12 MR. SULLIVAN: Well, in this case
13 it's another structure. The side yard
14 definition is the distance between a
15 structure, a house or some other structure and
16 the lot line. The distance here is a foot
17 which is seven feet short. The distance on
18 the other side is the same. The distance in
19 the middle, there is no distance.

20 COMMISSIONER MAY: You cite 404.1
21 but you don't cite the fact that the
22 definition of a rear yard there's an exception

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1 in there except as noted in -- except as
2 provided elsewhere in the title. Does this
3 fit any of the circumstances as provided
4 elsewhere in the title?

5 MR. SULLIVAN: I'm not sure I
6 understand the question.

7 COMMISSIONER MAY: I'm looking at
8 the definition actually.

9 MR. SULLIVAN: On rear yard?

10 COMMISSIONER MAY: Rear yard. It
11 says except as provided elsewhere in the
12 title. It provides that definition which you
13 gave us.

14 MR. SULLIVAN: Right. Right.

15 COMMISSIONER MAY: Did you examine
16 elsewhere in the title there are exceptions
17 and whether this applies?

18 MR. SULLIVAN: I don't believe
19 that any exception would apply in this case,
20 no.

21 COMMISSIONER MAY: Okay. I'm not
22 sure that the notion about lot occupancy is

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1 correct. This issue has come up before, the
2 difference between what the Wesley Heights
3 Overlay says versus the rest of the Zoning
4 Regs so I'm not sure that you made a
5 compelling case there but we'll hear from your
6 opposing counsel what their argument is on
7 that.

8 That's it for me.

9 CHAIRPERSON JORDAN: How do you
10 want to divide up your 10 minutes? Have you
11 guys talked? Do you want to divide up your 10
12 minutes?

13 MS. BROWN: First I was hoping to
14 ask a question of Mr. Sullivan if that's
15 permitted.

16 CHAIRPERSON JORDAN: We're just
17 doing argument. We're not necessarily doing
18 testimony per se. Tell me how you want to
19 provide up your 10 minutes.

20 MS. BROWN: I think we could split
21 it up five and five.

22 MR. SURABIAN: Sure. I would

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1 imagine Ms. Brown is going to hit a lot of the
2 same points. I can supplement at the end.

3 CHAIRPERSON JORDAN: So let's do
4 seven and you can still defer the other three
5 if you feel it's necessary.

6 MR. SURABIAN: Sure. I mean, it
7 may be important to hear from the Zoning
8 Administrator because some of these points
9 that were raised, you know, someone who works
10 with the Zoning Regulations every day and the
11 Zoning Administrator it might be important to
12 hear his perspective as well.

13 CHAIRPERSON JORDAN: Okay. Let's
14 find out where we're going with your argument.

15 MS. BROWN: My understanding is
16 that you would be going first.

17 CHAIRPERSON JORDAN: No, you can.
18 And I guess it's because of the real party in
19 interest.

20 MS. BROWN: The Zoning
21 Administrator's decision, yes. Absolutely.
22 First, Mr. Sullivan just has it plain wrong on

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1 whether or not this structure is greater than
2 four feet in a required yard.

3 The measurements on that plat
4 clearly show that wherever the wall is for a
5 required rear yard, whether it's the side yard
6 or the required rear yard, that wall is no
7 taller than four feet plus a five-foot curb.
8 I'm sorry, 5.5 foot curb that is there for
9 drainage and some safety issues.

10 That is factual. It is not above
11 four feet and it's permitted in any required
12 rear yard as long as it doesn't exceed four
13 feet.

14 Mr. Sullivan has it wrong when he
15 says that once you have a structure that is
16 taller than four feet elsewhere on the
17 property and any portion of it whether it's
18 zero feet, three inches, two inches and
19 there's three or two inches in that required
20 rear yard, the whole thing has to be thrown
21 out.

22 I give in my brief the example of

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1 having a barbecue pit in the back corner of
2 your property that is not in the required rear
3 yard. It's maybe 30 feet or 40 feet out in
4 your back yard. You have a nice chimney,
5 patio platform where you can stand on it to
6 cook.

7 But if that little curb of six
8 inches of the patio extends one inch into that
9 required rear yard, Mr. Sullivan's theory says
10 the whole thing is impermissible and that does
11 lead to absurd consequences and results. That
12 just can't be the way the zoning laws need to
13 be interpreted.

14 Third, the notion that the
15 structure has to count toward lot occupancy
16 here, I mean, the Economides decision made a
17 very clear distinction in what is building
18 area. I think, Mr. May, you've heard that.

19 COMMISSIONER MAY: That was in the
20 Wesley Heights.

21 MS. BROWN: Correct. That was in
22 Wesley Heights so both structures and

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1 buildings needed to count toward lot
2 occupancy. In our brief we have the clear
3 excerpt from this Board's decision saying
4 everywhere else it's just building area that
5 counts toward lot occupancy.

6 That is not disputed. Mr.
7 Sullivan want you to overturn that decision.
8 I think that could certainly open up a can of
9 worms if you try to get into that very complex
10 decision that was made.

11 There is no violation of the rear
12 yard because no portion of the structure is
13 over four feet in the required rear yard. No
14 portion is over four feet in the side yard.
15 There is just no basis for this appeal.

16 With that, I'll turn it over to
17 Mr. Surabian. We also have factual witnesses
18 here, by the way; Mr. Sher and the engineers
19 who did prepare the drawings who can easily
20 walk you through all the measurements, the
21 grading and the issues.

22 One point that I do want to make

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1 clear is that it does take three elements to
2 create a structure here under the Economides
3 decision; it's the wall, the geo grid, and the
4 fill. If you only have two of the three, it's
5 not a structure. The decision makes that
6 clear.

7 I'll yield the rest of my time to
8 Mr. Surabian.

9 MR. SURABIAN: Thank you. The
10 first point I want to make is just on
11 background. The permits were issued in
12 February initially for the houses and this
13 rear wall structure. A complaint was received
14 by the Zoning Administrator from Mr. Sullivan
15 on behalf of his client.

16 Mr. LeGrant looked into the matter
17 further and found out that permit had been
18 issued in error. Specifically he determined
19 that this was a platform structure which was
20 in excess of four feet in the required rear
21 yard. DCRA took action to revoke the permit.

22

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1 At that time Sandy Spring Builders
2 and their counsel met with the Zoning
3 Administrator and revised their plans. In
4 some parts they reduced the height of the wall
5 in half. They removed the soil and created a
6 plan that complied with the applicable zoning
7 standards.

8 Specifically, that it is not four
9 feet; that no part of the structure is over
10 four feet in a required yard; in total the
11 required yard is occupied more than 50
12 percent; and, of course, the lot occupancy
13 which is not relevant here for the reasons
14 that Ms. Brown argued.

15 That said, I do think if the Board
16 is unclear about what this drawing is showing
17 or has questions, it may be very helpful to
18 have a representative from CAS Engineer walk
19 the Board through because they can explain
20 what areas where fill was put in, where geo
21 grid was installed. It may give the Board
22 comfort as to the facts.

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1 If the Board is clear on the
2 drawing, what I'll indicate to the Board is
3 you can see where the final grade and where
4 the prior grade was. These dark lines are the
5 final grade and the dashed lighter lines were
6 the existing.

7 You can see -- I'm just starting
8 down here on 233 Forking Place at the bottom
9 you can see on the side yard existing grade
10 was 246. The final grade is 46 which means
11 246. There's another line 244, a dash line
12 for existing grade. Final grade 244. You can
13 see the height of the wall six inches, half a
14 foot, there.

15 It is not over four feet in height
16 at any point in that side yard. Of course,
17 the Zoning Regulations instruct us that the
18 side yard runs the length of the building.
19 Then beyond the building it's the rear yard
20 which runs the entire width of the lot.

21 The Schoenberger case indicates,
22 and has been practiced at DCRA for many years,

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1 required yards are measured from the building
2 out and that is what the Zoning Administrator
3 has been instructing the staff for years.

4 That's what the case law has held.
5 That's what was done in this case. The reason
6 being is that the purpose is to separate the
7 primary buildings from accessory structures or
8 anything that may be in the back.

9 Once you get beyond the 25-foot
10 required rear yard, the structure can be
11 higher but it's not do as you want as Mr.
12 Sullivan suggested. Other zoning standards
13 still apply.

14 With that I'll open it up to Board
15 questions if there are any.

16 COMMISSIONER MAY: You bet. So
17 I'm confused because, Ms. Brown, you have said
18 that no part of the wall was above four feet.

19 MS. BROWN: That's correct. In a
20 required yard.

21 COMMISSIONER MAY: Okay. You
22 didn't have that qualifier when you said it

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1 or, at least, I missed it.

2 MS. BROWN: I did.

3 COMMISSIONER MAY: Mr. Surabian
4 said that the required yards it is not above
5 that. You state that the measurement of the
6 rear yard is from the back of the building to
7 25 feet or whatever it was.

8 MR. SURABIAN: In the direction of
9 the lot line 25 feet.

10 COMMISSIONER MAY: Direction of
11 the lot line. So how do you reconcile that
12 with the definition of the yard that is in the
13 regulations?

14 MR. SURABIAN: The definition of
15 yard specifically?

16 COMMISSIONER MAY: Yard rear depth
17 of. Horizontal distance between the rear line
18 of a building and the rear lot line except as
19 provided elsewhere in the title. Is this the
20 case of except as provided elsewhere?

21 MR. SURABIAN: I don't believe so.
22 I don't think that this definition informs us

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1 exactly how to measure it.

2 COMMISSIONER MAY: Rear lot line
3 is pretty plain to me.

4 MR. SURABIAN: So from the rear
5 line of a building and the rear lot line.
6 From the rear line of the building to the rear
7 lot line --

8 COMMISSIONER MAY: That's the rear
9 yard.

10 MR. SURABIAN: -- is the rear
11 yard. The required rear yard.

12 COMMISSIONER MAY: So where is
13 that defined?

14 MR. SURABIAN: Required rear yard
15 is not defined. We have to look to -- the
16 Zoning Regulations contain standards, that
17 there has to be a 25-foot required yard.

18 COMMISSIONER MAY: Right.

19 MR. SURABIAN: And different
20 standards apply there.

21 COMMISSIONER MAY: What do you
22 call the space after the 25 feet?

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1 MR. SURABIAN: That's still the
2 rear yard but it's not the required rear yard.

3 COMMISSIONER MAY: The
4 differentiation between required rear yard and
5 rear yard is one of practice.

6 MR. SURABIAN: It's in the code.

7 COMMISSIONER MAY: Where?

8 MR. SURABIAN: In the zoning
9 standards there is a 25-foot required rear
10 yard there.

11 COMMISSIONER MAY: I know the
12 numbers are specified but where --

13 MR. SURABIAN: 2503 indicates that
14 a structure not including part of the building
15 more than four feet above grade at any point
16 may occupy any yard required under the
17 provisions of this title. I'm calling it
18 required rear yard. The code says yard
19 required under the provisions of the title.

20 COMMISSIONER MAY: State that
21 again. 25 --

22 MR. SURABIAN: 2503.2.

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1 COMMISSIONER MAY: Okay.

2 MR. SURABIAN: So in that space
3 that they call a yard required under the
4 provisions of this title, you can have a
5 structure as long as it's under four feet.
6 Outside of four feet it can be higher.

7 COMMISSIONER MAY: Outside of the
8 rear yard -- the required rear yard it can be
9 more than four feet.

10 MR. SURABIAN: Within the required
11 rear yard required under the title it has to
12 be under four feet. Then if you look at the
13 definition of yard, it says in the last
14 sentence, "No building or structure shall
15 occupy in excess of 50 percent of a yard
16 required by this title."

17 That is sort of another standard
18 that is sort of buried in the definition that
19 the part of that rear yard that's required
20 can't be occupied by more than 50 percent of
21 a structure. We're saying the platform is a
22 structure but it occupies less than the 50

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1 percent. It's 42 on one lot and 46.8 in the
2 other lot.

3 CHAIRPERSON JORDAN: Where did you
4 say required rear yard was defined?

5 COMMISSIONER MAY: It's alluded to
6 and never defined.

7 MS. BROWN: If I could make a
8 clarification, the Court of Appeals did define
9 it and I don't have the name of the case but
10 it was issued, I believe, in December of 2010
11 where the issue came up and it was --

12 COMMISSIONER MAY: Can you submit
13 that with your -- well, actually we haven't
14 decided what's going to be submitted on the
15 substance of this case but we may want that.

16 MS. BROWN: It was a decision of
17 this Board that said you measure the rear yard
18 from the back of the building out 25 feet.
19 That's required. That was contested at the DC
20 Court of Appeals and the court upheld this
21 Board's interpretation.

22 CHAIRPERSON JORDAN: Say that one

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1 more time?

2 MS. BROWN: The rear yard is
3 measured just as Mr. Surabian said, at the
4 back of the building outward 25 feet, not from
5 the rear lot line.

6 CHAIRPERSON JORDAN: Was that our
7 Mount Pleasant matter?

8 MS. BROWN: Yes.

9 CHAIRPERSON JORDAN: With the
10 library issue?

11 MS. BROWN: Uh --

12 MR. SURABIAN: Ms. Brown is
13 referring to Appeal 17414 of Geraldine Rebok
14 and Jeffrey Schoenberger.

15 MS. BROWN: Yes.

16 MR. SURABIAN: It's in the Court
17 of Appeals Schoenberger v. District of
18 Columbia Board of Zoning Adjustment 940
19 Atlantic 2nd 159.

20 CHAIRPERSON JORDAN: Give it to me
21 again. 940?

22 MR. SURABIAN: Atlantic 2nd 159

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1 from 2008.

2 COMMISSIONER MAY: Okay. That's
3 the key piece of information I was looking for
4 is how you define that required rear yard.
5 How do you define side yard?

6 CHAIRPERSON JORDAN: Before we
7 leave that, is the case saying how to measure
8 from the point of where you measure the rear
9 yard? Is that what the case says or it says
10 that -- does it make a distinction between a
11 required rear yard and a rear yard?

12 MS. BROWN: The case tells us
13 where the required rear yard has to be
14 measured from and that anything greater than
15 that is not required so you can either have
16 it --

17 CHAIRPERSON JORDAN: Do you have
18 the case?

19 MS. BROWN: I'll double check. I
20 haven't reread it for a couple weeks now.

21 CHAIRPERSON JORDAN: I want to
22 make sure, and I'm going to pull it, that the

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1 court actually examined the two different
2 words or two different phrases "rear yard" and
3 "required rear yard."

4 Or did it just interpret what the
5 regs were saying, a required rear yard and
6 should be a required rear yard meaning any
7 rear yard basically should be measured from
8 the center point back?

9 MS. BROWN: It's not necessarily
10 the center point. It's the part of the
11 building that extends the farthest out.

12 CHAIRPERSON JORDAN: Farthest out,
13 yeah.

14 MS. BROWN: You start there. You
15 take your tape measure and you go out 25 feet
16 and that is where you have a required rear
17 yard and that is where the restrictions are.
18 Once you get to 30 feet, that five-foot strip
19 you don't have the same restrictions.

20 CHAIRPERSON JORDAN: And that's
21 the case that talks about that?

22 MS. BROWN: Yes.

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1 CHAIRPERSON JORDAN: Okay. All
2 right. Thanks. I'll find it.

3 COMMISSIONER MAY: So the
4 definition of side yard and how we distinguish
5 between side yard I didn't get to it but is
6 the side yard definition explicit that it ends
7 at the rear wall of the house?

8 MS. BROWN: Yes. I'm sorry. I'll
9 go back and look at the side yard definition
10 but it is certainly in the court decision that
11 it extends -- once you hit the back of the
12 building everything beyond that is a rear yard
13 so the side yard does not extend outward.

14 I'll read from the definition.
15 You probably have it there as well. "Yard,
16 side. A yard between any portion of the
17 building or other structure and the adjacent
18 side lot extending the full depth of the
19 building or structure." So it's just the
20 building or structure.

21 COMMISSIONER MAY: So it ends
22 where we have that hard dash line in the

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1 drawing that was submitted.

2 MS. BROWN: Yes.

3 MR. SURABIAN: I have the
4 Schoenberger case in front of me here. This
5 is the BZA appeal. I'll just read four lines
6 for you. The question was whether or not a
7 garage was in the required rear yard and the
8 Board says, "The property owner's garage is
9 not located within this required 25-foot rear
10 yard area but is located approximately 38 feet
11 away from the rear wall of the dwelling.

12 Therefore, the garage in question
13 here is properly located in the rear yard but
14 is also properly not located within the
15 required rear yard."

16 COMMISSIONER MAY: You're reading
17 from the Appeal's Court decision?

18 MR. SURABIAN: I'm reading from
19 the BZA decision.

20 COMMISSIONER MAY: From the BZA
21 decision which was upheld.

22 MR. SURABIAN: Yes. And that's

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1 17414. The last sentence says, "Although the
2 garage is a structure, the Board concludes
3 that it does not require its own rear yard."

4 COMMISSIONER MAY: Okay. I just
5 want to clarify one other issue having to do
6 with how the heights are actually measured.
7 It's not completely clear from what I read,
8 and maybe it should be, but there is some
9 confusing information here.

10 It seems to me what was done here
11 to justify the current design essentially was
12 to grade the -- do a theoretical grading of
13 the property based on one-to-two slope which
14 we've been through it enough and the precedent
15 for Economides and so on that one-to-two is
16 allowable for someone to just go in and
17 regrade their property without running afoul
18 of any kind of zoning hurdle.

19 But there was a theoretical
20 regrading. Say the line of the property might
21 have gone like that and there is a theoretical
22 regrading that brings it up to here. It's

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1 from that theoretical grade that you measure
2 the four feet. That's what appears to have
3 been done here because when you look at the new
4 elevations and you look at the existing, or
5 the previously existing elevations, there are
6 difference of as much as six feet. Yet, they
7 fall into that area that is within the
8 required rear yard.

9 MR. SURABIAN: I guess the best
10 way I can explain it is that, first, the
11 literal language of Economides says that the
12 platform consist of the wall, the geo grids,
13 and the retained fill dirt. If we're talking
14 about a platform, I can visualize a wall and
15 that wall is retaining a certain amount of
16 fill against it.

17 When we're talking about dirt that
18 is not being retained by that wall, I don't
19 see how we can call that part of a platform.
20 It's just dirt on the ground. If you don't
21 need the wall to retain that dirt, I don't
22 know how we can call that a structure or part

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1 of a platform.

2 COMMISSIONER MAY: So you're
3 saying -- I mean, this is all a theoretical
4 exercise. In essence -- well --

5 MR. SURABIAN: We received
6 representation from the engineer and we ran it
7 through the engineer at DCRA as well. This is
8 what we can do just grading. Grading would
9 not implicate zoning.

10 COMMISSIONER MAY: Right.

11 MR. SURABIAN: They are saying,
12 "This is what we're going to do where we need
13 to have a structure to support that grade."
14 We're saying under Economides we are going to
15 call that whatever is being supported there as
16 part of the structure and we are going to
17 apply the standards.

18 Grading that you can put down
19 yourself that is not being supported that can
20 stand on its own, I just don't know how -- I
21 don't think it makes sense under Economides to
22 call that part of the structure.

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1 COMMISSIONER MAY: As I recall,
2 the solutions that have been negotiated on the
3 Economides case all assume a one-to-two grade
4 and then retaining walls up to four feet and
5 then a one-to-grade and so on.

6 MR. SURABIAN: That is sort of
7 ongoing. I don't want to get into it.

8 COMMISSIONER MAY: Right. All
9 right. Then I have just one last question and
10 I will refer to the submission by Mr. Sullivan
11 that includes a photograph. I assume this is
12 Ms. Lynch in front of the wall there.

13 I'm looking at that and I'm seeing
14 at least an eight-foot wall if you count the
15 courses of block assuming they are eight
16 inches tall which is a pretty standard unit.

17 This looks like it's at least
18 eight feet and I don't see anywhere that it's
19 eight feet. Is there grading that is not been
20 done there or something? I mean, if this is
21 in her property and she's standing there and
22 it's eight feet above her --

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1 MS. BROWN: Uh -- I'm sorry.

2 MR. SURABIAN: I'll just jump in.

3 The plan is showing at least 7 1/2 feet.

4 MS. BROWN: Excuse me. I think
5 there is a misconception that she is standing
6 in her yard. She is actually standing in the
7 non-required yard of 2338 and 34. That is the
8 rear of the property.

9 COMMISSIONER MAY: Okay. Where it
10 is more than eight feet.

11 MS. BROWN: Yes. And it has not
12 been finished grading. I can show you another
13 photograph that shows its current condition.
14 Yes, I think at that point it might be 7.6
15 feet in that area. That is the highest point,
16 I believe, along the rear.

17 COMMISSIONER MAY: So is there a
18 two-story covered porch there? I'm seeing the
19 covered porch above it.

20 MS. BROWN: It's at an odd angle.
21 It happens to appear that it's right up there
22 but I questioned that photograph myself with

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1 the engineers and the property owners.

2 Actually, it's a distorted --

3 COMMISSIONER MAY: I understand
4 how it could be distorted. I'm just curious.
5 Is it a two-story porch or is it a one-story
6 porch?

7 MS. BROWN: It's a two-story
8 porch, yes.

9 COMMISSIONER MAY: It is a two-
10 story porch. That would explain it the for
11 me.

12 MS. BROWN: Would it be helpful
13 for you to see this other photograph of
14 current conditions?

15 COMMISSIONER MAY: No, it's not
16 really important to the case. For me it's
17 just a check on whether what we're seeing in
18 the drawing is factual and I'm convinced that
19 it is.

20 CHAIRPERSON JORDAN: In fact, the
21 Schoenberger case makes a clear distinction
22 talking about the difference between a rear

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1 yard and it actually highlights required rear
2 yard.

3 MR. SURABIAN: Exactly. Once you
4 get out of that required rear yard, that four-
5 foot limitation doesn't apply. Obviously, if
6 it did, you couldn't have a four-foot high
7 garage. That doesn't make sense. Once you
8 get out of that required rear yard, you can
9 have taller structures. That's why the 7 1/2
10 foot complies.

11 CHAIRPERSON JORDAN: Are there any
12 other questions that the Board has in this
13 matter? Then let's conclude this hearing.

14 MR. SULLIVAN: Excuse me. Any
15 opportunity to cross? I'm not certain that
16 I'm going to but --

17 CHAIRPERSON JORDAN: No cross-
18 examination is necessary. You did your
19 presentation and --

20 MR. SULLIVAN: I know I do get an
21 opportunity for rebuttal and closing.

22 CHAIRPERSON JORDAN: Go ahead.

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1 MR. SULLIVAN: Thank you.

2 CHAIRPERSON JORDAN: So we're
3 wrapping up then. Two minutes.

4 MR. SULLIVAN: Regarding the --
5 okay. I might need a little bit more than
6 that.

7 CHAIRPERSON JORDAN: We have been
8 briefed on the matter. We sat here and
9 listened. We've taken all that in so --

10 MR. SULLIVAN: I want to give you
11 a full opportunity to make the right decision.

12 CHAIRPERSON JORDAN: What I'm
13 saying to you is we think we've been fully
14 briefed. We've had discussions and now you
15 are at the point of just --

16 MR. SULLIVAN: Okay. I would like
17 to rebut some things. Ms. Brown stated that
18 you need all three elements to be the elevated
19 platform structure. I have an email from Mr.
20 LeGrant, and I would have crossed him on this,
21 where he says, "Thus, the areas of compacted
22 fill dirt even without the geo grid sheets are

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1 subject to the above-noted Zoning
2 Regulations."

3 So you don't need all three
4 elements. The geo grid sheets are there.
5 Also the fill counts. It doesn't have to be
6 exactly where the geo grid is and that
7 complies with the Economides decision. He was
8 correct in saying that and I don't know if he
9 would agree with Ms. Brown's statement. I
10 believe Mr. Surabian said that as well.

11 Regarding the rear yard, I
12 understand there were two decisions that
13 incorrectly said where you measure the rear
14 yard from. It doesn't make sense. I don't
15 think it complies with the plan language of
16 the regs. I'm not going to push the issue.
17 I think the Board has an opportunity to
18 overturn and correct that decision.

19 This comment about a four-foot
20 garage doesn't really apply because accessory
21 garages are permitted in a required rear yard
22 anyway specifically for that purpose because

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1 they would be back there in the required rear
2 yard.

3 The side yard definition that you
4 heard her read said "or other structure." It
5 doesn't just say the building or the house.
6 It says the distance between a building or
7 another structure. So another question I
8 would ask is is this another structure? If
9 it's another structure, why is it not subject
10 to that plain language in the definition of a
11 side yard?

12 The barbecue pit analogy, people
13 comply with the regulations all the time with
14 the plain language of the regulations and they
15 have to adjust their plans to comply with
16 that. Just because they want to do something
17 that has to do with a barbecue pit doesn't
18 mean that is an observed result.

19 It seems to me, in summary, a lot
20 of this is, well, sure, if you want to follow
21 the plain language of the regulations, then
22 this building -- this elevated platform

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1 structure is noncompliant in every sense. But
2 if you're going to contort that plain language
3 then, sure. You can get out of it.

4 Finally, I would point out that
5 the height -- maybe this is my ability to read
6 a site plan -- it says 5 foot 7 in the
7 required side yard and that goes for eight
8 feet so it gets higher. I understand what
9 they are saying. For some reason
10 notwithstanding the language of the definition
11 of side yard you just ignore that "or other
12 structure" language, but it's there and the
13 Zoning Commission put it there for a reason.

14 Finally, these numbers aren't
15 accurate as shown by that photo. They
16 temporarily, or maybe permanently, raised the
17 grade and then they count from there. If
18 she's standing on the other side of the
19 property, I don't know how she could be
20 because there's 10 feet from the wall to the
21 edge of the property. Your grade is what it
22 is on the other side of that property in the

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1 rear.

2 I think that is all I have
3 rebuttal. Let me check my notes. That's all.
4 I'm not familiar with the Court of Appeals
5 case. I suspect they said we defer to the BZA
6 and whatever they said was fine.

7 I don't know that they
8 specifically addressed whether or not that was
9 a right or wrong decision on the measurement
10 of the rear yard. My point is just it doesn't
11 make sense and it doesn't really comply with
12 the strict language of the regulations. Thank
13 you.

14 CHAIRPERSON JORDAN: Thank you.

15 Mr. May.

16 COMMISSIONER MAY: I do have a
17 follow-up for Mr. LeGrant based on these
18 questions. That is the reference and the
19 requirement for side yard and its reference
20 for a requirement for a side yard where there
21 is a structure. This elevated platform
22 structure is a structure.

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1 That's been determined. Why isn't
2 the side yard required adjacent to that? We
3 saw drawings that indicate that is tall enough
4 to be a structure and it has the three
5 components to be a structure.

6 MR. LeGRANT: The requirements for
7 side yards is set forth in Chapter 4 of the
8 Zoning Regulations, a context against
9 principal buildings. In the rear yard and
10 side yard the standards apply to principal
11 buildings.

12 As long as my tenure as an
13 administrator, it has never been applied to an
14 accessory structure or any other type of
15 structures. The context of the side yard
16 requirement and the rear yard as well make
17 reference to the principal structures in which
18 they are being regulated to those standards.

19 COMMISSIONER MAY: So if you have
20 a required side yard and you put in an
21 accessory structure like a garage, you can
22 build it in that required side yard?

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1 MR. LeGRANT: That's correct.

2 COMMISSIONER MAY: And that's a
3 matter of application or that's -- is there
4 something specific in Chapter 4 that makes
5 that clear? Or is it in the layer chapters
6 relating to accessory structures? I mean,
7 there is no definition for this kind of
8 structure in the regs so we have to treat it
9 as something.

10 MR. LeGRANT: There is no
11 definition. I know that the practice long
12 before I arrived at DCRA and you can look
13 throughout the District at garages sitting on
14 property lines up in the rear corner of a lot.

15 It abuts an alley that has no side
16 yard. There is a standard for a setback from
17 center line of an alley for a detached
18 accessory garage structure but there is no
19 side yard standard requirement.

20 MR. SURABIAN: It might be helpful
21 to think about it like a deck. If there was
22 a two-and-a-half-foot deck in the required

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1 side yard, that would be permitted. As long
2 as it's not over four feet and doesn't occupy
3 more than 50 percent of that side yard it
4 would be allowed.

5 COMMISSIONER MAY: It's over four
6 feet.

7 MR. SURABIAN: Not in the side
8 yard.

9 COMMISSIONER MAY: Yeah, it is.
10 It very clearly is.

11 MR. LeGRANT: Under 2500.2(a) has
12 a specific standard. "An accessory private
13 garage may be located in the side yard
14 pursuant to 2300." There is the actual --

15 COMMISSIONER MAY: 2502. --

16 MR. LeGRANT: I'm sorry.
17 2500.2(a). I can read the full context if
18 you'd like.

19 COMMISSIONER MAY: That's okay.
20 I'll read it.

21 MR. SURABIAN: The Zoning
22 Administrator is saying the side yard as it's

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1 in the regulation it runs the length of the
2 principal building. Once you get beyond that,
3 you are in the rear yard.

4 COMMISSIONER MAY: Okay.

5 MR. SURABIAN: So the required
6 side yard is from --

7 COMMISSIONER MAY: The definition
8 of side yard applies to a building or
9 structure. The plain language reading of that
10 is that you've got a building, the house, and
11 then you've got this other structure. It as
12 a structure has to have its own side yard.

13 MR. SURABIAN: I don't agree. If
14 you look at 2503 it's saying a structure can
15 exist in a required yard and you can't
16 reconcile those two. If a structure was in
17 the required yard, then it's required to have
18 its own required yard. It doesn't make sense.
19 It's allowing for structures to be in required
20 yards.

21 COMMISSIONER MAY: But it defines
22 specific structures that are permitted.

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1 MR. SURABIAN: This is one of them.

2 COMMISSIONER MAY: Elevated
3 platform structure is defined in there and is
4 included?

5 MR. SURABIAN: Elevated platform
6 is a type of structure which is allowed under
7 four feet as long as it's not a building.

8 COMMISSIONER MAY: Okay. But it
9 says this is over four feet.

10 MR. SURABIAN: No, it's not, not
11 in the required side yard.

12 COMMISSIONER MAY: Yes, it is.
13 It's in the side yard because it's got a
14 structure.

15 MS. BROWN: But the structure is
16 less than four feet so it's permitted under
17 this section.

18 COMMISSIONER MAY: No, the
19 structure is not less than four feet. The
20 structure is 5.7 feet at the highest point.

21 MS. BROWN: Not in the required
22 side yard.

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1 MR. SURABIAN: That's the rear
2 yard.

3 MS. BROWN: Yeah, that's in the
4 back corner.

5 COMMISSIONER MAY: You're saying
6 -- you're limiting the definition of rear yard
7 to only that yard that is next to the house
8 but that's not apparent.

9 MS. BROWN: Side yard.

10 COMMISSIONER MAY: So your side
11 yard is only the yard that is beside the
12 house.

13 MR. SURABIAN: Exactly.

14 MS. BROWN: Correct.

15 COMMISSIONER MAY: That is not what
16 the definition says. The definition says any
17 building or structure has to have a side yard.

18 MS. BROWN: It's a principal
19 structure.

20 COMMISSIONER MAY: It doesn't say
21 principal structure. It says a building or
22 structure.

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1 MS. BROWN: That's how this Board
2 has interpreted it.

3 COMMISSIONER MAY: Okay.

4 MS. BROWN: We can provide you
5 those citations.

6 COMMISSIONER MAY: Thank you.
7 Sometimes these definitions have -- you know,
8 we have to have that.

9 MR. SURABIAN: You have to think
10 about that language building or structure in
11 that yard is once you have a principal
12 building and there is a required yard now,
13 2503 is saying you can have a structure in
14 that required yard.

15 COMMISSIONER MAY: As long as it's
16 not four-feet tall.

17 MR. SURABIAN: Not four-feet tall.

18 COMMISSIONER MAY: Right. And
19 this is more than four-feet tall.

20 MR. SURABIAN: This structure does
21 not require its own side yard.

22 COMMISSIONER MAY: If all you're

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1 looking at is the Zoning Regulations, it is
2 reasonable to conclude that it does. So if
3 there's past precedent or if it's been
4 litigated, it would be helpful to know that.
5 Just like how you measure the rear yard from.
6 It is helpful to know that because not
7 everything is absolutely defined here.

8 MR. SURABIAN: I agree. Just as I
9 read from Schoenberger, the Board said that
10 the garage does not require its own separate
11 rear yard.

12 COMMISSIONER MAY: But that is
13 specifically defined in the regulation,
14 accessory structure of that type.

15 MS. BROWN: If I could just
16 briefly turn your attention to page 6 of our
17 brief. In the Economides decision it did
18 discuss the purposes of whether or not you
19 should have structures in required yards.
20 They were talking in particular about the
21 required rear yard.

22 In NCPC reviewing this, they

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1 noticed that the purpose of Section 2503.3 and
2 related subsections is to allow low
3 structures, fences and stairs, in required
4 yards as a matter of right. If the structure
5 was low, they say it's okay. You can have it
6 whether it's a side yard or rear yard and
7 that's what we have here.

8 COMMISSIONER MAY: But you don't
9 because it's not low, it's 5.7 feet. It's not
10 four feet.

11 MS. BROWN: Not in any required
12 yard.

13 COMMISSIONER MAY: You are arguing
14 in circles.

15 CHAIRPERSON JORDAN: We are
16 already cleared up.

17 MR. SULLIVAN: No, I --

18 CHAIRPERSON JORDAN: We're cleared
19 up, Mr. Sullivan. I'm not asking you -- Mr.
20 Sullivan. I had a Board member ask a question
21 and we've gotten into a bigger dialogue than
22 what was necessary.

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1 MR. SULLIVAN: I think it's
2 necessary.

3 CHAIRPERSON JORDAN: I'm saying we
4 have completed this hearing but I would like
5 to give Mr. May -- I mean, Mr. Moy.

6 I guess we put this on for
7 November 7th. Certainly I would like to see
8 proposed findings of fact and conclusions of
9 law from both -- from each party particularly
10 addressing these issues as we discussed the
11 rear yard, required rear yard, side yard and
12 required side yard and the measurements of
13 this structure as we've gone through.

14 Anything else anybody needs?
15 Anything else in particular?

16 MS. GLAZER: Mr. Chair, should we
17 have dates for submissions?

18 CHAIRPERSON JORDAN: Absolutely.
19 I just have not gotten to that point yet.

20 MS. GLAZER: Sorry.

21 CHAIRPERSON JORDAN: Mr. Moy, what
22 are we looking at if we gave -- if we did 10

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1 days, 10 days for the exchange of briefs of
2 proposed findings of fact and conclusions of
3 law and then five days thereafter to do any
4 rebutting?

5 MR. MOY: Ten days would be --
6 would take us to Friday, October 26th. That's
7 the 10 days.

8 CHAIRPERSON JORDAN: We're not
9 going to do any rebutting of findings of facts
10 and proposed conclusions of law. We've got a
11 little bit more time then.

12 MR. MOY: Then -- well, right now
13 holding the motion to dismiss in obedience, the
14 response deadline for that was October 30. We
15 can either make that the same date which is
16 Tuesday.

17 CHAIRPERSON JORDAN: That's enough
18 time to get it out to the Board, etc.?

19 MR. MOY: Yes.

20 CHAIRPERSON JORDAN: It is?

21 MR. MOY: Yes, because the
22 decision is November 7th.

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1 CHAIRPERSON JORDAN: It will meet
2 your mail-out date?

3 MR. MOY: Well, let's make it
4 Monday, October 29th. Is that enough for the
5 parties?

6 CHAIRPERSON JORDAN: Do you have
7 enough time? Okay. Let's do that date.

8 MR. SULLIVAN: Yes, that's fine.
9 Thanks.

10 CHAIRPERSON JORDAN: Then we will
11 conclude this matter subject to those
12 documents that we talked about being
13 submitted.

14 MR. SULLIVAN: Thank you.

15 CHAIRPERSON JORDAN: Mr. Moy, do
16 we have any other business to come before us?

17 MR. MOY: No, sir.

18 CHAIRPERSON JORDAN: Then we are
19 adjourned.

20 (Whereupon, at 3:15 p.m. the
21 hearing was adjourned.)

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