

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY

SEPTEMBER 24, 2013

+ + + + +

The Regular Public Meeting convened in the Jerrily R. Kress Memorial Hearing Room, Room 220 South, 441 4<sup>th</sup> Street, N.W., Washington, D.C., 20001, pursuant to notice at 9:38 a.m., Lloyd J. Jordan, Chairman, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

LLOYD JORDAN, Chairperson  
JEFF HINKLE, Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

MARCIE COHEN, Vice-Chairperson

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary  
JOHN NYARKU, Zoning Specialist  
STEPHEN RICE, Zoning Specialist  
STEPHEN VARGA, Zoning Specialist  
PAUL YOUNG, Zoning Data Specialist

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D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

STEPHEN GYOR

The transcript constitutes the minutes from the Public Meeting held on September 24, 2013.

## TABLE OF CONTENTS

Item	Page
Application No. 18618; Appeal of Ginia L. Avery, et al	6
Application No. 18645 of John Rosenthal	13
Request for Modification of Condition No. Three to BZA Order No. 18463 of CAS Riegler Real Estate Development	14
Application No. 18583 of Oliver Samuels	17
Application No. 18613 of Continental Mortgage and Investment Corp.	25
Application No. 18614 of SMC United Industrial LP	50
Application No. 18617 of 1320 Harvard Street LLC	66
Application No. 18514 of Andrew Daly and Patty Jordan	108
Application No. 18615; Appeal of Advisory Neighborhood Commission 3/4G	110
Adjourn	251

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

9:38 a.m.

CHAIRMAN JORDAN: Would the hearing please come to order. Good morning ladies and gentlemen. We are located in Jerrily R. Kress Memorial Hearing Room, at 441 4<sup>th</sup> Street, N.W. Today's date is September 24, 2013. And we are here for the Board of Zoning Adjustments Public Hearing and Meeting. My name is Lloyd Jordan, chairperson of the board. To my left is Marcie Cohen, member of the zoning commission. To my right is Jeffrey Hinkle, member of the board. Please be advised that this proceeding is being recorded by a court reporter and also webcast live. So therefore, I'm going to ask you to refrain from any disruptive noises in the hearing room. And if you have cell phones, please turn them off or put them on vibrate.

If you are here to testify in any case or to re-testify or provide us a statement reading into the record, I'm going

1 to ask you to do two things for me. The first  
2 is that I need you to complete two witness  
3 cards for each person. Each person must  
4 complete two witness cards. And prior to  
5 testifying, provide those to the court  
6 reporter who is sitting to my right. So  
7 there's two witness cards for each person and  
8 provide them to the court reporter to my right  
9 prior to testifying.

10 The second thing I need you to do,  
11 all those who are going to provide testimony  
12 or statement on the record today, I'm going to  
13 ask you to stand and take the oath or  
14 affirmation being given Mr. Moy, the board  
15 secretary. So if you are going to provide any  
16 testimony today, please stand and be sworn or  
17 give affirmation.

18 MR. MOY: Good morning. Do you  
19 solemnly swear or affirm that the testimony  
20 you are about to present in this proceeding is  
21 the truth, the whole truth and nothing but the  
22 truth? Ladies and gentlemen you may consider

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1 yourself under oath.

2 CHAIRMAN JORDAN: Mr. Moy do you  
3 have any preliminary announcements or others?

4 MR. MOY: Good morning Mr. Chairman  
5 and members of the board. I do have one real  
6 quick one and its in reference to Application  
7 No. 18630 of Turker. The board will recall  
8 that was originally on the board's expedited  
9 review calendar a couple of weeks ago and was  
10 set for public hearing for October 23, has now  
11 been scheduled to October 1 in the afternoon.

12 CHAIRMAN JORDAN: So that's October  
13 1. Okay. Any other announcements that you  
14 wish to make regarding - I guess preliminary  
15 we still have to deal with 18618. Would that  
16 be correct?

17 MR. MOY: Yes.

18 CHAIRMAN JORDAN: Why don't you  
19 read the request and we can proceed with that?

20 MR. MOY: Okay. That would be  
21 Application No. 18618. This is the appeal of  
22 Ginia L. Avery et al, pursuant to 11DCMR 3100

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1 and 3101 from a decision by the Department of  
2 Consumer and Regulatory Affairs to issue a  
3 building permit, number B, as in bravo,  
4 1202925 dated April 9, 2013, allowing the  
5 construction of a retail store in the C-3-A  
6 district at premises 5929 Georgia Avenue NW  
7 Square 2986 Lot 38.

8 CHAIRMAN JORDAN: And in that case  
9 we have a motion, a consent motion to continue  
10 it pending some litigation. Is that correct?

11 MR. MOY: Yes sir Mr. Chairman.

12 CHAIRMAN JORDAN: I see no reason  
13 why we don't grant that request. Does the  
14 board have any issues with that? So then  
15 let's indicate by consent we will continue  
16 18618 by consent.

17 MR. MOY: Yes sir. Does the board  
18 a date that they would want?

19 CHAIRMAN JORDAN: No, what date do  
20 you?

21 MR. MOY: Mr. Chairman?

22 CHAIRMAN JORDAN: Yes.

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1                   MR. MOY: I think tentatively I'm  
2 looking at either a date in October 29 or  
3 November the 5<sup>th</sup>.

4                   CHAIRMAN JORDAN: October 29 and  
5 November 5? November 5.

6                   MR. MOY: All right. Thank you  
7 sir.

8                   CHAIRMAN JORDAN: I wonder if  
9 that's going to be as efficient. I'm really  
10 thinking we should probably -- well. Yes.  
11 That's a matter, a litigated matter and they  
12 want to resolve the litigation prior to coming  
13 before us.

14                   MR. MOY: Well we could always  
15 reschedule again.

16                   CHAIRMAN JORDAN: Okay. I tell you  
17 what. This is what we are going to indicate.  
18 We'll put it on November 5 for status.

19                   MR. MOY: Correct. That's good.

20                   CHAIRMAN JORDAN: Probably should  
21 provide us information as to the status.  
22 Okay?

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1 MR. MOY: That's a good solution  
2 Mr. Chairman.

3 CHAIRMAN JORDAN: Very good. Thank  
4 you. Then as a preliminary matter. Are the  
5 parties, any of the representatives who on  
6 case 18614 to come forward. We have a party  
7 and status, party status request on 18614 and  
8 the representative of the applicant.

9 CHAIRMAN JORDAN: Okay. Can you  
10 introduce yourselves for me please? If you are  
11 ready Mr. Sullivan.

12 MR. SULLIVAN: Thank you Mr.  
13 Chairman and members of the board. My name is  
14 Marty Sullivan here on behalf of party  
15 opposition applicant Pamela Bundy.

16 CHAIRMAN JORDAN: Make sure your  
17 mic is turned on please.

18 MS. BUNDY: Sure. Good morning.  
19 Pamela Bundy with Bundy Development.

20 CHAIRMAN JORDAN: Make sure your  
21 mic is turned on.

22 MR. FARSHEY: Good morning. My

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1 name is Fred Farshey with Stanley Marketing  
2 Commercial.

3 MR. COLLINS: Chris Collins with  
4 Holland and Knight.

5 MS. BLOOMFIELD: Jessica Bloomfield  
6 with Holland and Knight.

7 CHAIRMAN JORDAN: Thank you. As  
8 our practice, our recent practice has been, we  
9 have party status, well first let me say. I  
10 see no reason why not to grant the party  
11 status to Ms. Bundy. I didn't receive any  
12 opposition on that. Your position?

13 MR. COLLINS: We'd like to be heard  
14 on that if we may.

15 CHAIRMAN JORDAN: Okay. Go ahead.

16 MR. COLLINS: Mr. Chair, I thank  
17 you for the opportunity. In sum we do not  
18 believe that the -

19

20 CHAIRMAN JORDAN: Let me do this.  
21 Let me first do it this way and call the case  
22 back if you want to actually be tried. But,

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1 what we normally have when we have an  
2 application for party status and is asked the  
3 parties, prior to actually calling the case,  
4 to have some discussion. And what we've  
5 learned by having that type of process to go  
6 on, we've eliminated a lot of questions and  
7 issues. We've eliminated people coming, we  
8 have subsequently eliminated people who want  
9 to be in party status after they have had  
10 conversation and talked about the issues. I  
11 guess about 99 percent of the time they've  
12 been working out their issues. So that's why  
13 I called you forward. So I'm going to ask you  
14 to do so prior to your case being called to  
15 step out in the hall, have conversation about  
16 the issue. We will then call you back and in  
17 normal sequence and if you want to challenge  
18 the party status, you will challenge the party  
19 status request. But if you can work things  
20 out prior to us having to deal with the party  
21 status issue and the issues raised by party  
22 status, that will make everything a lot easier

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1 for everyone. So that's what I'm going to ask  
2 you to do prior to you being called on this  
3 docket. So that's what I'm requesting you to  
4 do.

5 MR. COLLINS: Thank you.

6 CHAIRMAN JORDAN: Have meaningful  
7 dialogue. As an example we had one where we  
8 had a case with about ten different party  
9 statuses and didn't think that was going to  
10 work out but came back and it worked out. So  
11 we've kind of adopted that. So thank you so  
12 much.

13 MR. SULLIVAN: Mr. Chairman, I have  
14 a letter of authorization I would like to  
15 submit to Mr. Moy.

16 CHAIRMAN JORDAN: Thank you and we  
17 will call the docket. Mr. Moy, do you want to  
18 - we can start at the top.

19 MR. MOY: Okay. Mr. Chairman, the  
20 board, good morning again. There are two  
21 cases for decision on the public meeting. We  
22 have one case on the expedited review calendar

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1 and the other case for decision is a Request  
2 for a Modification. The first is again on the  
3 calendar, its Application No. 18645. This is  
4 of John Rosenthal pursuant to 11DCMR 3104.1,  
5 special exception for an addition to a one  
6 family single detached dwelling under Section  
7 223. The lot occupancy Section 403 non-  
8 performance structure and subsection 2001.3  
9 requirements in the R3 district. This is a  
10 premise at 3128 P Street NW, Square 1256, Lot  
11 861.

12 CHAIRMAN JORDAN: Thank you Mr.  
13 Moy. This matter is a 223 expedited review  
14 and waiver. We do have the waiver segment  
15 request for a hearing, waiver of hearing?

16 MR. MOY: Yes sir.

17 CHAIRMAN JORDAN: And we've  
18 reviewed the record. Is the board ready to  
19 act on this application? Based upon the  
20 evidence submitted in the record, I believe  
21 this application should be granted for relief  
22 requested. So I therefore move that.

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1                   VICE-CHAIR    COHEN:     And     Mr.  
2   Chairman, I would second.

3                   CHAIRMAN JORDAN: Motion made and  
4   seconded. All of those in favor of granting  
5   the relief in 18645 signify by saying Aye.

6                   [Chorus of Ayes]

7                   CHAIRMAN JORDAN: Those opposed  
8   ney. The motion carries. Mr. Moy.

9                   MR. MOY: Staff would record the  
10   vote as 3 to 0. This on motion Chairman  
11   Jordan approved the application for 18645. On  
12   the calendar, seconded the motion, Ms. Marcie  
13   Cohen. Also in support Mr. Hinkle. We have a  
14   board member absent and a board seat vacant.  
15   Again, the motion carries.

16                  CHAIRMAN JORDAN: And may we have a  
17   summary order please?

18                  MR. MOY: Yes, thank your sir. The  
19   next application for action is a request for a  
20   modification condition number 3 to be BZA  
21   Order 18463 of CAS Riegler Real Estate  
22   Development pursuant to Section 3129 Zoning

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1 Regulations. In your case photos, Mr.  
2 Chairman, is the applicant's request under  
3 Exhibit 41. The board is also in receipt of a  
4 letter from A-6-A under Exhibit 43. It is a  
5 bit tardy so that's a preliminary matter.  
6 Then finally there is a report from the Office  
7 of Planning under Exhibit 44.

8 CHAIRMAN JORDAN: We will accept  
9 the ANC letter into the record. On 18463 it  
10 is my recommendation to the board that we move  
11 this for hearing. It doesn't fit the  
12 requirements of Section 3129.7, which requires  
13 a hearing for any other request or  
14 modification other than an adjustment to the  
15 plans themselves. It has been the practice of  
16 this board to follow suit and so I don't see  
17 any reason to alter that. I think maybe  
18 that's something we get to in the zoning  
19 rewrite and some other things about changing  
20 that language. But presently it is what it  
21 is. So I rule that we remove this from  
22 decision and put this on our hearing calendar,

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1 setting a hear date for this.

2 VICE-CHAIR COHEN: Mr. Chairman, I  
3 agree with your motion. However, I also want  
4 to state for the record that I think the  
5 applicant needs to come up with a compelling  
6 case as to why they missed this important cost  
7 to the project. If you do your due diligence,  
8 you usually find out all total sources and  
9 uses of the project. So I would think that  
10 needs to be addressed at the public hearing.

11 CHAIRMAN JORDAN: Yes, it does set  
12 a kind of a ugly precedent in regard to this  
13 particular matter. I don't know all the facts  
14 of it but I would just heed Ms. Cohen's  
15 warning. Okay, so what would be the date?

16 MR. MOY: Before I get to that, Mr.  
17 Chairman, I would be remiss if I didn't  
18 mention that the application had also asked  
19 for a waiver of notice of requirement. If the  
20 board were to move to pull it off its public  
21 meeting to hold a hearing today. It seems  
22 like the board is going beyond that.

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1 CHAIRMAN JORDAN: Yes, I think that  
2 --

3 MR. MOY: Just for the record.

4 CHAIRMAN JORDAN: Yes, if that's  
5 the request then I would deny that and I would  
6 suggest to the board that we deny that and  
7 that we go ahead and set this for a hearing  
8 and do it properly. Is that okay?

9 VICE-CHAIR COHEN: Yes.

10 CHAIRMAN JORDAN: So by consent Mr.  
11 Moy.

12 MR. MOY: Okay very good. So let's  
13 see. We are looking at, given the size of the  
14 docket, for a date in October. I see that Ms.  
15 Cohen is sitting with the board on October 29.

16 CHAIRMAN JORDAN: Okay that's a  
17 good date. Okay, Mr. Moy if you will call for  
18 me, 18583. Not for me, for the board.

19 MR. MOY: Okay. This is again,  
20 Application No. 18583. This is the  
21 application of Oliver Samuels. The board will  
22 recall this was an application that was

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1 originally scheduled on its expedited calendar  
2 on July 9. This application pursuant to  
3 11DCMR 3104.1, special exception to allow a  
4 second story addition to an existing one-  
5 family detached dwelling under Section 223,  
6 not meeting the side yard requirements,  
7 Section 405 and the R1B District at premises  
8 3014 South Dakota Avenue NE, Square 4340, Lot  
9 821.

10 CHAIRMAN JORDAN: Will the party or  
11 persons for 18583 please come? Please state  
12 your name? Would you make sure your  
13 microphone is on first please? Thank you.  
14 Push the button and you should have a bright  
15 glowing green light.

16 MR. MOBLEY: That's better. My  
17 name is Clarence Mobley. I'm an architect  
18 representing the client. 1600 Monroe Street,  
19 Northeast.

20 CHAIRMAN JORDAN: Very good. Thank  
21 you. This matter has been on our docket  
22 several times and there was some additional

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1 information that we requested. And all that  
2 information is now in the file, is right, in  
3 opinion to grant the relief without any other  
4 needs and necessity for any additional  
5 information. This has been on the docket for  
6 some time. You had to supplement the record  
7 with other information which we have received.

8 It is my inclination to go ahead and to grant  
9 the request under 18583. Does the board, then  
10 I would so move?

11 VICE-CHAIR COHEN: And I will  
12 second Mr. Chairman.

13 CHAIRMAN JORDAN: All those in  
14 favor of the motion, granting relief under  
15 18583 signify by saying aye.

16 [Chorus of ayes]

17 CHAIRMAN JORDAN: Those opposed,  
18 nay? The motion carries. Mr. Moy, do you  
19 want to?

20 MR. MOY: Yes sir with pleasure.

21 The board counts 3 to 0 on the motion of  
22 Chairman Jordan to approve. To second the

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1 motion, Ms. Marcie Cohen. Also support Mr.  
2 Jeffrey Hinkle. We have a board member absent  
3 and a board seat vacant. Again, the motion  
4 carries 3 to 0. Thank you.

5 CHAIRMAN JORDAN: Thank you Mr.  
6 Moy. Let's do 18619.

7 MR. MOY: Would that be a summary  
8 order or not?

9 CHAIRMAN JORDAN: Yes a summary  
10 order, absolutely.

11 MR. MOY: Thank you sir.  
12 Application No. 18619 is the application of  
13 Square 737 LLC pursuant to 11DCMR 3103.2.  
14 This is a variance from the parking space  
15 location requirements under subsection 2116.12  
16 for a mixed use grocery store and apartment  
17 house development in the C.3.C District, 800  
18 New Jersey Avenue, SE, Square 737, Lot 76.

19 CHAIRMAN JORDAN: Thank you.  
20 Please introduce yourself.

21 MR. TUMMONDS: Good morning Mr.  
22 Chairman and members of the board. Paul

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1 Tummonds, Goulston & Storrs on behalf of the  
2 applicant.

3 MR. FENNELL: Brad Fennell with WC  
4 Smith.

5 MR. RADUUESCU: Marius Raduuescu  
6 with SKNI.

7 MR. STROTT: Brian Strott with WC  
8 Smith.

9 CHAIRMAN JORDAN: Is there anyone  
10 here wishing to testify in opposition on this  
11 case, 18619? Anyone here wishing to testify  
12 in opposition of this case? This is another  
13 matter I think we've been through and its  
14 prime for action by the board. Without any  
15 additional testimony in my opinion, the board,  
16 there's a condition that OP has recommended  
17 and you agree to that condition?

18 MR. TUMMONDS: We are fine with  
19 that condition.

20 CHAIRMAN JORDAN: So, unless the  
21 board has something that we need to drill down  
22 and questions about it, otherwise I was just

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1 give you the opportunity if you want to do a  
2 hearing. But as you know, we are at this  
3 point, some people step in it.

4 MR. TUMMONDS: We are prepared to  
5 rest on the record.

6 CHAIRMAN JORDAN: Is there  
7 anything that Office of Planning needs to add  
8 other than what you've already submitted.

9 MR. JESICK: Thank you Mr.  
10 Chairman, no. We are happy to rest on the  
11 record in support of the project.

12 CHAIRMAN JORDAN: The only other  
13 issue I have, did you do a presentation ANC?

14 MR. JESICK: I believe the ANC  
15 submitted a letter yesterday.

16 CHAIRMAN JORDAN: Okay.

17 MR. JESICK: In support.

18 CHAIRMAN JORDAN: Oh good. Okay.  
19 That's very good and that completes my file.  
20 Then ANC 60 had a quorum present and the vote  
21 was 5 to 0 to 0 in support of the application.  
22 With that then we normally turn, well we

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1 would normally turn back to application for  
2 rebuttal or closing but I'm sure you are  
3 waiving that.

4 MR. TUMMONDS: That's correct.

5 CHAIRMAN JORDAN: So with that we  
6 will close the record.

7 VICE-CHAIR COHEN: May I?

8 CHAIRMAN JORDAN: Yes please.

9 VICE-CHAIR COHEN: I don't know  
10 I'm probably crossing the line to my PUD hate.

11 But just caution that the parking garage,  
12 again using, maybe question you, this is for  
13 OP and I know that Andy Litsky will do a great  
14 job on this too. But the lighting from  
15 anything looters is looking at onto the  
16 neighborhood and just concerned about that.

17 CHAIRMAN JORDAN: Appreciate  
18 that. Then I would move that we grant the  
19 relief for 18169 with the condition imposed by  
20 the Office of Planning and that being that  
21 they are required to screen the parking  
22 adjacent to H Street and to be substantially

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1 similar to and commensurate with the design,  
2 details and quality materials depicted in the  
3 supplemental material of September 10, 2013.

4 MEMBER HINKLE: Second

5 CHAIRMAN JORDAN: Motion made and  
6 seconded. Any unreadiness? All those in  
7 favor signify by saying aye?

8 [CHORUS OF AYES]

9 CHAIRMAN JORDAN: Those opposed,  
10 nay? The motion carries. Mr. Moy?

11 MR. MOY: Staff would record a  
12 vote as to 3 to 0 on a motion of Chairman  
13 Jordan to approve the application with one  
14 condition as cited. Second the motion, Mr.  
15 Hinkle. Also support, Ms. Cohen. Again three  
16 in support, fourth member absent, board seat  
17 vacant. Motion carries.

18 CHAIRMAN JORDAN: Okay. Next.

19 MR. MOY: Summary order --

20 CHAIRMAN JORDAN: Are you trying  
21 to tease? Trying to wake me up? Okay I think  
22 we have handled this docket of those issues.

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1 Now let's get down to the meat and potatoes.

2 MR. MOY: All right. So going  
3 back up to the top of the play card. We have,  
4 I believe, Application No. 18613. This  
5 application of Continental Mortgage and  
6 Investment corporation pursuant to 11 DCMR  
7 3103.2. This is a variance from the height  
8 and story limitations under Section 400.1.  
9 Variance from the nonconforming structure  
10 requirements under subsection 2001.3, to allow  
11 the renovation of and fourth floor addition to  
12 two apartment buildings in the R-3 District at  
13 premises 11 50<sup>th</sup> Street, S.E. and 4945 Ayers A-  
14 Y-E-R-S Street, S.E., Square 5331, Lots 32 and  
15 33.

16 CHAIRMAN JORDAN: Thank you.  
17 Would you please be seated. Did you give  
18 witness cards to the court reporter? Okay.  
19 All right. So I'm going to need you to make  
20 sure your microphones are turned on and  
21 identify yourselves.

22 MR. CRAWFORD: Good morning Mr.

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1 Chairman. My name is Mark Crawford. I am  
2 counsel for the applicant, Continental  
3 Mortgage and Investment Corporation. The  
4 gentlemen can introduce themselves. Mr.  
5 Walters is the owner of the applicant and Mr.  
6 Feinstein is the architect.

7 MR. WALTERS: Good morning as well.  
8 My name is Mark Walters, President of  
9 Continental Mortgage.

10 MR. FEINSTEIN: Good morning, I'm  
11 Marc Feinstein with architects.

12 CHAIRMAN JORDAN: Thank you.

13 MR. CRAWFORD: Mr. Chairman, as a  
14 preliminary matter. You may have something on  
15 file already but I hand up some authorization  
16 representations to Mr. Moy?

17 CHAIRMAN JORDAN: I tell you  
18 what. Just be sure you give it to him after  
19 we finish. We need to stop if we know you are  
20 representing, the company president is here  
21 and acknowledge that. But we do need it for  
22 the file.

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1 MR. CRAWFORD: Yes sir.

2 CHAIRMAN JORDAN: the other  
3 question here is I don't have a letter from  
4 ANC 7E. Do we have a letter from ANC?

5 MR. MOY: We do not have one in  
6 the official record Mr. Chairman.

7 CHAIRMAN JORDAN: Did you do a  
8 presentation with ANC 7E?

9 MR. CRAWFORD: We did not. What I  
10 have with me is I have copies of the  
11 applicant's correspondence, multiple  
12 correspondence to the 7E representative  
13 introducing ourselves, providing a copy of our  
14 application and requesting a meeting and  
15 opportunity to discuss the application,  
16 inviting them to come out and view the  
17 property or to go forward in any way that they  
18 would like.

19 CHAIRMAN JORDAN: Did you ask it  
20 on your agenda?

21 MR. CRAWFORD: No sir. We do have  
22 a recommendation from the Office of Planning

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1 recommending approval.

2 CHAIRMAN JORDAN: I'm talking  
3 about the ANC. Don't get ahead of myself.

4 MR. CRAWFORD: No sir.

5 CHAIRMAN JORDAN: So on the ANC  
6 you had, you sent them letters and you sent  
7 them several letters. Do you ever have  
8 conversation with anyone, the single member  
9 district person or?

10 MR. CRAWFORD: We directed our  
11 communications to Ms. McVeigh, the  
12 commissioner for this neighborhood. And I  
13 spoke with folks in the main office for ANC  
14 and confirmed that her contact information on  
15 the website was correct, made phone calls,  
16 sent e-mails. I can hand up the documents and  
17 make them a part of the record if you would  
18 like.

19 CHAIRMAN JORDAN: Yes and yes  
20 please do that if you have enough copies.  
21 Just give it to Mr. Moy please. Let me ask a  
22 question regarding this while Mr. Moy makes

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1 copies. Now you said you sent your  
2 communication to the single member person,  
3 person of the single member district. Did you  
4 contact the chairman of ANC 7-E? Send any  
5 correspondence to the full ANC?

6 MR. CRAWFORD: No sir. My  
7 understanding from my discussion with the  
8 office was that we should direct our  
9 communications directly to Ms. McVeigh, the  
10 commissioner.

11 CHAIRMAN JORDAN: Which office  
12 was that?

13 MR. CRAWFORD: The main number on  
14 the website. The central office for the ANC.

15 CHAIRMAN JORDAN: You really,  
16 when we ask, the recommendation comes from the  
17 full ANC. And the pattern of practice is that  
18 you at least notify the chairperson of the  
19 full ANC. Sometimes the single member of the  
20 ANC may run with it, may not run with it. But  
21 so it's the full ANC which really is required  
22 to act on it. Excuse me just a second. Mr.

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1 Moy. So we will decide how to handle that if  
2 necessary. Now I don't think we need a whole  
3 -- we understand a lot about your program. We  
4 know about what you are trying to do. We  
5 understand that. But the board has some very  
6 direct questions. I do. And so if you can  
7 kind of focus your presentation on some of  
8 those issues. One I would like to see what  
9 you are considering is exceptional condition  
10 or circumstances which should allow you to  
11 have a variance? I didn't see anything in  
12 your documentation submitted to the board that  
13 even hinted on that. We know the property is  
14 vacant. We recognize that. So, is there  
15 anything else that the board would like them  
16 to focus on?

17 MEMBER HINKLE: No Mr. Chairman.  
18 I think that's the key issue. I was just  
19 trying to understand what he considered the  
20 exceptional situation for this property.

21 CHAIRMAN JORDAN: We know what  
22 plans you have. We were comfortable with all

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1 of that. We've got to get to the first step  
2 before we can agree to anything else. Ms.  
3 Cohen anything specifically you want? Sir  
4 would you please let us know what that  
5 exceptional condition is?

6 MR. CRAWFORD: Certainly Your  
7 Honor. You are familiar with the plans and  
8 the basic design and structure of the  
9 building. It's a building that was erected  
10 some decades ago, vacant, abandoned. I won't  
11 belabor that point. It was acquired by  
12 Continental Mortgage, an investment  
13 corporation. And the essence of the hardship  
14 is they have this property and there is space  
15 within the property that simply can't be used  
16 for any productive purpose unless the variance  
17 is granted. And that's because of the  
18 original dimension of the property at the time  
19 of its original construction and at the time  
20 of its original creation consistent with the  
21 zoning as it existed then. And it simply  
22 can't be put to any use, any productive use

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1 absent the variance or exception, which I  
2 think is consistent with the language of  
3 3103.2 with respect to shapes and dimensions  
4 of structures at the time of their original  
5 creation.

6 CHAIRMAN JORDAN: You're saying  
7 that because the building is vacant and it  
8 needs some work, then that makes it unique and  
9 therefore creates an exceptional situation and  
10 that's what you should be granted relief?  
11 That's what I'm hearing. Tell me if I'm wrong  
12 because that's what I'm hearing.

13 MR. CRAWFORD: It's not just, it's  
14 not just that the building is vacant that  
15 makes it unique. It's the fact that they are  
16 working with the original structure and the  
17 structure is of a given height. They have,  
18 the plans of renovation that have already been  
19 approved, unless the variance is granted,  
20 there is an aspect of the building that is  
21 within the regulations as far as the height.  
22 We are not asking for any variance in terms of

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1 the height of the building. It's just the  
2 matter of how the space is used within the  
3 building. And without the variance and as  
4 noted by the Office of Planning, they simply  
5 can't utilize this what would otherwise be  
6 dead space. They would just have to have  
7 essentially a cathedral style ceiling on its  
8 top level unit and it would prevent the owner  
9 from developing the property consistent with  
10 modern standards, which is exactly what the  
11 Office of Planning said.

12 VICE-CHAIR COHEN: Is this  
13 building up to code currently?

14 MR. CRAWFORD: Well, it's under  
15 construction. It was not -- do you want to  
16 address this.

17 MR. FEINSTEIN: I think the  
18 existing building as it stands today would not  
19 be, meet today's codes. The drawings we  
20 received the permit for on the building to  
21 today's code standards and those were  
22 configuring the building new modern standards

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1 were also, from a code standpoint, we are  
2 putting a new fire alarm system in there. We  
3 are making it a much safer building than it is  
4 currently. Obviously the current state is,  
5 it's not up to today's codes. We already have  
6 on the building.

7 VICE-CHAIR COHEN: So you're  
8 hoping to get more efficiency in the building  
9 by asking for this, coming before us today?  
10 It's an efficiency argument?

11 MR. CRAWFORD: It's, it's yes,  
12 there would be more efficiency. There will be  
13 an ability to make use of space that couldn't  
14 otherwise be used.

15 CHAIRMAN JORDAN: I'm thinking of  
16 a couple of things here.

17 MR. CRAWFORD: Yes sir.

18 CHAIRMAN JORDAN: We are trying  
19 to help you. Ms. Cohen is trying to get you  
20 there. Let me do this. Before, something a  
21 little bit out of sequence here, because I  
22 think we might have to do something else here

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1 to do what you need. If we don't mind, can we  
2 ask the Office of Planning to help us with  
3 this. Because I also didn't see that in your  
4 report, what you consider was the uniqueness  
5 and exceptional condition. Can you help us  
6 with that Ms. Mordfin?

7 MR. MORDFIN: Good morning. I'm  
8 Stephen Mordfin with the Office of Planning.  
9 And these buildings, they are zoned R-3, which  
10 is row houses and single family detached  
11 dwellings. But they are developed with  
12 apartment buildings that cannot be converted  
13 into row houses because of the type of  
14 structure it is, it cannot happen, without  
15 their removal from the property and new  
16 construction. What they are proposing to do,  
17 our internal modifications to the existing  
18 buildings is not changing the use. The use  
19 right now of those buildings is 12-unit  
20 apartment houses. And with their proposal  
21 they would remain 12-unit apartment houses.  
22 They are just reconfiguring them internally

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1 but they are not, but they can't make them  
2 into single family detached. They can't make  
3 them into row houses. They can only make  
4 them, with these existing buildings, you can  
5 only make them into apartment houses, which is  
6 what they are. So to convert them and bring  
7 them into a use that is permitted by the R-3  
8 and within all of the bulk regulations of the  
9 R-3, does not work with these buildings?

10 CHAIRMAN JORDAN: Because?

11 MR. MORDFIN: Because of the way  
12 they are already constructed. They were  
13 constructed legally this way and they weren't  
14 intended to be --

15 CHAIRMAN JORDAN: The physical  
16 dimension of these buildings are so unique  
17 that they require it. Is that what you are  
18 saying?

19 MR. MORDFIN: Yes.

20 CHAIRMAN JORDAN: Because of the  
21 way that they are configured.

22 MR. MORDFIN: The way they are

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1 configured. The way they were built. What  
2 they were intended for. It makes it difficult  
3 to bring them into the R-3, which is a row  
4 house district.

5 CHAIRMAN JORDAN: Okay. I think  
6 we get it. I think I can live with that. I  
7 mean the plans and everything makes a lot of  
8 sense. The property is vacant. I think that  
9 with your explanation it gives it a big lift.

10 We have a lot of vacant properties in the  
11 district. The fact that something is vacant  
12 and not just meeting code is not sufficient  
13 enough. But I think its more of a indicator  
14 that this property was unique in its  
15 particular area, that its configured and its  
16 configuration is unique. The structure itself  
17 is different than other structures in the area  
18 and therefore we can look at that as its  
19 meeting the test. Mr. Hinkle.

20 MEMBER HINKLE: Thank you  
21 Chairman. I'm just not quite there yet. I'm  
22 still struggling because you could still put

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1       these buildings to a productive use without  
2       having the relief that's being requested. I  
3       don't have any problem with the relief. I  
4       really don't but I can't get pass that first  
5       variance test. I'm still not there in terms  
6       of the condition of these buildings and why  
7       that makes them unique in some way that  
8       requires them to have some sort of relief.  
9       And the way I read the plans, it just looks  
10      like you are adding an extra floor to add a  
11      master bedroom. Whereas if you didn't add that  
12      floor, those apartments would have the same  
13      floor plan as the other apartments underneath  
14      them. If those apartments are marketable then  
15      the top apartments would be marketable with  
16      the same floor plan. So I'm just not quite  
17      there yet. Maybe you can convince me.

18                   VICE-CHAIR COHEN:     I --

19                   CHAIRMAN JORDAN:    Ms. Cohen.

20                   VICE-CHAIR COHEN:    Thank you Mr.  
21      Chairman. I think that what we are attempting  
22      to do here though is to make these units more

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1 acceptable in the current market as opposed to  
2 what they were, to enhance their marketability  
3 and have a level playing field so to say with  
4 other buildings that are newer let's say. I  
5 really believe that we may be not fully  
6 arguing uniqueness but I think its there, but  
7 borderline.

8 MR. CRAWFORD: If I may Mr.  
9 Chairman?

10 CHAIRMAN JORDAN: Yes.

11 MR. CRAWFORD: I would just add in  
12 addition to what Mr. Mordfin said and  
13 Commissioner Cohen that it's as a part of the  
14 uniqueness, as a part of the circumstances of  
15 coming into possession of an old property that  
16 was designed under all zoning regulations and  
17 for the reasons that have been described, and  
18 as noted by the Office of Planning in its  
19 report in Section 5.B.1 it says that the grant  
20 of the application would allow the applicant,  
21 not just to bring the units up to code but to  
22 build them out in accordance with

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1 contemporary standards. If you have --

2 CHAIRMAN JORDAN: Let me help  
3 you. I understand what you are doing. We  
4 really understand what you are doing. I think  
5 its commendable.

6 MR. CRAWFORD: I would just like to  
7 get on the record if I can.

8 CHAIRMAN JORDAN: No, I'm going  
9 to try to help you.

10 MR. CRAWFORD: I also understand  
11 that. I'm listening.

12 CHAIRMAN JORDAN: Because I  
13 really, we need housing. We really do now. I  
14 think this is a great attempt to do so, but we  
15 have some requirements of law that we need to  
16 get there. And I'm on the borderline and I  
17 don't know, I'm kind of -- even if we went  
18 through the regular, all the way through this  
19 hearing, we're still at step one and at least  
20 1-1/2 of us -- I'm going to offer you the  
21 opportunity to continue this. I'll give you  
22 30 days. Have some consultation and then

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1 really take and then do a supplemental and  
2 then come in here so that we are comfortable.

3 Because here's the problem. We make these  
4 really, really exceptions to what the  
5 standards are. And then somebody else comes  
6 in and says well I've got a vacant property  
7 that's not up to code. Then we are doing that  
8 for every property that's vacant in the  
9 district that's not up to code. So that's  
10 just my offer or you can continue to go  
11 forward with the hearing, whichever you  
12 prefer.

13 MR. CRAWFORD: Well, if I may speak  
14 with the applicant and Mr. Feinstein, if I can  
15 confer with them for just a moment. I do want  
16 to make sure I have on the record that I think  
17 if you have a property that cannot be  
18 developed in accordance with contemporary  
19 standards because of the uniqueness of the  
20 design and the circumstances of when it was  
21 built and the zoning at the time. Then that  
22 is an exception circumstance.

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1                   CHAIRMAN JORDAN:        So you are  
2                   saying it cannot be -- that's your leave. You  
3                   want to leave it at that, that it cannot be  
4                   done -- you cannot use these properties as  
5                   allowed within the zoning regulations  
6                   presently for any use and they cannot be made  
7                   to be up to code for any use within the zoning  
8                   regulations that's allowed in that area. Is  
9                   that what you are saying to us?

10                  MR. CRAWFORD: May I have just a  
11                  moment Your Honor?

12                  CHAIRMAN JORDAN:        Yes please.  
13                  You can just say chair.

14                  MR. CRAWFORD: Yes, I'm sorry.

15                  CHAIRMAN JORDAN:        Okay. Let's  
16                  head off our usual 10:30 break and take a --  
17                  what is it 10:17, let's take ten minutes and  
18                  we usually kind of pull up at 10:30 but let's  
19                  take it now.

20                  (Whereupon the foregoing matter  
21                  went off the record at 10:22 a.m. and went  
22                  back on the record at 10:30 a.m.)

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1                   CHAIRMAN JORDAN:        Okay, we're  
2 back on the record.

3                   MR. CRAWFORD: Thank you Mr. Chair.

4        If it's okay with you, what we'd like to do  
5 is just continue for a few more moments. Mr.  
6 Walters would like to address the board  
7 briefly with a few comments and if we could  
8 see if that helps move things forward we would  
9 like to do that if you are still of the mind  
10 that a continuance would be a good idea then  
11 we'll see where we are at.

12                  CHAIRMAN JORDAN:        One thing I  
13 have to say. There's three of us here. You  
14 need at least three votes to go forward. It's  
15 not 2 and 1 or whatever. You need complete.

16                  MR. CRAWFORD: I understand sir.

17                  MR. WALTERS. With that being said  
18 I hope I have clear understanding of the  
19 situation and a couple of points that I want -  
20 - you asked some direct questions about what  
21 we can do and what we can't do. I think the  
22 property has been approved. The building

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1 permits are already in place for 12 units on  
2 each building. I think there is no denying  
3 that. You know the variance here is for the  
4 top floor which creates two bedroom scenario.  
5 The hardship is no one wants 24 one-bedroom  
6 apartments. They would like some mixed  
7 apartments, two bedrooms. We cannot put in  
8 any two-bedroom apartments without this  
9 variance. I think that's one of the critical  
10 criteria that we're looking at. Without this  
11 meeting we could go ahead and just build 24  
12 one-bedroom apartments. There's nothing  
13 that's already been approved.

14 MEMBER HINKLE: If I could ask  
15 you, you could do a different mix of units. Is  
16 that correct? You could have a different mix  
17 of one-bedrooms and two-bedrooms?

18 MR. WALTERS: No, not currently.

19 MEMBER HINKLE: Why not?

20 MR. WALTERS: They are too small.  
21 You couldn't, you can't with the space in  
22 there, you couldn't possibly build a two-

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1 bedroom apartment in any of those units. We  
2 are just trying to create some two bedroom  
3 apartments.

4 MEMBER HINKLE: But you could  
5 have less units all together?

6 MR. WALTERS: That would be an  
7 extreme hardship. Then the building wouldn't  
8 be marketable for us.

9 VICE-CHAIR COHEN: Go on and  
10 explain why it wouldn't be marketable.

11 MR. WALTERS: Well then you are  
12 reducing what we've already purchased, which  
13 is 24 units. We're trying to just create  
14 something better from what's there. If we  
15 reduce what's there, you are just, we don't  
16 have that money. That's just like taking  
17 something away that's already there. We'd  
18 build what's there.

19 CHAIRMAN JORDAN: Let's do this.  
20 I think it's a good project. Why don't we  
21 give you 30 days. You guys work with trying  
22 to justify the first part of the task and then

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1       come back. Let's set them, I know we might  
2       have a crowded, but this is a project and we  
3       need housing. We need housing bad but we have  
4       to do it the right way. It has to meet the  
5       requirements and the guidelines to follow. We  
6       can't shortcut that for anybody. So, what is  
7       a possible date?

8                   MR. MOY:        It sounds like Ms.  
9       Cohen is interesting in this case. I would  
10      suggest October 29.

11                   CHAIRMAN JORDAN:        Is that the  
12      soonest we can get it on?

13                   MR. MOY:        Oh you want something  
14      sooner?

15                   CHAIRMAN JORDAN:        Yes, yes. I  
16      just want to get, actually they could probably  
17      do it, if they go huddle within a week or so.  
18      I mean we don't even have to do 30 days.

19                   MR. WALTERS: Also it will give us  
20      a chance to meet with the ANC and I think we  
21      will reach out and make direct --

22                   CHAIRMAN JORDAN:        Yes, that's the

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1 other point too. That's another something  
2 where we have to look, do we have a checkmark.

3 I have a mental checkmark about that.

4 MR. MOY: In that case Mr.  
5 Chairman, I'm looking at October 8 if its  
6 doable with Ms. Cohen.

7 CHAIRMAN JORDAN: Are you on for  
8 the 8<sup>th</sup>?

9 VICE-CHAIR COHEN: Yes.

10 CHAIRMAN JORDAN: Yes, then let's  
11 do the 8<sup>th</sup>. Let's put it on for the 8<sup>th</sup>. A good  
12 project but we've got to dot the Is and cross  
13 the Ts as the Is and Ts are suppose to be  
14 crossed. That's all I'm trying to say. Okay?

15 MR. WALTERS: Yes, I understand.

16 CHAIRMAN JORDAN: Yes Ms. Cohen?

17 VICE-CHAIR COHEN: I just want to  
18 add one thing. This is designed in the period  
19 of less is more. The one thing I just want to  
20 encourage you to do is landscape. Because  
21 your beautiful design doesn't translate  
22 without landscaping. So, that's only my other

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1 suggestion.

2 MR. FEINSTEIN: Thank you.

3 CHAIRMAN JORDAN: So let's do  
4 that please.

5 MR. MOY: Mr. Chairman, sorry to  
6 interrupt. Would the board care for any  
7 deadlines for any supplemental information?

8 CHAIRMAN JORDAN: If we do  
9 October 8 then you need to have it here, Mr.  
10 Moy, by the, at least by that Wednesday right,  
11 that Wednesday before? Our package is usually  
12 complete by Friday. The website is --

13 MR. MOY: Thursday.

14 CHAIRMAN JORDAN: It is uploaded  
15 about Thursday. So we need to have it here by  
16 Wednesday before the 8<sup>th</sup>. I don't know what  
17 that is.

18 MR. MOY: That would be October  
19 2.

20 CHAIRMAN JORDAN: Okay, so that's  
21 like a week or so, right? So you need to  
22 supplement the record with your statement as

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1 to how you meet the variance test by October  
2 2. And at least we want to have also proof  
3 that you tried to contact the chair of the  
4 ANC, whether or not the ANC wants to request  
5 additional time. And Mr. Moy, we can, well  
6 just let ANC know the date and let's also --

7 MR. MOY: That's Wednesday and if  
8 you like, for your convenience we can, staff  
9 can move to that Friday.

10 CHAIRMAN JORDAN: And then upload  
11 tressor. So let's do that. Let's do Friday.

12 MR. MOY: The 4<sup>th</sup>.

13 CHAIRMAN JORDAN: The 4<sup>th</sup>.  
14 October 4 before noon on October 4. Does that  
15 help you Mr. Moy?

16 MR. MOY: Yes, well its to help  
17 you.

18 CHAIRMAN JORDAN: Okay. Because  
19 they upload the computer system which gets  
20 downloaded, the cases and files and  
21 information to our various computers. So I  
22 want to make sure there's enough time. I

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1 don't' want the office pressed to try to get  
2 things uploaded.

3 MR. CRAWFORD: And that is for  
4 supplemental submissions to the record?

5 CHAIRMAN JORDAN: Yes. Okay.  
6 Good. Well then thank you. Let's move this  
7 matter off until then.

8 MR. CRAWFORD: Thank you Mr. Chair.

9 CHAIRMAN JORDAN: Are the parties  
10 are back for 18614? Do you want to call that?

11 MR. MOY: Yes sir. That would be  
12 Application No. 18614 of SMC United  
13 Industrial PC pursuant to 11 DCMR 3104.1,  
14 special exception to allow the continuation of  
15 a parking lot under section 213. This was  
16 last approved pursuant to BZA Order No. 17049  
17 in the R-1-B District at premises 2310 and  
18 2320 31<sup>st</sup> Street, NW, Square 4365, Lots 805 and  
19 806. For the record Mr. Chairman, there is a  
20 support letter or rather a letter in support  
21 that was submitted to the record today from  
22 the Gateway Community Association.

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1                   CHAIRMAN JORDAN:            Would you  
2 please introduce yourselves again for the  
3 record?

4                   MR. SULLIVAN: Mr. Chairman and  
5 members of the board, my name is Martin  
6 Sullivan with the Law Firm of Sullivan &  
7 Barrows.

8                   MS. BUNDY: Good morning. Pamela  
9 Bundy, with Bundy Development. Good morning  
10 board.

11                  MR. FARSHEY: Good morning. Fred  
12 Farshey with Stanley Martin Commercial.

13                  MR. COLLINS: Chris Collins with  
14 Holland and Knight.

15                  MS. BLOOMFIELD.            Jessica  
16 Bloomfield with Holland Knight.

17                  CHAIRMAN JORDAN:        Okay. Did we  
18 resolve anything during our conference? I  
19 take it no.

20                  MR. COLLINS: No, Your Honor,  
21 nothing with relevance to this case.

22                  CHAIRMAN JORDAN:        Okay. We have

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1 a party status application pending for Ms.  
2 Bundy in this matter, which I am included to  
3 accept. So Mr. Collins you had some  
4 opposition to that. Would you want to present  
5 your opposition?

6 MR. COLLINS: Yes, thank you sir.  
7 We believe that the request for party status  
8 in our position does not qualify under the  
9 applicable provisions of Section 3106.2 and  
10 specifically 3106.2(e)(5). And I have  
11 several documents for your consideration.

12 CHAIRMAN JORDAN: If you would  
13 just hand those to Mr. Moy.

14 MR. COLLINS: As Mr. Moy hands  
15 those to you, I would call your attention to  
16 Exhibit 25, Tab B which is the applicant's  
17 pre-hearing statement. Tab B is a portion of  
18 the zoning map in color.

19 CHAIRMAN JORDAN: Wait a minute.  
20 What do you want us to look at?

21 MR. COLLINS: Exhibit 25, which is  
22 the pre-hearing statement of the applicant.

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1                   CHAIRMAN JORDAN:       Not what you  
2 just passed out?

3                   MR. COLLINS: Well I want you to  
4 look at three things. One is --

5                   CHAIRMAN JORDAN:       Hold on Mr.  
6 Collins. Take us step by step and reference  
7 what you want us to look at. We're not going  
8 to jump all over and try to catch up with you.  
9 I'm going to ask that you stay with us, help  
10 us to help you so we can follow you.

11                  MR. COLLINS: Understand.

12                  CHAIRMAN JORDAN:       What are we  
13 looking at?

14                  MR. COLLINS: I would like for you  
15 to look at Exhibit 25, Tab B.

16                  CHAIRMAN JORDAN:       All right.  
17 Give me one second.

18                  MR. COLLINS: Do you have it?

19                  CHAIRMAN JORDAN:       Go ahead.

20                  MR. COLLINS: Okay. Exhibit 25,  
21 Tab B shows a red triangle which is the  
22 applicant's property. Do you have it in

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1 color? The red triangle is the applicant's  
2 property. And within that red triangle is a  
3 white sort of rectangle which has the number  
4 806 in it.

5 CHAIRMAN JORDAN: Right.

6 MR. COLLINS: And that is the  
7 parking lot.

8 CHAIRMAN JORDAN: Okay.

9 MR. COLLINS: That's before you  
10 today. To the left of that, to the west, is  
11 an irregularly shaped property that has the  
12 number R-5-A inside of it in blue. That's the  
13 property of the party in opposition.

14 CHAIRMAN JORDAN: Yes.

15  
16 MR. COLLINS: I would like you to  
17 take a look at that for a second. What I  
18 would like you to take a look at is with  
19 regard to the two-page document just handed in  
20 to the record. The first document is marked  
21 as Zoning Commission Case No. 11-19, Exhibit  
22 No. 77. And that is the site plan for the

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1 project of the party in opposition. You can  
2 see it is irregularly shaped. You can see how  
3 it dove-tails with the blue outlined R-5-A  
4 portion on the zoning map which I just  
5 referred to earlier. And you can see that it  
6 is generally semi-circular in shape. It is  
7 sort of like a jug handle or a handle sticking  
8 out at the bottom. All of the proposed houses  
9 are within the semi-circle area. And then the  
10 third thing I would like you to take a look at  
11 is if you flip the page, is the aerial photo  
12 of the neighborhood. And you will there's a  
13 red arrow that points to the parking lot. And  
14 then if you look at that you can comparing  
15 those three documents you can see that the  
16 relative location of the party in opposition's  
17 property. The point there is that there is an  
18 entire neighborhood between the applicant's  
19 parking lot and the party in opposition's  
20 property. It is heavily vegetated. If you  
21 were to drive there, from the party in  
22 opposition's property to the parking lot

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1 that's the subject of this case, the driving  
2 distance is at least two blocks. The  
3 applicant, the party in opposition does not  
4 meet the test of Section 3106.2 E5 in that  
5 they are not more significantly, distinctively  
6 or uniquely affected in character or kind by  
7 proposed zoning relief than those of other  
8 persons and the general public. Again there's  
9 an entire neighborhood between the parking lot  
10 and the party in opposition's property.

11 CHAIRMAN JORDAN: How far is  
12 that? What is the distance?

13 MR. COLLINS: The distance is  
14 several hundred yards.

15 CHAIRMAN JORDAN: Okay. Mr.  
16 Sullivan, any reply?

17 MR. SULLIVAN: Yes, we believe we  
18 do meet the standard under 3106.2 E5. Ms.  
19 Bundy's property is more particularly affected  
20 that the general public for a couple of  
21 reasons. One is that it is a higher elevation  
22 and there is a view when the trees are not,

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1 when the leaves are not there you can see the  
2 parking lot potentially from her property. I  
3 don't know if it's a couple hundred yards. It  
4 doesn't seem like its that far to me. I don't  
5 know the actual distance. I would say its not  
6 an entire neighborhood. There is a dead-end  
7 street that comes down, not all the way in  
8 between the parking lot and her property.  
9 Because one of the requirements is that the  
10 parking lot be adequately screened either by a  
11 masonry wall or evergreen landscaping. We  
12 think that implies that it should be screened  
13 from view from neighboring properties. In  
14 that sense because we are at a higher  
15 elevation, I think Ms. Bundy's property is  
16 uniquely affected. Also I would add one of  
17 the other requirements is that the parking lot  
18 not negatively impact future residential  
19 development. And as the party opponent  
20 applicant's concern is her future residential  
21 development and its directly impacted by the  
22 existence of this parking lot and the view of

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1 the parking lot from her property.

2 VICE-CHAIR COHEN: Thank you Mr.  
3 Chair. Ms. Bundy did you get to speak to any  
4 of the neighbors who are closer to the parking  
5 lot?

6 MS. BUNDY: Not at this time, no I  
7 haven't.

8 CHAIRMAN JORDAN: Is there  
9 anything else you would like to say Mr.  
10 Collins?

11 MR. COLLINS: I think in response  
12 the party in opposition's property is stated  
13 as being at a higher elevation. So is that 30<sup>th</sup>  
14 Street with houses lining both sides of 30<sup>th</sup>  
15 Street is also at a higher elevation. The  
16 screening that was referred to about being a  
17 42-inch high brick wall, if in fact this is at  
18 a higher elevation, a 42-inch brick wall is  
19 not going to affect the screening in any  
20 measurable way. There are, I don't see how in  
21 any way, shape or form that the party in  
22 opposition could prove that they are more

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1 significantly or distinctively impacted than  
2 anyone else in the neighborhood.

3 CHAIRMAN JORDAN: All right.  
4 Thank you. I would be inclined to grant party  
5 status to party status applicant. I think  
6 there is significant impact upon what she is  
7 representing. She is an adjacent property  
8 owner. We have done so with properties even  
9 as far as a mile away and even had some issues  
10 when we did not do so. I think that I would  
11 be favor to grant party status. Anyone else?

12 All those in favor signify by saying aye.

13 [CHORUS OF AYES]

14 CHAIRMAN JORDAN: Opposed, nay.  
15 The motion carries. We grant party status in  
16 this matter. So then let's move on to the  
17 fundamental aspect of this case.

18 MR. SULLIVAN: Mr. Chairman, can  
19 I offer a preliminary motion?

20 CHAIRMAN JORDAN: Go ahead. What  
21 is that?

22 MR. SULLIVAN: We would like to

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1 request a continuance for the purpose of,  
2 although we did not come to a resolution we  
3 believe that a resolution is possible.  
4 Regarding the evergreen landscaping between  
5 our property and the parking lot, we believe  
6 if we could see something more substantial  
7 that it might resolve some concerns there.  
8 And also in light of the fact that the ANC has  
9 not reviewed this yet, it would give us the  
10 opportunity to go to the ANC as well.

11 CHAIRMAN JORDAN: We additionally  
12 do have a request from the ANC to continue  
13 this matter. I don't know if we consider that  
14 as a formal motion but they did make that  
15 request.

16 MR. COLLINS: Mr. Chair, the ANC's  
17 document and we have discussed that with the  
18 ANC. It is not a request to postpone. It is  
19 a request to leave the record open.

20 CHAIRMAN JORDAN: Keep the record  
21 open. That's what it is.

22

1                   MR. COLLINS: We have then, and the  
2                   ANC chair who I talked with, Ms. Manning asked  
3                   us to represent to the board that we would  
4                   support their request to leave the record open  
5                   as we proceed with this case, today to leave  
6                   the record open until after their meeting on  
7                   the 16<sup>th</sup> so that they could have until the 18<sup>th</sup>  
8                   of October to file their report and we would  
9                   of course ask for an opportunity to respond to  
10                  whatever that report is. But we did have a  
11                  good meeting with the ANC. My understanding  
12                  with our discussion, we did meet at the  
13                  gateway community last money. We could go  
14                  yesterday and we do have their support, the  
15                  immediate neighborhood. And the way this ANC  
16                  works is that they ask you to go to gateway  
17                  community first where the relevant  
18                  neighborhood community association first taken  
19                  to the ANC. We were scheduled, we thought we  
20                  were scheduled to be at the ANC. We had asked  
21                  them to schedule us for the September meeting  
22                  and the response I received on Monday from the

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1       ANC chair is that they were not going to have  
2       a quorum at the September meeting and they had  
3       asked us to come to the October meeting. We  
4       asked that they, that we be, I told them, we  
5       agreed that we would proceed with the hearing  
6       today and they would simply ask to leave the  
7       record open.

8                   CHAIRMAN JORDAN: I'm inclined to  
9       grant the motion to continue based upon  
10      representation of the request by the party  
11      status. But also, understanding that the ANC  
12      needs more time. I see they said let's keep  
13      the record open but I don't know if the ANC is  
14      going to be supportive and if they came back  
15      with some opposition or was not then we need  
16      to generate a record that was sufficiently for  
17      our standpoint because we have to give the ANC  
18      great weight. And I would want to have a full  
19      record and I don't see utilizing our time and  
20      effort, to go back and do that. So they come  
21      back. You might be 99.9 percent sure that  
22      they are going to be supportive but if they

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1 don't then we the board is under, required  
2 then to address the lack of support if we  
3 decide not to support the ANC's decision. We  
4 would have to respond to that. So, I would  
5 move that we grant the continuance for another  
6 30 days. That would be my motion.

7 MEMBER HINKLE: I will second it.

8 CHAIRMAN JORDAN: Motion made and  
9 seconded and your readiness. All those in  
10 favor signify by saying aye.

11 [CHORUS OF AYES]

12 CHAIRMAN JORDAN: All right.  
13 Those opposed, nay. Then we will move this  
14 matter for 30 days Mr. Moy.

15 MR. MOY: Mr. Chairman, the  
16 closest date to that 30 days would be October  
17 21 exactly.

18 CHAIRMAN JORDAN: Okay. So any  
19 other additional filings we need to have by  
20 when?

21 MR. MOY: Well I believe if the  
22 board is wishing to allow a response to the

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1 ANC's filing, staff would suggest then that  
2 the applicant provide a response by, let's say  
3 October 23, which is a Wednesday.

4 CHAIRMAN JORDAN: October 23 for  
5 any additional filings information and  
6 certainly if you would let Mr. Moy, if we  
7 could send a notice to ANC and let them know.

8 MR. MOY: Yes sir.

9 MR. COLLINS: Just for  
10 clarification Mr. Chair. This is the ANC to  
11 file by the 18<sup>th</sup> and then the applicant's  
12 response to the ANC by the 23<sup>rd</sup>?

13 CHAIRMAN JORDAN: Yes, let's do  
14 that. So the 23<sup>rd</sup> will be the date that all  
15 filings should be in. So the ANC needs to be  
16 in, well I think there's a new court case  
17 regarding ANC's responses. So, but we would  
18 like to have the ANC response before?

19 MR. MOY: Let's see, the ANC  
20 response I believe the applicant said that the  
21 ANC's meeting is October 16.

22 MR. COLLINS: They've offered in

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1 their motion that they would get it in by the  
2 18<sup>th</sup>.

3 CHAIRMAN JORDAN: But they do  
4 have a sliding scale, I think now under the  
5 law, but okay. Let's do that and if there's  
6 any other filings then by the 23<sup>rd</sup>.

7 MR. COLLINS: I would like to be  
8 clear what other filings other than the  
9 response?

10 CHAIRMAN JORDAN: Well the  
11 parties, all parties have a right to respond.

12 MR. COLLINS: Respond to the ANC  
13 report?

14 CHAIRMAN JORDAN: The ANC report.

15 MR. COLLINS: All right thank you.

16 CHAIRMAN JORDAN: All right good.

17 MR. SULLIVAN: Thank you.

18 VICE-CHAIR COHEN: And hopefully  
19 you'll meet and work things out. You will  
20 meet the party in opposition and possibly work  
21 things out. We would really like that.

22 CHAIRMAN JORDAN: There are some

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1 issues here and from my review of what's here  
2 and I think that -- yes there are some issues  
3 here.

4 MR. COLLINS: Really good. Thank  
5 you so very much.

6 MR. MOY: I believe the next  
7 agenda item Mr. Chairman is Application No.  
8 18617. This is the application of 1320  
9 Harvard Street LLC, pursuant to 11 DCMR,  
10 3103.2, for a variance from the lot area  
11 requirements under subsection 401.3. This is  
12 to convert a substance abuse treatment  
13 facility into an apartment building in the R-4  
14 District at premises 1318-1320 Harvard Street,  
15 N.W., Square 2855, Lot 79.

16 CHAIRMAN JORDAN: Well all right.  
17 We just keep on moving here today. This is  
18 such an easy docket today, I just cannot tell  
19 you. Right, opposite of that. Real  
20 challenges for us. Can the persons at the  
21 table please introduce themselves?

22 MS. MOLDENHAUER: Good morning Mr.

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1 Chair and members of the board. My name is  
2 Meredith Moldenhauer from Griffin, Murphy,  
3 Modenhaur & Wiggins. I'll let all the members  
4 of our presentation introduce themselves.

5 MR. ROELL: My name is Hugo Roell.

6 I am with --

7 CHAIRMAN JORDAN: I'm sorry.  
8 Your last name again.

9 MR. ROELL: Roell, R-O-E-L-L. I'm  
10 with Roell Architects.

11 MR. SAMUEL: My name is Ryan  
12 Samuel. I'm the developer with 1318 Harvard  
13 Street LLC.

14 MR. TANGNEY: My name is Kyle  
15 Tangney. I'm with Gray Steel.

16 MR. MERRITT: My name is Paul  
17 Merritt. I'm with Capital Bank.

18

19 CHAIRMAN JORDAN: I don't think  
20 we need the full song and dance. However, it  
21 is your opportunity to do so. But here's the  
22 issue as I see it and as the Office of

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1 Planning report. We're clear about the issue  
2 in trying to prove up this undue hardship. I  
3 think we're okay the building's condition and  
4 etc. and what you are trying to do. I think  
5 there's been some push back and there's a  
6 question about the undue hardship issue. We've  
7 already reviewed the financials. We know that  
8 we don't need a regurgitation of the  
9 financials. You can highlight some of the  
10 financials. I don't know if the board really  
11 needs to have any further drill down on the  
12 financials. But that's where this is  
13 centering. The design and all that kind of  
14 stuff, I think we completely understand all  
15 that. Anybody on the board need something  
16 like that? But, most directly responding to,  
17 as I understand, Mr. Jackson's report and I  
18 don't want to summarize it, I think OP can see  
19 the exceptional condition of this building. I  
20 think that was in the report. But they are  
21 saying everybody is going to have a financial  
22 hardship, a financial issue with doing

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1 anything in this building. So, I guess the  
2 question on how you set yourself apart. And  
3 then I guess my question when we get to Office  
4 of Planning is, is it a question of what  
5 hardship is harder the other? I don't know if  
6 that's before us as a board, a hardship of a  
7 hardship. So that's kind of where I am. Any  
8 other issues that we really want them to, that  
9 the board think they need to have drilled down  
10 on? Okay. I don't know if what I'm saying  
11 made sense to you, if that helps your  
12 presentation.

13 MS. MOLDENHAUER: I think what we  
14 can do we can do a presentation, try to focus  
15 on some of the specific issues, in regards to  
16 practical difficulty and how that relates to  
17 the property. And so I also just want to as a  
18 preliminary matter, we provided, we provided,  
19 we obviously have two additional witnesses  
20 here and provide them with experts,  
21 qualifications. If there is any additional --

22 CHAIRMAN JORDAN: Let me see.

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1 Who?

2 MS. MOLDENHAUER: Mr. Merritt  
3 from Capital Bank as an expert and finance.

4 CHAIRMAN JORDAN: He was tendered  
5 in your original filings?

6 MS. MOLDENHAUER: Yes, in our  
7 pre-hearing statement we provided a resume and  
8 information about requesting expert  
9 qualification. And also Mr. Tangney from Gray  
10 Steel qualified as an expert as a real estate  
11 professional in multi-family units.

12 MR. MOY: Both of those Mr.  
13 Chairman are under Exhibit 29, Tabs K and L.

14 CHAIRMAN JORDAN: But I thought  
15 you had a third person.

16 MS. MOLDENHAUER: We have our  
17 architect, but that's --

18 CHAIRMAN JORDAN: But you are not  
19 tendering as a --

20 MS. MOLDENHAUER: I don't  
21 believe that's necessary at this time.

22 CHAIRMAN JORDAN: So I have

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1 Merritt and Tangey.

2 MS. MOLDENHAUER: Tangney.

3 CHAIRMAN JORDAN: Tangney. We  
4 will accept them.

5 MS. MOLDENHAUER: Okay. With  
6 that being said, we will try to provide a very  
7 brief summary of the arguments we think in our  
8 initial application, our pre-hearing statement  
9 satisfy how the applicant satisfies the three  
10 prong standard. To point out one issue of  
11 clarification, the Office of Planning report  
12 inaccurately references the number of units.  
13 The number of units -- okay.

14 CHAIRMAN JORDAN: It's 16 and not  
15 14.

16 MS. MOLDENHAUER: 16, yes.

17 CHAIRMAN JORDAN: I'm glad you  
18 pointed that out.

19  
20 MS. MOLDENHAUER: I just wanted  
21 to make sure that's on the record. Fantastic.  
22 The other thing is just to focus on two

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1 specific Court of Appeals cases I think go  
2 directly to your point, Mr. Chair, that you  
3 brought up. The Downtown Cluster case which  
4 the Court of Appeals confirmed that the board  
5 could justify the granting of a variance based  
6 on undue hardship created by the necessity for  
7 reasonable return. In that case the Court of  
8 Appeals relied upon expert testimony as we  
9 will present today as well regarding the, what  
10 the board should see is what would be a  
11 reasonable return. In that case, the expert  
12 indicated that a nine percent return was what  
13 was considered to be reasonable and they found  
14 that the granting of a case where a matter of  
15 right project would proceed only a six percent  
16 return. I would then not have been considered  
17 viable. In addition to that, I like the board  
18 to focus on and I'll point out an issue later  
19 on in the case, Association for the  
20 Preservation of the 1700 Block of N Street.  
21 In that case focus is on the Court of Appeals  
22 confirmation that self created a hardship.

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1 This is not a factor for an area of variance  
2 and that the cost for compliance at the  
3 regulations could be considered satisfying or  
4 making the practical difficulty standard.  
5 With that being said, I will turn -- I can  
6 give you a copy of that case if you like. I've  
7 got copies for everybody. I will do that  
8 while I then now turn to the applicant and ask  
9 him to introduce himself and to try to walk  
10 through some of the specific issues.

11

12

13 MR. SAMUEL: Good morning. Thank  
14 you for having us here. As I mentioned my  
15 name is Ryan Samuel. I am the developer. So  
16 I'm a small local developer. I do pretty much  
17 exclusively residential development. A lot of  
18 interest in Columbia Heights. I love the  
19 neighborhood. Currently working on a 20-unit  
20 small apartment house in Northern Columbia  
21 Heights. And I have three other kind of  
22 moderate level apartment housing within a half

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1 mile radius of the property. I take a little  
2 bit of different approach than I think most  
3 other developer as I really focus on working  
4 with the community first. Seeing what the  
5 community wants. And in light of that the  
6 first thing that we did was we put out 475  
7 flyers from 15<sup>th</sup> Street to 11<sup>th</sup> Street and then  
8 from Gerard to Columbia Road and hosted a  
9 great community meeting at the Greater  
10 Washington Urban League, right there at  
11 Harvard and 14<sup>th</sup> Street. I spent a lot of time  
12 talking to the community. I learned a lot.  
13 The community did not like the original intent  
14 of doing larger units. They were worried it  
15 would bring kind of a group house dynamic to  
16 the neighborhood which they weren't interested  
17 in. I learned about tree canopies, which I  
18 didn't know very much about. I am now working  
19 with Casey Trees. It looks like we are going  
20 to be able to achieve a 42 percent tree  
21 canopy. I learned about the desire in the  
22 immediate neighborhood especially from

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1 Commissioner Gilliam for ADA units and working  
2 with Hugo. We have three, our plan is for  
3 three ADA units in the cellar. I learned that  
4 the community really wants me to leave the  
5 existing building envelope intact. They don't  
6 want pop outs, pop ups, pop sideways. The only  
7 change that you'll see in the building is just  
8 the handicap ramp going around in front. And  
9 the plan is to provide what I consider kind of  
10 moderate level housing. This was originally  
11 an apartment house. It was used, it's being  
12 used most recently as a 64-bed substance  
13 treatment facility and associated classrooms  
14 and offices. We are very excited to bring it  
15 back into its original intent. And the  
16 community is also very excited about the  
17 project. 44 letters of support. The ANC is  
18 equally excited. We got unanimous support  
19 from the ANC. So we're very excited about it.  
20 Sorry I will try to keep this brief. The  
21 location is fantastic. Oh here it shows the  
22 Square 2855, pretty unique square. There are

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1 three different zones. There is a school  
2 right behind it. There's a very large  
3 apartment building in the same square. The  
4 square is pretty unique. You can see the  
5 front of the property. I'm not going to  
6 belabor the point but it's a pretty  
7 exceptional property. The rear alley of the  
8 property we are going to be providing, we are  
9 required to provide five apartment spaces but  
10 we are going to provide six, one extra. It is  
11 currently operating under apartment variance.

12 And frankly from my experience in Columbia  
13 Heights, nobody wants these parking spaces but  
14 we are going to give them any way. And the  
15 community seemed happy about that. Moving  
16 forward to the next slide, as I mentioned its  
17 being used in this commercial use with all  
18 kinds of different things. I learned, we  
19 learned after about the property that there  
20 was actually an issue with this water heater  
21 here, the exhaust flue was cracked.

22 CHAIRMAN JORDAN: Can you drop

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1 that light first please?

2 CHAIRMAN JORDAN: Do we have a  
3 pointer?

4 MR. SAMUEL: Yes.

5 CHAIRMAN JORDAN: Mr. Moy does  
6 the office have a pointer?

7 MR. MOY: Not today sir.

8 CHAIRMAN JORDAN: I mean we do  
9 have one around somewhere?

10 MR. MOY: No we don't.

11 CHAIRMAN JORDAN: In fact I  
12 thought of this like last Saturday. I keep  
13 forgetting to ask that so -- sorry, doing this  
14 on the record, but I'll forget if I don't ask.

15 Good thing you brought your on. Otherwise we  
16 wouldn't have one.

17 [Laughter]

18 MR. SAMUEL: You can look over  
19 and see that exhaust goes all the way up  
20 through an old chimney and it turns out that  
21 it was cracked and there is currently a legal  
22 complaint. Apparently some of the residents

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1 suffered from carbon monoxide inhalation. So  
2 that was yet another issue that I found out  
3 about when I got a call from the lawyer saying  
4 that we need to come and look at the property.

5 CHAIRMAN JORDAN: Did you say it  
6 was cracked all the way up?

7 MR. SAMUEL: No, I believe it was  
8 just cracked on one floor.

9 CHAIRMAN JORDAN: Okay.

10 MR. SAMUEL: I think the metal  
11 components separated and admitted carbon  
12 monoxide. And that just kind of speaks to, I  
13 need to get rid all of these existing  
14 commercial elements. If I could figure out a  
15 way to reuse them because we do try to keep as  
16 much existing as we can. We can't, we  
17 certainly can't use these items. If you go to  
18 the next slide you can see even more really  
19 commercial grade HVAC units, that we are  
20 dealing with here in order to get this  
21 property back to what it was originally which  
22 is an apartment house. These are more

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1 examples of a large smoke eaters in the  
2 meeting room in the basements. And then the  
3 next slide, there's more commercial HVAC up on  
4 the roof. And then we had to have a full  
5 commercial kitchen in the basement complete  
6 with an exhaust hood that goes all the way to  
7 the roof. So it's a bit cumbersome and  
8 something that no matter who buys this  
9 property, because of the issues they had with  
10 carbon monoxide it can't be used in its  
11 current use. So whoever buys it, they are  
12 going to be confronted with the same  
13 challenges that I am here. Moving to the next  
14 slide, so I won't again belabor this point but  
15 the existing non-conforming courts, there are  
16 two non-conforming open courts and one non-  
17 conforming closed court which present quite a  
18 difficulty in terms of getting bedrooms into  
19 the property because I was under the  
20 assumption that a window is a window and could  
21 be used in the bedroom and these windows  
22 cannot be used as bedroom windows.

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1           Moving on to the next one. We got  
2 back, this is the, I won't spend too much time  
3 on the layout because you can already see  
4 them. But this is just the cellar and shows  
5 we were able to get the 88 units into the  
6 property which the community liked a lot. And  
7 there aren't that many opportunities right now  
8 to bring this type of housing back into the  
9 Columbia Heights community.

10           I'm just going to try to kind of  
11 go through the other. Floor plans quickly and  
12 then I'll just go through the financial and  
13 feasibility that I'm faced with here in terms  
14 of a limited return on equity developing as  
15 you know from our filing. Developing any  
16 project that fully complies with all --

17           MS. MOLDENHAUER:       You can have  
18 the light back on if the board would like.

19           MR. SAMUEL:           Developing any  
20 project that fully complies with all of the  
21 zoning requirements would not be economically  
22 feasible. The investment required of anybody

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1       that was to purchase this property  
2       substantial due to the existing condition of  
3       the property. The profit loss analysis  
4       submitted to the board shows the infeasibility  
5       of the alternatives. We have looked  
6       exhaustively. My business is to provide  
7       moderate level housing but we looked at the  
8       condo scenario. Because of the way the  
9       building is, it doesn't lay out very well at  
10      all for condominiums. But that's not what  
11      frankly we want to do anyway. So, we show the  
12      profit and loss analysis shows the  
13      infeasibility of alternatives in compliance  
14      with lot area requirement would result in a  
15      practical difficulty.

16               And going to the next slide, the  
17      financial and feasibility results and an  
18      inability to obtain conventional financing for  
19      the project. Lending institutions and Paul is  
20      going to speak to this, require minimum debt  
21      covered ratios. And none of the alternative  
22      unit mixes or all of the alternative unit

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1 mixes would be below the minimum DCR to obtain  
2 a conventional loan from a commercial bank or  
3 lending institution.

4 As I mentioned in the beginning,  
5 you know, the most important part to me  
6 because I was born and raised in DC but I  
7 don't live on this block. So the most  
8 important thing is to go find out what exactly  
9 is going on, on that block. Commissioner  
10 Gilliam lives right there on 14<sup>th</sup> Street. So  
11 she was super helpful in helping me get out  
12 and talk to folks. We had a great time.  
13 Learned a lot. Lots of great folks. They are  
14 really excited to not have a 64 bed drug  
15 facility. Second Genesis does a really nice  
16 job. They are going to continue providing  
17 their services in Silver Spring. But the  
18 residents at Columbia Heights they are really  
19 excited to have us and the type of housing  
20 that we plan to provide for a very long time.

21 Thank you very much.

22 MS. MOLDENHAUER: That just

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1 provides some overview. If you want we can go  
2 to our next witness. Or if you would like to  
3 ask questions?

4 CHAIRMAN JORDAN: Questions? No.  
5 Just have the witness continue please.

6 MS. MOLDENHAUER: We'll next turn  
7 to Kyle. Provide your testimony.

8 MR. TANGNEY: Hi there.

9 CHAIRMAN JORDAN: Hi there back.

10 MR. TANGNEY: My name is Kyle  
11 Tangney. I am a real estate agent in  
12 Washington DC since 2009. I have directed or  
13 otherwise participated in transacting over 100  
14 properties during that time. I'm co-director  
15 of Grey Steel's Mutlifamily Brokerage  
16 Division. We are recognized as the most  
17 active middle market sub institutional multi-  
18 family firm in DC. As co-director I oversee  
19 underwriting principles, market research,  
20 client development and brand management. I  
21 have reviewed the Office of Planning's report  
22 dated September 17, 2013. My company and I

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1 were retained by the sellers, Second Genesis  
2 to market and sell the building. The property  
3 was marketed for sale January 2013. The  
4 property was marketed and sold with all matter  
5 of right information. The property was  
6 broadly marketed with the intention of letting  
7 the market determine the price. And it was  
8 sold for \$2,450,000. We received multiple  
9 offers and the applicant's offer was the  
10 lowest offer to which the seller gave serious  
11 consideration because the applicant's terms  
12 allowed for a quick settlement and no  
13 contingencies. Other offers were in the range  
14 of \$500,000 higher than the applicant's offer.

15 Based on the offers that were received, I do  
16 not believe that the applicant overpaid or  
17 paid above market value for the property. My  
18 firm went to great lengths to market the  
19 subject property, conducted many showings and  
20 received dozens of offers. In my expert  
21 opinion OTR's assessed values are frequently  
22 not in line with market values and I feel

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1 confident in stating that my firm established  
2 that the market value for the subject property  
3 was significantly higher than OTR's assessed  
4 value and more than the applicant paid.

5 VICE-CHAIR COHEN: What are  
6 OTR's?

7 MR. TANGNEY: What the assessed  
8 value is.

9 VICE-CHAIR COHEN: What is it?

10 MR. TANGNEY: It is the office of  
11 tax and revenue.

12 MR. JACKSON: Your microphone is  
13 not on. They can't hear you.

14 CHAIRMAN JORDAN: What she said  
15 was -- okay, go ahead please.

16 MR. TANGNEY: Sure. Subsequently  
17 I conducted a market analysis for the  
18 applicant's proposed project at 1318-1320  
19 Harvard Street NW. I visited the property  
20 many times and also knew the applicant and all  
21 their development projects. I reviewed rental  
22 rates, sales prices, the applicant has

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1 provided to BZA and believe them to be  
2 accurate, an accurate prediction based on some  
3 market dynamics, interest rate, fluctuations,  
4 project delivery time. Furthermore, market  
5 rate for sale condominium units are different  
6 than rental accommodations. The finish is  
7 including heating, air conditioning, counter  
8 tops, cabinets, floors, lights, fixtures,  
9 appliances are held to a higher standard for  
10 sale units. At this time I would be happy to  
11 answer any questions you guys have.

12 CHAIRMAN JORDAN: None.

13 MR. TANGNEY: Okay.

14 MR. MOY: We'll now turn to Paul.

15 Thank you.

16  
17 MR. MERRITT: Good morning. My  
18 name is Paul Merritt. I'm senior vice  
19 president, commercial real estate with Capital  
20 Bank. We are a local community bank based in  
21 Maryland. However, we do have a significant  
22 presence in the district specifically with an

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1 office at 17<sup>th</sup> and I Street and then a pretty  
2 heavy lending presence in regard to multi-  
3 family housing any where between and two and  
4 40 units. My specific area of expertise is in  
5 evaluating and analyzing multi-family  
6 properties, assessing their value, future  
7 profitability and the finance ability of those  
8 projects. We generally follow Fannie Mae or  
9 similar standards for lending. Generally  
10 speaking we do not lend above 75 percent of  
11 the value of a given property. And for an  
12 income property such as this, we underwrite to  
13 a minimum of 1.2 times debt coverage ratio.  
14 That is the ratio of net operating income over  
15 the required debt service. I would emphasize  
16 those are minimum numbers. We are  
17 particularly careful when we are dealing with  
18 a property that is either vacant or needs to  
19 be renovated that has no recent operating  
20 history. In these circumstances we are  
21 relying on a forecast of the future potential  
22 earnings and that obviously can vary due to

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1 the volatility of the market. That being  
2 said, we are a local bank. We do pride  
3 ourselves on lending based on relationships  
4 and the people we are dealing with as much as  
5 anything. I've worked with Ryan on several  
6 other projects here in ths city. In fact in  
7 this very neighborhood, it's been my  
8 experience that he cares about his tenants and  
9 the community that he is investing in. I've  
10 looked at the profit and loss analysis, the  
11 construction budget, the sales, comps for  
12 1318-1320 Harvard and based on numbers that I  
13 reviewed the 16 unit scenario indicates that  
14 service coverage ratio of 1.29 times which  
15 would generally be financeable by my bank.  
16 The other scenarios that show a lesser debt  
17 service coverage ratio below 1.2 times could  
18 be problematic without some extenuating  
19 circumstances. And I'm happy to answer any  
20 questions.

21 CHAIRMAN JORDAN: Any questions  
22 board?

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1                   VICE-CHAIR COHEN:    First of all I  
2                   want to just complement the submission.  It's  
3                   extremely complete and easy to follow.  I  
4                   would be happier if it was down sided for  
5                   environmental reasons.

6                   CHAIRMAN JORDAN:            But it is  
7                   commended.  It is always very nice.

8                   VICE-CHAIR COHEN:    I just wanted  
9                   to ask our experts under Exhibit A.  Were  
10                  those the numbers that you reviewed?  I just  
11                  want to make sure when you say we reviewed  
12                  numbers that we are looking at the same thing.

13                  And then do either one of you have a land  
14                  loan on this building?

15                  MR. MERRITT:            These are the  
16                  numbers that I reviewed and I do not currently  
17                  hold any financing on this building.

18                  VICE-CHAIR COHEN:    Okay.

19                  MR. TANGNEY:            These are the  
20                  numbers that I received as well.  I do not  
21                  have any interest in the building.

22                  VICE-CHAIR COHEN:    Thank you.  I

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1 just, the return 6.15 percent. In the  
2 financial market today what would you say is  
3 the going rate of return?

4 MR. MERRITT: For an income  
5 properties such as this, the focus of our  
6 underwriting is more on the debt service  
7 coverage ratio. The more in excess of 1.2  
8 times that is, the more comfortable we are. I  
9 would venture to say that 6.15 is probably a  
10 little bit on the thin side thus the debt  
11 service coverage is just barely meeting the  
12 threshold.

13 CHAIRMAN JORDAN: We've examined  
14 this and actually had expert testimony before  
15 that on a project like this, it is at least  
16 eight percent return is what the norm is and  
17 what people shoot for trying to do this kind  
18 of project. We've had that in -- its in our  
19 records somewhere.

20 MS. MOLDENHAUER: We have to  
21 address one other issue from OP and I think  
22 the board would be very happy allowing me a

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1 moment to address that?

2 CHAIRMAN JORDAN: Sure.

3

4

5 MS. MOLDENHAUER: Yes, as we  
6 indicated, the existing building, I will jump  
7 through this slide is currently, was a special  
8 exception, a variance for 64 beds and six  
9 staff including five staff offices. The prior  
10 density was actually quite large. That's why  
11 they needed the special exception relief  
12 because they were violating a 50 percent  
13 square footage per patient in the housing  
14 regulations requirements and that's why that  
15 came before the board in 1986. As we are  
16 proposing a 16 residential unit building, we  
17 are actually reducing the density because if  
18 you average that out, you are talking about 26  
19 beds total in the buildings. You are going  
20 from a 64 bed plus staff and offices to about  
21 24 beds. As we know that the existing  
22 condition is not changing in regard to the

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1 total square footage and we are seeking relief  
2 under 401.3, the deviation that we are  
3 requesting here is a 45 percent deviation and  
4 is a 47 percent reduction in density based on  
5 the number of beds. If you look at density in  
6 a more multi-facet way in regards to not just  
7 units but also in regards to beds as well.  
8 That being said, I just want to focus on some  
9 points that Office of Planning brought up and  
10 I mentioned earlier looking at the association  
11 for preservation of 1700 Block of N Street  
12 case. In this case the Court of Appeals which  
13 would be at the board indicates that the  
14 petitioner in that Court of Appeals case  
15 challenged YMCA arguing that their hardship  
16 was self created. And the Court of Appeals  
17 confirmed that even though to the extent that  
18 metro YMCA had full knowledge of all problems  
19 with the alleged space to land, type of zoning  
20 and costs of putting in parking prior to  
21 purchasing the building, prior to purchasing  
22 the building in March of 1978. The YMCA's

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1 self created hardship is not a factor to be  
2 considered in an application for an area  
3 variance. However, as the factor applies only  
4 to a use variance. With that being said, it  
5 seems that the Office of Planning's Court of  
6 Appeals, I'm sorry, Office of Planning court  
7 tries to focus on a question of is there a  
8 self created hardship here because of  
9 potentially the purchase price? And then they  
10 are comparing that to the office of tax and  
11 revenues assess value. The one thing that the  
12 Office of Planning points and focused on is  
13 the fact that the current property is a  
14 classification. We've got copies for everybody  
15 if they would like is currently classed as  
16 commercial and is currently classed as -- I'll  
17 pass these out for you to look at. And so in  
18 reviewing, what I've done is actually, I know  
19 the board doesn't want to do this but I read  
20 through the District of Columbia's Office of  
21 Tax and Revenue, property tax, guidelines and  
22 assesses how they actually figure out how to

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1 assess a property. There are mathematical  
2 equations that they go through in regards to  
3 multiplying figures for both residential  
4 property and then a separate factor in  
5 calculations for calculating commercial  
6 values. The current property assessed value  
7 is based on a commercial factor. Not only is  
8 it a commercial factor, it is a special  
9 purpose factor. Each of those factors and  
10 codes correspond into a base rate. Those base  
11 rates then have about eight different factors  
12 which are multiplied, divided and done all  
13 kinds of mathematical things I don't totally  
14 understand. It addresses the fact that what  
15 they do, is they also multiply in reduction  
16 based on the size adjustment factor. Each use  
17 has a specific normal size adjustment. And so  
18 the special purpose use actually has a typical  
19 2,000 square foot size and as you get larger  
20 your base rate gets reduced and it also  
21 calculates additional things such as  
22 variables, adjustments, depreciation, which

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1 are factors as to why this assessed value is  
2 exceptionally low.

3 Now let me just show you this next  
4 quick slide and I'll try to walk you through  
5 this very quickly.

6 CHAIRMAN JORDAN: I think I  
7 understand how they do their assessments. I  
8 think we are okay with that. I think we are  
9 okay. We give it for its value, what its  
10 worth in the Office of Planning's report about  
11 assessed values done by any municipality.

12 MS. MOLDENHAUER: We just want to  
13 make sure that is adequately addressed. We  
14 are just showing the purchase price would be  
15 in line with the assessed values with the  
16 assessed values actually based on a  
17 residential value. So, that being said I will  
18 then, I will hold off on my summation of how  
19 the applicant satisfies the three prongs until  
20 potentially the board has any questions and we  
21 address any questions or discussions of OP.

22 CHAIRMAN JORDAN: No in fact I

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1 think I must say I think I misspoke earlier  
2 because this is a use variance and not a area  
3 variance and you just have to show practical  
4 difficulty. As I said earlier, I've been  
5 missing a step before I got here this morning  
6 and I just had another one. But yes, I think  
7 we are clear where we are. I think we just  
8 need to turn to Office of Planning and see if  
9 there's anything that they want to add or  
10 subtract from their report or to further  
11 emphasis but we have read the report and we  
12 know where you are.

13 MR. JACKSON: All right. Thank  
14 you Mr. Chairman, members of the board. I am  
15 Arthur Jackson, Office of Planning. You have  
16 your report before you. I think the one thing  
17 I want to clarify was in the report there's,  
18 on the last page, there's a reference to  
19 adjacent property that is the same size and  
20 that is slated for eight units. I should  
21 explain. The property actually is not  
22 residential at this time. It is a community

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1 center. What I did was refer to the master  
2 address directory for this district and so if  
3 that property was used, had at one time eight  
4 addresses, in essence eight units on the same  
5 size lot that's immediately behind the  
6 property. Now I'm going to get, the map on  
7 the last page of the OP report, that map. The  
8 highlighted property across the alley. That,  
9 we are making reference to what the master  
10 address file, the District Master Address file  
11 indicates --

12 CHAIRMAN JORDAN: Which is in the  
13 broken lines?

14 MR. JACKSON: Yes on Gerard  
15 Avenue. The same size lot. It has, under the  
16 master address file at what time it has as  
17 many as eight units. It is currently not  
18 residential. It is being used as a community  
19 center. It was approved under the BZA order  
20 17638 I believe. It is currently functioning  
21 in that role. So again I just wanted to  
22 clarify that.

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1                   CHAIRMAN JORDAN:       So it is not  
2 residential?

3                   MR. JACKSON:       No, but at one time  
4 had eight units which would have been allowed.

5                   CHAIRMAN JORDAN:       Why isn't it  
6 residential now?

7                   MR. JACKSON:       It came in as a  
8 special exception to become a community  
9 center. So the Chinese American community  
10 center for that community.

11                   MS. MOLDENHAUER:       Are you  
12 referencing 1323 Gerard?

13                   MR. JACKSON:       Yes.

14                   CHAIRMAN JORDAN:       The 7,230  
15 square foot land area?

16                   MR. JACKSON:       Yes.

17                   CHAIRMAN JORDAN:       You don't know  
18 if they tried to operate this residential do  
19 you?

20                   MR. JACKSON:       Well that, the  
21 special exception was renewed about three  
22 years ago. So I think it was residential

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1 prior to its being established as a community  
2 center there.

3 CHAIRMAN JORDAN: But for some  
4 reason its not residential anymore.

5 MR. JACKSON: It's a community  
6 center now.

7 CHAIRMAN JORDAN: Yes, I know but  
8 we don't know why it didn't continue as a  
9 residential?

10 MR. JACKSON: No we don't.

11 CHAIRMAN JORDAN: Whether or not  
12 they couldn't make it work as it was with  
13 eight units. We don't know that.

14 MR. JACKSON: I have no more  
15 background than what I have given you. So  
16 again that's the Office of Planning report and  
17 we are available to answer questions.

18 CHAIRMAN JORDAN: Thank you.  
19 Very thorough report as usual. But you  
20 realize, we talked about the hardships in the  
21 report as different than the difficulties, and  
22 a difficulty is a difficulty. I know if we are

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1 required to say this is more difficult than  
2 the other, just that the applicant is required  
3 to show that there is a difficulty. Would you  
4 agree with that?

5 MR. JACKSON: Well, on the  
6 property, yes. But I guess the Office of  
7 Planning report really focused on, in looking  
8 at the financial analysis that was provided by  
9 the applicant, which is very thorough. That  
10 analysis seemed to include the impact, the  
11 financial impact of the improvements that are  
12 necessary to bring the property up to speed  
13 and it seems like the applicant, obviously the  
14 applicant should have started from what was  
15 allowed on the property and what are you doing  
16 about, which would have been eight units.  
17 Given that, so the focus would have been on  
18 the first scenario. If you go to Exhibit A.

19 CHAIRMAN JORDAN: I thought it  
20 would have been eight units.

21 MR. JACKSON: Yes, yes. The  
22 Exhibit A, the eight unit scenario, you see

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1 that it does not, it has a negative return.

2 CHAIRMAN JORDAN: Negative  
3 return.

4  
5 MR. JACKSON: Right. But if you  
6 actually factor in the fact that given all the  
7 issues at the property and given the problems  
8 that they detailed, the narrow walls, the non-  
9 conforming courts, the fact that they had to  
10 remove commercial improvements and all, given  
11 that information then it really appears that  
12 the purchase price for the property should  
13 have been more in line with the assessment.  
14 Now, I know they are working and that the  
15 military's competitive bidding. But if you  
16 actually look at a purchase price of 1.7 or  
17 even 1.8 million as opposed to 2.4 the eight  
18 unit scenario would appear to work. But  
19 again, we don't have those calculations,  
20 because everything changes. You have lower  
21 debt service. You might, there might be some  
22 additional fees. So on its face, it appears

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1 that there was probably, there was an -- and  
2 based on what's allowed on the property as a  
3 matter of right now. That should have been  
4 the starting point. Given that information  
5 all the challenges that the property has, the  
6 price for the purchase should have been much  
7 lower. If that would have been the case, it  
8 would have been more in line with what the  
9 assessment is. How they arrived at it, the  
10 current assessment is, then the eight unit  
11 scenario at least based on the notice we have  
12 before us, would seem to be workable and  
13 feasible on this site. So that was it. I do  
14 appreciate the applicant taking us on the  
15 tour. We do see there are challenges on this  
16 site. And it was quite exhilarating going up  
17 around those stairs I must say in that narrow  
18 hallway. But, be that as it may, and we also  
19 discussed difficulties in going through and  
20 trying to find out what the original, the  
21 apartment building and how many units may have  
22 been in that apartment building. That

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1 information is as it appeared. But again if  
2 you start from what's allowed under matter of  
3 right and you look at what the issues are with  
4 this property, then the conclusion would seem  
5 to have been that you wouldn't pay more than a  
6 set amount for the project.

7 CHAIRMAN JORDAN: I appreciate  
8 that. But there's the line of questions --  
9 cases. Told you I'm off today. Line of cases  
10 that deal with the issue of the hand that's  
11 dealt or the hand that's accepted by the  
12 applicant in a lot of these cases and its not  
13 necessarily our job or duty to question that  
14 aspect, one which they were not underlying and  
15 control of these factors. They may have known  
16 some things but especially something like  
17 purchase price and etc. they start to get a  
18 little bit beyond what we are required to  
19 consider. Any question for Officer Jackson?  
20 Anything from the board you think you need to  
21 ask Mr. Jackson, that you need to ask? I  
22 think our record is pretty clear.

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1 MS. MOLDENHAUER: I will refrain  
2 from asking questions to Officer of Planning.

3  
4 CHAIRMAN JORDAN: I think we  
5 understand Mr. Jackson's report and where we  
6 are in this matter. Is there anyone here from  
7 Department of Transportation? You have their  
8 report. They recommend their usual no  
9 objections. The recommendation is no  
10 objection. I don't know how that flows but it  
11 is no objection. Is anyone here from ANC 1A?  
12 ANC 1A? We do have a letter of support, very  
13 strong letter of support from ANC 1A  
14 recommending approval by a vote of 11 to 0  
15 with a quorum present, which we would  
16 definitely have to give great weight to. We  
17 do have a lot of letters in support. Like  
18 forty something, 44 letters in support of this  
19 project from neighbors and people around the  
20 project, which I guess compared to the other  
21 issue that, the other use that it had, they  
22 are happy to give. Is anyone here wishing to

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1       testify in support of this application?  
2       Anyone wishing to testify in support of this  
3       application?  Anyone here wishing to testify  
4       in opposition to this application?  Anyone in  
5       opposition?  Then we normally return to the  
6       applicant for rebuttal or closing but I don't  
7       know if one's really necessary to have a  
8       rebuttal or closing on this matter.  Unless  
9       the board has other issues that they think  
10      need to be addressed?  Okay.  Anything?  So  
11      its up to you to do a rebuttal or closing if  
12      you wish?

13  
14                   MS. MOLDENHAUER:  I'll do a brief  
15      five second closing just to make sure that all  
16      the points are on the record.  We believe the  
17      applicant has satisfied the three prongs by a  
18      confluence of factors based on the fact that  
19      the property was originally built as an  
20      apartment.  That they are returning the  
21      building into apartment use, that the  
22      applicant is working within the existing

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1 structure, an envelop which has three existing  
2 non-conforming courts creating unuseful  
3 windows for bedrooms. The prior use was a  
4 substance abuse home with 64 beds and that  
5 unique diversity is actually being reduced by  
6 the proposed project for the 16 units. The  
7 square is a unique square that is split  
8 between three different zones. The other two  
9 zones which are permitting of an apartment  
10 building. There is a 15 unit apartment  
11 building to the east of this project as well.

12 And the unique aspects of the building, which  
13 would need to be removed and the costs  
14 associated with that. Based on those factors  
15 of practical difficulty exists, as we heard  
16 expert testimony from an individual from a  
17 lending institution regarding the required  
18 return and the cash flow requirement. We also  
19 heard testimony from an expert in real  
20 property from Gray Steel confirming that the  
21 purchase price was determined by a market rate  
22 where there are multiple offers received. And

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1 the applicant provided significant information  
2 regarding the extensive work on the property  
3 in order to have a practical difficulty to  
4 return this property to residential and the  
5 necessity for 16 units in order to have the  
6 project be viable. We don't believe that this  
7 would be a detriment to the public good for  
8 the zone plan based on the extensive support  
9 from the ANC and the neighborhood as the chair  
10 pointed out with the additional letters of  
11 support. And we believe this is returning a  
12 project to its original apartment use and  
13 reduction of density to 26 bedrooms and 16  
14 units. Based on the above, we find that the  
15 applicant, we believe the applicant has  
16 satisfied the standards and would ask the  
17 board to deliberate and provide us with a  
18 bench decision. Thank you.

19 CHAIRMAN JORDAN: Okay. With  
20 that then we will close the record. Is the  
21 board ready to deliberate on this matter? I  
22 would move that we grant the request for

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1 relief in case no. 18617.

2 VICE-CHAIR COHEN: And I would  
3 send that.

4 CHAIRMAN JORDAN: Motion made and  
5 seconded. Any unreadiness? Seeing none, all  
6 those in favor signify by saying aye.

7 [CHORUS OF AYES]

8 CHAIRMAN JORDAN: Those opposed  
9 nay. Mr. Moy.

10 MR. MOY: Staff would record a  
11 vote of 3 to 0 on the motion of Chairman  
12 Jordan to approve the application for the  
13 relief request. Seconded the motion Ms.  
14 Cohen. Also in support we have Mr. Hinkle. We  
15 have a board member absent, a board seat  
16 vacant. The motion carries on a vote of 3 to  
17 0. Mr. Chairman.

18 Before I call the next case, Mr.  
19 Chairman, just to inform the board that during  
20 the course of the hearing of the last  
21 application, the BZA is in receipt of a  
22 pointer. We have a pointer.

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1 [Laughter]

2 MR. MOY: So next up is  
3 Application No. 18514. This is an application  
4 of Andrew Daly and Patty Jordan, pursuant to  
5 DCMR 3104.1 and 3103.2. This is a request for  
6 a special exception under section 223, not  
7 meeting the lot occupancy requirements under  
8 section 403, variance from the parking space  
9 dimensions requirement under subsection  
10 2115.1, variance from the garage setback  
11 requirement under subsection 2300.2(b) to  
12 allow a detached garage addition serving a  
13 one-family dwelling in the R-4 District, at  
14 premises 1120 Park Street NE, Square 987, Lot  
15 8. As the board will recall this application  
16 was previously postponed from March 12, March  
17 21 and July 23.

18 CHAIRMAN JORDAN: Do we have  
19 someone? Anyone here for 18514? 18514, going  
20 once, going twice. I guess it's not that  
21 important. 18514, then let's move this off  
22 the docket and give notice. Next time we will

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1 continue on the next docket, whatever docket  
2 we put this on.

3 MR. MOY: Typically, well I  
4 shouldn't say typically. If the board wants  
5 to move this to next week then certainly --

6 CHAIRMAN JORDAN: We're not  
7 giving that type of grace. What's the next  
8 look like?

9 MR. MOY: We have --

10 CHAIRMAN JORDAN: Where can we  
11 comfortably put this case on the docket where  
12 we are not stressing the board?

13 MR. MOY: We've been running ten  
14 to twelve cases every Tuesday now.

15 CHAIRMAN JORDAN: We are not  
16 trying to do any favors if they failed to  
17 show. But we do have to give them an  
18 opportunity before we dismiss their case to  
19 show up.

20 MR. MOY: Okay. I think the  
21 board can comfortably address this application  
22 on October 8.

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1 CHAIRMAN JORDAN: Okay.

2 MR. MOY: Do you want longer?

3 CHAIRMAN JORDAN: That's fine.

4 October 8.

5 MR. MOY: And of course in the  
6 mean time staff will get in touch with the  
7 applicant Mr. Chairman.

8 CHAIRMAN JORDAN: Okay, before we  
9 call our last case on the docket, I'm going to  
10 take a five minute break and then we will take  
11 the last case on our docket. That's correct,  
12 18615 is the last case? Okay then we will do  
13 that.

14 (Whereupon the foregoing matter  
15 went off the record at 11:42 a.m. and went  
16 back on the record at 11:52 a.m.)

17 CHAIRMAN JORDAN: Back on the  
18 record. Would you call the next case please  
19 Mr. Moy?

20 MR. MOY: Yes sir. The last  
21 application for public hearing is Application  
22 No. 18615. As advertized it is the appeal of

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1 the Advisory Neighborhood Commission 3/4G,  
2 pursuant to 11 DCMR 3100 and 3101 from an  
3 April 3, 2013 and May 28, 2013, decision by  
4 the Department of Consumer and Regulatory  
5 Affairs to issue building permits B as in  
6 bravo 1208792, F as in foxtrot, D as in delta  
7 1200052 and SH, sierra hotel 1200128  
8 authorizing the construction of an apartment  
9 building in the R-5-D District, premises 5333  
10 Connecticut Avenue NW, Square 1873, Lot 128.

11 CHAIRMAN JORDAN: Will the  
12 persons at the table please introduce  
13 themselves please. Mr. Surabian would you  
14 begin?

15 MR. SURABIAN: Good morning,  
16 members of the board. Assistant Attorney  
17 General Jay Surabian on behalf of DCRA.

18 MR. LeGRANT: Good morning.  
19 Matthew LeGrant. I'm the zoning administrator  
20 with DCRA.

21 MR. HAWKINS: Good morning. I'm  
22 Don Hawkins, the architect and I will be

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1       testifying on behalf of 5333 CNC.

2                   MS. LENYK: Good morning. I'm  
3       Elizabeth Lenyk and I'll be testifying on --  
4       I'm an architect and testifying on behalf of  
5       5333 Connecticut Neighborhood Coalition.

6                   MR. KEYS JR.: My name is George  
7       Keys. I'm from Jordan and Keys PLC and I'll  
8       be representing 5333 CNC.

9                   MR. GRAHAM: Good morning. I'm  
10      Richard Graham. I am a homeowner, adjacent to  
11      the site and I'm also the chair of the 5333  
12      CNC.

13                  MR. QUIN: I apologize. I wasn't  
14      planning to say anything but I think it would  
15      be wise just to go ahead and say that my name  
16      is Whayne Quin of the law firm of Holland and  
17      Knight with Dennis Hughes also one of my  
18      partners at Holland and Knight. We represent  
19      the owner of the property, CMK Development  
20      LLC.

21                  CHAIRMAN JORDAN: All right.  
22      Good. Thank you. This matter is an appeal

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1 matter and I think this matter has been well  
2 briefed. So the way we are going to handle.  
3 Each party will have 20 minutes to do their  
4 presentation. Highlight what you want to  
5 highlight in your presentation. Put on  
6 evidence if you want to put on evidence. But  
7 there's going to be 20 minutes per party.  
8 We've, I'm clear the board has already read  
9 all of the documentation, looked at all the  
10 evidence that's already been submitted. And  
11 generally we are well abreast of where we are.

12 But certainly its your opportunity to handle  
13 your time whichever way you would like to.  
14 And so with that, Mr. Moy you want to make the  
15 announcement about the ANC withdrawing their  
16 parties', their request in this?

17 MR. MOY: Well, I could. Our  
18 understanding on the record is that ANC to the  
19 averment for the appeal, ANC 3/4G has  
20 withdrawn their appeal, for the record.

21 CHAIRMAN JORDAN: Okay. So what'  
22 we'll do is have the applicant do their

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1 presentation and then followed by the  
2 Department of Regulatory Affairs and then we  
3 will have certain, the case by the owner and  
4 allow each a cross-examination if necessary.  
5 So I believe Mr. Keys you are representing 53  
6 --

7 MR. KEYS JR.: First, Mr.  
8 Chairman, I would like to ask the board's  
9 indulgence. I don't see how an issue this  
10 complex on this site with a building this  
11 complex with these issues that we've raised,  
12 can be addressed in 20 minutes. If the board  
13 is prepared to be elastic with that time. We  
14 will not waste the board's time. But we've  
15 timed out what we think we need to say and I'm  
16 fairly certain that 20 minutes is an  
17 insufficient amount of time to deal with the  
18 issues that were raised in this case.

19 CHAIRMAN JORDAN: You've briefed  
20 this matter. We've read the matter. We've  
21 looked at the evidence, submitted, but I tell  
22 you what. We will give some flexibility. Ms.

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1 Cohen?

2 VICE-CHAIR COHEN: You timed it  
3 out? So how long would you need?

4 MR. KEYS JR.: I think 40 minutes  
5 would be sufficient.

6 CHAIRMAN JORDAN: I think 40  
7 minutes is a bit too much for what's already  
8 been briefed and we don't come here and first  
9 start looking at these cases. We look at  
10 these things and we put in at least eight  
11 hours before coming here, at least that to go  
12 through these matters. I tell you what, we'll  
13 do 30 and then those 30 minutes need to be  
14 used wisely.

15 MR. KEYS JR.: I understand.

16 CHAIRMAN JORDAN: If we get into  
17 repetition, if we get into matters which I  
18 think that are not relevant to where we are,  
19 I'm going to cut you off. That goes for  
20 everyone.

21 MR. KEYS JR.: Mr. Chairman there  
22 are two preliminary procedural matters that I

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1 would like to bring to your attention. The  
2 first is although I am on the pleadings that  
3 were submitted, the pre-hearing statement of  
4 the applicant. There is not a formal letter  
5 designating me as counsel. That's an omission  
6 that I will correct and supplement the record  
7 subsequent to the hearing, if that's  
8 acceptable.

9 CHAIRMAN JORDAN: Okay. I  
10 thought you were on the pleadings too, so go  
11 ahead. That's fine.

12 MR. KEYS JR.: The second  
13 procedural preliminary matter is just that I  
14 noted actually last night that the pre-hearing  
15 submission we submitted a witness CV, Don  
16 Hawkins. But only the first page managed to  
17 get into the bound copy of his CV. It is an  
18 eight-page CV. I have provided Mr. Moy with  
19 the full CV of Mr. Hawkins and we would  
20 request that the board accept his testimony as  
21 an expert in architecture and in maps of the  
22 District of Columbia.

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1                   CHAIRMAN JORDAN:     Let's take a  
2 look at his information. Thank you.

3                   MR. KEYS JR.:       And if it may  
4 simplify it, I would direct you to the second  
5 page, near the top. He has been previously  
6 qualified before the BZA as an architectural  
7 expert.

8                   CHAIRMAN JORDAN:     I just looked  
9 and I did not see that.

10                  MR. KEYS JR.:       Second page.

11                  CHAIRMAN JORDAN:     I see what's  
12 represented there and I don't see in the BZA  
13 records. Let me go back through that.

14                  MR. KEYS JR.:       In 2008.

15                  CHAIRMAN JORDAN:     I don't see in  
16 the BZA records that is the case. So that's  
17 why I already checked that. Mr. Moy, our  
18 expert records are pretty much up to date.  
19 Would that be correct?

20                  MR. MOY:            Yes sir, that's my  
21 understanding.

22                  VICE-CHAIR COHEN:    Mr. Chairman?

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1 CHAIRMAN JORDAN: Yes.

2 VICE-CHAIR COHEN: Having  
3 reviewed the CV, I have no objection to  
4 authorizing this person as an expert witness.

5 CHAIRMAN JORDAN: Okay. Just  
6 give me a second. We'll accept Mr. Hawkins as  
7 an expert. Mr. Moy, make sure we have him  
8 listed in the book.

9 MR. MOY: The staff will take  
10 care of that Mr. Chairman. We propose him as  
11 an expert for architecture and maps of the  
12 District of Columbia.

13 CHAIRMAN JORDAN: Yes.

14 VICE-CHAIR COHEN: You've done an  
15 enormous amount of writing and I respect that.  
16 Have you designed anything?

17 MR. KEYS JR.: I'm sorry, Mr.  
18 Hawkins is --

19 VICE-CHAIR COHEN: I'm sorry, Mr.  
20 Hawkins.

21 MR. HAWKINS: My architectural  
22 practice I began in 1967 in the District of

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1 Columbia and specialized in residential work.

2 VICE-CHAIR COHEN: Okay, thank  
3 you.

4 CHAIRMAN JORDAN: Let's begin.  
5 Clock starting.

6 MR. KEYS JR.: Good morning Mr.  
7 Chairman and members of the board. My name is  
8 George Keys and I am representing the  
9 appellant.

10 CHAIRMAN JORDAN: Excuse me just  
11 one second. Mr. Moy, because we gave  
12 additional time, we keep a running clock.  
13 Okay, proceed.

14 MR. KEYS JR.: We're challenging  
15 the decision of the zoning administrator and  
16 issuing a building permit for 261 unit  
17 apartment building at the subject property.  
18 The appellant represents the common opinions  
19 and views of almost 600 Chevy Chase residents  
20 who perceive themselves to be directly and  
21 adversely impacted by the gross construction.  
22 And there are two basic factors leading to

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1 the appeal. One is, this is a very  
2 knowledgeable community because many were  
3 resident in the community at the time the  
4 developer first proposed to build an apartment  
5 building on this site almost 30 years ago.  
6 After a four year planning process, consensus  
7 was reached on a 240 unit apartment house and  
8 that was embodied in a PUD. It is important  
9 to note that apartment house 4 FAR was a nine-  
10 story building that sloped down to six stories  
11 as it approached the R-1-A and R-1-B  
12 neighborhoods abutting the subject property.  
13 This agreement resulted in a PUD in 1990 and  
14 to accommodate that PUD the alley system  
15 within the square was reconfigured. The PUD  
16 was never built. The order expired within a  
17 few years after a couple of extensions by the  
18 developer. The next motive or impetus behind  
19 this appeal is that the community believes the  
20 project exemplifies one in which the  
21 regulations had been stretched and contorted  
22 by routine interpretation by officials

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1 including the zoning administrator. To the  
2 extent, to such an extent that the purpose and  
3 intent of the zoning scheme is really  
4 undercut. While such of the --

5 CHAIRMAN JORDAN: Let me say for  
6 the sake of this hearing for everybody, let's  
7 not characterize anybody. Let's just present  
8 the facts as they are and talk about where we  
9 are factually on matters. Proceed.

10 MR. KEYS JR.: We have three  
11 witnesses we want to present. First,  
12 Elizabeth Lenyk who will describe the building  
13 as depicted in the plans and point out the  
14 issues related to this appeal. Ms. Lenyk.

15 MS. LENYK: Good morning.

16 CHAIRMAN JORDAN: Good morning.

17 MS. LENYK: Good morning. I just  
18 wanted to give you a quick orientation of the  
19 project. I want to give you an idea of who we  
20 are, the location of the project and its  
21 overview.

22 CHAIRMAN JORDAN: Okay.

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1 MS. LENYK: The 5333 Neighborhood  
2 coalition is a community of concerns citizens  
3 near the proposed project. The community has  
4 near unanimous opposition to the building due  
5 its being overbuilt in our opinion. There are  
6 500 neighbors, over 500 neighbors who have  
7 signed our petition urging DC government and  
8 our elected officials to address the  
9 neighborhood's concern regarding the  
10 building's density and height.

11 If you look on slide 4 you can we  
12 have the, we are in the north upper  
13 Connecticut Avenue of the District of  
14 Columbia. In the comprehensive plan we are  
15 Rock Creek West. The issues of concern for  
16 what Rock Creek West residents is infill  
17 projects which this is one and it has the  
18 development challenge for us. As you can see  
19 its found on the north on military road to the  
20 east by Connecticut Avenue and to the south by  
21 Kanawha.

22 If you see the site is the

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1 undeveloped area and this was originally ten  
2 houses.

3 CHAIRMAN JORDAN: These are the  
4 houses that were there? Is that what you are  
5 saying?

6 MS. LENYK: I'm sorry. One  
7 moment. I'm sorry. What was the question?

8 CHAIRMAN JORDAN: The picture of  
9 the house. You said something about its  
10 currently vacant.

11 MS. LENYK: Yes, the area is  
12 currently vacant but it was originally ten  
13 house units. And if you look on the site that  
14 surrounding the site we have, if you can look  
15 on the slide you can see surrounding the site  
16 to the north we have single family homes.  
17 These are townhouses, single family homes.  
18 Single family homes, there's a small alley in  
19 between. Single family homes and an apartment  
20 building. We also have townhouses and an  
21 apartment building on the corner of  
22 Connecticut and Military. So as you see

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1 there's a lot of varied density and they have  
2 social economic from all ranges.

3           The next slide is showing the  
4 zoning. It is shown as a park that is  
5 actually residential, I'm sorry, it's a vacant  
6 lot. But you can see again this one shows a  
7 little more clearly the change in densities  
8 around the building. I'm going to give you  
9 just a quick tour of the neighborhood so you  
10 can get a feel for the density surrounding the  
11 vacant lot. This is clockwise going around  
12 the site. We have Kanawha Street, single  
13 family dwellings. This is the smallest street  
14 with a right-of-way of 50. Next to that we  
15 have apartment buildings at Kanawha and you  
16 can see the green area, that is the site.  
17 Then across the street on Connecticut, we have  
18 Kanawha and Connecticut townhouses. Then at  
19 the Avenue townhouses going clockwise,  
20 apartment buildings at the northeast corner of  
21 Military and Connecticut Avenue. Townhouses  
22 on Connecticut Avenue, the same development.

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1 And then townhouses on Military Road, Military  
2 Road, single family dwellings. This gives you  
3 an overview of the neighborhood. Then the  
4 wide variety, we have two apartment buildings,  
5 townhouses and then single family dwellings.  
6 These houses were built right after during  
7 World War 1 so our neighborhood has been here  
8 for about 100 years.

9 This is the building design that  
10 we are appealing. I would like you to note  
11 densities. You can see some of them in the  
12 photograph. This is the towers when we were  
13 talking about the apartment building across  
14 Kanawha Street. Our smallest, 50 foot right-  
15 of-way. This is the view from Connecticut  
16 Avenue. You see the houses in the background.

17 You can see the small scale and the change in  
18 scale. Just very characteristic of our  
19 neighborhood but that particular border  
20 becomes very, very important to maintain the  
21 property values of the existing houses and  
22 apartment buildings surrounding the new

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1 development for the infill development.

2 What I am showing you here is the  
3 site plan. This is what that building looks  
4 like on the vacant lot. In the area is the  
5 actual footprint and its kind of an H  
6 configuration or a dumbbell. And you can most  
7 of the massing is on Military which is longer  
8 than the Connecticut Avenue 130 right-of-way.

9 So in the comprehensive plan it talks about  
10 having all the mass on Milit -- I'm sorry  
11 having all the mass on Connecticut and then  
12 stepping back down. Our neighborhood has  
13 these wonderful apartment buildings that march  
14 up Connecticut Avenue and they add, we are  
15 very fortunate to have them and they a rich  
16 part of our neighborhood. So we are not empty  
17 development and we aren't a large apartment  
18 building. It's just the, we are trying to ask  
19 for sensitivity to our neighborhood.

20

21 The next one, what you see on the  
22 red line is the property line. The lighter

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1 tan area is a cellar level courtyard. The  
2 area of the sidewalks and if you can see we  
3 have an alley and service areas and then this  
4 feeds off to a small ten foot public alley.  
5 As we were talking about the height and  
6 density of this particular project -- this way  
7 you can see this building is to be 90 feet in  
8 height. But the mattering point is of  
9 concern. And so in this particular diagram,  
10 our lawyer has asked me to pull out at each  
11 corner of the building and the center, the  
12 beginning of the corner of Kanawha on the  
13 northern side of the site. As you can see the  
14 elevation and there are two points that are  
15 noted there. The sidewalk and on top of curb.  
16 So on this east corner of Kanawha Street, if  
17 you say that the measuring point is elevation  
18 13,137.00 you will see that the very, very  
19 corner, the building height is 89 feet, 9  
20 inches. To the center its 91.9. To the  
21 corner its 95.4. At the center of Connecticut  
22 Avenue its 100.5 feet. Again I'm working

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1 clockwise around the site. On the western  
2 corner of Military its 108. Because this  
3 slopes gently to the north approximately 20  
4 feet drop in elevation, at the center of  
5 Military its now 104.9 feet. And at the very  
6 east corner of Military is 110.5 feet. As we  
7 were talking about the H configuration this is  
8 a diagram showing the section through the  
9 building where we are clicking both you are  
10 being able to view the elevation of the area  
11 of the building through the ends of the H.  
12 And what you can see is there is almost two  
13 levels of below grade parking. Once cellar  
14 level and there are nine floors. The top of  
15 curb on this particular diagram is 317.00.  
16 Now the applicant has made several submissions  
17 or permits so this particular permit is the  
18 foundation plan. It is one of the three. And  
19 as we go through our testimony, you will see  
20 that this where they are counting or where  
21 they are measuring depending on which permit  
22 you are discussing. So, just keep that number

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1 mind, 317 elevation. And at this particular  
2 submission it was top of pool deck, 407, which  
3 means 90 feet.

4 This is the section across going  
5 on Military Road and you can see the size of  
6 the mass and again it's the same unless two  
7 floors of below grade parking, a cellar level  
8 plus nine floors and the property line is in  
9 read. Thank you.

10 MR. KEYS JR.: I'd like to ask  
11 Mr. Graham, the chairman of the 5333 CNC to  
12 offer a little more specifics as to the  
13 arguments we are making.

14

15 MR. GRAHAM: Thank you.  
16 Obviously some of our arguments are like  
17 nuance and while we submitted quite a detailed  
18 pre-hearing statement, that certainly does not  
19 fully explain some of the complexity of the  
20 exhibits which are complicated architectural  
21 plans with some oddities that are not fully  
22 pointed out in the exhibits. So with that

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1 said, I will jump straight into our straight  
2 issue, which is when we look at this building  
3 versus the PUD, one of the first things that  
4 we noticed is that this building which  
5 ultimately based on the final, final approved  
6 PUD is almost identical FAR of close to 4.2.  
7 This building happens to be roughly 12 to 13  
8 percent larger than the PUD. So one of the  
9 questions that we had was how was this  
10 building 12 or 13 percent larger when it was,  
11 should be almost an identical FAR. What we  
12 quickly found out was that the cellar level or  
13 the level that they call the cellar level had  
14 been manipulated to the point that they  
15 excluded entirely in one set of plans and  
16 apparently there is a second set of plans  
17 where its almost entirely excluded. If you  
18 look at the cellar floor plan here you notice  
19 that there is a large moat and not only is it  
20 an elevated moat which wraps around the  
21 building several hundred feet and the top of  
22 that moat happens to be 307.54 feet, which is

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1 the key elevation with regard to the cellar  
2 level. You will see it come up again and again  
3 at multiple artificial measuring points. The  
4 bottom of elevation of the areaway where the  
5 moat is 302 feet. Each of these cellar units  
6 that you see on here, you can see the actual  
7 apartment units, looks greatly down upon  
8 Military Road. It looks greatly down upon  
9 Connecticut Avenue. The cellar level units  
10 are in the sky relative to the buildings that  
11 they look at. Yet they are called, the cellar  
12 level by manipulation that will go through.  
13 So again the top of the wall --

14 VICE-CHAIR COHEN: You're talking  
15 about a moat, but I don't --

16 MR. GRAHAM: It's an areaway.

17 CHAIRMAN JORDAN: It's an areaway  
18 and he's just calling it a moat.

19 VICE-CHAIR COHEN: Okay.

20 MR. GRAHAM: And it happens to be  
21 highly elevated relative to what the grade was  
22 and what the grade truly is.

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1 VICE-CHAIR COHEN: Okay.

2

3 MR. GRAHAM: So the top of the  
4 wall along here is 307.54 feet. The bottom of  
5 the wall, the bottom of the areaway is a five  
6 foot drop down. The units that are along  
7 there have near floor to ceiling windows along  
8 these walls. These units actually have  
9 walkout patios and they are designated patios  
10 all along and they are at an elevation of  
11 302.5 feet, which would make them roughly nine  
12 feet below the ceiling level. So these cellar  
13 units happen, well the zoning code  
14 specifically refers to the four foot  
15 difference between the grade and the top of  
16 the ceiling. These are far, far greater and  
17 they are done purely through artificial means.  
18 They are done through a berm which is adjacent  
19 to the wall and sits on top of another part of  
20 the building as we'll see. They are done by  
21 planter boxes in the courtyard. The planter  
22 boxers are what they are referred to as

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1 adjacent finish grade. And then in a later  
2 plan as you will see the courtyard which still  
3 has a slab of 302.5 feet, they eventually add  
4 some artificial, they add artificial platform  
5 on top of that. Clearly in each of these  
6 instances the adjacent grade and the grade  
7 that used to exist is no where near 307.54  
8 feet and these units clearly should be  
9 basement or considered above grade. They  
10 should not be cellar. And only if you look at  
11 the building, the only arguable part of the  
12 building on this level that you could argue is  
13 truly a cellar is this point from here to  
14 here, which in terms of linear feet, is  
15 probably less than 25 percent of the floor.  
16 It's almost inarguable in my mind that at  
17 least 75 percent of this floor is not counted  
18 in the FAR. Again, its planter boxes and we  
19 see as we flip to the next exhibit --

20 CHAIRMAN JORDAN: You not saying  
21 that none of the cellars are included in the  
22 FAR by the administration?

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1                   MR. GRAHAM:     They include 12.34  
2 percent in the final plans. The plans we had  
3 gotten from DCRA appear to be an older set of  
4 plans but in the end and I think they walk  
5 through that in Exhibit P or R perhaps. The  
6 minuscule little segments that they include in  
7 their cellar versus the 75 percent we think  
8 should be included.

9                   CHAIRMAN JORDAN:     So you think  
10 it's more than 12 percent, 75 percent should  
11 be included?

12                   MR. GRAHAM:     Yes. So as you see  
13 along here, there are and the to make sure  
14 that this is clear. They are floor to ceiling  
15 or very near floor to ceiling windows behind  
16 this. But they have created a wall with an  
17 earth berm that steeply goes up to that wall  
18 to essentially bring something that was above  
19 grade, below grade. And again as you see they  
20 always point to the 307.54. as the key  
21 measuring point. You'll see the same thing on  
22 the Connecticut side just to show you visually

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1 on the elevation that this same is used over  
2 here. It's and this is sort of the area that  
3 we call the moat, is that little square there  
4 and that little square behind there. And the  
5 top of the wall is 307.54. This was sort of  
6 what they originally as being a grade leading  
7 up to the wall.

8 CHAIRMAN JORDAN: That's not  
9 existing. That's finished grade?

10 MR. GRAHAM: Well its probably,  
11 it was probably fairly close to existing  
12 grade. In the later set of plans they just  
13 mound the dirt more steeply up against here.  
14 But you'll see below this, is actually the  
15 building. So the building actually extends  
16 out to there and all of this is sort of a wall  
17 on top of a building that's connected to the  
18 P1 parking level. So there's no assemblance  
19 of dirt except the dirt that after they  
20 excavated that they put back a little bit on  
21 top of the slab that extends out another  
22 roughly eight or nine feet past here.

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1                   CHAIRMAN JORDAN:    So specifically  
2                   the parking level all the way up to here?

3                   MR. GRAHAM:     So the parking level  
4                   essentially goes all the way up underneath  
5                   where that dotted line is.  And you can see  
6                   that they simply built a little bit of dirt on  
7                   top of the parking garage to try to meet up  
8                   with the wall that they've created.

9  
10                   So as you can also see and this I  
11                   guess shows it better than the other one, you  
12                   can see that the wall that they have is  
13                   connected to the P1 slab.  It is actually on  
14                   top of the building and the cars and the slab  
15                   extend out further.  It's not entirely clear  
16                   at all that this is even a permanent  
17                   structure.  They could come back a month after  
18                   closing and knock off the wall and they would  
19                   have a nice patio here and these units would  
20                   get the life that they deserve and should be  
21                   counted in the FAR.  But instead they've built  
22                   this wall.     These walls are again the

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1 planters. These are planter boxes that they  
2 put in. They are again very much like that.  
3 They are connected to the P1 level. They are  
4 simply little concrete walls that will filter  
5 some dirt and foam in and they consider the  
6 top of this adjacent grade. These residential  
7 units in the cellar will very much have  
8 walkout patios. Many of the walkout patios  
9 will be approximately five feet wide or so  
10 before you get to the walls. Some will be  
11 larger than that, maybe eight or nine feet.  
12 And in all cases you will walk out at grade.  
13 So when you look at the cellar overall it is  
14 very clear that these are above grade. They  
15 will get great winter sunlight down on their  
16 patios while the building blocks the light  
17 from all of the adjacent homes along Military.  
18 Now in term of the adjacent grade that the  
19 developer refers to in one of its exhibits  
20 that he submitted in this pre-hearing  
21 statement. He tries to cherry pick a few  
22 sideways elevations and show that he's not

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1 manipulating grade substantially. I think he  
2 shows his in his Exhibit P or R perhaps. But  
3 what you will see when you look along here and  
4 this is the existing grade, there is not one  
5 linear feet, one linear foot as you kind of go  
6 around until you get to somewhere well around  
7 the corner, 236 feet along Military, that the  
8 building extends, there is not one linear foot  
9 where there ever existed dirt where they are  
10 now putting this wall. So unlike a English  
11 basement where you might dig out dirt to  
12 provide light to apartments that are otherwise  
13 below grade, this is exactly the opposite.  
14 They are simply building a wall to call  
15 something a cellar and bury these units behind  
16 a wall and mound a little bit of dirt.

17 MR. QUIN: Mr. Chairman, may I?  
18 I'm sorry to interject at this point. But  
19 these plans are not the final plans. I think  
20 we ought to know that.

21 CHAIRMAN JORDAN: You also have a  
22 right to cross-examine.

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1 MR. QUIN: I will.

2 CHAIRMAN JORDAN: All right.

3 MR. GRAHAM: And for the record,  
4 these plans did not change in any meaningful  
5 way. So again what the important note here is  
6 if you look at these elevations most of this  
7 area is 305 feet and change along that dotted  
8 line just above that red line. 307.54 feet  
9 would be back in here some where well off of  
10 what they are doing. So they are simply, they  
11 are manipulating the notion and the intent of  
12 the adjacent finish grade to treat this as a  
13 bonus floor. That's what they are trying to  
14 do. They are trying to have ten residential  
15 floors but only count the FAR for nine. While  
16 they will argue that they only manipulate the  
17 grade by a few feet, in the context of a four  
18 foot definition of cellar where its only four  
19 feet that you get above adjacent finished  
20 grade. An additional three, four or five feet  
21 in the case of the courtyard where there is a  
22 five foot high planter box, walkout patios at

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1 grade. A five foot elevation change for  
2 manipulation versus a four foot is 125 percent  
3 of the initial measure that you are going  
4 against. They have nine foot walkout ceiling  
5 cellar levels. They have a five foot tall  
6 planter box. And in no way, shape or form do  
7 any of the courtyard units or any of their  
8 units along Military qualify as being a  
9 reasonable interpretation of adjacent finish  
10 grade.

11

12 The second argument, which I will  
13 go through quickly and this is more of a legal  
14 brief, is simply that what has been relied on  
15 by the District of Columbia for a very long  
16 period of time, to justify mixing and matching  
17 within the height act by essentially letting  
18 you take the width of Connecticut Avenue and  
19 apply it to a very narrow street that is  
20 simply of higher elevation and we have  
21 detailed this in great detail in our brief.  
22 So I will only talk about it very briefly.

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1 But what is very clear is that the 1950  
2 opinion is simply flawed. It is full of  
3 factual incorrectness. It's never been  
4 challenged as far as we can tell. And once  
5 you walk through the history of the different  
6 acts, the language of the 1910 act and think  
7 about the enforcement of that act, there is no  
8 reasonable way that you think, that you can  
9 come to the conclusion that you are allowed to  
10 simply mix and match streets in order to  
11 achieve a much taller building and in this  
12 case again, its 100.5 feet along Connecticut  
13 Avenue that this building will be. It will  
14 tower over most other buildings that were  
15 built to the full height limit of the height  
16 act in Chevy Chase along Connecticut Avenue.  
17 So, you know as Jennifer Steingasser correctly  
18 notes in the 2008 report that is excerpted as  
19 Exhibit 8, Page 18, she says clearly the act  
20 anticipates that a building on a corner or  
21 through lot with two frontages could result in  
22 a building that is higher on one of those

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1 frontages than would otherwise be allowed.  
2 However, separating height determination and  
3 measuring points allows in some cases a  
4 building to be higher on both frontages than  
5 would otherwise be allowed on either one. She  
6 has very succinctly made the case why this  
7 violates the Height of Buildings Act.

8 The third argument and I will have  
9 to say that in Exhibit 14 we had a substantial  
10 typo in our pre-hearing statement. And  
11 hopefully you understood what we were talking  
12 about.

13 CHAIRMAN JORDAN: Exhibit 14?  
14 What are you referring to?

15 MR. GRAHAM: I'm sorry. In  
16 Exhibit 14 which will get to in this argument,  
17 we are on argument number 3 now which is that  
18 the building clearly is in excess of 90 feet  
19 tall from Kanawha Street. And Exhibits 9 to  
20 16 show the plat that was certified by the  
21 developer, which clearly indicates top of pool  
22 deck and stairwells below 90 foot height

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1 limit. The architect clearly recognizes that  
2 --

3 CHAIRMAN JORDAN: When you use  
4 the term exhibit what are you referring to  
5 because we have exhibits as a record in this  
6 case that don't match up to what you are  
7 talking about? So you are using terms  
8 exhibit.

9 MR. GRAHAM: I'm sorry. I'm  
10 referring to the pre-hearing statement  
11 exhibits.

12 CHAIRMAN JORDAN: Okay.

13 MR. GRAHAM: So Exhibit 9 shows  
14 the plat that they filed and the elevation  
15 that they came to of 316.83 feet in the off  
16 center position of Kanawha Street.

17 Next Exhibit 10 shows that the  
18 elevation at the true middle of Kanawha Street  
19 should be 315.33 feet. This is the distant  
20 part of the Kanawha Street front. And when  
21 you go to the sidewalk height its 315.33. If  
22 you were with the curb height it would be

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1 about 315.10.

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In all case, including the plat shown as Exhibit 9 that shows the pool deck needs to be below the 90 foot height limit. The pool deck is exactly 90 feet from whatever the height of the day at the top of the curb is that they've used. And in this case if you look at the history of the plans initially they claim to the top of the curb height was 317 feet. In the second iteration of plans they claim the top of the curb height is 317.33 feet. In the third iteration after we told them those elevations didn't exist they certified a plat that shows 316.83 feet. Even that plat as we show in the next slide and again this just shows the fact that any elevation at the top that would be more than 405.10 feet would violate the zoning code and more than 405.33 feet would violate the height act. The measurements at the top clearly do.

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1       This building is clearly 92 feet tall when  
2       you look through this from Kanawha Street from  
3       the center. In the next slide though you will  
4       see that once they were not allowed to make up  
5       a fictitious measuring point any longer, what  
6       they did was they simply said that this area  
7       here which we call the illegal middle is the  
8       center of the Kanawha Street faced. It is  
9       clearly way off center but it happens to be at  
10      a higher elevation point, which is why they  
11      chose they point and why they tried to justify  
12      the point that would be only 90, exactly  
13      again, somehow 90.00 feet from the parapet.  
14      While it's a meaningful measuring point its  
15      not as meaningful as the pool deck. From our  
16      legal measuring point you can see that this  
17      section of the building and it clearly has an  
18      elevation that is only 315.33 feet from the  
19      sidewalk for the height act or 315.10 feet  
20      from the curb height. So what they've done is  
21      try to add elevation artificially by simply  
22      taking a widely off center measuring point.

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1 To show you how they did that and this is  
2 where the typo in the pre-hearing statement  
3 that is significant is, a normal person  
4 looking at this would utilize segments C and D  
5 and bisect that area and call that the middle  
6 of the building, the middle of the front of  
7 the building. Because Kanawha Street has been  
8 the front of the building by the developer.  
9 Instead they take D, not C, E and F and call  
10 these points the front of the building. These  
11 are clearly not the front of the building by  
12 any common sense standard. They are the back  
13 of the building. They are up to, I believe  
14 120 feet from the lot line, which is even  
15 greater somehow than the height of the  
16 building removed from the lot line. There is  
17 nothing about this that could be called the  
18 front of the building. There is nothing about  
19 the intent of the height act that would allow  
20 that to be called the front of the building.  
21 It's simply manipulation after they were  
22 caught playing with measuring points of trying

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1 to show that their plans still comply with  
2 law. And again this simply shows some of the  
3 elevation marks so that you can see what we  
4 are talking about. This quality did not come  
5 out as well as I believe it should show up in  
6 the pre-hearing statement. But, again the  
7 point is clear. It is widely off center in  
8 terms of a measuring point and it results in a  
9 building that is 92 feet tall. It violates  
10 the height act and it is not permissible by  
11 law and as you know, anything under the zoning  
12 code cannot exceed the maximum limit of height  
13 set by the Height of Buildings Act.

14 The last point that we will make  
15 and this actually shows what probably, who  
16 knows is the current plan. Again its another  
17 elevation. Everything is from whatever the  
18 measuring point is to the pool deck.

19 CHAIRMAN JORDAN: Are you  
20 referring to Exhibit 16?

21 MR. GRAHAM: Exhibit 16, yes sir.  
22 And again this measuring point, again does not

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1 match the platted height, the certified  
2 platted height that the developer used at  
3 316.83 feet. So this is the essentially the  
4 second reiteration of curb height that was  
5 used by the developer during these drawings.

6 CHAIRMAN JORDAN: Okay.

7 MR. GRAHAM: So the next, the  
8 next issue and is also when we look at Exhibit  
9 19, which I'm not sure we have.

10 CHAIRMAN JORDAN: These are the  
11 same exhibits that we do have in our record  
12 that we've already looked at. I know you are  
13 three minutes short of going into 40 minutes.  
14 So I just want to let you know that.

15 MR. GRAHAM: Yes, I'll make this  
16 quick. But what, in addition to it being two  
17 feet too tall to the pool deck, the building  
18 also includes a substantial amount of  
19 recreation space, enclosure recreation space  
20 on the roof that in the 158 foot long  
21 penthouse, that will cast massive shadows and  
22 ensure that the homes along Military Road from

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1 roughly November through February will not  
2 achieve any direct sunlight.

3 CHAIRMAN JORDAN: I don't see  
4 shadow studies. Do you have?

5 MR. GRAHAM: We do not but the  
6 angle of the sun is in the low 20s in the sky  
7 and sort of wintertime months, it casts a  
8 shadow up to four times as long as the height  
9 of the building. So it casts hundreds and  
10 hundreds of feet long shadows. But the  
11 important note is that this recreation space  
12 is not allowed. It is allowed under the zoning  
13 code clearly but it is not allowed to exceed  
14 the maximum height under the height act. I  
15 have another exhibit here and this was  
16 something published by the National Capital --

17 CHAIRMAN JORDAN: What you are  
18 saying exceeds in the recreational area? What  
19 are you saying exceeds it?

20 MR. GRAHAM: The height of the  
21 recreation area, the enclosed recreation space  
22 brings the height limit, the height of the

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1 building to roughly 125 feet.

2 CHAIRMAN JORDAN: You are  
3 speaking of something other than accessory.

4 MR. GRAHAM: It's enclosed  
5 recreation space. As you will see and I will  
6 submit this into the record. This was  
7 published 12 days ago by the National Capital  
8 Planning Commission. It is succinctly and  
9 clearly states the height act currently  
10 prohibits human occupancy in penthouses  
11 regulated by the height act effectively  
12 limiting their use for anything other than  
13 mechanical equipment. It goes on to say in  
14 talking about potential changes to the height  
15 act. The use of those structures is currently  
16 restricted under the height act to mechanical  
17 equipment so long as those structures continue  
18 to be set back from exterior walls at a one to  
19 one ratio. It is not simply us saying that  
20 this recreation space is allowed with the  
21 zoning code but not allowed in excess of the  
22 height limit set by the height act. It's the

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1 National Capital Planning Commission saying  
2 the same thing. So, our message would be that  
3 if they want recreation space on the roof and  
4 enclosure recreation space they should do it  
5 under the limit of the height act and in  
6 compliance with the zoning code. And that's  
7 what's allowed. That's what the plain  
8 language of the Height of Buildings Act says.

9 That's what the National Capital Planning  
10 Commission says. That's what other documents  
11 in the public domain say including an article  
12 published by Whayne Quin back in 2010, which I  
13 believe is attached as perhaps Exhibit 18.  
14 So, that is another, yet another third  
15 independent way that the building violates the  
16 Height of Buildings Act.

17 CHAIRMAN JORDAN: All right thank  
18 you. We are ten minutes beyond the time that  
19 we had designated. We are into 40 minutes,  
20 going over 40 minutes. You know, that's why  
21 I'm saying, we've reviewed these documents  
22 that you've gone over and over. We understand

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1 the documents. I thought what you would do is  
2 hit the points you wanted us to focus in not  
3 do a re-presentation or re-presenting what  
4 you've already presented before. That's the  
5 purpose. It seems like now we are sliding  
6 back into that which I said we shouldn't do  
7 because we have examined all of these exhibits  
8 and looked at them and you could have  
9 highlighted those. We understand the area.  
10 We understand the makeup. I'm just trying to  
11 help you move this thing along.

12 MR. GRAHAM: We understand.

13 CHAIRMAN JORDAN: And I  
14 understand how important, I understand how  
15 important it is for the community. I really  
16 do. Especially looking at some of the  
17 pictures and etc. But we have to limit --

18 MR. GRAHAM: So if you will give  
19 me just a minute or two to touch on our last  
20 argument. We will hit only the high notes  
21 with your permission. The last argument that  
22 we have is that the zoning map, since 1975 at

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1 least and our guess is some time right around  
2 Mr. Cafritz' purchase back in 1973, the zoning  
3 map was distinctly changed as you can see in  
4 the difference between Exhibit 30 and the 1973  
5 zoning map and Exhibit 22. And the assertion  
6 of the developer is that the five is a nine.  
7 When you look at actual copies of the zoning  
8 maps as opposed to fuzzy reproductions, it is  
9 exceptionally clear --

10 CHAIRMAN JORDAN: This is not  
11 just the developer. You obviously have a  
12 certification from the Office of Zoning saying  
13 what the reading is. Is that right or am I  
14 wrong?

15 MR. GRAHAM: You have a  
16 certification with no rationale except that  
17 they say that the five looks like a nine.

18 CHAIRMAN JORDAN: Have you seen a  
19 record that said it was 2.51 versus 2.91?

20 MR. GRAHAM: It says it on the  
21 official zoning map.

22 CHAIRMAN JORDAN: No I mean have

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1 you seen anything else which created that  
2 particular area that said it is 2.51 versus  
3 2.91?

4 MR. KEYS JR.: No we have not,  
5 Mr. Chairman.

6 CHAIRMAN JORDAN: So we have a  
7 certification -- I just want to make sure that  
8 we are being very straight here and we are  
9 dealing with what we really need to be dealing  
10 with.

11 MR. KEYS JR.: I understand. I  
12 think its useful to know that 2.51 existed for  
13 over 40 years. During the period of time that  
14 the developer presented his PUD, they  
15 presented zoning maps. It showed 2.51.  
16 There's no record of any challenge as to the  
17 inaccuracy.

18 CHAIRMAN JORDAN: Don't we have  
19 the Office of Zoning actually certifying?  
20 Those people whose official responsibility for  
21 maintaining that map indicated what it was and  
22 what it reads. I don't know if you want to

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1 spend your time going back and challenging the  
2 Office of Zoning because I don't think that  
3 was part of your appeal, the Office of Zoning  
4 certification. Go ahead. It's up to you.  
5 Spend the time the way you want to.

6 MR. KEYS JR.: I would just say  
7 one final thing which again is we ask people  
8 to use their eyes and to read the number.  
9 We've had this examined by multiple people.  
10 The five, the upper side of the five is flat.

11 The lower right side of the five is curved.  
12 That is how a five is written. There is no  
13 confusion whatsoever.

14 CHAIRMAN JORDAN: All right.  
15 Thank you. Does the board have any questions  
16 they would like to ask the appellant? Does  
17 DCRA have any questions or would like to ask  
18 the appellant?

19 MR. SURABIAN: No questions.

20 CHAIRMAN JORDAN: Does the owner  
21 have any questions they would like to ask?

22 MR. QUIN: Yes, I have just one

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1 question I would like to address to Ms. Lenyk.

2 CHAIRMAN JORDAN: Sure.

3 MR. QUIN: I just want to  
4 confirm. I thought I heard you say in your  
5 testimony that your plans and where you took  
6 the grade was from the foundation to grade  
7 permit and not from the final drawings. Is  
8 that correct?

9 MS. LENYK: That's correct.

10 MR. QUIN: That's all the  
11 questions.

12 MS. LENYK: And that is one of  
13 the permits that we are appealing.

14 CHAIRMAN JORDAN: So from the  
15 foundation to grades you are saying from the  
16 finish grade or from the existing grade?

17 MS. LENYK: Well, Chair. I was  
18 going to say Your Honor.

19 CHAIRMAN JORDAN: No.

20 MS. LENYK: What we requested  
21 from DCRA was the building permit set. And we  
22 noticed that what they gave us was the, this

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1 was an official archive copy and what they  
2 gave us was the foundation to the permit set.

3 And I would also like to note from Mr. Quin  
4 that when they use exhibits that we don't see  
5 the stamped and signed permit set on their  
6 exhibits. I think that's an important  
7 distinction to make that all of our exhibits  
8 have the stamped and signed permit set.  
9 Because as we have said this is kind of  
10 moving, they keep changing the plans. And  
11 they are a big firm. We are a community  
12 organization. And they can make changes in  
13 the middle of the night and our arguments can  
14 be based on records that are available to us  
15 through the archives for DCRA. So I would  
16 just like to make that point to the Chair.

17 CHAIRMAN JORDAN: Good point.  
18 Thank you. I appreciate it. Okay then let's  
19 move to District of Columbia's, DCRA's  
20 presentation. And it was set for 30 minutes  
21 although we went 41.09. Thank you Mr. Moy.  
22 So go ahead.

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1                   MR. SURABIAN:    Thank you.  As the  
2                   Chair points out that the extensive briefing  
3                   in this case, that makes it unnecessary for me  
4                   to really bring anything new into the hearing.

5                   We feel as though that our brief touches on  
6                   all of the issues raises in the appeal and I'm  
7                   happy to rest on that.  I will say as again as  
8                   I did say in the brief that the issues that  
9                   are raised by the appellants are issues that  
10                  were raised during the plan review and were  
11                  vetted by the zoning administrator and he met  
12                  with the community and have heard these  
13                  arguments before and responded in writing to  
14                  them and in meetings.  Our pre-hearing  
15                  statement is just another reiteration of  
16                  addressing the same issues that have been  
17                  continuously raised.

18                  CHAIRMAN JORDAN:    Mr. Surabian,  
19                  let me ask you what is human occupancy?

20                  MR. SURABIAN:    Human occupancy as  
21                  related to the height act?

22                  CHAIRMAN JORDAN:    Yes.

1           MR. SURABIAN:     I looked to the  
2     1953 corporation counsel opinion where it  
3     indicates that, I quoted in part on page nine  
4     of my pre-hearing statement.

5           CHAIRMAN JORDAN:    I've seen that.

6           MR. SURABIAN:     Where it explains  
7     that human occupancy as it is used in that  
8     paragraph in the height act is construed to  
9     include residential office or business  
10    purposes.

11          CHAIRMAN    JORDAN:            Right.  
12    Residential, office or business use. But how  
13    does that reconcile with paragraph or section  
14    5H which talks about those things not counted  
15    toward the height act that includes the  
16    spirals, towers and that whole list of things?

17          MR. SURABIAN:     I think what the  
18    intention is that the height act allows you to  
19    construct a penthouse or a tower or a spiral  
20    but they don't want that space used as a  
21    dwelling or as an office, or to be occupied.

22          CHAIRMAN JORDAN:    You can have a

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1 temporary use but you can't, what's considered  
2 occupying it, a residential framework or  
3 working there every day. I guess it goes to  
4 the question we had on our --

5 MR. SURABIAN: If the penthouse  
6 was connected to a single dwelling unit. It  
7 was only accessible for one dwelling and that  
8 was living space, that one tenant lived there.  
9 It wouldn't have been allowed. We would have  
10 seen that as not being a penthouse but as  
11 being a story on a building. But if its used  
12 for those purposes outlined in 411 for  
13 mechanical, for elevator, stairs and for the  
14 occasional use, accessory to the outdoor  
15 activity space, then we deem that as being  
16 allowed.

17 CHAIRMAN JORDAN: So from what I  
18 understand from your brief, you said the  
19 pattern and the custom then in interpretation  
20 of Section 5H of the height act is that other  
21 buildings, other properties, its been the  
22 practice that non-residential office use has

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1       been allowed as long as its been recreational,  
2       etc. such as pools.

3                   MR. SURABIAN:        If it was an  
4       office use?  If that was the building office  
5       there, it would not be allowed.  That would be  
6       office use.  But this is, we are not calling  
7       this residential use because its an occasional  
8       use available to all tenants for a limited  
9       purpose that is approved by the zoning  
10      regulations, which is accessing the rooftop,  
11      pool and recreation space.

12                   CHAIRMAN JORDAN:    Ms. Cohen?  I  
13      don't mean to cut off your presentation but I  
14      know --

15                   MR. SURABIAN:        I would rather  
16      answer questions than --

17                   VICE-CHAIR COHEN:    On page five  
18      of your pre-hearing statement you talk about  
19      the berm is a little more than a few feet of  
20      soil that has been built up.  Can you be more  
21      expansive on what a little more means?

22                   MR. SURABIAN:        I think, if you

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1 look at the owner's pre-hearing statement  
2 there's an Exhibit Q attached to the owner's  
3 pre-hearing statement. I don't have an exact  
4 dimension on the berm but I think its maybe  
5 three feet, between three and four feet. So  
6 in Exhibit Q its shown as being on the  
7 lefthand side of the page. And its actually,  
8 the representation of the existing grade is.  
9 It's not far off from that.

10 VICE-CHAIR COHEN: Thank you.

11 CHAIRMAN JORDAN: Is there  
12 anything else you want to present?

13 MR. SURABIAN: I'd just be happy  
14 to answer questions if the board has any or  
15 needs clarification.

16 CHAIRMAN JORDAN: Board,  
17 questions, additional questions? DCRA? Then  
18 does the appellant have any questions they  
19 would like to ask? DCRA?

20 MR. KEYS JR.: Do I understand  
21 that DCRA is relying entirely on the  
22 submissions?

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1 MR. SURABIAN: Yes, that's  
2 correct. I don't know if any cross-  
3 examination is appropriate because I didn't  
4 provide any witness testimony.

5 CHAIRMAN JORDAN: I'm just giving  
6 the benefit of the doubt here.

7 MR. SURABIAN: Thank you.

8 CHAIRMAN JORDAN: All right.  
9 Then the building owner. Do you have any  
10 questions you want to ask?

11 MR. QUIN: No, I have no  
12 questions.

13 CHAIRMAN JORDAN: Okay, fine.  
14 Then let's proceed to your presentation. And  
15 the same thing you have 41, can you get the  
16 clock, 41.09 if you feel that's necessary.

17 MR. QUIN: I don't think I'll  
18 come close to that. Mr. Chairman and members  
19 of the board I want to first make sure that  
20 you are aware that the ANC did withdraw their  
21 appeal and they attached a memorandum of  
22 understanding which I assume that you have

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1 read and you understand where we are. We are  
2 all so very disappointed that we were not  
3 given, even though we did talk to on several  
4 occasions and talked and have asked for  
5 continued negotiations, that we were not able  
6 to reach any agreement with the CNC.

7 CHAIRMAN JORDAN: But you have  
8 met and had conversations?

9 MR. QUIN: Oh absolutely. In  
10 fact we have sent our landscape architect out  
11 to meet with them on both sides, Military Road  
12 and on Kanawha to try to reach a conclusion as  
13 to what type of landscaping should be  
14 installed. But any rate, if I may get to the  
15 merits if there are merits of this appeal.

16 CHAIRMAN JORDAN: And you can  
17 highlight if you want.

18 MR. QUIN: I'm going to be very  
19 brief. As indicated in our pre-hearing  
20 statement, we believe all of these issues are  
21 very clear and very simple. They are not  
22 complicated. They boil down to four issues

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1 that are raised. The zoning of the site. I  
2 think while they have always reversed this, to  
3 me the first thing you do if you are a Board  
4 of Zoning adjustment or zoning administrator  
5 or zoning commission, you find out what the  
6 zoning is. That's the very first thing. So  
7 that's the first issue that I've listed and  
8 I'll come back to that.

9 Secondly, they challenged the  
10 measurement of height that has been continuous  
11 since at least 1960. My understanding is that  
12 this board is bound by the opinions of the  
13 corporation counsel. It's not something  
14 that's arbitrary. I go back to, I can recall  
15 since I do go back a little ways but not as  
16 early --

17 CHAIRMAN JORDAN: We are bound by  
18 the opinion of corporation counsel.

19 MR. QUIN: In 1963 there was an  
20 organizational order that dealt with the  
21 advice of the corporation counsel at that  
22 time, which said that the opinions of the

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1 corporation counsel are binding upon the  
2 agencies of the District of Columbia.

3 CHAIRMAN JORDAN: Yes.

4 MR. QUIN: I'm not going to say  
5 anything more than that. You all can follow  
6 it but if you don't want to. I suppose you  
7 could always say no we don't agree.

8 CHAIRMAN JORDAN: Okay, for the  
9 record.

10 MR. QUIN: The third point is the  
11 structures above the top of the roof or  
12 parapet. And The fourth challenge is to the  
13 FAR and cellar measurements, which is based on  
14 many, many years of longstanding and  
15 approvals. But specifically I think what they  
16 are really using is an argument against the  
17 use of window wells or areaways. And that's  
18 where the crux of the argument comes in. So,  
19 we think --

20 CHAIRMAN JORDAN: And I think  
21 also what's being considered as where the  
22 grade line, what's grade?

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1           MR. QUIN:     I'm going to come to  
2     that too. We fully agree with the city's pre-  
3     hearing statement filed on behalf of the  
4     zoning administrator. What I would like to do  
5     is just summarize our position and Mr. Sher is  
6     here. I can ask him these specific questions  
7     and he can be a witness on these points. But  
8     I thought it would be just to follow our  
9     pleading and make it briefer if that's all  
10    right with you.

11           CHAIRMAN JORDAN:     That's fine.

12  
13           MR. QUIN:     First of all the  
14    zoning of the site. It is so simple to me. I  
15    find it a hard time any one can argue against  
16    it. We have an order of the zoning commission  
17    that's attached 1965, attached as Exhibit A.  
18    It tells you what lots are included and goes  
19    over there. It is absolutely clear. It is  
20    not even remotely in doubt as to what it is.  
21    A and B, we've included the order of the  
22    zoning commission that extends the zoning to,

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1 over to Lot 37 on Military and over to Lot 19.  
2 The plat is next. It shows you where that  
3 goes. There has been no action of the zoning  
4 commission since then whatsoever to change  
5 that zoning. Immediately after this, the  
6 zoning map showed it corrected. Then there's  
7 a time which they dispute. They pick in the  
8 center of time what the most recent zoning  
9 maps of this commission, zoning commission and  
10 followed by this board. Those are published  
11 and I've attached those as Exhibit 19, 2013  
12 zoning map as well as what's on the website  
13 today. Most importantly as the chairman  
14 pointed out the certification from the  
15 secretary of the zoning commission, Richard  
16 Nero, the Deputy Director of Operations who  
17 actually certified the zoning. There is  
18 simply no basis to show that's incorrect. In  
19 fact, its interesting to note that in the same  
20 PUD that apparently there was suppose for, the  
21 zoning was the same. There's been no change  
22 in zoning. The zoning was R5D then. It's R5D

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1 now. And they supported that PUD without any  
2 question. Now when they don't like the  
3 building, they come in and say, oh the zoning  
4 was wrong. It's a pretty illogical argument.

5  
6 The next question. The next issue.

7 Height measurement under the 1910 Height Act  
8 in zoning regulations. Since the beginning of  
9 the act as annunciated in the construction of  
10 that act in 1960 by the corporation counsel,  
11 zoning has always been, the height measurement  
12 has always been a two-step process. And if  
13 there's any doubt, all you need to do is look  
14 at the act itself. There are two separate  
15 sections. The first section is 601.05 now  
16 that talks about the height that you can go  
17 to. And the second one is the page that deals  
18 directly with the height 601.07 which says  
19 very specifically that if a building has more  
20 than one front, the height shall be measured  
21 from the, shall be measured from the elevation  
22 of the sidewalk opposite the middle of the

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1 front that will permit the greater height.  
2 That's very clear. And that's what was done  
3 in this particular case, Kanawha is the higher  
4 street. What's also interesting is that  
5 under Exhibit G, what we did was to take all  
6 the points that have been urged, our Exhibit G  
7 to our pre-hearing statement. To take all the  
8 points that have been argued by the proponents  
9 here of this appeal and measure to the top of  
10 the parapet. Each one is under 90 feet. And  
11 this is without regard to what we agreed to do  
12 with the ANC. This is the plans that were  
13 approved. And the zoning administrator  
14 concurred on all of that.

15  
16  
17 Let's see, the third point. By  
18 the way the opinion of the corporation counsel  
19 is attached and was submitted as part of the  
20 appellant's exhibits, not ours. We just  
21 reference it to try to shorten the number of  
22 pages you had to review. The third point is

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1 structures above the top of roof of parapet.  
2 I'm not surprised that the appellant's get  
3 confused because the city gets confused  
4 sometimes and so does the newspaper. They  
5 read that phrase spires, towers, domes, over  
6 elevators shafts, ventilating shafts, chimney  
7 smokestacks etc., may be erected to a greater  
8 height. And then they qualify it by saying  
9 it can't be used, such items may not be used  
10 for human habitation. No where did Congress  
11 tell the zoning commission or the city that  
12 they could not have other miscellaneous  
13 structures on the roof. In fact, they gave  
14 jurisdiction to in effect the zoning  
15 commission which has determined the height of  
16 penthouses. You wouldn't have a height  
17 limitation unless it went to, unless it were  
18 for the zoning commission. You wouldn't have  
19 the right to put, to have controls on  
20 antennas, unless it were the zoning  
21 commission. Window outriggers, the little  
22 things that flip out on top of the roof that

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1 allow persons to climb the walls to clean the  
2 windows. There's nothing in the act that  
3 prohibits that type of improvement above the  
4 height. And that's basically where I think  
5 the appellants get off the point. These  
6 miscellaneous structures have included for  
7 years pool decks, guard rails, antenna,  
8 accessory recreation and storage space. It  
9 can't be individual and the corporation  
10 counsel said and the chairman asked  
11 specifically about what human occupancy meant.

12 That's explained in the 1953 opinion of  
13 corporation counsel. So this is again a long  
14 standing application. I think it is important  
15 here to talk about what the meaning is of  
16 longstanding interpretations, what we call in  
17 the law *stare decisis*, which translated means  
18 to stand by things done and decided or to let  
19 the decisions stand. The Supreme Court has  
20 said that this doctrine is a fundamental  
21 importance to the rule of law. And in the  
22 District of Columbia I had the good fortune of

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1 arguing that in the DC Court of Appeals. So  
2 I've attached that opinion, portions of it  
3 that specifically talk about how the BZA needs  
4 to give weight to the long standing  
5 interpretations in a similar situation they  
6 have in footnote 9, which I am -- Exhibit O.  
7 They have a footnote that talks about the  
8 hundreds of interpretations by the zoning  
9 administrator. That is in footnote 9. So  
10 this is an important part of our  
11 jurisprudence. It's what you follow. It's  
12 what the zoning administrator follows. It's  
13 what the zoning commission follows and its  
14 what the courts follow. So these are things  
15 that have been interpreted this way for  
16 virtually a half century, more than a half  
17 century.

18  
19 So, that leads me to the last  
20 argument that is made. And this doctrine,  
21 stare decisis is equally important on this  
22 issue. Because the methodology used for

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1 determining height of a building or height of  
2 a floor, including the FAR is if a floor is  
3 partially in cellar and partially a basement,  
4 how do you compute it. Well someone would say  
5 would you just look around and you tell. But  
6 that's not what is heard. Mr. Fahey put it in  
7 writing, that's also in the brief of  
8 appellant. You use the parameter wall method.  
9 You calculate how much of the, that floor,  
10 where the ceiling is less than four feet out  
11 adjacent finish grade. Notice it is adjacent  
12 finish grade. It's not just and then you put  
13 that in a formula. And that's exactly what  
14 the zoning administrator did here. What the  
15 real problem is, and what the difficulty is as  
16 I can see from the appellants, very clearly is  
17 they do not like the consistent interpretation  
18 of window wells and areaways. The zoning  
19 administrator and you can ask him if you need  
20 to, for years, this zoning administrator and  
21 his predecessors have always said this is  
22 something in District of Columbia

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1 construction. If you go into Georgetown for  
2 example, not that's the best place to live.  
3 But if you went to Georgetown and you look at  
4 all their buildings, you have window wells.  
5 And the purpose is to let light and  
6 ventilation into cellar floors. That's the  
7 purpose. And that has been the consistent  
8 interpretation for well over a half century.  
9 So, when the appellant comes in and just  
10 wiggles its nose and says wait a minute. You  
11 can't do that. It's wrong. Well they've got  
12 to overturn that and the law says when you  
13 consider that, even if you disagree, you can  
14 only interpret prospectively. And that's what  
15 is said in the law and in the case that I  
16 furnished you.

17 So, I don't want to keep rambling  
18 off. I think I've taken more time than I  
19 probably needed to. But I can call Mr. Sher  
20 as a witness and go over these same points.  
21 He can give you examples of all of this. I  
22 think that we included them in our brief but

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1 we can give you 20 more if you want them on,  
2 for example, the uses, the pool decks. Just  
3 go down New York Avenue. Just go down K  
4 Street. Go down Pennsylvania Avenue and look  
5 at the tops of apartment buildings and see  
6 what you get. That's been the consistent  
7 interpretation and I believe that's what you  
8 should follow. So unless there are questions,  
9 unless you want to hear from Mr. Sher, that  
10 concludes my presentation.

11 CHAIRMAN JORDAN: Isn't the  
12 appellant also just maybe the underlying  
13 argument is that the adjacent finish grade is  
14 what's considered or what should be a real  
15 adjacent finish grade from existing grade  
16 because their argument although I've seen  
17 nothing and I'm just going to throw it out,  
18 that says that how much of a adjacent finish  
19 grade can you create from existing grade.

20  
21 MR. QUIN: I think that's a good  
22 point because what the zoning administrator

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1 has turned down patios that go out. Let's say  
2 you, rather than four feet or five feet which  
3 has been the rule of thumb, which you can  
4 verify or not verify. If it were 16 feet or  
5 20 feet, as an areaway, he would not permit  
6 it. Because that would really be adjacent  
7 finish grade. In this case, and I'm glad you  
8 pulled me back on course here is if you look  
9 at the two exhibits that we've submitted,  
10 Exhibit Q and Exhibit R. That shows and if  
11 you want to look specifically at what the  
12 existing grade is on the Military Road side,  
13 for example. Look at the dotted line. They  
14 are the existing grade lines in three  
15 different places as shown on the building, on  
16 the bottom right-hand side and you can see  
17 that the deviation is very small. In some  
18 cases its lower. So it's that we are building  
19 up a berm. Go back and look at Exhibit Q and  
20 you can see that the actually grade and we've  
21 made that in red so that you would see that  
22 through the building that was natural grade.

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1 So we're not, we're not trying to gerrymander  
2 grade. If we were we would be about ten feet  
3 higher, maybe 20 feet higher.

4 VICE-CHAIR COHEN: Excuse.

5 MR. QUIN: The point is that this  
6 is the grade.

7 VICE-CHAIR COHEN: You are  
8 referring to something in red.

9 MR. QUIN: Yes, on Exhibit Q.

10 VICE-CHAIR COHEN: Okay. I  
11 didn't have a color.

12 MR. QUIN: Okay, sorry.

13 VICE-CHAIR COHEN: Okay.

14 MR. QUIN: I'm sorry to take more  
15 time. That does complete my presentation  
16 unless you want to hear from Mr. Sher.

17 CHAIRMAN JORDAN: Okay. Then the  
18 board, any questions of the owner's  
19 presentation? Does the appellant have any  
20 questions they would like to ask?

21 MR. KEYS JR.: Mr. Jordan, Mr.  
22 Chairman, I have to wonder at the nature of

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1 the proceeding right now. Mr. Quin is an  
2 attorney. Mr. Quin is not a witness.

3 CHAIRMAN JORDAN: You can ask him  
4 questions if you want because a lot of the  
5 attorneys sit here and give testimony and --

6 MR. KEYS JR.: And they are not  
7 sworn.

8 CHAIRMAN JORDAN: Well, there's a  
9 lot of things we allow attorneys to do because  
10 of the oath that you've already taken as an  
11 attorney that you have been sworn to uphold.  
12 So if you do something outside of that, I'm  
13 sure we would have some concern about that and  
14 take appropriate measure. So if there's  
15 something that you would like to get or even  
16 their witnesses that they have already  
17 tendered, you can ask them questions if you  
18 want. I understand within the grounds of what  
19 you might want to ask the question. So, I'm  
20 opening it up to you to do so.

21 MR. KEYS JR.: Thank you.

22 MR. QUIN: And by the way, I'd

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1 like to call Mr. Sher because if it deals with  
2 the factual presentation, I'd rather not be  
3 the attorney. I'm counsel and I believe I'm  
4 factual and honest and direct. But I would  
5 feel more comfortable with Mr. Sher.

6 CHAIRMAN JORDAN: The way that  
7 this board and others have been operating,  
8 especially contacts. We have lawyers that do  
9 presentations. My question has always been  
10 well how come we are not allowing cross-  
11 examinations of lawyers since he is making  
12 these statements. But we also as you know,  
13 open up questions from parties and its  
14 generally not that it has to be specific to  
15 the person who gave the testimony, but to the  
16 group in the party in the whole. So I'm  
17 affording you that opportunity if you like to  
18 have it. If you don't then that's on you to  
19 decide.

20 MR. KEYS JR.: I understand.  
21 Well Mr. Sher, Mr. Quin, whichever wants to  
22 answer. How long have you represented Calvin

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1 Kaeperts with respect to this property?

2 MR. QUIN: That sounds like a  
3 question for me.

4 MR. KEYS JR.: Or Mr. Sher as a  
5 participant in your firm.

6 MR. QUIN: On this property I  
7 think I came in around, I personally didn't  
8 get involved until I think about January of  
9 this year. Mr. Sher answered a question  
10 earlier in November or October of 2012.

11 MR. SHER: I think it was longer  
12 ago than that.

13 MR. KEYS JR.: No, I said with  
14 respect to this property. In other words how  
15 long have you been working on this site  
16 representing the owner of the property? Did  
17 you represent the owner of the property in  
18 connection with the PUD in 1990?

19 MR. QUIN: No I did not.

20 MR. KEYS JR.: Did your firm  
21 represent the property owner with respect to  
22 this?

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1 MR. QUIN: No, Wilkes and Artis  
2 did I think.

3 MR. KEYS JR.: Were you a partner  
4 at Wilkes and Artis at the time?

5 MR. QUIN: I didn't handle this  
6 case.

7 CHAIRMAN JORDAN: Let's get to  
8 relevance of what you are trying to ask. I'm  
9 missing the relevance of where we are today.

10 MR. KEYS JR.: Could you look at  
11 the Exhibits 22 through 28 that are attached  
12 to the pre-hearing statement of the appellant?

13 MR. SHER: Yes, I can look at them.

14 MR. KEYS JR.: Is this the zoning  
15 map of the District of Columbia from 1975?

16 MR. SHER: Under your Tab 22.

17 MR. KEYS JR.: 22.

18 MR. SHER: That's what it says it  
19 is.

20 MR. KEYS JR.: And does it  
21 indicate that its 251 feet as the northern  
22 zone boundary of this site?

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1           MR. QUIN:     Mr. Chairman, I want  
2     to object to this. This really does not go to  
3     the fact of zoning, the certification or the  
4     original act of the zoning commission. It  
5     doesn't in any way contradict that.

6           CHAIRMAN JORDAN:     And I would  
7     tend to agree. I was giving some latitude.  
8     Where are you trying to go with this.

9           MR. KEYS JR.:     Mr. Chairman, what  
10    I want to do is simply note the number of  
11    times that the zoning map was published that  
12    repeated 251 feet as being the dimension. I  
13    also want to go --

14          CHAIRMAN JORDAN:     What's the  
15    relevance of that if we have both the original  
16    documentation and the certification of the  
17    Office of Zoning showing that the measurement  
18    is 291? I don't think what you are doing is  
19    being persuasive but if you want to continue  
20    along that line I'm going to allow you to just  
21    very limited. I don't know how much Mr. Sher  
22    can testify since whenever we started

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1 producing the zoning maps that he would have  
2 knowledge of that. I don't know if he's the  
3 witness for that. Unless he can testify that  
4 he created it and every year he updated them  
5 and he watched them each and every year.

6 MR. KEYS JR.: Well, Mr. Sher was  
7 executive secretary.

8 CHAIRMAN JORDAN: For a period  
9 but not since creation. He's asking how long  
10 this has been this way. I'm just saying. If  
11 you know answer the question please so we can  
12 move on.

13 MR. KEYS JR.: Mr. Sher, how long  
14 were you the executive secretary of the zoning  
15 commission, the Office of Zoning?

16 MR. SHER: It wasn't Office of  
17 Zoning then but was the zoning secretary of  
18 the Office of Planning from 1978 to 1985. I  
19 was employed in the office prior to that time  
20 but that was when I was the director.

21 MR. KEYS JR.: Which predated  
22 this 1975 print? I mean came after the 1975

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1 print?

2 MR. SHER: I was in the office in  
3 1975. I became the director in 1978, I  
4 believe.

5 CHAIRMAN JORDAN: You're next  
6 question please.

7 MR. KEYS JR.: We submitted in  
8 22, 23, 24, 25 and 26 a series of zoning maps  
9 that were published by your office that show  
10 the zone boundary at 250 feet. Do you have  
11 any reason to think that those maps were  
12 inaccurate at the time they were published?

13 MR. SHER: Yes.

14 MR. KEYS JR.: And what's the basis  
15 for that?

16 MR. SHER: The zoning commission in  
17 1965 adopted an order changing the zoning of  
18 certain lots which are now included in this  
19 property. As Mr. Quin referenced earlier, I  
20 know they are all over the place but the  
21 quickest way I can find them is under Exhibit  
22 A of our pre-hearing statement of the

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1 applicant's pre-hearing statement -- I'm sorry  
2 of the owner's pre-hearing statement. Exhibit  
3 A is in order dated March 16, 1965 signed by  
4 three members of the commission.

5 CHAIRMAN JORDAN: It's Exhibit A?

6 MR. SHER: It's Exhibit A of this  
7 document, the property owner's pre-hearing  
8 statement. It says the R-5C district abutting  
9 east side of Connecticut Avenue is extended  
10 easterly and identifies a certain number of  
11 lots. Exhibit B is a portion of the base  
12 plats which show what those lots are. That is  
13 the last record that I am aware of that I  
14 could find that gave any indication that the  
15 zoning commission had changed the zoning of  
16 this property. So notwithstanding what any  
17 draftsmen may have put on a map or any map  
18 that may have been published, I believe that  
19 the last official action of the commission  
20 occurred in 1965 and that established the  
21 zoning. That is not correct. I take that  
22 back. The 1965, the zoning commission zoned

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1 this property R-5C, as C as in Charles. At  
2 some later point and I can get you the exact  
3 date, they created a different R-5C district  
4 and redesignated this site R-5D. Everything  
5 that was R-5C became R-5D. So it didn't  
6 change the boundary line but it changed the  
7 designation. So the property has been R-5D  
8 since it was redesignated in 1992. The current  
9 official map if you go online and the online  
10 version is now. The official zoning map of  
11 the District of Columbia if you go right now  
12 today, take your computer and go online, it  
13 would show the entirety of this lot and this  
14 square being zoned R-5D. The certification  
15 provided by the Office of Zoning, which is the  
16 custodian of the official records of the  
17 commission indicate that the property is zoned  
18 R-5D. I don't have any reason to believe that  
19 is not correct based on my evaluation and  
20 assessment and review of the records.

21 MR. KEYS JR.: We have submitted  
22 an exhibit from Mr. Nero in the Office of

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1 Zoning in which he offers an explanation as to  
2 the discrepancy between the official zoning  
3 maps from the period of 1975 to 2013. Have  
4 you reviewed that letter from Mr. --

5 MR. SHER: In the course of  
6 preparing for this hearing, I reviewed a lot  
7 of things including that, yes.

8 MR. KEYS JR.: Do you accept his  
9 conclusions with respect to that issue?

10 MR. SHER: I told you what my  
11 conclusion is.

12 CHAIRMAN JORDAN: Let's not  
13 continue this line of questioning. He has it.  
14 Whether he said he supported it. He had no  
15 reason not to doubt it. You know, I think you  
16 are going, you are presenting a case for your  
17 client. There's some real things here I think  
18 that you can hit. I don't think this is one  
19 of them because I think the record has  
20 generated the record. And the bottom line is  
21 there in 1965. I think your clients really  
22 have some issues that they can raise. I don't

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1 think this is one of them. So, but it is up  
2 to you to present your case. We have this  
3 document that's certified, attested to from  
4 1965 which becomes the official record. I  
5 asked earlier did you have something that said  
6 that this was incorrect, that this record, the  
7 official record attested to, is incorrect.  
8 That's all I'm saying. This line of  
9 questioning I'm beginning to think --

10 MR. KEYS JR.: With all respect,  
11 the very existence of a zoning map for almost  
12 40 years is an official record. Published and  
13 republished at a time when the developer of  
14 the property was proceeding with development.

15 MR. QUIN: May I offer a response  
16 to that?

17 MR. KEYS JR.: It was a challenge  
18 with no attempt at correcting what was --

19 CHAIRMAN JORDAN: All right. I  
20 hear what you are saying and I'm finding this  
21 continuing line of dialogue not relevant. Why  
22 don't you go to the next one.

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1                   MR. KEYS JR.:    Mr. Chair, are you  
2 familiar with the PUD from 1990?

3                   MR. QUIN:     Mr. Chairman I'm going  
4 to object again.    I don't know why we are  
5 talking about a PUD in 1990 when we are now  
6 talking about a matter of right building which  
7 we believe its not a PUD.   The PUD expired and  
8 that's a matter of record.

9                   CHAIRMAN JORDAN:    Yes, I said  
10 that earlier.    I didn't see the relevance of  
11 the PUD.    We are dealing with what we are from  
12 the standpoint of one the zoning administrator  
13 issued the order.

14                  MR. KEYS JR.:    Right.   Mr. Sher I  
15 would like to ask you about the zoning  
16 regulations.    Do the zoning regulations define  
17 adjacent finish grade?

18                  MR. SHER: I do not believe that is  
19 a defined term under the regulations.

20                  CHAIRMAN JORDAN:    When you say  
21 defined term, you mean under 199 or just any  
22 provision?

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1 MR. KEYS JR.: Any provision that  
2 offers a definition of adjacent finish grade.

3 CHAIRMAN JORDAN: I think he  
4 answered not to his knowledge. He's not  
5 aware. Was that your testimony?

6 MR. SHER: That was my answer.

7 MR. KEYS JR.: Mr. Sher.

8 MR. SHER: Yes sir.

9 MR. KEYS JR.: The current  
10 version of the zoning regulations in the  
11 definitions, which were modified in June 2013.  
12 Under the definition of building height,  
13 contains the following sentence.

14 CHAIRMAN JORDAN: What are you  
15 referring to?

16 MR. KEYS JR.: These are the  
17 current --

18 CHAIRMAN JORDAN: What provision?

19 MR. KEYS JR.: It's the  
20 definitions 99.

21 CHAIRMAN JORDAN: 99.

22 MR. KEYS JR.: Definition of

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1 building, height of building.

2 CHAIRMAN JORDAN: Okay.

3 MR. KEYS JR.: Then I'm going to  
4 read the sentence for you. Berms or other  
5 forms of artificial landscaping shall not be  
6 included in measuring building height.

7 MR. SHER: Was there a question  
8 there?

9 MR. KEYS JR.: Is it your  
10 understanding that this regulation, this  
11 provision, this definition would exclude  
12 certain kinds of landscape, certain kinds of  
13 manipulative landscape from being used as a  
14 basis for calculation under the zoning  
15 regulations?

16 MR. SHER: As a basis for  
17 calculating what?

18 CHAIRMAN JORDAN: I'm not  
19 understanding. Would you rephrase that  
20 question please? I really don't understand  
21 what the question is myself. What position  
22 under building heights were you referring to

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1 under the definitions? What paragraph were  
2 you reading?

3 MR. KEYS JR.: It's the first  
4 paragraph. It's the last sentence of the  
5 first paragraph.

6 CHAIRMAN JORDAN: Last sentence.  
7 Under building heights?

8 MR. KEYS JR.: Yes.

9 CHAIRMAN JORDAN: There's only  
10 one sentence if you want to call that a  
11 sentence. You said the last sentence? You  
12 read the sentence, that sentence reads  
13 "building, height of-the vertical distance  
14 measured from the level of the curb opposite  
15 the middle of the front of the building to the  
16 highest point of the roof of parapet." Is that  
17 what you just asked the question from? I'm  
18 just trying to catch up with you because I  
19 might have missed it.

20 MR. KEYS JR.: No, I'm talking  
21 about the current version of the zoning  
22 regulations. The last sentence.

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1 CHAIRMAN JORDAN: Under Section  
2 199?

3 MR. KEYS JR.: Under 199. I just  
4 --

5 CHAIRMAN JORDAN: You said the  
6 first sentence, but you mean the last  
7 sentence?

8 MR. KEYS JR.: The last sentence.

9 CHAIRMAN JORDAN: Oh, last  
10 sentence, okay, got you. Last sentence. I  
11 thought you said the first sentence. Go on  
12 please.

13 MR. KEYS JR.: Mr. Sher, is it  
14 your understanding that a provision like this  
15 would prevent a developer or an owner of  
16 property from moving dirt to create an  
17 artificial base from which to measure the  
18 height of a building?

19 MR. SHER: To measure the height of  
20 the building, I think that's what that  
21 sentence says. But I would add (1) that  
22 sentence was not in the regulations at the

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1 time the permit was issued. The permit was  
2 issued and then subsequent to that, the zoning  
3 commission amended the regulations. So I  
4 don't know that has any bearing on an argument  
5 made as to this permit because this permit was  
6 issued when that sentence was not in the  
7 regulations.

8 MR. KEYS JR.: Okay. Let me ask  
9 you a question regarding your Exhibit R. Mr.  
10 Quin made reference to this exhibit and he  
11 pointed out that this exhibit shows that  
12 there's no change in the existing grade from  
13 the work that's being proposed. And I think  
14 he said that in fact in some instances where  
15 we are lowering the grade. Could you point  
16 out what aspects of this demonstrate that the  
17 grade is not being raised?

18 MR. SHER: Okay. I think Mr. Quin  
19 and he certainly can speak for himself, did  
20 not say that we weren't changing the grade. I  
21 think he was saying there was not a  
22 significant change in the grade and we can

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1 maybe debate what significant means. But if  
2 you look at all three of those partial  
3 sections, 3, 2, 1 top to bottom or 1, 2, 3  
4 bottom to top, there is a heavy dark line that  
5 says proposed grade and there's a dash line  
6 that's labeled existing grade. On all three  
7 of those sections cut through where they are  
8 shown on the key plan in the lower right-hand  
9 side, in some places the proposed grade is  
10 lower than the existing grade and in other  
11 places the proposed grade is higher than the  
12 existing grade. I think that's what Mr. Quin  
13 was talking about.

14 MR. KEYS JR.: How were those  
15 three cross section points chosen?

16 MR. SHER: I won't say quite at  
17 random but we took three points along the  
18 property line, along Military Road.

19 MR. KEYS JR.: Would any other  
20 points along that length of Military Road  
21 paint a different picture, show a larger  
22 change in grade?

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1                   MR. SHER: Well they are all going  
2 to paint different pictures because there are  
3 section cuts taken at different places. Some  
4 might show more and some might show less.

5                   MR. KEYS JR.:        So there are  
6 places along this line that show a greater  
7 change in grade.

8                   MR. SHER: I said some might show  
9 more and some might show less. I have not  
10 done a section cut at every interval along the  
11 way there to say what's higher and what's  
12 lower.

13                  MR. KEYS JR.:        I think it's  
14 enough to say you don't know.

15                  MR. SHER: I don't know each and  
16 every section cut along the way.

17                  MR. KEYS JR.:        The final set of  
18 plans that we referred to and that Mr. Graham  
19 used in his exhibits. This is Exhibit 4 of  
20 the applicants, of the appellant's filing. I  
21 just wanted to ask you the differences between  
22 what you are showing at Exhibit R and the

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1 differences in the filed plans that were  
2 submitted. Here the earth is much lower. I  
3 would suspect that's several feet below the  
4 top of that retaining wall structure. But now  
5 it is moved up to the very top of that  
6 retaining wall structure. Why was that change  
7 made?

8 MR. SHER: We changed the finished  
9 grade in order to comply with the regulations.

10 MR. KEYS JR.: And what  
11 regulations are you referring to?

12 MR. SHER: We are talking about the  
13 regulations that distinguish between a  
14 basement and a cellar.

15 MR. KEYS JR.: So you are saying  
16 that the change from this image to the image  
17 in Exhibit R is to create an adjacent finish  
18 grade?

19 MR. SHER: Well in both cases we  
20 created an adjacent finish grade. It's a  
21 different grade shown in Exhibit R and I don't  
22 frankly know whether that section cut is taken

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1 at one of the points here or not. That's a  
2 different drawing than Exhibit R and I had  
3 nothing to do with that drawing. So I can't  
4 tell you.

5 MR. KEYS JR.: Your submission  
6 stated that the purpose of areaways, the  
7 purpose of window wells is to get light and  
8 air to affected units. Is that correct?

9 MR. SHER: I guess so.

10 MR. KEYS JR.: With reference to  
11 these drawings or with reference to your  
12 Exhibit R, wouldn't there be more light and  
13 air available to the units adjacent to those  
14 areaways, to those wells if the grade were  
15 left at the top of the parking structure and  
16 the wall was removed?

17 CHAIRMAN JORDAN: We need you to  
18 be on the microphone. Either use the  
19 wireless. Here you can use our new fancy,  
20 fancy pointer.

21 MS. LENYK: We have a pointer.  
22 We just misplaced it.

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1                   MR. MOY:    I tried it.  It should  
2 work>

3                   MR. KEYS JR.:        I think Mr.  
4 Chairman I --

5                   CHAIRMAN JORDAN:    You can point.  
6    You have the wireless in your hand.

7                   MR. KEYS JR.:        What I'm asking  
8 Mr. Chair is that wouldn't even more light and  
9 air be available to these cellar units if this  
10 wall simply weren't there?  If the purpose of  
11 the areaway is to get light and air to lower  
12 level units, wouldn't there be more light and  
13 air available if this wall wasn't there?

14                   MR. SHER:  Yes, but if I were  
15 superman I would be able to jump tall  
16 buildings in a single bound.  I'm not.  And  
17 that wall is there for a reason and a purpose.

18                   MR. KEYS JR.:        And what purpose  
19 is that?

20                   MR. SHER:  We have designed the  
21 building such that it would comply with the  
22 requirements of the zoning regulations.

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1                   MR. KEYS JR.:     But what is the  
2 purpose of the wall?

3  
4                   MR. SHER: The wall is a mechanism  
5 by which the dirt is graded up to form. The  
6 finished grade when we're done. Not the grade  
7 there today. Not the grade at any other time  
8 but the adjacent finished grade is the top of  
9 the dirt behind that wall. And the level of  
10 that grade to the bottom of the ceiling of  
11 that story is less than four feet. That  
12 portion of the building is a cellar and not a  
13 basement. In other words, these plans, the  
14 plans that were submitted with the permit  
15 application would not have met the zoning  
16 regulations requirement because the dirt  
17 hadn't been moved up to the top to create the  
18 adjacent finished grade. Those plans were the  
19 foundation permit set. They did not include  
20 the final detailed drawings of the building  
21 going up. The plans which are in the building  
22 permit set which zoning administrator has

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1 signed off on, are, I believe consistent with  
2 those shown on our Exhibit R. And therefore  
3 they were designed in a way that they complied  
4 with the requirements and the regulations.

5 MR. KEYS JR.: And Mr. Sher,  
6 what's directly beneath that retaining wall  
7 and the earth that's being moved toward it?

8 MR. SHER: It's a portion of the  
9 parking garage.

10 MR. KEYS JR.: Now Mr. Sher I  
11 wanted to ask you about another exhibit that  
12 you submitted and that's Exhibit P. And I  
13 would direct you to the courtyard section of  
14 the building. That's the area between the two  
15 wings on Military and facing Kanawha. And I  
16 believe this exhibit shows those areas of the  
17 building that you claim are cellar units. Is  
18 that correct? The red lines?

19 MR. SHER: There is a calculation  
20 of the parameter of the building identifying  
21 what the total linear footage of the parameter  
22 is and the total parameter where the ceiling

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1 is more than four feet above the adjacent  
2 grade and then computing that as a percentage  
3 of the parameter, 12.38 percent.

4 MR. KEYS JR.: All right. Now  
5 looking at the units on the north side of the  
6 courtyard. I think there are six or seven  
7 units that run across that area. Do you see  
8 what I'm talking about? Those units?

9 MR. SHER: Yes, I think there are  
10 five, but that's okay.

11 MR. KEYS JR.: Those are all  
12 cellar units. Is that correct?

13 MR. SHER: They are units in a  
14 floor that is partly basement and partly  
15 cellar.

16 MR. KEYS JR.: Would you estimate  
17 or care to estimate the percentage of those  
18 units? Its 90 percent or plus that are cellar  
19 as opposed to basement.

20 MR. SHER: The regulations do not  
21 identify a specific square foot that's  
22 basement and a specific square foot that's

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1 cellar. That calculation is done on the basis  
2 of the parameter and it's a percentage applied  
3 to the entire floor. So, per the architect's  
4 calculations, 12.38 percent of the parameter  
5 is, ceiling height is four feet or more.  
6 12.38 percent of that floor as a whole is  
7 counted against FAR. It's not this square  
8 foot or that square foot.

9 MR. KEYS JR.: I understand. But  
10 let's look at the line of those units as it  
11 runs through the courtyard. I see at the  
12 lefthand or the western hand there is a ten  
13 foot designation with an asterisks. If I  
14 understand your exhibit that asterisk is a  
15 basement portion, that ten-foot stretch is  
16 basement. That portion of the parameter  
17 that's more than four feet. The ceiling is  
18 more than four feet above adjacent finish  
19 grade. Is that correct?

20 MR. SHER: Yes, that's my  
21 understanding of the asterisk.

22 MR. KEYS JR.: So you are

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1 claiming all of the rest of that linear  
2 frontage on those units is cellar?

3 MR. SHER: We're saying that the  
4 ceiling of that floor is less than four feet  
5 above the adjacent finished grade.

6 MR. KEYS JR.: And those units, I  
7 believe, are walkout units?

8 MR. SHER: If you are asking do  
9 those units have access into that areaway from  
10 their unit?

11 MR. KEYS JR.: Yes.

12 MR. SHER: I think the answer is  
13 yes.

14 MR. KEYS JR.: Yes, so you, so  
15 its not an areaway, it's a patio?

16 MR. SHER: You want to call it a  
17 patio, be my guest. It is an area where the  
18 District of Columbia has said an area on the  
19 range of four to five feet in depth out from  
20 the building would not be one where you would  
21 go to the bottom of it to determine the  
22 adjacent finished grade. So, -- I'll stop

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1       there.

2                   MR. KEYS JR.:     Okay.   And where  
3       in this instance is the adjacent finished  
4       grade?

5                   MR. SHER: As I understand --

6                   MR. KEYS JR.: For these units?

7                   MR. SHER: As I understand it we  
8       have calculated the adjacent finished grade as  
9       the level of that courtyard built up where it  
10      is in the middle of that building.

11                  MR. KEYS JR.:       Is that the  
12      courtyard that you are defining these planning  
13      areas here?

14                  CHAIRMAN JORDAN:    You know, for  
15      the record, why don't you indicate what you  
16      point to so that you have a record just in  
17      case there's a need.

18                  MR. KEYS JR.:       I'm pointing to  
19      the planning areas, planning boxes that are  
20      situated within the courtyard running east-  
21      west.   Is that the adjacent finished grade  
22      that makes these cellar units?

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1           MR. SHER: I'm, since you are using  
2 a different set of drawings than I'm using,  
3 I'm looking at what we had as our Exhibit Q  
4 and it shows that courtyard below what the  
5 existing grade is to be at elevation 307.54.

6           MR. KEYS JR.: Right. So then  
7 that is the elevation that you are claiming is  
8 the basis for those units being determined  
9 cellars?

10          MR. SHER: Yes.

11          MR. KEYS JR.: And those and what  
12 is the composition of that area? Is that soil  
13 in there?

14          MR. SHER: I believe it's paved.

15          MR. KEYS JR.: So where is grade?  
16 Where is the finished grade? If that's  
17 paved, where's the finished grade?

18          MR. SHER: We had delineated the  
19 grade at that point to be elevation 307.54.

20          MR. KEYS JR.: Are you contending  
21 that the grade is concrete? That's the  
22 adjacent finished grade? It's not earth? It's

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1 not soil?

2 MR. SHER: I think finished grade  
3 can be a lot of things but I think in that  
4 point it is my understanding of the top of  
5 that is that it is paved or I don't know  
6 whether its concrete per se George, so I'm not  
7 sure.

8 MR. KEYS JR.: And what is  
9 directly beneath that paved area, that  
10 adjacent finished grade? What is beneath it?

11 MR. SHER: I don't know. I may  
12 have known at one point but sitting here right  
13 now I don't know.

14 MR. KEYS JR.: I'm looking at  
15 Exhibit Q.

16 MR. SHER: I'm looking at Exhibit Q  
17 also. I'm sorry I'm looking at Exhibit Q also  
18 and my answer stands.

19 MR. KEYS JR.: I see the parking  
20 garage. If that's what beneath the element  
21 that you say is adjacent finished grade?

22 MR. SHER: Certainly as you go down

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1 to level one and level two that's the parking  
2 garage.

3 MR. KEYS JR.: I'd like to show  
4 you a courtyard section that your architect  
5 prepared.

6 CHAIRMAN JORDAN: What exhibit  
7 are you referencing? Is it an exhibit that's  
8 already in this case? Or is it something that  
9 you are tendering?

10 MR. KEYS JR.: It's something  
11 that we are tendering. Since we don't have an  
12 architectural witness, I have to use the  
13 exhibits.

14 CHAIRMAN JORDAN: Well then you  
15 need to tender it and we need to have  
16 sufficient copies or at least to identify it  
17 and it has to be accepted for the record. At  
18 this point it's not accepted for the record.  
19 I have not seen it and we don't know what it  
20 is.

21 MR. KEYS JR.: Yes. This is a  
22 drawing that we would like to submit,

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1 courtyard sections A-0.4 prepared by Eric  
2 Colbert and Associates for this property.

3 CHAIRMAN JORDAN: It is important  
4 the opposing party have them.

5 MR. SURABIAN: Mr. Keys, we don't  
6 have a copy.

7 MR. QUIN: Mr. Chairman, if this  
8 is suppose to be cross-examination, you are  
9 limited to the testimony of the witness, not  
10 your new case.

11 CHAIRMAN JORDAN: I understand  
12 that but we kind of gave some leeway the way  
13 we presented.

14 MR. KEYS JR.: Mr. Sher have you  
15 had an opportunity --

16 MR. SURABIAN: Before we being  
17 again I have not received a copy of that  
18 drawing. I would like one.

19 MR. KEYS JR.: Mr. Sher, this is  
20 a section of the courtyard that we were just  
21 talking about.

22 MR. SHER: I have not seen this

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1 before today and so I'm sort of having to fly  
2 by night here, but whatever.

3 MR. KEYS JR.: If you look at the  
4 section marked 4 courtyard section. On the  
5 lefthand side --

6 CHAIRMAN JORDAN: Wait, wait,  
7 wait. Time out. Not my responsibility, well  
8 it is kind of my responsibility. We need to  
9 identify this as an exhibit number. More  
10 importantly we need to identify it as an  
11 exhibit what it is particularly. So what  
12 exhibit number is this that we are offering?  
13 What is this going to be? What exhibit  
14 numbers do you have that's available? What is  
15 this?

16 MR. KEYS JR.: We will call it  
17 Hearing Exhibit, we will call it Hearing  
18 Exhibit 1 because all the others are  
19 previously designated.

20 CHAIRMAN JORDAN: Have you  
21 already called it something?

22 MR. KEYS JR.: We haven't called

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1 it anything.

2 CHAIRMAN JORDAN: It is  
3 identified for the record -- what is it?

4 MR. KEYS JR.: It is the  
5 courtyard section.

6 CHAIRMAN JORDAN: The document  
7 has to be identified. So we have here, it has  
8 Calvin Craft's Enterprises, excuse me,  
9 Cafritz Enterprises and I think identified at  
10 the bottom as A.04. A.04.

11 MR. KEYS JR.: A.04.

12 CHAIRMAN JORDAN: There now we  
13 have a record. Okay.

14 MR. KEYS JR.: And I'm asking you  
15 to look at the courtyard section that's  
16 labeled 4. This is a cross section view  
17 through the courtyard of the area we were just  
18 talking about. And the units are on either  
19 edge and we're looking through the courtyard.

20 And the section in the middle, the raised  
21 section, this is the adjacent finished grade  
22 that you were just discussing.

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1                   MR. SHER: I think you are looking  
2                   courtyard section 3, not section 4. The  
3                   numbers are below the section rather than  
4                   above.

5                   MR. KEYS JR.: Correct, it's 3  
6                   not 4. I'm sorry. Thank you for the  
7                   correction. I would draw your attention to  
8                   the note that indicates that its not soil that  
9                   fills this courtyard but its structural foam.  
10                  Is that accurate?

11                  MR. SHER: Well that's what the  
12                  drawing says.

13                  MR. KEYS JR.: Do you consider  
14                  structural foam to be adjacent finished grade?

15                  MR. SHER: I would say yes. No,  
16                  actually I would not. I would not say that  
17                  foam is the grade. The grade is the top, not  
18                  the foam itself.

19                  MR. KEYS JR.: And the grade you  
20                  say is concrete?

21                  MR. SHER: According to this and I  
22                  said I didn't know this --

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1                   CHAIRMAN JORDAN:     I'm trying to  
2     keep the relevance here.  Are you saying, is  
3     your questions leading as saying what makes up  
4     the adjacent finished grade and the substance  
5     thereof includes some type of foam and  
6     something else?  Is that what your line of  
7     questioning is?

8                   MR. KEYS JR.:     I'm trying to, I  
9     mean they have, well there is no definition  
10    for adjacent finished grade.  There's no  
11    content to it.  So I'm trying to establish  
12    from their plans what they deem adjacent  
13    finished grade to be.

14                  CHAIRMAN JORDAN:    Okay.  But your  
15    talking about but you are getting to the  
16    substance of what it's made up.  Are you  
17    asking them what they consider the line that's  
18    drawn or what part of their plan is the  
19    Adjacent Finished Grade?  What are you asking?

20                  MR. KEYS JR.:     Both.  And they  
21    have answered the question.

22                  CHAIRMAN JORDAN:    Okay.  What's

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1 your next question?

2 MR. KEYS JR.: I have one or two  
3 more questions. Now Mr. Sher, on the interior  
4 courtyard, which we agree is topped with  
5 concrete. You deem that to be the adjacent  
6 finished grade?

7 MR. SHER: Actually, I never agreed  
8 it was topped with concrete because I said I  
9 didn't know and I don't even see on this  
10 drawing an indication of what the top of it  
11 is. It appears to me that the number that we  
12 have said, the adjacent finished grade is  
13 elevation 307.54. I think that appears in a  
14 number of places throughout and that's what I  
15 believe it is.

16 MR. KEYS JR.: And the adjacent  
17 finished grade in this instance is really a  
18 container. Is it not? A container. There are  
19 walls on each side of it. And its holding up  
20 that adjacent finished grade.

21 MR. SHER: It is part of the  
22 building that this point the top of the

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1 structure and I believe that it constitutes  
2 the finished grade.

3 MR. KEYS JR.: Does it serve any  
4 functional purpose? Does it afford light and  
5 air? I mean if this structure --

6 CHAIRMAN JORDAN: Are you talking  
7 about adjacent finished grade or are you  
8 talking about the areaway?

9 MR. KEYS JR.: The adjacent  
10 finished grade. I'm talking about this  
11 courtyard level. What is it's function? It  
12 is elevated to an elevation of 3. or 307.54.  
13 What is it's function? What is it's purpose?

14 MR. SHER: The courtyard in the  
15 middle of the two wings of the building.

16 MR. KEYS JR.: Again does it  
17 serve to the afford light and air to cellar  
18 units?

19 MR. SHER: I don't think finished  
20 grade ever affords light and air. Finished  
21 grade defines a surface. I'm sorry, George,  
22 you got me.

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1                   CHAIRMAN JORDAN:       That was the  
2                   essence of my question just a minute ago.  
3                   What was the point. Are you asking -- are you  
4                   talking about the areaway or the finished  
5                   grade? And it seems like your question now  
6                   is, is the finished grade contributing to  
7                   light and air. Is that correct?

8                   MR. KEYS JR.:        I did ask him  
9                   that, yes.

10                  CHAIRMAN JORDAN:       Okay. Let's go  
11                  on to your next question. I think you've  
12                  answered a couple of different ways.

13                  MR. KEYS JR.:        Mr. Chairman, I  
14                  don't have any further questions of Mr. Sher.

15                  CHAIRMAN JORDAN:        Any other  
16                  questions of the owner's team. So you have  
17                  something you want to call in rebuttal?

18                  MR. KEYS JR.:        Yes we do.

19                  CHAIRMAN JORDAN:        Okay, then you  
20                  have ten minute rebuttal.

21                  MR. KEYS JR.:        I'd like to ask  
22                  Mr. Hawkins.

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1                   CHAIRMAN JORDAN:            Sure, I  
2 wondered when we were going to get to you.

3                   MR. QUIN:        I want to make sure  
4 that this is not new testimony but that it is  
5 rebuttal. I have a feeling that this is not  
6 rebuttal.

7                   CHAIRMAN JORDAN:    Do you want to  
8 make a proffer?

9                   MR. KEYS JR.:    Yes, I'm going to  
10 ask Mr. Hawkins to talk about his conclusions  
11 with request to his examination of the zoning  
12 maps. And I'm going to ask Mr. Hawkins about  
13 his view as an architect to what adjacent  
14 finished grade constitutes. And to point out  
15 examples of adjacent finished grade in this  
16 property.

17                  CHAIRMAN JORDAN:    I'm going to  
18 give you some leeway. You have ten minutes to  
19 do what you are doing. So, let's go ahead.

20                  MR. KEYS JR.:    Mr. Hawkins, could  
21 you quickly and please summarize your  
22 observations with respect to your review of

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1 the maps in question.

2 MR. HAWKINS: Yes. I am examined  
3 as you see this is the cover of the June 1,  
4 1983 version of the zoning map.

5 CHAIRMAN JORDAN: What are you  
6 referring to?

7 MR. KEYS JR.: It's an exhibit  
8 that's been submitted.

9 MR. HAWKINS: No it has not. I'm  
10 just going to illustrate something for the  
11 record.

12 CHAIRMAN JORDAN: I'm sorry.

13 MR. KEYS JR.: It's an official  
14 record.

15 CHAIRMAN JORDAN: Okay, well  
16 let's identify it though. We can't just start  
17 -- Mr. Keys, if you are going to use it, then  
18 we need to identify it for the record so that  
19 everybody can follow it from here and for 20  
20 or 30 years later what we were looking at.

21 MR. KEYS JR.: What we've shown  
22 on the screen is a portion of the Official

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1 Zoning map in 1983 for the District of  
2 Columbia.

3 CHAIRMAN JORDAN: Okay.

4 MR. KEYS JR.: And the page  
5 showing the subject property

6 CHAIRMAN JORDAN: Okay.

7 MR. HAWKINS: Shown here this is  
8 an image of the figure that's in question.  
9 I'm just going to be dealing with that figure.

10 I circled other 9s and 5s on the same page  
11 and another page as an example. It's  
12 important to note that these maps are drawn  
13 with a pen, a drafting pen that is held  
14 vertically. The letters and numbers are drawn  
15 with the same kind of pen in a device that  
16 follows a pattern. And the 5s and the 9s are  
17 as --

18 CHAIRMAN JORDAN: Whoa, you're  
19 testifying as an expert on maps and  
20 architectural but I'm talking here and you are  
21 saying handwriting.

22

23

1                   MR. HAWKINS:     Maps.    I want to  
2                   make a distinction between handwriting and the  
3                   standards for these maps.    The standard is  
4                   established by the template that you see in  
5                   the photograph here.    And the reason this is  
6                   done, is all of these maps used to be drawn by  
7                   hand with the same kinds of pens.    And the  
8                   larger numbers and letters were always dealt  
9                   with the template.    The smaller ones, the  
10                  standard shape for all of the letters and  
11                  numbers was based on the template shape so  
12                  there would not be the kind of confusion that  
13                  we have here today.    And the 5 and 9 are shown  
14                  here and you can see that all of the corners  
15                  are because of the size of the nib they are  
16                  rounded.    But you can see that these are two  
17                  numbers which were done with a single stroke  
18                  in the template or without the template.    What  
19                  I want to do is look at this greatly enlarged  
20                  version of the number in question and compare  
21                  it with a 5 and with a 9.    And you can see  
22                  that if it, if you take it as a 5 and we know

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1 there's a dash above it, that it became  
2 confused with. You can see that in the  
3 process or reproducing these maps and in the  
4 nature of the paper that they've drawn on,  
5 there is often bleeding out to the edges. The  
6 original image was scanned at 4800 pixels per  
7 inch. So every bit of it is included here.  
8 You can see that a single line eliminated the  
9 dash from consideration. You can see that  
10 another single line shows how the 5 that was  
11 originally drawn bled in every direction  
12 joined with the dash and became somewhat  
13 confusing to some of the people who looked at  
14 it, not all. Unfortunately it's the people  
15 who have authority, who didn't look carefully  
16 enough and who were swayed by probably other  
17 arguments or by or against the fairly direct  
18 interpretation of this as a 5. If it were a  
19 9, I've cleaned up where a 9 might have bled.  
20 I've cut the dash off from above. And one  
21 might say, well it could be a 9. But it can't  
22 be a 9 that came from the same kind of

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1 drafting and the same standard of 9 that had  
2 been used for years. Was used all the way  
3 from the beginning of this entire process  
4 until it became digitized a few years ago.  
5 This is what else you can do to make a 9 out  
6 of this. You can cut out some of the what I  
7 call the chin. You can cut out a lot more up  
8 above. And you can add the green part and you  
9 can make a fairly unattractive 9. But it  
10 cannot possibly be thought that 9, the green  
11 and the black and the green and the red 9 was  
12 what was originally drawn. The 5 is what was  
13 originally --

14 CHAIRMAN JORDAN: Can I ask a  
15 very fundamental question here?

16 MR. HAWKINS: Yes.

17 CHAIRMAN JORDAN: Because we  
18 still haven't gotten anything that says that  
19 the March 16, 1965 order that actually set the  
20 zoning up, that anything else came along that  
21 actually changed it. So here's my question.

22 MR. HAWKINS: Yes.

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1                   CHAIRMAN JORDAN:    Because I think  
2                   we are going down again down a road that I've  
3                   tried to suggest is not the road where you  
4                   want to be because you've got other things you  
5                   could have been spending your time on that I  
6                   think there's real concerns about.   So let's  
7                   take it for example, hypothetically.   As we  
8                   know acts are generated by city councils or  
9                   governments.   And the act actually may create  
10                  the law.   Correct?

11                  MR. HAWKINS:    Yes.

12                  CHAIRMAN JORDAN:           And we  
13                  subsequently know that a document, that act  
14                  may be codified into another document.   Right?

15                  That's suppose to reflect -- why don't you  
16                  stay with me.       Where the act, the  
17                  codification, a subsequent writing, is suppose  
18                  to reduce the writing that which was passed by  
19                  the legislation.   Okay?

20                  MR. HAWKINS:    Yes.

21                  CHAIRMAN JORDAN:           No what if we  
22                  have the original act that created whatever

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1 the law is and we now have a codification with  
2 an error in it. Which one takes the weight of  
3 law in comparison? Which one has the weight  
4 of law? Which is the one that has the weight?

5 Is it the original act as passed or is the  
6 error in the codification?

7 MR. HAWKINS: The original, I  
8 think you know the answer.

9 CHAIRMAN JORDAN: Absolutely.  
10 And I think you know the answer and why I'm  
11 asking it.

12 MR. HAWKINS: Yes.

13 CHAIRMAN JORDAN: That's why I'm  
14 suggesting to you in this hearing that you --

15 MR. HAWKINS: If I may say, the  
16 codification was consistent for 40 years in  
17 the map. It was codified in the map for 40  
18 years. A few years --

19 CHAIRMAN JORDAN: Evidently as we  
20 sit here today was an error.

21 MR. HAWKINS: No. For 40 years  
22 it was correct and then somebody changed it

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1 and said that's a 9.

2 CHAIRMAN JORDAN: No I'm talking  
3 about the original that is set forth what was  
4 being drawn?

5 MR. HAWKINS: Mr. Quin has been  
6 very positive about the act that said it took  
7 two lots or it might have been Mr. Sher who  
8 said it. That lots were taken on Military  
9 Road. But part of one of those lots was  
10 included in that act. We don't have the act  
11 anymore, as I understand it. It couldn't be  
12 found. The particular description --

13 CHAIRMAN JORDAN: I'm sorry, in a  
14 document of March 16, 1965? Have you reviewed  
15 that document? It was Owner's Exhibit A?

16 MR. HAWKINS: To include those  
17 lots. It's not a small matter that all of one  
18 of the lots was not included. It doesn't say  
19 it includes all of the lots. The 251 came  
20 after this. It was subsequent to this time.  
21 251 was drawn on the map and it was there for  
22 40 years.

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1 CHAIRMAN JORDAN: Okay. It's  
2 your case. Proceed on.

3 MR. KEYS JR.: Review Exhibit 32,  
4 which is the letter from Mr. Nero dated March  
5 29, 2013.

6 MR. HAWKINS: Yes I've seen it.

7 MR. KEYS JR.: And Mr. Nero gives  
8 the explanation that the 9 was in fact, the 5  
9 was in fact a 9.

10 MR. HAWKINS: Yes.

11 MR. KEYS JR.: Do you agree with  
12 that?

13 MR. HAWKINS: No. In fact I  
14 wondered how Mr. Nero could see a 9 in this 5.

15 MR. KEYS JR.: Thank you. Mr.  
16 Hawkins, I would like you to turn your  
17 attention now to the property itself and the  
18 drawings that were submitted. And I would  
19 particularly refer you to Exhibit Q.

20 MR. HAWKINS: Okay.

21 MR. KEYS JR.: And Exhibit Q  
22 contains features that Mr. Sher has identified

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1 as adjacent finished grade with respect to the  
2 Military Road side of the building and the  
3 courtyard.

4 MR. HAWKINS: Yes.

5 MR. KEYS JR.: In your opinion  
6 does the courtyard elevation, the concrete  
7 elevation constitute an adjacent finished  
8 grade?

9 MR. HAWKINS: I would say that it  
10 does not. There is very little of anything  
11 natural even in the material of this structure  
12 in the middle of the courtyard. The entirety  
13 of that structure as shown in red here is  
14 built on top of a roof and it could be any  
15 height it wanted to be. The developers  
16 obviously wanted it to be high enough to make  
17 cellars out of the adjacent spaces. But there  
18 is nothing in the nature of the materials that  
19 was put in there which is disconnected from  
20 earth.

21 CHAIRMAN JORDAN: Let me ask you  
22 something because this is very key and ver

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1 important to this case. And I really want to  
2 get an understanding because I've asked this  
3 several times and I haven't seen anything to  
4 the contrary nor to my knowledge that there's  
5 something to the contrary, but if you know  
6 please help me. Adjacent finished grade or  
7 finished grade has to be made up of natural  
8 substances. What's your authority for that?

9 MR. HAWKINS: Well as has been  
10 pointed out, there is a very good, not a very  
11 extended definition.

12 CHAIRMAN JORDAN: But is there  
13 one that you see?

14 MR. HAWKINS: But I would say  
15 going in the other direction, I would say that  
16 a structure that has nothing of nature in it  
17 that is connected with the earth, none of that  
18 can be called a grade.

19 CHAIRMAN JORDAN: Isn't that  
20 consistent of nature of the earth more so  
21 starts off sometimes as the existing grade?  
22 Isn't that more existing grade? But my

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1 question was because this is really important  
2 for the sake of these measurements and  
3 everything that we are doing. If you know of  
4 something that said that the finished grade  
5 had to be made of natural materials or any  
6 type of material? I just need to know. It is  
7 really something and that's what I wanted us  
8 to get to throughout this hearing and I kept  
9 saying there are some other things that are  
10 out there.

11 MR. HAWKINS: Let me make a  
12 distinction using this section and it's a  
13 section, there are three sections through the  
14 architect's submitted drawings.

15 CHAIRMAN JORDAN: But just stay  
16 with me for a second.

17 MR. HAWKINS: Yes.

18 CHAIRMAN JORDAN: I'm just trying  
19 to be correct. You don't know of anything and  
20 certainly under DC zoning regulations or even  
21 any place in the code, that says to have  
22 finished grade you have to have natural

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1 materials as you just testified?

2 MR. HAWKINS: No, I don't. There  
3 isn't anything that says that. But what we see  
4 in a number of different locations on these  
5 drawings that what is considered finished  
6 grade is different in different places. I  
7 want to call attention to a section is on the  
8 screen now. You can see the red part in the  
9 upper two sections.

10 CHAIRMAN JORDAN: What is this  
11 document we are looking at? What's the  
12 exhibit number?

13 MR. HAWKINS: The sections are  
14 cut north/south across the courtyard so that  
15 the elevation --

16 CHAIRMAN JORDAN: Excuse me. We  
17 have to have a record of this. What's the  
18 exhibit number?

19 MR. HAWKINS: That would be taken  
20 from the one you just -- I will give you an  
21 exhibit number in a moment. It is Exhibit 4.

22 MS. LENYK: This is a close up of

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1 Exhibit 4 in the pre-hearing.

2 CHAIRMAN JORDAN: Okay, thank  
3 you.

4  
5 MR. HAWKINS: The red indicates  
6 the built up area in the courtyard. This is a  
7 structure entirely disconnected from the earth  
8 on all four sides. It has no connection  
9 whatsoever to natural ground of any sort. And  
10 it is a structure that's made of plastic  
11 concrete water and dirt. The dirt has come  
12 from Maryland because there's no room for them  
13 to stockpile the dirt on site. So they will  
14 have to go out and get a truckload of dirt to  
15 sprinkle over the top so there's enough to  
16 grow something on. That does not constitute  
17 grade. I am certain of that. Whatever grade  
18 is, that isn't it. Now, the natural grade, we  
19 had a set of drawings earlier, Exhibit R, that  
20 Mr. Quin submitted that showed three sections  
21 along Military Road. He was right in saying  
22 that some parts are higher, some parts are

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1 lower. But in each of those sections, I would  
2 like you to notice that the grade was raised  
3 high enough to make a cellar out of the nearby  
4 space. In each of those cases, the minimum  
5 being four inches of extra dirt. The maximum  
6 being 18 inches of extra dirt. If they had  
7 just followed natural grade along there, it  
8 would disqualified the adjacent spaces from  
9 being considered cellar. They've raised the  
10 grade after doing everything else. They put  
11 enough dirt in above the natural grade to make  
12 a cellar.

13 CHAIRMAN JORDAN: My follow up  
14 question then is what do you have or what  
15 regulation or what code says how much in a  
16 adjacent, excuse me, a finished grade be over  
17 the existing grade.

18 MR. HAWKINS: There isn't  
19 anything in the code that says that. This is  
20 just part of a pattern that is consistent  
21 throughout this project in almost every side,  
22 not including the part of the west and

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1 southwest corners. Every other part has been  
2 manipulated just to make the cellars. And  
3 its on top of a roof after all. This grade is  
4 being manipulated up and down. So its really  
5 entirely as Mr. Keys pointed out, an area is  
6 meant to facilitate bringing light and air  
7 into a cellar.

8 CHAIRMAN JORDAN: You said  
9 areaway.

10 MR. HAWKINS: An areaway is. And  
11 that's what these appear to do until you  
12 realize that they had plenty of light and air  
13 until these high walls were brought close  
14 enough to the windows. In several cases not  
15 close enough in others to be able to call it  
16 grade. At the entrance, it's a court, it's a  
17 ten-foot wide, 62-foot long court. And yet  
18 the applicant's here, the owners leap across  
19 that court to 12-1/2 feet away where there's  
20 some dirt. So they are calling that the  
21 adjacent grade. I've got a diagram I made  
22 tracing over the architect's drawings and this

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1 has not been entered as an exhibit but I would  
2 be glad to give you a print of it. This is  
3 just an enlargement of the plan showing the  
4 building in gray. The apartments, the sitting  
5 room, the areas and how far it is from the  
6 face of those buildings, parts of the building  
7 to the closest place where you can say the  
8 grade is high enough to make a cellar out of  
9 it.

10 CHAIRMAN JORDAN: Mr. Moy, are we  
11 like 16:38? Is that what that is? That's  
12 what that means. So, I'm going to ask Mr.  
13 Keys that you move into your closing.

14 MR. QUIN: May I ask a quick  
15 question of the witness?

16 CHAIRMAN JORDAN: Yes. I'm  
17 sorry, yes.

18 MR. QUIN: I'll be very brief.  
19 Mr. Hawkins, you are familiar with sidewalks  
20 in the District of Columbia, right?

21 MR. HAWKINS: Somewhat.

22 MR. QUIN: Well you are an

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1 architect.

2 MR. HAWKINS: I use them all the  
3 time but --

4 MR. QUIN: What is underneath a  
5 lot of sidewalks? Is it always dirt? Is it  
6 sometimes vault? Is it vault space? Is it  
7 sometimes garages? Is it something other than  
8 dirt?

9 MR. HAWKINS: Lots of things  
10 including vault, yes.

11 MR. QUIN: Okay. And the  
12 measurement of height under the 1910 Height  
13 Act goes from the top of sidewalk. Is that  
14 correct?

15 MR. HAWKINS: That's right.

16 MR. QUIN: No other questions.

17 CHAIRMAN JORDAN: Thank you.  
18 Does the District have questions? Have  
19 question or questions?

20 MR. SURABIAN: Yes, one question.  
21 Mr. Hawkins, in the courtyard area, where is  
22 it that you believe the finished grade should

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1 be measured from?

2 CHAIRMAN JORDAN: Give me that  
3 question one more time please.

4 MR. SURABIAN: In the courtyard  
5 area, I wanted to know what Mr. Hawkins'  
6 opinion of what the finished grade, where that  
7 should be measured from?

8 MR. HAWKINS: For purposes of  
9 determining whether the first floor is a  
10 cellar or not, I would say it would be taken  
11 from the roof of the garage. But I don't  
12 think it is a relevant question where you have  
13 an open court with an essentially flat plain  
14 which is the roof of the garage and it's the  
15 floor of the court. Grade is not a relevant  
16 question there. It's a construction with no  
17 grade. The grade is outside the building in  
18 that case.

19 MR. SURABIAN: Am I understanding  
20 you correct that in the courtyard, because  
21 there is a parking garage below that there is  
22 no finished grade. Is that your opinion?

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1                   MR. HAWKINS:     Yes.  There is no  
2 adjacent finished grade to any of the spaces  
3 that open into the courtyard.

4                   MR. SURABIAN:     Well if there is  
5 no adjacent finished grade, how are we to  
6 administer the regulations with regard to  
7 determining basement and cellar level.

8                   MR. HAWKINS:     It doesn't come up.  
9                   There is no question about that unless the  
10 developer wants to claim that by some  
11 artificial device.  An irrelevant part of the  
12 zoning code of building code can be applied to  
13 it.  It's simply there is no grade there.  
14 There's no way of measuring it.  Now if they  
15 insist upon putting the obstructions in front  
16 of the windows and the doors, they have made  
17 it sufficiently feel like a cellar to the  
18 people who have to live in those units.  And  
19 they are welcome to do that.  But it is not  
20 grade that's causing the problem.  It is the  
21 designer who put that chunk of stuff there.

22                   MR. SURABIAN:     Okay, thank you.

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1                   CHAIRMAN JORDAN:     So, with that,  
2     are you concluded?

3                   MR. SURABIAN:     Yes.

4                   CHAIRMAN JORDAN:     Okay.     So,  
5     three minute closings.

6  
7  
8                   MR. KEYS JR.:     Mr. Chairman,  
9     members of the board.   What the appellant has  
10    tried to do is to eliminate the elasticity of  
11    the interpretations giving to designing  
12    regulations over time.   And I think they come  
13    to a kind of combination in this structure.  
14    With the result that we have a ten-story  
15    building where only a nine-story building  
16    should be.   We have almost an entire floor of  
17    FAR taken out of the calculation.   And that  
18    based on an interpretation that really is a  
19    stretch beyond any reasonable understanding of  
20    adjacency, of finished grade, of the need for  
21    cellar units to have light and air.   I think  
22    the number of times the developer has relied

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1 upon the notion that we are doing this to give  
2 light and air to cellar units, I would  
3 reiterate Mr. Hawkins' point. It is precisely  
4 manipulation of grade that denies light and  
5 air to cellar units. It is done for the sole  
6 purpose of pushing this area out of FAR. And  
7 that is an extremely loose reading of the  
8 regulations. And it's one that I think  
9 subsequent changes to the regulations are  
10 recognizing. The section I cited in the  
11 definition of building height talked about the  
12 artificiality of landscaping shouldn't be a  
13 factor. In that instance it was building  
14 height. I would make the same point that the  
15 artificiality of this circumstance is far  
16 different from the usual situation of areaways  
17 as we come to understand them as an  
18 architectural feature of a lot of residential  
19 development in the city. This is nothing more  
20 than a naked grab for FAR and the guys of  
21 light and air for lower units. We have made a  
22 very technical argument, legal argument with

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1 respect to building height. I'm not going to  
2 try to summarize that. I think we will rest  
3 on the analysis that we submitted in our  
4 application. But if you look at the Height of  
5 Buildings Act and look at the literal plain  
6 meaning of the words, its clear that Kanawha  
7 Street should not be the basis for the  
8 measurement of the height. It should be  
9 Connecticut Avenue as the wider street.

10 Finally I would reference Section  
11 101.1 through 101.4, zoning regulations, which  
12 is the section that defines how the  
13 regulations ought to be interpreted. And in  
14 particular there's a provision in 101.3 and  
15 101.4. They are kind of mirror image  
16 provisions. But the essence of them is that  
17 where there's a conflict between a statute and  
18 a regulation, and I would argue where there's  
19 ambiguity as to the meaning of provisions,  
20 that the proper resolution is to opt for the  
21 option that in the terms of the regulation  
22 that imposes a higher standard or requires a

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1 larger yard, court or open space, requires a  
2 lower height or bulk of buildings, requires a  
3 greater percentage of lot occupancy to be  
4 unoccupied. The bias in the interpretation  
5 provisions of the regulations is that if  
6 there's a question, make it less dense, make  
7 it lower, make it smaller, not make it larger.

8 And that really is the position that zoning  
9 administrators over the last 40 to 50 years  
10 have talked themselves into. One  
11 interpretation simply follows another without  
12 ever subjecting this to the analysis of how  
13 should these regulations be seen in the  
14 context of the clear directions of the Height  
15 of Building Act and the interpretation  
16 provisions of the zoning code.

17 MR. SURABIAN: Thank you members  
18 of the board. Appellants speak of elasticity  
19 of interpretation but I think what has been  
20 demonstrated at the hearing the way the  
21 regulations have been applied in this case is  
22 consistent with how the regulations have been

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1 applied for generations. Specifically much of  
2 the dispute in this case is settled and  
3 corporation counsel from over 60 years ago,  
4 that we are continually relying on and have  
5 applied. And appellants have offered very few  
6 alternatives and explanations as to how the  
7 regulations should be applied. For example,  
8 they object the developer altering making  
9 alternations in the grade. But what else does  
10 the term finished grade mean if it doesn't  
11 mean that it would be different than the site  
12 conditions before construction? Ultimately  
13 the grade can be changed during construction  
14 and the determination of the height of the  
15 cellar depends on that finished grade. Mr.  
16 Hawkins testified, their expert, that the  
17 courtyard has no finished grade. And that's  
18 not how, that's not a reasonable explanation  
19 of how we are going to determine what the  
20 finished grade of the courtyard is. The  
21 zoning administrator's interpretation that its  
22 at the height of the grade adjacent to the

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1 areaway is consistent with how buildings all  
2 around the city has been applied.

3 And lastly, again the appellants  
4 said that the 1975 zoning map was changed but  
5 they have no explanation as to how that  
6 happened and there's no record of any official  
7 action by the Zoning Commission to change the  
8 map. The Zoning Commission is the only body  
9 that can change the map. And so I think its  
10 clear again to the briefs that have been filed  
11 and the testimony today that the appeal should  
12 be denied. Thank you.

13 MR. QUIN: I'll be very brief.  
14 The zoning should be clear. The measurement  
15 of height should be clear. The rooftop  
16 structures unquestionably should be clear.  
17 Years and years of interpretation. Likewise  
18 the fourth argument about that really goes  
19 after the window well, the openings to allow  
20 light and ventilation. What is really in my  
21 mind so puzzling is appellant's position that  
22 they oppose the height, the bulk and the

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1 configuration. That's what they are  
2 challenging here. If we were to raise, saying  
3 we wanted to, the base of the areaway or  
4 change the center of the courtyard to dirt,  
5 that doesn't change one single bit of the  
6 height, bulk or configuration. Because you  
7 still have ten stories. Same thing. So it is  
8 so crazy. What you do though is you wind up  
9 with units that are not as nice without light  
10 and ventilation which this traditionally has  
11 been the interpretation. So, I just, I wish  
12 that we had been more effective in trying to  
13 negotiate and come up with a settlement. We  
14 are still open to that, but not right at this  
15 moment. We would like to have the decision of  
16 the board affirming the zoning administrator  
17 as soon as possible. And I appreciate the  
18 opportunity to talk so much. Thank you.

19 CHAIRMAN JORDAN: Thank you all.

20 We will close the record except that I am  
21 going to ask that each party present findings  
22 of facts and conclusions to the board and that

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1 we put this on for decision, Mr. Moy.

2 MR. MOY: I'm looking at, Mr.  
3 Chairman, in two weeks. If you feel two weeks  
4 is sufficient.

5 CHAIRMAN JORDAN: It might take  
6 that much.

7 MR. MOY: Okay.

8 CHAIRMAN JORDAN: You know what?  
9 I don't want a debate over findings of facts  
10 and conclusions so there is no need for  
11 responses from findings of facts and  
12 conclusions. So let's say two weeks then.

13 MR. MOY: Because that second  
14 week would be October 8. If not --

15 CHAIRMAN JORDAN: How are we  
16 looking on that docket that day? The office  
17 has been adding more and more cases to us, but  
18 that's okay.

19 MR. MOY: We're looking good.  
20 We're looking good. If not October 8 -- two,  
21 four, six hearings and two decisions.

22 CHAIRMAN JORDAN: Okay. Six

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1 hearings?

2 MR. MOY: Hearing cases.

3 Otherwise we are looking at October 22.

4 CHAIRMAN JORDAN: Any appeals on  
5 there?

6 MR. MOY: As a matter of fact,  
7 no.

8 CHAIRMAN JORDAN: And Ms. Cohen  
9 is on that date?

10 VICE-CHAIR COHEN: No I'm gone.

11 CHAIRMAN JORDAN: What date?

12 VICE-CHAIR COHEN: October 29.

13 MR. KEYS JR.: Mr. Chairman, if I  
14 could just, I'm going to be out of the office  
15 for a week from the 28<sup>th</sup> to the 3<sup>rd</sup>. If it's a  
16 two-week, I would find it very difficult to be  
17 able to --

18 CHAIRMAN JORDAN: And I think  
19 what we are finding out now because  
20 Commissioner Cohen needs to be here. So it  
21 looks like it's going to be, October 29,  
22 right?

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1 MR. MOY: Yes sir.

2 CHAIRMAN JORDAN: October 29. So  
3 let's your information in. 29, kicking back  
4 four days, the 25<sup>th</sup> or 26<sup>th</sup>?

5 MR. MOY: I would prefer at least  
6 a week. The week prior would be the 22<sup>nd</sup>.

7 CHAIRMAN JORDAN: 22<sup>nd</sup>, okay.  
8 Well good. I really appreciate everyone  
9 taking the time and participating in this  
10 matter. I think it requires a lot of effort  
11 especially its important for citizens to get  
12 involved like citizens have been. Sometimes  
13 things happen on the back end and its too  
14 late. But anyway, I know how important these  
15 issues are to people from every aspect of it.  
16 So with that we will close this particular  
17 hearing.

18 So again, I thank you all for  
19 being here all day with us. But I understand  
20 it is a very important point, issue. One that  
21 the board is going to take a very, very  
22 serious look at So, that' where we are. So we

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1 will end this particular case.

2 The next matter of business is  
3 that for the board --

4 MR. LeGRANT: Mr. Chair, I'm sorry  
5 to interrupt. I just want to make a point of  
6 information.

7 CHAIRMAN JORDAN: Yes.

8 MR. LeGRANT: This is Mr.  
9 Surabian's last appearance before the board.  
10 He is moving on to another division of the  
11 Office of Attorney General. I just want to  
12 make the board aware.

13 CHAIRMAN JORDAN: And thank you  
14 for being remiss. We really appreciate your  
15 work and effort here as well as I'm sure the  
16 citizens do and wish you well in your change  
17 offices.

18 MR. SURABIAN: Thank you. It's  
19 been a pleasure.

20 CHAIRMAN JORDAN: Anyone else?

21 VICE-CHAIR COHEN: I haven't  
22 worked with you very long but I do have a lot

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1 of respect for what I have seen.

2 MR. SURABIAN: Thank you, I  
3 appreciate that.

4 CHAIRMAN JORDAN: I hope I  
5 haven't beaten you up too much many times, but  
6 I have to do what I have to do. No, really I  
7 do appreciate you. So with that board, in  
8 accordance with Section 405(c) of the Open  
9 Meetings Act of DC Official Code Section 2-  
10 575(c), I move that the Board of Zoning  
11 Adjustment hold closed meetings on the Mondays  
12 of September 30, October 7, 21 and October 28,  
13 that would begin at 4:00 p.m. for the purpose  
14 of obtaining legal advice from our counsel and  
15 to deliberate upon but not voting on the cases  
16 scheduled to be publically heard or decided by  
17 the board on the day after the closed meeting.

18 Those cases are identified on the board's  
19 public agenda for October 1 at 1:00 p.m.,  
20 October 5, October 22 and October 29. Is there  
21 a second?

22 VICE-CHAIR COHEN: Yes, second.

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1 CHAIRMAN JORDAN: Motion made and  
2 seconded. Would the secretary please take a  
3 roll call?

4 MR. MOY: Thank you Mr. Chairman.  
5 When I call your name if you would respond  
6 with yes or no. Ms. Cohen?

7 VICE-CHAIR COHEN: Yes.

8 MR. MOY: Chairman Jordan?

9 CHAIRMAN JORDAN: Yes.

10 MR. MOY: Mr. Hinkle?

11 MEMBER HINKLE: Yes.

12 MR. MOY: Ms. Allen is absent  
13 today and we have a board seat vacant. The  
14 motion still carries 3 to 0.

15 CHAIRMAN JORDAN: Then in  
16 accordance I request that the Office of Zoning  
17 provide notice of the closed meeting in  
18 accordance with the act. So we thank you.  
19 And we are adjourned.

20 (Whereupon the above-entitled  
21 meeting was concluded at 2:37 p.m.)  
22

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