

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

DECEMBER 3, 2013

+ + + + +

The Regular Public Hearing convened in the Jerrily R. Kress Memorial Hearing Room, Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 10:09 a.m., Lloyd Jordan, Chairman, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

LLOYD JORDAN, Chairman
S. KATHRYN ALLEN, Vice-Chairperson
JEFF HINKLE, Board Member (NCPC)

ZONING COMMISSION MEMBERS PRESENT:

MICHAEL G. TURNBULL, FAIA, Commissioner
(AOC)
ANTHONY J. HOOD, Chairman

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
JOHN NYARKU, Zoning Specialist

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STEPHEN VARGA, Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

STEPHEN GYOR
BRANDICE ELLIOTT
ARTHUR JACKSON
KAREN THOMAS
MAXINE BROWN-ROBERTS
STEPHEN MORDFIN

The transcript constitutes the minutes from the Public Hearing held on December 3, 2013.

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

(10:09 a.m.)

1
2
3 MR. MOY: Okay. That would be
4 Application Number 18629. This is the
5 application of Leticia Long pursuant to 11 DCMR
6 3103.2 for a variance to establish an indoor
7 cycling fitness center under subsection 330.5 in
8 the R-4 District at premises 2028 4th Street,
9 N.E. (Square 3563, Lot 94).

10 This application was previously heard
11 at public hearing on October 8 and November 5.

12 CHAIRMAN JORDAN: Good morning.
13 Please identify yourselves.

14 MR. LONG: For the record, Leonard
15 Long.

16 CHAIRMAN JORDAN: Make sure your
17 microphone is on, please.

18 MR. LONG: For the record, Leonard L.
19 Long, Jr.

20 MS. LONG: Leticia Long.

21 MR. PEACE: Emerick Peace.

22 CHAIRMAN JORDAN: Mr. Peace, you are?

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1 MR. PEACE: Real estate broker.

2 CHAIRMAN JORDAN: This is a matter of
3 which we've had several visits with you, and I'm
4 willing to say we're at the point of moving
5 forward with granting the relief requested.

6 We appreciate all the supplemental
7 work, but we have to have these things in our
8 file. We know it's in your head, but we actually
9 have to have the facts and data and the record
10 has been supplemented with enough evidence, in my
11 opinion, that show that the variance request that
12 you've made should be granted.

13 I think that the financial information
14 backs up the support about the financial
15 hardships that will be -- would be the burden for
16 you in trying to adhere to the zoning regulations
17 and to convert this back into a residential
18 property, which has a lot of challenges in that
19 regard and your ability to use this as the
20 cycling center.

21 It doesn't really cost you any money.

22 It is very negligible -- well, some people argue

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1 \$5,000 is not negligible, but it's different than
2 \$172,000 use. So, I don't know if we need to
3 hear anything from you.

4 In addition, does the Board have any
5 questions or something they want to drill down
6 with the applicant?

7 Yes, Mr. Turnbull?

8 ZC MEMBER TURNBULL: No, I think
9 you're correct. I think there's enough evidence
10 here. I mean, the only thing that's not here is
11 obviously the equipment cost that you have to --
12 bicycles for spinning and everything else.

13 So I'm sure that that's another
14 incidental cost, but as far as renovation to the
15 property itself, I think you've covered it in
16 what you submitted.

17 CHAIRMAN JORDAN: Yes, we'll do that.
18 Yes. There were some conditions that I think
19 you proposed and the OP proposed and that was
20 that operating hours shall be limited to 6 a.m.
21 to 8 p.m.

22 The number of patrons in the first

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1 floor bicycle studio shall be limited to
2 30 customers per class. The number of
3 instructors shall be limited to two, and the
4 number of employees in the second floor office
5 should be limited to two. Is that -- okay.

6 Any other questions or issues or
7 things we have? I think we've already heard from
8 OP on this; haven't we? You've already
9 testified? We kind of sent this back around to
10 dot the I's, cross the T's and then dot the I's
11 again and cross the T's, but you know what?

12 You did it, and we really appreciate
13 your help in providing what was necessary in this
14 file to grant you relief.

15 Is there anyone in the audience who
16 wish to speak in opposition to this application?

17 We've already done it, but I want to give
18 another shot. We've had the full hearing on
19 this, but I just want to give someone the
20 opportunity.

21 Seeing none, let's be sure to close
22 the record based upon the evidence which is

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1 already in our record. Is the Board ready to
2 deliberate?

3 Then I would move that we grant the
4 relief requested with the conditions that provide
5 that operating hours shall be limited to 6 a.m.
6 to 8 p.m.

7 The number of patrons on the first
8 floor bicycle studio shall be limited to
9 30 persons per class. The number of instructors
10 shall be limited to two, and the number of
11 employees in the second floor office shall be
12 limited to two.

13 That would be my motion.

14 MEMBER ALLEN: Second.

15 CHAIRMAN JORDAN: Motion made and
16 seconded. Additional discussion?

17 All hosts in favor of the motion
18 signify by saying aye.

19 (Chorus of ayes)

20 CHAIRMAN JORDAN: Those opposed, nay.
21 The motion carries. Mr. Moy?

22 MR. MOY: Staff would record the vote

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1 as 4-0. This is on the motion of Chairman Jordan
2 to approve the application with the one, two,
3 three, four conditions as cited. Second the
4 motion, Vice Chairperson Allen. Also in support,
5 Mr. Turnbull and Mr. Hinkle. Board seat vacant.

6 The motion carries 4-0.

7 CHAIRMAN JORDAN: Let's have a summary
8 order, please.

9 MR. MOY: Yes, sir.

10 CHAIRMAN JORDAN: Thank you. Well,
11 congratulations.

12 MR. LONG: Thank you.

13 MR. PEACE: Thank you.

14 MS. LONG: Can I come back next month
15 just because?

16 CHAIRMAN JORDAN: I think we've seen
17 the last three or four months, but that's okay.

18 MS. LONG: Thank you.

19 MR. MOY: The next application, I
20 believe, on your lineup, Mr. Chairman, is the
21 DCCA Remand in the appeal of West End Citizens
22 Association. This is Case Number 18031-B

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1 pursuant to 11 DCMR 3100 and 3101 from the
2 November 4, 2009 decision of the Zoning
3 Administrator to issue Certificate of Occupancy
4 Number CO1000323 for a grocery store in the R-5-E
5 District at premises 2140 F Street, N.W., Square
6 81, Lot 811.

7 CHAIRMAN JORDAN: All right, parties,
8 please come forward. Good morning. I'll let you
9 please -- make sure your microphone is on and
10 identify yourselves.

11 Let me first make sure everyone has
12 turned in witness cards that needs to turn in
13 witness cards. It has happened, right? Right?

14 All right, so please -- starting to my
15 left, would you please introduce yourself?

16 MR. HART: Kris Hart. I'm the owner
17 of Foggy Bottom Grocery.

18 MS. MILLER: Constance Miller, counsel
19 for Foggy Bottom Grocery.

20 MR. SULLIVAN: Marty Sullivan, counsel
21 for the appellant, West End Citizens Association.

22 MS. KAHLOW: Barbara Kahlow,

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1 secretary/treasurer of the West End Citizens
2 Association and representing them today.

3 MS. BOLLING: Good morning, Chairman
4 Jordan and Board. Melinda Bolling, general
5 counsel for DCRA. It is my pleasure to introduce
6 our newest counsel, John Postulka, who will be
7 doing our land use and zoning work.

8 MR. POSTULKA: Good morning.

9 CHAIRMAN JORDAN: Your last name
10 again?

11 MR. POSTULKA: John Postulka.

12 CHAIRMAN JORDAN: Spell that for me.

13 MR. POSTULKA: It's P-O-S-T-U-L-K-A.

14 CHAIRMAN JORDAN: Okay. This matter
15 is before us to -- on the issue of whether or not
16 this matter that the Board should grant relief
17 based upon equitable defenses of estoppel and
18 laches, and the parties have briefed this and
19 presented their documents in support for their
20 positions to the Board.

21 This matter's been around for a while
22 going up and down, back and forth, and sideways.

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1 So, the Board is very clear and understands the
2 principles of estoppel and laches and we don't
3 need to be educated in that regard. The law's
4 the law, and we're very, very clear about it.

5 I believe that the facts and evidence
6 have already been around. I think the parties
7 have briefed their matters. The parties have
8 rebutted and replied to everybody else's actions.

9 However, I'm going to ask you if
10 there's something that you think the Board needs
11 to hear from you, other than what you've already
12 submitted in your brief or something that's
13 contested that you think is important that's not
14 in the briefs, I'm going to ask you to do so.

15 Since the movant here is the
16 intervenor, I'm going to ask you first if there's
17 something that you want -- addition that you want
18 to present to the Board?

19 MS. MILLER: There really isn't
20 anything additional that you already have not
21 heard in one form or another at prior hearings or
22 that has been submitted in writing.

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1 I would just ask you to look at the
2 totality of the circumstances and recognize that
3 this case began in 2008 and all of Foggy Bottom
4 Grocery's actions were predicated on the
5 certificates of occupancy that were issued by the
6 zoning office and the building plans that were
7 submitted and the building permits that were
8 issued.

9 There was a great deal of funds spent
10 prior to hearing on this matter in February of
11 2010 as a result of the West End Citizens
12 Association appealing the revised certificate of
13 occupancy in November 2009 which replaced the
14 2008 certificate of occupancy.

15 CHAIRMAN JORDAN: We're real good on
16 the sequence of events. That's why I'm asking is
17 there -- let me ask a question. When was the --
18 it's my understanding that the 2008 C of O was
19 issued August 21, 2008. Is that correct?

20 MS. MILLER: Correct.

21 CHAIRMAN JORDAN: When was the
22 building permit issued?

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1 MS. MILLER: In July or August of
2 2009.

3 CHAIRMAN JORDAN: July-August 2009?

4 MS. MILLER: Correct, and this was
5 after the Commission on Fine Arts had given its
6 approval to the exterior plans for the property.

7 CHAIRMAN JORDAN: Between August 21,
8 2008 and July or August 2009, what activities
9 were taking place in regards to development or
10 build out of the location?

11 MS. MILLER: First of all, the
12 property was -- or the contract to purchase the
13 business was negotiated. Then the lease with
14 George Washington University was negotiated.

15 Plans were drawn up by an
16 architectural firm. They were approved by George
17 Washington University, and then negotiations
18 regarding the sharing of the costs for the build
19 out. The Commission on Fine Arts needed to give
20 approval before anything could start, and then
21 the --

22 CHAIRMAN JORDAN: I got you. So there

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1 was no physical activities being shown at the
2 building at that time? No public displayed
3 activities at the building? All these other
4 things were just transactional kind of --

5 MS. MILLER: Correct.

6 CHAIRMAN JORDAN: Got it.

7 MS. MILLER: Correct. Excuse me, the
8 building began sometime in late September/early
9 October and was --

10 CHAIRMAN JORDAN: Of 2009?

11 MS. MILLER: 2009, correct.

12 CHAIRMAN JORDAN: Excuse me just one
13 second. We're just examining the building
14 permit. On the building permit, it does not
15 indicate any use on the building permit, does it?

16 MS. MILLER: I believe not.

17 CHAIRMAN JORDAN: It just indicates
18 that there's some interior work that's being --
19 taking place. Correct?

20 MS. MILLER: Correct.

21 CHAIRMAN JORDAN: Okay. When was the
22 building permit posted?

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1 MS. MILLER: As soon as they received
2 it.

3 CHAIRMAN JORDAN: So it would've been
4 on or about August 10 or something, 2009?

5 MS. MILLER: I believe so.

6 CHAIRMAN JORDAN: Okay. Board, any
7 other questions you may have for -- then let's
8 then go to you, Mr. Sullivan, if you please.

9 If there's anything in addition that
10 you need to present to the Board. As I said, we
11 understand what you've submitted or anything in
12 rebuttal to what you've heard here this morning.

13 MR. SULLIVAN: Thank you,
14 Mr. Chairman. Because they filed the response to
15 our response and we didn't have an opportunity to
16 file a response, I do have a couple --

17 CHAIRMAN JORDAN: Go ahead.

18 MR. SULLIVAN: -- comments in
19 response. As you stated, you already know that
20 they have a high burden to meet to approve a
21 laches case. The building permit, of course,
22 mentions nothing about the use.

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1 There's nothing in there that would
2 provide any knowledge to anybody that the
3 building was going to have three floors of use --
4 of non-residential use.

5 In fact, by this time, by the time the
6 permit was issued, the West End Citizens
7 Association was actively challenging the proposed
8 use leading to the revocation of the 2008 C of O,
9 which led to the issuance of the 2009 and this
10 current appeal.

11 The decision being appealed here is
12 and always has been the Zoning Administrator's
13 decision to prove three full floors of non-
14 residential use at 2140 F.

15 There's 10 to 15 C of Os over the
16 years for grocery use. The 2009 C of O was the
17 very first one that ever mentioned that there
18 would be three floors of non-residential use.
19 That's the decision that the West End Citizens
20 Association has appealed. That's the decision
21 that the Court of Appeals overturned.

22 CHAIRMAN JORDAN: Aren't you making a

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1 fine line because the 2008 one said it was, what,
2 1800 square feet of use?

3 MR. SULLIVAN: I don't know how --

4 CHAIRMAN JORDAN: It's called a
5 difference -- I hear what you're saying and I
6 want to make sure I'm clear so when we make our
7 decision is that the 2008 C of O didn't say three
8 floors, although it did talk about the 1800-plus
9 square feet of use.

10 MR. SULLIVAN: Yes, it mentioned that.
11 I don't know how --

12 CHAIRMAN JORDAN: So the only
13 difference being the two was that one said three
14 floors, but it was still the same amount of
15 square footage. Correct?

16 MR. SULLIVAN: It may or may not have
17 authorized the use of the entire building. There
18 was no way to know that by looking at the number
19 of floors. But I'm going beyond that.

20 CHAIRMAN JORDAN: Mr. Sullivan, come
21 on. I'm asking you this very straightforward
22 question. The square foot of use was the same on

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1 both 2008 and 2009 C of Os?

2 MR. SULLIVAN: Yes, but we wouldn't
3 have known that. West End -- we wouldn't have
4 known that until 2009 C of O was issued.

5 CHAIRMAN JORDAN: I'm not arguing --
6 I'm not arguing because it's not my point to
7 advocate either way. I'm just trying to get the
8 facts straight, Mr. Sullivan.

9 MR. SULLIVAN: They were the same.

10 CHAIRMAN JORDAN: So I expect for you
11 to give a straight answer as to the question, was
12 it the same on both? That's all we asked.

13 MR. SULLIVAN: Yes. It was the same
14 on both.

15 CHAIRMAN JORDAN: Okay. We haven't
16 made any conclusions from that at all. Just
17 asking the questions.

18 MR. SULLIVAN: I understand. But, in
19 any event, even if the 2008 C of O authorized
20 three floors, the West End Citizens Association
21 had no knowledge of this certificate of occupancy
22 until they began to challenge it around July of

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1 2009.

2 So, once they found out about the C of
3 O in 2008, they began to challenge the use, and
4 then they got the C of O revoked. That's C of O
5 was revoked by DCRA.

6 So the element of laches that there
7 was an inexcusable and unreasonable delay just
8 isn't present because there was no delay,
9 actually, in challenging the 2008 C of O. In
10 fact, this appeal was lodged six days after the
11 issuance of the 2009 C of O that mentioned the
12 three floors.

13 If I might, regarding the second
14 element, it's correct to point out that they did
15 not undertake any physical activity on the site.

16 They negotiated a contract and they negotiated
17 contracts with their architects and they did some
18 planning.

19 They haven't presented any evidence
20 that they spent in justifiable reliance on any
21 decision of the Zoning Administrator. The 2008 C
22 of O, which was change of ownership C of O, was

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1 not questions and was discontinued for the
2 previous use.

3 When it was discovered that it was a
4 change of use, it was immediately revoked by the
5 Zoning Administrator.

6 CHAIRMAN JORDAN: Mr. Turnbull.

7 ZC MEMBER TURNBULL: Thank you,
8 Mr. Chair. But isn't it true in the record that
9 Ms. Kahlow in 2008 testified that she was aware
10 even before the C of O was issued that the
11 building contained the store on one floor,
12 storage on another, and an office upstairs and
13 then in 2010, the business owner, Kris Hart,
14 testified that prior to 2008 one floor of the
15 building contained the store and the other two
16 floors were for office space and storage related
17 to the operation of the store? That's in the
18 public record.

19 MR. SULLIVAN: Yes. She said she may
20 have -- there may have been storage on the
21 basement floor, but the fact that she knew what
22 it was currently being used for doesn't mean that

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1 she had knowledge of the 2008 C of O and ability
2 to challenge that.

3 Overlying this whole thing is that the
4 Court of Appeals has stated clearly that a non-
5 conforming use or -- we understated it -- an
6 invalid C of O issued cannot transform an illegal
7 use into a legal use no matter how much time
8 passes.

9 ZC MEMBER TURNBULL: But I just want
10 to clarify for the record that the -- that it was
11 the understanding of the parties that the three
12 floors were occupied for the operation of the --

13 MR. SULLIVAN: She was aware of the
14 previous use, yes.

15 ZC MEMBER TURNBULL: Okay.

16 MS. KAHLOW: Can I add something? We
17 -- the West End Citizens Association had filed at
18 the BZA when somebody tried to use the basement,
19 the prior owner, and we won. The BZA denied the
20 case, so we only thought one floor commercial
21 use, active commercial use, would ever be in
22 play.

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1 MR. SULLIVAN: If I might add, it's
2 not an unimportant point that the 2008 C of O is
3 not even valid because it was certified and
4 signed by Mr. Hart certifying that he was the
5 owner of the business when he was, in fact, not
6 the owner of the business.

7 CHAIRMAN JORDAN: Anything else?

8 MR. SULLIVAN: Then that C of O was
9 not implemented. It was not used until well
10 after the appeal was filed. It was almost two
11 years later that Foggy Bottom Grocery, LLC, the
12 entity which he claimed to be applying for the C
13 of O in 2008 actually used that C of O.

14 MS. KAHLOW: Mr. Jordan, I would like
15 to add something if I may.

16 CHAIRMAN JORDAN: Yes, please.

17 MS. KAHLOW: I'm Barbara Kahlow. I
18 want to just go through a simple time frame.

19 CHAIRMAN JORDAN: No. I'm good at
20 time frames unless there's something in addition
21 that's not in the record already.

22 MS. KAHLOW: I think so. I think it's

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1 not in there.

2 CHAIRMAN JORDAN: Okay. All right.

3 MS. KAHLOW: I'm sorry. You mentioned
4 the August 21, 2008 C of O. He didn't sign the
5 lease until June 11, 2009, so he couldn't do
6 anything in 2009, and I want to produce a copy of
7 that information.

8 CHAIRMAN JORDAN: July 11, 2009?

9 MS. KAHLOW: June 11, 2009 is when he
10 got a lease. That's not ever stated. It's
11 always in generalities, so I have that in the
12 docket.

13 He said the construction didn't begin
14 until October 1 and it ended after the C of O was
15 revoked on October 14. I discovered in my
16 research after he filed for an alcohol license in
17 July 2009 that the Zoning Administrator issued an
18 August 16, 2007 letter Bill proves to Mr. Hart
19 saying that he had to have a zoning case for any
20 expansion of the one floor active commercial use.

21 CHAIRMAN JORDAN: When was that ABC
22 hearing?

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1 MS. KAHLOW: The ABC hearing was --
2 I'll give you the exact date. Give me a second,
3 but it was right after the July '09. I'll let
4 you know in a second. Give me one second and
5 I'll find that out.

6 Let me give you the rest of the dates,
7 and I'll look for it. You have the record.
8 Okay, I have the record, too. What I wanted to
9 say is there is a 2007 letter from the Zoning
10 Administrator saying you need a BZA Case. I met
11 with Mr. Hart, which is not in the record, on
12 April 16 -- excuse me, on February 23, 2009, and
13 I personally told him about the BZA case --

14 CHAIRMAN JORDAN: 2009 or 2008? 2009?

15 MS. KAHLOW: 2009.

16 CHAIRMAN JORDAN: Okay.

17 MS. KAHLOW: So I told him -- the
18 zoning administrators have 2007. I told him
19 February 2009 that we will wait -- that we had to
20 have -- we won the denial case for the basement
21 use and we are waiting on a BZA application, so
22 he knew way before all this started, before he

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1 got --

2 CHAIRMAN JORDAN: Did he tell you he
3 had a C of O then?

4 MS. KAHLOW: He only had the illegal
5 change of ownership and it still had the old
6 owner --

7 CHAIRMAN JORDAN: Was that the C of O,
8 the 2008 C of O that had 1,800 square -- 18-plus
9 square feet of use?

10 MS. KAHLOW: It -- if you say so it
11 did, but it did -- but the old one was a one-
12 floor operation. The woman was still running it,
13 and then she closed it right after that in
14 October 2008.

15 So it was closed on the whole time.
16 We had no idea what was happening. We were
17 waiting for a BZA case. We've only been involved
18 -- the West End Citizens Association -- in three
19 BZA cases.

20 I know the record says -- but city
21 wrote there was a hundred and something. It's
22 not 157. That's not true. We've only done

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1 three. This is the third case, and we were
2 waiting for that.

3 So, as soon as we said the alcohol
4 stuff, we immediately went back to the Zoning
5 Administrator and said, "Hey, wait a second.
6 Don't they need a zoning case?"

7 That's when they revoked it and
8 everything started happening because we knew that
9 they needed it to do anything like a pizza, deli,
10 sandwich shop. They needed a BZA case.

11 CHAIRMAN JORDAN: Could you give me
12 that date again, the alcohol beverage?

13 MS. KAHLOW: I'm looking for it.

14 CHAIRMAN JORDAN: Yes, I thought you
15 said July of 2009.

16 MS. KAHLOW: I'm looking for it.

17 MS. MILLER: If I may, the application
18 was made in July, and the actual hearing was held
19 in October, October 14 or 15.

20 MS. KAHLOW: December 9, 2009,
21 Mr. Jordan. Mr. Chairman.

22 CHAIRMAN JORDAN: December -- okay --

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1 MS. KAHLOW: December 9, 2009 was the
2 ABRA hearing. So all this is -- but we
3 immediately when we heard about it there was --
4 placards and it was in the DC Register, we
5 immediately got on it, and that's where we found
6 the 2007 letter and of course, I had already told
7 them on February 23, 2009.

8 CHAIRMAN JORDAN: Okay. So, you met
9 Mr. Hart February 29, 2009.

10 MS. KAHLOW: February 23, 2009.

11 CHAIRMAN JORDAN: February 23, 2009,
12 and you discussed the C of O at that time. Then
13 on December 9, you --

14 MS. KAHLOW: Well, we didn't know it
15 was a C of O. He didn't tell me. All I said is
16 the history is you can't use it for anything
17 below or above. You only can use it for one
18 floor and you have to have a BZ case.

19 CHAIRMAN JORDAN: So February 28 he
20 didn't show you or tell you --

21 MS. KAHLOW: Absolutely not. Never
22 mentioned it. Didn't know that it even existed.

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1 The building was closed. Had no way of knowing.

2 CHAIRMAN JORDAN: That's when you just
3 advised him at that point --

4 MS. KAHLOW: Yes.

5 CHAIRMAN JORDAN: -- regardless of
6 what use he was having that he probably was going
7 to need relief.

8 MS. KAHLOW: He would need relief and
9 our civic association does is we wait for the
10 case to come, if it's a BZA or the Zoning
11 Commission, and then we -- and since nothing was
12 filed, we then found out about the other C of O
13 when we did our alcohol research and immediately
14 asked for it to be revoked and it was.

15 CHAIRMAN JORDAN: Okay. Any other
16 questions of this witness or this other party?
17 Okay. Let's turn to DCRA for their input.
18 Anything --

19 MR. HART: Mr. Chair, I'm sorry.

20 CHAIRMAN JORDAN: No, let me turn to
21 DCRA if I could.

22 MR. HART: Yes.

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1 CHAIRMAN JORDAN: Well, no, no.
2 Excuse me. Let me go ahead and let you -- if
3 there's some cross-examination you need to do,
4 let's do cross-examination. That means cross-
5 examination and no statement. Cross-examination?

6 MR. HART: I would just, if I can --

7 CHAIRMAN JORDAN: No, you're not
8 making a statement. You're going to cross-
9 examine.

10 MR. HART: Okay, Barbara, if I may,
11 when we met at Distrikt Bistro for lunch well
12 before -- it was in the spring of 2009, and then
13 we walked over to the business, did you or did
14 you not state, and we are both under oath, in
15 fact, that the business should be used in its
16 totality and you even brought up outdoor seating,
17 and we're talking about that, and we're also
18 talked about hours. The two things --

19 MS. KAHLOW: We never talked about
20 hours.

21 MR. HART: Yes, it's in our emails.

22 CHAIRMAN JORDAN: We're not going to

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1 have -- we're not going to have that type of
2 dialogue. We're going to ask the questions.
3 She's going to respond, and you're going to ask
4 the next question.

5 MR. HART: Did you or did you not
6 state that it would be a good idea to use the
7 full part of the business because nobody had been
8 living in there for over ten years?

9 MS. KAHLOW: I stated that I was
10 waiting for a zoning case. That's what we were
11 waiting for and then we could review it
12 appropriately.

13 MR. HART: Did you or did we not
14 discuss the hours prior to when you made your
15 objection?

16 MS. KAHLOW: You wrote an email saying
17 it would be 2 a.m. or 3 a.m., and I said
18 absolutely not.

19 MR. HART: Okay. My last thing is
20 there were two objections you actually brought up
21 in that meeting. Do you remember what they were?

22 MS. KAHLOW: I do not.

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1 MR. HART: One was making pizza, which
2 the Zoning Administrator then did nullify, and
3 the other one was 2 a.m. or 3 a.m.

4 MS. KAHLOW: That is incorrect. I
5 didn't know about the 2 a.m. or 3 a.m. until you
6 were right before you filed the zoning
7 application, and I did not mention the pizza. So
8 this is your memory; not mine.

9 CHAIRMAN JORDAN: Let me ask the DC --
10 is that -- do you have any additional questions?
11 Let me ask the DCRA again, cross-examination?

12 MR. POSTULKA: No cross-examination.
13 I would just like to respond to some of the legal
14 arguments --

15 CHAIRMAN JORDAN: Let's just wait
16 because I just --

17 MR. POSTULKA: Okay.

18 CHAIRMAN JORDAN: -- haven't checked
19 myself because I didn't give Mr. Sullivan an
20 opportunity if there was any cross-examination
21 you need to ask the --

22 MR. SULLIVAN: I don't have any cross-

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1 examination, but I have a re-direct on that
2 cross.

3 CHAIRMAN JORDAN: Well, let's get all
4 the re-directs together.

5 MR. SULLIVAN: One brief question --

6 CHAIRMAN JORDAN: Go ahead. Go ahead.

7 MR. SULLIVAN: -- respond to it
8 directly. Ms. Kahlow, do you have -- when you
9 met with Mr. Hart in February -- or better --
10 prior to your ABRA research and your discovery in
11 your ABRA research in the middle of 2009, did you
12 have any knowledge that there was a Zoning
13 Administrator decision to be challenged regarding
14 2140 F Street?

15 MS. KAHLOW: Absolutely not.

16 CHAIRMAN JORDAN: Okay. Now the
17 presentation by the DCRA. Thank you.

18 MR. POSTULKA: The key legal
19 consideration here is not what does the C of O
20 say, what did the building permit say, it's when
21 did the Citizens Association know that the
22 building --

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1 CHAIRMAN JORDAN: Knew or should have
2 known. We're clear about the legal standards as
3 I've asked. You don't have to give that to us.

4 MR. POSTULKA: Sure. Well --

5 CHAIRMAN JORDAN: We're trying to put
6 the facts with the standards.

7 MR. POSTULKA: Sure. I think in the
8 prior opinion of this Board and in testimony that
9 the Citizens Association representative gave at
10 the last hearing, it was established that they
11 knew that this entire building was being used
12 even before the C of O was issued in 2008.

13 They knew that all three --

14 CHAIRMAN JORDAN: I think they clearly
15 said they knew that it was being used but they've
16 also filed objection to that and it was a hearing
17 that they filed a protest or whichever phase you
18 want to say about it.

19 The fact that it was maybe being used
20 in part but it doesn't give a right or the
21 ability for them -- for anybody else to come in
22 and use it improperly.

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1 MR. POSTULKA: Well, I don't know that
2 I necessarily agree with that. I don't think
3 that you can sit there and watch someone using a
4 building that you allege is in --

5 CHAIRMAN JORDAN: But they said they
6 didn't sit there. They said they actually filed
7 complaints, etc. Did they do that or not do
8 that?

9 MR. POSTULKA: Well, I don't think
10 they did that immediately.

11 CHAIRMAN JORDAN: I'm asking did they
12 do that? For the prior owner, did they file a
13 complaint about its use of the building, in all
14 the building?

15 MR. POSTULKA: From what they say,
16 they did. I don't know when that exact date was.

17 CHAIRMAN JORDAN: You're supposed to
18 be -- you guys -- you're supposed to be up on
19 what's been filed in this case and what the
20 history of the transactions have been. That
21 would be my point --

22 MR. POSTULKA: Sure.

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1 CHAIRMAN JORDAN: -- in asking. So --
2 all right -- so you don't know is the answer?

3 MR. POSTULKA: No, but I think that
4 the record is clear that they -- there was at
5 least some period of time between when they may
6 have filed the prior challenge and up to 2008
7 when the C of O was issued, when this building
8 was still being used, all three floors, for
9 grocery store purposes.

10 CHAIRMAN JORDAN: When did they file
11 their challenge, their first challenge to the
12 use?

13 MR. POSTULKA: I don't have that.

14 CHAIRMAN JORDAN: So how can you tell
15 me you know there's been a period of time? Let's
16 move on. What else do you have to say?

17 MR. POSTULKA: That was the key point.
18 The key point is when did they know or should've
19 known and did they fail to take action, but the
20 key is it's their burden of proof here. It's not
21 DCRA's burden of proof. It's no one else's.
22 They're challenging this building permit.

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1 ZC MEMBER TURNBULL: That's incorrect.

2 CHAIRMAN JORDAN: This is on the
3 intervenor's motion to dismiss the appeals based
4 upon laches and equitable estoppel.

5 MR. POSTULKA: Right.

6 CHAIRMAN JORDAN: It's up on the
7 movant to defend that particular point. All
8 along I've said that DCRA, and I've said this in
9 regard to the zoning rewrite, that the government
10 on matters like this really don't have a dog in
11 the hunt.

12 It should always be on the burden of
13 the applicant movant. I've said it a thousand
14 times. That's one of my recommendations to the
15 Zoning Commission that the government should
16 intervene if they want to but the applicant is
17 the real party in interest and we waste a lot of
18 government time and money to do so.

19 MR. POSTULKA: Sure.

20 CHAIRMAN JORDAN: But that's my
21 editorial for today. So I'm there.

22 MR. POSTULKA: Okay.

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1 CHAIRMAN JORDAN: But we are where we
2 are and this issue is based upon the movant's
3 request that this be dismissed for laches and
4 equitable estoppel.

5 MR. POSTULKA: Right.

6 CHAIRMAN JORDAN: You've all briefed
7 that point.

8 MR. POSTULKA: Yes.

9 CHAIRMAN JORDAN: So now we're just at
10 this hearing trying to see what additional facts
11 that need to go with the legal basis thereof so
12 that we can render some type of decision.

13 So, when you sit here, I would think
14 that you would know the facts of the case and
15 that's all we're requesting; right? I think
16 that's all we're looking for.

17 So, let me -- so, is there anything
18 else you want to present?

19 MR. POSTULKA: Well, could I do some
20 questioning then about that topic?

21 CHAIRMAN JORDAN: I thought I asked
22 you did you have some cross-examination. Did I

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1 not?

2 MR. POSTULKA: You did.

3 CHAIRMAN JORDAN: You waived it. Yes,
4 you did.

5 MR. POSTULKA: Yes.

6 CHAIRMAN JORDAN: Okay. Out the barn,
7 gone. Now you just made your statement. Is
8 there any cross-examination by the intervenor or
9 --

10 MS. MILLER: No, not of the DCRA.

11 CHAIRMAN JORDAN: Mr. Sullivan?

12 MR. SULLIVAN: Yes, one question.
13 Mr. Postulka, do you have any knowledge that the
14 2008 C of O was actually used prior to 2010?

15 MR. POSTULKA: No.

16 CHAIRMAN JORDAN: Any other questions?

17 MR. SULLIVAN: No further questions.
18 Thank you.

19 CHAIRMAN JORDAN: Let me ask an
20 additional question. To your knowledge, was the
21 2008 C of O posted in any place that was public
22 or is there any public record of the 2008 C of O

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1 and where is it located?

2 MR. POSTULKA: I don't have any
3 information --

4 CHAIRMAN JORDAN: You also have the
5 Zoning Administrators here if you think you would
6 like to --

7 MS. BOLLING: Well, Chairman Jordan,
8 DCRA always sends out biweekly to all the ANCs
9 any issued building permits and any issued C of
10 Os. So that was public knowledge and it was
11 supplied to --

12 CHAIRMAN JORDAN: When was that? It's
13 not in your pleadings.

14 MS. BOLLING: Well, not in this
15 current case, but in previous cases.

16 CHAIRMAN JORDAN: So, did it happen in
17 this case?

18 MS. BOLLING: It always happens. It
19 is not in the record in this case. In the remand
20 of the legal issue.

21 CHAIRMAN JORDAN: This is a case about
22 public notice and knowledge because the

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1 requirement is knew and should have known. It
2 still encompasses -- is it 3112? It still
3 encompasses -- you still look at the statutory
4 requirements for a -- in a laches case but you
5 can expand it if you're given such ability to do
6 so because you'd use it in an equitable nature.

7 So any facts that would support that,
8 hey, somebody had the ability to know or should
9 have known, is always -- I believe it would be
10 helpful.

11 MS. BOLLING: Understood.

12 CHAIRMAN JORDAN: So --

13 MS. BOLLING: Unfortunately, for '08
14 we don't keep records beyond a three-year period,
15 but every two weeks it is the policy and
16 procedure of DCRA to send to every agency all
17 building permits issued and all C of Os issued.

18 CHAIRMAN JORDAN: Within two weeks of
19 issuance.

20 MS. BOLLING: Yes, sir.

21 CHAIRMAN JORDAN: That's been the
22 practice and has there been anything that broke

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1 that practice? How long's that practice been in
2 place?

3 MS. BOLLING: Since before I joined
4 the agency, which is '07, and it happens
5 electronically. Prior to electronically, it was
6 mailed. But, again, we don't have records beyond
7 three years. That's our record retention.

8 CHAIRMAN JORDAN: Okay. You have --
9 and to your knowledge, has that practice been
10 broken at any period of time that you've been
11 there?

12 MS. BOLLING: Not to my knowledge.

13 CHAIRMAN JORDAN: That goes to the ANC
14 and to anyone else?

15 MS. BOLLING: No. To the ANC. It is
16 the ANC's responsibility to share it within their
17 --

18 CHAIRMAN JORDAN: Is it filed in any
19 public records at DCRA?

20 MS. BOLLING: It is in our database.

21 CHAIRMAN JORDAN: If I came in and I
22 wanted to know what C of Os were in this

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1 property, I could go where in DCRA?

2 MS. BOLLING: It is in our database,
3 which is called ACELA. You would need probably a
4 staff person to help you, but there is an online
5 system, PIVS, P-I-V-S, that your chair is aware
6 of, and you can actually log on and look up C of
7 Os and their issuance there.

8 CHAIRMAN JORDAN: I'm just trying to
9 help -- trying to understand because -- and see
10 where the differences lie and what the courts and
11 the law requires in regards to public land
12 records that there is a public notice -- a
13 constructive notice of those things which are
14 filed in the public record.

15 So I'm trying to make sure that we
16 would -- that any citizen would have the same
17 ability to look at a record at DCRA as any other
18 person at the land records --

19 MS. BOLLING: Yes, sir.

20 CHAIRMAN JORDAN: -- such as recorder
21 of deeds. That's kind of where I'm asking those
22 questions. Okay.

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1 So, a person could come in and inquire
2 about any C of O and then someone at DCRA would
3 help them?

4 MS. BOLLING: Well, if they came in,
5 someone could help them. You could actually do
6 it online. Now, going back to '08, if you came
7 online probably after that you'd have to come in
8 to the facility to get assistance prior to
9 probably 2011.

10 But since that time, it's been online
11 and from the comfort of your laptop or mobile
12 device, you could actually log on to PIVS and see
13 the issuance date.

14 CHAIRMAN JORDAN: Is there a
15 requirement that a C of O gets posted on the
16 property?

17 MS. BOLLING: Yes, it is.

18 CHAIRMAN JORDAN: To your knowledge,
19 did that happen in this case?

20 MS. BOLLING: I do not know.

21 CHAIRMAN JORDAN: Anyone else?
22 Question? Good. I think we already had cross on

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1 that and you crossed, crossed, crossed. I'm
2 confused whose turn it is. Okay, now we're going
3 to go back for -- I think we're doing rebuttal.

4 Let me -- before we get to the level
5 of rebuttal, I got a question for -- well, I've
6 lost the question. Let's go with any rebuttal
7 that you have, please.

8 MS. MILLER: Yes, if I could, first of
9 all, the C of O was posted on the property.

10 CHAIRMAN JORDAN: When?

11 MS. MILLER: It would've been right
12 after it was received in August of 2008, the
13 first one.

14 CHAIRMAN JORDAN: So --

15 MS. MILLER: I can have Mr. Hart
16 testify.

17 CHAIRMAN JORDAN: Mr. Hart, you posted
18 this -- the C of O August of 2008?

19 MR. HART: Yes, what happened was we
20 had a letter of intent to buy the business from
21 Mesco Incorporated, so we had -- that was
22 contingent upon negotiating the lease. So as

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1 soon as we received the licenses, we did post it.

2 CHAIRMAN JORDAN: Did you take
3 pictures of it?

4 MR. HART: No, sir. Didn't even -- I
5 took pictures of one once it was contested.

6 CHAIRMAN JORDAN: It was posted when?

7 MR. HART: It would've been August 23
8 or 24, 2008.

9 CHAIRMAN JORDAN: See, this is amazing
10 because this is not in any of your briefs, and
11 that seems like a really, really, really key
12 point to me to have raised.

13 MR. HART: Also, if I -- concerning
14 the -- they were able to find -- the challengers
15 were able to find all the C of Os of Foggy Bottom
16 Grocery from previous owners, but even when it
17 was announced to our ANC, then I got mine, and
18 Barbara was informed. It wasn't contested until
19 about a year later.

20 CHAIRMAN JORDAN: Okay. All right.
21 Is there anything else in rebuttal?

22 MR. HART: I would just say one other

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1 thing on the DCRA's testimony. While the
2 challengers have known that we were using the
3 building, not for residential at all, for over a
4 decade, it was either incidental grocery store
5 use on all three floors, it was never challenged
6 except for in 1997 up until when I bought it.

7 That was for pizza use, which is,
8 again, what we ended up going against doing when
9 we had our initial let's say show down five years
10 ago.

11 CHAIRMAN JORDAN: So there was no
12 challenge at any other time for the use of the
13 building?

14 MR. HART: When Mesco Incorporated
15 owned it and they knew that it was all three
16 floors --

17 CHAIRMAN JORDAN: That's the prior
18 owner?

19 MR. HART: Yes, sir. Yes, sir.
20 That's who I bought it from.

21 CHAIRMAN JORDAN: Okay.

22 MR. HART: Again, Barbara actually

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1 walked over to the building with me as we were
2 finalizing the lease and we discussed the uses
3 for it. She knew nobody lived there. I mean,
4 her memory is completely different than the
5 accurate. Again, I have no problem --

6 CHAIRMAN JORDAN: Was that prior use,
7 the one where the challenge was filed, was that
8 use issued by the -- approved by the Zoning
9 Administrator?

10 MR. HART: Yes, sir.

11 CHAIRMAN JORDAN: It was?

12 MR. HART: Yes. The use of all three
13 floors? I'm sorry, sir. The pizza? No, that
14 was not in '97. The prior owners started
15 delivering pizza out of the store. They
16 challenged it. That was in '97.

17 CHAIRMAN JORDAN: So '97 was a
18 challenge to restaurant use or something?

19 MR. HART: Yes. Pizza delivery.

20 CHAIRMAN JORDAN: Pizza delivery.

21 MR. HART: Which over 50% was going to
22 be pizza delivery. It was called Bella Pizza.

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1 She opened it up, ran it without any C of O.

2 CHAIRMAN JORDAN: Any other rebuttal?

3 MS. MILLER: One other question. At
4 any time did anyone at the zoning office suggest
5 that you apply for an area variance for expanding
6 the use within the building?

7 MR. HART: No, not -- no. We got the
8 C of O for the full building as soon as we
9 applied for it because in previous years the C of
10 O has said basement, second floor, first and
11 second, first, so they were kind of all over the
12 board. I agree with that. It is confusing.

13 But, again, for a decade before I
14 bought it, the only thing being used out of that
15 building was grocery and fresh sandwiches, which
16 there are pictures showing that.

17 Again, I swear under oath that Barbara
18 --

19 CHAIRMAN JORDAN: Everything you're
20 saying here is under oath.

21 MR. HART: I know, but Barbara knew
22 there was nobody living in that building, and we

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1 even had a conversation about the full use of the
2 building prior to me finalizing the lease, which
3 I did contingent upon all the permits and
4 licenses we got.

5 CHAIRMAN JORDAN: Thank you. Yes,
6 please, Ms. Allen?

7 MEMBER ALLEN: I just want to clarify
8 something you just said. So you said that in
9 prior C of Os, right, that they specifically
10 listed floors --

11 MR. HART: Yes.

12 MEMBER ALLEN: -- different floors?
13 Not the whole building?

14 MR. HART: Well, it also did have the
15 square footage, I believe, on them. I can look,
16 but they did say basement, second, first and
17 second.

18 MEMBER ALLEN: Okay. Thank you.

19 CHAIRMAN JORDAN: All right, cross-
20 examination, Mr. Sullivan?

21 MR. SULLIVAN: No questions.

22 CHAIRMAN JORDAN: Cross-examination,

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1 DCRA?

2 MR. POSTULKA: None.

3 CHAIRMAN JORDAN: All right. Then
4 let's go to rebuttal of Mr. Sullivan.

5 MR. SULLIVAN: I would like to first
6 point out is it -- does it make any sense that
7 the West End Citizens Association would have
8 known about a 2008 C of O and not challenged it
9 when by the representation of the intervenor
10 they're the most vigilant of defenders of the
11 community here?

12 It doesn't. They -- the fact is,
13 regardless of the ownership change C of O, they
14 had no knowledge of it until the ABRA case came
15 on, until there was actually some activity
16 surrounding the proposed use.

17 Secondly, the second element's not
18 met. FoBoGro may have a claim against their
19 seller for transferring to them a business with
20 an invalid C of O, but that doesn't mean that the
21 community has to live with an illegal use.

22 Third, the C of Os, yes, over the

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1 years there have been C of Os since, I think,
2 1977 that have expanded the use beyond one floor
3 and the Court of Appeals said unequivocally the
4 use is illegal regardless of the issuance of
5 those C of Os. Those C of Os create no right or
6 entitlement in anybody.

7 Finally, the case that DCRA -- and I
8 would agree, I don't understand why DCRA is
9 involved at the estoppel laches stage because
10 it's been termed to be an illegal use and their
11 interest should be in not continuing the illegal
12 use.

13 But, the case that they rely on
14 principally or entirely is the Goto case. In
15 that case, the court said very clearly that
16 during that seven-month period, Gottesman and CAG
17 were working within the administrator process to
18 attempt to prevent construction of the kiln.

19 That delay is reasonable and cannot be
20 held against them. I would compare that to the
21 two or three months after they found out about
22 the 2008 C of O and the ABRA case was started

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1 that they worked within the administrative
2 process for two or three months.

3 Now, if in Goto, their main case,
4 seven months was reasonable, then in this case
5 two months is certainly reasonable.

6 In the end, underlying the whole case
7 is the fact that an illegal use can't become
8 legal by the passage of time.

9 CHAIRMAN JORDAN: Since this is just
10 straight argument, there really was no testimony,
11 still, is there any cross you want to make?

12 MS. MILLER: No.

13 MR. HART: No.

14 CHAIRMAN JORDAN: Let's turn to DCRA
15 for any rebuttal.

16 MR. POSTULKA: Nothing to add.

17 CHAIRMAN JORDAN: Okay. Board,
18 anything other questions or anything that you
19 want? I don't know how close we've gotten to
20 where we need to be, but any other questions?

21 Then why don't each of you take a
22 minute to close, two minutes to close, and I

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1 think we probably heard that in your rebuttals,
2 but --

3 MS. MILLER: Well, the history of the
4 case is pretty clear that the business
5 negotiations for purchasing the business began in
6 2008, and there was a series of transactions that
7 were necessary and dependent upon the issuance of
8 the 2008 C of O.

9 When that -- early in 2009, after the
10 business was closed temporarily to effect the
11 planning and the construction, Mr. Hart engaged
12 in active conversation with the West End Citizens
13 association and the ANC to keep them well
14 informed about what his plans for the business
15 were.

16 It's been a vital business now for
17 five -- for going on four years. It pays taxes.

18 It employs 60 employees in the City. It serves
19 as a neighborhood facility for the residential
20 halls and the residents of the Foggy Bottom area.

21 There have been no violations alleged
22 against it since it's received its ABRA license

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1 and since it has opened for business in March of
2 2010, shortly after the third C of O was issued
3 by this body after hearing fully about the
4 history of the property and hearing from the
5 Zoning Administrator regarding why and how he
6 issued the November 2009 certificate of
7 occupancy.

8 Clearly, there were many ways that
9 WECA would have received notice about the changes
10 in the property. The certificate of occupancy
11 was posted within the property before it closed.

12 They were informed fully by Mr. Hart about their
13 plans.

14 They participate in the ANC. They
15 would've received notice of any certificate of
16 occupancy that was issued, and they engaged their
17 processes way too late and manipulated the
18 process so that a new certificate of occupancy
19 could be issued from which they took their
20 appeal.

21 At this point, laches absolutely must
22 operate to stop a serious injustice. There was

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1 never any suggestion that Foggy Bottom Grocery
2 should obtain an area variance which would have
3 probably solved this issue quite some time ago,
4 but it's a viable business now, and laches should
5 bar revoking any certificate of occupancy that's
6 been issued at this point. Thank you.

7 CHAIRMAN JORDAN: All right.
8 Mr. Sullivan?

9 MR. SULLIVAN: Thank you. In any
10 event, any activity taken -- undertaken by
11 FoBoGro after -- at the very latest after the
12 date of the filing of the appeal on November 10,
13 2009, would not be applicable here.

14 So, they didn't open their business
15 for -- until the next year after that. So, no
16 business was undertaken prior to the time that
17 they had knowledge of a zoning challenge.

18 Secondly, whatever information was
19 floating around out there, the critical point is
20 that the West End Citizens Association, and more
21 importantly, more to the point, the intervenor
22 has presented no evidence to show that the West

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1 End Citizens Association had any knowledge of an
2 actual DC agency decision that needed challenged
3 prior to the time that the West End Citizens
4 Association found out about the 2008 C of O in
5 the summer of 2009.

6 It was at that point that they
7 immediately began to challenge that issuance and
8 have continued to this day. So, the intervenor
9 simply hasn't met their high burden to show that
10 there is a laches defense present here. Thank
11 you.

12 CHAIRMAN JORDAN: Let me ask a
13 question because we didn't get to it -- didn't
14 get in and didn't get in your rebuttal. Nobody
15 crossed.

16 Ms. Kahlow, did -- was there a posting
17 of the C of O on August 23 to 24, 2008?

18 MS. KAHLOW: I don't think so. It was
19 still the other Foggy Bottom Grocery owned by the
20 other lady for a month and a half before she
21 closed, or a month -- it might've been a month,
22 so I do not believe so.

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1 CHAIRMAN JORDAN: Okay. Thank you.
2 Closing?

3 MR. POSTULKA: Thank you, Your Honor.

4 In the Board's prior order on this case, it, and
5 I quote here, resolved that all three floors were
6 devoted to the grocery store use when that use
7 became non-conformant. That was 1958.

8 We had some testimony today that from
9 the period 1958 on there was one challenge and
10 that had to do with the sale of pizza, not the
11 use of all three floors for grocery store
12 purposes.

13 The fact that that use has existed for
14 years and was not challenged indicates that
15 laches should bar a challenge at this late period
16 in time. Thank you.

17 CHAIRMAN JORDAN: Good. All right.
18 Well, thank you. We will close this hearing
19 based upon the record that we've already had.

20 Let's move this for a decision
21 meeting.

22 MR. MOY: Mr. Chairman, I have two

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1 dates. The Board's January docket's pretty full.

2 However, if the Board wants to squeeze in a
3 decision case --

4 CHAIRMAN JORDAN: I'm not squeezing.
5 We've ended up with 20 cases on the docket.

6 MR. MOY: That guides me here. So
7 we're looking at a -- we can do a decision on
8 this on February the 4th.

9 CHAIRMAN JORDAN: Okay. That's not
10 squeezing?

11 MR. MOY: No, sir.

12 CHAIRMAN JORDAN: All right. So -- I
13 don't know if we need findings of fact and
14 conclusions. I mean, that's basically what your
15 arguments have been already submitted to us, so I
16 think -- that's -- I don't think -- yes, I think
17 we've been briefed enough and I think your
18 finding of facts are going to be -- no, I'm not
19 going to recall evidence unless the Board wants --
20 -- yes, because I think that's what your briefs
21 were doing anyway.

22 So, all right. Thank you. We'll have

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1 a decision February 4. Oh, and we missed our
2 customary time. So we're going to recess for ten
3 minutes.

4 (Whereupon, the foregoing matter went off the
5 record at 11:02 a.m. and went back on
6 the record at 11:22 a.m.)

7 CHAIRMAN JORDAN: All right. Let's
8 see if we can -- let's try 18666

9 MR. MOY: Okay. That would be
10 Application Number 18666. This is the
11 application of Patrick G. Shaughness pursuant to
12 11 DCMR 3104.1, special exception for an
13 accessory apartment under subsection 202.10, R-1-
14 B District 5236 Loughboro Road, N.W., Square
15 1448, Lot 13.

16 CHAIRMAN JORDAN: Is there anyone here
17 for that case, 18666? Thank you. Make sure your
18 microphone is on and it should be a bright green.
19 Introduce yourself, please.

20 MR. SHAUGHNESS: Yes, Patrick
21 Shaughness.

22 CHAIRMAN JORDAN: Turn your mic on.

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1 Push your mic -- push -- there we go, yes.

2 MR. SHAUGHNESS: Patrick Shaughness,
3 5236 Loughboro Road, N.W.

4 CHAIRMAN JORDAN: Thank you,
5 Mr. Shaughness. I don't know if the Board ruled.

6 I think the record's already complete in regards
7 to the relief that you're requesting, so it might
8 be easier if the Board just -- if the Board had
9 any questions, ask you questions, but I do
10 believe that, in my opinion, the Board -- does
11 the Board have any questions about -- they want
12 to hear from?

13 So, you have a right to present some
14 information, but I think we're where you need to
15 be.

16 MR. SHAUGHNESS: Yes, thank you,
17 Mr. Chairman. Very briefly, my application for a
18 special exception to allow an accessory apartment
19 was noticed to my 16 neighbors. I only heard
20 from two of them.

21 One of them -- my two immediate
22 neighbors -- of them to the south gave me an

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1 email indicating that she didn't object to the
2 basement apartment. There's an email that I
3 provided to the Board indicating that.

4 My other neighbor, I've discussed it
5 with her several times so I've just never gotten
6 anything in writing from her. So -- it also has
7 the approval of ANC 3D, so based on that, I would
8 ask for the Board to approve the application.

9 CHAIRMAN JORDAN: Certainly. Thank
10 you. Anything in addition from OP?

11 MS. ELLIOTT: Thank you, Mr. Chairman.
12 For the record, I'm Brandice Elliott
13 representing the Office of Planning, and we are
14 recommending approval of the request and have
15 nothing additional to add to the record, but I'd
16 be happy to answer any questions.

17 CHAIRMAN JORDAN: Anyone here from --
18 any questions for Office of Planning, anyone?
19 Anyone here from the Department of Transportation
20 for this matter?

21 Then we have a recommendation -- no
22 objection from the Department of Transportation.

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1 Is anyone here from ANC 3D?

2 We have a letter that we give great
3 weight to for ANC 3D, which certainly supports
4 the application. Is there anyone here wishing to
5 speak in support of the application? Speaking in
6 support?

7 Anyone wishing to speak in opposition?

8 Opposition? Then we will close the record based
9 upon the evidence already in the record, and I
10 would move that we grant the relief requested.

11 MEMBER ALLEN: Second.

12 CHAIRMAN JORDAN: We got a tie. Let's
13 see. Who was first?

14 MEMBER HINKLE: I'll yield to the Vice
15 Chair, sir.

16 CHAIRMAN JORDAN: Okay. There's a
17 yield to the Vice Chair on the second, but it was
18 timely. You know? I usually have to prod you -
19 - anybody want to second?

20 Any unreadiness? All those in favor
21 signify by saying aye.

22 (Chorus of ayes)

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1 CHAIRMAN JORDAN: Those opposed, nay.
2 The motion carries. Mr. Moy?

3 MR. MOY: Yes, sir. Staff would
4 record a vote as 4-0 on the motion of Chairman
5 Jordan to approve the application. Second the
6 motion, Vice Chairperson Allen. Also support,
7 Mr. Hood and Mr. Hinkle. Board seat vacant. The
8 motion carries 4-0.

9 CHAIRMAN JORDAN: Okay. I'm getting
10 briefed on something else. Okay, thank you.
11 Thanks so much. Appreciate it.

12 Can we call 18642, please, Mr. Moy?

13 MR. MOY: Okay. Okay, so next up is
14 Application Number 18642. This is the
15 application of 57th Street Mews, Inc., pursuant
16 to 11 DCMR 3103.2, variance from the lot
17 occupancy requirements under Section 772, a rear
18 yard requirements under 774, and from the parking
19 requirements under Subsection 2101.1, to
20 construct a new four-unit apartment house in the
21 C-2-A District at premises 1210 Simms Place,
22 N.E., Square 4052, Lot 181.

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1 CHAIRMAN JORDAN: Thank you. Please
2 introduce yourself.

3 MR. BELLO: Good morning, Mr. Chair.
4 This is Toye Bello for the applicant.

5 MR. DEMUREN: I'm Taiwa Demuren,
6 President 57th Street Mews, Inc.

7 CHAIRMAN JORDAN: Good. All right, I
8 think that the -- I don't know if we need a
9 presentation from you, Mr. Bello. I think we
10 have a file that's complete. You have support
11 from everyone that needs to give support, unless
12 the Board has some questions or something they
13 want to hear from you on -- seeing none, then I
14 know that you want to go ahead and move on to the
15 next phase because you know better; right?

16 MR. BELLO: That's correct, sir.

17 CHAIRMAN JORDAN: Okay. Anything the
18 Office of Planning wanted to add to their report?

19 MS. BROWN-ROBERTS: For the record,
20 Maxine Brown-Roberts from the Office of Planning,
21 and we would stand on the record for approval.
22 Thank you.

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1 CHAIRMAN JORDAN: Any questions for
2 Office of Planning, anyone? Department of
3 Transportation, anyone here for this case?

4 We do have a letter from Department of
5 Transportation, no objection. Wait a minute.
6 What about ANC 5B? I don't think we have any.
7 Do we have 5B?

8 MR. BELLO: We have a copy of a
9 resolution of support.

10 CHAIRMAN JORDAN: Okay. Let's finish
11 and then you can submit it to the -- let me --
12 let's let me have it. I want to make sure we
13 have -- give it to -- okay.

14 Ms. Allen?

15 MEMBER ALLEN: As always, I'm always
16 concerned about the parking. What is the plan
17 for the tenants to park since you're not going to
18 provide the two required parking spaces?

19 MR. BELLO: Well, the -- there's
20 unrestricted ample parking on Simms Street. The
21 property is located within a commercial zone.
22 Many parking spaces.

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1 MEMBER ALLEN: Okay.

2 CHAIRMAN JORDAN: Mr. Bello, on the
3 ANC's recommendation, they recommend some
4 conditions. Have you reviewed these conditions?

5 MR. BELLO: Yes, we have.

6 CHAIRMAN JORDAN: These conditions are
7 acceptable to you?

8 MR. BELLO: Yes, we have changed the
9 facade of the building to all brick, and the
10 ANC's resolution was actually predicated on
11 receiving a list of supporters in the immediate
12 neighborhood.

13 I think we had something else in
14 there, 39 --

15 CHAIRMAN JORDAN: Yes, that's --

16 MR. BELLO: -- signatures of support.

17 CHAIRMAN JORDAN: Okay. Well, let's -
18 - yes, I think some of these -- okay. Got it.
19 All right. So ANC 5B we have now gotten their
20 letter in support, which we give great weight to.

21 We have on the record that the plans -
22 - your plans would be in accordance with the

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1 condition provided here and that you've already
2 taken care of the signatures from the neighbors.

3 MR. BELLO: That is correct.

4 CHAIRMAN JORDAN: Okay. Is anyone
5 here wishing to speak in support of this
6 application? Anyone here wishing to speak in
7 opposition to this application? Anyone in
8 opposition?

9 I think turning back we would now move
10 to close the record -- I will close the record
11 and see if the Board is ready to deliberate.
12 Heads are going up and down meaning yes, we will,
13 so I would move that we grant the relief
14 requested.

15 Oh, now nobody's going for the
16 microphone.

17 MEMBER ALLEN: Second.

18 CHAIRMAN JORDAN: Motion made and
19 seconded and we grant the relief requested in
20 this case. Any further discussion?

21 All those in favor signify by saying
22 aye.

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1 (Chorus of ayes)

2 CHAIRMAN JORDAN: Opposed, nay. The
3 motion carries.

4 MR. MOY: Staff would record votes 4-
5 0. This is on the motion of Chairman Jordan to
6 approve the application. Second the motion, Vice
7 Chairperson Allen. Also in support, Mr. Hood and
8 Mr. Hinkle. Board seat vacant. The motion
9 carries 4-0.

10 CHAIRMAN JORDAN: Thank you. Summary
11 please?

12 MR. MOY: Yes, sir.

13 MEMBER ALLEN: You didn't say that
14 last time.

15 CHAIRMAN JORDAN: Yes, I did. Didn't
16 I? I didn't. I think I -- I didn't say summary
17 order last time?

18 MR. MOY: Yes, you did.

19 CHAIRMAN JORDAN: That's okay. That's
20 okay. That's why you're the vice chair. I'm
21 just playing. No, I appreciate it. No, no, keep
22 me honest. That's right, keep me honest.

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1 Let's go up to the top of the order.

2 MR. MOY: Okay. That case then would
3 be Application Number 18655, which is the
4 application of B of A, Bank of America, pursuant
5 to 11 DCMR 3104.1, 1304.1 and 1325, special
6 exception to exceed the 20% limit on the amount
7 of ground floor to be devoted to banks under
8 Subsection 1302.4(a) to install an automatic
9 teller machine, or ATM, banking center in the HS-
10 R/C-2-A District, 1102 H Street, N.E., Square
11 981, Lot 806.

12 CHAIRMAN JORDAN: Please identify
13 yourself.

14 MR. FREEMAN: Good morning, Chairman.
15 For the record, my name is Kyrus Freeman with
16 the law firm of Holland & Knight.

17 MR. AXELROD: Robert Axelrod with Uof-
18 H Street, LLC, the owner of the property.

19 MR. FARLEY: Good morning. My name is
20 Jeff Farley. I work at Little Architects.

21 MR. O'CONNOR: My name is Joe
22 O'Connor. I'm with Bank of America.

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1 MS. BUTCHEE': Patreece Butchee' --

2 CHAIRMAN JORDAN: Just make sure your
3 microphone's on, please.

4 MS. BUTCHEE': Patreece Butchee',
5 CBRE.

6 CHAIRMAN JORDAN: CBRE? CBRE?

7 MS. BUTCHEE': Yes, sir, CB Richard
8 Ellis.

9 CHAIRMAN JORDAN: I know what it
10 means, but we're on the record here, right.
11 Everybody in the world as they pick this up may
12 not know and there might be someone, so --

13 MS. BUTCHEE': My apologies.

14 CHAIRMAN JORDAN: That's okay. Is
15 there an ANC letter in this?

16 MR. FREEMAN: No, Chairman. We've
17 gone to the Planning and Zoning Committee twice,
18 but the full ANC has not taken an action or
19 submitted a letter.

20 CHAIRMAN JORDAN: Okay, and our file
21 doesn't have it and they've been noticed --

22 MR. FREEMAN: Absolutely.

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1 CHAIRMAN JORDAN: -- regarding this.
2 Yes. Well, yes, I mean, from the Office of
3 Zoning. I think this is one, also, that's as
4 your usual cases, Mr. Freeman. I think this is
5 one that I don't have any particular question. I
6 think the file is well documented.

7 Board, any issues or something you
8 need to drill down with the applicant? I think
9 we can use that approach as opposed to have a
10 presentation because I think the file, as I said,
11 only has what we need.

12 MR. FREEMAN: Thank you, sir.

13 CHAIRMAN JORDAN: Yes?

14 MEMBER ALLEN: Just, I guess, two
15 quick questions. One, sir, this is purely ATMs.
16 There's no live bodies there. Is that correct?

17 MR. FREEMAN: Yes, ma'am. It's a
18 remote ATM facility which is completely
19 automated.

20 MEMBER ALLEN: Automated? Then where
21 is this in relation to the branch that's on
22 H Street?

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1 MR. FREEMAN: The branch that you're
2 thinking of, I believe, is on 9th and H. This is
3 to the -- this is at 11th and H, so two blocks
4 away.

5 MEMBER ALLEN: Okay. Thank you.

6 CHAIRMAN JORDAN: Any other questions
7 of the applicant? Then, is there anything in
8 addition that we would need to receive from the
9 Office of Planning?

10 MS. THOMAS: Mr. Chair, Good morning.
11 Mr. Chairman and the members of Board, Karen
12 Thomas with the office of planning. I have
13 nothing additional to add, and stand on the
14 record of our report. Thank you.

15 CHAIRMAN JORDAN: Any questions for
16 the Office of Planning? Board? Applicant?

17 MR. FREEMAN: No, sir.

18 CHAIRMAN JORDAN: Okay. Anyone here
19 from the Department of Transportation for this
20 particular case?

21 Then we have a letter of no objection
22 from the Department of Transportation.

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1 UNIDENTIFIED SPEAKER: Which is
2 universally of approval, right?

3 CHAIRMAN JORDAN: We already asked
4 here, so nothing from -- we have nothing in our
5 from ANC. Anyone here from ANC 6A for this case?
6 ANC 6A for this case, and we don't have a letter
7 regarding this from ANC 6A.

8 Any here wishing to speak in support
9 of this application? Anyone wishing to speak in
10 opposition to this application? Anyone in
11 opposition?

12 Then we would turn it back for
13 rebuttal, but there's nothing to rebut and
14 there's really nothing to close. As I said at
15 the beginning, the file was well documented to
16 support the relief requested, so I would move
17 that we grant the relief requested by this
18 applicant.

19 MEMBER HINKLE: I'll second.

20 CHAIRMAN JORDAN: Oh, there you go.
21 Motion made and seconded. Any unreadiness? All
22 those in favor of the motion signify by saying

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1 aye.

2 (Chorus of ayes)

3 CHAIRMAN JORDAN: Those opposed, nay.

4 The motion carries. Mr. Moy?

5 MR. MOY: Thank you, sir. The staff
6 would record the vote as 4-0. It is on the
7 motion of Chairman Jordan to approve the
8 application with the relief requested. Seconded
9 the motion, Mr. Hood. Also support, Vice
10 Chairperson Allen and Mr. Hinkle. Board seat
11 vacant. Motion carries on a vote of 4-0.

12 CHAIRMAN JORDAN: Summary please? 67,
13 right? Is that where we are, 67?

14 MR. MOY: Yes, sir. Yes, sir.
15 That's correct. That would be Application Number
16 18667 of St. Elmo W. Crawford, Jr., pursuant to
17 11 DCMR 3103.2, variance from the use provisions
18 for a dental office in the R-3 District at
19 premises 45 Franklin Street, N.E., Square 3500,
20 Lot 124.

21 CHAIRMAN JORDAN: Okay. So please
22 identify yourselves.

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1 MR. CRAWFORD: I'm St. Elmo Crawford,
2 practicing dentist, Washington, D.C., 36 years.

3 DR. MATABAR: Dr. Matabar, Enrique
4 Matabar, practicing dentist at the same location
5 for about six years.

6 MR. MITCHELL: Sean Mitchell --

7 CHAIRMAN JORDAN: Just make sure your
8 mic's on.

9 MR. MITCHELL: Sean Mitchell, Bank of
10 America.

11 CHAIRMAN JORDAN: Okay. Now, I'm
12 clear. You've made a request, and I think you're
13 just going to have to amend -- formally amend it,
14 but your submission did move this and make a
15 request for a use variance from 3103. That's
16 correct?

17 MR. CRAWFORD: Yes, sir.

18 CHAIRMAN JORDAN: All right. I think
19 you're going to have a lift regarding the
20 understanding that you have to show undue
21 hardship and why a use variance should be granted
22 for this particular property.

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1 I think you make the window in regards
2 to uniqueness, for me, but the Board might want
3 to hear something about it. But certainly, I
4 think you might have a lift in regards to the
5 undue hardship requirement that's required for a
6 use variance.

7 So, the Board need to hear anything
8 about the uniqueness -- unique condition of this
9 property? I think that the record -- yes, thank
10 you. What -- was this noticed as a -- what was
11 the notice in this, Mr. Moy?

12 MR. MOY: It was publicly noticed as -
13 - was it special exemption?

14 CHAIRMAN JORDAN: It was a special
15 exception was the notice?

16 MS. GLAZER: It believe it was a
17 special exception under Section 202 for an
18 accessory apartment. I'm sorry, not for an
19 accessory apartment; for an accessory use.

20 CHAIRMAN JORDAN: Okay. So, we have a
21 lesser standard but a harder burden? What was
22 the notice? What is the notice?

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1 MR. MOY: I'm pulling that now,
2 Mr. Chairman.

3 CHAIRMAN JORDAN: Ms. Glazer, we're
4 going to have to do some thought on that. We
5 have to send this back to be re-noticed.

6 MS. GLAZER: Mr. Moy is saying it was
7 noticed as a use variance, but the application
8 was submitted and I --

9 CHAIRMAN JORDAN: If the notice went
10 out as a use variance, Mr. Moy --

11 MR. MOY: Yes, sir, and under
12 Exhibit 1, the applicant did file for a use
13 variance under 202.2.

14 CHAIRMAN JORDAN: And then later on
15 corrected as a 3103? Okay. Then we're good.
16 All right.

17 MR. MOY: This is in the record.

18 CHAIRMAN JORDAN: That's the record
19 record.

20 MR. MOY: Yes, sir.

21 CHAIRMAN JORDAN: That's the real
22 record record. That's the record for the record.

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1 MR. MOY: The hard copy anyways.

2 CHAIRMAN JORDAN: So we're good.
3 Thank you. We had to get that straight because
4 sometimes we have to send these back out for
5 notices and it's important that the public has
6 the ability to weigh in one way or the other if
7 they wish to do so.

8 So, where was I? So, anyway, I think
9 you're going to have to -- you can present this
10 in evidence in regards to the undue hardship, and
11 I think that you, in my opinion that's a solely
12 mine, that you already get under -- just hit in
13 under the radar for uniqueness because this
14 building is situated and what it's set for its
15 use, how the upper floors are laid out, the
16 parking pad, that it's kind of different than the
17 other properties in the neighborhood.

18 It's already used in -- it's a
19 professional office building?

20 MR. CRAWFORD: For the past 80 years.

21 CHAIRMAN JORDAN: But, I don't know if
22 the Board needs something else on that. Do you

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1 want to hear evidence on its uniqueness?

2 MEMBER ALLEN: No, I'm good.

3 CHAIRMAN JORDAN: Okay. Then I think
4 your drill is certainly on the undue hardship
5 requirement to show -- and you're also familiar
6 with the objection made by the Office of
7 Planning, so your presentation should hit those
8 things.

9 MR. CRAWFORD: Yes. We've had
10 numerous emails back and forth with Mr. Arthur
11 Jackson and discussing the hardship issue, and we
12 were really focusing on the one particular issue,
13 which was the residence upstairs.

14 I purchased the building from a
15 dentist who purchased it from another dentist
16 and it's been continuously operated as a dental
17 office.

18 Unfortunately, the upstairs residence
19 is not really suitable for a family and more than
20 one or two people. You understand, it has one
21 bathroom. It has only -- it's listed as three
22 bedrooms, but it really only has one and a half

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1 or two bedrooms.

2 CHAIRMAN JORDAN: You mean real
3 bedrooms?

4 MR. CRAWFORD: Well, real bedrooms,
5 yes. So the other one is not much more than a
6 closet size space. So, as families grow and
7 develop, it becomes extremely difficult to
8 maintain a family upstairs in addition.

9 The dental office occupies the entire
10 street level. It has its own entrance, its own
11 exit, its own parking area, which can accommodate
12 five cars. It has been continuously operated as
13 a dental office for, like I said, almost
14 80 years.

15 It was built as a medical/dental
16 office in 1932 prior to these regulations. The
17 only thing that we are really asking for is
18 relief from the residence requirement of the
19 dentist upstairs.

20 That creates a hardship for me, too,
21 because I have a relatively large family now and
22 I am no longer able to live up there, as well.

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1 So, when all of this surfaced, it made
2 it clear that I need to obtain an occupancy
3 permit along with the dentist that is planning to
4 come in to meet these requirements.

5 So, what we are asking for is simply
6 relief on the requirement that the dentist
7 actually reside upstairs in the property, but
8 that the property will remain in its current
9 structure and there will be no changes in the
10 physical structure of the building or its
11 intended use.

12 Upstairs will still remain a residence
13 for a single person. In this particular case,
14 with the person that -- Dr. Matabar's intending
15 to purchase only he will have his family member
16 upstairs, so it will be an accessory resident's
17 use.

18 Everything else -- it's operated in a
19 neighborhood. We have a number of patients that
20 wanted to come but when I inquired, they said
21 they had 60 cases. I don't know if she meant
22 60 people or 60 cases, but she said you had to be

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1 prepared to be here all day, so a number of my
2 patients said they had to take off work, and I
3 didn't know if that --

4 CHAIRMAN JORDAN: Okay. So, the
5 requirements here just show that the property --
6 it's unique in this condition or situation in
7 which we are kind of giving you that based upon
8 how it's being used, what it's situated for, but
9 the lift for you is to show that it's an undue
10 hardship for you to operate this building in
11 light of the zoning regulations based upon these
12 unique conditions or exceptional circumstance.

13 So, that we're missing. I mean, I
14 haven't heard that. I saw something in your
15 pleadings. You stated that it would be an undue
16 burden or undue hardship on the patients because
17 if the building wasn't there, the patients
18 wouldn't have any place to go.

19 MR. CRAWFORD: But they wouldn't have
20 the dental practice there.

21 CHAIRMAN JORDAN: I understand. I
22 understand. But it has to arise -- we're talking

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1 about -- well, how the zoning regulations -- you
2 complying with the zoning regulations and the
3 condition of this building or situation of this
4 building presents an undue hardship for you to be
5 able to operate this as required by the zoning
6 regulations.

7 MR. CRAWFORD: Well, in this case,
8 it's going to make it impossible for me to sell
9 the building, too, because we approached at least
10 three or four banks and with the corporation of
11 the Bank of America, they have agreed to provide
12 a purchase loan for the building and practice,
13 but it's not possible for banks for some reason
14 under their regulations to provide a residential
15 loan in a building that occupies a business in
16 it, as well.

17 CHAIRMAN JORDAN: That is set up for a
18 business, the first floor being the dental
19 office.

20 MR. CRAWFORD: The dental office, so
21 we go back and forth because initially we had
22 tried to get --

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1 CHAIRMAN JORDAN: So otherwise, you
2 would have to convert the whole first floor to
3 residential?

4 MR. CRAWFORD: To residential in order
5 to get the loan, and the way it's set up it's a
6 linear layout, waiting room, reception area with
7 a window between the waiting room and the
8 bathroom and then three treatment rooms.

9 Fighting with the bank, they said,
10 well, you know, the only way we'll provide the
11 loan is as a commercial loan and in order for it
12 to be a commercial loan, you will have to have
13 either a variance or a zoning change.

14 CHAIRMAN JORDAN: Because the building
15 is --

16 MR. CRAWFORD: Zoned R1-3, yes.

17 CHAIRMAN JORDAN: Okay. So your
18 argument that your undue hardship is you have to
19 convert this building to residential --

20 MR. CRAWFORD: To residential to sell
21 it.

22 CHAIRMAN JORDAN: You can't do

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1 anything financially --

2 MR. CRAWFORD: I can't do convert to
3 all commercial.

4 CHAIRMAN JORDAN: -- because it's
5 already commercial in the first floor.

6 MR. CRAWFORD: Well, it's the dental
7 office on the first floor.

8 CHAIRMAN JORDAN: Yes, that's --

9 MR. CRAWFORD: But it would not change
10 anything in the physical appearance, structure,
11 or essentially the use except the residency
12 requirement. That's all we're asking for relief
13 under, this residential requirement.

14 CHAIRMAN JORDAN: Okay.

15 MR. CRAWFORD: We've been to the ANC
16 and we have gotten unanimous support from the
17 ANC. I've been a regular member and attended all
18 of their hearings, certainly the ones recently in
19 the past five months.

20 All of our neighbors, we have had
21 discussions with them and they seem to appreciate
22 we have approximately 1,000 patients in the 2002

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1 ZIP Code.

2 CHAIRMAN JORDAN: Got you. Okay. Any
3 other questions? Does the Board have questions
4 of the applicant? Is there anything else you
5 think you want to present on that point? I think
6 -- Ms. Allen?

7 MEMBER ALLEN: I just wanted to
8 clarify this point. So, Dr. --

9 MR. CRAWFORD: Matabar.

10 MEMBER ALLEN: -- Matabar, it's your
11 father that's going to live there? I thought it
12 was your father that was going to live there.

13 DR. MATABAR: My father.

14 MEMBER ALLEN: Your father.

15 MR. CRAWFORD: If he's able to
16 purchase it, yes.

17 MEMBER ALLEN: Well, for some reason I
18 thought it was -- your father was going to be
19 there. Okay.

20 CHAIRMAN JORDAN: All right. So let's
21 turn to the Office of Planning. We do have,
22 Mr. Jackson, your report but I think your report

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1 was based upon it being a 202 kind of
2 application. What's your --

3 MR. JACKSON: No, this is actually --
4 Arthur Jackson, DC Office of Planning. No, this
5 is -- this report is predicated on it being a use
6 variance because the use is allowed in the
7 District by special exception, but the applicant
8 in a proposal does not meet the standards of the
9 allowable special exception so thereby returning
10 them to a use variance because he's modifying
11 more than one of the uses -- requirements for
12 this use.

13 In fact, there are two requirements of
14 this space that -- requirements of this use that
15 the applicant's not addressing or not meeting.

16 One is the residency requirement, but
17 the other based on the letter submitted
18 October 28, 2013 indicated that there would be --
19 there will be a number of employees not to exceed
20 four, but no more than two of which would be
21 dentists.

22 That means that one of the employees,

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1 one or more of the employees would be dentists,
2 which is also not allowed under the special
3 exception, and I'm looking at --

4 CHAIRMAN JORDAN: Why are we talking
5 about special exception? That's what I'm trying
6 to understand.

7 MR. JACKSON: Well, again, the
8 applicant -- the use is allowable under special
9 exception. The applicant -- however, the
10 applicant was not -- cannot meet the standards of
11 the special exception.

12 CHAIRMAN JORDAN: He's asking us to
13 grant a use variance based upon the conditions
14 that he's presenting to us so that all those
15 things that you're talking about, he's asking us
16 to give a variance to allow him to do those
17 things.

18 MR. JACKSON: Right, but I think what
19 he's saying is the only irregularity is the
20 residency requirement. So, again, it's if he has
21 said more than once he wants relief from the
22 residency requirement. That's not the only

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1 requirement he has to get relief from.

2 He has to get relief from C, no other
3 person to be employed as dentist on the property.

4 So, apparently, there may be as many as three
5 dentists working on the property based on --

6 MR. CRAWFORD: No, no, no, no. No,
7 no. Let me --

8 CHAIRMAN JORDAN: No, no -- that's not
9 --

10 MR. CRAWFORD: I'm a dentist.

11 CHAIRMAN JORDAN: No, let's not -- we
12 don't do give and take.

13 MR. CRAWFORD: Okay. I'm sorry.

14 CHAIRMAN JORDAN: Let him finish.

15 MR. CRAWFORD: Okay.

16 MR. JACKSON: So, that's just based on
17 what the letter submitted by Dr. Matabar about
18 who the employees can be on the site.

19 So, to repeat, the use that's being
20 requested is allowed by special exception. The
21 applicant's asking to continue the use in a
22 manner that is generally consistent with the

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1 standards of the special exception but they don't
2 meet two.

3 Because they don't meet two of the
4 standards of the special exception, it becomes a
5 use variance. But we're still judging the use
6 variance in accordance with the special
7 clearances -- exception standard.

8 CHAIRMAN JORDAN: Okay. Now -- go
9 ahead.

10 MR. JACKSON: Okay, now, we've heard
11 testimony about what can and cannot be done with
12 the property, but we think the applicant should -
13 - our options on which they could proceed to sell
14 the property that would be in line with the
15 existing zoning that the -- that's a brief
16 overview --

17 CHAIRMAN JORDAN: Such as what, what
18 is the other that that's --

19 MR. JACKSON: Sell it as a residence.

20 CHAIRMAN JORDAN: What difficulties
21 would it be for them to use this as a residence?

22 Do they have to do anything to change this as a

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1 residence?

2 MR. JACKSON: Oh, I don't know. I
3 didn't hear them say. What we have is a two-
4 story residence with a basement.

5 CHAIRMAN JORDAN: But doesn't your
6 testimony go to the fact that you're saying that
7 he can do these things and he's saying it's a
8 hardship for him to do these things?

9 MR. JACKSON: No, he didn't say -- he
10 said it was a hardship for -- he said it was a
11 hardship for him not to be able to sell the
12 property.

13 CHAIRMAN JORDAN: He said it was a
14 hardship because he would have to also convert
15 this first floor to residential.

16 MR. JACKSON: Well, you have to
17 eliminate the doctor's office, but it can still
18 be -- well, my understanding is, now correct me
19 if I'm wrong -- they have a half bath on the
20 first floor, a separate entrance, and a large
21 space.

22 CHAIRMAN JORDAN: I'm not sure what

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1 the issue is.

2 MR. JACKSON: You can sell it as a
3 residence, the entire building, without the
4 dental office if they chose to.

5 CHAIRMAN JORDAN: He's saying it's a
6 hardship for him to do that.

7 MR. JACKSON: Why is it a hardship for
8 him to do that? I haven't seen --

9 MR. CRAWFORD: Because we can't get
10 financing.

11 MR. JACKSON: No, no, no. I think the
12 testimony was he cannot get financing to sell it
13 to this person with a dental office. What I'm
14 saying is he can sell the residence as a
15 residence without the office.

16 CHAIRMAN JORDAN: Do you have anything
17 contrary to show that he can afford to change it
18 as a residence.

19 MR. JACKSON: He hasn't said anything
20 to show --

21 CHAIRMAN JORDAN: No, but do you have
22 something at the other side of that?

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1 MR. JACKSON: No. He had --

2 CHAIRMAN JORDAN: Okay. I just wanted
3 to know.

4 MR. JACKSON: -- not part of his case.
5 Not part of his case. His case he cannot sell
6 this --

7 CHAIRMAN JORDAN: Mr. Jackson, I'm
8 asking questions and I'm asking you and I
9 understand what we need to have, if you just
10 respond. So, no. Okay.

11 Does the Board have any other
12 questions for Mr. Jackson?

13 ZC CHAIR HOOD: Mr. Jackson, I'm
14 trying to -- I pass this place all the time. I
15 didn't even know all this was going on. What is
16 on the, I guess, to the east? Is this right
17 across from the street from, what's that,
18 Trinity?

19 MR. CRAWFORD: Yes, sir.

20 ZC CHAIR HOOD: It's right on the
21 corner.

22 MR. CRAWFORD: Right on the corner.

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1 Yes, sir.

2 ZC CHAIR HOOD: So, what we're saying,
3 Mr. Jackson, is basically he does not meet the
4 residence requirement, which is under section --
5 is that --

6 CHAIRMAN JORDAN: 202.

7 ZC CHAIR HOOD: -- 202. Whatever the
8 number is. Even though he's been operating -- I
9 guess there's been some shifts. It does not meet
10 the resident requirement. His argument that his
11 family or their families are larger and because
12 the second floor is not livable for them to live.
13 Right?

14 When I look at this, and I know we are
15 bound by the regulations, but I think about
16 something we dealt with, Mr. Chairman, some years
17 ago. The NCI Center, what it was called then,
18 would not have been downtown if we didn't show
19 some flexibility, and I just think -- and that
20 was a great move and I know that may not have
21 anything to do with this, but sometime,
22 Mr. Chairman, and I'm a stickler for making sure

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1 we stick to the regulations because the Zoning
2 Commission we -- right -- so I hate when we break
3 --

4 CHAIRMAN JORDAN: Right.

5 ZC CHAIR HOOD: I am inclined,
6 Mr. Chairman, if we can find a way, I think this
7 is one of those cases that I would put in line
8 with the NCI Center. That's just where I am with
9 this.

10 I think this is just a whole lot of
11 thing. I think that this is some undue hardships
12 that we're putting out. This is one of those
13 cases. I'm sorry. That's just where I am.

14 CHAIRMAN JORDAN: I think I'm clear
15 about where we are in the matter, and I certainly
16 appreciate your wisdom and from a similar thought
17 because I think although this is not a typical
18 matter, but I think the arguments that have been
19 made would meet the requirements.

20 He's asking for a use variance, and
21 his use variance, as this Board would grant the
22 use variance, will be from all these other

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1 provisions would be adverse to what he need that
2 would stop him from operating as he's requested,
3 so we will take care of that.

4 Do you have any questions you would
5 like to -- questions that you would like to ask
6 Mr. Jackson, Office of Planning?

7 MR. CRAWFORD: No, sir.

8 CHAIRMAN JORDAN: Then where are we?

9 MR. CRAWFORD: I think I wore him out
10 with questions in our emails.

11 CHAIRMAN JORDAN: Okay. Then let's do
12 -- okay. Is there anyone here from Department of
13 Transportation? Department of Transportation?
14 We have a letter of no objection from Department
15 of Transportation.

16 Wait a minute, Ms. Glazer, don't hit
17 and run because I may have questions for you.
18 Anyone here from ANC 5E? ANC 5E?

19 MR. CRAWFORD: I have asked, but --

20 CHAIRMAN JORDAN: We have -- huh?

21 MR. CRAWFORD: I have asked --

22 CHAIRMAN JORDAN: No, we have a letter

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1 from ANC 5E, which we will grant great weight --

2 MR. CRAWFORD: Okay.

3 CHAIRMAN JORDAN: -- who seeks to
4 support this application. Just one second,
5 please.

6 Counsel is correcting us again as
7 that's where I was that 202 is no longer in front
8 of us. You're coming here for a use variance
9 under 3102 to allow for a physician's use on the
10 first floor of this building. That's what you're
11 here for.

12 MR. CRAWFORD: Yes, sir.

13 CHAIRMAN JORDAN: That's what -- so
14 we're all -- we're in agreement. Okay. Thank
15 you. Appreciate that. Now where are we?

16 ANC, is there anyone in the audience
17 wishing to speak in support of his application?
18 In support of his application?

19 Anyone wishing to speak in opposition
20 to this application? Anyone wishing to speak in
21 opposition? Then we usually turn back for
22 rebuttal if there's anything you wanted to say.

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1 You can respond to something that you
2 heard if you would like, if you think you need
3 to, but sometimes people say too much and get
4 themselves into trouble or you do whatever you
5 want to do or you can just close.

6 MR. CRAWFORD: I just wanted to say
7 Mr. Jackson said possibly three. It was two
8 dentists and I only mentioned two dentists
9 because there is a transition period where I
10 would have to introduce patients. We would have
11 to consult, collaborate on patient care and
12 things like that, so it would be a period of
13 time, short, that we would need to collaborate
14 together on patient care and all.

15 So, if I was in the office with him,
16 that would be the two dentists that we were
17 referring to.

18 CHAIRMAN JORDAN: Okay. All right,
19 then we will close the record based upon what is
20 before us. Is the Board ready to deliberate?

21 MEMBER ALLEN: Yes.

22 CHAIRMAN JORDAN: Any discussion or

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1 anything on -- I believe that the applicant has
2 made a case for a use variance under 3103 and
3 that to allow for the use of the facility in --
4 this is an R1, in an R1 district as the first
5 floor to be a physician's -- excuse me, a dental
6 office as requested.

7 I don't see where 202 is any longer
8 applicable to this and all those other
9 requirements there wouldn't be applicable since
10 we're granting the use variance in the R1, which
11 something would not be a matter of right or even
12 by special exception, we are now allowing that
13 particular use of that property.

14 I think that the building has a
15 uniqueness in the fact that it's already been
16 operated as a physician's -- a dental office.
17 It's set up on the first floor as a commercial
18 operation.

19 It has parking for a commercial
20 facility and that the hardship would be that you
21 would have to convert -- to do anything else with
22 this, you would have to convert that to

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1 residential and therefore, that's a hardship and
2 we will allow you to -- for the Board to be able
3 to grant this use variance.

4 So, I would -- any other discussion or
5 -- I would move that.

6 MEMBER ALLEN: Second.

7 CHAIRMAN JORDAN: Motion made and
8 seconded. Any discussion? All those in favor
9 signify by saying aye.

10 (Chorus of ayes)

11 CHAIRMAN JORDAN: Those opposed, any.
12 The motion carries. Mr. Moy?

13 ZC CHAIR HOOD: Mr. Chairman, can I --
14 before he calls the vote -- okay, after he calls
15 the vote I just wanted to add something.

16 MR. MOY: The staff would record votes
17 4-0. This is on the motion of Chairman Jordan to
18 approve the application for the use variance
19 under section 3103. Second the motion, Vice
20 Chairperson Allen. Also in support, Mr. Hood,
21 Mr. Hinkle with a Board seat vacant. The motion
22 carries.

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1 ZC CHAIR HOOD: Mr. Chairman, I just
2 wanted to add that you mentioned that people say
3 it takes all day. This is a different BZA. I've
4 been here when it used to take all day. This BZA
5 is very thorough.

6 All of them were, but this is very
7 thorough in the Chairman's leadership. So, let
8 them know, it doesn't take all day down here
9 anymore.

10 MR. CRAWFORD: I appreciate it and I'm
11 very impressed with the whole proceeding. It's
12 my first time.

13 CHAIRMAN JORDAN: Let's have a summary
14 order if we may, please. Thank you so much and
15 good luck to you.

16 MR. CRAWFORD: Thank you.

17 MR. MOY: While there's a little
18 pause, I'd just like to state for the record that
19 in one of the earlier cases, which is the
20 application of William Green, 18628, the Board
21 announced that it would be taken up on February
22 2014.

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1 I have a date certain. That date
2 would be February 25, 2014 for either a public
3 hearing or a status report.

4 CHAIRMAN JORDAN: All righty, let's
5 rock and roll. Let's keep going.

6 MR. MOY: All right. On the lineup,
7 Mr. Chairman, I believe we have 18668. This is
8 the application of CAS, C-A-S, Riegler Companies.
9 There are multiple variance requests here from -
10 -

11 CHAIRMAN JORDAN: I think it's been
12 noticed --

13 MR. MOY: Okay.

14 CHAIRMAN JORDAN: -- and we're alright
15 then. It's like I got a checkerboard of
16 something going here on my -- trying to keep
17 right on where we are and what we haven't and
18 what we do have to do.

19 I think I've seen you before. Welcome
20 back. 66 to 8, yes. 18668. Okay, introduce
21 yourselves again for us, please.

22 MS. MILANOVICH: Good afternoon. My

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1 name is Jami Milanovich with Wells and
2 Associates.

3 MR. CAIN: My name is Walt Cain. I'm
4 from ANC 2F.

5 MR. KADLECEK: Cary Kadlecek on behalf
6 of the applicant from the law firm of Goulston &
7 Storrs.

8 MS. BETTAREL: Robin Bettarel on
9 behalf of the applicant.

10 MR. LOCKWOOD: I'm Jeff Lockwood with
11 Hickok Cole Architects.

12 MR. CAUDLE: Lawrence Caudle with
13 Hickok Cole Architects.

14 CHAIRMAN JORDAN: All right. I'm just
15 wondering if we get to that point, you only have
16 tendered two experts, Mr. Kadlecek.

17 MR. KADLECEK: I have three, actually.
18 There are three resumes in the pre-hearing
19 submission.

20 CHAIRMAN JORDAN: Is that right?

21 MR. KADLECEK: They were double-sided,
22 so you might not see them, but Lawrence Caudle,

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1 Jeff Lockwood, and Jami Milanovich are all
2 proper.

3 CHAIRMAN JORDAN: Okay. All right, so
4 let's see where we are. Did we -- where are the
5 -- the case?

6 MR. KADLECEK: The case?

7 CHAIRMAN JORDAN: Yes.

8 MR. KADLECEK: Yes, we actually were
9 able to reach an agreement and Ms. Bettarel will
10 testify as to those elements to get on the
11 record. They actually left, and I believe they
12 informed Mr. Moy that they had withdrawn their
13 party status request.

14 CHAIRMAN JORDAN: So you see what I
15 mean? When I have --

16 MR. KADLECEK: I agree with you.
17 You're --

18 CHAIRMAN JORDAN: We've had people in
19 groups of 10 and 12 that say, "Oh, no. We've
20 been at each other's throats forever and we'll
21 never get this resolved." But this room works
22 miracles.

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1 MR. KADLECEK: Must be the pressure.

2 CHAIRMAN JORDAN: I don't know if we
3 even need to get to that point. But for the
4 party status in opposition, I thought that we
5 were -- are you amending to also -- you amended
6 to accept this relief from 776, didn't you?

7 MR. KADLECEK: Yes, we did.

8 CHAIRMAN JORDAN: Board, do you have
9 any issues that you need to drill down on or want
10 to hear from this applicant? Because I think
11 your file is complete.

12 MR. KADLECEK: Yes, we're happy to
13 just answer questions if that's what the Board
14 would prefer.

15 CHAIRMAN JORDAN: Yes. I'm just
16 checking with the Board to make sure the Board is
17 comfortable and content with what's been filed.
18 I know I am, so -- the lot's unusually shaped.
19 It's a contaminated site.

20 I understand the difficulties in the
21 adverse ability to do things here. Is it okay,
22 Board? Then let's turn to the Office of Planning

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1 and see if there's anything in addition the
2 Office of Planning wanted to add, but I think
3 they've already submitted some -- let me go back.

4 Are you okay with the Office of
5 Planning's conditions?

6 MR. KADLECEK: Yes, there's one -- the
7 second condition regarding public space
8 committee, Mr. Mordfin and I spoke yesterday just
9 to clarify that a little bit, and he can speak
10 for himself, but I think the understanding was
11 that if that were needed, but in fact, those are
12 issues that would be resolved with Development
13 Code official.

14 CHAIRMAN JORDAN: Yes, that's not for
15 us.

16 MR. KADLECEK: That's not for you
17 guys?

18 CHAIRMAN JORDAN: Okay, so let's go to
19 OP. Anything at issue? Welcome.

20 MR. MORDFIN: Thank you. Good
21 afternoon. For the record, I'm Stephen Mordfin
22 with the Office of Planning and we continue to

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1 support the application.

2 As Mr. Kadlecek stated, the purpose of
3 putting in the condition number two for the
4 public space committee for those things when they
5 went to final design, not comply with all of the
6 requirements and they had to go.

7 Otherwise, it's not necessary for them
8 to take an application to the parking space
9 committee.

10 CHAIRMAN JORDAN: Board, any questions
11 for Office of Planning? The applicant, any
12 questions of Office of Planning?

13 MR. KADLECEK: No questions, although
14 I do want to say, though, the first condition
15 went through after the root plan. We just
16 submitted that for the record, as well.

17 CHAIRMAN JORDAN: So you already made
18 the change?

19 MR. KADLECEK: We did. Well, we
20 didn't make a change. We just delineated it --

21 CHAIRMAN JORDAN: Delineated it.

22 MR. KADLECEK: -- as Office of

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1 Planning had requested.

2 CHAIRMAN JORDAN: Okay, so we don't
3 have to make a condition, it's already done?

4 MR. KADLECEK: Right.

5 CHAIRMAN JORDAN: Has Planning seen --
6 have you seen it?

7 MR. KADLECEK: No, we just submitted
8 it, so --

9 CHAIRMAN JORDAN: Okay. Oh, okay.
10 All right. All right. ANC -- anyone here form
11 ANC 2F? Yes, I'm sorry, Mr. Cain.

12 MR. CAIN: Yes, I'm here from the ANC,
13 and I just wanted to come. You got a letter from
14 us, but I wanted to kind of be here in person to
15 express our endorsement of the project and to
16 thank the developers for their transparency and
17 their willingness to work with the community.

18 There were a number of concerns from
19 the community, and I think everyone's worked
20 together to get to a good place. So --

21 CHAIRMAN JORDAN: We appreciate you
22 coming down and we do have a letter from ANC 2F

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1 supporting the application, which we will give
2 great weight to and the vote 8-0. The -- I think
3 the conditions that they had were not zoning
4 regulation conditions, if I'm not mistaken.

5 MR. CAIN: Yes, the only condition
6 that was in the ANC approval was the signing of a
7 memorandum of understanding --

8 CHAIRMAN JORDAN: Right.

9 MR. CAIN: -- between the ANC and the
10 community, and that's been taken care of.

11 CHAIRMAN JORDAN: Yes, and that's not
12 -- okay. Good. Is there anyone in the audience
13 wishing to speak in support of the application?
14 Anyone else wishing to speak in support?

15 Anyone wishing to speak in opposition?

16 Anyone in opposition? We did have some
17 opposition. It's been withdrawn and something's
18 been worked out, which, again, commend the
19 parties for doing it.

20 Then we would normally turn back to
21 the applicant to do a rebuttal and closing, but
22 there's nothing to rebut.

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1 MR. KADLECEK: There's nothing to
2 rebut. I do have a final -- couple final
3 comments that I wanted to make.

4 One is DDOT is not here, but one of
5 the condition -- two of the conditions, actually,
6 that DDOT had put in their report, one of which
7 was offering a smart -- sorry, carshare and/or
8 bikeshare memberships in perpetuity.

9 I actually spoke with Mr. Rogers
10 yesterday. He agreed to amend that, and I
11 actually have an email from him, if that would
12 suffice --

13 CHAIRMAN JORDAN: Yes.

14 MR. KADLECEK: -- to have those
15 memberships be for the first three years if the
16 building is a rental and then to the initial
17 purchasers if the building is a condo. But we've
18 also agreed to the transit screen that they have
19 asked for as a condition.

20 CHAIRMAN JORDAN: So you have agreed
21 to the transit screen?

22 MR. KADLECEK: Yes, we have, and then

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1 we just modified with their consent the carshare
2 and the bikeshare membership condition.

3 CHAIRMAN JORDAN: I forgot to mention
4 that. Their condition -- one second, please.

5 MEMBER ALLEN: Just a quick question
6 about the parking. So the 14 sites, I mean the
7 14 spaces that you're going to have there, is
8 there going to be some -- and did I just miss it
9 -- how are those figured out?

10 I mean, is it sort of whoever gets
11 there first or are they assigned?

12 MR. KADLECEK: Yes, I understand the
13 question.

14 MS. BETTAREL: Usually, it would be
15 first come, first serve but we tend to try to
16 reserve them for the larger units, so the two
17 bedrooms.

18 MEMBER ALLEN: Thank you.

19 CHAIRMAN JORDAN: Great. I was just
20 trying to pull the other Department of
21 Transportation conditions. I was trying to look
22 at the DDOT conditions. I don't -- oh, yes,

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1 there it is. That's the one.

2 All right. Yes. Okay. That's what
3 it was. Usually, it's on the front page and in
4 their conclusion section. That's why I missed it
5 before.

6 By the time I catch on here, I was
7 going to take seven hour's worth of looking at
8 the files and would kind of go crazy. Okay, so
9 you're good on those conditions. You're going to
10 change the one to -- condition number one is
11 going to be the same or is it going to change?
12 What did you say?

13 MR. KADLECEK: So, it would be a
14 carshare and bikeshare membership to residents
15 within the first three years of the building's
16 operation if it were a rental and then to the
17 initial purchasers if the building was a condo.

18 CHAIRMAN JORDAN: So after three years
19 then we can get cars and flood the neighborhood?

20 MR. KADLECEK: Well, we actually
21 believe, as our transportation expert could
22 attest, that we don't believe that is really

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1 likely to happen. The rest of the DDOT report
2 goes on to agree with our analysis that there's
3 not really likely to be a high demand for cars in
4 this building in this location.

5 CHAIRMAN JORDAN: Yes, but we keep
6 hearing that but no has a proof to show that.
7 So, all right -- I think we do five years here as
8 opposed to in perpetuity and in three years
9 because we are beginning to establish a policy
10 with what we're requiring and until we see
11 differently -- and if that's not acceptable to
12 you, then we can do something else. I mean, we
13 can just go back through and reject the request,
14 but --

15 MR. KADLECEK: We're okay with five
16 years.

17 CHAIRMAN JORDAN: Okay. Then --

18 MR. KADLECEK: Assuming that's rental.
19 That's what you intend, right?

20 CHAIRMAN JORDAN: Yes. The car --
21 bikeshare.

22 MR. KADLECEK: Yes, right, right,

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1 right. Thank you.

2 CHAIRMAN JORDAN: All right. So let's
3 close the record based upon what we have, and I
4 would move that we grant the relief requested
5 with the modified condition as set forth in
6 Department of Transportation's report, that being
7 the five years as opposed to perpetuity in
8 condition number one. Discussion?

9 MEMBER ALLEN: Second.

10 CHAIRMAN JORDAN: Motion made and
11 seconded. Further discussion? All those in
12 favor signify by saying aye.

13 (Chorus of aye)

14 CHAIRMAN JORDAN: Those opposed, nay.
15 The motion carries. Mr. Moy?

16 MR. MOY: Staff would record the vote
17 as 4-0. This is on the motion of Chairman Jordan
18 to approve the application with the conditions as
19 cited and with a provision for five years in
20 condition number one.

21 Also in support, or rather seconded,
22 Vice Chairperson Allen. Also support Mr. Hood

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1 and Mr. Hinkle. Board seat vacant. The motion
2 carries 4-0.

3 CHAIRMAN JORDAN: I believe we have
4 summary order, please?

5 MR. MOY: Yes.

6 MR. KADLECEK: Thank you.

7 MR. MOY: Your final case for the day,
8 Mr. Chairman, is number 18664 of Charles C.
9 Parsons pursuant to 11 DCMR 3100 and 3101 from a
10 November 23, 2012 decision by the Zoning
11 Administrator to permit the construction of an
12 addition to a flat in CAP/R-4 District, 7 --
13 rather 117 C Street, S.E., Square 733, Lot 23.

14 CHAIRMAN JORDAN: Okay. All right.
15 18664, introductions starting left to right.
16 Make sure your microphones are turned on, please.

17 MR. LESTER: Yes. Good afternoon. My
18 name is Jack Lester. I live at 117 C Street with
19 my wife, Stephanie.

20 MR. AVITABILE: David Avitabile with
21 the law firm of Goulston & Storrs, counsel for
22 the intervenor and property.

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1 CHAIRMAN JORDAN: Your name again?

2 MR. AVITABILE: David Avitabile.

3 CHAIRMAN JORDAN: Thank you.

4 MR. SULLIVAN: Marty Sullivan with the
5 law firm of Sullivan & Barros here on behalf of
6 the appellant.

7 MR. PARSONS: I'm Charles Parsons. I
8 reside at 129 C Street, S.E.

9 MR. LE GRANT: Good afternoon.
10 Matthew Le Grant. I'm the Zoning Administrator,
11 DCRA.

12 MR. POSTULKA: John Postulka,
13 assistant attorney general for DCRA.

14 CHAIRMAN JORDAN: Okay. All right.
15 What do we have here, which I'm really kind of at
16 a loss. I mean, there's a motion to stay the
17 hearing, stay the matter pending a hearing and
18 then there's a motion to expedite.

19 So one wants to stop, one wants to go,
20 but we're already at the hearing stage so I think
21 both of those are really a moot point.

22 MR. SULLIVAN: I would withdraw those,

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1 Mr. Chairman. All right. I do hereby withdraw
2 those. Those were both our requests.

3 CHAIRMAN JORDAN: So, I then
4 understand completely what the appeal is about,
5 but -- and everybody has briefed this matter. I
6 just -- I'm at a loss for seeing -- has anything
7 changed, and I'm going to ask the appellant.

8 Has anything changed in the condition
9 as what was before the Board in, what was it,
10 October 25, 2011 or November 8, 2011 regarding
11 the trellis, the connection, communication, and
12 the plans?

13 MR. SULLIVAN: Nothing has changed
14 about the specific facts surrounding the trellis,
15 no. What's different is we actually have the
16 Zoning Administrator decision in this case, which
17 wasn't --

18 CHAIRMAN JORDAN: Got you. The Board
19 has already issued a ruling regarding the trellis
20 and the condition. They've made findings and
21 they've made some conclusions. This Board did
22 already. Would that be correct?

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1 MR. SULLIVAN: The Board did and it
2 was arguably dicta because it was a self-
3 certified application and the issue before the
4 Board was the special exception approval.

5 So -- and the Board's finding was that
6 the Zoning Administrator -- it was plausible that
7 he could make such a decision. Also the Order of
8 the Board stated that the Zoning Administrator
9 was free to make whatever decision he felt was
10 correct and that that decision could be affirmed
11 or denied by this Board as well.

12 So it was a separate -- although very
13 similar, it was a separate standard and the
14 special exception is before the Court of Appeals
15 right now and the primary argument there is the
16 same, that the trellis is below the main floor.

17 But DCRA's counsel in that case has
18 informed us that they are going to argue that
19 everything related to the trellis and the main
20 floor is dicta and is not even part of that
21 appeal case.

22 So, they're looking at it as two

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1 separate cases, as well. The appellate division,
2 not the DCRA counsel that's here before you now.

3 CHAIRMAN JORDAN: Okay. But nothing's
4 changed from the facts and circumstances here.
5 Okay. The only thing that's changes is that we
6 actually have a formal decision by the Zoning
7 Administrator. Everything else is the same.
8 Would that be correct for the intervenor?

9 MR. POSTULKA: Yes, that's correct.

10 CHAIRMAN JORDAN: This really bothers
11 me that the intervenor in a case where you have
12 the vested interest in and the government has
13 actually become the appellee in the matter which
14 they don't have a vested interest in. But, I
15 guess the Zoning Commission worked that out at
16 some point, but so would that be correct?

17 MR. POSTULKA: That is correct.

18 CHAIRMAN JORDAN: Is that also your
19 understanding from the government's side?

20 MR. SULLIVAN: That's correct.

21 CHAIRMAN JORDAN: Nothing else has
22 changed? I don't know if there is any need to

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1 receiving testimony here. This has been well
2 briefed, as you've all stated, that the facts and
3 circumstances are the same. The only addition to
4 that is that the Zoning Administrator has now
5 made a formal decision which takes -- puts the
6 ball into play.

7 So, we've already been briefed by you
8 on the matter. Is there anything that you think
9 you need to add that needs to be added to this
10 record, Mr. Sullivan, as the appellant?

11 MR. SULLIVAN: No, Mr. Chairman. We
12 agree that our argument that's on the record is
13 purely a legal argument.

14 CHAIRMAN JORDAN: I'm going to call
15 intervenor/appellee, party of interest.

16 MR. LESTER: We agree. I think the
17 record is clear before you and it's the same
18 issue that the Board's already decided.

19 CHAIRMAN JORDAN: And for the
20 government's interest?

21 MR. POSTULKA: Yes, the Zoning
22 Administrator is here to answer any questions you

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1 may have. If you feel no need to, then we would
2 agree.

3 CHAIRMAN JORDAN: Board any questions?

4 All right. Then we will conclude this hearing
5 and let's set this for a decision date, Mr. Moy.

6 We good?

7 MR. MOY: That would be the date
8 established earlier for one of the other cases,
9 Mr. Chairman, that's convening on the budget
10 which would be February 4.

11 UNIDENTIFIED SPEAKER: February?

12 CHAIRMAN JORDAN: Four.

13 MR. MOY: Fourth.

14 CHAIRMAN JORDAN: Okay. Let's do
15 that, and we thank you all for coming in and
16 thanks for the hard work and the briefs and the
17 go back and forth and the rebuttals and the
18 replies. Thank you all. Thank you for coming.

19 Mr. Moy, do we have any other business
20 before the Board this morning?

21 MR. MOY: According to my records,
22 we're clear.

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1 CHAIRMAN JORDAN: All right. So, is
2 there anything else that the Board needs to deal
3 with today, Board? Board?

4 Okay, we're adjourned.

5 (Whereupon, the above-entitled matter was
6 concluded at 12:27 p.m.)

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