

GOVERNMENT

OF

THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

WEDNESDAY

MAY 5, 1999

The meeting convened in Room 220, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Sheila Cross Reid, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

SHEILA CROSS REID	Chairperson
BETTY KING	Vice Chair
JERRY GILREATH	Board Member
ANTHONY HOOD	Zoning Commissioner

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.

(202) 234-4433 WASHINGTON, D.C. 20005-3701 [www.nealrgross.com](http://www.nealrgross.com)

STAFF PRESENT:

Sheri M. Pruitt, Director  
Alberto Batista, Staff  
John Nyarku, Staff  
Paul Hart, Staff  
Beverly Bailey, Staff  
Alan Bergstein, Esq., Staff

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.

(202) 234-4433 WASHINGTON, D.C. 20005-3701 [www.nealrgross.com](http://www.nealrgross.com)

C-O-N-T-E-N-T-S

AGENDA ITEM      PAGE

PRELIMINARY MATTERS                      4

APPLICATION OF PROTESTANT EPISCOPAL CATHEDRAL:  
FOUNDATION OF THE DISTRICT OF COLUMBIA  
16433    7

APPLICATION OF SAM AND R.D. ANSELLEM:  
16432    20

APPLICATION OF FLORIDA AVENUE ASSOCIATES:  
16412    24

MOTION OF MILDRED R. CRARY:  
16405    27

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.

(202) 234-4433    WASHINGTON, D.C. 20005-3701    [www.nealrgross.com](http://www.nealrgross.com)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

MS. REID: Good morning. Those of you who are here for the hearing this morning, we have a public meeting first and then we will commence with the hearing. I'd also like to apologize for the delay this morning.

We had issues that came up that the Board had to address prior to coming in as well as the fact that we were looking to have our system up and running this morning and, after undue delay, we realized that it's not going to happen, so again, we're going to just have to project our voices and amplify. Everyone who speaks here will have to amplify so that they can be heard hopefully.

So the special public meeting for May 5th will now commence.

MS. KING: Madam Chair, I move approval of the meeting minutes for the public meeting of April 7th and for the public hearing of March 3rd. I want to make some comments on the March 17th meeting minutes, so I would move those, too.

MR. GILREATH: I second the motion.

MS. REID: Okay. All in favor.

(Ayes)

MS. REID: All opposed.

MS. KING: With regard to March 17th, on page two, the minutes with regard to the Georgetown University Residence Hall. I would like to suggest a couple of

1 amendments, if I may. Under one, I would suggest that it read  
2 as follows. "The Georgetown University shall honor its  
3 commitment to use this project to remove a large number of  
4 students living in the neighborhoods and shall not increase  
5 its student enrollment." And I have that in writing and will  
6 give it to the staff.

7 MS. REID: Okay. Repeat that again, please.

8 MS. KING: "The Georgetown University shall  
9 honor its commitment to use this project to remove a large  
10 number of students living in the neighborhoods and shall not  
11 increase its student enrollment." It, I think, has the same  
12 impact but I think it's clearer.

13 MS. REID: Doesn't it say that?

14 MS. KING: No, not to me, it doesn't. I think  
15 this is better.

16 MS. REID: It says, "Shall adhere to the  
17 statement that the purpose of the project is not to increase  
18 enrollment but to remove a large number of students living in  
19 the neighborhood."

20 MS. KING: I just --

21 MS. REID: Do you feel comfortable with that?

22 MR. GILREATH: -- specific. Setting a limit.

23 MS. REID: All right.

24 MS. KING: And I don't understand item #4. Is  
25 it possible that there are typos or emissions, but I don't get  
26 it.

1 MS. REID: Okay.

2 MS. KING: I don't know what it means and it  
3 doesn't scan and it's not good grammar and what does it mean?

4 MS. PRUITT: I don't have a copy of it.

5 MS. KING: Oh, I'm sorry. I thought it was on  
6 the agenda for today.

7 MS. PRUITT: They are. I just don't have them  
8 in my package.

9 MS. KING: It says, "The university shall  
10 consult ANC 2E and the surrounding neighbors and particularly  
11 West Georgetown for the purpose of providing the students who  
12 reside in this residence and the most appropriate locations  
13 for pedestrian access to and from campus that are more  
14 directly into Canal Road rather than through the residential  
15 streets of West Georgetown." I don't know --

16 MS. REID: Something is missing.

17 MS. KING: -- it's a word or a phrase or--

18 MS. REID: Something that's missing.

19 MS. PRUITT: We can go back and check the  
20 transcript.

21 MS. KING: Okay. So should we  
22 postpone consideration of this until the next meeting?

23 MS. PRUITT: So you can postpone those until  
24 next month.

25 MS. KING: Madam Director, can I give you my  
26 wording for item one?

1 MS. PRUITT: Certainly.

2 MS. KING: And I wasn't here for the March 31st  
3 meeting, so I can't vote on that.

4 MS. PRUITT: Mr. Parsons left so we have to  
5 postpone that. Madam Director, we have to postpone it.

6 MS. REID: Thank you, Ms. King, for that  
7 observation.

8 MS. KING: Thank you.

9 MS. REID: Very keen observation. Okay.

10 MR. HART: The first case to be decided this  
11 morning. Application No. 16433 of the Protestant Episcopal  
12 Cathedral Foundation of the District of Columbia, pursuant to  
13 11 DCMR 3108.1 for a special exception under 205 for the  
14 construction of an athletic facility with below grade parking  
15 and to establish two surface athletic fields to an existing  
16 private school located in an R-1-B District at premises 3500  
17 Woodley Road, N.W. (Square 1944, Lot 25).

18 MS. REID: Okay. This particular case is  
19 fraught with a lot of different twists and turns that we have  
20 been trying to absorb and to digest. Nonetheless, it appears  
21 that, given time, some of the positions that were received and  
22 the ability to be able to consult with corporate counsel, it  
23 is our view that we should postpone or continue this  
24 particular decision today until such time that we're able to  
25 get the appropriate input from our corporate counsel and to be  
26 able to adequately review the instruments that have come in to

1 us, the instruments that have come in to us within the last  
2 couple of days. And corp counsel is here this morning to  
3 speak on the nuances of the position that the Board is  
4 advocating here today.

5 MS. KING: Do you need a motion that we  
6 postpone consideration?

7 MS. REID: I was going to do it after, but we  
8 can do it now and then allow him to speak.

9 MR. BERGSTEIN: Madam Chairperson, my name is  
10 Alan Bergstein, assistant corporation counsel. I don't think  
11 I need to say anything on the substance of what's been  
12 submitted other than to remind the Board that at least one of  
13 the parties has requested an extension of time to submit a  
14 late filed submission, and I believe that there's other  
15 submissions that may be to be considered in terms of when they  
16 were filed by whom.

17 But I would also ask the Board to remind the  
18 parties that they are not to communicate with my office  
19 directly and that since the record is closed, there should be  
20 no need to file subsequently with the Board unless the Board  
21 is going to request other materials. But I'd request the  
22 parties not to contact my office unless they all contact my  
23 office collectively through a conference call because I don't  
24 want to engage in any separate communication with any party in  
25 this proceeding.

26 MS. REID: That should be our policy at all

1 times, I think we've agreed.

2 MR. GILREATH: I reluctantly support the  
3 postponement. I feel that the applicant has provided enormous  
4 information and so forth and I believe I personally have a  
5 very substantial knowledge of the issues and so forth.  
6 However, apparently some things have arisen that perhaps have  
7 some potential legal implication and caused this uncertainty,  
8 certainly on the part of the other Board Members. I concur  
9 that postponement is appropriate.

10 MS. KING: Mr. Bergstein, should we deal with  
11 the question of Mrs. Miller's submission as to whether or not  
12 we just make a decision to receive it?

13 MR. BERGSTEIN: My understanding of what has  
14 occurred is that ANC Commissioner Ruth Ann Miller filed a  
15 submission that was both filed after the April 27th close of  
16 the record and that the order of the Board on its face  
17 appeared to be limited to submissions by the parties and since  
18 Commissioner Miller was responding in her capacity as an ANC  
19 Commissioner alone, she did have that status. So if the Board  
20 wanted to take into account the submission by Commissioner  
21 Miller, it would have to either interpret its order as having  
22 contemplated that she was going to provide a separate response  
23 or to modify its order to allow, in this case, a non-party who  
24 was nevertheless ANC Commissioner to provide a response in  
25 this particular instance and to provide one that was out of  
26 time in terms of the close of the record.

1 MS. KING: And should we decide to adopt that  
2 last alternative, would we therefore need to supply that same  
3 option to all of the ANC Commissioners in ANC 3C?

4 MR. BERGSTEIN: If you did view your order as  
5 being discreet as to Ms. Miller, then any person in her same  
6 category, if they had wanted to respond, would not have known  
7 that they could have based upon the order.

8 MS. KING: But in this circumstance, the 12  
9 members, the other 12 members voted for the resolution. She  
10 was the one dissenting vote and, in effect, filed a minority  
11 opinion. Can we admit her letter and presume with some  
12 confidence that the other 12 were in favor of the resolution  
13 that they voted for?

14 MR. BERGSTEIN: Well, since they formally voted  
15 for it, you do know their position with respect to the issue  
16 and, therefore, in that sense, her submission could be viewed  
17 as a singular instance and that there are no other persons who  
18 fall into that category of persons, since there's no other  
19 person who is both an ANC Commissioner of that Commission who  
20 is in opposition to the position of the NCH.

21 MS. KING: In that case, Madam Chair, I move  
22 that we accept Ruth Ann Miller's submission, although it was  
23 untimely filed.

24 MS. REID: Do you want to make a motion to  
25 postpone or to continue?

26 MS. KING: I move that we postpone.

1 MS. REID: Okay. I'll accept that.

2 MS. KING: And that we accept Ruth Ann Miller's  
3 letter as part of the record. Do you go along with that or do  
4 you want me to bifurcate the issues?

5 MS. REID: No. I think that I am in agreement  
6 with you but I think that we should simply state for the  
7 record that this is --

8 MR. GILREATH: Louder please.

9 MS. REID: -- that we should say for the record  
10 that this is an unusual circumstance under which we are  
11 adopting this position at this time.

12 MS. KING: Yes. Well, the thing is that Ruth  
13 Ann Miller was representing the ANC at the public hearing, and  
14 we asked her to go back and see if the ANC wished to amend its  
15 earlier resolution, which it did, but she had a minority  
16 opinion on it so, since Mrs. Miller was so intimately involved  
17 in the situation and had represented the ANC, I think that we  
18 should open the door to receive her minority report on their  
19 second resolution.

20 MR. GILREATH: I agree with that.

21 MS. REID: Mr. Bergstein, in regard to some of  
22 the other issues that were raised in both submissions, the  
23 draft orders, the post-hearing submissions, the draft orders,  
24 should we address any of those at this time or just table it  
25 until --

26 MR. BERGSTEIN: It's my understanding --

1 MS. REID: -- the next --

2 MR. BERGSTEIN: -- that you are postponing your  
3 decision -- that both you are accepting the submissions that  
4 had been received even though one was late filed and that you  
5 are postponing your decision in order to analyze all the post-  
6 findings of facts and the conclusions of law that your  
7 decision will be reflective of your opinion regarding the  
8 issues that are raised.

9 MS. REID: Okay. Ms. King, we were discussing  
10 earlier the aspects of the merits of the case and the  
11 conditions.

12 MR. GILREATH: We can't hear.

13 MS. KING: When we were discussing this earlier  
14 with the -- yes.

15 MS. REID: There was a question in regard to  
16 the conditions that were proffered by both the ANC and the  
17 Cleveland Park Business Association. Was it your feeling that  
18 that encompassed for the most part the primary conditions that  
19 we were going to address within any order that we --

20 MS. KING: I think we've got such a volume of  
21 material and new material that was given to us this morning  
22 that I don't think that I could -- the question was, you know,  
23 all of these conflicting conditions that have been proposed by  
24 various people in their draft orders, in resolutions, in  
25 agreements--

26 MS. REID: Amendments.

1 MS. KING: -- and amendments and so forth. I  
2 think that any conversation about that needs to be postponed  
3 as well because I have not had the opportunity to read all the  
4 material that I was handed this morning and so I think that we  
5 need to just postpone all further discussion of this until the  
6 2nd of June.

7 MS. PRUITT: So Madam Chair, unless you are  
8 going to ask for additional information at this time from  
9 various people, I would suggest you postpone that.

10 MS. REID: I don't know if there's anything  
11 else that we need to request from the --

12 MS. KING: We've got more information than we  
13 can --

14 MS. PRUITT: I would agree so I think maybe we  
15 just should vote on the motion of postponement and the  
16 acceptance.

17 MR. BERGSTEIN: Can I just clarify from the  
18 discussion you just had that obviously you won't be discussing  
19 the conditions unless you've decided to first grant the  
20 special exception and, since no decision has been reached,  
21 that discussion of the conditions wouldn't be relevant. You  
22 have not at this point reached a decision whether or not to  
23 grant the application.

24 MS. KING: Exactly.

25 MR. BERGSTEIN: If you did grant the  
26 application, then the next question that would follow is what

1 conditions you've attached to the grant.

2 MS. REID: My question --

3 MS. KING: She was just wondering if you needed  
4 more information.

5 MS. REID: My question was not in regard to  
6 discussing the conditions per se. What my question was was  
7 with regard to the fact that there have been so many  
8 conditions by different entities and some of which are  
9 opposing in their content and I was just querying the Board to  
10 see if in fact we needed to request that there be some  
11 aggregate type of submission that would make it easier for us  
12 rather than us having to go through the materials and  
13 determine what's relevant and what's not relevant and then to  
14 go even further into analyzing, in some instances, amendments  
15 to the conditions.

16 MR. BERGSTEIN: I think that's fine. I just  
17 wanted to make -- request for that information, you haven't  
18 pre-judged the ultimate --

19 MS. REID: It's not as clean as I would like to  
20 see it.

21 MS. KING: No, but I think we're going to have  
22 to, you know, we're going to have to decide. If we decide to  
23 grant the application and if we decide to impose conditions, I  
24 think we're going to have to be the ultimate arbiters of what  
25 they are.

26 MS. REID: I was trying to see if there was a

1 way that we could circumvent having to do that.

2 MS. KING: I think we've done as much as we  
3 can.

4 MR. GILREATH: Can we have some kind of-- maybe  
5 before the regular meeting -- it seems to me we need some time  
6 to sit down and go through systematically and say, okay, here  
7 are the issues --

8 MS. KING: I don't think we can do that in  
9 camera, Jerry. I don't think it's legal. I think we have to  
10 make our decisions in public.

11 MS. REID: I have no problem with doing that  
12 publicly. Perhaps we can do it prior to when we have the  
13 decision making meeting prior to actually going to the  
14 decision making discussion, perhaps we can take some time and  
15 then enumerate issues.

16 MS. KING: There's a sunshine law in the  
17 District of Columbia. I don't think we can sit in the other  
18 room --

19 MS. REID: No, no, no. I prefaced it by saying  
20 publicly, Ms. King, that to publicly sit here and to determine  
21 point by point all the issues that we want to consider prior  
22 to going into the discussion about the decision on the record  
23 publicly. I don't see anything wrong with that. Is there,  
24 Mr. Bergstein?

25 MR. BERGSTEIN: In fact, the court feels, has  
26 held that the sunshine law does not apply to this body.

1 MS. REID: Oh.

2 MS. KING: Oh, really?

3 MR. BERGSTEIN: Yes.

4 MS. REID: Okay. That'll work. I agree with  
5 that.

6 MR. GILREATH: But I think we need something  
7 saying ANC, one said this and one said this, so we can go  
8 through and compare.

9 MS. REID: This issue, that issue.

10 MS. PRUITT: Madam Chair, I think that may be  
11 better served when we do at the decision meeting on the 2nd  
12 because we have a fairly heavy agenda here this morning.

13 MS. REID: Exactly.

14 MS. PRUITT: So unless there's additional  
15 information --

16 MS. REID: Just kind of floating that balloon  
17 to see whether or not that was something we could do and I  
18 think that we're all in agreement that we can do it and will  
19 do it.

20 MS. KING: Could the staff person on this case,  
21 however, follow Mr. Gilreath's suggestion and do a matrix to  
22 show those areas of agreement and those areas of disagreement  
23 amongst all the various --

24 MS. PRUITT: We'll certainly try to put  
25 together some type of a listing or --

26 MS. KING: The bottom line is that we've got an

1 agreement with the Cleveland Park Citizens Association, we've  
2 got a resolution of the ANC, and we've got the appellant's  
3 draft order.

4 MS. REID: Not appellant. The applicant.

5 MS. KING: The applicant. Sorry. The  
6 applicant's draft order and, if we could see where those mesh  
7 and where they don't --

8 MS. REID: It would be most helpful.

9 MS. KING: And if we could have that in our  
10 package together with Alan's legal opinion prior to the  
11 meeting of the 2nd, that would be very useful.

12 MS. REID: So are we all in agreement that from  
13 this time until the actual postponed hearing date -- I mean  
14 decision date, there will be no other, no further submissions  
15 by anyone.

16 MS. KING: Not another word.

17 MS. REID: Nothing else from anyone.

18 MS. KING: Not a word, please.

19 MS. PRUITT: Can you call for the question.

20 MS. REID: All right. All in favor.

21 (Ayes)

22 MS. REID: Opposed.

23 MR. GILREATH: I would like to ask our staff,  
24 will we get a copy of this matrix prior to our meeting?

25 MS. KING: Yes, on the Friday.

26 MR. GILREATH: I'd like to study it and so

1       forth.

2                       MS. KING:   And Mr. Bergstein's legal opinion  
3       also, at least on the Friday.

4                       MS. PRUITT:   And this is being postponed until  
5       July 2nd.

6                       MS. KING:   June 2nd.

7                       MR. BERGSTEIN:   I'm sorry.   June 2nd.   June  
8       2nd.   And no more submissions.

9                       MS. REID:   No more submissions please.

10                      MR. HART:   Next case.   Application No. 16432 of  
11       Sam and R.D. Ansellem, pursuant to 11 DCMR 3107.2, for a  
12       variance from Section 2001.3(c) to allow an addition to an  
13       existing non-conforming structure, a variance from the minimum  
14       side yard requirements, Section 405.9, and a variance from the  
15       minimum width of an open court requirement, Section 406.1, for  
16       addition to an existing non-conforming single family dwelling  
17       in an R-1-B District at premises 3417 Fulton Street, N.W.  
18       (Square 1941, Lot 18).

19                      MS. REID:   Board Members, I would move approval  
20       of this application.

21                      MS. KING:   Madam Chair, I have a real problem  
22       with this.   I think there isn't a real detriment to the  
23       neighborhood.

24                      MS. REID:   I'll tell you the basis of my  
25       decision, Ms. King, was predicated upon, 1) the fact that  
26       these particular applicants have received an order, an

1 approved order #15496, for the same relief that they're  
2 requesting now and they were unable to act on it for various  
3 reasons. Nonetheless, they did have an approval. And then I  
4 looked at the submission in regard to the shading, the  
5 shadowing, and that seemed to be the only aspect of it that  
6 was in contention, how the sun hit the yard next door. And I  
7 looked at the pictures submitted by the applicant and looked  
8 at the drawings that were submitted by the neighbors, Finnegan  
9 and Courier, and it appears to me that the amount of shading  
10 or the amount of adverse impact was not such a magnitude that  
11 would convince me to turn down the application.

12 MR. GILREATH: I concur with that, that almost  
13 any of us who are --

14 MS. REID: Are you seconding?

15 MR. GILREATH: I will, but I'd like to make a  
16 statement first.

17 MS. REID: Oh, okay.

18 MR. GILREATH: As a homeowner, I was looking at  
19 our house with the sun at different angles in the winter and  
20 in the spring and in the summer. We all get a little bit of  
21 shade. And looking at that, I concur with our chairman that  
22 the bit of shading that occurs at certain times of the day,  
23 certain times of the year, I think is really minimal and,  
24 therefore, I second the motion and think it should be  
25 approved.

26 MS. REID: Okay. And I think if -- were here

1 had agreed to eliminate the ballast --

2 MS. KING: The balustrade. Yes.

3 MS. REID: The balustrade. He agreed to try to  
4 compromise. I like to see people try to reach each other and  
5 give some, take some, and he --

6 MS. KING: But the balustrade is not going to  
7 cause -- is not going to be an element in the shadow.

8 MS. REID: That was something that --

9 MR. GILREATH: He agreed to remove that.

10 MS. REID: Yes. Someone had brought it up as  
11 an issue and he agreed to eliminate that. And I think that  
12 there may be some adverse impact, but I just didn't think that  
13 it was of such a degree to merit the application being denied.

14 MR. GILREATH: I thought he also established  
15 the fact that the lot is situated in such a way that the house  
16 is not configured normally the way a lot would be. It's an  
17 east-west thing. The lot is facing south. It has unique  
18 qualities to it.

19 MS. KING: It's in my block, so I know the  
20 property.

21 MR. GILREATH: All right. I defer.

22 MS. KING: I will not oppose granting of this  
23 application.

24 MS. REID: Okay. All in favor.

25 (Ayes)

26 MS. REID: Opposed.

1 MS. KING: With the inclusion of the condition  
2 that the balustrade be eliminated from the design.

3 MS. REID: I think that we should also  
4 stipulate that we felt still that they had met their burden of  
5 proof in regard to -- if you want to just amend that vote to  
6 stipulate that we felt that they had met their burden of proof  
7 in regard to the three pronged test of uniqueness and adverse  
8 impact not being of adverse substantial detriment to the  
9 public good and that it would not impair the intent and  
10 integrity of the zoning regulations or map. I want to just  
11 add that.

12 MS. PRUITT: Staff will record the vote as  
13 three to zero to approve motion made by Ms. Reid, seconded by  
14 Mr. Gilreath.

15 The next application before you is 16412 of  
16 Florida Avenue Associates, pursuant to 11 DCMR for a special  
17 exception to permit a change of nonconforming office use to a  
18 restaurant in a DCOC/R-5-B District at premises 2128 Florida  
19 Avenue. It is before you for a decision today.

20 MS. KING: Madam Chair, I move approval of this  
21 application with some conditions. I would attach to the order  
22 the voluntary agreement entered into between Florida Avenue  
23 Associates and ANC 2-B and, as a further condition, I would  
24 require that if the -- that they -- I'm trying to figure out  
25 how to say this right.

26 MS. REID: Okay. Now you said the agreement.

1 Let me look at that.

2 MS. KING: The voluntary agreement between  
3 Nora's and 2-B.

4 MS. REID: What I was looking for in this  
5 agreement was the provision for the --

6 MS. KING: That's what I'm going to try to deal  
7 with.

8 MS. REID: Okay.

9 MS. KING: I also would impose as a condition  
10 that should either of the parking off site parking -- off  
11 street parking agreements that have been filed by Florida  
12 Avenue Associates be voided, that they be required to inform  
13 the Board of Zoning Adjustment of any such cancellations and  
14 to provide us with information about substitute parking that  
15 is provided. In other words, if they do not continue to have  
16 the off street parking with Cafritz and --

17 MS. REID: Cafritz and also Church of the  
18 Pilgrim.

19 MS. KING: -- and Church of the Pilgrims, that  
20 they either provide us with similar signed agreements with  
21 other off street parking facilities or come back to us for a  
22 review of their application.

23 MR. BERGSTEIN: May I suggest a word choice?  
24 We say voided or terminated.

25 MS. KING: Okay. Say it for me right, Alan.

26 MR. BERGSTEIN: The entire request?

1 MS. KING: Right.

2 MR. BERGSTEIN: All right. I believe what  
3 you're requesting as a condition is that if the applicant is  
4 advised that its parking agreements are to be terminated or  
5 voided --

6 MS. KING: Or if they terminate or void them  
7 themselves.

8 MR. BERGSTEIN: -- or if they decide to  
9 terminate the agreements themselves, that they immediately  
10 provide the Board with notice of that event and of any  
11 substitute or existing parking arrangements that they have  
12 reached.

13 MS. KING: Thank you. That's my motion.

14 MS. REID: I would second the motion, Ms. King,  
15 and also just add that the letter that was submitted to us  
16 from the State Department, my read on it is is that it really  
17 did not get permission for parking on that particular lot, the  
18 Embassy lot, and if, in fact, this were to happen, it would  
19 have to be done by virtue of them first coming to BZA to get  
20 such an approval. So that particular letter does not, in my  
21 opinion, reach the requirement for an agreement to park on  
22 that lot and it appears that, given the fact that they do have  
23 two other lots, two other agreements with Universal as well as  
24 with the -- I'm sorry -- with Cafritz and also with the  
25 Pilgrim Church.

26 MS. KING: Whatever.

1 MS. REID: The Pilgrim -- whatever -- the  
2 Church of the Pilgrim, that that seems to be adequate. So --

3 MR. GILREATH: I concur with that. I think the  
4 Embassy parking is really irrelevant to this. It's not  
5 essential. If they want to do that, they can go through the  
6 process, and I presume it has to come through foreign missions  
7 BZA. Is that the procedure and that the parking at the  
8 Universal Building -- I guess that's the Cafritz parking --  
9 and the church I think is fully adequate.

10 MS. REID: And that they have complied with  
11 their burden of proof for a special exception and it appeared  
12 that the Florida Avenue Associates took adequate action to try  
13 to diffuse and mitigate adverse impact in regards to this  
14 application being approved. All in favor.

15 (Ayes)

16 MS. REID: Opposed.

17 MS. PRUITT: Staff will record the vote as  
18 three to zero approval. The maker of the motion is Ms. King,  
19 seconded by Ms. Reid.

20 The last issue before you is a motion, an  
21 appeal of No. 16405 of Mildred R. Crary, pursuant to 11 DCMR  
22 from the administrative decision of the Zoning Administrator  
23 to issue the following building permits. Permits were issued  
24 for the property located at 3020 43rd Street.

25 MS. KING: Madam Chair, I find -- I mean I have  
26 been concerned all along that the Department of Consumer and

1 Regulatory Affairs has failed to testify in this case. I  
2 think it's been appalling and I trust that somebody has  
3 written to the Mayor or whoever. But anyways, the thing that  
4 came in my packet on Friday that I found most compelling was  
5 this affidavit of Inspector Shelton which is the only  
6 information we have received from DCRA. He's the Building  
7 Inspector.

8 MS. REID: What was that?

9 MS. KING: It was part of the Intervenor's  
10 submission.

11 MS. REID: I don't have that.

12 MS. KING: You don't have it? Mr. Gilreath,  
13 you don't have it either?

14 MR. GILREATH: I'm not sure I do. What does it  
15 say at the top?

16 MS. PRUITT: Which document are you talking  
17 about?

18 MS. KING: Before the Board of Zoning  
19 Adjustment.

20 MS. PRUITT: What's the date?

21 MS. REID: I don't have that. What does it  
22 say, Ms. King?

23 MS. KING: "Inspector Shelton, being first  
24 sworn, deposes and says, '1) I'm a Building Inspector with  
25 DCRA and I'm confident to make this statement.'"

26 MS. PRUITT: It's Exhibit G.

1 MS. KING: "2, my responsibilities include  
2 enforcing the zoning regulations. Charles Sissan is the owner  
3 of 3020 43rd Street, N.W. Duly filed with the District  
4 government in full accordance with all laws and regulations,  
5 building permits" and gives the numbers to renovate that  
6 residence. In connection with the issuance of the required  
7 building permits, I inspected the premises on several  
8 occasions to determine whether the work performed was in  
9 accordance with the permits.

10 Based on my inspection, the work was in full  
11 compliance. On one occasion, it was determined that the work  
12 exceeded the permit. This occurred when the contractor took  
13 down the existing garage rather than simply constructing the  
14 approved addition. A stop work order was issued and  
15 subsequently lifted when the corrected permit was issued.

16 I'm unaware of any information or facts that  
17 would change my opinion."

18 MS. REID: I think that in this particular  
19 instance we have a situation that we have to address with  
20 regard to the allegation of ex parte communications and we  
21 discussed that at some length at the last hearing. However,  
22 at the conclusion of the hearing, we requested that, all  
23 things being equal, that the counsel for the applicant get to  
24 all persons involved a copy of the materials that were  
25 submitted to Mr. Bergstein just so as not to give any  
26 appearance of any ex parte communication.

1 MS. KING: I think it's established that  
2 communication with our attorney is not ex parte but improper I  
3 think would be --

4 MS. REID: I prefaced what I said, Ms. King, by  
5 saying the appearance, the appearance. We didn't want even  
6 the appearance because his -- okay. Anyway, be that as it  
7 may, we want to -- we have not received -- I have not received  
8 the material that was submitted and also the counsel of the  
9 Appellant stated that they had not received the material as  
10 requested to be provided to all parties in this case.

11 MR. GILREATH: Are there two issues here? One  
12 is the ex parte matter and the other is the timeliness and so  
13 forth. If the ex parte matter requires that there be some  
14 kind of postponement so the Appellant or the opposition can  
15 have access to this one matter, legal counsel will have to  
16 advise me on that.

17 On the other, I am prepared to offer at least  
18 my own read of this other matter, the timeliness and what have  
19 you. So do we have to split this up? Okay. If we leave the  
20 legal part of it out.

21 MS. KING: It's not only this question. Ms.  
22 Dwyer didn't submit the information that she had promised to  
23 submit, both to the Board and to the opposing counsel.

24 MR. GILREATH: This is -- but the terms of the  
25 original applicant, when he applied to the D.C. Regulatory  
26 Affairs Office and so forth, and particularly since there was

1 this work stopped order and then he complied with that, to me,  
2 I don't feel that he would have any reason to say well, he has  
3 to question what has been approved for him. He need not be an  
4 authority. And secondly, when they start investigating this,  
5 get digging into it, they found this one and later on they  
6 found that one.

7 MS. REID: Oh, I see what you mean.

8 MR. GILREATH: There's the timeliness and so  
9 forth. The legal cases they gave is about three months and  
10 some of these go about seven or eight months and what have  
11 you. So in terms of that, from what I've seen and  
12 particularly this affidavit, I think the homeowner acted in  
13 good faith in assuming that what had been approved was  
14 acceptable and legal.

15 MS. REID: Okay.

16 MR. BERGSTEIN: -- what the posture is for this  
17 because I thought that this matter was postponed for a  
18 hearing, the actual appeal, and that what was going to happen  
19 -- I didn't know this was even on the agenda today and I  
20 apologize. But I thought what was going to happen was that an  
21 opportunity was going to be given to the property owner to  
22 file a motion to dismiss.

23 MS. PRUITT: And that's what has to be filed.

24 MR. BERGSTEIN: And that's what has to be  
25 filed, and which I have not seen.

26 MS. REID: And the motion to dismiss was

1 predicated upon the ex parte communication allegation.

2 MR. BERGSTEIN: Well, it came up that initially  
3 when the ex parte communication issue came up, the Board was  
4 going to give the applicant an opportunity to respond to  
5 whatever it was had been given to me. I suggested that  
6 instead that if the property owner had a request to make that  
7 related to that packet proved something, then he should either  
8 submit a trial brief or a motion to dismiss.

9 MS. REID: Wait a minute. Excuse me. I'm not  
10 following you because you're saying that your understanding  
11 was that Ms. Dwyer was not asked to supply the same materials  
12 that she had given you to all the other parties concerned.  
13 That was our understanding.

14 MR. BERGSTEIN: She was asked to do that and to  
15 do it as part of either a motion or a trial brief which she  
16 said that she would give to the applicant, the Appellant that  
17 day. Then a time was set to respond. But that was separate  
18 from the fact that there would still be a hearing on the  
19 application itself, assuming the Board did not grant the  
20 motion -- if she did do a motion to dismiss, if the Board did  
21 not grant the motion to dismiss, there would be a hearing. On  
22 the other hand, the Board could hold the motion to dismiss in  
23 abeyance and still have the hearing.

24 But I don't know what it is before the Board,  
25 if there's a motion to dismiss that the Board is going to be  
26 acting on. If it denies the motion to dismiss, it would still

1 have to have a hearing on the actual application, on the  
2 actual appeal.

3 MS. PRUITT: Or they could hold it in abeyance  
4 until after any hearing.

5 MR. BERGSTEIN: Right. I haven't seen this  
6 motion, so I don't know what the grounds are and what it  
7 encompasses or if it's been responded to or if it attaches  
8 materials that were sent to me. But if the Board is going to  
9 act on the motion to dismiss if it denies it, that simply  
10 means that the appeal isn't dismissed but would go forward and  
11 you'd have a hearing on the issues.

12 MR. GILREATH: Well, if we vote to dismiss this  
13 ex parte matter, will that subsequently have legal  
14 ramifications?

15 MR. BERGSTEIN: I received the motion and I did  
16 read it completely and I gave it to one of my staff people to  
17 respond to and to provide you guidance. I wasn't aware that  
18 you had agenda'd this motion for decision and whether or not  
19 you intended to take up that motion or request that related to  
20 the ex parte today as well. I'm simply not aware of that.

21 MS. KING: Are you suggesting that it would be  
22 prudent for us to postpone this until June?

23 MR. BERGSTEIN: Yes, because I really don't  
24 know what it is that you're proposing to do here.

25 MS. KING: I move that we postpone this until  
26 the June 2nd meeting.

1 MS. REID: All right. Before disposing of this  
2 particular case, I am not clear as to the status and what I  
3 mean by that is if in fact there was a request that Mrs. Dwyer  
4 supply all the parties, the counsel for the Appellant as well  
5 as the Board Members, with the documents that have been given  
6 to you that form the basis for the alleged ex parte  
7 communication, if that has not been done, then it can't be  
8 done from this point forward even though we're postponing the  
9 hearing. Is that not correct?

10 MR. BERGSTEIN: Well, if --

11 MS. REID: She had a time certain to submit  
12 that.

13 MR. BERGSTEIN: It was my understanding that  
14 whatever was going to be filed, whether it was going to be a  
15 motion or trial brief, would be accompanied or would have  
16 attached to it those materials so that it would allow the  
17 property owner an opportunity to respond to it in the context  
18 of some sort of formal request or brief or whatever. Again, I  
19 don't know what it is that's been received or what it is --

20 MS. REID: But that has not -- the material  
21 that was specifically asked for has not been received by us  
22 or, according to the letter that we received from the  
23 Appellant counsel, by them either.

24 MR. BERGSTEIN: Well, I think that the  
25 contemplation was that whatever it was that was going to be  
26 filed, motion or the time frame was set, I recall, by the

1 attorney for the property owner when she said that she would  
2 provide the motion, I believe that day and so it was my  
3 contemplation that those materials would be provided that day.  
4 But the Board did not specifically order the materials. I'm  
5 trying to recall off the top of my head.

6 MS. REID: We did. We specifically asked for  
7 it.

8 MR. BERGSTEIN: It was certainly the intent of  
9 the Board that those materials would be provided to --

10 MS. REID: Right.

11 MR. BERGSTEIN: -- the property owner and that  
12 the vehicle that was agreed to by all, I thought, would be  
13 that they would be attached to something like a pleading that  
14 would explain their relevance and either to be a trial brief  
15 that explained the relevance of the package or could be a  
16 motion to dismiss.

17 MS. PRUITT: Which is what they have supplied  
18 to you in the motion to dismiss. It is not the exact package,  
19 but it's sort of a -- let me get it. I believe Mary Mabel has  
20 had this and she had an opportunity to look at it.

21 MS. KING: Could we just, to make everybody  
22 happy, myself included, ask Ms. Dwyer to supply an exact copy  
23 of the material that she supplied to Mr. Bergstein to all the  
24 parties and to the Board?

25 MS. REID: Ms. King, that's the whole point.  
26 We did that and it was not done.

1 MS. PRUITT: I don't believe, Ms. Reid, that it  
2 was as explicit as that.

3 MR. BERGSTEIN: I think we need to --

4 MS. PRUITT: We can go back and check the  
5 transcript.

6 MS. REID: I'm sure it was because I think when  
7 --

8 MS. PRUITT: I have a different recollection --

9 MS. REID: -- not wanting to have any  
10 appearance of any tainting or any type of impropriety or  
11 anything unethical, we specifically asked that, all things  
12 being fair, that you submit it so that that would, for all  
13 intents and purposes, eradicate that as an issue that in  
14 regards to ex parte communications.

15 MR. BERGSTEIN: I would ask an opportunity to  
16 look at this because it seems to me what I'm seeing is that  
17 what's been supplied here are the things that -- what I was  
18 supplied was what I'm seeing here plus some cases. That's  
19 what I believe I'm seeing. If this motion cited the cases  
20 that I was given copies of and contains those materials, those  
21 additional materials, then it would contain everything that I  
22 sought, either by the specific documents or references to the  
23 cases, a citation to the cases, which anyone can pull in a  
24 public library.

25 MS. REID: What is it that you had because we  
26 don't have it?

1 MR. BERGSTEIN: Well, I have --

2 MS. KING: He has the submission that we have.

3 MR. BERGSTEIN: I have a motion that was filed  
4 by the intervenor to dismiss and it contains one, two, three,  
5 four, five, six, seven attachments. Most of them look very  
6 familiar to me as being part of what I was provided. I see --

7 MS. REID: Could I see that, please?

8 MR. BERGSTEIN: Certainly.

9 MS. PRUITT: Ms. Reid, you have that in your  
10 package.

11 MS. REID: I don't know what he's looking at.  
12 I just wanted to make sure that what I have and what he's  
13 looking at is one and the same. Okay. Is this what you're  
14 saying is --

15 MR. BERGSTEIN: This is what I'm saying and I'm  
16 looking at these attachments and each one of these -- and I  
17 didn't know this was on today and I didn't bring anything with  
18 me -- but these look all very familiar in terms of what I was  
19 provided. The only thing that's not here are cases which I  
20 was also provided.

21 MS. REID: Initially she said it was an agenda.  
22 She gave you an agenda.

23 MR. BERGSTEIN: Yes.

24 MS. REID: The agenda and then materials, about  
25 a half inch of materials that were attached to the agenda and  
26 that's what we want to get to the exact submission that was

1 given to you by Ms. Dwyer. Everyone should have a copy of the  
2 exact same thing. We can eliminate the ex parte communication  
3 aspect of this case and move forward. That's what I'm  
4 thinking.

5 MR. BERGSTEIN: What I can do for the Board is  
6 to look at my package, compare it with this, provide the Board  
7 with what's not in this.

8 MS. REID: Okay.

9 MR. BERGSTEIN: And then the Board make its  
10 determination upon what --

11 MS. KING: But we want to provide it also to  
12 the attorney for the Appellant.

13 MR. BERGSTEIN: I'll be glad to. What I'll do  
14 is I will forward a communication to you with the attachments  
15 and I'll copy that to the attorneys.

16 MS. KING: Okay. Please do.

17 MS. PRUITT: Mr. Bergstein, do you have the  
18 original package?

19 MR. GILREATH: When does it occur? Today or a  
20 subsequent meeting?

21 MS. PRUITT: -- the applicant for Mr. Sisson's  
22 attorney.

23 MR. BERGSTEIN: That's Ms. Dwyer?

24 MS. PRUITT: Yes.

25 MR. BERGSTEIN: Yes. Not with me right now. I  
26 didn't know this was on here today.

1 MS. PRUITT: Why don't we just make this simple  
2 and you provide us that --

3 MR. BERGSTEIN: I'll provide you with the whole  
4 thing.

5 MS. PRUITT: And then we'll provide it to  
6 everybody.

7 MR. BERGSTEIN: That's fine.

8 MR. GILREATH: When does this occur? By the  
9 next meeting? Are we done in between and then okay, so we're  
10 talking about a postponement.

11 MS. KING: Yes, we're talking about a  
12 postponement. So do we need a motion to postpone?

13 MS. PRUITT: So you're going to take the view  
14 that we will be taking up the issue of whether or not to  
15 dismiss it in abeyance until we've gotten all this  
16 information?

17 MR. BERGSTEIN: When was the hearing scheduled  
18 for in this matter?

19 MS. KING: We haven't decided whether to have a  
20 hearing or not.

21 MS. PRUITT: No, no. It was scheduled. I'm  
22 sorry. May 26th.

23 MS. KING: Are you sure?

24 MS. PRUITT: Yes.

25 MS. KING: I beg your pardon.

26 MS. PRUITT: May 26th.

1 MS. KING: For what?

2 MS. PRUITT: A hearing.

3 MS. KING: But we haven't decided whether to  
4 have a hearing or not.

5 MS. PRUITT: Well, it was scheduled for hearing  
6 and if you decide to have it, it will be there. I mean you  
7 have this motion to either dismiss or have a -- you can  
8 dismiss this and not have a hearing and you can do it at the  
9 beginning of that hearing.

10 MS. KING: It's going to be a special hearing.

11 MS. PRUITT: Or you can hold this into abeyance  
12 until after you have the hearing.

13 MS. KING: I didn't know anything about a date  
14 of the 26th.

15 MR. BERGSTEIN: I may have not understood that  
16 today was the day we were going to decide this thing. There's  
17 two issues, the ex parte issue and then the issue of deciding  
18 this.

19 MS. REID: The what?

20 MR. BERGSTEIN: There's two issues.

21 MS. REID: What's the second one?

22 MS. KING: The issue of deciding whether to --

23 MR. BERGSTEIN: The ex parte issue which has  
24 been raised which is a separate pleading about and then  
25 there's this issue of a motion to dismiss. Has there been a  
26 response to this motion?

1 MS. REID: No. The motion is to -- requires us  
2 to make a decision whether it will be heard or dismissed.

3 MR. BERGSTEIN: If you feel you can make the  
4 decision, I don't want to forestall you. I just was not aware  
5 that this had all come in and, therefore, I didn't provide you  
6 with any guidance on it. I apologize because I believe there  
7 was a staff problem in my section. If you believe that -- if  
8 there was a time allowed for response and no response was  
9 given and you believe you can make a decision today, I'm not  
10 requesting that you postpone it. I think I did not note on my  
11 calendar that you were going to decide this today.

12 But since the parties are here and time for  
13 response has passed and there's been no response, and if you  
14 feel comfortable deciding the matter, I apologize.

15 MS. KING: There was no response to the motion  
16 to dismiss?

17 MS. PRUITT: Not in the file. They had a week  
18 from the 21st. I mean that's typical how we do on all  
19 responses.

20 MR. BERGSTEIN: But did the pleading that came  
21 in about the ex parte request a stay? Could I see that? I'm  
22 sorry.

23 MR. GILREATH: Wasn't there an actual request  
24 for a stay?

25 MR. BERGSTEIN: Yes.

26 MS. REID: Let me correct something I said

1 earlier, too, matter of fact, and that was in regard to the ex  
2 parte communication being predicated by the motion to dismiss  
3 as basically -- is saying that it was based on the motion for  
4 the stay. Now, the ANC also -- so let's not overlook the fact  
5 that the ANC also had some grave concerns about this ex parte  
6 communication issue and, giving them the great weight to which  
7 they are entitled, we certainly don't want to overlook that  
8 or be remiss in our responsibility to see that that is  
9 addressed adequately.

10 I think that what we need to do is to -- my  
11 motion would be to stay the case until the next --

12 MS. KING: Postpone.

13 MS. REID: Postpone.

14 MS. KING: Please.

15 MS. REID: -- the next hearing date and then,  
16 once we've gotten this issue of ex parte communication  
17 straightened out, then we will make the determination on  
18 whether or not we will hear the case or dismiss the case.

19 MS. KING: Okay. So it's postponed until the  
20 2nd of June.

21 MS. PRUITT: Madam Chair, you've already  
22 scheduled a special public hearing for May 26th. That was  
23 determined at the last meeting.

24 MS. KING: But we haven't made a decision as to  
25 whether we're going to have a hearing.

26 MS. PRUITT: You determined that you would

1 schedule a hearing. At that point, you would determine  
2 whether or not you want to dismiss it or have a hearing.

3 MS. REID: Okay. Well, I wasn't certain as to  
4 the date but whatever the date is --

5 MS. PRUITT: Right. That's what I wanted to  
6 let you know. It's the 26th.

7 MS. REID: But we already have a date and  
8 that's the 26th.

9 MS. KING: Are you suggesting that we have a  
10 special public meeting at our next meeting?

11 MS. PRUITT: What would you need a special  
12 public meeting for?

13 MS. KING: To make a decision on this.

14 MS. PRUITT: You can make that decision at the  
15 hearing.

16 MS. KING: We just come in for a special  
17 meeting --

18 MS. PRUITT: A hearing and/or meeting,  
19 depending upon what your decision is. Yes.

20 MR. BERGSTEIN: You can decide at the hearing  
21 as a preliminary matter, I believe.

22 MS. PRUITT: Correct, which is what was  
23 determined.

24 MR. BERGSTEIN: To deal with the ex parte  
25 issue, deal with the motion to dismiss, at that point, either  
26 go on to have a hearing or not.

1 MS. REID: Right. Can I get a second and a  
2 motion.

3 MR. GILREATH: We have a motion.

4 MS. REID: My motion is to continue it,  
5 postpone it until May 26th. All in favor.

6 (Ayes)

7 MS. REID: Opposed.

8 MS. KING: So there's nothing else on the  
9 agenda for the 26th but this case. Is that correct?

10 MS. PRUITT: Correct.

11 MS. REID: That will conclude our May 5th  
12 meeting.

13 (Whereupon, off the record briefly at 10:55  
14 a.m.)

15 MS. REID: Okay. Are we on now? Repeat that,  
16 Ms. King.

17 MS. KING: As someone who voted in favor of  
18 this last motion on the Crary case, I would like to submit --  
19 I don't know parliamentarily what I do, but I want to change  
20 our motion. I would move that we make a decision as to  
21 whether or not we hear this case at the beginning and in a  
22 special public meeting on the 19th of May prior to our public  
23 hearing. Should we make a determination to hear this case, it  
24 will be heard on the 26th of May.

25 MS. REID: Okay. That's fine. However, I  
26 don't know if we have to have a special hearing to do that. I

1 think we can do it just as a matter of -- I mean a special  
2 meeting to do it. I think we can do it just as a matter of  
3 public hearing.

4 MS. KING: It has to be done in --

5 MS. REID: As a preliminary matter.

6 MS. PRUITT: My understanding is Ms. King wants  
7 to do it at a regular schedule in case it --

8 MS. KING: Should we decide to dismiss the  
9 appeal, we will then not have to come down to the BZA on the  
10 26th since we have nothing else on the agenda.

11 MS. REID: Okay. You want it to be discussed  
12 at a meeting on what day?

13 MS. KING: On the 19th.

14 MS. REID: At a regularly scheduled meeting.

15 MS. KING: We will make a decision on the  
16 appeal to the motion to dismiss. All the legal issues will be  
17 smoothed out.

18 MS. REID: I see what you're saying now. Okay.  
19 I got it.

20 MS. KING: And then, should we decide to have a  
21 hearing on the appeal, we will then come back a week later and  
22 devote as much of that day as we need to to this sole case.

23 MS. REID: Okay. Then what we need to do is we  
24 nullify the previous motion.

25 MR. GILREATH: Modify it.

26 MS. REID: Or just amend it.

1 MS. KING: Amend it to say that we postponed  
2 the decision until the 19th and, should the decision favor a  
3 hearing, that the hearing will be on the 26th.

4 MS. REID: Does everyone understand that? I  
5 just don't want any confusion. It is rather convoluted. I  
6 just want to make sure that we're all clear, everyone is clear  
7 on what we're doing.

8 MR. BASTIDA: Excuse me. --

9 MR. BERGSTEIN: The problem is that we're  
10 having a lot of talking off the record and I'm hearing it and  
11 I -- We have a motion to stay that may have been filed in lieu  
12 of a response which is why there was no response to the motion  
13 to dismiss. And if the Board is going to determine both the  
14 issue of the ex parte contact and the substantive issues  
15 presented in the motion to dismiss, then perhaps it should be  
16 made clear to the Appellant that without waiving their  
17 arguments with respect to the stay, it's still the expectation  
18 of the Board that they file a response unless your view is  
19 that they had to file a response rather than file a motion to  
20 stay.

21 In other words, I believe that what happened  
22 here was that a motion to stay proceeding was filed in lieu of  
23 response to the motion to dismiss. Therefore, with the idea  
24 that a response might follow at some future point. If the  
25 Board intends to take up the issue of stay first, which it  
26 would have to do before it moves on a motion to dismiss, and

1 then denies that motion and proceeds on to the motion to  
2 dismiss, whether at this point the Appellant should file a  
3 formal response to the motion so that we have everything  
4 together. Otherwise, the argument that may be made is that  
5 you can't cite on the 19th but you have to wait until there's  
6 been a ruling on the motion to stay. But there is no stay at  
7 this point because you haven't ordered a stay.

8 MS. KING: Okay.

9 MR. BERGSTEIN: So the question is what do you  
10 want to do about the absence of response? Do you want to  
11 clarify that because you haven't yet ruled on the motion to  
12 stay, that response is therefore due even though it's late?

13 MS. KING: Yes.

14 MR. BERGSTEIN: All right. And then how much  
15 time do you want to give the Appellant to respond to the  
16 motion to dismiss?

17 MS. KING: How much time do you think it should  
18 be, Alan?

19 MR. BERGSTEIN: Well, let me look at my  
20 calendar.

21 MR. GILREATH: Can it be done by the 19th?

22 MS. KING: I mean he doesn't have to -- I mean  
23 does there have to -- if he responds, does Ms. Dwyer then have  
24 to respond to his response?

25 MR. BERGSTEIN: No. We're not going to allow a  
26 response.

1 MS. KING: Okay. So all we need is his  
2 response --  
3 MS. REID: -- to her submission.  
4 MS. KING: To her submission which should be  
5 available -- I mean --  
6 MR. BERGSTEIN: The time frame of doing  
7 something by the 19th, I would hope by Monday.  
8 MS. KING: But the packages come to us on  
9 Friday.  
10 MR. BERGSTEIN: The what?  
11 MS. PRUITT: -- which was brought up earlier,  
12 traditionally, from the time -- there's a week from the  
13 submission of the motion for the respondent to respond.  
14 MS. REID: Which motion?  
15 MS. PRUITT: This would be the motion to  
16 dismiss. In this case, it appears Mr. Brown responded in a  
17 stay as opposed to a response to the dismissal, which is what  
18 Mr. Bergstein is talking about.  
19 MS. REID: Okay.  
20 MS. PRUITT: So we're sort of doing apples and  
21 oranges.  
22 MS. REID: It's the same. It's the same thing.  
23 MS. PRUITT: Not exactly but --  
24 MS. KING: I would err on the side of -- I mean  
25 for efficiency sake and as long as our lawyers don't think  
26 that we're treading on unstable ground, I would ask that Mr.

1 Brown submit his response by the morning of the Friday before  
2 or the close of business on the Thursday before the 19th --

3 MR. BERGSTEIN: That would give us the  
4 opportunity to --

5 MS. KING: -- so that we can deal with the--

6 MS. PRUITT: Corp counsel would not have the  
7 opportunity to give you benefit --

8 MS. KING: -- motion to dismiss and wrap up  
9 everything in the same meeting.

10 MS. PRUITT: Ms. King, though in doing that, we  
11 would not allow corp counsel the opportunity to give you the  
12 best advice. I mean what we could do is do it a week from  
13 today, which is what -- if this were to come in as a motion  
14 today, typically we give a week for response so it would not  
15 be shortcutting or giving any additional time.

16 MS. KING: Great. Fine.

17 MR. GILREATH: Will there be ample time for the  
18 Appellant to prepare his response?

19 MS. KING: Well, the traditional amount of time  
20 that he would have to respond.

21 MR. GILREATH: The 19th would enable him to  
22 meet the normal traditional requirements.

23 MS. PRUITT: Actually, it would be before the  
24 19th --

25 MS. REID: Okay, let's reiterate.

26 MS. PRUITT: -- which would allow us to give

1 corp counsel the opportunity --

2 MS. REID: Let's reiterate time line. Okay.

3 Now, we have submission by Ms. Dwyer.

4 MS. PRUITT: We have that.

5 MS. KING: No, no. Mr. Bergstein is going to  
6 give to Ms. Pruitt-Williams what he got from Ms. Dwyer and she  
7 is going to provide it to the Board and to all parties.

8 MS. REID: Okay. All right. That's fine.

9 MS. KING: -- in house.

10 MS. REID: When will that be done?

11 MR. BERGSTEIN: I'm going to do that today.

12 MS. REID: Today. Okay. Now, also provided to  
13 Mr. Brown.

14 MS. KING: And, therefore, it would be  
15 distributed not later than a week from today.

16 MS. REID: Also, it would be given to Mr.  
17 Brown.

18 MR. BERGSTEIN: I'm going to give it to Office  
19 of Zoning, Office of Zoning is going to distribute it to the  
20 parties.

21 MS. REID: Okay. Today.

22 MS. PRUITT: No, not today.

23 MS. REID: Somebody just said today.

24 MS. PRUITT: He's going to -- he will not be  
25 able to distribute it today.

26 MS. REID: All right.

1 MS. PRUITT: It has to be copied.

2 MS. REID: When will it be distributed?

3 MS. PRUITT: Probably by Friday or Monday.

4 MS. REID: Okay.

5 MS. PRUITT: I am going to be out of the office  
6 Thursday and Friday so I will say close of business Monday so  
7 I can be sure it's done.

8 MS. REID: Once that is distributed, then what  
9 is the time line for Mr. Brown to respond or does he have to?

10 MS. KING: He's responding to the motion to  
11 dismiss of which he already has a copy.

12 MS. PRUITT: Which the clock starts today.

13 MS. REID: No, wait a minute. Wait. I thought  
14 that he did respond in the form of the motion to stay.

15 MR. BERGSTEIN: That's right, but he didn't  
16 respond to the substance of the motion to dismiss.

17 MS. REID: Okay. So we're giving him an  
18 appertained to do that as well?

19 MR. BERGSTEIN: That's right.

20 MS. REID: Okay. All right.

21 MS. KING: So because first we will consider  
22 the motion to stay and, should we decide not to stay, then we  
23 will consider the motion to dismiss.

24 MS. PRUITT: Excuse me, Ms. King. What we can  
25 also do to expedite and make sure everybody gets everything at  
26 the same time. The --

1 MR. BERGSTEIN: I can provide --

2 MS. PRUITT: They're going to serve it on all  
3 the parties today. We can make sure --

4 MR. BERGSTEIN: What?

5 MS. PRUITT: The information that you got. Ms.  
6 Dwyer will serve on Mr. Brown and the ANC today so that,  
7 therefore --

8 MR. BERGSTEIN: And a courtesy copy to me,  
9 please.

10 MS. PRUITT: A courtesy copy to the corp  
11 counsel.

12 MS. KING: And to the Board.

13 MR. BERGSTEIN: Can I suggest something? We're  
14 setting time schedules that relate to the parties. I don't  
15 know what the Board's rules are at meetings and hearings, but  
16 what's going on here is the parties seem to want to  
17 communicate to the Board. -- absolute ban against that at a  
18 meeting. But what you're doing is you're setting pleading  
19 schedules as if you're at a hearing during a meeting and I can  
20 see that the parties seem to want to communicate to you. I  
21 don't know if that's allowed, but we're in a situation where  
22 we may be doing something that --

23 MS. KING: I mean let's not end up in court on  
24 this one.

25 MR. BASTIDA: Well, the Board has the authority  
26 to waive its rule and accept information from the parties.

1 MS. REID: And we're doing it --

2 MR. BASTIDA: I mean --

3 MS. REID: We're doing it here, Ms. Pruitt-  
4 Williams.

5 MS. KING: But I would be much more comfortable  
6 if Mr. Brown and Ms. Dwyer were to speak to us, and I have no  
7 problem with that if you have no problem, Madam Chair.

8 MR. GILREATH: We're wanting to just set a  
9 reasonable time frame here. All this intermediary thing is --  
10 if we can waive the rules, let's --

11 MS. REID: I think that without their  
12 participation, I think we've got it, don't we? I mean don't  
13 we have a time line now?

14 MS. KING: I would like to hear from their lips  
15 whether they feel what we are proposing is --

16 MS. REID: Then we'll have to waive the rule --

17 MS. KING: -- is acceptable.

18 MS. REID: -- to allow them to speak.

19 MS. KING: Yes.

20 MS. REID: All right. Very well.

21 MR. BASTIDA: You should re-vote for the  
22 record, Ms. Reid.

23 MS. REID: All in favor of a waiver to allow  
24 the two counsels for the Appellant and the Intervenor to speak  
25 at the meeting.

26 (Ayes)

1 MS. REID: We made the motion.

2 MR. GILREATH: Second the motion.

3 MS. REID: Okay. All in favor, aye.

4 (Ayes)

5 MS. REID: All opposed. Okay.

6 MR. BROWN: I identify myself as Patrick Brown,  
7 counsel for the Appellant.

8 In setting a schedule, 1) I think it needs to  
9 be based on my and everyone else's receipt of what Mr.  
10 Bergstein received from him. I think that way there's no  
11 question that what he received is what everybody received. I  
12 have difficulty responding -- again, I filed the motion to  
13 stay in lieu of opposing the motion to dismiss because, based  
14 on this outstanding issue, I wasn't in the position to  
15 respond.

16 Once I receive that, the requisite seven day  
17 period to respond would be appropriate. I do have some  
18 logistical problems, as I mentioned earlier. I am going on  
19 vacation, but I'll work around that. But I think my clock  
20 shouldn't start running until in fact I have in hand what I  
21 refer to as the ex parte communications from Mr. Bergstein as  
22 the recipient of them.

23 MS. REID: Mr. Brown, did I understand you to  
24 say that in lieu of that material coming from the Office of  
25 Zoning, you wish it to come directly from --

26 MS. KING: He doesn't care where it comes from

1 as long as he gets it.

2 MS. REID: No. Let him answer. Let him  
3 answer.

4 MR. BROWN: I want it to come -- and again --  
5 from Mr. Bergstein to the Office of Zoning, but I want a copy  
6 made of his copy, not somebody else's because again, we're  
7 talking about what he received.

8 MS. REID: I think in all instances we're  
9 speaking of nothing else but what he received.

10 MR. BROWN: But there's no question about it.  
11 If he transmits it to Office of Zoning staff and then they  
12 transmit it to everybody, then we are in agreement.

13 MS. REID: Fine.

14 MR. GILREATH: When can Mr. Bergstein make this  
15 available to him?

16 MR. BERGSTEIN: What I was going to do, again,  
17 was to write a cover memo to the Office of Zoning that says  
18 Attached are the communications that I received from Ms. Dwyer  
19 and, with that statement, you can then -- and I can make  
20 copies if that would make your life easier. But then it would  
21 be for the Office of Zoning to distribute that to the parties.

22 MR. GILREATH: Ms. Pruitt, what time would that  
23 occur?

24 MR. BERGSTEIN: I would provide it today and,  
25 if it makes it easier, I'll provide copies of it today.

26 MS. PRUITT: If that's --

1 MS. REID: Today. May 5th.

2 MR. GILREATH: Mr. Brown and Ms. Dwyer get  
3 copies?

4 MR. BERGSTEIN: That's right.

5 MR. GILREATH: When will they get their copies?

6 MS. PRUITT: If we messenger it out tomorrow,  
7 they'll get it the same day.

8 MS. REID: So it will be May 6th, not the 5th.  
9 As of May 6th. Correct?

10 MR. BERGSTEIN: Well, can it not be made  
11 available for pick up by the parties as opposed to  
12 messengering? Do the parties oppose the idea of having the  
13 package available for pick up at this office by close of  
14 business today?

15 MR. BROWN: That's fine.

16 MS. REID: So May 5th.

17 MR. GILREATH: So you will have enough time  
18 then to prepare your response for the 19th?

19 MR. BROWN: Well then, the question is setting  
20 that time. Seven days from --

21 MS. REID: From your receipt of the packet.

22 MR. BROWN: Assuming that occurs today--

23 MS. REID: Wednesday. No, Tuesday.

24 MR. BASTIDA: Wednesday the 12th.

25 MS. KING: Close of business on Wednesday the  
26 12th if you get it at close of business today. If it slips to

1 tomorrow, then it slips another day.

2 MR. BROWN: Okay. The problem is if it slips,  
3 I leave the office at the end of the day May 11th and I don't  
4 return until Tuesday the 18th. So if I get it today, I'm  
5 willing to work with six days and file before I leave. If I  
6 don't --

7 MS. KING: I'm sorry. I don't think the Board  
8 can take into account -- I mean it's seven days. If you get  
9 it today, you've got seven days. One of those days you're  
10 going to be on vacation. I hope you have a great time. But I  
11 don't think that our rules encompass seven days unless the  
12 lawyer is on vacation.

13 MS. REID: Well, he said he would make sure  
14 that he had it in if it was issued today.

15 MR. BROWN: Yes, I mean I'll do that. But if  
16 we just fall into the next day, then I am --

17 MS. REID: You have a problem.

18 MR. BROWN: Yes.

19 MS. REID: Let's just assume, just for the  
20 purposes of clarity, that you will receive it today and that  
21 will give you the time that you need.

22 MS. KING: And Mr. Bergstein is going to supply  
23 copies to this office that you can pick up by the close of  
24 business today.

25 MS. REID: Your submission will be in by May  
26 the 11th or 12th?

1 MR. BERGSTEIN: It will be due the 12th but--

2 MS. KING: The 12th is the deadline.

3 MS. REID: The 12th. Okay.

4 MR. BASTIDA: Madam Chairperson, who is going  
5 to provide the copy to the ANC, which is a party?

6 MS. PRUITT: That will go out from our office.  
7 We can messenger it out. We'll do it. If we get it today, we  
8 can messenger it today so everybody has it the same day.

9 MR. BASTIDA: Okay. So Mr. Brown is going to  
10 pick it up here, the ANC will receive it by messenger.

11 MS. PRUITT: Since there's no ANC person  
12 represented, we have to.

13 MR. BASTIDA: Okay. I just wanted to make sure  
14 that everything is covered.

15 MS. REID: Thank you. Thank you very much, Mr.  
16 Bastida.

17 MR. GILREATH: Madam Chair, if you get the  
18 copies today, then you can -- there's no problem in terms of  
19 the logistics of getting this to Mr. Brown. In other words,  
20 they will go out?

21 MS. PRUITT: Oh, he's offered to pick it up.

22 MR. GILREATH: He can come and pick it up.

23 MS. PRUITT: Yes.

24 MS. DWYER: And, as counsel for the Intervenor,  
25 I will pick up a copy as well and I assume I have the same  
26 seven days to respond.

1 MR. GILREATH: Absolutely.

2 MR. BERGSTEIN: Well, to respond to what?

3 MS. REID: To respond to what? It's your  
4 document.

5 MS. DWYER: It's my document.

6 MS. REID: Why would you want to respond to  
7 your document?

8 MS. DWYER: Well, let me just say something.  
9 Mr. Brown is given the opportunity, an additional opportunity,  
10 to respond to the motion to dismiss that we filed. Let me go  
11 back for a minute. When we filed the motion to dismiss at the  
12 last hearing, the understanding was we filed that on Thursday  
13 so that he would respond by the following Thursday. And his  
14 response was in the form of another motion.

15 Traditionally, what happens is a lawyer files a  
16 response and may, in the alternative, file a motion because  
17 that seven day period ends. You are now giving him an  
18 additional opportunity to respond to our motion to dismiss,  
19 which I object to because I believe he had the opportunity and  
20 chose not to take it. He has also the opportunity to respond  
21 to whatever is coming into the record today and, as a party, I  
22 want to have the same opportunity to file a response. Maybe  
23 it's further clarification of issues in our motion to dismiss.  
24 But I see no reason why I'm precluded from filing something on  
25 May 12th if the other parties have the same opportunity to  
26 file something on May 12th.

1 MR. BERGSTEIN: But I thought -- sorry to jump  
2 in.

3 MS. KING: Jump away.

4 MR. BERGSTEIN: I thought that what was going  
5 to be responded to was the Intervenor's motion to dismiss. I  
6 understand that I'm to provide the package for the point of  
7 clarity of what was provided to me which relates to the motion  
8 for stay and the opposition. I'm not clear of what is being  
9 responded to in terms of that package or anything that's  
10 supposed to be responded to in that package.

11 MS. DWYER: And that's what I'm trying to  
12 clarify. If his only response on the 12th is to our motion to  
13 dismiss, then that's fine. But if he is requesting, as I  
14 understand it, the opportunity to also respond to the agenda  
15 with the Zoning Administrator and any attachments to that,  
16 that's an additional response that he's planning and I think,  
17 since the other parties are getting served copies, they have  
18 the same opportunity to respond.

19 MR. BERGSTEIN: And the question is, is the  
20 Board contemplating that the Appellant is also going to be  
21 providing a written response when the Appellant is going to be  
22 receiving this package? I understand that the package is  
23 triggering response time to the motion to dismiss.

24 MS. KING: But that's just because his motion  
25 to stay was based on the unavailability of the information  
26 that he had earlier supplied to you. I think that the response

1 is limited to his response to the motion --

2 MR. BERGSTEIN: -- to dismiss.

3 MS. KING: -- to dismiss.

4 MR. BERGSTEIN: Okay.

5 MS. KING: And not widespread comments on -- I  
6 mean it's just so that everybody has all of the same  
7 information, but the response, Madam Chair, that I think we're  
8 requesting from Mr. Brown is simply the response that he did  
9 not formulate when he made his motion to stay his response to  
10 the motion to dismiss. Just on that basis and that he's being  
11 supplied with the information from you simply so that he has  
12 everything before him that he needs in order to formulate that  
13 response to the motion to dismiss.

14 MR. BROWN: I'm not so sure I'm comfortable. I  
15 understand that certainly one of my responsibilities is to  
16 have my opportunity to respond to the motion to dismiss. But  
17 the document, what I refer to as the ex parte communications,  
18 again, once I see that, I don't think I should be foreclosed  
19 from making comment on that as part of -- I mean I've raised  
20 what the Board considers an issue of legitimate concern  
21 wherever they come out on it finally. So I'm not so sure I'm  
22 comfortable being precluded and I can't say, again, having  
23 never seen the document other than a few minutes at the last  
24 hearing, what's in there. And so I don't want to foreclose my  
25 ability to respond to that, but my ability to respond to the  
26 motion to dismiss filed by Mr. --

1 MS. REID: My understanding was the purpose of  
2 making sure that Mr. Brown and the ANC and all parties were  
3 provided with this material was for the purpose, if in fact,  
4 they wanted to, that they could have the opportunity to  
5 respond to it.

6 MR. BERGSTEIN: What --

7 MS. REID: That was my understanding.

8 MR. BERGSTEIN: What was supposed to happen was  
9 that those materials were supposed to be attached to this  
10 motion to dismiss and they would respond to it in the context  
11 of that motion. Now, the issue has been raised, and I don't  
12 know if it's true, that all those materials weren't attached.  
13 So to remedy that situation and to allow the Appellant to  
14 respond fully to the motion to dismiss based upon all the  
15 materials that were provided to me, those will be provided to  
16 him.

17 What I would suggest is, rather than invite  
18 another written response to this, if the Board is going to  
19 take up the issue of the ex parte stay motion on May 26th,  
20 that you can invite the parties to make any supplemental  
21 arguments they wish to make based upon the full package  
22 supplied today rather than to have a formal written response  
23 and then a reply. It's a very short time frame here.

24 MS. REID: You said to invite the parties to do  
25 what?

26 MR. BERGSTEIN: To allow the parties before you

1 make the decision on a motion to stay, whether or not they  
2 wish to provide any further comment, oral comment, concerning  
3 the difference between the package that was -- actually, the  
4 package because the motion to stay is based upon a package  
5 that was provided to me. I am going to provide what I believe  
6 to be the package today.

7 The stay motion was written before that package  
8 was delivered to the Appellant so that if the Board wishes, it  
9 can allow the Appellant, whose motion it is, to make any  
10 further comment that he believes would be appropriate with  
11 respect to what the package actually represents based upon  
12 what the package is. And that can be done as a form of oral  
13 argument to the Board of Hearings -- a written response. It  
14 would just perhaps be quicker.

15 MS. KING: Good idea.

16 MR. BROWN: One question. Mr. Bergstein was  
17 saying May 26th.

18 MS. PRUITT: May 19th.

19 MR. BERGSTEIN: May 19th. I apologize.

20 MR. BROWN: May 19th.

21 MR. GILREATH: Well, if we decide not to  
22 dismiss and say there's a stay on the 26th, then they'll have  
23 a chance to get a response in on this date, the 26th meeting,  
24 is what you're saying, other than for --

25 MR. BERGSTEIN: What I'm saying --

26 MR. GILREATH: Mr. Brown's response is just for

1 the dismissal.

2 MR. BERGSTEIN: What I'm -- The Appellant's  
3 attorney is going to put in a response to the motion to  
4 dismiss and that will be done by a week from today. At the  
5 hearing on the 19th, the first thing the Board will consider  
6 is the motion to stay. If it grants the motion to stay,  
7 there's nothing else you need to do. -- decide how long it's  
8 to be stayed for.

9 If the motion to stay is denied, then you would  
10 go on to consider the motion to dismiss. If the motion to  
11 dismiss is granted, there's nothing else to do. If the motion  
12 to dismiss is not granted or granted partially, then you will  
13 go on to have a hearing on what remains.

14 MS. KING: On the 26th.

15 MR. BERGSTEIN: On the 26th.

16 MR. GILREATH: Then Mr. Brown and Ms. Dwyer  
17 both, if we approve the stay, then they can provide whatever  
18 responses they want, additional responses.

19 MR. BERGSTEIN: I'm sorry. I missed that.

20 MR. GILREATH: Well, if we do not vote for  
21 dismissal and say it's stayed on the 19th, then these  
22 responses or the additional options of responding, they would  
23 prepare written responses for the 26th meeting on the stay  
24 then.

25 MR. BERGSTEIN: There are no more responses.  
26 The only -- there's already been a written response in

1 opposition to the motion to stay. We have that.

2 MR. GILREATH: Yes.

3 MR. BERGSTEIN: The only thing I'm suggesting  
4 is that on the 19th, before the Board considers its decision  
5 on the motion to stay, to allow the Appellant and the  
6 Intervenor the opportunity to comment on any additional points  
7 they wish to make concerning the package as they know it to  
8 exist which they will know based upon -- at least Appellant  
9 will know based upon what I'll be providing today.

10 MS. KING: And that'll be oral argument.

11 MR. BERGSTEIN: There'll be oral argument maybe  
12 for the motion to stay.

13 MR. GILREATH: That will be the only response  
14 from the --

15 MR. BERGSTEIN: That will be the only response  
16 that relates to the package itself. There will be a written  
17 response that relates to the motion to dismiss and that's due  
18 a week from --

19 MR. GILREATH: I understand that.

20 MS. PRUITT: Madam Chair, given all of this,  
21 what time will you be hearing? Is this going to be a special  
22 public hearing on this prior to the regularly scheduled one at  
23 9:00, I mean at 9:30 or 8:30 given the problem with the --

24 MS. KING: 9:00.

25 MS. PRUITT: Do you think you can handle this  
26 in half an hour?

1 MS. REID: What date? May 19th?

2 MS. PRUITT: May 19th.

3 MS. KING: Well, we never start on time anyway  
4 so if we're really here and really start at 9:00, we can  
5 handle in the hour that we usually waste.

6 MS. PRUITT: Do you want to start at 9:00 or  
7 8:30?

8 MS. KING: 9:00.

9 MS. REID: Is everyone comfortable with this  
10 scenario?

11 MS. KING: Yes.

12 MS. DWYER: I understand the time frame and the  
13 deadlines. I just want to state on the record again that we  
14 object to giving the Appellant in essence three weeks to  
15 respond to a motion when it was clear at our last meeting that  
16 he had to file his response by April 29th and I see no reason  
17 why he could not have responded to the motion to dismiss and  
18 at the same time filed a motion to stay, which is normally the  
19 way it is done.

20 But I understand the time frame you've set out,  
21 and we will abide by it.

22 MS. KING: Thank you.

23 MS. REID: Okay. Are we straight with the time  
24 lines and what's expected of who, when, where, how, what date?

25 MR. GILREATH: You fully understand the time.  
26 You're satisfied with the time lines.

1 MS. REID: I would suggest that we all make  
2 sure we get copies of the final resolution to the time line  
3 from staff so that we'll all be on the same page. Okay? All  
4 right.

5 Any other issues, questions, whatever?

6 MS. KING: No.

7 MS. REID: All right. This is for the record  
8 when I reconvene the meeting so what we'll do, this is closing  
9 the meeting that was reconvened after we closed the first  
10 meeting, closed the meeting the first time.

11 (Whereupon, the meeting was closed at 11:25  
12 a.m.)

13

14