

DISTRICT OF COLUMBIA
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ALCOHOLIC BEVERAGE CONTROL BOARD
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MEETING

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IN THE MATTER OF: :
 :
Leeds The Way, LLC :
t/a Hank's Oyster Bar :
1622-1624 Q Street, NW : Remand
Retailer CR : Hearing
License No. 71913 :
Case No. 10-PRO-00094 :
ANC 2B :
Termination of Voluntary :
Agreement :
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JUNE 13, 2012

The Alcoholic Beverage Control Board met in the Alcoholic Beverage Control He

aring Room, Reeves Building, 2000 14th Street, N.W., Washington, D.C., Ruthanne Miller, Chairperson, presiding.

PRESENT
RUTHANNE MILLER, Chairperson
NICK ALBERTI, Member

DONALD BROOKS, Member
CALVIN NOPHLIN, Member

T-A-B-L-E O-F C-O-N-T-E-N-T-S

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1 Diagram of neighborhood214

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

4:40 p.m.

CHAIRPERSON MILLER: Okay. Good afternoon. Thank you for your patience. Our other case went a little bit late, but now we're ready to proceed.

And this is Case No. 10-PRO-00094. It is a remand hearing in the case of Hank's Oyster Bar located at 1622-1624 Q Street, N.W. located in ANC 2B.

And I just want to say as a preliminary note that I was not on the case before and I have read most of the record and will read the rest of the record before I make any decision in our deliberations.

Okay. So why don't we start with introductions by the parties?

MR. KLINE: Good afternoon, Madam Chairperson, members of the Board. Andrew Kline licensing representative on behalf of Hank's Oyster Bar.

MS. LEEDS: Jamie Leeds,

1 chef/owner of Hank's Oyster Bar.

2 MR. HIBEY: Mike Hibey on behalf
3 of --

4 CHAIRPERSON MILLER: I'm sorry, we
5 can't hear you.

6 MR. HIBEY: Mike Hibey.

7 CHAIRPERSON MILLER: Okay.

8 MR. HIBEY: I represent the
9 signatories to the voluntary agreement.

10 CHAIRPERSON MILLER: Okay.

11 MR. MALLOF: Good afternoon, Madam
12 Chair. David Mallof, M-A-L-L-O-F, a 29-year
13 resident of Dupont Circle, representing six
14 fellow -- five fellow residents.

15 CHAIRPERSON MILLER: Okay. I'll
16 just make a preliminary comment and -- oh,
17 there are more people here? I'm sorry. Go
18 ahead.

19 MR. RIEFFEL: I'm Lex Rieffel, a
20 resident at 1709 Q Street and a signatory to
21 the protest -- I'm sorry, to the VA.

22 CHAIRPERSON MILLER: Okay.

1 MS. STEELE: I'm Patricia Steele.
2 I'm a signatory to the VA And a petitioner
3 on --

4 MR. JOHANSSON: Ralph Johansson.
5 I'm a signatory to the VA, a 20-year resident
6 of the 1700 block of Q Street.

7 MS. MEEHAN: I'm Susan Meehan.
8 I'm a signatory. I'm a 48-year resident of
9 Dupont Circle.

10 CHAIRPERSON MILLER: Okay. Well,
11 I welcome everybody else who's come to hear
12 this hearing.

13 Okay. As I started to say when we
14 first came out here that this is a remand from
15 the D.C. Court of Appeals and regarding
16 Hank's, the proceeding before to terminate the
17 voluntary agreement. And as I understand it,
18 the Board in this case, when applying 25-
19 446(d)(4), only required the establishment to
20 meet one out of three prongs of the tests that
21 were set forth in that provision, and the
22 court said that all standards had to be met.

1 So we are here today I think to
2 give the licensee the opportunity to meet all
3 three standards, not just (C) out of that
4 provision, but also (A) and (B).

5 Is there anybody have a different
6 opinion?

7 MR. KLINE: Yes, our understanding
8 is that (C), the Board has already made a
9 finding with respect to (C), and we are here
10 today to educe sworn testimony on the issues
11 of (A) and (B) under 25-446(d)(4).

12 MR, HIBEY: Isn't that what she
13 said?

14 CHAIRPERSON MILLER: He's
15 agreeing. I'm asking if you have any
16 disagreement with the way I characterized how
17 we were going to proceed today. Do you --

18 MR. HIBEY: We disagree.

19 CHAIRPERSON MILLER: You do
20 disagree? Okay. Before we start then I'll
21 hear what you have to say.

22 MR. HIBEY: (C) is settled. We're

1 not here on (C).

2 CHAIRPERSON MILLER: Okay.

3 MR. HIBEY: But (A) can never be
4 met in this case, so this case should not go
5 forward any further and the petition must be
6 tossed, or dismissed.

7 CHAIRPERSON MILLER: Okay. Now
8 why don't you --

9 MR. HIBEY: And I can explain
10 that, if you'd like.

11 CHAIRPERSON MILLER: -- explain
12 why (A) can never be met?

13 MR. HIBEY: Okay. The way that
14 the Board must find that (A) has been met is
15 in 25-446(d)(5), and (d)(5) states that to
16 fulfill the good faith attempt criteria of
17 (d)(4)(A) a sworn affidavit from the applicant
18 shall be filed with the Board at the time that
19 an application to amend a voluntary agreement
20 by fewer than all parties is filed stating
21 that either a meeting occurred between the
22 parties which did not result in agreement, or

1 the non-applicant parties refuse to meet with
2 the applicant.

3 There is no affidavit in this
4 case. The affidavit must be filed at the time
5 of the application. The case must end and we
6 do not need any further testimony because
7 there is no testimony that can ever produce a
8 sworn affidavit.

9 CHAIRPERSON MILLER: Okay. Mr.
10 Kline?

11 MR. KLINE: Yes, Madam
12 Chairperson. This argument was made to the
13 D.C. Court of Appeals --

14 MR. HIBEY: No, it was not.

15 MR. KLINE: Excuse me. May I
16 proceed?

17 CHAIRPERSON MILLER: Okay. You
18 will get a chance to respond, so let him have
19 his say fully and then you can respond.

20 MR. KLINE: Thank you. I'm
21 looking at the brief for petitioners filed by
22 Mr. Hibey in the District of Columbia Court of

1 Appeals, February 11th, 2011, page 13, and he
2 makes the same argument there.

3 And I will read from that brief:

4 "Recognizing that 25-446(d)(4)(A) applies and
5 recognizing that the requirements of Section
6 25-446(d)(4)(A) through D.C. Code 25-446(d)(5)
7 were not met, and can never be met in this
8 case, the Court must reverse the order, grant
9 the motion to dismiss and dismiss the
10 petition."

11 That is indeed the very argument
12 that Mr. Hibey has again just made to the
13 Board. That argument was made to the D.C.
14 Court of Appeals, so the D.C. Court of Appeals
15 certainly could have at that point not even
16 reached the issue as to whether there needed
17 to be a remand with respect to the remaining
18 tow issues concerning good faith efforts and
19 change in circumstances. Instead, what the
20 D.C. Court of Appeals did, as we know, was
21 ordered, because the Board only made findings
22 as to (C) on remand, the Board must make

1 findings regarding (A) and (B). Accordingly,
2 we vacate the order.

3 So the court of appeals, given the
4 opportunity to make that decision and accept
5 that argument, declined to do so would not
6 have had to reach the other issues, if that's
7 a predicate issue, and would have reversed at
8 that point and dismissed. The court of
9 appeals did not do that.

10 There are at least three other
11 reasons why Mr. Hibey's argument should not be
12 deemed persuasive by the Board. One is until
13 the court of appeals ruled that all three
14 standards applied to a termination, the
15 licensee was under the impression that only
16 (C) applied regarding appropriateness. Now
17 that we are on notice, we do have an affidavit
18 and would be happy to tender it to the Board
19 which sets forth the licensee's good faith
20 attempts to work this out.

21 Two other points. There were
22 three other cases concerning voluntary

1 agreements which were previously decided by
2 the Board, and in none of those three cases
3 did the Board require that there be an
4 affidavit accompanying the petition prior to
5 taking up the issues concerning either
6 termination or amendment to the voluntary
7 agreement. So the Board would be doing
8 exactly what the court of appeals was upset
9 about in this case if the Board now changed
10 course and said, well, now we're going to
11 require an affidavit. And if the Board will
12 bear with me, I will give you those three
13 cases.

14 And those three cases are: Jaime
15 Carillo, trading as Don Juan's Restaurant; NHV
16 Corporation, trading as Haydee's Restaurant,
17 and Don Juan Restaurant, Inc., trading as Don
18 Juan Carryout. And I'll give you the case
19 numbers if you need them. I think the Board
20 is very well aware of them. If the Board
21 requires the case numbers, I will give them.

22 Lastly, in terms of the statute

1 and what's required and what the Council
2 intended when it was passed, I direct the
3 Board to the legislative history, specifically
4 the report on Bill 5-516, the Omnibus
5 Alcoholic Beverage Amendment Act of 2004.
6 This is the report from the Committee on
7 Consumer and Regulatory Affairs chaired by
8 then Chairperson Sharon Ambrose.

9 And on page 35 and 36 of that
10 report, which is a section-by-section
11 analysis, the Council discusses the changes to
12 25-446(d), those changes which allow a
13 licensee to seek termination or an amendment
14 of a voluntary agreement. They discuss the
15 process. They discuss that after four years
16 have passed since the signing of the voluntary
17 agreement one may seek termination or
18 amendment. It then goes on to talk about the
19 good faith effort that must be made. Lastly,
20 the last sentence of that section says,
21 "Finally, this amendment specifies criteria
22 for what it means to make a good faith

1 effort."

2 Now the criteria are exactly what
3 are contained in 25-446(d)(5), a meeting
4 occurred between the parties which did not
5 result in agreement or the non-applicant
6 parties refused to meet with the applicant.

7 So in discussing this and doing a
8 section-by-section analysis, what the Council
9 dwelled on as being important with respect to
10 this section was setting forth criteria and
11 not setting forth some sort of threshold or
12 predicate that had to be met before the Board
13 might consider a petition to terminate or
14 amend a voluntary agreement. Thank you.

15 And I have copies of those pages
16 of the legislative history if the Board would
17 like to see them.

18 CHAIRPERSON MILLER: Okay. We
19 would. Thank you.

20 Did you have one more comment, Mr.
21 Hibey?

22 MR. HIBEY: If I could just

1 briefly reply. The argument I'm making now,
2 and I made actually at our original hearing,
3 and that's how we got into this whole mess,
4 was never before the court of appeals because
5 the Board didn't make a finding on (A). So
6 whatever line he's quoting from my brief is an
7 attempt to explain how the statute works. But
8 the court of appeals couldn't rule on it
9 because you didn't make a finding on (A), so
10 there was nothing before the court of appeals
11 to do. They couldn't dismiss it until you
12 make a finding. So there was no finding on
13 (A) to be appealed to be before the court of
14 appeals to be argued.

15 Furthermore, the idea that the
16 licensee only knew or thought only (C) applied
17 is proven false by the actual petition filed
18 in this case where all three; (A), (B), (C),
19 are discussed in the petition and it's clear
20 that the licensee knows all three apply.
21 Everyone thought all three applied until I
22 filed my motion to dismiss. Then there was a

1 problem, and the problem was not let's try to
2 do this the right way. It was let's do a
3 work-around and ignore (A) and (B) entirely
4 and go straight to (C).

5 Now we're back here again and
6 they're basically asking you to do the same
7 thing. They've ignored part (A) again.
8 They're putting you in a very tough spot,
9 because they're asking you to ignore the law
10 again. And it can't happen. This case needs
11 to be over now.

12 CHAIRPERSON MILLER: Okay. This
13 is what I'd like to say and if my colleagues
14 disagree, we can have a discussion. But
15 looking at the court of appeals decision on
16 its face, it says on page 16 that on remand
17 the Board must make findings regarding (A) and
18 (B). And I think if the Court did not want us
19 to make findings and wanted us to dismiss the
20 case because no sworn affidavit had been
21 filed, then the Court would have told the
22 Board to do that. So --

1 MR. HIBEY: If I may, the --

2 CHAIRPERSON MILLER: No, please
3 don't interrupt me.

4 So at this point then I would
5 suggest that we proceed with the remand
6 hearing. And, you know, if there's any
7 concern later by Board members, we can take a
8 closer look. Fine. But as far as I can see
9 that it was the clear language of the order
10 that we make the findings regarding (A) and
11 (B). And the establishment is producing a
12 sworn affidavit, if I understood Mr. Kline
13 correctly, right from the start of this
14 proceeding. And I think to dismiss the case
15 out-of-hand at this point would not be
16 consistent with the court of appeals' opinion.

17 So that being said, unless my
18 colleagues --

19 MR. HIBEY: I'm asking you to make
20 the finding on (A), not -- I'm asking you to
21 make the finding on (A) that it can't be
22 found. That ends the case. This is an

1 affidavit today.

2 CHAIRPERSON MILLER: The way we're
3 are going to proceed at this point is that the
4 licensee has the burden of meeting the
5 requirements of (A) and (B). And if they
6 don't meet the requirements, they won't meet
7 the requirements. This is a hearing in which
8 they have the opportunity to produce evidence,
9 and you will have the opportunity to produce
10 evidence, and then we'll make a decision. Is
11 that clear?

12 MR. HIBEY: The only question I
13 had was this -- is this now evidence? What is
14 this, this affidavit?

15 CHAIRPERSON MILLER: I'm not sure
16 what you're -- evidence? Well, I'm going to
17 leave that to Mr. Kline to begin his case.
18 And if he has a sworn affidavit that he is
19 going to submit as evidence, then it will be
20 evidence.

21 MR. HIBEY: Shouldn't it have been
22 included in a Protest Information Form at the

1 beginning of this case?

2 MR. KLINE: Madam Chairperson,
3 we're here on --

4 MR. HIBEY: We're now talking
5 about evidence of things that are outside --

6 CHAIRPERSON MILLER: I'm sorry, I
7 don't want to have an argument at this point.
8 What I'm saying is we have a special hearing
9 right now. It's a remand from the court of
10 appeals and the court of appeals has told the
11 Board to have a remand hearing and let the
12 parties address --

13 MR. HIBEY: It doesn't say let the
14 parties address this.

15 CHAIRPERSON MILLER: -- (A) and
16 (B), and that is what we are going to be doing
17 at this point.

18 Okay. Are you ready, Mr. Kline?

19 MR. KLINE: Yes, I am. Madam
20 Chairperson, with your permission I'll tender
21 the legislative history. I did not copy the
22 whole thing, but the pages that are relevant

1 to the section.

2 And also the affidavit that I
3 referenced earlier, I'm tendering that up as
4 well. To the extent that the Board feels it
5 necessary that there be an affidavit, here's
6 an affidavit. You'll also hear testimony
7 covering the same points.

8 CHAIRPERSON MILLER: And you have
9 shown the affidavit to the other parties?

10 MR. KLINE: I've provided a copy.

11 MR. HIBEY: So I'll object to
12 this. Whatever -- if this is evidence, how
13 are we going to accept this? We would object.

14 CHAIRPERSON MILLER: Okay. You
15 don't have copy?

16 MR. HIBEY: I have a copy. I just
17 got it. I haven't had a chance to read it.

18 CHAIRPERSON MILLER: Okay. Well,
19 we'll give you a chance to read it then before
20 it's moved into evidence.

21 MR. HIBEY: And I don't have a
22 copy of the legislative history.

1 MR. KLINE: Oh, I apologize. I
2 thought I handed you one.

3 MR. HIBEY: Furthermore --

4 CHAIRPERSON MILLER: Do you have a
5 question before we start?

6 MR. HIBEY: I just want to word
7 the objection correctly. This information is
8 not in the Protest Information Form, so this
9 is not proper evidence.

10 CHAIRPERSON MILLER: Okay.

11 MR. KLINE: And for the record,
12 I'm not aware of any rules specifically that
13 requires that it be included in the Protest
14 Information Form. There was no order as there
15 normally is by the Board with respect to this
16 hearing requiring a Protest Information Form,
17 just for the record.

18 MR. HIBEY: This is a hearing
19 consistent with --

20 CHAIRPERSON MILLER: Sir, can I --
21 let me have -- sir? Mr. Hibey? We can't have
22 just speaking out of turn. Okay? So you can

1 speak at your turn. And if you want to
2 address -- you should be addressing the Board
3 and not be addressing opposing counsel. Yes?

4 MR. HIBEY: Madam Chair, I'm a
5 layperson, but every time we've done something
6 like this; and this is unusual -- and
7 specifically in this case, the citizens who
8 struggle to understand the process receive the
9 petition and look at it and then provide
10 protest. This Board required that we treat
11 this like a placarding, like a protest case.
12 And we had to actually get our ticket punched
13 again. Even though we were the signatories to
14 the voluntary agreement, we had a rightful
15 seat at the table, we were required by this
16 Board to go through that basic placarding and
17 protestation processes.

18 For you to sit here today and
19 accept an affidavit that was required with the
20 petition that we haven't had an opportunity to
21 even look at and respond to in writing in the
22 due course manner that this Board last

1 required of us, is lack of due process. We
2 were required -- I'm sorry if I'm not saying
3 this well -- we were required to have three or
4 more signatories to a protest letter even
5 though we were the signatories. And I can
6 stomach that if we're going to be consistent
7 here. The Board must not proceed today
8 without us not even reading the arguments
9 stated in the affidavit that are the reasons
10 why prong (A) was satisfied.

11 CHAIRPERSON MILLER: Okay. Why
12 don't --

13 MR. HIBEY: We're being totally
14 denied an opportunity to substantively
15 respond. Thank you.

16 CHAIRPERSON MILLER: Why don't we
17 all take a look at that affidavit then? I
18 haven't seen the affidavit either.

19 MR. HIBEY: I'm not prepared to do
20 that today.

21 CHAIRPERSON MILLER: You're not
22 prepared?

1 MR. HIBEY: I'm not a lawyer. I
2 need to talk to my lawyer. This is not -- for
3 us to be instant presented with an affidavit
4 that a plain reading of the law requires needs
5 to be presented with the petition is the heart
6 of why we're here in the first place. The
7 Board dissed the plain reading of our court's
8 -- and the court, our highest court in D.C.,
9 effectively the State Supreme Court for D.C.
10 if we're ever a state someday, said that the
11 plain reading of our law, the heart of our
12 legislation was denied. I feel as a layperson
13 you're doing that precisely again today. And
14 I'm not prepared to file my protest letter,
15 which you made me do last time, without
16 knowing what the substance is of how prong (A)
17 is or is not satisfied.

18 CHAIRPERSON MILLER: Your protest
19 letter that you filed last time, not this --

20 MR. HIBEY: Yes.

21 CHAIRPERSON MILLER: Not this
22 time.

1 MR. HIBEY: Well, I should -- we
2 should be entitled to a protest letter. Now
3 that we see the affidavit, it is -- this is
4 from another case.

5 CHAIRPERSON MILLER: This is a
6 little different. It's a remand.

7 MR. HIBEY: It's the
8 fundamental --

9 CHAIRPERSON MILLER: It's not a
10 protest, so --

11 MR. HIBEY: Ma'am, it's the
12 fundament -- all I'm saying, ma'am, is that
13 the -- forgive me. It's transparency and it's
14 due process. We have to be entitled to
15 comment on the substance, otherwise we're
16 flailing here in the defense of any prong (A)
17 argument.

18 CHAIRPERSON MILLER: Okay.

19 MR. HIBEY: And I'm sorry for us
20 as a city.

21 CHAIRPERSON MILLER: Okay. Do we
22 have a copy of your affidavit, Mr. Kline?

1 MR. KLINE: Yes, I've handed
2 copies up and I've given a copy to Mr. Hibey
3 as well.

4 CHAIRPERSON MILLER: Okay.

5 MR. MALLOF: I will not instant
6 comment on it. I can't. I'm sorry, ma'am,
7 also it strikes at the heart --

8 MEMBER ALBERTI: Please, sir.

9 MR. MALLOF: I'm sorry.

10 MEMBER ALBERTI: Please, sir.

11 We're not listening right now.

12 MR. MALLOF: All right. Thank
13 you.

14 MEMBER ALBERTI: Speak when you're
15 called on. Thank you.

16 CHAIRPERSON MILLER: Okay. I just
17 want to take a look at the affidavit before I
18 say anything further.

19 Okay. As I stated at the
20 beginning of this hearing, it's a remand from
21 the court of appeals. I think that this
22 affidavit is a side issue. The court did

1 order us to hold a hearing on those two
2 standards that were not addressed in the
3 previous hearing, period.

4 So I propose that we'll go forward
5 with the hearing which you have had notice on
6 and which you will address, in which the
7 parties will address (A) and (B), and we'll
8 proceed. And then we'll take a look at this
9 affidavit and see whether there's a problem
10 later. I do not think it's a hindrance to
11 proceeding at this point and I think that, you
12 know, Mr. Kline's tried to the best of his
13 ability given the circumstances now to comply
14 with that requirement. And maybe you'll have
15 a chance to look at it after, but look at it.
16 If there's a problem later, you can advise
17 later. But at this point, I think it's time
18 to proceed with the hearing.

19 MR. HIBEY: If I could, could we
20 have a few minutes to review the documents
21 we've just been handed?

22 CHAIRPERSON MILLER: There are

1 other documents that have just been --

2 MR. KLINE: Madam Chairperson, if
3 it might speed things along, all of the items
4 that are in the affidavit will be covered by
5 testimony. Mr. Hibey will have an ample
6 opportunity --

7 CHAIRPERSON MILLER: Okay.

8 MR. KLINE: -- to cross-examine on
9 those issues.

10 CHAIRPERSON MILLER: Okay.

11 MR. KLINE: So it's somewhat
12 duplicative and it would seem to me that that
13 would still be the issue with respect to Mr.
14 Hibey being able to address those issues. If
15 the Board prefers to take a break, that's up
16 to the Board.

17 CHAIRPERSON MILLER: No, I don't
18 think so at this point.

19 MEMBER ALBERTI: Madam Chair, just
20 so that I'm clear --

21 CHAIRPERSON MILLER: Okay.

22 MEMBER ALBERTI: -- on where we're

1 proceeding, it's my understanding from what
2 you're saying is that we're not really
3 accepting this affidavit as --

4 CHAIRPERSON MILLER: I'm saying
5 I'm not moving it into evidence at this point.

6 MEMBER ALBERTI: Pardon?

7 CHAIRPERSON MILLER: I'm not
8 moving it into evidence at this point.

9 MEMBER ALBERTI: Okay. Thank you.

10 CHAIRPERSON MILLER: There's an
11 objection to it and, you know, we'll
12 consider --

13 MEMBER ALBERTI: All right. Thank
14 you.

15 CHAIRPERSON MILLER: -- the fact
16 that the court of appeals has said, you know,
17 that for us to have this hearing on (A) and
18 (B) and the parties are ready to proceed on
19 that. And I don't see any reason to not
20 proceed. We've already heard your argument
21 that you don't think we should proceed because
22 it wasn't filed at the time of the application.

1 MR. HIBEY: That's not correct.

2 CHAIRPERSON MILLER: Is there
3 something different you want to say, because
4 with (B) there's --

5 MR. HIBEY: Well, yes, I'd like
6 to, I mean, point out that a hearing doesn't
7 necessarily require us to proceed on (A) and
8 (B). I mean, this is a hearing. We're having
9 a hearing right now and the issue is (A) can't
10 be met without -- with anything that's going
11 to be presented.

12 CHAIRPERSON MILLER: Okay, sir.
13 Okay. This is it. That's your argument and
14 you can make it at closing. You can make it,
15 you know, at opening, I guess. At opening you
16 can make your argument. But we are proceeding
17 at this point.

18 So you have an opening statement?

19 MR. KLINE: I think that in the
20 interest of time and given the fact that the
21 Board is certainly well aware of the issues
22 that are before us, I'm going to proceed to

1 call witnesses.

2 CHAIRPERSON MILLER: Do you have
3 any other opening that you wish to make?

4 MR. HIBEY: Not at this time.

5 CHAIRPERSON MILLER: Now, how many
6 witnesses do you have?

7 MR. KLINE: Three at most.

8 CHAIRPERSON MILLER: Three? And
9 how many do you have? Do you have any
10 witnesses?

11 MR. HIBEY: I'm not sure.

12 CHAIRPERSON MILLER: Is anybody
13 invoking the rule on witnesses?

14 MR. KLINE: I'm not.

15 MR. HIBEY: No.

16 CHAIRPERSON MILLER: Okay. Good.

17 Then --

18 MEMBER ALBERTI: Madam Chair, may
19 I ask just for information, because I -- in an
20 effort to make sure we're on target here and
21 keeping us focused, because I'm looking at the
22 clock.

1 Mr. Kline, I mean, can you tell us
2 what the three witnesses will be testifying
3 to?

4 MR. KLINE: The three witnesses
5 will be testifying about the two issues that
6 we're here on. One is whether the applicant
7 made a good faith effort to enter into a new
8 or substitute voluntary agreement or amended
9 voluntary agreement prior to filing the
10 petition to terminate. And then witnesses on
11 change in circumstances or change in the
12 neighborhood beyond the licensee's control.
13 That's what the witnesses are designed to get
14 at.

15 MEMBER ALBERTI: Thank you.

16 CHAIRPERSON MILLER: Okay. Call
17 your first witness.

18 MR. KLINE: Call to the stand --
19 may I proceed?

20 CHAIRPERSON MILLER: Yes.

21 MR. KLINE: Thank you. Call to
22 the stand Jack Jacobson, please.

1 MR. HIBEY: We object to Mr.
2 Jacobson, but that's fine. He's not in the
3 Protest Information Form. This is a
4 continuation of the initial hearing. How
5 is --

6 CHAIRPERSON MILLER: Okay. I'll
7 note that it's standing objection then.

8 MR. HIBEY: And you're going to
9 hear?

10 CHAIRPERSON MILLER: Yes.

11 MR. HIBEY: Okay.

12 CHAIRPERSON MILLER: Because this
13 is a remand hearing.

14 MR. HIBEY: But it's like --

15 CHAIRPERSON MILLER: I'll notice
16 your objection.

17 MR. HIBEY: -- it's remanded to
18 continue. It's the same hearing.

19 CHAIRPERSON MILLER: Okay. I hear
20 your objection and it is noted. I don't
21 understand. Can I get at the relationships
22 here, because do we have one attorney

1 representing a party, or do we have two
2 different -- if you're -- we -- because
3 really, we only need to listen to the
4 attorney. So you need to write a note to your
5 attorney if you want to have him make an
6 objection or something --

7 MR. MALLOF: If I say he's not an
8 attorney and just a representative -- no, no.
9 Ma'am, I --

10 CHAIRPERSON MILLER: Okay. Only
11 by representative except he's here to testify.

12 MR. MALLOF: As a citizen I would
13 like to make a comment on this point. I'm
14 representing six people who --

15 CHAIRPERSON MILLER: No, I'm
16 sorry. If he's the representative, he can
17 make the comment. If you want to testify
18 later, you know, that's your choice.

19 Okay. You can come forward, sir.
20 Over here.

21 MR. KLINE: Oh, over here.

22 CHAIRPERSON MILLER: There's a

1 witness stand over there. And I need you to
2 raise your right hand. Do you swear to tell
3 the truth, the whole truth, nothing but the
4 truth?

5 MR. JACOBSON: I do.

6 CHAIRPERSON MILLER: Okay. Thank
7 you.

8 MR. KLINE: Would you state your
9 name for the record, please?

10 MR. JACOBSON: Jack Jacobson, J-A-
11 C-O-B-S-O-N.

12 MR. KLINE: And where do you
13 resides?

14 MR. JACOBSON: 1701 16th Street,
15 N.W., Apartment 630.

16 MR. KLINE: And how long have you
17 resided there?

18 MR. JACOBSON: Two-and-a-half
19 years.

20 MR. KLINE: How long have you
21 resided in the District of Columbia?

22 MR. JACOBSON: I've -- 12 of the

1 last 12« years.

2 MR. KLINE: Okay. Are you an ANC
3 commissioner?

4 MR. JACOBSON: I am.

5 MR. KLINE: And where are you an
6 ANC commissioner?

7 MR. JACOBSON: 2B-04. That's 16th
8 -- 15th to 17th Street, between Q and S.

9 MR. KLINE: And what's the
10 relationship of that neighborhood to -- or the
11 area that you described and Hank's Oyster Bar?

12 MR. JACOBSON: I represent the
13 constituents directly across the street from
14 Hank's.

15 MR. KLINE: Okay. So that would
16 be directly across the Q Street?

17 MR. JACOBSON: Directly across Q
18 Street, yes.

19 MR. KLINE: And how long have you
20 been an ANC commissioner?

21 MR. JACOBSON: I was elected in a
22 special election in March of 2008.

1 MR. KLINE: Now as an ANC
2 commissioner have you participated in
3 discussions concerning a moratorium in your
4 neighborhood?

5 MR. JACOBSON: We have. In
6 January 2009 the ANC 2B voted 9-0 to form an
7 ad hoc moratorium review committee for the
8 Dupont East Moratorium. I was selected by my
9 colleagues as chairman of that committee.

10 MR. KLINE: And as chairman of
11 that committee what did you do?

12 MR. JACOBSON: A lot of work. We
13 had a couple of fact finding missions where
14 commissioners and community leaders walked up
15 and down 17th Street within the moratorium
16 zone. We held two listening sessions for the
17 community where I think a total of about 100
18 people between the two of them attended. I
19 held my own for my single member district
20 listening session on the moratorium renewal.
21 And then we had another community meeting
22 after we produced a report and invited

1 community input and response. I also sought
2 -- for those that couldn't attend meetings, I
3 sought as chairman comments by email or by
4 postal mail for constituents who had comments
5 on the moratorium renewal and we were
6 presented a petition by neighbors concerning
7 the moratorium renewal.

8 MR. KLINE: As a result of that
9 did ANC 2B make a recommendation to the ABC
10 Board concerning the moratorium?

11 MR. JACOBSON: We did. On a 5-0
12 -- I mean; I'm sorry, a 9-0 vote, a unanimous
13 vote we voted to ask the Board to extend the
14 moratorium for an additional five years and
15 ask them to allow for two lateral expansions
16 and two additional licenses, I believe.

17 MR. KLINE: Given your work do you
18 know when -- well, let me withdraw that. The
19 moratorium had been in effect for some time,
20 is that correct?

21 MR. JACOBSON: Yes, since about
22 1990.

1 MR. KLINE: And in your work do
2 you know when the ABC Board and/or ANC 2B
3 looked at the moratorium before the work that
4 you've described in looking at it?

5 MR. JACOBSON: Yes, I have all of
6 those dates written down, but there were I
7 believe three renewals prior to this one.

8 MR. KLINE: Okay. And was the one
9 prior to this one -- when was this one that
10 you're talking about? Let's start with that.

11 MR. JACOBSON: This one was in --
12 the original expiration I believe was April of
13 2009, but the ANC requested and was granted a
14 30-day extension to complete our report so we
15 could do appropriate community outreach.

16 MR. KLINE: And before that when
17 did the ANC and/or the ABC Board look at this
18 moratorium?

19 MR. JACOBSON: I think it had been
20 three years prior, somewhere around 2006.

21 MR. KLINE: Okay.

22 MR. JACOBSON: Before I came to

1 the commission.

2 MR. KLINE: Before you came to the
3 commission? Now the recommendations that you
4 made represented a change from what had
5 previously been done?

6 MR. JACOBSON: Correct. The
7 immediate past recommendation from the ANC I
8 believe was to request a renewal with no
9 additional licenses. The Board ended up doing
10 a renewal with additional licenses, over
11 objection from the ANC.

12 MR. KLINE: And you're talking
13 about in 2005 or 2006 --

14 MR. JACOBSON: Yes.

15 MR. KLINE: -- when it was last
16 considered?

17 MR. JACOBSON: Yes.

18 MR. KLINE: And this moratorium is
19 unusual in one respect, isn't it?

20 MR. JACOBSON: I --

21 MR. KLINE: Isn't there a
22 prohibition on lateral expansion?

1 MR. JACOBSON: In my moratorium
2 zones I believe there's a prohibition on
3 lateral expansions on new licenses, on things
4 like that.

5 MR. KLINE: Okay.

6 MR. JACOBSON: In my experience.
7 This was the first time that the Dupont Circle
8 ANC had actually requested additional lateral
9 expansions.

10 MR. KLINE: So that represented a
11 change over what had been done before?

12 MR. JACOBSON: Correct.

13 MR. KLINE: And represented a
14 change from what had been done in the
15 immediate previous renewal, which you believe
16 was in 2006 and the Board's --

17 MR. JACOBSON: Correct.

18 MR. KLINE: -- records will
19 confirm exactly when it was.

20 MR. JACOBSON: Correct.

21 MR. KLINE: All right. Is it fair
22 to say that this change resulted from some

1 change in circumstances?

2 MR. JACOBSON: I would say
3 absolutely based on the feedback we got from
4 the community. We put together a very
5 comprehensive report on our outreach and our
6 findings, and our findings reflected that
7 change in circumstance in the neighborhood.

8 MR. KLINE: Okay. And what were
9 the change in circumstances or the change in
10 the neighborhood?

11 MR. JACOBSON: I have documented
12 -- written two of those, both in my report and
13 communications that were made available to all
14 commissioners. Those two included the
15 economic downturn. We were entering a
16 recession in 2009, which drastically changed
17 the circumstances of the neighborhood. And
18 secondly was the pending 17th Street
19 renovation. The ANC had just come through
20 another street renovation on P Street and many
21 -- a significant number of establishments
22 closed because the street renovation

1 negatively impacted their business. We knew
2 that the same thing was going to be happening
3 on 17th Street in 2009-2010, and took that
4 into account. And that was reflected in our
5 findings as well.

6 MR. KLINE: Okay. Did you also
7 make findings in terms of the way people ate,
8 when people shopped in the neighborhood?

9 MR. JACOBSON: We did not record
10 that in our notes, but one of the ANC
11 commissioners -- and it would be reflected in
12 the ANC -- we record everything that we -- all
13 of our meetings are recorded. A commissioner
14 said and made note that we're a different
15 society than we were in 1990 when the
16 moratorium was first instituted. More people
17 eat out and don't cook at home now than 1990
18 and more people shop at home online and don't
19 shop out at brick and mortar stores. And that
20 comment was made at a couple of hearings,
21 including one -- a couple of meetings,
22 including one ANC meeting.

1 MR. KLINE: Now given the fact
2 that there have been now similar
3 recommendations or requests in the previous
4 examination of the moratorium, is it fair to
5 say that that's a change that occurred from
6 the previous examination of the moratorium in
7 2005 or 2006?

8 MR. JACOBSON: I don't feel
9 qualified to make that statement.

10 MR. KLINE: Okay. All right.
11 Fair enough. But based on those changes, that
12 was what caused the ANC to request that there
13 be a relaxation of the prohibition against
14 lateral expansion?

15 MR. JACOBSON: That's correct.

16 MR. KLINE: Were any of those
17 circumstances within the control of Hank's
18 Oyster Bar?

19 MR. JACOBSON: No.

20 MR. KLINE: Okay. Great. Thank
21 you. I don't have any further questions.

22 CHAIRPERSON MILLER: Do you have

1 cross-examination?

2 MR. HIBEY: When was the
3 moratorium relaxed?

4 MR. JACOBSON: The Board made an
5 order I believe in May of 2009.

6 MR. HIBEY: And were you saying
7 that there was some sort of finding that your
8 committee made or --

9 MR. JACOBSON: Yes, we published
10 reports including one I believe that's still
11 online at the Dupont Circle ANC's Web site.
12 And that detailed all the work that we'd done,
13 our findings and our recommendation to the
14 ANC, because this was a committee of five
15 making recommendations to the full commission
16 of nine.

17 MR. HIBEY: And do you have any of
18 those reports or findings or recommendations
19 with you?

20 MR. JACOBSON: I do. I'm going to
21 see if I have an extra copy, which I don't,
22 because I gave it to Kevin O'Connor when he

1 came onto the commission, I believe, and took
2 over a similar initiative for Green Wall of
3 Dupont West. But I do have it. I do have my
4 original copy that I'd prefer to keep if I
5 can, but I'm happy to provide it to counsel.
6 I've annotated some of the findings with the
7 red tabs that they could look at and
8 underline, some of the findings. Or I could
9 read them.

10 MR. KLINE: I have them at this
11 point.

12 CHAIRPERSON MILLER: Okay.

13 MR. KLINE: But given he testified
14 to it, I --

15 MR. JACOBSON: Or I could read
16 them as part of the testimony, if that would
17 be helpful.

18 MR. HIBEY: I mean, this is the
19 basis of why he can't testify. We never knew
20 he was a witness until -- actually I think you
21 texted me today and said you were coming at --
22 what was that 3:30, 3:00? And I have no idea

1 who he is until know. I have no idea what
2 he's going to testify about until now.

3 CHAIRPERSON MILLER: Okay.

4 MR. HIBEY: And apparently there's
5 all these published reports and findings and
6 recommendations I've never seen and I have no
7 idea what they say or don't say about these
8 things he's testifying about. We do not have
9 an opportunity to cross-examine him on --

10 CHAIRPERSON MILLER: Okay.

11 MR. HIBEY: So all of his
12 testimony must be struck or we need to pick
13 this up at another time after we've been given
14 fair notice that he's going to testify.

15 MR. KLINE: Madam Chairperson, may
16 I be heard?

17 CHAIRPERSON MILLER: Yes.

18 MR. KLINE: Madam Chairperson,
19 this hearing has been set for some time. Mr.
20 Hibey and I had a conversation last week as to
21 what was to occur today. We disagreed about
22 what was to occur today, but he could have

1 done exactly what I did, which was pick up the
2 phone and call the Board's counsel and say
3 what are we supposed to be doing here today?
4 And if there were certain other things that he
5 wanted, he certainly could have asked for
6 that. But to wait until the day of the
7 hearing and say, gee, I don't understand what
8 we're doing here, I'm not prepared, I don't
9 know what I'm supposed to do, it seems to me
10 in light of the fact that we have a court of
11 appeals order that says have this hearing,
12 which seems to be pretty clear to the rest of
13 us, we would object to the protestations that
14 Mr. Hibey has had no opportunity to be
15 prepared for this hearing and had no idea what
16 was going to go on here.

17 CHAIRPERSON MILLER: Okay. I hear
18 what you're saying and I hear what you're
19 saying. I mean, number one, I understood when
20 you talked about the witness not being in the
21 PIF report way back then is different from no
22 notice whatsoever as to who the witnesses were

1 going to be, and I wasn't aware that that was
2 exactly the situation here. I understand what
3 you're saying, Mr. Kline, about, you know, he
4 knew about it a week ago, but how come you
5 just knew about the witnesses yesterday? Is
6 that --

7 MR. KLINE: And Mr. Hibey asked
8 me. I told him that I intended to educe
9 testimony today and that we intended to put on
10 evidence. Had he simply asked me --

11 CHAIRPERSON MILLER: Okay.

12 MR. KLINE: -- what it was that I
13 intended to put on, I certainly would have
14 been happy to share that with him.

15 CHAIRPERSON MILLER: Okay.

16 MR. HIBEY: It's just that it
17 never crossed my mind that we'd be going
18 outside a Protest Information Form, because
19 that's the entire basis --

20 CHAIRPERSON MILLER: Okay.

21 MR. HIBEY: -- that we were told
22 we were limited to that --

1 CHAIRPERSON MILLER: All right.

2 MR. HIBEY: -- at the original
3 protest hearing. This is just simply saying
4 we're back down to continue what we should
5 have done two years ago. So we had to stay to
6 the Protest Information Form. Or, if the
7 Board wants to reopen it and let us refile
8 Protest Information Forms and add witnesses
9 and permit us an opportunity to cross-examine
10 additional witnesses, that's fine. But I
11 don't even think that's appropriate.

12 CHAIRPERSON MILLER: I just want
13 to deal with just the question of the notice
14 of who the witnesses are. Just so that I get
15 the big picture at this point, who are the
16 other witnesses?

17 MR. KLINE: The other witnesses
18 are Jamie Leeds and Victor Wexler.

19 CHAIRPERSON MILLER: Well, I
20 wouldn't think that Jamie Leeds would be a
21 surprise.

22 MR. KLINE: I would have not.

1 CHAIRPERSON MILLER: Who was the
2 other person?

3 MR. KLINE: But nothing would
4 surprise me at this point.

5 CHAIRPERSON MILLER: Okay. Who
6 was the other person?

7 MR. KLINE: Victor Wexler, an ANC
8 commissioner.

9 CHAIRPERSON MILLER: Okay.

10 MR. KLINE: I don't need to call
11 him. It's not a big issues.

12 CHAIRPERSON MILLER: Okay.

13 MR. KLINE: Mr. Hibey has heard
14 his testimony. He certainly is a capable
15 trial attorney. I'm certain that he could
16 cross-examine him if that's what he desired to
17 do.

18 MR. HIBEY: He testified about
19 reports and information --

20 CHAIRPERSON MILLER: Oh, no.
21 Okay. Let me ask you this then.

22 MR. HIBEY: -- and I don't --

1 CHAIRPERSON MILLER: That's where
2 we were, on these reports. So you wanted to
3 ask a question about the reports but you
4 haven't seen them, is that correct?

5 MR. HIBEY: Correct. I have no
6 idea what these findings or reports came to.
7 I don't know whether there's other issues in
8 those reports or findings that could bear on
9 the --

10 CHAIRPERSON MILLER: Do you want a
11 moment to take a look at those reports?

12 MR. HIBEY: No.

13 CHAIRPERSON MILLER: I don't --

14 MR. HIBEY: No.

15 CHAIRPERSON MILLER: -- know how
16 extensive they are.

17 MR. HIBEY: I don't know if --

18 CHAIRPERSON MILLER: You are
19 referencing reports that you have made in your
20 testimony?

21 MR. JACOBSON: We did and we made
22 them available online to the community at the

1 time they were published. This one was
2 published on March 11th, 2009.

3 CHAIRPERSON MILLER: Oh, okay.
4 And how extensive is it?

5 MR. JACOBSON: The report from the
6 committee to the commission is 13 pages long.

7 CHAIRPERSON MILLER: Okay.

8 MEMBER ALBERTI: Madam Chair, may
9 I ask a question?

10 CHAIRPERSON MILLER: Yes.

11 MEMBER ALBERTI: Unless Mr. Kline
12 is submitting that as evidence, then that's
13 all I think that we're all -- that that's --
14 the only thing in play are the statements that
15 the witness has made. And so, the question to
16 Mr. Hibey would be can he cross-examine the
17 witness on those statements, because as far as
18 I know Mr. Kline has not submitted this report
19 into evidence. So the whole report is not a
20 matter of the topic here.

21 MR. HIBEY: The statements he made
22 were that we made these findings and this is

1 what they were. And I have no idea if those
2 -- what those findings -- whether there was
3 other findings, whether there's more in that
4 report. I would use the report to cross-
5 examine him eventually if could see it.

6 CHAIRPERSON MILLER: Okay. All
7 right. So that's important to you.

8 MR. KLINE: Madam Chairperson,
9 this is no different than any other
10 situation --

11 CHAIRPERSON MILLER: Right.

12 MR. KLINE: -- when someone, a
13 commissioner in these proceedings comes in and
14 testifies concerning findings that were made
15 by an ANC. There may or may not be a report,
16 but the fact of the matter he's testified, I
17 certainly agree with Mr. Alberti, he can
18 cross-examine on the statements he's made. If
19 he wants to go further and get into the
20 report, that's his prerogative. Maybe at that
21 point we'll move it in. But I agree at this
22 point the only thing that's in evidence and

1 the only thing that's at issue is his
2 testimony and the statements that he's made,
3 which Mr. Hibey can certainly cross-examine
4 him on.

5 MEMBER ALBERTI: Want to take a
6 moment to discuss?

7 MR. HIBEY: That's incorrect.
8 It's not the same as when an ANC commissioner
9 comes in and testifies in another case because
10 that ANC commissioner is either part of the
11 case or has been listed on a Protest
12 Information Form.

13 MR. KLINE: Even if he'd been
14 listed on a Protest Information Form, we'd be
15 exactly in the --

16 MR. HIBEY: No, we wouldn't.

17 MR. KLINE: -- same place we are
18 today.

19 MR. HIBEY: Because I would have
20 had a week to find out what he's going to
21 testify about.

22 CHAIRPERSON MILLER: Mr. Hibey, do

1 you want to look at that report right now for
2 your cross-examination?

3 MR. HIBEY: I'd like to look at
4 that report, as well as a number of other
5 documents that may be related to it, but yes,
6 I'd like to look at it.

7 CHAIRPERSON MILLER: Okay. Well,
8 if you --

9 MR. HIBEY: It may lead to other
10 things.

11 CHAIRPERSON MILLER: Okay. I
12 would say because you didn't get advance
13 notice and he referred to that, if you want to
14 take 10 minutes to look at that report --

15 MR. HIBEY: Sure.

16 CHAIRPERSON MILLER: Okay. Then
17 we could recess for 10 minutes while you have
18 time to look at the report and then you can
19 cross-examine him.

20 Do you have an objection, Mr.
21 Kline?

22 MR. KLINE: If he's going to see

1 it, we'd like to see it, too. So we would
2 request that staff make two copies of it and
3 we'll look at it together.

4 CHAIRPERSON MILLER: Oh, you
5 haven't seen it either? Oh.

6 MR. KLINE: No.

7 CHAIRPERSON MILLER: Okay. Can we
8 do that? Okay. We'll do that. We'll do
9 that. So why don't you take -- we'll get the
10 staff to make a copy of this.

11 MEMBER ALBERTI: Can we have -- I
12 would allow 15 minutes, because --

13 CHAIRPERSON MILLER: Fifteen
14 minutes? We'll do --

15 MEMBER ALBERTI: -- staff has to
16 look this up on the Web and print it.

17 CHAIRPERSON MILLER: No, it's not
18 on the Web. It's right in his hands. Is that
19 correct?

20 MEMBER ALBERTI: We have one copy
21 in his hand. I think someone needs to
22 provide --

1 CHAIRPERSON MILLER: It's 13
2 pages.

3 MEMBER ALBERTI: -- copies. It's
4 how many pages?

5 CHAIRPERSON MILLER: Thirteen.

6 MEMBER ALBERTI: Okay.

7 CHAIRPERSON MILLER: Thirteen.

8 MEMBER ALBERTI: All right.

9 CHAIRPERSON MILLER: Is 10 minutes
10 all right? Fifteen minutes, because he's got
11 to copy it.

12 MEMBER ALBERTI: Yes, I mean,
13 let's --

14 CHAIRPERSON MILLER: Okay. So
15 we'll come back in 15 minutes. Okay. The
16 Board's in recess.

17 (Whereupon, at 5:27 p.m. off the
18 record until 5:44 p.m.)

19 CHAIRPERSON MILLER: Okay. We're
20 back on the record.

21 Mr. Hibey, have you had a chance
22 to read the report that was referenced?

1 MR. HIBEY: No.

2 CHAIRPERSON MILLER: Are you ready
3 to cross?

4 MR. HIBEY: (No audible response.)

5 CHAIRPERSON MILLER: Do you have
6 any cross-examination?

7 MR. HIBEY: I would, but --

8 CHAIRPERSON MILLER: You don't?

9 MR. HIBEY: No.

10 CHAIRPERSON MILLER: Okay. Are
11 there any Board questions?

12 (No audible response.)

13 MR. KLINE: Madam Chairperson, I
14 don't mean to interrupt the Board, but it
15 might be useful. We're going to move the
16 report -- offer the report as evidence at this
17 point.

18 CHAIRPERSON MILLER: Okay. Is
19 there an objection?

20 MR. HIBEY: I object.

21 CHAIRPERSON MILLER: You object?
22 And the basis of your objection?

1 MR. HIBEY: It's not part of the
2 Protest Information Form. It has --

3 MEMBER NOPHLIN: Can you talk
4 louder, please? I can't hear you.

5 CHAIRPERSON MILLER: Could you
6 speak into your microphone?

7 MR. HIBEY: Yes, it's not part of
8 the Protest Information Form, number one. And
9 number two, I don't know who authored it. And
10 I've just never -- I'm just now seeing it. I
11 haven't even read it.

12 CHAIRPERSON MILLER: I'm sorry,
13 what?

14 MR. HIBEY: I haven't even read
15 it. So we object because it's not in the
16 Protest Information Form and it's unfair to
17 move it into evidence without an opportunity
18 to even read it.

19 CHAIRPERSON MILLER: Could you
20 speak louder, please?

21 MR. HIBEY: Without an opportunity
22 to even read it.

1 CHAIRPERSON MILLER: Okay. I just
2 want to note that we recessed for 15 minutes
3 for you to take a look at the report, which
4 was 13 pages. And the Board's ruled that the
5 PIF requirements don't apply in this remand
6 case. So I'm going to overrule your objection
7 and admit the report into evidence.

8 So now we are at any Board
9 questions. Any Board questions?

10 MEMBER ALBERTI: I do.

11 CHAIRPERSON MILLER: Okay.

12 MEMBER ALBERTI: Mr. Jacobson, I'm
13 trying to -- you gave us a lot of information
14 and I haven't seen the report, so I'm trying
15 to understand; and you probably told us this,
16 but could you highlight what the key changes
17 are that you found?

18 MR. JACOBSON: Yes.

19 MEMBER ALBERTI: And -- all right.
20 Just do that first. Yes.

21 MR. JACOBSON: I can actually read
22 directly from the report --

1 MEMBER ALBERTI: Okay.

2 MR. JACOBSON: -- so that I'm
3 precise.

4 "In addition, we are mindful of
5 the need to address the current economic
6 crisis and the pending streetscape project,
7 both of which have greatly impacted and will
8 continue to significantly impact both
9 residents and businesses with the moratorium
10 zone for the foreseeable future."

11 That's among our findings --

12 MEMBER ALBERTI: --

13 MR. JACOBSON: -- and part of the
14 report in terms of changes in the
15 neighborhood.

16 MEMBER ALBERTI: Are you familiar
17 with the voluntary agreement that's the
18 subject of this hearing?

19 MR. JACOBSON: Yes.

20 MEMBER ALBERTI: Okay. Can you
21 relate those changes to that voluntary
22 agreement in terms of how it may affect -- how

1 the conditions in that voluntary agreement may
2 affect this licensee relative to the changes
3 that you saw?

4 MR. JACOBSON: I would say that
5 allowing a lateral expansion and additional
6 seats may --

7 MEMBER ALBERTI: Yes.

8 MR. JACOBSON: -- in this
9 particular instance could allow a business
10 owner who may have lost money during that
11 downturn and economic crisis or during the
12 street project to recoup some of that loss or
13 that debt that was accumulated during those
14 instances.

15 MEMBER ALBERTI: Okay. And what
16 in the voluntary agreement prohibited that?

17 MR. JACOBSON: I have not read the
18 voluntary agreement recently.

19 MEMBER ALBERTI: Okay. Thank you
20 very much. I have no further questions.

21 CHAIRPERSON MILLER: Others?

22 MEMBER NOPHLIN: No, I'm fine.

1 CHAIRPERSON MILLER: No? I just
2 wanted to follow up. I don't have the report
3 in front of me, but you made a reference to
4 the foreseeable future. What did you mean by
5 that? How far down the road were you looking?

6 MR. JACOBSON: I believe we were
7 looking at the foreseeable future of -- we
8 were really looking at that five-year time
9 frame, which is what we requested in our
10 request to the Board, in our resolution that
11 came to the Board.

12 CHAIRPERSON MILLER: So what five-
13 year --

14 MR. JACOBSON: From the renewal
15 date to the five-year expiration of the
16 moratorium -- of a moratorium renewal, if that
17 makes sense, because we had to request --

18 CHAIRPERSON MILLER: Do you know
19 the years?

20 MR. JACOBSON: Pardon?

21 CHAIRPERSON MILLER: Do you know
22 the years off hand?

1 MR. JACOBSON: It would have been
2 from 2009 when we requested through --

3 CHAIRPERSON MILLER: '14?

4 MR. JACOBSON: -- 2014.

5 CHAIRPERSON MILLER: Okay. And I
6 think that you referenced earlier in your
7 testimony about finding that more people were
8 eating out than in the past.

9 MR. JACOBSON: It wasn't a
10 specific finding in our documents, but it was
11 something that commissioners from 2B-04 had
12 said -- a single commissioner had said at
13 public meetings as part of our record.

14 CHAIRPERSON MILLER: Okay. And if
15 you can comment on whether that correlates or
16 also would show that there would be a greater
17 demand for outdoor eating places.

18 MR. JACOBSON: I would say so, but
19 I can't say. I don't want to speak for other
20 people.

21 CHAIRPERSON MILLER: Oh, okay. Do
22 you have an opinion based on --

1 MR. JACOBSON: I certainly think
2 it would.

3 CHAIRPERSON MILLER: Yes.

4 MR. JACOBSON: I eat out more and
5 I eat outside more than when I moved to D.C.
6 12 years ago.

7 CHAIRPERSON MILLER: Yes, I guess
8 my question went to more people eat out, but
9 in this locality was there a greater demand
10 for outside eating spaces, do you know?

11 MR. JACOBSON: We did not find
12 that in our report, no.

13 CHAIRPERSON MILLER: Okay. So
14 your report didn't address that?

15 MR. JACOBSON: No, did not.

16 CHAIRPERSON MILLER: Okay. Thank
17 you very much. Do you have another question?

18 MEMBER ALBERTI: Yes.
19 Commissioner, just -- and I know this is
20 unscientific, but you've lived there how many
21 years?

22 MR. JACOBSON: I've lived in the

1 vicinity of Dupont seven years.

2 MEMBER ALBERTI: About seven
3 years? Okay.

4 MR. JACOBSON: With -- four
5 different places within two blocks.

6 MEMBER ALBERTI: And you became
7 involved as an ANC commissioner why?

8 MR. JACOBSON: I wanted to give a
9 voice to younger folks, the newer folks moving
10 into Dupont.

11 MEMBER ALBERTI: Were you involved
12 at all or had you focused on the community
13 before you became an ANC commissioner in some
14 way in your own community?

15 MR. JACOBSON: I did. I've been a
16 member of the Dupont Circle Citizens
17 Association. I had participated in community
18 events. I'd really gotten into public safety
19 issues and developed relationships with the
20 police in the neighborhood. My dad was a cop,
21 so that's near and dear to my heart. So, yes,
22 I'd gotten involved in the neighborhood prior

1 to becoming a commissioner.

2 MEMBER ALBERTI: Okay. The locale
3 of this -- or the neighborhood of this
4 establishment, have you seen changes in
5 establishments creating outdoor caf,s?

6 MR. JACOBSON: Yes, and requesting
7 additional seats for existing caf,s. Yes.

8 MEMBER ALBERTI: Do they seem to
9 be busy?

10 MR. JACOBSON: They do. In fact,
11 I don't get to enjoy them as often as I'd
12 like.

13 MEMBER ALBERTI: Are there any
14 other changes in terms of commerce that you've
15 seen in this neighborhood?

16 MR. JACOBSON: A lot of the retail
17 space that we had on 17th Street was moved
18 over to 14th Street that tends to have a
19 little bit more commerce. Reincarnations
20 Furniture did. Universal Gear Clothing Store
21 did. They've moved to more higher traffic
22 areas, it seems.

1 MEMBER ALBERTI: Have you seen
2 many more eating establishments opening up in
3 this neighborhood or -- well, actually you had
4 the moratorium, so you wouldn't have.

5 MR. JACOBSON: We had a
6 moratorium, correct.

7 MEMBER ALBERTI: That's right.
8 Okay. I have no further questions.

9 CHAIRPERSON MILLER: Mr. Nophlin?

10 MEMBER NOPHLIN: Yes, indeed. You
11 said "we" developed this report. Could you
12 say who "we" are?

13 MR. JACOBSON: Sure. It was
14 Commissioner Bob Meehan, Commissioner Phil
15 Carney, Commissioner Victor Wexler,
16 Commissioner Mike Feldstein, myself as chair.
17 And Mike Silverstein, who at the time was the
18 chairman of the ANC, was an ex officio member.
19 Wasn't -- didn't help develop the report, but
20 he participated in many of our meetings.

21 MEMBER NOPHLIN: Thank you.
22 That's all I have.

1 CHAIRPERSON MILLER: Mr. Kline, do
2 you have any redirect?

3 MR. KLINE: Yes, in light of the
4 Board's questions. Thank you.

5 CHAIRPERSON MILLER: Okay.

6 MR. KLINE: And the commissioners
7 that you mentioned are all commissioners of
8 ANC 2B?

9 MR. JACOBSON: Correct.

10 MR. KLINE: All right. And the
11 report, you were asked about findings in the
12 report. On page 9, finding No. 8, was there
13 also a finding with respect to vacancies in
14 the neighborhood comparing the last time the
15 moratorium was looked at with the then renewal
16 in 2009?

17 MR. JACOBSON: There was. "Retail
18 space -- retail and service diversity. On May
19 11th, 2005, the hearing date for the last
20 moratorium renewal, there was only one vacant
21 commercial property within the Dupont East
22 Moratorium Zone, 1636 17th Street, N.W. There

1 currently exists within the Dupont East
2 Moratorium Zone four vacant commercial
3 properties as of the date of submission.
4 Another property located at 1521 17th Street
5 remains vacant, but has been leased to the
6 owners of JR's Bar & Grill, which is located
7 next door."

8 MR. KLINE: So from a simple
9 mathematical proposition, there were four
10 times as many vacancies in 2009 when you
11 looked at this then there were in 2005, is
12 that correct?

13 MR. JACOBSON: Correct.

14 MR. KLINE: All right. Thank you.
15 No further questions.

16 CHAIRPERSON MILLER: Mr. Hibey, do
17 you have any cross based on Mr. Kline's
18 redirect?

19 MR. HIBEY: Yes. How many
20 vacancies are there now?

21 MR. JACOBSON: I haven't looked at
22 that recently. I can estimate that there are

1 -- Blockbuster, Club Chaos. Probably three or
2 four.

3 MR. HIBEY: Thank you.

4 CHAIRPERSON MILLER: Okay. Thank
5 you very much.

6 MR. KLINE: Call to the stand
7 Jamie Leeds.

8 CHAIRPERSON MILLER: Would you
9 raise your right hand, please? Do you swear
10 to tell the truth, the whole truth, nothing
11 but the truth?

12 MS. LEEDS: I do.

13 CHAIRPERSON MILLER: Okay. Thank
14 you.

15 MR. KLINE: State your name for
16 the record, please.

17 MS. LEEDS: Jamie Leeds.

18 MR. KLINE: And what's your
19 connection to Hank's Oyster Bar?

20 MS. LEEDS: I am the chef/owner of
21 Hank's Oyster Bar.

22 MR. KLINE: And have you been the

1 chef/owner since its existence, since it's
2 creation?

3 MS. LEEDS: Yes, I opened it.

4 MR. KLINE: Okay. And what did
5 you do before that?

6 MS. LEEDS: Before that I was a
7 chef in a local restaurant called 15 Ria in
8 Washington.

9 MR. KLINE: And when was it that
10 you decided to open your own restaurant?

11 MS. LEEDS: I've always wanted to
12 open my own restaurant ever since I was --
13 I've been cooking for 25 years and ever since
14 I started cooking I always wanted to open my
15 own place. But specifically coming to D.C. I
16 saw the opportunity for neighborhood
17 restaurants back in 2005, so I sought out the
18 opportunity.

19 MR. KLINE: Okay. And did you
20 find an opportunity?

21 MS. LEEDS: I did at 1624 K
22 Street.

1 MR. KLINE: And about when did you
2 locate that opportunity?

3 MS. LEEDS: It was in like mid-
4 2004.

5 MR. KLINE: And did you sign a
6 lease for the premises?

7 MS. LEEDS: Yes, I did.

8 MR. KLINE: And do you recall from
9 memory when you signed the lease?

10 MS. LEEDS: It was the end of
11 2004, October, I believe.

12 MR. KLINE: And did that lease
13 require that at some point you begin paying
14 rent?

15 MS. LEEDS: Yes, I had negotiated
16 that I would have to begin paying full rent
17 six months after opening, after signing the
18 lease, while it was in construction.

19 MR. KLINE: Okay. So that would
20 have been May of --

21 MS. LEEDS: May of --

22 MR. KLINE: -- 2005?

1 MS. LEEDS: Yes.

2 MR. KLINE: Okay.

3 MS. LEEDS: Which is when I
4 opened.

5 MR. KLINE: Now after you signed
6 the lease you applied for an alcoholic
7 beverage license?

8 MS. LEEDS: Yes, we opened with
9 just a beer and wine license and then a few
10 months later we applied for a liquor license.

11 MR. KLINE: Okay. But in terms of
12 the voluntary agreement that's the subject of
13 this hearing that related to the original beer
14 and wine license, correct?

15 MS. LEEDS: That's correct.

16 MR. KLINE: All right. And that
17 was an application to transfer?

18 MS. LEEDS: Yes, I believe so.

19 MR. KLINE: Okay. And do you
20 recall when you filed that application?

21 MS. LEEDS: Um --

22 MR. KLINE: If I told you the

1 Board's records would reflect that it was in
2 January in 2005 --

3 MS. LEEDS: It was, yes, in the
4 beginning of 2005.

5 MR. KLINE: All right. Is that
6 consistent with your recollection?

7 MS. LEEDS: Yes.

8 MR. KLINE: Now after you filed
9 the application did you learn of any
10 opposition to the license transfer?

11 MS. LEEDS: Yes, there were
12 protestors.

13 MR. KLINE: Okay.

14 MS. LEEDS: There was a huge
15 amount of support, but then there were also a
16 few protestors.

17 MR. KLINE: All right. And a
18 protest was filed?

19 MS. LEEDS: Yes.

20 MR. KLINE: And what did you do as
21 a result of the protesting filed?

22 MS. LEEDS: Well, I wanted to, you

1 know, hear what the court would have to say as
2 far as -- I knew little about voluntary
3 agreements at the time, so I wanted to go in
4 front of the Board and see if we could work
5 something out.

6 MR. KLINE: Okay. Now when you
7 say go in -- you said the "court," but you
8 meant the ABC Board?

9 MS. LEEDS: The ABC Board.

10 MR. KLINE: And were you looking
11 for the Board to have a hearing on your
12 license application?

13 MS. LEEDS: Yes, I was expecting
14 to have a hearing.

15 MR. HIBEY: We're going to object
16 and ask that the questions go to the issues
17 before the Board. I've given a lot of
18 latitude here, but we're not talking -- we're
19 talking about all past stuff, and most of this
20 was actually in the record at the first
21 hearing.

22 CHAIRPERSON MILLER: Okay. Mr.

1 Kline, do you want to address the relevance of
2 the questions?

3 MR. KLINE: Sure. We're talking
4 about, based on the instructions from the
5 court of appeals, change in circumstances, so
6 certainly the delta to be established. We
7 have to look at what was and what is, and
8 we're going back to what was so we can get to
9 what is, or really what was when we filed the
10 petition. But the difference between 2004-
11 2005 when Ms. Leeds started this process and
12 entered into the voluntary agreement and then
13 what changed from then until 2010 when the
14 petition to terminate was filed.

15 CHAIRPERSON MILLER: Okay. I'll
16 overrule objection. Go ahead.

17 MR. KLINE: Okay. So you
18 indicated that you wanted to get a hearing.
19 You were prepared to go to hearing, correct?

20 MS. LEEDS: Correct.

21 MR. KLINE: Did you have that
22 hearing?

1 MS. LEEDS: No, I don't -- no, we
2 didn't have the hearing.

3 MR. KLINE: Why not?

4 MS. LEEDS: The Board wanted to
5 delay the date, or the date was later, much
6 later than I wanted to open my restaurant.

7 MR. KLINE: Okay. Did you appear
8 before the Board at any point in that process
9 in terms of applying for a license?

10 MS. LEEDS: We did have one
11 hearing.

12 MR. KLINE: Okay.

13 MS. LEEDS: Yes.

14 MR. KLINE: And at that point did
15 you request that -- or did you through your
16 representative request that a hearing be
17 scheduled?

18 MS. LEEDS: Yes.

19 MR. KLINE: And do you recall what
20 the response to that was?

21 MS. LEEDS: I remember it was much
22 later.

1 MR. KLINE: Okay. So there was a
2 delay in the process?

3 MS. LEEDS: Delay, yes.

4 MR. KLINE: So you ultimately
5 never had your hearing?

6 MS. LEEDS: No, we never had the
7 hearing.

8 MR. KLINE: And --

9 MS. LEEDS: Because ultimately I
10 felt like -- because the hearing was delayed
11 so long I felt like I was forced into
12 complying with the voluntary agreement.

13 MR. KLINE: When you say
14 "complying" with the voluntary agreement,
15 there was no voluntary agreement at that time,
16 correct?

17 MS. LEEDS: No, but agreeing to
18 sign a voluntary agreement.

19 MR. KLINE: All right. So you
20 said you felt like you were forced into it,
21 like you didn't have a choice?

22 MS. LEEDS: Well, I felt, you

1 know, the circumstances presented were that,
2 you know, I only had a certain amount of
3 working capital to open my restaurant and if
4 I would have had to have waited another, you
5 know, six months before the hearing, all of my
6 working capital would have been gone because
7 I had to start paying rent, full rent in May.
8 So I felt like I was backed into a corner and
9 either, you know, sign the voluntary agreement
10 and get open or wait for the hearing and pay
11 the rent and, you know, just spend all the
12 money.

13 MR. KLINE: And what would have
14 happened had you elected to pursue the latter
15 course?

16 MS. LEEDS: Well, you can't open a
17 business without operating capital, so -- or
18 else you're going to fail. So I didn't want
19 to chance that, being my first restaurant.

20 MR. KLINE: Now one of the
21 provisions in the voluntary agreement
22 restricted your occupancy, is that correct?

1 MS. LEEDS: Yes.

2 MR. KLINE: And you agreed to that
3 when you signed the voluntary agreement,
4 correct?

5 MS. LEEDS: Yes, I did. Yes.

6 MR. KLINE: Was that of concern to
7 you when you signed it?

8 MS. LEEDS: No. No, it didn't
9 really matter to me. I was very happy with
10 the space and the amount of seats, and it was
11 fine.

12 MR. KLINE: And why? Were there
13 any other reasons why it didn't matter to you
14 that you agreed to a restriction on occupancy?

15 MS. LEEDS: I didn't see any other
16 options. You know, there wasn't anywhere to
17 move, anywhere to grow really at that point.

18 MR. KLINE: So there weren't any
19 opportunities to expand?

20 MS. LEEDS: No, not at that point.

21 MR. KLINE: All right. And why
22 was that?

1 MS. LEEDS: Because the space next
2 door to me was already a restaurant and the
3 other space on the other side of me was a
4 residential unit.

5 MR. KLINE: Okay. Was there
6 anything else in effect at that point that
7 would have prevented you --

8 MS. LEEDS: Oh, there was a
9 moratorium also.

10 MR. KLINE: So there was a
11 moratorium?

12 MS. LEEDS: There was a
13 moratorium.

14 MR. KLINE: So given those two
15 facts; the fact that there was no physical
16 space and there was a moratorium, there was no
17 opportunity to expand?

18 MS. LEEDS: Exactly.

19 MR. KLINE: All right. So that
20 made you uncomfortable in terms of signing the
21 voluntary agreement that contained the
22 restriction on expansion?

1 MS. LEEDS: Correct.

2 MR. KLINE: Were there ultimately
3 -- well, let me ask you this: Was it in your
4 power to change the fact that there was a
5 moratorium in place at that time? Was it
6 within your control?

7 MS. LEEDS: No, I didn't have any
8 power at all to change the moratorium.

9 MR. KLINE: All right. Was it
10 within your control to make space available
11 next to you that you could have ran into,
12 expanded into?

13 MS. LEEDS: No, I had nothing to
14 do with that as well.

15 MR. KLINE: Were there ultimately
16 changes which affected your ability to expand
17 or created an opportunity to expand?

18 MS. LEEDS: Yes, three things
19 actually happened. The moratorium was amended
20 to allow lateral expansions for a couple of
21 operations. The landlord in the building next
22 door made the building commercial,

1 commercially zoned the building so that an
2 establishment, a commercial establishment
3 could go in. And the business was -- you
4 know, I had a very successful thriving
5 business. So it was -- the space, extra space
6 was really needed.

7 MR. KLINE: And were those three
8 things -- in terms of those changes, were
9 those within your control?

10 MS. LEEDS: No. I mean, I think
11 that hopefully the business, the success of
12 the business was in my control.

13 MR. KLINE: Okay. Fair enough.

14 MS. LEEDS: The other ones were
15 not.

16 MR. KLINE: All right.

17 MS. LEEDS: No.

18 MR. KLINE: When the adjacent
19 property became available and the moratorium
20 was relaxed or looked like it might be
21 relaxed, what did you do?

22 MS. LEEDS: I decided to -- I

1 talked with you and decided to try to amend
2 the VA or vacate the VA.

3 MR. KLINE: All right. May I
4 approach the witness?

5 CHAIRPERSON MILLER: Yes.

6 MR. KLINE: I'm going to show you
7 what we've labeled as Applicant's Exhibit 1
8 and ask you if you can identify that.

9 MS. LEEDS: It's a letter to meet
10 with the --

11 MR. KLINE: First of all, it's a
12 letter. And what's the date of the letter?

13 MS. LEEDS: The letter is January
14 26th, 2010.

15 MR. KLINE: And who is it direct
16 to?

17 MS. LEEDS: The letter is directed
18 to Robert Diener, president of Dupont -- the
19 DCCA, David Mallof and Alexis Rieffel.

20 MR. KLINE: All right. And what's
21 the subject of the letter?

22 MS. LEEDS: Regarding Leeds the

1 Way, LLC and Hank's Oyster Bar, 1624 Q Street.

2 MR. KLINE: All right. Did you
3 direct that this letter be sent?

4 MS. LEEDS: Yes.

5 MR. KLINE: And did you receive a
6 copy of it when it was sent?

7 MS. LEEDS: Yes.

8 MR. KLINE: I would move
9 Applicant's Exhibit 1.

10 CHAIRPERSON MILLER: I don't have
11 a copy in front of me to see what it is. Does
12 Mr. Hibey have a copy?

13 MR. KLINE: Yes.

14 CHAIRPERSON MILLER: Okay. Is
15 there an objection?

16 MR. HIBEY: I'm not sure
17 technically everything's correct, but I don't
18 have any objection.

19 CHAIRPERSON MILLER: You don't
20 have any objection? Okay.

21 Okay. Then it's admitted.

22 MR. KLINE: Do you know if there

1 was any response to the letter?

2 MS. LEEDS: I don't believe there
3 was a response to the letter.

4 MR. KLINE: I'm going to show you
5 what we've marked as Applicant's 2. Are those
6 a series of emails?

7 MS. LEEDS: Yes, these are emails
8 from --

9 MR. KLINE: Starting on the second
10 page --

11 MS. LEEDS: Yes.

12 MR. KLINE: -- with the one that's
13 labeled A --

14 MS. LEEDS: Yes.

15 MR. KLINE: -- do you know what
16 that is?

17 MS. LEEDS: A letter asking for a
18 meeting.

19 MR. KLINE: Looking at the bottom
20 of page 2 it's labeled A in the upper left-
21 hand corner?

22 MS. LEEDS: Yes. It says please

1 see attached letter from Andrew J. Kline.

2 MR. KLINE: Right. Were you
3 copied on that? Do you remember receiving
4 that?

5 MS. LEEDS: Yes, yes.

6 MR. KLINE: Do you remember if
7 this was the cover to Applicant's Exhibit 1
8 that's previously been admitted?

9 MS. LEEDS: Yes.

10 MR. KLINE: All right. Looking up
11 at the top of that page, what's been labeled
12 B --

13 MS. LEEDS: Yes.

14 MR. KLINE: -- do you recall
15 receiving this email, or a copy of this email?

16 MS. LEEDS: Yes. Yes. Yes.

17 MR. KLINE: And then on the first
18 page what's labeled C, do you recall receiving
19 -- it indicates that you're copied, you're
20 CC'd on this email. Do you remember receiving
21 this email?

22 MS. LEEDS: Yes, I do.

1 MR. KLINE: And who's that email
2 from?

3 MS. LEEDS: It's from Dave Mallof.

4 MR. KLINE: Directed to?

5 MS. LEEDS: To you.

6 MR. KLINE: All right. And then
7 at the top of page 1, the one that's labeled
8 D --

9 MS. LEEDS: Yes.

10 MR. KLINE: -- did you receive
11 that email?

12 MS. LEEDS: Yes, I did.

13 MR. KLINE: And who's that email
14 from?

15 MS. LEEDS: From you.

16 MR. KLINE: And who's it directed
17 to?

18 MS. LEEDS: To Dave Mallof and Lex
19 Rieffel.

20 MR. KLINE: All right. We'd move
21 Applicant's 2.

22 CHAIRPERSON MILLER: Any

1 objection?

2 MR. HIBEY: Just -- and I think I
3 might have misspoken earlier. It's the
4 continuing objection you gave me earlier on
5 the previous exhibit and this exhibit as to
6 the -- outside the scope of the Protest
7 Information Form.

8 CHAIRPERSON MILLER: Okay.

9 MR. KLINE: Can we just understand
10 that that's a continuing objection?

11 MR. HIBEY: Yes, I just wanted to
12 make sure that was clear.

13 CHAIRPERSON MILLER: Okay. Fine.
14 Overruled. It's admitted as Exhibit No. 2.

15 MR. KLINE: Now Exhibit 2, the one
16 that's labeled D --

17 MS. LEEDS: Yes.

18 MR. KLINE: -- can you look at
19 that and summarize the substance of that email
20 for the ABC Board?

21 MS. LEEDS: It's from you to Dave
22 Mallof. It's saying that you see no point in

1 meeting. You indicated that you would speak
2 with the other -- that David speak with the
3 other signatories and see if they felt
4 differently.

5 MR. KLINE: And what about the
6 final sentence of that email?

7 MS. LEEDS: The final sentence
8 says, "I am keeping March 10th at 10:00
9 available in case you're willing to meet.
10 Please let me know whether you will be
11 coming."

12 MR. KLINE: Okay. Now in an
13 earlier email that's in Exhibit 2 was there
14 was also a proposal for a meeting date earlier
15 than March 10th?

16 MS. LEEDS: March 4th was
17 proposed.

18 MR. KLINE: And did any such
19 meeting ever occur?

20 MS. LEEDS: No, never happened.

21 MR. KLINE: And what was your
22 understanding as to why meetings never

1 occurred?

2 MS. LEEDS: I don't know actually.

3 MR. KLINE: You don't know?

4 MS. LEEDS: They didn't come to
5 the meeting.

6 MR. KLINE: Okay. All right. Was
7 it your understanding that Mr. Mallof wouldn't
8 meet?

9 MS. LEEDS: I thought he would
10 meet. I don't -- I'm not sure.

11 MR. KLINE: Okay. Now I'm going
12 to show you what we're marking as Applicant's
13 3 and ask you to identify that.

14 MS. LEEDS: This is an email from
15 Dave Mallof to Andrew Kline and Lex Rieffel.
16 I'm CC'd. Fred Moosally is CC'd.

17 MR. KLINE: Do you recall
18 receiving this email?

19 MS. LEEDS: Yes.

20 MR. KLINE: Subject to Mr.
21 Mallof's continuing objection, we would move
22 Applicant's Exhibit 3.

1 MR. HIBEY: None of the --

2 CHAIRPERSON MILLER: Do you have
3 an additional objection?

4 MR. HIBEY: This is Dave Mallof's
5 email and now he's moving it in through Jamie
6 Leeds. Is that what's happening?

7 MR. KLINE: Ms. Leeds, did you
8 receive a copy of this email?

9 MS. LEEDS: Yes, I'm CC'd on the
10 email.

11 MR. KLINE: Right. And you
12 received them?

13 MS. LEEDS: Yes.

14 MR. KLINE: Okay.

15 MR. HIBEY: This looks like the
16 type of email I get quite often. I'm not
17 quite sure what the point is.

18 CHAIRPERSON MILLER: The question
19 is --

20 MR. KLINE: Object to the
21 testimony.

22 MR. HIBEY: How is this relevant?

1 Yes, objection.

2 CHAIRPERSON MILLER: You're
3 objecting on relevance?

4 MR. HIBEY: Is this relevant?
5 This is about --

6 CHAIRPERSON MILLER: Mr. Kline,
7 would you address how it's relevant?

8 MR. KLINE: The date of the email
9 is February 25th. It's immediately after the
10 24th, which is labeled D on Exhibit 2, an
11 email from me I'm going to say February 24th,
12 at 6:18 p.m. And then this email is dated
13 Thursday, February 25th at 12:52 p.m. So in
14 terms of time, all of these emails the Board
15 will see relate to efforts to set up the
16 meeting that was originally proposed in the
17 January 26th, 2010 letter. And indeed the
18 February 24th email says we're keeping March
19 10 at 10:00 a.m. available. And this is an
20 email the very next day. Does not respond to
21 the request for a meeting and doesn't indicate
22 that there's some other date or time that they

1 wish to have the meeting.

2 CHAIRPERSON MILLER: Okay. So
3 this is a part of the chain of correspondence
4 relating to attempts to negotiate and a
5 response?

6 MR. KLINE: Yes.

7 CHAIRPERSON MILLER: Okay. Then
8 I'll admit it.

9 MR. KLINE: So in the winter of
10 2010 --

11 MS. LEEDS: Yes.

12 MR. KLINE: -- before the petition
13 to terminate the voluntary agreement was
14 filed, attempts were made to meet with the
15 signatories to the VA, is that correct?

16 MS. LEEDS: Correct.

17 MR. KLINE: And does this chain of
18 letters and email represent those attempts?

19 MS. LEEDS: Yes.

20 MR. KLINE: And did such a meeting
21 ever occur?

22 MS. LEEDS: Well, we had a small

1 meeting at Hank's with a couple -- with the
2 ANC commissioner and a couple other people.

3 MR. KLINE: Right. And wasn't
4 that after the VA termination petition was
5 filed?

6 MS. LEEDS: Correct.

7 MR. KLINE: But before it was
8 filed was there ever a meeting?

9 MS. LEEDS: No, there was not a
10 meeting.

11 MR. KLINE: And was there not a
12 meeting because you were unwilling to meet?

13 MS. LEEDS: I was willing to meet.

14 MR. KLINE: All right. So why
15 wasn't there a meeting?

16 MS. LEEDS: I guess they weren't
17 willing to meet. I don't really know why.

18 MR. KLINE: All right. And to
19 your knowledge was -- in response to Exhibits
20 1 and 2 --

21 MS. LEEDS: Yes.

22 MR. KLINE: -- was there any

1 effort by Mr. Mallof to schedule a different
2 date for a meeting?

3 MS. LEEDS: Not that I recall.

4 MR. KLINE: Was there ever any
5 effort to schedule a different place for a
6 meeting?

7 MS. LEEDS: No, not that I recall.

8 MR. KLINE: Now you mentioned that
9 you ultimately did meet, is that correct?

10 MS. LEEDS: Yes.

11 MR. KLINE: And that was at the
12 establishment?

13 MS. LEEDS: Yes.

14 MR. KLINE: Who was at that
15 meeting?

16 MS. LEEDS: There was an ANC
17 commissioner there. Victor was there. Robin
18 Diener was there representing DCCA. There
19 were a couple of other people there.

20 MR. KLINE: Okay. Other
21 representatives from the ANC?

22 MS. LEEDS: Yes. ANC was well

1 represented in that meeting.

2 MR. KLINE: And what was the
3 purpose of that meeting?

4 MS. LEEDS: Just to talk about
5 discrepancies and what, you know, they're
6 looking for and try to work things out.

7 MR. KLINE: What they were looking
8 for in terms of what?

9 MS. LEEDS: In terms of the
10 voluntary agreement and, you know --

11 MR. KLINE: For a substitute or
12 amended voluntary agreement?

13 MS. LEEDS: Yes.

14 MR. KLINE: Yes?

15 MS. LEEDS: Yes.

16 MR. KLINE: As a result of that
17 meeting, or at that meeting, or as a result of
18 that meeting was any agreement reached
19 concerning a substitute voluntary agreement or
20 an amendment to the previous voluntary
21 agreement?

22 MS. LEEDS: I don't -- no, I don't

1 believe there was anything. I mean, we were
2 able to -- the ANC and I agreed. We were able
3 to agree with the ANC and get the ANC's
4 support through that meeting, but that was it.

5 MR. KLINE: All right. And the
6 ANC agreed that the VA could be terminated?

7 MS. LEEDS: Yes.

8 MR. KLINE: Now Mr. Mallof was not
9 there, correct?

10 MS. LEEDS: No, he was not.

11 MR. KLINE: Mr. Rieffel was there?

12 MS. LEEDS: Yes, that's right.

13 MR. KLINE: And he was the
14 representative of the group of six?

15 MS. LEEDS: Yes.

16 MR. KLINE: Were you able to reach
17 agreement with Mr. Rieffel --

18 MS. LEEDS: No.

19 MR. KLINE: -- as the
20 representative of the group of six?

21 MS. LEEDS: No.

22 MR. KLINE: And you're clear on

1 that, correct?

2 MS. LEEDS: Yes, I remember now.

3 MR. KLINE: Okay. And was Mr.

4 Mallof aware of that meeting?

5 MS. LEEDS: I believe he was, yes.

6 MR. KLINE: And he didn't attend?

7 MS. LEEDS: No.

8 MR. KLINE: That's all the

9 questions I have at this time.

10 CHAIRPERSON MILLER: Okay. Any

11 cross?

12 MR. HIBEY: Did you file an

13 affidavit with your petition to terminate the

14 voluntary agreement?

15 MS. LEEDS: I don't believe so.

16 MR. HIBEY: That's all.

17 CHAIRPERSON MILLER: Okay. Any

18 Board questions?

19 (No audible response.)

20 CHAIRPERSON MILLER: We don't

21 actually. Thank you very much.

22 MS. LEEDS: Thank you.

1 MR. KLINE: Call to the stand
2 Victor Wexler.

3 CHAIRPERSON MILLER: Good evening.

4 MR. WEXLER: Good evening.

5 CHAIRPERSON MILLER: Do you swear
6 to tell the truth, the whole truth, nothing
7 but the truth?

8 MR. WEXLER: I do.

9 CHAIRPERSON MILLER: Okay. Thank
10 you. Have a seat.

11 MR. KLINE: State your name for
12 the record, please.

13 MR. WEXLER: Victor Wexler.

14 MR. KLINE: And are you an ANC
15 commissioner?

16 MR. WEXLER: I am.

17 MR. KLINE: And where are you an
18 ANC commissioner?

19 MR. WEXLER: ANC 2B-05, which
20 includes Hank's on the --

21 MR. KLINE: And how long have you
22 been an ANC commissioner?

1 MR. WEXLER: I've been elected
2 three times, once in an off election and twice
3 in general elections, so it would be five
4 years.

5 MR. KLINE: All right. Now you
6 were here with Ms. Leeds testified? You were
7 in the room?

8 MR. WEXLER: Yes. Oh, yes.

9 MR. KLINE: Were you at the
10 meeting that she referred to concerning
11 renegotiation of the voluntary agreement?

12 MR. WEXLER: The meeting that took
13 place in June '10.

14 MR. KLINE: June of 2010.

15 MR. WEXLER: Yes. Yes, I was
16 there. Yes.

17 MR. KLINE: And who else was
18 present at that meeting?

19 MR. WEXLER: Will Stephens, you,
20 Mr. Rieffel, Jamie, Robin. I believe Robin
21 Diener was there.

22 MR. KLINE: Robin Diener?

1 MR. WEXLER: Yes, I believe she
2 was. You know, I think that's it.

3 MR. KLINE: All right. And Robin
4 Diener, is she involved in some organization,
5 just for the record?

6 MR. WEXLER: At the time she
7 certainly was involved with DCCA. She may
8 have been president at the time.

9 MR. KLINE: And that's the Dupont
10 Circle Citizens Association?

11 MR. WEXLER: Yes, that is. It is.

12 MR. KLINE: And were there efforts
13 made by Ms. Leeds at that time to enter into
14 a substitute voluntary agreement?

15 MR. WEXLER: Yes, she was quite
16 willing to do so.

17 MR. KLINE: Okay. And Mr. Rieffel
18 was there?

19 MR. WEXLER: Yes.

20 MR. KLINE: Was agreement reached
21 at that time?

22 MR. WEXLER: The -- what we agreed

1 with was the ANC would support this and go
2 forward is what we agreed to.

3 MR. KLINE: With the Board
4 termination?

5 MR. WEXLER: With Board
6 termination and support expansion. That we
7 were -- the ANC really wasn't involved in the
8 first agreement. When the ANC really walks
9 into the party is as a result of the
10 moratorium, which Jack so handsomely
11 engineered through the community. And this
12 became a big issue. This was going to be an
13 example of what we meant by responsible
14 business expansion and lateral expansion. And
15 Hank's was a natural.

16 MR. KLINE: Okay.

17 MR. WEXLER: And they were
18 cooperative from the very start.

19 MR. KLINE: All right. So was Mr.
20 Rieffel in agreement with what Ms. Leeds and
21 ANC 2B agreed to?

22 MR. WEXLER: I don't recall him

1 saying anything.

2 MR. KLINE: You don't recall him
3 saying anything?

4 MR. WEXLER: No.

5 MR. KLINE: Okay. All right.
6 Thank you. I have no further questions.

7 CHAIRPERSON MILLER: Okay. Any
8 cross?

9 MR. HIBEY: I'm sorry, did you
10 testify that your ANC agreed to terminate this
11 -- voted and agreed to terminate the voluntary
12 agreement in this case?

13 MR. WEXLER: We agreed to the
14 expansion. I don't think there was an
15 explicit vote to terminate the agreement to
16 the best of my recollection. And I see -- as
17 I was saying, the ANC's -- the chronology of
18 this is the ANC only steps in after -- for
19 lack if it, of the first agreement. So we
20 were seeing this in a positive light as in
21 something to expand. We did not go back and
22 I was not even made aware of the first

1 agreement.

2 MR. HIBEY: Okay. And the
3 meeting --

4 MR. WEXLER: And the ANC was not a
5 signatory to the first agreement.

6 MR. HIBEY: All right. So what
7 was discussed at this meeting?

8 MR. WEXLER: How we would -- how
9 the operator or owner would make this a
10 suitable business establishment for the
11 community, and how this would fit into the
12 vision we had for Dupont. Commissioner
13 Jacobson was correct. We felt that 17th
14 Street had been dealt a series of unfortunate
15 blows and was losing people, and so we wanted
16 to liven it up. And what better way to do it
17 than with Hank's?

18 MR. HIBEY: And this in talking
19 about the expansion?

20 MR. WEXLER: Yes.

21 MR. HIBEY: So was a voluntary
22 agreement discussed, or was it just about --

1 MR. WEXLER: Not per se. Not per
2 se.

3 MR. HIBEY: Okay.

4 MR. WEXLER: At that point. I
5 mean, there was -- prior ones is something
6 else, but I'm speaking for the one I attended
7 in June of 2010. There was no discussion of
8 agreement.

9 MR. HIBEY: Thank you.

10 MR. WEXLER: I'm sorry.

11 CHAIRPERSON MILLER: No, we
12 have --

13 MR. WEXLER: I'm sorry.

14 CHAIRPERSON MILLER: I have
15 questions. Just to clarify of what you're
16 just speaking about, the voluntary agreement
17 wasn't discussed per se, but the expansion was
18 discussed, is that correct?

19 MR. WEXLER: Correct.

20 CHAIRPERSON MILLER: Okay. And
21 did you also say that the ANC was not a
22 protestant on the voluntary agreement?

1 MR. WEXLER: Yes, I did say that.

2 CHAIRPERSON MILLER: Okay. And I
3 just want to clarify between you and Mr.
4 Jacobson, or something, who testified before,
5 because he said he was in the ANC across the
6 street from Hank's and you said Hank's is in
7 your ANC.

8 MR. WEXLER: Right. It just so
9 happens that his street is a border street.

10 CHAIRPERSON MILLER: Okay.

11 MR. WEXLER: The south side is my
12 SMD, which includes Hank's.

13 CHAIRPERSON MILLER: I see.

14 MR. WEXLER: And the north side
15 where -- Commissioner Jacobson at that time
16 lived on the north side of the street. That
17 was 2B-06. Is that not you, Jack? Yes.

18 CHAIRPERSON MILLER: Okay. So but
19 you're both on the same commission?

20 MR. WEXLER: Correct.

21 CHAIRPERSON MILLER: Okay. All
22 right. Good. Did you have discussions with

1 your constituents with respect to how they
2 felt about the expansion?

3 MR. WEXLER: Yes, I did.

4 CHAIRPERSON MILLER: Okay.

5 MR. WEXLER: I think there was
6 general enthusiasm. Only one person I know
7 contacted me with an objection, and that was
8 the immediate neighbor to Hank's.

9 CHAIRPERSON MILLER: Okay.

10 MR. WEXLER: He called me up and I
11 went down and met with him and he was -- other
12 than that, there was general discussion.
13 Hank's had established itself already as a
14 good place and people generally were happy
15 with more of it. The neighbor whose property
16 abuts Hank's was concerned about the effect on
17 his property.

18 CHAIRPERSON MILLER: Okay. Any
19 other questions?

20 MEMBER ALBERTI: Yes.

21 CHAIRPERSON MILLER: Mr. Alberti?

22 MEMBER ALBERTI: I'm not sure what

1 I heard. Mr. Wexler, I'm a little confused.

2 Mr. Wexler, the meeting that you attended, all
3 right, to discussed the expansion --

4 MR. WEXLER: Yes, sir.

5 MEMBER ALBERTI: -- with the
6 licensee. Did the issue of the voluntary
7 agreement, the topic of the voluntary
8 agreement come up at all during that meeting?

9 MR. WEXLER: I don't recall that.

10 MEMBER ALBERTI: Okay. Are you
11 aware of any discussions about the voluntary
12 agreement between any of the parties?

13 MR. WEXLER: No, that was -- I was
14 not on the when the first voluntary agreement
15 was negotiated.

16 MEMBER ALBERTI: But are you aware
17 of any discussions about the termination of
18 the voluntary agreement, the discussions that
19 may have taken place relating to that between
20 the licensee --

21 MR. WEXLER: There may have been
22 mention of it, but there was not discussion

1 that I recall.

2 MEMBER ALBERTI: Okay. Thank you
3 very much.

4 MR. WEXLER: Thank you.

5 CHAIRPERSON MILLER: Okay. Any
6 redirect?

7 MR. KLINE: No.

8 CHAIRPERSON MILLER: Okay. Mr.
9 Hibey, do you have any cross based on the
10 Board's questions?

11 MR. HIBEY: No.

12 CHAIRPERSON MILLER: Okay. Thank
13 you very much.

14 MR. WEXLER: You're welcome.

15 MR. KLINE: Call to the stand
16 David Mallof.

17 CHAIRPERSON MILLER: Do you swear
18 to tell the truth, the whole truth, nothing
19 but the truth?

20 MR. MALLOF: I do.

21 CHAIRPERSON MILLER: Okay. You're
22 on.

1 MR. KLINE: State your name for
2 the record, please.

3 MR. MALLOF: David Mallof.

4 MR. KLINE: And are you a
5 signatory to the voluntary agreement that's at
6 issue before the Board today?

7 MR. MALLOF: Yes, Mr. Kline.

8 MR. KLINE: And you are one of the
9 designated representatives?

10 MR. MALLOF: Yes.

11 MR. KLINE: All right. I'm going
12 to show you what's been marked as Applicant's
13 1. Do you have it?

14 MR. MALLOF: Yes.

15 MR. KLINE: Do you recall
16 receiving that letter?

17 MR. MALLOF: Can I have those
18 back? Sorry.

19 MR. KLINE: The question is do you
20 recall receiving that letter?

21 MR. MALLOF: I'm sorry, just one
22 moment.

1 MR. KLINE: There's a question
2 pending.

3 MR. MALLOF: Oh, yes.

4 MR. KLINE: You do recall
5 receiving that letter. Did you respond to
6 that letter, specifically the request to set
7 up a meeting?

8 MR. MALLOF: I'm sorry, I
9 mistakenly handed back some paper. I'm sorry,
10 sir, could you repeat the question?

11 MR. KLINE: The question is did
12 you respond to the letter, specifically the
13 request to schedule up a meeting?

14 MR. MALLOF: No, not to you, but
15 to the Respondent's -- to the other
16 participants I did, yes.

17 MR. KLINE: Okay. But not to me?

18 MR. MALLOF: I did not respond to
19 you.

20 MR. KLINE: All right.

21 MR. MALLOF: I was in
22 communication with the other --

1 MR. KLINE: All right.

2 MR. MALLOF: -- five members.

3 MR. KLINE: All right. I'm going
4 to show you what's been marked as Applicant's
5 2, a series of emails.

6 MR. MALLOF: Yes, I do.

7 MR. KLINE: Do you recall that
8 email exchange?

9 MR. MALLOF: Well, there are a lot
10 of email exchanges. I --

11 MR. KLINE: The question is do you
12 recall that email exchange?

13 MR. MALLOF: No, not in this
14 manner, not in this sequencing.

15 MR. KLINE: You don't recall that
16 at all?

17 MR. MALLOF: I believe there were
18 more emails.

19 MR. KLINE: The question is do you
20 recall those emails?

21 MR. MALLOF: Oh, which exchange?
22 Which one?

1 MR. KLINE: A, B, C and D.

2 MR. MALLOF: I recall each of
3 those discreetly, yes.

4 MR. KLINE: Okay.

5 MR. MALLOF: I do.

6 MR. KLINE: And the fact of the
7 matter is your response was that was not an
8 appropriate time to review termination or
9 amendment of the voluntary agreement, correct?

10 MR. MALLOF: I'm lost. I'm sorry.
11 Where was --

12 MR. KLINE: It's just a question.

13 MR. MALLOF: In the exchange?

14 MR. KLINE: No, it's just a
15 question.

16 MR. MALLOF: Is it mentioned in
17 this exchange?

18 MR. KLINE: It's mentioned --

19 MR. MALLOF: In writing?

20 MR. KLINE: -- in my question.

21 MR. MALLOF: Well, you're mixing
22 this -- I thought we were -- I thought you

1 were asking about this document. I don't see
2 anything here about that. What do you mean?

3 MR. KLINE: The question is in
4 response to the -- the emails requested a
5 meeting, correct?

6 MR. MALLOF: Which email, sir?

7 MR. KLINE: There are four emails
8 there.

9 MR. MALLOF: Yes.

10 MR. KLINE: Don't two of the
11 emails suggest specific dates for meetings,
12 being March 4th and March 10th?

13 MR. MALLOF: Could I hear the
14 prior question about -- we're mixing emails
15 with discussions. I don't see anywhere in the
16 email where you made an assertion it was
17 premature to meet. Where does that appear,
18 sir?

19 MR. KLINE: Mr. Mallof, focus on
20 the present -- well, Madam Chairperson, I
21 would ask that you direct the witness to --

22 CHAIRPERSON MILLER: Right.

1 MR. KLINE: -- focus on the
2 current question.

3 CHAIRPERSON MILLER: Okay. No, we
4 were just about to do that. Okay. It would
5 be much, much easier. All you need to do is
6 just listen to his exact question and then
7 answer that, regardless of, you know, whatever
8 you might be thinking it might relate to.
9 Just answer his --

10 MR. MALLOF: Yes, I'm sorry. I
11 did not indicate in this string that it was
12 premature to me.

13 MR. KLINE: Okay.

14 MR. MALLOF: That's because we had
15 floor conversations as well, and I believe
16 there were other emails as well --

17 MR. KLINE: All right.

18 MR. MALLOF: -- in addition to
19 these four emails that have been cherry-
20 picked.

21 MR. KLINE: In --

22 MR. MALLOF: That's where I was

1 going.

2 MR. KLINE: In Applicant's Exhibit

3 2 --

4 MR. MALLOF: Yes.

5 MR. KLINE: -- on page 2 --

6 MR. MALLOF: Yes.

7 MR. KLINE: -- the email labeled

8 B --

9 MR. MALLOF: Yes.

10 MR. KLINE: -- you received that
11 email, correct?

12 MR. MALLOF: Yes.

13 MR. KLINE: All right. And that
14 email says, "We have heard nothing from you in
15 response to our request for a meeting
16 concerning the possible expansion of Hank's
17 Oyster Bar." Do you dispute the statement
18 that's in that email?

19 MR. MALLOF: I responded
20 immediately back the next day.

21 MR. KLINE: All right.

22 MR. MALLOF: And I believe it was

1 during a snowstorm that was historic for the
2 District of Columbia. Maybe I'm wrong about
3 that, but I responded.

4 MR. KLINE: All right.

5 MR. MALLOF: And I believe I said
6 in addition to e-exchanges that we should
7 speak by telephone.

8 MR. KLINE: Mr. Mallof, let's turn
9 to February 23rd, 2010 at 10:54 p.m. There
10 was an email to you, correct?

11 MR. MALLOF: 10:54.

12 MR. KLINE: It's marked as B --

13 MR. MALLOF: Yes, sir.

14 MR. KLINE: -- on page 2.

15 MR. MALLOF: Yes.

16 MR. KLINE: It says, "We have
17 heard nothing from you in response to our
18 request for a meeting concerning the possible
19 expansion of Hank's Oyster Bar." You see that
20 statement?

21 MR. MALLOF: Yes, sir.

22 MR. KLINE: All right. You had

1 previously received a letter dated January
2 26th, 2010, correct?

3 MR. MALLOF: Yes, sir.

4 MR. KLINE: All right. Is it
5 true, is that statement true that at that
6 point we had heard nothing in response to you?
7 That's correct, isn't it?

8 MR. MALLOF: That is correct.

9 MR. KLINE: All right. And then
10 March 4th at 10:00 a.m. was proposed as the
11 time and place of the meeting in that same
12 email, correct?

13 MR. MALLOF: That is correct.

14 MR. KLINE: All right. And then
15 your response to that was email that's labeled
16 C on the first page, correct?

17 MR. MALLOF: The next day.

18 MR. KLINE: The next day. "Hope
19 you and your family" --

20 MR. MALLOF: Not at midnight.

21 Yes.

22 MR. KLINE: All right. It's 4:35

1 p.m. on February 24th, correct?

2 MR. MALLOF: Yes, sir.

3 MR. KLINE: And at that point you
4 wrote and said, "Hope you and the family
5 survived the snow that just hit just after
6 just sent your note. Would be delighted to
7 speak with you or Jamie by phone first.
8 Please call anytime." And you gave your phone
9 number, correct?

10 MR. MALLOF: Yes.

11 MR. KLINE: All right. Above that
12 is an email dated February 24, 2010 at 6:18
13 p.m., correct?

14 MR. MALLOF: Yes.

15 MR. KLINE: All right. And do you
16 concede that you received that email?

17 MR. MALLOF: Yes, it verifies we
18 spoke also --

19 MR. KLINE: All right.

20 MR. MALLOF: -- at the top.

21 Spoke.

22 MR. KLINE: And it also indicates

1 that you did not believe it was time was to
2 revisit the voluntary agreement for Hank's
3 Oyster Bar, correct?

4 MR. MALLOF: That is incorrect.

5 MR. KLINE: That's incorrect?

6 MR. MALLOF: That's incorrect.

7 That is incorrect because it does not
8 accurately reflect the conversation that we
9 had.

10 MR. KLINE: Okay.

11 MR. MALLOF: You're mixing written
12 correspondences that I believe are cherry-
13 picked with the phone calls that also
14 occurred.

15 MR. KLINE: Well, is it your
16 assertion --

17 MR. MALLOF: I'd be glad to try to
18 recollect what you and I spoke about at length
19 that day.

20 MR. KLINE: Right. So is it your
21 assertion that these series of emails; A, B,
22 C and D, that there's other emails in between

1 the times that these emails were written?

2 MR. MALLOF: Well, I wouldn't
3 know, sir. I haven't seen the affidavit that
4 was sworn so that I could go and check my
5 Outlook for you today.

6 MR. KLINE: Madam Chairperson --

7 MR. MALLOF: My --

8 MR. KLINE: -- I would ask you to
9 direct the witness to answer the question.

10 MR. MALLOF: My impression is that
11 there are --

12 CHAIRPERSON MILLER: Okay.

13 MR. MALLOF: -- probably other
14 emails, yes.

15 MR. KLINE: Probably or there are?

16 MR. MALLOF: I think that sitting
17 here and not having seen the affidavit, and
18 having these presented to me in this manner
19 and having no reference made yet to our phone
20 conversations that at least were more than
21 one, or at least one, it's a little unfair,
22 so --

1 MR. KLINE: Mr. Mallof, have I
2 asked you any questions about an affidavit?

3 MR. MALLOF: No.

4 MR. KLINE: Okay. Just so that
5 we're clear for the record.

6 MR. MALLOF: First of all --

7 MR. KLINE: Now looking at Exhibit
8 3 --

9 MR. MALLOF: Yes.

10 MR. KLINE: -- that was your
11 response to letter D on Exhibit 2, wasn't it?

12 MR. MALLOF: It was at least one,
13 yes. I don't know, I think there may have
14 been more.

15 MR. KLINE: All right. Now the
16 fact of the matter was at that time you were
17 unwilling to meet to address termination of
18 the voluntary agreement, correct?

19 MR. MALLOF: That is not true.

20 MR. KLINE: All right.

21 MR. MALLOF: That is patently
22 untrue.

1 MR. KLINE: Okay. What evidence
2 do you have that you responded to any of these
3 emails or this letter and sought to schedule
4 a meeting to revisit the voluntary agreement?

5 MR. MALLOF: Given that this is
6 the sequencing you are representing today, I
7 have nothing to offer at this moment because
8 it was never represented, your (A) prong
9 argument, and this is absolutely unfair.
10 Regarding conversations that we had, I'm
11 willing to go into that with you now, if you'd
12 like.

13 MR. KLINE: I haven't asked you
14 that. I've asked you what evidence you have
15 that you responded to either the emails or the
16 letter with any offer to meet concerning the
17 voluntary agreement.

18 MR. MALLOF: I asked that we
19 receive a proposal from you of some sort that
20 I could share, that was of substance, with the
21 six people I believe in the middle of an
22 historic snowstorm before we sat down. And to

1 propose working hours, on a weekday at 10:00
2 a.m., I mean, that's not even cooperative on
3 a scheduling basis. I specifically asked you,
4 I believe, by phone, sir, at least twice to
5 please just, you know, send us over a little
6 proposal of what you wanted to do so I can at
7 least chat with the other six people.

8 MR. KLINE: So it is your position
9 you were unwilling to meet until you got a
10 proposal, is that --

11 MR. MALLOF: I didn't say that.
12 No, it is not that.

13 MR. KLINE: That's not what your
14 testimony is?

15 MR. MALLOF: That's not -- I
16 didn't -- I don't -- that's not my testimony
17 that -- I'm not saying say that, no.

18 MR. KLINE: Okay. So what efforts
19 did you make to meet?

20 MR. MALLOF: Mr. Kline, I asked
21 you on two occasions. I believe at least it
22 certainly occurred on the spoke conversation

1 that you please send over something that we
2 could take a look at.

3 MR. KLINE: Okay. So having
4 something to take a look at was in your mind
5 the first step towards having a meeting, is
6 that correct?

7 MR. MALLOF: Well, yes, on a
8 business-like basis and certainly I think I
9 also mentioned in that call that it was not
10 easy to just pick one date and one time in
11 order to get together.

12 MR. KLINE: All right.

13 MR. MALLOF: On a business-like
14 basis I believe you and I spoke about, in all
15 fairness, Mr. Kline, the business-like
16 preference to get a little something, a little
17 meat on the bone so we could talk about it
18 among the six of us, decide who could attend
19 and propose some dates. None of this is
20 reflected in these four emails. And I guess
21 I've learned something here about paper trail.
22 And you did a fair thing in regard to

1 presenting these, but these are not all that
2 occurred by far.

3 MR. KLINE: So it's your testimony
4 that you have other emails in addition to the
5 ones that are presented here today --

6 MR. MALLOF: I don't know for a
7 fact --

8 MR. KLINE: -- excuse me, may I
9 finish my question, please -- that you have
10 other emails in addition to those that were
11 presented here today that relate to scheduling
12 a meeting?

13 MR. MALLOF: No, I didn't say
14 that. I believe absent the ability to see
15 this line of argument as required by law, then
16 I mean, I can't sit here today. I know we've
17 had conversations, Mr. Kline, and you know
18 that, too. And I don't see those here.

19 MR. KLINE: So I want to make sure
20 that I'm clear --

21 MR. MALLOF: Yes.

22 MR. KLINE: -- or that you're

1 clear for the Board. Is it your contention
2 that there are other emails that were
3 responsive or that relate to efforts to meet
4 regarding either termination or amendment of
5 the voluntary agreement?

6 MR. MALLOF: I believe there may
7 be other emails that -- I don't know for a
8 fact, but there may be other emails where I
9 suggested send us something over. And this
10 certainly occurred in telephone calls that at
11 least occurred at least on one occasion here.
12 That was it. And I think I also mentioned in
13 those phone calls that it was uncomfortable
14 for me to try to get the six people together
15 precisely at 10:00 a.m. on a weekday absent a
16 little bit of a PowerPoint proposal or
17 something from you. I am certain those
18 conversations occurred with you.

19 MR. KLINE: Mr. Mallof, I forgot,
20 what do you do professionally?

21 MR. MALLOF: I'm a -- well, I'm a
22 telecommunications consultant.

1 MR. KLINE: Okay. You're a
2 professional, correct?

3 MR. MALLOF: Yes.

4 MR. KLINE: All right. And you
5 received an email from me, which you've
6 conceded that you received --

7 MR. MALLOF: Yes.

8 MR. KLINE: -- dated February
9 24th, 2010 at 6:18 p.m., correct?

10 MR. MALLOF: Oh, yes.

11 MR. KLINE: Which says when we
12 spoke today, you indicated you do not believe
13 it is time to revisit the voluntary agreement
14 for Hank's Oyster Bar. And you --

15 MR. MALLOF: I remember this
16 email.

17 MR. KLINE: -- conceded that you
18 received it, correct?

19 MR. MALLOF: I remember this email
20 very directly.

21 MR. KLINE: As a professional --

22 MR. MALLOF: Yes.

1 MR. KLINE: -- is it your
2 contention that you didn't believe it
3 appropriate to respond in writing that what
4 you're now saying today is not true and
5 accurate, was not appropriate, or not prudent?

6 MR. MALLOF: Mr. Kline, I'm sorry,
7 repeat the question, please? I know you want
8 a yes/no, but please repeat it.

9 MR. KLINE: The question is
10 reading this email as a professional, is it
11 your contention that you relied on a telephone
12 conversation to respond to this email, which
13 you today contend is inaccurate?

14 MR. MALLOF: I remember very
15 precisely looking at this and saying very
16 clever that you summarized it that strongly.
17 And I remember us leaving that call with my
18 request that you please send something over
19 for me to share with the other five people.
20 And that's not unreasonable, something with a
21 little bit of meat on the bone. So this is
22 like 10 percent, maybe 20 percent of the

1 story.

2 MR. KLINE: Okay. So, but the
3 question to you is you didn't follow this up
4 with an email saying no, no, no, that's not
5 what was said.

6 MR. MALLOF: I don't know that
7 today.

8 MR. KLINE: Okay.

9 MR. MALLOF: I can't say that
10 today.

11 MR. KLINE: Are you saying that
12 you did?

13 MR. MALLOF: I don't know that. I
14 believe that there may be other emails, and I
15 know for certain that there are other
16 telephone calls. And none of that -- I mean,
17 I think you'd be in a very good position and
18 have this kind of tone if I had like seen the
19 affidavit.

20 MR. KLINE: No further questions
21 at this time.

22 MR. MALLOF: Thank you.

1 MR. KLINE: Thank you.

2 CHAIRPERSON MILLER: Cross?

3 MR. HIBEY: Well, I don't know how
4 you want to handle this. Because if you have
5 more witnesses, I can just put him back on
6 later. Or if you're not going to have any
7 more witnesses, we can just go straight on to
8 that.

9 CHAIRPERSON MILLER: Well, I would
10 say if you have cross related to the direct
11 testimony, you should ask questions related to
12 that. Don't ask questions beyond what Mr.
13 Kline --

14 MR. HIBEY: Okay. Well, at the
15 time I don't have any questions.

16 CHAIRPERSON MILLER: Okay. Board
17 questions?

18 MEMBER ALBERTI: Yes, I do.

19 CHAIRPERSON MILLER: You can
20 start.

21 MEMBER ALBERTI: Ah, Mr. Mallof.
22 Okay. I'm looking at this January 26th, 2010

1 letter that was sent to you and Mr. Rieffel.

2 MR. MALLOF: Yes, sir.

3 MEMBER ALBERTI: You see it. I'm
4 not sure -- it's labeled Exhibit 1. All
5 right? Did you discuss this letter with the
6 other protestants to the 2005 -- the other
7 signatories to the 2005 voluntary agreement?

8 MR. MALLOF: I believe I discussed
9 it, sir, with at least the majority of them,
10 yes. I think the one option might not have
11 been Ms. Meehan because of the snowstorm, and
12 also she had not been as active on this and
13 had signed over her authority. But I believe
14 everyone else, to the best of my knowledge.

15 MEMBER ALBERTI: So you discussed
16 it with Mr. Johansson, Mr. Assano and Mr.
17 Steele?

18 MS. STEELE: Ms. Steele.

19 MEMBER ALBERTI: I'm sorry. I'm
20 sorry.

21 MS. STEELE: Thank you.

22 MEMBER ALBERTI: I apologize. And

1 Ms. Steele?

2 MR. MALLOF: I believe so.

3 MEMBER ALBERTI: Okay.

4 MR. MALLOF: And then we had a
5 conclusion I think also.

6 MEMBER ALBERTI: All right. So it
7 was your impression that they were aware of
8 this?

9 MR. MALLOF: My impression today
10 is that at least five of the six. Maybe
11 Susan. I think probably --

12 MEMBER ALBERTI: Did you provide
13 them copies of this letter?

14 MR. MALLOF: I think so.

15 MEMBER ALBERTI: You did not?

16 MR. MALLOF: I think so.

17 MEMBER ALBERTI: Oh, you did?

18 MR. MALLOF: Oh, I at least --
19 this was a short letter. I at least read it
20 or most likely -- the best way to do is
21 forward things on, yes.

22 MEMBER ALBERTI: Okay. Thank you.

1 Okay. Now you have indicated in your
2 testimony that you thought it was prudent --
3 and I think maybe in your words -- I'll
4 categorize it this way, necessary to have a
5 proposal on the table to really begin the
6 negotiations. Is that true?

7 MR. MALLOF: I think so. I mean,
8 looking at the letter, it's very, very general
9 and I think I asked for a little bit of meat
10 on the bone; it's typical for me, a couple of
11 PowerPoints and an agenda.

12 MEMBER ALBERTI: Okay. And, well,
13 I was under the impression that when you said
14 a little meat on the bone, that you wanted
15 sort of an initial proposal for a voluntary
16 agreement. Is that -- or talking points for
17 a voluntary -- well, what were you looking
18 for?

19 MR. MALLOF: Well, I mean -- and I
20 hadn't had an opportunity to think about this
21 letter more, but as I recollect this letter,
22 you know, adjacent space, I mean, sort of how

1 much are you looking for and, you know, what's
2 the plan? Just generally what's the plan?
3 And I'm not sure that was discussed --

4 MEMBER ALBERTI: So you were
5 looking for information on what her plan was
6 for expansion?

7 MR. MALLOF: No, the substantial
8 change. I mean, what exactly is the
9 substantial change? I think that was it. I
10 mean, nightclub, outside seating, lounge?
11 It's now a lounge, which I'm told is pretty
12 nice. Summer garden was requested and --

13 MEMBER ALBERTI: Well, I'm
14 thinking I got your answer. So it's your
15 contention that at this point in the
16 conversation you had not been presented with
17 any details as to what the licensee had
18 planned?

19 MR. MALLOF: Well, yes, that's
20 correct. And I think in order to come back
21 and offer dates rather than a single one -- I
22 was hoping to -- again, this is sort of

1 herding stray cats on our end. And we get
2 criticized for only having six signatories.
3 For the expansion we had 20 signatories. It's
4 the same watch word. You have to herd the
5 stray cats and --

6 MEMBER ALBERTI: Okay.

7 MR. MALLOF: -- let your fellow
8 neighbors know what is being asked, yes.

9 MEMBER ALBERTI: At the time of
10 these conversations were you aware of the
11 statute, the requirements of the statute --

12 MR. MALLOF: No.

13 MEMBER ALBERTI: -- for
14 terminating a voluntary agreement?

15 MR. MALLOF: Not at all. And
16 that's in the record of the last time around
17 here.

18 MEMBER ALBERTI: Pardon? What was
19 that?

20 MR. MALLOF: That's on the record
21 with Mr. Brodsky. That question was asked by
22 Mr. Brodsky the last --

1 MEMBER ALBERTI: You weren't aware
2 of --

3 MR. MALLOF: I was unaware, yes.

4 MEMBER ALBERTI: Okay. And it's
5 your contention that Mr. Kline did not respond
6 to your request other -- did not respond in
7 any positive way to your request for
8 information about --

9 MR. MALLOF: I believe we were
10 talking past each other. He did not. In at
11 least I believe two phone calls I said,
12 Andrew, send something over. And I
13 specifically -- we covered it that day I know
14 in the email because I said be delighted to
15 speak with you by phone and we would chat it.
16 It was, you know, give us a little something.

17 MEMBER ALBERTI: Did you think to
18 send Mr. Kline an email outlining the types of
19 information you were looking for?

20 MR. MALLOF: No, I didn't. No,
21 because I think it's his proposal to make.
22 And we respectfully requested that they simply

1 send a little something along that would
2 summarize what they wanted to do. I would
3 communicate it with the six -- with the other
4 five people and then we could pick some dates.
5 Absent that, I wasn't comfortable trying to
6 get something going where we didn't know what
7 they were really seeking. And it came across
8 a couple of occasions, my not knowing the
9 statute, that we were --

10 MEMBER ALBERTI: Mr. Mallof, I'm
11 going to --

12 MR. MALLOF: Yes, sorry.

13 MEMBER ALBERTI: -- share with you
14 my thoughts right now.

15 MR. MALLOF: Yes, please.

16 MEMBER ALBERTI: And they are that
17 I don't really understand what you were asking
18 Mr. Kline to give you.

19 MR. MALLOF: Okay.

20 MEMBER ALBERTI: All right? And
21 so I'm at a quandary here as to understand why
22 you didn't -- given this categorization that

1 you were talking past each other, why you
2 didn't take the steps of sending an email to
3 Mr. Kline to say, look, we would like these
4 bits of information, these categories of
5 information before we proceed.

6 MR. MALLOF: I believe I got
7 pretty specific verbally. I agree with you,
8 sir, I did not put it in an email, not that I
9 see here. I could go take a look. I doubt
10 it. I believe he and I talked twice, at
11 least.

12 MEMBER ALBERTI: Twice?

13 MR. MALLOF: I think at least
14 twice.

15 MEMBER ALBERTI: And what were the
16 topics of those conversations?

17 MR. MALLOF: Well, send something
18 over if you want to do something. I'd be glad
19 to share with the other five.

20 MEMBER ALBERTI: So we have one.
21 Well, we know that he responded in an email to
22 one of your conversations.

1 MR. MALLOF: Yes.

2 MEMBER ALBERTI: That was on
3 January 24th. Did you have a subsequent
4 conversation to February 24th?

5 MR. MALLOF: I think we had a
6 couple of conversations. I don't -- I'm not
7 disputing -- well --

8 MEMBER ALBERTI: Well, you just
9 said --

10 MR. MALLOF: Well, I'm not
11 disputing B. And again, I feel quite -- well,
12 it's not comfortable being put upon with the
13 format here, but okay. I don't think -- well,
14 nothing happened -- no call happened between
15 B and C. I either called him or he called me.
16 He probably called me. So I think the second
17 conversation would have occurred quite
18 possibly as a follow-up to this. And I should
19 have put it in writing.

20 MEMBER ALBERTI: And what was in
21 that --

22 MR. MALLOF: I'm not saying I

1 didn't.

2 MEMBER ALBERTI: -- conversation
3 subsequent to B?

4 MR. MALLOF: Subsequent to -- yes.

5 MEMBER ALBERTI: And what was the
6 nature of that conversation?

7 MR. MALLOF: Well, I believe I
8 said send -- put a little meat on the bone and
9 I'll share it with the people and we'll try to
10 schedule a date.

11 MEMBER ALBERTI: But you only
12 categorized it as --

13 MR. MALLOF: Otherwise, I don't
14 see -- I think he's close here, otherwise, I
15 don't see a reason to get together, if, you
16 know, he'd make a little proposal.

17 MEMBER ALBERTI: Well, what I'm
18 wondering, did you give him any specifics? I
19 mean, a little meat on the bone?

20 MR. MALLOF: I think I did. I
21 usually do.

22 MEMBER ALBERTI: You're testifying

1 you told him you want a little meat on the
2 bone.

3 MR. MALLOF: Yes.

4 MEMBER ALBERTI: Did you give him
5 any --

6 MR. MALLOF: I think I did.

7 MEMBER ALBERTI: -- specifics?

8 MR. MALLOF: I think I did, sir.
9 Yes.

10 MEMBER ALBERTI: You think you
11 did?

12 MR. MALLOF: It's my manner, yes,
13 to ask.

14 MEMBER ALBERTI: And what were
15 those specifics?

16 MR. MALLOF: Well, I can't --

17 MEMBER ALBERTI: Okay. Maybe
18 after Mr. Hibey's questioning I'll better
19 understand it.

20 MR. MALLOF: Thank you.

21 MEMBER ALBERTI: So I'll pause
22 here. Thank you.

1 MR. MALLOF: Thank you.

2 CHAIRPERSON MILLER: Yes, Mr.

3 Nophlin?

4 MR. HIBEY: Can I ask a follow-up
5 question?

6 MEMBER NOPHLIN: Not yet. The
7 Board still has some questions, but you'll get
8 a chance to.

9 Mr. Nophlin?

10 MEMBER NOPHLIN: Yes, I'm sorry,
11 again, can I just piggyback on the Board's
12 concern? Do you have in your record any kind
13 of emails, period, or any kind of
14 correspondence to Mr. Kline?

15 MR. MALLOF: Oh, yes. Yes.

16 MEMBER NOPHLIN: You have some
17 that you could present to the Board?

18 MR. MALLOF: I think I can do
19 that, yes. Not at this moment. I hadn't seen
20 the affidavit, sir. Hadn't seen -- I would be
21 glad to look and provide something for the
22 Board, yes.

1 MEMBER NOPHLIN: Okay. That's all
2 I have.

3 CHAIRPERSON MILLER: I just want
4 to ask you: You were the appellant in the
5 court of appeals case, is that correct?

6 MR. MALLOF: Yes.

7 CHAIRPERSON MILLER: That's the
8 subject of this remand?

9 MR. MALLOF: Yes, ma'am.

10 CHAIRPERSON MILLER: Okay. So you
11 are aware that the Board remanded the case for
12 the two issues that we discussed, ones, you
13 know, that were not addressed before. Okay?

14 MR. MALLOF: Yes.

15 CHAIRPERSON MILLER: And one of
16 them dealt with good faith negotiations. So
17 therefore, are you prepared -- well, I guess
18 we'll see in your case. It sounds like you
19 didn't think about checking your emails or
20 anything like that to bring forth any evidence
21 regarding the issues on remand.

22 MR. MALLOF: Well, my

1 understanding of good faith negotiations as a
2 layperson is a willingness to speak and to
3 meet, but not necessarily come to an
4 agreement. And I expressed a willingness to
5 speak and understand what they wanted to do in
6 order to schedule a meeting, yes. But that as
7 nothing came by, I believe I did indicate that
8 it's a little hard to get the group together
9 on weekdays at 10:00 if indeed you haven't
10 provided some specifics.

11 CHAIRPERSON MILLER: Okay. So
12 your testimony is that you expressed a
13 willingness to meet in telephone
14 conversations?

15 MR. MALLOF: Oh, absolutely.

16 CHAIRPERSON MILLER: Okay.

17 MR. MALLOF: And I -- for today, I
18 guess I would have also liked to check the
19 weather, because I think there were some other
20 things going on here, but okay. Yes.

21 CHAIRPERSON MILLER: There was
22 weather on --

1 MR. MALLOF: Yes, I don't recall.

2 CHAIRPERSON MILLER: -- only so
3 many days.

4 MR. MALLOF: Yes, I understand
5 that.

6 CHAIRPERSON MILLER: So not that I
7 want to testify.

8 MR. MALLOF: No, I understand.

9 CHAIRPERSON MILLER: But what
10 happened? If there was this willingness to
11 meet, are you saying that it never happened
12 because you didn't get the specific proposal
13 you had asked for?

14 MR. MALLOF: Yes, I think I wanted
15 to -- not knowing the part of the statute, I
16 wanted to share something meaningfully with
17 the other people and then decide what days
18 we'd be available and at what possible times
19 and then come back. The offering of a
20 specific day and time was not really -- was
21 not easy to work with.

22 CHAIRPERSON MILLER: Okay.

1 MR. MALLOF: Especially during a
2 weekday when people are trying to earn
3 livings, including the licensee.

4 CHAIRPERSON MILLER: So the date,
5 you didn't offer a counter date because you
6 didn't get the specifics?

7 MR. MALLOF: Yes, I wanted to go
8 on an orderly basis to the other protestants,
9 to the other signatories.

10 CHAIRPERSON MILLER: Okay.

11 MR. MALLOF: And I also believe I
12 at least once, if not twice, said you can
13 contact them directly, too. And I -- was that
14 in one of the emails as well where I offered
15 that? I believe I offered in one or both of
16 -- a couple of emails where, you know,
17 certainly I didn't want to be a conduit and
18 that they should -- you should feel free to
19 contact them as well directly.

20 CHAIRPERSON MILLER: Okay.

21 MEMBER ALBERTI: I have some
22 follow-up questions.

1 CHAIRPERSON MILLER: All right.

2 Any other Board questions?

3 MEMBER ALBERTI: Yes.

4 CHAIRPERSON MILLER: Yes.

5 MEMBER ALBERTI: Mr. Mallof, just
6 a few other questions.

7 MR. MALLOF: Yes.

8 MEMBER ALBERTI: Were you aware of
9 the issues surrounding the renewal of the
10 moratorium and changes that were made to the
11 moratorium?

12 MR. MALLOF: Oh, yes.

13 MEMBER ALBERTI: Specifically
14 that --

15 MR. MALLOF: Yes.

16 MEMBER ALBERTI: -- the moratorium
17 would allow expansions?

18 MR. MALLOF: Yes, substantial -- I
19 think there were a couple of substantial
20 changes that were allowed.

21 MEMBER ALBERTI: Okay.

22 MR. MALLOF: Vaguely defined, yes.

1 Anything, really.

2 MEMBER ALBERTI: Do you follow
3 what happens in the ANC?

4 MR. MALLOF: Little bit.

5 MEMBER ALBERTI: Okay.

6 MR. MALLOF: I've been out to the
7 meetings.

8 MEMBER ALBERTI: Are you aware of
9 some of the goings on in the community?

10 MR. MALLOF: Oh, yes.

11 MEMBER ALBERTI: Were you at all
12 aware that Ms. Leeds was interested in
13 expanding next door?

14 MR. MALLOF: Only by these
15 letters. Only by these emails.

16 MEMBER ALBERTI: Only by which
17 emails?

18 MR. MALLOF: Only by the email,
19 the letter of January 26th.

20 MEMBER ALBERTI: Okay.

21 MR. MALLOF: Which actually we
22 talked about it and we thought it was --

1 MEMBER ALBERTI: So you --

2 MR. MALLOF: -- could be quite a
3 good thing.

4 MEMBER ALBERTI: Okay. So you --

5 MR. MALLOF: There's nothing
6 negative about it.

7 MEMBER ALBERTI: So you knew at
8 least that much?

9 MR. MALLOF: From this? Oh, yes.

10 MEMBER ALBERTI: Okay. Thank you.

11 MR. MALLOF: Yes.

12 MEMBER ALBERTI: No further
13 questions.

14 CHAIRPERSON MILLER: Just we
15 talked about it and thought it was a good
16 thing. Is that what you just said?

17 MR. MALLOF: No, that it could be
18 a good thing. Yes, more growth supporting our
19 businesses, having a vibrant community,
20 ambience, all those things are good things.
21 We've never questioned those. Yes. And
22 Hank's had been doing pretty well under the

1 voluntary agreement, so, yes. And it's not as
2 if receiving this email, ma'am -- it's not as
3 if receiving this letter was bad news. Not at
4 all.

5 CHAIRPERSON MILLER: Okay.

6 MEMBER ALBERTI: Mr. Mallof, had
7 you gone back and looked at the voluntary
8 agreement after you got this letter?

9 MR. MALLOF: I think I had it
10 pretty well --

11 MEMBER ALBERTI: Okay. So you
12 knew what the voluntary agreement was, right?

13 MR. MALLOF: Oh, yes.

14 MEMBER ALBERTI: Did you
15 contemplate how that voluntary agreement might
16 affect her new plans?

17 MR. MALLOF: I didn't know what
18 the new plans were other than to hear
19 expansion. And I was hoping, sir, it might be
20 a purchase of Trio and move into Trio. And I
21 mentioned that to Ms. Leeds several times,
22 that rather than moving eastward into --

1 directly abutting a residential row that it
2 would have been, and still should be, super if
3 she just -- Mr. Mallios took over Trio.

4 MEMBER ALBERTI: So when did you
5 mention it to her?

6 MR. MALLOF: They have huge seats.

7 MEMBER ALBERTI: When did you
8 mention it to her, just at the time of --

9 MR. MALLOF: We talked about it
10 off and on.

11 MEMBER ALBERTI: -- this exchange?

12 MR. MALLOF: No, we've talked
13 about it off and on over the last --

14 MEMBER ALBERTI: As opposed to
15 moving the other direction?

16 MR. MALLOF: Yes, I told everyone
17 I could think of in the community, too, that,
18 yes, that --

19 MEMBER ALBERTI: Well, what I'm
20 trying to --

21 MR. MALLOF: -- half of the
22 challenge is --

1 MEMBER ALBERTI: -- know that
2 she's contemplating moving in the other
3 direction, not towards Trio?

4 MR. MALLOF: No. No, all I knew
5 was this and I think some of the conversations
6 we had was let's see what she's proposing. I
7 mean, if it's intended in the Trio direction,
8 that could be very good. I remember having
9 that conversation.

10 MEMBER ALBERTI: Did you ask Mr.
11 Kline that specifically?

12 MR. MALLOF: I don't think that
13 one, no.

14 MEMBER ALBERTI: Okay. Did you
15 ask him any other questions about his plan,
16 about their plans?

17 MR. MALLOF: Only to put something
18 I think a little substantive in writing, you
19 know, like a PowerPoint. Not complicated.

20 MEMBER ALBERTI: Thank you very
21 much.

22 MR. MALLOF: Thank you.

1 CHAIRPERSON MILLER: Okay. Follow
2 up? Redirect?

3 MR. KLINE: It's mine.

4 CHAIRPERSON MILLER: Okay. I'm
5 sorry.

6 MR. KLINE: My witness.

7 CHAIRPERSON MILLER: It's your
8 witness, right. Okay.

9 MR. KLINE: Mr. Mallof, do you
10 still have Applicant's 1 in front of you?

11 MR. MALLOF: This, sir?

12 MR. KLINE: Yes.

13 MR. MALLOF: Yes.

14 MR. KLINE: Would you read the
15 last sentence of the letter, please?

16 MR. MALLOF: "Please advise as to
17 whether you are amenable to such a meeting and
18 provide some dates and times when you might be
19 available."

20 MR. KLINE: Okay. And this letter
21 didn't propose any specific date, did it?

22 MR. MALLOF: No, not at all.

1 MR. KLINE: Did you ever propose
2 any specific dates for a meeting?

3 MR. MALLOF: I think I established
4 that we'd like to see something a little bit
5 in writing so that I could share with the --
6 I'm repeating myself. Sorry.

7 MR. KLINE: So which was it? Was
8 it that you wanted to see something in writing
9 or that you needed several dates to meet?
10 You've given both in response --

11 MR. MALLOF: No, I think I've been
12 very clear. I believe I've been very clear
13 here that we wanted to see a little something
14 in writing, a little meat on the bone with
15 maybe a PowerPoint; I believe I said that to
16 you a couple of times, and that I would share
17 with the other signatories and we would
18 consider some dates, yes.

19 MR. KLINE: So basically --

20 MR. MALLOF: I would like to see
21 something first and kind of like what would
22 you like to talk about? There's no agenda

1 here, Andrew. There's nothing.

2 MR. KLINE: All right.

3 MR. MALLOF: I understand that
4 you're calling us to a meeting.

5 MR. KLINE: Mr. Mallof?

6 MR. MALLOF: Yes?

7 MR. KLINE: There's no question
8 pending. There will be.

9 MR. MALLOF: Sorry.

10 MR. KLINE: Look again at Exhibit
11 1 and read the first sentence of the second
12 paragraph.

13 MR. MALLOF: "Hank's Oyster Bar
14 desires to expand its premises to include
15 seating in the adjacent space." Yes. "Along
16 with using additional outside seating abutting
17 the adjacent space." Yes.

18 MR. KLINE: All right. So
19 that's --

20 MR. MALLOF: Yes.

21 MR. KLINE: -- what we told you
22 what the substance of the meeting was to be

1 about, didn't it?

2 MR. MALLOF: Well, I didn't know
3 which space. I mean, just at a very basic
4 level here, Mr. Kline, meat on the bone would
5 define adjacent space.

6 MR. KLINE: All right.

7 MR. MALLOF: Mr. Mallios fought
8 very hard --

9 MR. KLINE: Mr. Mallof, there's no
10 question pending. So that was certainly a
11 single question that you could have asked
12 during the several telephone conversations
13 that you testified to, correct?

14 MR. MALLOF: I didn't say several
15 and I don't recall asking it. I asked for a
16 proposal.

17 MR. KLINE: All right. So your
18 position is you had to have a PowerPoint
19 before there could be a meeting?

20 MR. MALLOF: Something.

21 MR. KLINE: And the description in
22 the January 26th letter was not sufficient for

1 you?

2 MR. MALLOF: I felt that if you
3 wanted me, not unfairly, to contact the other
4 signatories, that it would be businesslike for
5 me to see a little something more from you and
6 then ask them for some dates, correct.

7 MR. KLINE: All right.

8 MR. MALLOF: I think I've said
9 that five times now.

10 MR. KLINE: Okay. And it's also
11 your testimony that in response to the setting
12 of specific dates; March 4th and March 10th,
13 that you -- and you said it again now, that
14 you came back and asked for more information,
15 meat on the bones, as you've called it,
16 correct?

17 MR. MALLOF: I am definitely -- I
18 am definitely -- I definitely recollect me
19 saying to you, Andrew, one date and one time
20 is not good. And you came back on D and said
21 I am keeping March 10th open.

22 MR. KLINE: Okay.

1 MR. MALLOF: So again, I don't say
2 that perhaps you weren't trying, but I believe
3 that tone of that sentence indicates that
4 rifle shotting one date and one time without
5 you being responsive to me saying please send
6 us a little something and let me talk and then
7 I'll check with five other people to schedule
8 is a more businesslike approach.

9 MR. KLINE: All right. So --

10 MR. MALLOF: So --

11 MR. KLINE: -- your request for
12 additional information, is that what's
13 contained in the rambling four-paragraph email
14 that is Applicant's Exhibit 3 dated Thursday,
15 February 25, 2010?

16 MR. MALLOF: I take offense. You
17 can retract that.

18 MR. KLINE: I'll rephrase it.

19 CHAIRPERSON MILLER: Wait. And
20 let me just say this: I think this topic has
21 been pretty thoroughly covered.

22 MR. KLINE: Right.

1 CHAIRPERSON MILLER: So I don't
2 know how --

3 MR. KLINE: We're fine. Thank
4 you.

5 CHAIRPERSON MILLER: Okay.

6 MR. MALLOF: Thank you.

7 CHAIRPERSON MILLER: Okay. Thank
8 you.

9 MR. KLINE: No further questions.

10 CHAIRPERSON MILLER: Mr. Hibey,
11 did you have any cross --

12 MR. HIBEY: It's his witness
13 and --

14 CHAIRPERSON MILLER: You'll have
15 him back --

16 MR. HIBEY: I don't have anything
17 now.

18 CHAIRPERSON MILLER: Okay. Good.
19 So we're finished for now with you. Thank
20 you.

21 Do you have any other witnesses?

22 MR. KLINE: The only thing we have

1 is we would request that the Board take
2 administrative notice Mr. Hibey's letter dated
3 June 7, 2010 to Mr. Brodsky, the then-
4 chairperson of the Alcoholic Beverage Control
5 Board. Mr. Mallof's letter. Mr. Mallof's
6 letter dated June 7th, 2010. It's actually
7 from Mr. Mallof, Mr. Rieffel. Then there are
8 several other names there. It's in the
9 Board's files. Specifically on the third
10 page, the very last paragraph references to
11 being -- effectively being summoned to a
12 meeting called by petitioner's counsel. We
13 would ask the Board to take administrative
14 notice of that letter, which is in the Board's
15 files and is penned by Mr. Mallof.

16 We would also ask the Board to
17 take administrative notice of the -- and it's
18 already actually been noted in the prior
19 hearing, but it's the March 30th, 2005
20 transcript of the initial hearing on the
21 application, and specifically pages 17 through
22 24, in which the licensee requests the Board

1 schedule a protest hearing. We would ask the
2 Board to take administrative notice of that
3 and we will tie it up in closing as to why
4 it's relevant.

5 CHAIRPERSON MILLER: Okay.

6 MR. KLINE: Oh, one more. And
7 lastly, we would ask the Board to take
8 administrative notice of the 2005 moratorium
9 for Dupont East which retained the moratorium
10 in place as it had been for the many years
11 before that, along with the 2009 Board order
12 amending that moratorium to allow lateral
13 expansion.

14 CHAIRPERSON MILLER: Okay.

15 MR. KLINE: And with that, we
16 rest.

17 CHAIRPERSON MILLER: Okay. Are
18 you all ready to go forward?

19 MR. HIBEY: I need just a quick
20 break. A few minutes? A short one.

21 CHAIRPERSON MILLER: Oh, you want
22 a five-minute break?

1 MR. HIBEY: Yes.

2 CHAIRPERSON MILLER: Okay. We'll
3 take a five-minute break.

4 (Whereupon, at 7:09 p.m. off the
5 record until 7:21 p.m.)

6 CHAIRPERSON MILLER: Okay. We're
7 back on the record.

8 Mr. Hibey, are you ready to go
9 forward?

10 MR. HIBEY: Yes, we'll call Mr.
11 Ralph Johansson.

12 CHAIRPERSON MILLER: Good evening.

13 MR. JOHANSSON: Good evening.

14 CHAIRPERSON MILLER: Would you
15 raise your right hand? Do you swear to tell
16 the truth, the whole truth, nothing but the
17 truth?

18 MR. JOHANSSON: I do.

19 CHAIRPERSON MILLER: Okay. Thank
20 you. Have a seat.

21 MR. HIBEY: Good evening. Could
22 you please state your name?

1 MR. JOHANSSON: Yes, my name is
2 Ralph Johansson.

3 MR. HIBEY: And where do you live?

4 MR. JOHANSSON: 1700 block of Q
5 Street.

6 MR. HIBEY: And are you one of the
7 signatories to the voluntary agreement --

8 MR. JOHANSSON: I am.

9 MR. HIBEY: -- in this matter?

10 MR. JOHANSSON: Yes.

11 MR. HIBEY: Were you involved with
12 discussions with the applicant related to the
13 termination of the voluntary agreement back in
14 2010?

15 MR. JOHANSSON: No.

16 MR. HIBEY: And did you refuse to
17 meet with the applicant or licensee at any
18 time in 2010?

19 MR. JOHANSSON: No.

20 MR. HIBEY: Can you tell me how
21 long you've lived in the neighborhood?

22 MR. JOHANSSON: Twenty years at

1 our house in Q Street.

2 MR. HIBEY: And can you describe
3 for me how the neighborhood changed from 2005
4 to now?

5 MR. JOHANSSON: I would say that
6 in 2005 up into the streetscape work, which I
7 think was 2010, there was some decline
8 because, as has been previously testified,
9 there were a couple of retail establishments
10 which moved to 14th Street. But since that
11 time, in my personal view, there has been a
12 great rejuvenation of the two-block area on
13 17th Street between P and R. The businesses
14 have come in. The drug stores have come in.
15 We certainly still have 2,500 alcohol serving
16 seats in that two-block area. And based on
17 the street traffic going by my house every
18 day, because it feeds from the Metro east, the
19 area is booming.

20 MR. HIBEY: So the number of
21 licenses is about the same from 2005 to now?

22 MR. JOHANSSON: I would say --

1 well, I'm not an ABC specialist, but I think
2 the number of licenses is probably about the
3 same and the number of seats are about the
4 same in both cases, and maybe a little higher,
5 but I'm not positive.

6 MR. HIBEY: And you mentioned a
7 streetscape. When did that happen?

8 MR. JOHANSSON: Well, you could
9 talk to the erstwhile ANC commissioners to get
10 the exact details, but I believe it was 2010,
11 thereabouts.

12 MR. HIBEY: It's finished?

13 MR. JOHANSSON: Oh, yes, and it's
14 done beautifully.

15 MR. HIBEY: Can you in any way
16 describe for us the change in the neighborhood
17 between 2005 and 2010 beyond what you've
18 already told us?

19 MR. JOHANSSON: Not really. I
20 mean, the streetscape came at a particular
21 point in time, but as has been previously
22 testified, there were two retailers that moved

1 to 14th Street in that time frame. But since
2 they moved there have been businesses that
3 have come in to the neighborhood, so the
4 neighborhood itself, in my view, is thriving.

5 MR. HIBEY: Okay. And just back
6 to the beginning again, you signed the
7 voluntary agreement?

8 MR. JOHANSSON: Yes.

9 MR. HIBEY: And you were never
10 contacted directly by the licensee about
11 terminating or amending the voluntary
12 agreement --

13 MR. JOHANSSON: No.

14 MR. HIBEY: -- correct?

15 MR. JOHANSSON: No.

16 MR. HIBEY: And you never refused
17 to meet?

18 MR. JOHANSSON: No.

19 MR. HIBEY: All right. No further
20 questions.

21 MR. KLINE: Mr. --

22 CHAIRPERSON MILLER: Yes, go

1 ahead. Yes.

2 MR. KLINE: Mr. Johansson, you
3 weren't the designated representative of the
4 protest group, were you?

5 MR. JOHANSSON: The members of the
6 protest group had given powers of attorney to
7 one or two people so they could participate if
8 they were able. If they were not, then their
9 representative through power of attorney would
10 be representing them.

11 MR. KLINE: So in effect in terms
12 of meeting about the voluntary agreement or
13 termination of the voluntary agreement, you
14 had delegated your rights to Mr. Mallof to Mr.
15 Rieffel, hadn't you?

16 MR. JOHANSSON: Well, if I were
17 unable to participate, they had that power;
18 that's correct.

19 MR. KLINE: All right.

20 MR. JOHANSSON: That's what powers
21 of attorney are.

22 MR. KLINE: Right. So that if one

1 were contacting the protest group about
2 terminating the voluntary agreement, it would
3 be expected that they would contact Mr.
4 Rieffel and Mr. Mallof, correct?

5 MR. JOHANSSON: Since we are all
6 signatories, I can't say that as a fact, no.

7 MR. KLINE: All right. Your group
8 is six, correct?

9 MR. JOHANSSON: I believe so.

10 MR. KLINE: All right. Are you
11 aware that in some cases there might be 50,
12 60, 70 protestants in a protest group?

13 MR. JOHANSSON: I've not heard of
14 that number, but I'm familiar with protest
15 groups that have been in the 20s, yes.

16 MR. KLINE: Okay. And in those
17 circumstances you wouldn't expect the licensee
18 to be expected to contact all 60, 70 or 80
19 protestants, would you?

20 MR. HIBEY: Objection.

21 MR. JOHANSSON: Sixty --

22 MR. HIBEY: Objection.

1 MR. JOHANSSON: -- is different
2 from six.

3 MR. KLINE: Wait.

4 MR. HIBEY: It's irrelevant. He's
5 talking about protest groups. We're talking
6 about signatories to the voluntary agreement.
7 He's not a member of the protest group.

8 MR. KLINE: I will rephrase the
9 question. Thank you.

10 CHAIRPERSON MILLER: You're not a
11 member of a protest group? Aren't you a
12 protestant here today?

13 MR. JOHANSSON: I'm a signatory to
14 the voluntary agreement.

15 CHAIRPERSON MILLER: Oh, you're
16 not a -- oh, you didn't protest?

17 MR. JOHANSSON: No, I'm a
18 signatory.

19 MR. HIBEY: None of us are
20 protestants.

21 MEMBER ALBERTI: All right. Mr.
22 Kline's going to rephrase.

1 CHAIRPERSON MILLER: Okay.

2 MR. KLINE: I'm going to rephrase
3 the question so it's clear.

4 CHAIRPERSON MILLER: Go ahead.
5 Sorry. Yes.

6 MR. KLINE: Thank you. So if a
7 protest group of let's say 80, just to pick a
8 number out of the air, entered into a
9 voluntary agreement and designated
10 representatives, all 80 would be parties,
11 correct? In your view. I'm not asking you to
12 give an opinion on the law. I'm just asking
13 you to give your view.

14 MR. JOHANSSON: Yes, they would.
15 And 6 is different from 80. I mean, you're
16 talking order of magnitude which just doesn't
17 equate.

18 MR. KLINE: Okay. But if that
19 were the case were you expect that the
20 licensee would be required to contact all 80
21 signatures about meetings?

22 MR. JOHANSSON: Well, in the case

1 of an 80, which is not our case --

2 MR. KLINE: Right.

3 MR. JOHANSSON: -- you may have a
4 point, Mr. Kline. You may. But 80 is
5 different from 6.

6 MR. KLINE: Okay. Now you
7 testified that today the neighborhood is
8 thriving, correct?

9 MR. JOHANSSON: Yes, I did.

10 MR. KLINE: All right. And part
11 of that thriving neighborhood is represented
12 by the expansion of what used to be Jack's and
13 now is Agora, correct?

14 MR. JOHANSSON: But there are -- I
15 can't give you the names of them, but Agora,
16 yes, is there.

17 MR. KLINE: Okay. And part of
18 that thriving neighborhood is represented by
19 the expansion of the Coney business to include
20 Little Serow, correct?

21 MR. JOHANSSON: Yes, I think
22 that's correct.

1 MR. KLINE: All right. So one of
2 the reasons that the neighborhood is thriving
3 is because there was a relaxation on the
4 restriction of lateral expansion, correct?

5 MR. JOHANSSON: That's an
6 assertion I just can't really answer.

7 MR. KLINE: All right.

8 MR. JOHANSSON: Clearly both of
9 them have made contributions to the
10 neighborhood.

11 MR. KLINE: And would that --

12 MR. JOHANSSON: Whether it was
13 because of what you're referring to, I can't
14 tell you because I'm not familiar with the
15 details.

16 MR. KLINE: Okay. But had they
17 not been able to expand, then they wouldn't
18 have been able to make those contributions,
19 correct?

20 MR. JOHANSSON: Obviously if they
21 hadn't been able to open, they wouldn't be
22 there.

1 MR. KLINE: Okay. Thank you. I
2 have no further questions.

3 CHAIRPERSON MILLER: Board
4 questions? Mr. Alberti?

5 MEMBER ALBERTI: Good evening, Mr.
6 Johansson.

7 MR. JOHANSSON: Good evening, Mr.
8 Alberti.

9 MEMBER ALBERTI: Okay. I don't
10 know where to start. Okay. You stated that
11 you did not meet with the licensee or their
12 representative --

13 MR. JOHANSSON: That's correct.

14 MEMBER ALBERTI: -- with regards
15 to their request to terminate the voluntary
16 agreement, is that correct?

17 MR. JOHANSSON: Yes.

18 MEMBER ALBERTI: You were here
19 present when Mr. Mallof testified that he
20 shared the January 26th, 2010 letter with you,
21 the letter from -- I guess from Ms. Leeds --
22 I guess from Mr. Kline on behalf of Ms. Leeds

1 informing the protestants -- or the signatures
2 -- well, informing Mr. Mallof and Mr. Rieffel
3 that they were planning to expand and wanted
4 to amend the voluntary agreement. Were you
5 aware of that letter?

6 MR. JOHANSSON: Yes. I can't tell
7 you for sure whether I actually saw the letter
8 or whether I saw a summary, but yes, I was
9 made aware of it by Mr. Mallof.

10 MEMBER ALBERTI: Were you aware
11 that they wanted to meet?

12 MR. JOHANSSON: I was aware and my
13 recollection is that they wanted changes or
14 expansion. I can't remember precisely,
15 because we're talking a least a couple years
16 back and I haven't thought about it recently.
17 And I can specifically remember communicating
18 to Mr. Mallof, based on 35 years of business
19 experience and dealing with negotiations and
20 third parties, that in my view, provided we
21 had some details about what was contemplated,
22 a meeting would be in order. But unless and

1 until the party proposing the changes or
2 expansion spelled out at least a little bit
3 was contemplated there wasn't much point in
4 having a meeting.

5 MEMBER ALBERTI: Okay. All right.
6 So you shared Mr. Mallof's view on that?

7 MR. JOHANSSON: That was the view
8 I expressed to Mr. Mallof.

9 MEMBER ALBERTI: Okay. So you
10 were aware that a meeting was desired, is that
11 correct?

12 MR. JOHANSSON: I honestly can't
13 remember because I can't remember if I saw the
14 letter or if I saw some kind of a summary in
15 an email. So I can't recall.

16 MEMBER ALBERTI: Oh.

17 MR. JOHANSSON: It would be the
18 logical assumption, but you know, you're
19 asking me under oath --

20 MEMBER ALBERTI: Okay.

21 MR. JOHANSSON: -- to swear to
22 something today that took place two years ago

1 in haste, and in rush, and in passing, and I
2 don't want to get myself into a perjury
3 situation.

4 MEMBER ALBERTI: Okay.

5 MR. JOHANSSON: I just don't
6 remember.

7 MEMBER ALBERTI: That's fine. I
8 understand. It's best to say you don't know
9 when you don't know.

10 Okay. Is it fair conclusion from
11 what I'm hearing that you sort of allowed Mr.
12 Mallof to handle the communications with the
13 licensee and their representative with respect
14 to this issue?

15 MR. JOHANSSON: Yes, I think
16 that's a fair conclusion.

17 MEMBER ALBERTI: Okay. So you
18 consciously sort of allowed him to take the
19 lead and be your representative, is that
20 correct?

21 MR. JOHANSSON: As far as the back
22 and forth and so forth, yes, I had a lot going

1 on and he was able and willing and probably
2 knew the situation better than I did, so, yes,
3 I think that's a fair conclusion.

4 MEMBER ALBERTI: So even though no
5 meeting happened that you're aware of -- well,
6 you knew that no meeting happening, is that
7 correct? Were you aware that no meeting
8 happened?

9 MR. JOHANSSON: I must have been
10 aware because if there had been a meeting, I
11 would have been either invited or briefed on
12 it before.

13 MEMBER ALBERTI: Okay. And you
14 took no action to find out why?

15 MR. JOHANSSON: No, because there
16 wasn't anything, at least to my knowledge, to
17 meet about and I was never aware of substance
18 which would have warranted a meeting.

19 MEMBER ALBERTI: Okay. Fair
20 enough. I'm going to go back now to the 2005
21 voluntary agreement that you're a signatory
22 to.

1 MR. JOHANSSON: Which I haven't
2 looked at since 2005, so you've got me there.

3 MEMBER ALBERTI: Well, then I'll
4 ask my questions. And you may not remember
5 much, but I will ask anyways. I will tell you
6 that in this voluntary agreement item 2 says
7 capacity. Applicant's capacity for the
8 interior of the establishment will be no more
9 than 65. That's 2.1. 2.2, the applicant
10 shall have seating for no more than 20 in its
11 sidewalk caf,. Do you remember how those
12 numbers were arrived at?

13 MR. JOHANSSON: No, I don't. I
14 don't recall.

15 MEMBER ALBERTI: Okay.

16 MR. JOHANSSON: It may have been
17 -- I mean, I do a lot of work with people that
18 want to open restaurants, so I'm very familiar
19 with the business plans. And it may well have
20 been that there were measurements taken as to
21 the number of square feet that seats take up
22 at tables. And but that's just pure

1 hypothesis.

2 MEMBER ALBERTI: So did you go
3 back and take a look at this voluntary
4 agreement when --

5 MR. JOHANSSON: No, I did not.

6 MEMBER ALBERTI: So you didn't
7 look into at all why they might be requesting
8 an amendment?

9 MR. JOHANSSON: I had no idea that
10 they were requesting an amendment. I didn't
11 know what they were requesting.

12 MEMBER ALBERTI: Mr. Mallof didn't
13 characterize that, make that characterization
14 to you when he --

15 MR. JOHANSSON: He said they
16 planned to --

17 MEMBER ALBERTI: -- told you about
18 the letter?

19 MR. JOHANSSON: My recollection is
20 is he said they --

21 MEMBER ALBERTI: Pardon?

22 MR. JOHANSSON: -- planned to make

1 some changes.

2 MEMBER ALBERTI: Okay.

3 MR. JOHANSSON: What they were, I
4 really didn't know.

5 MEMBER ALBERTI: And you didn't
6 ask Mr. Mallof anymore questions about that?

7 MR. JOHANSSON: I may have then,
8 but I don't recall.

9 MEMBER ALBERTI: Okay. Thank you.
10 No further questions.

11 CHAIRPERSON MILLER: Was it your
12 testimony that you wanted to hear more
13 information, like Mr. Mallof, before you would
14 meet with the licensee?

15 MR. JOHANSSON: My recollection,
16 Madam Chairman, based on 35 years of
17 negotiating, is that unless you have something
18 to negotiate about, you can't move. And my
19 recollection is that I shared that view with
20 Mr. Mallof, but it was necessary that there be
21 something concrete proposed by the person who
22 wished to expand or change the business before

1 it was possible to do that.

2 CHAIRPERSON MILLER: So you don't
3 recall whether you saw the letter or whether
4 Mr. Mallof --

5 MR. JOHANSSON: I don't recall
6 whether I saw the letter or just saw a summary
7 in an email.

8 CHAIRPERSON MILLER: Okay. So I'm
9 going to ask you this question that was asked
10 of Mr. Mallof; and that is, in the letter the
11 licensee says that Hank's Oyster Bar desires
12 to expand its premises to include seating in
13 the adjacent space along with adding
14 additional outside seating abutting the
15 adjacent space.

16 So my question to you based on
17 that sentence is what more would you need in
18 order to meet with the licensee?

19 MR. JOHANSSON: Well, to start
20 with, which space is contemplated? Which side
21 of the establishment did the licensee have in
22 mind? It doesn't say that. How many seats?

1 What other proposals like hours, etcetera,
2 etcetera, etcetera? The things that you would
3 normally be concerned about if you're looking
4 at peace, order and quiet issues.

5 CHAIRPERSON MILLER: I can see
6 that you would want to know those things. My
7 question is why would you need to know that
8 before you meet with the --

9 MR. JOHANSSON: Because how can
10 you have a reaction to a general statement
11 that someone wants to expand without knowing
12 more? Now maybe its' just me, but this is
13 something that's been ingrained in me in terms
14 of negotiating business agreements for many
15 years, that if somebody comes to you and says,
16 gee, we're thinking of maybe making use of
17 that field over there, at that point I haven't
18 got a clue. I need to know more. And I felt
19 the same way here.

20 CHAIRPERSON MILLER: And what's
21 your background where you have this 35 years
22 of negotiating?

1 MR. JOHANSSON: I was an
2 international and corporate lawyer for a
3 Fortune 10 company, an associate general
4 counsel at the end.

5 CHAIRPERSON MILLER: Okay. Thank
6 you. All right.

7 MEMBER ALBERTI: Can I?

8 CHAIRPERSON MILLER: Go ahead.

9 MEMBER ALBERTI: Mr. Johansson,
10 you have a point about getting more
11 information before you begin discussions.
12 I've been there in your shoes. All right? So
13 if you had been handling this discussion and
14 leading this, would you have provided Ms.
15 Leeds' representative with a list of items
16 that you wanted information about?

17 MR. JOHANSSON: No, because again,
18 I wasn't handling it. So this is --

19 MEMBER ALBERTI: Well, if you
20 were.

21 MR. JOHANSSON: -- hypothetical.

22 MEMBER ALBERTI: Hypothetically --

1 MR. JOHANSSON: Hypothetically,
2 no, I wouldn't have --

3 MEMBER ALBERTI: -- would you have
4 given them a clue as to the types of
5 information that you were looking for?

6 MR. JOHANSSON: No, because in my
7 experience you need to hear from the party who
8 wants something in order to be able to react
9 to it.

10 MEMBER ALBERTI: But you just
11 outlined several topics on which you would
12 like more information to us.

13 MR. JOHANSSON: Yes.

14 MEMBER ALBERTI: Would you have
15 been prepared to tell Ms. Leeds that --

16 MR. JOHANSSON: If Ms. Leeds
17 said --

18 MEMBER ALBERTI: -- before meeting
19 that you wanted that information?

20 MR. JOHANSSON: You've turned this
21 around, Mr. Alberti. They were the people
22 seeking something. You have now placed the

1 burden on the people who are to react to that.
2 And I believe that that's an unfair burden to
3 place in that context.

4 MEMBER ALBERTI: Well, you may see
5 it that may. I see this as a cooperative
6 effort.

7 MR. JOHANSSON: Well, you can
8 agree to disagree.

9 MEMBER ALBERTI: And that's why we
10 call them cooperative agreements. Thank you,
11 Mr. Johansson.

12 CHAIRPERSON MILLER: Okay. No
13 further Board questions. Any redirect?

14 MR. HIBEY: No.

15 CHAIRPERSON MILLER: Well, Mr. --

16 MR. KLINE: Mr. Johansson, using
17 your field example, if you wanted to build a
18 building in a field, wouldn't the first thing
19 you wanted to know is whether it was properly
20 zoned and whether you'd be allowed to do that?

21 MR. JOHANSSON: Probably not,
22 because I wouldn't know how it was proposed to

1 be used.

2 MR. KLINE: Well, no, I'm saying
3 if you were doing it. If it were your
4 project.

5 MR. JOHANSSON: It's not my
6 project.

7 MR. KLINE: Well, I'm going to
8 give you a hypothetical. Let's presume it is.
9 Let's presume it is and you've testified about
10 your experience and your background and what
11 you would expect, which was presumably what
12 you would do if you were on the other side of
13 the table. Is that a fair assessment?

14 MR. JOHANSSON: I would say, Mr.
15 Kline, that it varies by the circumstance and
16 I can't give you an answer because you're
17 making a hypothesis that I can only guess
18 about.

19 MR. KLINE: All right. Fine.
20 We'll take about this circumstance. You were
21 aware, were you not, that there was a limit on
22 the number of occupants in the establishment

1 stated in the voluntary agreement, correct?

2 MR. JOHANSSON: With respect to
3 Hank's Oyster Bar?

4 MR. KLINE: With respect to Hank's
5 Oyster Bar. That's what we're here about.

6 MR. JOHANSSON: Again, I haven't
7 looked at it recently, but I believe there was
8 a statement of maximum seating.

9 MR. KLINE: Okay. So one seeking
10 to expand such a premises with such a
11 constraint might first want to know before
12 spending much time whether the other side
13 would be amenable to a discussion about
14 relaxing that restriction, wouldn't they?

15 MR. JOHANSSON: If they knew where
16 the expansion was going to take place,
17 perhaps, but we didn't know if it was going to
18 go towards Trio or the other way. We had no
19 idea what was contemplated.

20 MR. KLINE: You had no idea? You
21 live in the neighborhood, correct?

22 MR. JOHANSSON: I do.

1 MR. KLINE: You live in the 1700
2 block of P Street?

3 MR. JOHANSSON: I do, yes.

4 MR. KLINE: You're not aware that
5 the property into which Ms. Leeds' expanded
6 was rezoned?

7 MR. JOHANSSON: I don't recall
8 being aware of that.

9 MR. KLINE: Madam Chairperson, I
10 would request that other participants in this
11 proceeding be directed not to answer and
12 comment while questions are being posed to the
13 witness.

14 CHAIRPERSON MILLER: Okay.

15 MR. KLINE: Thank you.

16 MR. JOHANSSON: My answer is I
17 don't recall. I don't keep up with the
18 neighborhood ins and outs on a daily basis.

19 MR. KLINE: How far are you from
20 Hank's Oyster Bar?

21 MR. JOHANSSON: Fifteen houses.

22 MR. KLINE: Fifteen houses? You

1 walk up and down --

2 MR. JOHANSSON: Maybe 20.

3 MR. KLINE: You walk up and down
4 the street from time to time?

5 MR. JOHANSSON: I do.

6 MR. KLINE: Were you aware that
7 the premises into which Ms. Leeds has expanded
8 now was vacant when this proposal was made?

9 MR. JOHANSSON: I don't recall
10 that.

11 MR. KLINE: You don't recall?

12 MR. JOHANSSON: No.

13 MR. KLINE: You are aware that
14 Trio had operated on the other side of her for
15 a number of years, correct?

16 MR. JOHANSSON: I certainly am
17 aware of that.

18 MR. KLINE: And you didn't have
19 any reason to believe that Trio was going out
20 of business, did you?

21 MR. JOHANSSON: Well, with
22 respect, one of the principals involved with

1 Trio had died not terribly long before and it
2 wasn't beyond the realm of possibility in my
3 mind that the owner might have wished to
4 retire or move, or something like that.

5 MR. KLINE: Okay. But Trio was
6 operating at that time?

7 MR. JOHANSSON: Yes, it was.

8 MR. KLINE: And the other side was
9 vacant, correct?

10 MR. JOHANSSON: I don't recall,
11 because frankly I don't -- I turn to go to the
12 Safeway. I turn to go to CVS. I turn to walk
13 downtown to do volunteer work. I rarely go
14 towards the Cairo across 17th Street. So I
15 have no recollection that it was vacant.

16 MR. KLINE: It would have been
17 pretty easy to contact the licensee and say,
18 gee, which space you talking about? You
19 talking about --

20 MR. JOHANSSON: Why would I do
21 that?

22 MR. KLINE: -- Trio's space or the

1 space on the other side?

2 MR. JOHANSSON: Why would I do
3 that?

4 MR. KLINE: I don't know, Mr.
5 Johansson. No further questions. Thank you.

6 CHAIRPERSON MILLER: I'm a little
7 curious. I have a couple of just general
8 questions.

9 MR. JOHANSSON: Sure.

10 CHAIRPERSON MILLER: I mean, it
11 sounds like you hardly went near Hank's Oyster
12 Bar. And you didn't have any curiosity as to
13 which way it was expanding? You didn't really
14 care about that?

15 MR. JOHANSSON: As I remember,
16 this was one of the worst winters that we
17 experienced. There were periods of time you
18 couldn't get out of your street, let alone
19 your house. So I would not have -- I rarely
20 go that way anyway and with the winter being
21 what it was, I didn't go past it, no.

22 CHAIRPERSON MILLER: Did you care

1 whether --

2 MR. JOHANSSON: Well, it would
3 have been -- I cared in the sense that it was,
4 you know, when you're concerned about peace,
5 order and quiet in the neighborhood, you are
6 concerned about pretty much liquor-serving
7 seats, which we have 2,500 of in a two-block
8 area. In the middle of winter there isn't a
9 lot of service going on out there. There
10 isn't a lot of activity going on out there.
11 And quite honestly, there wasn't much point in
12 going down there because it may have been
13 closed or it may not have been closed next
14 door, but there was -- it was blocked off with
15 snow. There wasn't any service going on.

16 CHAIRPERSON MILLER: Let me
17 interrupt though. My question really is it
18 sounds like -- I mean, there was no follow up
19 to the request to --

20 MR. JOHANSSON: Not by me.

21 CHAIRPERSON MILLER: Not by you?
22 Okay. Because there wasn't enough detail --

1 MR. JOHANSSON: Detail.

2 CHAIRPERSON MILLER: -- given to
3 you?

4 MR. JOHANSSON: That's correct.

5 CHAIRPERSON MILLER: But I guess
6 my question is didn't you care about it? Did
7 you have like curiosity about any of those
8 details so that you would just want to ask
9 which way do they want to expand?

10 MR. JOHANSSON: Well, at that
11 point I had a lot going on in my life. And
12 Dave Mallof was a person who was actually
13 communicating with the representative of the
14 owner and I had expressed to him my views
15 about what we as a group needed to know in
16 order to have something to respond to.

17 CHAIRPERSON MILLER: Okay. I'm
18 sorry, I just have one other follow-up
19 question. You know, I see that you all are
20 signatories to the voluntary agreement, but
21 that Mr. Mallof seems to have taken the lead.
22 Was he like a designated representative of

1 your group?

2 MR. JOHANSSON: Well, I tried to
3 explain I guess for Mr. Kline --

4 CHAIRPERSON MILLER: I mean, I
5 heard you say that about the power of
6 attorney.

7 MR. JOHANSSON: And that's what --
8 I would view someone who holds the attorney,
9 the power of attorney as being a designated
10 representative for times and situations where
11 the person granting the power is not in a
12 position to act for him or herself.

13 CHAIRPERSON MILLER: Okay. Did he
14 act generally on your behalf?

15 MR. JOHANSSON: Yes, he would
16 communicate with Mr. Kline and perhaps with
17 Ms. Leeds; I don't know, and I would be
18 communicating back and forth with him to be
19 sure that he knew what my views were.

20 CHAIRPERSON MILLER: All right.
21 Thank you. Okay. I'm sorry. Any redirect
22 based on my additional questioning?

1 MR. KLINE: No, thank you.

2 CHAIRPERSON MILLER: Okay. All
3 right. Thank you very much.

4 MR. HIBEY: We call Dave Mallof.

5 CHAIRPERSON MILLER: Okay. I'm
6 going to need to swear you in again. Do you
7 swear to tell the truth, the whole truth,
8 nothing but the truth?

9 MR. MALLOF: I do.

10 CHAIRPERSON MILLER: Okay.

11 MR. HIBEY: Good evening.

12 MR. MALLOF: Good evening.

13 MR. HIBEY: Please state your
14 name.

15 MR. MALLOF: David Mallof.

16 MR. HIBEY: And where do you live?

17 MR. MALLOF: 1711 Q Street.

18 MR. HIBEY: How long have you
19 lived there?

20 MR. MALLOF: Twenty-one years.

21 MR. HIBEY: There has already been
22 -- or you have already testified quite a bit

1 about some discussions and emails with Mr.
2 Kline. At this time is there anything you
3 need to add to explain to the Board the nature
4 or character of those discussions?

5 MR. MALLOF: Discussions with Mr.
6 Kline or with also the signatories?

7 MR. HIBEY: Just Mr. Kline and the
8 licensee.

9 MR. MALLOF: No, I believe we
10 covered it.

11 MR. HIBEY: Okay. Did you refuse
12 to meet with the licensee --

13 MR. MALLOF: No.

14 MR. HIBEY: -- to discuss --

15 MR. MALLOF: No.

16 MR. HIBEY: And are you opposed to
17 terminating the voluntary agreement?

18 MR. MALLOF: Yes.

19 MR. HIBEY: Are you opposed to
20 amending the voluntary agreement?

21 MR. MALLOF: No problem.

22 MR. HIBEY: And what is the

1 distinction?

2 MR. MALLOF: The distinction is we
3 established, with the exception of perhaps one
4 small provision that the ANC thought was
5 important on tree guards in its public caf,
6 policy -- that we established provisions that
7 I think provide an improvement in the
8 neighborhood of peace, order and quiet and has
9 allowed the licensee to thrive without any
10 unreasonable constraint.

11 MR. HIBEY: Okay.

12 MR. MALLOF: I haven't heard
13 beyond a unreasonable constraint yet, but that
14 would require a Draconian termination request.

15 MR. HIBEY: Well, had the licensee
16 negotiated with you in 2010 by providing some
17 more information, what would you have done?

18 MR. MALLOF: We absolutely would
19 have agreed to a meeting with more detail, and
20 I believe I mentioned to Mr. Kline on at least
21 two occasions that send me the -- here we go
22 again -- send me the information and I'll talk

1 to the folks about getting together.

2 MR. HIBEY: Well, let's move on
3 now.

4 MR. MALLOF: May I comment on the
5 communications related to working with your
6 neighbors on this?

7 MR. HIBEY: Please.

8 MR. MALLOF: It's --

9 MR. KLINE: Objection.

10 MR. MALLOF: There have been --

11 MR. KLINE: Excuse me.

12 MR. MALLOF: I'm sorry.

13 MR. KLINE: Objection. The
14 witness is going to ask his own questions now?
15 I would request that we proceed in an orderly
16 fashion and have Mr. Hibey ask the questions.
17 And then Mr. Mallof can ask questions while I
18 sit calmly and run back and forth.

19 MR. HIBEY: I'm just trying to
20 move this along. I mean, I'll walk out of the
21 room and just let him talk. That's fine with
22 me.

1 CHAIRPERSON MILLER: I think Mr.
2 Kline is right. You need to ask the
3 questions.

4 MR. HIBEY: I don't even think
5 that goes to anything, so I'm not going to ask
6 about that. Let's move onto changes in the
7 neighborhood. What changes in the
8 neighborhood can you identify for the Board
9 that would require this voluntary agreement to
10 be terminated?

11 MR. MALLOF: Absolutely none.
12 Regarding the economic conditions, Washington
13 in general has been doing better than the rest
14 of the country and Dupont Circle has been
15 doing spectacularly. Regarding rents and
16 occupancy, we did a little study in 2010 and
17 even a year after the recession began, all of
18 the radius, I think 1,800 square feet; we can
19 provide the analysis from then, around the
20 center of Q and 17th, the vacancy rates were
21 low with the exception of two subterranean
22 locales. Blockbuster and the infamous Club

1 Chaos closed, and then Angie's New Leaf, which
2 has had authority from this Board to expand
3 from JR's Tavern for the last 10 years. Those
4 are the only three vacancies in the whole
5 neighborhood. 2005 -- probably 2005, 2009,
6 I'm sure, and today. Only three properties,
7 two of them below ground in very undesirable
8 locations.

9 There was mention of economic
10 vitality with Reincarnations. They moved out
11 long before Mr. Jacobson did his study. They
12 were a great place my wife and I shopped at.
13 And they were immediately filled by a bank.
14 The Universal Gear moved down to 14th Street
15 for more space. That's what people do
16 sometimes when they seek more space, I
17 understand. And they were immediately filled
18 by a CVS ancillary.

19 So the vacancy rates have been
20 good. The economic conditions have been good.
21 The streetscape went well. Komi expanded.
22 The licensees are the same if you go from P

1 Street up to R Street, wraparound --

2 MR. HIBEY: Dave, I'm going to
3 have to stop you.

4 MR. MALLOF: Sorry.

5 MR. HIBEY: In 2005 --

6 MR. MALLOF: Yes.

7 MR. HIBEY: -- can you identify
8 what ABC licensed establishments were within
9 say 50 feet of Hank's?

10 MEMBER NOPHLIN: I can't hear you.

11 MR. HIBEY: I'm sorry. I asked
12 him to identify the ABC licensed
13 establishments within 50 feet of Hank's in
14 2005, or 100 feet. I mean --

15 MR. MALLOF: Okay. Well, Hank's
16 is --

17 MR. HIBEY: -- just give me a
18 general sense of --

19 MR. MALLOF: Hank's itself was
20 Trio pizza, a DR and we supported it going to
21 CR, specifically in a voluntary agreement as
22 License No. 1. Next door, Trio Restaurant, a

1 CR that operates both as a CR and as a bit of
2 a tavern. Wraparound the corner across the
3 street, a DR, Java House, which has a
4 voluntary agreement. And that's about it
5 within 50 feet, Michael.

6 MR. HIBEY: All right. Can you go
7 further?

8 MR. MALLOF: Yes, going north,
9 Annie's Steakhouse, a CR. Then you've got the
10 Mexican place, the Italian place, the Bar
11 above it. I mean, I can go on and on. I
12 think I've got them all memorized.

13 To the south along 17th Street --
14 17th Street is very odd. To the south Q
15 Street and west and south is solidly
16 residential. I'd like to punch the person in
17 the nose that designed 17th Street, because
18 that's part of our challenge as a community.
19 We have residences on one side on large
20 aprons, commercial on the other side.

21 Going from Fox & Hounds south you
22 have then Jack's that did not expand. They

1 have approval to expand. They have not to the
2 best of my knowledge yet. And let's seen,
3 then there's the pizza place.

4 CHAIRPERSON MILLER: How far -- we
5 don't really have any idea --

6 MR. MALLOF: We're going to the
7 Corcoran.

8 CHAIRPERSON MILLER: -- as to what
9 the parameters are here, so --

10 MR. HIBEY: We're talking about
11 neighborhood. These are all -- do you want
12 the addresses of each property?

13 CHAIRPERSON MILLER: No, we just
14 went beyond 50 feet --

15 MR. HIBEY: Yes.

16 CHAIRPERSON MILLER: -- and I
17 don't really know --

18 MR. HIBEY: How far have you gone
19 now?

20 MR. MALLOF: I'm going down to
21 Church Street, probably to JR's and Angie's
22 New Leaf which they've expanded to.

1 MR. HIBEY: Okay. Is that in your
2 neighborhood?

3 MR. MALLOF: Oh, yes.

4 MR. HIBEY: And far is that from
5 Hank's?

6 MR. MALLOF: Well, let's see.
7 Church Street is probably, I don't know --

8 MR. HIBEY: How many city blocks
9 are we talking about?

10 MR. MALLOF: Well, but some of the
11 blocks are kind of half-blocks. You know,
12 they're shorter. I could probably -- I mean,
13 I don't know to describe it. I mean, like
14 about 200 feet from me to Hank's, and it's
15 about probably 200 feet around the corner down
16 to the pizza place.

17 MR. HIBEY: Okay.

18 MR. MALLOF: As the crow flies
19 west. These are very tightly packed in
20 directly opposing residences.

21 MR. HIBEY: All right. You're
22 talking all 2005, right?

1 MR. MALLOF: I think so.

2 MR. HIBEY: Okay.

3 MR. MALLOF: I believe there are
4 some changes of control and maybe a couple of
5 administrative transfers. I think the, well,
6 coffee place that Mr. Kline also got a CR
7 permit for, CR approval for, changed to a
8 different restaurant format. But it's been
9 basically very, very stable and very positive.

10 MR. HIBEY: And --

11 MR. MALLOF: And Ms. Leeds'
12 knew --

13 MR. HIBEY: Did you --

14 MR. MALLOF: -- when she moved
15 into the neighborhood that the conditions --

16 MR. HIBEY: Did you create a
17 diagram of this area?

18 MR. MALLOF: Yes, and I believe
19 that we submitted it in the last go around;
20 it's a representational, but we could submit
21 it again.

22 CHAIRPERSON MILLER: Are you

1 saying that in the record --

2 MR. MALLOF: Actually, I'm not
3 sure. I don't think it's in the record,
4 ma'am.

5 MR. HIBEY: Can I show you?

6 MR. MALLOF: I think we were going
7 to do it.

8 CHAIRPERSON MILLER: Okay.

9 MR. MALLOF: Sorry.

10 MR. HIBEY: Can I show him a
11 document?

12 CHAIRPERSON MILLER: Sure.

13 MR. HIBEY: Do you know what that
14 is?

15 MR. MALLOF: Oh, yes.

16 MR. HIBEY: What is that?

17 MR. MALLOF: This is an Excel
18 representation of the -- all the ABC
19 licensees.

20 MR. HIBEY: And when?

21 MR. MALLOF: This is as of I think
22 late 2005, mid-2005.

1 MR. HIBEY: Okay. And if you were
2 to do the same spreadsheet for 2010 or 2012 --

3 MR. MALLOF: Yes.

4 MR. HIBEY: -- how would you
5 change this spreadsheet?

6 MR. MALLOF: Well, I could very
7 quickly go from P Street. Those are all
8 jammed in. They're fine. Komi has done a
9 great job. They use no public space.
10 There's --

11 MR. HIBEY: Dave, stop.

12 MR. MALLOF: Yes.

13 MR. HIBEY: I'm not asking you
14 that.

15 MR. MALLOF: Sorry.

16 MR. HIBEY: Just tell me how you
17 would change this.

18 MR. MALLOF: Komi has expanded.
19 They have some seating in public space
20 approval. I don't know if they're using it
21 yet. And then they have moved next door.
22 They did a good job. The video place was

1 failing. The 17th Street Caf, has changed its
2 name. Pigalle is now Jack's. Same ownership.
3 That's all the same. Club Chaos was a morph,
4 CR to a nightclub. They closed.

5 MR. HIBEY: So Club Chaos isn't
6 there any longer?

7 MR. MALLOF: No, the kids --

8 MR. HIBEY: Cross that out on your
9 diagram?

10 MR. MALLOF: Cross it out. They
11 used to --

12 MR. HIBEY: All right. What about
13 Casa --

14 CHAIRPERSON MILLER: You know,
15 you're losing us on this, I got to tell you.

16 MR. MALLOF: This is all --
17 everything's the same.

18 MR. HIBEY: All right.

19 CHAIRPERSON MILLER: What we're
20 hearing is a rambling --

21 MR. HIBEY: Yes, I have this
22 document that he created and it's a diagram of

1 the neighborhood in 2005.

2 CHAIRPERSON MILLER: Okay.

3 MR. HIBEY: He's testifying that
4 the neighborhood is essentially the same from
5 2005 to 2012.

6 CHAIRPERSON MILLER: Are you? Are
7 you actually, Mr. Mallof --

8 MR. MALLOF: Yes, I'm sorry.

9 CHAIRPERSON MILLER: -- testifying
10 to that, that the neighborhood is basically
11 the same as it was in 2005 and that we should
12 look at your diagram and conclude that?

13 MR. MALLOF: Yes.

14 MR. HIBEY: Okay.

15 MR. MALLOF: And it's been stable.

16 CHAIRPERSON MILLER: Okay.

17 MR. MALLOF: Very stable.

18 MR. HIBEY: I mean, do you need me
19 to go through? I'll go through each place,
20 identify the location and identify whether
21 they were there in 2005, whether they're there
22 in 2012, or we can all agree that none of

1 these places have changed except for two.

2 CHAIRPERSON MILLER: It's your
3 case, but I don't think we need to hear you go
4 name-by-name. If there's something that's
5 different on the diagram and he's testifying
6 under oath, then it ought to be reflected.
7 That's all.

8 MR. HIBEY: Okay.

9 CHAIRPERSON MILLER: If you're
10 planning on submitting that. I mean, I don't
11 know.

12 MR. HIBEY: Is this an accurate
13 depiction of the ABC licensed establishments
14 along 17th Street in 2005?

15 MR. MALLOF: Yes.

16 MR. HIBEY: And if you looked at
17 this document and recognized your pen marks on
18 two of the establishments, would that be an
19 accurate depiction of the 17th Street ABC
20 establishments in 2012?

21 MR. MALLOF: As far as licenses,
22 yes.

1 MR. HIBEY: But not as far as
2 size, correct?

3 MR. MALLOF: Not as far as seats.

4 MR. HIBEY: Seats? Okay. Yes, so
5 we would like to move this in as our Exhibit
6 1.

7 CHAIRPERSON MILLER: Mr. Kline, do
8 you have any objection? I need to see it,
9 too, before I say whether we can move it into
10 evidence.

11 MR. HIBEY: The one X is the --

12 MR. KLINE: I would object on the
13 grounds of relevance. I'm not sure where they
14 get the --

15 MR. HIBEY: This case is about
16 change in the neighborhood and this is
17 documentation of the neighborhood.

18 CHAIRPERSON MILLER: Okay.

19 MR. KLINE: I would object on
20 another ground in that it's not -- if it's
21 meant to depict 2005 and 2010, it's admittedly
22 not accurate.

1 MR. HIBEY: How so?

2 MR. KLINE: The witness has
3 already testified that it doesn't -- we have
4 a colored chart which indicates ABC licensed
5 establishments and spaces occupied. It
6 doesn't reflect the expansions, so it's not
7 accurate.

8 MR. HIBEY: Correct. It doesn't
9 reflect the expansions for 2012. He testified
10 to that.

11 MR. KLINE: All right.

12 MR. HIBEY: The differences are
13 the cross-outs and the size of --

14 MR. MALLOF: Well, it has Hank's
15 as a CR, not a DR. I think --

16 MR. KLINE: Objection, Madam
17 Chairperson.

18 CHAIRPERSON MILLER: Well, it
19 sounds like he's -- I don't understand.
20 You're going down the road of saying that some
21 things are different and you're explaining
22 that?

1 MR. MALLOF: It's his road. He
2 told me to go down.

3 MR. HIBEY: Can I clarify?

4 CHAIRPERSON MILLER: Yes. Well,
5 okay. Yes, so my problem with this is --

6 MR. HIBEY: Yes.

7 CHAIRPERSON MILLER: -- and, you
8 know, we have the ability to accept it for the
9 value we want to give it, but I -- first of
10 all, who prepared this? Did Mr. Mallof
11 prepare this on --

12 MR. HIBEY: Yes.

13 CHAIRPERSON MILLER: Okay. On
14 Excel. And what's it based on? What's in
15 your head, or what's it based on?

16 MR. MALLOF: Based on knowledge on
17 the ground and cross-referencing with, you
18 know, facts, you know, ABC information that we
19 have.

20 CHAIRPERSON MILLER: So you
21 created it based on your observation and -- of
22 the establishments and data that you got

1 from --

2 MR. MALLOF: Sure, we have all
3 that from all the moratoriums, yes. And then
4 this doesn't attempt to show seats or hours or
5 anything.

6 CHAIRPERSON MILLER: Okay. You're
7 just attempting to show locations of ABC
8 establishments?

9 MR. MALLOF: And it's relationship
10 to residential areas, yes.

11 CHAIRPERSON MILLER: Right.

12 MR. MALLOF: Yes.

13 CHAIRPERSON MILLER: And the Xs
14 mean those establishments don't exist anymore?

15 MR. MALLOF: That Casa Pena has
16 surrounded its B license, which doesn't really
17 matter in this case, and Club Chaos closed as
18 a morphed CR nightclub.

19 CHAIRPERSON MILLER: Are they
20 vacant spaces?

21 MR. MALLOF: Vacant space. I
22 don't know what happened to the license. It

1 maybe in safekeeping.

2 CHAIRPERSON MILLER: Okay. Both
3 of them are vacant spaces?

4 MR. MALLOF: No, no. I think Pena
5 became a terrific yoga studio.

6 CHAIRPERSON MILLER: Okay.

7 MR. MALLOF: Two floors. Very
8 nice.

9 CHAIRPERSON MILLER: And the
10 purpose of this is to show very little change
11 in ABC establishments?

12 MR. MALLOF: Stability. And
13 Michael's question I believe to me was was
14 there any reason to terminate versus something
15 like amend. And I said to Draconian change.

16 CHAIRPERSON MILLER: Okay. Let me
17 just ask you one more time. If the purpose of
18 this diagram -- I know it's in response to
19 your attorney's questions, but is the purpose
20 to show the ABC establishments that existed in
21 2005 and the little change as of now, 2012, or
22 what?

1 MR. MALLOF: No, I believe this
2 was done late-2005, probably when we were
3 doing the Hank's expansion, and that's why
4 Hank's appears as a CR rather than a DR. They
5 already got the VA. We supported the
6 expansion.

7 CHAIRPERSON MILLER: Okay. Well,
8 I don't need all that. I just need to know
9 really the dates and what this is
10 demonstrated. So this --

11 MR. MALLOF: It demonstrated --

12 CHAIRPERSON MILLER: -- is late
13 2005?

14 MR. MALLOF: My guess is mid-2005.

15 CHAIRPERSON MILLER: Mid-2005 --

16 MR. MALLOF: Yes.

17 CHAIRPERSON MILLER: -- is when
18 you did this. And you did the two Xs to show
19 what doesn't exist --

20 MR. MALLOF: That's correct.

21 CHAIRPERSON MILLER: -- as of
22 today?

1 MR. MALLOF: As of operating
2 today, yes.

3 CHAIRPERSON MILLER: As of today.
4 Okay.

5 MR. MALLOF: With limited
6 resources.

7 CHAIRPERSON MILLER: Okay.

8 MEMBER NOPHLIN: Madam Chair?

9 CHAIRPERSON MILLER: Yes, Mr.
10 Nophlin?

11 MEMBER NOPHLIN: I need to see
12 the --

13 CHAIRPERSON MILLER: Oh, I'm
14 sorry. You all want to see this?

15 MEMBER NOPHLIN: No, I'm totally
16 confused. I mean, the chart doesn't give any
17 explanation. I mean, what are we trying to
18 prove here? I mean, please, somebody tell the
19 Board what's going on.

20 CHAIRPERSON MILLER: I think that
21 they're -- but correct me if I'm wrong, you're
22 trying to show that there's very little change

1 in ABC establishments between 2005 and 2012.

2 I don't know. You know, how you argue that
3 that's relevant to, you know, the change issue
4 in this case is something else. You'll get to
5 that? Okay.

6 MR. HIBEY: Well, I mean, do you
7 want me argue now or --

8 MEMBER ALBERTI: May I ask Mr.
9 Kline a question, Madam Chair, real quick,
10 because Mr. Kline objected? And the objection
11 I guess is still standing. Is that true, Mr.
12 Kline?

13 MR. KLINE: I'll withdraw.

14 MEMBER ALBERTI: Pardon?

15 MR. KLINE: I'll withdraw.

16 MEMBER ALBERTI: Okay. Thank you.

17 MR. KLINE: The Board can give it
18 whatever weight it deems relevant at this
19 point.

20 MEMBER ALBERTI: Okay. Thank you.

21 CHAIRPERSON MILLER: Okay. That
22 will be -- we understand what it is and Mr.

1 Hibey will explain in his closing why it's
2 relevant.

3 MR. HIBEY: Yes.

4 CHAIRPERSON MILLER: Correct?
5 Okay.

6 MR. HIBEY: Has the population in
7 the neighborhood changed since 2005?

8 MR. MALLOF: I believe no. I
9 believe no. We haven't had new condos, new
10 multiple dwelling units, no nothing new.

11 MR. HIBEY: Okay.

12 MR. MALLOF: No, none at all.

13 MR. HIBEY: And the streetscape,
14 is that finished?

15 MR. MALLOF: That work was
16 finished two years ago.

17 MR. HIBEY: All right.

18 MR. MALLOF: And all these -- the
19 purpose of this chart was to show that
20 nothing's -- nobody's folded. There's been no
21 economic disaster.

22 MR. HIBEY: Were you here earlier

1 and Mr. Wexler testified about a meeting?

2 Were you involved in that meeting or -- what
3 he was talking about?

4 MR. MALLOF: No, and what I heard
5 Mr. Wexler say was that nothing was presented
6 on the specifics, that the voluntary agreement
7 was not discussed. I believe that's on the
8 record. Voluntary agreement didn't come up.
9 So I have a hard time understanding what Mr.
10 Rieffel would have objected to that would have
11 closed off any hope of discussions if Mr.
12 Wexler said there was no discussion of the
13 voluntary agreement.

14 MR. HIBEY: All right. Thank you.
15 I don't have any further questions.

16 CHAIRPERSON MILLER: Okay. Is
17 there any cross?

18 MR. KLINE: A little.

19 MEMBER ALBERTI: Okay.

20 MEMBER ALBERTI: But don't we have
21 questions from the Board?

22 CHAIRPERSON MILLER: No, I usually

1 go to cross first.

2 MEMBER ALBERTI: Pardon?

3 CHAIRPERSON MILLER: Usually go to
4 cross first.

5 MEMBER ALBERTI: No, you don't.

6 CHAIRPERSON MILLER: I do.

7 MEMBER ALBERTI: Oh, I'm sorry.

8 I'm sorry. This is --

9 MR. KLINE: You did with us now.

10 MEMBER ALBERTI: -- Mr. Hibey's
11 witness. All right. I'm sorry. It's late.
12 I'm sorry.

13 MR. KLINE: I know. So, Mr.
14 Mallof, given all that you live in a pretty
15 stagnant neighborhood, don't you?

16 MR. MALLOF: Very stable, very
17 nice, very upscale.

18 MR. KLINE: "Stagnant" was the
19 word I used.

20 MR. MALLOF: No. I didn't say
21 that.

22 MR. KLINE: That's what I said.

1 That was the question.

2 MR. MALLOF: No.

3 MR. KLINE: No? You disagree with
4 that?

5 MR. MALLOF: I don't live in a
6 stagnant neighborhood.

7 MR. KLINE: Okay. The fact of the
8 matter is --

9 MR. MALLOF: "Stagnant" is a
10 horrible word.

11 MR. KLINE: -- the study that you
12 alluded to that you did, that was in
13 connection with the renewal of the moratorium,
14 wasn't it?Mr. Mallof

15 MR. MALLOF: Mr. Kline, there are
16 so many ABC issues in the neighborhood, I
17 don't recall. I believe this was with the --
18 I believe this was because of the expansion
19 request, and that's why the Xs are there.

20 MR. KLINE: No, Mr. Mallof, I'm
21 not talking about the chart. You said that
22 you did a survey, a study of retail in the

1 neighborhood. Remember talking about that?

2 MR. MALLOF: No, the study of
3 retail; sorry, sir, was related to the
4 termination and we did not present that
5 because prong (B) was not accepted --

6 MR. KLINE: Okay.

7 MR. MALLOF: -- when the voluntary
8 agreement was blown up.

9 MR. KLINE: Fair enough. Okay.
10 The fact of the matter is you were involved in
11 the moratorium discussions, weren't you?

12 MR. MALLOF: No.

13 MR. KLINE: No?

14 MR. MALLOF: Well --

15 MR. KLINE: You didn't
16 participate?

17 MR. MALLOF: Not as a party. I
18 mean --

19 MR. KLINE: It was rulemaking, so
20 there weren't any parties. Did you
21 participate in opposing portions of the
22 extension of the moratorium?

1 MR. MALLOF: I think we -- the ANC
2 did. I believe --

3 MR. KLINE: Let me withdraw it and
4 ask it another way.

5 MR. MALLOF: I don't recall.

6 MR. KLINE: You're aware, are you
7 not --

8 MR. MALLOF: Yes.

9 MR. KLINE: -- that as part of the
10 2009 extension of the moratorium that the
11 restriction on lateral expansion was slightly
12 relaxed?

13 MR. MALLOF: Yes.

14 MR. KLINE: You're aware of that?

15 MR. MALLOF: Absolutely.

16 MR. KLINE: You were opposed to
17 that, weren't you?

18 MR. MALLOF: We were opposed to
19 more seats.

20 MR. KLINE: Were you opposed to
21 the relaxation of the strict prohibition
22 against lateral expansion that had been in the

1 Dupont East Moratorium since day one until it
2 was relaxed in 2009?

3 MR. MALLOF: To the -- yes. To
4 the -- yes.

5 MR. KLINE: Right.

6 MR. MALLOF: I'll keep it simple.
7 Sorry. Sorry.

8 MR. KLINE: Yes, you were opposed
9 to that. You were vehemently opposed to it,
10 weren't you?

11 MR. MALLOF: If it meant more
12 seats and more hours, which is the same as
13 adding more licenses, yes.

14 MR. KLINE: All right. And your
15 position was that there should be no
16 relaxation of the moratorium because there had
17 been no changes in the neighborhood, correct?

18 MR. MALLOF: No.

19 MR. KLINE: That wasn't your
20 position?

21 MR. MALLOF: No, this change in
22 the neighborhood applies to blowing up a

1 voluntary agreement. It does not apply to
2 moratorium questions.

3 MR. KLINE: Oh, so there --

4 MR. MALLOF: The moratorium has
5 nothing to do with changing the neighborhood.

6 MR. KLINE: Has nothing to do with
7 it?

8 MR. MALLOF: No, it has to do with
9 whether people are maxed out on the peace,
10 order and quiet and whether citizens seek a
11 diversity of retail, which we have now, which
12 is terrific for everyone. It has nothing to
13 do with change in the neighborhood.

14 MR. KLINE: It has nothing to do
15 with change in the neighborhood? So --

16 MR. MALLOF: Do you see that in
17 the legislation? I don't. You need to direct
18 me.

19 MR. KLINE: Mr. Mallof, we're not
20 talking about legislation today. We're
21 talking about --

22 MR. MALLOF: I don't have the

1 moratorium order.

2 MR. KLINE: -- my questions to
3 you --

4 MR. MALLOF: Yes.

5 MR. KLINE: -- and having you
6 answer those questions.

7 MR. MALLOF: I don't have --

8 MR. KLINE: We're not talking
9 about legislation. We're not talking about
10 affidavits. We're talking about these
11 questions.

12 MR. MALLOF: Change in the
13 neighborhood, to the best of my knowledge,
14 does not appear in the moratorium as any kind
15 of acid test or -- it's apples and oranges.

16 CHAIRPERSON MILLER: Okay. Let's
17 get back. You were doing pretty well before.
18 Let's just get back to --

19 MR. MALLOF: Thank you. Please
20 help us. Help us.

21 CHAIRPERSON MILLER: This is how
22 -- I'll ask a question. You'll answer it

1 and --

2 MR. KLINE: All right.

3 MR. MALLOF: Getting tired.

4 MR. KLINE: Let's get back. The
5 moratorium has been in existence for how long
6 to your knowledge in 2005? Do you know?

7 MR. MALLOF: Not exactly.

8 MR. KLINE: Approximately?

9 MR. MALLOF: Awhile.

10 MR. KLINE: Fifteen years?

11 MR. MALLOF: A couple renewals.

12 No, I don't think it's that long.

13 MR. KLINE: Ten years? Pick a
14 number. Ten years?

15 CHAIRPERSON MILLER: Okay. If you
16 don't know --

17 MR. MALLOF: I don't know.

18 MR. KLINE: All right. At least
19 10 years, correct?

20 MR. MALLOF: I don't think so. I
21 don't know. I don't know if it was at least
22 10.

1 MR. KLINE: Okay.

2 MR. MALLOF: This is like I --

3 MR. KLINE: You don't know? I
4 don't know.

5 MR. MALLOF: You know, what's the
6 answer? I don't --

7 MR. KLINE: The answer's not that
8 relevant. The question is in order to make a
9 change in a moratorium one would presume that
10 there would be something that would cause that
11 change to need to be made, correct?

12 MR. MALLOF: I thought we were
13 talking about terminating VAs. I have no idea
14 on these moratorium questions. I need to go
15 read the moratorium language.

16 MR. KLINE: Not answer my
17 question, Mr. Mallof.

18 MR. MALLOF: What is it? Where
19 are you at again?

20 MR. KLINE: My question to you is
21 this: If you have a law in place --

22 MR. MALLOF: Yes.

1 MR. KLINE: -- okay, and it's been
2 in place for a number of years --

3 MR. MALLOF: Yes.

4 MR. KLINE: -- you with me so far?

5 MR. MALLOF: Crystal.

6 MR. KLINE: Okay. And you decide
7 -- and let's say it's been in place for 50
8 years, just to use an example.

9 MR. MALLOF: A hundred's better.

10 MR. KLINE: Hundred years. All
11 right? And that law's going to be changed,
12 would you presume that if there's going to be
13 some sort of change in the law that that's
14 necessitated by some sort of change in society
15 or changed circumstances?

16 MR. MALLOF: This is such a
17 speculative leading question, I have no idea
18 how to answer it. You're blowing my mind at
19 8:15. I fold.

20 CHAIRPERSON MILLER: Okay. If you
21 don't know, you just have --

22 MR. MALLOF: I don't know.

1 CHAIRPERSON MILLER: -- to say I
2 don't know. Okay.

3 MR. MALLOF: I don't know.

4 CHAIRPERSON MILLER: Then we'll
5 move on.

6 MR. KLINE: I will withdraw it.

7 CHAIRPERSON MILLER: Okay.

8 MR. KLINE: I have nothing
9 further.

10 CHAIRPERSON MILLER: Okay. Board
11 members?

12 MEMBER NOPHLIN: I just have one
13 question.

14 CHAIRPERSON MILLER: Okay. Mr.
15 Nophlin?

16 MEMBER NOPHLIN: Mr. Mallof, what
17 kind of relationship do you have with the
18 ANCs?

19 MR. MALLOF: Well, I don't attend
20 all the meetings. I'm here for my
21 commissioner. I think pretty -- I think okay.
22 As a -- I don't know.

1 MEMBER NOPHLIN: In this
2 particular situation do they agree with your
3 premise that they should not receive the
4 expansion on that program?

5 MR. MALLOF: Well, thank you for
6 asking me that. I believe Commissioner Wexler
7 was dead wrong on what he said, if we go back
8 to the facts of the ANC. The ANC supported
9 the zoning change that I think went through in
10 December, and I was completely unaware of it
11 until the petition was filed to terminate.
12 That's my recollection.

13 The ANC took no position
14 whatsoever on the termination of the voluntary
15 agreement, even though Ms. Leeds' letter said
16 that it did wholeheartedly. They never voted.
17 And Commissioner Wexler was wrong on the ANC's
18 official position.

19 I think he was right to the extent
20 that he said for awhile in supporting the
21 zoning. And a hearing about growth that the
22 ANC members, his colleagues, I believe he was

1 right in that his colleagues were in support
2 of expansion, which I'm saying to you in
3 principle we are, too. We were. We still
4 are.

5 The ANC did not vote on anything
6 other than the zoning issue until after the
7 moratorium was blown -- after the VA was blown
8 up; I'm not sorry about the language, and then
9 the subsequent expansion substantial change
10 was filed for. I believe then and only then
11 did the ANC weigh in and they supported
12 expansion.

13 MEMBER NOPHLIN: Thank you, Madam
14 Chair. That's all I have.

15 CHAIRPERSON MILLER: Mr. Alberti,
16 do you?

17 MEMBER ALBERTI: Yes, thank you.
18 Mr. Mallof -- I'll try to make
19 this quick, folks.

20 MR. MALLOF: Thank you, sir.

21 MEMBER ALBERTI: Mr. Mallof, you
22 were a signature to the original voluntary

1 agreement, correct?

2 MR. MALLOF: Yes, sir.

3 MEMBER ALBERTI: All right. Let
4 me ask you what I asked Mr. Jacobson: Do you
5 know this -- item 2 is restrictions on
6 capacity, number of seats for this
7 establishment --

8 MR. MALLOF: Yes.

9 MEMBER ALBERTI: -- in the
10 original VA. Do you know how those numbers
11 came about?

12 MR. MALLOF: My impression is that
13 -- my distinct impression is that Jamie -- we
14 agreed to everything she wanted on the inside;
15 nothing was carved back, and the 20 was
16 established by DDoT.

17 MEMBER ALBERTI: Okay.

18 MR. MALLOF: That's my impression.
19 She might have asked for five seats more. I
20 don't think so. I think it was a DDoT number.
21 They come in and do their magic with fire
22 lanes and all that.

1 MEMBER ALBERTI: Okay. And the
2 interior, she requested that?

3 MR. MALLOF: I believe so.

4 MEMBER ALBERTI: Okay.

5 MR. MALLOF: I mean, she didn't --
6 we did a request to that.

7 MEMBER ALBERTI: All right.

8 MR. MALLOF: A woman or man's home
9 is his castle. We've always said that.

10 MEMBER ALBERTI: So when this
11 request to amend the VA or terminate the VA
12 came to you --

13 MR. MALLOF: Yes.

14 MEMBER ALBERTI: -- did you kind
15 of look at the VA and sort of speculate why it
16 needed to be amended?

17 MR. MALLOF: Oh, yes. Yes, sure.
18 Yes, sir.

19 MEMBER ALBERTI: All right. Did
20 it dawn on you that if it was an expansion
21 that the limit on the interior seats might
22 have to be amended?

1 MR. MALLOF: I believe the VA was
2 requested to be terminated, not amended.
3 Termination.

4 MEMBER ALBERTI: Let me see.

5 MR. MALLOF: That's the hot button
6 we're --

7 MEMBER ALBERTI: I'm just looking
8 for the letter. Where is the letter?

9 CHAIRPERSON MILLER: Oh, yes.
10 Here.

11 MEMBER ALBERTI: Yes, the letter,
12 please.

13 Let's see. Because of the
14 limitations of the voluntary agreement adopted
15 by the Board, the licensee may apply for the
16 desired substantial change unless the
17 voluntary agreement is either amended or
18 terminated. "Amended" was in there. So I
19 think it was clear --

20 MR. MALLOF: Oh, in the
21 moratorium?

22 MEMBER ALBERTI: -- that they

1 were, I think -- no, it's clear in this letter
2 that they were -- the issue was open as to
3 whether it would be amended or terminated.
4 There was no -- this letter -- the message
5 that was sent to you in this letter did not
6 confine itself to saying to you that we want
7 to terminate the VA.

8 MR. MALLOF: No. Oh, I agree.

9 MEMBER ALBERTI: It said the
10 voluntary agreement is either amended or
11 terminated.

12 MR. MALLOF: Okay. Mr. -- you're
13 referring --

14 MEMBER ALBERTI: Is that correct?

15 MR. MALLOF: I'm sorry. I'm
16 tired. You're referring to Mr. Kline's
17 letter? Yes.

18 MEMBER ALBERTI: Yes.

19 MR. MALLOF: Yes. I'm sorry.

20 MEMBER ALBERTI: Okay. So is it
21 reasonable to assume that you understood that
22 if there was going to be an expansion they

1 would have to amend or eliminate this
2 restriction on 65 seats?

3 MR. MALLOF: Oh, sure. Yes, I
4 did.

5 MEMBER ALBERTI: Okay. And also
6 for the outside. It kind of was -- was that
7 obvious to you?

8 MR. MALLOF: I don't recall if the
9 letter mentions outside, but everybody want's
10 public space. Yes, I think so.

11 MEMBER ALBERTI: Okay.

12 MR. MALLOF: Yes.

13 MEMBER ALBERTI: All right.

14 MR. MALLOF: Absolutely.

15 MEMBER ALBERTI: Also, were you
16 aware that the property next door to Ms. Leeds
17 was vacant?

18 MR. MALLOF: No, that was a big --
19 well, vacant, yes, for years. Yes.

20 MEMBER ALBERTI: Ah, okay.

21 MR. MALLOF: Yes.

22 MEMBER ALBERTI: So you were aware

1 that was vacant?

2 MR. MALLOF: Yes.

3 MEMBER ALBERTI: And the property
4 on the other side --

5 MR. MALLOF: Well, actually, sir,
6 I think people were living in there upstairs
7 and downstairs, and it was residential. I
8 mean, it wasn't totally vacant. People were
9 sleeping there. I think that's in the
10 testimony from the last time around. It
11 wasn't empty like these other places I just
12 mentioned to you, the three --

13 MEMBER ALBERTI: Okay. All right.
14 Fine.

15 MR. MALLOF: Used as residences.

16 MEMBER ALBERTI: And the other
17 side was a long-time business that --

18 MR. MALLOF: Yes.

19 MEMBER ALBERTI: Did that business
20 look like it was thriving?

21 MR. MALLOF: They'd done well for
22 years, yes.

1 MEMBER ALBERTI: Okay. Good.

2 MR. MALLOF: Good place.

3 MEMBER ALBERTI: So now you said
4 to us that you told Mr. Kline that you
5 wouldn't meet with him unless he put some meat
6 on the bones --

7 MR. MALLOF: I don't think --

8 MEMBER ALBERTI: -- with regards
9 to what their plans were.

10 MR. MALLOF: I'm sorry, I don't
11 think it was a quid-pro-quo-kind of a thing.
12 It was --

13 MEMBER ALBERTI: Oh, it wasn't?

14 MR. MALLOF: No, it was more like
15 send something over and dealing --

16 MEMBER ALBERTI: Send something
17 over and then we'll meet.

18 MR. MALLOF: Mr. Kline is very
19 much feared by your average resident in this
20 town. Okay?

21 MEMBER ALBERTI: Well, wait, wait,
22 wait, wait, wait.

1 (Laughter.)

2 MR. MALLOF: Let's get with it
3 here. Send something over, please.

4 MEMBER ALBERTI: Mr. Kline is very
5 much feared by me also, so --

6 MR. MALLOF: I think he runs the
7 D.C. government, from what I can tell.

8 MEMBER ALBERTI: So, Mr. Mallof,
9 all right --

10 MR. MALLOF: Fear and loathing.

11 MEMBER ALBERTI: Now, Mr.
12 Mallof --

13 MR. KLINE: Can we get this for my
14 wife and kids?

15 (Laughter.)

16 MEMBER ALBERTI: Just in jest, Mr.
17 Kline. Please don't take that personally.

18 All right. Well, where was I?
19 Okay. So, but it sounds to me that you
20 conveyed to him the fact that you would only
21 meet if he gave you more details on their
22 plans.

1 MR. MALLOF: No, I don't think it
2 was stated like that, but please send
3 something over. We'd like to see something,
4 yes. I think that -- I don't think it --
5 sirs, you phrased it a little bit -- if I'm
6 hearing correctly --

7 MEMBER ALBERTI: Okay.

8 MR. MALLOF: -- a little bit of a
9 solid quid pro quo.

10 MEMBER ALBERTI: Did you ever
11 agree to meet? But he kept offering you
12 dates. Did you ever agree

13 MR. MALLOF: I believe --

14 MEMBER ALBERTI: -- to meet?

15 MR. MALLOF: I believe -- I'm
16 sorry. I'm interrupting. There were two
17 conversations.

18 MEMBER ALBERTI: Did you ever
19 agree to meet without getting that
20 information?

21 MR. MALLOF: The two conversations
22 we had I said please send something over.

1 I'll talk to the team. It's hard working with
2 residents. You want to be deferential to your
3 neighbors and not be the boss power of
4 attorney.

5 MEMBER ALBERTI: And what was his
6 response to that?

7 MR. MALLOF: I think he was
8 talking A and I was talking B.

9 MEMBER ALBERTI: What was his
10 response to that?

11 MR. MALLOF: Wow, I believe I
12 didn't get a no, but I didn't get a yes.

13 MEMBER ALBERTI: Okay.

14 MR. MALLOF: If you'd like --
15 believe me.

16 MEMBER ALBERTI: Okay.

17 MR. MALLOF: It's a point of doing
18 business.

19 MEMBER ALBERTI: Did you sense a
20 resistance on his part to meet?

21 MR. MALLOF: No, not to meet, but
22 to send something over.

1 MEMBER ALBERTI: Okay. Did you
2 make any moves, I'll call it? Did you take an
3 steps to ensure that a meeting happened?

4 MR. MALLOF: Well, I think as we
5 left the call, sir, they were sort of I'll
6 wait to see. I mean, it's --

7 MEMBER ALBERTI: You don't have a
8 give a specific date. Did you say --

9 MR. MALLOF: I believe I offered.

10 MEMBER ALBERTI: -- you won't
11 agree to that date?

12 MR. MALLOF: I believe I said that
13 first day was certainly not good because it
14 was a specific date during the middle of a
15 snowstorm.

16 MEMBER ALBERTI: What about the
17 March 10th meeting?

18 MR. MALLOF: Didn't I reply that
19 the snowstorm was probably on the 24th?

20 MEMBER ALBERTI: No, I'm keeping
21 March 10th at 10:00 a.m. available in case you
22 are willing to meet.

1 MR. MALLOF: Yes, that's the
2 second one.

3 MEMBER ALBERTI: What did you tell
4 him about that date?

5 MR. MALLOF: I think I said to him
6 please send some meat on the bone and I'll
7 talk to the neighbors and we'll get back to
8 you with some times. That's like, again,
9 we're back into what is a reasonable protocol
10 when at my end he's asking me to chat with
11 five neighbors, which is not unreasonable.
12 But I would never -- I want to clarify with
13 what Mr. Johansson was talking about as well.
14 I was never assigned, nor did I assume that I
15 was the official representative. It's only if
16 the neighbor's not available that --

17 MEMBER ALBERTI: Okay. So it's
18 your testimony, Mr. Mallof, that the
19 information included in the letter --

20 MR. MALLOF: Yes.

21 MEMBER ALBERTI: -- the fact that
22 they wanted to expand, the fact that you knew

1 the conditions in the neighborhood, that the
2 property next door to them was vacant or not
3 fully utilized --

4 MR. MALLOF: Yes.

5 MEMBER ALBERTI: -- that you knew
6 that you were familiar with the VA and that
7 you knew that for an expansion to happen that
8 the VA would have to be amended, that wasn't
9 sufficient information for you to go into this
10 meeting with?

11 MR. MALLOF: I think -- sir, I
12 think not. I think it's perfectly
13 businesslike when we have residents who have
14 other lives, other careers. For the expansion
15 we had 20 signatories. In this one we had
16 six; and I get criticized for only having six,
17 but six it tough to manage with your
18 neighbors. I think it was perfectly
19 reasonable to say send something over and I'll
20 -- we'll -- dates. The proposing of one date
21 at a specific time is -- I --

22 MEMBER ALBERTI: Did you propose

1 to meet individually with Mr. Kline just to
2 get the details?

3 MR. MALLOF: I asked him to send
4 something over. I mean, again, it's -- I --

5 MEMBER ALBERTI: Well, you told me
6 that.

7 MR. MALLOF: And --

8 MEMBER ALBERTI: That's not my
9 question. Did you propose to Mr. Kline --

10 MR. MALLOF: No, I --

11 MEMBER ALBERTI: -- that we meet
12 to get the details?

13 MR. MALLOF: No, because I didn't
14 -- I don't -- I have five neighbors who are --
15 who've been through hell and back on these
16 proceedings.

17 MEMBER ALBERTI: Were you
18 available on March 10th at 10:00 a.m.?

19 MR. MALLOF: No. I'm sure of
20 that.

21 MEMBER ALBERTI: Okay. And did
22 you tell Mr. Kline that?

1 MR. MALLOF: Yes, I believe that
2 came up.

3 MEMBER ALBERTI: Okay.

4 MR. MALLOF: And the polite way to
5 say it is thank you for the proposal, but you
6 know, please let me take it back and I'll get
7 back to you --

8 MEMBER ALBERTI: All right. You
9 were aware that the moratorium was changed?

10 MR. MALLOF: Yes.

11 MEMBER ALBERTI: That the
12 conditions of the moratorium were changed?

13 MR. MALLOF: Yes.

14 MEMBER ALBERTI: It was pretty
15 drastic. I mean, there was expansion of what,
16 two licenses and lateral expansion and --

17 MR. MALLOF: I think it was one
18 license and --

19 MEMBER ALBERTI: One license?

20 MR. MALLOF: -- well, substantial
21 changes. Wasn't it a couple of substantial
22 changes?

1 MEMBER ALBERTI: All right.

2 Substantial changes.

3 MR. MALLOF: Probably.

4 MEMBER ALBERTI: Would you agree
5 that that's a change in the neighborhood?

6 MR. MALLOF: Not necessarily. Not
7 at all. But if the world pivots on the ABC
8 and even restauranteuring, then yes. If also
9 the yoga studio and three marvelous pharmacies
10 the CVS filled in are also part of life, then
11 no.

12 MEMBER ALBERTI: So --

13 MR. MALLOF: This is not an ABC
14 center issue.

15 MEMBER ALBERTI: So we had all
16 these hearings, we had all these debates in
17 the ANC, it goes before the City Council and
18 that change in that moratorium.

19 MR. MALLOF: Right.

20 MEMBER ALBERTI: In your view it's
21 not a change in the neighborhood that's worth
22 mentioning?

1 MR. MALLOF: No, I'm not saying
2 that. I'm saying it's not on a new licensee
3 here, so I can't say to you that -- I can't
4 say yes to the question as it proposed it.

5 MEMBER ALBERTI: Okay.

6 MR. MALLOF: It's --

7 MEMBER ALBERTI: No further
8 questions.

9 MR. MALLOF: I want to be polite,
10 but you are here --

11 MEMBER ALBERTI: No further
12 questions. Thank you.

13 CHAIRPERSON MILLER: I just have a
14 quick couple of questions. First is I heard
15 you say tonight that you were in support of
16 expansion.

17 MR. MALLOF: For Hank's?

18 CHAIRPERSON MILLER: For Hank's.

19 MR. MALLOF: Yes, not knowing
20 which way it would go.

21 CHAIRPERSON MILLER: Yes.

22 MR. MALLOF: Certainly hoping it

1 would go west into Trio, not east; when we
2 found out the details, directly abutting a
3 residential road. That's the flash point
4 here. It's --

5 CHAIRPERSON MILLER: Okay. I
6 thought you -- and I even thought you were
7 talking now. So you're not in support of
8 expansion the way that it's going to be
9 expanded, if approved, if the agreement is
10 terminated?

11 MR. MALLOF: Well, it's already
12 been approved.

13 CHAIRPERSON MILLER: No, I know,
14 sir, but are you in support of the expansion
15 the way it expanded?

16 MR. MALLOF: I can't un-spill the
17 milk. So what has been approved is 125
18 percent increase inside, moving next door to
19 directly abut a residential road for the first
20 time; unprecedented in most of Dupont Circle,
21 I might add. Hard to find other examples.
22 And outside a 100 percent increase in seats

1 directly abutting a residential road. And we
2 opposed that magnitude of expansion. But
3 expansion per se, no.

4 CHAIRPERSON MILLER: So but
5 expansion per se really is pretty speculative.

6 MR. MALLOF: Well --

7 CHAIRPERSON MILLER: There's no
8 meat on the bones on that one, right?

9 MR. MALLOF: What's that?

10 (Laughter.)

11 CHAIRPERSON MILLER: Well, you're
12 not --

13 MR. MALLOF: Well, no, I -- yes.

14 CHAIRPERSON MILLER: I don't what
15 you mean, because --

16 MR. MALLOF: No, I think it means
17 in our mind, in our collective mind that
18 proprietor, the owner of the property promised
19 apparently under oath that the residential
20 zoning variance would be a flower shop or a
21 bank or something, not a restaurant. Mr.
22 Kline ran through --

1 CHAIRPERSON MILLER: Wait. Wait a
2 second. I just wanted to clarify so we can
3 finish here.

4 MR. MALLOF: Sorry.

5 CHAIRPERSON MILLER: You had made
6 a remark that you were in support of expansion
7 and I didn't know what that meant.

8 MR. MALLOF: I would not object to
9 expansion of some sort, no.

10 CHAIRPERSON MILLER: Yes, so you
11 mean expansion of some sort, whatever that is,
12 maybe --

13 MR. MALLOF: Yes.

14 CHAIRPERSON MILLER: -- but not
15 what --

16 MR. MALLOF: Not 125 percent.

17 CHAIRPERSON MILLER: -- the
18 expansion that they wanted?

19 MR. MALLOF: Not -- that was a
20 huge acceleration of seats and impacts --

21 CHAIRPERSON MILLER: Okay.

22 MR. MALLOF: -- directly abutting

1 a residence for the first time.

2 CHAIRPERSON MILLER: Okay. I just
3 wanted to clarify what, because it sounded
4 like you were in support of an expansion and
5 I didn't know why you were here then. But --

6 MR. MALLOF: Well, the expansion
7 to the -- I would've certainly supported Trio.

8 CHAIRPERSON MILLER: Okay. And
9 then --

10 MR. MALLOF: I want to be clear.

11 CHAIRPERSON MILLER: -- my other
12 question is --

13 MR. HIBEY: The Board has a
14 misunderstanding of sort of what we are
15 seeking or what we're trying to accomplish
16 here.

17 CHAIRPERSON MILLER: I'm almost
18 finished here. I'm trying to get a
19 clarification of some of his statements so
20 that I understand it correctly.

21 MR. HIBEY: It's going to take
22 another 20 minutes with him.

1 CHAIRPERSON MILLER: Ooh, I think
2 you're kind of out order, so I --

3 MR. HIBEY: I'm sorry. I was
4 joking.

5 CHAIRPERSON MILLER: Okay. My
6 last question is --

7 MR. HIBEY: Sorry.

8 CHAIRPERSON MILLER: -- you had
9 said I'm in support of amendment, but not
10 termination. So my question is were you just
11 talking in the same way, speculatively, like
12 I might be in support of amending it as
13 opposed to a specific amendment?

14 MR. MALLOF: You mean --

15 CHAIRPERSON MILLER: Like a
16 specific amendment to allow the expansion,
17 something like that?

18 MR. MALLOF: General support of
19 allowing -- of not objecting to any operator
20 who wanted to improve, no, I wouldn't have a
21 problem with that.

22 CHAIRPERSON MILLER: Okay. You

1 weren't talking --

2 MR. MALLOF: It's the meat on the
3 bone and when --

4 CHAIRPERSON MILLER: --
5 specifically about this case. You were not
6 talking about this case.

7 MR. MALLOF: -- you see 125
8 percent expansion in inside seats, you have to
9 sort of protest that because you think it
10 should be maybe 80 percent, or a step-down as
11 directed by what occurs. That's part of the
12 logic here --

13 CHAIRPERSON MILLER: Okay.

14 MR. MALLOF: -- that's linked to
15 the zoning situation.

16 CHAIRPERSON MILLER: Okay. Thank
17 you. Okay. That concludes my questions. Is
18 there any redirect based on --

19 MR. KLINE: Very briefly, yes.

20 CHAIRPERSON MILLER: -- my
21 questions?

22 MR. KLINE: I'm sorry. Mr.

1 Mallof, you've repeatedly referred to
2 signatories to the voluntary agreement and
3 indicated that you were only authorized to
4 speak in the absence of the other
5 signatories --

6 MR. MALLOF: I didn't say that.

7 MR. KLINE: -- is that correct?

8 MR. MALLOF: No, I didn't say
9 that.

10 MR. KLINE: Okay. Well, what was
11 your understanding of your role with respect
12 to this voluntary agreement that was in place?

13 MR. MALLOF: Flexible.

14 MR. KLINE: Your role was
15 flexible?

16 MR. MALLOF: The way it works at
17 the ABC Board is that sometimes people have
18 work and they can't appear on the day when the
19 Board members say please bring three new faces
20 to appear at a roll call or at a follow-up.
21 And so what we discovered over the years is to
22 simply say -- to provide the authorization if

1 necessary and for it to be Lex or me, in case
2 I had to be in another city, and for Susan to
3 participate if she needed to, a flexibility so
4 that we'd be covered if put on the spot,
5 covered to say -- as you typically say, Mr.
6 Kline, do you represent the group? Who is --

7 MR. KLINE: And you --

8 MR. MALLOF: You would.

9 MR. KLINE: -- and Mr. Rieffel
10 represented the group, correct?

11 MR. MALLOF: As needed. As
12 needed. Sometimes for a roll call I would
13 appear with three protestants and neighbors.
14 We need that flexibility, especially when you
15 have 100 protestants.

16 MR. KLINE: All right. So in
17 terms of dealing with a potential
18 termination --

19 MR. MALLOF: Yes.

20 MR. KLINE: -- of the voluntary
21 agreement --

22 MR. MALLOF: Yes.

1 MR. KLINE: -- or amendment to the
2 voluntary agreement, it was you and Mr.
3 Rieffel that had that responsibility, correct?

4 MR. MALLOF: We were assigned
5 authorization, yes.

6 MR. KLINE: Right.

7 MR. MALLOF: If needed. And it
8 could be either one of us.

9 MR. KLINE: Okay. But in terms of
10 the other members of the group, they didn't
11 have that authorization, correct?

12 MR. MALLOF: I didn't grant them
13 that authorization, no.

14 MR. KLINE: And in fact, you've
15 seen the final order in this case, the final
16 order in the original licensing case --

17 MR. MALLOF: Yes.

18 MR. KLINE: -- which incorporated
19 the voluntary agreement, correct?

20 MR. MALLOF: Yes.

21 MR. KLINE: Have you seen it?

22 MR. MALLOF: Oh, sure.

1 MR. KLINE: Have you looked at it
2 recently?

3 MR. MALLOF: Yes, I think I have.

4 MR. KLINE: Okay. I'm going to
5 show it to you.

6 MR. MALLOF: Yes.

7 MR. KLINE: It's in the Board's
8 files. I'm not going to introduce it.

9 MR. MALLOF: Sure.

10 MR. KLINE: You know that
11 document?

12 MR. MALLOF: Sure, I've seen this.

13 MR. KLINE: Okay.

14 MR. MALLOF: This is all our hard
15 work retyped.

16 MR. KLINE: Okay.

17 MR. MALLOF: Thank you.

18 MR. KLINE: But the fact of the
19 matter is that final order --

20 MR. MALLOF: Yes.

21 MR. KLINE: -- from the ABC Board
22 says this is the voluntary agreement, doesn't

1 it? This is the final voluntary agreement.

2 MR. MALLOF: Oh, yes.

3 MR. KLINE: Right.

4 MR. MALLOF: Yes.

5 MR. KLINE: So Ms. Meehan-Mizfeel
6 and the others, they're not even mentioned in
7 there, are they?

8 MR. MALLOF: That's not my fault.

9 MR. KLINE: I didn't ask you
10 whether it was your fault. I asked you if
11 they're mentioned in there.

12 MR. MALLOF: No, they're not
13 mentioned here.

14 MR. KLINE: All right.

15 MR. MALLOF: That's a huge
16 oversight, Andrew.

17 MR. KLINE: Okay.

18 MR. MALLOF: I might add that with
19 every --

20 MR. KLINE: No, you don't need to
21 add anything. There's no question pending.

22 MR. MALLOF: I would like to say

1 we always --

2 MR. KLINE: Mr. Mallof, we want to
3 get out of there. There's no question
4 pending.

5 CHAIRPERSON MILLER: It's 8:35, so
6 let's just answer the question and finish,
7 yes.

8 MR. KLINE: All right. That's all
9 I have. Thank you.

10 CHAIRPERSON MILLER: Okay. Mr.
11 Hibey, are you finished with this witness?
12 Any questions specifically related to --

13 MR. HIBEY: I don't --

14 CHAIRPERSON MILLER: -- Mr.
15 Kline's --

16 MR. HIBEY: Whatever this is isn't
17 the decision that the -- I mean, this isn't
18 what you say it is, so I don't --

19 MR. KLINE: Beg your pardon?

20 CHAIRPERSON MILLER: Mr. Hibey,
21 you have --

22 MR. HIBEY: Was this moved into

1 evidence?

2 CHAIRPERSON MILLER: -- a

3 question?

4 MR. KLINE: No, it's in the
5 Board's files.

6 MR. HIBEY: Well, then forget it.
7 No, no questions.

8 CHAIRPERSON MILLER: Okay. Thank
9 you, Mr. Mallof.

10 MR. MALLOF: Thank you very much.

11 CHAIRPERSON MILLER: Okay. Hold
12 on. Okay. Closing?

13 MR. KLINE: Closing?

14 CHAIRPERSON MILLER: Yes.

15 MR. KLINE: Madam Chairperson,
16 members of the Board, we're here today based
17 upon the remand from the court of appeals, and
18 it was the applicant's burden to come forward
19 to you today so that you can make two findings
20 that are necessary to proceed with an
21 amendment or termination of the voluntary
22 agreement. Those findings are that the

1 applicant made a diligent effort to locate all
2 other parties, or, if they were located, made
3 a good faith attempt to negotiate a mutually
4 acceptable amendment to the voluntary
5 agreement. And of course, the statute then
6 goes on to say that the way that can be shown
7 is that a meeting occurred between the parties
8 which did not result in an agreement, or the
9 non-applicant parties refused to meet.

10 Now, we've had a lot of
11 discussions about whether there was a refusal
12 to meet. Our position is pretty clearly that
13 Mr. Mallof's sort of general memory of what
14 went on is just not credible. If you look at
15 the documentary evidence, which is unrefuted,
16 and which Mr. Mallof concedes that he
17 received, the first correspondence is dated
18 January 26th, 2010 and sets forth very clearly
19 that Hank's Oyster Bar desired to expand its
20 premises to include the adjacent space and
21 that the expansion could constitute a
22 substantial change. It then goes on to say,

1 "Because of limitations in the VA adopted by
2 the Board, the licensee may not apply unless
3 the VA is either amended or terminated." It
4 then goes on to say, "We would like to meet
5 with you in an effort to negotiate a mutually
6 acceptable amendment to the voluntary
7 agreement." So at that point there wasn't
8 even any discussion necessarily about
9 termination, although that was obviously one
10 of the possibilities and was referenced. The
11 closing remarks is let's meet. Let's talk
12 about an amendment.

13 There was certainly plenty of
14 information at that point for Mr. Mallof to
15 proceed. Even though our position is the
16 order really didn't require that he talk with
17 the other people; I could understand why he
18 would want to do that, but he certainly had
19 enough information to do that at that point.
20 If he needed further information, he could
21 have asked for it. He testified repeatedly
22 that he asked for more meat on the bones. He

1 talked about some of the things that he would
2 have liked to have seen, but there's never any
3 real clear statement that he asked for any of
4 that.

5 Instead what you have -- remember,
6 this letter is dated January 26th, 2010.
7 Instead, almost a month later you have, "We
8 have heard nothing from you" -- now remember,
9 I know there's weather, I know there's winter,
10 but this isn't Maine. This isn't Minnesota.
11 This is the District of Columbia. This is a
12 full month later. "We have heard nothing from
13 you in response to our request for a meeting
14 concerning the possible expansions of Hank's
15 Oyster Bar." We propose March 4. Give a
16 date. There was no response. We said give us
17 some dates. We didn't hear anything. So we
18 write them again and say we propose a date in
19 my office, and my office is -- I think is in
20 evidence is in the Dupont Circle area, of the
21 jurisdiction in the ANC. "If I receive no
22 response, I shall presume that you have no

1 intention of meeting with us concerning this
2 matter." And that of course is February 23rd
3 at 10:54 p.m., at night.

4 The very next day there's an email
5 from Mr. Mallof. He says, "Hope you and the
6 family survived the snow just after just sent
7 your note." Now that was the month before.
8 "We'd be delighted to speak with you or Jamie
9 or by phone first."

10 Now, Mr. Mallof alludes to or
11 testifies to two telephone conversations. The
12 last email is in response to his. It is less
13 than two hours later. It's at 6:18 p.m. on
14 the same date. "Dave, when we spoke today,
15 you indicated you did not believe it is time
16 to revisit the voluntary agreement for Hank's.
17 Accordingly, although you indicated you did
18 not speak for the others, you see no point in
19 meeting to discuss the matter.

20 "You indicated that you would,
21 however, speak with the other signatories to
22 the VA to see if they feel differently. You

1 mentioned that I had admitted Susan Meehan
2 from the letter I sent. Indeed, as the Board
3 order approving the VA explicitly referenced
4 you and Lex Rieffel as the representatives, I
5 wrote only to the two of you. I presume you
6 have and will keep Susan as well as Michael
7 Fasano, Patricia Steele, the other members of
8 your protest group apprised of these
9 discussions. If that is not the case, please
10 let me know, provide their email addresses and
11 I will communicate with them directly. I am
12 keeping March 10th at 10:00 a.m. available in
13 case you're willing to meet." Give them
14 another day. Come meet.

15 Less than 24 hours later on
16 February 25th at 12:52 p.m.; so it's actually
17 18 hours later, "Andrew, thanks." And we have
18 this rambling email. No mention of the
19 proposed meeting. There is something in here
20 that is responsive to that last email. "I
21 mentioned to you when we spoke that just
22 admitted Susan Meehan in the January 26th

1 email she sent on your behalf and nevertheless
2 has forwarded copies." That's directly
3 responsive to the conversation in the previous
4 email on February 24th.

5 Mr. Mallof says that there may be
6 other emails intervening. He doesn't recall
7 directly. None have been produced. But I
8 would submit if you fit these together,
9 despite the rambling response, it's pretty
10 unlikely that there's anything else.

11 What's missing here is any request
12 for any additional information, any suggestion
13 that, well, gee, don't give us one date; give
14 us several, any offer of dates, any
15 inconvenient -- that it was inconvenient to
16 meet there, any of that.

17 Now let's look at the pleading
18 that Mr. Mallof filed where he complains about
19 how all this proceeded. None of the issues
20 that we've heard today are raised. There's a
21 long rambling pleading, other essential points
22 regarding pre-petition and re-placarding, and

1 he says, "The Board should be aware that
2 effectively being summoned to a meeting called
3 by the petitioner's counsel at his law office
4 with no substantive reasons for proposal
5 having yet been made even in cursory written
6 form is discourteous, if not disrespectful."

7 I think that kind of ties it all
8 up. He wanted something more. What it was
9 was never articulated, but there was an
10 unwillingness to meet. Here are the dates.
11 Mr. Mallof's a smart guy. He may ramble on a
12 bit, but he's a very intelligent man. And if
13 there was something more that needed to be
14 done, he would have answered the email and
15 said, well, give me X, Y and Z. We're happy
16 to meet with you.

17 I think that the more likely
18 scenario to be believed by the Board, as is laid
19 out in the email, "When we spoke today you
20 indicated you do not believe it is time to
21 revisit the voluntary agreement" -- if that's
22 not a refusal to meet, I don't know what is.

1 It seems to me if the Board finds that
2 credible; and I would suggest to you even
3 without my testifying, which obviously I've
4 not, with the correspondence one can come to
5 the conclusion that that's the credible
6 scenario.

7 That's what happened. Even Mr.
8 Mallof's pleading with you, which is on
9 record, is perfectly consistent with that. We
10 didn't give him enough. He didn't like what
11 I told him. He wasn't going to meet. Well,
12 that's a refusal to meet. You don't set the
13 conditions. And it's not as if we said meet
14 on this date, only on this date, otherwise
15 we're going to say you refused to meet. There
16 were plenty of opportunities for them to come
17 back, give us other dates, meet on the dates
18 we proposed, tell us they needed something
19 else to meet. None of that happened, and it
20 seems pretty clear.

21 All right. Let's look at the
22 other issue, and the other issue is whether

1 there were either circumstances beyond the
2 control of the applicant or change in the
3 neighborhood which caused a need for the
4 amendment. Well, there are several points,
5 but I'll focus on the major ones.

6 The first is how did this
7 voluntary agreement come about? This
8 voluntary agreement came about; and that's why
9 we introduced the transcript, because the
10 then-sitting ABC Board refused to schedule a
11 hearing. And it's very clear if you read the
12 transcript we said please give us a hearing.
13 No one really opposes this application. Well,
14 at least let us go to mediation. No, come
15 back for another status and then we'll send
16 you to mediation. And then after that we'll
17 send you to a protest hearing. It would have
18 been months and months and months.

19 As Ms. Leeds testified on the
20 stand, she would have been broke before she
21 got started. She couldn't wait for that, so
22 she had to sign a voluntary agreement. She

1 had absolutely no choice in the matter other
2 than to lose her business.

3 So one of the circumstances that
4 changed, which was clearly beyond her control,
5 suddenly we had an ABC Board who would hear
6 cases. Now one may think that's an odd
7 argument in terms of change in
8 circumstances --

9 (Laughter.)

10 MR. KLINE: -- but it's a change
11 in circumstance, and it's a really important
12 one, because she was stuck with a voluntary
13 agreement through no -- she was prepared to go
14 to hearing; she testified to it, but couldn't
15 get a hearing date. And then several years
16 later she wants to expand and she's stuck with
17 this voluntary agreement.

18 Now there are other circumstances
19 that changed in the neighborhood. And with
20 respect to the neighborhood, there were
21 changes in the neighborhood, and the changes
22 should be pretty obvious. This Board

1 struggles with moratoria all the time. And
2 although Mr. Mallof didn't want to admit it,
3 moratoria stay in place if they're there to
4 combat the same problems and deal with the
5 same issues.

6 When a neighborhood comes to you
7 and says, gee, we think we ought to relax it
8 in some way, particularly when it's as strict
9 as lateral expansion. It's almost self-
10 evident that there's been some change in the
11 neighborhood which caused this neighborhood to
12 come to you and say, gee, float four more
13 licenses, allow lateral expansion. So it's
14 almost obvious.

15 Now how does that relate to Ms.
16 Leeds? Well, as she testified, when she
17 signed the voluntary agreement, she wasn't
18 really worried about the limit on capacity.
19 It wasn't really an issue. It was enough
20 seats for her at that time. She wasn't
21 looking at the future. There was no place to
22 expand. There was no space available. Trio

1 had been there a number of years, as
2 everybody's testified to. The other space was
3 not commercial. And the moratorium preventing
4 lateral expansion was in place. So at that
5 point the voluntary agreement with respect to
6 that issue was fine, not an issue.

7 However, circumstances changed.
8 The neighborhood changed. The neighborhood
9 rezoned or allowed rezoning of the space next
10 to her. That's a change in the neighborhood.
11 The neighborhood said, gee, we should allow
12 lateral expansion. We should allow two or
13 three places to expand. That's a change in
14 the neighborhood. All of a sudden, this cap
15 in her agreement was significant, whereas when
16 she signed it, it wasn't significant.

17 Now all that's beyond her control.
18 You know, what this is designed to get to is
19 you creating the situation yourself. In other
20 words, you're providing parking and you sell
21 the parking lot and say, gee, I need to change
22 my voluntary agreement because I can't provide

1 parking anymore. Well, why not? Well,
2 because I sold the parking lot. Well, that's
3 within your control. None of this was in her
4 control.

5 We would submit to you for all of
6 those reasons and others; and I could go on,
7 but it's 8:50 at this point, so I won't, that
8 there are enough changes in the neighborhood
9 that are clearly beyond her control. If you
10 look at what you have, the proceedings on the
11 moratoria, both 2005 and 2009, you'll see the
12 change. Some of it was testified to by Mr.
13 Jacobson about migration of retail eastward.
14 There was some discussion about people eating
15 out more, shopping at home more, which would
16 create more demand obviously for seats in the
17 neighborhood. The neighborhood changed.
18 Neighborhoods are not stagnant. And that's
19 why you revisit moratorium every three or five
20 years.

21 Thank you. We would ask that at
22 the conclusion of the hearing that you

1 reinstate the termination of the voluntary
2 agreement and we would ask that you do so
3 quickly. As this matter lingers on, Ms. Leeds
4 loses thousands of dollars a week in terms of
5 the areas of her restaurant that she can't
6 use. So if you agree with our position and
7 you believe that the termination of the
8 voluntary agreement should be re-instituted
9 after the remand from the court of appeals, we
10 would respectfully request that that be done
11 as quickly as possible. Thank you.

12 CHAIRPERSON MILLER: Thank you.

13 MR. HIBEY: I'll be brief.

14 Earlier I said something when you were asking
15 a question, Chairperson Miller, asking Dave a
16 question about how it could go on. It was
17 meant as a comment about Dave, not you or
18 anyone else on the Board.

19 And what I wanted to address at
20 that time was sort of what we're actually
21 after here and what we're interested in. I
22 got the sense from some of your questions that

1 there was maybe the idea that what we're
2 trying to do is reinstate the VA and then take
3 away the expansion, or somehow keep them
4 limited to the seats that are currently in the
5 VA. That's not what we're trying to do.
6 We're not trying to undo the expansion.

7 So maybe that leads to the next
8 question: Well, what the heck are we doing
9 here? And really all we're doing here is just
10 trying to enforce the statute. And all of
11 this talk about who said what and what
12 happened is completely beside the point
13 because the statute defines what a good faith
14 attempt to negotiate is. It is specifically
15 defined as an affidavit filed at the time of
16 the termination. The purpose of it is so that
17 we don't get into this nonsense, so that there
18 can be an affidavit and right off the bat we
19 all know, okay, there was this good faith
20 attempt. It's been met.

21 In this case there was no
22 affidavit. That's the only way you can meet

1 it. Not by showing letters from one attorney
2 to another party and not by testifying about
3 conversations or emails. I mean, all it is is
4 an affidavit, and it's pretty simple. So what
5 should have happened months and months and
6 years ago is an amended petition should have
7 been filed with an affidavit. And they
8 refused for who knows what reason, but they're
9 putting you in this position where you have to
10 ignore the law and try to make a finding on
11 (A) where it's contrary to 446(d) -- what is
12 it, (d)(5)? The part that defines good faith.

13 So that's the real problem here.
14 There's no affidavit. Nothing talked about
15 today produced that other than one belated
16 after the fact. It wasn't filed with the
17 petition as the statute requires.

18 This goes all the way back to how
19 I was trying to save everybody some time. We
20 should have up front addressed this issue.
21 The petition should have been dismissed with
22 leave to file immediately or whenever. Get

1 the affidavit in place and then we don't have
2 this issue. We don't have people talking
3 about what was or was not good faith
4 negotiations. Two hours of this is gone.

5 Furthermore, if we're going to get
6 into it that affidavit couldn't have been
7 created. Not all the non-applicant parties
8 refused to meet, and she didn't even put it in
9 her current affidavit.

10 Now, clearly there was an attempt
11 by this party to reach out to the signatories
12 and they never met, they never negotiated an
13 amendment or termination, and that's why we're
14 here. But that doesn't mean prong (A) has
15 been met, no matter what has been talked about
16 here today. It requires an affidavit at the
17 time of filing the petition.

18 Moving on to the next part about
19 change in the neighborhood or change in
20 circumstances beyond the owner's control, the
21 changes that have been discussed, we would say
22 they're not changes in the neighborhood. We

1 would say they're not changes beyond her
2 control. But we don't even get there, because
3 whether they are or aren't, they are not
4 changes that warrant terminating the voluntary
5 agreement.

6 The court of appeals was very
7 clear: Terminating a voluntary agreement is
8 a drastic measure that goes way too far. And
9 to terminate it based on what isn't even a
10 changing neighborhood, that has been the same
11 neighborhood for years, between '05 and '12,
12 is incorrect. What we want is an amended
13 voluntary agreement, but not at this point.
14 This needs to end and they need to do it the
15 right way so that in the future we don't have
16 this problem again, so that in the future
17 everyone knows there is one way to show good
18 faith negotiations, and it's what the statute
19 tells you to do, and it's file an affidavit
20 when you file your petition.

21 So we go back to the beginning and
22 we ask that the Board not make a finding that

1 (A) has been met. And we'd be more than open
2 to an amendment so that she can operate her
3 business and use the expanded space in a good
4 way. That's what we want. Thank you.

5 MR. KLINE: May I have two minutes
6 for rebuttal?

7 CHAIRPERSON MILLER: Rebuttal to
8 closing?

9 MR. KLINE: Yes, I get to get a
10 last --

11 CHAIRPERSON MILLER: Okay.

12 MR. KLINE: I'm going to take Mr.
13 Hibey up on his offer and move to amend our
14 petition to incorporate the affidavit that we
15 filed with you earlier. Since he's offered to
16 allow it to be amended, we will take him up on
17 his offer and we will move that the petition
18 be amended to incorporate that affidavit.

19 MR. HIBEY: We object to that.
20 That is not what the statute says. We're
21 saying this case needs to be over and then we
22 will discuss that option.

1 MR. KLINE: All right. And then
2 with respect to the substantive points on that
3 issue; I argued them before, just a brief
4 recap, we have the legislative history. You
5 had three prior cases in which the Board
6 looked at good faith and made decisions in all
7 three of those cases, and in none of those
8 cases was a prior affidavit required. And for
9 the Board to now flip on that issue will raise
10 the very same issues that the court of appeals
11 expressed concern about in the opinion in this
12 case. And with that, we have nothing further.

13 MR. HIBEY: One minute on that, if
14 I could.

15 CHAIRPERSON MILLER: No, there's
16 not a rebuttal rebuttal. This is over. No
17 there's not. No.

18 MR. HIBEY: I'm trying to help
19 you.

20 CHAIRPERSON MILLER: We don't need
21 help, really. We got it. There's been a lot
22 of repetition. We really -- believe me.

1 MR. KLINE: Thank you for
2 indulging all of us.

3 CHAIRPERSON MILLER: Okay. So
4 you're welcome. I know it's been a long
5 afternoon/evening. At this point the record
6 is going to be closed on this case here. So
7 you have the opportunity if you so choose to
8 filed proposed findings of fact and
9 conclusions of law within 30 days. Does
10 anyone want to do that?

11 MR. KLINE: We'll waive.

12 MR. HIBEY: We will waive.

13 CHAIRPERSON MILLER: I'm sorry?

14 MR. HIBEY: We will waive.

15 CHAIRPERSON MILLER: Okay. So
16 that's that.

17 The Board will issue a decision
18 within 90 days, but we have heard, you know,
19 that if we do decide to terminate the
20 voluntary agreement you're concerned that we
21 try to do that more quickly. So we have heard
22 your concerns, your economic concerns, so we

1 will take that into consideration.

2 Okay. So I think that's it.

3 MEMBER ALBERTI: Read your script.

4 CHAIRPERSON MILLER: I will --

5 MEMBER ALBERTI: Read your script.

6 CHAIRPERSON MILLER: Yes, I'm
7 going to -- the only thing left that I have to
8 do is just read --

9 MEMBER ALBERTI: Do you want to
10 recite it for us, Mr. Kline?

11 CHAIRPERSON MILLER: Yes, we have
12 instructions for -- we're going to have a
13 closed meeting to deliberate on this case.
14 And so, in accordance with the Open Meetings
15 Act I am going to just read that. Not
16 instruction.

17 Okay. As Chairperson of the
18 Alcoholic Beverage Control Board for the
19 District of Columbia and in accordance with
20 Section 405 of the Open Meetings Amendment Act
21 of 2010, I move that the ABC Board hold a
22 closed meeting for the purpose of seeking

1 legal advice from our counsel on Case No. 10-
2 PRO-00094, Hank's Oyster Bar, per Section
3 405(b)(4) of the Open Meetings Amendment Act
4 of 2010 and deliberating upon this case for
5 the reasons cited in Section 405(b)(13) of the
6 Open Meetings Amendment Act of 2010. Do I
7 have a second?

8 MEMBER NOPHLIN: Second.

9 CHAIRPERSON MILLER: Now that the
10 motion's been seconded, I'll take a roll call
11 vote on the motion before us.

12 Mr. Nophlin?

13 MEMBER NOPHLIN: I agree.

14 CHAIRPERSON MILLER: Mr. Brooks?

15 MEMBER BROOKS: I agree.

16 CHAIRPERSON MILLER: Mr. Alberti?

17 MEMBER ALBERTI: I agree.

18 CHAIRPERSON MILLER: And I agree.

19 So the motion passes 4-0-0.

20 I hereby give notice that the ABC
21 Board will hold a closed meeting in the ABC
22 Board conference room today pursuant to the

1 Open Meetings Amendment Act of 2010 and issue
2 an order with 90 days.

3 So that concludes this hearing
4 Thank you very much everyone.

5 MEMBER ALBERTI: Thank you
6 everyone.

7 CHAIRPERSON MILLER: Good night.

8 MR. KLINE: As a housekeeping
9 matter, I don't believe that you have the
10 exhibit that is the report.

11 CHAIRPERSON MILLER: Right.

12 MR. KLINE: Okay. Does the Board
13 have a copy of it? I just wanted to make
14 sure.

15 CHAIRPERSON MILLER: No.

16 MEMBER ALBERTI: Which? The
17 report from the ANC?

18 MR. KLINE: From the ANC.

19 PARTICIPANT: The Board has a
20 copy.

21 MR. KLINE: Yes, you have a copy?

22 CHAIRPERSON MILLER: No, we have

1 it. Yes. Thank you very much.

2 MR. KLINE: Thank you.

3 (Whereupon, the hearing was
4 concluded at 9:01 p.m.)

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