

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

2 (1:40 p.m.)

3 CHAIRPERSON MILLER: Good

4 afternoon. We are here for Case No. 12-PRO-
5 00013, Walgreens #11408, located at 4225
6 Connecticut Avenue, N.W., License No. 88579 in
7 ANC-2F.

8 First, I would like to ask the
9 parties to introduce themselves for the
10 record.

11 MR. O'BRIEN: Stephen O'Brien for
12 the applicant. I'm accompanied by Rick
13 Conner, C-O-N-N-E-R, who is a regional manager
14 for the applicant, Walgreens.

15 MS. PERRY: Karen Perry, ANC-3F,
16 and I have two witnesses here right now, Brian
17 Lederer and Ed Sands and Mary Cheh is
18 conducting a hearing, but will be here.

19 CHAIRPERSON MILLER: Okay. All
20 right. Brian Lederer and who was the other
21 gentleman?

22 MS. PERRY: Ed Sands.

1 CHAIRPERSON MILLER: Okay.

2 MS. PERRY: Calvert Liquors.

3 CHAIRPERSON MILLER: Calvert
4 Liquor, okay. Okay. Councilmember Cheh hopes
5 to make this hearing after her own hearings?
6 Okay.

7 MS. PERRY: It's supposed to wrap-
8 up, yes.

9 CHAIRPERSON MILLER: Okay. I just
10 want to quickly kind of just address the
11 purpose of this hearing. I know we issued an
12 order reopening the record and calling the
13 parties before the Board for an additional
14 hearing, which is this.

15 We had a Protest Hearing on August
16 8 and what we addressed at that hearing was
17 all the appropriateness issues and a little
18 bit of the qualification issue, but we did not
19 have a full hearing on that issue. And it was
20 determined after the August 8, 2012 hearing
21 that we should do that.

22 And so I want to -- that's why we

1 are here. And I want to just refer the
2 parties, I will read the significant
3 paragraphs to remind us of the parameters of
4 this hearing.

5 It is to determine whether the
6 applicant qualifies for licensure under 25-
7 331(d) and 25-332(c). The applicant's
8 qualification for the exception shall be the
9 sole issue addressed at the hearing. As a
10 matter of the applicant's appropriateness was
11 properly addressed at the Protest Hearing on
12 August 8, 2012.

13 So I would think that's clear to
14 the parties that this is the sole issue, the
15 qualification and that appropriateness has
16 been addressed.

17 In determining whether the
18 applicant qualifies for licensure under 25-
19 331(d) and 25-332(c), the Board will only
20 consider the evidence submitted during this
21 hearing.

22 The Board will then give ANC-3F an

1 opportunity to cross-examine the applicant's
2 witnesses, present its interpretation of the
3 law and present any other evidence and
4 testimony it deems appropriate related to the
5 applicant's qualifications for licensure under
6 25-331(d) and 25-332(c).

7 So the Board is aware that there
8 was evidence submitted on qualifications in
9 the Protest Hearing. And we are also aware
10 that the applicant submitted documentation.
11 It was a Fact-Finding Hearing, so I wouldn't
12 call it exactly testimony, our evidence, but
13 information related to the licensure question,
14 qualification question.

15 What we are saying here is that we
16 want to -- whatever evidence you want us to
17 consider on this issue, bring it into this
18 hearing, either you can repeat it or you can
19 ask that it be moved in if the other side has
20 no objection.

21 I just wanted to make sure that
22 you understood that that's the order, so we're

1 going to be looking at the transcript and the
2 evidence in this case for the qualification
3 issue.

4 MS. PERRY: Excuse me, I couldn't
5 hear you. You're going to be looking at?

6 CHAIRPERSON MILLER: The evidence
7 in this case for the qualification issue. So
8 even if there was evidence submitted at the
9 Protest Hearing on this issue, either you need
10 to repeat it or ask or move it into the record
11 in this case.

12 We are not going to be going back
13 to those records for this issue. It should
14 all be here.

15 Okay. There is an advisory
16 opinion also that the Board issued that you
17 can address or, you know, argue to. However,
18 this order reopening the record is a little
19 bit broader, allowing for your interpretations
20 as well.

21 So if anyone has any questions
22 before we start, also, it is kind of like a

1 Protest Hearing, in that the applicant will go
2 first and then the protestants. We don't have
3 an investigator on this case. We don't have
4 an investigation report. It is just this
5 qualification issue.

6 Okay. Are there questions? Okay.
7 So we can start it like a Protest Hearing.
8 Mr. O'Brien, if you have an opening statement
9 you want to make? You don't have to, you
10 know.

11 MR. O'BRIEN: I really think that
12 we all by now know what the issue in the case
13 is.

14 CHAIRPERSON MILLER: Yes. Fine.

15 MR. O'BRIEN: So I don't think my
16 making an opening statement is going to help
17 much.

18 CHAIRPERSON MILLER: That's fine.
19 That's perfectly fine. So do you want to then
20 present your case on the qualifications?

21 MR. O'BRIEN: I don't know if Ms.
22 Perry wants to make a statement.

1 CHAIRPERSON MILLER: Okay. That's
2 true. You can make a statement now or before
3 your case. You don't need to either? Okay.
4 All right.

5 MR. O'BRIEN: Then we would call
6 our first witness, Jin Kim. First name J-I-N
7 last name Kim. I would ask him to step around
8 and face the Board while still standing in
9 order to be sworn in.

10 CHAIRPERSON MILLER: Good
11 afternoon.
12 Whereupon,

13 JIN KIM
14 was called as a witness by Counsel for the
15 Applicant, and having been first duly sworn,
16 assumed the witness stand and was examined and
17 testified as follows:

18 CHAIRPERSON MILLER: Okay. Thank
19 you.

20 MR. O'BRIEN: May I?

21 CHAIRPERSON MILLER: Yes, please.

22 MR. O'BRIEN: Okay.

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DIRECT EXAMINATION

MR. O'BRIEN: Sir, would you state your full name, please?

MR. KIM: Jin Kim.

MR. O'BRIEN: And, Mr. Kim, how are you employed?

MR. KIM: I'm sorry?

MR. O'BRIEN: How are you employed?

MR. KIM: From Walgreens. How am I employed?

MR. O'BRIEN: Yes. Where do you work?

MR. KIM: Oh, I work for Walgreens.

MR. O'BRIEN: Okay. Whereabouts for Walgreens do you work?

MR. KIM: At 4225 Connecticut Avenue.

MR. O'BRIEN: Okay. And what is your position at the Walgreens store at 4225 Connecticut Avenue?

1 MR. KIM: I'm a store manager.

2 MR. O'BRIEN: I'm sorry? Wait
3 until I finish the question before you answer,
4 because the reporter can't --

5 MR. KIM: Okay.

6 MR. O'BRIEN: So what is your
7 position there?

8 MR. KIM: I'm the store manager.

9 MR. O'BRIEN: Okay. And how long
10 have you been the store manager?

11 MR. KIM: I've been the store
12 manager there for almost a year now.

13 MR. O'BRIEN: All right. Mr. Kim,
14 I'm going to ask you to step back a bit from--
15 off the witness stand, step back towards the
16 audience and I'm going to ask, at this point,
17 that whoever is in the control room, it's
18 either Mr. Dees or Mr. Hager, start the video,
19 please.

20 And I believe each Board Member
21 has a screen there.

22 CHAIRPERSON MILLER: We do. We

1 are not seeing anything on it yet, are you?

2 Okay.

3 (VIDEO PLAYED/STOPPED)

4 MR. O'BRIEN: Here we are. Okay.

5 Before we actually roll it any further, Mr.

6 Kim, what do you see on the screen right now?

7 What is the nature of what you see on the

8 screen?

9 MR. KIM: That's the District
10 Manager, Mr. Conner, in front of the store.

11 MR. O'BRIEN: Okay. And is it a
12 single photograph?

13 MR. KIM: Yes.

14 MR. O'BRIEN: It's not a video?

15 MR. KIM: Well, no, it's a video.

16 MR. O'BRIEN: Okay. And who took
17 the video that we are about to see?

18 MR. KIM: Oh, I was behind the
19 camera.

20 MR. O'BRIEN: Okay. And when was
21 the video taken?

22 MR. KIM: It was in March of 2012.

1 MR. O'BRIEN: Okay. And is what
2 we are going to see in the video fairly and
3 accurately depict the condition of the store
4 in March of 2012?

5 MR. KIM: Yes.

6 MR. O'BRIEN: And have there been
7 any material changes to what we are going to
8 see since then?

9 MR. KIM: No.

10 MR. O'BRIEN: Okay. Now, we see
11 one person standing in front of the door and
12 who is that person?

13 MR. KIM: That's Rick Conner.

14 MR. O'BRIEN: And who is Rick
15 Conner, please?

16 MR. KIM: He is the District
17 Manager of Washington, D.C.

18 MR. O'BRIEN: Okay. And I would
19 ask the Board to note that Mr. Conner is
20 sitting next to me at the table.

21 CHAIRPERSON MILLER: So noted.

22 MR. O'BRIEN: All right. And if

1 we can then just roll the video, I'm going to
2 ask you, Mr. Kim, to describe what we see as
3 we go through.

4 (VIDEO RESUMED)

5 MR. KIM: Sure. That's pretty
6 much the entrance of the store, the vestibule
7 as you walk in.

8 MR. O'BRIEN: Now, what is right
9 behind Mr. Conner now in the picture?

10 MR. KIM: That is the summer
11 section.

12 MR. O'BRIEN: Okay.

13 MR. KIM: Well, in front is the
14 Pepsi cooler.

15 MR. O'BRIEN: Okay. Now, what is
16 Mr. Conner looking at?

17 MR. KIM: He is looking at the
18 Fresh Fruit Department.

19 MR. O'BRIEN: All right.

20 MR. KIM: And that is the
21 sandwiches or sandwich.

22 MR. O'BRIEN: Okay.

1 MR. KIM: Caesar salad.

2 MR. O'BRIEN: Is that fresh or
3 frozen?

4 MR. KIM: That's fresh.

5 MR. O'BRIEN: Okay.

6 MR. KIM: Pretty much everything
7 in the cooler is pretty much fresh.

8 MR. O'BRIEN: Okay.

9 MR. KIM: We get deliveries five
10 days a week. Fruit Bowl is -- wait a second,
11 melons and fruits. There are some entrees.
12 That looks like two Peking Rice along with
13 tacos, there are sandwiches. Some chicken,
14 buffalo it looks like, wraps, some pizzas and
15 paninis and, of course, salads on the bottom.

16 Let's see, Asian salads. Hold on
17 a sec. I mean, there is a variety of salads
18 and sandwiches, wraps, entrees to go. Just
19 variety-wise, we have about a total of a
20 little over 70 items in that cooler.

21 So from there pretty much this
22 floor is all -- I mean, I won't say it's --

1 it's about 50 percent consumables. There's a
2 fresh fruit and stand, bananas, mangos, apples
3 or nuts. Those are pretty much all basic
4 stands that we keep up pretty much all year.

5 He is now on the other side of the
6 store where there is frozen produce. There is
7 frozen fruit, strawberries, an assortment of
8 ice cream. We have an expanded frozen food
9 section. I think it is a door or two larger
10 than the Walgreens, choice pastries.

11 This is frozen pizzas to microwave
12 dinners. Chicken, my favorite. Two full
13 doors of pizza. That's just the wallpaper in
14 the background. We have the Eat Well, that's
15 one of our Well Initiatives, it's all part of
16 it, sustain and get well, eat well.

17 So there are our cooler doors. We
18 do have an expanded cooler section as well.
19 You know, we have the Lunchables, the more
20 snacky items, roasted chicken, turkey. I
21 mean, we usually get -- these deliveries we
22 usually get about twice a week.

1 MR. O'BRIEN: Are those fresh
2 eggs?

3 MR. KIM: Fresh eggs, yes.

4 MR. O'BRIEN: All right.

5 MR. KIM: And there is, I mean, a
6 variety of juices, teas, tonics, water, I
7 mean, soda, which I have pretty much in there
8 as possible the code reasons.

9 So he is now down Aisle 4. One
10 side is, of course, unconsumables, but the
11 other side is pretty much our grocery line
12 with cereals to canned goods to bread. We
13 have a bread delivery about twice a week as
14 well, fresh bread.

15 This is our canned tuna, pastas,
16 sauces, canned fruit, jams, soups. That's
17 pasta right there.

18 MR. O'BRIEN: Is this all the same
19 aisle?

20 MR. KIM: Yes, this is all the
21 same aisle. Yes, it's one aisle. It's pretty
22 much our grocery aisle. We have cereal, a

1 very large selection of cereal, breakfast bars
2 on the left. Those are more the donuts and
3 danishes.

4 This is down one of the aisles.
5 This is our warm section on the left in that
6 section. This is a different aisle. This is
7 Aisle 3. These are premium candy with hard
8 nuts, snack department. That right there is
9 just promotional space.

10 I mean, the store in general, I
11 have been there a year now, it's a very --
12 they did a lot of work around the area,
13 especially at lunchtime it's all about, you
14 know, consumables is what they are always
15 looking for, that's why we have such a big
16 variety there.

17 And he is just wrapping around.
18 That's kind of the -- that's what you kind of
19 see in the beginning.

20 MEMBER ALBERTI: Who is that?

21 CHAIRPERSON MILLER: Steven was --

22 MR. O'BRIEN: It never gets old,

1 does it?

2 (VIDEO STOPPED)

3 MR. O'BRIEN: All right. You can
4 resume the stand and I thank --

5 MR. KIM: I can resume?

6 MR. O'BRIEN: Sit down, yes. And
7 I thank staff for the technical support.

8 We would move this video into
9 evidence as Applicant's No. 1.

10 CHAIRPERSON MILLER: Ms. Perry, do
11 you have any objection?

12 MS. PERRY: No, I don't.

13 CHAIRPERSON MILLER: Okay. Thank
14 you. All right. Then the video is accepted
15 as Applicant's Exhibit No. 1.

16 (Whereupon, the document was
17 marked for identification as
18 Applicant Exhibit No. 1 and was
19 received in evidence.)

20 MR. O'BRIEN: Mr. Kim, I'm going
21 to show you now what has been marked as
22 Applicant's No. 2 for identification.

1 (Whereupon, the document was
2 marked as Applicant Exhibit No. 2
3 for identification.)

4 MR. O'BRIEN: And I am going to
5 pass up to staff reduced copies for each of
6 the Board and your's to follow. Could you
7 step --

8 MR. KIM: Sure.

9 MR. O'BRIEN: -- forward and I'll
10 ask you if you can take a look at Applicant's
11 Exhibit No. 2 for identification. Can you
12 tell the Board what that is, please?

13 MR. KIM: That is a picture of a
14 main level.

15 MR. O'BRIEN: Main level of what?

16 MR. KIM: Walgreen's.

17 MR. O'BRIEN: Is that what we just
18 saw on the video or at least portions of it?

19 MR. KIM: Yes, yes.

20 MR. O'BRIEN: Now, I see that
21 there are portions of the exhibit that are
22 shaded in blue. Could you tell the Board what

1 the blue depicts, please?

2 MR. KIM: All the blue is the
3 consumable section of the store.

4 MR. O'BRIEN: When you say
5 consumable, what do you mean?

6 MR. KIM: Food. Just food in
7 general.

8 MR. O'BRIEN: Do you include
9 beverages --

10 MR. KIM: Yes.

11 MR. O'BRIEN: -- as consumables?

12 MR. KIM: Yes, beverages. Just
13 not like Tylenol.

14 MR. O'BRIEN: Okay. Now, I see
15 superimposed on some of the blue some red.
16 Can you tell the Board what that red depicts?

17 MR. KIM: The potential -- that's
18 the location where we would like to add beer
19 and wine typically.

20 MR. O'BRIEN: Okay. You have
21 examined this exhibit before today, correct?

22 MR. KIM: Yes.

1 MR. O'BRIEN: Okay. What do you
2 estimate the floor space of the blue shaded
3 area as opposed to the total floor space of
4 that main level to date? What percentage?

5 MR. KIM: Give or take, I would
6 say about 50 percent.

7 MR. O'BRIEN: Okay.

8 MR. LEDERER: I'm sorry, I didn't
9 hear that answer.

10 MR. O'BRIEN: He said -- I believe
11 he said give or take about 50 percent.

12 MR. KIM: Yes.

13 CHAIRPERSON MILLER: Could you
14 clarify, 50 percent of that level?

15 MR. KIM: Yes.

16 CHAIRPERSON MILLER: Okay.

17 MR. O'BRIEN: I'm a little
18 confused here.

19 CHAIRPERSON MILLER: Right.

20 MR. O'BRIEN: We went through this
21 last time.

22 CHAIRPERSON MILLER: Right.

1 MR. LEDERER: Okay.

2 MR. O'BRIEN: Is Mr. Lederer
3 appearing as counsel?

4 MS. PERRY: No, no.

5 MR. LEDERER: No, I --

6 MR. O'BRIEN: Well, I don't think
7 he should be speaking.

8 CHAIRPERSON MILLER: Also I don't.
9 They shouldn't be speaking in the middle of
10 your presentation either.

11 MR. O'BRIEN: Okay.

12 CHAIRPERSON MILLER: So you will
13 have a chance to cross-examine though. Okay.

14 MR. O'BRIEN: All right. Thank
15 you. Now, I would move No. 2 for
16 identification into evidence.

17 CHAIRPERSON MILLER: And No. 2 is,
18 what do you call it?

19 MR. O'BRIEN: I call it a floor
20 plan.

21 CHAIRPERSON MILLER: Walgreens'
22 floor plan main level?

1 MR. KIM: First floor.

2 MR. O'BRIEN: Yes.

3 CHAIRPERSON MILLER: Is the first
4 floor main level?

5 MR. O'BRIEN: Yes.

6 CHAIRPERSON MILLER: First floor,
7 okay. Is there any objection to that exhibit?
8 This is the exhibit, the floor plan.

9 MR. O'BRIEN: Say again?

10 CHAIRPERSON MILLER: I'm asking
11 Ms. Perry if she has any objections to it.

12 MS. PERRY: Oh, I can't hear you.

13 CHAIRPERSON MILLER: You can't?
14 Oh, I'm terribly sorry. Do you have an
15 objection to the floor plan, Exhibit No. 2?

16 MS. PERRY: No.

17 CHAIRPERSON MILLER: Okay. Then
18 that is admitted as Applicant's Exhibit No. 2.

19 (Whereupon, the document marked as
20 Applicant Exhibit No. 2 was
21 received in evidence.)

22 CHAIRPERSON MILLER: Okay.

1 MR. O'BRIEN: Mr. Kim, I am now
2 going to show you what has been marked for
3 identification as Applicant's Exhibit No. 4.

4 (Whereupon, the document was
5 marked as Applicant Exhibit No. 4
6 for identification.)

7 MR. O'BRIEN: And I'm also going
8 to pass up to staff a copy. I'm sure I'm
9 cognizant and I have skipped over it, if I
10 may?

11 CHAIRPERSON MILLER: Okay.

12 MR. O'BRIEN: Mr. Kim, can you
13 tell the Board what Applicant's Exhibit No. 4
14 for identification is, please?

15 MR. KIM: This is a list of all
16 the fresh fruits that we carry and the cooler,
17 that's the cooler and it's in the cooler.

18 MR. O'BRIEN: Okay. How many
19 items of fresh food are on this exhibit?

20 MR. KIM: I would say 72.

21 MR. O'BRIEN: 72?

22 MR. KIM: Yes.

1 MR. O'BRIEN: Okay. Does this
2 depict all food items in the store or only
3 fresh food items?

4 MR. KIM: Only the fresh food.

5 MR. O'BRIEN: I move No. 4 for
6 identification into evidence, Madam Chair.

7 CHAIRPERSON MILLER: Any
8 objection?

9 MS. PERRY: No objection.

10 CHAIRPERSON MILLER: Okay.

11 Exhibit 4 is admitted into evidence.

12 (Whereupon, the document marked as
13 Applicant Exhibit 4 was received
14 in evidence.)

15 MR. O'BRIEN: Let me show you what
16 has been marked, Mr. Kim, as Applicant's
17 Exhibit No. 5 for identification.

18 (Whereupon, the document was
19 marked as Applicant Exhibit 5 for
20 identification.)

21 MR. O'BRIEN: I can pass up a copy
22 to the staff. Mr. Kim, can you tell the Board

1 what Applicant's Exhibit No. 5 for
2 identification is?

3 MR. KIM: This is the Certificate
4 of Occupancy for Walgreens at 4225 Connecticut
5 Avenue.

6 MR. O'BRIEN: All right. And what
7 is the date of issuance of that Certificate of
8 Occupancy?

9 MR. KIM: December 5, 2011.

10 MR. O'BRIEN: I would move No. 5
11 into evidence, Madam Chair.

12 MS. PERRY: No objection.

13 CHAIRPERSON MILLER: Okay. No. 5,
14 the Certificate of Occupancy is admitted/
15 accepted into evidence.

16 (Whereupon, the document marked as
17 Applicant Exhibit No. 5 was
18 received in evidence.)

19 MR. O'BRIEN: Those are my
20 questions of this witness.

21 CHAIRPERSON MILLER: Is there
22 cross-examination?

1 MS. PERRY: Yes, please.

2 CHAIRPERSON MILLER: Okay.

3 CROSS-EXAMINATION

4 MS. PERRY: Mr. Kim, I go in your
5 store quite often. On a daily basis, is this
6 exactly how this store looks with all of these
7 products in all of the cases?

8 MR. KIM: Yes.

9 MR. O'BRIEN: You have to speak
10 your answer.

11 MR. KIM: Yes.

12 MS. PERRY: I was in there last
13 night and when you referred to the section,
14 that round section where the fresh food is --

15 MR. KIM: Right.

16 MS. PERRY: -- from Knosh, on the
17 other side of the sandwiches, it was mostly
18 drinks and bottles. That's not what was shown
19 in your video. The video showed both sides
20 having food products.

21 MR. O'BRIEN: Is that a question?

22 MS. PERRY: So is it -- what I

1 asked you is is it always like that or doesn't
2 it vary?

3 MR. KIM: Like you mean exactly
4 the same as the video?

5 MS. PERRY: Yes.

6 MR. KIM: It does vary from -- I
7 mean, based on the needs and what the
8 customers are asking for.

9 MS. PERRY: Okay. The Certificate
10 of Occupancy, Exhibit No. 5, isn't it true
11 that when you go to DCRA you fill out a form
12 and they give you a Certificate of Occupancy
13 based on what you write down?

14 MR. O'BRIEN: Objection. No
15 foundation.

16 MS. PERRY: Well, you introduced
17 the Certificate of Occupancy.

18 MR. O'BRIEN: There is no
19 indication that this witness applied for a
20 Certificate of Occupancy.

21 CHAIRPERSON MILLER: There is no
22 indication --

1 MR. O'BRIEN: Or he knows what
2 might be written there. He simply identified
3 this as the Certificate of Occupancy for the
4 store.

5 CHAIRPERSON MILLER: Well, he
6 hasn't verified the foundation. You mean, do
7 you want her to ask how to -- what is his
8 knowledge of the Certificate of Occupancy?

9 MR. O'BRIEN: I don't have
10 objection to that.

11 CHAIRPERSON MILLER: Maybe you
12 could ask that and then pick up from there.

13 MS. PERRY: What is -- I'll let it
14 pass for now.

15 CHAIRPERSON MILLER: Okay.

16 MS. PERRY: Mr. Kim, the chart
17 that is Exhibit No., where did it go, 2, on
18 the side of this chart in the one that is in
19 the Board's record are some numbers that
20 correspond to this?

21 MR. KIM: I don't have it in front
22 of me. I'm sorry.

1 MS. PERRY: Let me get it. If you
2 will take off the time clock for a second,
3 because this was passed out at the last
4 hearing. It's this one. Can I hand it to the
5 witness?

6 CHAIRPERSON MILLER: Yes. But
7 could you identify for the record what
8 document you are referring to, so the
9 transcript, you know --

10 MS. PERRY: It's Exhibit No. 2
11 passed out at our last hearing.

12 CHAIRPERSON MILLER: At the
13 Protest Hearing?

14 MS. PERRY: At the last -- at the
15 Protest Hearing.

16 CHAIRPERSON MILLER: Okay.

17 MEMBER SILVERSTEIN: She needs to
18 show it to Mr. O'Brien.

19 CHAIRPERSON MILLER: Yes, have you
20 shown it to Mr. O'Brien?

21 MS. PERRY: Huh?

22 CHAIRPERSON MILLER: Have you

1 shown it to Mr. O'Brien as well?

2 MR. O'BRIEN: She has not, but I
3 have seen it.

4 CHAIRPERSON MILLER: Okay.

5 MR. O'BRIEN: I think perhaps it
6 ought to be marked for identification as a
7 protestant's exhibit before it's shown to the
8 witness.

9 MS. PERRY: Okay. So let's do
10 that as Protestant No. 1.

11 CHAIRPERSON MILLER: This would be
12 your Exhibit No. 1 in this case.

13 MS. PERRY: Okay.

14 CHAIRPERSON MILLER: Okay.

15 (Whereupon, the document was
16 marked as Plaintiff Exhibit 1 for
17 identification.)

18 MS. PERRY: If I may? Shown as
19 Plaintiff's No. 2 today is a -- the same as a
20 portion of this one, correct, Exhibit No. 1
21 for the protest for us?

22 MR. KIM: Yes, it appears so.

1 MS. PERRY: Thank you.

2 MEMBER ALBERTI: Madam Chair, Ms.
3 Perry, could you, for the record, identify
4 which portion we are talking about here?

5 MS. PERRY: It's the first floor
6 portion shaded in blue and pink.

7 MEMBER ALBERTI: And it's the left
8 or right hand portion of that, of your
9 exhibit?

10 MS. PERRY: It's the left.

11 MEMBER ALBERTI: Pardon?

12 MS. PERRY: It's the left hand
13 portion as it -- as the drawing faces you.

14 MEMBER ALBERTI: Okay. Thank you.
15 We just need that for the record. Thank you.

16 MS. PERRY: On the side of the
17 notice that's blown up --

18 CHAIRPERSON MILLER: What is that
19 document?

20 MS. PERRY: On the --

21 CHAIRPERSON MILLER: What is that
22 document?

1 MS. PERRY: It's the -- on the
2 side of the -- our Exhibit No. 1 is a series
3 of numbers.

4 CHAIRPERSON MILLER: Oh.

5 MS. PERRY: -- which we had blown-
6 up, so I'll make this our Exhibit No. 2.

7 CHAIRPERSON MILLER: Okay.

8 (Whereupon, the document was
9 marked as Plaintiff Exhibit No.
10 2.)

11 MS. PERRY: Just so we can see the
12 numbers clearer, doesn't it say for square
13 footage for general sales that there are 5,889
14 square feet?

15 MR. KIM: Could I look at it?

16 MS. PERRY: You most certainly
17 can. It's right up here.

18 MR. KIM: Okay. What is your
19 question?

20 MS. PERRY: Does it say that there
21 is 5,889 square feet for general sales on the
22 first floor?

1 MR. KIM: On the first floor? I
2 don't see that. I'm not sure what you are
3 looking at.

4 MS. PERRY: Right up here.

5 MR. KIM: Okay. How do you know
6 that's the first floor?

7 MS. PERRY: Because it shows
8 further down the square footage for the first
9 and the second floor.

10 MR. KIM: Oh, okay, here we go.
11 All right. Yes.

12 MS. PERRY: Okay. So you
13 estimated that your square footage for food
14 and drinks, etcetera, could be an average --
15 the advisory opinion issued by the Board said
16 that there was 1,700 square feet of the fresh
17 food and the drinks and the nuts and
18 everything, correct?

19 MR. KIM: I'm not sure what you
20 mean by that.

21 MS. PERRY: In the Board's
22 Advisory Opinion, on page -- if you will bear

1 with me for a second? On page -- this will be
2 -- I guess I have to move your advisory
3 opinion as our Exhibit No. 3? No? I'm not a
4 lawyer, so --

5 CHAIRPERSON MILLER: We have it.
6 Do you want to mark it? Do you want to
7 identify it as your Exhibit No. 3?

8 MS. PERRY: I probably should,
9 because I'm going to use it.

10 CHAIRPERSON MILLER: We can take
11 judicial notice certainly, but, yes, we can
12 say that's Exhibit 3, but we all have it.

13 MS. PERRY: Page --

14 CHAIRPERSON MILLER: Mr. O'Brien
15 has it.

16 MS. PERRY: On the bottom of page
17 2 and No. 3, it says "Frankly speaking, the
18 licensee offers pharmacy products, counter and
19 beauty. The licensee carries over 2,000
20 consumable items."

21 Would you, please, continue
22 reading right here? "The establishment has --

1 MR. O'BRIEN: Objection.

2 Foundation.

3 MS. PERRY: Oh.

4 MR. O'BRIEN: This is a document
5 that was prepared by the Board. I don't know
6 why he would be reading the Board's document.

7 MS. PERRY: Oh, I can read it into
8 the record then.

9 CHAIRPERSON MILLER: Do you want
10 his reaction to that statement --

11 MS. PERRY: Well, I think --

12 CHAIRPERSON MILLER: -- or what?

13 MS. PERRY: -- he just stated that
14 the food items are 50 percent of the first
15 floor square footage. According to this chart
16 that I have marked as Exhibit No. 2, it says
17 that the downstairs has 5,889 general sales
18 square foot -- square feet of general sales.

19 According to the Board's report,
20 it says "The establishment has 1,700 square
21 feet dedicated to the sale of food products."
22 I would submit that -- wouldn't you agree that

1 1,700 square feet is less than -- way less
2 than the 5,889 square feet --

3 MR. KIM: I never --

4 MS. PERRY: -- of first floor --
5 of the first floor?

6 MR. KIM: I never mentioned square
7 footage though. I don't -- if you are asking
8 me to do the math, you are correct on that, I
9 mean.

10 MS. PERRY: So the first floor has
11 less than 50 percent dedicated to food?

12 MR. O'BRIEN: Objection. Less
13 than 50 percent --

14 MS. PERRY: Okay.

15 MR. O'BRIEN: -- of what?

16 MS. PERRY: Of the square footage
17 for saleable items.

18 MR. KIM: Square footage of
19 saleable items?

20 MS. PERRY: Yes. Of items that
21 you would sell, you know, on the first floor.

22 MR. KIM: Are you talking --

1 MS. PERRY: You obviously do have
2 greeting cards. Do you have other things on
3 this first floor?

4 MR. KIM: So are you talking about
5 linear footage or the square footage of the
6 entire area?

7 MS. PERRY: Square. Square
8 footage of the items that are available for
9 sale. In other words, sir, the items that are
10 for sale in the other unmarked counters that
11 are not blue and pink. Do -- you sell other
12 things on that first floor, correct?

13 MR. KIM: I do.

14 CHAIRPERSON MILLER: Retail sales?

15 MR. KIM: The question is not
16 clear.

17 MS. PERRY: Okay.

18 MR. KIM: If your question is, I
19 mean, maybe you could correct me if I'm wrong,
20 but what I'm saying is my statement was that
21 the food that is shaded in blue is, I would
22 say, approximately, about 50 percent of what

1 we sell on that sales floor. If that's -- if
2 you know what I mean?

3 I mean, I'm not talking about
4 square footage or cubed or, you know, area,
5 surface space. Where people walk is not
6 included. I mean merchandise, right.

7 MS. PERRY: I understand that.

8 MR. KIM: So if you are asking if
9 shelf space-wise, I would -- I mean, I didn't
10 do the math on it, but, I mean, to me, I mean,
11 I'm there every day. I would say it's about
12 50 percent of what is on the sales floor.

13 MS. PERRY: Okay.

14 MR. KIM: As far as sale -- like
15 merchandisable space. I mean, was that -- did
16 that answer your question?

17 MS. PERRY: Not exactly, because
18 1,700 -- if you have saleable items that are
19 5,000-something square feet and food only
20 occupies 1,700 square feet, I don't see how
21 you can have 50 percent.

22 MR. O'BRIEN: Objection. That was

1 not --

2 CHAIRPERSON MILLER: Right. He
3 didn't testify to that.

4 MR. O'BRIEN: There has been no
5 testimony or finding that there is 5,800
6 square feet of shelf space or saleable items.

7 MR. KIM: Right.

8 CHAIRPERSON MILLER: Sustained.

9 MR. O'BRIEN: Are you talking
10 about aisles?

11 MS. PERRY: I understand. Steve,
12 you are not testifying.

13 CHAIRPERSON MILLER: No, he is
14 objecting and I'm sustaining his objection.
15 You really need to distinguish shelf space or
16 whatever kind of space, you know.

17 MS. PERRY: The total square
18 footage of this -- wait a minute. The total
19 square footage is 20,000 square feet for that
20 store on both levels?

21 MR. KIM: Just square footage-
22 wise?

1 MS. PERRY: Square footage-wise.

2 MR. KIM: Yes, I would agree with
3 that.

4 MS. PERRY: Approximately.

5 MR. KIM: Approximately, yes.

6 MS. PERRY: Is there a door
7 separating the first floor from the second
8 floor?

9 MR. KIM: There is no door.

10 MS. PERRY: Okay. Is there any
11 guard or person to stop people from going from
12 floor to floor, up the escalator and/or the
13 elevator?

14 MR. KIM: To stop them? There is
15 no one to stop them, no.

16 MS. PERRY: Okay. I think that's
17 my only questions.

18 CHAIRPERSON MILLER: Are you doing
19 redirect?

20 MR. O'BRIEN: No, I think the
21 Board has questions.

22 CHAIRPERSON MILLER: We have Board

1 questions. Can you hold your --

2 MR. O'BRIEN: Yes, sure.

3 CHAIRPERSON MILLER: Okay. Go
4 ahead, Mr. Alberti.

5 MEMBER ALBERTI: All right. Good
6 afternoon, Mr. Kim.

7 If you don't know the answer to
8 any of my questions, just say you don't know.
9 But hopefully as store manager you will have
10 knowledge of most of these.

11 When we talk about food items,
12 it's not quite clear what you mean when you
13 say consumables. And I don't know if the
14 store carries things like sugar, flour, cake
15 mixes, oils, spices, you know, baking goods,
16 that sort of thing.

17 Does the store carry any of that
18 sort of thing, muffin mixes, anything like
19 that?

20 MR. KIM: Everything you have
21 mentioned, yes.

22 MEMBER ALBERTI: Okay. And when

1 you say consumables, is that part of
2 consumables?

3 MR. KIM: Yes.

4 MEMBER ALBERTI: Okay. There has
5 been much discussion about the percentage of
6 the first floor and how it is utilized. All
7 right. So I want to talk about that. Let's
8 talk in terms of just floor space to start
9 with.

10 MR. KIM: Okay.

11 MEMBER ALBERTI: Okay. And this
12 would be the floor space that is occupied by
13 your display cases.

14 MR. KIM: Okay.

15 MEMBER ALBERTI: So whether the
16 display case has one item that goes floor to
17 ceiling or it, you know, has multiple shelves,
18 I don't care. It's the floor space that's
19 occupied by the footprint of that display
20 case.

21 MR. KIM: Gotcha.

22 MEMBER ALBERTI: Would you know

1 how much total floor space is occupied by
2 display cases on that floor?

3 MR. KIM: In the square footage
4 you mean?

5 MEMBER ALBERTI: Yes.

6 MR. KIM: Or --

7 MEMBER ALBERTI: Square footage.

8 MR. KIM: I don't know.

9 MEMBER ALBERTI: What is your
10 estimate of that square footage, that floor
11 space that is occupied by display cases that
12 are used for consumables?

13 MR. KIM: So on the first floor,
14 you're saying so if there is --

15 MEMBER ALBERTI: First floor, yes.

16 MR. KIM: -- that entire area, I
17 mean, I would estimate maybe 20 percent of
18 sales floor is dedicated to merchandise.

19 MEMBER ALBERTI: Okay.

20 MR. KIM: Does that answer your
21 question?

22 MEMBER ALBERTI: Yes.

1 MR. KIM: Okay.

2 MEMBER ALBERTI: So 20 percent is
3 floor space?

4 MR. KIM: Yeah, I mean, that's not
5 including like the office.

6 MEMBER ALBERTI: No, no, no.

7 MR. KIM: Right.

8 MEMBER ALBERTI: Just display
9 cases.

10 MR. KIM: Right. I mean, yes,
11 yes.

12 MEMBER ALBERTI: Items for people
13 to buy.

14 MR. KIM: Yes.

15 MEMBER ALBERTI: Okay.

16 MR. O'BRIEN: May I ask just for
17 clarification?

18 MEMBER ALBERTI: Sure.

19 MR. O'BRIEN: When we say display
20 cases, we are excluding, for instance, the
21 aisles between the display cases?

22 MEMBER ALBERTI: Yes.

1 MR. O'BRIEN: Okay.

2 MEMBER ALBERTI: Yes.

3 MR. O'BRIEN: All right. Thank
4 you.

5 MEMBER ALBERTI: Okay. Do you
6 know what the volume of sales is for the first
7 floor only? Is that something that you have
8 knowledge of? Because I know you have two
9 floors. You have a whole store. And that's
10 why I'm asking if you have knowledge of that?

11 MR. KIM: Just the first floor?

12 MEMBER ALBERTI: Yes.

13 MR. KIM: I have never done the
14 math on it, no.

15 MEMBER ALBERTI: Okay. Okay. All
16 right. You have a second floor, correct?

17 MR. KIM: Yes, I do.

18 MEMBER ALBERTI: And what's up
19 there? As detailed as you -- not items, but
20 how is it used? I mean, categories of things
21 that are sold. How is it used? Sort of as
22 detailed of a description as you can, please,

1 provide that.

2 MR. KIM: Sure. I mean, I want to
3 say about a third of it is taken up by
4 cosmetics.

5 MEMBER ALBERTI: Yes.

6 MR. KIM: Another third is taken
7 up by the actual pharmacy and one of the
8 clinics. And the other third would be
9 anything from eye and ear, over-the-counter
10 medication.

11 MEMBER ALBERTI: Yes.

12 MR. KIM: To feminine hygiene
13 products.

14 MEMBER ALBERTI: Health and beauty
15 aids?

16 MR. KIM: Plus first aid.

17 MEMBER ALBERTI: That sort of
18 thing?

19 MR. KIM: Yes, health and beauty,
20 I'm sorry, yes.

21 MEMBER ALBERTI: Okay.

22 MR. KIM: Great term. I should

1 know that.

2 MEMBER ALBERTI: I think I learned
3 that from my previous marriage. Okay. I'm
4 sure managing the store that you must have
5 some delineation of product line. Okay. So
6 that, you know, what if you measure your
7 sales, measure what is moving and what isn't,
8 when I ask that question of what are the
9 categories of items that you sell, what
10 springs to mind, in terms of the list of
11 categories?

12 MR. KIM: Like what would be the
13 first?

14 MEMBER ALBERTI: Yes, yes, in
15 terms of your usual business model. How would
16 you categorize your -- I know you have
17 pharmaceuticals. You told me pharmaceuticals.
18 You told me cosmetics. You told me health and
19 beauty aids. Are those all the categories
20 that are generally used by you in managing the
21 store?

22 MR. KIM: You mean used as in --

1 MEMBER ALBERTI: Well, used in
2 measuring sales, measuring volume.

3 MR. KIM: Yes.

4 MEMBER ALBERTI: Okay. Can you
5 tell me what all the categories are in the
6 store that are -- that you use in your -- in
7 managing your business?

8 MR. KIM: All the departments?

9 MEMBER ALBERTI: Yes. That's one
10 way of saying it.

11 MR. KIM: I mean, if I went off --
12 I think if I went through it, I think the
13 majority of them, I don't know if I could --
14 if I remember every single thing.

15 MEMBER ALBERTI: Let's go through
16 -- let's give it a start and maybe --

17 MR. KIM: Just the sales?

18 MEMBER ALBERTI: -- something else
19 -- clarify that first.

20 MR. KIM: Just upstairs?

21 MEMBER ALBERTI: The whole floor,
22 the whole store.

1 MR. KIM: Oh, the whole store,
2 okay.

3 MEMBER ALBERTI: It's a question,
4 I know, but you are the store manager, so --

5 MR. KIM: So I'll start from the
6 downstairs then. We have snacks. I'm sorry,
7 let me start from over here. So we have
8 audio/video, gift cards, nut and snacks. I
9 don't know the name of it, it's accessories.

10 MEMBER ALBERTI: Okay.

11 MR. KIM: Batteries, snacks.

12 MEMBER ALBERTI: You already went
13 there.

14 MEMBER SILVERSTEIN: He's hungry.

15 MR. KIM: I started back over.

16 MEMBER ALBERTI: No, I know. I
17 was just teasing.

18 MR. KIM: Yes. We'll just go in
19 order.

20 MR. O'BRIEN: May the witness look
21 at Exhibit No. 2?

22 MEMBER ALBERTI: Sure.

1 MR. KIM: Yes, that will help a
2 lot.

3 MEMBER ALBERTI: Go ahead, yes.
4 (Simultaneous speaking.)

5 MS. PERRY: I have the exhibit.

6 MR. KIM: All right. So snacks,
7 chips, fresh food, over here would be candy,
8 bagged candy and there is the promo space.
9 Gum and mint, the theater candy, single serve
10 candies, other candy, full-size nut and snack
11 department.

12 Back there would be water, water,
13 water, water, bread, breakfast, single serve
14 nuts and snacks, okay.

15 Going over here paper goods. No,
16 I'm sorry, that's the wrong one. We're on
17 this side. Cereal, I'm just trying to
18 remember the exact names, grocery.

19 MEMBER ALBERTI: What's grocery
20 mean?

21 MR. KIM: Dry grocery.

22 MEMBER ALBERTI: Okay.

1 MR. KIM: Name of the department.

2 MEMBER ALBERTI: Okay. So like
3 flour and --

4 MR. KIM: Yes, it means like I
5 think in that department it's all the canned
6 foods.

7 MEMBER ALBERTI: Okay. Gotcha.
8 Is consumables up?

9 MR. KIM: I'm sorry?

10 MEMBER ALBERTI: Consumables?

11 MR. KIM: Consumables, okay.
12 Paper goods, closet.

13 MEMBER ALBERTI: What was the last
14 one?

15 MR. KIM: Closet. This is the
16 prepared food department. It has hangers.

17 MEMBER ALBERTI: Gotcha. I can
18 imagine.

19 MR. KIM: Candles, air fresheners,
20 then a whole bunch of cleaners, household
21 cleaners.

22 MEMBER ALBERTI: What do you mean

1 products there?

2 MR. KIM: Laundry detergent.

3 Okay. Hardware, auto, lightbulbs, baby, baby
4 diapers, stationery. Oh, not stationery, too,
5 but it's not there. Stationery, crayons,
6 toys, tech toys, playing cards, baby
7 thermometers, Hallmark. That's everything on
8 the first floor.

9 MEMBER ALBERTI: Okay. All right.
10 So I'm going to take a little bit of liberty
11 here and describe some categories, because I'm
12 going to bunch some things that you have
13 separate, but I'm going to bunch them
14 together. All right? So maybe can we give
15 him a pad and pencil, so he can write these
16 things down in case he doesn't remember what
17 I'm saying?

18 MR. KIM: Thank you.

19 MEMBER ALBERTI: You talked about
20 a whole bunch of consumables, beverages, snack
21 foods and all of that. All right?

22 MR. KIM: Yes.

1 MEMBER ALBERTI: I'll lump
2 consumables all into one category. Okay?

3 MR. KIM: Okay.

4 MEMBER ALBERTI: So that's snack
5 food, that's fresh food, that's candy, that's
6 gum and mint, that's beverages, that's grocery
7 consumables. All right? All consumables,
8 that's one category. All right?

9 I'll lump stationery, toys, gifts,
10 playing cards, gift cards, all into one
11 category. Okay?

12 MR. KIM: All right.

13 MEMBER ALBERTI: Cleaning products
14 is another category.

15 MR. KIM: Fine.

16 MEMBER ALBERTI: Hardware, auto,
17 lightbulbs is another category.

18 MR. KIM: Okay.

19 MEMBER ALBERTI: Infant and child
20 needs another category.

21 MR. KIM: Is that five altogether
22 so far?

1 MEMBER ALBERTI: Pardon?

2 MR. KIM: Is that five so far?
3 Five categories?

4 MEMBER ALBERTI: Yes, I believe
5 so.

6 MR. KIM: Okay.

7 MEMBER SILVERSTEIN: Mr. Alberti,
8 does that include baby food?

9 MEMBER ALBERTI: No, I would put
10 baby food in with consumables.

11 MEMBER SILVERSTEIN: Okay.

12 MEMBER ALBERTI: Just for clarity.

13 MR. KIM: Yes.

14 MEMBER ALBERTI: All right. Then
15 you have audio/video, accessories and
16 batteries, I would lump into one.

17 MR. KIM: Yes.

18 MEMBER ALBERTI: This is just me,
19 just me.

20 MR. KIM: Yes.

21 MEMBER ALBERTI: This is mine,
22 whether it makes sense to you as a business

1 person or not, I'm just kind of doing this off
2 the cuff here. So bear with me.

3 And I would list closet, candles,
4 air fresheners and all of that as another
5 category. All right? So that's one, two,
6 three, four, five, six, seven categories?

7 MR. KIM: I got -- that's what I
8 got.

9 MEMBER ALBERTI: Of all of those,
10 which one is the largest?

11 MR. KIM: Consumables by far.

12 MEMBER ALBERTI: Okay. And then
13 you've got three departments upstairs, right,
14 that you listed?

15 MR. KIM: Three departments?

16 MEMBER ALBERTI: Well, there are
17 probably more, but cosmetics, pharmacy and
18 over-the-counter.

19 MR. KIM: Yes.

20 MEMBER ALBERTI: So we'll put
21 those all in, what's the largest of those?

22 MR. KIM: So does that --

1 MEMBER ALBERTI: In terms of
2 display space. Square footage of display
3 space.

4 MR. KIM: And upstairs counts as
5 three separate?

6 MEMBER ALBERTI: No, together with
7 the seven, so out of the 10.

8 MR. KIM: Oh, sure, yes,
9 consumables.

10 MEMBER ALBERTI: Still
11 consumables? Okay. Now, if I talk about
12 sales, dollar amounts is the only way I know
13 to talk about it. Which one would be the
14 largest?

15 MR. KIM: Dollars or items?

16 MEMBER ALBERTI: Yes, dollars.

17 MR. KIM: Dollars. If I had to
18 put a number on it, definitely not
19 consumables.

20 MEMBER ALBERTI: Okay.

21 MR. KIM: Oh, which --

22 MEMBER ALBERTI: Which one do you

1 think is the largest?

2 MR. KIM: Oh, pharmacy.

3 MEMBER ALBERTI: Okay. And after
4 pharmacy, which one?

5 MR. KIM: After pharmacy, dollars,
6 right?

7 MEMBER ALBERTI: Yes.

8 MR. KIM: Yes, I would say
9 cosmetics.

10 MEMBER ALBERTI: Okay. Where does
11 consumables --

12 MR. KIM: This is me just --

13 MEMBER ALBERTI: I know. Where
14 does consumables fit in there? I know this is
15 -- you don't have the figures in front of you.
16 I understand that.

17 MR. KIM: Right.

18 MEMBER ALBERTI: And after that,
19 where would -- so -- okay. So all of the
20 items upstairs would be -- well, the third one
21 there is over-the-counter. Is that still
22 larger in terms of dollars than --

1 MR. KIM: I don't --

2 MEMBER ALBERTI: -- consumables?

3 MR. KIM: I think it would be a
4 close second between cosmetics and
5 consumables.

6 MEMBER ALBERTI: Okay.

7 MR. KIM: Yes.

8 MEMBER ALBERTI: First floor,
9 guess, how much in terms of display area --

10 MR. KIM: Okay.

11 MEMBER ALBERTI: -- square footage
12 of display area, so this is stackables,
13 display area.

14 MR. KIM: Yes, the little --

15 MEMBER ALBERTI: This is a tough
16 one. This is a tough one.

17 MR. KIM: Okay.

18 MEMBER ALBERTI: Because the
19 greeting cards, I don't know how you count
20 those.

21 MR. O'BRIEN: Do you actually mean
22 cubic feet?

1 MEMBER ALBERTI: Yes, I guess,
2 cubic feet, yes. In terms of cubic feet? All
3 right. In terms of cubic feet of --

4 MR. KIM: Are you talking about
5 going up --

6 MEMBER ALBERTI: Yes.

7 MR. KIM: -- to cubic feet?

8 MEMBER ALBERTI: Yes.

9 CHAIRPERSON MILLER: I thought it
10 was linear.

11 MEMBER ALBERTI: So just your
12 guess, cubic feet. What percentage of the
13 area, display area is consumables versus --
14 this is a tough one. I don't know how you
15 measure --

16 MR. KIM: 6 cubic feet.

17 MEMBER ALBERTI: But I am just
18 going to get a guess from you.

19 MR. KIM: I mean, a little air
20 space as well.

21 MEMBER ALBERTI: Yes.

22 MR. KIM: Oh, God, I mean --

1 MEMBER ALBERTI: All right. Let's
2 let that go.

3 MR. KIM: Very little.

4 MEMBER ALBERTI: Yes, I'm thinking
5 that's a tough one to measure. That's a tough
6 one to measure.

7 I don't have any other questions
8 right now. Thank you.

9 CHAIRPERSON MILLER: Mr.
10 Silverstein?

11 MEMBER SILVERSTEIN: Thank you.
12 This is enough as the Broadway write said to
13 cross a rabbi's eyes. And we are trying to
14 figure out space. And you seem to be
15 interchanging what you are calling shelf space
16 with what protestants were calling floor space
17 or square feet and that's perfectly
18 understandable, but I think they are two
19 entirely different.

20 You know, you were speaking French
21 and they were speaking Italian. And you might
22 have understood each other, but they were

1 false cognates.

2 Let's talk about shelves and shelf
3 space, because if you have a freezer, it is
4 going up and you may have as much stuff in a
5 freezer as somebody who could have a bunch of
6 onions over here.

7 MR. KIM: Right.

8 MEMBER SILVERSTEIN: How much
9 shelf space on the first floor is consumables
10 versus other items for sale? We are not --
11 you know, I'm not talking cash registers. I'm
12 not talking aisles. I'm not talking the front
13 office. How much of your shelf space is
14 consumables on the first floor?

15 MR. KIM: When I said
16 approximately 50 percent, that was exactly
17 what I was referring to.

18 MEMBER SILVERSTEIN: Okay. So you
19 were referring to shelf space, including
20 stackable freezers, stackable shelves with
21 cereal that you've got to reach up and grab?

22 MR. KIM: Yes.

1 MEMBER SILVERSTEIN: Versus one --

2 MR. KIM: What is available to
3 customers purchase, yes. Not like what is
4 behind like the coolers, that customers can't
5 buy or anything like that.

6 MEMBER SILVERSTEIN: And that's
7 more than anything else? Is there any of that
8 on the second floor?

9 MR. KIM: On --

10 MEMBER SILVERSTEIN: The
11 consumables that you --

12 MR. KIM: I mean, we have
13 nutritional supplements. We have energy bars.
14 But I did not count that on the first floor
15 level, no.

16 MEMBER SILVERSTEIN: Okay. I have
17 got some other questions, but I think I have
18 gone far enough or we're going to start
19 running late here. So I'm not sure I have
20 much to add at this moment.

21 CHAIRPERSON MILLER: Okay. And
22 I'm not sure he is the appropriate witness for

1 all our questions, so Mr. O'Brien if he is not
2 the appropriate witness, let us know, because
3 we are going beyond his testimony to a certain
4 extent, correct?

5 MR. O'BRIEN: The Board's
6 questions are beyond the --

7 CHAIRPERSON MILLER: yes.

8 MR. O'BRIEN: -- scope of his
9 testimony?

10 CHAIRPERSON MILLER: Exactly.

11 MR. O'BRIEN: That's correct.

12 CHAIRPERSON MILLER: Because we
13 don't know who else is coming.

14 MR. O'BRIEN: Mr. Conner can also
15 speak to much of this.

16 CHAIRPERSON MILLER: Okay.

17 MR. O'BRIEN: But I don't know as
18 far as Member Silverstein's questions whether
19 anyone is going to be able to provide a better
20 answer than --

21 CHAIRPERSON MILLER: Okay.

22 MR. O'BRIEN: -- he can.

1 CHAIRPERSON MILLER: So shelf
2 space is appropriate for you. All right.
3 Right?

4 MR. KIM: Shelf space, yes.

5 CHAIRPERSON MILLER: Yes. So you
6 said that, I think, consumables took up 50
7 percent of the shelf space on the first floor.
8 Is that right?

9 MR. KIM: Yes, yes.

10 CHAIRPERSON MILLER: Okay.

11 MR. KIM: That's what I meant,
12 yes.

13 CHAIRPERSON MILLER: Okay. What
14 percentage is it of the whole store?

15 MR. KIM: The whole store?

16 CHAIRPERSON MILLER: The
17 consumables take up in shelf space?

18 MR. KIM: If I had to guess, it
19 would be about a quarter of it, I'm assuming,
20 just because the second floor and the first
21 floor does about half.

22 CHAIRPERSON MILLER: It would be

1 25 percent?

2 MR. KIM: 25 percent.

3 CHAIRPERSON MILLER: And it's a
4 guess, I understand.

5 MR. KIM: Yes.

6 CHAIRPERSON MILLER: You didn't
7 testify to this, so --

8 MR. KIM: Right.

9 CHAIRPERSON MILLER: Okay. The
10 list you gave us, Exhibit 4.

11 MR. KIM: Yes.

12 CHAIRPERSON MILLER: A list of
13 food products, I think, on the first floor.
14 Is that what it represents?

15 MR. KIM: This is what --

16 CHAIRPERSON MILLER: The fresh
17 food.

18 MR. KIM: The fresh foods, yes,
19 not including though the fruit and that -- to
20 the extent you saw on the video.

21 CHAIRPERSON MILLER: Not including
22 the fruit, like the bananas and the --

1 MR. KIM: That stuff has to be
2 stored at ambient temperature. Only the stuff
3 that is refrigerated.

4 MEMBER ALBERTI: What's that?

5 MR. KIM: More the stuff that is
6 refrigerated, fresh food that is refrigerated
7 or that needs refrigeration.

8 CHAIRPERSON MILLER: Fresh food
9 that is refrigerated?

10 MR. KIM: Yes.

11 CHAIRPERSON MILLER: Is it all
12 primarily prepared food?

13 MR. KIM: As opposed to?

14 CHAIRPERSON MILLER: The category
15 of prepared foods as to -- you know, I see a
16 lot here like the salads and Asian salad, for
17 instance, like a serving for one or two or
18 that kind of thing, already prepared, so that
19 when the purchaser goes home, they don't have
20 to like throw together ingredients --

21 MR. KIM: Oh, yes, yes.

22 CHAIRPERSON MILLER: -- they have

1 got there.

2 MR. KIM: Yes.

3 CHAIRPERSON MILLER: Okay. Do you
4 carry fresh meat or poultry or fish?

5 MR. KIM: No.

6 CHAIRPERSON MILLER: Okay. We
7 asked you about shelf space.

8 MR. KIM: Yes.

9 CHAIRPERSON MILLER: Do you ever
10 measure by what is referred to as floor space
11 or is shelf space the appropriate measurement
12 to determine, you know, the percentage that a
13 product takes up in your store?

14 MR. KIM: When you say floor
15 space, do you mean square footage?

16 CHAIRPERSON MILLER: I'm not even
17 sure to tell you the truth. I'm asking you do
18 you ever measure --

19 MR. KIM: I do.

20 CHAIRPERSON MILLER: Do you ever
21 use measurements for floor space?

22 MR. KIM: I do have a measurement

1 that I use and company standard.

2 CHAIRPERSON MILLER: Do you use it
3 for measuring how much space some items occupy
4 in the store?

5 MR. KIM: Yes.

6 CHAIRPERSON MILLER: So do you
7 have a measurement for how much floor space
8 food products take up or consumables?

9 MR. KIM: Are you asking me for a
10 number?

11 CHAIRPERSON MILLER: Do you have
12 one?

13 MR. KIM: No, I don't have a
14 number, no.

15 CHAIRPERSON MILLER: Do you
16 include vitamins in consumables?

17 MR. KIM: No.

18 CHAIRPERSON MILLER: No, okay.

19 MR. KIM: That would be with OTC.

20 CHAIRPERSON MILLER: Okay. Are
21 you the -- do you have information about, I
22 guess maybe you made a guess before, but

1 about, revenue for instance? The percentage
2 of revenue that is attributable to
3 pharmaceutical products?

4 MR. KIM: Pharmaceutical products?

5 CHAIRPERSON MILLER: The pharmacy.
6 Whatever you would consider --

7 MR. KIM: Just the pharmacy,
8 including over-the-counter?

9 CHAIRPERSON MILLER: What would
10 normally be considered a pharmacy product?
11 I'm not sure what you mean over-the-counter.

12 MR. KIM: I mean like aspirin,
13 tylenol.

14 CHAIRPERSON MILLER: Oh, Tylenol
15 and things like that, yes.

16 MR. KIM: Between all that, a
17 dollar amount?

18 CHAIRPERSON MILLER: I'm just
19 asking you if you do. I think we were looking
20 to compare what percentage of the business is
21 pharmacy.

22 MR. KIM: Right. I mean, when Mr.

1 Alberti asked me, I just said -- yes, I mean,
2 pharmacy by -- I mean, I think pharmacy was
3 number one, if I had to think about it.

4 CHAIRPERSON MILLER: Okay.

5 MR. KIM: But I mean, if I had to
6 put a dollar amount --

7 CHAIRPERSON MILLER: Is pharmacy,
8 percentage amount, is it by far the greatest
9 percentage of revenue compared to other
10 products?

11 MR. KIM: Currently, yes, yes.

12 CHAIRPERSON MILLER: Okay.

13 MR. KIM: Currently, yes.

14 CHAIRPERSON MILLER: Now, I think
15 you were asked about Plaintiff's Exhibit No.
16 5. Applicant's Exhibit No. 5, I think, the
17 Certificate of Occupancy. And at that point,
18 Ms. Perry withdrew it.

19 Are you familiar with the
20 Certificate of Occupancy?

21 MR. KIM: Yes.

22 CHAIRPERSON MILLER: Okay. There

1 is -- how are you familiar with it?

2 MR. KIM: We needed it before we
3 opened the store. It's a permit that we need
4 to file in order for us to stock and open --
5 stock merchandise and open the store.

6 CHAIRPERSON MILLER: Okay. Thank
7 you. So the description of occupancy says
8 "Pharmacy and direct store with accessory
9 retail." Do you know how the store got to be
10 described that way? I mean, that there are
11 categories that you look at at DCRA or how was
12 that determined to describe the store as a
13 pharmacy?

14 MR. KIM: That I don't know.

15 CHAIRPERSON MILLER: You didn't do
16 that?

17 MR. KIM: No, I did not. I did
18 not put this application in, no.

19 CHAIRPERSON MILLER: Okay. That's
20 all my questions. Do you have another
21 question?

22 MEMBER SILVERSTEIN: Yes, I have a

1 question regarding that and this was about how
2 you figure out what you are getting out of the
3 drug store. Now, let me give you an example
4 and it's a very personal example.

5 I went to the drug store this past
6 week and I picked up a medication that I take
7 and I learned from my provider that next year
8 it won't be covered. So I found out what it
9 would cost if I had to buy it out of pocket
10 and what I'm doing now.

11 It is a \$293 drug and when I go to
12 the drug store, I give them \$25 and the rest
13 of it is co-pay.

14 MR. KIM: Right.

15 MEMBER SILVERSTEIN: Now, when I
16 bought that drug, do you count that as \$25 or
17 do you count that as \$293, based on what you
18 would be reimbursed by the pharmacy, by the
19 insurance company? You know, how do you
20 consider that in sales?

21 MR. KIM: I mean, that's why I
22 said that the pharmacy was going to be a lot

1 more, because, I mean, it's the total dollar
2 amount, not what you are paying co-pay.

3 MEMBER SILVERSTEIN: So in other
4 words if somebody goes there and they get
5 their diabetes test strips and they don't pay
6 anything or they pay \$10, you are actually
7 counting that as several hundred perhaps
8 because it might be a two month supply?

9 MR. KIM: Well, it depends if the
10 diabetic test strips are covered by insurance
11 or not. If it's not covered by insurance,
12 then, I mean, if it is --

13 MEMBER SILVERSTEIN: Okay.

14 MR. KIM: If I just pay out like
15 just without a prescription --

16 MEMBER SILVERSTEIN: Yes.

17 MR. KIM: -- it will count towards
18 our front end sales.

19 MEMBER SILVERSTEIN: But --

20 MR. KIM: If they go through with
21 a prescription, then it will count towards as
22 a pharmacy sale. So that's why I asked when

1 you went dollar-wise, I mean, the pharmacy
2 dollar amounts, you know what I mean, I'm
3 talking about a pill that costs \$1,000, that's
4 why it's just very hard to measure in that
5 sense.

6 MEMBER SILVERSTEIN: And that
7 could -- so depending on how you count that,
8 it could skew your revenues wildly?

9 MR. KIM: Right, right. So I
10 mean, if it were per item, I mean, consumables
11 would kill it like out of the park, because
12 consumables are much cheaper. You know, so a
13 bag of chips, a sandwich, that's \$5 as opposed
14 to, you know, a hair product that is going to
15 cost \$25 or a pill that's going to cost
16 \$1,000.

17 So when Mr. Alberti asked me the
18 dollar amount, I mean, I didn't -- I just have
19 to answer the question. I didn't elaborate on
20 it, but, you know, I was hoping he was going
21 to ask me something else, but the dollar
22 amount far outweighs anything else in the

1 pharmacy.

2 Only because of the fact that it
3 is so costly. And the consumables, I think,
4 per item we saw a lot more consumables than
5 anything else in the store, but even more
6 than, I would say 50 percent, because when
7 they buy candy bars or gum -- I mean, I range
8 up 150 Kit Kat bars last night or yesterday in
9 total.

10 And I mean, they didn't do -- the
11 pharmacy didn't do 150 scripts, but dollar-
12 wise they knocked it out of the park.

13 MEMBER SILVERSTEIN: So it could
14 be skewed wildly with just one or two very
15 expensive prescriptions.

16 MR. KIM: Yes.

17 MEMBER SILVERSTEIN: It makes it
18 difficult. Thank you. No further questions.

19 CHAIRPERSON MILLER: I just had
20 one follow-up. Do you keep track of how many
21 consumable items you sell every day? You
22 know, a pack of gum, candy.

1 MR. KIM: Well, there is a
2 specific candy bar I do keep track of that my
3 boss wants me to make sure I keep track of.
4 And I do very well with it, so I do like to
5 keep track of it and but yes, let everyone
6 know that I'm doing well at it. They are Kit
7 Kat bars and Hershey bars. Hershey products,
8 bars, candy bars.

9 CHAIRPERSON MILLER: Do you have a
10 question? No, I'm just curious. Do you keep
11 track of -- I would think you have a register.
12 You know, everything gets recorded what is
13 sold. Do you keep track of all the items that
14 are sold in each category and know how many
15 items, for instance, or you could? How many
16 consumables you actually sold in a day?

17 MR. KIM: Yes, I mean, I do look
18 at it maybe I would say once a week. I don't
19 keep track of it, because it's stored on data.
20 I may look at it at times.

21 CHAIRPERSON MILLER: Right.

22 MR. KIM: So I mean, I don't hold

1 on to it. I just take a look at it and see
2 percentages. But when I say consumables, it
3 doesn't break it -- you know, it will be gum
4 and mint would be one department, but it
5 doesn't have a whole as far as consumables is
6 concerned.

7 But I do, yes, look at it once a
8 week. I think every store manager looks at it
9 at least once a week on just kind of how
10 things are going.

11 CHAIRPERSON MILLER: Okay. Thank
12 you. Did you have another? Mr. Brooks?

13 MEMBER BROOKS: Yes.

14 CHAIRPERSON MILLER: Yes, he
15 hasn't gone.

16 MEMBER ALBERTI: Okay.

17 MEMBER BROOKS: Oh, okay. Well,
18 thank you, Madam Chair, just very quickly.

19 I want to piggyback on Chairperson
20 Miller's question about you carrying fresh
21 meats and fish and you said no?

22 MR. KIM: Yes, I said no.

1 MEMBER BROOKS: Okay. What about
2 fresh vegetables? Broccoli, asparagus,
3 lettuce, things like that?

4 MR. KIM: No.

5 MEMBER BROOKS: You don't.

6 MR. KIM: Not at this time. We
7 are trying.

8 MEMBER BROOKS: Okay. And the red
9 shaded area on the first floor.

10 MR. KIM: Yes.

11 MEMBER BROOKS: In Exhibit No. 2.

12 MR. KIM: I don't have it in front
13 of me, but I know what you are talking about.

14 MEMBER BROOKS: Yes, okay. What
15 is the area percentage of the floor space or
16 shelf space for the red shaded area?

17 MR. KIM: Percentage as to the
18 consumables or the total sales floor or the --

19 MEMBER BROOKS: No, just space.

20 MR. KIM: Total space.

21 MEMBER BROOKS: Shelf space, yes.

22 MR. KIM: Of the first floor?

1 MEMBER BROOKS: Yes.

2 MR. KIM: I want to say,
3 percentage-wise, less than 5 percent.

4 MEMBER BROOKS: Yes, not -- that's
5 where you are going to carry the beer and
6 wine?

7 MR. KIM: That's where we -- yes.
8 If we did get it, that's where we would put
9 it.

10 MEMBER BROOKS: Okay. So about 5
11 percent of the first floor?

12 MR. KIM: Maybe less or more.
13 Maybe a little bit more. Between 5 and 10.

14 MEMBER BROOKS: 5 and 10, okay.
15 Okay. Thank you, Madam Chair.

16 CHAIRPERSON MILLER: Thank you.
17 Mr. Alberti, did you have any follow-up?

18 MEMBER ALBERTI: Yes. Well, first
19 of all, let me just follow through on Mr.
20 Brooks' question. Do you carry lunchmeats?

21 MR. KIM: Yes.

22 MEMBER ALBERTI: Packaged

1 lunchmeats?

2 MR. KIM: Yes.

3 MEMBER ALBERTI: Okay. Going back
4 to the number of items that you sell.

5 MR. KIM: Okay.

6 MEMBER ALBERTI: How do you count
7 that, by single items? I mean, if a sale is
8 rung up and it is two packs of gum, it's one
9 item. Is that two? Is that counted as two or
10 is it counted as one sale item, because it's
11 rung up as one sale?

12 MR. KIM: It's counted as one -- I
13 mean, as far as one skew as far as one item.
14 But as far as the sale inventory purposes,
15 it's counted as two.

16 MEMBER ALBERTI: Okay. Okay.
17 What percent of your sales in terms of items
18 or in terms of numbers and items sold do you
19 think is consumables? And tell me whether
20 that is individual items or counted as one
21 skew item that was rung up.

22 MR. KIM: So you want to know if--

1 how many --

2 MEMBER ALBERTI: Frequency to see

3 how much --

4 MR. KIM: -- items were sold --

5 MEMBER ALBERTI: -- the percentage
6 is of consumables.

7 MR. KIM: -- yesterday? Items,
8 you want to know how many --

9 MEMBER ALBERTI: Yes.

10 MR. KIM: -- of those items were
11 consumables?

12 MEMBER ALBERTI: Yes, percentage-
13 wise.

14 MR. KIM: I want to say, if I have
15 to put a number on it, 40 percent.

16 MEMBER ALBERTI: So if they bought
17 two bottles of water, you are counting it as
18 two items?

19 MR. KIM: Yes.

20 MEMBER ALBERTI: Okay. Okay. And
21 if I just look at single sales, all right, the
22 way they are rung up at the register, because

1 there might be -- you know, buying two of the
2 same bottles of water, so they get rung up as
3 two, but if it's two different brands, they
4 get rung up as two separate sales on your
5 slip.

6 So counting it that way in terms
7 of what appears on my number of items that --
8 number of lines that appear on my sales slip,
9 counting it that way, consumables would be
10 what?

11 MR. KIM: Oh, that's what I
12 actually meant when I answered that question
13 the first time. I --

14 MEMBER ALBERTI: Do you know what
15 percentage it would be, consumables would be
16 of all sales that way, counting it that way?

17 MR. KIM: I think --

18 MEMBER ALBERTI: It's a slightly
19 different measure.

20 MR. KIM: Well, I'm saying when I
21 answered that first question, I meant that.

22 MEMBER ALBERTI: Oh, my first

1 question?

2 MR. KIM: Yes, that -- when I
3 answered you first question, I actually
4 answered it as your second, I think. I think
5 that's two of the same bottles of water as one
6 item.

7 MEMBER ALBERTI: As one sale item?
8 Yes, it's one sale. And so consumables is 40
9 percent of your sales?

10 MR. KIM: Right.

11 MEMBER ALBERTI: In terms of
12 numbers?

13 MR. KIM: Item, item.

14 MEMBER ALBERTI: Item, sale item,
15 right.

16 MR. KIM: Yes.

17 MEMBER ALBERTI: Okay. I
18 understand. I'm understanding. So if I have
19 five items on average, if I have five items
20 listed on my register slip --

21 MR. KIM: Okay.

22 MEMBER ALBERTI: -- on average, 40

1 percent or two of those would be consumable
2 items.

3 MR. KIM: Yes.

4 MEMBER ALBERTI: Is that what you
5 are saying?

6 MR. KIM: Yes.

7 MEMBER ALBERTI: Okay.

8 MR. KIM: If I had to put a number
9 on it, that's what I would say.

10 MEMBER ALBERTI: Okay.

11 MR. KIM: Yes.

12 MEMBER ALBERTI: Thank you. I
13 understand. Thank you.

14 CHAIRPERSON MILLER: Anything
15 else?

16 MEMBER ALBERTI: You don't
17 understand, Mr. O'Brien, but I do.

18 MR. O'BRIEN: I think the dialogue
19 cleared up.

20 MEMBER ALBERTI: Okay.

21 MR. O'BRIEN: As I understood it
22 as, in essence, how many transactions.

1 MEMBER ALBERTI: How many
2 transactions, yes, that's a better word.
3 Thank you. Okay. Yes.

4 MR. O'BRIEN: Does the Member want
5 to ask the question with that word to make it
6 clearer?

7 MEMBER ALBERTI: Okay. For
8 clarity. In terms of transactions, how many
9 transactions -- what percentage of
10 transactions would be food, consumables?

11 MR. KIM: I mean, only consumables
12 on that transaction?

13 MEMBER ALBERTI: Well, I mean,
14 transactions. Again, if I have a receipt slip
15 and it has --

16 MR. KIM: About --

17 MEMBER ALBERTI: -- five items,
18 each item is a transaction for me.

19 MR. KIM: Right.

20 MEMBER ALBERTI: That's what I'm
21 counting as a transaction. Each item, each
22 line of my receipt is a transaction.

1 MR. KIM: Okay.

2 MEMBER ALBERTI: And so what
3 percentage of those, on average, if I had five
4 items, would it be two items, 40 percent, that
5 would be two transactions that would be
6 consumable?

7 MR. KIM: And you are saying
8 transaction is an item, right?

9 MEMBER ALBERTI: Is a line item on
10 my receipt.

11 MR. KIM: Yes. I would say 40
12 percent.

13 MEMBER ALBERTI: Okay. Thank you.

14 CHAIRPERSON MILLER: Mr. Kim, I
15 really appreciate your testimony. I just want
16 to --

17 MR. KIM: Yes.

18 CHAIRPERSON MILLER: -- say that
19 it sounds like you are making your best
20 educated guess. You haven't actually sat down
21 and run these.

22 MR. KIM: No.

1 CHAIRPERSON MILLER: Correct?

2 MR. KIM: No.

3 CHAIRPERSON MILLER: Okay. I
4 appreciate that. I just wanted to make that
5 clear for the record, you know.

6 MR. KIM: Right.

7 CHAIRPERSON MILLER: Okay. Thank
8 you. Okay. Mr. O'Brien, do you have any
9 redirect on --

10 MR. O'BRIEN: Yes, I do.

11 CHAIRPERSON MILLER: -- the
12 Board's questions? Okay.

13 REDIRECT EXAMINATION

14 MR. O'BRIEN: Mr. Kim, as items
15 are taken off the shelves and sold to
16 customers who depart with them, shelves have
17 to be restocked, do they not?

18 MR. KIM: Yes, they do.

19 MR. O'BRIEN: Okay. In what
20 department do you find that you do the most
21 restocking?

22 MR. KIM: Grocery by far.

1 Consumables by far, yes.

2 MR. O'BRIEN: Okay. In response
3 to one of Ms. Perry's questions, I believe,
4 you said that the total square footage in each
5 floor was, approximately, 10,000? Did I
6 understand the question/answer correct?

7 MR. KIM: No.

8 MR. O'BRIEN: I thought we heard
9 the 10,000 figure. No?

10 MR. KIM: I'm sorry. I'm not sure
11 what your question was.

12 MR. O'BRIEN: What do you believe
13 the total square footage area of the first
14 floor, the entire store?

15 MR. KIM: Yes, if I would have to
16 -- yes, I would say roughly 10,000.

17 MR. O'BRIEN: Okay.

18 MR. KIM: Sorry.

19 MR. O'BRIEN: Now, does that --
20 are all 10,000 square feet of that store
21 accessible to the public?

22 MR. KIM: No.

1 MR. O'BRIEN: All right. For
2 instance, looking at the first floor, go to
3 No. 2, what would have to be excluded, and I'm
4 not asking you for numbers, I'm asking you for
5 what areas would you not include, would you
6 exclude in order to talk about where customers
7 can shop?

8 MR. KIM: Pretty much behind the
9 registers, on the top outside where the
10 staircase is, that's -- there's nothing there.
11 It's only an emergency exit. Everything from
12 on the right side where you see the cooler
13 doors where it's shaded in blue and red,
14 everything to the right of that is not
15 accessible to --

16 MR. O'BRIEN: And what is to the
17 right of that?

18 MR. KIM: That is more, I guess,
19 back stock space. And it's the office, the
20 employee break room. There is a seating area.
21 And then on the bottom right corner is also
22 more emergency exits, staircases.

1 MR. O'BRIEN: What's on the left
2 to the -- what's on the left side of the
3 diagram to the left of the blue shaded area?

4 MR. KIM: That's an escalator.

5 MR. O'BRIEN: Are there any
6 products sold of any nature on the escalators?

7 MR. KIM: No.

8 MR. O'BRIEN: Okay.

9 MR. KIM: There is none.

10 MR. O'BRIEN: Why did you measure
11 -- let me take back the word measure. Why did
12 you only discuss, basically, that first floor
13 and not the second floor?

14 MR. KIM: Why did I only discuss
15 the first floor?

16 MR. O'BRIEN: Yes, yes.

17 MR. KIM: I'm not sure.

18 MR. O'BRIEN: Okay. To what
19 extent will alcoholic beverages be sold on the
20 second floor?

21 MR. KIM: There is no -- there is
22 nothing -- there is no alcoholic beverages

1 sold on the second floor. If we had the right
2 to sell that.

3 MR. O'BRIEN: I'm sorry, your
4 voice trailed off. There is no alcoholic
5 beverage on the second floor.

6 MR. KIM: Correct.

7 MR. O'BRIEN: And then you said
8 something after that.

9 MR. KIM: Oh, I said if we were to
10 sell it, I said, yes.

11 MR. O'BRIEN: Okay. And how would
12 you ensure that alcoholic beverages don't get
13 up onto the second floor?

14 MR. KIM: Oh, I mean, we will put
15 a sign. We will put a sign on there as far as
16 the escalator and the elevator, but we could
17 also program their registers and code it.
18 Probably the easiest way to do it would be to
19 code off certain -- the upstairs employees not
20 to be able to make a sale on an alcoholic
21 beverage. And I'm sure we could do it through
22 the registers as well. I mean, all that new

1 POS system where -- I mean, it would block the
2 sale of it.

3 MR. O'BRIEN: Those are my
4 questions. Thank you.

5 CHAIRPERSON MILLER: Thank you. I
6 have a follow-up. I'm not sure if it's to Mr.
7 O'Brien or you, Mr. Kim.

8 I heard the words consumables and
9 groceries both mentioned. Are they the same
10 the way you are using them or are they
11 different?

12 MR. KIM: The way I'm using it, I
13 would say that grocery is part of consumables.

14 CHAIRPERSON MILLER: Okay. What
15 part?

16 MR. KIM: I mean, it's a --

17 CHAIRPERSON MILLER: The food?

18 MR. KIM: I'm sorry?

19 CHAIRPERSON MILLER: The food
20 part?

21 MR. KIM: Yes. I mean, when I say
22 consumables, I'm including grocery as part of

1 it.

2 CHAIRPERSON MILLER: Okay.

3 MR. KIM: That's what I'm --

4 CHAIRPERSON MILLER: What is not
5 included in groceries then?

6 MR. KIM: What is not included?

7 CHAIRPERSON MILLER: That is a
8 consumable. You said groceries are a part of
9 consumables.

10 MR. KIM: Yes. I mean, when I
11 said part of it, I mean, when I saw the word
12 consumables, I mean that grocery is included--

13 CHAIRPERSON MILLER: Right.

14 MR. KIM: -- in consumables.

15 CHAIRPERSON MILLER: What else is
16 included in consumables?

17 MR. KIM: What else is included
18 inside -- when I say the word consumables?

19 CHAIRPERSON MILLER: Yes.

20 MR. KIM: Drinks, for me it's the
21 baby food, snacks, beef jerkey, gum and mint,
22 peanuts.

1 CHAIRPERSON MILLER: What is
2 groceries then?

3 MR. KIM: Cereal, pasta. I mean,
4 cereal would be a different -- I think it is
5 typically a different category, but canned
6 foods, flour, oil, that's part of dry grocery.

7 CHAIRPERSON MILLER: Dry grocery.

8 MR. KIM: They have like the
9 microwavable pasta stuff that is stored real
10 warm on the shelf.

11 CHAIRPERSON MILLER: Is that
12 grocery?

13 MR. KIM: Spam. Yes. No, that
14 isn't dry grocery. I consider that dry
15 grocery.

16 CHAIRPERSON MILLER: So not
17 including beverages aren't groceries,
18 according to your use?

19 MR. KIM: I don't -- no. I'm not
20 referring to any kind of drinks as dry
21 grocery, no.

22 CHAIRPERSON MILLER: Okay. Soups,

1 are they --

2 MR. KIM: Yes, they are. Canned
3 soup is. I do consider that dry grocery.

4 CHAIRPERSON MILLER: Dry grocery,
5 okay. Do you carry eggs?

6 MR. KIM: I do.

7 CHAIRPERSON MILLER: All right.
8 Thank you. Any follow-up to any redirect on
9 that? Okay. Any other Board questions?

10 MS. PERRY: Will I get redirect?
11 Recross?

12 CHAIRPERSON MILLER: Oh, on Board
13 questions, yes. On Board questions.

14 RECROSS-EXAMINATION

15 MS. PERRY: On Exhibit No. 2,
16 which is the floor plan --

17 MR. KIM: Yes.

18 MS. PERRY: When the Board report
19 was issued, was the red in there, the 1,700
20 square feet establishing that 1,700 square
21 feet dedicated to the sale of food products.
22 You are now going to be taking some of the

1 shelving or whatever we want to call it,
2 cases, shelving, whatever that contain food
3 products and they will now contain alcohol or
4 beer and wine, if you get approval?

5 MR. KIM: What was that? I don't
6 remember what you said.

7 MS. PERRY: The Board's order was
8 issued in the advisory opinion was --

9 CHAIRPERSON MILLER: July.

10 MS. PERRY: -- July.

11 MR. KIM: Actually, if your
12 question is --

13 MS. PERRY: My question is where
14 the blue and the red are --

15 MR. KIM: Yes.

16 MS. PERRY: Aren't there food
17 products now in the areas that -- where the
18 red is now?

19 MR. KIM: There are consumables
20 there.

21 MS. PERRY: There are consumables
22 there?

1 MR. KIM: Yes.

2 MS. PERRY: So those consumables
3 be they groceries or dry groceries or however
4 you want to -- drinks, will now be -- the
5 1,700 square feet will be less, because those
6 spaces will be occupied by beer and/or wine,
7 correct?

8 MR. KIM: I don't know the
9 numbers. I'm not sure what you mean by the
10 1,700 square feet, that's why.

11 MS. PERRY: Well, the Board -- the
12 finding of the Board's advisory opinion says
13 the establishment has 1,700 square feet
14 dedicated to the sale of food products. The
15 store in total has, approximately, 20,000
16 square feet of retail space.

17 MR. KIM: Well, I didn't write
18 that.

19 MS. PERRY: Let me put it this
20 way.

21 MR. KIM: Okay.

22 MS. PERRY: What is in the cases

1 now that are marked in red on your Exhibit No.
2 2?

3 MR. KIM: Okay. Which one? Which
4 part are you talking about? In the cooler?

5 MS. PERRY: Well, you have the
6 cooler and one of the -- space in one of the
7 aisles.

8 MR. KIM: Right. In the cooler
9 right now, I have some water. I have some
10 teas, some soda and the fourth door is
11 expanded, more water actually, yes. The warm
12 section right now because of the season, I
13 have more of the seasonal consumables. I have
14 some like the seasonal chocolate cookies,
15 snacks.

16 Typically, before the season,
17 before Christmas, I used to -- I mean, pretty
18 much all year until Christmas I had additional
19 waters and juices and teas.

20 MS. PERRY: Okay. You don't have
21 to testify on the review. Thank you.

22 Oh, one other question. One last

1 question. As you approach the store, what's
2 the signage on the outside of the store?

3 MR. KIM: As I approach the store?

4 MS. PERRY: Yes, are you are
5 walking into the store. What's the sign on
6 the store? What does it say?

7 MR. KIM: My goodness.

8 MS. PERRY: It's on the Veazey
9 Street side of the store and on the
10 Connecticut Avenue side in big letters. They
11 are 20 something inches tall each letter.

12 MR. KIM: Walgreens.

13 MS. PERRY: It says Walgreens.
14 And that is under the Walgreens?

15 MR. KIM: Pharmacy and clinic.

16 MS. PERRY: Pharmacy and clinic.
17 Does it say grocery store anywhere on the
18 outside signage? Does it say food items?

19 MR. KIM: No.

20 MS. PERRY: Does it say
21 consumables?

22 MR. KIM: No.

1 MS. PERRY: So basically, the
2 signage for the average person like me driving
3 or walking by the 20 inch letters, basically,
4 says Walgreens, pharmacy, clinic. You don't
5 identify yourself as a grocery store, correct?

6 MR. O'BRIEN: Objection. Ask and
7 answered.

8 MR. KIM: I mean, you asked that
9 question.

10 MS. PERRY: Okay.

11 CHAIRPERSON MILLER: It has been
12 answered. It's over. I'm sorry, did you need
13 me to rule on an objection?

14 MR. O'BRIEN: Not any more.

15 CHAIRPERSON MILLER: Okay. I'm
16 sorry. I just wanted to recognize
17 Councilmember Cheh has just come in the room.
18 Are you okay on time as far as waiting until--
19 okay, good. Okay. Because otherwise let us
20 know and we will accommodate your schedule.

21 Did you finish with your
22 questions?

1 MS. PERRY: Yes.

2 CHAIRPERSON MILLER: I just want
3 to ask a follow-up question, because I think
4 it was the question you were trying to ask and
5 I don't think we got an answer to it. And I
6 think it would be good for the record.

7 As I understood it, I thought Ms.
8 Perry was trying to ask that Plaintiff's
9 Exhibit No. 2 where there is a red shading
10 that indicates where the beer and wine would
11 go on the shelves if you get permission to
12 sell beer and wine.

13 It looks like, according to her
14 diagram, which I don't have the other diagram,
15 it's currently shaded in blue where you are
16 currently selling consumables.

17 Are you currently selling
18 consumables in the area where you would be
19 putting the beer and wine?

20 MR. KIM: Yes. I have consumables
21 in where the red shaded section is right now.

22 CHAIRPERSON MILLER: So my

1 question is would those consumables be moved
2 to another shelf space or would you be
3 devoting less shelf space to consumables, if
4 you got permission to sell beer and wine?

5 MR. KIM: Those are all duplicate
6 facings, so if it's two bottles of maybe Evian
7 water, we did four bottles of Evian water to
8 expand it. But I mean, we won't lose any
9 skews as far as individual items, no, we will
10 not lose any.

11 CHAIRPERSON MILLER: You won't
12 lose individual items. Will you lose shelf
13 space?

14 MR. KIM: Will we lose shelf space
15 to?

16 CHAIRPERSON MILLER: To the beer
17 and wine.

18 MR. KIM: Yes, I mean, it will be
19 placed in the red section.

20 CHAIRPERSON MILLER: Okay.

21 MR. KIM: So we won't lose shelf
22 space to consumables, I guess.

1 CHAIRPERSON MILLER: Okay. Do you
2 have a measurement of that shelf space that
3 would be devoted to beer and wine that is
4 marked that is shaded in red?

5 MR. KIM: When you say
6 measurement, what do you mean?

7 CHAIRPERSON MILLER: Well, I
8 believe that the advisory opinion may talk in
9 terms of how much shelf space.

10 MR. KIM: Yes, I can give you an
11 exact measurement as far as footage is
12 concerned, if you want.

13 CHAIRPERSON MILLER: That would be
14 nice.

15 MR. KIM: I can look at the
16 diagram and there all my little squares are 3
17 feet across.

18 CHAIRPERSON MILLER: Okay.

19 MR. KIM: Five shelves high. So
20 that's four sections there, so that's one,
21 two, three, four, that's 12 times 5, that's
22 70.

1 MR. O'BRIEN: 60.

2 MR. KIM: Oh, 60.

3 CHAIRPERSON MILLER: Okay.

4 MR. KIM: Yes.

5 CHAIRPERSON MILLER: 60? Okay.

6 MR. KIM: 12 times 5, yes, 60.

7 CHAIRPERSON MILLER: All right.

8 Thank you. I just wanted to make sure we had
9 the right figures in the record. Okay.

10 MR. KIM: That's linear foot not
11 square foot, so I'm not sure.

12 CHAIRPERSON MILLER: That's linear
13 feet.

14 MR. KIM: Yes, that's not square
15 footage.

16 CHAIRPERSON MILLER: Okay. Any
17 other questions?

18 MR. O'BRIEN: And I'm sorry, but
19 the Chair's questions force me to ask another
20 one.

21 CHAIRPERSON MILLER: Go ahead,
22 that's your right.

1 MR. O'BRIEN: Thank you.

2 CHAIRPERSON MILLER: Yes.

3 MR. O'BRIEN: As you look at No.
4 2, immediately above the blue shading are some
5 shelves that are white shaded.

6 MR. KIM: Which way am I looking
7 at it? I'm sorry.

8 MR. O'BRIEN: If you look above --
9 I'm sorry, that's at an angle.

10 MEMBER SILVERSTEIN: So we're
11 looking at No. 2?

12 CHAIRPERSON MILLER: Yes.

13 MR. O'BRIEN: Just above the blue
14 shaded area, which I know at the present is
15 consumables.

16 MR. KIM: Yes.

17 MR. O'BRIEN: I understand the
18 Chair's question to be will putting beer and
19 wine in the red shaded areas result in
20 diminished linear footage of shelf space. If
21 there is a demand for it, could you expand the
22 blue area to the white areas?

1 MR. KIM: Oh, for sure, yes.

2 MR. O'BRIEN: Thank you.

3 MS. PERRY: Can you point --
4 excuse me. Can you point that out for a
5 moment?

6 CHAIRPERSON MILLER: Okay.

7 MS. PERRY: Hoping we can go out
8 that way. Then I have to ask a question.

9 RE-RECROSS-EXAMINATION

10 MS. PERRY: Wouldn't you then be
11 displacing other products?

12 MR. KIM: Yes.

13 MS. PERRY: Okay.

14 CHAIRPERSON MILLER: So just so we
15 all understand this better, I would ask one
16 other question too then.

17 In the white space I thought there
18 weren't any products. Are there? Are they
19 not accessible to the public or what is the
20 white space?

21 MR. KIM: They are just not
22 consumable items.

1 CHAIRPERSON MILLER: Not
2 consumable items.

3 MR. KIM: Yes, they are --

4 CHAIRPERSON MILLER: Okay.

5 MR. KIM: -- paper towels.

6 MR. O'BRIEN: I'm talking about
7 this white space.

8 CHAIRPERSON MILLER: Oh.

9 MR. O'BRIEN: That white space.
10 The shelving space, that's what he is talking
11 about.

12 CHAIRPERSON MILLER: Oh, okay.
13 One more question. Where would you be
14 expanding your shelf space on the diagram?

15 MR. KIM: I mean, I can expand
16 anywhere.

17 CHAIRPERSON MILLER: Anywhere?

18 MR. KIM: Anywhere we want to.

19 CHAIRPERSON MILLER: I see, you
20 could knock off something else. It doesn't
21 have to be a consumable.

22 MR. KIM: Yes.

1 CHAIRPERSON MILLER: Right.

2 MR. KIM: I mean, move things
3 around and, you know, we have the liberty to
4 do that.

5 CHAIRPERSON MILLER: Right.

6 MR. KIM: Depending on what the
7 need for business is.

8 CHAIRPERSON MILLER: Okay. Okay.

9 MEMBER SILVERSTEIN: Madam Chair,
10 the -- after the first witness, the licensee
11 has used 22 minutes. The protestant has used
12 19. We have spent one hour and 25 minutes on
13 the first witness. Our next hearing is
14 scheduled to begin in 49 minutes. Thank you.

15 CHAIRPERSON MILLER: Thank you.
16 Hopefully, we have covered a lot of ground
17 with our first witness. Thank you. I think
18 we are finished with you. Thank you very
19 much. Appreciate your testifying.

20 Mr. O'Brien, do we have --

21 MR. O'BRIEN: Our next witness is
22 Rick Conner.

1 MS. PERRY: Excuse me for a second
2 if I may interrupt. Would it be possible for
3 the Councilmember to testify before Mr.
4 Conner, so she can leave to go back to her
5 other duty?

6 CHAIRPERSON MILLER: That's what I
7 had inquired and we do that with police
8 officers as well. And so we would be happy to
9 accommodate Councilmember Cheh. Do you have
10 an objection, Mr. O'Brien?

11 MR. O'BRIEN: Well, it's up to the
12 Board to control the conduct of hearings. But
13 where a witness is designated as more
14 important than other witnesses sends a pretty
15 clear message.

16 CHAIRPERSON MILLER: I don't think
17 those are the words that I used.

18 MR. O'BRIEN: I didn't say they
19 are the words that you used.

20 CHAIRPERSON MILLER: Okay. I
21 don't hear any prejudice to your party, that's
22 what I was wondering and I don't see it in

1 this type of case. So we would be happy to
2 accommodate Councilmember Cheh.

3 Do you want to come up and be
4 sworn in? Do we swear in Councilmembers? Why
5 not.

6 Whereupon,

7 COUNCILMEMBER MARY CHEH
8 was called as a witness by Counsel for the
9 Plaintiff, and having been first duly sworn,
10 assumed the witness stand and was examined and
11 testified as follows:

12 CHAIRPERSON MILLER: Thank you.

13 COUNCILMEMBER CHEH: Well, thank
14 you very much for accommodating me. I don't
15 think I'll take too much of your time.

16 The issue about Walgreens being a
17 full-service grocery store and thus --

18 MR. O'BRIEN: Madam Chair?

19 CHAIRPERSON MILLER: Yes?

20 MR. O'BRIEN: The witness is
21 testifying?

22 CHAIRPERSON MILLER: This is a

1 witness who is testifying. She was just sworn
2 in.

3 MR. O'BRIEN: I think she should
4 be asked questions.

5 CHAIRPERSON MILLER: Not
6 necessarily. We have many witnesses who come
7 and testify. She is offering her testimony.

8 MR. O'BRIEN: Offering testimony
9 or making --

10 CHAIRPERSON MILLER: Do you want
11 to cite a rule that you are talking about, Mr.
12 O'Brien? What rule in our regulations are you
13 citing?

14 MR. O'BRIEN: Rules of procedure.

15 CHAIRPERSON MILLER: What rule of
16 procedure?

17 MR. O'BRIEN: All right. You're
18 asking me for a citation, I don't have one.

19 CHAIRPERSON MILLER: Okay. Then I
20 think you are out of order. I do.

21 MR. O'BRIEN: I'm out of order for
22 raising an objection?

1 CHAIRPERSON MILLER: I do. You
2 have made your objection. You cannot cite a
3 regulation.

4 MR. O'BRIEN: Okay. I don't -- I
5 suggest with respect that people should not be
6 able to come in here and give speeches. It
7 should be ask questions and answer the
8 questions.

9 CHAIRPERSON MILLER: Okay. You
10 can proceed.

11 COUNCILMEMBER CHEH: Thank you
12 very much. I don't plan to give a speech.
13 And the question to me, I'll put it to myself.
14 Do I have a statement about the matter at
15 hand? Yes, I do and now I will read it.

16 CHAIRPERSON MILLER: Thank you.

17 COUNCILMEMBER CHEH: I want to
18 talk first about the Council's intent
19 regarding the grocery store exemption. The
20 Council, as you know, created a moratorium on
21 the Class B Alcohol Licenses in the District
22 and I have no opinion about whether that

1 should be maintained, but rather what and how
2 the moratorium operates.

3 Council created an exemption from
4 the moratorium for full-service grocery stores
5 that sell "a full range of fresh canned and
6 frozen items." The Council created the
7 grocery store exemption by emergency in 2000.
8 The accompanying Emergency Declaration
9 Resolution explained that the exemption was
10 created to "encourage high-quality grocery
11 stores to locate new stores in the District of
12 Columbia."

13 Specifically, the emergency
14 legislation was passed and this exemption was
15 created to allow Whole Foods, which is a full-
16 service grocery store on P Street to sell beer
17 and wine.

18 The Council explained, and I'm
19 quoting, "The success of this Whole Foods
20 store and similar stores is contingent on the
21 ability to sell a full range of products,
22 including beer and wine.

1 The ability to provide such
2 products greatly enhances the potential for
3 success, thereby ensuring economic viability
4 and encouraging other grocery stores to
5 consider locating in the District.

6 The ability to provide beer and
7 wine on an incidental basis along with a full
8 range of food products provides an essential
9 service and convenience to District
10 residents."

11 Now, the exemption was made
12 permanent several months later and the bills'
13 legislative history makes clear that the
14 intent of the exemption is to, and I'm
15 quoting, "strongly support new supermarket
16 development in the city," and that it "does
17 not apply to cornerstores or convenience
18 stores."

19 Again, the legislative history is
20 clear that the Council's intent in creating
21 this exemption was to allow new high-quality
22 grocery stores, like Whole Foods, to sell beer

1 and wine, not cornerstores, convenience stores
2 or drug stores.

3 Now, in terms of the Board's
4 opinion on this matter that the Walgreens
5 qualifies as a full-service grocery store and
6 thus may be exempt, based on the Board's
7 findings of fact, it is a very -- we should be
8 very skeptical of that conclusion that
9 Walgreens would be eligible for the exemption.

10 By way of example, the opinion
11 characterizes the floor space dedicated to
12 food as "significant," but it is, as I'll
13 discuss in a moment, and you may have further
14 testimony here, of course, is only 8.5 percent
15 of the store's entire floor space. And how
16 that can be deemed significant is certainly
17 open to question.

18 To be eligible for the exemption,
19 the "primary purpose" business and purpose of
20 the store must be "the sale of a full range of
21 fresh, canned and frozen food items." And the
22 evidence in the record suggests that Walgreens

1 does not meet the requirements.

2 First, the Board made a factual
3 finding, again, that only 1,700 of the store's
4 20,000 square feet of retail space or 8.5
5 percent is dedicated to the sale of food
6 products.

7 And two, the Board noted that
8 Walgreens carries tens of thousands of items
9 in its store, but only 55 of them are fresh
10 food items.

11 Additionally, Walgreens federal
12 filings with the United States Securities and
13 Exchange Commission further supports the
14 conclusion that the store is ineligible for
15 the exemption.

16 Walgreens states that it "operates
17 the largest drug store chain in the United
18 States selling prescription and non-
19 prescription drugs, as well as general
20 merchandise, including household products,
21 convenience and fresh foods, personal care,
22 beauty care, photo finishing and candy."

1 Indeed, the company reported that
2 75 percent of sales at its drug stores are
3 prescription and non-prescription drugs.

4 So, yes, Walgreens does sell a
5 range of food products. The stores have
6 coolers and freezers and perishable goods, but
7 only a small portion of the gross sales is
8 from food and only 8.5 percent of the store's
9 retail space is used to display the food
10 items. And food items constitute a very small
11 percentage of the total number of items
12 available for sale.

13 So it is highly likely that under
14 the exemption that Walgreens shouldn't qualify
15 and particularly when you understand the
16 background of the exemption itself, as the
17 legislative history reveals.

18 And finally, I am finished, but I
19 do want to make some comment about the
20 advisory opinion and the letter I had sent to
21 the Board about that advisory opinion.

22 I understand that Mr. Silverstein

1 criticized that letter as a back door attempt
2 to influence the Board stating that the letter
3 was an ex parte communication and was, and I'm
4 quoting here, "ethically, morally and legally
5 reprehensible and untenable."

6 Now, those charges are quite
7 serious, so I just want to make a couple of
8 observations.

9 First, my letter is not an
10 improper ex parte communication with the
11 Board. I'm not a party in this case. The
12 principles of ex parte communications simply
13 don't apply.

14 Indeed, a letter from the
15 Councilmember to the Board is a public
16 document and available to anyone. And its
17 purpose, in fact, was to become part of the
18 record.

19 Additionally, the concerns
20 expressed in my letter were in response to a
21 decision already made by the Board, Order No.
22 2012327, and not a pending matter.

1 When I sent my letter, the Board
2 had already published its opinion and
3 conclusions of law.

4 Second, I would like to point out
5 the Council created the ABC Board. The
6 Board's purpose is to administer and enforce
7 the Alcoholic Beverage Laws of the Council.
8 The Council created the Moratorium on Class B
9 Licenses and the Grocery Store Exemption.

10 And the sum total of the body's
11 deliberations is, obviously, then the business
12 of the Council.

13 And when I believe the Board is
14 misinterpreting the law, it is fully
15 appropriate for me to communicate my concerns
16 to the Board.

17 As a final matter, I just want to
18 advise the Board that the Council will be
19 taking up, on Tuesday, Bill 19824, the Omnibus
20 Alcohol Beverage Regulation Amendment Act of
21 2012 for final reading. And that I'm working
22 with Councilmember Graham and other members on

1 an amendment that does touch upon this issue.

2 But I thank you for your time and
3 I'm sorry if you thought this was irregular.

4 CHAIRPERSON MILLER: Thank you.

5 MR. O'BRIEN: I'm sorry, I didn't
6 get the very last word.

7 COUNCILMEMBER CHEH: I'm sorry if
8 you thought this was irregular.

9 MR. O'BRIEN: Irregular. Thank
10 you.

11 CHAIRPERSON MILLER: Do you have
12 any cross-examination?

13 MR. O'BRIEN: Say again?

14 CHAIRPERSON MILLER: Do you have
15 any cross-examination?

16 MR. O'BRIEN: Yes, I do. Thank
17 you.

18 CHAIRPERSON MILLER: Okay.

19 MEMBER ALBERTI: Is that the --

20 CHAIRPERSON MILLER: That's what
21 the --

22 MEMBER ALBERTI: -- I mean, does

1 Ms. Perry have any questions of her?

2 CHAIRPERSON MILLER: Oh, I thought
3 this was the testimony. Is there more
4 testimony?

5 MS. PERRY: I just have --

6 CHAIRPERSON MILLER: Okay.
7 Continue.

8 MS. PERRY: -- one question.
9 Since you are wiping the slate clean and we're
10 starting all over with the hearing, I just
11 want Councilmember Cheh to identify the letter
12 that she spoke of.

13 CHAIRPERSON MILLER: Why is that?

14 MS. PERRY: Because you said that
15 we had to introduce everything new at this
16 hearing.

17 CHAIRPERSON MILLER: Okay. Thank
18 you, Ms. Perry. I just thought we all knew
19 which letter it was, but go ahead.

20 MS. PERRY: You said for the
21 record we had to --

22 CHAIRPERSON MILLER: You want to

1 submit it into evidence, correct? Okay.

2 MS. PERRY: Councilmember Cheh, is
3 this the letter you are referring to?

4 COUNCILMEMBER CHEH: Yes.

5 MS. PERRY: Thank you. I would
6 offer it and mark it as our Exhibit No. 2 --
7 or 4.

8 CHAIRPERSON MILLER: 4?

9 MR. O'BRIEN: It's 3, I think.

10 MS. PERRY: I would like to move
11 this into evidence.

12 CHAIRPERSON MILLER: Is there an
13 objection?

14 MR. O'BRIEN: Yes. I object on
15 the grounds that an opinion as to what the law
16 says is not competent evidence in a contested
17 case.

18 CHAIRPERSON MILLER: Okay.
19 Overruled. The subject of this hearing is
20 interpreting the legislation, so it's relevant
21 and it was admitted in the previous hearing.
22 So it's part of the record or it came in and

1 certainly was in the record, so it's admitted.

2 (Whereupon, the document was
3 marked for identification as
4 Plaintiff Exhibit 3 and was
5 received in evidence.)

6 MS. PERRY: Okay.

7 MEMBER SILVERSTEIN: Madam Chair?

8 CHAIRPERSON MILLER: Yes?

9 MEMBER SILVERSTEIN: I would like
10 to rise now to a point of first privilege,
11 because, in fact, my name was invoked. There
12 was an accusation made and I seek to
13 respectfully defend myself.

14 And what occurred at our previous
15 meeting was that an objection was filed by
16 counsel, Mr. O'Brien, that a letter was sent
17 to us that he had not received regarding a
18 contested matter in a contested case.

19 Being that he had not received
20 prior notice and it came from a lawyer, he
21 felt, and others did as well, that though it
22 was well-meaning, it may have been a foul of

1 Rule 3.5(b) of the D.C. Bar's Standards and
2 Rules of Conduct, impartiality, and in that,
3 a lawyer, even if the lawyer is a member of
4 City Council, is supposedly not to communicate
5 ex parte with a member of a tribunal in a
6 contested case without prior notification or
7 simultaneous notification of the other party.

8 At that point, he asked that the
9 case be -- that the protest be dismissed. I
10 argued that it should not be dismissed,
11 because, in fact, they were not culpable for
12 the fact that you had sent -- you or your
13 staff had sent this letter and not notified
14 him. And they should not be punished.

15 But that it put is in a very, very
16 difficult position, because, in fact, you had
17 weighed in on a matter that was a contested
18 matter in a contested case before a tribunal
19 without, in other words back door, prior
20 notification to the other side.

21 I was in a difficult position and
22 I felt that it was morally wrong for us to

1 have to do that, to be in that position. I
2 did not mean it to insult you, but I hope you
3 understand the position that we are in.

4 We are to be -- we are sworn to
5 uphold the law without fear or favor or
6 prejudice. And when the people who confirm us
7 and in case -- there was a Member sitting on
8 this Board who had just been vetoed by a
9 member of Council who didn't like him.

10 In a situation like that, it put
11 us in a very difficult position Ms. Cheh. And
12 I hope you understand we are trying to be fair
13 and that had there been notification given to
14 the other side -- the only way that the
15 applicant found out about this was our staff
16 told them.

17 Otherwise, we were being asked to
18 rule on something, on a contested matter, on
19 a contested case, without their prior
20 notification.

21 Please, if I offended you,
22 understand that's where I was coming from and

1 I'm sorry if I hurt your feelings or offended
2 you.

3 COUNCILMEMBER CHEH: May I reply?

4 CHAIRPERSON MILLER: Sure.

5 COUNCILMEMBER CHEH: You haven't
6 hurt my feelings. You have made a mistake
7 here to even suggest that I have violated any
8 disciplinary rules. I am not a lawyer in this
9 case. The fact that I happen to be a lawyer
10 is irrelevant.

11 I'm not a lawyer in this case.
12 The advisory opinion had been issued. And to
13 describe what I did as ethically, morally and
14 legally reprehensible is beyond the pail.

15 I sent the letter here as a Member
16 of the Council on a matter that had been
17 decided that was a public record. There was
18 no ex parte -- you don't even know what an ex
19 parte communication is apparently.

20 So your explanation only digs the
21 hole deeper.

22 CHAIRPERSON MILLER: Okay. Thank

1 you.

2 MEMBER SILVERSTEIN: I don't see
3 any reason to go any further with this, but --

4 CHAIRPERSON MILLER: I just want
5 to say that on that day there -- as a lawyer
6 as well, I did not consider it at all to be an
7 ex parte communication. That it is common for
8 Councilmembers to submit letters to Boards on
9 cases.

10 MEMBER SILVERSTEIN: I would only
11 point out that every other lawyer in the room
12 did before I made the comment.

13 CHAIRPERSON MILLER: Okay. In any
14 event --

15 MEMBER SILVERSTEIN: Every other
16 staff lawyer.

17 CHAIRPERSON MILLER: Okay. We are
18 not relitigating that. It is part of the
19 record. We are not excluded it as ex parte
20 communication. So let's move on.

21 MEMBER SILVERSTEIN: Excuse me,
22 Madam Chair. Just this one thing. From U.S.

1 Legal Definitions an ex parte communication is
2 defined, and this is what I went by, as "An
3 oral or written communication, not on the
4 public record," which it had not been at that
5 time, but was or would be later, "with respect
6 to which reasonable prior notice to all
7 parties is not given.

8 But it shall not include requests
9 for status reports on any matter or proceeding
10 covered by 5 USCS 551."

11 COUNCILMEMBER CHEH: That applies
12 to parties.

13 CHAIRPERSON MILLER: And
14 everything was on the record. The letter came
15 into the Board's record. No Board Members had
16 any communications with Councilmember Cheh.
17 That would be an ex parte outside of the
18 record. But anyway --

19 MEMBER SILVERSTEIN: Fine.

20 CHAIRPERSON MILLER: -- let's move
21 this on. It's Mr. O'Brien's cross-
22 examination.

1 MR. O'BRIEN: Yes. I want to make
2 something clear about my objection to the
3 admission of the letter from Councilmember
4 Cheh. I don't object to it being in the
5 record. It has to be in the record, because
6 the Board received it.

7 I object to it being admitted into
8 evidence in this contested case.

9 CHAIRPERSON MILLER: On what
10 grounds?

11 MR. O'BRIEN: Because it's nothing
12 but an attempt -- an opinion, I'm sorry, not
13 evidence.

14 CHAIRPERSON MILLER: I don't have
15 the record in front of me, but if it's an
16 opinion that goes to interpreting the
17 legislation that we are bound by and this
18 hearing is about interpreting in part, you
19 know, what is meant by a full-service grocery
20 store or what isn't, it's relevant and I don't
21 think that provision that you are saying bars
22 it.

1 MR. O'BRIEN: I have not known --

2 CHAIRPERSON MILLER: But you have
3 noted for the record.

4 MR. O'BRIEN: I have not know it
5 except in cases with expert witnesses that
6 opinions are admissible.

7 CHAIRPERSON MILLER: We didn't
8 qualify Councilmember Cheh as an expert
9 witness. Is that what you are saying?

10 MR. O'BRIEN: What I said was
11 except in the case of expert witnesses,
12 opinions are not admissible.

13 CROSS-EXAMINATION

14 MR. O'BRIEN: Councilmember Cheh,
15 you were not a Member of the Council at the
16 time that the grocery store exception was
17 passed, were you?

18 COUNCILMEMBER CHEH: No.

19 MR. O'BRIEN: So what you have
20 spoken of today is your opinion as to what the
21 Council intended at a time before you became
22 a member. Is that correct?

1 COUNCILMEMBER CHEH: No. I rely
2 on the legislative history.

3 MR. O'BRIEN: Your reading of the
4 legislative history, correct?

5 COUNCILMEMBER CHEH: No, I'm
6 actually quoting from the legislative history.

7 MR. O'BRIEN: Understood. And you
8 are quoting those portions of the legislative
9 history which support your position, correct?

10 COUNCILMEMBER CHEH: Well, of
11 course.

12 MR. O'BRIEN: Okay. All right,
13 I'll go on. Now, you are familiar,
14 Councilmember Cheh with the District of
15 Columbia Administrative Procedure Act?

16 COUNCILMEMBER CHEH: Generally.

17 MR. O'BRIEN: Okay. And you
18 recognize that the ABC Board in the context of
19 a contested case, such as this Protest
20 Hearing, is performing a quasi judicial
21 function, do you not?

22 COUNCILMEMBER CHEH: If you have a

1 protest, that would be correct, but the
2 advisory opinion, apparently, is a separate
3 matter.

4 MR. O'BRIEN: Well, when you wrote
5 your letter on August 7th did you not say two
6 things in the letter? Number one, please,
7 give the protestants in this pending case a
8 continuance.

9 And then number two, here is my
10 opinion as to what the legislation meant.

11 COUNCILMEMBER CHEH: Correct.

12 MR. O'BRIEN: Okay. So you were
13 aware when you wrote the letter, you stated so
14 yourself that this was an ongoing matter and
15 not a finished matter, correct?

16 COUNCILMEMBER CHEH: The advisory
17 opinion had been issued on the matter of
18 whether it's a full-service grocery store,
19 which was not part of the protest.

20 MR. O'BRIEN: And you are aware,
21 are you not, that an advisory opinion is not
22 a decision by the Board, are you not?

1 COUNCILMEMBER CHEH: But it
2 nevertheless is an opinion.

3 MR. O'BRIEN: Yes, it's an
4 opinion.

5 COUNCILMEMBER CHEH: Right.

6 MR. O'BRIEN: But you were aware
7 when you sent the letter that this was an
8 ongoing contested case before the Board, were
9 you not?

10 COUNCILMEMBER CHEH: The issue
11 about whether it is a full-service grocery
12 store had been decided in the advisory
13 opinion, which had already been issued and
14 published.

15 MR. O'BRIEN: But the advisory
16 opinion was influencing the decision in the
17 contested case, correct?

18 COUNCILMEMBER CHEH: I have no
19 idea.

20 MR. O'BRIEN: Okay. Did you send
21 a copy of that letter to the applicant?

22 COUNCILMEMBER CHEH: I sent it to

1 the Board.

2 CHAIRPERSON MILLER: Mr. O'Brien?

3 MR. O'BRIEN: Is the answer no,
4 you did not send a copy to the applicant?

5 CHAIRPERSON MILLER: Mr. O'Brien?

6 COUNCILMEMBER CHEH: To the
7 applicant? No.

8 CHAIRPERSON MILLER: Mr. O'Brien?
9 I really do not -- we are limited on time and
10 I don't think it is fruitful if you are going
11 down the ex parte road. If you want to ask
12 Councilmember Cheh about her testimony today
13 that goes to the subject of this hearing, I
14 think you should turn to that.

15 MR. O'BRIEN: Councilmember Cheh,
16 you recognize the Board is required to base
17 its finding of fact in this contested case on
18 substantial evidence, are you not?

19 COUNCILMEMBER CHEH: Um-hum.

20 MR. O'BRIEN: Good. You are the
21 Councilmember for Ward 3, correct?

22 COUNCILMEMBER CHEH: Correct.

1 MR. O'BRIEN: The protestant in
2 this case is ANC-3C, correct?

3 MR. KIM: Correct.

4 MR. O'BRIEN: 3 -- I'm sorry.

5 COUNCILMEMBER CHEH: No, 3
6 something.

7 MR. O'BRIEN: 3 --

8 MS. PERRY: I'm 3F.

9 MR. O'BRIEN: 3F.

10 COUNCILMEMBER CHEH: 3F.

11 MR. O'BRIEN: Thank you for
12 clarifying that.

13 How did your August 7 letter to
14 the Board come to be written?

15 COUNCILMEMBER CHEH: I'm not sure
16 exactly what you mean by that, but I was aware
17 that there was this opinion. And I live in
18 the neighborhood. I know the particular
19 store. I know my ward and it struck me from
20 the law, as it is written, that this was an
21 incorrect result.

22 MR. O'BRIEN: All right. How did

1 you become aware that the opinion had been
2 written?

3 COUNCILMEMBER CHEH: That I don't
4 recall.

5 MR. O'BRIEN: Did Ms. Perry tell
6 you about it?

7 COUNCILMEMBER CHEH: She may have
8 told me. I don't recall.

9 CHAIRPERSON MILLER: Mr. O'Brien?

10 MR. O'BRIEN: Yes?

11 COUNCILMEMBER CHEH: But I believe
12 it's a public document.

13 CHAIRPERSON MILLER: Could you
14 just tell us where you are going with this,
15 because we do have a limited time and what I
16 said to you before --

17 MR. O'BRIEN: We have an hour and
18 a half, Madam Chair.

19 CHAIRPERSON MILLER: What I said
20 to you, Councilmember Cheh is not on trial
21 here. We are having a hearing about
22 interpreting what is a full-service grocery

1 store. She testified quoting from legislative
2 history, that should be the subject of your
3 cross-examination.

4 MR. O'BRIEN: Bias and motive of a
5 witness are always relevant, Madam Chair.

6 CHAIRPERSON MILLER: Well, I would
7 get there really fast, because you are going
8 to use up all your time on bias and motive.

9 MR. O'BRIEN: Is Ms. Perry a
10 political supporter of your's?

11 COUNCILMEMBER CHEH: I hope so.

12 MR. O'BRIEN: Is she?

13 COUNCILMEMBER CHEH: I hope so.

14 MR. O'BRIEN: Do you know if she
15 is a supporter of your's?

16 COUNCILMEMBER CHEH: One never
17 knows until the time comes.

18 MR. O'BRIEN: Has she been a
19 contributor to your campaign?

20 COUNCILMEMBER CHEH: No, but I
21 wish she would.

22 MS. PERRY: I might after this.

1 MR. O'BRIEN: Have you ever
2 testified in favor of an ANC's position in a
3 contested case before?

4 COUNCILMEMBER CHEH: I haven't
5 testified before this Board, but I have
6 testified before the Zoning Board.

7 MR. O'BRIEN: In a contested case?

8 COUNCILMEMBER CHEH: Yes, they are
9 always contested about whether, you know, PUD
10 or whatever the --

11 MR. O'BRIEN: Well, PUDs are by
12 the Zoning Commission, correct?

13 COUNCILMEMBER CHEH: Right. But--

14 MR. O'BRIEN: Which is engaged in
15 rulemaking.

16 COUNCILMEMBER CHEH: Yes.

17 MR. O'BRIEN: Which is not a
18 contested case.

19 COUNCILMEMBER CHEH: No, I meant--

20 MR. O'BRIEN: Correct?

21 COUNCILMEMBER CHEH: -- the Board
22 when they argue --

1 MR. O'BRIEN: You meant the Board
2 of Zoning Adjustment?

3 COUNCILMEMBER CHEH: Yes.

4 MR. O'BRIEN: Okay. Councilmember
5 Cheh, do you consider it appropriate to put
6 the weight of your office behind the one
7 litigant in a contested case?

8 COUNCILMEMBER CHEH: When the
9 matter is of such concern as this is, this is
10 one case, you are right, but the fact of the
11 matter is these cases can set a precedent.
12 And I'm concerned very much if the law that
13 creates an exemption for a narrow, narrow
14 category would be applied here, then the
15 consequences of that are quite severe
16 throughout, not just Ward 3, but throughout,
17 the District.

18 It would mean -- it could mean
19 that, you know, gas stations, drug stores,
20 convenience stores, all kinds of entities that
21 might sell some amount of food, could then be
22 granted an exemption from the liquor license.

1 I think that the law was not so
2 intended and I think that the consequences
3 would be very significant, that's how I look
4 at it.

5 MR. O'BRIEN: You mentioned in
6 your remarks that you are pursuing an
7 amendment to the legislation presently, are
8 you not?

9 COUNCILMEMBER CHEH: Yes.

10 MR. O'BRIEN: By the legislation,
11 I mean, they are a full-service grocery --

12 COUNCILMEMBER CHEH: Yes.

13 MR. O'BRIEN: -- store. Would you
14 not --

15 COUNCILMEMBER CHEH: No, no, no.
16 To the -- it's a total amendment related to
17 other matters beyond this issue.

18 MR. O'BRIEN: Okay.

19 COUNCILMEMBER CHEH: That's --

20 MR. O'BRIEN: But did you not on
21 December 4th at the first reading on the
22 Omnibus Bill before the Council --

1 COUNCILMEMBER CHEH: Yes.

2 MR. O'BRIEN: -- move an amendment
3 to redefine full-service grocery store?

4 COUNCILMEMBER CHEH: Yes.

5 MR. O'BRIEN: Okay.

6 COUNCILMEMBER CHEH: I had a
7 number of amendments, that was one of them.

8 MR. O'BRIEN: Okay. That was one
9 of them. And that amendment was withdrawn?

10 COUNCILMEMBER CHEH: Correct.

11 MR. O'BRIEN: I under -- I'm
12 inferring from what you said and wrote that
13 you intend to revisit it again on December
14 18th.

15 COUNCILMEMBER CHEH: Well, I said
16 -- I made reference to an amendment. It will
17 not be that amendment. I have been discussing
18 with Councilmember Graham the potential for a
19 rulemaking by the Board, but it won't be the
20 amendment that I had introduced.

21 MR. O'BRIEN: Okay.

22 COUNCILMEMBER CHEH: It will be an

1 amendment on this topic.

2 MR. O'BRIEN: Would you agree that
3 if a legislator believes that the law is being
4 misinterpreted, that the appropriate vehicle
5 is to amend the law?

6 COUNCILMEMBER CHEH: That is one
7 vehicle.

8 MR. O'BRIEN: All right.

9 COUNCILMEMBER CHEH: But not the
10 only one.

11 MR. O'BRIEN: Do you believe it is
12 -- I'm going to ask the same question then.
13 Is it appropriate for a legislator to use her
14 office to weigh in on favor of one side in a
15 particular contested case?

16 COUNCILMEMBER CHEH: Well, the way
17 you are phrasing it, what I'm weighing in is
18 on behalf of the law and a proper
19 interpretation of the law. And a
20 consideration of the consequences if there is
21 an error made here.

22 MR. O'BRIEN: The Council,

1 including you, confirm appointments of Board
2 Members. Is that correct?

3 COUNCILMEMBER CHEH: That's right.

4 MR. O'BRIEN: Can you appreciate
5 that Members of the Board might be somewhat
6 intimidated --

7 COUNCILMEMBER CHEH: I think --

8 MR. O'BRIEN: -- and fearful of
9 crossing you when coming in to take a side --

10 COUNCILMEMBER CHEH: I think
11 they --

12 MR. O'BRIEN: -- on behalf of one
13 litigant?

14 COUNCILMEMBER CHEH: I think that
15 they are precisely not intimidated. In a
16 recent hearing that we had, I think that was
17 made quite evident.

18 MR. O'BRIEN: You teach
19 Constitutional Law at George Washington
20 University?

21 COUNCILMEMBER CHEH: I do.

22 MR. O'BRIEN: Okay. You are aware

1 then, are you not, that Federal Judges are
2 confirmed by the U.S. Senate, aren't you? Are
3 you aware of that?

4 COUNCILMEMBER CHEH: Yes.

5 MR. O'BRIEN: Okay. Have you ever
6 heard of a U.S. Senator going into a Federal
7 Courtroom and telling the Judge how to rule on
8 a case?

9 COUNCILMEMBER CHEH: It is totally
10 inapplicable in this kind of instance. We are
11 not equivalent to the Federal Courts. It's
12 not a Court. It's not judicial in that sense.
13 It is a Board. I have sent letters to other
14 boards on matters where I think that the issue
15 is one that has a broader impact in the case
16 in front of the Board.

17 MR. O'BRIEN: And you are aware,
18 are you not that the reason that Federal
19 Judges are appointed for life is so that they
20 won't be subject to pressure?

21 CHAIRPERSON MILLER: Mr. O'Brien,
22 I think you are going off on a tangent, pretty

1 far from the subject of this hearing. This is
2 well-beyond -- it is well-beyond what you were
3 talking about motive or bias. It's well-
4 beyond.

5 MR. O'BRIEN: Well, I suggest --

6 CHAIRPERSON MILLER: So --

7 MR. O'BRIEN: -- Madam Chair, that
8 where someone comes in and has testified on
9 behalf of one party, that their reasons for
10 doing it are always relevant, but I will stop
11 now.

12 CHAIRPERSON MILLER: Thank you.

13 Is there any other Board questions?

14 MEMBER SILVERSTEIN: Oh, yes.

15 CHAIRPERSON MILLER: Okay. Mr.
16 Silverstein?

17 MEMBER SILVERSTEIN: Yes, let's
18 move beyond this to the facts at hand and the
19 legislated history, Councilmember.

20 This legislation was passed
21 originally to carve out an exemption for a
22 single entity, Whole Foods, correct?

1 COUNCILMEMBER CHEH: That's the
2 store they had in mind, but they didn't phrase
3 the exemption in that way.

4 MEMBER SILVERSTEIN: So this is
5 quite to the point, this is where we start to
6 get into either trouble or get into the weeds.
7 Come on into the weeds with us.

8 It's not specifically designed for
9 that, but it is designed for what was called
10 a full-service grocery store.

11 Now, I go into a grocery store and
12 there is a pharmacy there if I go to Safeway,
13 if I go to the Walmart Super Center, I go into
14 a grocery store or super center and there is
15 tires for sale in the back and I can get my
16 car -- there is a florist. There is an eye
17 doctor. There is a Subway sandwich shop.
18 There is a bank.

19 How do you define what is a full-
20 service grocery store? You can't say it has
21 got to be 50 percent or if you did, would you
22 consider a super center, a big box store a

1 full-service grocery store, even though less
2 than 50 percent of its space is groceries and
3 consumables?

4 How do we -- help us define that.
5 What is the legislation?

6 COUNCILMEMBER CHEH: Well, you
7 know, I appreciate your difficulty, because
8 there is many different kinds of arrangements
9 that can be made. But by the same token and
10 although they abandoned this in the obscenity
11 cases, you will know it when you see it kind
12 of thing comes into play here.

13 If a pharmacy identified as a
14 pharmacy, which identifies itself in public
15 filings as that is its principal business, it
16 has some ancillary things, and then it offers
17 some food, it seems to me that the spirit and
18 the letter of this law is violated, because
19 what they had in mind was, and Whole Foods is,
20 a full grocery store that would then have
21 available this line of products to enhance
22 their attractiveness to customers.

1 But to say that you have a
2 pharmacy, which is plainly a pharmacy, a
3 Walgreens Pharmacy, and to suggest that
4 whatever percentage of their space, 8.5
5 percent, or the volume of their business or
6 even as I said in their own filings, that's
7 what they identified themselves as, to equate
8 that with a grocery store like Whole Foods or
9 like a full-service grocery store, I don't
10 think you have to be, you know, particularly
11 insightful or intelligent to say you know
12 what, this doesn't match that.

13 MEMBER SILVERSTEIN: I think it is
14 fair and, you know, using the, you know,
15 Potter Stewart and the Jacob Bell, it's
16 certainly on point here. I think that, you
17 know, we often -- you know, if we see a full-
18 service grocery store, we know what a full-
19 service grocery store is.

20 But we have to define it, because,
21 you know, the law has to have some parameters.
22 And if it is -- does -- the Walmart Super

1 Center or Costco, are they full-service
2 grocery stores?

3 COUNCILMEMBER CHEH: You know, we
4 are going to have to deal with that when we
5 get there, but if you have what you have in
6 front of you now, which is basically the
7 ultimate concern of mine in terms of the
8 application of the law, if the predominant
9 business is a different kind of business and
10 the liquor license is an ancillary
11 enhancement, the exemption was meant for those
12 whose predominant or principal form of
13 business was a full-service grocery store.

14 Now, when you get into the Walmart
15 or Costco kind of a situation, that may indeed
16 present a more difficult issue. It's not in
17 front of you, but they have a full-service
18 grocery store within a bigger store.

19 MEMBER SILVERSTEIN: Right.

20 COUNCILMEMBER CHEH: That is not
21 anything like what you are presented here.
22 And that's why I told you the consequences of

1 this are troubling from the legal perspective,
2 because then what about the gas station? What
3 about the other pharmacy stores? What about
4 the corner store?

5 MEMBER SILVERSTEIN: Yes.

6 COUNCILMEMBER CHEH: Again, I am
7 not -- I don't have any opinion or view about
8 the moratorium itself, but I do have an
9 opinion about this exemption that was carved
10 out for this limited purpose being extended in
11 this way, which I think based on the
12 legislative history, and I think if you got
13 all of the legislative history would all be in
14 conformance, that it was not meant to apply in
15 these circumstances.

16 MEMBER SILVERSTEIN: So but the
17 things that you are using to say that, one is
18 you are saying because this is Walgreens
19 Pharmacy. If they were to change --

20 COUNCILMEMBER CHEH: It's not just
21 the label.

22 MEMBER SILVERSTEIN: -- it to

1 Walgreens Foods and Drugs --

2 COUNCILMEMBER CHEH: No, it's not
3 just the label. It is their principal
4 business. Without question --

5 MEMBER SILVERSTEIN: How do we
6 define --

7 COUNCILMEMBER CHEH: -- their
8 principal business --

9 MEMBER SILVERSTEIN: This was
10 something that we --

11 COUNCILMEMBER CHEH: They have
12 defined it in their own filings with the
13 Securities and Exchange Commission.

14 MEMBER SILVERSTEIN: But this
15 particular store --

16 COUNCILMEMBER CHEH: Um-hum.

17 MEMBER SILVERSTEIN: -- which is
18 what we are supposedly dealing with --

19 COUNCILMEMBER CHEH: Right.

20 MEMBER SILVERSTEIN: -- we went
21 through this with the gentleman before you
22 here. A single pill that someone gets at a

1 pharmacy, whether they get it there or whether
2 they get it at Safeway or something, may cost
3 \$100 or more. Does that -- do we measure what
4 their primary thing is by sales? And if so,
5 how does that affect even Safeway where they
6 have a pharmacy?

7 Is sales the single thing? How do
8 we define what primary is? We can --

9 COUNCILMEMBER CHEH: You know --

10 MEMBER SILVERSTEIN: I'm not
11 badgering you with this.

12 COUNCILMEMBER CHEH: No, --

13 MEMBER SILVERSTEIN: We struggle
14 with this --

15 COUNCILMEMBER CHEH: -- that's
16 fine.

17 MEMBER SILVERSTEIN: -- so much.
18 This is how -- you know, how do we define the
19 parameters? What are the rules here? How do
20 we set the rules? You know, I'm asking you
21 for your guidance.

22 COUNCILMEMBER CHEH: Well, I

1 think, you know, you are going to be somewhat
2 disappointed, because I think that what we are
3 going to do is throw back a rulemaking on you.

4 MEMBER SILVERSTEIN: That might
5 not be a bad idea.

6 COUNCILMEMBER CHEH: Um-hum. But
7 again, you know, you know it when you see it.
8 Primary, you know, how do we know what primary
9 means? I mean, wasn't there a famous
10 situation where certain precedents say how do
11 we -- what does this mean?

12 Is this -- you know, we can play
13 these games about the language, but the fact
14 of the matter is the essence of this business
15 is to be a pharmacy and not a grocery store.

16 And along various metrics,
17 whatever ones you want to take, now, if you
18 take them seriodium, one-by-one, say well, if
19 you increase the space a little bit or the --
20 you are losing sight of the ultimate point
21 which is reflected in the legislative history
22 that they are talking about, and it was a

1 means of, and it says right there, attracting
2 and encouraging other grocery stores like
3 Whole Foods --

4 MEMBER SILVERSTEIN: Yes.

5 COUNCILMEMBER CHEH: -- to locate
6 in the District. So if that is what you have
7 in mind, you know, the Sesame Street thing,
8 which of these things don't belong, and then
9 you compare it to what we have here, it seems
10 to me that you know it when you see it.

11 MEMBER SILVERSTEIN: I wish we
12 did. And a couple of things. First of all,
13 you can't sell at gas stations period, that's
14 against the law. You can't sell alcoholic
15 beverages at a gasoline station in the
16 District, fortunately.

17 And second, there is a real
18 concern and I think everybody in this room
19 shares it. We don't want this to be extended
20 to convenience stores, corner stores and the
21 idea that anybody who opens a drug store could
22 be able to have a thing of beer. It's clearly

1 not Council's legislative intent.

2 I think we all agree on that.

3 COUNCILMEMBER CHEH: I hate to
4 interrupt, but it actually says in the
5 committee report, "It does not apply to corner
6 stores or convenience stores."

7 MEMBER SILVERSTEIN: Clearly.

8 COUNCILMEMBER CHEH: Those are the
9 two things that were mentioned, the full-
10 service grocery store and the convenience
11 store. And I appreciate your difficulty. You
12 are saying well, we are hard-pressed to figure
13 out where along this line this might be
14 positive. But I think that any gross -- and
15 maybe, you know, the fool lies in me, it's
16 plainly the case that it is on the side of the
17 line closer to convenience stores.

18 MEMBER SILVERSTEIN: And the other
19 thing is there are parts of the city that are
20 considered food deserts where people have to
21 go considerable distances to get groceries.
22 And in those places, you begin to get hybrid

1 stores where something that may be a drug
2 store, but it, you know, provides food.

3 It is so much -- we know a full-
4 service grocery store when we see one for
5 sure.

6 COUNCILMEMBER CHEH: Okay.

7 MEMBER SILVERSTEIN: But what
8 happens when we see something that is sort of
9 a full-service grocery store, but it has other
10 things? When does it cease to be a full-
11 service grocery store or when does it start to
12 become one? And that's where we had the
13 problem.

14 Do you have to be able to buy a
15 sweet potato there? Do you have to be able to
16 buy a rutabaga? Is there a rutabaga test?
17 You know, how do you define something that is
18 truly indefinable?

19 COUNCILMEMBER CHEH: Well, you
20 know, as an adjudicative body, you might think
21 of strategies that are used in other
22 circumstances to say we may not have a precise

1 line, but we are sure that this case falls on
2 the other side of it.

3 MEMBER SILVERSTEIN: And then we
4 have to set up rules by which we decide that,
5 so that we could at least justify --

6 COUNCILMEMBER CHEH: Well, you
7 could --

8 MEMBER SILVERSTEIN: -- other than
9 saying we don't like how you look.

10 COUNCILMEMBER CHEH: No, no. We
11 bring to bear all of the facts as you
12 establish them here. But what I'm saying is
13 the inability to define a precise line over
14 which, you know, at that point, you precisely
15 step, the inability to define that line does
16 not mean that you can't say that this case
17 falls on the other side of it.

18 And it's done all the time. We
19 have issues in the law that are like that.

20 MEMBER SILVERSTEIN: But would
21 this rule include excluding things if you are
22 a -- if you have tires and you have a bank,

1 does that mean you can't be or if you sell
2 prescriptions that you can't be or should it
3 be something where we say, and this is if we
4 were to do a rulemaking, if you have the
5 following things, then you do qualify.

6 If you are at least X percentage,
7 if you have at least as much square footage,
8 if you have these quantities and whatever of
9 products, then you qualify.

10 COUNCILMEMBER CHEH: Well, you
11 know, I mean, you are citing cases for like a
12 Safeway or a Giant. They may have a pharmacy.
13 They may have -- they may sell tires. I don't
14 know if they do. But in our little canvas of
15 those stores, the big stores, over 70 or 75
16 percent of their store was devoted toward
17 conventional grocery products.

18 So, I mean, you have some
19 benchmarks. But my point about that is not
20 that you would say okay, we have that, what
21 you say is we need to have greater clarity on
22 precisely where that line is. But again, as

1 I said before, but it's plain that this one
2 falls on the other side of it.

3 MEMBER SILVERSTEIN: Okay. Thank
4 you. Thank you, Madam Chair.

5 CHAIRPERSON MILLER: Okay. Other
6 Board questions? I have a question.

7 COUNCILMEMBER CHEH: Oh, yes.

8 CHAIRPERSON MILLER: I hesitate to
9 ask it, because I should know the answer. But
10 Securities and Exchange Commission filings are
11 public documents?

12 COUNCILMEMBER CHEH: Yes.

13 CHAIRPERSON MILLER: Okay. And
14 general information that they contain, I think
15 you made reference to them because you said
16 that Walgreens described them, the type of
17 business that they were in their filing there.
18 Is that correct?

19 COUNCILMEMBER CHEH: Yes.

20 CHAIRPERSON MILLER: Okay. Is
21 there anything else that they mentioned in
22 those that is relevant to our analysis?

1 COUNCILMEMBER CHEH: There is
2 other information. I mean, if you want, I
3 mean, you can get it, too, but if you want, I
4 can obtain it for you.

5 CHAIRPERSON MILLER: Well, so this
6 is something we could take judicial notice of
7 assuming it's in a public document?

8 COUNCILMEMBER CHEH: Yes.

9 CHAIRPERSON MILLER: Public arena.
10 Okay. All right. I don't have any other
11 specific questions. Are there any --

12 MEMBER ALBERTI: Can I ask a
13 question?

14 CHAIRPERSON MILLER: Yes, go
15 ahead, yes.

16 MEMBER ALBERTI: Hi, Councilmember
17 Cheh. I really am struggling with this
18 particular case whether it crosses the line or
19 not. And I guess part of my dilemma is that
20 we have got a portion of the store that is
21 selling food items. And something struck me.
22 You said that in Walmart cases they have a

1 full-service grocery store within another
2 store.

3 So it's not the fact that they are
4 selling other items. It seems to me, and you
5 can tell me if this is not correct, I'm
6 interpreting you incorrectly, but, it's not
7 the case that they are selling other items
8 that doesn't make them a full-service grocery
9 store. It has to do with the items that they
10 sell. Is that correct?

11 COUNCILMEMBER CHEH: Well, you
12 know, because the case of Walmart or Costco
13 was brought up, I was trying to respond to
14 that. I haven't thought about how exactly to
15 deal with that situation, which is why we are
16 going to throw the rulemaking back on you, I
17 believe.

18 But in that kind of a case, I
19 mean, this is just off the top of my head, but
20 you may have to think about stores within
21 stores. All right. It may be that a Costco
22 or a Walmart or something like that is almost

1 like a mini mall and they have a full-service
2 grocery store. And they have a full-service,
3 I don't know, clothing store or what have you.

4 I don't know. I was just
5 speculating about how those hybrids might have
6 to be treated or separated out. I mean, you
7 don't have that in front of you, but since you
8 raised it, I was trying to think about it.

9 MEMBER ALBERTI: I'm going to ask
10 a tough question here.

11 COUNCILMEMBER CHEH: Okay.

12 MEMBER ALBERTI: Are you familiar
13 with this store at all?

14 COUNCILMEMBER CHEH: Yes.

15 MEMBER ALBERTI: Have you been in
16 it? Okay. So you have seen it?

17 COUNCILMEMBER CHEH: Yes.

18 MEMBER ALBERTI: Okay. So the
19 question is, and this is your opinion --

20 COUNCILMEMBER CHEH: I purchased
21 sunglasses.

22 MEMBER ALBERTI: -- if -- right,

1 right. No, no, no. I'm just asking your
2 opinion on this.

3 If we carved out food sections of
4 the store --

5 COUNCILMEMBER CHEH: No.

6 MEMBER ALBERTI: -- wait, wait.

7 COUNCILMEMBER CHEH: No, I know
8 where you are going.

9 MEMBER ALBERTI: If you carved it
10 out --

11 COUNCILMEMBER CHEH: It's not
12 analogous. But, okay, go ahead.

13 MEMBER ALBERTI: Yes. You know,
14 if you carved it out --

15 COUNCILMEMBER CHEH: Go ahead.

16 MEMBER ALBERTI: -- and sort of
17 expanded not the product line, but just the
18 volume of things that they sold, made it a
19 little bit bigger, would it be a full-service
20 grocery store into itself?

21 COUNCILMEMBER CHEH: I don't think
22 so, because it doesn't have these aspects that

1 perhaps a Costco would have. And again on
2 that point --

3 MEMBER ALBERTI: Which are?

4 COUNCILMEMBER CHEH: Which are the
5 fact that the -- you and I have life
6 experience and you know a full-service grocery
7 store. You have all the aisles. You have all
8 the goods. You have the cash registers which
9 are associated with that part of the store.
10 It really is almost a store within a store.

11 I would find it almost impossible
12 to think of creating that kind of a store
13 within this Walgreens, which would not then
14 make it like a corner convenience store. And
15 then you would butt up against that.

16 What I'm talking about, and again,
17 this is our own experience about going to
18 these big huge stores, they in every respect
19 look like a full-service grocery store, like
20 a Giant or like a Safeway, plunked down in the
21 middle of, you know, this mini acre
22 conglomerate.

1 I don't think you have the
2 possibility of that here.

3 MEMBER ALBERTI: Okay. Thank you.

4 CHAIRPERSON MILLER: Any cross on
5 the Board's questions? Only on the Board's
6 questions.

7 RECROSS-EXAMINATION

8 MR. O'BRIEN: Councilmember Cheh,
9 you talked about a store within a store. I
10 think you did in the context of perhaps a
11 Costco or a Walmart.

12 COUNCILMEMBER CHEH: Right.

13 MR. O'BRIEN: Would that not be
14 analogous to restricting food and beverage
15 sales to one floor of a building and having
16 unrelated functions, such as pharmacy on
17 another floor?

18 COUNCILMEMBER CHEH: You know, we
19 are -- often to my response to the Walmart and
20 Costco hypothetical, I mean, again, you would
21 have to see it. If it's on the one floor and
22 it has all those aisles and the separate cash

1 registers, even though it might be under, you
2 know, I'll call it Bob's --

3 MR. O'BRIEN: Yes.

4 COUNCILMEMBER CHEH: -- it could
5 have all of the attributes of a full-service
6 grocery store. And the bottom floor could be
7 something else. I could see that that's
8 possible.

9 MR. O'BRIEN: Okay. Thank you
10 very much.

11 CHAIRPERSON MILLER: Ms. Perry?

12 COUNCILMEMBER CHEH: I know you
13 have a two-level store, so maybe you could --
14 I'm kidding.

15 CHAIRPERSON MILLER: No, not yet.

16 COUNCILMEMBER CHEH: Oh.

17 CHAIRPERSON MILLER: Ms. Perry?

18 REDIRECT EXAMINATION

19 MS. PERRY: Councilmember Cheh,
20 when you think of a full-service grocery
21 store, do you think of being able to go in and
22 buy a fresh turkey or a frozen turkey at

1 Thanksgiving?

2 MR. O'BRIEN: Objection. Leading.

3 COUNCILMEMBER CHEH: You can ask
4 me what I think of --

5 CHAIRPERSON MILLER: Thanksgiving.

6 MS. PERRY: When you go into a
7 grocery -- what you consider a full-service
8 grocery store, do you expect to be able to
9 buy --

10 COUNCILMEMBER CHEH: No, no, say
11 what is my expectation.

12 MS. PERRY: What is your
13 expectation as to what you refer to?

14 COUNCILMEMBER CHEH: I would think
15 that I could buy, you know, a fresh turkey for
16 Thanksgiving. You know, all sorts of fresh
17 meats. Just the full panoply of foods that
18 are available. Just whatever.

19 MS. PERRY: Would you expect to be
20 able to buy potatoes?

21 COUNCILMEMBER CHEH: Of course.

22 MS. PERRY: Onions?

1 COUNCILMEMBER CHEH: Yes.

2 MS. PERRY: Tomatoes?

3 COUNCILMEMBER CHEH: Of course.

4 MS. PERRY: A steak?

5 COUNCILMEMBER CHEH: I don't eat
6 meat, but, yes.

7 MS. PERRY: Do -- what about would
8 you expect to be able to buy fresh fish, which
9 is healthy?

10 COUNCILMEMBER CHEH: Sure, sure.

11 MS. PERRY: Okay.

12 MR. O'BRIEN: As opposed to
13 unhealthy fresh fish?

14 MS. PERRY: You know, if it's
15 rotten, it's bad.

16 MR. O'BRIEN: Okay. I'm sorry.

17 MS. PERRY: To your knowledge, is
18 Walgreens selling any of those products at
19 this store?

20 COUNCILMEMBER CHEH: To my
21 knowledge, I don't know.

22 MS. PERRY: Okay.

1 COUNCILMEMBER CHEH: As I said, I
2 bought sunglasses and other items that were
3 not food.

4 MS. PERRY: Okay.

5 CHAIRPERSON MILLER: All right.
6 Are you finished?

7 MS. PERRY: I am. Thank you.

8 CHAIRPERSON MILLER: Okay.
9 Councilmember Cheh, I want to thank you very
10 much for coming down and giving us your
11 insight. And I just want to say that that is
12 a service that a Councilmember performs when
13 they take the time out to come and testify on
14 an issue they have familiarity with.

15 And when I was on the Zoning
16 Board, Councilmember Mendelson came down and
17 testified and other Councilmembers as well and
18 I just wanted to express our appreciation for
19 your coming down.

20 COUNCILMEMBER CHEH: Thank you --

21 MR. O'BRIEN: Okay.

22 COUNCILMEMBER CHEH: -- for

1 indulging me. Thank you.

2 CHAIRPERSON MILLER: Thank you.

3 MS. PERRY: I would like to thank
4 you also.

5 CHAIRPERSON MILLER: So where we
6 are in the proceeding is you have one more
7 witness.

8 MR. O'BRIEN: I have two more.

9 CHAIRPERSON MILLER: You have two
10 more.

11 MS. PERRY: Can you tell me how
12 much more time Mr. O'Brien has? I have a
13 specific reason for asking. Tonight is the
14 Ward 3 DEMS meeting and it is the election of
15 the State Committee and the election of area
16 reps, vice president, etcetera.

17 CHAIRPERSON MILLER: What time is
18 that?

19 MS. PERRY: And I'm running.

20 CHAIRPERSON MILLER: Oh.

21 MS. PERRY: I mean --

22 MR. LEDERER: And I'm Co-Chair of

1 the election.

2 MS. PERRY: And he is chairing the
3 Election Committee.

4 CHAIRPERSON MILLER: I think we
5 should be able to move much more quickly, I
6 hope, with the rest of this case.

7 MS. PERRY: I don't think so
8 because I still have 40 minutes and it is --

9 CHAIRPERSON MILLER: It doesn't
10 mean you take them all, Ms. Perry.

11 MS. PERRY: It's going to take,
12 based on what I have heard and neither one
13 have -- and we both have this problem. I was
14 -- is there any way we could postpone the rest
15 of this hearing?

16 MEMBER SILVERSTEIN: That would
17 take us to next year.

18 CHAIRPERSON MILLER: Well --

19 MS. PERRY: I'm just -- I hate to
20 say it, but I really do have a conflict that
21 I have to be somewhere.

22 CHAIRPERSON MILLER: Okay. What

1 time is it?

2 MS. PERRY: I'm supposed to be
3 there by 6:00.

4 CHAIRPERSON MILLER: Okay.

5 MS. PERRY: And I'm not even home.
6 He has to be there at --

7 CHAIRPERSON MILLER: We have
8 another hearing as well scheduled. But can we
9 just see why we have so much? This is a
10 pretty finite topic. Why should this take so
11 long? Can you tell us? Can you give us a
12 proffer of what you all are going to do?

13 MS. PERRY: I can't speak for Mr.
14 O'Brien.

15 MR. O'BRIEN: I'm sorry, were you
16 speaking to me?

17 MS. PERRY: How much time --

18 CHAIRPERSON MILLER: I'm speaking
19 to both of you, so I can figure out the time.

20 MS. PERRY: How much time does Mr.
21 O'Brien have left for his witnesses?

22 CHAIRPERSON MILLER: Mr.

1 Silverstein just stepped out, but why is it
2 you have 40 minutes? You have one witness,
3 correct?

4 MS. PERRY: No, I have two
5 witnesses and I have cross-examination
6 testimony and I have documents that I want to
7 put into evidence.

8 CHAIRPERSON MILLER: Maybe we can
9 put the documents in pretty quickly, so that's
10 not --

11 MS. PERRY: You know, I really --
12 it's really just --

13 CHAIRPERSON MILLER: I was saying
14 before that you can move into evidence some of
15 the testimony that you put in in the last
16 proceeding.

17 MS. PERRY: It's entirely
18 different.

19 CHAIRPERSON MILLER: Okay.

20 MS. PERRY: I mean, we really -- I
21 hate to ask, but I'm just in a bind.

22 CHAIRPERSON MILLER: Okay. Well,

1 let's just assess where we are. Does she have
2 40 minutes?

3 MEMBER SILVERSTEIN: The licensee
4 has spent 24 minutes. The protestant 42. You
5 each have 90 total.

6 CHAIRPERSON MILLER: I can't
7 believe that, 90? That doesn't sound right.

8 MR. O'BRIEN: 90 or 60?

9 MEMBER SILVERSTEIN: Huh?

10 MR. O'BRIEN: I thought it was 60.

11 MEMBER SILVERSTEIN: 60 rather.

12 I'm sorry.

13 CHAIRPERSON MILLER: He is at 20
14 and she is at 40?

15 MEMBER SILVERSTEIN: I'm sorry, I
16 apologize. 21 minutes has been taken up by
17 the protestant and 37 minutes juxtaposed the
18 Councilmembers testimony, because she was out
19 of order and I apologized for that.

20 MR. O'BRIEN: That was
21 protestant's testimony.

22 CHAIRPERSON MILLER: The cross is

1 your time.

2 MEMBER SILVERSTEIN: Yes.

3 CHAIRPERSON MILLER: But he is on
4 37 and 21?

5 MS. PERRY: My time --

6 MEMBER ALBERTI: 21 was --
7 Councilmember Cheh's testimony was only 21?

8 MEMBER SILVERSTEIN: Well --

9 CHAIRPERSON MILLER: A lot of it
10 was argument.

11 MEMBER SILVERSTEIN: It was 21.

12 MEMBER ALBERTI: Her statement
13 was --

14 MEMBER SILVERSTEIN: Oh, wait a
15 minute. Her statement was --

16 CHAIRPERSON MILLER: Her
17 statement. All right. So, Mr. O'Brien, how
18 long do you estimate your case to be?

19 MR. O'BRIEN: I can finish my
20 direct examination and my remaining two
21 witnesses within the time allotted.

22 CHAIRPERSON MILLER: What is that?

1 We have cross, too, so that doesn't really
2 answer my question.

3 MS. PERRY: I have to do -- do you
4 have the time that he said -- thinks he has?

5 CHAIRPERSON MILLER: How much time
6 do you think? Can you estimate or not, you
7 know, for each of your witnesses?

8 MR. O'BRIEN: The first witness
9 probably five minutes. The second one maybe
10 10 or 15.

11 CHAIRPERSON MILLER: Okay. So
12 that's 20.

13 MR. O'BRIEN: Plus the cross-
14 examination and Board questions.

15 CHAIRPERSON MILLER: That's right.
16 That's right. And your's?

17 MS. PERRY: I really have to --
18 you know, it has really put us in a bind,
19 because we expected to be out of here by 4:00
20 because we heard that first was going to be
21 the CVS case after us at 4:00.

22 MEMBER ALBERTI: No.

1 CHAIRPERSON MILLER: But I don't
2 see what --

3 MS. PERRY: And then there was
4 another case scheduled for 4:00. So we really
5 anticipated being able to be at -- we both
6 have commitments tonight.

7 CHAIRPERSON MILLER: Okay.

8 MEMBER SILVERSTEIN: Well, we all
9 just have to work harder.

10 CHAIRPERSON MILLER: Yes, that's--
11 all right.

12 MR. O'BRIEN: Can I call my next
13 witness?

14 MR. LEDERER: I can't stay. You
15 know, I'm a witness. I just got -- this is
16 mostly a ward democratic meeting is not, you
17 know --

18 CHAIRPERSON MILLER: Wait.

19 MS. PERRY: Wait until you're on
20 the record. Nobody can hear you.

21 CHAIRPERSON MILLER: All right.
22 Okay. We are going to spend more time. I

1 understand to get there by 6:00 that's not
2 going to be an issue.

3 MS. PERRY: No, I said I have to
4 go home.

5 CHAIRPERSON MILLER: Be there by
6 6:00.

7 MS. PERRY: And he has to be at
8 the --

9 CHAIRPERSON MILLER: Okay.

10 MS. PERRY: -- there at 5:30 and
11 he has got the car.

12 CHAIRPERSON MILLER: Okay. Let's
13 move -- go to -- we will see if we can --
14 maybe we can finish up by 5:00. Let's just --

15 MS. PERRY: He can't stay.

16 CHAIRPERSON MILLER: You can't
17 stay now?

18 MR. LEDERER: I can't stay. I
19 planned this. I have my responsibilities.

20 CHAIRPERSON MILLER: This has been
21 your case. The Board has --

22 MR. LEDERER: I can't --

1 CHAIRPERSON MILLER: -- not
2 delayed you. We started your case on time,
3 so --

4 MEMBER SILVERSTEIN: Sir, we
5 scheduled a special day for this. We are not
6 being paid for this.

7 MR. LEDERER: To 4:00, Your Honor.
8 4:00, you know, it cuts both ways.

9 CHAIRPERSON MILLER: Yes.

10 MR. LEDERER: I can't stay.

11 CHAIRPERSON MILLER: So do you
12 have testimony?

13 MR. LEDERER: I have testimony.

14 CHAIRPERSON MILLER: You have
15 testimony you want to submit into the record?
16 Again, we could go out of order if you can --
17 if you stay, if you want to testify right now.

18 MS. PERRY: I would be willing.
19 I'm not sure Mr. O'Brien would be.

20 MR. O'BRIEN: Madam Chair, we all
21 have priorities. I have a witness here from
22 Chicago who has a 5:00 plane.

1 CHAIRPERSON MILLER: Oh, do you
2 want to just call it a day then and just
3 submit everything --

4 MR. O'BRIEN: No.

5 CHAIRPERSON MILLER: -- in
6 writing?

7 MR. O'BRIEN: No.

8 MEMBER SILVERSTEIN: Absolutely
9 not.

10 CHAIRPERSON MILLER: Okay. So
11 everybody is complaining and not being
12 constructive. And I would like to accommodate
13 witnesses. If this witness has to go first,
14 then I would put him on. The witness from
15 Chicago has to go next, we will put him on.
16 That's what I'm trying to figure out to give
17 you all a fair proceeding.

18 So --

19 MS. PERRY: May I make a
20 suggestion?

21 CHAIRPERSON MILLER: If he can
22 give testimony right now and be cross-

1 examined, I think we ought to just do that.

2 What?

3 MS. PERRY: Chair Miller, I would
4 like to make a suggestion. Mr. O'Brien does
5 have one witness here from Chicago. I could
6 stay for that, but that's the extent of the
7 time that even I can stay. I'm afraid I
8 really have to leave.

9 CHAIRPERSON MILLER: Okay.

10 MS. PERRY: The Ward 3 DEMS
11 meeting is a very important --

12 CHAIRPERSON MILLER: I understand
13 that.

14 MS. PERRY: -- meeting. And it's
15 only every two year time thing. It's not like
16 it's continued next week. If Mr. O'Brien --

17 CHAIRPERSON MILLER: I'm just
18 trying to -- I'm not going to keep you beyond
19 that. We're just saying can we finish this
20 now?

21 MS. PERRY: Well, by the time I
22 get the Metro home and stuff, I have to be at

1 St. Columbus. It's not like I just -- I'm
2 next door.

3 MEMBER SILVERSTEIN: Well, let's
4 just try to take this one or two witnesses and
5 see how quickly we can go.

6 CHAIRPERSON MILLER: I don't think
7 there are going to be a lot of questions.

8 MEMBER SILVERSTEIN: We are not
9 going to move this on into the new year.

10 CHAIRPERSON MILLER: No.

11 MEMBER SILVERSTEIN: If we can
12 help it.

13 MS. PERRY: I can understand that.

14 CHAIRPERSON MILLER: Well, why
15 don't we --

16 MEMBER SILVERSTEIN: And this not
17 our last meeting. This is our special
18 meeting. Our staff is moving into Christmas.
19 We have gone beyond our stipend. We are
20 coming in and doing this turning our lives
21 upside down as well to accommodate you, all of
22 you.

1 CHAIRPERSON MILLER: So Mr.
2 Lederman?

3 MS. PERRY: Lederer.

4 CHAIRPERSON MILLER: Lederer. Can
5 you stay right now for your testimony or not?

6 MR. LEDERER: If I can testify
7 right now.

8 CHAIRPERSON MILLER: Right.

9 MR. LEDERER: I have prewritten
10 testimony, so I don't have to --

11 CHAIRPERSON MILLER: But you
12 couldn't be crossed if you just put in the
13 testimony.

14 MR. LEDERER: Yes, that's why.

15 CHAIRPERSON MILLER: So why don't
16 we do that. It seems like he is the most
17 urgent, at this point.

18 MS. PERRY: I think somebody has a
19 5:00 plane.

20 CHAIRPERSON MILLER: Is that
21 correct?

22 MS. PERRY: it's 4:00.

1 MR. O'BRIEN: Yes.

2 CHAIRPERSON MILLER: I'm sorry.

3 Let me hear both -- I didn't understand that.

4 MR. LEDERER: A 5:00 plane. I
5 mean, what are we --

6 MR. O'BRIEN: He's probably going
7 to miss it now. But my point is --

8 MR. LEDERER: You can't even get
9 to the airport by then.

10 MR. O'BRIEN: -- the Board's order
11 said the applicant would present its case.
12 Then the protestants would present their case.
13 The order did not say it will cease at 4:00.

14 MR. LEDERER: It said another
15 hearing was set at 4:00.

16 CHAIRPERSON MILLER: That's right.
17 And we are -- we can go out of order. It
18 isn't the type of case where, you know,
19 somebody is going to say something and then it
20 is going to prejudice the other side if we are
21 out of order.

22 So let's try to get through this

1 right now. We are not going to have a lot of
2 Board questions. Go ahead.

3 MR. LEDERER: Go.

4 MS. PERRY: If possible, can we
5 have a continuance, because I think we will --

6 CHAIRPERSON MILLER: No.

7 MEMBER SILVERSTEIN: No.

8 CHAIRPERSON MILLER: We are going
9 to go with this. We will get you out on time
10 to go to the DEMS thing, especially if we move
11 right now. Go ahead, Mr. Lederer.

12 MR. LEDERER: Okay.

13 MR. O'BRIEN: Over my objection,
14 correct, Madam Chair?

15 CHAIRPERSON MILLER: You object
16 because he is out of order. Okay.

17 MR. O'BRIEN: This is the second
18 one.

19 CHAIRPERSON MILLER: The second
20 one, okay.

21 MR. LEDERER: Let me make sure
22 that you --

1 CHAIRPERSON MILLER: You know,
2 this is interpreting a meaning of a full-
3 service grocery store. I don't believe that
4 would prejudice you by going out of order. I
5 think it would prejudice you further if you
6 couldn't cross-examine the testimony.

7 MR. LEDERER: This should help the
8 Board.

9 CHAIRPERSON MILLER: Okay. We
10 need to swear you in. Do you want to testify
11 from there or up here?

12 MR. LEDERER: Oh, yes, I'll go up
13 there, sure.
14 Whereupon,

15 BRIAN LEDERER
16 was called as a witness by Counsel for the
17 Plaintiff, and having been first duly sworn,
18 assumed the witness stand and was examined and
19 testified as follows:

20 CHAIRPERSON MILLER: Okay. Thank
21 you.

22 MR. LEDERER: I had prepared

1 written testimony to which I have attached the
2 full exhibit that shows the entire store. I
3 testified on August 8th and I went through
4 sort of an aisle-by-aisle description of the
5 products. And I went back and reexamined the
6 store and it hasn't changed.

7 But what I have done in my
8 prewritten testimony is outlined it aisle-by-
9 aisle-by-aisle.

10 CHAIRPERSON MILLER: Okay.

11 MR. LEDERER: And I have attached
12 their exhibit, the two floors, and I have
13 numbered the aisles.

14 CHAIRPERSON MILLER: Okay.

15 MR. LEDERER: And you can track
16 it.

17 CHAIRPERSON MILLER: Okay.

18 MR. LEDERER: And my overall
19 testimony going in there, this is, basically,
20 a pharmacy the way they describe it and a
21 convenience store. Convenience stores are
22 specifically excluded from the exemption and,

1 you know, it was my testimony so before the
2 Councilmembers, I said you go in and you can
3 tell what you see.

4 This is not a full-service grocery
5 store. It's not even close. And you -- if
6 you look at, you know, the -- they are
7 convenience stores, a pharmacy with a
8 convenience store.

9 Aisle 1, they have snacks and
10 electronics. They have candy, bagged candy,
11 beverages, cookies, water, tea, soda, bread.

12 Aisle 4, bread, cereal and so on.
13 You can see the things they have there. And
14 then they have this cabinet with -- on the
15 side with 21 doors. That film that they
16 showed, it completely misrepresents what
17 actually is there.

18 I mean, like it goes over to one
19 Door 4, which has prepackaged something
20 Alfredo and something else and he pulls out
21 the healthiest stuff that is on one shelf,
22 which is that Healthy Foods Korean vegetable

1 thing. The rest -- even that door doesn't
2 have the right stuff.

3 He doesn't show the rest of the
4 store. They show eggs. They have one shelf
5 of eggs, one shelf of eggs and that is in Door
6 No. 13. They are going to eliminate the
7 products if they sell alcohol.

8 Door 8, juices and sodas. Door 9,
9 bottles of water. Door 10, ice tea. Door 11,
10 milk. So they are going to -- milk which you
11 expect to find in a full-service grocery
12 store. Plus, other products.

13 The cosmetic business is far
14 bigger than these food products. And I was --
15 I'm struck and I noticed it when I went there,
16 I can't get any fresh foods whatsoever. I
17 mean the definition of this exception is a
18 full-service grocery store sells a full range
19 of fresh, canned and frozen items.

20 There is not any fresh meat.
21 There are some apples, some bananas and maybe
22 some oranges and that's it. All the rest is

1 prepackaged food. That's what a convenience
2 store sells. And they described themselves as
3 a convenience store.

4 My inspection, which I have in my
5 testimony, confirms that they are a pharmacy,
6 cosmetic department and they are a convenience
7 store. And convenience stores are excluded.
8 And they are trying to do, what I would call,
9 mathematical charismatic precedents here. It
10 doesn't add up.

11 I mean, you know, what are they --
12 50 percent of what? There is no way that this
13 store sells 50 percent of fresh food, of
14 fresh, canned and frozen items.

15 CHAIRPERSON MILLER: Can I make a
16 suggestion?

17 MR. LEDERER: Yes.

18 CHAIRPERSON MILLER: And you can
19 tell me if you object.

20 MR. LEDERER: Right.

21 CHAIRPERSON MILLER: That we take
22 your written testimony into the record, so

1 that you don't have to use all the time
2 testifying.

3 MR. LEDERER: No, I agree with
4 you. That's fair enough.

5 CHAIRPERSON MILLER: And, Mr.
6 O'Brien, if you have cross-examination on this
7 as well --

8 MR. LEDERER: I appreciate you
9 letting me testify. And this map should be
10 helpful.

11 CHAIRPERSON MILLER: Okay.

12 MR. LEDERER: Because it shows the
13 whole store. There's one other thing that I
14 wanted to say about trying to separate the two
15 floors, it's just an escalator. So I mean, I
16 don't know what -- how you can go in and
17 analyze a store that is a cosmetic store, a
18 pharmacy and a convenience store and eliminate
19 half the store. There is an escalator and
20 there is an elevator.

21 I mean, you know, trying to
22 analyze whether it is a full-service grocery

1 store.

2 MS. PERRY: Mr. Lederer, let me
3 stop you, because --

4 MR. LEDERER: That's it.

5 MS. PERRY: -- I also have
6 questions for you.

7 MR. LEDERER: Okay.

8 CHAIRPERSON MILLER: Okay.

9 MR. LEDERER: That's my testimony.

10 MS. PERRY: And I would like you
11 to --

12 CHAIRPERSON MILLER: Thank you.

13 MS. PERRY: -- stick to your
14 testimony. On page 2 of your testimony, you
15 talk about the floor. Would you, please, go
16 down there and talk about the aisles and talk
17 about what is along the wall and how you reach
18 that?

19 MR. LEDERER: Yes. I went in
20 there and I looked and I wrote it down.

21 MS. PERRY: Okay. And this is an
22 accurate depiction of what you saw?

1 MR. LEDERER: This is an accurate
2 depiction of what is in the store. And as I
3 said --

4 MS. PERRY: In your opinion, is 50
5 percent of the ground floor food, consumables?

6 MR. LEDERER: No.

7 MR. O'BRIEN: Objection to his
8 opinions.

9 CHAIRPERSON MILLER: I mean, I
10 understand, yes.

11 MR. LEDERER: My observation, it
12 is not even close to 50 percent.

13 MS. PERRY: Okay.

14 CHAIRPERSON MILLER: Okay. He has
15 changed it to his observation.

16 MR. LEDERER: They have a lot of
17 gift cards. I don't know -- I mean, if you
18 want to start adding, you have 50 different
19 types of potato chips and 40 different types
20 of peanuts and then you have --

21 CHAIRPERSON MILLER: Can you
22 just --

1 MR. LEDERER: And 500 different
2 cards. I don't know how they are kept, but
3 it's not -- you go in there, it's not even
4 close.

5 MS. PERRY: Their Exhibit No. 2,
6 which has the red and blue shading?

7 MR. LEDERER: Oh, yes, okay.

8 MS. PERRY: If you take away those
9 products, what products are you taking away
10 from the consumables?

11 MR. LEDERER: What you are taking
12 away for -- in -- are Door No. 8, 9, 10, 11
13 and I'm sorry, 5 he said. That's true. 8, 9,
14 10, 11 and 12.

15 CHAIRPERSON MILLER: Okay.

16 MR. LEDERER: Margarine and cream
17 cheese, orange juice, yogurt.

18 MS. PERRY: Giovanni, okay. So
19 it's not all --

20 MR. LEDERER: Milk.

21 MS. PERRY: -- just drinks.

22 MR. LEDERER: Pardon?

1 MS. PERRY: I said it's not all
2 just drinks?

3 MR. LEDERER: No. And then the
4 other -- that's Aisle, I'll just tell you
5 specifically the other aisle would disappear.
6 Let me look at the chart here for a second.

7 CHAIRPERSON MILLER: You know, we
8 are all in a hurry, Ms. Perry.

9 MS. PERRY: Huh?

10 CHAIRPERSON MILLER: I said --

11 MR. LEDERER: Aisle 3 or Aisle 4
12 and I would just say Aisle 4 is bread, cereal.

13 MS. PERRY: Mr. Lederer?

14 MR. LEDERER: Groceries.

15 MS. PERRY: Okay.

16 MR. LEDERER: That part of --

17 MS. PERRY: Mr. Lederer?

18 MR. LEDERER: -- that would
19 disappear.

20 MS. PERRY: This map that's
21 attached to your testimony --

22 MR. LEDERER: Yes.

1 MS. PERRY: -- where did it come
2 from?

3 MR. LEDERER: It came from
4 Walgreens.

5 MS. PERRY: Did the Board -- did
6 this come from the ABRA files?

7 MR. LEDERER: I believe, yes. It
8 also has on the side --

9 MS. PERRY: Can you --

10 MR. LEDERER: -- all this work.

11 MS. PERRY: Okay. Can you read
12 from the bottom of it?

13 MR. LEDERER: Yes. The bottom of
14 it says "In order for Walgreens to have
15 greater shelf and floor space dedicated to the
16 sale of food, a part of this item and its
17 other products, Walgreens" it looks like "use
18 or must add additional square footage, 1,240
19 feet."

20 MS. PERRY: On the big map or the
21 big handout, this one. Do you have a copy of
22 it handy?

1 MR. LEDERER: Yes. That's a
2 blowup of what is on my --

3 MS. PERRY: On this little map.
4 Does it not say that the first floor is 585
5 linear feet?

6 MR. LEDERER: General sales, yes,
7 that's what it says.

8 MS. PERRY: Okay. And at the top
9 it says general sales and that pertains to the
10 new, okay, store? It says total floor area of
11 the first floor is 9,985 square feet. Am I
12 reading that correctly?

13 MR. LEDERER: That's correct.
14 That's in the report.

15 MS. PERRY: And the total area of
16 the other levels is 10,031 square feet?

17 MR. LEDERER: Yes.

18 MS. PERRY: Okay.

19 MEMBER ALBERTI: Madam Chair, I
20 just want to point out here that this is
21 redundant testimony here.

22 CHAIRPERSON MILLER: Okay.

1 MR. LEDERER: I was --

2 MEMBER ALBERTI: Just wait, wait,
3 wait. To information that you got from the
4 previous witness. So are we just going to go
5 over all that? These facts are in evidence
6 already.

7 MS. PERRY: Okay.

8 MR. O'BRIEN: Thank you.

9 MS. PERRY: Well, it's a little
10 bit different, because this is an actual
11 depiction taken --

12 MEMBER ALBERTI: No, I meant your
13 measurements.

14 MS. PERRY: Oh, okay.

15 MEMBER ALBERTI: From that chart.
16 Those are in evidence already.

17 MS. PERRY: Okay.

18 MR. O'BRIEN: Thank you.

19 MS. PERRY: Okay. I would like to
20 move Mr. Lederer's testimony into the record.

21 CHAIRPERSON MILLER: Any
22 objection?

1 MR. O'BRIEN: I object to the
2 extent that it expresses opinion.

3 CHAIRPERSON MILLER: You --

4 MR. O'BRIEN: I have no objection
5 to Mr. Lederer testifying as to his visual
6 observations when he inspected the store, that
7 is quite pertinent and relevant. But that him
8 telling you whether, as a matter of law, this
9 qualifies as a full grocery -- full-service
10 grocery store is utterly inappropriate.

11 MR. LEDERER: I didn't say that.

12 MR. O'BRIEN: Just as
13 Councilmember Cheh's opinions were.

14 CHAIRPERSON MILLER: Okay. We are
15 not going to strike the testimony. We will
16 give it the weight that it deserves.

17 Do you have cross-examination?
18 Oh, I'm sorry, go ahead. Please, proceed.
19 Any other objections on the testimony?

20 MR. O'BRIEN: Well, you pulled the
21 chart out again, so I'm not going to argue
22 with you.

1 CHAIRPERSON MILLER: Okay. We
2 really want to take it in because, you know,
3 we want to move this along. It is written and
4 so he doesn't have to repeat himself and take
5 up another 15 minutes.

6 CROSS-EXAMINATION

7 MR. O'BRIEN: Mr. Lederer, you
8 mentioned that you didn't see any fresh food?

9 MR. LEDERER: No, I said I saw a
10 couple apples, a couple bananas.

11 MR. O'BRIEN: Okay. Didn't you
12 see prepackaged entrees?

13 MR. LEDERER: They are not fresh
14 food. I mean, they are prepackaged.

15 MR. O'BRIEN: Were they frozen?

16 MR. LEDERER: Some of them. Many
17 of them were, yes.

18 MR. O'BRIEN: No, but the ones --
19 I'm talking about the ones like --

20 MR. LEDERER: They were all in
21 these freezer cabinets.

22 MR. O'BRIEN: Freezer cabinets?

1 MR. LEDERER: They are all in
2 chillers.

3 MR. O'BRIEN: In chillers.
4 Chillers and freezers are not the same, are
5 they?

6 MR. LEDERER: Well, you are
7 dancing on the head of a pin. I mean, they
8 are kept cold for a reason. They are
9 prepackaged. They are not fresh foods.

10 MR. O'BRIEN: So it's your
11 position that if something is prepackaged, it
12 is no longer fresh?

13 MR. LEDERER: No, I didn't say
14 that. What I observed was not fresh foods.
15 The only fresh foods, fresh foods, you know,
16 were the apples, the oranges and whatever
17 other fruit.

18 MR. O'BRIEN: What's your
19 definition of fresh then?

20 MR. LEDERER: Fresh? What's your
21 definition of air? I mean, you know, it's
22 fresh. It's not prepackaged. I can go in --

1 like lettuce. I can go in and there is a head
2 of lettuce. I can go in and get turnips that
3 have been pulled out of the ground.

4 MR. O'BRIEN: Okay.

5 MR. LEDERER: The only things that
6 have come without packaging are those items I
7 mentioned. Fresh foods don't have all that
8 packaging. Fish, you go to the fish market,
9 you get fish. It's not packaged. You get
10 meat. None of that stuff is there.

11 MR. O'BRIEN: So the term fresh
12 means that it has not been packaged?

13 MR. LEDERER: Don't put words in
14 my mouth. You have almost no --

15 MEMBER SILVERSTEIN: So the answer
16 to the question?

17 MR. LEDERER: -- food that isn't
18 prepackaged or canned or Fritos and potato
19 chips. I mean, that's just going in there and
20 seeing what's there.

21 MR. O'BRIEN: Okay. Mr. Lederer,
22 attached to your written statement is a

1 diagram of the store to which Ms. Perry
2 referred.

3 MR. LEDERER: Yes.

4 MR. O'BRIEN: And she asked you if
5 this was out of the ABRA records. And I
6 believe your answer was yes.

7 MR. LEDERER: As far as I know,
8 yes.

9 MR. O'BRIEN: Okay.

10 MR. LEDERER: And that document --

11 MR. O'BRIEN: Then she asked you
12 to read at the bottom. And I see at the
13 bottom handwriting.

14 MR. LEDERER: Yes.

15 MR. O'BRIEN: That's not -- that
16 handwriting is not out of the ABRA records, is
17 it?

18 MR. LEDERER: It's on your
19 document. I assume you all put it on there.

20 MR. O'BRIEN: All of the
21 handwriting at the bottom?

22 MR. LEDERER: Are you going to

1 deny that it's your company's handwriting?

2 It's your document.

3 MR. O'BRIEN: I'll tell you what,
4 I will deny it.

5 MR. LEDERER: Okay. Well, then
6 you can argue it with the Board. I don't
7 know. The handwriting is on the Walgreens
8 document that I have.

9 MR. O'BRIEN: So the fact is you
10 don't know who wrote it on there, do you?

11 MR. LEDERER: Of course not.

12 MR. O'BRIEN: Okay.

13 MR. LEDERER: I don't even know
14 who did the graphics on this document either,
15 but it's your document, so I assume you --

16 MR. O'BRIEN: I represent that
17 what is on the bottom of that was not as
18 submitted to the Board. I believe it is
19 probably notations made by staff or by the
20 Board itself at some point during the course
21 of the hearing.

22 CHAIRPERSON MILLER: Okay.

1 Neither party knows. Neither party wrote
2 what's down on there.

3 MR. O'BRIEN: Yes. So I would ask
4 that this exhibit, to the extent it's got
5 unidentifiable handwriting on it -- let's put
6 it this way. That the unidentified
7 handwriting is not evidence.

8 CHAIRPERSON MILLER: It's
9 certainly not reliable. Okay. Nobody knows
10 where it came from.

11 MR. O'BRIEN: Nobody knows where
12 it came from.

13 CHAIRPERSON MILLER: Okay.

14 MR. O'BRIEN: Okay. Those are my
15 questions.

16 CHAIRPERSON MILLER: All right.
17 Then I've got --

18 MR. LEDERER: I would say with
19 regard to the subject document, those are
20 numbers, but the store clearly isn't even
21 close.

22 MEMBER ALBERTI: There is not a

1 question.

2 CHAIRPERSON MILLER: There is no
3 question. No, there is no question.

4 MS. PERRY: Brian, stop.

5 CHAIRPERSON MILLER: There is no
6 question pending. Ms. Perry, is this
7 Protestant's Exhibit No. 5?

8 MS. PERRY: I think I have it as
9 4.

10 CHAIRPERSON MILLER: This is 4?
11 Okay. Okay.

12 (Whereupon, the document was
13 marked as Plaintiff Exhibit 4 for
14 identification.)

15 CHAIRPERSON MILLER: Board, any
16 more questions?

17 MEMBER ALBERTI: Yes. You say --
18 Mr. Lederer?

19 MR. LEDERER: Pardon? Yes?

20 MEMBER ALBERTI: Mr. Lederer, this
21 map.

22 MR. LEDERER: Yes, sir.

1 MEMBER ALBERTI: How did you come
2 into possession of it?

3 MR. LEDERER: It came out of -- as
4 far as -- it came from Walgreens and it's the
5 same document --

6 MEMBER ALBERTI: No, how did you
7 come into possession? Did Walgreens give it
8 to you?

9 MR. LEDERER: No. It was --

10 MR. O'BRIEN: The answer is no.
11 That's Walgreens --

12 MR. LEDERER: Ms. Perry gave it to
13 me.

14 MEMBER ALBERTI: Who?

15 MR. LEDERER: In her research in
16 the Walgreens --

17 MEMBER ALBERTI: Ms. Perry gave it
18 to you?

19 MR. LEDERER: -- file.

20 MEMBER ALBERTI: Okay. Thank you.

21 MR. LEDERER: That's how it came
22 in.

1 MEMBER ALBERTI: That's it.

2 That's all I needed to know. Thank you.

3 CHAIRPERSON MILLER: Okay. Any
4 other Board questions? Okay. I don't think--

5 MS. PERRY: Mr. Lederer, I have a
6 redirect.

7 CHAIRPERSON MILLER: Do you have a
8 redirect --

9 MS. PERRY: Yes.

10 CHAIRPERSON MILLER: -- on the --

11 MS. PERRY: A redirect or
12 whatever, yes.

13 CHAIRPERSON MILLER: Based on his
14 question only?

15 MS. PERRY: Yes.

16 CHAIRPERSON MILLER: Okay.

17 RE-REDIRECT EXAMINATION

18 MS. PERRY: Mr. Lederer, to your
19 knowledge, did I come down to the Board
20 yesterday to examine files?

21 MR. LEDERER: Yes.

22 CHAIRPERSON MILLER: Okay. I

1 think that concludes Mr. Lederer's testimony.

2 MR. LEDERER: Yes. Anyway and you
3 told me you were examining the files and the
4 documents, so that's what you gave me.

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

7 MR. LEDERER: Thank you. And
8 thank you for your courtesy. I appreciate it.

9 CHAIRPERSON MILLER: Okay. Now,
10 Mr. O'Brien, you have a witness that --

11 MR. O'BRIEN: Yes.

12 CHAIRPERSON MILLER: -- a witness
13 that needs to catch an airplane?

14 MR. O'BRIEN: I think he has
15 missed that plane.

16 CHAIRPERSON MILLER: Then --

17 MR. O'BRIEN: Joseph Mazurkiewicz,
18 please.

19 MR. MAZURKIEWICZ: Good afternoon.

20 CHAIRPERSON MILLER: Good
21 afternoon. I'm going to swear you in.
22 Whereupon,

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JOSEPH MAZURKIEWICZ

was called as a witness by Counsel for the Applicant, and having been first duly sworn, assumed the witness stand and was examined and testified as follows:

CHAIRPERSON MILLER: Thank you.

DIRECT EXAMINATION

MR. O'BRIEN: Sir, would you state your full name and spell your last name for the Board and the court reporter, please, sir?

MR. MAZURKIEWICZ: My name is Joseph Mazurkiewicz. The last name is M, as in Mary, A-Z-U-R-K-I-E-W-I-C-Z.

MR. O'BRIEN: And, Mr. Mazurkiewicz, how are you employed?

MR. MAZURKIEWICZ: Through Walgreens.

MR. O'BRIEN: You say through Walgreens?

MR. MAZURKIEWICZ: I'm employed by Walgreens.

MR. O'BRIEN: And where are you --

1 where is your place of business at Walgreens?

2 MR. MAZURKIEWICZ: My office --
3 I'm out of our corporate office in Deerfield,
4 Illinois.

5 MR. O'BRIEN: What are your duties
6 at Walgreens?

7 MR. MAZURKIEWICZ: I'm a category
8 manager for fresh foods.

9 MR. O'BRIEN: And what are your
10 responsibilities as a category manager for
11 fresh foods?

12 MR. MAZURKIEWICZ: My primary
13 responsibilities are to work with our product
14 manufacturers to develop items, develop
15 merchandising for stores, negotiate costs, set
16 retail pricing, set promotional schedules.
17 There is 34 equivalent category managers in
18 our business. I'm the sole category manager
19 overseeing fresh food in this initiative.

20 MR. O'BRIEN: When you say
21 initiative, what do you mean?

22 MR. MAZURKIEWICZ: Over the last

1 two years, the company, Walgreens, has
2 identified fresh foods as a major pillar of
3 strategic growth for our organization. We
4 have developed capabilities internally to
5 build around that. And like I mentioned, that
6 was two years ago.

7 One thing that I have wanted to
8 say, our CEO references it and the thing that
9 sticks in my head, we are transforming from a
10 traditional drug store to a retail health and
11 daily living store. There is so much that
12 goes into that and it varies by customer, but
13 we are transforming to a retail health and
14 daily living store. I think that's very
15 important. Fresh food is a major part of
16 that.

17 MR. O'BRIEN: Okay. Now, you
18 identified yourself as a category manager for
19 fresh food. What duties do you have at
20 Walgreens other than relating to fresh food?

21 MR. MAZURKIEWICZ: 100 percent of
22 my responsibilities are related to fresh food,

1 perishable items, specifically. I also
2 oversee the floral categories and dispense
3 beverages. But 100 percent fresh food, highly
4 perishable items.

5 MR. O'BRIEN: And are you the only
6 person within Walgreens who works solely on
7 fresh food?

8 MR. MAZURKIEWICZ: I am not, no.

9 MR. O'BRIEN: How many are there?

10 MR. MAZURKIEWICZ: So I have a
11 team of four individuals. Two category
12 specialists that --

13 MR. O'BRIEN: How many?

14 MR. MAZURKIEWICZ: -- develop
15 items and then two coordinators.

16 MR. O'BRIEN: I'm sorry, how many
17 did you say?

18 MR. MAZURKIEWICZ: My team is
19 four. So I have four direct reports. And we
20 have 18 individuals total back at the office.
21 Four of which are directly involved in buying.
22 The remainder are all support to develop this

1 program internally.

2 MR. O'BRIEN: And that program is?

3 MR. MAZURKIEWICZ: Fresh food.

4 It's -- the program is fresh food. And we
5 will talk more about it. It's not accurately
6 depicted in what you have seen in this
7 particular store up to this point in time, but
8 I hope that my testimony hopes shed light on
9 what that program is inside our organization.

10 MR. O'BRIEN: Okay.

11 MS. PERRY: I have an objection,
12 because I -- we can't talk about the future.
13 We need to talk about what is there now.
14 That's what this application is about.

15 CHAIRPERSON MILLER: Why don't you
16 make a proffer --

17 MR. O'BRIEN: Madam Chair?

18 CHAIRPERSON MILLER: -- Mr.
19 O'Brien, how is this related --

20 MR. O'BRIEN: If the Board --

21 CHAIRPERSON MILLER: -- to the
22 store that we are considering now?

1 MR. O'BRIEN: Okay. Let me point
2 out the Board every day considers new license
3 applications based on what the business is
4 going to do in the future. So the fact that
5 there is projections and prediction as to how
6 the business will operate, happens before this
7 Board every single day.

8 CHAIRPERSON MILLER: How is it
9 related to the Walgreens? On the one hand,
10 you are saying the Walgreens this is it. This
11 is how it was a month ago. This is how it is
12 now. This is how we want you to evaluate it.

13 Now, you are saying, no, what this
14 is going to be when?

15 MR. O'BRIEN: What I'm saying is
16 it is now and it will be even more so in the
17 immediate future.

18 CHAIRPERSON MILLER: Well, I think
19 we should make this -- if we can limit this
20 and not spend too much time on how it is going
21 to be way in the future, since we are
22 considering Walgreens now.

1 MR. O'BRIEN: I didn't say way in
2 the future, Madam Chair.

3 CHAIRPERSON MILLER: Two years?

4 MR. O'BRIEN: No. Who said two
5 years? I didn't.

6 CHAIRPERSON MILLER: Okay. All
7 right. What future are we talking about?

8 MR. MAZURKIEWICZ: Is that a
9 direct question to me?

10 CHAIRPERSON MILLER: Yes.

11 MR. MAZURKIEWICZ: March 2013.

12 CHAIRPERSON MILLER: 2013, a year,
13 okay.

14 MR. O'BRIEN: Three months.

15 MR. MAZURKIEWICZ: Three months.

16 CHAIRPERSON MILLER: Oh, I'm
17 sorry, next year, okay. Three months, okay.

18 MR. O'BRIEN: How will the Fresh
19 Food Initiative impact this particular
20 Walgreens store at Connecticut and Veazey in
21 a three month or less time period?

22 CHAIRPERSON MILLER: Thank you.

1 MR. MAZURKIEWICZ: Within three
2 months, there is going to be two major impacts
3 to this store. The first is an increased
4 product range. So additional items being
5 added to the store.

6 The second is around product
7 quality. There is a major infrastructure that
8 we have developed to support fresh foods and
9 that hasn't existed in this store to this
10 time. So everything you see in the store has
11 been developed with limited local resources
12 through Jin and his team.

13 And we feel that there is a major
14 increase to that. Like I mentioned, it's
15 going to come with increased items and SKUs,
16 individual items, product assortment and
17 increase quality because of better oversight
18 at a corporate level.

19 MR. O'BRIEN: Well, how will that
20 be achieved if you are in Chicago?

21 MR. MAZURKIEWICZ: We have --
22 that's my job. So myself and the team that

1 work directly with me, where we have
2 established our Fresh Food Program, New York,
3 Chicago, San Francisco, Indianapolis, Arizona
4 and Florida.

5 Myself and my team are personally
6 traveling to those markets to build
7 relationships with product manufacturers and
8 set up a custom infrastructure capped off with
9 six-day a week delivery to ensure product
10 freshness hitting the stores.

11 We are going to bring that to this
12 area in March 2013.

13 MR. O'BRIEN: And how will you
14 bring it physically to this area?

15 MR. MAZURKIEWICZ: So
16 specifically, the infrastructure that supports
17 our program, we have folks back in the office
18 that are focused on distribution specifically,
19 but we will manage -- it's called the
20 Consolidated Distribution Center. But
21 essentially a logistics partner that will
22 aggregate supplier deliveries and ship to this

1 area. That's going to be in Maryland and that
2 does not exist today.

3 MR. O'BRIEN: And when do you
4 expect that facility to open?

5 MR. MAZURKIEWICZ: Again, I expect
6 that to open in March of 2013.

7 MR. O'BRIEN: And what kind of
8 products will come out of that facility to
9 this particular store, that it is not getting
10 now?

11 MR. MAZURKIEWICZ: The primary
12 products that the store is not receiving now
13 that it will get in the future are expanded
14 cut fruit. The store currently has four
15 items, I believe, and that will expand to 20
16 plus.

17 And then traditional grocery fill-
18 in produce items. So that's kind of a long
19 term, but what I mean there is chilled
20 vegetables and fruits primarily.

21 Strawberries, grapes, green peppers,
22 cucumbers, kiwi, bagged salads, heads of

1 lettuce, those sorts of items.

2 MR. O'BRIEN: And all those sorts
3 of items you expect will be available in this
4 store come March?

5 MR. MAZURKIEWICZ: I can't make a
6 commitment that all of them will be. What I
7 do and what my team does is -- excuse me.
8 What we work against is data. And what a
9 specific store and the customers that shop
10 that store are asking for.

11 If it determines that we add those
12 items and they are successful, then
13 absolutely, we will have them all. My initial
14 guess is it would be certainly half of those,
15 but much more than the store has today.

16 To put very firm numbers around
17 it, like for offering when we started the
18 store is 120 SKUs. I think in earlier
19 testimony we heard 72 items, approximately, in
20 the chilled fresh food case. So right off the
21 bat, there is going to be a significant
22 increase in the amount of items we are

1 carrying, as a shift from a local program to
2 our corporately-supported program.

3 MR. O'BRIEN: All right. I'm
4 going to show you what I have marked as --
5 well, to keep it clean, I'm going to show you
6 first what is marked as Applicant's Exhibit
7 No. 6.

8 (Whereupon, the document was
9 marked as Applicant Exhibit 6 for
10 identification.)

11 MR. O'BRIEN: I am not going to
12 ask you to read it. I'm just going to ask you
13 to tell the Board generically what it is.

14 MR. MAZURKIEWICZ: I would love to
15 read it, because it's --

16 MR. O'BRIEN: We are not going to
17 read it.

18 MR. MAZURKIEWICZ: So this is our
19 corporate -- it's a corporate press release,
20 essentially, that explains our Fresh Food
21 Initiative and what we are all about. As far
22 as new product offering, we've remodeled

1 stores across the country.

2 MR. O'BRIEN: All right. I'm now
3 going to show you -- I move that into
4 evidence.

5 CHAIRPERSON MILLER: What number
6 are you on?

7 MR. O'BRIEN: That's No. 6.

8 CHAIRPERSON MILLER: Oh, you
9 marked it. Good. Okay.

10 MEMBER ALBERTI: Any objections?

11 CHAIRPERSON MILLER: Any
12 objections?

13 MEMBER ALBERTI: Do you want to
14 ask Ms. Perry?

15 CHAIRPERSON MILLER: Oh, Ms.
16 Perry, can you hear me?

17 MS. PERRY: No.

18 CHAIRPERSON MILLER: No
19 objections. Is that what you are saying?

20 MS. PERRY: I do have an
21 objection, because I really believe this deals
22 with the future and not today. And we -- this

1 application has to be considered as it is
2 today.

3 It wasn't noticed three months
4 from now or placarded three months from now
5 where footage wasn't based on three months
6 from now or a year from now.

7 CHAIRPERSON MILLER: Okay. Ms.
8 Perry, I think you made your objection when
9 the witness was on the stand being asked
10 questions on the future. And where Mr.
11 O'Brien said that he is talking about actually
12 and the witness said they were actually -- he
13 was actually talking about March of 2013. The
14 Board overruled the objection, because that
15 is --

16 MS. PERRY: Okay.

17 CHAIRPERSON MILLER: -- an
18 assumed.

19 MS. PERRY: I just want to
20 continue my objection, just like Mr. O'Brien
21 does.

22 CHAIRPERSON MILLER: Okay. So

1 noted.

2 MR. MAZURKIEWICZ: Can I make one
3 point for clarification --

4 CHAIRPERSON MILLER: Right.

5 MR. MAZURKIEWICZ: -- on the
6 document that was handed out? We reference up
7 to 750 items available. That specifically
8 references -- the term was brought up earlier
9 about food deserts and food oasis stores,
10 that's a sub-format of our Fresh Food Program.

11 This store isn't slated for that
12 program currently, but just know that there is
13 this sub-format that we have actually been in
14 talks and commitments with Ms. Obama about a
15 number of stores that will convert to that
16 over time.

17 This particular store that we are
18 talking about today, doesn't apply to that at
19 the current time.

20 MR. O'BRIEN: I'm going to show
21 you now what has been marked for
22 identification as Applicant's Exhibit 6A.

1 (Whereupon, the document was
2 marked as Applicant Exhibit 6A for
3 identification.)

4 MR. O'BRIEN: Can you tell the
5 Board what the piece of paper is I just gave
6 you?

7 MR. MAZURKIEWICZ: Yeah, the piece
8 of paper we are looking at is an internal
9 presentation that I have used in the past that
10 depicts a food desert store in Chicago. In
11 the upper left, you will see the store layout.

12 MR. O'BRIEN: Let me, in the
13 interest of time --

14 MR. MAZURKIEWICZ: Yes.

15 MR. O'BRIEN: -- invite your
16 attention --

17 MR. MAZURKIEWICZ: Absolutely.

18 MR. O'BRIEN: -- to the photograph
19 on the lower left. What does that depict?

20 MR. MAZURKIEWICZ: The lower left
21 is a pictorial representation of the items I
22 mentioned earlier that are going to be

1 available in this store come March 2013.

2 MR. O'BRIEN: And what are those
3 items?

4 MR. MAZURKIEWICZ: They are items
5 that you would see in a traditional grocer.
6 Chilled vegetables and fruits, household
7 penetration items that people are expecting to
8 buy in a grocery store, grapes, strawberries,
9 peppers, salad kits, celery, that's pretty --

10 MR. O'BRIEN: And you would expect
11 these items to be in this store come March?

12 MR. MAZURKIEWICZ: Yes.

13 MR. O'BRIEN: All right. Those
14 are my questions of Mr. -- of the witness.

15 CHAIRPERSON MILLER: Ms. Perry?

16 MS. PERRY: I do. I'm just -- let
17 me look for it here.

18 CHAIRPERSON MILLER: I'm going to
19 ask a question, because we are short on time.

20 MS. PERRY: Yes.

21 CHAIRPERSON MILLER: What is SKU?

22 MR. MAZURKIEWICZ: When I

1 reference SKU, it's one individual item. It's
2 a saleable unit.

3 CHAIRPERSON MILLER: Okay. One
4 item --

5 MR. MAZURKIEWICZ: Yes.

6 CHAIRPERSON MILLER: -- it refers
7 to. And the picture in the lower left of
8 Exhibit 6A is that actually how it is going to
9 look at Walgreens? What is that supposed to
10 show us?

11 MR. MAZURKIEWICZ: It specifically
12 shows the items that we are going to sell in
13 this store come March 2013. It's not how it
14 is going to look.

15 To start, those items will be
16 merchandised in the cooler, the chilled
17 refrigerator that is currently merchandising
18 fresh foods --

19 CHAIRPERSON MILLER: Okay.

20 MR. MAZURKIEWICZ: -- in the
21 store.

22 MEMBER SILVERSTEIN: I want to

1 interrupt you for a second. These are listed
2 here, 6A, it says food desert and yet you said
3 that these were not going to be in a food
4 desert store.

5 MR. MAZURKIEWICZ: Yes.

6 MEMBER SILVERSTEIN: This
7 particular store is not a food desert store.
8 There seems to be a disconnect here.

9 MR. O'BRIEN: May I clarify?
10 That's my fault.

11 MEMBER SILVERSTEIN: Yes, sir.

12 MR. O'BRIEN: We are introducing
13 6A only with respect to the photograph in the
14 lower left.

15 MEMBER SILVERSTEIN: Ah, only the
16 one in the lower left.

17 MR. O'BRIEN: The lower left. We
18 didn't have time to cut it out and redo it.

19 MEMBER SILVERSTEIN: Thank you.

20 CHAIRPERSON MILLER: Okay. I want
21 to follow-up on that. I'm sorry, Ms. Perry,
22 we are just trying to take up the time.

1 MS. PERRY: Move it along, that's
2 fine. I found the document and I'm ready.

3 CHAIRPERSON MILLER: Okay. Okay.
4 For clarification then, I think also in
5 Exhibit 6 it says up to 750 items are
6 available and that's not applicable because
7 that doesn't apply to the type of Walgreens
8 that is here.

9 MR. MAZURKIEWICZ: Yes.

10 CHAIRPERSON MILLER: Does the rest
11 of this document apply, except for that 750
12 items?

13 MR. MAZURKIEWICZ: I think the
14 only other part would be the specific
15 reference to frozen seafood under Fresh
16 Solutions.

17 CHAIRPERSON MILLER: Okay.

18 MR. MAZURKIEWICZ: Which you would
19 find that in addition to an expanded protein
20 line, broccoli, cheese in the food desert
21 stores, that's the only other follow-up.

22 CHAIRPERSON MILLER: You're not

1 going to have frozen seafood here? But there
2 will be frozen meats?

3 MR. MAZURKIEWICZ: There -- no. I
4 can't answer that. That's -- I don't manage
5 that category, so I can't answer that question
6 directly.

7 CHAIRPERSON MILLER: So this is
8 just an example of what is happening in other
9 Walgreen stores?

10 MR. MAZURKIEWICZ: Yes. I think
11 it's a great description of our corporate
12 initiative over the last two years.

13 CHAIRPERSON MILLER: Okay.

14 MR. MAZURKIEWICZ: We are behind
15 it 100 percent as an organization.

16 MR. O'BRIEN: All right. If the--
17 I'm sorry.

18 CHAIRPERSON MILLER: Okay. My
19 understanding is this, from what he just said,
20 Exhibit 6 is an example of their corporate
21 initiative with respect to Fresh Foods, but
22 it's not necessarily what is going to be in

1 the Walgreens store here.

2 MR. O'BRIEN: For clarification, I
3 believe the witness said that it's not
4 representative to the extent that it says 750.
5 Perhaps the witness could substitute a number
6 for the 750.

7 CHAIRPERSON MILLER: Okay. I just
8 want to clarify what the -- I haven't admitted
9 this document yet and I'm sure I will, but for
10 what purpose? And you said no on the frozen
11 meats and seafoods. And then I thought you
12 said well, you can't really get into saying
13 yes or no on all of the things that are
14 listed.

15 MR. MAZURKIEWICZ: What I can
16 confidently tell you --

17 CHAIRPERSON MILLER: Okay.

18 MR. MAZURKIEWICZ: -- is we will
19 have 120 items at minimum, which is an
20 increase over the 72 today.

21 CHAIRPERSON MILLER: Okay.

22 MR. MAZURKIEWICZ: That are all an

1 expanded assortment of fresh produce and fresh
2 foods.

3 CHAIRPERSON MILLER: Okay. Thank
4 you.

5 MR. MAZURKIEWICZ: Fresh sold, but
6 refrigerated.

7 CHAIRPERSON MILLER: All right.
8 I'm going to admit this document into
9 evidence. I hadn't done that yet, but 6.

10 (Whereupon, the document marked as
11 Applicant Exhibit 6 was received
12 in evidence.)

13 MR. O'BRIEN: And then I would
14 move 6A, but only the photograph in the lower
15 left.

16 CHAIRPERSON MILLER: You are
17 moving 6A, only the photograph in the left
18 hand bottom corner?

19 MR. O'BRIEN: Correct.

20 CHAIRPERSON MILLER: Okay. Ms.
21 Perry, any objection?

22 MR. O'BRIEN: It's labeled B.

1 MS. PERRY: No.

2 CHAIRPERSON MILLER: Okay. And I
3 would say that again, this is to show or
4 represent an example of these vegetables which
5 will be in a cooler. They won't be displayed
6 in the way that the photo displays them and
7 what the witness said. Do you have a
8 different --

9 MR. O'BRIEN: Well, I understood
10 the witness to be saying they may not be
11 displayed and stacked just like that, but they
12 are going to be in the chilled cooler, just to
13 keep them fresh.

14 CHAIRPERSON MILLER: Okay. Is
15 that accurate?

16 MR. MAZURKIEWICZ: Yes.

17 CHAIRPERSON MILLER: I just want
18 to know --

19 MR. MAZURKIEWICZ: That's
20 accurate.

21 CHAIRPERSON MILLER: -- how --

22 MR. MAZURKIEWICZ: That's

1 accurate.

2 CHAIRPERSON MILLER: -- remember
3 how we are supposed to read that picture.
4 Okay.

5 (Whereupon, the document marked as
6 Applicant Exhibit 6A was received
7 in evidence.)

8 CHAIRPERSON MILLER: All right.
9 Ms. Perry?

10 CROSS-EXAMINATION

11 MS. PERRY: We're moving quickly,
12 so let me see if I'm clear now.

13 You said in addition to what the
14 types of stuff that are in the expanded
15 produce, you're --

16 MR. MAZURKIEWICZ: Yes.

17 MS. PERRY: -- going to bring in
18 other fresh food items? How are you
19 classifying the food items? And what type of
20 food items?

21 MR. MAZURKIEWICZ: The
22 classification is anything that needs to be

1 chilled or anything that is highly perishable,
2 so that's how I'm managing my business. I'm
3 working with items that are typically three,
4 four and five day life-on-shelf.

5 MS. PERRY: Okay. So it's
6 basically prepackaged --

7 MEMBER ALBERTI: No.

8 MS. PERRY: -- food items? I
9 mean, I'm not sure what you mean. Can you
10 give me an example of the food items?

11 MR. MAZURKIEWICZ: Yes.

12 MS. PERRY: Is it a steak? Is it
13 a turkey?

14 MR. MAZURKIEWICZ: No, not all.
15 Certainly, we sell many items that are not
16 prepackaged. And I think our produce line,
17 our ambient produce line is a good example of
18 that.

19 MS. PERRY: I'm referring not to
20 the produce line. I'm referring to you
21 mentioned food items.

22 MR. MAZURKIEWICZ: Yes.

1 MS. PERRY: I think food a tomato
2 a produce or a carrot is not a food item, but
3 you mentioned in addition to this, you're
4 going to have food items. What type of new
5 food items? Is my question.

6 MR. MAZURKIEWICZ: Yes, so the new
7 food items specifically we talked about a
8 couple of times. It's the expanded produce,
9 right? The chilled produce, which is both
10 fruits and vegetables that you would expect to
11 see at a grocery store. Strawberries, grapes,
12 packaged salads.

13 MS. PERRY: But it's not --

14 MR. MAZURKIEWICZ: Heads of
15 lettuce.

16 MS. PERRY: Okay. But it's not
17 meats or steaks or turkey or that type of
18 food?

19 MR. MAZURKIEWICZ: When I launched
20 the program in September 2010, I actually sold
21 a line of raw proteins and customers --

22 MS. PERRY: Please answer --

1 MR. MAZURKIEWICZ: -- did --

2 MS. PERRY: -- my question and not
3 going back to 2010.

4 MR. O'BRIEN: Madam Chair, he is
5 answering the question.

6 MS. PERRY: No, he is going back
7 to 201.

8 MR. O'BRIEN: And do not interrupt
9 him in mid-sentence.

10 CHAIRPERSON MILLER: Okay.

11 MR. O'BRIEN: It's inappropriate.

12 MR. MAZURKIEWICZ: It's my job
13 with limited space to provide customers
14 exactly what they want in our format of store.
15 And I feel comfortable that we have been able
16 to do that in the fresh food arena and we will
17 continue to do it.

18 MS. PERRY: Okay.

19 MR. MAZURKIEWICZ: And at this
20 time, it does not include raw proteins of any
21 sort, including seafood.

22 MS. PERRY: I --

1 CHAIRPERSON MILLER: Okay.

2 MS. PERRY: -- would like to show
3 you something. I went on to the website last
4 night and pulled up from your press release
5 the company overview.

6 MR. MAZURKIEWICZ: Yes.

7 MS. PERRY: Are you familiar with
8 this?

9 MR. MAZURKIEWICZ: Yes,
10 absolutely.

11 MS. PERRY: And this company
12 overview it explains the new program that you
13 are going into with the oasis and where the
14 cities already are, am I correct?

15 MR. MAZURKIEWICZ: Can I see the
16 document? I'm sure we --

17 MS. PERRY: Sure.

18 MR. MAZURKIEWICZ: -- have posted
19 quite a few company overviews.

20 CHAIRPERSON MILLER: Mr. O'Brien,
21 do you need to see that document?

22 MR. O'BRIEN: I've been trying to

1 attract the attention of staff.

2 MS. PERRY: I can -- I have it.

3 CHAIRPERSON MILLER: Okay.

4 MS. PERRY: I have another copy.

5 Is that correct?

6 MR. MAZURKIEWICZ: Can you ask me
7 your question and then I'll --

8 MS. PERRY: Okay. Are you
9 familiar with this document from --

10 MR. MAZURKIEWICZ: We are a large
11 organization. I know we post a lot of
12 information externally, so I can't say with
13 certainty that I have seen this document in
14 the past or read it over 100 percent.

15 MS. PERRY: Okay. On page 2 in
16 the third paragraph down.

17 MR. O'BRIEN: Can I see a copy of
18 this?

19 MS. PERRY: Yes, certainly. You
20 were standing up or I would have given it to
21 you. You were over talking to staff.

22 MR. O'BRIEN: I'll make it a point

1 to remain seated then.

2 MS. PERRY: Please do. Would you,
3 please, read the first two sentences of
4 paragraph 3 for the record?

5 MR. MAZURKIEWICZ: Can you give me
6 some rise as to what it says? I don't want to
7 be my first time reading something to be on
8 public record certainly.

9 CHAIRPERSON MILLER: Do you want
10 to take a look at the document?

11 MS. PERRY: He has got it.

12 CHAIRPERSON MILLER: I mean --

13 MR. MAZURKIEWICZ: Can you give me
14 a couple of minutes just to --

15 CHAIRPERSON MILLER: Yes.

16 MR. O'BRIEN: What in particular
17 do you want him to read?

18 MS. PERRY: It's paragraph 3 on
19 page 2 that begins with the word "we."

20 MR. O'BRIEN: Okay.

21 MS. PERRY: W-E.

22 CHAIRPERSON MILLER: Ms. Perry,

1 did you provide any copies for the Board by
2 any chance?

3 MS. PERRY: I can. I've got -- I
4 brought plenty of them.

5 MEMBER SILVERSTEIN: At this
6 point, Madam Chair, the protestant has used 54
7 minutes and the licensee 49 minutes.

8 MS. PERRY: How much?

9 MEMBER SILVERSTEIN: You have used
10 54 and the licensee has used 49.

11 MS. PERRY: That's impossible,
12 because we still have cross-examination here.

13 CHAIRPERSON MILLER: Let's keep
14 moving.

15 MR. MAZURKIEWICZ: Yeah, this is
16 perfect. I don't mind reading this at all.

17 MS. PERRY: Okay.

18 MR. MAZURKIEWICZ: "We continue to
19 offer competitively priced consumables, whose
20 sales have been very strong, particularly for
21 fast, easy, midweek fill-in needs in our
22 conveniently located retail stores. Walgreens

1 has also introduced fresh food at hundreds of
2 locations.

3 In conjunction with efforts by
4 First Lady Michelle Obama" --

5 MS. PERRY: Okay. I just wanted
6 the -- excuse me. I just wanted the first two
7 sentences.

8 MR. MAZURKIEWICZ: -- "in
9 Partnership for a Healthier America" --

10 MS. PERRY: I just wanted --

11 CHAIRPERSON MILLER: Okay.

12 MS. PERRY: -- the first two
13 sentences.

14 MR. MAZURKIEWICZ: Okay. Which
15 talked about midweek fill-in needs. It
16 doesn't -- and on page 3, the first sentence,
17 would you, please, read that? It starts with
18 the word --

19 MR. MAZURKIEWICZ: I'm not
20 completely confident that that is 100 percent
21 relevant to the products we are talking about,
22 but it says "Expand convenience food and drink

1 section for the 'pick-up a loaf of bread on
2 the way home customer.'"

3 MS. PERRY: Okay. Thank you.

4 MR. O'BRIEN: You can now read the
5 balance of paragraph --

6 CHAIRPERSON MILLER: Wait a
7 minute.

8 MEMBER ALBERTI: Wait, wait. We
9 don't know if Ms. Perry is done with her
10 cross-examination.

11 MR. O'BRIEN: Oh, I'm sorry. I
12 thought she was. I apologize.

13 MS. PERRY: Thank you, Steve. No.

14 CHAIRPERSON MILLER: Are you
15 finished?

16 MR. O'BRIEN: Oh, she said okay.

17 MS. PERRY: No, I did not. You
18 interrupted my cross-examination.

19 MR. O'BRIEN: I apologize.

20 MS. PERRY: I'm not that rude. I
21 think I'll just stop. I want to introduce
22 this document into evidence to give the total

1 amount of products. We will talk about it
2 more in terms of a convenience store pick-up
3 on the way home.

4 MEMBER ALBERTI: She wants to
5 introduce it. Any objections, Mr. O'Brien?

6 MR. O'BRIEN: I would -- I have no
7 objections to introduction of the document
8 with respect to those portions that the
9 witness commented on. Not the whole document.

10 MS. PERRY: I --

11 CHAIRPERSON MILLER: I don't have
12 the document. I can't even evaluate the --

13 MS. PERRY: I just gave it to you.

14 CHAIRPERSON MILLER: -- objection.

15 MS. PERRY: I gave it to him. I
16 gave him enough copies for everybody.

17 MR. O'BRIEN: They are right here.

18 CHAIRPERSON MILLER: Okay. So
19 let's hold this for a minute. All right. You
20 can say what your objection is.

21 MR. O'BRIEN: Well, at the same
22 time?

1 CHAIRPERSON MILLER: Yes, and then
2 I'll look at it. It's already in the record.

3 MR. O'BRIEN: The witness was
4 asked to read paragraph 3, but was cutoff
5 after the first two sentences.

6 CHAIRPERSON MILLER: Right.

7 REDIRECT EXAMINATION

8 MR. O'BRIEN: The witness may now
9 read the balance of the paragraph.

10 MR. MAZURKIEWICZ: "In conjunction
11 with efforts by First Lady Michelle Obama and
12 the Partnership for a Healthier America to
13 stop the Childhood Obesity Epidemic and
14 provide better food option and accessible
15 health care to under-served communities,
16 Walgreens has committed to convert or open at
17 least 1,000 food oasis stores across the
18 country over the next five years.

19 Walgreens currently offers food
20 oasis locations in Chicago, San Francisco,
21 Oakland and Indianapolis."

22 CHAIRPERSON MILLER: Okay.

1 MR. O'BRIEN: Madam Chair, I have
2 no objection to introduction of this document
3 to the extent that it is limited to the third
4 paragraph on page 2, and the first line on
5 page 3, which are the only portions of this
6 document the witness referred to.

7 CHAIRPERSON MILLER: Ms. Perry, do
8 you have a response to that?

9 MS. PERRY: I believe that the
10 witness testified to their new program in
11 total. And he introduced the document talking
12 about it. And this is right from their
13 company website, which talks about their
14 future plans, the food oasis, etcetera. So I
15 would like the whole document introduced, not
16 just those two paragraphs.

17 If there were more time, I would
18 put the whole -- you know, go into more
19 detail.

20 CHAIRPERSON MILLER: Did I
21 understand you correctly, I think at some
22 point, say you're not sure that some of this

1 applied to the initiative that is being
2 applied to the Walgreens or no?

3 MR. MAZURKIEWICZ: The way it is
4 phrased could be interpreted in different
5 ways, when it comes to the word convenience,
6 so I was a little hesitant to use that word.

7 I think the solution we are
8 offering customers is certainly a convenient
9 one when you can pick up items that you would
10 get across multiple retail just at one stop.
11 So I was a little worried the way it was
12 worded, but I think, in totality, it does
13 explain the initiative and really what we are
14 centered around as an organization.

15 MR. O'BRIEN: I'll withdraw my
16 objection.

17 CHAIRPERSON MILLER: Yes, I think
18 it is good to have it in, the whole document.
19 I never really accepted a paragraph out of a
20 document.

21 Okay. What number is this,
22 protestant's exhibit?

1 MR. O'BRIEN: I have -- my
2 documents are now out of order, so I would
3 like to just go through my documents. I'm
4 going to make this one -- why don't I make it
5 No. 5?

6 MR. O'BRIEN: I think that's
7 correct.

8 MS. PERRY: I think it is.

9 CHAIRPERSON MILLER: Okay. Then
10 we will accept that into evidence as
11 Protestant's Exhibit No. 5.

12 (Whereupon, the document was
13 marked for identification as
14 Plaintiff Exhibit 5 and was
15 received in evidence.)

16 CHAIRPERSON MILLER: Did we do
17 Board questions?

18 MEMBER ALBERTI: No.

19 CHAIRPERSON MILLER: Okay. Do we
20 have Board questions?

21 MEMBER SILVERSTEIN: I have a
22 couple questions. First of all, it's Mr.

1 Mazurkiewicz?

2 MR. MAZURKIEWICZ: Mazurkiewicz,
3 yes.

4 MEMBER SILVERSTEIN: Mr.
5 Mazurkiewicz?

6 MR. MAZURKIEWICZ: Yes.

7 MEMBER SILVERSTEIN: Thank you for
8 coming. Thank you for staying late enough to
9 miss your plane. We treat all of our people
10 here, all of our witnesses equally.

11 MR. MAZURKIEWICZ: Okay.

12 MEMBER SILVERSTEIN: I appreciate
13 your sacrifice and that of all the other
14 people here who are missing things. It's not
15 easy.

16 MS. PERRY: I'm not cleaning up.
17 I'm just getting rid of some of the junk.

18 CHAIRPERSON MILLER: Keep going.
19 Keep going.

20 MEMBER SILVERSTEIN: Please don't
21 go. Do you sell onions?

22 MR. MAZURKIEWICZ: Sorry?

1 MEMBER SILVERSTEIN: Are you going
2 to sell onions or potatoes?

3 MR. MAZURKIEWICZ: Not today.

4 MEMBER SILVERSTEIN: Why not?

5 MR. MAZURKIEWICZ: In this store?

6 MEMBER SILVERSTEIN: Yes.

7 MR. MAZURKIEWICZ: We do not sell
8 them today, because we don't have the
9 infrastructure to support it. What Jin and
10 his team have done is try to identify partners
11 that can get us into fresh foods. We are
12 coming in with a corporate solution that has
13 a logistics backbone to support getting
14 produce from top notch suppliers and bringing
15 it in to stores.

16 So the single reason we can't do
17 it today is because of the lack of
18 infrastructure and that is what is going to
19 change. I could do potatoes. I could do
20 tomatoes. I could do raw meat if I wanted to
21 come March 2013.

22 MEMBER SILVERSTEIN: You could,

1 but you don't have plans to?

2 MR. MAZURKIEWICZ: Correct.

3 MEMBER SILVERSTEIN: Why not?

4 MR. MAZURKIEWICZ: So
5 specifically, to answer your question around
6 the --

7 MEMBER SILVERSTEIN: Yes.

8 MR. MAZURKIEWICZ: -- raw meat
9 specifically, there is limited space in our
10 stores and we need to provide customers items
11 that they are going to purchase time and time
12 again and not move on the shelves. And that
13 is not typically what I have seen in learnings
14 -- from learnings in Chicago raw proteins.

15 MEMBER SILVERSTEIN: Why not? Why
16 don't customers -- you're saying customers
17 don't want to buy that? What, do they come
18 home from work and don't want to prepare a
19 full dinner or do they not know how or do they
20 not afford it? Why wouldn't a customer want
21 to buy fresh meat or buy necessarily a sweet
22 potato?

1 MR. MAZURKIEWICZ: Yes, so what I
2 can tell you is the suppliers that we are
3 working with and the infrastructure that we
4 created, delivers the highest quality of
5 product to our stores in line with a grocer or
6 any other channel. So I couldn't answer that
7 question. I could tell you that I would buy
8 it from our stores, but I couldn't tell you
9 why most people wouldn't buy those categories.

10 MEMBER SILVERSTEIN: But you are
11 saying the reason that you are not offering
12 these is that people don't want them or that
13 people would go to another store or another
14 full-service grocery store to buy them?

15 MR. MAZURKIEWICZ: Well, the
16 specific reason for a store like the one we
17 are talking about is with limited
18 merchandising space. There is only so much
19 product that you could offer and we are able
20 to offer the customer better solutions and/or
21 at least solutions that they will come to us
22 time and time again to purchase.

1 MEMBER SILVERSTEIN: So is it fair
2 to say what you are telling me, and I don't
3 want to put the words in your mouth, but what
4 I hear you saying is you are saying what you
5 think your customer wants.

6 MR. MAZURKIEWICZ: We are selling
7 -- we have learned over the last two years.
8 We started our program in Chicago and New York
9 and there is extensive learning that we have
10 internally in those markets. We are selling
11 what customers are buying from us today and
12 maximizing the space we have to work with
13 there.

14 MEMBER SILVERSTEIN: Thank you.
15 No further questions, Madam Chair.

16 CHAIRPERSON MILLER: Okay. I just
17 have one.

18 MR. MAZURKIEWICZ: Yes.

19 CHAIRPERSON MILLER: Why did
20 Walgreens move into the food area?

21 MR. MAZURKIEWICZ: Everyone eats
22 food. It's healthy options. It's healthy

1 options. It's being more relevant in our
2 stores. That's really what everything comes
3 down to. We are trying to provide customers
4 quality items that typically they would have
5 had to go somewhere else to buy.

6 CHAIRPERSON MILLER: My other
7 question is so you have these initiatives
8 going on all over the country. Well, I don't
9 know, Chicago, New York, right, Florida,
10 Arizona. Do they sell alcohol in those
11 stores?

12 MR. MAZURKIEWICZ: Most of them,
13 yes.

14 CHAIRPERSON MILLER: Beer and
15 wine?

16 MR. MAZURKIEWICZ: Yes. I think
17 we have, this is an estimate, but, 5,500
18 stores out of 8,000 stores that sell beer and
19 wine. So it's the majority of our store
20 fleet.

21 CHAIRPERSON MILLER: Okay. Thank
22 you. Others? Okay. Any redirect on Board

1 questions? Okay. Thank you very much.

2 MR. MAZURKIEWICZ: Yes. Thank you
3 guys for your time. It's always exciting to
4 talk about the program.

5 CHAIRPERSON MILLER: Great.

6 MR. MAZURKIEWICZ: And how it will
7 work out.

8 CHAIRPERSON MILLER: Thanks for
9 coming all this way.

10 MR. MAZURKIEWICZ: Yep,
11 absolutely.

12 CHAIRPERSON MILLER: Okay. One
13 more witness?

14 MR. O'BRIEN: Rick Conner.

15 CHAIRPERSON MILLER: Do you want
16 to move his testimony in for the Board?

17 MR. O'BRIEN: Move his testimony?

18 CHAIRPERSON MILLER: We heard that
19 before -- welcome back, welcome back. You are
20 a movie star, too. Okay.

21 Whereupon,

22 RICK CONNER

1 was called as a witness by Counsel for the
2 Applicant, and having been first duly sworn,
3 assumed the witness stand and was examined and
4 testified as follows:

5 CHAIRPERSON MILLER: Okay. Thank
6 you.

7 DIRECT EXAMINATION

8 MR. O'BRIEN: Mr. Conner, you have
9 heard all -- first of all, what's your
10 position?

11 MR. CONNER: I'm currently
12 employed at Walgreens as a District Manager.

13 MR. O'BRIEN: And as District
14 Manager, do you supervise stores?

15 MR. CONNER: Yes, I do.

16 MR. O'BRIEN: How many stores do
17 you presently supervise?

18 MR. CONNER: I currently --
19 presently, I supervise 33 stores.

20 MR. O'BRIEN: Okay.

21 MR. CONNER: With -- I would say
22 which is different from my previous statement,

1 because our area has grown, so now we split
2 into two districts and we have another
3 district manager in this area.

4 MR. O'BRIEN: Okay. In the
5 interest of time, may I simply lead by saying
6 is the store we are talking about today one of
7 your 33 stores?

8 MR. CONNER: Yes, it is.

9 MR. O'BRIEN: Thank you.

10 CHAIRPERSON MILLER: Yes.

11 MR. O'BRIEN: I'm going to show
12 you what has been marked -- let me go back a
13 second.

14 Did you hear Mr. Kim, Jin Kim's
15 testimony regarding fresh products presently
16 sold at the store?

17 MR. CONNER: Yes, I did.

18 MR. O'BRIEN: And did you see
19 Exhibit No. 4, which is a list of, I think he
20 said, 72 fresh products sold at the store?

21 MR. CONNER: Yes, I did.

22 MR. O'BRIEN: Okay. I am now

1 going to give you Plaintiff's Exhibit No. 3
2 for identification and ask if you can tell the
3 Board what that is?

4 MR. CONNER: In addition to the 72
5 from Exhibit 4, I believe it was, of the fresh
6 food, these are all the other items within our
7 store that are considered consumables. And
8 they consist of directly about 2,100 or so
9 items.

10 CHAIRPERSON MILLER: Okay.

11 MR. O'BRIEN: Is every single one
12 of these 2,100 or so items available in the
13 store we are talking about today?

14 MR. CONNER: Yes, it is. This is
15 a store-specific plan-o-gram.

16 MR. O'BRIEN: Okay. The statute
17 says that the sales from alcoholic beverages
18 at a store that qualifies under the full-
19 service grocery store exception cannot exceed
20 15 percent of total. Will, if granted a Class
21 B License, sales at this store exceed that 15
22 percent threshold?

1 MR. CONNER: No, they will not.

2 MR. O'BRIEN: Okay. Based on your
3 experience with your other stores, what
4 percentage of overall sales do you anticipate
5 will come from the sale of beer and wine?

6 MR. CONNER: Well, currently the
7 stores that I do have that currently have beer
8 and wine, it ranges from about 3 to 7 percent.

9 MR. O'BRIEN: Okay. Did you hear
10 Mr. Kim's testimony regarding restrictions of
11 alcohol sales to the first floor of the store
12 that we are talking about today?

13 MR. CONNER: Yes, I did.

14 MR. O'BRIEN: Okay. How will you,
15 as District Manager, oversee implementation of
16 that restriction?

17 MR. CONNER: Well, along with our
18 normal, we have -- any time that we do -- are
19 granted an alcohol license, there is extensive
20 training that every employee has to go
21 through.

22 MR. O'BRIEN: Yes.

1 MR. CONNER: It is documented in
2 their files electronically. They sign-off on
3 it. And that will also apply here as well as
4 specialized training being that this store is
5 unique and has a two-level of additional rules
6 and regulations that has to be in place
7 because it's not a single-level store like the
8 standard prototype.

9 MR. O'BRIEN: Yes. Will you
10 permit alcohol to be carried from the first
11 floor to the second floor by patrons?

12 MR. CONNER: No, we will not
13 permit it. Obviously, we can't always
14 supervise it, but there will be other things
15 in place that will prohibit that from
16 happening upstairs.

17 MR. O'BRIEN: What other things?

18 MR. CONNER: With -- as Jin had
19 already stated, our computer system is a newer
20 system and it is capable of employee-specific
21 selling of alcohol based on their ID numbers
22 that are put into the computer. And if it is

1 not matched up when they scan it at the
2 register, it will not allow it to be scanned
3 in and tallied up as a total price.

4 MR. O'BRIEN: Would you be willing
5 to commit in precluding alcohol from going to
6 the second floor if the Board were inclined to
7 otherwise grant the license?

8 MR. CONNER: Yes.

9 MR. O'BRIEN: I'm sorry?

10 MR. CONNER: Yes, I would.

11 MR. O'BRIEN: Okay. Those are my
12 questions.

13 CHAIRPERSON MILLER: Thank you.
14 Ms. Perry, any cross?

15 MS. PERRY: Yes.

16 CROSS-EXAMINATION

17 MS. PERRY: If -- I have never
18 seen this list before, so I cannot -- my
19 question is that you said you would be willing
20 to commit to precluding somebody from taking
21 wine and beer to the second floor. How would
22 you do that? Would you post a security guard

1 by the elevator and the escalator?

2 MR. CONNER: No. At this time, we
3 would post signs stating that. If it seemed
4 to be a problem, obviously, then we would
5 take, you know, more stricter measurements.

6 MS. PERRY: If I put a bottle of
7 wine in my -- in a basket and I took it to the
8 second floor up the escalator or the elevator
9 and I went to the Look Boutique and bought
10 makeup and other things that are upstairs and
11 I took it to the cash register on the second
12 floor in the Look Boutique, would you tell me
13 you would not accept my check or my credit
14 card and you would send me downstairs?

15 MR. CONNER: We would not accept
16 it upstairs, but we would also walk you down
17 as a customer service and help expedite your
18 checkout because of the inconvenience, but we
19 would have a staff member walk you down to the
20 register that will allow it to happen.

21 MS. PERRY: Okay.

22 CHAIRPERSON MILLER: Okay?

1 MS. PERRY: I'm done.

2 CHAIRPERSON MILLER: Okay.

3 MS. PERRY: Yes, because I have a
4 lot to --

5 CHAIRPERSON MILLER: Any Board
6 questions?

7 MS. PERRY: -- do.

8 CHAIRPERSON MILLER: Okay. Thank
9 you very much.

10 MR. CONNER: Okay.

11 CHAIRPERSON MILLER: So does that
12 conclude your case, Mr. O'Brien?

13 MR. O'BRIEN: That concludes our
14 case, Madam Chair. I believe I have already
15 moved 1 through 6 and 6A into evidence.

16 CHAIRPERSON MILLER: Right. And I
17 admitted all of them. Okay. Ms. Perry, you
18 have one more witness?

19 MS. PERRY: I would like to -- I
20 have a bunch -- I have other stuff, too, that
21 I would like to introduce.

22 CHAIRPERSON MILLER: Would you

1 like to --

2 MS. PERRY: And comments I would
3 like to make.

4 CHAIRPERSON MILLER: You have
5 documents you want to introduce into evidence?

6 MS. PERRY: Yes, I do.

7 CHAIRPERSON MILLER: Do you want
8 to do that now?

9 MS. PERRY: So let me start with--
10 can I just go in reverse and do it that way,
11 because that way I can get rid of some of this
12 junk in front of me.

13 CHAIRPERSON MILLER: Okay. Do you
14 have any objection, Mr. O'Brien?

15 MR. O'BRIEN: Madam Chair, these
16 are documents. I think the witness has to be
17 sworn and has to identify the documents.

18 CHAIRPERSON MILLER: Is that --
19 are you going to use your witness?

20 MS. PERRY: These are documents
21 that I have in the comments that I'm going to
22 make.

1 CHAIRPERSON MILLER: You want to
2 testify? She is not a lawyer. Are you going
3 to testify?

4 MS. PERRY: Yes, I am.

5 CHAIRPERSON MILLER: Now?

6 MS. PERRY: Yes.

7 CHAIRPERSON MILLER: Do you have
8 an objection, Mr. O'Brien? She is not a
9 lawyer.

10 MR. O'BRIEN: I have no objection
11 to her testifying, no.

12 CHAIRPERSON MILLER: Okay. And
13 you are going to identify the documents at the
14 same time?

15 MS. PERRY: As I go along in my --
16 but I would like to go ahead and just give the
17 Board these documents now.

18 CHAIRPERSON MILLER: Okay.

19 MS. PERRY: If I could?

20 CHAIRPERSON MILLER: So you are
21 going to identify them now?

22 MS. PERRY: Yes.

1 CHAIRPERSON MILLER: And then --

2 MS. PERRY: If you don't mind.

3 CHAIRPERSON MILLER: No. Mark
4 them, identify them and then we can move them
5 later.

6 MS. PERRY: The first document is
7 a dictionary -- the Merriam Webster Dictionary
8 definition of primary, which states "A first
9 rank importance or value." Because everybody
10 is talking about what is the definition of
11 primary.

12 CHAIRPERSON MILLER: Okay. What
13 number is that?

14 MS. PERRY: I would like to make
15 that our Exhibit No. 6.

16 (Whereupon, the document was
17 marked as Plaintiff Exhibit 6 for
18 identification.)

19 MS. PERRY: Next, the definition
20 of protest is No. 7. The definition of what
21 full-service is, which describes a business
22 that offers the full range of services.

1 CHAIRPERSON MILLER: Is that out
2 of our -- the D.C. Statute?

3 MS. PERRY: This is a dictionary
4 definition.

5 CHAIRPERSON MILLER: Oh, okay.
6 Sorry.

7 MS. PERRY: Because we don't have
8 real definitions for some of the stuff we
9 talked about today. But it refers to an
10 example of a full-service gas station.

11 CHAIRPERSON MILLER: Okay.

12 MS. PERRY: And it has people to
13 pump your gas --

14 CHAIRPERSON MILLER: Ms. Perry?

15 MS. PERRY: -- into the vehicle.

16 CHAIRPERSON MILLER: The court
17 reporter needs to take a five minute break.

18 MS. PERRY: Okay.

19 CHAIRPERSON MILLER: So we can all
20 take a five minute break and then --

21 MS. PERRY: Okay.

22 CHAIRPERSON MILLER: -- go through

1 these.

2 MS. PERRY: Yes.

3 CHAIRPERSON MILLER: Okay.

4 MR. O'BRIEN: Can I ask Mr.
5 Silverstein what our remaining times are?

6 MEMBER SILVERSTEIN: Remaining,
7 there is 56 minutes for the protestant.

8 CHAIRPERSON MILLER: Remaining?

9 MEMBER SILVERSTEIN: Oh,
10 remaining, four. And there are five minutes
11 remaining for the licensee.

12 MR. O'BRIEN: Thank you.

13 MEMBER SILVERSTEIN: I must admit
14 that when things were taken out of order,
15 there may have been some error and disruption
16 because things moved from column to column.
17 And I apologize profoundly for that. I was
18 doing my best. I was caught in the middle of
19 something there that was very difficult.

20 CHAIRPERSON MILLER: Okay. We
21 need to take a break. So we will deal with
22 that when we come back. I think things are

1 wrapping up in any event.

2 MEMBER ALBERTI: May I make a
3 quick suggestion? Ms. Perry, if you would
4 give Mr. O'Brien copies of that while we take
5 a break?

6 MS. PERRY: Okay.

7 MEMBER ALBERTI: It might be
8 helpful.

9 CHAIRPERSON MILLER: And the
10 Board, too, perhaps if you can.

11 MEMBER ALBERTI: Well, at least
12 Mr. O'Brien would have copies to see.

13 MR. O'BRIEN: To see if I object
14 to them being shown to the Board.

15 MEMBER ALBERTI: Right.

16 CHAIRPERSON MILLER: I know, but I
17 need a copy to evaluate for objections.

18 MEMBER ALBERTI: It may speed
19 things up.

20 CHAIRPERSON MILLER: Unless she
21 agrees.

22 (Whereupon, at 5:04 p.m. a recess

1 until 5:11 p.m.)

2 CHAIRPERSON MILLER: Okay. Are
3 you ready to proceed, Ms. Perry?

4 MS. PERRY: I am. I just would
5 like to go ahead and get these documents in
6 and then I'll do my testimony, if that's
7 possible. He can object afterwards, if he
8 doesn't feel they are timely.

9 CHAIRPERSON MILLER: He -- no, he
10 would object now before they get in, but we
11 can go through them. I just want to see if --
12 because you would be the witness putting them
13 in. Okay.

14 MS. PERRY: They are all different
15 documents.

16 CHAIRPERSON MILLER: Oh, my
17 goodness.

18 MS. PERRY: Well, originally, when
19 I got these, you know, you said to bring seven
20 copies of everything.

21 CHAIRPERSON MILLER: Good. Okay.

22 MS. PERRY: So that's what I tried

1 to do.

2 CHAIRPERSON MILLER: I just have
3 all these -- these are all exhibits. Okay.

4 MS. PERRY: But they are all
5 different documents and a lot of -- in the
6 folders.

7 CHAIRPERSON MILLER: Okay. What
8 should I look for first or describe your --
9 the first one you said was -- go ahead, just
10 tell me again.

11 MS. PERRY: Okay. The first one I
12 want to do is Exhibit No. 8, which is the
13 Notice of Public Hearing for the Protest
14 Hearing.

15 CHAIRPERSON MILLER: The Notice of
16 Public Hearing? Okay. This is public record.
17 Why are you offering it as an exhibit?

18 MS. PERRY: Because it was posted
19 as a drug store, not as a --

20 CHAIRPERSON MILLER: Well, that's
21 for the purpose --

22 MS. PERRY: -- grocery store and

1 the property, which is contrary to --

2 MR. O'BRIEN: No objection to No.

3 8.

4 CHAIRPERSON MILLER: Okay. No

5 objection. Okay. There is another copy.

6 Okay. This is exhibit number what?

7 MS. PERRY: I'm just -- these are

8 out of order now, but I'm just -- I just want

9 to get them in.

10 CHAIRPERSON MILLER: But you are

11 up to what number?

12 MS. PERRY: That's No. 8.

13 CHAIRPERSON MILLER: No. 8. Okay.

14 They have to have a number to get in. There

15 is no objection. Exhibit No. 8 Notice of

16 Public Hearing is admitted.

17 (Whereupon, the document was

18 marked for identification as

19 Plaintiff Exhibit 8 and was

20 received in evidence.)

21 CHAIRPERSON MILLER: Okay.

22 MS. PERRY: The next exhibit I'm

1 going to call No. 9. It is the one that says
2 Walgreens, "Find a Walgreens Near you." It is
3 a two-page document that I took from your
4 website. It shows the Walgreens store.

5 MR. O'BRIEN: Because this is from
6 Walgreens' website, no objection.

7 CHAIRPERSON MILLER: Okay. I'm
8 not even -- okay.

9 MS. PERRY: Do you have it?

10 CHAIRPERSON MILLER: I don't know.
11 There is no objection. It's number what, 8?

12 MS. PERRY: 9.

13 CHAIRPERSON MILLER: 9. Find a
14 Walgreens Near You from the website.

15 MS. PERRY: Yes.

16 CHAIRPERSON MILLER: Okay.

17 MS. PERRY: And I'm going to put
18 it in because on the second page it says
19 convenience store. So that's how they
20 identified themselves.

21 CHAIRPERSON MILLER: Okay.

22 MR. O'BRIEN: Do you just want to

1 hand me a copy?

2 CHAIRPERSON MILLER: I can't find
3 them.

4 MR. O'BRIEN: Oh.

5 CHAIRPERSON MILLER: I would hand
6 it to you.

7 MS. PERRY: Okay?

8 CHAIRPERSON MILLER: Are you sure
9 we have all of these?

10 MS. PERRY: Yes, I am, because I
11 brought them all up.

12 CHAIRPERSON MILLER: This is it,
13 right? This is it.

14 MS. PERRY: I was very careful.

15 CHAIRPERSON MILLER: Okay. Got
16 it.

17 MS. PERRY: You trained me at the
18 BZA.

19 CHAIRPERSON MILLER: Okay. Good.

20 (Whereupon, the document was
21 marked for identification as
22 Plaintiff Exhibit 9 and was

1 received in evidence.)

2 CHAIRPERSON MILLER: Next?

3 MS. PERRY: No. 10 is the one that
4 says Walgreens.

5 MR. O'BRIEN: Also from the
6 Walgreens' website.

7 MS. PERRY: It's from the website.

8 MR. O'BRIEN: No objection.

9 MS. PERRY: It shows light food.

10 CHAIRPERSON MILLER: Is it the one
11 that says Welcome to Walgreens, Your Home for
12 Prescriptions, Photos and Health Information?

13 MS. PERRY: Yes.

14 CHAIRPERSON MILLER: Okay. This
15 is number what?

16 MS. PERRY: 10.

17 CHAIRPERSON MILLER: 10. Okay.
18 No objection, right?

19 MR. O'BRIEN: Correct. It is from
20 the Walgreens' website.

21 CHAIRPERSON MILLER: Okay. It is
22 admitted.

1 (Whereupon, the document was
2 marked for identification as
3 Plaintiff Exhibit 10 and was
4 received in evidence.)

5 MS. PERRY: My number 11 is the
6 first page of the variance from the Board of
7 Zoning Adjustment when Walgreens asked for a
8 variance to construct this store.

9 CHAIRPERSON MILLER: Any
10 objection? It's a public document.

11 MR. O'BRIEN: I'm trying -- I'm
12 looking at something else.

13 MS. PERRY: Yes, you're on the
14 next page.

15 CHAIRPERSON MILLER: It's the
16 first page of the BZA Decision.

17 MS. PERRY: Yes.

18 MR. O'BRIEN: Do we have the full
19 document?

20 MS. PERRY: I can put the full --
21 I can get you the full document. I only
22 Xeroxed this much of it.

1 MR. O'BRIEN: Well, can we have a
2 proffer as to what the significance of this
3 is?

4 MS. PERRY: Because I feel -- I
5 can Xerox the whole thing and bring it in
6 tomorrow.

7 CHAIRPERSON MILLER: Yes.

8 MS. PERRY: It says --

9 CHAIRPERSON MILLER: It's in the
10 public realm. It's right on their website.

11 MS. PERRY: Yes, it's on the
12 Board's website, too.

13 CHAIRPERSON MILLER: But what is--
14 yes, what does --

15 MS. PERRY: "The purpose is to
16 construct a pharmacy and drug store," is the
17 reason -- is the way they asked the city for
18 the variance. It has -- it does not say to
19 construct a pharmacy, drug store and retail
20 store or pharmacy, drug store --

21 MR. O'BRIEN: No objection.

22 MS. PERRY: -- and a grocery

1 store.

2 CHAIRPERSON MILLER: Okay. This
3 is number?

4 MS. PERRY: No. 12.

5 CHAIRPERSON MILLER: 11? Is this
6 number 11?

7 MS. PERRY: No, that's number 12.

8 CHAIRPERSON MILLER: No.

9 MR. O'BRIEN: No, this is 11.

10 MS. PERRY: 11.

11 CHAIRPERSON MILLER: 11.

12 MS. PERRY: 11.

13 CHAIRPERSON MILLER: Okay.

14 (Whereupon, the document was
15 marked for identification as
16 Plaintiff Exhibit 11 and was
17 received in evidence.)

18 MS. PERRY: No. 12 is the building
19 permit to construct this store from the DCRA.

20 CHAIRPERSON MILLER: Yes.

21 MS. PERRY: It says retail,
22 pharmacy and a drug store, two floors and

1 cellar as Walgreens for the BZA with a
2 variance shown on it.

3 MR. O'BRIEN: No objection to 12.

4 CHAIRPERSON MILLER: Okay. No. 11
5 -- 12 building permit is admitted.

6 (Whereupon, the document was
7 marked for identification as
8 Plaintiff Exhibit 12 and was
9 received in evidence.)

10 MS. PERRY: Then I brought you,
11 and each of you have it, a copy of this week's
12 Giant's circular to show what a full-service
13 grocery store looks like, which would be, I
14 guess, No. 13.

15 MR. O'BRIEN: I object to No. 13.
16 It's not a Walgreens document.

17 CHAIRPERSON MILLER: Only
18 Walgreens documents can come in?

19 MR. O'BRIEN: Well, without a
20 foundation.

21 CHAIRPERSON MILLER: Well --

22 MR. O'BRIEN: I'm sorry. You are

1 trying to expedite these and that's why I have
2 been --

3 CHAIRPERSON MILLER: Okay. No, it
4 just wasn't enough of a reason for me.

5 MR. O'BRIEN: Well, I --

6 CHAIRPERSON MILLER: I didn't
7 really get it. Just that there is not a lot
8 of --

9 MR. O'BRIEN: I don't know what
10 the foundation for introducing a Giant
11 circular in a Walgreens' proceeding is.

12 CHAIRPERSON MILLER: Wait.

13 MS. PERRY: The Walgreens --

14 CHAIRPERSON MILLER: No, wait.
15 Let's just go -- we are on No. 13, Giant
16 newspaper advertisement, correct?

17 MS. PERRY: Yes. It's the
18 circular that comes in the newspapers and that
19 they have in the store.

20 CHAIRPERSON MILLER: The purpose
21 is to show how it advertises for --All right.

22 MS. PERRY: It is supposed to show

1 the products in a full-service grocery store.

2 CHAIRPERSON MILLER: Okay. Do you
3 have an objection?

4 MR. O'BRIEN: Yes, it has got
5 nothing to do with this case.

6 CHAIRPERSON MILLER: I think it
7 does. Because their premise is that it's not
8 like Giant. Giant is a full-service grocery
9 store and Walgreens isn't like it. Is that
10 right, Ms. Perry?

11 MS. PERRY: Right.

12 CHAIRPERSON MILLER: Just to make
13 things short.

14 MS. PERRY: Yes. All these things
15 in question is what is a full-service grocery
16 store.

17 CHAIRPERSON MILLER: Right.

18 MS. PERRY: I don't think anybody
19 can dispute that Giant is a full-service
20 grocery store.

21 MR. O'BRIEN: I don't know if the
22 Board has made a finding to that fact.

1 CHAIRPERSON MILLER: Okay. So you
2 are -- no, no.

3 MS. PERRY: I'm not asking them to
4 make a finding.

5 CHAIRPERSON MILLER: All right.

6 MS. PERRY: I introduced to talk
7 about what --

8 CHAIRPERSON MILLER: Let's move
9 this along. You object?

10 MR. O'BRIEN: Yes, I object to
11 trial by newspaper, yes.

12 CHAIRPERSON MILLER: Okay. And I
13 overrule it. I think it is relevant to what
14 a full-service grocery store may be
15 advertising for whatever it is worth here.
16 Whoops, wait a minute. We will give it the
17 weight that it is worth, but I think it is
18 relevant, because there isn't -- for her
19 showing what she thinks a full-service grocery
20 store serves or advertises. Okay.

21 (Whereupon, the document was
22 marked for identification as

1 Plaintiff Exhibit 13 and was
2 received in evidence.)

3 MS. PERRY: Madam Chair, I would
4 like to -- as Exhibit No. 14 --

5 CHAIRPERSON MILLER: What, 14?

6 MS. PERRY: Yes.

7 CHAIRPERSON MILLER: Okay.

8 MEMBER ALBERTI: You know --

9 MS. PERRY: The Walgreens --

10 CHAIRPERSON MILLER: Do you have a
11 comment?

12 MS. PERRY: -- are --

13 MEMBER ALBERTI: I'm having a
14 problem here.

15 CHAIRPERSON MILLER: I'm sorry.

16 MEMBER ALBERTI: How are we going
17 to identify this for the record? I mean, it
18 hasn't been identified by date. We just have
19 a flyer.

20 CHAIRPERSON MILLER: No, it's
21 not --

22 MEMBER ALBERTI: I mean, I don't

1 know --

2 MS. PERRY: The date is on it. It
3 says prices effective Friday, December 7.

4 MEMBER ALBERTI: Well, do you want
5 to put that in the record?

6 MS. PERRY: -- to Thursday,
7 December 13th.

8 MEMBER ALBERTI: I mean, this is--

9 CHAIRPERSON MILLER: It's on the--

10 MEMBER ALBERTI: It seems like we
11 are just throwing stuff into the record.

12 CHAIRPERSON MILLER: No, we are --

13 MEMBER ALBERTI: And we're not
14 really forming a basis for it. I am just a
15 little concerned here.

16 MEMBER SILVERSTEIN: Mr. Alberti,
17 it's very useful though, because if we don't
18 use it, we can always wrap fish in it.

19 MEMBER ALBERTI: All right.

20 CHAIRPERSON MILLER: No, I think
21 the date is on the bottom here.

22 MS. PERRY: I'm just going quickly

1 for time purposes.

2 CHAIRPERSON MILLER: That's right.

3 MEMBER ALBERTI: All right.

4 MS. PERRY: I'll tie it all
5 together when I do my statement.

6 MEMBER ALBERTI: All right.

7 MS. PERRY: I just wanted to get
8 everything out.

9 MEMBER ALBERTI: No, that's okay.

10 CHAIRPERSON MILLER: Next? 14, is
11 this the last one?

12 MS. PERRY: 14 is the Walgreens'
13 weekly circular that is in stores and in our
14 newspapers and it also has the date on the
15 bottom.

16 CHAIRPERSON MILLER: Right.
17 December 15th. No. Sale prices good --

18 MR. O'BRIEN: No objection to No.
19 14, no objection.

20 CHAIRPERSON MILLER: Okay.
21 (Whereupon, the document was
22 marked for identification as

1 Plaintiff Exhibit 14 and was
2 received in evidence.)

3 MS. PERRY: These are also Happy
4 and Healthy and The Corner Wishlists are two
5 brochures that are in the Walgreens stores
6 today, in this store, and it shows the
7 products that they offer. And it doesn't show
8 much food.

9 CHAIRPERSON MILLER: Any
10 objection, Mr. O'Brien?

11 MR. O'BRIEN: I object to the
12 statement it shows the products they offer.
13 The implication being that they don't offer
14 other products.

15 MS. PERRY: No. It shows some of
16 -- let me clarify. It shows some of the
17 products available at Walgreens.

18 MR. O'BRIEN: Okay.

19 MS. PERRY: And not necessarily at
20 this store.

21 MR. O'BRIEN: They are Walgreens'
22 publications.

1 MS. PERRY: Oh, the Walgreens'
2 publications.

3 MR. O'BRIEN: So I can live with
4 those. Which is which?

5 MS. PERRY: I don't care.

6 MR. O'BRIEN: Well --

7 CHAIRPERSON MILLER: The Walgreens
8 -- this is a Walgreens' publication that is in
9 Walgreens' store here?

10 MS. PERRY: Yes.

11 CHAIRPERSON MILLER: Correct?

12 MS. PERRY: Yes.

13 CHAIRPERSON MILLER: But the store
14 may not have all these products?

15 MS. PERRY: Correct.

16 CHAIRPERSON MILLER: Okay. Just
17 so we know what it is. Okay. Any objection,
18 just so you know?

19 MR. O'BRIEN: No, I don't have
20 objection to Walgreen brochures.

21 CHAIRPERSON MILLER: Right.

22 MR. O'BRIEN: I just asked which

1 is which. I've got two of them here in my
2 hand and I don't know which one we are talking
3 about.

4 CHAIRPERSON MILLER: Oh.

5 MS. PERRY: I'll make Happy and
6 Healthy No. 15.

7 MR. O'BRIEN: Happy and Healthy is
8 15. Thank you.

9 MS. PERRY: And the Wishlist is
10 16.

11 MR. O'BRIEN: The Wishlist is 16.

12 CHAIRPERSON MILLER: Do you have
13 that, John?

14 MS. PERRY: Okay.

15 CHAIRPERSON MILLER: That's it?

16 MS. PERRY: No.

17 CHAIRPERSON MILLER: Happy Healthy
18 15. This is 16. Okay. They are all
19 admitted.

20 (Whereupon, the documents were
21 marked for identification as
22 Plaintiff Exhibit 15 and 16 and

1 were received in evidence.)

2 MS. PERRY: I'm going to go
3 through my testimony very, very quickly.

4 CHAIRPERSON MILLER: Okay.

5 MEMBER SILVERSTEIN: Madam Chair?
6 I'm not certain about the times that I have
7 taken. And I think that it would be fair
8 especially to the protestants if we were to
9 add a small amount of time, so as not to cut
10 them off, because I may have inadvertently
11 erred.

12 CHAIRPERSON MILLER: Well, thank
13 you. And I think that Ms. Perry --

14 MS. PERRY: Thank you.

15 CHAIRPERSON MILLER: -- wants to
16 go quickly anyway, since she has another --

17 MS. PERRY: I do. I have to be
18 somewhere.

19 CHAIRPERSON MILLER: --
20 engagement. Okay.

21 MS. PERRY: And thank you, Mr.
22 Silverstein.

1 First, I was down at the Board
2 yesterday just so everybody knows where that
3 map came from attached to Mr. Lederer's --

4 CHAIRPERSON MILLER: Oh, let's
5 swear you in, Ms. Perry.

6 MS. PERRY: Huh?

7 CHAIRPERSON MILLER: Are you
8 testifying?

9 MS. PERRY: Oh, I've got to be
10 sworn in.

11 CHAIRPERSON MILLER: Yes.

12 MS. PERRY: I'm sorry. Do I get
13 sworn in right here or --

14 CHAIRPERSON MILLER: Well, if you
15 don't mind coming up over there? Do you need
16 your papers?

17 MS. PERRY: I do.

18 CHAIRPERSON MILLER: If you need--
19 all right, then you can do it there.

20 Whereupon,

21 KAREN PERRY

22 was called as a witness by Counsel for the

1 Plaintiff, and having been first duly sworn,
2 assumed the witness stand and was examined and
3 testified as follows:

4 CHAIRPERSON MILLER: Okay.

5 DIRECT EXAMINATION

6 MS. PERRY: Just for the record, I
7 was down at the -- I was here at ABRA
8 yesterday. I met with Mr. Hager and he
9 reviewed the Walgreens' file with me, because
10 in looking at your Fact-Finding Advisory
11 Opinion, it mentioned the video, which I had
12 only seen quickly the last hearing and it
13 mentioned this document.

14 This was not in the file, so I
15 could not look at it. So I can't attest to
16 the veracity or whether all of these products
17 are really in the store.

18 I know on the website they refer
19 to Annie's Macaroni and Cheese and some other
20 stuff. I have yet to find it in the store.

21 MR. O'BRIEN: For clarification
22 only, we are not stating that this list is

1 identical to the list that -- the 2,000 list
2 submitted back in April at the Fact-Finding.
3 Products switch in and out all the time.

4 CHAIRPERSON MILLER: The list
5 that's in the record now in this hearing --

6 MR. O'BRIEN: In this hearing is
7 current.

8 CHAIRPERSON MILLER: Okay.
9 Reflects what is in the store now?

10 MR. O'BRIEN: Yes. I'm just
11 saying I don't want anybody to infer that this
12 was a carbon copy of what was submitted in
13 April.

14 CHAIRPERSON MILLER: What?

15 MR. O'BRIEN: The list in April
16 has probably had items added, items
17 subtracted.

18 CHAIRPERSON MILLER: Okay. So,
19 Ms. Perry, which one are you referring to?

20 MS. PERRY: I think I just wanted
21 to say that I can't testify to the veracity
22 without really looking at the store and

1 checking on this list.

2 CHAIRPERSON MILLER: Okay.

3 MS. PERRY: That's all. I don't
4 know whether all these products really are in
5 the store.

6 CHAIRPERSON MILLER: Okay.

7 MS. PERRY: Not from my going in
8 and out all the time.

9 I wanted -- I don't have extra
10 copies, but one of the documents I would like
11 to put into the record is the Walgreen Company
12 information from Hoovers, which monitors the
13 SEC filings. And it describes the -- it is
14 described this way.

15 Walgreens prescription for world
16 domination of the drug store industry relies
17 on acquisitions at home and abroad. The
18 nation's number one drug store chain operates
19 more than 79 mostly free-standing Walgreen
20 stores in 50 U.S. States, the District of
21 Columbia, Guam and Puerto Rico.

22 Prescription drugs that count for

1 about two-thirds of sales. The rest come from
2 general merchandise, over-the-counter
3 medications, cosmetics and groceries.

4 And then it goes on, most Walgreen
5 stores offer dry food, pharmacies and one hour
6 photo processing.

7 MR. O'BRIEN: I object. That is
8 somebody's commentary. I doubt Walgreens
9 described themselves as engaging in world
10 domination.

11 MS. PERRY: This is what you
12 described on the, you know, SEC filing, so put
13 it that way.

14 CHAIRPERSON MILLER: I would need
15 to look at that, but, you know, I have some
16 concerns. I don't know who Hoover is. I
17 don't really know what this is.

18 MS. PERRY: Okay. I can --

19 CHAIRPERSON MILLER: Is that your
20 only -- and that is your only copy? And where
21 did you get it?

22 MS. PERRY: Off the Internet on

1 this SEC filings. I didn't want to copy that
2 whole filing, because it's like this thick.

3 CHAIRPERSON MILLER: It's under
4 the SEC filings? So the SEC filings --

5 MS. PERRY: If you log into
6 Walgreens, if you just Google Walgreens, it
7 comes up with one of the -- this is one of the
8 documents that come up.

9 MR. O'BRIEN: May I see that?

10 MS. PERRY: Sure.

11 MR. O'BRIEN: I can guarantee the
12 Board that notwithstanding where it may have
13 come from on the Internet --

14 CHAIRPERSON MILLER: Yes.

15 MR. O'BRIEN: -- Walgreens did not
16 describe itself as engaging in world
17 domination.

18 MS. PERRY: I'm not saying
19 Walgreens said that.

20 MR. O'BRIEN: Well --

21 MS. PERRY: I'm saying --

22 MR. O'BRIEN: -- somebody other

1 than Walgreens wrote this. I don't mind
2 having Walgreens statement shoved back down
3 Walgreens' throat, but having somebody else's
4 unknown statements shoved down Walgreens'
5 throat is not competent evidence.

6 MS. PERRY: Okay.

7 CHAIRPERSON MILLER: You're
8 withdrawing it? So the Board could take
9 judicial notice if it looks at the SEC
10 filings, but, I mean, Councilmember Cheh
11 referred to the SEC filings.

12 So I don't know what that is. You
13 are not even showing it to me at this point,
14 I gather, so we are going to move on.

15 MS. PERRY: Okay.

16 CHAIRPERSON MILLER: Okay.

17 MS. PERRY: The first thing I
18 would like -- I mean, I did put copies of my
19 full testimony in the record. But just to
20 move quickly, I want to just go through it
21 quickly.

22 We believe that Walgreens was not

1 properly posted or placarded in accordance
2 with your -- with notice -- with ^U 25-421. It
3 shows that Walgreens posted not as a grocery
4 store.

5 MEMBER ALBERTI: It's not a
6 Protest Hearing, no.

7 CHAIRPERSON MILLER: This is part
8 of the protest.

9 MEMBER ALBERTI: Please, it's not
10 your case to argue. It's Mr. O'Brien's.

11 MS. PERRY: I did --

12 CHAIRPERSON MILLER: He's not
13 arguing it.

14 MS. PERRY: Let me just -- if you
15 will -- I'll get into it.

16 CHAIRPERSON MILLER: Let's hear
17 what you are saying and then if there is an
18 objection.

19 MS. PERRY: This store was
20 placarded and sent to our ANC for us to file--
21 before we filed our protest as a full -- as a
22 drug store requesting a Class B License.

1 As you know, when we came -- a few
2 days before our Protest Hearing, we got the
3 rule -- the Board's Advisory Opinion that it
4 was being considered as a full-service grocery
5 store.

6 When we came here, we were told,
7 basically, by the Board that that was an issue
8 we really could not protest or it was not a
9 protestable ground or an appropriate ground
10 for a protest.

11 However, the Council in the
12 statute in 25-332 --

13 CHAIRPERSON MILLER: Ms. Perry?

14 MS. PERRY: -- says that AN -- the
15 opinion of an ANC, if any, has been given
16 great weight.

17 CHAIRPERSON MILLER: Ms. Perry?
18 That's what this hearing is about now to get
19 your input on it.

20 MS. PERRY: But our ANC could not
21 give great weight, because this was not
22 placarded correctly. It was not sent back to

1 us as a grocery store. And our ANC has not
2 really, the full ANC, been able to weigh in on
3 it after a public meeting.

4 MEMBER ALBERTI: May I ask a
5 question, Madam Chair? Ms. Miller?

6 CHAIRPERSON MILLER: Yes, sure.

7 MEMBER ALBERTI: So, Ms. Perry,
8 are you representing the ANC at this hearing?

9 MS. PERRY: I am, but I, you know,
10 I --

11 MEMBER ALBERTI: Wait, wait. Let
12 me say this. You are with the authority of
13 the ANC?

14 MS. PERRY: Correct.

15 MEMBER ALBERTI: Okay. Fine.

16 MS. PERRY: But we just want to go
17 on record that we felt -- feel it needs to --
18 it should have been replacarded and we should
19 have been able to hold a real public hearing.

20 CHAIRPERSON MILLER: Why couldn't
21 the ANC submit a resolution in time for this
22 hearing?

1 MS. PERRY: Because we didn't know
2 about this hearing until we got your notice
3 November -- I think -- I forgot what date it
4 came out. November 10th.

5 CHAIRPERSON MILLER: I don't know.

6 MS. PERRY: Whatever. It was
7 after our meeting.

8 CHAIRPERSON MILLER: Okay.

9 MR. O'BRIEN: I don't see what the
10 prejudice is, because --

11 MS. PERRY: I'm not saying there
12 is prejudice.

13 MR. O'BRIEN: -- this --

14 MS. PERRY: I just think that --

15 MR. O'BRIEN: Well, you --

16 MS. PERRY: -- it should have been
17 replacarded. That's all our ANC is saying.

18 MR. O'BRIEN: Okay. If Ms. Perry
19 is conceding there is no prejudice, I think we
20 can move on.

21 MEMBER ALBERTI: Well, actually, I
22 think we are getting out of order here,

1 because this is Ms. Perry's testimony. So,
2 Mr. O'Brien, you will have a chance to cross-
3 examine.

4 MR. O'BRIEN: Thank you very much.

5 CHAIRPERSON MILLER: I just want
6 to make sure you are not alleging raising a
7 great weight issue that the ANC --

8 MS. PERRY: I'm not really raising
9 the great weight issue.

10 CHAIRPERSON MILLER: Okay.

11 MS. PERRY: Because we did not
12 include -- the Council said that we should
13 have had a say in whether Walgreens was a
14 grocery store. It says in there --

15 CHAIRPERSON MILLER: I know that's
16 what you have right now.

17 MS. PERRY: Yes.

18 CHAIRPERSON MILLER: Okay.

19 MS. PERRY: But it would have been
20 nice had we had more notice and we could have
21 really had a full public hearing at one of our
22 ANC meetings, which we did not. We could not.

1 It has been -- it was discussed, but not --

2 CHAIRPERSON MILLER: When is your
3 next public -- when is your next ANC meeting?

4 MS. PERRY: Not until the second
5 Monday in January.

6 MEMBER SILVERSTEIN: When was your
7 last?

8 MS. PERRY: The second Monday in
9 November.

10 MEMBER SILVERSTEIN: You don't
11 have one in December?

12 MS. PERRY: No. We are not --
13 most ANCs don't meet in December. We don't.
14 We don't have an issue that requires an
15 immediate decision and people going away for
16 the holidays.

17 MEMBER SILVERSTEIN: My only
18 question then is are D.C. agencies required to
19 set our schedules around the leisurely pace of
20 ANC?

21 MS. PERRY: No. I did not
22 indicate that. I did not say that.

1 CHAIRPERSON MILLER: Okay.

2 MS. PERRY: Our ANC has met every
3 month and sometimes more than once a month for
4 the last two years. So we -- they are not --
5 because it is an election year, we have four
6 new Commissioners coming on that aren't being
7 sworn-in and four people going off because of
8 redistricting, they just opted not to have a
9 December meeting.

10 Not my vote, but not --

11 MEMBER SILVERSTEIN: I respect
12 that. But this is not something that is our--
13 it's under our control.

14 MS. PERRY: I didn't say --

15 MEMBER SILVERSTEIN: We gave you
16 over a month's notice and if there is not a
17 meeting, then this is not --

18 MS. PERRY: The notice was not for
19 this only --

20 MEMBER SILVERSTEIN: -- our
21 attempt to skirt --

22 MS. PERRY: I'm not saying it is,

1 sir. I'm really not saying it is, but we
2 really did not have a month's notice of this
3 hearing before our last ANC meeting. But
4 that's -- I'm not -- it doesn't matter.

5 Let me just move on, because I --

6 CHAIRPERSON MILLER: Okay.

7 MS. PERRY: -- we have a lot to do
8 yet tonight.

9 CHAIRPERSON MILLER: Yes.

10 MS. PERRY: At your Fact-Finding
11 Hearing, Mr. O'Brien quoted from the Upper
12 Georgia Avenue Planning Committee versus ABRA
13 case in an attempt, in my opinion, to blur the
14 definition of primary.

15 The ruling did say because the
16 legislative intent in this instance is clear,
17 we hold the Board and decide that the chief
18 source of revenue of any establishment
19 claiming to be a restaurant shall be from the
20 preparation, cooking and service of meals.

21 They also did leave it up to the
22 Board to determine whether the chief source of

1 revenue means an amount or percentage of
2 revenue.

3 The part that Mr. O'Brien did not
4 quote to you though is this: "In addition to
5 the factors listed in ^U 25-103.4, adequate
6 kitchen equipment, etcetera. The Board is
7 free to consider relevant evidence in
8 determining the key source of revenue,
9 including such items as cash register tapes,
10 canceled checks and paid invoices."

11 The Court went on to say "The
12 Board is not free to disregard the statutory
13 criteria and base its finding on mere promises
14 by the applicant to make its chief source of
15 revenue the sale of meals, rather than
16 beverages.

17 Hard evidence is required, not
18 promises or good intentions."

19 And I have the LexisNexis decision
20 here of the case that Mr. O'Brien quoted from.

21 And that's why I believe a lot of
22 what you heard tonight is a promise to do

1 things within three months, etcetera, but it
2 has -- your decision according to the Court
3 should be based on what is before you now, not
4 three months from now where it flat out says
5 it's not -- that the Board has to rely on the
6 hard evidence, not promises or good
7 intentions.

8 We have already gone over the fact
9 of the square footage.

10 The map that is attached to Mr.
11 Lederer's testimony where he read from the
12 bottom about the square footage, that was in
13 the Board's record and that wording coincides
14 with the Board's Advisory Ruling as to the
15 number of square feet currently in the store
16 that -- of 1,700, etcetera, and what would be
17 needed to make up the 50 plus 1 percent would
18 be 1,200 and something square feet.

19 So that was in your files
20 yesterday. And I made a copy of it. And that
21 does jive with the Board's Advisory Ruling.

22 At -- the Upper Georgia Avenue

1 case cited by Mr. O'Brien, the Board cannot
2 grant the exemption based on good intentions
3 and a promise to increase the square footage
4 if the exemption is granted.

5 It must be based on hard evidence
6 and what is there now. In no way does our ANC
7 concede that the Board is correct in its
8 conclusion that one must merely dedicate more
9 floor space to food sales than to other items
10 to meet the primary business and purpose test.

11 Walgreens does not hold itself out
12 as a grocery store nor do any of its
13 advertising suggest that it is anything other
14 than a pharmacy or a drug store which sells
15 some food items.

16 And then I submitted the
17 definition from Webster's, etcetera, of what
18 a full-service grocery store is.

19 And I think it is important that
20 what you hold yourself out to be is, you know,
21 usually what you are. And I noticed you were
22 talking with Councilmember Cheh, but to me if

1 it walks like a duck and it talks like a duck
2 and it quacks or whatever that saying is.

3 The 20 foot plus lettering on both
4 sides of the store facing the street says
5 Walgreens. And underneath it in equally large
6 letters -- it's not 20 foot lettering, it's 20
7 inches, I guess, it says Walgreens, it says
8 pharmacy and clinic. There is no mention of
9 a grocery store.

10 I also provided you with the top
11 floor it's a pharmacy, a take-care clinic,
12 print photos, all non-perishable items and
13 half of the store is -- half of the second
14 floor is dedicated to the Look Boutique.

15 So in square -- in terms of area
16 of the store, it is equal. The same way that
17 the pharmacy and all of the products that line
18 the wall, the bandaids, the foot care
19 products, I guess, I'll call it the non-
20 prescription drug items, the Advil, etcetera,
21 are all on the second floor.

22 And when you get off the elevator,

1 it is pretty much an equal -- Look Boutique
2 and makeup and pharmacy and non-pharmaceutical
3 items that bring the store in.

4 I go to -- as I was going to say,
5 I go into Walgreens quite often, because it is
6 right in front of my apartment building. And
7 I really can't buy blueberries, raspberries.
8 I know that is being said that it will be
9 there in the future, but it also doesn't have
10 any fresh meats, as I consider fresh meats.

11 If I was on a sodium-restricted
12 diet, which I'm not, I couldn't eat all that
13 prepackaged food because of the sodium content
14 and the preservatives. There are very few
15 sandwiches. It's like half of a counter.
16 There is some fresh fruit. There are some
17 apples but that's about it.

18 And that's my testimony.

19 CHAIRPERSON MILLER: Okay.

20 MS. PERRY: But I did want to get
21 it into the record about the LexisNexis, the
22 Upper Georgia Avenue decision by the Court.

1 CHAIRPERSON MILLER: Okay.

2 MS. PERRY: Which does say you
3 cannot do something based on promise.

4 CHAIRPERSON MILLER: Okay.

5 MS. PERRY: And if you want, I'll
6 make a copy.

7 CHAIRPERSON MILLER: We don't need
8 it as an exhibit, because it's also --

9 MS. PERRY: Okay.

10 CHAIRPERSON MILLER: -- we can
11 take judicial notice of that as long as the
12 site is in the transcript. Okay. So Mr.
13 Silverstein said you were at your last two
14 minutes.

15 MEMBER SILVERSTEIN: You have two
16 minutes remaining.

17 CHAIRPERSON MILLER: Are you
18 finished?

19 MEMBER SILVERSTEIN: Okay.

20 MS. PERRY: I said I would go as
21 quickly as possible.

22 CHAIRPERSON MILLER: Okay. That's

1 good. Okay. So I don't --

2 MS. PERRY: Mr. Sands would like
3 two minutes, if it's possible?

4 CHAIRPERSON MILLER: You want to
5 use your last two minutes with -- okay. So
6 there won't be a closing.

7 MEMBER ALBERTI: Excuse me.

8 CHAIRPERSON MILLER: What?

9 MEMBER ALBERTI: No, never mind.
10 I'm sorry. Never mind.

11 CHAIRPERSON MILLER: Correct?
12 You're not going to have a closing. Your two
13 minutes will be Mr. Sands? Not that you need
14 a closing.

15 MS. PERRY: Um --

16 CHAIRPERSON MILLER: You have two
17 minutes to use however you like.

18 MS. PERRY: I'll make my closing
19 right now before Mr. Sands or he can speak.
20 He does not consider Walgreens --

21 MEMBER ALBERTI: Wait, wait, wait.

22 CHAIRPERSON MILLER: I'm sorry.

1 Closings aren't included in that time frame.

2 I'm sorry.

3 MS. PERRY: Okay. Oh, they are
4 not? Okay.

5 CHAIRPERSON MILLER: So you have
6 two minutes.

7 MS. PERRY: Then Mr. Sands for two
8 minutes, unless Steve has -- does he want to
9 cross-examine me?

10 CHAIRPERSON MILLER: Oh, right.
11 Thank you. You don't have to use all 10
12 minutes.

13 MEMBER ALBERTI: Do we have Board
14 questions?

15 CHAIRPERSON MILLER: Do we have
16 Board questions?

17 MEMBER ALBERTI: Yes, I have some
18 Board questions.

19 CHAIRPERSON MILLER: Oh.

20 MEMBER ALBERTI: Ms. Perry?

21 MS. PERRY: Yes, sir.

22 MEMBER ALBERTI: In the ANC of the

1 Commissioners, who has taken the lead in this
2 case?

3 MS. PERRY: I'm sorry?

4 MEMBER ALBERTI: In the ANC,
5 amongst the Commissioners in your ANC, who has
6 taken the lead on this case?

7 MS. PERRY: I have. It's my
8 Single Member District.

9 MEMBER ALBERTI: Well, in terms of
10 relative knowledge of this case --

11 MS. PERRY: Me.

12 MEMBER ALBERTI: -- who -- all
13 right.

14 MS. PERRY: Probably, because it's
15 my Single Member District.

16 MEMBER ALBERTI: Well, let me ask
17 my question. How would you rank your
18 knowledge compared to the other Commissioners
19 of this case?

20 MS. PERRY: Oh, that's a toughy.
21 I would say 50/50 probably with one of our
22 Commissioners. One doesn't care. I would say

1 with two of our existing Commissioners,
2 probably 50/50.

3 MEMBER ALBERTI: Okay.

4 MS. PERRY: Maybe I have 75/50.

5 MEMBER ALBERTI: Okay. So would
6 you say --

7 MS. PERRY: I mean, we have never
8 discussed who knows more.

9 MEMBER ALBERTI: Okay.

10 MS. PERRY: So --

11 MEMBER ALBERTI: Would you say you
12 are the primary --

13 MR. O'BRIEN: You would have to
14 define that.

15 MS. PERRY: Am I --

16 MEMBER ALBERTI: -- representative
17 of --

18 MS. PERRY: Yes, I am.

19 MEMBER ALBERTI: -- in this case?
20 Okay.

21 MS. PERRY: I was designated by
22 the ANC.

1 MEMBER ALBERTI: And was there a
2 vote taken to allow you to represent?

3 MS. PERRY: Yes, there was. It
4 was during the initial protest.

5 MEMBER ALBERTI: Okay. Okay. So
6 we have to -- so we, as a body, have to rely
7 on your representation of the ANC's position.

8 MS. PERRY: Correct.

9 MEMBER ALBERTI: Whether or not
10 you guys met --

11 MS. PERRY: We did.

12 MEMBER ALBERTI: -- you know,
13 that's -- you are the representative and we
14 have to listen to who is here. And I just
15 want to make sure that we have the right
16 person.

17 MS. PERRY: You do.

18 MEMBER ALBERTI: And you're saying
19 we do. Thank you.

20 MS. PERRY: Unfortunately, yes.

21 MEMBER ALBERTI: All right. Okay.

22 CHAIRPERSON MILLER: I just have a

1 follow-up on that. Does your ANC wish to
2 submit a resolution?

3 MS. PERRY: I would love us to on
4 the issue of a grocery store.

5 CHAIRPERSON MILLER: Because --

6 MS. PERRY: That was not something
7 that we did a resolution on. And it was not
8 originally part of the protest.

9 CHAIRPERSON MILLER: Okay.

10 MS. PERRY: And we --

11 CHAIRPERSON MILLER: And that's
12 what you are -- just about the placarding,
13 they didn't put you on notice about that and
14 it wasn't considered until today. And when
15 you got your advisory -- when you got the
16 opinion reopening the record, it was after the
17 ANC meeting?

18 MS. PERRY: It was after our
19 November meeting.

20 CHAIRPERSON MILLER: Okay. Well,
21 I just would like to suggest that there is an
22 objection. If your meeting is January 2nd --

1 MS. PERRY: It's the second
2 Monday.

3 CHAIRPERSON MILLER: Oh.

4 MS. PERRY: Not --

5 CHAIRPERSON MILLER: It's not
6 January --

7 MS. PERRY: It's not January 2nd.

8 CHAIRPERSON MILLER: -- 2nd.

9 MS. PERRY: We are not even sworn
10 in yet. We don't get sworn in --

11 CHAIRPERSON MILLER: What's the
12 date of the second Monday?

13 MS. PERRY: Huh?

14 CHAIRPERSON MILLER: What's the
15 date of the second Monday?

16 MS. PERRY: I would have to get
17 out a calendar. I don't know.

18 CHAIRPERSON MILLER: Is that when
19 we come back, January 7th?

20 MR. O'BRIEN: Monday is the 31st.
21 So the first Monday would be the 6th.

22 CHAIRPERSON MILLER: The 9th is a

1 Wednesday.

2 MR. O'BRIEN: And the next Monday
3 would be the 13th, the second Monday, I think.

4 MS. PERRY: We get sworn in that
5 first week of January.

6 MEMBER SILVERSTEIN: The second
7 Monday is the 14th of January.

8 CHAIRPERSON MILLER: Oh, it's the
9 14th.

10 MR. O'BRIEN: Oh.

11 MS. PERRY: So that would be our
12 first meeting of the new Commission.

13 CHAIRPERSON MILLER: Well I --
14 yes? I was just thinking of the possibility
15 of keeping the record open for that one
16 resolution and then, Mr. O'Brien, if you
17 wanted to respond to it. I don't know if you
18 do.

19 MR. O'BRIEN: Well, I have
20 questions for Ms. Perry based on the Board's
21 questions.

22 MEMBER ALBERTI: Okay. All right.

1 CHAIRPERSON MILLER: All right.

2 MEMBER ALBERTI: Sure. But I am
3 not finished yet, sir.

4 CHAIRPERSON MILLER: Did you --

5 MEMBER ALBERTI: Ms. Perry, you
6 submitted the first page of a BZA Order,
7 right? Now, I'll admit that I haven't seen
8 the rest of the order, so my question may be
9 totally off-base, but the BZA Order was
10 written based on testimony given in 2008, July
11 and October 2008. Well, as late as March
12 2009. But no later than March 2009.

13 I have heard much testimony about
14 how Walgreens is evolving over time. And they
15 plan to evolve in the future. All right? And
16 you objected to looking at the future. So I'm
17 wondering -- so I have to kind of view that
18 objection as the same objection to looking in
19 the past.

20 No, wait. Let me finish.

21 MS. PERRY: Yes.

22 MEMBER ALBERTI: So can you speak

1 to the relevance of an order that was based on
2 testimony given in 2009 when we have a
3 constantly evolving retailer?

4 MS. PERRY: I think the reason I
5 raised it is because Walgreens came into the
6 neighborhood -- just to show what Walgreens
7 came into the neighborhood as. It billed
8 itself as a drug store.

9 MEMBER ALBERTI: Oh, but it's not
10 relevant necessarily to what it is today.

11 MS. PERRY: I still believe --

12 MEMBER ALBERTI: Is that correct?

13 MS. PERRY: -- that it's a drug
14 store.

15 MEMBER ALBERTI: I just asked
16 would you believe. I asked is this document
17 now relative to -- relevant for --

18 MS. PERRY: It's relevant just to
19 show --

20 MEMBER ALBERTI: -- what it is
21 today?

22 MS. PERRY: It is relevant just to

1 show that Walgreens billed itself as a drug
2 store.

3 MEMBER ALBERTI: Okay. I'll take
4 that as a no. Thank you, Ms. Perry.

5 Would you quickly read the
6 definition from the Webster's Dictionary of
7 primary again for us? Because in all the mass
8 of papers I have lost --

9 MS. PERRY: Join the club.

10 MEMBER ALBERTI: -- the --

11 MS. PERRY: I had more papers and
12 I think Brian walked off with some of mine.

13 MEMBER ALBERTI: Mr. O'Brien,
14 could you help us out here?

15 MR. O'BRIEN: I don't --

16 MEMBER ALBERTI: Do you have a
17 copy?

18 MR. O'BRIEN: I didn't get a copy
19 of it.

20 MEMBER ALBERTI: Oh, you didn't
21 get a copy either? Maybe that's why I don't
22 have a copy.

1 MR. O'BRIEN: But I do have a
2 dictionary definition.

3 MEMBER ALBERTI: Because I didn't
4 get a copy.

5 MS. PERRY: It's from the Merriam
6 Webster Dictionary and it says definition of
7 primary "First an order of time or
8 development. The primary stage of
9 civilization. First rank importance or value
10 principles.

11 MEMBER ALBERTI: Okay. Thank you.
12 I have it here actually. I just want to make
13 sure it was what I was looking at on the web.
14 I don't know if the sources are the same.

15 Okay. So I have that. Do you
16 know -- do you understand the term plurality?

17 MS. PERRY: Not really.

18 MEMBER ALBERTI: Okay.

19 MS. PERRY: I'm not a lawyer.

20 MEMBER ALBERTI: Oh, well, I'll
21 read you the definition from the dictionary,
22 because it's not a law term.

1 MS. PERRY: Oh, okay. Then maybe
2 I do. I just --

3 MEMBER ALBERTI: It is the state
4 or fact of being plural, a large number or
5 amount, a multitude. Well, I would say we
6 have a -- Walgreens has a multitude of product
7 categories. Would you agree to that? They
8 have many product categories. Would you agree
9 to that?

10 MS. PERRY: I totally agree with
11 that.

12 MEMBER ALBERTI: Okay. If you
13 have a plurality of product categories, none
14 of which is 50 percent or more, how would you
15 define primary?

16 MS. PERRY: If I accepted your
17 premise that nothing with 50 percent or more,
18 I would still define primary by the dictionary
19 definition of what -- of how Walgreens
20 described itself in the SEC filing.

21 MEMBER ALBERTI: No, no, no, no.
22 I'm asking --

1 MS. PERRY: The outside of --

2 MEMBER ALBERTI: Let's not --
3 answer my question, please.

4 MS. PERRY: I thought I did. I
5 mean, I --

6 MEMBER ALBERTI: Okay.

7 MS. PERRY: -- believe that if --

8 MEMBER ALBERTI: Let me follow-up.

9 MS. PERRY: I believe --

10 MEMBER ALBERTI: All right. So --

11 MS. PERRY: -- 50 percent of the
12 store is a pharmacy.

13 MEMBER ALBERTI: So if --

14 MS. PERRY: And pharmacy-related
15 items.

16 MEMBER ALBERTI: -- food sales by
17 some measure, whatever that measure is, if
18 food items was the largest category amongst
19 all categories, then it would be first in
20 order of time or development. You know, it
21 would be -- well, let me put it this way. It
22 would be of first rank.

1 Because if I ranked everything by
2 size and food items was the largest in size,
3 it would be first -- of first rank. So by
4 that categorization, would it not be a primary
5 item category?

6 MS. PERRY: You know, I think it's
7 a hypothetical because I can't agree with you.

8 MEMBER ALBERTI: Absolutely it's a
9 hypothetical. But by that categorization,
10 would it be the primary product?

11 MS. PERRY: If food sales and if
12 the square footage, if, if, if.

13 MEMBER ALBERTI: If, yes,
14 hypothetically.

15 MS. PERRY: Hypothetically?

16 MEMBER ALBERTI: We are talking
17 about definitions here. I feel --

18 MS. PERRY: Hypothetically --

19 MEMBER ALBERTI: -- confident
20 going out on hypotheticals.

21 MS. PERRY: -- Walgreens billed
22 itself as a grocery store and advertised

1 itself as a grocery store and more than 50
2 percent of --

3 MEMBER ALBERTI: No. You're not
4 being responsive to my question.

5 MS. PERRY: Well, I mean, I can't
6 be because it's a hypothetical. And I can't
7 say that 1,700 square -- that it's --

8 MEMBER ALBERTI: Okay.

9 MS. PERRY: -- first.

10 MEMBER ALBERTI: Okay. I have no
11 further questions. Thank you, Ms. Perry.

12 MS. PERRY: Do I think it is what
13 we were trying -- you were trying --

14 MEMBER ALBERTI: Thank you, Ms.
15 Perry.

16 MS. PERRY: -- everybody was
17 trying to do with Mary Cheh and I can't get
18 into that.

19 MEMBER ALBERTI: I don't know what
20 he was trying to do with Mary Cheh. I can't
21 read Mr. Silverstein's mind.

22 MS. PERRY: Okay.

1 MEMBER ALBERTI: Fine.

2 MS. PERRY: I mean, I just -- and
3 I guess I'm not --

4 MEMBER ALBERTI: I'm done.

5 MS. PERRY: I'm not --

6 MEMBER ALBERTI: I'm done. Thank
7 you.

8 MS. PERRY: I'm done dealing in
9 hypotheticals.

10 MEMBER ALBERTI: Ms. Miller, I'm
11 done.

12 CHAIRPERSON MILLER: Okay. Any
13 other Board questions? I did bring up this
14 question, so I think we should resolve it.

15 The stuff you talked about, the
16 opinion of the ANC, if any, being given great
17 weight under 25-331, without a resolution of
18 the ANC, I don't think that your participation
19 necessarily is given great weight. I think it
20 is given, basically, equal weight.

21 MS. PERRY: Wait a minute. Wait a
22 minute.

1 MEMBER SILVERSTEIN: Wait, wait.

2 CHAIRPERSON MILLER: Great weight,
3 great weight.

4 MS. PERRY: We've got --

5 CHAIRPERSON MILLER: Great weight
6 goes to --

7 MS. PERRY: I didn't understand
8 what you were saying. I couldn't hear you.

9 CHAIRPERSON MILLER: I'm talking
10 about the fact that there is no ANC resolution
11 that has been filed. And you had asked about
12 that, because you said the placarding didn't
13 give the notice about the issue of the grocery
14 store.

15 MEMBER ALBERTI: Ms. Miller, I
16 think that Ms. Perry testified that she was
17 voted as -- by the ANC to be the
18 representative. That makes her the duly
19 condoned or however you want to say it --

20 CHAIRPERSON MILLER: Duly
21 designated representative.

22 MEMBER ALBERTI: Duly designated

1 representative and so her testimony and her
2 representation here should carry great weight
3 with us. Unless --

4 CHAIRPERSON MILLER: Do you have a
5 resolution that designated you the
6 representative?

7 MS. PERRY: We filed when we filed
8 our initial protest.

9 CHAIRPERSON MILLER: Okay.

10 MS. PERRY: The initial letter had
11 me in it.

12 CHAIRPERSON MILLER: Okay. Good.

13 MEMBER ALBERTI: Fine.

14 CHAIRPERSON MILLER: I just wanted
15 to make sure that there was something --

16 MS. PERRY: At that point --

17 CHAIRPERSON MILLER: -- from the
18 whole ANC.

19 MS. PERRY: -- it was not a
20 grocery store, that's what I was raising.
21 That it was never replacarded as a grocery
22 store, which is contrary to your notice, Board

1 Notice in 25-421.

2 MEMBER ALBERTI: Madam Chair?

3 MR. O'BRIEN: Madam Chair, I will
4 note that by letter dated February 17, 2012 by
5 the ANC-3F by Karen Perry, Acting Chair,
6 protested and designated Karen Perry as
7 representative.

8 CHAIRPERSON MILLER: Okay. Thank
9 you. Okay. Then let's finish then. Any
10 other questions? Okay. Yes?

11 MR. O'BRIEN: May I follow based
12 on Board's questions?

13 CHAIRPERSON MILLER: Okay.

14 RECROSS-EXAMINATION

15 MR. O'BRIEN: Ms. Perry, Member
16 Alberti asked you about the ANC taking a vote
17 in this case. What was the vote of the ANC?
18 How did it break down numerically?

19 MS. PERRY: To be honest, I don't
20 have the letter in front of me. I think it
21 was 3-2, if I'm not mistaken.

22 MR. O'BRIEN: I will tell you what

1 the -- I'll let you look at the letter, if you
2 would like to?

3 MS. PERRY: I mean, I can. I
4 think it was 3-2, if I'm not mistaken.

5 MR. O'BRIEN: Well, I would tell
6 you that your February 17th letter does say
7 ANC voted 3-2-0.

8 MS. PERRY: Yes.

9 MR. O'BRIEN: Okay. So the
10 opposition to Walgreens was not unanimous at
11 the ANC, was it?

12 MS. PERRY: The opposition to
13 Walgreens was not unanimous for the sale of
14 beer and wine, as a -- but it was as a drug
15 store, not as a grocery store.

16 MR. O'BRIEN: How many --

17 MS. PERRY: I mean --

18 MR. O'BRIEN: -- are there seven
19 members of the ANC?

20 MS. PERRY: Correct.

21 MR. O'BRIEN: All right.

22 MS. PERRY: Two were not there

1 that night.

2 MR. O'BRIEN: Well, that would be
3 seven. The new ANC is that also going to be
4 seven?

5 MS. PERRY: Yes, it is.

6 MR. O'BRIEN: Okay. How many new
7 faces are on that ANC?

8 MS. PERRY: We are going to get
9 four.

10 MR. O'BRIEN: Well, it seems to me
11 that if --

12 MS. PERRY: They are familiar with
13 the issue.

14 MR. O'BRIEN: Yes. It seems to me
15 that if Ms. Perry wanted to bring this back in
16 front of the ANC, she could. And I'm sure she
17 would afford the applicant an opportunity to
18 present its case --

19 MS. PERRY: Definitely.

20 MR. O'BRIEN: -- to the ANC.

21 MS. PERRY: Definitely.

22 MR. O'BRIEN: I strongly suspect

1 that given the Christmas break we are
2 encountering now and vacations and all, I
3 doubt very much the Board is going to issue an
4 order before January 14th in this case.

5 So I would consent to the record
6 being left open for the sole purpose of the
7 ANC submitting a resolution adopted on January
8 14th.

9 CHAIRPERSON MILLER: Okay. Ms.
10 Perry, is that what you would like to do, give
11 your ANC the opportunity to do that?

12 MS. PERRY: Well, I mean, I will
13 consult with our other members, but as far as
14 I know, I would like to do that.

15 CHAIRPERSON MILLER: Okay.

16 MS. PERRY: I mean, I would like
17 to put it on. I don't have sole authority to
18 just stick it on, but I would like to. So I
19 will contact everybody.

20 CHAIRPERSON MILLER: If the date
21 of the ANC meeting were the 14th, would you be
22 able to --

1 MS. PERRY: Second Monday in
2 January.

3 CHAIRPERSON MILLER: -- would you
4 be able to submit a resolution by the 15th or
5 the 16th?

6 MS. PERRY: If we -- yes, as far
7 as -- I -- yes, I can fax something in, you
8 know, as long as everybody agrees to it, yes.

9 MEMBER SILVERSTEIN: Madam Chair,
10 I don't think it is fair to Commissioner Perry
11 to ask her to speak on behalf of the
12 Commission or to expect her to do something.
13 I think that it would be fair to ask her if
14 she would be willing to allow the Commission
15 to do something.

16 Would she -- if the question is is
17 it okay for us to leave the record open until
18 the week after your meeting and if you choose
19 to do so. I don't think we are in a position
20 where we should be telling any ANC what it
21 should do, other than meet our statutory
22 deadlines.

1 Is that fair, Ms. Perry?

2 MS. PERRY: It's more than fair.

3 CHAIRPERSON MILLER: There is no
4 disagreement.

5 MEMBER SILVERSTEIN: Okay.

6 CHAIRPERSON MILLER: It's still
7 giving them the opportunity to file.

8 MS. PERRY: But I do have to
9 consult with everybody, since it is a new
10 Commission and bring everybody up to date.

11 MEMBER SILVERSTEIN: I mean, the
12 reason we are here is because we want to give
13 the Advisory Neighborhood Commission great
14 weight, otherwise, this meeting would not be
15 here. The gentleman would not have missed his
16 plane from Chicago. Mary Cheh wouldn't have
17 been here.

18 MS. PERRY: I agree. No, I think
19 it is more than fair.

20 MEMBER SILVERSTEIN: Thank you,
21 ma'am.

22 MR. O'BRIEN: And so to be clear,

1 the record will be kept open until January --

2 CHAIRPERSON MILLER: January --

3 MR. O'BRIEN: -- 21 for receipt of
4 a resolution from the ANC should one be
5 forthcoming.

6 CHAIRPERSON MILLER: I don't know
7 if we want to go that far.

8 MR. O'BRIEN: It's only a week
9 after the meeting.

10 MEMBER SILVERSTEIN: The meeting
11 is the 14th.

12 CHAIRPERSON MILLER: Okay. As
13 long as it's all right with our General
14 Counsel. Okay. All right. And you are not
15 seeking any response thereto. Is that
16 correct?

17 MR. O'BRIEN: Huh?

18 CHAIRPERSON MILLER: You are not
19 seeking any response?

20 MR. O'BRIEN: A response?

21 CHAIRPERSON MILLER: Yes. You are
22 not --

1 MR. O'BRIEN: Of the ANC
2 resolution?

3 CHAIRPERSON MILLER: Yes. You
4 don't need to. I'm just making sure that --

5 MR. O'BRIEN: No. Okay.

6 CHAIRPERSON MILLER: -- this is
7 the date.

8 MR. O'BRIEN: I thought I was
9 missing something.

10 CHAIRPERSON MILLER: Yes. No. I
11 just wanted to make sure that you know. Okay.

12 MR. O'BRIEN: Yes.

13 CHAIRPERSON MILLER: So you are
14 amenable to that?

15 MR. O'BRIEN: Yes.

16 CHAIRPERSON MILLER: Okay. Board
17 Members, amenable to that?

18 MS. PERRY: No.

19 MR. O'BRIEN: I have one last
20 question based on Board questions.

21 Ms. Perry, most of the ABC
22 applications that come before your ANC are for

1 businesses that have not opened yet. Are they
2 not?

3 MS. PERRY: We do have businesses
4 that have been open that come before us to
5 modify their voluntary agreements. We have
6 had quite a number of those.

7 MR. O'BRIEN: My question --

8 MS. PERRY: So I guess I'm going
9 to say it's probably 50/50 maybe.

10 MR. O'BRIEN: Okay. Well, let's
11 just say -- then let me take the word most
12 back. Frequently, you have -- the ANC is
13 faced with applications for businesses that
14 are not yet open, correct?

15 MS. PERRY: Yes.

16 MR. O'BRIEN: Okay. And likewise,
17 by the time, if there is a protest filed, it
18 gets before the Board, the business is still
19 not open, correct?

20 MS. PERRY: This is the first
21 application we have protested, so I can't
22 answer you. I can't say our ANC has ever held

1 up an application.

2 MR. O'BRIEN: Okay. Those are my
3 questions.

4 CHAIRPERSON MILLER: Okay. I
5 think that completes your testimony. Was
6 there two minutes for one witness?

7 MEMBER SILVERSTEIN: You have two
8 minutes, yes.

9 CHAIRPERSON MILLER: Okay. It's
10 Mr. Sanders? Do you want to testify?

11 MR. SANDS: Excuse me?

12 CHAIRPERSON MILLER: Do you have
13 anything you want to testify about? Ms.
14 Perry, do you want him to testify?

15 MEMBER ALBERTI: If they don't
16 want to do that, I mean, we're --

17 CHAIRPERSON MILLER: I know. We
18 are short on time.

19 MEMBER ALBERTI: We are two hours
20 late already.

21 CHAIRPERSON MILLER: We don't want
22 anything redundant. If there is anything

1 quickly that you are here to testify about?

2 MR. SANDS: Can I put the
3 testimony in -- you know, give you the
4 testimony that I had prepared?

5 CHAIRPERSON MILLER: Well, Mr.
6 O'Brien would have to look at it, so he could
7 have a chance to cross-examine you on it.

8 MS. PERRY: This is already in the
9 record.

10 CHAIRPERSON MILLER: Right.

11 MS. PERRY: So I'm going to take
12 it out.

13 CHAIRPERSON MILLER: Right.

14 MS. PERRY: Okay. Oh, wait a
15 minute. Yes, these are.

16 CHAIRPERSON MILLER: Your clock is
17 ticking.

18 MS. PERRY: Oh, okay.

19 CHAIRPERSON MILLER: You can just
20 give your highlights. Mr. O'Brien, I don't
21 know. I don't have a copy of the testimony,
22 so I don't know how long it is.

1 MS. PERRY: Yes, only --

2 MR. SANDS: I can give just the
3 highlights.

4 CHAIRPERSON MILLER: Highlights?
5 Okay.

6 MEMBER ALBERTI: Swear him in.

7 CHAIRPERSON MILLER: Go ahead, the
8 clock is --

9 MEMBER ALBERTI: Wait a minute.

10 CHAIRPERSON MILLER: Huh?

11 MEMBER ALBERTI: Do you want to
12 swear him in?

13 CHAIRPERSON MILLER: Yes. Do you
14 want to go over here or stay there? Stay
15 right there for a time.

16 Whereupon,

17 ED SANDS

18 was called as a witness by Counsel for the
19 Plaintiff, and having been first duly sworn,
20 assumed the witness stand and was examined and
21 testified as follows:

22 CHAIRPERSON MILLER: Okay. Thank

1 you.

2 DIRECT EXAMINATION

3 MR. SANDS: Thank you for the
4 opportunity to make some brief comments.

5 I'm the co-owner of Calvert
6 Woodley Fine Wine and Spirits. Most -- a good
7 deal of what I was going to say is already
8 discussed.

9 I kind of thought that that list
10 that was given to you with the 2,100 items,
11 consumable items only 72 of those items are
12 classified as fresh food, that's 3.5 percent
13 of the items, of the consumable items that are
14 possibly carried in the store are only
15 considered fresh food or grocery items.

16 According to the advisory opinion,
17 the sale of consumable items was 19 percent of
18 the store sales in February. And this
19 includes snack items, which are normally
20 carried by this type of store, a pharmacy,
21 convenience store or whatever.

22 On their website, the store has 12

1 tabs. I won't read them all to you, but I'll
2 state none of those tabs indicate as any
3 reference to food or consumable items.
4 Everything has to do with pharmaceutical
5 items, household items and so forth.

6 MEMBER SILVERSTEIN: Thank you,
7 sir.

8 MR. SANDS: Now, if you look at
9 the --

10 CHAIRPERSON MILLER: Is that his
11 time?

12 MR. SANDS: -- inserts which I
13 have included --

14 CHAIRPERSON MILLER: Okay.

15 MR. SANDS: -- with my testimony--

16 CHAIRPERSON MILLER: You are
17 actually out of time.

18 MR. SANDS: Sorry?

19 CHAIRPERSON MILLER: You have used
20 up all the time.

21 MR. SANDS: I have?

22 CHAIRPERSON MILLER: They had 90

1 minutes and you were last and so if you have
2 one sentence to wrap-up, otherwise we will
3 just stop here.

4 MR. SANDS: Are you talking to me?

5 CHAIRPERSON MILLER: Yes, I'm
6 talking to you.

7 MR. SANDS: Yes. One minute.

8 MS. PERRY: Can he have one
9 minute?

10 CHAIRPERSON MILLER: No, not one
11 minute. One like sentence to wrap it up.
12 Wrap it up.

13 MR. SANDS: Right. Okay. If you
14 look at those inserts that were in yesterday's
15 paper, you will see the clear difference
16 between what we all recognize as grocery
17 stores, full-service grocery stores and the
18 offerings by Walgreens.

19 CHAIRPERSON MILLER: Okay.

20 MR. SANDS: And thank you for
21 giving me 30 second.

22 CHAIRPERSON MILLER: Thank you.

1 Thank you very much. Sorry you got squeezed
2 at the end.

3 CROSS-EXAMINATION

4 MR. O'BRIEN: Mr. Sands? Mr.
5 Sands, as you said, you're the owner of
6 Calvert Woodley, which is a liquor store on
7 the same block, correct?

8 MR. SANDS: Next block.

9 MR. O'BRIEN: Next block. One
10 block away. One of the reasons that you are
11 protesting is you are concerned about
12 competition hurting your store if Walgreens
13 gets a beer and wine license, correct?

14 MR. SANDS: It is certainly one,
15 but it's not the only reason.

16 MR. O'BRIEN: And the other reason
17 is that you feel it is fundamentally unfair
18 for the grocery store exception to allow an
19 entity to have multiple licenses when you, as
20 a Class A owner, can only have one license.
21 Is that not the other reason?

22 MR. SANDS: That's partly it.

1 It's not fully the -- that's not fully my
2 position. I think that the proliferation of
3 the beer and wine stores in every grocery
4 store, in every drug store, in every store of
5 that type is not a good thing for the city.

6 MR. O'BRIEN: Yes. When you talk
7 about whether Walgreens qualifies as a full-
8 service grocery store, you are expressing your
9 personal opinion, correct?

10 MR. SANDS: Yes. And the fact I
11 sell more groceries than they will. And I'm
12 not a grocery store. I probably sell and will
13 sell even with the -- what the intend to do,
14 I sell five times the amount of food items --

15 MR. O'BRIEN: There is no such
16 thing as --

17 MR. SANDS: -- that they can --

18 MR. O'BRIEN: -- a Class A full-
19 service grocery store, is there?

20 MR. SANDS: Well, maybe we will go
21 for one.

22 MR. O'BRIEN: And so would you

1 agree that that concern you have citywide
2 really is appropriately addressed through the
3 legislature, including Councilmember Cheh as
4 opposed to in the particular case of whether
5 a particular store should be licensed?

6 MR. SANDS: Say that again.

7 MR. O'BRIEN: Do you not agree
8 that your concerns about proliferation --

9 MR. SANDS: Right.

10 MR. O'BRIEN: -- of Bs with
11 licenses really is a legislative concern that
12 should be addressed at Council as opposed to
13 a reason for the Board to rule one way or
14 another in a particular case?

15 MR. SANDS: No, no, I don't agree
16 with that at all. I think that this is very
17 important the way the Board rules on this.

18 MR. O'BRIEN: Okay.

19 MR. SANDS: Because it will be a
20 precursor of what is to come.

21 MR. O'BRIEN: And if the next
22 full-service grocery store application is in

1 say Ward 5, will you be here at the Board to
2 tell the Board what you think is a full-
3 service grocery store?

4 MR. SANDS: If they would like me
5 to come, I will be here.

6 MR. O'BRIEN: Okay. Thank you.

7 MR. SANDS: And spend my whole
8 day.

9 MS. PERRY: Especially if you are
10 the attorney.

11 MR. O'BRIEN: Oh, I'm sure. Okay.

12 CHAIRPERSON MILLER: Okay. I
13 think we are finished with witnesses.

14 MS. PERRY: I just have one
15 question.

16 CHAIRPERSON MILLER: Okay.

17 REDIRECT EXAMINATION

18 MS. PERRY: Mr. Sands, you also
19 sell deli?

20 MR. SANDS: Oh, wait a minute.

21 MS. PERRY: Oh, never mind. I'll
22 stop. It's late.

1 CHAIRPERSON MILLER: Okay.

2 MS. PERRY: I have to get out,
3 too.

4 CHAIRPERSON MILLER: Are you going
5 to do closings or are you going to forego
6 closings?

7 MR. O'BRIEN: I just want to make
8 one point on the closing.

9 CHAIRPERSON MILLER: Okay.

10 MR. O'BRIEN: Although it may not
11 be Commissioner Perry's personal experience in
12 her ANC, the great majority of applications
13 that come before the Board are for businesses
14 that are not yet open. And the Board must
15 rely on commitments, projections as to what
16 the nature of the business will be.

17 Otherwise, there wouldn't be any
18 new licenses granted in the city.

19 MEMBER ALBERTI: That's true.

20 MR. O'BRIEN: So the fact that we
21 are arguing that the food, fresh food is at
22 this level right now, but in a few short

1 months, probably before the Board issues its
2 decision in this case, it is going to be at
3 another level, a higher level. It is
4 certainly admissible and competent.

5 CHAIRPERSON MILLER: Okay.

6 MR. O'BRIEN: And I think the
7 other issues have all been vetted fully.

8 CHAIRPERSON MILLER: All right.
9 Thank you. Ms. Perry, do you have any other
10 closing remarks?

11 MS. PERRY: I would like just to
12 address what Mr. O'Brien just said. Maybe
13 it's not true in our ANC, because we do
14 usually do -- we do stipulated licenses in
15 most of our -- I can't say every establishment
16 that I'm aware of, we do stipulated licenses
17 and people have voluntaries before they open.

18 In this case, we are not talking
19 about a license that hasn't -- or a store that
20 has been placarded and an ANC's protesting.
21 This store is open. It has been operating now
22 for a year.

1 So it's not quite the same as the
2 analogy that Mr. O'Brien just used of a Board
3 not knowing what is going to happen or
4 something in the future.

5 I would just like to say I want to
6 thank the Board for their time today and at
7 the last hearing, because I think it was nice
8 of you to reopen it and give this whole thing
9 a second look.

10 CHAIRPERSON MILLER: Thank you.
11 Any other final questions? Okay. I'm going
12 to close the record now, except for leaving it
13 open for the ANC to file a resolution on the
14 question of Walgreens' qualification for
15 licensure pursuant to 25-331. That is until
16 January 21, should the ANC choose to do so.

17 MS. PERRY: Was Councilmember
18 Cheh, and I might have missed it, was she
19 going to produce an SEC filing for the record?

20 CHAIRPERSON MILLER: No.

21 MS. PERRY: Oh, okay.

22 CHAIRPERSON MILLER: I think she

1 offered.

2 MS. PERRY: Sure.

3 CHAIRPERSON MILLER: It is public
4 record.

5 MS. PERRY: Okay.

6 CHAIRPERSON MILLER: So the Board
7 could look at that public record, but --

8 MS. PERRY: I was just asking
9 because I just heard -- I kind of lost track.

10 CHAIRPERSON MILLER: Right, right.

11 MEMBER ALBERTI: Ms. Miller, I
12 just want to understand the conditions under
13 which we are opening -- keeping the record
14 open, because we are going to accept this
15 resolution from the ANC, but I thought there
16 was kind of a stipulated objection here from
17 Mr. O'Brien that it was under the
18 understanding he would have no objection under
19 the understanding if the ANC allowed his
20 client to present their case to the ANC before
21 -- and use that in considering the resolution.

22 Am I correct here in my

1 understanding of the agreement that we had
2 between the parties?

3 MS. PERRY: Let me speak for that.
4 Our ANC never has an agenda item where we
5 would not invite Mr. O'Brien.

6 MEMBER ALBERTI: All right. Then
7 we have an understanding.

8 MS. PERRY: Yes. We invite him.

9 MEMBER ALBERTI: Then we have that
10 understanding.

11 MS. PERRY: We invite every
12 licensed applicant to come or --

13 MEMBER ALBERTI: Okay.

14 MS. PERRY: -- public space
15 applicant, whatever it is. We never just meet
16 in private.

17 MEMBER ALBERTI: All right. I
18 just wanted to have that on the record. Thank
19 you.

20 CHAIRPERSON MILLER: Finally. Do
21 the parties want to file proposed findings of
22 fact and conclusions of law?

1 MS. PERRY: Possibly.

2 CHAIRPERSON MILLER: Mr. O'Brien?

3 MR. O'BRIEN: Possibly if --

4 CHAIRPERSON MILLER: Possibly.

5 MS. PERRY: I said that the last
6 time and we didn't, so --

7 CHAIRPERSON MILLER: Okay. All
8 right. Let me say this. I mean, if you
9 really --

10 MEMBER SILVERSTEIN: Possibly
11 doesn't work. You either will or won't.

12 CHAIRPERSON MILLER: You know, our
13 General Counsel set her deadline to write
14 these orders, so we don't want to leave the
15 record open too long and then you don't file
16 them and then, you know. But if you are
17 asking us to leave the record open, we will.
18 Just alert us that you are -- alert Ms.
19 Jenkins that you are not going to be filing,
20 if you are not.

21 I would think you would want to,
22 too, Mr. O'Brien.

1 MS. PERRY: I would do that at the
2 same time as we file our other resolution, if
3 we are not going to do so.

4 CHAIRPERSON MILLER: Okay.

5 MS. PERRY: If we file a
6 resolution, I should say.

7 MEMBER ALBERTI: Well, Ms. Miller?

8 CHAIRPERSON MILLER: What?

9 MEMBER ALBERTI: Usually the
10 findings of fact and conclusions of law are --
11 the parties wait for the transcript, because
12 it is kind of meaningless if you don't have
13 the transcript if it's based solely on your
14 memory. Unless you are better at it than I
15 am.

16 MS. PERRY: I wish.

17 MR. O'BRIEN: I assure you I'm
18 not.

19 MS. PERRY: And I can --

20 MEMBER ALBERTI: So our transcript
21 will probably not be out for two weeks.

22 CHAIRPERSON MILLER: Two weeks.

1 MEMBER ALBERTI: So I'm trying to
2 understanding the statement that you are going
3 to have that kind of a document prepared and
4 to us by --

5 MS. PERRY: No, I think what I'm
6 saying --

7 MEMBER ALBERTI: -- by the 6th of
8 January.

9 MS. PERRY: -- is I would notify
10 the Board if we were not going to file them.

11 CHAIRPERSON MILLER: By the 21st?
12 The date that we are leaving the record open.

13 MS. PERRY: The 21st. I would
14 notify the Board if we were not going to file
15 them.

16 MEMBER ALBERTI: Okay.

17 MS. PERRY: I wouldn't leave you
18 dangling for months.

19 MEMBER ALBERTI: Okay. Fine. All
20 right. Thank you.

21 CHAIRPERSON MILLER: Mr. O'Brien,
22 do you think -- do you have an opinion on that

1 or you just want to leave it open?

2 MR. O'BRIEN: Well --

3 CHAIRPERSON MILLER: I mean --

4 MR. O'BRIEN: -- I could agree
5 that we would notify the Board's staff by the
6 21st of January whether we are going to file
7 or not.

8 CHAIRPERSON MILLER: Right. Thank
9 you. That's all.

10 MR. O'BRIEN: But if we notify
11 that we are, then when are they due?

12 CHAIRPERSON MILLER: They are due
13 30 days after you get the transcript. And the
14 transcript is available in, approximately, two
15 weeks.

16 MR. O'BRIEN: Is that when I'm
17 required to file --

18 CHAIRPERSON MILLER: After the
19 holidays.

20 MR. O'BRIEN: -- the findings
21 within a week of advice that we are going to
22 file the findings?

1 CHAIRPERSON MILLER: If you are
2 filing what?

3 MR. O'BRIEN: Two different
4 calendars.

5 CHAIRPERSON MILLER: Oh.

6 MR. O'BRIEN: You start that clock
7 ticking when the transcript is prepared.

8 CHAIRPERSON MILLER: Correct. I
9 don't know what the dilemma is.

10 MR. O'BRIEN: Okay. Can I suggest
11 this? We will -- the rest of this month is
12 shot for everyone, as a practical matter. So
13 let's -- especially the Board. Let's leave
14 the record open for that single purpose that
15 we discussed.

16 CHAIRPERSON MILLER: That has been
17 done.

18 MR. O'BRIEN: Until the 21st. And
19 proposed findings and conclusions are due the
20 31st, if a party deems it appropriate to file
21 it.

22 MS. PERRY: Oh, no.

1 CHAIRPERSON MILLER: No. They are
2 due 30 days after the transcript is available.

3 MS. PERRY: After the transcript.

4 CHAIRPERSON MILLER: It is later.
5 I mean, I don't know what the date is.

6 MEMBER ALBERTI: Well, let's --

7 CHAIRPERSON MILLER: But that's
8 standard. That's what the rule is.

9 MEMBER ALBERTI: We're not talking
10 about the same thing, Mr. O'Brien, so just 30
11 days is fine. Two weeks from now is the 1st
12 of January and --

13 CHAIRPERSON MILLER: And 30 days.
14 It's about the same time.

15 MR. O'BRIEN: All right.

16 MS. PERRY: Give or take.

17 CHAIRPERSON MILLER: You just let
18 us know on the 21st if you are not going to do
19 it, that's all.

20 MR. O'BRIEN: Okay.

21 CHAIRPERSON MILLER: If you know
22 you are not going to do it.

1 All right. I think that's all
2 set. Okay. Neither party has waived their
3 right on that one. And I think we are set.
4 I'm going to read my closing remarks, but if
5 you have to race off, you can.

6 Okay. No more questions, correct?

7 MEMBER ALBERTI: Yes.

8 CHAIRPERSON MILLER: Everybody is
9 set? Okay.

10 MEMBER SILVERSTEIN: If the Board
11 keeps on affording an opportunity, I'll think
12 of one.

13 MS. PERRY: Me, too. Do I give
14 this in the record now or do you have
15 everything? These are the --

16 CHAIRPERSON MILLER: If you gave
17 us copies of all the exhibits, we have them.

18 MS. PERRY: Okay.

19 CHAIRPERSON MILLER: So you keep
20 them.

21 MS. PERRY: Okay. I don't have to
22 give you these copies then.

1 CHAIRPERSON MILLER: Okay. As
2 Chairperson of the Alcoholic Beverage Control
3 Board for the District of Columbia and in
4 accordance with ^U 405 of the Open Meetings
5 Amendment Act of 2010, I move that the ABC
6 Board hold a closed meeting for the purpose of
7 seeking legal advice from our counsel on Case
8 No. 12-PRO-00013, Walgreens #11408, located at
9 4225 Connecticut Avenue, N.W., per ^U 405(b)(4)
10 of the Open Meetings Amendment Act of 2010 and
11 deliberating upon this case after receipt of
12 proposed findings of fact and conclusions of
13 law, should they come in for the reasons cited
14 in ^U 405(b)(13) of the Open Meetings Amendment
15 Act of 2010.

16 Is there a second?

17 MEMBER BROOKS: Second.

18 CHAIRPERSON MILLER: Okay. The
19 motion has been seconded by Mr. Brooks. I'll
20 take a roll call vote.

21 Mr. Brooks?

22 MEMBER BROOKS: I agree.

1 CHAIRPERSON MILLER: Mr. Alberti?

2 MEMBER ALBERTI: I agree.

3 CHAIRPERSON MILLER: Ms. Miller

4 agrees.

5 Mr. Silverstein?

6 MEMBER SILVERSTEIN: I agree.

7 CHAIRPERSON MILLER: Mr.

8 Silverstein agrees.

9 It appears the motion has passed
10 by a 4-0-0 vote.

11 I hereby give notice that the ABC
12 Board will hold a closed meeting in the ABC
13 Board conference room after receipt of the
14 proposed findings of fact and conclusions of
15 law, should they be filed, pursuant to the
16 Open Meetings Amendment Act of 2010 and issue
17 an order within 90 days.

18 Thank you.

19 MR. O'BRIEN: Thank you.

20 CHAIRPERSON MILLER: Have a good
21 holiday.

22 MS. PERRY: Thank you.

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CHAIRPERSON MILLER: All right.

Okay. I know that there are people waiting for our next and last hearing for this afternoon, the Summary Suspension Hearing. The Board is going to take just a five minute break and then we will come back for that case.

(Whereupon, the Protest Hearing in the above-entitled matter was concluded at 6:12 p.m.)

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