

DISTRICT OF COLUMBIA
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ALCOHOLIC BEVERAGE CONTROL BOARD
+ + + + +
PUBLIC HEARING

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IN THE MATTER OF: :

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Full Service Grocery Store : Rulemaking

Definition Rulemaking : Hearing

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Section 199 of the DCMR :

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February 28, 2013

The Alcoholic Beverage Control Board met in Alcoholic Beverage Control Hearing Room, Reeves Building, 2000 14th Street N.W., Washington, D.C., Chairperson Ruthanne Miller presiding.

PRESENT:

RUTHANNE MILLER, Chairperson

NICK ALBERTI, Member

DONALD BROOKS, Member

HERMAN JONES, Member

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

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

1:36 p.m.

CHAIRPERSON MILLER: Good
afternoon. Welcome to the Alcoholic Beverage
Control Board.

My name is Ruthanne Miller. I'm
the Chair. And joining me today is Mr. Donald
Brooks to my far right, Mr. Nick Alberti to my
immediate right, and Mr. Herman Jones to my
far left. Mr. Mike Silverstein's our other
board member and he unfortunately couldn't be
here today, but will read the transcript.

Today we have a series of
rulemaking hearings. We have heard the
morning calendar of rulemaking and we are not
beginning with the afternoon calendar starting
with the Full Service Grocery Store Definition
Rulemaking related to Section 199 of the DCMR.

We're here today pursuant to D.C.
Official Code 25-211(B) to conduct a public
hearing and take comment on a proposed
rulemaking to amend Chapter 1, Provisions of

1 General Applicability of Title 23 of the
2 District of Columbia Municipal Regulations.

3 These proposed rules define what
4 constitutes a full service grocery store. In
5 order to effectuate the purpose of the full
6 service grocery store exception to the
7 existing moratorium on the issuance of new
8 off-premises class B retailers licenses.

9 This rulemaking is also necessary
10 to address the specific provision of the
11 Omnibus Alcoholic Beverage regulatory
12 Emergency Amendment Act of 2012, which
13 requires the Board to undertake a rulemaking
14 defining the term "full service grocery store"
15 within 45 days of the effective date of the
16 Act.

17 I'll begin this hearing by calling
18 on those witnesses who notified the Agency in
19 advance regarding their desire to address the
20 Board. The Board will then hear from any
21 other individuals who wish to testify on this
22 proposed rulemaking. Each witness will be

1 granted five minutes to speak. If there's any
2 time left at the end of the hearing, the Board
3 may consider granting additional time to
4 individuals.

5 If you have prepared written
6 remarks, please hand them to Ms. Jenkins, our
7 general counsel, and she will ensure that they
8 are properly filed. After the Board convenes
9 this hearing today, the record will remain
10 open for interested parties to submit
11 additional comments by Friday, March 8th, 2012
12 at 4:00 p.m.

13 Okay. So we have basically four
14 seats available at a time, so I'm going to
15 call the four first witnesses that I have on
16 my list. Mr. Paul Pascal, counsel for CVS,
17 Pascal & Weiss. Mr. Risa Hirao. Is she here?
18 Okay. Vice-president and associate counsel,
19 District of Columbia Association of Beverage
20 Alcohol Wholesalers. Gary Cha, owner, Yes!
21 Organic Market. And I don't see Ms. Perry
22 here right now, so we can come back to her if

1 she comes. Brian Lederer. Is he here? No,
2 I don't see him either. And Andrew Kline.
3 Don't see him either.

4 Is there anybody else in the
5 audience who wishes to testify at this time?
6 Do you have papers to -- okay. Would you all
7 sign in also with your name and your
8 organization? Thank you. And when you're
9 ready, we could start with Mr. Pascal.

10 MR. PASCAL: Good afternoon, Madam
11 Chair and fellow Board Members. I preface my
12 remarks that sometimes in the practice of law,
13 and it's rare that you have to say things that
14 may foreclose you politically or deny me
15 access to what I do as a daily living at the
16 D.C. Council, but I have an obligation to CVS.

17 Dear Chairperson Miller and Board
18 Members, my name is Paul L. Pascal, counsel
19 for the District of Columbia CVS Pharmacy
20 whose class B off-premise retailer license
21 application remains pending before this Board.
22 Thank you for the opportunity to come on a

1 proposed regulations that seek to impose
2 restrictions on the type of business that may
3 apply for a class B license under the full
4 service grocery store exception.

5 It is reasonable for an applicant
6 to anticipate a protest to its license
7 application. It his however an outrageous
8 abuse of the system when a Council Member
9 becomes a de facto protestant and aggressively
10 lobbies the Board to reject an application.
11 In all of my many years practicing alcoholic
12 beverage control law, it is rare if not
13 unheard of when a Council Member interferes in
14 the license application process.

15 Council Member Mary Cheh using her
16 political office and influence inappropriately
17 waged an aggressive campaign to sway this
18 Board to reject pending license applications
19 that have been submitted under what is
20 commonly known as the full service grocery
21 store exception. I was shocked when I learned
22 that she engaged in ex parte communications in

1 one applicant's case by delivering a three-
2 page legal brief on behalf of the protesting
3 ANC to each Member of this Board. Without
4 disclosing these communications to the
5 applicant, Council Member Cheh attempted to
6 persuade Board Members to grant the
7 protestant's motion for a continuance and
8 presented legal arguments to deny the class B
9 license application.

10 Ms. Cheh, who is a licensed
11 attorney, should be well aware that secrecy of
12 contacts, especially with an individual who
13 holds political office, is offensive to the
14 fundamental notions of fairness implicit in
15 due process and interferes with the Board's
16 recent decision making on the merits. Yet she
17 continued to escalate her activities to block
18 the application by testifying as a witness for
19 protestants. She even held out to her
20 constituents and to the public at large that
21 these actions were taken as her official
22 capacity as Council Member.

1 Her recent opposition to
2 applications filed under the exception however
3 is out of place. Based on information I have
4 received, the Council Member attended the
5 opening of Walgreens which is located between
6 the two pending applications on Connecticut
7 Avenue.

8 Council Member Cheh's actions have
9 impacted every pending class B license
10 application that was submitted under the
11 exception. We can also credit her for today's
12 hearing. She introduced emergency legislation
13 which suspended applications and mandated the
14 creation of new regulations defining a scope
15 of who qualifies under the full service
16 grocery store exception with proposed
17 regulations that are clearly targeted to
18 prevent Walgreens and CVS from obtaining a
19 license. I find it impossible to disassociate
20 Ms. Cheh's conduct from the proposed
21 regulations that are the subject of this
22 hearing.

1 In fact, I believe it is not a
2 coincidence that the proposed regulations on
3 the full service grocery store exception are
4 similar to a New York City's Food Retail
5 Expansion to Support Health (FRESH) Program.
6 Exhibit C. Council Member Cheh has also been
7 an outspoken advocate of the FRESH Program and
8 has not concealed her ambitions to implement
9 a similar program in the District of Columbia.
10 In fact, FRESH was frequently cited by the
11 Council Member as she promoted the passage of
12 the FEED DC Act.

13 The purpose of the FEED DC Act is
14 to fight obesity, attract grocery stores,
15 generate jobs in low-income areas and provide
16 incentives for businesses to relocate or
17 renovate grocery stores in under-served areas
18 in the District. It is evident that the
19 Council Member sees an opportunity to promote
20 the FRESH Program and properly uses alcoholic
21 beverage control laws and regulations as a
22 avenue to advance her agenda to implement a

1 social and economic program similar to New
2 York City.

3 Before the Board commits to
4 narrowing the requirements of the Full Service
5 Grocery Store Exception it should understand
6 the circumstances that led to this law. I am
7 familiar with the legislation background
8 through my involvement in developing this law.
9 The aim of the exception went beyond the
10 introduction of D.C.'s first Whole Foods. The
11 Full Service Grocery Exception was a solution
12 to attract businesses to the District in light
13 of the drain of food providers from the
14 District which was triggered by the April '68
15 riots.

16 It is also distinguishable from
17 the objectives of the FEED DC Act. The
18 exception is not a zoning and financial
19 incentive program whose mission is to promote
20 revitalization of a specific area of D.C. and
21 to stimulate employment. It is not a public
22 health program whose objective is to combat

1 obesity. Rather it's goals were to attract a
2 variety of food service businesses to all
3 wards, especially during a time when no
4 grocery businesses wanted to return to the
5 District.

6 Drafters had the foresight to
7 favor a broader view of full of a service
8 grocery store since the aim was to attract
9 commerce. This was a wise move as the city
10 has experienced an upward trend in small
11 organic food stores, unique food service
12 operations and crossover businesses such as
13 Target, Walgreens, CVS entering the market.

14 The current law exhibits
15 flexibility that is essential to respond to
16 the changing landscape of grocery stores.
17 This was noted in CVS' testimony during its
18 April 18th, 2012 fact finding hearing. The
19 proposed regulation, by contrast, with its
20 impractical restrictive space and product
21 requirements are out of touch with business
22 market realities. Under the Board's proposed

1 regulations a successful applicant must
2 dedicate a minimum space requirement to
3 specific categories of food which curiously do
4 not include canned and frozen goods. This is
5 contrary to the current law which requires the
6 applicant to offer canned and frozen goods
7 among other consumables.

8 And additionally these regulations
9 are not practical and interfere with business
10 operations. What happens to an applicant if
11 one of their required product areas falls
12 slightly below five percent of the space
13 requirement? Who will be responsible of
14 ensuring the accuracy of measurement?

15 Protestants have also unfairly
16 demonized crossover retail businesses who seek
17 a class B license under the exception and have
18 a gross misconception regarding the quantity
19 of alcoholic beverages that would be sold by
20 these licensees. Under the exception sales of
21 alcohol are ancillary, not a primary function
22 of the licensed businesses. They cannot

1 exceed 15 percent of the total volume. In
2 most cases CVS sales of alcoholic beverages
3 would be within four to eight percent of gross
4 receipts.

5 It is fundamentally unfair to hold
6 pending applications hostage. Pending
7 applicants should not be penalized,
8 particularly after paying expensive fees
9 because there has been a political change of
10 heart regarding the scope of the full service
11 supermarket. ABRA and this Board have issued
12 many class B off-premise licenses under the
13 Full Service Grocery Store Exception. Two
14 were issued to Walgreens without controversy
15 or complaint. CVS submitted its application
16 and paid its fee only after a careful
17 assessment and understanding of the legal
18 requirements and parameters of ABRA's practice
19 in issuing this type of license, especially
20 after it issued two licenses to Walgreens.

21 The CVS application was submitted
22 in full compliance with the District of

1 Columbia Alcoholic Beverage Control laws. My
2 client expected that the administrative
3 process would determine the merits of its
4 application. At no time did CVS as well as
5 other applicants expect that the application
6 process would be the focus of a political
7 agenda which the protestants achieved when
8 they solicited the assistance of Council
9 Member Cheh. The protest with Council Member
10 Cheh as their advocate circumvented the
11 Board's jurisdiction and used political means
12 to define the scope of the Full Service
13 Grocery Store Exception.

14 CHAIRPERSON MILLER: Mr. Pascal?

15 MR. PASCAL: As a matter of
16 fairness --

17 CHAIRPERSON MILLER: Mr. Pascal,
18 are you almost done?

19 MR. PASCAL: This is my last
20 paragraph.

21 CHAIRPERSON MILLER: Okay. Go
22 ahead. Yes.

1 MR. PASCAL: As a matter of
2 fairness any contemplated restrictions on the
3 Full Service Supermarket Exception as a result
4 of this Board's rulemaking must be imposed on
5 new applicants, not on pending applications
6 that did not have the benefit of knowing that
7 a change would take place. However, I would
8 urge the Board to exercise restraint in
9 enacting new regulations that restrict the
10 Full Service Exception. Thank you very much.

11 CHAIRPERSON MILLER: Thank you.
12 Okay. What we're going to do is -- oh, Ms.
13 Perry, I see you've arrived. Is Mr. Lederer
14 with you also?

15 MS. PERRY: (Off microphone.)

16 CHAIRPERSON MILLER: Oh, okay.
17 Then I'll wait to call you the next panel.
18 Okay. All right. I'm sorry, what's -- Ms.
19 Hirao?

20 MS. HIRAO: Oh, thank you.

21 CHAIRPERSON MILLER: Go ahead.

22 MS. HIRAO: Good afternoon.

1 CHAIRPERSON MILLER: Good

2 afternoon.

3 MS. HIRAO: I'm here on behalf of
4 D.C. Association of Beverage Alcohol
5 Wholesalers, and thank you for the opportunity
6 to let me read my statement.

7 CHAIRPERSON MILLER: Okay.

8 MS. HIRAO: DCABAW represents the
9 interests of licensed wholesalers in the
10 District of Columbia. Our members serve
11 licensed retailers which include many grocery
12 stores. On behalf of DCABAW I appreciate this
13 opportunity to comment on the proposed
14 regulations that seek to define, redefine
15 actually qualifications of businesses that may
16 be exempt from the moratorium on class B off-
17 premise licenses. This exception is commonly
18 known as the Full Service Grocery Store
19 Exception that's found in the ABC laws.

20 For many years D.C. was considered
21 an undesirable market for grocery stores.
22 Since the enactment of the Full Grocery Store

1 Exception, we have seen an entry of new
2 businesses and the expansion of exciting
3 makeovers of long-established businesses here
4 in D.C. Smaller gourmet organic stores have
5 benefitted from this exception. This exciting
6 renaissance would not have taken place prior
7 to the enactment of the Grocery Store
8 Exception. We credit this law for the robust
9 growth here.

10 Changes are occurring in the
11 grocery store industry. That is spurred by
12 time-starved consumers such as myself who are
13 seeking more one-stop shopping opportunities.
14 Faced with this demand, there has been a
15 rising crossover store format. The industry
16 has recognized this trend. According to the
17 Food Marketing Institute the definition of
18 grocery store has expanded. It has expanded
19 from the traditional supermarket store format
20 to ones that include non-traditional
21 retailers, and these include wholesale clubs,
22 pharmacies and mass merchandisers such as

1 Target, K-Mart and Walmart.

2 Our association is concerned that
3 the proposed regulations will swing the
4 pendulum back too far and reverse the progress
5 of attracting quality businesses back to D.C.,
6 which is in my opinion a great achievement
7 considering the steep economic challenges that
8 face our country right now and the competition
9 for business dollars that D.C. addresses
10 everyday from Virginia and Maryland.

11 Council Member Grosso addressed
12 his opinion about the state of regulations and
13 rulemaking directed toward the business
14 community at a recent CHAMPS meeting. CHAMPS
15 is the Capitol Hill Chamber of Commerce. I
16 share these comment with you because I believe
17 they are relevant to this hearing and our
18 association's concerns about the regulations.

19 In this meeting Council Member
20 Grosso stated that D.C. needs regulations that
21 make sense in the real world and he criticized
22 enactments of regulations just for the sake of

1 regulating. The proposed Full Service Grocery
2 Store Exception unfortunately fails against
3 these measures. Proposed regulations are out
4 of touch with the realities of the current
5 business market. They ignore the realities of
6 retailer operations and in my opinion lack an
7 understanding of products that are sold
8 through grocery store businesses.

9 The regulations propose retailers
10 to maintain minimum floor space requirements
11 dedicated to at least four out of five
12 categories of food, and they are actually
13 listed in your proposed regulation, but let me
14 read them out to you for the benefit of the
15 audience who are sitting behind me.

16 No. 1 is fresh, uncooked or
17 unprocessed meat, poultry or fish, or any
18 combination. The second category is fresh,
19 uncooked or unprocessed fruits or vegetables,
20 or a combination thereof. Third category:
21 bread, cereals or baked goods of any
22 combination. Fourth category is dairy

1 products. Fifth category is dry groceries,
2 which to me is a big term, but in the
3 parentheses it says it's baking soda, coffee,
4 corn meal, etcetera.

5 The proposed minimum space
6 requirements is determined by a two-level
7 calculation. The retailer must first overcome
8 the initial threshold square footage
9 requirement dedicated to four out of five
10 categories, which is either 50 percent or more
11 of its retail space; I underscore retail space
12 in this, or a minimum 6,000 square feet.

13 Next, once you overcome this
14 initial threshold, the retailer must bypass
15 another hurdle by ensuring that each of the
16 four out of five categories it has relied upon
17 to meet the initial threshold constitutes at
18 least five percent of its total retail space.
19 And this is a hard standard. The smaller
20 stores will have a difficult time to meet the
21 space requirement.

22 Also the five percent does not

1 make sense. Why is the initial threshold and
2 the five-percent requirement based on the
3 total square footage of the store? This will
4 be a problem for non-traditional big box
5 stores over 30,000 square feet that only want
6 to commit a portion of its space, not 50
7 percent, to consumables. Assuming that in
8 this example that the store dedicates 6,000
9 square feet to the proposed categories, the
10 store's large footprint will work against them
11 because the five-percent requirement is based
12 on the total square footage.

13 The effect of these regulations
14 will not only exclude wholesale club
15 businesses and super centers, which are
16 recognized by the Food Marketing Institute as
17 grocery businesses, from obtaining a B license
18 under the Full Service Grocery Store
19 Exception, but also serve as a bar to smaller
20 store formats.

21 The mandatory product categories
22 are also not realistic. All groceries carry

1 canned and frozen goods as well as non-
2 alcoholic beverages; juices, non-dairy
3 products such as soy milk. It does not make
4 sense that products sought by consumers such
5 as baby food, Sriracha sauce, gourmet frozen
6 foods that are a familiar staple of working
7 families, Newman's Own marinara sauce, honey,
8 maple syrup; I can go on and on, are not given
9 the equal weight of the proposed five
10 categories that are set forth in these
11 proposed regulations.

12 The potential threat to smaller
13 businesses must also not be overlooked.
14 During my recent visit to a Capitol Hill
15 gourmet organic store which carries wine and
16 beer I found many products that would not be
17 used to meet the initial space threshold
18 requirements, and I have listed them here in
19 my statement. In fact all of the aisles that
20 were displayed in these stores displayed
21 products that would not fall under the
22 regulation categories. The exclusion rate per

1 aisle shelving in these stores range from 60
2 to 74 percent. And I've listed some items
3 that were here such are sardines, mustard,
4 capers, olive oil, agave. And it goes on and
5 on. These are things that you usually find in
6 a traditional supermarket and the smaller
7 supermarket and I don't understand why that
8 these are not addressed in the regulations.

9 CHAIRPERSON MILLER: I think --

10 MS. HIRAO: Going on --

11 CHAIRPERSON MILLER: Ms. Hirao,
12 just to be fair I think you've done your five
13 minutes, but do you want to summarize what's
14 left?

15 MS. HIRAO: Sure.

16 MEMBER ALBERTI: Ms. Miller, I
17 think it's unfair because we didn't set these
18 standards at the beginning of the meeting.

19 CHAIRPERSON MILLER: I thought we
20 said five minutes. I didn't say that?

21 MEMBER ALBERTI: I don't --

22 CHAIRPERSON MILLER: If you don't

1 want the five minutes, we could be open.

2 MEMBER ALBERTI: I don't believe
3 that we set that standard.

4 CHAIRPERSON MILLER: That's the
5 standard, five minutes.

6 MEMBER ALBERTI: Okay.

7 CHAIRPERSON MILLER: I mean we're
8 very interested in what you're saying, so --

9 MS. HIRAO: Yes, if you will allow
10 me --

11 CHAIRPERSON MILLER: Do you need a
12 minute or two -- a minute to --

13 MS. HIRAO: Sure, I'll --

14 CHAIRPERSON MILLER: And are you
15 submitting this in writing, too?

16 MS. HIRAO: I also submitted it in
17 writing, but I will say on the record I'd like
18 to state my concerns about the space and
19 product requirements --

20 CHAIRPERSON MILLER: Okay.

21 MS. HIRAO: -- under the
22 regulations.

1 CHAIRPERSON MILLER: Okay.

2 MS. HIRAO: They're basically
3 going to hog tie retailers' ability to make
4 purchasing decisions, respond to consumer
5 requests to expand services. Like in the
6 regulations you have these five categories,
7 but yet I think it was sub-section (C) that
8 says, okay, you know, full service
9 supermarket, you can also sell flowers, baked
10 goods and other items such as a pharmacy. But
11 I'm a retailer and I have these strict space
12 requirements, I don't want to spend my
13 valuable space allowance to be dedicated to
14 these services that can be obviously value
15 added to the consumer. I'll be very cautious.

16 And what if I want to consider a
17 new and untested product in D.C.? You know,
18 good for the local business. They're going
19 out and trying to push their new product. I
20 as, you know, a shop owner will be very
21 hesitant to accept this product because how do
22 I know if it's going to sell? And again, it's

1 going to take away from my mandatory space
2 requirement allowance.

3 So space, I mean it seems like
4 who's going to win as the architect and the
5 space planner, whereas, you know, the grocery
6 stores which have had a hard time to recover,
7 as Mr. Pascal is saying, from the '68 riots
8 and come to this point where retailers are
9 looking at D.C. as an attractive market.
10 These regulations are going to be a full swing
11 back. It's not going to be an attractive
12 market. It's going to be basically a binding
13 market, and that's going to make Maryland and
14 Virginia that more attractive. So we're in
15 the game to, you know, bring back business to
16 D.C. We're here to serve the customers, the
17 retailers, but these regulations are contrary
18 to the goal of customer service. And how are
19 retailers going to be responsive to customer
20 needs when you have very, very burdensome
21 requirements?

22 So on behalf of DCABAW I realize

1 there's political pressure and even though
2 that is existent I urge the Board to take the
3 time for a balanced solution. This process
4 should not be rushed.

5 And if I made add, too, Mr. Pascal
6 mentioned the FEED DC Act. Well, if we change
7 the definition of full service supermarket, I
8 think the business community should be
9 entitled to put their input and give their
10 suggestions, especially as these regulations
11 will impact operations, their ability to
12 purchase items and to respond to consumer
13 needs.

14 CHAIRPERSON MILLER: Thank you.

15 MS. HIRAO: Thank you very much.

16 CHAIRPERSON MILLER: Thank you.

17 And we do want your input. That's what this
18 rulemaking is about really. So it's an open
19 issue right now. This is a proposal that's on
20 the table and we definitely want your input,
21 you know, how you think it would impact
22 business and what you think would be better.

1 MS. HIRAO: Thank you very much.

2 CHAIRPERSON MILLER: Okay. Thank
3 you. Sir?

4 MR. CHA: Thank you. I will try
5 to keep it within five minutes.

6 CHAIRPERSON MILLER: Give or take.
7 Okay.

8 MR. CHA: Good afternoon. Thank
9 you, Chairman Miller and Mr. Brooks, Mr.
10 Alberti and Mr. Jones. I'm Gary Cha. I'm the
11 owner of the Yes! Organic Market. I have a
12 slightly different view than the people who
13 run the drugstores. And I'm mostly concerned
14 about how the definition was written, so this
15 is what I have to say.

16 Thank you for giving me an
17 opportunity to testify on proposed rulemaking,
18 the definition of a full service grocery
19 store. Although there is a need to clarify
20 the definition of full service grocery stores
21 to prevent unqualified businesses such as
22 drugstores, hardware stores, carryout

1 restaurants or convenience stores to pose as
2 full service grocery stores just so that they
3 can sell beer and wine, I want to make sure
4 that all qualified true full service grocery
5 stores are not excluded in the definition.

6 As a retailer who has been in the
7 grocery business for over 20 years, I would
8 like to share some of my experience where
9 improperly written rules have caused
10 undesirable outcome. I will point out how it
11 could happen to a grocery store if some of the
12 rules are not clarified. And I picked a
13 couple of examples. This has nothing to do
14 with ABRA, but this is also the definition
15 that was made on building a complete grocery
16 store.

17 Under the rule of Supermarket Act
18 of 2000 building a complete grocery store, a
19 designated store one can be exempted from
20 sales tax on equipment purchases and building
21 materials, however, the requirement for
22 getting the sales tax exemption one must first

1 provide certificate of occupancy. As we all
2 know the certificate of occupancy is issued
3 only when the building or store is completed,
4 filled with stock and approved by Health
5 Department and ready to open for business. No
6 sales tax is exempt or exempted on building
7 materials or store equipment because it was
8 improperly written. The requirement of
9 certificate of occupancy was later removed,
10 but unfortunately the change came only after
11 I brought it up and after finishing the
12 construction.

13 Another example was I spent
14 several months trying to convince the Tax and
15 Revenue personnel that Supermarket Act of 2000
16 includes sales tax exemption of equipment
17 purchases such as freezers, refrigerators and
18 shelves whereas D.C. Tax and Revenue person
19 interpreted that if a building a complete
20 store include only nails, drywalls, lumbers.
21 It took many months with the Deputy Mayor of
22 Planning and Economic Development Valerie

1 Santos to intervene to include the store
2 equipment to be included in the definition of
3 complete store.

4 So how I can see the definition is
5 not clear, this kind of things could happen.
6 In the proposed rulemaking the Board proposed
7 five acceptable categories as Risa has read
8 off earlier, so I won't read that off again.
9 But the Board have neglected to include the
10 important category of frozen food. For
11 grocery store frozen food category, there are
12 fruits, vegetables, specialty breads, fish,
13 meats, entr,es, desserts and much more. At
14 least 10 percent of the store is dedicated for
15 this category and must be included in one of
16 the requirements along with the above five
17 categories.

18 Under Section (B)(i) 50 percent or
19 more of the retail space with at least four of
20 the five product categories listed in
21 paragraph. I can foresee problems determining
22 50 percent of the retail space, how is going

1 to be measured in that criteria. Is it going
2 to be measured from the corner of the shelf,
3 or it is going to be measured from the aisle,
4 or is it going to be measured from the other
5 side, opposite side of the aisle? How about
6 the display spaces that displayed products
7 changes weekly? What about the deli
8 preparation room, meat cutting area where it
9 requires a great deal of space or work table,
10 slicers, scales and even ovens, but they're
11 not considered retail area?

12 What if we change a display of
13 breakfast cereal which is grocery item to
14 seasonal items such as firewood or snow
15 melting rock salt, Valentine's Day chocolates
16 or flower? Would that space be counted
17 towards 50 percent requirement?

18 There are many gray areas that
19 cannot be left for discretion of an inspector.
20 Please take more time and include inputs from
21 retailers whose livelihood may be affected by
22 the new definition of full service grocery

1 store. Thank you.

2 CHAIRPERSON MILLER: Thank you
3 very much. Are there Board questions?

4 (No audible response.)

5 CHAIRPERSON MILLER: Okay. I have
6 some Board questions. And it seems like we
7 have enough time, so if I cut you off before,
8 feel free to add anything else you want into
9 the record.

10 I want to make sure that I
11 understand exactly where you think the regs
12 are problematic. Okay. Mr. Cha? Okay. And
13 I don't know if you all three agree. Do you
14 all find problematic the section dealing with
15 50 percent or more of retail space being
16 devoted, the whole concept, the concept in
17 general of measuring space?

18 MR. PASCAL: Absolutely.

19 CHAIRPERSON MILLER: Okay. It's
20 not just what the number assigned to it is?
21 You don't think that that should be a factor
22 in determining a full service grocery store?

1 MR. PASCAL: I haven't seen the
2 footprint for a Walmart, but I've been in
3 enough Walmarts in my lifetime in traveling
4 around where even in the Super Walmarts, maybe
5 only 30 percent of their space will be food as
6 you come in on the right and then the dry
7 goods and clothing and everything. They'll
8 never meet the 50 percent threshold.

9 And then when you talk about the
10 five percent, even if they put it in there and
11 they somehow have the 6,000 square feet -- but
12 then you need five percent of each category.
13 On a 100,000 square foot store, that's 5,000
14 feet for each category, which is 20 out of the
15 30,000 they're going to carry.

16 So the comments that Mr. Cha made
17 I really found interesting. Like the seasonal
18 products. In the summer time you have your
19 produce there, but in the winter people want
20 logs for their fireplace and you put it there,
21 does that mean that ABRA's going to send an
22 investigator in and say that you're now under

1 your -- you know, you only have four-and-a-
2 half percent of space? So yes, the answer to
3 50 percent just is not logical.

4 CHAIRPERSON MILLER: Okay. But my
5 question is -- I got that you're opposed to it
6 and you're opposed to it for both reasons.
7 One, to have that type of measurement in
8 general; and two, the 50 percent not being
9 realistic. Both reasons. So you wouldn't
10 even come up with another percentage then to
11 recommend, right?

12 MS. HIRAO: Madam Chair, if I may
13 add?

14 CHAIRPERSON MILLER: Yes.

15 MS. HIRAO: A space requirement is
16 problematic for this type of business because
17 let's say you meet that 50 percent, or let's
18 say you make the 6,000 square feet. Having
19 that percentage based on total retail space
20 will not -- I mean I would think twice about,
21 okay, I notice that, you know, it's getting a
22 little crowded in my store. I need to expand

1 my store. But wait a minute. If I expand my
2 store, I am at risk for failing those space
3 requirements. So that's a tricky thing is,
4 you know, it will discourage expansions. It
5 would discourage renovations. It's just too
6 much micro-managing into a grocery store's
7 business.

8 MR. PASCAL: What has been
9 overlooked so far in all the arguments in
10 which I touched in is myself and Andrew Kline
11 were really the original drafters of this law.
12 Andrew wanted to get Whole Foods. I
13 representing the wholesalers, wanted to see
14 more stores coming in. And we left the
15 definition loose, but one of the things the
16 community wanted, they wanted that 15 percent
17 capped. And our CVS store, as the Walgreens
18 stores, are far below that. So the real
19 community need was to make sure that you
20 didn't have stores basically just marketing a
21 lot of alcohol. I mean that's part of our
22 business model.

1 CHAIRPERSON MILLER: Yes?

2 MR. CHA: If you'll let me make
3 some inputs on something. Like on No. 2,
4 fresh, uncooked, unprocessed fruits,
5 vegetables or any combination thereof, if you
6 just follow that, basically you can put
7 orange, bananas, potato and carrots and met
8 that requirement. So rather than going with
9 the space -- because you'd be amazed how much
10 you could put in a small space of 8 feet, 10
11 feet or 12 feet. So maybe a more proper way
12 to decide something like that would be minimum
13 of 50 items or 75 items. Because you could
14 still squeeze that in, but you won't have a
15 big display of one item like they do at the
16 conventional supermarkets or big 50,000
17 supermarkets, 50,000 square feet. So that
18 would be better way of measuring rather than
19 square footage or percentage. That way you
20 can still weed out the stores or the
21 businesses that are trying to be a full
22 service grocery store, which are not.

1 CHAIRPERSON MILLER: So you're
2 saying kind of a minimum number, like a
3 minimum number of bananas?

4 MR. CHA: That would be more --

5 CHAIRPERSON MILLER: But how --

6 MR. CHA: -- accurate --

7 CHAIRPERSON MILLER: what would
8 that be?

9 MR. CHA: -- way of measuring than
10 space size.

11 MS. HIRAO: And also the problem
12 with space, again I seem like the anti-space
13 girl today, but the way people shelve items in
14 a grocery store; you guys are probably --
15 they're not segregated. Everything's kind of
16 commingled together. So those categories
17 that's listed in the proposed regulations,
18 you'll see a canned item next to a -- what was
19 the term that was used, a grain good or a
20 baked good, or maybe it might be next -- fresh
21 salsa might be next to like fresh meats. I
22 mean it's really hard to conduct a

1 measurement. And this is where I was -- the
2 point at is architects are going to love this.

3 CHAIRPERSON MILLER: So I get you
4 don't like the measurement. What do you think
5 about the (A) where it describes what should
6 be in a full service grocery store? Do you
7 any of you have a problem with that?

8 MR. CHA: Which was question, (B)?

9 CHAIRPERSON MILLER: (A).

10 MR. CHA: (A).

11 CHAIRPERSON MILLER: You don't
12 have to answer the question. I just want to
13 make sure that I get your feedback.

14 MR. PASCAL: Well, the problem
15 with that, Ms. Miller, is you've left out two
16 of the categories that are in the law. You
17 know, canned goods and frozen goods are left
18 out of (A).

19 CHAIRPERSON MILLER: Okay.

20 MR. PASCAL: And in addition
21 you've left out beverage. Even if you were to
22 say non-alcoholic beverages. You know, when

1 you go into a grocery store, like the first
2 thing you see is the Cokes and the sodas
3 there, because these are the things that a lot
4 of people -- when they come in quickly to buy
5 things, that's the first thing they want to
6 grab. So you've left three categories out of
7 there that really inhibit, as Ms. Hirao has
8 said, how a store can plan to operate.

9 CHAIRPERSON MILLER: But how is
10 that? That just means they're just no
11 required to have soda.

12 MR. PASCAL: No, but you've left
13 it out of your definition, so you're
14 constraining the store that they will
15 eventually have to plan and operate. To meet
16 the requirements they got to have these four.
17 And then if that's taking up, you know, a
18 certain amount of percentage, especially like
19 on the big box stores -- what you've really
20 created to me is a nightmare for the big
21 stores and for the small stores. For the
22 small stores you're really eliminating the

1 opportunity for them to have a creative
2 variety of foods. For the big box stores,
3 with this five-percent percentage, and it has
4 to be of their total space of the space
5 occupied by the grocery part, then you're
6 creating a nightmare for them to have enough
7 in those categories. What's going to happen
8 if a given day you have four percent of one
9 and six percent of the other?

10 CHAIRPERSON MILLER: I hear --

11 MR. PASCAL: Actually Mr. Cha's
12 comments about the seasonal -- replacing food
13 with wood in the winter time I think is a
14 classic example.

15 CHAIRPERSON MILLER: Okay. So I
16 hear that you have an issue also with the
17 percentage of products that have to be had.
18 I guess, Mr. Cha, though you have a small
19 store, correct?

20 MR. CHA: Yes, I have a small
21 store. I had a question about the 6,000
22 square feet. Wanted to make sure that that

1 was -- what was explained to me later that you
2 have to -- because you have to satisfy by one
3 or the other, not both. Because that 6,000
4 square feet was originally in the Supermarket
5 Act of 2000, which was taken out, because in
6 D.C. it's almost impossible to get that much
7 square space.

8 So I would like to see that
9 definition more clearly, just another sentence
10 there said you can meet the criteria by
11 satisfying one or the above, rather than just
12 leaving that one little word, said "or,"
13 because that could be -- if the inspector
14 could take position, then you're out of luck.

15 CHAIRPERSON MILLER: I just wanted
16 to ask you since you have a small store, the
17 products listed, the categories listed in (A),
18 is that a problem for you to carry those
19 goods?

20 MR. CHA: No, these are not a
21 problem for me.

22 CHAIRPERSON MILLER: Okay.

1 MR. CHA: Even though our stores
2 are small stores at 3,500 square feet.
3 Largest stores is 11,000 square feet. And
4 they do all meet well over 50 percent, but it
5 all depends on how that is measures 50
6 percent. If you just take the square footage
7 of the shelves, of course we won't meet. But
8 if you take into space where that shelf is,
9 definitely it will be over 50 percent, well
10 over that. It will be in a discretion of how
11 it will be measured.

12 CHAIRPERSON MILLER: No, my
13 question really goes to the requirement to
14 carry four out of the five following types of
15 products. Is that --

16 MR. CHA: Yes, our stores would be
17 meet all that for --

18 CHAIRPERSON MILLER: You have
19 that?

20 MR. CHA: Also I mention that
21 there's another category that we allocate a
22 great deal of space for. It would be frozen.

1 Without frozen our store wouldn't be a full
2 service grocery store. That's an important
3 category there. It's growing.

4 CHAIRPERSON MILLER: Okay. Other
5 Board questions?

6 (No audible response.)

7 CHAIRPERSON MILLER: Okay. Thank
8 you. Oh, oh. Oh, Mr. Jones. I'm sorry.

9 MEMBER JONES: Thank you, Madam
10 Chair. So there were some comments about it
11 being hard to measure. Did I hear that
12 correctly?

13 MR. CHA: Yes.

14 MEMBER JONES: Why is it hard to
15 measure? Anyone.

16 MR. CHA: If you will allow me?
17 Okay. Let's say only the -- a shelf, you have
18 a 4 feet by 16 inches. Let's just say it's 12
19 inches. So it's four square feet. That's
20 what the grocery goes on. But how do you
21 measure in percentage? Do you measure that --
22 because you have to have at least three to six

1 feet of aisle space. Would that count as a
2 space for 50 percent, or will you measure just
3 that shelf space?

4 MEMBER JONES: Okay. So if that
5 was more clearly defined, then you may have
6 more of a problem with it, or you may have
7 less of a problem with it?

8 MR. CHA: If there is no --

9 MEMBER JONES: It's just a matter
10 of understanding how it's going to be
11 measured. But the process of measuring
12 itself, do you find that to be an encumbrance?
13 Say for example if it the statement was floor
14 space, square footage of your floor space, is
15 it hard for you to get your mind around the
16 concept of measuring your floor space?

17 MR. CHA: Well the problem with
18 that is not all the fixture are permanent.

19 MEMBER JONES: Understood.

20 MR. CHA: So the --

21 MEMBER JONES: But do they sit on
22 the floor?

1 MR. CHA: Yes, they all sit on the
2 floor.

3 MEMBER JONES: Can you measure
4 your floor space?

5 MR. CHA: Oh, absolutely.

6 MEMBER JONES: Okay. So you could
7 measure that. It may change. It may be
8 dynamic, but you can measure it. So you're
9 saying it will be encumbrance of it changes?

10 MR. CHA: If it's a holds a
11 product that's -- doesn't fall under these
12 five categories, could be there, but next week
13 it could be display a product that falls under
14 that five categories. So how would you
15 measure that? Would you exclude that one week
16 and include that in the following week?

17 MEMBER JONES: Okay. So it's the
18 dynamic nature of it that you anticipate being
19 a problem, not the process of measuring in and
20 of itself?

21 MR. CHA: It would have to be very
22 subjective of a person who's measuring. And

1 I'm thinking that would be very inconsistent
2 from time after time, or store by store.

3 MEMBER JONES: So inconsistent in
4 just that it's changing, right? So you're
5 saying it would be inconsistent because it
6 changes, or you're saying it would be
7 inconsistent just by its nature?

8 MR. CHA: My nature.

9 MS. HIRAO: It would be
10 inconsistent and vague because you're assuming
11 in your scenario that one shelf would have all
12 the five categories, or quality uniformly.
13 One shelf would have all those category
14 products. But the reality is there is
15 commingling in shelving. So how is one
16 supposed to make a standard measurement of
17 different products with one shelf would
18 include; let me pick out one, baby food and to
19 the side of that there are spices and salt?
20 How do you segregate that? You know, it's --

21 MEMBER JONES: So I'm looking for
22 feedback from you guys. Since you own and

1 operate grocery stores, how do you section,
2 categorize, break down the sections where you
3 keep -- because I've been in a couple of your
4 stores. I've seen your layouts.

5 MR. CHA: Thank you.

6 MEMBER JONES: All right. And I'm
7 trying to understand. To me it seems pretty
8 -- in this section you have your fresh
9 groceries or your fresh vegetables, then fresh
10 fruits maybe. Then in another section you may
11 have refrigerated items which would include X,
12 Y and Z. Then you may have a frozen section
13 over here. You have an area where you may
14 serve sushi. It seems to be pretty well
15 segmented. But maybe I just was
16 misrepresented in what saw.

17 MR. CHA: Under this definition
18 the produce case, when you walk in there and
19 see, they are usually three feet in depth.
20 They are sections of 12 feet. So when you
21 calculate the percentage, would you measure
22 that 3 feet by 12 feet, or 36 feet, or would

1 you allow space where the customer would have
2 to walk around with a shopping cart? Would
3 that part be included in that space? So
4 there's a lot of gray area that hasn't been
5 decided.

6 MEMBER JONES: Okay. But I
7 understand what you're saying in terms of
8 walking area versus area where the food
9 product is actually located. That's not my
10 question. My question is when you lay out
11 your store, when you lay it out, do you have
12 predefined or do you set up categories or
13 sections?

14 MR. CHA: Oh, absolutely.

15 MEMBER JONES: You do? Okay. So
16 that's a typical practice in the operation of
17 a grocery store. It wouldn't be something
18 foreign to you, something --

19 MR. CHA: Only thing that changes
20 would be the end of the shelving called end
21 caps.

22 MEMBER JONES: Okay.

1 MR. CHA: Those, we try to change
2 it every -- up to every 20 days. And the
3 seasonal things. So that varies. That's
4 something came up in market where it's all of
5 sudden everyone wants it. So we'll dismantle
6 -- let's say pasta sauce we had there. We'll
7 take that off, put something else there.

8 MEMBER JONES: Understood. Okay.
9 So from your standpoint --

10 MR. PASCAL: Well, Mr. Jones, you
11 know --

12 MEMBER JONES: Yes, Mr. Pascal?

13 MR. PASCAL: I'm not perhaps the
14 best expert on operations of grocery stores,
15 but you know, I've been around for a few
16 years. There's a lot of psychology in
17 shopping. And so that psychology dictates
18 where things are going to be today and where
19 they may be tomorrow.

20 MEMBER JONES: Yes.

21 MR. PASCAL: And basically you're
22 going to micro-manage and limit how a store

1 will operate, because if he has to meet that
2 five-percent threshold and -- he's going to
3 end up having to put all that five percent in
4 one area so they'll know that he has that
5 rule, whereas you should have the flexibility
6 when you're a merchant to be able to move
7 things around. And basically you're going to
8 add a whole new dimension to shopping in
9 grocery stores with this. You're basically
10 throwing out the baby with the bath water, is
11 the best way I can put it. Because, you know,
12 trying to resolve one problem, you're creating
13 many more problems for the grocery industry.

14 MEMBER JONES: Understood. So you
15 made reference to the five percent. What if
16 that five percent was just five percent of the
17 retail space defined to be for grocery items?

18 MS. HIRAO: That's still vague.

19 MEMBER JONES: How is that vague?

20 MS. HIRAO: Are you including --

21 MEMBER JONES: So it's 50 percent
22 or it's item 2(B)(1), or (B).1 or i, and

1 (B).ii. So it's either 50 percent of your
2 total retail space or 50 percent of the 6,000
3 square feet.

4 MS. HIRAO: We might pose that
5 question to you as what is retail space? Are
6 you including the storage area?

7 MEMBER JONES: No.

8 MS. HIRAO: The freight area?
9 It's not defined. This is not a defined term
10 in the regulations here. Are you talking
11 about display --

12 MEMBER JONES: So if we define
13 retail space, that would help?

14 MS. HIRAO: As an association
15 we're against the space requirement.

16 MEMBER JONES: I understand. I'm
17 just trying to understand. There was made
18 reference of the fact that it was nonsensical
19 the way that it was currently written in terms
20 of five percent of the total retail space --

21 MS. HIRAO: Yes.

22 MEMBER JONES: -- versus meeting

1 those other criteria, (B)(i) and (B)(ii). So
2 I'm trying to stay focused on the one item and
3 not jump to the next. So I want to be clear,
4 in your feedback about that specific item, if
5 that five percent of total retail space was
6 changed to five percent of the retail space
7 dedicated to grocery items, would that make a
8 difference?

9 MS. HIRAO: That would make a
10 difference, but as I stated in my testimony,
11 space requirements will not work.

12 MEMBER JONES: Why not?

13 MS. HIRAO: As I said, it's micro-
14 managing the way grocery store operators,
15 retail operators can -- like shelving
16 decisions. They will have to make efficient
17 use of their employees' time to make sure
18 that, okay, we need to measure and make sure
19 we meet these percentage calculations quickly.
20 Because the balance of our time should be
21 dedicated to sales, should be dedicated to
22 customer service, should be dedicated to make

1 sure our business survives this economic
2 period, and also be competitive against
3 Virginia and Maryland. We're not in the
4 business to measure. We're in the business to
5 sell.

6 MR. PASCAL: You know, every time
7 they announce that it's going to snow in this
8 city, what goes first is toilet paper, the
9 salt from your driveway and milk. So the
10 merchants are going to be moving all that
11 toilet paper, salt and milk around. Well,
12 toilet paper doesn't account in your
13 definition, but they're going to have a lot of
14 it out there, see? So you're really changing
15 how a store can really run its business.

16 MEMBER JONES: Right.

17 MS. HIRAO: And, you know, I could
18 make a few more puns about toilet paper, but
19 I'll hold my tongue.

20 MEMBER ALBERTI: All right. We'll
21 stop you there.

22 (Laughter.)

1 MEMBER JONES: So it seems pretty
2 clear you're opposed to space requirements,
3 correct?

4 MS. HIRAO: Correct.

5 MEMBER JONES: At least I'll speak
6 to you two about that.

7 MR. CHA: Yes, absolutely.

8 MEMBER JONES: Okay. Fifty
9 percent is not a -- and as the Chairman
10 indicated, it's not a matter that you have an
11 issue with the 50 percent. You just have a
12 issue with the metric of being measured
13 against space, period, right? So you would
14 like to have that at a minimum be removed from
15 that. What then would you use as a basis for
16 your definition of a full service grocery
17 store?

18 MS. HIRAO: I would like the input
19 of more people that are in this industry, to
20 get their wisdom, to see what the balanced
21 approach would be. We're just two members of
22 the food and beverage industry. So we need

1 more input.

2 MEMBER JONES: Well, I'm concerned
3 by that only from the standpoint of --

4 MS. HIRAO: So are we.

5 MEMBER JONES: No, I'm
6 concerned --

7 MS. HIRAO: So are we concerned
8 about --

9 MEMBER JONES: -- about your
10 statement, because I guess -- I'm confused,
11 maybe is a better way of putting it. In one
12 aspect of it you're saying that you know
13 enough to tell us that space requirements
14 won't work, why 50 percent won't work. So you
15 know enough to tell us that. But in terms of
16 being able to give us I guess positive or
17 affirmative feedback to say this is what we
18 think will, you're saying you don't know
19 enough about that.

20 MS. HIRAO: Now you're twisting my
21 words. No --

22 MEMBER JONES: No, I'm asking.

1 I'm not twisting. I'm asking for
2 clarification.

3 MS. HIRAO: That's a twist. But
4 if I may segue, Mr. Cha's recommendation of
5 expanding the category group is a good start.
6 Is a good start. For example, baby food, it
7 would be excluded from the regulation's
8 categories because it's canned. It would not
9 be -- you know, you couldn't count shelves and
10 shelves of baby food into the required minimum
11 space requirement. So I agree with Mr. Cha,
12 it needs to be expanded. So that's a start.

13 MEMBER JONES: But Mr. Cha didn't
14 seem to have an issue with the space being a
15 measure.

16 MS. HIRAO: No, I think his
17 response was --

18 MEMBER JONES: He was more
19 concerned about how it was being measured.

20 MS. HIRAO: No, you're question
21 was --

22 MEMBER JONES: But he didn't seem

1 to have an issue with the space.

2 MS. HIRAO: -- was it possible to
3 measure the shelves. That was your question.
4 It wasn't an issue about whether he has an
5 issue having it in the regulations.

6 MEMBER JONES: Okay. Let me ask,
7 did you have a -- maybe I misunderstood. When
8 you responded to the question that I thought
9 I asked, were you responding as she has
10 indicated, or were you responding as I had
11 interpreted?

12 MR. CHA: Measuring is going to be
13 unless it's clearly specified --

14 MEMBER JONES: Yes.

15 MR. CHA: -- and the permanent
16 shelf, display shall have -- be measured from
17 such and such and there will be room for
18 moveable displays or something. There needs
19 to be some variations and flexibility there.
20 Without those depending on -- I know we -- our
21 store, all of our store we far exceed 50
22 percent, but if you just --

1 MEMBER JONES: So you're saying
2 you know all of your stores would far exceed
3 50 percent?

4 MR. CHA: Right.

5 MEMBER JONES: Okay.

6 MR. CHA: If you just measure the
7 shelf spaces, I don't think any grocery store
8 in this town will exceed that.

9 MEMBER JONES: So when you say you
10 know your store will far exceed the 50
11 percent, what are you basing that measure off
12 of? Is it square -- of your floor space?
13 Like how are you making that determination?

14 MR. CHA: You can't run a business
15 just having a shelf there. You have to have
16 aisle space. So that would have to be
17 included. The people can't shop there if
18 there's no aisle space. It would be just a
19 storage.

20 MEMBER JONES: But when you say
21 you know your stores far exceed the 50
22 percent, I'm just trying to understand how you

1 made that determination.

2 MR. CHA: We divide them up into
3 sections. This will be our health and beauty
4 section. This will be produce section.

5 MEMBER JONES: Yes.

6 MR. CHA: And there, that's --
7 we'll put shelves and display cases and things
8 there that would make it work. So in our
9 definition we'll be section it out. It's just
10 it goes beyond the equipment and the shelves.
11 It would be where people who have space for
12 and people to roam around with the shopping
13 carts.

14 MEMBER JONES: Okay. So where
15 that item is as well as where the people walk,
16 based on that --

17 MR. CHA: That would be the space.

18 MEMBER JONES: -- the definition,
19 if you will? That's how you would define the
20 space? And based on that definition of the
21 space --

22 MR. CHA: Right.

1 MEMBER JONES: -- your stores
2 would far exceed the 50 percent?

3 MR. CHA: But in here there's
4 nowhere that how it --

5 MEMBER JONES: Understood. But
6 based on what you just said, that's how you
7 got to the understanding that your stores
8 would exceed, far exceed, based on what you
9 said, what I heard you say -- did you say far
10 exceeds 50 percent?

11 MR. CHA: (No audible response.)

12 MEMBER JONES: Okay. Thank you.
13 Thank you, Madam Chair.

14 MR. PASCAL: I think you have to
15 focus on the first words out of Mr. Cha's
16 mouth is having rules that work. And that's
17 the problem here. You have rules that may not
18 be workable.

19 CHAIRPERSON MILLER: Mr. Cha, I
20 want to clarify one point from you. Okay.
21 From what I heard with your conversation with
22 Mr. Jones that the 50 percent of the retail

1 space being devoted to those certain products
2 wasn't a problem really for you, right? You
3 said 50 percent, over half of your store is
4 going to display those products?

5 MR. CHA: My concern is how that
6 will be measured and may I just say 50 percent
7 is the criteria there.

8 CHAIRPERSON MILLER: Okay.

9 MR. CHA: Then we could say 50
10 percent would be no problem. But other --
11 common sense would be no problem, but let's
12 say that it was measured differently.

13 CHAIRPERSON MILLER: Yes.

14 MR. CHA: It has happened, and
15 being in business 20 years I'm aware of that.

16 CHAIRPERSON MILLER: Okay.

17 MR. CHA: They wouldn't look at it
18 extreme opposite way.

19 CHAIRPERSON MILLER: Okay.

20 MR. CHA: Unlike what was
21 intended. Then what do you do? Where do you
22 go up there try to solve that?

1 CHAIRPERSON MILLER: Okay. I've
2 got that. So there has to be a clarity with
3 respect to measuring. But the other
4 measurement I thought you may have a problem
5 with and I just want to see if that is so,
6 with the five percent of each of the different
7 categories.

8 MR. CHA: Okay. So also for
9 example five percent, I'm going to take a
10 specific example of meat category where you
11 can't put a whole lot out there to make the
12 five percent, but it requires -- let's say
13 you'll need some space in the back where --
14 refrigerator space to cut meats and fish and
15 package and wrap and those things. It takes
16 a lot of space, but and if you just made
17 measurement where the meats and fishes are
18 displayed, it will usually be less than five
19 percent. So if you go through all that
20 effort, have those available, but it still
21 won't qualify.

22 CHAIRPERSON MILLER: Okay. Thank

1 you very much. All right.

2 MEMBER ALBERTI: So can I --

3 CHAIRPERSON MILLER: Yes, sure.

4 Mr. Alberti?

5 MEMBER ALBERTI: I want to follow
6 up on that, Mr. Cha. So do you have any
7 suggestions for an alternative? I'm talking
8 about this --

9 MR. CHA: Yes.

10 MEMBER ALBERTI: Let me step back.
11 I mean I think starting with the assumption
12 that we had a criteria of 50 percent of this
13 floor space and you were satisfied that it was
14 a fair way of measuring it. Okay. Let's just
15 assume that for a second. How else would you
16 suggest that we zero in on what's a full
17 service grocery store? Because I'm going to
18 give you a bizarre example. There's nothing
19 in the store except dairy products. Now
20 that's not a full service grocery store,
21 because that's a dairy store. It's nothing
22 but dairy products. How would you suggest

1 that we zero in on what's a full service
2 grocery store?

3 MR. CHA: Maybe think in a way the
4 grocery store operators would think. Let's
5 say if we're checking out our competitor.
6 We'll go up there, look at their produce
7 department, and we'll say do they have a full
8 service produce department? And our answer
9 is, well, they only had about 30 items. Then
10 no, they're just kind of partial produce
11 department. So what we measure is how many
12 varieties does it have? If you just have a
13 ground beef on there, is that a meat
14 department? Probably not. But if you have a
15 ground beef, you got New York chuck, rib eye
16 steaks, and things like that, many, many
17 different cuts, then you have a selections of
18 meat.

19 So maybe rather than space maybe
20 you could look at it in terms of how many SKUs
21 you got to carry to call it a full service.

22 CHAIRPERSON MILLER: How many

1 what?

2 MR. CHA: How many items.

3 CHAIRPERSON MILLER: Okay.

4 MEMBER JONES: Did you say SKUs,
5 S-K-Us?

6 MR. CHA: Yes.

7 MEMBER ALBERTI: Would you define
8 SKUs just for the record for us? I know what
9 it is, but would you just define what SKU
10 means?

11 MR. CHA: It is an industry term
12 that one item -- where let's say if it's a
13 salsa and one would be unsalted, one would be
14 salted or spicy, they would consider -- each
15 would be consider one SKU.

16 MEMBER ALBERTI: And it's a code.
17 That's a code that you use to identify that
18 item?

19 MR. CHA: (No audible response.)

20 MEMBER ALBERTI: Okay. So that's
21 what you would suggest?

22 MR. CHA: That would be more

1 measurable without a whole lot of discrepancy,
2 rather than it needs to be certain size.
3 Because if you get to New York, just amaze.
4 That's where we go, up there, to learn so we
5 can improve our stores. It's such a small
6 space. They can just put so much stuff in
7 there, you go, wow, we're not utilizing our
8 space. And we come back and we put more
9 spaces, more shelves and this that. So if you
10 just put space requirement, that kind of
11 hinders your ability to utilize the whole
12 space. It may not be full five percent space,
13 but maybe you got three percent, but you could
14 display, you can be creative, pack that place
15 in there so it can look better than store that
16 has allocated 10 percent, the competitor.

17 MEMBER ALBERTI: And how would you
18 demonstrate that? If we had criteria on the
19 number of SKUs for each category, how would
20 you demonstrate that to someone who was coming
21 in, let's say; I'll use the term "audit," to
22 audit your products?

1 MR. CHA: Well, you'll have to
2 decide on the categories. Now there is many
3 different categories and some things, some
4 categories, if you don't have it, you probably
5 can't call it a grocery store. You have to
6 have it. Like baby food would be one of them.
7 You would definitely have to have dairy. Now
8 dairy meaning -- it's kind of expanding
9 because now there's blends of soy milk, rice
10 milk, flax milk, all these kind of things.
11 But you have to create those categories and in
12 order to be a full service grocery store you
13 have to have this category, not more than just
14 this five or six. You know, a lot more to it
15 than that.

16 MEMBER ALBERTI: All right. You
17 think that we need more --

18 MR. CHA: If you want to get --

19 MEMBER ALBERTI: -- and more
20 discreet categories than we have here?

21 MR. CHA: Yes, if you want to get
22 away from the square footage or the size

1 limitation. Size really doesn't --

2 MEMBER ALBERTI: Okay. But let's
3 say we have a category, and let's use for our
4 example here -- we have the fresh, uncooked,
5 unprocessed fruits and vegetables, which is --
6 I mean that's pretty well defined I think.

7 MR. CHA: It would be considered
8 produce.

9 MEMBER ALBERTI: Produce. So how
10 would you demonstrate that you had 100 SKUs,
11 if that's what it was, in produce, or 50 SKUs?

12 MR. CHA: Well, you --

13 MEMBER ALBERTI: How would you
14 demonstrate that, please?

15 MR. CHA: Some things are not
16 going to be available all the time. So things
17 change. So that availability, we may have 100
18 item today, maybe tomorrow it will be 110, the
19 next week maybe only 90.

20 MEMBER ALBERTI: Right, so how
21 would we --

22 MR. CHA: So you have to have some

1 minimum number of fresh fruits and vegetable
2 in order to call that complete produce
3 department.

4 MEMBER ALBERTI: Could it be done
5 on a say yearly basis? I'm just throwing this
6 out. I mean this is just -- I'm fishing here.
7 Yes, I'm going to switch gears a little bit,
8 because, Mr. Cha, you seem to be okay with
9 this 50 percent measure, assuming that it's
10 measured in a fair way that can be done
11 consistently. All right. It makes sense
12 to --

13 MR. CHA: As long as it's
14 reasonable.

15 MEMBER ALBERTI: And I haven't
16 heard much about the 6,000 square feet, but
17 anyone else want to talk about that
18 measurement? Assuming that we have a rational
19 way of measuring it that makes sense, is that
20 50 percent --

21 MR. PASCAL: I think you're going
22 to have trouble with Walmarts on that, and

1 this city wants --

2 MEMBER ALBERTI: But we have the
3 "or" of 6,000 square feet here.

4 MR. PASCAL: Yes, well again, the
5 larger the footprint, you know, they may have
6 the 6,000, but they won't be able to comply
7 with that five percent of each --

8 MEMBER ALBERTI: Yes, I'm
9 discarding that now. I'm just focusing on the
10 50 percent or 6,000 square feet. Are there
11 any comments? Disregarding the five percent
12 rule.

13 MR. CHA: Yes, the way I see the
14 6,000 square feet is the large stores that are
15 100,000 square feet, if you go by percentage,
16 they would not meet that, but they will still
17 be -- they would fall under over 6,000.

18 MEMBER ALBERTI: New Costcos would
19 probably be able to meet the 6,000 square
20 feet, but right.

21 MR. CHA: I'd hate to see them
22 cater -- our rules change then to cater them,

1 but that's the way it is.

2 MEMBER ALBERTI: Well, I mean
3 that's why we have the "or," the 50 percent or
4 -- right. Okay. I have no further questions.

5 CHAIRPERSON MILLER: Others?

6 (No audible response.)

7 CHAIRPERSON MILLER: No? All
8 right. Thank you.

9 MR. PASCAL: Thank you very much.

10 CHAIRPERSON MILLER: And please
11 feel free to submit any additional material
12 that you would like until March 8th when the
13 record closes. Thank you.

14 MS. HIRAO: Thank you. We will
15 want to supplement our original testimony as
16 well.

17 CHAIRPERSON MILLER: Okay. That
18 would be great.

19 MS. HIRAO: Thank you very much.

20 CHAIRPERSON MILLER: Thank you.

21 MR. CHA: And thanks for shopping
22 at our store.

1 CHAIRPERSON MILLER: Thank you
2 very much. I'm going to call the next panel
3 up. Karen Perry, commissioner, ANC 3F. Brian
4 Lederer, attorney, Brian Lederer Law Office.
5 And Andrew Kline, attorney representative, the
6 Veritas Law Firm.

7 Is there anybody else in the
8 audience who wishes to testify? We have
9 another seat at the table. Want to come up?

10 MR. KLINE: I'd actually like to
11 bring -- I'm here with Eric Smucker who's --

12 CHAIRPERSON MILLER: You want to
13 wait?

14 MR. KLINE: -- an applicant. And
15 I would like to bring him to the table --

16 CHAIRPERSON MILLER: Oh, okay.

17 MR. KLINE: -- with me, because
18 he's a better resource than I am.

19 CHAIRPERSON MILLER: Okay. So
20 we'll get to you next, Mr. James. Okay.

21 MR. KLINE: Thank you.

22 CHAIRPERSON MILLER: Sure. So

1 we've been starting from our right, which
2 would be Ms. Perry, if you're ready.

3 MS. PERRY: I guess I am.

4 CHAIRPERSON MILLER: Okay.

5 MS. PERRY: My name is Karen Perry
6 and I also want to thank you for the
7 opportunity to present testimony today. I
8 represent ANC 3F, 3F-02, to be exact. I'm
9 also the president --

10 CHAIRPERSON MILLER: We can't
11 hear.

12 MEMBER ALBERTI: We can't hear.

13 CHAIRPERSON MILLER: Is your mic
14 on?

15 MS. PERRY: Yes. Is this better?

16 CHAIRPERSON MILLER: The court
17 reporter can hear that?

18 MS. PERRY: Is that better?

19 MEMBER ALBERTI: Yes.

20 CHAIRPERSON MILLER: We can hear
21 it.

22 MS. PERRY: Okay.

1 CHAIRPERSON MILLER: Thank you.

2 MS. PERRY: Now?

3 MEMBER ALBERTI: Yes, I think so.

4 Okay.

5 MS. PERRY: Okay.

6 CHAIRPERSON MILLER: Thank you.

7 MS. PERRY: In addition to ANC 3F
8 and 3F-02, I'm president of the Van Ness
9 Tenant Association, incorporated in 1979, and
10 representing the residents of 625 apartment
11 units.

12 I'm not going to focus my
13 testimony on what brought us to rulemaking on
14 the definition of a grocery store. I think we
15 all know what got us here. Rather, I want to
16 focus on what is the definition of a full
17 service grocery store and whether you've
18 actually written the definition of a full
19 service grocery store, which is what I believe
20 the Council asked you to do, not the
21 definition of a corner store or a super center
22 or a Walmart, because they're all different

1 definitions.

2 First I want some history here.

3 At the beginning of the 20th Century grocery
4 stores in the United States were full service.
5 Customers would ask a clerk behind the counter
6 for specific items and the clerk would package
7 the items which were limited at that point to
8 dry goods only.

9 In 1916 there was a shift in
10 grocery store science when Clarence Saunders
11 invented the self-service grocery store,
12 namely Piggly Wiggly, which opened in 1916 in
13 Memphis, Tennessee. That model is what grew
14 rapidly. At the same time grocery stores also
15 began to offer products beyond dry goods.
16 They added meat, dairy, fruit and vegetables
17 and breads to their offerings, which had
18 formerly been offered by individual stores
19 such as butchers, bakeries and the milk man.
20 The introduction of these products signaled
21 the birth of the grocery store or the
22 supermarket, because today the terms are

1 basically interchangeable.

2 According to Wikipedia, the
3 typical supermarket comprises meat, fresh
4 produce, dairy and baked good aisles along
5 with shelf space reserved for canned and
6 packaged goods, as well as for various non-
7 food items such as household cleaners, pet
8 supplies and on and on.

9 The Food Marketing Institute, the
10 voice of food retail, describes the
11 traditional supermarket as a store offering a
12 full line of groceries, meat and produce with
13 at least 2 million in annual sales and up to
14 15 percent of their sales in general
15 merchandise. These stores typically carry
16 anywhere from 15,000 to 60,000 SKUs depending
17 on the size of the store and may offer a
18 service deli and service bakery and/or a
19 pharmacy. The Institute also has definitions
20 for the super stores and warehouse-type stores
21 which are very different from the traditional
22 supermarket, which is what I believe we're

1 really here to discuss.

2 The city of Portland, Oregon in
3 2001 put out an RFI for the recruitment of a
4 grocery store to develop for underserved
5 neighborhoods, not unlike what the D.C.
6 Council did when attracting Whole Foods to P
7 Street. They defined the full service grocery
8 store as providing a full complement of
9 healthful fruits, vegetables, grains, meats
10 and dairy products along with household items.

11 I think we can all agree that
12 Whole Foods, Giant, Safeway, Harris Teeter,
13 Fresh & Green are grocery store, or now
14 supermarkets. One thing all of these stores
15 have in common is that they are one-stop
16 shopping. So I hope you'll take a second look
17 at your definition.

18 A full service grocery store is
19 not a pick four or five category, nor is it a
20 pick of bread, cereals, baked goods or a
21 combination, not a pick of fresh, uncooked or
22 unprocessed fruits or vegetables or any

1 combination thereof. What the Council
2 envisioned when offering the class B license
3 to grocery stores such as Whole Foods was that
4 they would sell meat, dairy, fruit,
5 vegetables, baked goods, etcetera. It was not
6 a take your pick. When you leave a grocery
7 store, unless you don't like what they sell,
8 you should not have to first go find a
9 butcher, baker, fish monger or poultry farm.

10 Turning to the definition of
11 square footage necessary to qualify as a
12 grocery store. According to the Food
13 Marketing Institute, the median square footage
14 in 2010 for a grocery store was 46,000 square
15 feet. The Giant in Van Ness, which is one of
16 the smaller Giants, is approximately 30,000
17 square feet. Approximately 5,000 of that is
18 the back rooms, you know, where they store
19 things. And the Fresh & Green in Spring
20 Valley is about 25,000 square feet. I think
21 it might be fair to say that 50 percent of the
22 retail space there is dedicated to food items.

1 I think 6,000 square feet for a full-service
2 grocery store is actually too small, because
3 that's basically what Calvert-Woodley is.

4 They say timing is everything.
5 And as it turns out, the Washington Post
6 yesterday featured Whole Foods, first in its
7 Planet Market on the back which says, "From
8 the freshest produce, humanely-raised meat and
9 sustainable seafood to ready-to-eat entr,es,
10 bread baked in house, everyday staples in the
11 grocery aisles and much more." To the front
12 page --

13 CHAIRPERSON MILLER: Ms. Perry?

14 MS. PERRY: -- this is the Whole
15 Foods -- the food section yesterday. This is
16 the Whole Foods on P Street.

17 CHAIRPERSON MILLER: So I think we
18 have a little give, but I think you've done
19 really five minutes. Where are you --

20 MS. PERRY: Well, believe it or
21 not, Ms. Miller --

22 CHAIRPERSON MILLER: Yes?

1 MS. PERRY: -- when I sent -- I
2 asked Martha and Sarah Fashbaugh how much time
3 we would have for our testimony --

4 CHAIRPERSON MILLER: Yes?

5 MS. PERRY: -- and the email I got
6 back was 15 minutes. I have the email at
7 home. I'll be happy to give it to you.

8 CHAIRPERSON MILLER: All right. I
9 know. Okay. I think that's a mistake. But
10 anyway, we do want to hear from you, but I've
11 just been generally telling people five, so we
12 can get everybody through the hearing.

13 MS. PERRY: I understand, but I
14 also listened to the other witnesses and they
15 were way longer --

16 CHAIRPERSON MILLER: Right.

17 MS. PERRY: -- than what I just
18 did.

19 CHAIRPERSON MILLER: Right. So do
20 you have like a couple minutes more?

21 MS. PERRY: I have one more
22 paragraph.

1 CHAIRPERSON MILLER: Okay. Oh,
2 fine.

3 MS. PERRY: Where people bought
4 groceries to take home for making dinner and
5 grocery stores these days are basically de
6 facto home kitchens. I realize that it's the
7 Board's job to give out alcohol and/or beer
8 and wine licenses and I recognize you have a
9 difficult job trying to balance the needs of
10 the applicants and the neighborhoods, but at
11 the same time I hope you will go back and
12 rewrite your definition to reflect what a full
13 service grocery store truly is, and that is
14 one-stop shopping for all of your needs, from
15 meats to poultry, soup to nuts, vegetables to
16 fruit, frozen foods, baby food, all of it. I
17 know of no full service grocery store that
18 does not sell fresh, uncooked or unprocessed
19 meats, poultry or fish and that only sells a
20 combination of fruits of vegetables, breads or
21 cereals, etcetera. I don't believe that's
22 what the D.C. Council envisioned when they

1 granted the initial application.

2 CHAIRPERSON MILLER: Thank you.

3 MS. PERRY: And I brought me with
4 the Food Marketing Institute, which I'll
5 attach to my testimony when I submit it.

6 CHAIRPERSON MILLER: Great. Okay.
7 We'll get back to you with questions after we
8 go through the panel. Okay?

9 MR. LEDERER: Good afternoon,
10 Madam Chair, Members of the Committee. My
11 name is Brian Lederer and I'm also a Van Ness
12 resident. We're grateful also. This is an
13 important topic. Liquor sales in the District
14 of Columbia concerns everybody and
15 particularly when one is talking about putting
16 it into stores that for the fundamental
17 purpose is something else.

18 I think that this rulemaking which
19 came from the Council, including Council
20 Member Cheh, is an important expression of the
21 policy authority that is vested in the charter
22 to the Council and I just don't think it's

1 productive to have anybody come in here
2 commenting on this complaining about the
3 exercise of sovereign democratic authority to
4 a delegated agency.

5 Anyway, the city has a moratorium
6 on class B liquor licenses with no exceptions.
7 And then because they wanted to promote
8 economic development, they enacted an
9 exception, which is the one we're now trying
10 to apply here, but it was a full service fresh
11 food/meats exception to allow a big store,
12 Whole Foods, to come into the District and
13 they wanted to give them the added ability to
14 sell beer and wine.

15 And so whatever else I think is
16 done here, that this definition it seems to me
17 ought to reflect what people would understand
18 is a Whole Foods or a Giant or a if A&P --
19 Safeway. You go in it and you see a full
20 service grocery store. They're large stores.
21 All of the items that are listed in the
22 proposed rulemaking are available, not four of

1 the five, and you certainly expect to get
2 fresh meats, poultry or fish. So the
3 definition is already too restrictive in my
4 view.

5 I don't think the purpose of this
6 hearing is to have what are otherwise
7 convenience stores, pharmacies and corner
8 stores somehow be able to morph themselves
9 into coming in under the exception of full
10 service grocery stores. If they can meet what
11 most people would understand when they go into
12 a Whole Foods what a full service grocery
13 store is, you know, then that's fine. But
14 this definition here is way too small and I
15 think it's too complicated in many ways. I
16 mean people have said that.

17 I mean I'm walked into the Giant
18 in Van Ness yesterday and just looked it. I
19 mean you just walk in there and it's a large
20 store and you can see the meat area, the fish
21 area, the fresh fruits and vegetables and you
22 know this is a full service grocery store.

1 You do the same thing at the Whole Foods at
2 Calvert Street or the Safeway further down or
3 the Harris Teeter.

4 And this, you know, for these
5 other entities, these pharmacies and so on,
6 they're not that. So if they can be like that
7 and have incidental sales of pharmacy like
8 Giant does or some of the -- that's okay. But
9 otherwise, there's no constitutional right to
10 sell liquor. I mean it's a heavily regulated
11 item that whatever -- you know, there's a lot
12 of history to that. So I think the definition
13 that the Board has should track what is a full
14 service grocery store according to the nature
15 of the exception that was put into the
16 statute, and that would be my -- just chosen
17 to do that.

18 I do know that; and I've heard
19 this conversation around the city, there is a
20 concern about having too many liquor store
21 outlets in the community. Now we're not here
22 to make any moral judgments, but there has to

1 be some reason behind the moratorium and class
2 B liquor licenses, and the exception was very
3 clearly stated by legislative action of the
4 Council. So the rulemaking seems to me ought
5 to track the substance of that exception and
6 I'm saying it's too narrow.

7 But in the context of the
8 rulemaking you have to have A, B, C, D and E,
9 all of the above in order to at least begin to
10 meet the threshold and there needs to be a lot
11 more than 6,000 square feet under -- because
12 it's an economic development exception and
13 it's not clear how having all the convenience
14 stores and pharmacies that are already in
15 helps the economic development. We're not
16 here to pass judgment on that. That's just I
17 think the policy that the Council stated when
18 they adopted the exemption. And then this
19 delegated rulemaking was I think -- so that's
20 what I --

21 CHAIRPERSON MILLER: Thank you.
22 Mr. Kline?

1 MR. KLINE: Yes, good afternoon.
2 Andrew Kline. I'm here on behalf of Smucker
3 Foods. Seated to my right is Eric Smucker.
4 He is an applicant, or his company more
5 specifically is an applicant for a class B as
6 a full service grocery store. I believe that
7 his application is the only one that's
8 pending; or there might be one other, that are
9 not under scrutiny as a possible pharmacy or
10 drug store. In fact, he has a store at 2118
11 14th Street which is a food store. That's his
12 business. It has the array of products that
13 we're talking about today.

14 We frankly don't have any
15 objection to the rule that you've proposed
16 simply because Mr. Smucker's store meets those
17 requirements. Our purpose in being here today
18 is that you may be doing some sort of
19 emergency rulemaking. You may veer off of
20 what's been proposed and we just want to make
21 sure that Mr. Smucker does not get lost in the
22 shuffle if based on comments that you hear

1 today you go in a different direction and
2 somehow inadvertently, without having seen a
3 prior proposal and without having had any
4 opportunity to comment -- you do something
5 that would jeopardize his application, because
6 it is a very much a food store.

7 I do want to take issue with one
8 point that was made, which is in terms of
9 supermarkets, yes, I think what we've heard
10 described is an apt description of any market
11 that you find in the suburbs. But this is a
12 city and space is tight and there are all
13 different manners of food operations that are
14 strictly food operations.

15 Mr. Smucker's store, for example,
16 is 1,800 square feet. There's 1,300 square
17 feet of retail. Nine hundred is dedicated to
18 food. As I stated earlier, he does have the
19 array of products that we're talking about,
20 everything from fresh produce to fresh meat on
21 down the line. He meets all of the
22 categories, dairy products, bread, cereals,

1 dry groceries, fresh vegetables, fresh meat
2 and poultry. So he has all of those
3 categories.

4 In terms of size, he's not as big
5 as this panel is discussing. We don't think
6 that that makes, you know, any less of a full
7 service grocery store because the concepts
8 that have been discussed in terms of being
9 able to go in one-stop shopping and meet your
10 food needs, that very much exists in this
11 store. So we want to make that point. But
12 other than that, we don't really take issue
13 with much that's been said.

14 In terms of whether stores that
15 have traditionally been known as drug stores
16 are pharmacies, we take no position on that.
17 That's not relevant to Mr. Smucker's
18 application. And that's my limited purpose
19 here today is to speak to that issue. And
20 we're happy to be a resource and Mr. Smucker's
21 happy to answer any questions that the Board
22 might have in terms of some of the concepts

1 that have been run around this afternoon.

2 Thank you.

3 CHAIRPERSON MILLER: Thank you.

4 MS. PERRY: Can I say for one
5 minute, I agree with what Mr. Kline just said.
6 I'm not here to discuss square footage. Our
7 feeling is basically that they have all five
8 items, not four, as Mr. Smucker's store does
9 have. I don't care whether it's 1,800 square
10 feet or 25,000.

11 CHAIRPERSON MILLER: Okay.

12 MEMBER ALBERTI: Well, that's
13 interesting.

14 CHAIRPERSON MILLER: Okay. So it
15 sounds like there's agreement of this panel
16 that for there to be a full service grocery
17 store; tell me if I'm wrong, that they should
18 have all five categories that are identified
19 in the regulations? Or you don't have a
20 problem with those five categories?

21 MS. PERRY: I have no problem with
22 them, and if -- you know, I think, you know,

1 if you want to expand it, you can expand it,
2 that they should also have frozen food, they
3 should also have baby food. I mean you can --

4 CHAIRPERSON MILLER: But the
5 question is do they have to have baby food to
6 be a full service grocery store, you know?

7 MR. SMUCKER: Some of our
8 customers make their own baby food.

9 MS. PERRY: Yes, I was going to
10 say a lot of people do that.

11 CHAIRPERSON MILLER: Right.

12 MS. PERRY: I'm just saying --

13 CHAIRPERSON MILLER: This doesn't
14 say they can't. It just says --

15 MS. PERRY: No.

16 CHAIRPERSON MILLER: -- they don't
17 have to.

18 MS. PERRY: Yes.

19 CHAIRPERSON MILLER: Right. Well
20 let me ask you all, so that part is okay, but
21 do you have any other thoughts as to what else
22 would characterize a full service grocery

1 store to distinguish it from stores that
2 aren't?

3 MS. PERRY: I guess to me a full
4 service grocery store, as I said, is one-stop
5 shopping, where I can go in and buy my toilet
6 paper, I can go in and buy a steak or a piece
7 of fish or I can go in and buy a frozen dinner
8 if I want. But it's that whole combination
9 and I think you know it when you walk in it.
10 It's a Giant. It's a Safeway. It's a Harris
11 Teeter. It's that kind of store.

12 CHAIRPERSON MILLER: I mean I
13 don't want to talk about a specific
14 application, but there are these categories of
15 smaller grocery stores that --

16 MS. PERRY: As I said, as long as
17 they carry all of these types of items, I
18 don't have a problem with how many square feet
19 they are, and I don't think any of us do.
20 And, you know, when I looked at the Food
21 Marketing Institute, because I also did, and
22 they talk about, you know, the different

1 definitions that they have. You know, I just
2 pulled out the traditional supermarkets
3 because that's what I thought we were dealing
4 with, the full service grocery store.

5 But there's the warehouse store,
6 the super warehouse store. In fact they even
7 talk about the super center, which is the
8 Walmart-type. And it basically says a hybrid
9 of a large traditional supermarket and a mass
10 merchandiser. Super centers offer a wide
11 variety of food as well as non-food
12 merchandise. These stores average about
13 170,000 square feet and typically devote as
14 much as 40 percent of the space to grocery
15 items. And then they cite Walmart, Super
16 Target, Meijer and Fred Meyer. I don't know
17 those stores, but --

18 MR. LEDERER: I know Meyer.
19 They're up in Seattle.

20 MS. PERRY: But they actually, you
21 know, break it down and in some cases they
22 break it down with dollar amounts and square

1 footage amounts. So I mean it's a good
2 resource.

3 CHAIRPERSON MILLER: So in your
4 view it does a full service grocery store
5 include like a Costco?

6 MS. PERRY: I think yes.

7 CHAIRPERSON MILLER: Okay.

8 MS. PERRY: I believe a Costco
9 would be either here a warehouse store --
10 would that be Costco, or a super warehouse?
11 Okay. It says warehouse store, grocery store
12 with limited service that eliminates frills
13 and concentrates on price appeal. Items may
14 be displayed in their original shipping
15 cartons rather than placed individually on
16 shelves.

17 CHAIRPERSON MILLER: Okay. You
18 can submit that.

19 MS. PERRY: Yes, I'll add it to my
20 testimony when I submit it.

21 CHAIRPERSON MILLER: I guess I
22 want to ask Mr. Smucker, okay, so I mean I

1 understand you're in a position where, oh,
2 okay, you have an application that meets these
3 regulations, so you know, but -- or you think
4 it does, but separate from that, as a small
5 grocery store, which I believe you are, do you
6 find any of the provisions problematic like
7 Mr. Cha did from Yes!?

8 MR. SMUCKER: I actually don't
9 find any of those provisions problematic. I
10 do have some issues with some of the
11 suggestions that I might find problematic.
12 One would be like a bare minimum of fresh
13 produce items being on the shelves at all
14 times. We're very much focused on what's in
15 season and but at the same time -- so our
16 produce case might only have 50 different
17 items in it. Sometimes it only has 25
18 different items in it, or something like that.

19 But at the same time we do a
20 community-supported agriculture program where
21 we're pre-selling shares of produce and that
22 accounts for about 90 percent of our produce

1 sales. And this year we'll serve close to
2 1,000 people between our winter, spring,
3 summer and fall. That I think needs to be
4 taken into consideration that if you start
5 putting minimum numbers of amounts in these
6 different categories, that that could pose
7 some problems for smaller grocery stores like
8 myself. So I just wanted to mention that.
9 That's about it actually.

10 CHAIRPERSON MILLER: Okay.

11 MR. LEDERER: You know, it's the
12 range of goods. And I think whether what --
13 like the fresh foods, too, I mean where you
14 can go and get cabbage or lettuce or brussels
15 sprouts or mushrooms, things that are not
16 cooked, not processed, not all seasoned. And
17 then you buy them and you make them as you
18 wish. You expect to get those things. You
19 expect to be able to get fresh meats, fresh
20 fish.

21 MS. PERRY: A turkey at
22 Thanksgiving.

1 MR. LEDERER: A turkey at
2 Thanksgiving that isn't necessarily frozen.
3 And with regard to a Costco, for example, I
4 mean they have all these items and then they
5 have a lot other items. So sometimes we've
6 gone shopping at Costco as if we were going to
7 Whole Foods. I mean everything is there.

8 CHAIRPERSON MILLER: Well, Costco
9 does. I think to me the question is more in
10 the other end where you're a smaller store,
11 you know? So what if they don't have cat
12 food, right? Whole Foods has cat food.

13 MR. LEDERER: Right.

14 CHAIRPERSON MILLER: Does that
15 mean it's not quote a "full service grocery
16 store?"

17 MR. LEDERER: I don't think so. I
18 mean, no, I think you're really looking at
19 these types of items here --

20 CHAIRPERSON MILLER: Okay.

21 MR. LEDERER: -- not trying to
22 exclude them because they don't have cat food

1 or kitty litter, or dog litter, or you know,
2 any of those -- I mean those additional items
3 that you often find in the stores. I can go
4 to the Giant or Whole Foods and get some
5 stationery items, but it's a, you know, area.
6 You don't expect to get what you could get if
7 you went to a stationery specialty store.

8 CHAIRPERSON MILLER: Mr. Kline, I
9 have one question about the legislative
10 history. If I may ask, whether full service
11 grocery store was intended to apply to stores
12 like Whole Foods, which was often mentioned
13 that that was the one that wanted to come in,
14 whether there is evidence that it also
15 intended to apply to a variety of types of
16 food stores, or just the more traditional or
17 whatever supermarkets.

18 MR. KLINE: I don't think there
19 was much focus on that at the time when it was
20 done. I mean the history which is pretty well
21 known, I think, is that there was a group of
22 residents in the Logan Circle neighborhood

1 that very much wanted a Whole Foods to come to
2 the neighborhood and actually targeted Whole
3 Foods and went to Austin and gave them -- and
4 paid for a marketing study, said we want you
5 in our neighborhood. And then there was this
6 discussion about, well, how do we sweeten the
7 pot? And there were then discussions about
8 the alcohol and the beer and wine license.
9 And the original legislation was actually
10 passed as emergency and temporary with the
11 permanent.

12 So there wasn't much look beyond
13 the grocery stores at that point. There was
14 the thought that the District in those days
15 was lacking in grocery stores; there just
16 wasn't much, and what could be done at that
17 point. And I just don't think the others were
18 really on the radar. That's not to say they
19 do or they don't qualify.

20 CHAIRPERSON MILLER: Right.

21 MR. KLINE: But you asked a
22 question in terms of the history.

1 CHAIRPERSON MILLER: Yes.

2 MR. KLINE: And the thinking just
3 was not there at that time when it was going
4 on.

5 CHAIRPERSON MILLER: Okay.

6 MR. LEDERER: I'd like to quote
7 from the legislative history because it -- of
8 course it's a matter of public record in the
9 legislative services of the Council, but it
10 says that the legislative history, that the
11 intent of the exception was to, quote,
12 "strongly support new supermarket
13 development."

14 CHAIRPERSON MILLER: Yes.

15 MEMBER ALBERTI: Can you --

16 MR. LEDERER: Strong supermarket
17 development in the city and that it does not
18 apply to corner stores or convenience stores.
19 And then going further on the emergency, the
20 emergency resolution explained that the
21 exception was to, quote, "encourage high
22 quality grocery stores to locate new stores in

1 the District of Columbia."

2 CHAIRPERSON MILLER: Thank you.

3 Okay. Other Board Members have questions?

4 Mr. Alberti?

5 MEMBER ALBERTI: You know, Ms.

6 Perry, I'm trying to understand your concept
7 of full service grocery store, because you use
8 terms like "one-stop shopping." You also said
9 that as long as it has all of these products
10 that were listed in the five categories in our
11 proposed rulemaking that they would be full
12 service groceries. So if a store had all of
13 those products but had limited or no cleaning
14 products or paper products, would that
15 constitute as a one-stop shopping store?

16 MS. PERRY: You always do this to
17 me.

18 (Laughter.)

19 MS. PERRY: To me a full service
20 grocery store has paper products, it has
21 toilet paper, it has tissues. I mean we're
22 talking full service grocery store. You know,

1 I can walk -- the regs, from what I
2 understand, exclude the 7-Elevens, because
3 they are, quote, "a convenience store." But
4 when I go into the 7-Eleven that's right next
5 to the Walgreens now on Connecticut Avenue,
6 they have all the food products. They even
7 have now a rotisserie that they're doing
8 chickens and they're making fresh hot dogs.
9 They have paper products. They have all the
10 candy and canned goods and all of that, yet
11 they're a convenience store. So I guess I'm
12 having trouble with, you know, why are they a
13 convenience --

14 MEMBER ALBERTI: But do they have
15 fresh produce?

16 MS. PERRY: Yes, they do.

17 MEMBER ALBERTI: Okay. So what
18 makes them not a full service grocery store?

19 MS. PERRY: Your definition has
20 them as a convenience store.

21 MEMBER ALBERTI: But I'm asking
22 you. I'm not asking -- you're commenting --

1 MS. PERRY: I'm saying --

2 MEMBER ALBERTI: -- on our
3 definition.

4 MS. PERRY: I'm not saying they're
5 not.

6 MEMBER ALBERTI: Wait. Wait.
7 You're commenting on our definition, so I want
8 to hear from you what makes them not a full
9 service grocery store.

10 MS. PERRY: They don't sell meat.

11 MEMBER ALBERTI: Oh, they don't
12 sell meat? Okay.

13 MS. PERRY: And they don't sell
14 fish.

15 MEMBER ALBERTI: And so, but if
16 they did? If they would, they --

17 MS. PERRY: If they did and they
18 applied for a license, I might agree.

19 MEMBER ALBERTI: Okay. So if a
20 CVS or a Walgreens or a Rite Aid sold
21 unprocessed fruits and vegetables and
22 unprocessed meat and poultry and breads and

1 cereals and dairy products and dry goods and
2 cleaning products and paper toweling and all
3 those sorts of things, would they be a full
4 service grocery store?

5 MS. PERRY: If they did that, I
6 probably would agree.

7 MEMBER ALBERTI: Okay. Thank you.

8 MS. PERRY: In fact, if you want
9 to -- Walgreens now is partnering with Key
10 Food for a full service grocery store in a --
11 where are they -- something, Windsor Terrace.

12 MEMBER ALBERTI: Okay. I'm just
13 wondering. Now I have some clarity as to what
14 your concept is. Thank you. That's been very
15 helpful.

16 CHAIRPERSON MILLER: Other Board
17 questions?

18 MEMBER ALBERTI: Okay. I have no
19 further questions.

20 CHAIRPERSON MILLER: Mr. Jones?

21 MEMBER JONES: Thank you, Madam
22 Chair.

1 So just for clarification; I will
2 admit that I'm probably a little slow today,
3 but I didn't understand or comprehend, there
4 seemed to be a difference in your written
5 testimony that you were reading versus what
6 you're now saying to be a grocery store. And
7 maybe I just missed it and maybe your written
8 testimony was more geared towards the written
9 words that were presented in terms of the
10 definition, but I'm just trying to reconcile
11 that. Because I got the impression that your
12 original opinion based on your written
13 testimony was that the definition that was put
14 forward by the Board was woefully inadequate.

15 MS. PERRY: I do still feel that
16 way because you're only saying four out of the
17 five categories. So by your definition a
18 grocery store would not have to sell meat or
19 fish or a turkey at Thanksgiving, an
20 unprocessed turkey.

21 MEMBER JONES: Okay. So but that
22 alone makes it woefully inadequate?

1 MS. PERRY: To me it does.

2 MEMBER JONES: Okay. And so but
3 you have no issue with the fact -- or would
4 you have an issue if like say -- let's take
5 your example of the 7-Eleven I believe you
6 mentioned, and let's say they had a fresh
7 produce section which included apples only and
8 they had one item for the other categories,
9 because the 7-Eleven that you mentioned I'm
10 assuming doesn't have a very large selection
11 of fresh produce, a very large selection of
12 the other items that would fall into four of
13 these five categories. But you looked at that
14 and you said, well, I might consider that to
15 be a full service grocery store based on what
16 you -- in your response to Board Member
17 Alberti.

18 MS. PERRY: I think you're
19 misinterpreting because it depended. I said
20 they had some fresh fruit. You know, if they
21 only had a couple of bananas, would I consider
22 them a full service? No.

1 MEMBER JONES: Okay. So stop
2 right there. Where would you draw the line?
3 So where would it transition from a no to a
4 yes?

5 MS. PERRY: To me a full range
6 might be what was described over here. I
7 think you said you had 50 products of produce
8 and it was seasonal, or sometimes it's down to
9 25. You know, to me in a full service grocery
10 store I can walk in and buy onions, I can buy
11 potatoes.

12 MEMBER JONES: Right, but --

13 MS. PERRY: To me that's a full
14 service grocery store.

15 MEMBER JONES: And I know I'm
16 asking you, so I'm asking you for your
17 opinion.

18 MS. PERRY: My opinion is --

19 MEMBER JONES: But one of the
20 objectives that we're trying to meet is how to
21 come up with a uniform mechanism to apply a
22 set of rules that eliminate personal opinion,

1 perspective and ambiguity.

2 MS. PERRY: I think --

3 MEMBER JONES: So --

4 MS. PERRY: -- maybe a full range.

5 To me a full range is not one or two apples or

6 bananas. It's a full range.

7 MEMBER JONES: Understood.

8 Understood.

9 MS. PERRY: And that's in your
10 definition now.

11 MEMBER JONES: But I just want to
12 make sure I'm understanding. What you're
13 telling me is what it's not. I'm looking for
14 some feedback from you on what it is.

15 MS. PERRY: Okay.

16 MEMBER JONES: Based on your
17 thoughts. All right. So you're telling me
18 it's not X and it's not Y. Help me. Help me
19 understand what it is --

20 MS. PERRY: Well --

21 MEMBER JONES: -- so that I could
22 then potentially incorporate that --

1 MS. PERRY: Okay.

2 MEMBER JONES: -- into my
3 thoughts.

4 MS. PERRY: Okay. A full range to
5 me -- I'll just do vegetables, fruits or
6 whatever. You have apples, you have oranges,
7 you have --

8 MR. LEDERER: Grapefruits.

9 MS. PERRY: -- pears, you have
10 maybe mangoes, grapefruits, whatever is in
11 season.

12 MR. LEDERER: Blueberries.

13 MS. PERRY: Blueberries,
14 strawberries. You know, the things that --

15 MR. LEDERER: Kiwis.

16 MS. PERRY: -- you buy in a
17 supermarket. I'm not asking you to have, you
18 know, a lot of the exotic fruits that some
19 stores now carry. But you know --

20 MR. LEDERER: Well, I am.

21 MS. PERRY: Well, you might. I
22 don't. I eat the weird stuff. You know --

1 MR. LEDERER: You just insulted
2 Hawaii.

3 MS. PERRY: -- a full range of
4 stuff. It to me means, you know, I should be
5 able to go in and buy a head of lettuce, a
6 cucumber. To me it's the staples that you go
7 in and your feed your family with. I should
8 be able to go in and buy that kind of stuff.

9 MR. LEDERER: I want to simplify
10 it. If you go into the Giant or you go into
11 a Whole Foods and you see the type of fresh
12 fruit, vegetables, meats, fish that you can
13 buy, that full range is what is contemplated
14 and it needs to be reflected in the
15 definition, not whether you have 20 or 30,000
16 square feet. So that if I'm going to this
17 store, I can get all of the fruits and
18 vegetables and meats and fish that I need for
19 whatever purpose I have, which is what I can
20 get without thinking about it if I go to Whole
21 Foods, Giant, Safeway, Harris Teeter, and not
22 to have one fruit, two types of fish and one

1 type of meat.

2 MEMBER JONES: So you're basing a
3 definition in a past tense? So something
4 is --

5 MR. LEDERER: No, I'm basing it on
6 the present. I'm basing it on the exception
7 that created the moratorium, and your
8 definition needs to mirror that exception.

9 MEMBER JONES: Well, with all due
10 respect, that's your opinion. I'm just trying
11 to understand your rationale for your opinion.

12 MR. LEDERER: It's more --

13 MEMBER JONES: So help me --

14 MR. LEDERER: -- than my opinion.

15 Let me be clear. This rulemaking that you're
16 doing comes out of the Full Service Grocery
17 Store Exception to the moratorium for class B
18 liquor -- it's not my opinion. It's the
19 policy of the Council. And I think, well, you
20 can --

21 MEMBER JONES: With all due
22 respect, sir --

1 MR. LEDERER: Huh? But let me
2 finish.

3 MEMBER JONES: -- you're giving me
4 your opinion on it, and that's fine.

5 MS. PERRY: Brian, would you --
6 let me -- sir --

7 MR. LEDERER: May I finish? So
8 your definition ought to reflect that policy
9 and --

10 MEMBER JONES: And that's your
11 opinion, and I respect your opinion.

12 MR. LEDERER: Well, I don't know
13 what you mean by --

14 MEMBER JONES: But I'm trying to
15 understand.

16 MR. LEDERER: Well, okay.

17 MEMBER JONES: In terms of
18 defining it, you're saying you know it when
19 you see it. In order for you to see it, you
20 have to --

21 MR. LEDERER: No, I'm saying if
22 you go into the full service grocery store

1 like the Whole Foods at P Street and you do an
2 inventory on what they offer, that inventory
3 would be a factual, not an opinion,
4 definition, if you want to say, of what would
5 constitute a full service grocery store that
6 was what the Council had in mind and what you
7 should reflect in your definition.

8 MEMBER JONES: And I'm trying to.
9 So if I go into that one particular store and
10 I do an inventory at that one particular
11 store, and they come up with a list and they
12 provide me that list --

13 MR. LEDERER: Right.

14 MEMBER JONES: -- should that now
15 be the baseline upon which every single other
16 full service grocery store is defined?

17 MR. LEDERER: It should be the
18 type of baseline if you're going to do an
19 exception to the class B moratorium --

20 MEMBER JONES: Yes.

21 MR. LEDERER: -- not if you're
22 going to issue a certificate of occupancy for

1 them. That's a different --

2 MS. PERRY: Excuse me.

3 MEMBER JONES: Yes, I'm not
4 talking about that.

5 MS. PERRY: Let me --

6 MEMBER JONES: I'm talking about
7 what we're here to talk about.

8 MS. PERRY: Let me just try and
9 answer.

10 MEMBER JONES: No, no. But I
11 didn't get the answer to what I thought I
12 asked. So that inventory, you're saying no it
13 shouldn't be, but you --

14 MR. LEDERER: No, I said yes. It
15 is, yes.

16 MEMBER JONES: You did?

17 MR. LEDERER: That's because
18 that --

19 MEMBER JONES: So every single
20 other full service grocery store must be held
21 to that baseline that you get from an
22 inventory of a single store?

1 MR. LEDERER: It's the only
2 baseline you have, yes.

3 MEMBER JONES: Okay.

4 MR. LEDERER: Until and if --

5 MS. PERRY: Wait a minute, Brian.

6 MR. LEDERER: -- you have a
7 discussion and it's reflected because this
8 gives you a sense of --

9 MS. PERRY: May I --

10 MR. LEDERER: Now I'm not
11 saying --

12 MS. PERRY: Wait a minute. Excuse
13 -- Brian, let me -- excuse me. Let me try and
14 answer, because I think you started with me.

15 I don't have a problem when you
16 say here offers a full line of at least -- of
17 products on a continuous basis. And then you
18 say fresh, uncooked or unprocessed meat,
19 poultry or fish, fresh, uncooked or
20 unprocessed fruits or vegetables, bread,
21 cereals or baked goods, dairy products, dry
22 groceries. I don't have a problem with that.

1 MR. LEDERER: That's a reasonable
2 list.

3 MS. PERRY: That's a reasonable
4 list. I'm not asking you to quality that you
5 have to have four different kinds of lettuce
6 or four different types of tomatoes. My
7 objection to this is where you say or any
8 combination thereof or that you only have to
9 have four of the five. I'm not asking for you
10 to be specific that if blueberries aren't in
11 season that you have to have them. I mean I
12 think what you've done here is fairly good as
13 long say you don't say of a combination or
14 only four of the five.

15 MEMBER JONES: Thank you.

16 MS. PERRY: Does that make it any
17 clearer as to where I'm coming from?

18 MEMBER JONES: It does as far as
19 where you're coming from, yes, ma'am. Thank
20 you.

21 MS. PERRY: And I think that's in
22 a full service grocery store, or in a store

1 like what he's talking about, or in a Yes!.

2 MEMBER JONES: And just from my
3 understanding what I'm hearing is different
4 and separate and distinct from what he's
5 saying.

6 MR. LEDERER: No, it isn't.

7 MS. PERRY: Oh, I don't know. No,
8 it isn't.

9 MR. LEDERER: It is not.

10 MEMBER JONES: Oh, it's the same?

11 MS. PERRY: It's not.

12 MEMBER JONES: Okay.

13 MR. LEDERER: It's the same. But
14 I'm just saying you don't have to have 30,000
15 square feet of all this stuff. You know, you
16 can have smaller stores that have a full
17 range.

18 MEMBER JONES: Okay. Sir, you
19 read what has been put out in terms of the
20 definition of a full service grocery store,
21 and part of the reason you're here today I'm
22 assuming is you have an interest.

1 MR. LEDERER: Correct.

2 MEMBER JONES: I think I've heard
3 you say that you didn't see anything overly
4 onerous about what has been presented in terms
5 of keeping track of square footage, as long as
6 we do a better job of clearly defining what
7 that metric is, what the measurement is. In
8 terms of your daily operations, would you look
9 at any of the things that have been put in
10 here as show stoppers for you to be able to
11 make a profit?

12 MR. SMUCKER: I know I may upset
13 some people by saying this, but no.

14 MEMBER JONES: No, and I need you
15 to be honest.

16 MR. SMUCKER: Yes.

17 (Laughter.)

18 MEMBER JONES: So upsetting them,
19 that's fine. I do it on a daily basis.

20 (Laughter.)

21 MEMBER JONES: So don't feel
22 anything about that. I just want to

1 understand what your honest opinion is.

2 MR. SMUCKER: As long as it's
3 measured honestly, you know, upon an
4 inspection or if somebody walks in and they
5 say, all right, you have five percent of --
6 you know, they measure it out and it's five
7 percent of -- these are baselines that you
8 guys are providing that you're having minimums
9 of this.

10 MEMBER JONES: Right.

11 MR. SMUCKER: And I do not find it
12 onerous. And we change our shelves two to
13 three times a week.

14 MEMBER JONES: Right.

15 MR. SMUCKER: And I'm not going to
16 be worried. I mean we will have the products
17 somewhere in the store --

18 MEMBER JONES: Okay.

19 MR. SMUCKER: -- at any given
20 time.

21 MEMBER JONES: And just to make
22 sure I get this for my own understanding, do

1 you consider yourself operating with the
2 intent of what your application has been put
3 forward as? Do you consider yourself
4 basically to be a full service grocery store?

5 MR. SMUCKER: Yes, I do.

6 MEMBER JONES: Okay. Thank you.

7 Thank you, Madam Chair.

8 CHAIRPERSON MILLER: Other

9 questions?

10 (No audible response.)

11 CHAIRPERSON MILLER: I have one
12 more question for you, Mr. Lederer, just for
13 clarification, and I mean I can go back and
14 look at the legislative history myself. I
15 have it. But just based on what you were
16 saying, you know, you talked about our
17 regulations should mirror the exception that
18 was at issue before the Council. And so I'm
19 thinking, well, what does he mean mirror? How
20 are we going to mirror it? And then I think
21 that what comes to my mind was what you said
22 about there being a variety of high-quality

1 grocery stores, that that was the intent of
2 the Council, other than helping Whole Foods go
3 to Logan Circle.

4 MR. LEDERER: Right.

5 CHAIRPERSON MILLER: Okay. Thank
6 you. Okay. Any other comments for this
7 panel?

8 MR. LEDERER: Yes, high-quality
9 grocery stores I think was the language they
10 used, but --

11 CHAIRPERSON MILLER: I thought
12 that's what I said.

13 MR. LEDERER: Yes, I agree.

14 CHAIRPERSON MILLER: Okay. And
15 you will be submitting what you read from, Ms.
16 Perry?

17 MS. PERRY: Yes, I'm going to have
18 to type it all up.

19 CHAIRPERSON MILLER: Okay.
20 Because I was interested in what you read.

21 MS. PERRY: When do you need to
22 have it in by?

1 CHAIRPERSON MILLER: Well, March
2 8th is the deadline.

3 MS. PERRY: March 8th? Okay.

4 CHAIRPERSON MILLER: 4:00. But
5 because I know you read something from
6 Portland, what they said was a high --

7 MS. PERRY: I did. And I have all
8 of it here, so I can attach it.

9 CHAIRPERSON MILLER: Okay. That
10 would be great. So and any of you -- what?

11 MR. LEDERER: One week. I was
12 trying to get that.

13 CHAIRPERSON MILLER: Okay.

14 MR. LEDERER: Approximately one
15 week.

16 CHAIRPERSON MILLER: Okay. And
17 we're open to any ideas of alternative
18 language that you think might capture this
19 better. This is open. We have a proposal out
20 there and we're totally open to any ideas that
21 you all may have, even after you leave this
22 hearing. Yes?

1 MR. SMUCKER: Not that I think
2 it's overly important, but I think the
3 inclusion of canned goods or canned items may
4 be important, even though it's not in the
5 language.

6 CHAIRPERSON MILLER: Let me ask
7 you about that because people keep coming up
8 with other items, you know, like baby food or
9 canned goods or whatever. I mean we're not
10 necessarily going to list every type of food
11 item that would be in a grocery store or that
12 would have to be in a grocery store in order
13 for us to consider it a full service grocery
14 store. It doesn't mean you can't have canned
15 food.

16 MR. SMUCKER: Right.

17 CHAIRPERSON MILLER: But do you
18 think it needs to be there instead of
19 something else, or so you can have that and --
20 I mean --

21 MR. SMUCKER: Right now we're at
22 probably six percent of dry groceries, even

1 though I might include canned items or canned
2 goods under that sort of definition.

3 CHAIRPERSON MILLER: So it would
4 you meet one of the --

5 MR. SMUCKER: Exactly.

6 CHAIRPERSON MILLER: --
7 definitions? All right. Okay. Canned goods.
8 Where do you think that falls?

9 MR. SMUCKER: I guess under dry
10 groceries.

11 CHAIRPERSON MILLER: All right.
12 Or whatever. I mean this is in flux.

13 MR. SMUCKER: Right.

14 CHAIRPERSON MILLER: Okay.

15 MEMBER JONES: Madam Chair?

16 CHAIRPERSON MILLER: Oh, yes?

17 MEMBER JONES: I'd like to follow
18 up.

19 CHAIRPERSON MILLER: Okay.

20 MEMBER JONES: One thing I wanted
21 to ask in terms of the 50 percent, as a full
22 service grocery store operator --

1 MR. SMUCKER: Yes.

2 MEMBER JONES: -- how would you
3 view the 50 percent? Is that way high? Way
4 low? On the mark? Considering that we're
5 trying to find what a full service grocery
6 store is, 50 percent, where does that fall?

7 MR. SMUCKER: I don't think the 50
8 percent is onerous. I think when you have the
9 -- as long as it's like a deli space. Is that
10 included as part of your retail space? Is
11 that counted against the rest of your retail?
12 But I mean I'm looking at future reference.
13 You know, we would like to have more of like
14 a bakery and a deli counter and maybe a caf,.
15 Would those all be counted against that 50
16 percent that was quoted to you? But as I
17 stand right now it's not onerous at all.
18 We're at like 75 percent.

19 MEMBER JONES: Okay. Thank you.

20 Thank you, Madam Chair.

21 CHAIRPERSON MILLER: That does
22 sound like something Ms. Hirao was saying

1 about expanding and stuff. I don't know
2 whether that type of restriction is a
3 limitation, the 50 percent, or whether the
4 other one, the 5 percent total retail space
5 for each of the 4 to 5 product categories.

6 MR. SMUCKER: What was the
7 question? I'm sorry.

8 CHAIRPERSON MILLER: Are those
9 kind of a hindrance to expansion or
10 renovation?

11 MR. SMUCKER: Potentially. Say
12 that if we were to install a deli counter, if
13 we were ever able to get water all the way to
14 the back of the store, you know, but more so
15 if you were to have a full service market,
16 which add a lot of grocery, beer, wine plus
17 deli -- say a Dean & DeLuca, may not meet
18 these requirements. So if Dean & DeLuca
19 wanted to repeat what they did in Georgetown,
20 you probably wouldn't grant them a license to
21 sell beer and wine.

22 CHAIRPERSON MILLER: Why wouldn't

1 they meet the requirements?

2 MR. SMUCKER: Because their retail
3 space wouldn't meet the 50 percent because so
4 much of their prep counter and a good portion
5 of the store in the back is wine. Just
6 something to keep in mind.

7 CHAIRPERSON MILLER: No, that's
8 why we're asking you. Yes.

9 MEMBER JONES: Well, are you
10 asking us if we consider areas where you do
11 prep work as part of your retail space and
12 storage areas part of your retail space? So
13 if we were to respond to you hypothetically
14 and say, no, we weren't including prep space
15 and storage space as part of what we would
16 define as retail space, how would that impact
17 your thoughts?

18 MR. SMUCKER: I think that would
19 be very helpful.

20 MEMBER JONES: Okay.

21 MR. SMUCKER: I think that would
22 be incredibly helpful especially when you have

1 stores that want to add on to those things but
2 then all of a sudden their overall floor space
3 is no longer 50 percent. Instead of actual
4 retail space it's still meeting those
5 requirements.

6 MEMBER JONES: Okay.

7 MR. LEDERER: Yes, we think that's
8 a good suggestion that you made, because you
9 need the prep space to offer fresh meats and
10 vegetables. And even a deli counter is a
11 source of fresh meats because you go and they
12 -- it's just sold in a smaller quantity, but
13 it's still fresh.

14 MEMBER JONES: Right.

15 MR. LEDERER: Sometimes.

16 MS. PERRY: Or it can be a cheese
17 bar.

18 MEMBER JONES: Yes, ma'am. Thank
19 you. Appreciate it.

20 CHAIRPERSON MILLER: And I just
21 want to ask, Mr. Smucker, just hypothetically,
22 I mean do you think that you could be a full

1 service grocery store in the sense that --
2 well, it's not really defined yet -- but you
3 offer your full range, same range of food and
4 paper products or whatever but only occupy 40
5 percent as opposed to 50 percent of whatever
6 the retail space? We're talking about there's
7 a 50 percent proposed --

8 MR. KLINE: Yes, he's way over
9 that. He's at 75 percent is the point right
10 now.

11 CHAIRPERSON MILLER: Okay.

12 MR. SMUCKER: We're talking about
13 retail space, correct?

14 MR. KLINE: Yes.

15 MR. SMUCKER: Right.

16 CHAIRPERSON MILLER: I know you're
17 way over. It's not an issue for you as you
18 are now and you're the only one up here who
19 actually runs a grocery store, we think. And
20 Mr. Cha was here before.

21 MR. SMUCKER: Yes.

22 CHAIRPERSON MILLER: So he was

1 here before and we asked him these kind of
2 questions, too. But I mean even with respect
3 to your competitors or whatever, is that
4 something in your mind that if you got to the
5 point where you had too low a percentage of
6 area devoted to food it wouldn't be a grocery
7 store really?

8 MR. SMUCKER: I mean --

9 MR. KLINE: We'll leave that to
10 you.

11 (Laughter.)

12 MR. SMUCKER: Yes, I'd say
13 something about -- we just need to define
14 where -- what the retail space is versus prep
15 space versus storage.

16 CHAIRPERSON MILLER: Okay. Just
17 be clear about --

18 MR. SMUCKER: Yes. Beyond that I
19 am not --

20 CHAIRPERSON MILLER: Okay.

21 MR. LEDERER: Since I don't run a
22 store, I'm not constrained by counsel, but I

1 think if one were to go into the Whole Foods
2 and the Giant, they're well over 50 percent.
3 I don't know what they are, but --

4 CHAIRPERSON MILLER: Giant?

5 MR. LEDERER: Giant or Whole
6 Foods.

7 CHAIRPERSON MILLER: Okay.

8 MS. PERRY: I think any of the
9 stores, Safeway, whatever.

10 CHAIRPERSON MILLER: Okay. So you
11 all think that's basically reasonable, the 50
12 percent?

13 MR. LEDERER: I think so.

14 CHAIRPERSON MILLER: Okay.

15 MS. PERRY: You know, and I also
16 want to say I would consider fresh foods --
17 you know, when you have a cheese bar or you
18 have the deli counter where they slice the ham
19 or the turkey breast or whatever, you know, I
20 think that's reasonable in a grocery store.

21 MEMBER JONES: What about a sushi
22 bar? Would you --

1 MS. PERRY: I don't like it, but
2 yes.

3 (Laughter.)

4 CHAIRPERSON MILLER: Okay.

5 MR. LEDERER: Make sure it meets
6 the health requirements and you have good tuna
7 for it because --

8 CHAIRPERSON MILLER: Okay.

9 MS. PERRY: That's enough, Brian.

10 CHAIRPERSON MILLER: I think we
11 have some more witnesses who want to testify.

12 MR. KLINE: Thank you.

13 CHAIRPERSON MILLER: Oh, Mr.
14 James. I think he wanted to testify.

15 Anybody else want to come forward
16 to testify besides Mr. James? Mr. O'Brien?

17 MR. O'BRIEN: I'm not on your
18 witness list?

19 MEMBER ALBERTI: We do?

20 CHAIRPERSON MILLER: I'm sorry.
21 I don't. Do you have an updated witness list?

22 MEMBER ALBERTI: You know we

1 didn't get an updated list. I mean late
2 entries did not get up in our list. I
3 apologize for that, Mr. O'Brien.

4 CHAIRPERSON MILLER: It's all
5 right. Okay. Is there anybody else that I
6 didn't call who wants to testify? Okay. Oh,
7 yes. Come on, Mr. Woodson. There's a seat.
8 Come on up.

9 Okay. Mr. O'Brien? So I don't
10 have the list of you all, so if you want to
11 say, you know, your name. I know who you are,
12 but you know?

13 MR. O'BRIEN: I think the next
14 names were MR. Conner on behalf of
15 Walgreens --

16 CHAIRPERSON MILLER: Okay.

17 MR. O'BRIEN: -- on the list.

18 CHAIRPERSON MILLER: Okay.

19 MR. O'BRIEN: And then I will hand
20 up some comments and speak very briefly on
21 behalf of Trader Joe's.

22 CHAIRPERSON MILLER: Okay.

1 MR. O'BRIEN: Which is also on the
2 list you probably didn't get. But Mr. Conner
3 will speak on behalf of Walgreens and he may
4 ask me for any technical clarification in
5 response to your questions.

6 CHAIRPERSON MILLER: Okay. Thank
7 you.

8 MR. O'BRIEN: And I have written
9 from both --

10 MEMBER ALBERTI: Martha?

11 CHAIRPERSON MILLER: Or Jonathan?

12 MEMBER ALBERTI: Thank you, Jon.

13 CHAIRPERSON MILLER: So I'm sorry
14 I didn't have your names, but we want to hear
15 from you. So, Mr. Conner?

16 DR. CONNER: I may proceed?

17 CHAIRPERSON MILLER: Go ahead.

18 DR. CONNER: Okay. My name is
19 Rick Conner, district manager for Walgreens.
20 And first I want to thank the Board for taking
21 the time to hear my testimony.

22 My personal responsibility as a

1 district manager, I oversee approximately 33
2 stores in Northern Virginia, Southern Maryland
3 and also 3 existing stores in the District of
4 Columbia. Our fourth District of Columbia
5 store at 7th and H Streets in Chinatown is
6 scheduled to open up on March 21st. This new
7 store will be one of our first new concept
8 flagship stores. Within the company we have
9 8,000 stores and this will be the 8th flagship
10 store. It is also a prototype with components
11 of this store being included in additional
12 stores in the Walgreens within the District.

13 Because of the suspension of the
14 Board's authority to grant a full grocery
15 store license we have been forced to apply to
16 move our current B license from our west end
17 location to the forthcoming flagship store.
18 That existing license will be impacted by
19 promulgation of the draft --

20 MR. O'BRIEN: Will not be
21 impacted.

22 DR. CONNER: Oh, I'm sorry, will

1 not be impacted by promulgation of the draft
2 regulation, but as I will discuss below
3 further expansions of Walgreens within the
4 District will be impaired if the regulations
5 are enacted in their proposed form.

6 Walgreens opened its first store
7 in D.C. in 2008. We've invested progressively
8 larger amounts of money to establish the
9 stores with the filing. We expended millions
10 of dollars to open our third store at
11 Connecticut and Veazey, N.W., right across
12 from UDC, and we are continuing to spend
13 millions more into opening our forthcoming
14 flagship store.

15 There are three open D.C. stores.
16 Walgreens employs about 90 total staff of whom
17 more than 50 percent are residents of the
18 District. The flagship store will also employ
19 70 personnel at that store, and right now
20 that's -- about 80 percent are District
21 employees. Our hiring of employees at the new
22 store has been coordinated with the partnering

1 through the Mayor Gray's Once City, One Hire
2 Program. And we're very happy to participate
3 as an employer and we've been able to offer
4 approximately, like I said, 80 percent of
5 those jobs from the District and working with
6 the city.

7 In addition to our store's
8 creations our stores have been very active
9 participants in the community that we serve
10 in. And we lead the way in charitable
11 activities such as donating free flu shots
12 within the city, providing heart and
13 cholesterol screenings, A1C diabetes
14 hemoglobin testing, and also Walgreens is
15 partnering with the HIV community to provide
16 necessary counseling on medication adherence.

17 It's in these contexts that
18 Walgreens' monetary investments in the city in
19 the recent past years, our creation of
20 employment opportunities, including highly-
21 paid and skilled positions as pharmacists,
22 technicians and nurse practitioners and

1 generations of millions of dollars in tax
2 revenue that we find the present targeted
3 attack against Walgreens in the form of these
4 proposed regulations so surprising to us.

5 These proposed regulations are the
6 direct result of our efforts to secure a B
7 license for our one-year-old store at
8 Connecticut Avenue and Veazey under the Full
9 Service Grocery Store Exception and the
10 general moratorium on the issuance of the
11 class B license in the District.

12 Notwithstanding the operations that our
13 existing stores have generated zero complaints
14 of peace, quiet and order nature, a mere
15 handful, less than five neighbors, are
16 fighting the license application.

17 In an effort to find some way to
18 stop the issuance of a license for our
19 Connecticut and Veazey store, they latched
20 onto the full service grocery store definition
21 issue. We recognize that the present standard
22 may be subject to multiple reasonable

1 interpretations and that the Board addressed
2 that issue in an advisory opinion dated August
3 1st, 2002. I'm sorry, 2012. Not satisfied
4 with the Board's advice with that Walgreens
5 after hearing might be able to qualify as a
6 full service grocery store, the handful of
7 opponents enlisted political support in the
8 effort to fix the outcome of the case.

9 There was no city-wide crisis or
10 emergency created by the proliferation of a
11 full service grocery store license. Rather,
12 the January 15, 2013 suspension of the Board's
13 authority to issue full service grocery store
14 licenses and the requirements that the Board
15 created new rules in that regard are the
16 direct result of undue exercise of political
17 influence in the one case.

18 We have presented evidence at all
19 three hearings on our pending application for
20 a license at Connecticut Avenue and Veazey,
21 N.W. and the Board is well aware of the nature
22 and extent of our food offerings at the store.

1 If the proposed regulations are viewed in that
2 context, it is clearly beyond argument that
3 the proposed rules are intended to exclude
4 Walgreens and like businesses from the
5 licensure of full service grocery store.

6 Your own advisory opinion, you
7 agreed that retail in the United States has
8 evolved over recent years. Supermarkets are
9 not operating pharmacies and pharmacies are
10 now selling food. In order to be competitive
11 Walgreens must offer the same one-stop
12 shopping as the chain supermarkets and mass
13 merchants. Why would one fill their
14 prescription at Walgreens when they can fill
15 it at a Safeway and pick up a bottle of wine
16 at the same time?

17 City officials have reportedly
18 urged us to open additional stores in the
19 District, especially in particularly
20 underserved neighborhoods, but the business
21 model for our stores requires the offering of
22 adult beverages. These regulations are geared

1 at Walgreens and our category competitors.
2 The authors must expect that it will act as a
3 disincentive for us to build more stores and
4 employ more employees. From our perspective
5 this would go counter to those city officials
6 who have encouraged us to grow and expand here
7 in the District. We believe that the proposed
8 regulations before you will in fact have a
9 chilling effect on the economic development,
10 creation of jobs and generation of revenues.

11 I stated earlier that we perceive
12 the proposed regulations as targeted
13 specifically at us. Any different
14 interpretation would not be accurate
15 especially after reviewing section (E) of the
16 proposed rules which would apply to the new
17 definition retroactively to pending
18 applications notwithstanding the creative use
19 of the word "prospective."

20 According to our counsel we are
21 aware that in a previous situation posed by
22 new legal requirements the Board has

1 exemplified pending applications such as the
2 cases of the neighborhood moratorium. The
3 Board's failure to do so in this instance
4 makes its intentions towards Walgreens very
5 clear. For the sake of economic development
6 and employee opportunities that our current
7 and future stores will bring, we hope the
8 Board will reconsider. And thank you for your
9 time in considering my comments and testimony.

10 CHAIRPERSON MILLER: Thank you
11 very much.

12 Mr. O'Brien, do you have some
13 testimony for Trader Joe's?

14 MR. O'BRIEN: I was asked by
15 Trader Joe's, which only became aware of this
16 within the last week.

17 CHAIRPERSON MILLER: Okay.

18 MR. O'BRIEN: I was asked by them
19 to submit testimony from Angus Armstrong, the
20 general counsel.

21 CHAIRPERSON MILLER: Okay.

22 MR. O'BRIEN: That's already been

1 passed up. But I was asked in particular to
2 emphasize just a couple of points.

3 CHAIRPERSON MILLER: Okay.

4 MR. O'BRIEN: One of the previous
5 witnesses opined that the regulations in the
6 present form might foreclose licensure of a
7 Dean & DeLuca, and I think I perceived some
8 eyebrows raised on the dais at that
9 proposition. It never occurred to us or
10 initially to Trader Joe's that someone could
11 say Trader Joe's is not a full service grocery
12 store, but these narrow definitions may be
13 hard to meet for Trader Joe's, as well as for
14 the Dean & DeLucas of the world.

15 The statute says that a full
16 service grocery store must offer a full range
17 of fresh, frozen and canned items, but when we
18 look at the proposed regulations there is no
19 credit given toward full service grocery store
20 for frozen or canned items. Now I do note
21 that -- I think it's -- and I'm sorry, I don't
22 have it in front of me, I do think Section 5

1 of the categories talks about dry goods. In
2 the grocery industry parlance dry goods
3 includes canned goods, okay, but this
4 regulation doesn't say that and one could
5 imply for its omission that it is being
6 excluded. So if the intention is that dry
7 goods should include canned goods, it should
8 say so to remove any doubt.

9 The other issue though is the
10 frozen foods. If you were to put frozen foods
11 in that category Trader Joe's would not have
12 any issue at all. When I say "that category,"
13 create perhaps a sixth category including
14 frozen foods. And if you create a sixth
15 category and maybe say four of the six, then
16 a Trader Joe's has no issue.

17 The regulations are supposed to
18 supplement and interpret the statute, but when
19 a statute says that you are a full service
20 grocery store if you have a full range of
21 fresh, canned and frozen, yet the regulation
22 that's supposedly implementing or

1 supplementing that excludes from consideration
2 whether you have canned or frozen, the
3 regulation is inconsistent with the statute
4 and should not be adopted that way.

5 In summation I think Trader Joe's
6 position is as expressed by Brother Pascal a
7 little while ago. In what apparently is some
8 zeal here; and by "here" I don't mean
9 personally members of the Board -- but some
10 zeal right now to knock out certain kinds of
11 businesses, this may have a much broader scope
12 than one might guess. And so I echo what
13 Brother Pascal said, which is don't throw out
14 the baby with the bath water. Well, that's
15 what Trader Joe's says.

16 CHAIRPERSON MILLER: Thank you.
17 We'll get back to you. Mr. James?

18 MR. JAMES: Good afternoon. We
19 took your rulemaking and worked with it. So
20 my words are in green on that. And I quote
21 the Code, and that's in blue. Everything else
22 remains the same.

1 So there's already a description
2 of what comprises a full service grocery store
3 in the Code. It is found in various sections
4 including at 25-333. I think it's worth
5 reading it, because I don't think anybody's
6 actually read the whole thing into the record
7 today.

8 "The primary business and purpose
9 is the sale of a full range of fresh, canned
10 and frozen food items, and the sale of
11 alcoholic beverages incidental to the primary
12 purpose. The sale of alcoholic beverages
13 constitutes no more than 15% of the total
14 volume of gross receipts on an annual basis.
15 The establishment is located in the C Zone."
16 I won't read them all. "The establishment is
17 a full service grocery store which is newly
18 constructed with a certificate of occupancy
19 issued after January 1, 2000, or is an
20 existing store which has undergone renovations
21 in excess of 500,000 in a calendar year which
22 an application is made."

1 So it then follows the list that
2 the Board has put forth; and I say after that,
3 and put into practice, this list would prove
4 inadequate to the test describing what the
5 average person would expect to find in a full
6 service grocery store. The Board's four out
7 of five methodology could lead to a full
8 service grocery store without dairy products,
9 without fresh fruits and vegetables.

10 In item (C) the language would
11 allow a full service grocery store to not even
12 carry bread or cereal or baked goods. It
13 could carry one or the other, but when you
14 have the qualifying "or any combination
15 thereof" it makes it questionable exactly what
16 it means.

17 (E) under dry groceries would
18 allow no pasta. I mean, you could just go on
19 and on through the Board's list of things that
20 most people would expect to find in a full
21 service grocery store. And importantly
22 missing from the list are frozen foods and

1 canned foods, a major part of any serious
2 grocery store's offerings.

3 So if you add the frozen and
4 canned -- now I'm speaking not from the text.
5 I think you should have all five of your
6 listed suggestions plus the two. So there
7 would be seven. And I don't see the point of
8 a four out of a five or a five out of seven,
9 or anything like that. I think it needs to be
10 all of these things.

11 As to the 50 percent or 6,000
12 square -- I don't know. I'm not in that
13 business, you know? When the discussion went
14 to warehouse-type establishments, that could
15 be massive and food could be a comparatively
16 small segment of their offering, but if they
17 still offer everything that a full service
18 grocery store would, then I think you really
19 get into problems with 50 percenting it or
20 6,000 square feet. I'm familiar with Mr.
21 Cha's first store in Adams Morgan. I doubt if
22 it is even 6,000 square feet in toto.

1 I think warehouse stores probably
2 need to be licensed separately. I think it's
3 a different animal altogether. They could
4 sell massive amounts of alcohol. You know,
5 it's supposed to be 15 percent, no more than
6 15 percent under this license. And just
7 following the discretion -- I made some notes.
8 ABRA regulates alcohol, not bread. Why not
9 put a maximum on the space devoted to alcohol?
10 ABRA investigators shouldn't be measuring the
11 corn flake aisle, but should be measuring the
12 alcohol aisle.

13 So going to page 3 under your item
14 (C), I note the five percent figure could lead
15 to a very small selection within each
16 category, particularly if the premises is
17 small to the point where an average person
18 would not describe the establishment as a full
19 service grocery store. But then I conclude
20 with the Board must be cognizant that the
21 public will lose shelf space for other needed
22 items, items that help provide variety to

1 consumers to the more profitable alcohol
2 products which are already widely available in
3 A stores and other existing mediums. In what
4 were once known as drug stores this could mean
5 any number of health-oriented products or
6 useful household products would not be
7 available and in grocery stores it could mean
8 instead of numerous different manufacturers'
9 offerings there may be just one brand of tuna
10 fish or mayonnaise or corn flakes.

11 A better definition must be
12 adopted or consumers' quality of life will
13 suffer. The wording that I copied out from
14 the Code above has worked well to date in
15 helping bring more and better full service
16 grocery stores to the District and has enabled
17 the store operators to provide a wide variety
18 of wine and beer products. Why mess with
19 success? The Board must be prepared to reject
20 applicants that don't quality with the
21 language that has served D.C. so well. I
22 suggest the Board adapt that language in

1 perhaps some further detail for the definition
2 to be placed in 23 DCMR.

3 CHAIRPERSON MILLER: Thank you.
4 We'll get back to with questions when we're
5 finished with the panel.

6 Mr. Woodson?

7 MR. WOODSON: Yes, Madam Chair, I
8 didn't come to the hearing today intending to
9 deliver remarks, but I have an interest in
10 this area for a variety of reasons, but I
11 thought I would, with your permission, share
12 a few observations.

13 First of all, this whole matter
14 arose from a parochial local argument. We
15 have a controversy in a single space with a
16 single license in a single ward, but we are
17 now captured with a city-wide policy problem.
18 I have some suspect about that.

19 The statute that currently is in
20 operation has worked well for the purposes
21 that it was designed for; Mr. James just
22 remarked to that effect, but what is being

1 called for from the Board is to make another
2 decision about what a grocery store is. And
3 whatever that decision is going to be is going
4 to be incorporated into the statute.

5 One of the challenges that you all
6 have as a body is interpreting law to
7 effectuate a purpose in the future. You all
8 must apply the ABC statute to circumstances
9 which arise. We can't predict them all. No
10 one can predict them all. So that says, that
11 implies at least to me that the Board does
12 itself well by allowing greater flexibility in
13 its decision that is on this particular
14 rulemaking. It can build in flexibility so
15 that the circumstances which arise going
16 forward can be adequately addressed.

17 The second thing I would observe
18 is that the impetus for the moratorium was to
19 encourage economic development in underserved
20 areas. Now ironically the area that was so
21 underserved was the P Street/Logan Circle
22 area. Now they may have been missing a

1 supermarket, but I would submit that other
2 parts of the city have greater need for retail
3 services and retail opportunities.

4 The challenge here with this
5 question of moniker, what is a drug store?
6 What is a supermarket? What is a grocery
7 store? These are self-imposed monikers that
8 we have in our own sense of experience, but
9 the retail business is evolving and merging.
10 I know I was in this hearing room a few months
11 ago when there was quite a lot of testimony
12 about that, how the various businesses are
13 more and more coming to look alike so that the
14 supermarkets now -- and I won't say Walmart;
15 that's been overused. Let's talk about Giants
16 and Safeways.

17 Giants and Safeways now are
18 drugstores and there may be those who believe
19 that a pharmacy operation is a very incidental
20 portion of those kinds of businesses
21 underestimate the economic power of the
22 pharmacy, especially versus food where

1 pharmacies have a much, much larger profit
2 margin. The margins are much larger with the
3 pharmacy operations.

4 But that to the side though, the
5 need to have -- your body to have flexibility
6 in dealing with what is a grocery store is
7 going to serve you well as retail businesses
8 move further into truly underserved areas, and
9 I'm specifically looking at areas east of the
10 river, indeed in a lot of areas east of Rock
11 Creek Park. You need to have this
12 flexibility.

13 What is a full service grocery
14 store is also a function of what the
15 expectation of the community is. Your
16 proposal is to have a series of categories,
17 and you can have four out of five or five out
18 of six, or whatever the number was. My mind
19 fails me at this moment. But that's a
20 reasonable thing to do because every
21 operation, every circumstance you face is not
22 going to require the same kind of application,

1 is not going to require the same kind of
2 operation. This is not a cookie cutter
3 proposition here.

4 And the second thing I would
5 observe is that your need for flexibility has
6 to be clearly stated to the Council. You
7 know, the people who are participating here in
8 this hearing now move to the City Council once
9 you all have made your decision. And those
10 who don't like what has happened will go there
11 and complain. And those who do like what has
12 happened will go and try to defend. But the
13 next proposition will go to the Council.

14 I recommend strongly that the
15 flexibility you need be expressed clearly to
16 the Council, that the Council is not on the
17 front line here. You are. The Council is not
18 going to be the body that has to absorb the
19 need for decision making. You are. And it
20 will be the city at large; and you are all at-
21 large members, by the way -- the city at large
22 needs that at-large perspective because the

1 communities vary and the communities differ in
2 their needs across the city.

3 One other point, and that is the
4 class B moratorium was imposed to inhibit the
5 spread of convenience stores, the traditional
6 corner mom and pop -- I guess it's traditional
7 corner mom and pop stores that were
8 proliferating throughout the city in the '90s.
9 Indeed, when I first came to be asked to
10 participate in this area of work, the question
11 was asked what can we do about areas of the
12 city that have a mom and pop store on every
13 corner and all of them are selling beer and
14 wine, and all of them are making their money
15 there? That is not the circumstance that you
16 are facing with this convergence of retail.

17 The convergence of retail
18 operation is not being driven by the desire to
19 sell alcoholic beverages. And by the way,
20 we're talking about beer and wine, not
21 spirits. It's not being driven by that. It's
22 being driven by other kinds of consumer needs.

1 The ability to sell beer and wine, to have a
2 B license adds a measure of economic support
3 to what is otherwise seen as a really
4 desirable economic footprint from a retail
5 operations. It's a sweetener, if you will,
6 but it is not driving, it is not the driving
7 force for the retail expansion.

8 I return to my first point is that
9 you all need the regulatory flexibility. In
10 my humble opinion, you should not have a
11 statutory imposition that requires a cookie
12 cutter response. The City Council needs to
13 trust the ABC Board to do the right thing for
14 the community, for the citizens of the
15 District. I will certainly say that to them
16 and say that to them on a regular basis. And
17 when you do complete your rulemaking I urge
18 you to say the same thing, that they need to
19 be willing to trust you to do the right thing
20 for the community of the District.

21 CHAIRPERSON MILLER: Thank you.

22 MR. WOODSON: Thank you.

1 CHAIRPERSON MILLER: Thank you.
2 Okay. Mr. O'Brien, I want to ask you, did you
3 say that Trader Joe's would not meet the
4 requirements definitively?

5 MR. O'BRIEN: No, I did not say
6 that.

7 CHAIRPERSON MILLER: They might
8 not?

9 MR. O'BRIEN: It called into
10 question.

11 CHAIRPERSON MILLER: Can you
12 elaborate on that at all for us to --

13 MR. O'BRIEN: Yes, I think Trader
14 Joe's carries all five of the categories
15 listed --

16 CHAIRPERSON MILLER: Yes. Okay.

17 MR. O'BRIEN: -- especially if you
18 include the canned and frozen.

19 CHAIRPERSON MILLER: Right.

20 MR. O'BRIEN: But when you start
21 to get to the five percent, the allocation
22 within the store, that's where I think it got

1 a little iffy from Trader Joe's point of view.
2 As I said a little while ago, it never dawned
3 on us in my office that a Trader Joe's would
4 not be -- would be ensnared in this
5 rulemaking. And I'm not saying that it will
6 be, but I'm saying it called it into question.
7 And that's why there's not somebody from
8 Trader Joe's here today. Couldn't get anybody
9 here that quick.

10 But from Trader Joe's point of
11 view, if you did away with the five percent
12 and simply said that 50 percent of your floor
13 space has to be devoted to, you know, four of
14 five or four of six of the following
15 categories, then I think Trader Joe's has no
16 further dog in the fight.

17 CHAIRPERSON MILLER: And can you
18 elaborate anymore why that five percent is a
19 problem?

20 MR. O'BRIEN: Well first of all,
21 not all Trader Joe's stores are the same.
22 Okay?

1 CHAIRPERSON MILLER: Yes.

2 MR. O'BRIEN: They're not
3 necessarily cookie cutter. But a particular
4 department, perhaps dairy, might only be four
5 percent.

6 CHAIRPERSON MILLER: Okay.

7 MR. O'BRIEN: Okay?

8 CHAIRPERSON MILLER: Yes.

9 MR. O'BRIEN: It's this cookie
10 cutter approach that gives Trader Joe's some
11 pause. I am not for a minute saying that
12 Trader Joe's will not qualify.

13 CHAIRPERSON MILLER: Right.
14 Right.

15 MR. O'BRIEN: Okay.

16 CHAIRPERSON MILLER: Right.

17 MEMBER ALBERTI: I have a
18 question.

19 CHAIRPERSON MILLER: Oh, did you
20 want to jump me?

21 MEMBER ALBERTI: Actually, because
22 I was going to speak about something Mr. Jones

1 talked about earlier.

2 But maybe you want to talk about
3 that. Go ahead. Please.

4 MEMBER JONES: Do you want me
5 to --

6 MEMBER ALBERTI: Please. No, go
7 ahead.

8 MEMBER JONES: Mr. O'Brien, just
9 to follow up, since we're on topic; I hope the
10 Chair doesn't mind, but do you happen to have
11 the document in front of you related to the
12 definition as the proposed --

13 MR. O'BRIEN: Actually I don't.

14 MEMBER JONES: You don't? Okay.
15 The area where -- the five percent category,
16 as it is currently stated, it says five
17 percent of -- well, five percent . . . total
18 retail space.

19 MR. O'BRIEN: Right.

20 MEMBER JONES: When you're
21 questioning the five percent, are you
22 measuring that against what the words state

1 here explicitly, as in total retail space of
2 Trader Joe's, for example, store when you're
3 saying that's --

4 MR. O'BRIEN: Yes.

5 MEMBER JONES: -- questionable?

6 MR. O'BRIEN: Yes.

7 MEMBER JONES: Okay. If that
8 wording was changed from "total retail space"
9 to "space dedicated to the grocery items;
10 i.e., as defined in (B)(i) or (B)(ii) 6,000
11 square feet or 50 percent of your total retail
12 space," would that then still be a high bar?

13 MR. O'BRIEN: No, it would be a
14 lesser bar, especially if you include frozen
15 foods.

16 MEMBER JONES: Understood. So
17 with the assumption that frozen foods --

18 MR. O'BRIEN: And canned foods.

19 MEMBER JONES: -- are included,
20 with the assumption that frozen food and
21 canned foods are included and that the 5
22 percent is of the 50 percent or 6,000 square

1 feet, from your perspective, would Trader
2 Joe's still have that challenge?

3 MR. O'BRIEN: I believe Trader
4 Joe's concerns would be greatly assuaged.

5 MEMBER JONES: Okay. Thank you.

6 Thank you, Madam Chair.

7 CHAIRPERSON MILLER: Would there
8 still be this concern about meeting the
9 percentages, five percentages in the product
10 categories? It would be lesser of a concern
11 I heard you say.

12 MR. O'BRIEN: Yes.

13 CHAIRPERSON MILLER: Is it still a
14 concern?

15 MR. O'BRIEN: Yes. The way it's
16 written, as Member Jones has pointed out --

17 CHAIRPERSON MILLER: Yes.

18 MR. O'BRIEN: -- is you either got
19 6,000 square feet devoted to these categories
20 of food or one half of your floor space. Now
21 I understood Mr. Jones' question to be suppose
22 we make it 50 percent or 5 percent not of

1 total retail floor space, but 5 percent of
2 that portion of the floor space devoted to
3 food.

4 MEMBER JONES: You did interpret
5 my question correctly, sir.

6 MR. O'BRIEN: Thank you. And that
7 would greatly assuage Trader Joe's concerns
8 if --

9 MEMBER JONES: Understood.

10 MR. O'BRIEN: -- frozen and canned
11 are included.

12 MEMBER JONES: Understood.

13 MR. O'BRIEN: Trader Joe's does a
14 lot of pre-made entr,es. You can buy whole
15 dinners, but an awful lot of them are frozen.
16 And the absence of any mention of frozen or
17 canned; and I understand the latter may be
18 just a misunderstanding --

19 CHAIRPERSON MILLER: Okay.

20 MR. O'BRIEN: -- causes Trader
21 Joe's to say, hum, now five percent for this
22 for this for this. They've even looked at it

1 that way because no one ever questioned
2 whether they're a grocery store.

3 CHAIRPERSON MILLER: Right.

4 MEMBER JONES: Thank you.

5 Thank you, Madam Chair.

6 CHAIRPERSON MILLER: I hear you
7 say their concern would be assuaged, but would
8 there be any concerns of having this five
9 percent apply to each category? We've heard
10 concerns from other small grocery stores, and
11 so that's why I'm asking you.

12 MR. O'BRIEN: Yes.

13 CHAIRPERSON MILLER: Or from other
14 witnesses, yes.

15 MR. O'BRIEN: Even the witness
16 from one of the three pending applications
17 which have been suspended by what's going on
18 here had concerns. He said, yes, yes, I think
19 we qualify. Yes, we qualify under these regs.
20 But even he questioned. Well, the five
21 percent of this, you know, suppose seasonal,
22 back and forth.

1 CHAIRPERSON MILLER: Yes. Right.

2 MR. O'BRIEN: It seems to me that
3 if one carries the line, the various product
4 lines enumerated in the draft regulations
5 supplemented by canned and frozen --

6 CHAIRPERSON MILLER: Right.

7 MR. O'BRIEN: -- then why does one
8 have to go to a percentage for each one?

9 CHAIRPERSON MILLER: Okay. Mr.
10 James, I have a question for you. I'm not
11 sure if you said this or not, but did you
12 think that the full service grocery store
13 definition was already in our regulations at
14 the places that you added, or did you think
15 that somehow we should add to what's in there
16 now?

17 MR. JAMES: I do think you should
18 add to it, because that's the --

19 CHAIRPERSON MILLER: Use what's
20 there?

21 MR. JAMES: -- only mention in the
22 Code or the regulations about what is a full

1 service grocery store? That's what you have
2 to base your rulemaking on.

3 CHAIRPERSON MILLER: Yes.

4 MR. JAMES: But whatever you do
5 shouldn't be at odds with that, as Mr. O'Brien
6 says. But, you know, I think the key things
7 are the primary business of the grocery store.
8 That's language that is there, you know? So
9 the Board has to decide what that is. What
10 does "primary" mean? Does that mean 50
11 percent --

12 CHAIRPERSON MILLER: Right.

13 MR. JAMES: -- of this one when
14 it's going to the regulation?

15 CHAIRPERSON MILLER: Okay.

16 MR. JAMES: And, you know,
17 obviously unless the discussion today has been
18 what is a full range?

19 CHAIRPERSON MILLER: Right.

20 MR. JAMES: And I just don't think
21 it makes sense to list vegetables and fruit.
22 There has to be --

1 CHAIRPERSON MILLER: You don't
2 think that's necessary?

3 MR. JAMES: -- some way to
4 quantify it. But you know, if you say full
5 range of fresh, canned and frozen items, well,
6 that could be fleshed out. But it seems like
7 a place like Yes! -- generally health food-
8 oriented places are not so strong on meat, so
9 they might not have a big line of meats. You
10 know, a lot of folks don't think that meat is
11 healthy.

12 CHAIRPERSON MILLER: Right.

13 MR. JAMES: But I happen to know
14 that they do sell a few meat items. But a lot
15 of that could be just if it's available. I
16 could picture them just having one chicken
17 item, one beef item, one lamb item, one fish
18 item.

19 CHAIRPERSON MILLER: Right.

20 MR. JAMES: But if they keep it
21 regularly stocked, you know, it's always
22 there, it's always available, that could

1 conceivably qualify.

2 CHAIRPERSON MILLER: Well, is it
3 your opinion that if we said a full range that
4 the Board wouldn't need to define that
5 further, that that's basically people know a
6 full range when they see it, or --

7 MR. JAMES: I think I'd like to
8 work on a suggestion for you.

9 CHAIRPERSON MILLER: Yes.

10 MR. JAMES: You know, go home and
11 write it up.

12 CHAIRPERSON MILLER: Okay.

13 MR. JAMES: But I think that you
14 can say more because obviously, you know, you
15 could have bananas, apples, pears and berries,
16 but still not have a full range of fruit.

17 CHAIRPERSON MILLER: Right.

18 MR. JAMES: So, you know, not to
19 be unkind to the various drug store
20 entrepreneurs, you know, but it looks like
21 they're attempting -- you know, they're
22 carrying food. You go to CVS and -- you know,

1 the one at Woodley Park is not far from my
2 house and I see that all of a sudden they've
3 got a lot of food items and I think it's so
4 that they can get the ABC license so they can
5 devote space to beer and wine. And I do think
6 losing existing stock is a real thing that
7 happens. Like you've got a built Safeway.
8 They didn't have an ABC license. Then they
9 get one. So obviously they're not carrying
10 some things now because they've got a full
11 double-sided aisle that has alcohol products.

12 CHAIRPERSON MILLER: So I'm not
13 sure if you said this, but I think you might
14 have that. You know, we already have in our
15 statute about a grocery store being a primary
16 business and purpose is the sale of a full
17 range of fresh, canned and frozen food items,
18 and the alcohol is incidental. Okay. So
19 today is it your position that that's worked
20 fine, that we don't need to have more a
21 specific definition?

22 MR. JAMES: I think the Board

1 would be perfectly justified in making a
2 decision based on that and looking at the kind
3 of operations that are and saying, no, that
4 doesn't quite make it.

5 MR. O'BRIEN: Madam Chair?

6 CHAIRPERSON MILLER: Yes?

7 MR. O'BRIEN: May I expand
8 slightly on a point that Mr. James made?

9 CHAIRPERSON MILLER: Sure.

10 MR. O'BRIEN: Let us take the
11 example; and neither of my clients fall into
12 this category -- take the example of a vegan
13 supermarket.

14 MEMBER ALBERTI: A what?

15 CHAIRPERSON MILLER: Vegan.

16 Vegan.

17 MR. O'BRIEN: Vegan.

18 MEMBER ALBERTI: Oh.

19 CHAIRPERSON MILLER: Right.

20 MEMBER JONES: Vegan.

21 MR. O'BRIEN: Yes, Vegan? Is

22 that --

1 MEMBER JONES: Vegan.

2 MR. WOODSON: Thank you.

3 MEMBER ALBERTI: Is it vegan? Is
4 it --

5 MEMBER JONES: It's vegan.

6 MR. WOODSON: Or either one of
7 them.

8 (Laughter.)

9 MEMBER ALBERTI: Are you talking
10 about a brand name or a vegan?

11 CHAIRPERSON MILLER: No.

12 MR. O'BRIEN: No, I'm talking
13 about --

14 CHAIRPERSON MILLER: Vegetarian.

15 MR. O'BRIEN: -- a store that is
16 100 percent food items.

17 CHAIRPERSON MILLER: Right.

18 MEMBER ALBERTI: Right. Vegan.

19 MR. O'BRIEN: Okay?

20 MEMBER ALBERTI: Okay.

21 MR. O'BRIEN: But there's no meat,
22 there's no fish and there's no poultry.

1 CHAIRPERSON MILLER: Right.

2 MR. O'BRIEN: Okay? Is it the
3 intention of these regulations to exclude such
4 a store? I think it might arguably have the
5 effect.

6 CHAIRPERSON MILLER: I think that
7 one of the reasons for the not requiring
8 everything to be included, to have a little
9 bit of flexibility of four out of five or
10 whatever, was to consider that issue, or
11 issues like that.

12 MR. O'BRIEN: Then that store
13 having -- let's assume it carries the other
14 four categories -- well, no, do vegans --
15 would dairy --

16 MEMBER ALBERTI: Vegans would not
17 have dairy products.

18 CHAIRPERSON MILLER: They wouldn't
19 have dairy, right.

20 MR. O'BRIEN: Okay. Well then
21 you're at three. No animal source. Thank
22 you. Is that what this is about?

1 CHAIRPERSON MILLER: I'm not
2 saying that's what this is about. I think
3 that's one of the issues that the Board is
4 kind of grappling with, and I would be
5 interested, we would be interested in, you
6 know, your point of view, whether you think a
7 vegan store or whatever would still be full
8 service if it didn't provide fish, meat and --
9 which are words that we've often heard as
10 needed to be provided.

11 MR. O'BRIEN: And let us say in
12 this hypothetical vegan store that -- let's
13 say you lowered the bar to three categories to
14 reflect that. Well, then -- maybe I'm going
15 -- I'm getting -- I'm worried about the five
16 percent issue now.

17 CHAIRPERSON MILLER: Yes. Yes.

18 MR. O'BRIEN: Would that dictate
19 the product mix of the remaining three
20 categories?

21 MEMBER ALBERTI: May I interject
22 something?

1 CHAIRPERSON MILLER: Sure.

2 MEMBER ALBERTI: I mean part of
3 the dilemma that we had centered around this,
4 because you have to somehow capture a range of
5 items, and that's what we struggle with.
6 Because you can't just say it has to be food,
7 otherwise a butcher shop qualifies as a full
8 service grocery store because they sell food,
9 and they sell nothing but food.

10 MR. O'BRIEN: Yes.

11 MEMBER ALBERTI: Or a seafood
12 purveyor has nothing but food.. So that's
13 what we were struggling with. And I don't
14 know if that helps you.

15 MR. O'BRIEN: It does. It does.
16 In my mind there's a greater policy
17 consideration, which is, well, suppose the
18 store is nothing but a butcher shop. What's
19 wrong with it being able to offer its
20 patrons --

21 MEMBER ALBERTI: That's a fair
22 question.

1 MR. O'BRIEN: -- nice bottles of
2 red wine? But I recognize that that is
3 actually a legislative issue and it's beyond
4 the scope of what the Board can do by
5 rulemaking.

6 MR. JAMES: I just would note that
7 there's one other possibility if we're under
8 the cap on Bs, under the moratorium cap --

9 CHAIRPERSON MILLER: Yes.

10 MR. JAMES: -- if there is on.
11 The same omnibus has this statement or, you
12 know, foresees a 25 percent minimum
13 requirement maximum amount of alcohol that
14 could be sold on one of those licenses, and
15 that kind of license could be available for
16 this kind of specialty --

17 CHAIRPERSON MILLER: Yes.

18 MR. JAMES: -- operation without
19 having to worry about whether it's full
20 service or not.

21 MR. O'BRIEN: Just in response to
22 that, yes, there are a number of -- probably

1 30 or so class Bs available now subject to the
2 25 percent limitation, but that doesn't
3 address multiple ownership of chain stores.

4 CHAIRPERSON MILLER: I just want
5 to throw out this question one more time; and
6 then you can come back later, about the full
7 range of fresh, canned and frozen. If we just
8 had something like that and didn't have the
9 detailed -- all the lists of what that means.
10 Do you have an opinion about the
11 enforceability of something like that, or the
12 predictability, or the -- you know, if you'd
13 had a protest would you be able to address
14 that question?

15 MR. O'BRIEN: I think that's Mr.
16 Woodson's point.

17 CHAIRPERSON MILLER: All right.
18 So if that's your flexibility point, I think,
19 I mean the more you define, you know, the less
20 flexibility you have, right?

21 MR. WOODSON: One other aspect of
22 this is that even if you have this feature in

1 place, you still have the appropriateness
2 standards to deal with, and the
3 appropriateness standard, if you will, is
4 intentionally nebulous because it allows you
5 the flexibility to make that decision. And I
6 would submit that were you to have the
7 language you just described, Chairperson
8 Miller, attached to an appropriateness
9 standard you wind up in a better place really,
10 because you get a sense of what the community,
11 the retail market would actually need from the
12 presentation of the licensee. The licensee
13 would have to establish that it's an
14 appropriate operation in the area. The
15 licensee would also have to establish that --
16 you follow what I mean? Am I there?

17 CHAIRPERSON MILLER: No. I mean I
18 think we still have to make a distinction
19 between what's a grocery store and what isn't.

20 MR. WOODSON: Oh, yes, you have to
21 do that.

22 CHAIRPERSON MILLER: Separate from

1 the appropriate --

2 MR. WOODSON: Yes, but what
3 happens is, what my point is --

4 CHAIRPERSON MILLER: Okay.

5 MR. WOODSON: -- is that using
6 that kind of broad standard --

7 CHAIRPERSON MILLER: Yes.

8 MR. WOODSON: -- the question
9 comes which of these items that would be in a
10 grocery store would satisfy your perspective
11 on that part of the statute? What would
12 satisfy that? And Mr. O'Brien's example of a
13 vegan population, the vegan population would
14 help you understand what that is, because the
15 appropriateness of the business would be
16 informed by the vegan side of the business.
17 That really sounds esoteric, but I do believe
18 that as you would be called upon to make this
19 analysis, as you'd be called upon to make this
20 decision, that these kinds of considerations
21 will fall into play also.

22 MR. O'BRIEN: If I may, back in

1 the '80s there were additional appropriateness
2 standards which were later reviewed. They
3 included the contribution of the business to
4 the cultural diversity of the District of
5 Columbia, the contribution of the business to
6 employment opportunities and tax revenues. I
7 suppose you could have an additional
8 appropriateness kind of factor that says the
9 contribution of the business to needed food,
10 pharmaceutical and other desirable things and
11 thereby roll it in on a case-by-case basis
12 into the appropriateness standards.

13 But even if it's a totally
14 separate issue than appropriateness, as it is
15 now under the statute -- I understood Mr.
16 Woodson when he talked about flexibility -- I
17 thought perhaps he was referring to what
18 happened in the pending Walgreens case. The
19 Board issued an advisory opinion. That
20 opinion didn't say that Walgreens qualified
21 for a license. It said Walgreens may apply,
22 may qualify for a license and we'll see after

1 a hearing on these very issues. That gives
2 the Board the kind of flexibility it needs to
3 address things on a case-by-case basis.

4 CHAIRPERSON MILLER: Okay. Any
5 other questions?

6 MR. JAMES: I have a --

7 CHAIRPERSON MILLER: Yes, a
8 comment?

9 MR. JAMES: -- sort of a
10 comment --

11 CHAIRPERSON MILLER: Okay.

12 MR. JAMES: -- that came from a
13 reaction to different things that were said.
14 So because all these licenses that are in
15 question are to do with the Full Service
16 Grocery Exemption from the B moratorium and
17 cap, they're not subject to the distance
18 requirement between regular Bs, so they don't
19 have to be 400 feet apart. For instance, the
20 1700 block of Columbia Road, Safeway has a
21 regular -- well, it has a full service grocery
22 B exemption because they did a \$500,000 store

1 reset and they got the license.

2 Right now right next door is a
3 CVS. I have no doubt that they will want to,
4 you know, possibly have a license as they are
5 applying for one in their Woodley Park store.
6 So that would be two Bs right next door to
7 each other. I mean they're not getting the
8 benefit of the distance requirement, which is
9 -- you know, from the community point of view
10 it is a benefit because we don't want to be
11 saturated more than we already are in Adams
12 Morgan with alcohol.

13 CHAIRPERSON MILLER: Okay. And I
14 appreciate that. I don't think that's -- it
15 may be something that comes to mind as we're
16 thinking about these things, but the issue
17 before us is really this definition, and I
18 think that the Council wanted us to make some
19 kind of a distinction as to what is the
20 grocery store. And so the issue we're really
21 exploring today is, you know, what do you like
22 in this reg? What don't you like? Do you

1 have another proposal? How broad should it be
2 for flexibility? How detailed should it be
3 for, you know, certainty.

4 MR. JAMES: Well, when Mr. O'Brien
5 started talking about changing the
6 appropriateness standards, I thought it was
7 free form.

8 CHAIRPERSON MILLER: (Laughter.)
9 Okay. All right.

10 All right. Any other Board
11 questions?

12 MR. O'BRIEN: May I just say --

13 CHAIRPERSON MILLER: Yes.

14 MR. O'BRIEN: -- and now I'm
15 wearing my hat as Walgreens' counsel, Mr.
16 Conner said that given the contributions to
17 the city Walgreens has made over the last five
18 years that Walgreens was surprised. I've
19 spoken to people; no offense, but above Mr.
20 Conner's pay grade at Walgreens at corporate
21 headquarters, and surprise is a mild
22 statement. And in particular they are

1 dismayed that these new regulations would be
2 applied to an application that has already
3 been fully heard, fully tried in order to
4 alter the outcome of the case. And that is
5 something that bothers them quite a bit.

6 You've got three pending
7 applications, one I guess the gentleman,
8 Smuckers, said he doesn't really care. His
9 problem is he's been ensnared and held up. So
10 the other two are Walgreens, which is already
11 been through full hearings, and CVS. Those
12 are the only other two pending applications.

13 And when the proposed regulation
14 says that this is applicable to pending
15 applications, which is a marked departure from
16 the Board's past practice in rulemaking, I
17 can't argue with them and somehow disabuse
18 them of the notion that Walgreens is targeted
19 by that. It's one thing to change the rules
20 prospectively. All right? They understand
21 that laws change, but to change the rules of
22 this particular game while the ball's in the

1 air, only as to them and incidently to CVS,
2 which is behind Walgreens in the litigation
3 track here, sends a clear message.

4 When I said in a marked departure,
5 if you look at the moratorium for several like
6 Adams Morgan, Georgetown and all, they say
7 these rules apply prospectively, but not to
8 applications already on file. So I would urge
9 the Board to please consider the fundamental
10 fairness of section (E) as written applying
11 these retroactively to pending applications.

12 CHAIRPERSON MILLER: Okay. So
13 noted. All right. Thank you very much and --
14 oh, Mr. Jones, go ahead.

15 MEMBER JONES: Thank you.

16 CHAIRPERSON MILLER: Yes.

17 MEMBER JONES: Mr. O'Brien?

18 MR. O'BRIEN: Yes, sir?

19 MEMBER JONES: Heard you loud and
20 clear. Appreciate your candid feedback upon
21 that, but I would like to ask and direct my
22 question directly to -- Mr. Collins, is it?

1 DR. CONNER: Yes.

2 MEMBER JONES: Conner. I
3 apologize. Appreciate your testimony and I
4 understand the sentiment there, and I'm not
5 trying to discredit or not give it the full
6 credence that it deserves, but what I'm also
7 interested in hearing from you is if you have
8 any further resolution into a more detailed
9 perspective as to the mechanics of what is
10 wrong in your opinion, from your perspective,
11 not from the political or also high, but the
12 implementation thereof. If guidelines had to
13 be in place, if rules had to be in place, how
14 would you, from your perspective, envision
15 modifying what you understand to be our
16 proposal so that it would in any way help the
17 perspective that you have, if my question
18 makes sense. If it doesn't, then feel free to
19 tell me. I get it all the time, so I don't
20 mind rephrasing.

21 DR. CONNER: Yes, if you could
22 rephrase it or condense it.

1 MEMBER JONES: So the bottom line
2 is your testimony was quite candid. You noted
3 some things that were very critical, but what
4 I wasn't able to pull from your testimony was
5 constructive feedback as to how things could
6 be modified of the proposal in the interest of
7 what your interests are.

8 DR. CONNER: Okay.

9 MEMBER JONES: Okay? So and it
10 may not be a fair question. Maybe you haven't
11 had an opportunity to look at the details of
12 what was proposed and had an opportunity to
13 review that in terms of your proposed business
14 model, because you mentioned that during your
15 testimony. You mentioned it would be
16 crippling. I'm not sure if those were the
17 exact words, but you did mention some things
18 that would be very detrimental to your
19 operations, to the business. And I'm trying
20 to understand what about this proposed item
21 impacts what you were planning to do and what
22 changes if any you would recommend or propose

1 to counter, to help facilitate not having as
2 much of an impact to your ongoing desired
3 proposed business operations?

4 DR. CONNER: Okay. Like I said, I
5 guess the biggest problem would be obviously
6 the proposal here, but like I said, I have to
7 stand the entire process with the application.
8 It's more the pending application. You know,
9 things have been put into place with our
10 business model, having the business here. And
11 now, like I said, I guess a curve ball being
12 thrown at us at the end.

13 MEMBER JONES: Okay. Let me ask
14 it this way: With your proposed business
15 model could you meet the 50 percent, just the
16 50 percent if it included canned and frozen
17 food and all the other items, four of the
18 five, or whatever the case may be? Could you
19 meet that benchmark or any changes to said
20 benchmark?

21 DR. CONNER: Where our current
22 model is probably not.

1 MEMBER JONES: Okay.

2 DR. CONNER: I'd have to say a
3 different model could be made, but at, you
4 know, the standard model, no.

5 MEMBER JONES: Okay. And I'm
6 going to make an assumption; and I may be
7 wrong in this, but I'm going to make an
8 assumption that you don't have a number that
9 you could propose as a counter to say, well,
10 we can't do 50, but if it was 25 we may be
11 able to survive. We may be able to do what we
12 thought we were going to do before.

13 DR. CONNER: At this time, no, I
14 don't.

15 MEMBER JONES: Okay. Thank you.

16 CHAIRPERSON MILLER: Okay. Thank
17 you very much. If you have any other thoughts
18 or written materials you want to submit to us,
19 we'd love to have them by March 8th at 4:00
20 p.m. Thank you very much for coming down.

21
22 MS. PERRY: If I may, I'd like to

1 just put one more thing on the record very
2 quickly.

3 CHAIRPERSON MILLER: Okay.

4 MS. PERRY: First, I've had to sit
5 here and watch Mr. Pascal and others destroy
6 our ANC. No. 1, there was no ex parte
7 communications. I thought we had already been
8 that route. No. 2, ANCs are not part of the
9 fact finding to determine that these areas are
10 grocery stores. Maybe we should be, because
11 then we're not allowed to protest that and
12 maybe that's something in the law that needs
13 to be changed. We're not allowed to protest
14 something.

15 CHAIRPERSON MILLER: That's why we
16 have the second hearing so you could protest
17 it.

18 MEMBER ALBERTI: Yes, the law says
19 that we have to take in -- the law
20 specifically says that we have to consider
21 input from the ANC. So I think that you
22 are --

1 MS. PERRY: But not when --

2 MEMBER ALBERTI: I think you need
3 to go back and --

4 MS. PERRY: -- you make a fact
5 finding.

6 MEMBER ALBERTI: -- reread the
7 regulations. Okay?

8 MS. PERRY: We were not part of
9 that fact finding.

10 CHAIRPERSON MILLER: Okay. Thank
11 you.

12 MS. PERRY: Just sitting here it's
13 hard to hear that.

14 CHAIRPERSON MILLER: I know.
15 Okay. All right. Thank you.

16 (Whereupon, the hearing in the above-
17 entitled matter was concluded at 4:23 p.m.)

18

19

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21

22

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