

DISTRICT OF COLUMBIA
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ALCOHOLIC BEVERAGE CONTROL BOARD
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MEETING

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IN THE MATTER OF: :
 :
Smucker Farms of Lancaster :
County, LLC t/a Smucker Farms : Fact-
of Lancaster County : Finding
2118 14th Street, N.W. : Hearing
Retailer B :
License No. 90945 :
 :
(New Application) :
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May 8, 2013

The Alcoholic Beverage Control Board met in the Alcoholic Beverage Control Hearing Room, Reeves Building, 2000 14th Street, N.W., Suite 400S, Washington, D.C. 20009, Chairperson Ruthanne Miller, presiding.

- PRESENT:
RUTHANNE MILLER, Chairperson
NICK ALBERTI, Member
DONALD BROOKS, Member
HERMAN JONES, Member

MIKE SILVERSTEIN, Member

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

(11:14 a.m.)

CHAIRPERSON MILLER: Okay. Come on forward. We have a Fact-Finding Case now for Smucker Farms of Lancaster County located at 2118 14th Street, N.W., License No. 90945.

Okay. This is a new application for a grocery store license.

MR. KLINE: Good morning.

CHAIRPERSON MILLER: Good morning.

MR. KLINE: Andrew Kline here on behalf of the applicant. Seated to my left is Eric Smucker, who is the principle for the applicant. We're happy to proceed in however manner the Board prefers.

CHAIRPERSON MILLER: Okay. Okay.

MEMBER ALBERTI: What, Mr. Kline?

MR. KLINE: I said we are happy to proceed in whatever manner the Board prefers. We did submit a supplemental drawing. We have copies. I don't know if everyone is going to need a copy. Apparently I'm told just to

1 distribute it.

2 I would note at the outset we're
3 not sure that this applicant who applied long
4 before these regs were in place and his
5 application should have been considered and in
6 our minds approved long before these
7 regulations took effect is required to meet
8 these regulations, but none the less, we have
9 made the showing and happy to walk you through
10 the drawing.

11 We don't think there is any
12 question that he meets the test in the new
13 regulations promulgated by the Board on an
14 emergency basis.

15 I would note, one, addition to
16 what you have before you in terms of the
17 calculations. You will note that Mr. Smucker
18 says, and he prepared this drawing, but in the
19 drawing he indicates that he has no frozen
20 foods. He has frozen meats. We think frozen
21 meats are frozen foods.

22 But nonetheless, even without

1 that, he meets six of the seven categories and
2 qualifies under your regulations. I'm happy
3 to walk you through the drawing or answer any
4 questions you might have as the Board prefers.

5 CHAIRPERSON MILLER: I just have a
6 couple of questions and I know that you were
7 given some questions to focus on for this
8 hearing, I believe. Okay.

9 Mr. Kline, what did you say about
10 that it was already approved? You didn't know
11 that Smucker should be subject to the new --

12 MR. KLINE: Well, Smuckers applied
13 -- this application has been pending since
14 November 1st. When Smuckers applied, these
15 regulations were not in effect.

16 CHAIRPERSON MILLER: Right.

17 MR. KLINE: Smuckers got caught
18 up, it's no secret, in the controversy
19 surrounding applications for certain drug
20 stores in the District that wanted to be
21 licensed under the supermarket exemption to
22 the restrictions to the additions of these

1 licenses.

2 Smuckers isn't in any way part of
3 that. There isn't any question, in our minds
4 at least, that they meet the requirements for
5 a supermarket. They met the requirements that
6 were in effect on November 1st when they
7 applied. Had the application proceeded in the
8 normal course, it would have been considered
9 approved long before your emergency
10 regulations took effect.

11 And it would be as if you
12 submitted an application for a building permit
13 to add an addition to your house. You
14 complied with all the requirements, got all
15 the way through the process and then somebody
16 said oh wait a minute, we have a new set of
17 rules that you have to comply with that were
18 not in effect when you applied.

19 We don't think that is
20 appropriate, but we don't think it matters,
21 because he meets the requirements. The only
22 reason I even raise this is because I'm

1 hopeful at the conclusion of this Fact-Finding
2 Hearing when we believe the Board will find
3 that he meets the requirements, we are going
4 to ask you to direct the staff to issue the
5 license forthwith, because we think that Mr.
6 Smucker has been unfairly caught up in this
7 other issue and has suffered innocently in the
8 fact that his license application has been
9 delayed.

10 CHAIRPERSON MILLER: Okay. I just
11 wanted to make sure. I thought you might have
12 said they -- it was approved. What you said
13 was --

14 MR. KLINE: Oh, no.

15 CHAIRPERSON MILLER: -- should
16 have been approved. Okay.

17 MR. KLINE: Should have been
18 approved.

19 CHAIRPERSON MILLER: Right, right.

20 MR. KLINE: But I mean --

21 CHAIRPERSON MILLER: Okay.

22 MR. KLINE: -- he has always met

1 the requirements.

2 CHAIRPERSON MILLER: Okay.

3 MR. KLINE: And even these new
4 requirements, although --

5 CHAIRPERSON MILLER: So --

6 MR. KLINE: -- technically we
7 don't think he needs to, but he meets them
8 anyway.

9 CHAIRPERSON MILLER: Okay. So now
10 we are here to -- just to see if he meets the
11 new requirements?

12 MR. KLINE: Correct.

13 CHAIRPERSON MILLER: Okay. So
14 basically, I think that those four questions,
15 particularly the first one, are a good
16 starting area, except I just want to note that
17 there may be a distinction that I might want
18 you to address, I think, or look at because it
19 looks like to me the regulations speak to 50
20 percent of a certain footage of selling area.

21 And again for -- and then 5
22 percent of the store's selling area in D. And

1 I think that you were talking about 50 percent
2 of the store's products or something. So
3 there is a difference --

4 MR. KLINE: Well, if you --

5 CHAIRPERSON MILLER: -- there.

6 MR. KLINE: -- look at the drawing
7 that you have in front of you today that was
8 submitted to legal yesterday, you will see
9 that Mr. Smucker has prepared a very detailed
10 drawing of the selling area. He has the total
11 square footage of the store is 1,422 square
12 feet.

13 He has got storage and cleaning,
14 etcetera, non-public areas of 469 feet. His
15 remaining selling area or the remaining area,
16 which is the selling area of 953 feet, he has
17 got 221 feet that is non-food selling area.
18 And then you can see the square footage of the
19 total selling area down below devoted to the
20 various categories: Fresh fruits and
21 vegetables 60 square feet, 18 percent; fresh
22 and uncooked meats 18 square feet, 5 percent;

1 dairy products 35 square feet, 11 percent;
2 canned goods 60 square feet, 18 percent.

3 He says no frozen meat, but -- or
4 no frozen foods, but in reality there is
5 frozen food, but it doesn't matter, so that he
6 has put that at zero percent. Dry groceries
7 87 square feet, 26 percent; non-alcoholic
8 beverages 25 square feet, 8 percent. And then
9 the non-food stuff 46 square feet, 14 percent.

10 CHAIRPERSON MILLER: Okay. I just
11 want to see if I can -- if we can correlate
12 some of your figures with the regulation
13 description.

14 So if the regulation is talking
15 about selling area dedicated to the sale of
16 food items, then we are looking at 732 square
17 feet? Are we --

18 MR. SMUCKER: That is correct.

19 CHAIRPERSON MILLER: Okay. And
20 then, let's see --

21 MR. SMUCKER: Give or take 20
22 square feet, I would say. It was an Excel

1 file, so it's imperfect.

2 CHAIRPERSON MILLER: Okay. And
3 you are saying the total selling area is 953
4 square feet?

5 MR. KLINE: Correct.

6 CHAIRPERSON MILLER: Okay. So is
7 that 77 percent figure, is that the percentage
8 of -- that 732 is to 953?

9 MR. KLINE: Yes.

10 MR. SMUCKER: That's correct.

11 CHAIRPERSON MILLER: Okay. So you
12 would say that by that calculation, you meet
13 the 50 percent minimum?

14 MR. KLINE: Yes.

15 MR. SMUCKER: And then the --

16 MR. KLINE: Overwhelmingly.

17 MR. SMUCKER: -- rest of the
18 categories were just to make sure that you can
19 see that we have those products being sold in
20 those areas.

21 CHAIRPERSON MILLER: So let's go
22 to that one. So D -- our regulation reads in

1 (D) "5 percent of the store selling area set
2 aside for each of those items."

3 So 5 -- that 8 -- for instance if
4 you look at fruits and vegetables, is that 18
5 percent of --

6 MR. KLINE: The selling area.

7 CHAIRPERSON MILLER: The selling
8 area.

9 MR. KLINE: 60 square feet, 60 --
10 732.

11 MR. SMUCKER: Well --

12 CHAIRPERSON MILLER: Selling area
13 for food though? What is it for food, set
14 aside for food items?

15 MR. SMUCKER: -- that was actually
16 shelving area, but I mean, if you want to
17 include the walkways and the pathways, I mean,
18 that would expand to about 180 square feet
19 when you have all the space around the
20 produce, the produce in the back, etcetera.

21 When we did the original
22 calculations, I was under the impression that

1 it was shelving space or selling area was with
2 shelving space, so that was our original
3 calculations with just shelving space.

4 And so with that, we have 60
5 square feet of shelving space.

6 CHAIRPERSON MILLER: Okay.

7 MR. SMUCKER: But you can't just
8 take the shelving space that is built up quite
9 high, so, you know, the selling area of what
10 all that we are selling on all the shelving
11 space is 18 percent, all of the shelving
12 space, if you will. But there is a lot more
13 than just 60 square feet dedicated to selling
14 produce.

15 CHAIRPERSON MILLER: So your -- so
16 would those figures starting with 18 percent
17 go to shelving space?

18 MR. SMUCKER: Shelving footprint,
19 correct.

20 CHAIRPERSON MILLER: Footprint.
21 Not going up, okay. Right.

22 MR. KLINE: But not the aisle

1 where you are standing looking at the product,
2 which I think you can reasonably assume that
3 the walkways would be proportional to the
4 shelving space.

5 In other words, if you have a foot
6 of vertical shelving, then in front of that
7 you will have the aisle of 3 or 4 feet for the
8 person to stand in front of that aisle and
9 that's going to be proportional based on the
10 shelving. Follow me?

11 CHAIRPERSON MILLER: Yes. I'm
12 still just trying to go back and forth with
13 the way our regulations read right now.

14 MR. KLINE: Understood.

15 CHAIRPERSON MILLER: And so it
16 says the "5 percent of the store's selling
17 area set aside for the sale of food items."
18 And you have total food selling area up above,
19 which is 732 square feet?

20 MR. SMUCKER: Yes.

21 CHAIRPERSON MILLER: If you
22 measured the square footage set aside for

1 these food products, related to that
2 measurement, would you be at 5 percent?

3 MR. KLINE: Well, here is the
4 issue. And the issue is this -- the shelving
5 is very clear in terms of what products are on
6 those shelves. Let's take, for example, in
7 the drawing, I don't know if you have it in
8 two pages, but --

9 CHAIRPERSON MILLER: We just --

10 MR. KLINE: -- towards the front
11 of the store on 14th Street, okay? Let's look
12 at the non-alcoholic beverages. There is --
13 it is shown 5 foot width of shelving there.
14 Across from that is the check-out counter with
15 bread sales.

16 Now, if you are standing between
17 those two, then what are you attributing the
18 selling area to? You know, it's a little
19 difficult to parse through the square footage
20 of the store and say where a particular
21 customer is standing represents selling area
22 related to a particular product.

1 We think the rational and logical
2 way to do it is to look at the shelving that
3 is there, otherwise we are making some
4 artificial distinctions in terms of someone
5 standing there. Are they looking at the food
6 products or are they looking at the non-food
7 products?

8 CHAIRPERSON MILLER: So and I'm
9 sure other Board Members will have their
10 individual questions, too, but --

11 MR. KLINE: That's fine.

12 CHAIRPERSON MILLER: -- I'm not
13 disputing with you about the shelf space, that
14 that -- did that say the shelf space measures
15 the particular item of food? How much space
16 it takes up, if you measured that shelf space
17 or something. I'm just saying why don't you
18 take that and make that a percentage of your
19 total food selling area number?

20 MR. KLINE: Well, because then our
21 selling area would be a fraction of the total
22 store. Then the areas where people are

1 standing, which is certainly part of the
2 "selling area," wouldn't be taken into account
3 and that clearly is selling area.

4 But to artificially assign where
5 someone is standing to a food or a non-food
6 item, we don't think gives the Board a very
7 clear way to analyze how the store is parsed
8 out in terms of the various products.

9 CHAIRPERSON MILLER: So what --
10 oh, I'm sorry. So what are you doing is --
11 you are just adding up all the shelf space
12 dedicated to each product and deciding -- and
13 determining what percentage each product --
14 what percentage of space each product picks up
15 on the shelves?

16 MR. SMUCKER: Well, can I?

17 CHAIRPERSON MILLER: Okay.

18 MR. SMUCKER: Actually, when
19 drawing this up, the 5 percent minimum, I
20 viewed that as being the 5 percent minimum of
21 what you are selling overall in the store,
22 which is why I included the non-food stuff,

1 because that brings you to your 100 percent of
2 non-food stuff that you are selling.

3 The overall selling area being 50
4 percent of the store is actually two different
5 things, in my mind, and the way I think that
6 the rules read. We have two different
7 categories, one is 50 percent of the store
8 dedicated to food and here we have 77 percent
9 being dedicated to food.

10 And of that selling area, are you
11 at least meaning is 5 percent of all the
12 different foods or is there a minimum of 5
13 percent of all the different categories within
14 that area being these different items and you
15 have to have a minimum of 5 percent?

16 So I would look at it as two
17 different things. One is the 50 percent
18 minimum and one is of that 50 or of whichever
19 minimum that you guys are looking at is 5
20 percent of your overall product being sold in
21 the store, at least attributed to one of these
22 items. And I -- we meet both those. I'm not

1 sure if that answers --

2 CHAIRPERSON MILLER: I think that
3 answers my question.

4 MR. SMUCKER: Is that the way that
5 you wanted it shown going forward? I'm not
6 sure.

7 CHAIRPERSON MILLER: We are going
8 to have to decide that. I mean, we -- you
9 know, these are regulations, like a proposed
10 regulation and okay, how is it playing out,
11 you know. And there may be refining needs and
12 interpretation and so you are the guinea pig
13 here, I guess.

14 MR. SMUCKER: Yes, yes. I'm
15 honored.

16 CHAIRPERSON MILLER: So but let me
17 just get clarity then. I think, Mr. Kline,
18 you said that if you just took the shelf
19 square footage of each product and you took
20 that as a percentage of the total food selling
21 area, then there might be difficulty meeting
22 the percentage because you are not -- there is

1 all this open space where people are standing
2 and buying. No?

3 MR. KLINE: No. We are not saying
4 that we would have difficulty meeting the
5 percentage. We are saying that if you look at
6 the shelving in the total shelving -- is the
7 total number there?

8 MR. SMUCKER: 321, yes.

9 MR. KLINE: Yes. So there is 321
10 square feet.

11 MR. SMUCKER: Footprint.

12 MR. KLINE: A footprint of
13 shelving. We are not even going up in the
14 air.

15 CHAIRPERSON MILLER: Right.

16 MR. KLINE: We are just looking at
17 the footprint.

18 CHAIRPERSON MILLER: Right.

19 MR. KLINE: Okay.

20 CHAIRPERSON MILLER: Right.

21 MR. KLINE: So the percentages
22 that you see represent what portion of the

1 shelving footprint is dedicated to each of
2 these categories.

3 Now, if you want to look at
4 selling area as being where people are
5 standing, then what you have to do is make
6 judgments about, as I said earlier, I mean,
7 let's take one that is a little clearer, if we
8 have the wine rack display, let's say -- let's
9 take the second page where you have the wine
10 rack display and you have a little bayage
11 where you have non-alcoholic beverages.

12 If they are standing in front of
13 the wine rack display, then to the left, the
14 person's left, is non-alcoholic beverages, the
15 square that they are standing on, say it is 2
16 square feet, is that qualifying food products
17 or is that non-alcoholic beverages?

18 We think that those distinctions
19 are arbitrary at best. And in order for the
20 Board to have a clear bright line test, the
21 simple way to do it is to look at the
22 footprint of what is being sold.

1 Now, if you want to go up and
2 measure, you know, and multiply the footprint
3 times the height of the shelves, we can do
4 that, too. I mean, we will qualify. I think
5 that is going to complicate your task, but I
6 leave that to you. I mean, we can certainly
7 bring those measurements in.

8 But once you start looking at
9 selling space and trying to classify selling
10 space where the customer is standing, we think
11 those classifications get to be very
12 arbitrary.

13 So in terms of a clear way to do
14 it in looking at the shelving, we think that
15 that -- if you attribute customer standing
16 area, I'll call it, proportionately to each
17 linear footage of shelf, you end up in the
18 same place.

19 Those percentages of -- I see the
20 statistician seems to understand what I'm
21 talking about. But the footage of shelving,
22 you would just parse it out in terms of

1 proportionately to the area occupied by the
2 patrons where they stand.

3 CHAIRPERSON MILLER: Okay. But
4 just looking at these figures, you know,
5 because this is open for interpretation, at
6 this point, so if I look at fresh and uncooked
7 meats and I see that it says 5 percent, 18
8 square feet, if I take that 18 square feet and
9 I apply it to the total food selling area,
10 it's going to be under 5 percent of the total
11 food selling area.

12 MR. KLINE: Right. But what you
13 have to do is you have to look at 321 square
14 feet, which is the total shelving footprint.

15 CHAIRPERSON MILLER: Okay.

16 MR. KLINE: I mean, obviously,
17 three-quarters of a store -- well, I don't
18 know about three-quarters, but certainly half
19 of a store is not occupied by product because
20 people have to walk through the store.

21 So if you apply it that way, then
22 no one will ever meet the definition, because

1 people have to walk through the store. There
2 has to be a place for them to walk.

3 CHAIRPERSON MILLER: So are you
4 saying that the selling food area should be
5 the shelves?

6 MR. KLINE: I'm saying --

7 CHAIRPERSON MILLER: The products?

8 MR. KLINE: -- that the --

9 CHAIRPERSON MILLER: The square
10 footage of them?

11 MR. KLINE: -- measurement of the
12 footprint of the shelving represents a
13 reasonable way to calculate the selling area,
14 because in reality, the selling area includes
15 where patrons are standing, but if you assign
16 the standing area to various categories other
17 than by the proportion of shelving, then it's
18 just going to be arbitrary.

19 CHAIRPERSON MILLER: Okay. So
20 what I think you are saying is you look at
21 that 732 square feet when you are looking at
22 what is 50 percent of the total of store

1 selling area. But then when you want to
2 measure the 5 percent of the products, then
3 you, for selling area purposes, should look at
4 the shelves?

5 MR. SMUCKER: Yes.

6 MR. KLINE: Right. And in other
7 words, we have 411 square feet where there is
8 no product resting.

9 CHAIRPERSON MILLER: Yes.

10 MR. KLINE: Which is for people to
11 travel through the store and view product and
12 pick it up and put it in their basket.

13 MR. SMUCKER: I would love to fill
14 that space up, but you can't.

15 MR. KLINE: You can't. You have
16 to have a place for the people to walk through
17 the store.

18 So by definition, if this is a
19 typical store and you do it the way that you
20 might be suggesting to do it, no one would
21 ever qualify and we don't think that is the
22 Board's intent in promulgating this

1 regulation.

2 MR. SMUCKER: Actually, you know,
3 it's the way it is interpreted, these
4 regulations. It's 5 percent minimum of
5 whatever the shelf space is.

6 MR. KLINE: Right.

7 MR. SMUCKER: And then you are
8 fine.

9 MR. KLINE: Right, exactly.

10 CHAIRPERSON MILLER: Okay. If I
11 look at Question No. 1 it says that "The
12 current drawing indicates that the total
13 actual retail footprint is 331 square feet."
14 Could you address maybe No. 1, because when I
15 look at this map, I don't see 331.

16 MR. SMUCKER: No, that would be if
17 you look at percentage of products sold in the
18 store on page 1 bottom area, if you add up all
19 of those square feet of shelf -- of the
20 various dedicated shelving spaces, that is the
21 331 square feet.

22 CHAIRPERSON MILLER: Oh, okay.

1 MR. SMUCKER: I should have put
2 that into my calculations, but this is what I
3 had done previously.

4 CHAIRPERSON MILLER: So that's the
5 addition of the 60 square feet plus all those
6 other measurements below it?

7 MR. KLINE: Yes.

8 MR. SMUCKER: That's correct.

9 CHAIRPERSON MILLER: Okay. Okay.
10 Good.

11 MR. KLINE: That's your
12 denominator.

13 CHAIRPERSON MILLER: Um-hum, okay.
14 Well, let me just jump to No. 2 then. With
15 respect to products case, fresh meat case,
16 frozen meat case, is that relevant?

17 MR. SMUCKER: They are open to the
18 public. People can reach into the meat case.
19 The frozen meat case and the produce case.

20 CHAIRPERSON MILLER: Are you
21 counting them somehow?

22 MR. SMUCKER: Counting which?

1 CHAIRPERSON MILLER: In any of
2 these areas?

3 MR. SMUCKER: That would just be
4 kind of -- oh, you mean the produce case,
5 fresh meat case and the frozen meat case?

6 CHAIRPERSON MILLER: Yes.

7 MR. SMUCKER: They are counted in
8 B and A as far as the products being sold,
9 fresh fruits and vegetables.

10 CHAIRPERSON MILLER: Okay.

11 MR. SMUCKER: Fresh and uncooked
12 meats.

13 CHAIRPERSON MILLER: Okay.

14 MR. SMUCKER: I'm not counting the
15 space in front of it back there.

16 CHAIRPERSON MILLER: Right.

17 MR. SMUCKER: I am counting the
18 entire area surrounding there as part --

19 CHAIRPERSON MILLER: Like a shelf?

20 MR. SMUCKER: -- of the selling
21 area.

22 CHAIRPERSON MILLER: Right. Okay.

1 All Right. I am going to let others ask
2 questions now. Who would like to ask
3 questions? Any other Board Members have
4 questions?

5 MEMBER ALBERTI: I guess I'll be
6 next.

7 CHAIRPERSON MILLER: Okay. Mr.
8 Alberti?

9 MEMBER ALBERTI: First of all, I
10 appreciate your dilemma. You have thrown out
11 a lot of options on how we could measure this.
12 All Right. And I, for my own part, will
13 apologize that we brought you here without
14 having the Board itself having clearly decided
15 how we would implement this rulemaking in
16 terms of what it means to measure floor space,
17 what it means to measure selling area.

18 I have my ideas. And I will tell
19 you, at this time, I believe that other Board
20 Members have other ideas. So that's why we
21 don't have a decision. So it makes it
22 difficult here in asking questions. I can

1 only ask questions from my perspective, which
2 I will do. All Right.

3 The other problem I'm having with
4 what you submitted here is what the problem is
5 with what you have submitted. It would be
6 helpful to us and you have thrown a lot of
7 options out, all right? And it would be
8 helpful even if I just consider my approach to
9 this, I would need a scale drawing here to
10 really discern and validate the measurements
11 that you are giving us. Okay?

12 You have linear feet for the
13 shelving, but you don't really have -- you
14 know, I don't see the dimensions of the store.
15 I see at the top I see one block equals
16 approximately 1 square feet, but I don't see
17 blocks.

18 MR. SMUCKER: That was for my
19 Excel sheet.

20 MEMBER ALBERTI: Yes, so one of
21 the things before I can really tell you what
22 I think or tell my fellow Board Members what

1 I think is that I'm going to need some scale
2 drawings here so that -- I mean, if we had
3 clear direction, we could even offer you what
4 -- we could offer you direction on what -- we
5 have clear policy ourselves. We could offer
6 you direction on what to put on that scale
7 drawing, but unfortunately we don't.

8 Again, I apologize for that. But
9 if we had a scale drawing, I could at least do
10 the measurements and discern which pieces
11 belong to what, to the base or the numerator
12 of the percentage that I'm calculating.

13 MR. SMUCKER: We did some of those
14 scale drawings with the original application,
15 which was just what the architect had
16 submitted for when we did the applications for
17 DCRA and our Certificate of Occupancy. And
18 that had the various shelving in it, but all
19 of that is -- you know, some of our shelving
20 has changed since the proposal.

21 So I didn't realize I would have
22 to submit another CAD drawing with those in

1 there. And I apologize for that. If I would
2 have known --

3 MEMBER ALBERTI: And it's not your
4 fault.

5 MR. SMUCKER: -- I would have
6 asked the architect to have done that.

7 MEMBER ALBERTI: No, really, Mr.
8 Smucker, that's probably -- if that wasn't
9 communicated to you, then that is the Board's
10 fault and the Agency's fault. So because that
11 -- I believe that that is necessary.

12 Now, again, I'm not sure what my
13 fellow Board Members believe, but, to me, that
14 is necessary.

15 MR. SMUCKER: Is it necessary for
16 us today?

17 MR. KLINE: Mr. --

18 MEMBER ALBERTI: Well, I
19 understand.

20 MR. SMUCKER: Sorry.

21 MEMBER ALBERTI: I appreciate your
22 surprise and angst here. I appreciate it,

1 because I wonder how much was communicated.

2 And --

3 MR. KLINE: Mr. Alberti, if I may?

4 MEMBER ALBERTI: Yes.

5 MR. KLINE: The drawing does
6 reflect all of the measurements, so I'm not
7 sure -- the fact that it's to scale or not to
8 scale --

9 MEMBER ALBERTI: What's the width
10 of the store?

11 MR. SMUCKER: It's 19 square feet.

12 MEMBER ALBERTI: Excuse me, what's
13 the width of the store?

14 MR. KLINE: The width?

15 MR. SMUCKER: From front to back?

16 MEMBER ALBERTI: From --

17 MR. KLINE: From side to side?

18 MEMBER ALBERTI: How do I know the
19 width of the store from this drawing?

20 MR. SMUCKER: You wouldn't.

21 MEMBER ALBERTI: Well, okay, see,
22 that's my point.

1 MR. SMUCKER: Okay. I can get
2 that.

3 MEMBER ALBERTI: All the
4 measurements aren't there.

5 MR. SMUCKER: Yes.

6 MEMBER ALBERTI: Okay?

7 MR. KLINE: Okay. Fair enough.

8 MEMBER ALBERTI: So I say to
9 scale, but I need to be able to parse out the
10 area on the floor here. All Right. However
11 that is done in your drawings.

12 Okay. Just so some questions here
13 on your drawing as you have it.

14 You have display case for produce,
15 fresh meat and frozen meat case, right?

16 MR. SMUCKER: Correct.

17 MEMBER ALBERTI: You have got area
18 in front on the side. You have got area on
19 three sides of that. It looks like there is
20 public access. Is there public access --

21 MR. SMUCKER: There is --

22 MEMBER ALBERTI: -- on --

1 MR. SMUCKER: -- public access.
2 There is actually just a small divider that we
3 use to cut off to the rear of that.

4 MEMBER ALBERTI: So it's a display
5 case open to the public, that would be the
6 front.

7 MR. SMUCKER: Correct.

8 MEMBER ALBERTI: And the rear
9 would be the opposite side of that?

10 MR. SMUCKER: Correct. One reason
11 is ventilation. You have to have air flow
12 behind there for the cooling units to flow.

13 MEMBER ALBERTI: That's not
14 accessible to the public, right?

15 MR. SMUCKER: That's correct. And
16 if you didn't want to count that as selling
17 space, I guess you wouldn't.

18 MEMBER ALBERTI: Yes. And see
19 this is what -- and I don't know how much
20 space that is, because I don't have your -- I
21 mean, I can ask you in this hearing is that
22 accessible and you can tell me, but I have no

1 idea how much -- and that's again why I need
2 drawings that allow me to discern what those
3 measurements are.

4 MR. SMUCKER: Correct. There is
5 one foot between produce case and the wall.
6 There is 2 feet between the meat case and the
7 wall. I understand that you can't discern
8 that from this drawing. What I can also say
9 is that that entire footprint of this area
10 would you like me to cut out -- well, I mean,
11 maybe you should be asking what you want to
12 ask people in the future and asking me now.

13 Did you want to cut out the area
14 behind the check-out counter? Is that
15 considered to be a work area and not a selling
16 area? Is there area behind the produce case
17 not a selling area, but a work area or a
18 storage area? I don't know.

19 CHAIRPERSON MILLER: Okay.

20 MR. SMUCKER: I understand your
21 dilemma.

22 MEMBER ALBERTI: And the Board

1 doesn't, at this point, know what to tell you.

2 MR. SMUCKER: Okay.

3 MEMBER ALBERTI: That's the
4 dilemma we have today. And I apologize for
5 that.

6 MR. SMUCKER: Okay.

7 MEMBER ALBERTI: I can't tell you
8 how much I am sorry that we are not better
9 prepared.

10 MR. SMUCKER: Okay.

11 MR. KLINE: Mr. Alberti, in terms
12 of that point, I mean, I don't know that we
13 can address all of your points, but in terms
14 of that point, the cases are open to the
15 public. And the way that we have done the
16 measurement and the calculation, the fact that
17 the back of the cases is not open would not
18 affect that calculation in any way.

19 MEMBER ALBERTI: I get that.

20 MR. KLINE: Okay.

21 MEMBER ALBERTI: I understand
22 everything that you have told me.

1 MR. KLINE: I just wanted to make
2 sure.

3 MEMBER ALBERTI: I absolutely
4 understand everything you told me. And I will
5 tell you that if I had scale drawings here,
6 with a few questions, I could probably make
7 the assessment based on the way I would apply
8 it. All Right. So I'm just telling you,
9 you're not that far off from the information
10 that you need to provide, but it's not to
11 scale and I can't complete my assessment.

12 So I'm just telling you where I'm
13 at. So I will let other Board Members
14 continue.

15 CHAIRPERSON MILLER: Mr.
16 Silverstein?

17 MEMBER SILVERSTEIN: I would also
18 like to apologize to Mr. Smucker and I feel
19 that Mr. Kline has made a compelling argument
20 that Mr. Smucker is blameless in this issue,
21 that he got caught up in a game of football
22 where the goal posts not only keep moving, but

1 they are going to keep moving because he
2 doesn't know where they are.

3 And he is being asked to comply
4 with regulations that are changing. Something
5 about nailing jello to the wall comes to mind
6 here. I do not believe that there is any harm
7 at all to the community in allowing what is
8 clearly a food store, clearly a grocery store
9 of a unique model to be allowed to sell
10 alcoholic beverage incidental to the entire
11 business plan.

12 I'm not sure that you meet the
13 regulations, because the regulations aren't
14 there, but I'm comfortable that you meet the
15 spirit of what I need. And I know that other
16 Board Members have other concerns and I fully
17 respect those concerns. And I understand them
18 and I do not disagree with them.

19 But I don't want to hold you
20 responsible for a situation that you -- that
21 is absolutely not of your making, sir. We
22 have not been able to finalize these

1 regulations. You have a business that is
2 operating now. You are either making money or
3 losing money every day and I don't want you to
4 be caught in the middle of what is almost like
5 a nasty custody battle and you're the kid.
6 This is wrong and as such, sir, I would vote
7 to approve it.

8 CHAIRPERSON MILLER: Other Board
9 Members? Mr. Jones?

10 MEMBER JONES: Thank you, Madam
11 Chair. The Board has failed you and the Board
12 hasn't done its job. I mean it's period point
13 blank. And we have licensees and applicants
14 before us all the time and we are sticklers
15 about following the rules and whatever the
16 case may be.

17 I'll be the first one to tell you
18 that we haven't done our job. We have failed
19 miserably in meeting this need. I'm not going
20 to make any excuses for it, because there
21 aren't any to be made. We just failed in that
22 sense.

1 You are in a quandary. I
2 understand in a sense of trying to interpret
3 something that we, as a Board, haven't come to
4 a consensus on. And clear information hasn't
5 been provided to you so that you can make that
6 assessment.

7 But given that, I am not in the
8 same camp as Board Member Silverstein. I am
9 not just going to accept anything in the
10 guidelines as being acceptable because it
11 feels right. I don't want to get caught in
12 that sense. I don't want to -- I want to be
13 able to be in any position where I cannot be
14 arbitrary and capricious in my assessment of
15 your's and future applications.

16 So given that, I believe firm
17 guidelines will be and need to be established,
18 so that it is clear and there is nothing gray
19 in the sense of how you interpret what the
20 application says, what the regulations say and
21 how the Board would -- what the expectations
22 of the Board are when you are submitting these

1 things. That's me.

2 As Board Member Alberti would say,
3 I'm speaking as an individual Board Member
4 right now and clearly, based on the three
5 statements you have heard, you haven't heard
6 any clear, concise consensus from the three
7 that have spoken on it thus far.

8 So just to put it in perspective,
9 we have failed you. I apologize for that.
10 And I accept responsibility for my part in
11 that. But it will be rectified to the best of
12 my ability as expeditiously as we can.

13 So that's what I can offer you
14 right now. I know it's not much. I know it's
15 not worth much of anything, but I recognize
16 that I have failed you and I don't take that
17 lightly. Thank you, Madam Chair.

18 CHAIRPERSON MILLER: Okay.

19 Others? Okay. I would like to --

20 MR. KLINE: Madam Chair?

21 CHAIRPERSON MILLER: Yes?

22 MR. KLINE: I mean, it seems to me

1 in the first instance, particularly given what
2 we have learned during this hearing, the very
3 first question, and maybe the Board needs to
4 get with legal on this, is is it appropriate
5 to apply these rules that were only
6 promulgated recently to an application that
7 was filed back in November.

8 You know, the United States
9 Constitution talks about something called ex
10 post facto laws, that's when you impose the
11 law after the fact. You change the
12 requirements. And you say all right, you
13 know, maybe you did it then that way, but now
14 you have to do it this way.

15 And that's exactly what we are
16 looking at. When this application was filed,
17 a letter was sent to you that demonstrated
18 that this applicant met what was then in
19 effect. The Board had a ruling on how it was
20 interpreting grocery stores. There was a
21 Fact-Finding Hearing and as a result of that
22 a Board order came out.

1 And we wrote you a letter dated
2 November 1st and said we are submitting this
3 application. We meet all the requirements.
4 Here is why. And it would be our position,
5 strictly from a legal standpoint, that that's
6 where we need to be.

7 And the Board can continue to
8 wrestle with this issue as it accepts new
9 applications. The rules are now in effect on
10 an emergency basis, so anyone filing, at this
11 point, would be required to meet them. But it
12 would seem to me that this applicant met not
13 only the rules that were in effect when we
14 filed, but the rules that were in effect when
15 the application was placarded, the rules that
16 were in effect when the Board, in the normal
17 course, would have considered and decided on
18 this application.

19 So we think that is the first
20 issue before we get into what else we have to
21 provide and whether -- what else is provided,
22 your plans are met or not met.

1 CHAIRPERSON MILLER: All Right. I
2 just have a few comments.

3 First of all, the regulation
4 itself says that it should apply to license
5 applications being considered by the Board for
6 approval on or after January 14, 2013. So I
7 don't know if you can argue that it doesn't
8 fall within that, but we can take your point
9 under advisement.

10 I would propose we take that under
11 advisement argument, but I don't think that we
12 are that far away, hopefully, from deciding on
13 this case.

14 I disagree with those of my
15 colleagues who say that, you know, the Board
16 has failed you. I think that the Board came
17 up with a regulation and this last issue about
18 measuring, I think, it was good to hear from
19 somebody who actually operates a market how
20 the different measurements would affect -- the
21 different types of measurements would affect
22 your business. So I think that's very

1 valuable information to have to make a good
2 decision.

3 And I think you made a good
4 argument today. I can't speak for the -- my
5 Board Members, but I think that it was good to
6 hear your explanation of how and why you
7 measured a certain way. And I think it --
8 personally, I think it makes sense.

9 So I think what is left is though
10 there is a request for scale drawings, which
11 sounds like may not be that much of an issue.
12 I don't know. You can let me know. Your
13 brother is an architect or whatever. If the
14 Board hasn't stated that behind the checking
15 account -- behind the checking is public or
16 not public, you can just identify it as, you
17 know, checking area and the Board will make
18 that decision then.

19 MR. SMUCKER: I'm not saying that
20 it would be onerous, but I would really -- I'm
21 kind of surprised that there isn't enough
22 information to make a decision on whether or

1 not I own a grocery store that meets these
2 regulations.

3 CHAIRPERSON MILLER: Right. We
4 will have to take a -- I heard one Board
5 Member say that he wanted that information.
6 For me, I understand what you are doing here
7 and I think this may be sufficient. But if
8 the majority doesn't think it is, I don't
9 know. We will have to decide.

10 I'm hoping that that's the only
11 thing that -- further that would be asked of
12 you and then the Board Members now with the
13 information that we got from your proposal and
14 from what we have been discussing could come
15 up with a decision about your case very
16 shortly. I don't -- we are not waiting for
17 much else.

18 MR. SMUCKER: Okay. There were
19 two other questions on the email or the --

20 CHAIRPERSON MILLER: Yes. I think
21 we should address everything that needs to be
22 addressed, so that the Board Members have all

1 the information they need and you have all the
2 information that we can give you.

3 Do you want to address?

4 MR. SMUCKER: There was the issue
5 of do we have a Certificate of Occupancy for
6 the building, for the grocery store. I
7 believe that has been submitted.

8 CHAIRPERSON MILLER: Okay.

9 MR. SMUCKER: Just to make sure.

10 MR. KLINE: Madam Chair, that has
11 been in your file since the initial filing of
12 the application as has the business license.

13 CHAIRPERSON MILLER: Okay. So
14 they are non-issues.

15 MR. SMUCKER: They were taken care
16 of. Okay.

17 CHAIRPERSON MILLER: And with
18 respect to No. 2, your answer was in your
19 measurement you counted the square footage of
20 the cases, basically just that, like a shelf?

21 MR. SMUCKER: Which --

22 CHAIRPERSON MILLER: No. 2.

1 MR. SMUCKER: Oh.

2 CHAIRPERSON MILLER: When we are
3 talking about there was a question regarding
4 the front of the produce case, fresh meat case
5 and frozen meat case.

6 MR. SMUCKER: The question was is
7 it open to the public.

8 CHAIRPERSON MILLER: I guess that
9 was --

10 MR. SMUCKER: And the --

11 CHAIRPERSON MILLER: -- the
12 question. Yes, what is your answer?

13 MR. SMUCKER: That's the question.
14 I'm sorry, I didn't know that that question
15 had anything to do with the square footage.
16 Sorry, I thought that question had to do with
17 whether or not they were open to the public,
18 which they are.

19 CHAIRPERSON MILLER: The front,
20 okay. It only has to do with it if Board
21 Members are measuring in front of the case or
22 something, otherwise, it doesn't. If we are

1 just measuring shelves and cases, then it
2 doesn't.

3 MR. SMUCKER: Oh, so you are
4 saying that the actual place where the meat
5 rests would not count as a selling space?

6 CHAIRPERSON MILLER: No. I'm not
7 saying that at all.

8 MR. SMUCKER: Oh.

9 CHAIRPERSON MILLER: I'm saying
10 this went to the area in front, whether that
11 was public --

12 MR. SMUCKER: That's why I put
13 that on the --

14 CHAIRPERSON MILLER: Right.

15 MR. SMUCKER: Display cases are
16 open to the public.

17 CHAIRPERSON MILLER: It would only
18 be relevant if we are counting that area for
19 some reason.

20 MR. SMUCKER: Okay.

21 CHAIRPERSON MILLER: Anyway --

22 MR. SMUCKER: Well, we will submit

1 this.

2 CHAIRPERSON MILLER: Yes.

3 MR. SMUCKER: Yes. And, you know,
4 I think the overall food selling areas are
5 well within the requirements and then your
6 different indices of do you meet this 5
7 percent of this together, I think we are well
8 within that as well.

9 CHAIRPERSON MILLER: Okay. Do
10 Board Members have any other questions?

11 MEMBER SILVERSTEIN: Just can we
12 sort of agree on exactly what has to be done
13 and when we can meet on this and give the
14 applicant a time certain as to when we can
15 take this up once again?

16 MR. KLINE: Are we clear that the
17 majority of the Board is not satisfied, at
18 this point?

19 CHAIRPERSON MILLER: No, we
20 haven't had that discussion. I know that Mr.
21 Jones and Mr. Alberti, I believe, have said
22 that they are not ready to go forward on the

1 application. Is that correct?

2 MR. KLINE: Speaking as individual
3 Board members, I think that's what I heard
4 them say.

5 CHAIRPERSON MILLER: Is that
6 correct?

7 MEMBER JONES: I thought I made
8 that pretty clear.

9 MEMBER ALBERTI: I think I made
10 that pretty clear --

11 CHAIRPERSON MILLER: Okay. Good.
12 I just --

13 MEMBER ALBERTI: -- several times.

14 CHAIRPERSON MILLER: -- didn't
15 want to mischaracterize it.

16 MR. SMUCKER: I don't wish to
17 create any animosity.

18 MEMBER SILVERSTEIN: I do not
19 think I have a majority that agrees with me,
20 but I would --

21 CHAIRPERSON MILLER: You might.

22 MEMBER SILVERSTEIN: -- ask if I

1 might propose that we accept the application,
2 so that just everyone has the opportunity to
3 vote it up or down, that we accept this as
4 having met the standard.

5 CHAIRPERSON MILLER: Oh, you are
6 doing a motion right now?

7 MEMBER SILVERSTEIN: Yes.

8 CHAIRPERSON MILLER: That based on
9 the information that they have provided, that
10 they have met the standard to show that they
11 are a full-service grocery store under the new
12 regulations? Okay. I would second that
13 motion.

14 Is there further discussion?

15 MEMBER ALBERTI: Well, may I ask a
16 question?

17 CHAIRPERSON MILLER: Yes.

18 MEMBER ALBERTI: I would
19 appreciate it if Board Member Silverstein
20 would articulate succinctly why he believes
21 this meets the regulations as written.

22 CHAIRPERSON MILLER: Before you do

1 that, I just want to make a clarification. We
2 are not voting on the application, per se by
3 your motion, at this point. You are just --
4 are you asking that we take a vote right now?

5 MEMBER SILVERSTEIN: Well --

6 MEMBER BROOKS: What's the motion?

7 MEMBER SILVERSTEIN: Mr.

8 Silverstein?

9 CHAIRPERSON MILLER: I'm trying to
10 get clarification what it is before --

11 MEMBER ALBERTI: I understand.

12 CHAIRPERSON MILLER: -- he
13 explains it.

14 MEMBER ALBERTI: I obviously
15 misunderstood this.

16 MEMBER SILVERSTEIN: That this --

17 MEMBER ALBERTI: time out. May I
18 speak?

19 MEMBER SILVERSTEIN: Sure.

20 MEMBER ALBERTI: I obviously miss
21 -- it appears from your comments, Ms. Miller,
22 that I may have misunderstood the motion. So,

1 Mr. Silverstein, would you, please, repeat
2 your motion?

3 MEMBER SILVERSTEIN: I would ask
4 that we vote to -- that we vote that this --
5 that what has been provided is sufficient to
6 allow them to apply for a full-service grocery
7 application. That they have --

8 MEMBER ALBERTI: At the time?

9 MEMBER JONES: A point of
10 unreadiness if --

11 MEMBER SILVERSTEIN: No.

12 MEMBER JONES: -- the motion has
13 been concluded.

14 CHAIRPERSON MILLER: What?

15 MEMBER ALBERTI: Can we go back
16 and talk?

17 MEMBER JONES: You can ask the
18 Chairman if we can go back and talk.

19 CHAIRPERSON MILLER: What are you
20 saying?

21 MEMBER ALBERTI: I think we should
22 continue this discussion.

1 CHAIRPERSON MILLER: Okay.

2 MEMBER ALBERTI: I would like to
3 continue this discussion.

4 CHAIRPERSON MILLER: Do you want
5 to withdraw the motion?

6 MEMBER JONES: I don't know when
7 the Chairman wants to do it out here or back
8 there, that's why I say ask the Chairman.

9 MEMBER ALBERTI: I would rather do
10 it out here.

11 MEMBER SILVERSTEIN: I would ask
12 if we seek legal advice as to how best to
13 phrase this.

14 CHAIRPERSON MILLER: Can --

15 MEMBER SILVERSTEIN: I mean, there
16 is a multi-step process here.

17 CHAIRPERSON MILLER: Okay.

18 MEMBER SILVERSTEIN: The applicant
19 is proposing this as a way to apply for the
20 license. We must determine that he has met
21 the standard to apply. We are not giving him
22 the license. We cannot do that.

1 MR. KLINE: If I may, Madam Chair?

2 CHAIRPERSON MILLER: Yes, yes.

3 MR. KLINE: We are already through
4 the process.

5 CHAIRPERSON MILLER: Yes.

6 MR. KLINE: I think what we are
7 hearing to do today is determine --

8 CHAIRPERSON MILLER: Okay.

9 MR. KLINE: -- whether this
10 license application --

11 CHAIRPERSON MILLER: Okay.

12 MR. KLINE: -- meets the
13 requirements under whatever regulations you
14 determine apply to the situation. And in
15 terms of the comment that the counsel said
16 that applies to any applications pending, I
17 don't think the counsel can override the
18 Constitution, that's just my own personal
19 opinion.

20 But in any event, so the issue is
21 does this license application meet your
22 requirements for a full-service grocery store?

1 It seems to me that's the only thing we are
2 here to talk about at this Fact-Finding.
3 Otherwise, the application has been filed. It
4 has been pending since November. And that's
5 all we are waiting on in terms of issuance of
6 this license, as I understand it.

7 It's whether we meet the
8 requirements.

9 CHAIRPERSON MILLER: Okay.

10 MR. KLINE: And if we meet -- if
11 he meets the requirements, then the license
12 should issue.

13 MR. SMUCKER: And I'm --

14 CHAIRPERSON MILLER: I think --
15 okay. Well, this is a Fact-Finding Hearing.
16 And I just think the threshold issue is
17 whether we need more information or not. I
18 mean, that was one of the issues, I think, is
19 on the table. And Mr. Alberti said that he
20 would like scale drawings. And some of us may
21 think that we don't need that.

22 And so that's what I would like to

1 find before I put any more burdens on the
2 applicant, whether or not we need any more
3 information.

4 MR. KLINE: Well, if the majority
5 of the Board feels that the applicant has met
6 the requirements, then you don't need any more
7 information.

8 CHAIRPERSON MILLER: Well, okay.
9 Mr. Brooks, can I ask you, because I think it
10 is kind of at a 2-2 right now, whether we need
11 more information?

12 MEMBER BROOKS: No, I would like
13 to echo Board Member Alberti's request --

14 CHAIRPERSON MILLER: Okay.

15 MEMBER BROOKS: -- for scale
16 drawings.

17 CHAIRPERSON MILLER: Okay.

18 MEMBER BROOKS: Because I'm not
19 ready to reach a decision based --

20 CHAIRPERSON MILLER: Okay.

21 MEMBER BROOKS: -- upon the
22 information that I have seen.

1 CHAIRPERSON MILLER: That's kind
2 of what I thought. So --

3 MEMBER SILVERSTEIN: I'm perfectly
4 good with that.

5 CHAIRPERSON MILLER: Okay.

6 MEMBER SILVERSTEIN: But all I
7 really would hope that we do right now is (A)
8 vote this down if that is what is going to
9 happen.

10 CHAIRPERSON MILLER: We don't have
11 to vote today.

12 MEMBER SILVERSTEIN: And two -- or
13 I'll withdraw it.

14 CHAIRPERSON MILLER: Okay.

15 MEMBER SILVERSTEIN: And two, that
16 we tell the applicant exactly what is needed.

17 CHAIRPERSON MILLER: Right.

18 MEMBER SILVERSTEIN: And we set a
19 date certain as to when that is going to be
20 here and when we can determine whether he has
21 met the test.

22 CHAIRPERSON MILLER: I agree.

1 MEMBER SILVERSTEIN: And that we
2 at least give him the goal post and tell him
3 where the goal posts are, so that he can try
4 to cross the goal line, which is 10 yards in
5 front of the goal posts.

6 CHAIRPERSON MILLER: Yes. Mr.
7 Jones?

8 MEMBER JONES: So with all due
9 respect, Member Silverstein, I have no issue
10 with that if we had a consensus or
11 understanding of what the requirements are, so
12 that we could clearly communicate those
13 requirements to the applicant.

14 Given that we have not done our
15 job and thus have failed to define them
16 clearly, I don't see how we could possibly
17 convey them when we don't know what they are
18 in our own understanding.

19 MEMBER ALBERTI: Yes.

20 MEMBER SILVERSTEIN: May I respond
21 to that?

22 CHAIRPERSON MILLER: Yes.

1 MEMBER SILVERSTEIN: And this is
2 something where we find ourselves in a
3 difficult situation. Even though ex post
4 facto laws apply primarily or almost
5 exclusively to criminal cases, there is still
6 the spirit that you don't change the law and
7 move the goal posts in the middle of
8 something.

9 And we are -- we have a choice
10 here legally as to whether to allow time to
11 talk or to meet the September Regulations as
12 they were because he applied prior to this
13 kerfuffle or whether we seek to make him
14 comply to the requirement that we still
15 haven't concluded.

16 I personally feel that the fair
17 thing to do is that if he currently meets the
18 prior, we have the absolute legal right to do
19 that.

20 MEMBER JONES: So if I may?

21 CHAIRPERSON MILLER: Yes, sir.

22 MEMBER JONES: Just for

1 clarification on that, there are two -- I
2 interpreted what you said this time slightly
3 different from what you said initially.

4 So if the discussion is whether or
5 not we go against what is clearly stated in
6 the reg and --

7 MEMBER SILVERSTEIN: In which reg?

8 MEMBER JONES: -- accept them
9 against the -- accept this application and
10 process this application, correct?

11 MEMBER SILVERSTEIN: In which
12 regs? The September Regs or the new regs?

13 CHAIRPERSON MILLER: The new regs.

14 MEMBER JONES: The new.

15 MEMBER SILVERSTEIN: Okay.

16 MEMBER JONES: All Right. So it
17 was stated in there and accepted based on the
18 old requirements, then we would have to seek
19 legal counsel on that. I would need legal
20 counsel on that, because as has been pointed
21 out several times, I'm not a lawyer. So I
22 need input from a lawyer to help me understand

1 the nature and the magnitude of the potential
2 impact of doing that.

3 Because we are not just talking
4 about this one instance. We are talking about
5 how this precedent is now set going forward.

6 MEMBER SILVERSTEIN: No, this --

7 MEMBER JONES: So I think --

8 MEMBER SILVERSTEIN: If I might,
9 the precedent would only involve those cases
10 that were in the pipeline prior to.

11 MEMBER JONES: I completely agree
12 and understand.

13 MEMBER SILVERSTEIN: So it's s
14 limited number of cases.

15 MEMBER JONES: It is not isolated
16 to just this case.

17 MEMBER SILVERSTEIN: Correct.

18 MEMBER JONES: Okay. So --

19 MEMBER SILVERSTEIN: Correct.

20 CHAIRPERSON MILLER: So I would
21 concur with Mr. Jones, too, because we didn't
22 come out here ready to make a decision on that

1 legal argument. So I think we should take it
2 under advisement.

3 And I would also say if Mr. Kline
4 if you want to brief it in any way, feel free
5 to do so. You may not. You may want to leave
6 it the way it is or you may want to add
7 something. I don't know.

8 But I think that that's one point,
9 I think that we should not make a decision now
10 except for what we are going to do by when.
11 You know, and I think we should deal with this
12 expeditiously as possible.

13 So it seems to me that what we
14 want from the applicant are scaled drawings.
15 And if that is -- if all questions aren't
16 resolved, is that -- you know, just make those
17 areas obviously, you know.

18 MR. KLINE: Madam Chair, may I
19 make three points?

20 CHAIRPERSON MILLER: Yes.

21 MR. KLINE: First, with respect to
22 Board Member Jones' comments, I mean, let's be

1 clear. The universe is small. I think we are
2 talking about three applicants. This
3 applicant I don't think in anybody's mind, at
4 least that I'm aware of, meets -- doesn't --
5 no one would say that he doesn't meet the
6 requirements that were in effect when his
7 application was filed.

8 The other two applications that
9 are out there sort of the elephant in the room
10 that nobody is talking about are the drug
11 store applications that are pending. And
12 there is some question as to whether they met,
13 way back when, the requirements.

14 The second point is not only did
15 we meet the requirements when the application
16 was filed, but there was a moratorium that was
17 put in effect by the Council. That moratorium
18 expired. And we still didn't get our license,
19 even though this applicant had met the
20 requirements.

21 And I don't think Board and action
22 should be used to deny this applicant's

1 application and that's in effect what we had,
2 because that moratorium expired before and was
3 -- and there was no emergency moratorium in
4 effect for several weeks.

5 There was no emergency rulemaking
6 in effect, I mean, for several weeks. So
7 there was a gap there and why our license
8 didn't get approved and get issued at that
9 point even though we certainly contacted staff
10 and said give us the license, I don't know.

11 We in effect had a continued
12 moratorium without any legal action being
13 taken.

14 The third point I want to make is
15 if it's the Board's consensus, at this point,
16 without formal vote that we are not done and
17 we have to come back, then I would hope that
18 the Board would consider this in Executive
19 Session with legal counsel as appropriate and
20 thereafter provide us with clear unequivocal
21 guidance as to what it is that you want to
22 make this decision.

1 And that it be done as
2 expeditiously as possible and that we not be
3 made to come back and shadowbox in terms of
4 what it is that we are supposed to provide and
5 that that be done very quickly, so that we can
6 come back here next week and say here it is.
7 Assuming we get the drawing done that quickly,
8 here it is. We meet the requirements.

9 Because in my mind, I don't see
10 any way in the world that this applicant is
11 not going to meet the requirements, even if he
12 has to tweak his layout a little bit once we
13 get the drawing. He will meet the
14 requirements. This is not the drug store
15 situation that the Council was so concerned
16 about.

17 CHAIRPERSON MILLER: So well, how
18 long does it take to get the scale drawings?

19 MR. KLINE: It depends on what
20 terms he is on with his brother, I guess.

21 MR. SMUCKER: Very good or my dad
22 as well. But I mean, we have submitted

1 everything that you have asked for at this
2 hearing.

3 CHAIRPERSON MILLER: Right.

4 MR. SMUCKER: I'm in shock, but --

5 CHAIRPERSON MILLER: The majority
6 of the Board would like scale drawings. And
7 I don't know -- I could ask them if they want
8 it, but before we decide for sure what the
9 measurements technique is or after?

10 MEMBER ALBERTI: Ms. Miller, I
11 think that Mr. Kline has made a very good
12 point. And I don't know how this affects
13 timing, but I think it would be in everyone's
14 best interest if the Board solidified its
15 policy and articulated that very clearly to
16 this licensee before we ask for any more
17 information.

18 CHAIRPERSON MILLER: Okay.

19 MEMBER ALBERTI: I don't know how
20 that is going to affect the timing and I
21 understand your frustration, but, you know, we
22 brought you here today. Mr. Brooks?

1 We brought you here today to
2 shadowbox. I understand your frustration and
3 it is -- you have every right to be
4 frustrated. And I don't want that to happen
5 again. And in fact, I had hopes that you
6 would have had more information on the
7 information we have. And that didn't come to
8 fruition and it's not your fault.

9 MR. SMUCKER: But I'm still
10 being --

11 MEMBER ALBERTI: I'm just putting
12 that on the record. All Right.

13 MR. SMUCKER: I'm still being held
14 accountable.

15 MEMBER ALBERTI: I understand. I
16 understand. And I don't know what to do about
17 that. You know, I don't know what to do about
18 that. Ms. Miller, I would just point out, at
19 this time, before we proceed, just so we don't
20 get into a quandary later, we have a motion on
21 the floor. And I don't know --

22 MEMBER SILVERSTEIN: I would like

1 to withdraw it. I will withdraw the motion.

2 CHAIRPERSON MILLER: So --

3 MR. SMUCKER: Unless you would
4 like to change your vote, because I'm not sure
5 if this sets precedence to allow us to have a
6 license.

7 MEMBER SILVERSTEIN: I'm sorry?

8 MR. SMUCKER: I'm not sure that
9 this sets precedence for future license
10 applicants, especially when you're going to be
11 changing the rules or what is required if you
12 say prima facie you have evidence that we meet
13 all the requirements.

14 And it may not be up to your exact
15 specifications of what you are not yet aware
16 of yet, but I think we have met what you have
17 asked for.

18 MEMBER ALBERTI: Can I make a
19 response? Oh, Mr. Jones, please, go ahead.

20 MEMBER JONES: So with all due
21 respect, I acknowledge and I acknowledged
22 earlier and I apologized earlier for my role

1 in failing you as an applicant. I acknowledge
2 that.

3 With that being said, I will also
4 say that if you are going to be held, which it
5 looks like you will be and you will be if it's
6 up to me, to the standard that is in place
7 right now, that there is not enough
8 information in this drawing for me to make a
9 proper assessment of whether or not you do or
10 do not meet those requirements.

11 I have indicated through Board
12 Member Alberti what is needed in order to do
13 that. This information right here regarding
14 the layout isn't sufficient, as far as I'm
15 concerned. I need to be able to look at that
16 drawing and make the determination based on
17 the information provided independently that
18 you meet that requirement.

19 That is my expectation as an
20 independent Board Member.

21 MR. SMUCKER: Will that drawing
22 have to be --

1 MR. KLINE: Let me just remind the
2 Board, and we are not -- this is a Fact-
3 Finding, but let's keep in mind that the
4 standard in any administrative proceeding is
5 a preponderance of the evidence. And that bar
6 is is it more likely than not that the
7 standard is met?

8 And I would submit to you even if
9 you may not have exactly what you would like,
10 exactly what you would prefer in a particular
11 case, what you might require in the next case,
12 that given what you have, it is more likely
13 than not that he meets the standard that is
14 required in the regulations.

15 And we would hope that with that
16 showing, as I said and it may not be perfect
17 and it may not be what you would have
18 preferred, is it more likely than not that
19 this store, with the information that you
20 have, meets the requirements of the
21 regulations. And that's all we have to do.

22 And we would hope that you would

1 consider that and reconsider, particularly,
2 with this applicant, particularly given the
3 history, particularly that this application
4 has been pending for six months and that there
5 was a period of time where the license by law
6 should have been issued, because there was no
7 Board -- there was no Council-imposed
8 moratorium. There was no Board-imposed
9 emergency rulemaking. The license should have
10 issued during that period. And it didn't.

11 And I would ask that you consider
12 all of that and I would ask one or more of you
13 to reconsider your position that in this case,
14 that in this case, this case only, that you
15 don't have enough information to determine
16 that it is more likely than not that this
17 applicant meets the requirements of the
18 regulations.

19 CHAIRPERSON MILLER: Okay. And I
20 would also like to comment. I know that when
21 we looked at another supermarket that you --
22 or grocery store that we represented the Glenn

1 Gardening one or whatever it is that, at that
2 time, there were no -- there wasn't
3 specificity in the regs as to how to measure
4 or whatever when we looked at it and could
5 tell that it met the requirements.

6 However, anyway, I think that, you
7 know, we are a Board of five Members and we
8 just have to figure out how we are going to
9 proceed. And we will take everything that you
10 have said under advisement, but I don't want
11 to leave you hanging like just well, we'll
12 take it under advisement.

13 So some Members have said they
14 want more. Okay. Whether -- just before you
15 go, I want to make sure that that's all
16 fleshed out on the table, so that if somebody
17 wants more and we get back to you or we leave
18 it with you, you know what they want.

19 So I hear that scale drawings are
20 requested. Is there anything else that Board
21 Members feel that they need to make this
22 judgment?

1 MEMBER ALBERTI: I can't answer
2 that entirely --

3 CHAIRPERSON MILLER: So nothing?

4 MEMBER ALBERTI: -- with
5 confidence, because I don't know what our
6 final policy will be.

7 CHAIRPERSON MILLER: Okay. Is
8 there anything that you can be -- in all
9 fairness to this applicant, if there is
10 anything in your mind as to how you might
11 measure differently from them that you want to
12 ask them for now, so that you have the data
13 that you need?

14 MEMBER JONES: Madam Chair?

15 CHAIRPERSON MILLER: Yes?

16 MEMBER ALBERTI: I want to make a
17 comment to that.

18 CHAIRPERSON MILLER: Yes.

19 MEMBER ALBERTI: Ms. Miller, I
20 have been trying my damndest to be fair to
21 this licensee. All Right? That it has been
22 in the back of my mind through all of this.

1 So the fact that I'm not asking for something
2 else is not because I'm not thinking about it,
3 because I'm not trying, I am trying to work
4 this through as expeditiously and as fairly as
5 possible for this licensee.

6 CHAIRPERSON MILLER: Mr. Jones,
7 did you have something? Okay. So just --

8 MR. KLINE: I mean, I would ask
9 that the Board entertain my last comment in
10 terms of --

11 CHAIRPERSON MILLER: We will
12 entertain it.

13 MR. KLINE: -- is the Board
14 prepared to say that they don't have enough
15 information, at this point, to say that it is
16 more likely than not that this applicant meets
17 the requirements of a full-service grocery
18 store?

19 CHAIRPERSON MILLER: So we can
20 consider that. I just want to make sure I
21 have a schedule, so that we can consider that
22 as a threshold issue, but if we don't find --

1 MR. KLINE: Well, if the Board --

2 CHAIRPERSON MILLER: -- that --

3 MR. KLINE: -- agrees with that,
4 we are done.

5 CHAIRPERSON MILLER: I don't think
6 we are going to vote on that, at this point
7 though, because I have heard three people as
8 of now be interested in more documents.

9 MR. KLINE: We can certainly --

10 MEMBER ALBERTI: We had a motion
11 on that and it was withdrawn.

12 CHAIRPERSON MILLER: No, it was --

13 MEMBER SILVERSTEIN: It was
14 withdrawn.

15 MR. KLINE: Well, I ask that those
16 who were considering voting against it,
17 reconsider their position in light of the
18 standard, because we really hadn't talked
19 about the standard. We talked about whether
20 people had what they wanted in an ideal world,
21 whether they were satisfied.

22 But now, I have put on the table

1 the standard on the -- under the law, which is
2 is it more likely than not that we have met
3 the burden?

4 And given that, I'm hopeful that
5 one of the Board Members may have rethought
6 their position and that might consider
7 approving this application recognizing,
8 despite the concerns of several Board Members
9 in terms of precedent, there really isn't
10 precedent.

11 We are talking about this case.
12 You now have rules in effect that clearly
13 apply to anyone who applies from here on out
14 and it's really not going to be an issue.

15 MEMBER BROOKS: Madam Chair?

16 CHAIRPERSON MILLER: Yes, Mr.
17 Brooks?

18 MEMBER BROOKS: Maybe I'm
19 confused, because I thought this was a Fact-
20 Finding Hearing.

21 MR. KLINE: It is.

22 MEMBER BROOKS: Okay. And I

1 didn't think that we, at this point --

2 CHAIRPERSON MILLER: Yes.

3 MEMBER BROOKS: -- was ready to
4 make a decision yay or nay. After we get the
5 facts, perhaps, yes.

6 CHAIRPERSON MILLER: Okay.

7 MEMBER BROOKS: But not at this
8 point. For me, anyway.

9 CHAIRPERSON MILLER: Yes, okay.

10 MEMBER SILVERSTEIN: What facts?

11 CHAIRPERSON MILLER: He wants to
12 see the scale drawings.

13 MEMBER BROOKS: No.

14 MEMBER SILVERSTEIN: And that's
15 all you need?

16 CHAIRPERSON MILLER: Or consider
17 this issue, but not right this minute.

18 MEMBER BROOKS: Yes, exactly.

19 CHAIRPERSON MILLER: Yes, not
20 right this minute, right.

21 MEMBER SILVERSTEIN: I can
22 certainly accept that, but my concern is one

1 of this gentleman being held hostage because
2 of our inability to reach -- to get this done
3 in a timely fashion.

4 He is still operating and we are
5 in the District under the September Rules,
6 those -- that's the law right now. And he is
7 applying under that, because the moratorium is
8 over.

9 CHAIRPERSON MILLER: No, we have--

10 MEMBER ALBERTI: No. We have an
11 emergency rulemaking.

12 MEMBER JONES: Maybe we should
13 talk to our legal counsel here --

14 MEMBER SILVERSTEIN: We have an
15 emergency --

16 MR. KLINE: -- about statements on
17 the dias about whether --

18 CHAIRPERSON MILLER: It's an
19 emergency regulation.

20 MEMBER JONES: -- what's in place.

21 MEMBER ALBERTI: Thank you, Mr.
22 Jones.

1 MEMBER JONES: All Right.

2 CHAIRPERSON MILLER: Okay. So --

3 MEMBER SILVERSTEIN: I stand
4 corrected.

5 MEMBER JONES: Thank you.

6 CHAIRPERSON MILLER: I think that
7 we should set a date by which we are going to
8 decide this.

9 MR. KLINE: Well, we can --

10 CHAIRPERSON MILLER: Maybe by
11 next --

12 MR. KLINE: -- all walk down to
13 the store right now. It's a block away.
14 Let's just have at it. I mean, maybe that's
15 what we should do. I mean, the Board can
16 certainly make a visit and satisfy itself by
17 looking at the store.

18 CHAIRPERSON MILLER: That's not
19 the standard though.

20 MR. KLINE: Well, I understand.

21 CHAIRPERSON MILLER: Okay.

22 MR. KLINE: But I mean --

1 CHAIRPERSON MILLER: I understand
2 your frustration.

3 MR. KLINE: You don't have a
4 standard and what you are saying is we are not
5 satisfied that by a preponderance of the
6 evidence that you meet the requirement, but
7 what else we need to look at, we don't really
8 know, at this point. I mean, that's more than
9 unfair.

10 CHAIRPERSON MILLER: No, that's
11 not what the Board is saying. So I think --

12 MR. KLINE: I heard --

13 CHAIRPERSON MILLER: -- that in
14 hearing the majority of the Board would like
15 to take this under advisement, having gotten,
16 which was very important, your input on how
17 you measure it and apply the regs and why you
18 think you meet the regulations.

19 So I would suggest that the Board
20 take that under advisement, consider Mr.
21 Kline's argument about what the standard
22 should be and, you know, whether it even

1 should be applied retroactively.

2 But that we make a commitment to
3 do this expeditiously, so that this particular
4 licensee isn't, you know, left hanging longer
5 than he should be. So maybe we can commit to
6 do this by next Wednesday, if --

7 MR. SMUCKER: Will I know what is
8 required before then? Because I still don't
9 know what -- I mean, CAD drawings to scale,
10 but with what stipulations? Will it have to
11 be stamped? Will it have to be --

12 MEMBER JONES: Just a minute. So
13 can you --

14 MR. SMUCKER: -- before DCRA?

15 MEMBER JONES: -- clarify what the
16 "this" is in your statement? That you said we
17 will commit to have "this" done by next
18 Wednesday. Can you define what this is?

19 CHAIRPERSON MILLER: That we would
20 be able to vote on the application that we
21 will have determined how we are measuring
22 which was the only --

1 MEMBER JONES: So is the this that
2 we be prepared to --

3 CHAIRPERSON MILLER: -- issue.

4 MEMBER JONES: -- convey that
5 information to the applicant by next Wednesday
6 or we will have it done in time enough to give
7 it to the applicant, so that they could appear
8 before us again next Wednesday, should their
9 schedule permit that?

10 CHAIRPERSON MILLER: Okay.

11 MEMBER JONES: I'm not sure what
12 the this is --

13 CHAIRPERSON MILLER: Okay.

14 MEMBER JONES: -- with the
15 schedule.

16 CHAIRPERSON MILLER: We are --

17 MEMBER JONES: What are we doing?

18 CHAIRPERSON MILLER: I'm just
19 throwing this out for the Board's
20 consideration, that we make our decision as to
21 how we will be measuring by next Wednesday.
22 And if by next Wednesday -- or we can decide

1 that -- what standard we are applying. If we
2 are going to apply a different standard, a
3 general standard, whatever, and we can rule on
4 the application by next Wednesday, fine.

5 If we find that we need scale
6 drawings, this is one option, then at that
7 point, we will have decided on our policy and
8 they can submit scale drawings with -- in
9 response to whatever specifics we actually
10 identify at that point.

11 Otherwise, we -- the other
12 alternative is to get the scale drawings in
13 earlier, but they would -- you would have to
14 say what you would need to see on those scale
15 drawings if you want them earlier.

16 MEMBER JONES: So I think at a
17 minimum, we owe the applicant clear definitive
18 feedback as to what we expect and what we
19 need. So I'm just trying to get clarification
20 from you is that something that we are going
21 to be in a position to provide by next
22 Wednesday or is this the clear articulated

1 specified requirements in our expectations,
2 something that we are going to provide prior
3 to next Wednesday?

4 And if so, when?

5 CHAIRPERSON MILLER: No. I think
6 given our heavy schedule, I wouldn't say prior
7 to.

8 MEMBER JONES: So we --

9 CHAIRPERSON MILLER: I wouldn't
10 commit to that.

11 MEMBER JONES: -- will be doing
12 this at our meeting session next Wednesday?

13 CHAIRPERSON MILLER: The proposal.

14 MEMBER JONES: At the outcome of
15 our meeting --

16 CHAIRPERSON MILLER: Yes.

17 MEMBER JONES: That's what you are
18 proposing?

19 CHAIRPERSON MILLER: Yes, without
20 looking at the calendar, yes.

21 MEMBER JONES: All Right.

22 CHAIRPERSON MILLER: But I think

1 we should.

2 MEMBER JONES: So there would be
3 no need to have the applicant back here next
4 Wednesday, because we won't be --

5 CHAIRPERSON MILLER: No.

6 MEMBER JONES: -- telling them
7 what it is they need until next Wednesday,
8 correct?

9 CHAIRPERSON MILLER: I don't know
10 if we would have to have the applicant even
11 back.

12 MR. KLINE: Excuse me. We have a
13 CAD drawing of --

14 MR. SMUCKER: The actual layout.

15 MR. KLINE: -- the actual layout
16 of the premises.

17 CHAIRPERSON MILLER: Oh, good.

18 MR. KLINE: Which we have arranged
19 with staff to have printed out right now.

20 CHAIRPERSON MILLER: Okay. Good.

21 MR. KLINE: Or he can show it --

22 MR. SMUCKER: I can show it to you

1 on my computer, if you would like.

2 MEMBER JONES: With all due
3 respect, I think we need to still define what
4 those requirements are, so you can overlay
5 appropriately and show us how you are meeting
6 the requirements, similar to how you did with
7 this.

8 MR. SMUCKER: Right.

9 MEMBER JONES: But I can't even
10 say that, because we, as a Board, haven't come
11 to that consensus yet.

12 MR. SMUCKER: Right.

13 MEMBER ALBERTI: And I just wanted
14 to add say what Mr. Jones just said in a
15 slightly different way. We need, as a Board,
16 to have it to decide how we are going to
17 interpret and implement the rulemaking that is
18 in place.

19 MR. SMUCKER: I under --

20 MEMBER ALBERTI: Until we do --
21 wait. And until we do that, we can't give you
22 clear direction. And once you have clear

1 direction, then you, I believe, will have a
2 better idea of what you need to provide to us.

3 Pretty much what Mr. Jones is
4 conveying to you.

5 MR. KLINE: I mean, you know, with
6 all due respect, how long is all this going to
7 take? It sounds like we are out there and I
8 really don't understand why this license did
9 not issue when the Council-imposed moratorium
10 ended.

11 I mean, there wasn't any reason in
12 the world why this license shouldn't have been
13 issued. I mean, the Board acted unlawfully,
14 frankly. I mean, the Board just sat on an
15 application with no legal commandment to hold
16 the application and sat on it.

17 CHAIRPERSON MILLER: So --

18 MR. KLINE: And this licensee met
19 the requirements, the license should have
20 issued. And here we are several weeks later
21 trying to get along, trying to play along,
22 trying to give you what you want and we still

1 don't know what you want.

2 So excuse my anger and
3 frustration, but you are ignoring the law.
4 And if one of my clients sat at this table and
5 so blatantly ignored the law, you would
6 suspend the license. And forgive my outburst,
7 but I'm utterly frustrated.

8 CHAIRPERSON MILLER: I would like
9 to suggest that if Mr. Smucker has a scale
10 drawing that he thinks might be useful to us
11 and would save time, that you are welcome to
12 submit that. And if the Board needs more,
13 they could ask you, but otherwise we would
14 have the information in front of us, if it,
15 you know, can be read together with the
16 submission you gave us.

17 MR. SMUCKER: And this lines up
18 very well with what has been submitted.

19 CHAIRPERSON MILLER: Okay.

20 MR. SMUCKER: Although some things
21 have changed. Do you want me to print it? Do
22 you want me to just show it to you?

1 MEMBER SILVERSTEIN: Yes.

2 MR. SMUCKER: I'm not exactly sure
3 how you want me to do that.

4 CHAIRPERSON MILLER: Well, I don't
5 think -- let me just make clear, we have other
6 cases scheduled, too, for today, so we are not
7 going to consider it right now. So if you
8 can, you know, get it to our attorney one way
9 or the other, we will consider it this week or
10 as soon as -- you know, but she is going to
11 make copies and we are going to have time to
12 look at it.

13 So I know you are anxious to get a
14 decision today, but I don't see that
15 happening.

16 MR. KLINE: Well, I mean, we can
17 email it right now.

18 CHAIRPERSON MILLER: Yes, email
19 it. Okay.

20 MR. KLINE: Legal can have it
21 within minutes.

22 CHAIRPERSON MILLER: Okay.

1 MR. KLINE: In terms of --

2 MR. SMUCKER: And maybe you can
3 deliver it, too.

4 CHAIRPERSON MILLER: Okay.

5 MR. KLINE: I mean, the question
6 that I heard was what is the width of the
7 store and how does it lay out? I mean, this
8 scale drawing, which was used in connection
9 with the construction plans --

10 CHAIRPERSON MILLER: Yes.

11 MR. KLINE: -- it was then
12 submitted with the application, which means it
13 is already in your files, which the business
14 license and the C of O are already in your
15 files also, which you asked for.

16 MEMBER ALBERTI: Okay.

17 CHAIRPERSON MILLER: So I would
18 have to, you know --

19 MR. KLINE: Please pay attention
20 to this application --

21 CHAIRPERSON MILLER: I would have
22 to, you know --

1 MR. KLINE: -- for the license.

2 CHAIRPERSON MILLER: -- ask Mr.
3 Alberti and Mr. Jones and Mr. Brooks who are--
4 wanted to see those drawings. So I don't want
5 to speak for you. Are you ready to analyze
6 them and make a decision now?

7 MEMBER ALBERTI: Well, Ms. Miller,
8 I guess partly I want to see them because I
9 didn't hear my other two Board Members
10 articulate to me why -- what -- the criteria
11 that were met and how they were met, based on
12 this evidence.

13 CHAIRPERSON MILLER: I --

14 MEMBER ALBERTI: I mean, you know,
15 when they ordered that we write -- any order
16 that we write has to justify our decision.
17 And we have to state clearly, because other
18 people are going to come in behind this. We
19 have to state clearly why we think what the
20 evidence is that is before us that makes us
21 think there has been -- it meets the criteria
22 set forth in the law.

1 And I have not heard that today
2 from any of my Board Members.

3 CHAIRPERSON MILLER: Well, I would
4 be happy to put that on the record right this
5 minute.

6 MR. KLINE: Mr. Alberti,
7 procedurally, I don't think you have to write
8 an order. You just issue the license.

9 CHAIRPERSON MILLER: And I --

10 MR. KLINE: There isn't anything
11 contested here. There is no order to be
12 written.

13 MEMBER ALBERTI: Forgive me, Mr.
14 Kline. It would at least be on the transcript
15 and in the decision of the Board.

16 CHAIRPERSON MILLER: I will say
17 this, I --

18 MEMBER ALBERTI: It would be best
19 if we articulated that.

20 CHAIRPERSON MILLER: I think that
21 their information does meet the requirements.
22 If you accept their method of measurement, I

1 think that they show that the selling area of
2 the whole retail space is 77 percent. And
3 then they show in the categories below that
4 they measure selling area of the specific food
5 products by the shelf space. And that they
6 show that each of those products that they --
7 that we have identified to be at least 5
8 percent are that percentage.

9 So that's why I am comfortable
10 with it. I would be ready to approve it, but
11 that's it.

12 MR. SMUCKER: And, Mr. Alberti,
13 you will have to forgive me, but I thought
14 that these plans and schedules had already
15 been submitted and maybe you had not seen them
16 in the documentation, but they were a part of
17 the original application.

18 MEMBER ALBERTI: Okay.

19 MEMBER JONES: Let me make sure.
20 Sir, I think you made a statement earlier that
21 you had already submitted CAD drawings with
22 your application, correct?

1 MR. SMUCKER: That is correct.

2 MEMBER JONES: Is that the CAD
3 drawing that you are referring to?

4 MR. SMUCKER: That is correct,
5 sir.

6 MEMBER JONES: In that statement
7 that you made earlier, you indicated that the
8 statement you made was the layout of the store
9 has changed and that this is more reflective
10 and representative of what is your intended
11 plan or current structure and layout than
12 those CAD drawings?

13 MR. SMUCKER: The --

14 MEMBER JONES: Is that correct?

15 MR. SMUCKER: What --

16 MEMBER JONES: Is that statement
17 correct? Did you make that statement earlier?

18 MR. SMUCKER: As far as shelving
19 space, that would be correct.

20 MEMBER JONES: Okay. So from that
21 standpoint, this CAD drawing is it
22 representative and reflective of what you want

1 us to base our assessment on?

2 MR. SMUCKER: If you want to see
3 the actual footprint of the store, yes.

4 MEMBER JONES: As the food is laid
5 out in order to make the determination that
6 you meet the requirements as noted?

7 MR. SMUCKER: No, because --

8 MEMBER JONES: Okay.

9 MR. SMUCKER: -- this was for
10 DCRA.

11 MEMBER JONES: That's, I think,
12 where the delta is.

13 MR. KLINE: But between that
14 drawing, which is a scale drawing, provides
15 measurements that were requested before, there
16 was a request about the width of the store and
17 the length of the store, that drawing along
18 with the drawing that you have in front of
19 you, which is not to scale admittedly, but
20 contains measurements between the two of
21 those, you have all of the information related
22 to the layout of the store.

1 MEMBER JONES: So fine. I will
2 just say this. You submit that. Well, I'll
3 speak individually. You submit that. I will
4 do my own assessment of it, based on your laid
5 out drawing and my interpretation of this non-
6 scale drawing and we will see if you meet the
7 requirement.

8 MR. SMUCKER: Please. That would
9 be wonderful.

10 MR. KLINE: And it has been
11 submitted. As we said, it was part of the
12 original application, but we will submit it
13 again.

14 MEMBER ALBERTI: For my part, I'll
15 reserve judgment on whether I have all the
16 information I need.

17 MR. SMUCKER: And I apologize.

18 MEMBER ALBERTI: Because I'm not--
19 I don't want to make you any promises at this
20 point.

21 MEMBER JONES: And just to be
22 clear, I'm not making any promises.

1 MEMBER ALBERTI: I'm going to try
2 my best.

3 MEMBER JONES: I'm saying I will
4 take this --

5 MR. SMUCKER: I agree.

6 MEMBER JONES: -- and I will take
7 that and I'll make an assessment. If there is
8 something missing, I'll let you know.

9 MR. KLINE: Right. Thank you.

10 MEMBER JONES: Okay.

11 MR. SMUCKER: And, Mr. Brooks, is
12 there anything else that you would want?

13 MEMBER BROOKS: I'm fine.

14 CHAIRPERSON MILLER: Okay. So let
15 me just ask, I think that or I would hope that
16 we would have time to consider this by next
17 Wednesday's meeting, unless our calendar is
18 totally jammed next Wednesday.

19 MEMBER ALBERTI: No.

20 CHAIRPERSON MILLER: I think that
21 we could put this on as a priority for the
22 Board to make its decision.

1 MEMBER ALBERTI: Ms. Miller, I
2 would --

3 CHAIRPERSON MILLER: As our other
4 goal at least, yes.

5 MEMBER ALBERTI: My impression of
6 our schedule and the business that needs to be
7 conducted today is such that I would rather
8 discuss that amongst the Board Members.

9 CHAIRPERSON MILLER: Okay. Let me
10 just --

11 MEMBER ALBERTI: It's not
12 business, but it's just our schedule and I
13 don't think we need to air that here to the
14 public, but we have a lot on our plate. And
15 I would like to have a discussion as to what
16 we can meet and what we can't meet.

17 MEMBER SILVERSTEIN: I share Board
18 Member Alberti's concerns.

19 CHAIRPERSON MILLER: Okay. So let
20 me just convey to you that we hear your
21 frustrations and we -- this -- your case is a
22 priority. And I am going to, you know, try to

1 get it into our calendar, so that we can -- as
2 a goal I hope that we can make a decision by
3 next Wednesday, but that -- I can't, I guess,
4 commit to that.

5 But this is a priority and we
6 realize you are in a special situation. So
7 and I do say, for me, this Fact-Finding
8 Hearing was very helpful to resolving that
9 issue.

10 MR. SMUCKER: If you need more
11 facts, I have them right now.

12 CHAIRPERSON MILLER: What?

13 MR. SMUCKER: The CAD drawing, I
14 have it right now.

15 CHAIRPERSON MILLER: Okay.

16 MR. SMUCKER: I just didn't know I
17 needed to resubmit it.

18 CHAIRPERSON MILLER: You figure
19 out how to submit it the best way for the
20 Board to review it and we will take a careful
21 look at that.

22 MR. KLINE: Madam Chair, I know

1 that the Board, as a group, may not be able to
2 meet and consider this, but Mr. Alberti, Mr.
3 Jones, Mr. Brooks, I mean, any of you that
4 individually believe that you need additional
5 information to evaluate that, I hope -- to
6 evaluate the situation, I hope that you will
7 communicate that through legal, let us know
8 and we will provide it as quickly as we can.

9 Because although you may not know
10 as a group in terms of what the Board is going
11 to require, you know what you need
12 individually in terms of analyzing it and
13 making the decision.

14 MEMBER ALBERTI: Mr. Kline, just
15 to make it very clear to you, I do not know
16 with certainty what I need until the Board, as
17 a whole, decides on what its policy is with
18 respect to interpreting this rulemaking. Only
19 at that time will I know with confidence what
20 I need.

21 I think I know what I need, based
22 on my opinion of what that policy should be,

1 but I don't know if that's going to be the
2 policy or not.

3 MR. KLINE: And that's just --

4 MEMBER ALBERTI: So that's the
5 quandary I'm in.

6 MR. KLINE: That's just a scale
7 drawing, at this point, just so we are clear?

8 MEMBER ALBERTI: I believe so.

9 MR. KLINE: Do you want photos?
10 Should we give you photos? Would that help?
11 We'll submit photos.

12 MEMBER ALBERTI: Okay.

13 MR. KLINE: We've submitted
14 photos. We have submitted the business
15 license. We have submitted to you --

16 CHAIRPERSON MILLER: Okay.

17 MR. KLINE: -- the C of O. So I
18 mean, if there is anything else --

19 CHAIRPERSON MILLER: Okay.

20 MR. KLINE: -- that you can think
21 of that might help you in terms of either
22 establishing a policy or determining whether

1 this applicant meets the policy, please, let
2 us know and we will submit it. But if we
3 don't know, then we don't know to submit it.
4 So any one of you, I would urge you even if
5 you -- if the Board has not decided on final
6 policy, if there is something that you would
7 think would be helpful in developing it, then
8 just let us know and we will provide it.

9 CHAIRPERSON MILLER: We will do
10 that. We will do that. So we will
11 communicate through legal, you know, if there
12 is anything else any Board Member needs to
13 make this decision.

14 And we will get to this as
15 expeditiously as possible.

16 MR. KLINE: Okay.

17 CHAIRPERSON MILLER: So thank you.

18 MR. KLINE: Thank you. Again, I
19 apologize for my earlier outburst.

20 MEMBER ALBERTI: Yes.

21 MR. KLINE: I feel passionately
22 about this.

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MEMBER ALBERTI: Yes.

CHAIRPERSON MILLER: Okay. So the Board is now going into recess until its afternoon calendar.

(Whereupon, the Fact-Finding Hearing in the above-entitled matter was concluded at 12:36 p.m.)

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