Planning Commission Meeting
January 21, 2010
Verbatim Excerpt

SEA 85-D-033-02 – METROPOLITAN WASHINGTON AIRPORTS AUTHORITY AND THE VIRGINIA DEPARTMENT OF RAIL AND PUBLIC TRANSPORTATION

Decision Only During Commission Matters
(Public Hearing held on November 19, 2009)

Chairman Murphy: All right. We have a decision only in the Dranesville District. Mr. Donahue.

Commissioner Sargeant: Mr. Chairman?

Chairman Murphy: Hello.

Commissioner Sargeant: Before you begin, as you know I'm employed by Dominion Virginia Power and Dominion is referenced in this particular application. Given the potential for possibility for a contractual relationship between the applicant and Dominion, I have recused myself from this case. Thank you.

Chairman Murphy: Okay. Thank you very much.

Commissioner Hall: Yes, but he can't leave.

Chairman Murphy: You have to sit in the back until we're all done.

Commissioner Donahue: Have a good evening, okay?

Commissioner Hall: Nobody gets to leave if I don't.

Chairman Murphy: All right. Do we have any remarks that we would like to make before we go on verbatim? What is the Board date on this anyway?

Commissioner Donahue: I'm not sure we have an official one that we're aiming for.

Cathy Lewis: No, the applicant would like to get the Board date for, I think it's February 23rd, whatever that second meeting is in February, but we don't have a Board date right now.

Chairman Murphy: All right. So, do you have any introductory remarks and then we'll go into the --?

Commissioner Flanagan: It's listed on the agenda.

Chairman Murphy: Huh?

Commissioner Flanagan: It's listed on their agenda for the 23rd.

Chairman Murphy: 23rd?

Commissioner Flanagan: Yes.

Chairman Murphy: Okay.

Commissioner Donahue: I don't know whether it's that or not to be perfectly honest with you, but --

Chairman Murphy: All right. Mr. Donahue.

Commissioner Donahue: -- 23rd is what we're after. Thank you, Mr. Chairman. On December 10, 2009 --

Chairman Murphy: All right. Then we'll go on verbatim if you're going to start with the rationale. Okay?

Commissioner Donahue: Okay. On December 10, 2009 [sic], the Planning Commission conducted a public hearing on SEA 85-D-033-02, the West Falls Church Rail Yard. The Commission deferred decision on this application to this evening. The rail yard is located in the Pimmit Community Planning Sector described in the staff report as a "stable, single-family residential area." Special Exception requirements and General Standards contained in Section 9-606 require that "a use proposed for Special Exception allowance must be in harmony with and not adversely affect the use or development of neighboring properties." In addition to these General Standards, Category 4 requirements specifically state that "facilities shall be so located and designed that the operation therein will not seriously affect adjacent residential areas, particularly with respect to noise levels." The concern and direction of the wording of the Comprehensive Plan is clear, while recognizing the imperative of first-rate rail and Metro facilities to sustain essential infrastructure. The Plan calls for establishment of and compliance with conditions that will allow homeowners in proximate stable, settled, single-family residential areas the rights to use and use in peaceful enjoyment of their properties. Such a settled residential area are the neighborhoods in close proximity to West Falls Church Rail Yard. Since the date of the public hearing, staff has worked diligently with the applicant to fashion enforceable development conditions. We believe that these conditions will accomplish the purposes of the rail yard, while fulfilling the mandate of the Comprehensive Plan that this use must operate in harmony with bordering residential areas. Therefore, Mr. Chairman, I MOVE THAT THE PLANNING COMMISSION RECOMMEND TO THE BOARD OF SUPERVISORS APPROVAL OF SEA 85-D-033-02, SUBJECT TO THE DEVELOPMENT CONDITIONS DATED JANUARY 15, 2010. I move that the Planning Commission recommend to the board of supervisors approval of the modification of the transitional screening and waiver of the barrier requirements --

Chairman Murphy: Wait a minute. We need a second on the main motion.

Commissioner Donahue: Oh, okay.

Chairman Murphy: All right.

Commissioner Lusk: Second.

Chairman Murphy: Seconded by Mr. Lusk. Is there a discussion of the motion?

Commissioners Donahue and de la Fe: Mr. Chairman?

Mr. Chairman: All right.

Commissioner Donahue: Just one other comment that I want to make. We had a fairly long discussion with the applicant tonight before the application. And I think -- I think it is fair for me to say that the applicant's wish, because we have a close deadline on the Board of Supervisors' meeting and because they want to get going on various notices they have to put out, that the applicant would like to go forward with the conditions noted on the January 15th set of conditions, with the statement by myself that they will continue to work with staff in certain areas in order to possibly get some of the conditions considered and maybe minor changes in time for the Board meeting, which they desperately want to do on February 23rd. Thank you.

Chairman Murphy: All right. Motion was seconded by Mr. Lusk.

Commissioner de la Fe: Mr. Chairman?

Chairman Murphy: Discussion of the motion? Mr. de la Fe.

Commissioner de la Fe: Mr. Chairman, I would like to MOVE AN AMENDMENT TO THE MAIN MOTION.

Chairman Murphy: All right.

Commissioner de la Fe: Mr. Chairman, I -- and I have, well -- and I have passed out to the Commissioners a copy of the main motion's January 15th Development Conditions, showing my marked up copy, and then also proposed development conditions dated January 21st, which would be what the development conditions would look like if my amendment were to pass. But -- so that's what you have before you. But before, you know, I don't know if there's -- so, I WOULD MAKE A MOTION TO AMEND THE DEVELOPMENT CONDITIONS, AS SHOWN IN WHAT I PASSED OUT.

Commissioner Hart: Second.

Commissioner Alcorn: Mr. Chairman?

Chairman Murphy: Seconded by Mr. Hart.

Commissioner Hall: Discussion?

Chairman Murphy: Is there a discussion of that motion?

Commissioner Alcorn: Mr. Chairman?

Chairman Murphy: Mr. Alcorn.

Commissioner Hart: Mr. Chairman?

Commissioner de la Fe: Mr. Chairman, could I explain why I --?

Chairman Murphy: Oh.

Commissioner Alcorn: Sure.

Chairman Murphy: Okay, but --

Commissioner de la Fe: If I may explain why it is that I'm taking this rather unusual step of amending the motion of the Commissioner of the district where this is located. I'm making this amendment, and if you noticed, it all relates to the noise level. At the public hearing and even before that, I expressed a great deal of concern that the noise level that was being proposed, which is different from what exists in the current SE, was well beyond what was reasonable for an operation of this type. I stipulate that there is a great deal of noise in a rail yard operation. Because of that, the Federal Transit Administration Record of Decision includes the requirement for the box to reduce the main noise. But this goes beyond that. This creates a level of noise -- maximum level of noise, which to me -- and frankly at the time of the public hearing, we received a letter from Metro saying that if this was imposed, they couldn't live with it and they would not be able to open the Silver Line until 2017, i.e. until the whole line was finished. I -- that concerned me a great deal and that is my main concern with this. All of my -- my amendment deals in Section 7, it eliminates the --

Chairman Murphy: Development conditions.

Commissioner de la Fe: In the development conditions. I'm sorry. It eliminates the requirement for the noise study submitted before the issuance of the Non-RUP for the West Falls Church Rail Yard. Frankly, the current condition that exists, which is what is essentially left in 7, I think is sufficient. The second one relates to the Condition Number 8, which also introduces that new Lmax rather than the existing Ldn as the level of noise that is permissible. And so, in effect, what I'm doing -- where in this new Number 8 reflects pretty much what there was, or there is, in

the current condition. Then when we received the memo from staff, transmitting the January 15th Development Conditions, the phrase said that "staff concurs," but when -- when -- when staff "concurs," I consider that to be all staff. So when checking today, I found out that there were some questions as to whether indeed all staff concurred with these new development conditions, and there has been a great deal of discussion, as Commissioner Donahue mentioned, before this meeting. And I think everyone is acting in good faith and everyone wants to make sure that this gets done, but at this stage I really believe that we have to deal, on the record, as to what we recommend to the Board of Supervisors for action. So, those changes are there. And I also asked, essentially the Transportation staff, what kinds of noise were the types of noise that they felt would interfere with the operation of the yard if the January 15th Conditions were left as they are. And they sent me a list of things that they felt were operational in nature and frankly, they also forwarded to me a memorandum from the Zoning Administrator, which lists these things as possible things that might indeed be higher than what exists, but that it would require an annual variance by Metro if, you know, to operate this way. And I don't understand that and frankly, so therefore, I wrote a new condition, Number 9, and all the others were changed, which says, "With regard to noise emanating from rail cars and other mobile sources, noise such as the following is not within the definition of stationary noise source and is not subject to the restrictions of Condition 8, above: coupling and decoupling of rail cars; use of train horns for daily pre-revenue service safety testing and safe operations within the yard; use of heavy duty equipment to maintain track and track beds, ballast, or other facilities within the yard; and use of backup warning beepers on vehicles as required by OSHA." I recognize that we could, you know, keep debating this, but I think if we need to go on the record. I noticed with some degree of interest that the staff report for this SEA was written on April 1st, a year ago. Whether that date has any significance as to how long it has taken to do this or not, I don't know. But I mean, you know, it's been almost a year and I think if we -- I agree with everybody, this has to go to the Board of Supervisors for action. And I think, from my perspective as the Commissioner for Hunter Mill, where we really want this rail line to open on time and on schedule, at least Phase 1. I really think we need these types of changes in order to make sure that through some whatever, we don't, you know -- we stop the -- you know, the operation. I take Metro at their word. I know that Metro's word lately is not overly, you know, looked well upon because of all the problems they have. But I really don't want to have a set of conditions, particularly regarding noise that may interfere with the operation and opening of the Silver Line, and that's the only reason I'm proposing these changes for discussion and to send to the Board of Supervisors for them to make the ultimate decision. My changes, particularly in the current Condition 8, are really to go back to what exists in the current SE. So, that's my statement and why I'm taking this step. I think it's the first time I've ever done this since I've been on the Commission. And --

Commissioner Alcorn: Mr. Chairman?

Chairman Murphy: Mr. Alcorn.

Commissioner de la Fe: I don't feel comfortable doing it, but in good conscience I feel I have to do it.

Chairman Murphy: Mr. Alcorn.

Commissioner Alcorn: Thank you, Mr. Chairman. And thank you for your comments, Commissioner de la Fe. I'd like to call the representative from the applicant to the podium, if I could.

Jonathan Rak, Esquire: Mr. Chairman, for the record, I'm Jonathan Rak, the attorney for the applicants.

Commissioner Alcorn: Hello, Mr. Rak.

Mr. Rak: Good evening.

Commissioner Alcorn: Welcome. Really just one question. In looking at the Development Conditions dated January 15th, as they are written now, my question is can you comply -- can your client comply and do you concur with the Development Conditions, specifically 7 and 8, as they are currently written in that January 15th document?

Mr. Rak: Thank you, Mr. Alcorn. As we stated at the public hearing, we have a concern with the imposition of the 55dBA Lmax, with respect to rail operations. And the confusion, such as it is, about this set of conditions for us is what aspects of the operations are considered stationary noise? As you know, trucks, cars, airplanes are not subject to the Noise Ordinance limitations and there is some confusion that we have as to whether the rail cars and the types of activities that Commissioner de la Fe mentioned with the coupling and decoupling, etcetera, whether those are intended to be considered subject to this maximum stationary noise level. Metro representatives are concerned that if they do apply to those aspects that they would not be able to comply with a 55Lmax. As stated before, the existing Special Exception has a 65Ldn average limitation.

Commissioner Alcorn: Okay. So Mr. Rak, just to follow up. So my understanding is that whether this gets modified here or at the Board of Supervisors that your view and your applicant -- in your client's view is that the language would need to be modified in order to clarify the applicability of the Ordinance to the rail yard basically, and the rail cars. Is that correct?

Mr. Rak: Or to receive an interpretation from the Zoning Administrator that specifies what stationary noise is and how that lines up with our activities.

Commissioner Alcorn: Okay. Well, let me move to the Zoning Administrator then, if I could, and ask if such an interpretation has been made or is forthcoming?

Michael Congleton: For the record, my name is Michael Congleton; I'm with the Department of Planning and Zoning. The staff is aware of the issue that the applicant has with the various types of noise generated by the yard. And it's the Zoning Administrator's position that these types of noise, the coupling and the decoupling of rail cars, use of train horns for pre-revenue service

safety testing, use of heavy duty equipment to maintain track and ballast, and other types of uses, do fall under the purview of Chapter 108, which is the Noise Ordinance. We would share the concern that these types of daily activities may exceed the 55 decibel limit. And I have a copy of an unsigned memo from Eileen McLane, the Zoning Administrator, to Regina Coyle, Director of Zoning Evaluation Division, that we are cognizant of these issues and will, on an annual basis, review and maybe possibly, I can't say definitely, but that we would entertain a noise variance for these types of operations. We have done this, literally, hundreds of times. We do this with VDOT projects, such as the Woodrow Wilson Bridge widening, the Interchange down in Springfield and this is the normal route to take for these types of activities.

Commissioner Alcorn: Okay.

Mr. Congleton: What our concern is with the condition -- the new condition, I think it's Number 20, is that --

Commissioner de la Fe: It's Number 9.

Mr. Congleton: Number 9, about what is stationary, what is non-stationary. That first reading that appears to be an interpretation of Chapter 108, which is under the purview of the Zoning Administrator, and not the Planning Commission. I've talked to the applicant before this and we both agree we need to go talk to the Zoning Administrator, with representatives, to discuss this issue further. But as it stands tonight, the daily uses in the yard are subject to the Noise Ordinance, which has a 55 decibel reading at residential property lines, but we would certainly assist the applicant in obtaining a noise variance for its daily operations, and we feel that's the best solution for this problem at this time.

Commissioner Alcorn: Okay. So, let me just -- let me just recap I think what you just said, which is your recommendation would be to pursue the noise variance procedure, or process, for this situation, and it's your opinion that -- that language in a development condition is not appropriate for -- you said, the Planning Commission, but I would assume the Board of Supervisors as well. Is that correct?

Mr. Congleton: That's correct. Chapter 108 provides that authority to the Zoning Administrator --

Commissioner Alcorn: Okay.

Mr. Congleton: -- per the interpretation of Chapter 108.

Commissioner Alcorn: Is there any other language that would achieve, say, the end of pursuing a variance that could go into a development condition that would, say, achieve the end which I believe we seek, which is clearly the operation of the rail yard?

Mr. Congleton: I think that issue should be discussed with staff and the applicant prior to going to the Board of Supervisors to see if some other solution can be attained.

Commissioner Alcorn: Thank you.

Chairman Murphy: All right. On that point, Mr. de la Fe and then Mr. Hart.

Commissioner de la Fe: I just have a question. If Number 9 is not appropriate because it's Noise Ordinance, then how can we have Number 8, which deals with the Noise Ordinance, as a development condition?

Mr. Congleton: With Condition Number 8, and I'm going by -- I'm going by the January 15th conditions.

Commissioner de la Fe: Right, it's the same number.

Mr. Congleton: Same number. Now, Number 8 states --

Commissioner de la Fe: I mean that also deals with the Noise Ordinance.

Mr. Congleton: Yes.

Commissioner de la Fe: What's the difference?

Mr. Congleton: The Noise Ordinance is applicable to the operations in the rail yard.

Commissioner de la Fe: But you just said they weren't in 9? Or, that we couldn't have a development condition because it was related to the Noise Ordinance and that was only subject to the --

Mr. Congleton: I'm going by the --

Commissioner de la Fe: -- you know, the Zoning Administrator --

Mr. Congleton: I'm going --

Commissioner de la Fe: So, either 8 and 9 are not permissible by your rationale, or they both are.

Mr. Congleton: I was referring to the condition I read earlier this evening that defined what a stationary noise source was, in respect to this application. And that's what my comments were directed to.

Chairman Murphy: But what he's saying is can you have it both ways? I mean, if one is in the purview of the Zoning Ordinance -- the Zoning Administrator, should the other one be also? Or, is it mutually inclusive?

Mr. Congleton: My understanding of the application is the applicant is putting in these boxes. Simplest terms, a moving rail car is not subject to the Noise Ordinance. That's a non-stationary noise source. What this one -- the condition I have, which is Number 7, is that the noise limit on the -- with the box, rather, would be limited to 55 decibels. That's a condition over and beyond any current requirement, which of course, the Planning Commission and Board can do for a special exception. Condition Number 8 is -- is almost a reiteration of what the Noise Ordinance currently -- currently says is "the operation of the rail yard is subject to Chapter 108, the Noise Ordinance."

Commissioner Donahue: Mr. Chairman?

Chairman Murphy: All right. Wait. We got to do it this way.

Commissioner Hart: Yes.

Chairman Murphy: Mr. Hart and then Ms. Hall and then Mr. Donahue.

Commissioner Hart: Thank you, Mr. Chairman. I speak in support of Commissioner de la Fe's amendment and I would like to articulate my reasons. First, I think this case has been pending for well over a year and it needs to move forward. I would not want the Commission to delay the decision any further. I personally had hoped we would have the revised development conditions before Christmas, that was a specific question asked at one of the earlier deferrals and we didn't get them until a couple days ago. I recognize that there have been a lot of discussions with staff and that this -- as shown, I think, so far with the discussion tonight this is still a very difficult issue. But I think with Commissioner de la Fe's changes, we're ready to go forward. I support the application generally and I recognize the important need for facilities like this. I think also in general, the methodologies that have been proposed with the application for noise reduction will substantially eliminate the wheel squeal, which is really the principal objection to the use. I sympathize with the complaints that we heard about noise at the public hearing. I had hoped that would have been resolved before now. Unfortunately, I have four concerns about the wording of staff's latest development conditions and particularly, Numbers 7 and 8, in the most recent handout. They introduce a new noise standard, Lmax, which is a significant change from the Ldn standard in the existing conditions. It substitutes a one-time measurement for a daily average. I have reservations about the wisdom or enforceability of including Lmax in such a development condition. In special exception applications, we have an obligation to the Board to evaluate whether development conditions are appropriate to mitigate impacts from the use where necessary. Equally -- equally importantly, we have an obligation to review and do our best to make sure that the wording of any such conditions is fair and enforceable. I think that the wording of 7 and 8 in staff's package fall short. First, to my way of thinking, the numerical value of 55Lmax is unrealistically low. Nothing in the record before us suggest to me that an Lmax as

severe as 55 would be necessary to mitigate any impacts from this use. As I understand it, many locations in Fairfax County already have an ambient noise level above 55 decibels, even without an adjacent rail yard or limited-access highway or anything else. We allow residential districts outside the Airport Noise Impact Overlay District with a significantly higher noise level anyway. Second, we have a letter in the record dated November 19th from Metro's General Manager, Gerald Francis, making clear, in no uncertain terms, that they cannot achieve an Lmax standard of 55. I'm not comfortable, on the record before us, imposing a severe condition that Metro has announced it cannot meet, especially where that condition is not consistent with any other similar approvals for rail facilities. Third, on the record before us, it appears that an Lmax standard has not been imposed upon WMATA for any other Metro facilities, whether in Fairfax County or other jurisdictions. Finally, I do not believe on the record before us that the first sentence of staff's proposed Development Condition 8 would be enforceable. Unless the sound measurement at any given location on a given date could accurately apportion the sound level among multiple sources, it would be impossible to objectively determine whether any given event, with a reading above 55, was due to stationary rail yard noise or other rail yard noise or other sources. The discussion tonight, I think, confirmed the confusion over any potential interpretation of that phrase, and I think is creating -- it's opening Pandora's Box, should there be an enforcement provision related -- an enforcement proceeding related to a violation coming out of the first sentence of Development Condition 8. A subsequent noise study is what I think is proposed by staff in the rest of Number 8. A subsequent noise study is of no particular help in determining the specific corresponding numerical values on an earlier violation date. Nothing in the record from the public hearing suggest to me that Zoning Enforcement staff can make that apportionment from any give measurement, or that the Zoning Administrator, the BZA, or the Courts would be able to piece together exactly what happened on a given date if a violation were to be issued. Even if this text represents compromise language, we do the Board and the citizens a disservice in recommending its approval, unless such a development condition actually could be enforced. If we're subjecting an applicant to civil penalties and other potential liability for a violation of a development condition, that condition needs to incorporate an objective and realistic standard, not something we cannot quite measure or cannot reasonably be achieved. At this point, given the choices before us and the timeframe with this application, I support Commissioner de la Fe's amendment, which satisfactorily mitigates the impacts and in my view is substantially more rigorous than the current conditions, without opening the Pandora's Box of an Lmax standard. Thank you.

Chairman Murphy: Thank you. Ms. Hall and then Mr. Donahue.

Commissioner Hall: Mr. Chairman, I keep hearing, "We have to move forward. We have to decide." Yet, I find this very confusing the way this is being done. I have two documents. I have no idea up until we started to discuss it what they were all about, so it's like I'm --

Commissioner de la Fe: I gave them to you so you would know what they were.

Commissioner Hall: Yes, I understand that, but it would have helped me if I knew what this was going to be discussed that this is what you're proposing and, you know, the scribble. It's very

confusing when you have this three-page development condition and you want to make major changes -- what I view to be major changes. Now, I have a question. Has staff looked this over?

Ms. Lewis: No -- no, Ms. Hall, we have not. And in fact, it wasn't until I arrived here this evening that I realized that the applicant had -- now had trouble with the conditions. So, I -- we have not looked it over. What we have preliminarily looked it over; we've expressed some of our concern.

Commissioner Hall: You know -- I know we want to get this to the Board. I know this is important, but this thing has been around for really long time and to wait until the night for a decision to rewrite the development conditions and not give staff the benefit of reviewing it? I mean I don't pretend to be an expert on this stuff. You know obviously, my fellow Commissioners share a concern and I value that and I appreciate their input, but we work together here. And at least staff has got to be able to look at this and incorporate it into something that they can review and make comment on. I guess I find this very frustrating.

Commissioner Hart: Mr. Chairman?

Chairman Murphy: All right. Mr. Donahue and then Mr. Hart.

Commissioner Donahue: Thank you, Mr. Chairman. I find Commissioner Hall's comments interesting because it was part of the discussion that I went over with the applicant earlier this evening, and I'm in complete agreement with her. And I appreciate the fact that Commissioner de la Fe gave us conditions this evening that he would like considered, but I think it's a monumental task with everything else going on to really get a feel for what those conditions say and what they are and try to interpret them with everything else going on this evening, and I think staff has the same problem. I also want to join in Ms. Lewis' comments that up until two hours and 45 minutes ago, I did not realize there was a problem. These problems had not been expressed to me in any way, shape, or form. Dealing with staff not admittedly, not talking directly to the applicant, we had certainly been led to believe that the various comments and suggestions that we were having for the conditions were going back to the applicant, and the applicant was accepting them. And the applicant had clarified that a little bit this evening with respect to certain reservations I guess they have had that we had no indication whatsoever that that was the case. Let me get into some of the other comments. What were suggested this evening, I believe, by Commissioner Hart that one of the problems he had is we're dealing with a new noise standard, namely Lmax. From everything I've been able to hear and talk about and see and talk to staff about Lmax and more -- more particularly, 55dBA Lmax, is a well-known and accepted noise standard in Fairfax. It actually is the noise standard, and that has been confirmed to me by various members of the Zoning Enforcement staff, that obviously if you want to question them about that that might be a good thing to do, I don't know. As I said earlier, it has been noted that a letter was submitted, I believe, the night of the public hearing, showing certain concerns on the part of the applicant concerning whether or not they could reach a 55dBA Lmax standard. But all of the discussions since then, again I say, I thought have resolved that and I thought that they felt, ongoing from that point, that they had come to a point

where they could reach that standard. I find out now there may be certain exceptions that they would like dealt with. But again, the folks from Zoning Administration say they can be dealt with under the process that was -- that was suggested this evening. When we -- the reason I would like to go forward this evening with the January 15th Development Conditions is precisely the reason that everyone else has stated mainly that we don't have much more time with this application. No one is more desirous than myself for this application to move forward, but the point is it seems to me you have a better chance of it moving forward in good order, if we really don't have any more time. We got to do something tonight. You have a much better chance of this moving forward in good order to the Board if you take a set of development conditions that have been written for at least a few days, I would say, maybe a couple of weeks, and -- and pass them with the understanding -- this is what the applicant said to me tonight -- with the understanding that they will continue to talk and negotiate over a few items and I think when the Zoning Administrator mentioned -- mentioned Condition 20, it was this 20 that they were talking about. You have a much better chance to have this thing go forward in order -- with good order under that procedure than if we all of a sudden start trying to figure out what a new condition said. I think that's impossible tonight. In addition to that, I have problem with the substance of what I believe is the condition that Commissioner de la Fe is introducing. I have problem with the fact that it apparently goes back to Ldn rather than Lmax, and I had said many times, I think an Ldn condition on noise is useless because it is an average and it tells you nothing about what the high points or what the spikes that residents in these areas may be dealing with. That's why I think you have to have an Lmax figure. I think that's the type of number you have to have. I think without that Lmax figure, it's very hard, and I think part of the problem with the Zoning Administrator's operations over the last few years is we had an Ldn figure and that's the one that's hard to enforce. I believe it was Mr. Hart who said, or possibly Mr. de la Fe, that there could be a real problem with enforcement in Lmax. I don't think there's a problem with enforcement and again, I allow the Zoning Administrator to speak to this, I don't think there's a problem with enforcement, at least in clarity when you have a definite figure of some Lmax figure, in this case, 55. I think you have a real difficulty in enforcement when you're trying to deal with an average. And as far as Mr. Hart's point -- or Commissioner Hart's point of trying to -- I think he suggested that under this -- under this scenario, you would have difficulty because you would be going out after a possible violation had been found and trying to reinterpret that violation. That's not what this condition is all about. What this condition is all about is to alert the Zoning Administrator, through various means, that people feel that there has been a violation of whatever the noise allotment is, at which point the Zoning Administrator, and again I will turn to the Zoning Administrator to see if they feel they're competent to do this. At that point the Zoning Administrator goes out, using accepted techniques and charge noise for awhile to find out if the complaint about the violation of the standard is legitimate, and if it is not, the case ends right there. But Lmax to me, and we have studied this for a long time and we have done research into this for a long time, and we have found that Lmax is a much easier standard to interpret and to deal with a violation of than Ldn. So again, I think the basis of my case with respect to what is best for the rail yard and what is best to moving forward is that we have a set of conditions that staff supports, that the Commissioner supports, and up until today, I thought the applicant -- something until two hours ago, I thought the applicant supported, and even at that the applicant supports those conditions, and I think from the discussion we had tonight, I found out that they're

okay with the 55dBA Lmax, except for a very few potential exceptions or conditions that they would like to continue to discuss. But I believe the best way to do this in an ordered way is to pass the January 15th Conditions as they are written, allow the discussion to go forward, and that will go to the Board. And that is clearly the most sensible way to do this. Thank you.

Commissioner Hart: Mr. Chairman?

Chairman Murphy: Mr. Hart.

Commissioner Hart: Yes. Commissioner Hall made a couple very good points and I wanted to respond specifically to them. One regarding the timing of this and why not to wait. And I hate voting on things the night of.

Chairman Murphy: Yes.

Commissioner Hart: I hate trying to fake our way through changes. But it's my understanding that Metro begins to incur significant delay damages, penalties under the contract, if this isn't done at the next --

Chairman Murphy: Board date.

Commissioner Hart: Board date. Secondly, with respect to Commissioner de la Fe's motion and the timing of these things coming out, I think it was clear as a bell at the public hearing that at least three of us had a problem with an Lmax standard. That was -- that was a long area of questioning and I think some comments were made at the end. There were comments, and I forget now if it was the night of the public hearing or it was a couple of the times during the deferrals, but we specifically asked staff for development conditions and I believe that, again I thought it was Mr. Williams perhaps, but that we were told we would probably get them before Christmas and that was fine with me, we'd have time to look at them. We didn't get them. We got them two days ago. I got on the phone with Mr. Williams. I asked specifically for alternate language because this wasn't going to work. We didn't -- I understand Mr. Williams had some problems and I don't -- I understand he's not here this evening, I understand all that. He was going to talk to Ms. Lewis, I don't know if that happened. I had some other questions which didn't get answered. No one called me today. It was only late this afternoon that I realized, in speaking with the applicant's counsel that Mr. Williams was not even in the office today that apparently I wasn't going to get a call back that is apparently what happened. We had no alternate language. We got these development conditions, I think, two days ago, and I realized at that point for the first time that Lmax was back in -- in 7 and 8, or it never came out or that never went away. So under the circumstances, I don't think it's necessarily Commissioner de la Fe's fault that the changes are coming out tonight because we were -- we were given no opportunity to reflect on this over Christmas or come up with anything else. We were given no opportunity to come up with alternate language, and I understand about Mr. -- Mr. Williams' family issues going on, sometimes that sort of thing happens. But I think this was the best we could do. Given

that and given the financial penalties for Metro, I think we can try and crank it out tonight, as painful as it is. We don't have any other public hearings after this. Thank you.

Chairman Murphy: Let -- let me just ask a question. Mr. Stevens is here, Mr. Rak. Let me -- let me -- I've been on the Planning Commission maybe too long, I don't know. But I've been on -- at the Planning Commission a lot of Thursday nights, when we've had an application that's been controversial and the Board meeting has been, in the olden days, Monday, okay? Now the Board meeting is the 23rd of February?

Mr. Congleton: Yes, sir.

Chairman Murphy: I mean if we defer -- I mean and even what Mr. Hart said leads me to believe that we need some time here. And the one thing I don't want to do tonight is to have the Planning Commission in a violation of the Noise Ordinance. Will the whole world crumble for the Silver Line if this is deferred until the 28th of January, so we can have a chance to look at this stuff?

Mr. Congleton: I'm not exactly sure of the dates, but I believe there's an issue of public hearing notice for the Board public hearing.

Chairman Murphy: No, it won't affect the Board at all. The Board has a date set; they've already sent the notices out. We're just deferring this a week.

Mr. Congleton: The notices have not been sent out yet.

Chairman Murphy: Well, they can still send them out.

Commissioner Flanagan: There's a certain distance between the Planning Commission and the Board.

Commissioner Donahue: Mr. Chairman, if I could? During the discussion with the applicant and I had this evening, that was kind of the line that I was taking. I was wondering exactly why we couldn't have a delay. That, frankly, would be my druthers if we could have a delay until January 28th.

Chairman Murphy: This has been here for a year.

Commissioner Donahue: And I was - - I was persuaded by the applicant and possibly they want to come to the microphone to say more, but I was persuaded by the applicant that that would put them in desperate jeopardy with respect to the Board of Supervisors' public hearing. The thing that was mentioned was, and maybe it's legitimate, I challenged it nevertheless. The thing that was mentioned was if anything happens, snowstorm, whatever, and we cannot meet on January 28th then we have a problem. But, my druthers would be January 28th too.

Chairman Murphy: Mr. Rak? Are you running away from us, or --? I mean I was just going to ask you the same question and then you're heading for the exit.

Mr. Rak: Talking to my client, Mr. Chairman. Sorry.

Chairman Murphy: Yes. I know the application has been here a year, but the stuff before us tonight and the arguments given by Mr. Hart, Mr. de la Fe, Mr. Donahue are new to my ears tonight. That's my problem.

Ms. Lewis: Mr. Chairman, can I -- during this pause, can I just apologize for the lateness in these development conditions getting to you?

Chairman Murphy: Yes.

Ms. Lewis: We did spend all of Christmas trying to work them out with the applicant. That -- that was the delay. And as you may recall during the original hearing, it was staff that had trepidations about Lmax. It was because the applicant ended up accepting it, that's why this changed.

Chairman Murphy: Okay. And I'm not going to get into pinning the rose on anybody. We have a situation here; I'm trying to resolve it. Mr. Rak?

Mr. Rak: Mr. Chairman, thank you. I've spoken with my client and provided that -- that we can come to an agreement with staff that they will move forward with the scheduling of the Board hearing and that we can get there if we act -- if the Planning Commission acts next week, we would reluctantly agree to that if that's the Commission's desire.

Commissioner Alcorn: Mr. Chairman?

Chairman Murphy: Mr. Alcorn.

Commissioner Alcorn: With the -- with the Commission's permission, I WOULD MOVE A SUBSTITUTE MOTION THAT WE DEFER DECISION ON THIS MATTER FOR ONE WEEK UNTIL THE 28TH OF JANUARY.

Commissioner Lusk: Second.

Chairman Murphy: Seconded by Mr. Lusk. Is there a discussion of that motion?

Commissioner Alcorn: Mr. Chairman?

Chairman Murphy: Mr. Alcorn.

Commissioner Alcorn: Just very quickly. What I would request -- honestly, I think there is a difference of opinion here that needs to show -- probably, if there can't be a single set of development conditions, I think we need to see one set and maybe an alternative for us to deal with this. And I think both of them need to be reviewed by staff and be technically defensible, even if they result in different outcomes. So, I would ask that -- that basically we see such conditions. If it's one set, that's great. But I would like to see that at least a day or two before the 28th.

Chairman Murphy: Yes.

Commissioner Flanagan: Mr. Chairman?

Chairman Murphy: Mr. -- yes, Mr. Flanagan.

Commissioner Flanagan: Yes, I'd like to address the motion. Yes, I -- it appeared --

Commissioner de la Fe: Mr. Chairman?

Chairman Murphy: Mr. de la Fe.

Commissioner de la Fe: He was -- he was --

Commissioner Flanagan: Oh.

Commissioner de la Fe: He was making a substitute motion to my substitute --

Commissioner Flanagan: Yes.

Commissioner de la Fe: -- to my amendment. And frankly, we have deferred this since November and every time we come up, we come up with two days before of development conditions where the main issues are still the same. So I, frankly, would object to another deferral because I really don't think we're going to wind up with anything different than what we see on January 15th -- the January 15th one. And it's time for the Board of Supervisors to act on this.

Chairman Murphy: All right. Mr. Flanagan.

Commissioner Flanagan: I've listened diligently and it appears to me that if we can -- if this motion, which I will support, to defer is -- if they, in particular, address these three little subjects evidently that to which there is an objection about a 55Lmax to be applied, evidently there's some trouble applying 55Lmax to three or four subjects. I think if we can -- if the staff can focus on that and help the Commission clarify those issues, it will go a long way to resolving this issue.

Commissioner Hart: Mr. Chairman?

Chairman Murphy: Further discussion? Mr. Hart.

Commissioner Hart: Thank you. I had understood as of late this afternoon that tonight was more or less drop-dead and we had to decide this tonight. I think based on Mr. Rak's comment, it sounds like we -- we -- as long as we meet next week and there's not an ice storm or something. Famous last words.

Chairman Murphy: We're going to meet at Mr. Rak's house.

Commissioner Hart: My concern would be if we -- if the 28th gets cancelled because of something and if -- if then the Board date isn't set or do they -- are we forcing them into penalties or we -- at the mercy of the weather if it's the 28th, does that -- is there anything else that could happen? I mean the 28th then becomes the drop-dead date?

Ms. Lewis: But couldn't then -- the Board's meeting on the 26th [of January], couldn't a Board member move to set it for the 23rd?

Chairman Murphy: Yes.

Commissioner Hart: Can we set the Board date even -- even if we haven't voted on the night of the 28th?

Chairman Murphy: Yes.

Ms. Lewis: Well, perhaps Mr. Stevens will make a phone call and talk to one of the Board members? He's been making awful lot of phone calls.

Commissioner Hart: I suspect he will have several phone calls.

Chairman Murphy: Mr. Stevens, would you like to use this one?

Richard Stevens: No.

Commissioner Hall: Mr. Chairman?

Chairman Murphy: Yes.

Commissioner Hall: The agenda is on the Internet, okay, for the -- for the 26th, and this case is not on it.

Mr. Lewis: No, I meant that one of the Board members would make a motion to put it on the February 23rd agenda.

Commissioner Hall: Exactly. But there is another meeting. There's one in -- after this. And it just moved. It's very tiny, but it's February 6th or something.

Commissioner Flanagan: No, it's January 26th.

Commissioner Hall: Yes, I know that. There's January 26th but according to --

Ms. Lewis: Right.

Commissioner Flanagan: I think there's only one.

Commissioner Hall: February -- it's that Tuesday, February 9th, and if we hear it next week, why can't you do it in February?

Commissioner Flanagan: I don't think there's anything on February 9th.

Chairman Murphy: Advertising. It's the advertising.

Ms. Lewis: Yes, it's the advertising. Right.

Chairman Murphy: Mr. Stevens, can you do that? Will you take care of that? Okay. All those in favor of the motion --

Commissioner Alcorn: Substitute motion.

Commissioner Flanagan: Aye.

Chairman Murphy: -- substitute motion to defer decision on SEA 85-D-033-02, to a date certain of January 28th, with the record remaining open for comments, say aye.

Commissioners: Aye.

Chairman Murphy: Opposed?

Commissioner de la Fe: No.

Chairman Murphy: Motion carries. Mr. de la Fe votes, "no." Okay, but there is a mission here with you guys. Mr. Donahue, you're the leader of the pack.

Commissioner Donahue: Thank you very much, Mr. Chairman. Nobody wanted this to be over more than I did tonight. I should have guessed it with the Planning Commission. But I supported the motion and I think it is appropriate and we will move swiftly starting tonight or

tomorrow to resolve this situation and get appropriate motions and so forth to the Planning Commission on the 28th. Thank you.

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(The substitute motion carried by a vote of 8-1 with Commissioner de la Fe opposed; Commissioner Sargeant recused; Commissioners Harsel and Lawrence absent from the meeting.)

KAD