GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 14640 of the American University, as amended, pursuant to 11 DCMR 3108.1, for a special exception under Section 211 for review and approval of a revised campus plan in the R-1-B, R-5-A and R-5-B Districts; in the area generally bounded by Van Ness Street on the north; Glenbrook Road, Rockwood Parkway and Newark Street on the south; University Avenue and 46th Street on the west, and; Nebraska and Massachusetts Avenue east of Ward Circle, N.W. on the east; and in the area bounded by Yuma Street on the north; Warren Street on the south; 42nd Street on the west, and; Nebraska Avenue and Tenley Circle, N.W. on the east (Square 1560, Lot 807; Square 1599, Lots 805 and 812; Square 1600, Lots 1, 800, 801, 810 and 814; Square 1601, Lot 3; Square 1728, Lot 1), and

Application No. 15109 of the American University, pursuant to 11 DCMR 3108.1, for a special exception under Section 211 for further processing of the Washington College of Law, temporary trailers, an addition to the Mary Graydon Center, and an addition to the Butler Pavilion Shops in conjunction with a proposed revised campus plan (BZA Application No. 14640) in an R-1-B and R-5-A District at premises 4400 Massachusetts Avenue, N.W. (Square 1599, Lot 805 and Square 1600, Lot 1).

HEARING DATES: **October 28 and November 12, 1987; January 6 and 30, 1988; Further Hearings on July 12, October 20, 21 and November 1, 1989**

DECISION DATES: **March 2 and April 6, 1988, and December 6, 1989**

DISPOSITION: The Board **GRANTED** the applications with **CONDITIONS** by a vote of 5-0 (William L. Ensign, Charles R. Norris, Paula L. Jewell, William F. McIntosh and Carrie L. Thornhill to grant).

FINAL DATE OF ORDER: **February 21, 1990**

CLARIFICATION ORDER

The Board granted the applications by its final order dated February 21, 1990, subject to seven conditions. Subsequent to the issuance of the Board's order, the Ft. Gaines Citizens Association and the Glenbrook Road Association filed petitions for review of the decision in the D.C. Court of Appeals. On March 17, 1992, the D.C. Court of Appeals issued its opinion affirming the decision of the Board.

On June 18, 1992, counsel for the applicant filed a motion requesting the Board to clarify Condition No. 5 of its order dated February 21, 1990. Condition No. 5 of the Board's order reads as follows:

> "The terms and conditions of the Agreement marked as Exhibit No. 196 of the record, between the community groups and the University dated July 11, 1989, including the provisions of Exhibit G to the Agreement, are incorporated in this order as though fully set forth herein and shall be enforceable in the same manner as any other condition contained in an order of this Board."

Counsel for the applicant noted the basis for the filing of the subject motion, generally summarized as follows:

a. During the passage of time since the issuance of the Board's order, the duration of the appeals process, and because of uncertainties associated with financing and construction of the law school on campus, the applicant was presented with an opportunity to purchase an existing commercially-zoned building at 4801 Massachusetts Avenue, N.W. which may meet the applicant's needs for an appropriate facility for its law school in a more timely and cost efficient manner than the residentially-zoned on-campus site originally approved by the Board.

b. The applicant's consideration regarding the relocation of its proposed law school from the on-campus site approved by the Board to an existing commercially-zoned building was based on the fact that a university is a use that is permitted as a matter-of-right in a commercial zone.

c. On May 18, 1992, the applicant filed an application for a Certificate of Occupancy for university use of the property at 4801 Massachusetts Avenue, N.W. By letter dated May 26, 1992, the Zoning Administrator advised as follows:

> "Considering the terms and conditions of both the BZA Order and the agreement, I am of the opinion that before I can approve applications for the American University to occupy premise 4801 Massachusetts Avenue, N.W., it will be necessary for the University to seek modification of its campus plan."

Subsequently both the Zoning Administrator and the Administrator of the Building and Land Regulations Administration advised the applicant that because the Board's order incorporated the agreement with the

community as contained in Condition No. 5, the commercially-zoned building at 4801 Massachusetts Avenue, N.W. could not be used for university purposes unless approval was obtained from the Board.

d. The applicant argued that the Zoning Administrator's position that the incorporation of the agreement with the community precludes the use of 4801 Massachusetts Avenue for university use, even though permitted by the Zoning Regulations as a matter-of-right, precludes the applicant from exercising the same rights available to any other college or university. Further, the applicant's ability to relocate any program that may have been the subject of a Board order or agreement with the community into a commercial area anywhere within the city would be severely harmed.

e. The applicant needs a prompt decision from the Board due to time constraints with regard to its need to respond to accreditation issues regarding the law school and due to the need to respond to the feasibility period contained in the purchase contract with respect to 4801 Massachusetts Avenue.

In support of its position, counsel for the applicant argued as follows:

a. Both the final order of the Board and the decision of the D.C. Court Appeals dealt specifically with property located within the boundaries of the campus plan. The property located at 4801 Massachusetts Avenue is not within the campus plan boundaries.

b. The agreement cited in Condition No. 5 recites that the University is the record owner of certain property located at 4400 Massachusetts Avenue and 4300 Nebraska Avenue, N.W. That property is referred to throughout the agreement as "the subject property" or "the campus." The agreement makes no reference to any building outside the boundaries of the property that was before the Board as part of the campus plan. The agreement, therefore, cannot operate to amend other portions of the Zoning Regulations or to deprive the applicant of the right to use the property in the same way as any college or university.

c. Under Section 701.6(f) of the Zoning Regulations, a college or university use is permitted as a matter-of-right in a commercial zone. The Board has no jurisdistion to control uses that are otherwise permitted as a matter-of-right by the Zoning Regulations.

d. The applicant seeks a location for its law school that it can utilize in a cost-effective and timely manner. While the building at 4801 Massachusetts Avenue, N.W. appears to meet those criteria, the purchase of that building may not be concluded for a variety of reasons. The applicant may need to continue to explore other commercially zoned properties for this use or may need to seek commercial space off-campus for other university programs. The applicant's option to locate in a matter-of-right zone cannot be constrained by an agreement which clearly relates only to what and how the applicant operates on its main campus in a residential zone which was subject to significant review by the Board and the community under the special exception process.

e. In the case of **Draude v. Board of Zoning Adjustment, 527 A.2d 1242 (D.C.APP. 1987)**, a ruling on a petition for review of a BZA decision approving a project involving a George Washington University building which was partially in a commercial zone, the Court of Appeals, stated: "We begin by noting that colleges and universities may locate as of right in commercial districts **without reference to a campus plan.**"

f. Other college or university uses have been allowed to locate outside approved campus boundaries if the use is allowed as a matter-of-right. There are residence facilities for Howard University located at 2601 16th Street, 1230 13th Street and 1239 Vermont Avenue, N.W. All are located in zones (R-5-C and SP) which permitted the apartment house and dormitory uses without BZA approval and without reference to the campus plan. The Georgetown University Law School is located as a matter-of-right in a C-3-C District, and is not included in or referenced by the approved campus plan.

g. The Zoning Commission has considered amending the campus plan provisions of the Zoning Regulations on several previous occasions. The Commission has had the opportunity to address the issue of university uses in zones where they are now permitted as a matter-of-right, and has chosen not to amend the regulations. In a 1979 text amendment case, dismissed in 1982, the Commission specifically noted that universities could have property falling into both special exception and matter-of-right categories, and concluded that no changes to the regulations were then warranted (Z.C. Order No. 366). The Commission noted that the BZA had handled the matter when it needed to and that, if necessary, the regulations

could be addressed in the future. More recently, in 1989, the Commission again declined to make any changes in the campus plan regulations (Z.C. Order No. 610).

h. The preparation of a campus plan is required so that the BZA can understand the maximum impact of a university's future growth and development on surrounding areas. If the law school is moved off the campus to a matter-of-right location, and the other conditions of the BZA order as to enrollment, parking, etc., remain the same, then the sum total of impacts expected from the campus development must be equal to or less than what would occur if the law school were built on campus as proposed.

i. If the applicant is able to occupy the 4801 Massachusetts Avenue building for its law school and determines to go forward with the proposed purhcase and renovation, the applicant would modify the campus plan at the first appropriate opportunity to delete the law school from the plan. However, it is premature for the applicant to seek an amendment to the plan at present because it does not know whether it can occupy the 4801 Massachusetts Avenue building. Any contract to purchase that building, or any other building, would be contingent on obtaining permits for the university use. The applicant clearly cannot give up its rights to go forward with the approved on-campus site for the law school until it is assured that it may locate the use on an alternate site.

j. The Board's decision to approve the law school building within the campus plan is permissive, not mandatory. The Board could not and did not require that the building be constructed. The Board could and did regulate the conditions under which the building could be built, on that site. If the proposed construction does not proceed within the time frames specified in the Regulations, then the Board's approval would expire and the applicant could not proceed under the existing Board order.

k. If the applicant relocates the proposed law school to a matter-of-right off-campus location or if the Board's approval of the proposed on-campus law school expires, the existing use of the approved on-campus site, the Cassell building, would continue for the interim period. The campus plan process provides for review of the long-range strategy of a college or university use with respect to planned or proposed overall development. Specific projects within the campus plan may be accomplished within the special exception procedures for further processing of a campus plan on a short-term or long-term basis or may never occur.

The record contains responses from eight parties to the original applications in support of the applicant's motion. The basis for the support is generally summarized as follows:

a. The applicant should not be penalized by having the right to occupy the building at 4801 Massachusetts Avenue as a law school denied to them when any other university could occupy the premises for the same purpose as a matter-of-right.

b. The proposed location is commercially zoned and has a history of commercial uses including a theatre, restaurant, wine shop, bank, pharmacy, doctors' offices, etc. The proposed use would not appreciably change the impact of the previous use of the proposed site on the surrounding area.

c. The existing structure at 4801 Massachusetts Avenue contains adequate floor space to accommodate the number of students and faculty proposed. The proposed use would be an improvement over prior uses in that it would provide for a controlled daily influx of a limited number of people.

d. The proposed site is separated from the nearest residential property by Massachusetts Avenue, an empty Garfinckel's building, an alley and a grocery store parking lot.

e. Renovation of the structure at 4801 Massachusetts Avenue would be largely interior and would have less impact on surrounding areas in terms of construction dust, noise and congestion than would the demolition of an existing building and new construction as approved in the campus plan.

f. The proposed location would have minimal traffic impacts due to the provision of adequate on-site parking with access from Massachusetts Avenue. In addition, the proposed location is well-served by public transportation and could easily be encompassed by the existing campus shuttle system.

g. The proposed location is already developed and is well-landscaped. Use for law school purposes would not impact existing trees or greenery nor obstruct existing views.

The record contains written responses in opposition to the motion from the Chairpersons of Advisory Neighborhood Commissions (ANCs) 3E and 3D, the ANC Single Member District Commissioner for ANC 3E-01 and from Neighbors for a Liveable Community. At its

public meeting of July 8, 1992, the Board accepted responses in opposition to the motion from counsel for the American University Park Citizens Association, the Spring Valley/Wesley Heights Citizens Association, and the Concerned Citizens Coalition into the record. The opposition is generally summarized as follows:

a. The motion should be denied on procedural grounds in that the applicant has not shown good cause for the Board to waive its rules to accept the motion. In addition, the applicant is attempting to rewrite the terms of a private agreement; to amend the campus plan without holding a public hearing; and, to deny a forum, i.e., public hearing, by which prejudice to other parties can be fairly assessed.

b. The motion for "clarification" actually seeks a "modification" to the private agreement cited in Condition No. 5 of the Board's order.

c. Condition No. 5 is clear and unambiguous. The first substantive paragraph of section A of the Agreement states:

> "The University will insure that the revised Campus Plan submitted to the BZA will be consistent with this agreement. If there is any inconsistency between the Plan and this Agreement or, if there is any ambiguity in the Plan, the terms of this Agreement will govern."

Consequently, the agreement is dominant and relocation of the law school by the applicant would require an amendment to the campus plan.

d. The terms of the agreement extend beyond the boundaries of the campus plan as indicated in Section B of the agreement which states, as follows:

> "The university further agrees that it shall not request approval of any building, other than the presently proposed law school building, or enlargement of existing buildings, on the north side of Massachusetts Avenue before the year 2010, unless a new Campus Plan meeting all applicable requirements of the Zoning Regulations, including Section 210.4, and not inconsistent with the Comprehensive Plan, is submitted to the BZA. However, in no event shall such approval be sought prior to the year 2001."

This section of the agreement does not use the phrases "the subject property" or "the campus", which the applicant argued limited the scope of the agreement. 4801 Massachusetts Avenue, N.W. is located on the north side of that street. American University is now attempting to acquire and occupy that building without amending the Agreement. It also seeks to do so before the year 2001, the moratorium time."

e. The agreement deals with population caps for the entire university, including a cap of 1,058 for the approved on-campus law school, which would not be applied at the proposed 4801 Massachusetts Avenue location. If the cap applies only to the property within the campus plan boundaries, the surrounding area could be developed and populated with students without regard to any cap with no limit to the university's expansion.

f. Section U of the agreement dealing with traffic issues specifically addresses streets outside the campus - Rockwood Parkway, Glenbrook Road, 49th Street and Indian Lane. The concern with traffic and parking is spillover <u>from</u> the campus <u>into</u> the neighboring community. The agreement, in clear operative language, binds the university to take certain actions outside the physical boundaries of its now existing campus.

g. The applicant's motion for clarification must be denied because it requests that the Board ignore its own rules and the terms of the private Agreement between the applicant and the community. The conditions of the order are clear and unambiguous. Further, the terms of the Agreement are clear.

h. Parties to the application were not given an adequate opportunity to respond to the applicant's plans to relocate its law school and whether such proposal violates Condition No. 5 of the Board's order nor to assess the impacts of the law school on the neighborhood surrounding the proposed law school location at 4801 Massachusetts Avenue.

At its public meeting of July 8, 1992, the Board accepted letters from City Council Chairman John A. Wilson and Council-Members John Ray and James E. Nathanson into the record. In summary, the Councilmembers are generally of the opinion that the proposed relocation of the law school results in a significant change to the approved campus plan and the agreement cited in

Condition 5 of the Board's order. The Councilmembers were of the opinion that the proposed relocation of the law chool should be the subject of a public hearing to allow for significant community review and participation.

By memorandum to the Acting Director, Office of Zoning, dated June 30, 1992, the Office of the Corporation Counsel stated as follows:

a. The authority of the Board, is limited to those residence districts within the boundaries of the University campus for which a special exception was required and originally sought by the University. The Board's authority cannot be extended legally by private agreement between the University and the community.

b. D.C. Code Section 5-424(d) and 11 DCMR Sections 210, 302, 322, 332, 352, 3105.2 and 3108 provide the authority for the BZA to assume jurisdiction over the development plans for a college or university located in a residential district. Section 5-424(d) of the D.C. Code and 11 DCMR Sections 3105.2 and 3108 grant the Board the authority to make special exceptions to the provisions of the Zoning Regulations in harmony with the general purpose and intent of those regulations. Sections 210, 302, 322, 332, and 352 of the Zoning Regulations require colleges or universities seeking to locate in residential districts to seek the approval of the Board. The jurisdiction of the Board in this case is, therefore, circumscribed by the original authority of the Board to grant a special exception for the University to implement the Plan.

c. Under Section 701.6(f) of the Zoning Regulatins, a college or university use is permitted as a matter-of-right in a commercial zone. Permitting Condition No. 5 of BZA Order No. 14640 to modify a matter-of-right use is tantamount to the Board amending the Zoning Regulations, which Section 5-424(e) of the D.C. Code specifically prohibits.

d. The Motion to clarify Condition No. 5 involves questions of law concerning the jurisdiction of the Board. Consideration of this motion clearly does not require further testimony from interested parties.

The Office of Corporation Councel recommended that the Board issue an order clarifying that Condition No. 5 applies only to the property included within the boundaries of the University campus that was before the Board and not to any other property where a college or university use is permitted as a matter-of-right.

Although some of the responses to the motion dealt largely with the appropriateness or inappropriateness of the law school use at its proposed location, the Board finds that the impacts of a matter-of-right use which has not been referred to the Board for zoning review and approval is beyond its jurisdiction. The Board therefore finds that it must limit its consideration to the motion, the record in the applications, its final order and the responses raised which relate to the specifics thereof.

Upon consideration of the motion, responses thereto, and its final orders, the Board finds as follows:

a. The Board's jurisdiction may not extend beyond that expressly set forth in the D.C. Code and the Zoning Regulations. In the instant cases, the Board's authority is limited to the areas of residential property located within the campus plan boundaries as specifically reviewed and considered by the Board through the special exception process.

b. The motion for clarification of the Board's order does not result in a modification to the Board's order as originally approved and conditioned. The campus plan, as approved in BZA Application No. 14640, is fully applicable until such time as a revision of such plan is reviewed and considered by the Board. If the development of the on-campus law school goes forward in a timely manner pursuant to Board approval, such development must be in accordance with the Board's approval in BZA Application No. 15109.

c. The agreement cited in Condition No. 5 of the Board's order has not been deleted or amended in anyway. However, the provisions of such agreement can only be applied and enforced through the zoning process in terms of the Board's consideration of specific requests for zoning relief and is limited to the property which was the subject of such zoning review. If the scope of the agreement extends beyond the parameters to which the Board's consideration is applicable, the parties to such agreement are not precluded from seeking clarification or enforcement of the private agreement through appropriate channels.

d. Because the motion is sought solely to clarify the scope of the authority of the Board's order and does not require reconsideration or modification of the Board's approval as contained in that order, the Board finds that the timeliness of such request is a direct consequence of

the Zoning Administrator's determination regarding the applicant's request for a certificate of occupancy and as such is not untimely. The Board further finds that the ten day period for responses from parties was reasonable given that the relevant issues relate only to questions of law relative to the Board's jurisdiction.

Based on the foregoing, the Board concludes that its review and approval of the subject applications are limited to property contained within the boundaries of the campus plan as originally reviewed and approved by the Board. Accordingly, it is hereby **ORDERED** that the **MOTION** for **CLARIFICATION** is hereby **APPROVED**. The conditions cited in the Board's order, dated February 21, 1990, apply only to the residentially-zoned property located within the boundaries of the approved campus plan. In all other respects the order of the Board, dated February 21, 1990, remains in full force and effect.

VOTE: 3-0 (William L. Ensign, Carrie L. Thornhill and Paula L. Jewell to approve; Angel F. Clarens and Sheri M. Pruitt not voting, not having heard the case).

DECISION DATE: **July 8, 1992**

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: Reginald C. Lyons for
MADELIENE H. ROBINSON
Acting Director

FINAL DATE OF ORDER: _____

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED,

CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.
UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

14640/15109Orders/bhs

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 14640 and 15109

As Acting Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on _____ a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

1. Whayne S. Quin, Esquire
   Wilkes, Artis, Hedrick & Lane
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2. Ann Heuer, Chairperson
   Advisory Neighborhood Commission 3D
   P.O. Box 40846, Palisades Station
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3. James Curtin, Chairperson
   Advisory Neighborhood Commission 3E
   P.O. Box 9953, Friendship Station
   Washington, D.C. 20016

4. Robert E. Herzstein
   Neighbors for a Livable Community
   4710 Woodway Lane, N.W.
   Washington, D.C. 20016

5. Alan M. Pollock
   4428 Sedgwick Street, N.W.
   Washington, D.C. 20016

6. Leonard E. Santos, President
   Spring Valley Wesley Heights Citizens Assn.
   4512 Lewell Street, N.W.
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7. John F. Brown
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   4230 Embassy Park Drive, N.W.
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8. Stanley Baum
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9. Barbara T. Yeomans
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10. Charles Schulze
    4119 - 45th Street, N.W.
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11. Carolyn Carr
    Westover Place Community Assn.
    4376 Westover Place, N.W.
    Washington, D.C. 20016

12. Glenbrook Road Association
    c/o Richard B. Nettler, Esquire
    Gordon, Feinblatt, Rothman, Hoffberger & Hollander
    1800 K Street, N.W.
    Suite 600
    Washington, D.C. 20016

13. John E. Montel, President
    Ft. Gaines Citizens Assn.
    4447 Springdale Street, N.W.
    Washington, D.C. 20016

14. Dr. Cyril Ponnamperuma
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15. Michael Wolf
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16. Edward Flattau
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17. Betty Sheffield
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19. Dr. M.S. Esfandiary
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20. Michael Geglia
American University Park Citizens Assn.
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21. James & Eugenia Langley
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22. Rosa L. Sumpter
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23. Faith Burton
Ft. Gaines Citizens Assn.
4441 Sedgwick Street, N.W.
Washington, D.C. 20016

24. Jill Abeshouse Stern
4840 Glenbrook Road, N.W.
Washington, D.C. 20016

25. John A. Wilson, Chairman
D.C. Council
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Washington, D.C. 20004

26. Councilmember James E. Nathanson
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27. Councilmember John Ray
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28. Angel Vallot, Esquire
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29. Concerned Citizens Coalition
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MADELIENE H. ROBINSON
Acting Director

DATE: JUL 31 1992

14640Att/bhs