

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Application No. 16238 of Ilia and Darina Pavlov, as amended, pursuant to 11 DCMR 3108.1 and 3107.2, for a special exception under Section 2003 to change a nonconforming use from retail drugstore and pharmacy (part of first floor and basement) to an office, retail or service use or, in the alternative, a variance from the use provisions (Subsection 201.1) to allow any commercial/retail/office/service use permitted as a matter-of-right in a C-1 or more restrictive zone (part of first floor and basement), and a variance from the use provisions (Subsection 201.1 and 2003.5) to allow office use on part of the second floor and part of the first floor of a structure in a WHOD/R-1-B District at premises 3301-03 45th Street, N.W. (Square 1603, Lot 38).

**HEARING DATE:** April 9, June 4 and September 17, 1997  
**DECISION DATE:** October 1, 1997

**ORDER**

**SUMMARY OF EVIDENCE**

Based on the evidence of record the Board finds as follows:

1. Pursuant to a letter to the Board dated May 21, 1997 applicant amended the application to seek office use of the entire building for users who qualify under the Special Purpose (SP) regulations and general office of the second floor for the applicant's own business entity (M.G. Finance USA). Such revisions withdrew earlier requests for retail and service uses on the first floor, general office use of the first floor and any change from a nonconforming use on the first floor to another use pursuant to a special exception.

2. The subject site, located at 3301-05 45th Street, N.W., is improved by a two-story building with basement and a paved parking lot. The site is located on the corner of 45th and Macomb streets, N.W. The building was built in 1927 and was designed for nonresidential use in a style compatible with the residential neighborhood. For its entire history, the building has been devoted to community-based nonresidential uses (except that a prior owner resided in the basement residential unit), such as a grocery store, drug store/pharmacy, real estate office, church and community club. There are no residences located adjacent to the subject site or within the block containing the subject building, but single-family residences face the subject site immediately across the street on Macomb and 45th Streets.

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The Horace Mann School and playground occupies the balance of the square. The property was designated as a historic landmark on March 27, 1997

3. After lengthy negotiations between the applicant and members of the community, the parties entered into an agreement dated September 15, 1997 (the Agreement), marked as Exhibit No. 41 of the record providing for the types and scope of uses of the property, site improvements and corrections, and enforcement and oversight by the community and District.

4. The subject property is currently used, in part, as a nonconforming use, as a grocery store (on part of the first floor) and an English basement apartment (currently under renovation and thus unoccupied). The balance of the first floor and basement, most recently used by the drug store/pharmacy, is currently vacant. The second floor is also vacant.

5. By the subject application and under the terms of the Agreement, the applicant proposes the following uses of the building:

(a) Basement level: one single-family residential dwelling unit, to be occupied by no more than three (3) persons (exclusive of dependent children under eighteen (18) years of age), which is permitted as a matter-of-right, and storage, ancillary and incidental office use for the SP office users on the first floor;

(b) First floor: Office use limited to SP users for the entire first floor, including the former pharmacy space and the space currently as a grocery store; and

(c) Second floor: Office use limited to SP users and general office use for the applicant's personal business entity (Multigroup Finance USA, Inc.) for so long as the applicant owns the property.

6. The current parking lot encroaches on public space on the south and east sides. The applicant is required under the Agreement to remove all portions of the current parking lot surface that extend beyond the property line, with the exception of a small area containing a storm water inlet and certain underground facilities built in public space (subject to approval by public space officials).

7. The design and configuration of the building is such that the second floor of the building is reached only by a separate doorway on the southern side of the building along Macomb Street and by a fire escape on the northern side of the building (near the Horace Mann School). This configuration separates the uses of the first floor from the uses of the second floor. In addition, the first floor areas are connected by stairways to the basement, but are not connected to the second floor.

8. A portion of the first floor fronting on 45th Street, N.W., containing 820 square feet, is currently occupied as a grocery store. The grocery store is a valid nonconforming use. However response to concerns expressed by nearby residential neighbors and community organizations and to minimize adverse impacts from this application, the applicant has agreed under the Agreement that the grocery store will be discontinued, subsequent to the approval of this application, by no later than August 1, 1998. The balance of the first floor (1,640 square feet), the entire second floor (2,900 square feet) and a portion of the basement, which is located under part of the former pharmacy space (820 square feet), are all currently vacant. A portion of the basement (820 square feet) is used as storage for the existing grocery store and another portion of the basement is undergoing renovation as a single-family residential unit. Due to a change in topography from the front of the site to the rear, the basement at the rear of the building is out-of-ground.

9. A representative of the applicant testified regarding the proposed uses of the building as well as the applicant's efforts to work with the surrounding neighbors in reaching the Agreement regarding the use and development of the site. A copy of the Agreement is located in Exhibit 41 of the record. In addition to testifying to the contents of the Agreement, the applicant's representative testified that the number of vehicular trips to the site would diminish when the grocery store use is discontinued. The representative testified that, at present, approximately 500 vehicular trips are made daily to the grocery store. By contrast, SP offices uses would be restricted under the Agreement to no greater than 50 (vehicular) trips daily for visitors. The representative testified that the applicant has agreed to limit the number of occupants on the first and second floors to a maximum of 17. Finally, the representative testified that, because the building was not designed for residential use, SP office use, as restricted by the Agreement, would be compatible with nearby and surrounding uses.

10. The applicant's architect testified regarding the site improvements proposed and the standards necessary for the grant of a use variance. Exterior renovations to the building and site would include:

(a) landscaping, screening, fencing and other buffering as depicted on the final site plan submitted on May 21, 1997 (Exhibit 32), as revised by the site plan dated June 3, 1997, attached to the Agreement;

(b) opening of a window on the south side of the building which had previously been bricked over and installation of a sliding glass or similar door in the eastern facade of the building, as depicted on elevations submitted to the Board on September 19, 1997 and September 22, 1997 as Exhibit 38;

(c) replace the sidewalk along 45th Street, N.W. and install planters (subject to the approval by public space officials);

(d) rebuild the retaining wall and stairs along the south side of the property (subject to approval by public space officials) and install an additional buffer between the street and the parking lot in accordance with the final site plan;

(e) removal of all portions of the paved parking lot surface constructed beyond the easterly and southerly property lines of the site, with the exception of a small area in the southeastern corner of the site which is necessary to accommodate the retention of the storm water inlet and underground facilities (subject to obtaining the required approvals from public space officials);

(f) removal of steel posts and their foundations located at the rear of the building;

(g) installation of a speed bump near the exit to the parking lot and safety striping on the sidewalk crossing the exit;

(h) installation of additional lighting (with shields to prevent disturbing the nearby houses) as depicted on the final site plan and the elevations provided to the Board on September 19, 1997 and September 22, 1997; and

(i) installation of snap-in muntins in the windows on the western, southern and eastern facades of the building in the locations identified in the elevations submitted to the Board on September 19, 1997 and September 22, 1997.

The applicant's architect testified that a total of 17 permanent and three temporary visitor parking spaces would be provided. These spaces would be provided as follows: (1) at least one would be designated for the residential unit; (2) three would be designated for visitors (as short-term temporary parking); and (3) 16 spaces would be available for use by the SP office occupants and visitors.

The architect testified that it would be difficult to use the building for matter-of-right uses. The testimony revealed that the building was designed for commercial use and it would be too costly to convert to single-family use. Furthermore, the building is too large to be used for a single-family residence. Although the building may be used as a small church, the parking generated by such a use would overwhelm the community. The building is too small for use as an embassy and the use of the building as an embassy would pose significant security problems. The use of the building as a community-based residential facility would not be compatible with the surrounding community, especially because of the location of the Horace Mann School located adjacent to the subject property. Multi-family use of the building would require a use variance.

11. Advisory Neighborhood Commission 3D, by a resolution adopted on September 16, 1997, supported the application premised upon the Agreement between the applicant and the community and the incorporation of the Agreement into the final order of the Board of Zoning Adjustment.

12. Members of the Spring Valley-Wesley Heights Citizens' Association, the Wesley Heights Historical Society and other interested neighborhood residents (collectively the Community) were recognized as parties in support of the application, based on the Agreement and its incorporation into the Board's order.

13. Counsel for the community, stated with respect to the Agreement between the applicant and the community that the Agreement was the basis of the community's support of the application. The Agreement covered three critical elements: (1) types and scope of uses of the property; (2) site improvements and corrections; and (3) stringent enforcement and oversight by the community, and District of Columbia, including no issuance of

any nonresidential certificate of occupancy until all site improvements and landscaping are substantially complete (as determined jointly by the applicant and community). Counsel for the community requested an expedited and/or bench order approving the application. The community's counsel explained that an expedited order was necessary because the Agreement provided for certain events, including plantings and site improvements, to occur upon the Board's final written order.

14. The Vice President of the Spring Valley-Wesley Heights Citizens' Association, the President of the Wesley Heights Historical Society, and a property owner who resides directly across the street from the site testified in favor of the application, specifically subject to the Agreement and urged to the Board to expedite its written order.

15. The Office of Planning, by a report dated April 2, 1997, recommended conditional approval of the application, subject to the following conditions:

(a) No more than two SP-type office uses shall occupy the premises. The type of office use permitted shall be limited to those identified in Section 508 of the Zoning Regulations.

(b) Office use of the building shall be limited to the portion of the first floor previously occupied as a pharmacy and to the second floor (with the entrance from Macomb Street). No basement space shall be used for office use, but may be used for ancillary storage space.

(c) Office hours shall be limited to Monday through Friday, from 9 a.m. to 6 p.m.

(d) The office space use on the second floor shall not be occupied by more than eight persons and the office space on the first floor shall not be occupied by more than six persons.

(e) Vehicular trips to the premises by visitors, customers and delivery persons shall not exceed eight trips daily on a regular and continuing basis.

(f) Fourteen on-site parking spaces must be made available at all times for the exclusive use of the office tenants.

(g) Signage cautioning motorists that children are in the area, and to drive carefully, shall be installed on the parking lot.

(h) Landscaping shall be provided as identified on the proposed site/landscape plan.

(i) The area for trash receptacles shall be screened and located in the area identified by the applicant.

**FINDINGS OF FACT**

1. The portion of the subject property requiring a variance from the use provisions (i.e., first floor, second floor and that portion of the basement not used as an English basement apartment) cannot reasonably be devoted to a residential use or any other use permitted in the WHOD/R-1-B District as a matter-of-right for the following reasons:

(a) the building was constructed, and is currently used in part for commercial purposes, and cannot reasonably be converted to residential purposes;

(b) the property is presently devoted to a single-family residence use by virtue of the location in a portion of the basement of an English basement apartment and cannot lawfully contain any additional residential units pursuant to the WHOD/R-1-B zoning requirements;

(c) the property has consistently been assessed and taxed by the District of Columbia Government as a commercial property and was sold by all prior owners and purchased by the current owners on the basis of commercial valuation;

(d) the portion of the premises last used by the drug store/pharmacy is inappropriate for conversion to a residential or non-commercial use because it is located immediately adjacent to the sidewalk and has no rear yard or deck or other outdoor space; and

(e) the property is too large (i.e., 8,320 square feet) to be reasonably occupied as a single-family unit for the entire building and, furthermore, a single-family residential unit exists in the basement.

2. The portion of the building previously used as drug store/pharmacy was vacant for more than three years. Section

2005 of the Zoning Regulations states that if a nonconforming use is vacant for a period of more than three years, any subsequent use shall conform to the regulations of the district in which the use is located.

3. The applicant proposes to discontinue the use of the grocery store on the first floor pursuant to the terms of the Agreement with the community in order to minimize the adverse impacts to the community. The applicant proposes to use the first floor for "special purpose" office use. The second floor may be used for the applicant's own business, Multigroup Finance, Inc., but, if so used, only for so long as the applicant owns the property and/or for "special purpose" office use. The basement will be used for a single-family residential unit and storage and ancillary and incidental office use for the SP office users on the first floor.

4. The proposed "limited office" uses, as well as the use of the second floor by the applicant for its general office business, will not generate adverse area impacts because of the limited nature of the proposed operations, the closing of the community market, the restrictions on the maximum numbers of employees, the adequacy of on-site parking and loading facilities and the effectiveness of the landscaping and screening to be installed by the applicant, as required under the Agreement.

5. The proposed modifications to the building will enhance this historic landmark and make it more compatible with surrounding residences.

6. The proposed landscape plans and site improvements will adequately buffer the parking lot, mechanical equipment and trash receptacles from the surrounding residences, school and playground. The landscaping, fencing and buffering will protect the surrounding neighborhood from adverse visual and other impacts and will make the property compatible with nearby single-family residential uses.

7. The proposed "limited office" uses, as expressly limited by the terms of the Agreement, are unobtrusive with respect to the residential neighborhood, appropriate for a nonconforming structure and consistent with the historic and principally nonresidential uses and design of the building. The building could not reasonably be used for any matter-of-right use permitted in a WHOD/R-1-B District.

8. The Agreement provides for oversight and enforcement by the community and the District.

9. At the September 17, 1997 hearing, the Office of Planning recommended approval of this application, subject to the conditions contained in its report dated April 2, 1997, as well as conditions contained in the Agreement.

10. The proposed uses in accordance with the Agreement will not impair the intent, purpose and integrity of the Zoning Regulations.

**CONCLUSIONS OF LAW AND OPINION**

Based on the foregoing findings of fact and evidence of record, the Board concludes that the applicant is seeking a variance from the use provisions of Section 201 of the Zoning Regulations to permit "limited office" use as permitted in the Special Purpose (SP) District and, with respect to the second floor, limited general office use.

The Board concludes that the applicant has met its burden of proof. The building which is the subject of this application was constructed in 1927 and designed and configured for community-oriented nonresidential use. For the past 70 years, the building has been used for community oriented nonresidential uses such as a grocery store, drug store, real estate office, church and community club. The building cannot reasonably be used for any matter-of-right uses. Single-family residential use is not feasible because the building is too large. In addition, a single-family residential use exists in the basement of the building. Additional impediments to use of the building as a single-family residence include the layout of the interior and the prohibitive costs of converting the building to a single-family residence. Similarly, the building could not reasonably be used as a church because there is inadequate parking for such use. The building is too small for use as an embassy and use of the building as a community-based residential facility may not be compatible with the community.

The Board takes note of the Agreement between the applicant and the community. Based on the difficulties in achieving the objectives set forth in the Agreement by alternative means and the uniqueness of the site, the Board finds that strict application of the Zoning Regulations would create an undue hardship on the applicant. The Board concludes that the variance

relief requested, subject to the Agreement, will not have an adverse impact on the neighborhood.

In conjunction with the proposed use under the Agreement, adequate and appropriate landscaping and screening will be provided so that there will be no adverse visual effects from the building, equipment or parking lot. The parking lot is sufficiently large to accommodate all the employees, visitors and residents who will reasonably be expected to use the property, as expressly limited by the Agreement. The elimination of the grocery store currently occupying a portion of the building will significantly reduce traffic in the immediate area.

The Board concludes that the use of the building for special purpose office use as provided for in Section 508 of the Zoning Regulations, the limited general office use on the second floor, and site and building improvements proposed by the applicant will not likely become objectionable to adjoining or nearby properties because of noise, traffic, number of occupants, visitors, or other objectionable conditions. Also, ample on-site parking is provided to accommodate the office users, their visitors and invitees.

Based upon the record before the Board, the Board concludes that the applicant has met the burden of proof, pursuant to 11 DCMR 3107.2, that there exists an exceptional or extraordinary situation or condition related to the property which creates an undue hardship for the owners in complying with the Zoning Regulations, that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the Zoning Regulations and Map, and that the proposed use will not adversely affect surrounding uses or the zone plan for the area.

The Board accorded ANC 3-D the "great weight" to which it is entitled. Accordingly, it is hereby **ORDERED** that the application be **GRANTED, SUBJECT** to the following **CONDITIONS**:

1. The type of office use permitted on the first and second floors, subject to the restrictions as set forth in the Agreement, shall be limited to those identified in Section 508 of the Zoning Regulations (11 DCMR 508.1), as of the date hereof, including specifically "international organizations, nonprofit organizations, labor unions, architects, dentists, doctors, engineers, lawyers or similar professional persons". The second floor may also be used

for general office use subject to the restrictions on such general office use as set forth in the Agreement of the parties.

2. No basement space shall be used for office use, but may be used for storage space and customary uses which are ancillary, incidental and directly related to the office uses of the building (e.g. mail room, library, conference room, kitchen, etc.) and for building HVAC, telephone service and other mechanical systems. No occupants or tenants shall work or conduct work-related activities in the basement on an active or regular basis (e.g. have individual offices as opposed to work areas used in common).

3. Office hours for all SP and general office users shall be limited to Monday through Friday, from 9:00 a.m. to 6:00 p.m., and office users shall not conduct operations during weekends and on holidays recognized by the United States Government. However, office users may conduct activities on weekends or Federal holidays and before or after the above-referenced hours provided, however, that such uses are only intermittent (as defined in the Agreement) and do not result in the use of the offices by the general public or persons other than occupants and/or tenants of the permitted office users, does not disturb the surrounding residential neighborhood and does not create any hazards to the students of the adjacent Horace Mann Elementary School.

4. No more than 17 employees or "occupants" (as defined in the Agreement) shall occupy any portion of the building devoted to nonresidential use (i.e., basement, first and second floors, exclusive of the residential unit) at any time.

5. That portion of the basement depicted on the Plans as an apartment with a current address of 4433 Macomb Street, N.W., shall not be used for any office or other nonresidential use. No "accessory use" or "home occupation" (as such terms are defined in Sections 202 and 203 of the Zoning Regulations) shall be permitted in the apartment. The apartment shall be occupied by no more than three persons (exclusive of dependent children under 18 years of age), and any lease for the apartment shall be subject to the Residential Rules and Regulations (Exhibit 41, A-1) as set forth in the Agreement.

6. No vehicles other than those used by occupants, visitors, customers or invitees using the office space or persons engaged in construction, improvements, alterations or repairs with respect to the property shall be parked in the parking lot at any time.

7. Seventeen on-site parking spaces shall be made available at all times for the exclusive use of the office and residential occupants. A minimum of one of these parking spaces shall be designated for exclusive use by the resident(s) of the residential unit. An additional three spaces shall be designated for temporary use by visitors.

8. Vehicular trips to the premises by delivery persons shall not exceed eight trips daily on a regular and continuing basis. Daily trips by clients, patients, visitors, customers and guests of the office space shall be limited to 50. Vehicular trips for removal of refuse shall be limited to no more than two weekly between the hours of 9:00 a.m. and 2:30 p.m.

9. All occupants, visitors, customers, invitees, commercial messengers and persons making deliveries shall be required to stand, load and conduct all vehicular-related activities in the parking lot and to use the loading facilities located within the parking lot for all loading and unloading activities.

10. No certificate of occupancy for nonresidential use shall be issued until all site improvements and landscaping are substantially complete (as determined jointly by the applicant and community or, in the event of a dispute, by a District of Columbia zoning inspector or other zoning official).

11. Signage cautioning motorists that children are in the area, and to drive carefully, shall be installed on the parking lot. A speed bump shall be installed near the entrance to the parking lot and safety striping shall be painted on the sidewalk crossing the exit.

12. Landscaping and site improvements shall be provided as identified on the proposed site/landscape plan and in accordance with the Agreement. The applicant shall continuously maintain, in good condition, all site improvements, landscaping and screening and to replace same with comparable materials promptly when and as necessary.

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13. The area for trash receptacles and any HVAC or other mechanical equipment shall be screened and located in the area identified on the site plan and elevations in Exhibits 25a and 37.

14. The applicant shall reconstruct, replace and repair all those portions of the stairs and retaining walls which are not located in public space in a good and workmanlike fashion (e.g., workmanship of a quality comparable to the original construction) in accordance with the plans submitted on May 21, 1997 as Exhibit 32 [subject to Historic Preservation Review Board (HPRB) requirements and approvals]. The applicant shall remove the steel posts and their foundations which were erected on the site in conjunction with a rear platform and fire escape planned by the applicant for the rear of the building but subsequently abandoned.

15. All signs on the exterior of the building shall be small brass or similar plaques, shall not be illuminated, and shall be no larger than 12 inches in height by 12 inches in length. Any lettering on exterior doors shall be black or gold lettering of a traditional design. Upon discontinuance of the grocery store, the applicant shall remove the exterior sign in the front of the building identifying the grocery store and restore that portion of the facade of the building obscured by, and immediately adjacent to, such sign.

16. The applicant shall remove the portion of the existing parking lot which encroaches into public space, with the exception of that portion which contains an inlet grate and related subsurface facilities which are a portion of the storm water management system installed in conjunction with the development of the parking lot (subject to approval by public space officials). The inlet facilities shall be designed in such a manner to prevent the overflow of storm water beyond the property.

17. Construction activities shall not commence before 7:00 a.m. and shall be concluded by 7:00 p.m., Monday through Friday. No construction shall be conducted on weekends except in emergency circumstances.

**VOTE: 4-0** (Betty King, Susan Morgan Hinton, Laura Richards and Sheila Cross Reid to grant)

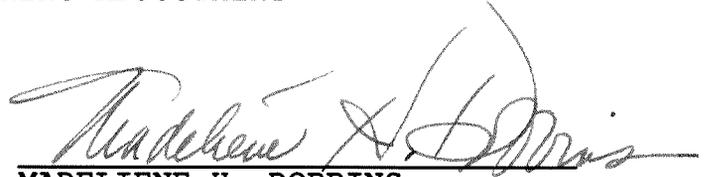
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THIS ORDER WAS ADOPTED BY THE BOARD OF ZONING ADJUSTMENT AT ITS PUBLIC MEETING OF OCTOBER 1, 1997.

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

ATTESTED BY:



MADELIENE H. DOBBINS  
Director

FINAL DATE OF ORDER

DEC 10 1997

PURSUANT TO D.C. CODE SEC. I-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 TWO YEARS 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.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



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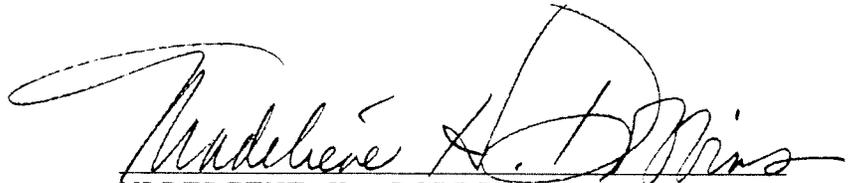
As Director of the Board of Zoning Adjustment, I certify and attest that on DEC 10 1997 a copy of the order entered on that date in this matter was mailed first class postage prepaid to each person who appeared and participated in the public hearing concerning this matter, and who is listed below:

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MADELIENE H. DOBBINS  
Director

DATE: DEC 10 1997