

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

+ + + + +

TUESDAY

JANUARY 21, 2003

+ + + + +

The meeting convened in Room 220 South,
441 4th Street, N.W., Washington, D.C. 20001, at 9:20
a.m., Geoffrey H. Griffis, Chairperson, presiding.

BZA MEMBERS PRESENT:

GEOFFREY H. GRIFFIS, Chairperson
ANNE MOHNKERN RENSHAW, Vice Chairperson

ZONING COMMISSIONER PRESENT:

CAROL J. MITTEN

ALSO PRESENT:

CLIFFORD MOY, Office of Zoning
BEVERLEY BAILEY, Office of Zoning
JOHN NYARKU, Office of Zoning

LORI MONROE, D.C. Office of Corporation Counsel

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C-O-N-T-E-N-T-S

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P R O C E E D I N G S

9:20 a.m.

CHAIRPERSON GRIFFIS: I will call to order the 21st of January 2003, Special Public Meeting of the Board of Zoning Adjustment for the District of Columbia. Of course, in our public meetings, this is a time for deliberation on cases that the Board has already heard, so we will not obviously have any new testimony or case presentation.

We have several to get through today. I think it will be fairly expeditious. Some of our Members are caught, I believe, on public transportation, difficulties today, so they will be joining us as they get out of the tunnels.

With that, let us address our first case for deliberation this morning.

MR. MOY: Good morning, Mr. Chairman and Members of the Board, as a real quick preliminary case, meeting cases this morning, Application No. 16942 of the Government of the District of Columbia Office of Aging has been withdrawn.

The first case this morning is Application No. 16875 of All Souls Memorial Episcopal Church. This is the Board's motion to reconsider its July 2, 2002 decision on said application. In order to make

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1 this decision, the Board requests the following
2 information from the Applicant which is the additional
3 information to support the burden of proof required
4 for the relief being sought under Sections 310.4 and
5 213. And that was submitted as supplemental filing in
6 support of burden of proof which was dated December
7 30, 2002 in your packets.

8 Also, responses by the party was submitted
9 in response to this additional information and the
10 Applicant's response was submitted to the Board on
11 January 13, 2003 and that is Exhibit 53 in your
12 packets.

13 Also, as a preliminary on December 24,
14 2002, the party opponent filed a motion to submit
15 additional information during this reopened record or
16 in the alternative to schedule a new hearing and
17 that's in your packet as Exhibit 50.

18 In response to the party opponent, the
19 Applicant filed opposition to the opponent's motion
20 and that is in your packet as Exhibit 51.

21 Finally, just to note on January 9, 2003,
22 Council Member Jim Graham submitted a letter dated
23 January 6, 2003 withdrawing his support for the
24 Applicant for the application and that is listed in
25 your files as Exhibit No. 48.

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1 In response to Council Member's letter,
2 the Applicant submitted a letter dated January 13,
3 2003. That's Exhibit No. 49.

4 That completes my briefing, Mr. Chairman.

5 CHAIRPERSON GRIFFIS: Thank you very much
6 and good morning to you. On this case, of course,
7 joining in the deliberations today is myself, Geoff
8 Griffis, Chairperson and Ms. Anne Renshaw, Vice Chair;
9 also, Ms. Mitten representing the Zoning Commission
10 and we will see if we have proxies from that Member
11 that is scheduled to be absent today when we get to
12 that point.

13 COMMISSIONER MITTEN: Mr. Chairman, before
14 we begin, inasmuch as there was not a Zoning
15 Commissioner on this case when it began, I have
16 reviewed the record, read the transcripts, read the
17 additional submissions and I'm prepared to participate
18 in the deliberations this morning.

19 CHAIRPERSON GRIFFIS: Very well. Thank
20 you.

21 Let's get through the first preliminary
22 pieces on this. We have a motion to submit additional
23 information. Mr. Cohers, party in opposition,
24 submitted that. It was received on the 24th of
25 December.

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1 I would believe in my review of the entire
2 record that this actually, I would be moved to deny
3 the motion as I believe it is premature and perhaps
4 even redundant to the proceedings that is here before
5 us now. But I'll hear from others.

6 COMMISSIONER MITTEN: Mr. Chairman, I
7 would agree with you. We reopened the record for a
8 fairly specific purpose as outlined in the letter of
9 December 13th to the Applicant which was to request
10 additional information supporting the burden of proof
11 and the submissions by parties were meant to be
12 responsive to that, as opposed to responding to other
13 matters. There will be ample opportunity after the
14 order is written if anyone should want to file a
15 motion for reconsideration. That would be the
16 appropriate time to do that. So I agree with you.

17 CHAIRPERSON GRIFFIS: Very well, then I
18 would move denial of the motion by the opposition for
19 submission of additional evidence and also in the
20 alternative to schedule a new hearing.

21 COMMISSIONER MITTEN: Second.

22 CHAIRPERSON GRIFFIS: Thank you.
23 Discussion, Ms. Renshaw?

24 VICE CHAIRPERSON RENSHAW: No. I'm voting
25 for it.

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1 CHAIRPERSON GRIFFIS: Very well, all in
2 favor?

3 (Ayes.)

4 CHAIRPERSON GRIFFIS: Opposed?

5 (No response.)

6 MR. MOY: The staff would record the vote
7 to deny the motion by the opposition as 3-0-1; three
8 in favor of denying, the Chairman, the Vice
9 Chairperson and Ms. Mitten; David Zaidain not present,
10 not voting.

11 CHAIRPERSON GRIFFIS: Very well, we also
12 have a motion again by the party in opposition for
13 advanced told of the deadline or reconsideration. I
14 would also move denial of that motion. I'll hear a
15 second and then I'll give a brief discussion.

16 COMMISSIONER MITTEN: Second.

17 CHAIRPERSON GRIFFIS: Thank you. I
18 believe that it also fits into the point that this is
19 not needed, in fact, to extend the deadline and also
20 is premature in terms of asking for reconsideration on
21 this. I'd hear from others.

22 Not hearing any responses, I'd ask for all
23 those in favor, signify by saying aye.

24 (Ayes.)

25 CHAIRPERSON GRIFFIS: And opposed?

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1 (No response.)

2 MR. MOY: The staff would record the vote
3 as 3-0-1; the Chairman, the Vice Chair and Ms. Mitten
4 to deny the motion for the new hearing and David
5 Zaidain, not present, not voting.

6 CHAIRPERSON GRIFFIS: Thank you, Mr. Moy.
7 Again, as we have directed and why we are here, we
8 asked for additional submission, a restatement and any
9 new information that might go towards supporting the
10 burden of proof. That was received by the Applicant.

11 Likewise, we allowed for the response by the party in
12 opposition. We also received that. It is dated 13
13 January, Exhibit 53. Clearly, I believe those are
14 appropriate and should be accepted into the record.

15 And I'll hear anybody that objects to
16 that, if anyone has concern. Not seeing any response,
17 I would then go to the last issue. It is indeed --
18 the letter from Council Member Graham, I do not
19 believe our indication nor the specifics in the letter
20 asked for us to open the entire record and that would
21 be open up to accept anything and everything, letters
22 from neighbors or anything else that was appropriate.

23 Therefore, I do believe that the letter from Mr.
24 Graham should not be accepted into the record. I do
25 not believe that it will greatly prejudice any of the

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1 cases or participants in the case. I believe there's
2 ample submissions to discussing the issues involved in
3 this. I would put that out there for a consensus
4 unless there's any opposition or further discussion.

5 COMMISSIONER MITTEN: I concur, Mr.
6 Chairman.

7 CHAIRPERSON GRIFFIS: Very well, Ms.
8 Renshaw?

9 VICE CHAIRPERSON RENSHAW: it is just that
10 you have noted that Mr. Graham, Council Member Graham,
11 has withdrawn his support and I think that that is
12 sufficient for the record.

13 CHAIRPERSON GRIFFIS: Well, how do we get
14 that into the record if we're not accepting it?

15 VICE CHAIRPERSON RENSHAW: Because you
16 said it.

17 CHAIRPERSON GRIFFIS: I didn't say it, I
18 just said the letter from Mr. Graham.

19 VICE CHAIRPERSON RENSHAW: Well, if you
20 reference the letter, you need to reference the
21 content.

22 CHAIRPERSON GRIFFIS: I haven't read it
23 yet, because we haven't accepted it into the record.

24 VICE CHAIRPERSON RENSHAW: But you have
25 reviewed all the material and that was in the file.

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1 CHAIRPERSON GRIFFIS: Very well. In fact,
2 it is pointed out in the submission by Mr. Cohers, the
3 additional communication that took place after the
4 hearing and I think that is sufficient to reflect any
5 record. I just believe that if we accept that, then
6 we could conceivably open ourselves to looking at a
7 reconsideration because why, in fact, it would not
8 open it up for submission of all the -- the entire
9 neighborhood's letters.

10 So that being said, we take it that it
11 would not be -- the physical letter won't be part of
12 the record.

13 Is that correct? Is that my
14 understanding?

15 Seeing a great nod of heads on the Board,
16 I believe that is the consensus then. I think we are
17 ready to proceed, if I'm not mistaken. Good.

18 Let's get right into this because I
19 believe we'll have some good and substantive
20 discussion. Clearly, when we went into the hearing on
21 this, there was -- although the case itself, in fact,
22 was very straight forward, there was a lot of peculiar
23 specifics with this. It started, in fact, with what
24 was the relief needed and required for this. I think
25 the Board apply went through that. In looking at the

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1 resubmission, I do believe that as we looked at our
2 order, as we were putting it together that we felt
3 that the record was not reflecting strongly enough the
4 case that perhaps we thought was presented.

5 I think it's always good to be able to
6 question ourselves and to be able to reevaluate the
7 direction that we were going and that's why we are, in
8 fact, here today.

9 One issue I want to bring up, we had
10 talked extensively about a use variance and I'm not
11 sure how far we need to delve into this, but I know
12 there was not a consensus of the Board that it was a
13 use variance that was needed and I would just
14 reiterate a statement of my opinion that this is
15 actually an area variance because it goes directly to
16 the distance and adjacency of what would make it an
17 allowable use. It is not the use, necessarily, in
18 question, but the distances outlined in the
19 regulations that allow that use.

20 That being said, let me open it up to
21 others for discussion.

22 Ms. Mitten?

23 COMMISSIONER MITTEN: Mr. Chairman, if you
24 -- if we look at it as an area variance, then
25 typically the test for the burden of proof is whether

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1 or not there's a unique circumstance that leads to a
2 practical difficulty in the strict application of the
3 zoning regulations. The case that has been made is --
4 and sometimes we had a case recently where the line
5 between practical difficulty and undue hardship is
6 somewhat blurry. The case that's being made here is
7 one, I would say, that leans more into the undue
8 hardship category, but in terms of the -- I think
9 there's two general themes. One is that the parking
10 lot is under utilized and then the other is that there
11 is the greater good is being served by granting the
12 variance. And to the second point, that is not part
13 of the burden of proof. So I'm not persuaded by the
14 greater good argument. That's why, in fact, if there
15 is such a prevailing circumstance, why the zoning
16 regulations are often changed, not that that's
17 persuasive in a variance discussion.

18 To the first point which is the under
19 utilization of the parking lot, the parking lot is
20 part of a larger property that's improved with the
21 church and if there's any kind of hardship or
22 practical difficulty, it's certainly not undue. It's
23 at the margin and the property itself is being almost
24 fully utilized for its designed purpose and its
25 longstanding purpose as a church and the parking lot

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1 supports that use, whether it's people attending
2 services or frequenting the property for other
3 reasons.

4 And I'm not persuaded in this case that
5 the burden of proof has been met regarding either
6 practical difficulty or undue hardship.

7 CHAIRPERSON GRIFFIS: Very well. Others?

8 VICE CHAIRPERSON RENSHAW: Mr. Chairman?

9 CHAIRPERSON GRIFFIS: Yes.

10 VICE CHAIRPERSON RENSHAW: I concur with
11 my colleague's statements about the practical
12 difficulty and undue hardship. I was not at all moved
13 when the case addressed the parking for commercial
14 businesses' employees and I was persuaded by the
15 conditions as outlined by the opponent in the case
16 about conditions on that particular street, and the
17 business about the fact that of the number of parking
18 spaces and also the opposition that has surfaced. So
19 I concur with Ms. Mitten and her statements and I
20 would like to hear from the Chair as to his opinions
21 also.

22 CHAIRPERSON GRIFFIS: Very well, first of
23 all, to address Ms. Mitten, the greater good. I think
24 this is perhaps a larger discussion to have, but I
25 need to make a statement and I think that actually the

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1 greater good does go to part of the test and it would
2 be a third prong of the test in terms of not impairing
3 the intent or integrity of the zoning plan which
4 speaks to (1) maintaining the zoning, but also I think
5 implies, if not directly states, that it is, in fact,
6 to ensure that it is for the betterment or the public
7 good.

8 That being said, however, I look at the
9 submissions by the Applicant and I was frankly a
10 little disappointed in what was presented as the case,
11 whether it be practical difficulty was really what I
12 was looking for or even hardship and I think the
13 uniqueness was there in terms of the church's history,
14 its location. I think the uniqueness of the property
15 has also changed, although the parties in opposition
16 argue against this notion.

17 I think the uniqueness of the property is
18 changed as the surrounding area has also changed. It
19 clearly then redefines it as unique. As it was
20 originally built with a church and parking surrounded
21 by fields, it is not that now, making it somewhat
22 unique.

23 However, I was hoping that the case would
24 have been presented in a much more persuasive manner
25 in terms of (1) reiterating some of the -- what I

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1 perceive to be stated in the public hearing and also
2 perhaps even adding to the presentation of the case.
3 I did not find that happening. In fact, I found an
4 overwhelming persuasion from the party in opposition
5 looking to (1) the detrimental impact as we are
6 looking at a special exception and variances for this,
7 the overwhelming impact of (1) the potential for
8 increased traffic down the one-way street that this
9 church is accessed on. Secondly, I didn't see in the
10 resubmission an awful lot of -- or any detail
11 outlining the fact that it was so critical, I think,
12 in our deliberation of this case of how the parking
13 was to be managed, how it was to be secured. We had
14 talked extensively and perhaps it is our fault for not
15 having that written directly in the order and that we
16 perhaps were pressed by time and didn't take the time
17 to look at it, but I recall quite an extensive
18 discussion about having some sort of gated entry and
19 some sort of control over that situation.

20 I'm not persuaded by the party in
21 opposition talking about crime and I just want to
22 bring that up because I do not believe that just
23 additional cars will necessarily and directly increase
24 crime in a neighborhood. I think the persuasive
25 argument would be made on the other side saying with

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1 more people in and out and on the street it would, in
2 fact, decrease crime, but that being said, I don't
3 think it is critical in terms of what is presented to
4 us today.

5 I think we should also reiterate the fact
6 that there was some question about the proper notice
7 of the community meetings, of the ANC meetings, of the
8 WPCA. I think we cleared up and I think the record
9 shows adequately and correctly that our procedures in
10 terms of announcement of the public hearing and the
11 application was properly followed and although it may
12 not have been for others, we have no jurisdiction or
13 control over that.

14 I'm looking for one other point, but I
15 would ask if there's others that want to continue,
16 that would be appropriate.

17 COMMISSIONER MITTEN: I just want to make
18 one, just maybe general point which is I think what --
19 there was a distraction in this case and I had sort of
20 the luxury, if you will, of digesting it all in one
21 sitting in reading through all the transcripts, the
22 transcripts of the hearing and then the decision
23 meeting.

24 And I just want to maybe remind us of why
25 the provision exists in the zoning regulations that

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1 parking lots of this type can be located in
2 residential zones and whether or not this is an
3 antiquated notion but it was primarily to serve
4 adjacent commercial uses, not to relieve parking
5 situations in residential neighborhoods which is why
6 the text of the ordinance is written the way that it
7 is. And I think that notion was lost in the
8 discussion because there was -- because of these other
9 elements that were introduced. So I just wanted to --
10 I think it's helpful in deciding whether or not the
11 burden of proof has been met to remember why those
12 provisions exist in the first place in terms of
13 proximity and so forth.

14 CHAIRPERSON GRIFFIS: I think that's an
15 excellent point. I think if I'm understanding you,
16 that the party in opposition is actually taking up
17 that cause and indicating several elements of why it
18 should not be granted based on the fact that it is
19 well within a residential neighborhood.

20 COMMISSIONER MITTEN: Yes, I agree.

21 CHAIRPERSON GRIFFIS: Okay. The last
22 thing I need to state is to look at page 5 of the
23 Applicant's submission and when they talked about the
24 undue hardship, the only piece that I could really
25 find in addressing this, as well as looking at the

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1 past record, but their sentence is "the undue hardship
2 resulting from the church's inability to relocate its
3 parking lot supports the approval of a use variance in
4 this instance."

5 That's not the most persuasive evidence.

6 VICE CHAIRPERSON RENSHAW: I marked the
7 same section with a big question mark because I did
8 not think that that was overwhelming evidence.

9 COMMISSIONER MITTEN: And I think that
10 goes to my point, Mr. Chairman, which -- I appreciate
11 the help that you gave me in trying to articulate it,
12 which is there's a reason why parking lots that are
13 adjacent to commercial districts, why there is relief
14 in the ordinance for that use and why those that are
15 more distant, there is no relief.

16 CHAIRPERSON GRIFFIS: Right.

17 COMMISSIONER MITTEN: So to way it's
18 because of where we're located, that just proves the
19 point of why that was what was intended with the
20 ordinance, that those parking lots would not be able
21 to be used.

22 CHAIRPERSON GRIFFIS: That statement seems
23 to me in my reading it, outlines the hurdle that they
24 need to jump.

25 COMMISSIONER MITTEN: Yes.

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1 CHAIRPERSON GRIFFIS: And I think the
2 party in opposition addresses that fairly directly in
3 saying that if, in fact, that is what we rely on, then
4 we would essentially undo the burden for any use
5 variance because anyone outside of an allowable matter
6 of right use could say well, we're outside of it and
7 therefore we have undue hardship.

8 Okay, anything else?

9 (No response.)

10 CHAIRPERSON GRIFFIS: I would entertain a
11 motion then, if you're ready.

12 COMMISSIONER MITTEN: Mr. Chairman, I move
13 that we deny Application No. 16875, due to a lack of
14 adequate showing by the Applicant that they have met
15 their burden of proof.

16 CHAIRPERSON GRIFFIS: Is there a second?

17 VICE CHAIRPERSON RENSHAW: Second.

18 CHAIRPERSON GRIFFIS: Thank you. Further
19 discussion on the motion? Then I ask for all those
20 for favor signify by saying aye.

21 (Ayes.)

22 CHAIRPERSON GRIFFIS: And opposed?

23 (No response.)

24 MR. MOY: The staff would record the vote
25 to deny the application as 3-0-1. The three in favor

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1 to deny is the Chairman, The Vice Chairperson, Ms.
2 Mitten; and David Zaidain, not present, not voting.

3 CHAIRPERSON GRIFFIS: Do we have a proxy
4 on that?

5 MS. BAILEY: No, Mr. Chairman, we do not.

6 MR. MOY: No, we do not.

7 CHAIRPERSON GRIFFIS: Thank you. Okay,
8 let's move on.

9 MR. MOY: The next case is Application No.
10 16919 of Mike Meier, pursuant to 11 DCMR, 3103.2, for
11 a variance from the use provisions to allow the
12 construction of a new apartment building under
13 subsection 330.5, in an R-4 District at premises 4517
14 Georgia Avenue, N.W., in Square 3016, Lot 13.

15 On December 10, 2002, the Board concluded
16 hearing the case application. After hearing the
17 testimony, the Board requested specific information to
18 make a decision from the Applicant. That additional
19 information was submitted by the Applicant on December
20 30, 2002. That's in your folder as Exhibit 42.

21 There were no other submissions of either
22 responses, nor submissions of findings of fact and
23 conclusions of law and that completes my brief.

24 CHAIRPERSON GRIFFIS: Thank you, Mr. Moy.
25 We had asked in the submissions for a site survey, a

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1 reiteration of the practical difficulties on this and
2 the roof plan. Are you showing any of that submitted?

3 MR. MOY: Give me a moment to go through
4 the package, Mr. Chairman.

5 CHAIRPERSON GRIFFIS: Okay. We can easily
6 step into this, Members. If you recall, this was --
7 well, first of all, the physical characteristics of
8 this, this did have a structure on it. It was noted
9 in the record, although it's not existing, but there
10 was a large single family house. It was actually
11 raised by the District government and all evidence
12 from the testimony shows that they dropped the
13 building into the basement, so it's all still there if
14 you wanted to put it back together. That's actually a
15 big joke.

16 There is a slope, dramatic slope change
17 down to the avenue. That was also discussed. We do
18 have a party in opposition which is Ms. McLeod, who is
19 the adjacent and abutting property owner. I think if
20 you look back we do have Office of Planning
21 recommending denial. I am showing ANC-4C in support
22 and that does concur with my recollection.

23 What's interesting about this case is the
24 Office of Planning actually outlined perhaps other
25 possibilities for the development of this site and one

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1 of the submissions, of course, that we looked at is to
2 address why those couldn't be pursued. Clearly, the
3 side yard requirement would diminish, in fact,
4 probably make practically difficult the floor plan of
5 the new building if they were done as flats or semi-
6 detached single families. With that being said, I
7 think the case, I think the case can be made that
8 there is some uniqueness to this project. Oh, it
9 should also be noted that Council Member Fenty gave
10 testimony and also there are written submissions in
11 support of this. There was an awful lot of
12 discussion, first of all, by Mr. Fenty. I think he
13 very well articulated the issue of how important it is
14 to have new development in this area and particularly
15 on this side, that this would, in fact, be a project
16 of some community and neighborhood merit. I don't
17 believe that any of us -- I won't speak for you, but I
18 don't believe that I disagree with that. I think
19 that, in fact, new development and new residential
20 units on this avenue as on numerous avenues all across
21 the city, is a very important and excellent objective.
22 However, that doesn't go directly to what we have
23 jurisdiction over and I think can, in fact, be part of
24 it, but does not, on his whole and specific make a
25 case for relief before the BZA.

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1 Some of the uniqueness, of course, going
2 back to there was discussion of the historical
3 development problems, meaning the site has been
4 vacant, has been in trouble for a long time. No one
5 has been able to put together a project on this. Of
6 course, the District of Columbia has had to come in
7 and demolish and left the building demolished on the
8 site which adds to a sense of the cost and difficulty
9 of doing new construction on that.

10 The other practical difficulty that was
11 discussed with this really went to -- well, they went
12 directly to the elements that created additional cost,
13 that is, the site clearing. Again, removing the
14 building that was demolished, the potential for
15 hazardous abatement. One of the physical
16 characteristics that created, it was in the record,
17 created some difficulty was the slope of the site that
18 would need to be retained by a physical wall. I'm not
19 sure how that changes, based on what the construction
20 would be. Certainly it would be specific detail
21 changes. There might be an addition as discussed of
22 two stairways and entrances rather than conceivably
23 one, but still in all, I'm not -- although I want to
24 be, I'm not convinced of how that uniqueness arises
25 that gets us to the variances that we're looking at

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1 today.

2 Let me leave that as my part of this point
3 and hear from others.

4 MR. MOY: May I interrupt for a moment,
5 Mr. Chairman?

6 CHAIRPERSON GRIFFIS: Yes.

7 MR. MOY: The reference to your earlier
8 question, the submission by the Applicant included
9 addressing the site clearing cost analysis. The
10 record doesn't show the Applicant addressing the
11 Board's question about a site survey nor a revised
12 roof plan.

13 CHAIRPERSON GRIFFIS: Indeed, and the site
14 survey that -- in particular, and the roof plan, if I
15 recall, and I think I do correctly, was to address
16 several issues, but the most pertinent that I recall
17 is that a Member had a concern of the roof decks, the
18 terraces and also in order to gain an understanding of
19 the adjacency of the owner that is actually in
20 opposition to this case.

21 So Ms. Mitten?

22 COMMISSIONER MITTEN: Mr. Chairman,
23 there's another aspect of the submission that is
24 incomplete that I just want to call out which is we
25 have the cost aspect of the developing the site under

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1 different scenarios, but what we don't have is the
2 second part of what was requested which is the
3 analysis to include cost estimates related to site
4 clearing and its effect on the overall cost of
5 construction and how it translates into actual sales
6 costs. Which means cost is one aspect and then value
7 or resulting sale price is another.

8 We had testimony in the hearing that
9 absent any kind of adverse site conditions, the market
10 conditions in this part of Georgia Avenue do not
11 support new construction of single family residential
12 buildings. So what we have as sort of background
13 condition that applies across the board to properties
14 in that area is we have the fact that single family
15 development is not economic, so we're starting with a
16 use that the zoning permits that's not economic and
17 it's not the purpose, I just want to state, it's not
18 the purpose of the variance process to make up for
19 adverse economic conditions because those are not
20 unique to a particular property. Those are market
21 wide for however far that market reaches.

22 To the second point which you were
23 beginning to touch on, if you look at the Applicant's
24 additional submission, Exhibit 42 and just for the
25 ease of talking about it, the chart that starts on

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1 page 6, and you go through each of these various items
2 that affect the cost to develop the site, very few and
3 I would argue only one is even arguably unique to this
4 property. In the section of Georgia Avenue, the sites
5 are elevated above the grade of Georgia Avenue. They
6 all have retaining walls, so they all have the slope
7 issue. They have the retaining wall issues. The size
8 issue in terms of the incremental cost of developing
9 on a smaller site, there was no -- there's nothing in
10 the record to show that this property is unique in
11 that regard.

12 Issues about insulation of utilities and
13 so forth, that's not unique to this property. That
14 goes with any new development. So -- and I would add
15 that one of the things that causes me a lot of concern
16 and we've seen it in other cases, even the Zoning
17 Commission has seen it is when an Applicant comes
18 forward and is seeking relief from zoning to make up
19 for some shortcoming of the property, that is the kind
20 of thing you would discover in due diligence and then
21 adjust the price that you're willing to pay to acquire
22 the property accordingly. And I think that's largely
23 what we have in this case.

24 You mentioned that there are other avenues
25 that the Applicant can pursue. One would be a

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1 rezoning which we talked about which is often what we
2 recommend when someone is seeking a use variance for
3 new construction. Another if you wanted to pursue
4 developing twin flats on two lots would be relief from
5 the side yard requirement. And there would have to be
6 certainly have to be an application and additional
7 submissions on that, but I just don't see how the
8 Applicant in this case has proven any substantially
9 unique conditions and then to go all the way to undue
10 hardship, there may be a hardship, but it's clearly
11 not undue hardship. So I'm not persuaded that the
12 Applicant has met their burden of proof in this case.

13 CHAIRPERSON GRIFFIS: Very well, Ms.
14 Mitten. This is troubling for me because this is
15 something that I, in my opinion, would like to grant
16 in order to see a development happen on that site and
17 I don't think that anyone disagrees with that.

18 I think you've well articulated the fact
19 that this will have great difficulty being approved
20 based on the use variance and so in my mind also, it
21 goes to the fact of how -- who are we serving if, in
22 fact, we are unable to do this and deny it when
23 everyone seems to be perhaps in favor or perhaps this
24 could be something that would be done for the
25 betterment of an area. That leads me to say is there

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1 not another avenue for relief that might make this an
2 appropriate project under the zoning and I think
3 you've articulated two that are excellent and I think
4 would be good avenues to pursue. The rezoning, as we
5 looking at it, I know I did in terms of the area,
6 there is a commercial zoning in close proximity. I
7 have not put together a case, but it seems to me that
8 a case could be at least developed in terms of making
9 a rezoning case.

10 The side yard that you bring up also, I
11 think, is an excellent avenue to pursue.

12 Ms. Mitten? I'm sorry, Ms. Renshaw.

13 VICE CHAIRPERSON RENSHAW: I concur with
14 your statements, Mr. Chairman. The community,
15 obviously, wants to take a bad scene, a lot that needs
16 development and see that something is done with it.
17 We've had this case now for several months and we're
18 moving to the conclusion and we are at the point where
19 we don't see the uniqueness in order to grant the
20 relief that is needed.

21 So again, if we can be proactive here and
22 look to how the Applicant can take the regulations and
23 hurdle the difficulties and get the relief that is
24 needed so that the project, a project, a development
25 project can move forward on that lot and I think that

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1 would be the best area, the best arrangement for us to
2 move towards suggestions of how we can get development
3 on that site as soon as possible.

4 COMMISSIONER MITTEN: If I could just pick
5 up on that, your theme as developed by Ms. Renshaw and
6 further developed by me. We do agree that it is very
7 important that the site be redeveloped with an
8 appropriate building. And it is to harken back to
9 what we talked about a few minutes ago in the other
10 case, the greater good dictates that that is what will
11 happen, is that this site not sit there vacant,
12 indefinitely. But our first obligation, before we go
13 to the greater good is that we must not do anything
14 that is inconsistent with the zone plan and
15 notwithstanding the burden of proof for the
16 three-prong test, we also have that standard and I
17 think we're moving in the right direction to protect
18 the zone plan and if the zone plan, in fact, needs to
19 be changed, then that's what should happen.

20 CHAIRPERSON GRIFFIS: Well said. Sounds
21 like a motion is being formulated.

22 COMMISSIONER MITTEN: I move that we deny
23 Application 16919 on the basis that the Applicant has
24 failed to meet the burden of proof for a use variance.

25 CHAIRPERSON GRIFFIS: Is there a second?

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1 VICE CHAIRPERSON RENSHAW: Second.

2 CHAIRPERSON GRIFFIS: Thank you. Further
3 discussion on the motion?

4 (No response.)

5 CHAIRPERSON GRIFFIS: I'd ask for all
6 those in favor of the motion signify by saying aye?

7 (Ayes.)

8 CHAIRPERSON GRIFFIS: And opposed?

9 (No response.)

10 MR. MOY: The staff would record the vote
11 as -- the staff has a proxy from Mr. Etherly and his
12 proxy is a vote to approve the application with
13 conditions as approved by the majority of the Board
14 Members.

15 So with that, then the staff would record
16 the vote as 3-1-1, three in favor to deny the
17 application via the Chairman, the Vice Chairperson and
18 Ms. Mitten; proxy vote to approve and one vote from
19 Mr. Zaidain, not present, not voting.

20 CHAIRPERSON GRIFFIS: Thank you, Mr. Moy.
21 Let's move to our next.

22 MR. MOY: The next case is Application No.
23 16559 of the Morris and Gwendolyn Cafritz Foundation,
24 the Field School.

25 The Board has been requested to decide on

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1 the motion by the Applicant to modify the approved
2 alternate transportation management plan in BZA order
3 No. 16559B. The Board at its Executive Session on
4 January 7, 2003 requested that the Applicant provide a
5 status report of all the items of the conditions and
6 then the order, the Board received the information
7 from the Applicant on January 13, 2003 and that is in
8 your packet as Exhibit No. 512.

9 The Board has also received a response
10 from a party, the opponent party, on January 15, 2003,
11 from the 44th Street Neighbors to the Field School and
12 that is in your packet as Exhibit No. 513.

13 That completes my --

14 CHAIRPERSON GRIFFIS: Which exhibit?

15 MR. MOY: 513. That is the response from
16 the -- from a party to the Field School's requested
17 motion.

18 CHAIRPERSON GRIFFIS: What's the date on
19 that?

20 MR. MOY: January 15th.

21 CHAIRPERSON GRIFFIS: All right, I just
22 don't have an exhibit on that. Okay, well, here we
23 are again.

24 Ms. Renshaw, it's you and I. Ms. Mitten
25 has gladly decided to stay in physical form so that we

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1 might have a quorum on this.

2 Ms. Renshaw, I would -- let me first state
3 that in looking at this we are again looking at a
4 provision that allows for the extension of time based
5 on the complication of doing street construction and
6 coordinating with District agencies to get that done
7 and how that relates directly to the Field School and
8 the condition of the Field School.

9 I think in the previous extension that we
10 looked at, it was very clear to me that this Board was
11 very concerned with the public safety and the public
12 safety in terms of the temporary construction and how
13 one and most -- perhaps most importantly, maybe it's
14 just my opinion, but what provisions were to be made
15 for pedestrian safety that would be implemented while
16 construction was happening, knowing full well that
17 they would be temporary provisions in lieu of the
18 future permanent provisions. And we had talked about
19 creating a level area for walking, also some sort of
20 fencing or construction fencing that would give a line
21 of demarcation for pedestrian traffic and vehicular
22 traffic.

23 We also looked at how the vehicular
24 traffic would move over to that in a safe manner.
25 Again, I think it was of total concern that the Board

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1 addressed and stated that we wanted that in short.
2 Therefore, if I'm not mistaken, our direction in order
3 to have that, in order to be here today, in order to
4 discuss this, we just wanted to see what, in fact, was
5 being done.

6 VICE CHAIRPERSON RENSHAW: Mr. Chairman, I
7 reviewed all the material that has been submitted by
8 the Applicant and did not find what I needed. I was
9 looking for all of this alternative transportation
10 plans and some description of the pedestrian safety,
11 etcetera and I didn't see it, did you?

12 CHAIRPERSON GRIFFIS: All of the
13 conditions of the original order and the interim
14 order, I'll call it, were addressed. That's 16559 and
15 559-B, with a total of 53 conditions. They were
16 addressed in the submission as being within compliance
17 and those that weren't, they were to be complied with
18 at the final completion, but I think where you're
19 going is looking at condition 4 which I'll read,
20 submit a pedestrian safety plan and description of how
21 the plan will be implemented during the period of
22 construction activity during the permit process such
23 as a construction fence along the property line with
24 leveled compacted earth for walking surface, I think
25 what we were looking for was the actual -- some sort

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1 of graphic representation of what's there. Not that
2 we know it's there or not there, that's not the
3 question, but clearly, I think we just wanted
4 satisfaction that we had that documented.

5 VICE CHAIRPERSON RENSHAW: That's why I
6 said that I looked through the material and I didn't
7 find it.

8 CHAIRPERSON GRIFFIS: Good, I'm going to
9 take some liberty and ask the representative just to
10 come up, briefly, if they're here.

11 MR. FEOLA: Thank you, Mr. Chairman,
12 Members of the Board. For the record, my name is Phil
13 Feola with Shaw Pittman.

14 CHAIRPERSON GRIFFIS: Rather than us
15 talking extensively to ourselves which we may enjoy
16 doing, I think --

17 MR. FEOLA: We enjoy listening.

18 CHAIRPERSON GRIFFIS: Indeed. You're
19 gracious in your comment.

20 I would ask, clearly you see what we want
21 and I think, and my opinion is, I am leaning, tending
22 towards favorably looking at this, but again, just to
23 ensure for public safety, in terms of condition 4, are
24 in possession today of any documentation that would
25 satisfy the Board or is there a time where you could

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1 produce that?

2 MR. FEOLA: I think it's the latter, Mr.
3 Chair. For the record though, I will point out that
4 the item 4 you're referencing isn't a condition of
5 Order 10659-B. It was additional information that was
6 requested. And that particular information was
7 supposed to come from the Department of
8 Transportation. And in fact, in the submission, Mr.
9 Laydon of DOT made on August 19th, indicates that
10 after they selected a contractor, they would provide a
11 copy of the construction and traffic management plan
12 and I'm assuming that would incorporate pedestrian
13 safety as well, to the Board, which apparently has
14 not. So we can drag it out of DOT. There is many of
15 the measures that you have suggested, the fencing, the
16 temporary sidewalk, in place, so -- but I have not
17 seen the plan. I don't think the school has either
18 and clearly the Board hasn't. So we can work with DOT
19 to get that to you.

20 CHAIRPERSON GRIFFIS: Very well. That's a
21 great clarification. It was so important to me that I
22 just overlooked the specifics of why it was in the
23 order, but it puts here in my mind, Ms. Renshaw, what
24 we're doing is burdening the Applicant to get the
25 Department of Transportation to be forthcoming with

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1 this plan. What I don't want to get into, as we have
2 in other cases, wait indefinitely for the production.

3 Do you think of any other remedy that we
4 might -- for instance, there could be photographic
5 representation is what I'm thinking immediately.

6 VICE CHAIRPERSON RENSHAW: Well, I think
7 it's up to the Applicant to make sure that the Board
8 has what it has asked for and if indeed the
9 information was to come from the Department of
10 Transportation, then I feel the Applicant, since the
11 Applicant's attorney is honcho-ing the project, so to
12 speak, it is up to Mr. Feola to ask the Department of
13 Transportation to be forthcoming with some information
14 for the Board.

15 MR. FEOLA: Fair enough.

16 VICE CHAIRPERSON RENSHAW: And I don't
17 think that I am in a position to move ahead with this
18 until that information is in hand.

19 MR. FEOLA: Okay.

20 CHAIRPERSON GRIFFIS: I want an end date
21 to this, that's all and Mr. Feola may be very well
22 moving DDOT, but in the case that that doesn't happen,
23 well, there it is, clearly we're looking at something
24 very simple in terms of just documenting what's in
25 place and whether that ultimately comes from DDOT

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1 which it should, that would be grand. If not, I think
2 we'd be open to having some other documentation that
3 would show that.

4 There is some concern of schedule here, is
5 there not?

6 MR. FEOLA: There is, the modification
7 order expires by its terms on the 31st of this month.

8 CHAIRPERSON GRIFFIS: Right.

9 MR. FEOLA: The work looks like it will be
10 completed on February 3rd or 4th, but as I look
11 outside and it continues to snow, we are subject to
12 that which is the reason why we ask for the one month
13 extension.

14 So --

15 CHAIRPERSON GRIFFIS: What if it snows all
16 the way to the 31st?

17 (Laughter.)

18 MR. FEOLA: Then we have a whole lot
19 bigger problem.

20 CHAIRPERSON GRIFFIS: Let us do that. We
21 will clearly take this up at our next meeting. We'll
22 look for that submission and I would also -- I would
23 be open to -- I want to be very clear that a month is
24 enough or is realistic or what it is. There's no
25 reason for us to deal with this again come February

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1 20th, if in fact, we do enjoy the snow for the rest of
2 the week.

3 Ms. Renshaw?

4 VICE CHAIRPERSON RENSHAW: I have a
5 question for Mr. Feola about the January 13th
6 submission. On page 4, you talk about community
7 outreach and you state that the chairman of the
8 school's Board of Trustees agreed to have another
9 meeting with the community, approximately one month
10 after the improvements on Foxhall Road are completed.

11 Is there -- since we're delayed in making
12 a decision here, and there is an extension, is there
13 any provision for the Board of Trustees to meet with
14 the community to resolve emerging problems?

15 MR. FEOLA: Is the question has a meeting
16 been scheduled?

17 VICE CHAIRPERSON RENSHAW: Yes, because it
18 says here that there will be another meeting with the
19 community approximately one month after improvements
20 are completed. And we're still in the works on the
21 improvements.

22 MR. FEOLA: That's correct.

23 VICE CHAIRPERSON RENSHAW: And so
24 therefore that postpones the meeting with the
25 community for another one or two or three months. And

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1 so it has surfaced that there are some difficulties
2 that the abutters are expressing and have expressed to
3 the Board. And so I'm asking is another meeting, an
4 interim meeting going to be planned for the abutters
5 and the immediate community to discuss the problems
6 that have surfaced?

7 MR. FEOLA: The purpose of the meeting
8 that was proffered was to let the new traffic
9 patterns, the light be -- permanent traffic management
10 plan that this Board approved a few years ago, shake
11 out a little bit and then sit down and see what needed
12 to be done to adjust that with the community.

13 So that was the purpose of the one month
14 meeting. The school does have quarterly meetings with
15 the community and it has as we documented in the
16 summer and started back up in the fall, that are
17 normal, regular meetings with the community, not
18 specific -- that was a meeting that was set up
19 specifically to address the shake down, if you will,
20 of the new road system and what it meant and how it
21 was going to work.

22 CHAIRPERSON GRIFFIS: So that's in
23 addition to regularly scheduled meetings with the
24 community?

25 MR. FEOLA: That's correct. With regard

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1 to the comments that the Board received in letters,
2 the school has been in constant contact with those
3 individuals about their individual issues.

4 CHAIRPERSON GRIFFIS: I think that was --

5 MR. FEOLA: To answer your question, we
6 can have a meeting if you think that's appropriate.

7 VICE CHAIRPERSON RENSHAW: It sounds like
8 it's appropriate.

9 And also, I wanted to ask with the
10 submission of the transportation plan, this was
11 included in your January 13th submission. You have
12 the proposed shuttle bus routes as requested and dated
13 September 10th, but on your certificate of service, I
14 don't see any service to ANC-2A and 3B, I believe it
15 was. You have 3D listed. Did you serve those other
16 two ANCs?

17 MR. FEOLA: The answer is yes. I'm
18 looking for our certificate.

19 VICE CHAIRPERSON RENSHAW: It's under Tab
20 C of your January 13th submission.

21 (Pause.)

22 And also since you're talking about the
23 Friendship Heights staging, ANC-3E would be involved.

24 MR. FEOLA: I'm sorry, I'm trying to --
25 what was the second question? I'm looking for the

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1 service. We did serve those. I'm not sure why it's
2 not -- in September we served those ANCs. I believe
3 the staff can affirm that some of the ANC
4 Commissioners came down complaining about it,
5 actually.

6 CHAIRPERSON GRIFFIS: Okay, well, I think
7 Ms. Renshaw's point should be well taken and that is
8 service goes to those obviously that will be affected
9 and have been evident, correct?

10 VICE CHAIRPERSON RENSHAW: Yes, and I
11 would expect that the Applicant would be inviting
12 those ANCs to participate in meetings regarding the
13 transportation to and from the school. You talked
14 about a shake down meeting, so to speak, after the
15 improvements to the road are finished, right?

16 Another meeting with the community one
17 month after improvements?

18 MR. FEOLA: We served them because the
19 Board asked us to. I personally and professionally
20 think it is a mistake to -- when you're using public
21 roads and public Metro rail stations for access to
22 invite comments from ANCs that are not affected any
23 more than they would be by traffic at this Metro
24 stations.

25 VICE CHAIRPERSON RENSHAW: But you have an

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1 intense use at various staging areas that --

2 MR. FEOLA: If you stand behind the Tenley
3 Metro Station any time, you see buses for AU and GU --

4 VICE CHAIRPERSON RENSHAW: -- Are
5 affecting the traffic situation of a particular ANC
6 and they have a right to comment.

7 MR. FEOLA: But that's what those traffic
8 hubs are for, Ms. Renshaw. That's what we have a
9 Metro rail system for. You don't want those people --
10 you want those people to take the system, ride the
11 buses to their location. You don't want to have them
12 drive down Foxhall Road. That's the whole purpose of
13 it.

14 CHAIRPERSON GRIFFIS: Very well. And Ms.
15 Renshaw, your concern is the permanent implementation
16 of this plan, is that correct?

17 VICE CHAIRPERSON RENSHAW: Exactly.

18 CHAIRPERSON GRIFFIS: Let me just note --

19 VICE CHAIRPERSON RENSHAW: The staging of
20 the routing.

21 CHAIRPERSON GRIFFIS: Right. A little
22 concern is I'm not sure how we're getting there --

23 MR. FEOLA: The simple answer though, we
24 can do that. We can advise them and invite them to a
25 meeting.

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1 VICE CHAIRPERSON RENSHAW: That's the best
2 idea.

3 CHAIRPERSON GRIFFIS: Okay, so noting that
4 direction, let's set this for next week and whenever
5 that information is available, it can be submitted and
6 we will ask staff to get it to Board Members
7 immediately upon receipt and we'll have ample time.
8 If, in fact, it comes in at 2 o'clock today, we'll
9 review it and send back comments if we have concern.
10 Ample time is my whole point, so as quickly as it can
11 come in, the best. Very well.

12 MR. FEOLA: Thank you.

13 CHAIRPERSON GRIFFIS: Anything else we
14 need to do on that? Any other concerns? Mr. Feola,
15 you're clear?

16 MR. FEOLA: We are.

17 CHAIRPERSON GRIFFIS: Very well. Let me
18 make a last statement in terms of the submissions of
19 letters that we did get regarding this, I think we
20 will reiterate next week. We have a very clear and
21 focused issue that we're looking at and whether we'd
22 like to or not we are unable to reopen the entire
23 record and revisit all the issues that are pertaining
24 to the previous order.

25 I think we will have discussions as a

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1 Board of how we may address these concerns. At this
2 point, I am not aware of how we would do that under
3 this proceeding.

4 So that being said, we'll see you next
5 week.

6 MS. BAILEY: Mr. Chairman, just so we have
7 something on the record, that's a special public
8 meeting to be held on January 28th at 9 a.m.

9 CHAIRPERSON GRIFFIS: That's correct.
10 Thank you very much.

11 With that, I will conclude the 21st of
12 January 2003 Special Public Meeting of the Board of
13 Zoning Adjustment.

14 (Whereupon, at 10:25 a.m., the meeting was
15 concluded.)

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NEAL R. GROSS

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