

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

APRIL 1, 2003

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 1:32 p.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS, Chairperson
CURTIS L. ETHERLY, JR., Board Member

ZONING COMMISSION MEMBER PRESENT:

PETER G. MAY, Commissioner

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

APPEARANCES (Continued)

COMMISSION STAFF PRESENT:

Clifford Moy, Office of Zoning
Beverley Bailey, Office of Zoning
John K.A. Nyarku, Office of Zoning

OTHER AGENCY STAFF PRESENT:

Steve Cochran, Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

Lori Monroe, ESQ.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

APPEARANCES:

On behalf of the Appellant,
Southeast Citizens for
Smart Development, Inc.:

MARY WITHUM, ESQ.
Southeast Citizens for Smart
Development
1514 Potomac Avenue, S.E.
Washington, D.C. 20003
(202) 547-5414

On behalf of the Appellee,
the Zoning Administrator:

ARTHUR PARKER, ESQ.
441 4th Street, N.W.
Washington, D.C. 20001
(202) 727-0874

On behalf of the Property Owner,
Father Flanagan's Boys' Home,
Girls' and Boys' Town:

MARTIN SULLIVAN, ESQ.
Shaw, Pittman
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-9062

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

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

<u>AGENDA ITEM</u>	<u>PAGE</u>
PRELIMINARY MATTERS	10
<u>APPLICATION NUMBER 16935, ANC-6B</u>	
<u>APPEAL OF SOUTHEAST CITIZENS FOR SMART DEVELOPMENT, INCORPORATED</u>	9
Opening Statement by the Appellant	49

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE CROSS</u>	<u>VOIR DIRE</u>
Candace Avery	43	--	--	--	--
Ellen Opper-Weiner	58	71/72	--	--	--
Lyle R. Schauer	90	105/108	109	110/110	77
Robert Kelly	113	139/151	--	--	--

EXHIBITS

<u>APPELLANT'S</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
No. 7A	35	--
No. 7B	35	--
No. 7C	35	--
No. 4	37	--

APPELLEE'S

(None.)

PROPERTY OWNER'S

(None.)

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

(1:32 p.m.)

CHAIRMAN GRIFFIS: Good afternoon, ladies and gentlemen. My name is Geoff Griffis. This is the public hearing of the Board of Zoning Adjustments of the District of Columbia. Joining me is Mr. Etherly on my right, and the representative of the Zoning Commission this afternoon is Mr. May.

Copies of today's hearing are available to you. They are located at the table where you entered into the hearing room.

I will run through a few things that most of you will be familiar, but they are important that we all refamiliarize ourselves with. All public hearings before the Board of Zoning Adjustments are recorded, so we ask several things of you. First, when coming forward to speak to the Board, that you have a seat, make yourself comfortable, turn on a microphone and speak into that microphone. Prior to doing that, you need to fill out two witness cards. Witness cards are available at the table also where you entered in and the table in front of us. Those witness cards go to the recorder, who is sitting to my right.

I would ask also that all people please

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 refrain from making any disruptive noises or actions
2 in the hearing room so that we don't disrupt those
3 giving testimony before the Board; also ask that
4 people turn off any cell phones or beepers at this
5 time, again not to disrupt the proceedings.

6 The order of procedure for the appeal this
7 afternoon will be, and we will make specific changes
8 as required, first statement of witnesses of the
9 appellant; second will be the Zoning Administrator or
10 government official; third would be the owner, leasee,
11 or operator of the property involved, if not the
12 appellant; fourth would be the ANC within which the
13 property is located; fifth would be the intervenor's
14 case if an intervenor has been established; and sixth
15 would be the rebuttal and closing statements by the
16 appellant. Cross-examination of witnesses is
17 permitted by the appellant or parties. The ANC within
18 which the property is located is automatically a party
19 in all cases.

20 The record will be closed at the
21 conclusion of the hearing except for any information
22 that the Board specifically requests, and we will be
23 very specific on what is to be submitted and when it
24 is to be submitted into the Office of Zoning. After
25 that is received, of course, no other information

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 would be accepted and the record would then be closed.

2 The Sunshine Act requires that public
3 hearings on each case be held in the open and before
4 the public. This Board may, however, consistent with
5 its rules of procedure and the Sunshine Act, enter
6 executive session during or after a public hearing on
7 a case. That is for the purposes of reviewing the
8 record or deliberating on the case.

9 The decision of this Board in contested
10 cases must be based exclusively on the public record,
11 so we ask those people present today not to engage
12 Board members in any conversations so that we don't
13 give the appearance of not basing our decisions solely
14 on the record.

15 We will jump into this appeal right away.

16 It looks like we may lose a quorum on about five
17 o'clock, so I want to get things moving very quickly.

18 We will give some direction as we proceed.

19 With that, I think the Board can take up
20 any preliminary matters. Preliminary matters are
21 those which relate to whether a case will or should be
22 heard today, such as -- well, there's a lot of
23 interesting ones, but requests for postponements,
24 continuances or withdrawal, or whether proper and
25 adequate notice of a case has been given.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 If you are not prepared to go forward
2 today or if you believe that the Board should not hear
3 a case for any reason, I would ask that you approach
4 the Board by having a seat and we will note that there
5 is a preliminary matter for the Board to take up.

6 Let me ask if staff, and also wish a very
7 good afternoon to Ms. Bailey, who is with us for the
8 Office of Zoning, also Mr. Moy. Mr. Nyarku is in and
9 out, also abling and assisting us. Corporation
10 Counsel is represented by Ms. Monroe.

11 Ms. Bailey, do we have any preliminary
12 matters?

13 MS. BAILEY: Mr. Chairman and members of
14 the Board, good afternoon.

15 There is a preliminary matter, Mr.
16 Chairman, and it has to do with the only case of the
17 afternoon. The staff is recommending that the case be
18 called and the witnesses sworn in and take up
19 preliminary matters at that time, Mr. Chairman.

20 CHAIRMAN GRIFFIS: Okay. That sounds
21 logical; however, we have had somebody come sit at the
22 Board. Is that amenable to you? Would you introduce
23 yourself for the record?

24 MR. SULLIVAN: Martin Sullivan
25 representing the property owner, Father Flanagan's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Boys' Home, Girls and Boys Town.

2 CHAIRMAN GRIFFIS: We're going to call the
3 case and then we can hear your preliminary matter. Is
4 that acceptable?

5 MR. SULLIVAN: Yes, that's fine.

6 CHAIRMAN GRIFFIS: Okay. Then let's do
7 that.

8 APPLICATION NUMBER 16935, ANC-6B

9 APPEAL OF THE SOUTHEAST CITIZENS

10 FOR SMART DEVELOPMENT, INC.

11 MS. BAILEY: Application Number 16934.
12 This is an appeal of the Southeast Citizens for Smart
13 Development, Inc., pursuant to 11 DCMR 3100 and 3101,
14 from the administrative decision of David Clark,
15 Director, Department of Consumer and Regulatory
16 Affairs, allowing the construction of four
17 single-family dwellings allegedly in violation of the
18 side yard requirements under subsection 405.9 and
19 775.2, location parking space provisions under
20 subsection 2116.1, parking space accessibility
21 provisions under subsection 2117.4. The property is
22 located in a C-2-B District at premises 1308, 1310,
23 1312 and 1314 Potomac Avenue, Southeast, Square 1045,
24 Lots 134, 136, 137 and 138.

25 All those wishing to testify, would you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 please stand to take the oath.

2 (Witnesses sworn.)

3 PRELIMINARY MATTERS

4 MS. BAILEY: Mr. Sullivan.

5 MEMBER ETHERLY: Mr. Chair, if I may, just
6 as a quick preliminary matter, I almost neglected to
7 note that I did not participate in the January 21st or
8 28th proceeding, but I have read the record in their
9 entirety and would be prepared to participate fully
10 going forward.

11 CHAIRMAN GRIFFIS: Good. Thank you.

12 MEMBER ETHERLY: Thank you.

13 MR. SULLIVAN: Good morning, Chairman
14 Griffis and members of the Board. For the record, my
15 name is Marty Sullivan. I'm with the law firm of
16 Shaw, Pittman, representing Girls and Boys Town, the
17 owner of the property which is the subject of this
18 appeal.

19 On January 28th, this Board granted with
20 prejudice our motion to dismiss this appeal as to the
21 allegations relating to parking. The Board denied
22 without prejudice our motion to dismiss as it relates
23 to the side yard allegation. The Board stated at that
24 time that if the property owner wished to clarify its
25 position, that it would be willing to entertain such a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 clarification, and we do wish to reiterate and clarify
2 our motion at this time.

3 CHAIRMAN GRIFFIS: We did say that?

4 MR. SULLIVAN: Yes, you did. I have the
5 motion to dismiss without prejudice. Although there
6 wasn't a written order on this, so I'm going from the
7 transcript. Commissioner May, on what I have as page
8 27, says, "With regard to the side yard, if the owner
9 of the property wants to make further motions with
10 regard to dismissing the case because of some other
11 argument that could be raised or some other
12 clarification, I would certainly be willing to hear
13 that."

14 I would also add that the legal theory or
15 argument that came up on January 28th was not
16 discussed on the record up until that point, and we --

17 CHAIRMAN GRIFFIS: I'm sorry. The last
18 part? The legal theory was not --

19 MR. SULLIVAN: The issues discussed on
20 January 28th frankly --

21 COMMISSIONER MAY: I think I made the
22 argument and no one else did, so there was no time for
23 them to respond to it, is what it comes down to.

24 CHAIRMAN GRIFFIS: Is that what you mean?

25 MR. SULLIVAN: That's what I mean. Nobody

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 thought of that theory until it came up on the 28th.

2 CHAIRMAN GRIFFIS: I see. Okay.

3 MR. SULLIVAN: And I will be relatively
4 brief.

5 CHAIRMAN GRIFFIS: Okay. Well, let me
6 hear from the Board, because my transcript also shows
7 another member indicating that they would go ahead
8 with the merits of the appeal and that we could bring
9 up the dismissal at any time we felt able, both of
10 which give an indication that we might entertain it
11 again.

12 Is there any objection to hearing a brief
13 discussion of the motion? We will hear presentation
14 of the motion and then we will hear from the other
15 participants. Let's go, then.

16 MR. SULLIVAN: Thank you.

17 I have two clarifications to make
18 regarding the January 28th decision regarding our
19 motion to dismiss the appeal.

20 In dismissing our motion on January 28th,
21 the Board seemed to rule that our change of use in the
22 permanent revision of June of 2002 triggered a change
23 in the proposed structures and the attendant side yard
24 regulations. This is simply not true.

25 Under the original building permits, the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 proposed structures, separate and apart from the then
2 proposed use, were correctly reviewed and approved
3 under the side yard regulations applicable to
4 semi-detached dwellings.

5 How do we know that? First of all, we
6 have the original building permits and applications
7 and the revised permits and applications. They both
8 say, under Description of Proposed Work, they say
9 two-story and cellar residence. These reflect on
10 their face that these structures were defined as
11 single-family dwellings. The use was separate from
12 the description of the proposed work, and the use was
13 youth residential care home originally, altered to
14 single-family dwelling.

15 Second, the Office of the Zoning
16 Administrator defined the structures separate and
17 apart from their proposed uses as semi-detached family
18 dwellings.

19 Third, the structures, when they are used
20 for a youth residential care home of six or less, fit
21 firmly within the definition of semi-detached
22 dwellings. Semi-detached dwellings are defined as, at
23 the beginning, a one-family detached dwelling. The
24 Girls and Boys Town model, six foster children living
25 with a married couple, is absolutely a family as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 defined in the zoning regulations, and the structure
2 is undoubtedly a building designed for human
3 habitation, i.e. a dwelling as defined in the zoning
4 regulations.

5 Now, all that's well and good, but my
6 second point of clarification is more important
7 because the second point of clarification is that the
8 issue of whether or not the Zoning Administrator was
9 correct in defining these structures as semi-detached
10 family dwellings is not germane to the issue now
11 before the Board, nor can it be second-guessed at this
12 late stage.

13 CHAIRMAN GRIFFIS: Can you say that again.

14 MR. SULLIVAN: It's not germane, it
15 doesn't matter what the Zoning Administrator was
16 supposed to do in September of 2001, and the Board
17 can't go back and touch that decision.

18 The issue that is before this Board right
19 now is not how the Zoning Administrator should have
20 defined these homes; the issue is how he did define
21 these homes in September of 2001. The relevant facts
22 for the Board to consider are clear. There's only
23 four of them.

24 First, sometime prior to September 6th,
25 2001, the Zoning Administrator made a decision that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the proposed structures were semi-detached dwellings,
2 and as such they complied with the side yard
3 restrictions applicable to semi-detached dwellings.

4 The second relevant fact is that the
5 appellant was chargeable with notice of that
6 particular decision on September 6th, 2001, and from
7 that time on was fully capable of appealing that
8 decision.

9 CHAIRMAN GRIFFIS: September 6, 2001, was
10 the original --

11 MR. SULLIVAN: The issuance of the
12 permits.

13 CHAIRMAN GRIFFIS: The original.

14 MR. SULLIVAN: The original permits,
15 correct.

16 CHAIRMAN GRIFFIS: Okay.

17 MR. SULLIVAN: The permits that
18 memorialize the decision that we're talking about here
19 today.

20 CHAIRMAN GRIFFIS: Right.

21 MR. SULLIVAN: The third relevant fact is
22 that the appellant failed to file an appeal of that
23 decision by November 7th, 2001, 60 days following the
24 time that they were chargeable with notice, which
25 leaves us with the fourth relevant fact:

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 On November 8th, 2001, this Board's
2 jurisdiction to entertain this appeal was extinguished
3 and it cannot be legitimately restored.

4 Those are the facts. The law is just as
5 clear as the facts. If an appeal is not timely filed,
6 the Board is without jurisdiction to entertain it. An
7 appeal is not considered to be timely filed if it is
8 filed more than two months after notice of the
9 decision being appealed, and the appellant is
10 chargeable with that notice upon issuance of the
11 permit.

12 The decision at issue here was made as of
13 September 6th, 2001. It was not appealed until July
14 of 2002. That's eight months too late. The Board
15 should not get hung up on the permit revision in June
16 of 2002 which revised only the proposed use.

17 That permit revision involved only a
18 decision of the Zoning Administrator to approve our
19 request for a change in the proposed use and a change
20 in the proposed use only, a request, I might add, that
21 we made or we -- a strategy that we took at the
22 suggestion of this Board in Order 16791 when they said
23 that we could protect our property interest by
24 dedicating the property to a matter of right use.

25 In June of 2002, the Zoning Administrator

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 did not alter his September 2001 decision. In June of
2 2002, the Zoning Administrator did not make a new
3 decision as to side yards. The Zoning Administrator's
4 original decision stands today. The permit revision
5 to change only the proposed use cannot resurrect the
6 appellant's right to appeal, a right that vanished
7 forever eight months earlier.

8 Now, as we consider the rationale for the
9 Board's decision on January 28th, we came up with two
10 possible conclusions as to what the Board was stating.

11 First, the Board could have been ruling that the
12 Zoning Administrator erred in originally defining
13 these structures as semi-detached dwellings. If
14 that's the case, the Board cannot hear this appeal
15 because it is eight months beyond its jurisdiction to
16 entertain that question.

17 The only other possible conclusion is that
18 the Board was ruling that the Zoning Administrator did
19 in fact originally define these proposed structures
20 as, quote/unquote, any other structure rather than as
21 semi-detached dwellings, but that cannot be the case
22 either because we have only to ask the Zoning
23 Administrator how these structures were originally
24 defined by his office. He defined them and reviewed
25 and approved there as semi-detached dwellings separate

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealgross.com

1 and apart from their proposed use as youth residential
2 care homes.

3 CHAIRMAN GRIFFIS: How do we know that?

4 MR. SULLIVAN: Well, we know that first of
5 all from the face of the building permit applications.

6 CHAIRMAN GRIFFIS: Okay. But you are
7 asserting that we only need to ask.

8 MR. SULLIVAN: We can ask. The can ask
9 the Zoning Administrator.

10 CHAIRMAN GRIFFIS: But that doesn't help
11 your argument to the motion to dismiss right now.
12 That means we can --

13 MR. SULLIVAN: Well, the Board can ask the
14 Zoning Administrator at this point.

15 CHAIRMAN GRIFFIS: Right. Okay. And let
16 me see if I'm following you up to this point.

17 MR. SULLIVAN: Well, one step further than
18 that, though. If the Board -- the Board also doesn't
19 have jurisdiction to ask the Zoning Administrator
20 exactly what he was thinking ten months ago. So I
21 would go a step further, even. I know personally that
22 the Zoning Administrator approved them as
23 semi-detached dwellings because they fit the
24 definition of family, they fit --

25 CHAIRMAN GRIFFIS: You put us in an

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 awkward situation, though, asking us to ask him and
2 then telling us we can't.

3 MR. SULLIVAN: No. No. Feel free to ask
4 him. I'm saying you don't even need to.

5 CHAIRMAN GRIFFIS: I see. I see.

6 MR. SULLIVAN: Feel free to ask him if it
7 gives you a level of comfort in dismissing this appeal
8 for timeliness, if that's the issue itself, but I
9 would take it even a step further.

10 CHAIRMAN GRIFFIS: I think it's pretty
11 clear for the Board, but let me summarize to make sure
12 it is, and we have a motion to dismiss based on
13 timeliness, and your point is the original permit,
14 September 6th, 2001, started the clock and that was --
15 so by November 8th, 2001, any sort of appeal rights
16 were lost; that an appeal properly before this Board
17 would be an appeal of any of the revisions that were
18 noted in the resubmission for the new permits.

19 MR. SULLIVAN: That's correct.

20 CHAIRMAN GRIFFIS: Okay. And you're
21 indicating that the only thing that has changed in the
22 substance of this permit application and drawings is
23 the use.

24 MR. SULLIVAN: Correct.

25 CHAIRMAN GRIFFIS: Mr. May.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 COMMISSIONER MAY: I haven't heard
2 anything that really contradicts the basis of what we
3 discussed before, which was that once the use changed,
4 the requirements changed, and everything that he said
5 so far may be valid points for the hearing of the case
6 itself, it doesn't go to the question of whether or
7 not we have jurisdiction to hear it at this point, in
8 my mind. I think that the motion to dismiss should be
9 denied at this point because we argued this whole
10 issue before.

11 CHAIRMAN GRIFFIS: Okay. Without great
12 deliberative piece at this point, because we want to
13 hear from the others involved, I think the case for
14 the motion right now is indicating that the structure
15 as defined did not change even with the use change,
16 and the structure is where you would go to look at the
17 required side yard.

18 MR. SULLIVAN: I'm also saying that if the
19 Board wants to reinterpret the -- a reinterpretation
20 by the Board of what the Zoning Administrator should
21 have done on September 2001, i.e. whether or not the
22 Zoning Administrator should have reviewed these under
23 775.3 or .5, is irrelevant. He actually did something
24 and you can't change the facts. The facts of the
25 matter are he reviewed them under 775.3; the facts of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the matter was that decision wasn't appealed.

2 CHAIRMAN GRIFFIS: But we have a revision,
3 and so what we're looking at is, in this revision,
4 this use, does that spring anything else that should
5 have been reviewed differently, and that's what's
6 being appealed.

7 MR. SULLIVAN: But how does that change?
8 How does that -- first of all, we know the Zoning
9 Administrator reviewed them both the same way, or if
10 not, you can ask him and find out. They were both
11 reviewed under 775.3. If you think he was wrong
12 originally, because I don't think you're questioning
13 that he was wrong in the permit revision, then you're
14 reaching back to September 2001 and saying, "You
15 should have reviewed them under --

16 CHAIRMAN GRIFFIS: Hypothetically, even if
17 we found right now that they were not -- that it was
18 not a correct issuance of the permit based on the side
19 yard requirements, that we actually don't have the
20 jurisdiction to remedy that because it was reviewed
21 similarly in the original and --

22 MR. SULLIVAN: The permit revision is
23 meaningless, in my mind. Ten months passed. Now, say
24 there was no permit revision and the Zoning
25 Administrator reviewed this under 775.3, and then

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 nothing happened for ten months, or, in this case, we
2 had an appeal of a separate matter on this case, ten
3 months later, the appellant comes forward and said,
4 "We want to appeal the side yards." Well, that would
5 be obvious to the Board; they can't do that.

6 CHAIRMAN GRIFFIS: That's true.

7 MR. SULLIVAN: The permit revision didn't
8 change --

9 CHAIRMAN GRIFFIS: Right.

10 MR. SULLIVAN: -- anything there.

11 CHAIRMAN GRIFFIS: I understand.

12 MR. SULLIVAN: The permit revision doesn't
13 change the fact that the Zoning Administrator made his
14 decision.

15 CHAIRMAN GRIFFIS: Any other questions for
16 Mr. Sullivan at this time?

17 COMMISSIONER MAY: But, Mr. Sullivan, is
18 it the fact that the permit revision didn't change
19 anything that impacts the ability for it to be
20 appealed, or the fact that it was simply an order or a
21 decision of a body of the District of Columbia
22 Government that can be appealed? I mean --

23 MR. SULLIVAN: No. The law states -- the
24 Court of Appeals has stated that -- I believe it's the
25 Woodley Park case, and it was in my original brief.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 It states that a decision of the Zoning Administrator
2 or a revision of a building permit is only appealable
3 as to the aspects of that permit that were revised.
4 So in effect they are saying that the key thing that
5 they are looking at is the decision of the Zoning
6 Administrator, not the actual issuance of the permit.

7 To say that every time we revised a
8 permit, whether it be significant or insignificant,
9 minor, that that resurrects the right to appeal every
10 other aspect of that permit, especially in this case
11 when the structure is 95 percent built -- I mean,
12 that's the whole reason for the requirement that an
13 appeal be filed timely.

14 CHAIRMAN GRIFFIS: But you would agree
15 that there is a difference between revisions in, say,
16 the mechanical plans or material changes that would
17 need to be reviewed by DCRA, there's a difference
18 between that as part of a permitting process and
19 changing an entire use.

20 MR. SULLIVAN: Well, can we just ask the
21 Zoning Administrator, because his opinion actually is
22 unrefuted. You can't take evidence?

23 CHAIRMAN GRIFFIS: No. It gets us closer
24 to the fact of just getting into this, and so I think
25 we want to exhaust your motion and then we can get

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 into it. If we're ending up -- if we're going into
2 the substance and we're asking the Zoning
3 Administrator how they do it, I'm going to air and
4 have a presentation of a case and let that be elicited
5 elsewhere.

6 MR. SULLIVAN: Even though the Board has
7 no jurisdiction to hear that case.

8 CHAIRMAN GRIFFIS: Well, that's what we're
9 trying to establish.

10 MR. SULLIVAN: Well, you can't establish
11 that after the fact, really, can you? I mean, I
12 didn't really understand the argument on January 28th
13 as to --

14 COMMISSIONER MAY: We already have
15 established that the Board has jurisdiction in the
16 previous discussion, and the question now is whether
17 there's anything new that you're bringing forth. At
18 this time --

19 MR. SULLIVAN: Well, I'm responding to the
20 argument because I don't understand why, if the Board
21 thinks that the Zoning Administrator should have
22 reviewed these homes under 5.3 instead of 5.5, how
23 that changes anything. I mean, if you're saying that
24 it was an extenuating circumstance that confused the
25 appellant, maybe now we're getting somewhere and I can

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 tell you how that's not a possibility; but other than
2 that, I don't see how we touch this appeal without
3 touching September 2001 decisions.

4 CHAIRMAN GRIFFIS: Okay. Let's --

5 MR. SULLIVAN: The appellants -- they
6 didn't bring up 775.5, the Board brought that up, so I
7 don't see how they could have been surprised or
8 confused by that decision because they never even
9 thought of it. The only thing they mentioned was that
10 there was a fundamental change, a fundamental change
11 in our application. I don't understand the definition
12 of that, but I would agree, there was a fundamental
13 change.

14 Unfortunately, they did not appeal the
15 fundamental change; they appealed instead the
16 fundamental consistencies of the structures that are
17 in the ground, foundations in, twelve months later.
18 This is the reason we have a rule. You can't give
19 somebody a building permit, let them build it for
20 twelve months, never question it, and then say, "Oh,
21 now we're going to question it. Tear the buildings
22 down."

23 CHAIRMAN GRIFFIS: But that's not 100
24 percent true. This went through an appeal.

25 MR. SULLIVAN: That makes it even more so

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 because it went through an appeal. Five hearings.
2 They sat here and they never once discussed any
3 dissatisfaction with these structures.

4 CHAIRMAN GRIFFIS: I understand that, but
5 you're going -- it's not as clear as you're putting it
6 out that no one addressed the construction of this. I
7 mean, once in an appeal, the developer is taking a
8 risk in continuing its construction.

9 All right. I think we understand. Any
10 other questions of Mr. Sullivan at this point?

11 (No response.)

12 CHAIRMAN GRIFFIS: Then let's hear from
13 the appellant.

14 MS. WITHUM: Good afternoon. Mary Withum
15 for the appellant, Southeast Citizens for Smart
16 Development.

17 First of all, I would like to say that I
18 really wasn't prepared to address this because we
19 thought that we had essentially dealt with this at the
20 last hearing, although I recognize that they are
21 always entitled to raise a motion to dismiss on
22 jurisdictional grounds, although I think he's raising
23 the same thing that you had addressed before.

24 If you look on the face of the
25 applications, for example, in looking at 1314 -- this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 is the original application -- it does describe it as
2 a youth residential care home; therefore, it was a
3 CBRF. A CBRF, as was discussed previously, can't be
4 anything else, and when you -- a CBRF does not require
5 a side yard under 775.5, one-family detached or
6 semi-detached does under the 775 regulations, and that
7 invoked 405.3 for side yards.

8 Another point I would like to make is that
9 while the -- Mr. Sullivan says that there was a
10 determination by the Zoning Administrator back in
11 September of 2001 that these were either detached or
12 semi-detached single-family dwellings, frankly I would
13 love to know if there is anything that actually
14 documents that. We have done Freedom of Information
15 Act requests and looked through the documents in the
16 file and, in fact, until the October 21st, 2002,
17 letter, I don't know that these were ever referred to
18 as semi-detached structures. So this is first news to
19 us that the Zoning Administrator had said that
20 previously.

21 Again, the change in use brings in --
22 significantly changes this and it brings in different
23 regulations that apply, and I think the previous
24 holding of the Board should stand.

25 CHAIRMAN GRIFFIS: All right. First you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 cited that CBRFs do not have a side yard requirement.

2 What section are you actually referring to there?

3 MS. WITHUM: 775.5. And I'm referring to
4 the discussion previously where they would be
5 classified under the other --

6 CHAIRMAN GRIFFIS: Right. And that's
7 indicating --

8 MS. WITHUM: -- as discussed on January
9 28th.

10 CHAIRMAN GRIFFIS: -- that if there is a
11 side yard -- none is required, but if there is one,
12 there is a dimension of which that side yard should
13 be.

14 MS. WITHUM: Right.

15 CHAIRMAN GRIFFIS: So it's not so clear
16 that CBRFs don't have side yards. Okay. And you're
17 stating and speaking to the motion that this use
18 change does, in fact, relate to how it should have
19 been reviewed for side yard requirement.

20 MS. WITHUM: Absolutely. And we think
21 that that was triggered the date the permits were
22 reissued, which was July 8th, 2001. I believe our
23 appeal was August 1st or 2nd -- excuse me -- July 8th,
24 2002, and our appeal was I believe August 1st or 2nd,
25 2002, so we were within 30 days of that decision.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 CHAIRMAN GRIFFIS: Okay. Anything else?

2 MS. WITHUM: That's it.

3 CHAIRMAN GRIFFIS: Does the appellee, the
4 Zoning Administrator, want to speak to the motion?

5 MR. PARKER: No. We have no comment on
6 that. We will be prepared to provide any testimony
7 that the Board wants to enlighten this, but in terms
8 of the timeliness issue, I think we're just going to
9 be neutral on this at this point.

10 CHAIRMAN GRIFFIS: Interesting.

11 Mr. May.

12 COMMISSIONER MAY: I haven't heard
13 anything this morning -- this afternoon, rather -- to
14 convince me that the discussion that we had last time
15 was not the right discussion and the right conclusion.
16 I think that the motion to dismiss should be denied
17 and I would so move.

18 CHAIRMAN GRIFFIS: Is there a second?

19 MEMBER ETHERLY: For the purposes of
20 discussion, I will second that motion.

21 CHAIRMAN GRIFFIS: Thank you.

22 Okay. There is a motion on the table. It
23 has been seconded. Let's hear discussion. Mr. May,
24 as I'm hearing today's iteration of the motion to
25 dismiss based on timeliness, it is substantially based

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 on the fact that the original permit of September 2001
2 defined how this would be reviewed; that is
3 particularly for the side yard; that, in fact, the
4 jurisdiction, on November 8th, 2001, would have lapsed
5 for an appeal to be heard; that the permit revision
6 changed the use only; that that is the appealable
7 portion; and so it has been stated that, in fact, that
8 does not bring us to the reevaluation of the side
9 yards.

10 We do have, as asked -- well, there it is.

11 That's my view of the presentation.

12 COMMISSIONER MAY: Okay. At the risk of
13 just repeating what is in the record already, I will
14 state that from what we have seen in this case, it is
15 apparent to me that, at least from the information
16 that we have -- there may be other information out
17 there that we've yet to see, but from the information
18 that we have, there was a substantive change to the
19 building permits that kicked in new requirements when
20 they filed in July of 2002.

21 In other words, when the use changed from
22 a residential youth care facility to a single-family
23 residential use, the side yard provision changed from
24 775.5 to 775.3, and under 775.3, the side yard
25 requirement should have been considered, the R-1-R-2

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 side yard requirement, which refers us back to 405.3.

2 I mean, this is a substantive change, and
3 now it may well be that the Zoning Administrator did
4 give further consideration to all aspects of the side
5 yard provisions or reviewed it under 775.3, but I
6 don't have anything in evidence to indicate that that
7 was the case. As far as I know, I mean, everything
8 that we have on the face of it indicates that the use
9 changed and the requirements changed at that moment,
10 and therefore, I think that the appeal is timely filed
11 with regard to this specific issue.

12 CHAIRMAN GRIFFIS: But how do you address
13 the issue under 775.3 as a one-family semi-detached
14 dwelling? How did the structures in the original
15 permit not fit within that category?

16 COMMISSIONER MAY: Well, that goes back to
17 the issue of the definition of the different types of
18 structures, and I think that the -- let's see. That
19 part of the discussion -- I have to reread my original
20 argument on -- my original notes on it.

21 Okay. By definition, if something is a
22 youth care residential facility, it is a CBRF and it
23 is nothing else, and that section of definitions which
24 define the different building types includes CBRF and
25 includes single-family semi-detached among the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 definitions, so the definitions are exclusive. So if
2 something is not -- if it is defined as a youth care
3 residential facility, it cannot be, by definition,
4 anything else. It cannot be a single-family
5 semi-detached house.

6 CHAIRMAN GRIFFIS: But a youth care
7 residential facility can occupy a single-family or
8 semi-detached building; is that correct?

9 COMMISSIONER MAY: I don't believe so. I
10 think that's not the way the regulations read in terms
11 of the definitions. Unfortunately, I don't have my
12 copy of the regulations with me. I can cite the
13 paragraph for you, if you want. We got into this
14 discussion the first time around with regard to
15 definitions. Here we go. Okay. Youth care
16 residential home is defined under paragraph G, and I
17 believe that's what the application originally stated,
18 all right? And then at the very beginning of that, I
19 think it's in the beginning -- hold on a second.
20 Okay.

21 If an establishment of a community based
22 residential facility as defined in this section -- if
23 an establishment is a community based residential
24 facility as defined in this section, it shall not be
25 deemed to constitute any other use permitted under the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 authority of these regulations. Single-family
2 residential is another use, so it can't be a youth
3 care residential facility and a single-family
4 semi-detached home at the same time.

5 CHAIRMAN GRIFFIS: I see.

6 COMMISSIONER MAY: I mean, the whole point
7 of that is so that you don't have multiple sets of
8 regulations, you don't have to review a building for
9 every single set of regulations that may apply.

10 CHAIRMAN GRIFFIS: Right.

11 COMMISSIONER MAY: Thank you.

12 CHAIRMAN GRIFFIS: Okay. Any other
13 discussion on the motion?

14 (No response.)

15 CHAIRMAN GRIFFIS: Then the motion before
16 us -- it has been seconded and spoken to -- is to
17 dismiss the motion -- is not to uphold the motion to
18 dismiss based on timeliness.

19 COMMISSIONER MAY: The motion was to deny
20 the motion to dismiss the appeal.

21 CHAIRMAN GRIFFIS: Indeed. Any other
22 clarification needed?

23 (No response.)

24 CHAIRMAN GRIFFIS: Then I would ask for
25 all those in favor of the Board's motion to signify by

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 saying aye.

2 (Chorus of ayes.)

3 CHAIRMAN GRIFFIS: And opposed?

4 (No response.)

5 CHAIRMAN GRIFFIS: Let's record that.

6 MS. BAILEY: The motion is four-zero-one
7 to deny the property owner's motion to dismiss based
8 on timeliness. The motion was made by Mr. May,
9 seconded by Mr. Etherly. Mr. Griffis is in support.
10 Mr. Zaidan is not present today, and there is no
11 mayoral appointee sitting in. I'm sorry, Mr.
12 Chairman. The vote is three-zero-two.

13 CHAIRMAN GRIFFIS: Good. Thank you very
14 much. In which case let's proceed.

15 MS. BAILEY: The property owner -- I'm
16 sorry. The appellant.

17 MS. WITHUM: May I just do a few
18 housekeeping matters initially just make sure we have
19 our exhibits right?

20 CHAIRMAN GRIFFIS: Okay.

21 MS. WITHUM: Okay. Last week, we faxed
22 new exhibits, three letters. One was dated July 8th,
23 another July 15th, and another August 5th. Those
24 should be identified as Exhibits 7A, 7B and 7C, just
25 because we're trying to keep everything in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 chronological order.

2 (Appellant's Exhibits No. 7A, 7B
3 and 7C were marked for
4 identification.)

5 CHAIRMAN GRIFFIS: Okay. Those exhibits
6 were what?

7 MS. WITHUM: Three letters that came in
8 last -- I believe it was last Thursday, Wednesday or
9 Thursday.

10 CHAIRMAN GRIFFIS: One from Ms. Withum?

11 MS. WITHUM: Yes.

12 CHAIRMAN GRIFFIS: One from Ms. -- a
13 letter from -- three letters -- oh, right.

14 MS. WITHUM: Right. Also --

15 CHAIRMAN GRIFFIS: Actually, I have noted
16 one letter with three additional documents attached;
17 is that correct?

18 MS. WITHUM: Yes. That's the cover letter
19 and the three additional documents are the ones that
20 we want to identify as 7A, 7B and 7C.

21 CHAIRMAN GRIFFIS: Oh, right. Okay. Were
22 the other participants served this?

23 MS. WITHUM: Yes, they were.

24 CHAIRMAN GRIFFIS: Do you have that, Mr.
25 Sullivan?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MR. SULLIVAN: Yes.

2 CHAIRMAN GRIFFIS: Okay. Okay.

3 MS. WITHUM: The other thing, I wasn't
4 certain whether we were actually moving the Shaw
5 Pittman plans and applications in as exhibits. Are
6 those going to be made a part of the record? Because
7 if not, then we would like to, at least for the
8 reissued permits, the applications and the plans,
9 which are Exhibits B and D, we would like to include
10 them as part of our exhibits.

11 CHAIRMAN GRIFFIS: My understanding is
12 those have already been introduced. I believe they
13 are Exhibit Number 32, which would have come in with
14 -- in either case, yes.

15 MS. WITHUM: Okay. I just wanted to make
16 sure they were going to be part of the record.

17 The other thing is, when we were here as
18 time, we were talking about the plat and our
19 difficulty getting a copy of the plat. Mr. Clark's
20 office did provide us a copy of this and we're
21 prepared to include this as Exhibit 4.

22 CHAIRMAN GRIFFIS: That's your Exhibit 4,
23 right?

24 MS. WITHUM: Yes. We already have a plat,
25 but what we had wasn't apparently what -- the Office

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 of the Surveyor did not have the most current plat,
2 and this is what we got from Dave Clark's office.

3 (Appellant's Exhibit No. 4 was
4 marked for identification.)

5 CHAIRMAN GRIFFIS: What do you mean, most
6 current?

7 MS. WITHUM: Well, if you look at our
8 Exhibit 4, the Office of the Surveyor -- this is what
9 the Office of the Surveyor provided us, which appears
10 not to be this, which is what Mr. Clark's office
11 provided to us, because we had had some problem
12 getting --

13 CHAIRMAN GRIFFIS: But how do these relate
14 to this appeal and this project? Which was the plat
15 that was submitted?

16 MS. WITHUM: Well, BZA had requested that
17 we put the -- that we submit the plat to them. From
18 the very beginning, they had asked for this, and we
19 had had problems getting it.

20 CHAIRMAN GRIFFIS: Okay.

21 MS. WITHUM: It's just a matter of
22 housekeeping.

23 CHAIRMAN GRIFFIS: No, I'm sure there was
24 a great reason why this Board would ask for it. My
25 question is whether the pertinence of it was not the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 plat that was submitted for the permit, not just any
2 new plat we could pull up now. I'm not sure how that
3 would relate --

4 MS. WITHUM: Well, quite frankly, we don't
5 need it. All we're doing is submitting it in response
6 to the BZA request. We're perfectly satisfied -- in
7 fact, we're going to be relying upon Exhibit D that
8 Mr. Sullivan submitted that has -- actually I think
9 these are the plats that we really want to look at,
10 which are the ones that were included with the
11 reissued permits. That's what we're happy to use and
12 look at for our purposes.

13 CHAIRMAN GRIFFIS: Yes. Those are the
14 pertinent documents.

15 MS. WITHUM: Okay. Well, that's fine.

16 CHAIRMAN GRIFFIS: And that's in already,
17 correct?

18 MS. WITHUM: Okay. Well, that's what I
19 thought. As I said, I was just responding to the
20 BZA's request, that's all.

21 CHAIRMAN GRIFFIS: Well, I'm sure it was
22 very wise when we said it. Okay.

23 MS. WITHUM: One other thing that we
24 wanted to submit were some photographs of the site.
25 Since we haven't done any kind of a site visit, we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 thought it would be appropriate to have some photos of
2 the site that our witness will be talking about just
3 because it gives more than just a two-dimensional look
4 at what we're talking about, and I think it just gives
5 a little bit more insight. We would like to submit
6 those.

7 CHAIRMAN GRIFFIS: That will help us
8 understand the side yard issue?

9 MS. WITHUM: Yes, I think it will.

10 CHAIRMAN GRIFFIS: More than a drawing and
11 a plat?

12 MR. SULLIVAN: Excuse me. Are we going to
13 have those shared with the other parties? We haven't
14 seen those.

15 MS. WITHUM: Yes. Absolutely.

16 CHAIRMAN GRIFFIS: If we accept it, we
17 will. Any reason not to accept the photographs of the
18 existing condition? Any objections, property owner --

19 MR. SULLIVAN: Just a second.

20 (Pause.)

21 MR. SULLIVAN: Marty Sullivan for the
22 property owner. I don't have a strong objection, but
23 if the issue is -- we're analyzing the building permit
24 applications and I don't know how this would be
25 germane to deciding whether or not those plans comply

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 with the regulations.

2 COMMISSIONER MAY: Believe it or not, we
3 actually get a lot of information on cases that is not
4 necessarily germane and we have to sort through it
5 all. So I would say we should take it all in.

6 MR. PARKER: Arthur Parker on behalf of
7 the Office of Corporation Counsel and the Zoning
8 Administrator. Based on that comment, we won't
9 object.

10 CHAIRMAN GRIFFIS: Very persuasive, Mr.
11 May.

12 Okay. We will note the property owner's
13 concern of its pertinence to this and let's take it
14 into the record and we will make our decision on that
15 and how it informs us.

16 Anything else?

17 MS. WITHUM: Yes. There is only one other
18 issue. I'm about to begin my opening statement, which
19 will only take about seven to eight minutes to go
20 through. But we did have a request from the ANC
21 representative who is doing a -- who is going to be
22 reading a statement on behalf of the ANC, and they
23 were wondering if they could put their statement in
24 earlier, before we start our case rather than at the
25 very end. Is there any problem with that? It's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 really more of an issue of timing. They have a
2 meeting tonight and the executive director is here
3 today, and she said, if possible, she would prefer to
4 go back to the ANC offices and prepare for tonight,
5 but if that's --

6 CHAIRMAN GRIFFIS: Right. Let's discuss
7 that briefly, and forgive me, because I have
8 overlooked asking the ANC for their response on any of
9 the issues that are before us. So here would be a
10 great opportunity. Oh, boy. Actually, you need to
11 call it to my attention, because there's a whole host
12 of things I need to keep track of up here, and so I
13 may miss certain things. Hopefully we haven't gone
14 against any direction that you would have had informed
15 us to. But to that going out of order, is there any
16 objection? You want the ANC to present first?

17 MS. WITHUM: Yes. It's a -- what is it?
18 A two-page statement that will be read into the
19 record, and actually it will now be less than two
20 pages since the parking section has been deleted.

21 CHAIRMAN GRIFFIS: Any objection of the
22 Board in looking at that, or moving the schedule
23 around? It's just the order of the proceedings.

24 MEMBER ETHERLY: I don't have any
25 objection, Mr. Chair. I know that we had a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 sensitivity to time in regards to our colleague. Is
2 there a need to read it verbatim into the record or
3 can we have highlights? I mean, I'm flexible either
4 way.

5 MS. WITHUM: Well, I think if it's -- I
6 mean, I know my opening statement is two pages, and I
7 timed it this morning -- it's seven minutes. I doubt
8 that hers is going to be much more than that if it's
9 two pages.

10 CHAIRMAN GRIFFIS: Okay. The property
11 owner have any objection to revising the schedule
12 process, hearing the ANC first? The ANC is then not
13 going to be participating with the rest of the case
14 presentation.

15 MS. WITHUM: Well, we actually have the
16 vice chair of ANC-6B sitting here, but for purposes of
17 the statement, the executive director is going to be
18 reading that into the record.

19 CHAIRMAN GRIFFIS: I see. All right.

20 Mr. Sullivan, any objection? You can just
21 shake your head no if it's no.

22 MR. SULLIVAN: No.

23 CHAIRMAN GRIFFIS: Fabulous. I will
24 record it into the record.

25 Mr. Parker, any objection?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MR. PARKER: So long as they are agreeing
2 to delete these comments regarding the parking
3 requirements because --

4 CHAIRMAN GRIFFIS: Yes. Okay. Good. And
5 that brings up an interesting point. I think let's
6 start with the ANC, then. Two points Mr. May has
7 brought up, or Mr. Etherly, in terms of being concise.

8 We can rip through this and then they can continue
9 with their participation in the case. Secondly, and
10 this is for everybody, clearly we have defined the
11 scope. We're talking side yards here, and that's what
12 we will hear, and we will be very deliberative in
13 cutting people off if we stray too far from that. I
14 will ask that if they believe it is incorrect for us
15 to stop them, that they immediately indicate to us and
16 persuade us of why we're hearing what we're hearing
17 that gets us to the side yards. So hopefully I won't
18 have to say that a lot, but that being stated, let's
19 go to the ANC.

20 Whereupon,

21 CANDACE AVERY,
22 was called as a witness by counsel on behalf of the
23 Appellant and, having been previously duly sworn, was
24 examined and testified as follows:

25 DIRECT TESTIMONY

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 THE WITNESS: Good afternoon. I am
2 Candace Avery, Executive Director of ANC-6B. This
3 testimony -- copies were given to your staff person,
4 and the original date of the testimony was January
5 21st, but we were deferred. We didn't get to testify
6 that day because you deferred the hearing to a later
7 date.

8 At its regularly scheduled and properly
9 noticed meeting of September 12th, 2002, ANC-6B voted
10 seven-zero-zero, seven members constituting a quorum,
11 to join in the appeal filed by the Southeast Citizens
12 for Smart Development regarding the decision by DCRA
13 to grant building permits to Father Flanagan's Boys'
14 Home to construct single-family dwellings at 1308,
15 1310, 1312 and 1314 Potomac Avenue, Southeast, BZA
16 Case Number 16935.

17 For the record, the date of this meeting
18 is different from that of our normal monthly meeting,
19 which would have been on Tuesday, September 10th.
20 Because that date coincided with D.C. primary election
21 day, the executive committee of the ANC voted to move
22 the date of the meeting to the 12th, with proper
23 notice being given. The ANC's decision was forwarded
24 to the Board in the form of two letters dated
25 September 17th and December 31st, 2002.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 The ANC believes that these buildings do
2 not conform to the zoning requirements for one-family
3 dwellings in several respects. First, three of the
4 four buildings do not meet side yard requirements of
5 the zoning regulations. These buildings are in a
6 C-2-B zone. According to DCMR 775, one-family
7 attached dwellings in a commercial zone must conform
8 to the side yard requirements of an R-1 zone, and
9 one-family semi-detached dwellings must conform to the
10 requirements of an R-2 zone. Those requirements are
11 for an eight-foot side yard.

12 In BZA Case Number 16811, the Pritchard
13 case, this Board ruled that a semi-detached dwelling
14 that does not have a common division wall with an
15 adjacent building requires an eight-foot side yard on
16 both sides. This requirement has clearly not been met
17 for 1310, 1212 and 1314 Potomac Avenue.

18 Note that the decision in the Pritchard
19 case was made on June 4th, 2002, a month before the
20 issuance of these building permits. DCRA seems
21 completely oblivious to the Board's ruling in that
22 case as shown by the response to then-Chairperson
23 Jarbo dated October 17th, 2002, which makes no
24 reference to the Board's finding in that case.

25 The next paragraph is about the parking,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 which has already been taken care of.

2 The ANC has voted a number of different
3 times on issues related to the proposed Boy's Town
4 site on Pennsylvania Avenue. In this case before us,
5 the ANC looked carefully and explicitly at the
6 decision by the Zoning Administrator and did not
7 engage in an analysis and discussion about the merits
8 of the proposed project. That discussion is properly
9 the subject of a hearing on a request for a zoning
10 variance or special exception.

11 The issue before the Board is the decision
12 by the Zoning Administrator to grant building permits
13 for these buildings as single-family dwellings. It is
14 the conclusion of ANC-6B, as represented in our
15 unanimous vote of September 12th, that the decision of
16 the Zoning Administrator was in error, must be
17 reversed to avoid setting a dangerous precedent.

18 Once again, we are very concerned that the
19 BZA uphold the principal that developers should not be
20 allowed to circumvent the process.

21 There is one other very disturbing aspect
22 of this case. Both points concerning side yards and
23 parking were explicitly raised in the earlier BZA
24 decision. As that decision clearly states, the four
25 buildings shown on the site plans, however, do not

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 have the characteristics of one-family dwellings.

2 The Board went on to elaborate in greater
3 detail specifically how the buildings do not meet the
4 parking and side yard requirements for one-family
5 dwellings; yet DCRA deliberately dismissed the BZA's
6 comments as evidenced in the letter from Gregory Love
7 to then-Chairperson Jarbo dated October 17th, 2002.
8 That letter states that the plans were thoroughly
9 reviewed. That supposed thorough review missed the
10 inconsistency about the construction of the driveway.
11 It also indicated that there was no change in proposed
12 construction or activity from the previously submitted
13 plans. If there was no change, then the early
14 comments of the Board are relevant and should have
15 been followed by the Zoning Administrator. They were
16 not, but were dismissed as irrelevant, compounding the
17 Zoning Administrator's error; therefore, ANC-6B
18 respectfully asks the Board to overturn the Zoning
19 Administrator's decision and revoke the permits issued
20 for these buildings.

21 Finally, the Board must also confront the
22 issue of enforcement. Work on these buildings is
23 essentially complete; thus, simply revoking the
24 building permits is not enough. Otherwise, developers
25 will have an incentive to attempt any and all methods

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 to circumvent the process, knowing that there would be
2 no penalties involved. This construction was carried
3 out with the full knowledge that there was strong
4 community opposition. Boys Town assumed the risk of
5 continuing construction knowing that there was a legal
6 challenge to their permits; therefore, should BZA find
7 that the permits are not valid, BZA should also impose
8 stiff sanctions on the developer for continuing this
9 illegal work.

10 That's it.

11 CHAIRMAN GRIFFIS: Thank you very much.

12 Any questions from the Board?

13 (No response.)

14 CHAIRMAN GRIFFIS: Just a clarification on
15 the last paragraph in terms of enforcement and
16 sanctions. That may overstep our bounds, but we will
17 address that if it comes up again.

18 Cross examination? We will start with the
19 appellant.

20 MS. WITHUM: None, Mr. Chairman.

21 CHAIRMAN GRIFFIS: Does the appellee have
22 any cross-examination?

23 MR. PARKER: On behalf of the Zoning
24 Administrator, no.

25 CHAIRMAN GRIFFIS: Property owner? Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 No cross-examination.

2 Okay. Thank you very much.

3 (Witness excused.)

4 CHAIRMAN GRIFFIS: Give me 30 seconds
5 here.

6 (Pause.)

7 CHAIRMAN GRIFFIS: Okay.

8 MS. WITHUM: Mr. Chairman, once again, I
9 just wanted to reiterate that Will Hill, who is
10 sitting right here, is the ANC vice chair -- excuse me
11 -- the vice chair for ANC-6B, so he remains to be an
12 ANC participant. Even though the executive director
13 has to leave, the ANC is listening and is involved and
14 will get a report.

15 I would like to start with my opening
16 statement, and while I have a copy here, I don't have
17 extra copies, but before the end of the day, I will
18 make some copies and submit that for the record. This
19 will be very brief, but if you will bear with me.

20 OPENING STATEMENT BY COUNSEL

21 ON BEHALF OF THE APPELLANT

22 MS. WITHUM: Good afternoon. My name is
23 Mary Withum and I represent the appellant in this
24 appeal, the Southeast Citizens for Smart Development,
25 Incorporated. Advisory Neighborhood Commission 6B has

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 joined in this appeal.

2 This appeal involves four reissued
3 building permits by the Department of Consumer and
4 Regulatory Affairs to Father Flanagan's Boys' Home,
5 owner and developer of the properties at 1308, 1310,
6 1312 and 1314 Potomac Avenue. The permits were
7 reissued by DCRA on July 8th, 2002, for the
8 construction of four two-story and cellar residences.

9 These properties constitute phase one of a proposed
10 two-phase development at the corners of Pennsylvania
11 and Potomac Avenues, Southeast.

12 As plainly noted on the building plans on
13 file with DCRA for the reissued permits, these four
14 structures are intended to constitute four group homes
15 forming part of Boys' and Girls' Town USA owned and
16 operated by the developer.

17 By decision dated June 21, 2002, this
18 Board determined that the Zoning Administrator erred
19 in approving the four building permits first issued
20 for this property on September 6th, 2001, as a matter
21 of right use since the use of the property constitutes
22 a single community based residential facility, a youth
23 residential care home for 24 children that requires
24 special exception review and approval.

25 On July 2nd, 2002, three days before the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 BZA's first decision on this property was to take
2 effect, the developer reapplied for four building
3 permits to continue construction of the four
4 structures as single-family dwellings. The DCRA
5 reissued four permits numbered B446916, 6917, 6918 and
6 6919 on Monday, July 8th, 2002. The permits enabled
7 the developer to continue construction on the four
8 properties.

9 SCSD immediately, upon notice of the
10 reissued permits, contacted DCRA officials to
11 determine the basis of the decision by DCRA to reissue
12 the permits and to seek a stop work order. As
13 testimony today will demonstrate, SCSD members and
14 counsel attempted repeatedly to obtain both a stop
15 work order on the construction and to obtain a written
16 decision from the Zoning Administrator explaining the
17 zoning compliance particularly with side yard,
18 setbacks, and parking which the BZA specifically
19 discussed in its decision in Case Number 16791 issued
20 only weeks earlier.

21 SCSD wanted to understand what efforts the
22 Zoning Administrator made to address the side yard and
23 parking issues discussed in the first appeal decision
24 which seemed to indicate that these structures did not
25 conform to the requirements for single-family

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 dwellings. After repeated unavailing efforts to get
2 an answer from DCRA as to the basis of its zoning
3 approval for the reissued permits and mindful of the
4 60-day appeal window to BZA, SCSD filed a formal
5 appeal of the four reissued permits on August 1, 2002.
6 SCSD specifically raised the side yard, setback and
7 parking nonconformance as the basis of its appeal.
8 The parking issue was dismissed by BZA on January 28,
9 2002.

10 In brief, SCSD's position is as follows:

11 First, these four structures appear to
12 constitute four detached dwellings. Such dwellings
13 require two side yards pursuant to 11 DCMR 199.1,
14 405.1 and 775.2. Two side yards were provided for
15 only one structure at 1308 Potomac Avenue. The other
16 three, therefore, fail to comply with the zoning
17 regulations and should not have been issued building
18 permits by DCRA.

19 Second, even if we assume arguendo, as the
20 DCRA claimed more than three months after reissuing
21 the permits, that the three other structures are
22 semi-detached units, the side yard zoning regulations
23 still were not followed. Zoning Regulation 11 DCMR
24 405.3 plainly indicates that an eight-foot side yard
25 is required on each of the resulting freestanding

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealgross.com

1 sides of the structures at 1310, 1312 and 1314 Potomac
2 Avenue. None was provided. Neither did the Zoning
3 Administrator follow BZA's decisional guidance that
4 further clarifies the side yard zoning regulations at
5 issue.

6 Specifically, the June 4th, 2002, decision
7 of David and Janet Pritchard, BZA Number 16811, was
8 readily available to the Zoning Administrator, who had
9 testified at length on side yard regulations at that
10 hearing. The plain meaning of the zoning regulations
11 and the recent decisional guidance from BZA should
12 have been considered and applied by DCRA and the
13 Zoning Administrator before the permits were reissued
14 for this project. This is especially true given the
15 guidance of BZA 16791, the first appeal on this
16 project, which discussed at pages 24 and 25 of the
17 written decision why these four structures appeared
18 not to have the characteristics of four single-family
19 dwellings. That is the legal basis of this case.

20 We believe that our testimony and evidence
21 presented today will meet our burden of proof to show
22 that the Zoning Administrator was wrong to reissue the
23 four permits, but in addition to the legal concerns,
24 the Southeast Citizens ask that this Board consider
25 carefully the timing, context, and process involved in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the reissuance of these permits as those factors show
2 how remiss the Zoning Administrator and DCRA have been
3 in interpreting, applying and enforcing the zoning
4 regulations. Equally egregious is how non-responsive
5 and slow DCRA has been to communicate with the
6 citizens of this community when inquiring about this
7 project and the permitting process.

8 I will note that in its responsive brief,
9 the developer has alleged that Southeast Citizens have
10 one goal: "To keep youth residential care homes out
11 of their neighborhood by any mean possible." This
12 demonization of the residents is unfair, unwarranted
13 and just plain wrong.

14 Southeast citizens are the residents who
15 pay the property taxes, the income taxes, the sales
16 taxes and other fees which pay for city services,
17 including police, schools, snow removal, and even the
18 operations of DCRA. Southeast citizens are composed
19 of families relatively new to the neighborhood as well
20 as elderly residents who have lived there since before
21 World War II. They are the people who make the
22 community what it is. They plant the tree boxes, pick
23 up the litter, walk safety patrols on the street, et
24 cetera. Southeast citizens have a right to demand
25 that city officials charged with administering the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 zoning and building permitting process do the job
2 according to the rules and regulations. In this case,
3 DCRA has not, and it is once again the unenviable task
4 of this Board to sort out this mess and ensure that
5 the developer and DCRA follow the rules, regulations
6 and decisional guidance before rather than after
7 construction activities take place.

8 Accordingly, we ask that this Board grant
9 the appeal and deem the reissued building permits as
10 issued in error. Thank you.

11 Would you like me to call my first
12 witness?

13 CHAIRMAN GRIFFIS: Any questions on the
14 opening?

15 (No response.)

16 CHAIRMAN GRIFFIS: Okay. Yes.

17 MS. WITHUM: First witness is Ms. Ellen
18 Oppen-Weiner.

19 MS. OPPEL-WEINER: Good afternoon, Board
20 members. My name is Ellen Oppen-Weiner.

21 MR. SULLIVAN: The property owner would
22 like to know if this is an expert witness or --

23 MS. WITHUM: A fact witness.

24 MR. SULLIVAN: What facts? I mean, the
25 Board has all the facts.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 CHAIRMAN GRIFFIS: Do you have an
2 objection to calling Ms. Opper-Weiner?

3 MR. SULLIVAN: We are objecting.

4 CHAIRMAN GRIFFIS: Okay. Let's get
5 clarification. First of all, this is a fact witness?

6 MS. WITHUM: This is a fact witness. In
7 fact, we will have Ms. Opper-Weiner as a fact witness
8 and then Mr. Lyle Schauer as an expert witness for our
9 case. Ms. Opper-Weiner will essentially just be
10 giving some groundwork as to what prompted this
11 appeal, go through some of the exhibits, provide a
12 little bit of insight, and then give a just thumbnail
13 sketch of the substance of the appeal. Her testimony
14 is expected to be very brief.

15 CHAIRMAN GRIFFIS: Okay. Mr. Sullivan, do
16 you continue with your objection?

17 MR. SULLIVAN: Yes. I object at least to
18 the portion about the substance of the appeal. How is
19 that factual? If she wants to talk about the facts of
20 the applications and the structures and things like
21 that, I don't have any objection to that, but I don't
22 think she gets to have an ad hominem discussion of all
23 that and its significance as a fact witness.

24 CHAIRMAN GRIFFIS: Understandable. Fact
25 witness then would be showing us actually how the side

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 yards -- the dimensions of them and how they weren't
2 complied with that support the appeal. Is that your
3 understanding?

4 MS. WITHUM: All she's going to do is just
5 say, "This is our position on the side yards" and then
6 Mr. Schauer is going to get in and talk about the
7 detail.

8 CHAIRMAN GRIFFIS: I understand what I'm
9 hearing from the objection is they don't want a lot of
10 opinions of --

11 MS. WITHUM: No, no, no. As I say, she is
12 -- I would be surprised if her testimony on that is
13 going to be all of five minutes. It's more a case
14 where all she's doing is just saying, "This is what we
15 see this to be and --

16 CHAIRMAN GRIFFIS: Okay.

17 MS. WITHUM: -- this is why we have
18 alleged what we have alleged in the appeal."

19 CHAIRMAN GRIFFIS: All right. Let's
20 proceed, noting the objections from the other
21 participants, and let me just caution that we will
22 also give direction in terms of being very specific,
23 and I don't think we're going to run down, no matter
24 how short it is, a lot of roads of, you know, who said
25 what and why we didn't get what we want kind of stuff.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 We want to get right to it. Let's have it in front
2 of us.

3 MS. WITHUM: Absolutely.

4 CHAIRMAN GRIFFIS: Okay.

5 Whereupon,

6 ELLEN OPPER-WEINER,

7 was called as a witness by counsel on behalf of the
8 Appellant and, having been previously duly sworn, was
9 examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MS. WITHUM:

12 Q Ms. Opper-Weiner, could you give us your
13 full name and address, please?

14 A Yes. It's Ellen Opper-Weiner, and I
15 reside at 223 10th Street, Southeast.

16 Q And what is your position with Southeast
17 Citizens?

18 A I am the vice chair of the Southeast
19 Citizens for Smart Development.

20 Q Do you hold any other community positions?

21 A Yes, I do. I am the chair of the Eastern
22 Market Community Advisory Committee, and I was
23 appointed to that by the mayor, and I'm also a member
24 of the Alcoholic Beverage Control Board, which I was
25 appointed by the mayor as well.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Q Could you explain to the Board what
2 prompted this appeal by the Southeast Citizens?

3 A Yes. We had, of course, received the
4 decision and order in the original case and were
5 trying to determine what action DCRA was going to take
6 in response to that order, and we knew because it was
7 issued on June 21st, 2002, that it would become final
8 on July 5th, 2002. So I initiated a couple of
9 telephone calls to Ms. Theresa Lewis to find out
10 whether or not DCRA intended to issue a stop work
11 order and/or revoke the permits per the BZA order in
12 the previous case, and I didn't get any answer from
13 her and there was this holiday week -- as you well
14 know, July 5th was the day it became final.

15 In any case, I wrote a letter to the --
16 I'm trying to think of who that is -- this is Exhibit
17 Number 7.

18 CHAIRMAN GRIFFIS: Of your submissions?

19 THE WITNESS: Yes.

20 MS. WITHUM: Yes.

21 THE WITNESS: On July 8th, 7A, the
22 additional one. I wrote a letter to Mr. Denzel Noble
23 kind of asking that he make sure to carefully review
24 -- he was the acting Zoning Administrator at that time
25 -- asking that he carefully review the BZA order and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 to make sure that they followed all the procedures.

2 I actually hand-delivered this letter
3 because I had a press conference at DCRA on that
4 particular day.

5 CHAIRMAN GRIFFIS: Okay. So your point is
6 you put him on notice that, here's an order from BZA.

7 THE WITNESS: That is correct.

8 CHAIRMAN GRIFFIS: Any future action
9 should take that into account.

10 THE WITNESS: That is correct.

11 CHAIRMAN GRIFFIS: Okay.

12 THE WITNESS: And then we received a
13 reply. We then found out a couple of days later that
14 the permits had been issued, and then on July 15th, we
15 received a response from -- well, actually I received
16 a response -- that's Exhibit 7B -- from Mr. Noble, and
17 at the very bottom of the first page, there is a
18 conclusory paragraph which said that after full
19 review, the BLRA determined that the application
20 satisfied all construction code and zoning
21 requirements for single-family dwellings.

22 CHAIRMAN GRIFFIS: Okay. Let me give a
23 little instruction here when you refer to these. This
24 is Exhibit 33 that you're talking about. For the
25 record, it would be easier to take that up. That was

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the recent submission, of which yours is attached.

2 THE WITNESS: Okay.

3 MS. WITHUM: Is that the BZA file number,
4 you mean?

5 CHAIRMAN GRIFFIS: That's correct.

6 MS. WITHUM: Okay.

7 THE WITNESS: And then, after that time
8 where we were concerned that there was no specificity
9 or basis of that decision, we then again retained the
10 services of Ms. Firster, an attorney, and she wrote a
11 letter, which is the next exhibit, which may be your
12 Number 34?

13 CHAIRMAN GRIFFIS: It's all actually in
14 33.

15 THE WITNESS: Thirty-three. It's all 33.

16 CHAIRMAN GRIFFIS: They are all attached.

17 THE WITNESS: Okay. So that is the letter
18 dated August 5th to Mr. Gregory Love.

19 CHAIRMAN GRIFFIS: And that is a corrected
20 date, August 5th, 2002.

21 THE WITNESS: Right. Apparently
22 originally it was done on August 2nd and there was a
23 typo.

24 CHAIRMAN GRIFFIS: Okay.

25 THE WITNESS: In any case, we raised the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 issue of stop work order, or she raised the issue on
2 our behalf of whether there would be a stop order
3 issued, and our opinion that these single-family
4 dwelling permits were issued in error.

5 CHAIRMAN GRIFFIS: Okay.

6 THE WITNESS: And we requested a response
7 -- she requested a response on our behalf. And then
8 in Exhibit Number 8, on August 19th, Ms. Firster
9 received a response from Mr. Love, who at the time was
10 the administrator of BLRA, and he indicated that
11 because we had already appealed the issuance of the
12 prior decision -- the issuance of the permits to BZA,
13 that he was unable to respond to any concerns we had
14 with regard to the stop work order. But, as you note,
15 there was no explanation given as to why these permits
16 were issued, which was one of the questions that we
17 had asked.

18 Our attorney then wrote a letter on August
19 26th -- this is Exhibit Number 9, our Exhibit Number 9
20 -- to Mr. David Clark and asked again about the
21 issuance of a stop work order, asked again about our
22 filing an appeal, and we were waiting for an
23 explanation as to how these applications met the
24 construction and zoning requirements.

25 CHAIRMAN GRIFFIS: Hold on a minute. The

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Clark letter is Exhibit 9 of your original submission;
2 is that correct?

3 THE WITNESS: That's correct.

4 CHAIRMAN GRIFFIS: Okay. And the previous
5 letter that you indicated?

6 THE WITNESS: Was our Exhibit 8.

7 CHAIRMAN GRIFFIS: Gotcha. Now we're back
8 on track.

9 THE WITNESS: I'm trying to do it in order
10 and --

11 CHAIRMAN GRIFFIS: Good.

12 MS. WITHUM: The letters are in
13 chronological sequence, so that's why she is following
14 that sequence.

15 CHAIRMAN GRIFFIS: Indeed.

16 THE WITNESS: So on August 26th, we again
17 tried, through our attorney, through Mr. Clark, to get
18 an explanation for the basis and justification for the
19 issuance of these permits for single-family dwellings,
20 and we were awaiting an answer, which came -- let's
21 see -- not until Exhibit Number 14.

22 BY MS. WITHUM:

23 Q Was this the first written decision that
24 you felt was ultimately rendered by DCRA?

25 A I believe this was the first decision

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 written in response to Ms. Firster's inquiries. This
2 is --

3 CHAIRMAN GRIFFIS: But why are we trying
4 to establish when the official decision was?

5 MS. WITHUM: No, what Ms. Opper-Weiner is
6 showing, that when we tried as early as July 8th to
7 get some kind of information as to the basis of the
8 decision for the reissued permits, we, in fact, didn't
9 get anything but the conclusory July 15th letter.

10 CHAIRMAN GRIFFIS: But you have it now. I
11 mean, we're not entertaining timeliness at this point.

12 MS. WITHUM: That's right.

13 CHAIRMAN GRIFFIS: I'm not understanding.

14 MS. WITHUM: She's just giving some
15 background and context to this, and she is virtually
16 done. I mean, we're almost there, really. This is
17 not going to go on much longer.

18 CHAIRMAN GRIFFIS: Okay.

19 MS. WITHUM: But we think it's important
20 to put this in context.

21 MEMBER ETHERLY: I understand where you're
22 trying to go. I just think you're -- let's get to the
23 payoff.

24 THE WITNESS: In any case, in this
25 decision on -- letter of description on October 21st

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 from Mr. Clark, I wanted to point out how, it page 2,
2 at the bottom of the last full paragraph on that page,
3 which, if you don't object, I would like to read into
4 the record, and if you do object --

5 CHAIRMAN GRIFFIS: No. Go ahead.

6 THE WITNESS: Okay. "BLRA's Zoning
7 Administrator reviewed each of the proposed dwellings
8 as either a detached or semi-detached dwelling as
9 defined by the zoning regulations. Although these are
10 dwellings in a C-2 commercial district, under 11 DCMR
11 section 775, each side yard must meet the dimensional
12 requirements for side yards in residential districts.
13 The detached dwelling, 1308 Potomac Avenue,
14 Southeast, meets the minimum eight-foot side yard
15 requirement on each side. Each of the other dwellings
16 -- 1310, 1312 and 1314 Potomac Avenue, Southeast -- is
17 an allowable semi-detached single-family dwelling,
18 having the required minimum side yard of eight feet.
19 As defined by 11 DCMR 199.1, a semi-detached
20 single-family dwelling is a 'one-family dwelling, the
21 wall on one side of which is either a party wall or
22 lot line wall, having one side yard.' The proposed
23 dwellings were thus found to meet the side yard
24 requirements of the applicable zoning regulations."

25 I would like us to turn back to the BZA

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 decision, which is in our Exhibit Number 7, and note
2 on page 24, the second full paragraph, which I would
3 like to read that into the record because it's
4 somewhat different than what Mr. Clark said on October
5 21st, if that is okay with you.

6 "Girls' and Boys' Town argues that if a
7 private developer could have legally subdivided the
8 parcel into four adjacent lots and constructed
9 single-family dwellings on them for sale to the
10 general public, then Girls' and Boys' Town must be
11 permitted to construct and operate the four group
12 homes for six children each as a matter of right."

13 The four buildings shown on the site
14 plans, however, do not have the characteristic of
15 one-family dwellings. For example, three of the
16 buildings are to be constructed with a lot line wall
17 on the side lot line. A one-family detached dwelling
18 in the C-2 District, however, must have two side
19 yards, and a lot line wall of a one-family
20 semi-detached dwelling must consist of a common
21 division wall.

22 If you note, there was a reference to six
23 various sections in 11 DCMR section 405.1, 405.2,
24 405.3, 405.9, 775.2 and 775.3; however, referring back
25 to Mr. Clark's response in Exhibit Number 14, page 2,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 there is no mention of 405.3, there's no mention of a
2 common division wall, and we believe this was a
3 partial answer to our inquiry as to the basis for the
4 issuance of these permits.

5 BY MS. WITHUM:

6 Q Okay. Ms. Opper-Weiner, since Mr. Schauer
7 will be getting into the substance of the appeal and
8 in order to make this a little bit more brief, there
9 is one more thing that I would like you to do, and
10 that is the photographs that we've introduced, if you
11 could please take those and give us some narrative
12 description of what they are.

13 A Well, I have to point to it.

14 Q Could you bring them over a little bit
15 closer so everybody can see?

16 A Have they been marked?

17 MS. WITHUM: Should we mark them 34?
18 Excuse me. Should we mark them 34?

19 CHAIRMAN GRIFFIS: Do you have an exhibit
20 number on these yet, Ms. Bailey?

21 MS. BAILEY: No, Mr. Chairman.

22 CHAIRMAN GRIFFIS: We will get an exhibit
23 number on them.

24 MS. WITHUM: Okay.

25 CHAIRMAN GRIFFIS: But let's note and mark

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 an identification and then we can figure out --

2 THE WITNESS: Okay. The one all the way
3 to the right would be, I would suggest, A, and that
4 particular picture -- can you all see it? -- shows
5 Building Number 1314, which is towards 14th Street,
6 and shows a jut out -- I want to put particular
7 emphasis on that -- which is part of the eight-foot
8 side yard. So that side yard of eight feet does not
9 exist because standing right there is where the
10 driveway actually is at this point. So the side yard
11 size on that particular Number A doesn't exist; there
12 is no eight feet side yard in that building.

13 The next building --

14 MEMBER ETHERLY: Could you identify that
15 by the street number?

16 THE WITNESS: It is 1314 Potomac Avenue,
17 Southeast.

18 Then the next photograph is --

19 MS. WITHUM: 1314 and 1312.

20 THE WITNESS: Okay. This is B, my
21 suggestion is, and this shows the side yard between
22 1314 and 1312 Potomac Avenue, Southeast, and as you
23 can see, it appears to be just one eight-foot side
24 yard.

25 The next photograph --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MEMBER ETHERLY: Excuse me, Ms.
2 Opper-Weiner. Could you identify the addresses again
3 for Exhibit B, please?

4 THE WITNESS: Yes. That would be 1314 is
5 to the right --

6 MS. WITHUM: Exhibit B, 1314 and 1312.

7 THE WITNESS: -- and 1312.

8 MEMBER ETHERLY: Thank you.

9 THE WITNESS: You're welcome.

10 And then C is 1314 from the front.

11 MS. WITHUM: I believe that is 1314, yes.

12 THE WITNESS: Okay. And this is just to
13 give you the sense of the size of one building. Okay.
14 That is C. And then D is the rear of 1314, and if
15 you notice, to the left there is again that jut out
16 that's in --

17 MS. WITHUM: Projection.

18 THE WITNESS: The projection, thank you.
19 And then obviously there is snow on the ground there.
20 It's also quite dark, as we can see. The driveway or
21 at least where the driveway is supposed to be is where
22 that snow is to the left of that fencing.

23 The last one is E, which just shows the
24 rear of the development, and if you'll note that one
25 of the purposes, as we understand it, of side yards is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 for light and air, and this looks like quite a large
2 development without very much evidence of light and
3 air. So that is E.

4 There was one more thing that -- there
5 were several requests for Freedom of Information Act,
6 you know, requests for documentation, and we still to
7 this date have only received copies of the permits and
8 the applications, which we already had. So other
9 information that we wanted with regard to this project
10 we are still awaiting from DCRA. That would have
11 included plans for phase two, if there had -- and we
12 understand there have been applications submitted and
13 we have not been able to receive any information with
14 regard to it.

15 So I would be happy to answer any
16 questions if you have them.

17 CHAIRMAN GRIFFIS: Any questions from the
18 Board?

19 (No response.)

20 CHAIRMAN GRIFFIS: Well, in terms of the
21 FOIA requests, I mean, clearly our jurisdiction
22 doesn't encompass that, and also phase two goes out of
23 this, but we certainly always ask that those involved
24 avail themselves with giving out the information.

25 Let's start cross-examination, then. I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 would like to continue in the order we have, and we
2 will go to the appellee, to the property owner, and
3 then to the ANC. Does the appellee have any
4 cross-examination of Ms. Opper-Weiner? Unless you
5 want to establish a different order, of which we are
6 very amenable.

7 CROSS-EXAMINATION

8 BY MR. PARKER:

9 Q My only question is, with regard to the
10 pictures that we have here, we don't have any pictures
11 of 1308, correct?

12 A Correct. Right. Correct.

13 Q All right. And based on your own
14 observations, have you been able to determine that
15 1308 has two side yards?

16 A Yes.

17 Q Okay.

18 MR. PARKER: I don't have any other
19 questions.

20 CROSS-EXAMINATION

21 BY MR. SULLIVAN:

22 Q Marty Sullivan for the property owner,
23 Girls' and Boys' Town.

24 Ms. Opper-Weiner, can you explain possibly
25 how the appellant is aggrieved by the side yard issue?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 A Yes. As I had said earlier, that the
2 issue of light and air with regard to the lack of the
3 side yards and the issue of density of the dwellings,
4 and the fact of we're not really clear on what the use
5 is other than if, in fact, there --

6 Q Are you aware that this -- this is a
7 commercial zone, right? This is C-2-B zone and row
8 houses are permitted as a matter of right in that
9 zone, correct?

10 A Yes, as far as I know, and I'm not a
11 zoning expert.

12 Q Which presumably would have no light and
13 air.

14 A Is it really your contention that
15 Southeast Citizens for Smart Development was -- where
16 is it? I don't know if it's in here -- was, and I
17 will quote loosely, and please feel free to correct
18 me, "organized to facilitate community involvement in
19 education and planning in Ward 6," something like
20 that?

21 A Yes, I would agree with that. We're also
22 interested in issues of economic development in the
23 eastern end of Capitol Hill, particularly along --

24 Q And you didn't have a website --

25 A May I finish?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Q No. You answered my question. You didn't
2 have a website called stopboystown.org which said that
3 the SCSD was created to stop Boys' Town?

4 A To be honest with you, Mr. Sullivan, I
5 never looked at that website and I had nothing to do
6 with it.

7 Q Okay. Has SCSD been involved in other
8 appeals related to side yards and other of these
9 important community education involvement issues?

10 CHAIRMAN GRIFFIS: How is that important?

11 MR. SULLIVAN: I'm trying to understand --
12 this goes to the question of standing and how they are
13 aggrieved. My contention is that side yards is not
14 the issue here at all.

15 THE WITNESS: I think I would like to
16 answer that.

17 MEMBER ETHERLY: Well, if I could jump in,
18 I mean, I'm kind of heading in the direction of the
19 Chairman's question here, Mr. Chair. I don't know
20 where this gets us. I mean, that is almost a
21 preliminary matter that either we should have dealt
22 with early on or, you know, kind of move on. I mean,
23 I understand where you're trying to go; I just don't
24 know if there's any use in us trying to go --

25 MR. SULLIVAN: I withdraw the question.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 No more questions.

2 CHAIRMAN GRIFFIS: Does the ANC have any
3 questions of Ms. Opper-Weiner? No questions? Okay.

4 (Witness excused.)

5 CHAIRMAN GRIFFIS: Let's go to the next
6 witness, please.

7 MS. WITHUM: We would just like to reserve
8 the opportunity to recall Ms. Opper-Weiner as a
9 rebuttal witness if it becomes necessary. We don't
10 foresee it, but we just want to make our reservation
11 on the record.

12 CHAIRMAN GRIFFIS: Okay. I don't think
13 there's any need to make reservations. We can address
14 it when it comes up, but it's good to know.

15 MS. WITHUM: Our next witness is Lyle
16 Schauer. He will be an expert witness and he will be
17 speaking to the substance of the appeal.

18 CHAIRMAN GRIFFIS: And have we --

19 MS. WITHUM: And I would like to qualify
20 him as an expert witness. If you have any voir dire
21 -- I know he has testified as an expert witness in
22 this forum before.

23 CHAIRMAN GRIFFIS: Right. And what we
24 recommend and I think we may even -- do we have a
25 resume, any documentation that we could just review?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MS. WITHUM: No, he didn't bring a resume.

2 CHAIRMAN GRIFFIS: Okay.

3 MS. WITHUM: We can submit one after the
4 hearing, if you would like, and he can go through --

5 CHAIRMAN GRIFFIS: He is being proposed as
6 an expert in what?

7 MS. WITHUM: In side yard regulations.

8 CHAIRMAN GRIFFIS: Really?

9 MS. WITHUM: D.C. zoning regulations.

10 CHAIRMAN GRIFFIS: Very specific. Has
11 this been a lifelong journey?

12 (Laughter.)

13 MS. WITHUM: No. Actually, he has very
14 broad knowledge in the D.C. zoning regulations, but
15 his --

16 CHAIRMAN GRIFFIS: Thank goodness.

17 MS. WITHUM: -- particular emphasis here
18 is side yard regulations.

19 CHAIRMAN GRIFFIS: Okay.

20 MS. WITHUM: As you know, he appeared
21 before this Board previously in another hearing
22 involving side yard regulations, but I would say
23 zoning regulations --

24 CHAIRMAN GRIFFIS: Let's just ask for just
25 a quick summation of the establishment of expert

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 status, and we can do it very quickly.

2 MR. SCHAUER: Mr. Chairman, members of the
3 Board, my name is Lyle Schauer, I reside 1107
4 Independence Avenue, Southeast.

5 As to my background, I am a graduate of
6 the University of Wisconsin Law School and I am an
7 admitted member of the Wisconsin Bar, though inactive,
8 and I am not in practice now, nor have I ever
9 practiced law as such.

10 I have been involved with zoning here in
11 the city for quite a long time in connection with work
12 with the Capitol Hill Restoration Society. In
13 connection with that, I have appeared before this
14 Board a number of times, and most recently, I think,
15 was on the Pritchard appeal, and I guess that kind of
16 qualifies me as a side yard expert.

17 CHAIRMAN GRIFFIS: Indeed. Any questions
18 from the Board?

19 COMMISSIONER MAY: Yes. I don't recall
20 from the Pritchard case, but have you been admitted as
21 an expert witness in zoning in the past?

22 MR. SCHAUER: I was in connection with the
23 Pritchard case.

24 COMMISSIONER MAY: Okay.

25 CHAIRMAN GRIFFIS: You have been involved,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 as you say, with the Capitol Hill Restoration Society
2 for some time doing their zoning, land use analysis?

3 MR. SCHAUER: Correct.

4 CHAIRMAN GRIFFIS: Do you write their
5 letters that come into --

6 MR. SCHAUER: Frequently.

7 CHAIRMAN GRIFFIS: Indeed. Okay.

8 Let me hear any objections from the
9 participants, appellee, property owner, ANC?

10 MR. PARKER: Arthur Parker on behalf of
11 the Zoning Administrator.

12 Whereupon,

13 LYLE SCHAUER,

14 was called as a witness by counsel on behalf of the
15 Appellant and, having been previously duly sworn, was
16 examined and testified as follows:

17 VOIR DIRE

18 BY MR. PARKER:

19 Q Mr. Schauer, aside from testifying at the
20 Pritchard case, have there been any other either
21 administrative or civil court hearings that you've
22 testified as an expert witness at?

23 A No. I think just before this Board and
24 only on one or two occasions.

25 Q Aside from the Pritchard case, what other

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 matters before this Board have you testified as an
2 expert, not just testifying, but as an expert?

3 A I have not.

4 Q And what was the specific issue that you
5 were permitted to testify to in the Pritchard case, if
6 you can recall?

7 A It involved the decision of this Board in
8 a case on 5th Street, Southeast, which had relevance
9 to the Pritchard case.

10 Q I need to then ask, then, the issue in the
11 5th Street, Southeast, case was what that you
12 testified on?

13 A It involved a side yard.

14 Q What aspect of the side yard?

15 A Whether a side yard was required in that
16 case and whether -- and I think the decision was that
17 it was and a special exception was granted, but the
18 point is that a special exception was needed to
19 provide for that side yard.

20 Q So your participation in the 5th Street --
21 did you participate as a witness in the 5th Street
22 case?

23 A No, I did not.

24 Q All right. So then your participation in
25 the Pritchard case was simply to recount what happened

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 in the 5th Street case?

2 A That's correct.

3 Q Okay. And so your expertise in zoning is
4 only that of what you read in the regulations and how
5 you interpret them, correct?

6 A Well, yes, and I read the regulations of
7 the -- or the orders of this Board quite avidly.

8 Q What was your undergraduate training? You
9 indicate you have a law degree.

10 A I was a mathematician.

11 Q Okay. And have you done any course work
12 or professional training in zoning or land use
13 planning?

14 A In connection with my law school training,
15 yes.

16 Q You mean as an undergraduate -- in your
17 law degree training.

18 A Yes.

19 Q You took a course in that?

20 A Yes.

21 Q Okay. And how long ago was that?

22 A More years than I like to recall.

23 Q And that was in --

24 A Nineteen-fifty-eight, say.

25 Q And that was in Wisconsin, correct?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 A Correct.

2 Q Okay. So it didn't pertain specifically
3 to the District zoning regulations.

4 A Generally, but not specifically.

5 Q Okay. And aside from that course work,
6 you have not participated in any other course work
7 that relates to zoning and land use development,
8 correct?

9 A No, I have not.

10 Q Okay.

11 MR. PARKER: I am going to -- that's all
12 I'm going to voir dire. I'm going to make an
13 objection that it seems that although he testified in
14 the Pritchard --

15 CHAIRMAN GRIFFIS: I'm sorry, I turned
16 your microphone off.

17 MR. PARKER: I am going to make an
18 objection as to his expertise. Although he testified
19 in the Pritchard case regarding side yards, it appears
20 as though his testimony was to recount what happened
21 in another matter and he doesn't have any other
22 independent professional training, degrees or
23 expertise in this matter.

24 CHAIRMAN GRIFFIS: Okay. So your
25 objection is to granting the expert status, but no

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 objection to him being called as a witness; is that
2 correct?

3 MR. PARKER: If he has factual issues to
4 describe.

5 CHAIRMAN GRIFFIS: Okay.

6 Mr. Sullivan?

7 MR. SULLIVAN: We have no further
8 questions, but the property owner -- for the record,
9 Marty Sullivan for Girls' and Boys' Town. We also
10 object to Mr. Schauer being considered an expert
11 witness, and I am not sure that, from the order, from
12 the Pritchard order, that he was an expert witness in
13 that case, and I am not sure what effect that would
14 have on the fact that he has no education or
15 professional degree or has practiced this other than
16 as a hobby.

17 CHAIRMAN GRIFFIS: Okay. ANC have any
18 opinion? Are you neutral on granting expert status?

19 MR. HILL: Yes.

20 CHAIRMAN GRIFFIS: Okay.

21 MR. HILL: I'm in favor of it.

22 CHAIRMAN GRIFFIS: Okay.

23 Board members?

24 MS. WITHUM: Could I add something,
25 please? Would that be possible?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 CHAIRMAN GRIFFIS: Yes.

2 MS. WITHUM: I would just like to -- I
3 don't know if Mr. Schauer made it clear but he is the
4 chair of the zoning committee of the Capitol Hill
5 Restoration Society. While he may not have the
6 extensive resume as testifying as an expert witness,
7 in fact, he is an expert witness. He spent -- devotes
8 pretty much all of his time working for the Capitol
9 Hill Restoration Society on zoning issues.

10 He is extremely familiar with zoning
11 issues, and given the side yard issues that we're -- I
12 mean, it would be one thing if we were talking about
13 something that were not side yard issues, but, in
14 fact, given the testimony in the Pritchard case and in
15 the prior case on 5th Street, in fact, he is very much
16 in sync with what is the requirements in the District
17 of Columbia for side yard regulations. I believe he
18 was admitted as an expert in that case; that's what
19 the case said; so I think that it's appropriate that
20 he be admitted here. He is speaking as to side yards.

21 It's a very limited scope and I think he's totally
22 qualified for that.

23 CHAIRMAN GRIFFIS: Okay. I don't think
24 this Board would disagree, Mr. Schauer. We're
25 familiar with your submissions and they are very

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 thorough and very articulate. But I think we have
2 been brought up to the fact that there is a different
3 threshold going to expert status. In expert status,
4 frankly what we're more inclined to see is those that
5 have been registered in a profession of which their
6 expertise is now known, some sort of formal training
7 and/or some sort of professional practice in that.

8 Ms. Monroe, do you have a comment on this
9 in terms of the threshold for granting expert status?

10 I don't think there would be anything that would
11 preclude, and in fact I would guarantee it, that would
12 preclude Mr. Schauer from participating and being
13 called as a factual witness, but let me let you speak.

14 MS. MONROE: Unfortunately, there is
15 nothing specifically in the regulations as to what
16 qualifications an expert has to have. 3117.3J merely
17 says the Board should rule upon the qualifications of
18 witnesses offered as experts. I think it's up to the
19 Board to determine what level of expertise you're
20 looking for, and I think you need to solicit the facts
21 and decide whether you're willing to accept him as an
22 expert or not.

23 MS. WITHUM: I would also like to note
24 that in our initial submission that we made -- I
25 believe it was January 7th -- we very clearly

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 indicated that we would have an expert witness on
2 this, and then when Mr. Schauer -- I believe it was on
3 the 14th, he submitted his materials indicating that
4 that was his testimony that he was going to make. I
5 mean, they had enough -- they've had previous notice
6 that he was going to be up here as a witness
7 testifying on the side yards and would have had an
8 opportunity to question this.

9 CHAIRMAN GRIFFIS: Now is the time to -- I
10 don't know that that relates.

11 All right. Board members?

12 MEMBER ETHERLY: If I could, just one
13 additional question.

14 Mr. Schauer, in your capacity as chairman
15 of the Zoning Committee with the Capitol Hill
16 Restoration Society, how long have you served in that
17 capacity?

18 THE WITNESS: Approximately eight years.

19 CHAIRMAN GRIFFIS: Leanings? Direction?

20 COMMISSIONER MAY: This is a little bit
21 difficult to decide because of the past case, the
22 Pritchard case, and I have no doubt that things
23 occurred the way it has been described here -- I don't
24 recall specifically myself -- considering Mr.
25 Schauer's credentials at that time. I think that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 while the case can certainly be made that formal
2 training certainly puts one a long way towards being
3 an expert witness, there's also something to be said
4 for the practical experience of representing a
5 community organization and handling zoning matters for
6 that organization and for others in the community, and
7 I think that, you know, from our own personal
8 experience with the BZA and mine with Zoning
9 Commission, we are aware of Mr. Schauer's past work
10 and testimony in these matters.

11 I think it would be -- it certainly would
12 be easier for us to vote positively on his status as
13 an expert witness if, in fact, we had all this on
14 paper because I think documenting past experience in
15 that form, even though it is past -- you know, the
16 degrees may not point towards expertise in zoning;
17 certainly the recent experience would indicate it.

18 I think I would be more comfortable voting
19 in favor if we had that on paper, and maybe, I don't
20 know, can we defer a decision for the submission of a
21 resume or CV or something to indicate that? If not,
22 I'm not --

23 CHAIRMAN GRIFFIS: I guess we can.

24 COMMISSIONER MAY: -- I'm not inclined to
25 move forward -- I mean I'm inclined to just let him

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 testify not as an expert.

2 MEMBER ETHERLY: Mr. Chair, I would
3 probably agree with that course of action. I mean,
4 the expert determination once again just kind of
5 creates a certain measure of weight that we would then
6 assign to the testimony of the individual. I think we
7 could definitely take the testimony and then, you
8 know, perhaps with some additional documentation, make
9 a subsequent determination as to the expert status. I
10 mean, it's kind of a close question.

11 CHAIRMAN GRIFFIS: Okay. I understand
12 exactly what you're saying and I think I agree. I
13 don't undervalue clearly the practice, and certainly
14 Mr. Schauer has that, although what we're weighing and
15 I think what is not being said is we're weighing some
16 of the people that we bestow expert status to and
17 their training, professional associations and that
18 actual practice.

19 In terms of going ahead, you know, Ms.
20 Monroe, if you want to give direction. I would say
21 that we would -- in fact, I would go more towards the
22 benefit of the doubt and, if we feel that there is
23 strong enough expertise in what we're about to hear,
24 grant the expert status and ask for the submission of
25 the resume to substantiate the record as it goes

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 forward. I think orally we've heard what the
2 background is. Unless we have great concerns, which I
3 think we would rule the other way.

4 MEMBER ETHERLY: And I will note, for me,
5 it's not necessarily so much concern, just, you know,
6 wanting to maintain a certain measure of consistency
7 as we deal with the issue of expert status. Typically
8 it's a very quick inquiry that we make, we have the
9 documentation to support the decision, and then we
10 just simply move forward.

11 CHAIRMAN GRIFFIS: Right.

12 MEMBER ETHERLY: Here, because of the
13 absence of documentation -- I don't think there is any
14 doubt of the experience. In looking at the Pritchard
15 order -- and I will note that on page 2, it does
16 reference that Mr. Schauer did indeed provide
17 testimony; it just doesn't characterize how that
18 testimony was received.

19 Perhaps the only other direction I might
20 suggest is, I mean, without belaboring this too much,
21 I mean just in terms of a little additional voir dire
22 for Mr. Schauer, maybe an additional question is,
23 during the past eight years in your capacity as
24 chairman of the Zoning Committee, would you be able to
25 estimate or speak to the number of zoning cases or

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 matters that you have dealt with over that time, and
2 maybe even with particular attention to side yard
3 issues. I mean, perhaps we may be a little more
4 probing in that regard. But once again, I'm more
5 inclined just you say let's just move forward and
6 perhaps subsequent documentation would be sufficient.

7 But if you want to answer in terms of, you
8 know, over the course of your eight years as zoning
9 chair --

10 THE WITNESS: We probably handle about 20
11 cases a year.

12 MEMBER ETHERLY: Okay.

13 THE WITNESS: And of those, side yards are
14 frequently issues because we're -- quite a few of the
15 cases involve rear additions that involve side yard
16 issues. It's not uncommon.

17 MEMBER ETHERLY: And these cases, of
18 course, typically do occur on Capitol Hill or in the
19 Capitol --

20 THE WITNESS: Yes, they are on Capitol
21 Hill.

22 MEMBER ETHERLY: So you are familiar with
23 the types of properties that appear on Capitol Hill
24 and the types of configurations that are fairly
25 typical of that vicinity?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 THE WITNESS: That is correct.

2 MEMBER ETHERLY: And as Zoning Committee
3 chair, you are responsible for reviewing the projects,
4 plans that are submitted by applicants or residents,
5 you review those with your committee and then you are
6 asked to make recommendations on those projects to the
7 full body?

8 THE WITNESS: Correct.

9 MEMBER ETHERLY: Okay.

10 Mr. Chairman, I would be comfortable
11 moving forward with Mr. Schauer as an expert witness
12 based on the practical experience in his role as chair
13 of the Zoning Committee for the past eight years.

14 CHAIRMAN GRIFFIS: Mr. May?

15 COMMISSIONER MAY: I would agree, and I
16 especially appreciate Mr. Etherly's questions in this
17 regard and his leading us forward on this matter.

18 CHAIRMAN GRIFFIS: Good. Then I would
19 concur and take that as a consensus of the Board. We
20 can bestow the great expert status on you, Mr.
21 Schauer, and I think it is based on the fact of our
22 past experience. We haven't had a submission from you
23 on your background, but our past experience. Whether
24 we agreed and ruled with or against your analysis, it
25 has always been very well articulated, thought out,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 and addresses the specific issues.

2 So with that, let's continue, and your
3 witness.

4 MS. WITHUM: Next I call Lyle Schauer as
5 an expert witness, and he is prepared to read his
6 statement into the record.

7 DIRECT TESTIMONY

8 THE WITNESS: I would like to call the
9 Board's attention first of all to the picture on the
10 very left over there, because I think that is most
11 informative, and also to the site plan, which I have
12 under Tab 3.

13 If you look at the site plan and then look
14 at --

15 MS. WITHUM: That's Photo B.

16 THE WITNESS: At Photo B.

17 CHAIRMAN GRIFFIS: Right. We're looking
18 at 1314 and 1312 -- I'm sorry.

19 MS. WITHUM: Yes.

20 CHAIRMAN GRIFFIS: You're referring to?

21 THE WITNESS: What I'm trying to convey is
22 the site plan is under Tab 3 of our submission.

23 CHAIRMAN GRIFFIS: Go ahead.

24 THE WITNESS: And what that photograph,
25 Photo B, does is to give you a perspective of how

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 these buildings look. They look very much like
2 detached buildings. There's a space between each one
3 and, in fact, they are sometimes and I guess quite
4 frequently described as detached buildings in the
5 plans themselves.

6 Well, as long as this was a community
7 based residential facility, it didn't matter that 210
8 -- I'm sorry -- 1310, 1312 or 1314 did not have two
9 side yards, they only had one, since CBRFs in
10 commercial zones don't have to provide side yards.
11 But faced with a revocation of building permits early
12 in July after this Board ruled that CBRF was not the
13 correct classification for that development, Boys'
14 Town applied for and received permits to complete the
15 buildings as single-family structures. At this point,
16 section 775.2 and 775.3 come into play, requiring side
17 yards if the buildings are either detached or
18 semi-detached.

19 I call your attention to the Zoning
20 Administrator's review in the notice of October 21st,
21 which --

22 MS. WITHUM: Exhibit 14.

23 THE WITNESS: -- is at Tab --

24 MS. WITHUM: It should be Tab 14 of that
25 notebook.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 THE WITNESS: Fourteen. And the related
2 letter of determination, the letter to Ken Jarbo dated
3 October 17th. Both of those documents state that the
4 buildings at 1310, 1312 and 1314 are allowed
5 semi-detached single-family dwellings, and the basis
6 for that is given as a definition in 199.1 that a
7 semi-detached single-family dwelling is a one-family
8 dwelling with a wall on one side that's either a party
9 wall or a lot line wall and having one side yard.

10 That certainly is -- these buildings
11 certainly meet that definition since they have a lot
12 line wall on one side and the yard on the other. The
13 problem is that now we fall into the situation where,
14 in 405.3, the regulations require a side yard beside
15 each freestanding wall.

16 Now, the wall along the lot line would
17 seem to ordinary folks to be a freestanding wall, but
18 it hasn't been so interpreted in the past by the
19 Zoning Administrator, and I refer to the transcript
20 from the Pritchard appeal where Mr. May and Mr. Levy
21 both questioned the Zoning Administrator on the point
22 of whether a lot line wall was a freestanding wall,
23 and the Zoning Administrator insisted that if you had
24 a lot line wall, it was not a freestanding wall, and
25 since it wasn't a freestanding wall, it wouldn't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 require a side yard.

2 This interpretation was apparently one of
3 some standing in the office, but the Board, this
4 Board, in reviewing that, in their finding of fact
5 number 17 in the Pritchard order, said that -- and let
6 me read that to you --

7 MS. WITHUM: That's Tab 6. Tab 6, page 5.

8 THE WITNESS: It's a very short finding.
9 The lot line wall is a freestanding wall; therefore,
10 of course, it requires a side yard according to 405.3.

11 CHAIRMAN GRIFFIS: That's a strange fact.

12 How do you have a lot line wall set back? It's not a
13 lot line wall. Okay. Go ahead.

14 THE WITNESS: Now, I would note that these
15 four buildings could very easily have been configured
16 as semi-detached dwellings and meet all the zoning
17 requirements. All that's necessary is to combine them
18 in sets of two, and this would require one of the
19 buildings to be flipped, so you would have a mirror
20 image, so you would have the two lot line walls coming
21 together. It could very easily have been done. We
22 wouldn't be here. Now, why that wasn't done, I don't
23 know. I'm sure there was some good reason for it, but
24 clearly that would have avoided all of these problems,
25 and we would be enjoying the afternoon out in the sun

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 instead of being here.

2 CHAIRMAN GRIFFIS: Don't tempt us.

3 THE WITNESS: Now, I would --

4 CHAIRMAN GRIFFIS: Well, in the same
5 manner, then, is it your opinion that they could add
6 onto that building and start attaching them?

7 THE WITNESS: They could certainly do that
8 and they could --

9 CHAIRMAN GRIFFIS: Interesting.

10 THE WITNESS: They presumably could change
11 these into row dwellings attached on both sides. Now,
12 it's a substantial change, but --

13 CHAIRMAN GRIFFIS: Right. Actually, let's
14 not walk too far down that. All right. There it is.
15 I think I understand your point, though.

16 THE WITNESS: My point is simply that they
17 have not met the requirements for a semi-detached
18 dwelling in a commercial district. They have simply
19 not done that. Thank you.

20 CHAIRMAN GRIFFIS: Is that it?

21 THE WITNESS: That's the end of my
22 presentation.

23 CHAIRMAN GRIFFIS: Okay. Let's go back to
24 the finding of fact 17, which was from the Appeal
25 16811. Can you explain what your understanding of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 that fact is, and I will read it to you: "The lot
2 line wall is a freestanding wall."

3 THE WITNESS: That's one of those
4 deceptively simple little sentences that means a lot,
5 it turns out, because it means you have to put a side
6 yard beside that wall or come to this Board for a
7 special exception.

8 CHAIRMAN GRIFFIS: But wouldn't the side
9 yard, if it's a lot line wall, wouldn't the side yard
10 be on the adjacent property?

11 THE WITNESS: No. You would have to set
12 back your building. You couldn't build to the lot
13 line.

14 CHAIRMAN GRIFFIS: But then it wouldn't be
15 a lot line wall anymore.

16 THE WITNESS: No. That's correct.

17 CHAIRMAN GRIFFIS: So conceivably, Fact 17
18 makes no sense.

19 THE WITNESS: Well, I think it makes a lot
20 of sense because it requires -- if you go to the lot
21 line, you've got to have something to connect it to.
22 If you don't, you have to put a side yard beside it.

23 CHAIRMAN GRIFFIS: So it goes to the
24 adjacent property, and what happens there?

25 THE WITNESS: Correct.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 CHAIRMAN GRIFFIS: Or what's your
2 understanding of, if it is in a row of row houses,
3 however, they haven't all been developed, or say, for
4 instance, there is a row house that used to be there
5 but has fallen apart and has lost its lot line or
6 party wall, is it your understanding that you would or
7 would not be able to build a row house on that lot
8 line if it didn't attach to an adjacent building?

9 THE WITNESS: If it didn't attach to an
10 adjacent building, I can't quite understand what the
11 fact situation might be here. What are we talking
12 about? A gap in the row of row houses?

13 CHAIRMAN GRIFFIS: That's correct.

14 THE WITNESS: Well, that's easily filled
15 in.

16 CHAIRMAN GRIFFIS: On the adjacent
17 property.

18 THE WITNESS: You'd just connect your
19 vacant lot --

20 CHAIRMAN GRIFFIS: But you don't control
21 both properties.

22 THE WITNESS: You don't have to. You can
23 build to the lot line.

24 CHAIRMAN GRIFFIS: And that would then not
25 be a freestanding wall that would have to be set back?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 THE WITNESS: Right.

2 CHAIRMAN GRIFFIS: Even if you didn't
3 attach to an adjacent structure.

4 THE WITNESS: Well, you bring up to the
5 lot line, and that's -- you're attaching if there's a
6 house next door.

7 CHAIRMAN GRIFFIS: If there isn't a house
8 next door, though?

9 THE WITNESS: Then you have to come to
10 this Board for a special exception or put a side yard
11 in.

12 CHAIRMAN GRIFFIS: Even if it's in a row
13 of row houses although one is missing?

14 THE WITNESS: Well, if one is missing,
15 there would usually be something to connect to on
16 either side. We have a few instances of that on
17 Capitol Hill where there is a gap in the row. You
18 connect to the house on either side. There's no
19 particular difficulty about that.

20 CHAIRMAN GRIFFIS: Okay.

21 Any other questions from the Board?

22 (No response.)

23 CHAIRMAN GRIFFIS: Okay. Let's go to
24 cross-examination, then. We will start with the
25 appellee.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MS. WITHUM: I just had --

2 CHAIRMAN GRIFFIS: Yes.

3 MS. WITHUM: I had a follow-up question.

4 CHAIRMAN GRIFFIS: Sure.

5 MS. WITHUM: I know you jumped in. But I
6 just wanted to turn to, in the Pritchard decision on
7 page 8, the paragraph that starts with "Moreover," the
8 last clause of the sentence, I would just like Mr.
9 Schauer to give us some elaboration on what that means
10 because it talks about the freestanding wall, and then
11 I have one other question for him.

12 You can read that into the record, if you
13 want.

14 THE WITNESS: The paragraph involved
15 reads: Moreover, the last clause of the sentence in
16 requiring a side yard on each resulting freestanding
17 side refers to one of potentially two freestanding
18 sides. Moreover, the use of the word "resulting"
19 indicates that the freestanding side results from the
20 absence of a common division wall with an adjacent
21 building such that a side yard must be provided on
22 each side of the dwelling that does not share a common
23 division wall with an adjacent building.

24 CHAIRMAN GRIFFIS: Mr. Schauer, let me
25 give you a hypothetical so I understand your position

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 on side yards. If you have a row of lots which are
2 matter of right for row dwellings, --

3 THE WITNESS: Correct.

4 CHAIRMAN GRIFFIS: -- let's say 18 feet
5 wide, you have six of them, you have the middle one.
6 Wait a minute. Don't have the middle one. Let's have
7 five of them and you have the middle one, two on each
8 adjacent side that are not developed yet or had
9 structures there that have been removed. Say the
10 District has demolished them. Can you build a
11 townhouse from lot line to lot line on the center lot?

12 THE WITNESS: You could not.

13 CHAIRMAN GRIFFIS: You would require two
14 side yards on that, would you not?

15 THE WITNESS: You would require two side
16 yards.

17 CHAIRMAN GRIFFIS: So you would require
18 16-foot setbacks, --

19 THE WITNESS: Correct.

20 CHAIRMAN GRIFFIS: -- eight on each side,
21 leaving you with --

22 THE WITNESS: With a two-foot buildable --

23 CHAIRMAN GRIFFIS: Two-foot house.

24 THE WITNESS: -- unbuildable lot.

25 CHAIRMAN GRIFFIS: Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 THE WITNESS: But the answer to that is a
2 special exception from this Board.

3 CHAIRMAN GRIFFIS: Indeed. Okay.

4 MEMBER ETHERLY: And just to follow up,
5 and I know Ms. Withum had a follow-up question, just
6 so I'm clear, so the argument is, from the appellant's
7 side, as I'm looking at Exhibit B, which represents
8 1312 and 1314, the argument is I'm looking at, what,
9 two freestanding walls? No.

10 THE WITNESS: No. You're looking at one
11 freestanding wall, which is the one you see, the one
12 you see there in the photograph, the one with the
13 shadow on it.

14 MEMBER ETHERLY: With the shadow. That
15 would be 1314.

16 THE WITNESS: That is a freestanding wall,
17 it's built on the lot line. Now, under the previous
18 interpretation by the Zoning Administrator, that would
19 not be considered to be a freestanding wall.

20 MEMBER ETHERLY: Okay.

21 THE WITNESS: But I think the better
22 argument is the one that this Board adopted in the
23 Pritchard appeal that a freestanding wall -- that a
24 lot line wall is a freestanding wall. Now, the other
25 wall, the one that you don't see, the one across the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 side yard, is a freestanding wall, but it has a side
2 yard beside it, so it meets the requirements, but the
3 other one built on the lot line we would think should
4 also have a side yard.

5 BY MS. WITHUM:

6 Q Okay. I had one other question, Mr.
7 Schauer. If you could -- I note, for example, on 1314
8 Potomac Avenue, there is within the eight-foot side
9 yard on the right side of the building, there is a
10 projection that goes significantly into the eight-foot
11 side yard. Does that, therefore, qualify as -- meet
12 the requirements?

13 A I would think not. I think that blocks
14 the side yard and therefore doesn't meet the
15 requirements. Now, I notice in the change of plans,
16 over time, that all of these buildings at one time had
17 projections into the side yard and they were all
18 removed except for the one at the very end on 1314.
19 But there were similar projections on the other
20 buildings, all of them, I believe, and they were
21 removed, obviously, to open up the side yards.

22 I don't understand why 1314 is allowed to
23 have that kind of a projection into the side yard. It
24 seems very strange. It looks like there's no side
25 yard at all there because it is blocked in large part

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 by this projection.

2 CHAIRMAN GRIFFIS: Okay. Anything else?

3 MS. WITHUM: Yes.

4 BY MS. WITHUM:

5 Q Finally, could you just, based upon your
6 testimony so far and your understanding of the
7 requirement for side yards, 405.3 specifically, could
8 you indicate to us what seems to be the purpose of
9 405.3?

10 A Well, I think the purpose of 405.3 is to
11 have -- to prevent the very sort of thing that's here
12 where you have detached, semi-detached buildings. I
13 would think the very notion of a semi-detached
14 building is that it ought to attach to something, and
15 these semi-detached buildings don't, and 405.3, had it
16 been followed, would have required that or forced them
17 to have a side yard so that each building would itself
18 be a detached building.

19 CHAIRMAN GRIFFIS: What is the importance
20 of attachment? I mean, if you say the purpose of
21 405.3 is to ensure that there is attachment for
22 semi-detached or not, why would the regulations be
23 wanting to make --

24 THE WITNESS: Well, if we have row houses,
25 we don't want little gaps between them, we want them

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 to come together. Semi-detached buildings ought to
2 attach together in pairs. Row houses ought to attach
3 together in rows. I mean, it seems that's the
4 definition and that's the practice of these buildings.

5 CHAIRMAN GRIFFIS: Okay. You know, I hate
6 to ask this, but I have to. It's burning on me,
7 because going back now to my hypothetical that I gave
8 you with five lots, --

9 THE WITNESS: We love hypotheticals.

10 CHAIRMAN GRIFFIS: -- you've just stated
11 that row houses should be attached, right? They
12 should go from property line to property line.

13 THE WITNESS: Correct.

14 CHAIRMAN GRIFFIS: But what you're saying
15 is, under your definition and under the Fact 17 where
16 a lot line wall that is not physically attached, even
17 though in the future it may well be, in fact probably
18 would with other row dwellings, that you actually are
19 indicating that the regulations stop row houses from
20 being attached in that type of development.

21 So my question is, if row houses are --if
22 Regulation 405 is saying row houses should be
23 attached, then a freestanding wall is not a lot line
24 wall is where I would assume you would go.

25 THE WITNESS: A lot line wall is not --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 CHAIRMAN GRIFFIS: They are different.
2 You can build a lot line wall without having it be
3 required to be set back.

4 THE WITNESS: No, you cannot unless you
5 have something to attach it to.

6 CHAIRMAN GRIFFIS: Right. I guess that --
7 all right. Okay.

8 THE WITNESS: A lot line wall is a
9 freestanding wall. I mean, that's Finding 17, and I
10 think that makes a lot of sense. What we are trying
11 to do is to prevent haphazard building of the row
12 housing and semi-detached buildings. This sort of
13 thing is one of the things we are trying to prevent,
14 and here you see a good example of what happens when
15 you don't apply 405.3.

16 CHAIRMAN GRIFFIS: Okay. Any other
17 questions?

18 COMMISSIONER MAY: I'll ask Mr. Schauer; I
19 may ask it of others as well. Are there other
20 circumstances in the zoning regulations where you
21 could have a lot line wall that is a freestanding wall
22 and can exist within the regulations?

23 THE WITNESS: Not within the regulations.
24 It could exist, though, if this Board granted --

25 COMMISSIONER MAY: Within other categories

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 other than residential?

2 THE WITNESS: I won't speak to commercial.
3 I don't know.

4 COMMISSIONER MAY: Okay. Well, then, I
5 will ask that of the Zoning Administrator. Thank you.

6 Okay. Lucky that the transcript doesn't
7 record those lapses of time. So let's go to
8 cross-examination, Mr. Schauer. We absolutely
9 appreciate your testimony today. Let's start with the
10 appellee.

11 CROSS-EXAMINATION

12 BY MR. PARKER:

13 Q I only have a couple of questions. You
14 referenced the Pritchard order, correct?

15 A That's correct.

16 Q Can you take a look at the last page of
17 that order for me, please?

18 CHAIRMAN GRIFFIS: What's the page number
19 you're referring to?

20 MR. PARKER: The very last page.

21 CHAIRMAN GRIFFIS: Page 10 or page 11?

22 MR. PARKER: It's the one that says the
23 effective date of the order.

24 CHAIRMAN GRIFFIS: Oh, okay. Page 11.

25 MR. PARKER: Page 11.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 THE WITNESS: Yes, I have it.

2 MR. PARKER: All right.

3 BY MR. PARKER:

4 Q And can you read the date the order was
5 issued on?

6 A October 15th, 2002.

7 Q All right. And it's correct to say after
8 that, there is a passage that says that order will be
9 effective ten days thereafter, correct?

10 A Yes.

11 Q Okay. And the date that these building
12 permits were issued was in July of 2002, correct?

13 A Correct.

14 Q The only other question I had was to try
15 to follow up on your analysis of the semi-detached
16 dwelling side yard requirements. As I had understood
17 you to say, if you have a semi-detached dwelling that
18 is on a lot line but not a common wall, you then have
19 to have two side yards, one on either side of the
20 dwelling.

21 A Yes. As a matter of right, you would have
22 a detached building in that case. You would have a
23 side yard on each side.

24 Q Well, that was my question, then. What is
25 the building semi -- what is it detached from or

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 semi-detached from if you've now put a side yard on
2 both sides if you read that, if you read that
3 construction into the regulations?

4 A Hopefully that would never happen. The
5 two buildings would be built simultaneously just as
6 these buildings were built simultaneously. You simply
7 build semi-detached buildings in pairs.

8 Q So you're saying the only way you can
9 build a semi-detached building, you have to build them
10 in pairs? That's your interpretation of the zoning
11 requirements?

12 A Or get an order from this Board.

13 A And what in the zoning requirements --
14 where in the zoning requirements does it say you have
15 to build semi-detached buildings in pairs?

16 A It's in 405.3 where it requires that if
17 you have a freestanding wall, you have to have a side
18 yard beside it.

19 Q But that just refers to side yards; it
20 doesn't say about the sequence of building, correct?

21 A Of course not, no.

22 Q Okay.

23 MR. PARKER: I don't have any further
24 questions.

25 CHAIRMAN GRIFFIS: Mr. Sullivan?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 CROSS-EXAMINATION

2 BY MR. SULLIVAN:

3 Q Marty Sullivan for the property owner,
4 Girls' and Boys' Town.5 Mr. Schauer, you said that we are
6 permitted to convert these homes to row houses; is
7 that correct?8 A I would suppose so. I mean, row housing
9 is permitted in the commercial zones and I would
10 assume that these could have been built as row houses.
11 They also could have been built as semi-detached
12 houses and they weren't built as either. They were
13 built as detached buildings.14 Q Are you familiar with the definition of
15 "one-family semi-detached dwelling"?16 A Lot line wall on one side and a side yard
17 on the other. And these buildings certainly meet
18 that.19 Q So we fit the definition of semi-detached
20 dwellings?

21 A Absolutely.

22 MR. SULLIVAN: Thank you. No further
23 questions.24 CHAIRMAN GRIFFIS: Does the ANC have any
25 cross-examination?**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MR. HILL: No.

2 CHAIRMAN GRIFFIS: Okay.

3 Yes.

4 REDIRECT EXAMINATION

5 BY MS. WITHUM:

6 Q I just had one follow-up question to Mr.
7 Sullivan's last question where he talked about
8 detached versus semi-detached, and I'm referring to
9 Sheet T100 of the plans that were submitted, and this
10 is the second set. I believe it was Exhibit B. I
11 just want to direct your attention to the top where it
12 says Zoning, and if you could read that, Mr. Schauer.
13 What is indicated there in terms of what kind of a
14 dwelling it is?

15 A In answer to the question, proposed use of
16 the site, we see one-family detached dwelling.

17 Q And then to which addresses does it direct
18 that to?

19 A It refers to 1308, 1310, 1312, 1314.

20 Q Is there any indication that 1310, -12 or
21 -14 are semi-detached?

22 A Not on this sheet.

23 Q And this was submitted for a permit,
24 correct?

25 A Yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MR. PARKER: Excuse me, Chairman. I had
2 one other question.

3 CHAIRMAN GRIFFIS: Yes.

4 RECROSS-EXAMINATION

5 BY MR. PARKER:

6 Q With regard to 1308, you agree with Ms.
7 Opper-Weiner that that's a building that had -- or a
8 structure that has two side yards?

9 A That is an exemplary detached building.

10 MR. PARKER: All right.

11 CHAIRMAN GRIFFIS: Okay. Any recross?

12 RECROSS-EXAMINATION

13 BY MR. SULLIVAN:

14 Q One quick question, Mr. Schauer. Is it
15 your opinion that if the plans there had some written
16 words that said something that was in conflict with
17 how these structures were actually defined by you or
18 by the pictures and the plans and the drawings, that
19 that would change what they actually were defined as?

20 A I'm not sure what the answer to that --

21 Q If they are defined as semi-detached
22 dwellings as, in your opinion, you've stated, could
23 what Ms. Withum pointed out in the plans change that?

24 If it was inadvertently written there or if there was
25 a mistake, would it change how these homes were

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 defined?

2 A If the plans, instead of saying
3 "detached," said, "semi-detached," would that change
4 my opinion? It wouldn't change my opinion a bit
5 because they still don't meet the requirements, in my
6 view.

7 Q But it's still a semi-detached dwelling.
8 You would still define it that way.

9 A Yes.

10 Q Thank you.

11 CHAIRMAN GRIFFIS: So as a follow up, Mr.
12 Schauer, I guess what I understood Mr. Sullivan to ask
13 is what do you find would regulate -- the actual plans
14 or the notes?

15 THE WITNESS: I think it's the actual
16 plans because notes can be misleading or et cetera. I
17 do note that pretty consistently, they have described
18 these buildings as being detached, but I don't think
19 that those words are magical in any way. I think what
20 you have to look at are the plans as they are
21 executed.

22 CHAIRMAN GRIFFIS: Okay. Good.

23 Anything further from the Board?

24 (No response.)

25 CHAIRMAN GRIFFIS: Very well. Thank you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 very much, Mr. Schauer.

2 (Witness excused.)

3 MS. WITHUM: Mr. Chairman, that concludes
4 our case.

5 CHAIRMAN GRIFFIS: Very well. Let's take
6 five minutes, stretch our legs, come back and revisit
7 the schedule very quickly. If I could, when we
8 return, I'm just going to ask everybody how much time
9 they need and require so that I can set up the rest of
10 the afternoon.

11 (Recess.)

12 CHAIRMAN GRIFFIS: Let's go to Zoning
13 Administrator's case. Do you have an idea of just
14 approximately how much time you're going to require?

15 MR. PARKER: I think we can get through
16 in, our side, 15 minutes.

17 CHAIRMAN GRIFFIS: Okay.

18 MR. PARKER: I don't know about
19 cross-exam.

20 CHAIRMAN GRIFFIS: Okay. Indeed. No.
21 Nor do any of us. Okay. What we are trying to do is
22 get a substantial amount done before we lose a quorum,
23 which would be between five, five-fifteen. Of course,
24 not having our standing member and one out of town,
25 you're looking at the quorum. So let's just get

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 through. I would, of course, love it if we made it
2 all the way through, but we will reassess. So with
3 that, let's continue.

4 Whereupon,

5 ROBERT KELLY,
6 was called as a witness by counsel on behalf of the
7 Appellee and, having been previously duly sworn, was
8 examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. PARKER:

11 Q Sir, would you state your name for the
12 record, please?

13 A Name Robert Kelly.

14 Q And what is your current employment?

15 A Zoning Administrator for the District of
16 Columbia.

17 Q How long have you held that position?

18 A Since August 12th.

19 Q Of what year?

20 A I'm sorry. Two-thousand-two.

21 Q And prior to that, taking that position,
22 what, if any, experience did you have in the zoning
23 and land use field?

24 A I was planning director for a city in
25 California for three years, and worked for the Land

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Use Transportation Department in Oregon for eight
2 years.

3 Q All right. And what is your professional
4 training?

5 A I have law school training, did not
6 graduate. My basic education was engineering. I've
7 been involved in codes and standards for 30 years.

8 Q Have you served on any professional
9 committees in the land use and zoning area?

10 A Yes. I've been a member of a zoning
11 appeals board, I've been a member of a building code
12 appeals board for the City of Beaverton in Oregon, and
13 was director of legislative process in the State of
14 California and for the California building officials.

15 Q All right. Thank you.

16 With regard to the issuance of the
17 building permits in July of 2002, did you participate
18 in those decisions?

19 A No, I did not.

20 Q Okay. And have you spoken with the
21 members of your staff regarding those decisions?

22 A Yes, both the technical reviewers and the
23 acting Zoning Administrator at that time. We had
24 discussions I believe in October on the issuance of
25 the permits and retitling of the building permit.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Q And you have heard reference to a letter
2 to Ms. Firster dated October 21st, 2002, from the
3 Department of Consumer and Regulatory Affairs.

4 MR. PARKER: If you could help me with the
5 number of that exhibit.

6 MS. WITHUM: I think it was 14.

7 MR. PARKER: Okay.

8 BY MR. PARKER:

9 Q Exhibit 14, in which they read passages
10 regarding the justification for issuing the permits.
11 Are you familiar with that letter?

12 A Yes, I am.

13 Q Did you review that letter and assist in
14 its preparation before it was sent out?

15 A Yes, I did.

16 Q Okay. And do you concur with the
17 information that's contained therein?

18 A Yes, I do.

19 Q All right. So the basis of your testimony
20 today would be conferring with members of your staff
21 and with a review of the actual decision to issue
22 these permits?

23 A And a review of the plans, yes.

24 Q Okay. Now, with regard to the side yard
25 issue, could you recap for the Board the decision

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 process of the Office of Zoning Administrator in
2 approving these permits?

3 A The side yard issue, as I interpret it,
4 where you have a face on line wall, that is defined as
5 a semi-detached dwelling whether or not there is a
6 dwelling on the other side.

7 Q And you get that interpretation from 11
8 DCR 199.1?

9 A Yes.

10 Q And could you again read that passage for
11 the record.

12 A Do you have it here?

13 Q Yes. Right here.

14 A Okay, 199.1, DCMR 11, also known as the
15 Zoning Code: "A semi-detached single-family dwelling
16 is a one-family dwelling, the wall on one side of
17 which is either a party wall or a lot line wall having
18 one side yard." Period and end of parentheses.

19 Q Okay. As it relates to this project and
20 these four permits, can you interpret that provision?

21 A I don't understand.

22 Q I'm sorry. The lot line wall phrase in
23 that definition, how does that relate to the permits
24 for these buildings and how they were placed on the
25 lots?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 A Okay. The lot line wall would also be
2 described as what we would call in construction as a
3 face on line wall, which means a wall that's built to
4 the property line that provides for future
5 construction on the other side to come up to the
6 property line, but it is a, I heard the phrase
7 freestanding wall. I mean, for obvious reasons, it
8 must be a freestanding wall for structural provisions
9 and for safety of inhabitation.

10 Q With regard to the side yard requirements
11 of a semi-detached dwelling, what is your
12 interpretation of the side yard requirements in this
13 zone, which I think everyone stipulated is a C-2 zone?

14 A For a semi-detached, you would have an
15 eight-foot side yard required on one side and face on
16 line or zero setback on the other line.

17 Q And reviewing the -- as it relates to the
18 plans that were provided at the time the permits were
19 issued in July of last year, 2002, what did those
20 plans show with regard to whether there was adequate
21 side yards for these properties?

22 A I reviewed both sets of plans, the July
23 set and then there was an additional attachment with
24 the October review. Both of the side yard setbacks
25 were identical in each situation, which would be a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 face on line or property line wall with an eight-foot
2 side yard on -- I don't know the addresses
3 specifically. And then there was one detached
4 dwelling that was, I believe, the end unit that had
5 side yards on both sides.

6 Q And the decision of the office was that
7 those properties met the side yard requirements for
8 single-family semi-detached dwelling?

9 A Yes, sir.

10 Q Now, you've heard reference to a Board
11 decision known as the Pritchard decision here today?

12 A Yes, sir.

13 Q Are you familiar at all with that
14 decision?

15 A Yes.

16 Q Is that, in your mind, distinguishable in
17 any way from this particular situation?

18 A Well, I guess my familiarity with it is
19 with Mrs. Pritchard wanting the zoning order enforced,
20 so I've been involved from that aspect. In fact, we
21 took action to have the addition torn down. So from
22 that aspect, that's my understanding from her, you
23 know, from Ms. Pritchard's side only, and from the
24 owner's side, from not having the revenue to hire
25 legal counsel to properly defend herself.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Q With regard to the contention that the
2 Pritchard decision has determined that a lot line wall
3 cannot be a freestanding wall, do you have any
4 familiarity with that interpretation?

5 A That's hard to rationale. I don't know
6 how you could have a wall standing that wouldn't be
7 freestanding. And clearly the Zoning Code allows for
8 a face on line wall. So, to me, there's no way to
9 define that.

10 Q Let me ask you --

11 A I guess I would equate to what the Chair's
12 description is. You can have an 18-foot-wide lot and
13 you can only build a two-foot-wide dwelling, and, I
14 mean, within walking distance of here, I can show you
15 situations where we have a lot of row houses. I mean,
16 the city's -- the whole town is based on row and
17 semi-detached dwellings, and we are issuing permits,
18 probably a hundred a month right now to build more.

19 Q With regard to -- so, first of all, in a
20 residential context, there are permits or permits that
21 have been issued for properties similarly situated to
22 these properties that are issued here today?

23 A Well, I couldn't comment because I don't
24 review every plan that comes across, and we issue
25 about 88,000 permits a year, so that would be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 impossible to do, but just guessing, I would say yes.

2 Q When you say just guessing, you mean there
3 are some that the Zoning Administrator has reviewed
4 and approved?

5 A Yes, that would be face on line walls,
6 correct.

7 Q What about in the commercial context?

8 A I can't answer that.

9 Q Okay. Do you know whether or not, in the
10 District of Columbia, there are commercial buildings
11 on lot line walls with face on -- I'm sorry -- the
12 description used, face on line walls?

13 A Well, the zone itself determines what the
14 setback requirements are, from R-1, which is the most
15 restrictive, to the different commercial zones, which
16 do not require setbacks, so you can build on the
17 property line. In some areas, there are building
18 restriction lines; other areas, there's overlay
19 districts that are even more restrictive than what
20 Title 11 requires. So that, depending on the zone,
21 that would dictate what the setbacks would be.

22 Q Mr. Schauer indicated that it was his
23 opinion that these structures could have been built as
24 a matter of right as row homes. Do you concur with
25 that?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 A Yes.

2 Q All right. And he also indicated that to
3 be semi-detached structures, they should have been
4 built as pairs with yards on either -- should have
5 been built as pairs initially so that they were
6 attached to something and then side yards on other
7 side. Do you concur with that?

8 A No, I do not.

9 Q With regard to a question that came up in
10 the preliminary matters, there was a discussion about
11 whether, in September of 2001, whether the Zoning
12 Administrator made a decision that the proposed
13 structures at that time were semi-detached dwellings
14 and were, as such, in compliance with the side yard
15 restrictions of those structures. Do you have any
16 information to share with us on that?

17 A Again, the initial plans and the plans as
18 they are presented today, the configuration of the
19 buildings on the lots remain the same, so they would
20 be semi-detached dwellings.

21 Q And you base that on your observations of
22 the plans themselves?

23 A Yes, sir.

24 Q All right. And so the footprint of the
25 structure in the initial set of plans is identical to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the footprint in the subsequent plans?

2 A Of the building, yes.

3 Q Okay. And that would include the
4 configuration of the side yards.

5 A That's correct.

6 MR. PARKER: I don't have any further
7 questions.

8 CHAIRMAN GRIFFIS: Questions from the
9 Board?

10 COMMISSIONER MAY: In your testimony, you
11 didn't make specific reference to Section 405.3, but I
12 would like to understand how you interpret 405.3 in
13 the aftermath of the Pritchard decision, which states
14 that when there is not a common division wall with an
15 existing building or building being constructed
16 together with the new building, it shall have a side
17 yard on each resulting freestanding wall.

18 THE WITNESS: Well, it would be my
19 interpretation that a face on line wall would not be a
20 freestanding wall by that definition. I mean --

21 COMMISSIONER MAY: But that's contrary to
22 what was decided in Pritchard.

23 THE WITNESS: Well, I mean, you're in a
24 position where you can't build a face on line wall.

25 COMMISSIONER MAY: I'm not asking about a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 theoretical situation; I'm asking specifically about
2 --

3 THE WITNESS: I'm not, either. I'm saying
4 that the Zoning Code allows you to build it. Then you
5 would need to amend the Zoning Code. And that would
6 be my opinion, for what it's worth.

7 COMMISSIONER MAY: So your opinion is that
8 what was stated in the BZA order in the Pritchard case
9 doesn't apply? Is that what you're stating? Because
10 it says in there that a lot line wall is a
11 freestanding wall, and therefore it has to have a side
12 yard.

13 THE WITNESS: So based on that decision,
14 we can't build on lot lines -- correct? -- anywhere.

15 COMMISSIONER MAY: When 405.3 applies, the
16 way the regulations are right now, that's what it
17 says.

18 THE WITNESS: I disagree. Again, that's
19 my opinion.

20 COMMISSIONER MAY: Okay. How many people
21 live in these houses, or how many people will?

22 THE WITNESS: I can't answer that.

23 COMMISSIONER MAY: Do you know what you've
24 been told? I mean, based on what other people --

25 THE WITNESS: Based on construction as a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 dwelling, in Title 11, a family is defined as six
2 people unrelated by blood.

3 COMMISSIONER MAY: Right. Or marriage.

4 THE WITNESS: Or marriage. There is no
5 limit if they are related by blood.

6 COMMISSIONER MAY: Right. So there are
7 theoretically six bedrooms for youths, plus the couple
8 that will manage the house, correct?

9 THE WITNESS: I have no idea.

10 COMMISSIONER MAY: Okay. So you didn't go
11 into that question at all, you didn't look at the
12 question of whether it fits the definition of a family
13 when looking at the definition of --

14 THE WITNESS: Certainly it does.

15 CHAIRMAN GRIFFIS: Doesn't that take us
16 back to the original appeal? I mean, we are no longer
17 looking at --

18 COMMISSIONER MAY: Well, the basis of
19 their decision to grant the permit is based on 199.1
20 and the applicability of this building to that
21 definition. That definition has the word "family" in
22 it.

23 CHAIRMAN GRIFFIS: Right.

24 COMMISSIONER MAY: I wanted to just make
25 sure that they consider the question of what a family

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 is. They didn't consider it, and that is not
2 necessarily a problem; I just wanted to know if they
3 had considered it.

4 CHAIRMAN GRIFFIS: I see.

5 COMMISSIONER MAY: Okay. Because the way
6 I understand the building to be operated or occupied,
7 if you will, there will be six individuals who are
8 unrelated by blood or marriage to the seventh and
9 eighth, who would be related in theory. So it's over
10 the six threshold. But you didn't consider that in --

11 THE WITNESS: No, no. Well, they were
12 built as a single-family dwelling.

13 COMMISSIONER MAY: Okay. Let's talk about
14 the projection into the side yard on the end property.

15 Did you give specific consideration to that? I think
16 that's -- what number is that one?

17 CHAIRMAN GRIFFIS: Thirteen-fourteen.

18 COMMISSIONER MAY: Thirteen-fourteen.

19 THE WITNESS: The air-conditioner?

20 COMMISSIONER MAY: No. The building, the
21 portion of the building -- that enclosed porch-like
22 thing. I mean, if you look on --

23 THE WITNESS: It's clearly shown on the
24 plans, so I'm assuming it was considered during plan
25 review. I did not give it specific consideration, so

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 I would have to say no to your question.

2 COMMISSIONER MAY: Okay. On the face of
3 it, the way it looks right now -- I know that we don't
4 have dimension plans here that show it very clearly,
5 but if, in fact, what we have on the other properties
6 is a minimum eight-foot side yard, it would seem that
7 that little projection of building goes into the side
8 yard, would it not?

9 THE WITNESS: Well, what I'm looking at,
10 it looks like the side yard comes all the way over to
11 here.

12 COMMISSIONER MAY: You don't see the
13 property line there? My drawing gives a -- shows
14 three dashes towards the back of that property
15 indicating it is the property line. Maybe I don't
16 have the right plat.

17 THE WITNESS: Well, mine shows two lines
18 along the building line that look like a wall or a
19 piece of construction.

20 COMMISSIONER MAY: Right. And beyond that
21 --

22 THE WITNESS: I guess I can't answer your
23 question.

24 COMMISSIONER MAY: Okay. So you didn't
25 consider that.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 THE WITNESS: No, that's not what I said.

2 COMMISSIONER MAY: I'm sorry, you're
3 right. Okay. That's not what you said.

4 Why were the -- on the first iteration of
5 the plans, they had similar structures in the side
6 yards. Can you talk to why they were not shown in the
7 second version?

8 THE WITNESS: Even in Title 11, it allows
9 for fireplace and attachments, you know, things that
10 can be in the side yard, and they are specifically
11 called out. I mean, I don't have the --

12 COMMISSIONER MAY: Right.

13 THE WITNESS: -- text in front of me, but
14 I would glad to provide it.

15 COMMISSIONER MAY: Okay. I'm just
16 wondering why they were taken out in the different
17 versions of the plan, because the first version we
18 have of the plans --

19 CHAIRMAN GRIFFIS: Is your question did
20 the ZA require the removal of it?

21 COMMISSIONER MAY: Exactly.

22 THE WITNESS: I can't answer that.

23 CHAIRMAN GRIFFIS: Okay. But you're not
24 aware that there was some decision that required
25 removal of portions of the building?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 THE WITNESS: Not to my knowledge.

2 CHAIRMAN GRIFFIS: Okay.

3 COMMISSIONER MAY: One last thing. Back
4 to the Pritchard decision and the whole issue of lot
5 line walls versus freestanding walls and whether they
6 can, in fact, be the same, and the decision -- or what
7 was written in that opinion was that a lot line wall
8 is a freestanding wall by definition, and that would
9 seem to be contrary in the context of the side yard
10 discussion. However, are there not circumstances in
11 the zoning regulation where you can have a perfectly
12 normal lot line wall and it's a freestanding wall?

13 THE WITNESS: I'm not sure what your
14 question is.

15 COMMISSIONER MAY: Okay.

16 THE WITNESS: I mean, you just said there
17 wasn't, so now you're saying that there is --

18 COMMISSIONER MAY: Well, no, I'm saying it
19 seems contradictory in the --

20 THE WITNESS: I agree.

21 COMMISSIONER MAY: Right. But in a
22 commercial district, which you cited before, you can
23 have -- I mean, the norm is to, in fact, have a lot
24 line wall with no side yard; is that right?

25 THE WITNESS: That's correct, and --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 COMMISSIONER MAY: So it is a freestanding

2 --

3 THE WITNESS: -- the same applies in
4 residential.

5 COMMISSIONER MAY: What?

6 THE WITNESS: The same applies in
7 residential.

8 COMMISSIONER MAY: That's not what I'm
9 asking you.

10 THE WITNESS: Okay. I'm sorry.

11 COMMISSIONER MAY: In commercial, in a
12 commercial application, you could have a freestanding
13 lot line wall and it is does not even seem to be
14 contradictory; is that right?

15 THE WITNESS: I'm not sure.

16 COMMISSIONER MAY: Okay. How do I phrase
17 this? Commercial buildings are built right up to the
18 property line, right?

19 THE WITNESS: No.

20 COMMISSIONER MAY: Or often.

21 THE WITNESS: They can be.

22 COMMISSIONER MAY: They can be.

23 THE WITNESS: Depends on the building and
24 the height, the zone, the overlay.

25 COMMISSIONER MAY: You're right. Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 It can be built right up to the property line.

2 THE WITNESS: Yes, sir.

3 COMMISSIONER MAY: And that is a lot line
4 wall or a face on line wall, as you called it, when
5 it's built up to the property line?

6 THE WITNESS: Well, I guess my
7 interpretation is different than yours.

8 COMMISSIONER MAY: What is it, then?

9 THE WITNESS: I'm just saying, I think our
10 interpretation differs. I mean, you can call it a
11 face on line wall, you can call it a property line
12 wall, you can call it an exterior wall of a building.
13 So I'm not sure what you're getting at here.

14 COMMISSIONER MAY: I'm just asking you
15 whether you would consider, in a commercially zoned
16 area, a commercial building, if the wall is on the
17 property line, would you consider that a lot line
18 wall?

19 THE WITNESS: Yes, sir.

20 COMMISSIONER MAY: Okay. That's all I was
21 asking.

22 THE WITNESS: Thank you.

23 COMMISSIONER MAY: My point in making this
24 -- in raising this issue is that the seeming
25 contradiction in residential application of the zoning

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 regulations with regard to lot line walls and
2 freestanding walls is not a contradiction in the
3 context of typical commercial development where a side
4 yard is not required. It seems to be a contradiction
5 in the context of residential where there is an
6 allowance in the definition of a single-family
7 residential for a lot line wall to qualify as a
8 single-family semi-detached.

9 THE WITNESS: I would refer you to back to
10 199. In the definition, it's very clear that --I
11 mean, because what you're saying is you cannot build a
12 lot line wall, you can't have a semi-detached house
13 unless there is another house there, and if you've got
14 a row of --

15 COMMISSIONER MAY: I think that's the
16 point of 405.3, is the point that I --

17 THE WITNESS: I disagree. I think --

18 COMMISSIONER MAY: Well, you made that
19 point before.

20 THE WITNESS: Right. Thank you.

21 COMMISSIONER MAY: Okay. That's it.
22 Thank you.

23 CHAIRMAN GRIFFIS: Other questions?

24 (No response.)

25 CHAIRMAN GRIFFIS: Okay. Let's go to --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MEMBER ETHERLY: I have one very focused
2 question, because, I mean, I think Mr. May has served
3 to confuse me even further.

4 COMMISSIONER MAY: I'm sorry.

5 MEMBER ETHERLY: No, no, no. But it's
6 good confusion because we are trying to work through
7 this.

8 We dealt with a little bit of a
9 hypothetical from the Chair to Mr. Schauer earlier.
10 Then again, it could have been just part of our
11 sidebar conversation. But I had asked a question
12 regarding a scenario where you have your hypothetical
13 row of four or five houses, and for whatever reason,
14 you have a gap that has now appeared in that row.
15 Based on the interpretations that you have been
16 working under, you would be able -- an applicant or a
17 prospective property owner would be able to come in
18 and fill in that gap.

19 THE WITNESS: Yes, sir.

20 MEMBER ETHERLY: Correct. Okay.

21 THE WITNESS: What may be even easier --
22 we will do it visually.

23 MEMBER ETHERLY: Okay. I like that.

24 THE WITNESS: You have -- we will do it
25 the easy way. You have three lots.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MEMBER ETHERLY: Yes, sir.

2 THE WITNESS: No buildings on them. Now,
3 you want to build -- these two houses have been
4 demolished and you want to build on this lot. You can
5 do it and you can build face on line wall on both
6 sides, no side yards are required, providing it's not
7 an R-1-A zone or whatever, and you can do so, and it's
8 done so on a regular basis, especially where you have
9 areas in the town that have been demolished, some of
10 them by the District, and we are trying to revitalize
11 those neighborhoods. So you can't force someone to
12 build two dwellings at one time if they are under
13 individual ownership. So that is why it is very
14 difficult, what I was trying to -- I wasn't trying to
15 argue with Mr. May; I was just trying to say that it
16 puts us -- I mean, I understand Pritchard's decision,
17 but it puts us in a position where, in a matter of
18 right zone, where you are allowed to build on the
19 property line. We are required by the building code
20 and by law that if the applicant has met all the
21 requirements and has provided plans and everything,
22 we're required by law to issue that permit.

23 MEMBER ETHERLY: Okay. Thank you.

24 Thank you, Mr. Chair.

25 COMMISSIONER MAY: May I follow that for a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 second?

2 CHAIRMAN GRIFFIS: Sure.

3 COMMISSIONER MAY: In that circumstance
4 where you have three existing houses, one in the
5 middle is demolished for whatever reasons, typically
6 what you're left with is three houses with party
7 walls, or two houses with party walls, right?

8 THE WITNESS: Or face on line. I mean --

9 COMMISSIONER MAY: Typically.

10 THE WITNESS: In nomenclature, where
11 you're talking about party wall, face on line wall,
12 basically the same construction applies, construction
13 type. I mean, you're dealing with building code
14 requirements that are going to stipulate that if that
15 wall is built on the property line, it must be built,
16 depending on the code again and the type of
17 construction, to meet this fire-resistant requirement
18 and this sound-transmission requirement. Zoning could
19 care less. I mean, you could build it out of tissue
20 paper if you wanted to.

21 But what we're talking about is a wall
22 that you're going to have the ability to attach
23 another wall to later, or you may not if it's a side
24 -- if you semi-detach and you've got an open yard
25 there, you're not going to be able to attach because

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 of what the gentleman testified to earlier, you've got
2 a two-foot-wide row house now with required setbacks
3 on both sides, and we all know that doesn't occur.

4 COMMISSIONER MAY: Right. But if you are
5 building up -- in the circumstances where you have
6 three houses and the middle one has been torn down and
7 what's left are two houses with party walls or walls
8 that -- I mean, there is a difference between a lot
9 line wall and a party wall, right? The party wall
10 shares; the property line is somewhere in the middle
11 of that wall.

12 THE WITNESS: Well, a property line wall
13 can only build up to the property line. You can't
14 build over it.

15 COMMISSIONER MAY: Right. But when
16 building --

17 THE WITNESS: There are buildings where
18 the property line --

19 COMMISSIONER MAY: Bisects the wall
20 between the two properties.

21 THE WITNESS: -- bisects the wall, and
22 even the bricks are overlaid such to where you can't
23 tear the wall down without tearing both walls down.

24 COMMISSIONER MAY: Right.

25 THE WITNESS: So I -- we don't want to get

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 into that.

2 COMMISSIONER MAY: No. The point I'm
3 trying to make is that, in effect, what you wind up
4 with is a common division wall between -- I mean, you
5 can fill in that gap between the two houses and create
6 what is referred to in 405.3 as a common division
7 wall, because that's effectively what you're doing.
8 If you build a new wall there, you're not sheathing it
9 on the outside, you're not making it a completely
10 otherwise freestanding wall.

11 THE WITNESS: Well, yes, it is
12 freestanding. You cannot --

13 COMMISSIONER MAY: Structurally it may be
14 freestanding, --

15 THE WITNESS: It would have to be. It
16 would have to be.

17 COMMISSIONER MAY: -- but it would be
18 attached at the top, would it not? Certainly you
19 aren't going to have water dripping down between them.

20 THE WITNESS: Well, you can have roof
21 covering go across, yes, but attached, no. In fact,
22 they're designed where one can burn down and the other
23 one should stay intact for an hour.

24 COMMISSIONER MAY: Well, they are still
25 attached in that circumstance and they cut the joists

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 in such a way so that they will fall down without
2 pulling the brick wall down. I mean, I understand how
3 buildings are built.

4 THE WITNESS: Okay.

5 COMMISSIONER MAY: My point is that in
6 effect what you wind up with is a common division
7 wall, and I think this helps solve some of the issue
8 that you have, Mr. Chairman, when you have that gap
9 and you try to fill that gap. I think that 405.3
10 doesn't prevent you -- 405.3, the way Pritchard was
11 interpreted, does not prevent you from filling that
12 gap because, in effect, what you have in the end is
13 common division walls, not freestanding lot line
14 walls, common division walls.

15 CHAIRMAN GRIFFIS: And I would agree, even
16 if, in fact, you were in the case that you were not
17 attaching to a physical wall of the adjacent property
18 but you were building a common division wall. So it
19 doesn't mean that there has to be another structure on
20 the other piece of property.

21 THE WITNESS: That's true.

22 CHAIRMAN GRIFFIS: Without taking this --

23 COMMISSIONER MAY: I'm not sure about that
24 one.

25 CHAIRMAN GRIFFIS: All right. I think the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 pertinent piece for our reconciliation today, because
2 clearly this is going to be a longstanding discussion
3 between this Board and the Zoning Commission, we ought
4 to look at findings of fact in the Pritchard case and
5 Finding of Fact Number 8, which I think gives us some
6 context for what the order and the case was, and that
7 reads, "The eastern side lot of the subject property
8 coincides with the rear lot lines of five lots
9 developed with a row dwelling fronting on 11th
10 Street." And I think that the importance of that is
11 that we had a side yard that abutted a rear yard.

12 That is the specific case that we heard
13 and that is where Pritchard, in my understanding, goes
14 to when dealing with the issues that came before us in
15 appeal and what the ruling was based on.

16 So that being said, any other questions of
17 Mr. Kelly at this time from the Board?

18 (No response.)

19 CHAIRMAN GRIFFIS: Let's go, then, to the
20 appellants, if they have cross-examination of Mr.
21 Kelly.

22 CROSS-EXAMINATION

23 BY MS. WITHUM:

24 Q Mr. Kelly, you were discussing two sets of
25 plans. You said there was a set in July and then

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 there was a set in October? You said there was an
2 October set of plans?

3 A The set of plans in October, I think the
4 only thing that changed was a site plan on parking.

5 Q Yes, there was a revised set of plans that
6 you --

7 A Not plans; there was a page. The building
8 construction drawings remained the same, at least in
9 my recollection.

10 Q You said you were involved in the -- did
11 you actually draft the October 21st letter, the
12 October 21st, 2002, letter?

13 A I'm sure I did parts of it. I didn't do
14 the entire letter, no.

15 Q Have you ever had the occasion to read the
16 first Boys' Town decision, 16791, which was the
17 decision, and certain language of that that we
18 specifically cited?

19 A Possibly. I don't recall.

20 Q So you don't know whether you've read that
21 decision even though that was essentially the basis of
22 -- one basis of our appeal?

23 A On this appeal?

24 Q Yes.

25 A Yes, then I read this. Yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Q So you did read the first decision?

2 A Yes.

3 Q Okay. You also said that you were
4 guessing that the Zoning Administrator had issued
5 permits, I think you said thousands, perhaps, with
6 face on line walls. Do you have any specific example
7 of construction like the one at issue here that you
8 can point to?

9 A Not specifically, but you can just drive
10 around town.

11 Q But you have no specific example; you're
12 --

13 A Not an address, no.

14 Q -- just guessing? Okay. So as far as we
15 know, there really isn't one; you're just speculating.

16 CHAIRMAN GRIFFIS: Okay. I think he
17 answered it.

18 MS. WITHUM: Okay.

19 BY MS. WITHUM:

20 Q You said that these structures could not
21 have been built in pairs. Why is that?

22 A No. I said it's not -- if you have three
23 individual lot owners and your expectation is the
24 neighbor is going to build at the same time you build,
25 that's not realistic. That's what I said.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Q Okay. I understood something different.

2 You said that in the decision to issue the
3 permits for September 6th, 2001, that, at that time,
4 there was a decision made by the Zoning Administrator
5 that these were semi-detached structures, 1310, -12
6 and -14. Do you know where there is evidence that
7 there was actually a decision made that these were
8 semi-detached structures?

9 A The signature on the plan review form that
10 indicates approval from Zoning.

11 Q Can we just turn for a minute to Exhibit
12 2. Do you have a copy of our materials? I believe we
13 served you with a notebook.

14 MR. PARKER: Could you identify what you
15 are referring to as Exhibit 2?

16 MS. WITHUM: That was the permit
17 applications and this one.

18 MR. PARKER: That's not it.

19 MS. WITHUM: I know it's not, but there is
20 a whole stack here. That's why I want you to look at
21 the whole stack. If you can tell me where the plan
22 review form is.

23 BY MS. WITHUM:

24 Q Just so that we can all be on the same
25 page, how about if you look at Exhibit 2 in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Appellant's exhibits?

2 A Okay.

3 Q I am flipping through four, five pages,
4 and I come to an approvals page, J. Is that what
5 you're referring to? That page.

6 A Yes.

7 Q Is that the one you're referring to?

8 A That's correct.

9 Q Where is it indicated that these are
10 semi-detached dwellings?

11 CHAIRMAN GRIFFIS: What are we looking at?

12 THE WITNESS: Excuse me?

13 MS. WITHUM: Let's see. It's one, two,
14 three, four, five -- sixth page in.

15 THE WITNESS: Okay. You would have to go
16 to the front page.

17 MS. WITHUM: Okay.

18 THE WITNESS: And it says two-story and
19 cellar residence.

20 BY MS. WITHUM:

21 Q But that doesn't say semi-detached.

22 MR. PARKER: Excuse me. I believe you're
23 directing him to the applications from 2002.

24 MS. WITHUM: Okay. Either one. I mean,
25 I'm just trying to see where there's any reference to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 semi-detached dwellings prior to October of 2002.

2 THE WITNESS: It's just going to say
3 one-family dwelling.

4 BY MS. WITHUM:

5 Q So that, in fact, there is no reference to
6 semi-detached dwellings.

7 MR. PARKER: That's not what he said.
8 Could you ask him the question again, please?

9 BY MS. WITHUM:

10 Q Where is there any reference -- and we
11 will just look at the second set of reissued permits.

12 Is there anywhere in here that indicates that these
13 are semi-detached dwellings?

14 A I would need time to review them all.

15 Q Just look at one. One would be fine.

16 A Well, I hate to make a blanket statement
17 like that. On the one that I'm looking at here, it
18 says single-family dwelling. Whether it's detached or
19 unattached or a row dwelling, it's a single-family
20 dwelling.

21 Q I know, but my issue was to the -- whether
22 it was a detached or a semi-detached because that was
23 what you had testified to.

24 A Excuse me?

25 Q You had testified that there was a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 decision that these were semi-detached early in the
2 application process.

3 A Well, I can't testify to when the decision
4 was made. What I'm saying is the plans as submitted
5 were reviewed at this time when the permits were
6 issued in '90 or '91 or 2001, whenever it was. At
7 that time, the site plan remains the same.

8 Q Okay.

9 A So as a plans examiner, you would look at
10 it. Whether it's a single-family -- on the
11 application, it may not say single-family dwelling
12 attached, single-family dwelling detached.

13 Q Okay.

14 A I mean, that's done by a permit clerk.
15 They will write down whatever the permit runner tells
16 them to.

17 Q Can I also ask you, turning to Exhibit 14,
18 --

19 A Okay.

20 Q -- and on page 2, it talks about the
21 dwellings as semi-detached single-family dwellings,
22 and you had indicated in your statement that, you
23 know, it was very clear that these -- that's what they
24 were.

25 Ms. Opper-Weiner testified earlier that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the Southeast Citizens had some difficulty obtaining a
2 more detailed explanation of the basis, and I was
3 wondering if this information was available back in
4 July when we had requested it.

5 MR. PARKER: Objection. Irrelevant as to
6 what they requested, what they got. The issue is what
7 is the side yard and that's the only thing that's
8 germane at this point.

9 CHAIRMAN GRIFFIS: Yes, I would agree. I
10 mean, it seems like we have the information. When it
11 came in doesn't really help us with anything right
12 now.

13 BY MS. WITHUM:

14 Q I would like to ask you just a couple more
15 questions in terms of what's the basis of your
16 testimony here today. You said that -- did you look
17 at the appeal document, the actual appeal filing in
18 this appeal?

19 A Yes, I did.

20 Q And you looked at all the exhibits?

21 A Yes, I did.

22 Q Okay. And you looked at the Pritchard
23 case?

24 CHAIRMAN GRIFFIS: Where are we going?

25 MS. WITHUM: I just wanted to ask him a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 couple questions to make sure that I knew the basis of
2 what he's testifying to. I mean, it seems to me a lot
3 of these questions he hasn't been able to provide the
4 answer to. I just wanted to know what he --

5 CHAIRMAN GRIFFIS: Okay.

6 THE WITNESS: Yes.

7 BY MS. WITHUM:

8 Q Do you know who was the Zoning
9 Administrator who actually made the decision to issue
10 these permits?

11 A On which? I mean, you talked about
12 Pritchard --

13 Q The second set of permits. The second set
14 of permits here.

15 A On this --

16 Q In this particular appeal.

17 A I would have to look at who signed the
18 application, but the one that we were just looking at
19 was signed by Toye Bello.

20 Q Okay. Did you have an opportunity to
21 speak with him about this case at all in the zoning --

22 A I did not.

23 Q Okay. Did you have a chance to speak with
24 Denzel Noble about this case?

25 A Frequently.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Q Okay. Did you speak with him about his
2 letter of July 15th?

3 A Not specifically, no.

4 Q Okay.

5 MS. WITHUM: I'm trying to cut out a few
6 things because I know you are pressed for time.

7 CHAIRMAN GRIFFIS: No, we just want to get
8 to the --

9 MS. WITHUM: Done by five.

10 CHAIRMAN GRIFFIS: No, no, no. I mean,
11 time is not the element that is running us, but rather
12 getting to the real core of this.

13 BY MS. WITHUM:

14 Q Okay. Would you look at the documents
15 that were submitted by the developer, Exhibit D.

16 A Over here?

17 Q These materials.

18 A Okay. And I would like you to look --
19 well, you can start, for example, with the last one,
20 and there's a stamp on there. It says it complies
21 with the zoning requirements.

22 A Yes.

23 Q And do you know whose initials those are?

24 A Yes.

25 Q Whose are they?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 A Toye Bello.

2 Q And the date on that?

3 A 7/5/01.

4 Q Is there anything more recent to indicate
5 that there was any review, specific review and
6 approval taken since July of '01 on the zoning
7 approval for this?

8 A I don't understand your question.

9 Q Well, this is the basis for reissued
10 permits, correct? This application.

11 A Well, I think -- it doesn't look like it,
12 no, because this is dated '01; the permits were
13 reissued in '02.

14 Q So to your knowledge, there was no further
15 zoning review taken in July of '02?

16 A There would be a document that indicated
17 when the review was done, but if no site plan review
18 was necessary, then it may not have been updated.

19 Q Okay. So what we see here is what we get,
20 correct? I mean -- okay.

21 A I would have to say yes.

22 Q Just one this question on this. If you
23 look at the last one, I believe that deals with 1314.
24 The last one. Is that correct?

25 A Well, I've got it on square, lot and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 square.

2 Q I think it's what's in front of it. If
3 you look at what's stapled to it in the beginning.

4 A It says Square 1045 on the top here. Can
5 we make sure we're --

6 Q Square 1045?

7 A Okay. Yes.

8 Q Yes.

9 A So we're looking at --

10 Q And I just want to direct your attention
11 to the projection within the eight foot side yard.

12 A Yes

13 Q I just want to ask you, based upon your
14 own determination in the October 21 letter which said
15 that all of these semi-detached complied because they
16 had an eight-foot sidewall on one side, how this met
17 that requirement.

18 A I would have to speculate, but looking at
19 it, I'll bet that's the front door, and there's no
20 front yard requirement in a residential construction.

21 And I'm guessing, but it sure likes it with a walk,
22 ramped walk coming up.

23 CHAIRMAN GRIFFIS: So your view on that,
24 if I understand you correctly, is 1314, actually we're
25 looking at, as has been an assumption, that that is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the side yard, but rather, that's probably the front
2 yard.

3 THE WITNESS: I would be willing to bet,
4 but I'm guessing. I mean, only because the ramp is
5 coming up there and the ramp is coming from the
6 parking area, that would be a logical assumption, but
7 it would purely be an assumption on my part.

8 BY MS. WITHUM:

9 Q I would like to ask you just a couple more
10 questions. I will try to cut this down. Why wasn't a
11 stop work order issued when it was first requested by
12 the Southeast Citizens?

13 MR. PARKER: Objection.

14 CHAIRMAN GRIFFIS: How does that have
15 pertinence to us today?

16 MS. WITHUM: Well, I think it -- we had
17 specifically requested it in our --

18 CHAIRMAN GRIFFIS: I know.

19 MS. WITHUM: All right. I will withdraw
20 it.

21 CHAIRMAN GRIFFIS: We've got to do the
22 side yards.

23 MS. WITHUM: I'll withdraw it. I
24 understand. I know where we're going here.

25 CHAIRMAN GRIFFIS: Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 BY MS. WITHUM:

2 Q Why did you not, in your October 21st
3 letter, address -- or should I say Mr. Clark -- if you
4 know, because I know you had a hand in drafting that
5 letter, why did you not address 405.3, that
6 regulation?

7 A When the letter was prepared, we did not
8 feel that section was applicable.

9 MS. WITHUM: That's it.

10 CHAIRMAN GRIFFIS: Thank you.

11 Mr. Sullivan.

12 CROSS-EXAMINATION

13 BY MR. SULLIVAN:

14 Q Marty Sullivan for the property owner,
15 Girls' and Boys' Town.

16 Mr. Kelly, just to clear up a few points
17 that came up already, the appellant's expert witness
18 has told us that the Pritchard case is new law. Do
19 you know about when that new law became effective?

20 A I don't know the specific date, no.

21 Q I have the order here in the record as an
22 exhibit to the appellant's prehearing statement, and
23 on the last page of the order, page number 11, it
24 states a final date of order date. Can you tell me
25 what that date is?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 A October 15th, 2002, but then it must be
2 published.

3 Q And so it must be published, then it
4 wouldn't become effective for another ten days after
5 it becomes final; is that correct?

6 A That's correct.

7 Q So somewhere in late October 2002,
8 Pritchard -- new law became effective.

9 A Yes.

10 Q Okay. The revised permits in this case
11 were filed sometime before that new law became
12 effective; is that correct?

13 A I'm not sure of the specific date when
14 they amended the permits, but I think it was before
15 then, yes.

16 Q I think the Board knows that it was.

17 Have you considered how you were going to
18 go back and cite other properties permitted before the
19 new law became effective and try to get them to comply
20 with the law that became effective after the building
21 permits were issued?

22 A Which law?

23 Q Pritchard law.

24 A No.

25 Q Okay. Next, just to be very clear and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 specific, I know you have mentioned this a couple of
2 times already, but you testified, and if you could an
3 again, before issuance of the original permits in
4 September 2001, your staff reviewed these structures
5 and defined them as semi-detached dwellings; is that
6 correct?

7 A They were reviewed and permits were issued
8 based on the fact that they were semi-detached
9 dwellings.

10 Q For purposes of determining the
11 restrictions of side yards, the Office of the Zoning
12 Administrator reviewed them under the section of the
13 regs that apply to semi-detached dwellings; is that
14 correct?

15 A Yes.

16 Q Which would be section 775.3; is that
17 correct?

18 A I'm not sure of the section. I don't have
19 the Title 11 here.

20 Q I have it here.

21 A 775.3 would be correct.

22 Q Thank you.

23 To your knowledge, was that decision that
24 came out of your office before September 6th, 2001,
25 appealed before this subject appeal in June of 2002?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 A I believe so.

2 Q It was appealed when?

3 A I don't know the date.

4 Q In this appeal, the second appeal.

5 A Oh, this appeal?

6 Q It wasn't appealed before two months had
7 lapsed.

8 A No.

9 MR. SULLIVAN: Thank you. That's all I
10 have.

11 CHAIRMAN GRIFFIS: Does the ANC have any
12 cross-examination? No? Okay.

13 Last Board questions? Very well.

14 Mr. Kelly, thank you very much for your
15 participation today.

16 (Witness excused.)

17 CHAIRMAN GRIFFIS: That leaves us at a
18 couple minutes before five. We have, of course, the
19 property owner's case to present. We have heard from
20 the ANC, but then we have closing.

21 Mr. Sullivan, how much time do you think
22 you need for -- ten minutes for presentation? Okay.
23 Let's do that, we will get through that, and perhaps
24 what we have left over is rebuttal and closings, which
25 may not be that disruptive if you actually had

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 additional time, but we will visit that.

2 So, Mr. Sullivan, when you're ready.

3 MR. SULLIVAN: Again, my name is Marty
4 Sullivan with the property owner, Father Flanagan's
5 Boys' Home or Girls' and Boys' Town.

6 The definition of one-family semi-detached
7 dwellings is a one-family dwelling, the wall on one
8 side of which is either a party wall or a lot line
9 wall having one side yard. Clearly, our three homes
10 meet that definition, and clearly they have the
11 minimum required width of side yards to comply with
12 the zoning regulations. It's hard for me to
13 understand any way in which these three homes do not
14 meet this definition.

15 If the Board grants this appeal, beyond
16 considering an untimely filing, it will have rewritten
17 the zoning regulations, eliminating the phrase "or lot
18 line wall" from semi-detached dwellings. Surely this
19 could not be your intent. Only the Zoning Commission
20 has the authority to amend the zoning regulations and
21 the Board has no such authority.

22 I have read the Pritchard decision and I
23 was not privy to the intimate details of those
24 proceedings. I do know if the Board were to grant
25 this appeal, it could lead to the ridiculous

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 conclusion that we would just eliminate these side
2 yards and make row houses. The appellant's expert has
3 said we could do that. So I really don't understand
4 the motivation behind this appeal, for one thing. I
5 understand the motivation; I don't understand the
6 stated motivation.

7 I don't think the Board intended that
8 result, that we would just eliminate side yards and
9 make row houses, and I doubt that the appellant would
10 be satisfied with that outcome.

11 Regardless, the Pritchard case, which the
12 appellant's expert has stated is new law, became
13 effective after our building permits were issued,
14 after construction started. If you can go back four
15 months, where do you draw the line? Can you go back
16 five years? Ten years? Do we have to issue
17 citations? Do we have to bring people before the
18 Board? How do we get people in the past to comply
19 with the new Pritchard law?

20 You have heard sufficient and sound
21 testimony from the Zoning Administrator as to how
22 these particular homes have complied with the
23 applicable side yard regulations. You have also now
24 heard conclusive and unchallenged evidence that the
25 decision being appealed here today was made by the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Zoning Administrator fully ten months before this
2 appeal was filed. Other than that, I have little to
3 add other than to say that we ask only that if the
4 Board chooses to grant this untimely appeal, that it
5 spell out very clearly what is exactly required of
6 Girls' and Boys' Town.

7 We had a case at Sargent Road where this
8 Board said if we subdivide the property into four
9 separate record lots, we're permitted as a matter of
10 right. Then we had a case before the Board where the
11 Board said, "No, you can't do that. We're sorry we
12 said that. We're sorry that you built the homes.
13 But, however, we will tell you that you can protect
14 your property interest by dedicating this property to
15 a matter of right use." So we did just that, and here
16 we are again. And then we filed for a C of O with the
17 Zoning Administrator for one home for six kids because
18 we thought, even under the Board's Order 16791, that
19 one home for six would be permitted, and that was
20 denied.

21 We don't know which end is up when it
22 comes to the zoning regulations, and if the Board is
23 going to rule on this, just tell us exactly what to do
24 and we will do it.

25 Girls' and Boys' Town intends to persevere

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 in its mission here in the District of Columbia. The
2 appellant has one goal: to see us leave town with our
3 tail between our legs. They don't care about side
4 yards. This issue isn't about side yards. Boys' Town
5 will, without apology, pursue available legal remedies
6 to ensure that the children it intends to serve are
7 provided equal treatment that they are entitled to.

8 Thank you.

9 CHAIRMAN GRIFFIS: Thank you, Mr.
10 Sullivan.

11 Questions from the Board?

12 (No response.)

13 CHAIRMAN GRIFFIS: Very well. Let's have
14 cross-examination. Any cross from the appellant? Any
15 from the appellee?

16 MR. PARKER: No.

17 CHAIRMAN GRIFFIS: ANC? I can't believe
18 you're going to let him off scott-free. I mean, come
19 on. He's here, he's now.

20 Mr. May, any questions? Clarifications?

21 COMMISSIONER MAY: I'm very curious about
22 the denial of the C of O for the one home, but that's
23 not our case.

24 CHAIRMAN GRIFFIS: I know.

25 COMMISSIONER MAY: That's the one question

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 I have, but I'll find out other ways.

2 CHAIRMAN GRIFFIS: Yes. That is
3 interesting. Mr. Sullivan has brought up something
4 that I don't think this Board is at all aware of nor
5 had anything to do with, but it does bring up an
6 interesting point, and that is clarity. I don't think
7 any member -- maybe you were, Mr. May. I don't think
8 the current members sat on Sargent Road. I know we
9 reviewed it substantially going into the Girls' and
10 Boys' Town application, and I think, generally
11 speaking, that clarity and foundation of decisions is
12 very important. I think we've worked hard to do that.

13 MR. SULLIVAN: If I may, the reason that a
14 C of O was denied, it was because -- it was based on
15 the ruling in 16791. That's in writing. They didn't
16 want to go forward until basically the Board signed
17 off on anything that goes on on this property now.

18 CHAIRMAN GRIFFIS: Okay.

19 MR. SULLIVAN: Stated just to say the
20 effect of this order might do something similar. If
21 we just, at your recommendation, revised our permit
22 application, can we be appealed again and again and
23 again and again?

24 CHAIRMAN GRIFFIS: I understand.

25 MR. SULLIVAN: And are we --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MS. WITHUM: Mr. Chairman, I think I would
2 object to this continuing adlib here. I mean, if his
3 testimony is over, his testimony is over. Enough.

4 MR. SULLIVAN: I believe the Board was --

5 MS. WITHUM: It's not providing any
6 additional substantive information.

7 MR. SULLIVAN: I believe the Board was
8 going to ask questions and I was still here and not
9 dismissed, but, you know, whatever.

10 CHAIRMAN GRIFFIS: Indeed. We can call
11 this to a conclusion, unless there are any other
12 questions from the Board of clarity. And frankly I
13 was more adlibbing here, talking about how the Board
14 should generally -- or, no, specifically hold and be
15 substantive and be able to rely on what we decide, and
16 there is some discrepancy in what I recall between
17 Sargent and Boys' Town, but be that as it may, let's
18 move on, then.

19 Let's assess. We're at five after five.
20 Let me hear any objections from those participating
21 about setting this for conclusions, rebuttal. Are you
22 anticipating calling rebuttal witnesses?

23 MS. WITHUM: Unclear. I have to go back
24 and look over my notes and perhaps look at the
25 transcript here today. But if I did, it would be -- I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 would, of course, try to make it as brief and concise
2 as possible.

3 CHAIRMAN GRIFFIS: Okay. And let me just
4 state again, I'm not concerned with how much time we
5 take, but it's the utilization of the time we have.
6 We will continue this for, you know, another year if
7 you need a full afternoon.

8 MS. WITHUM: Don't say that.

9 CHAIRMAN GRIFFIS: No, I think it's
10 important for me to be clear on that. We do have a
11 deadline today, but that doesn't mean we have to
12 finish everything, nor do I want people to rush
13 through what is pertinent in their presentations to
14 the Board.

15 Okay. It's good -- if you knew you would
16 call rebuttal, then clearly everyone else could be
17 prepared. But be that as it may, what do we have
18 upcoming? I know next week afternoon is not possible
19 as we have added a few things to it, but can we look
20 to April following 15? Oh, wow. We're really hitting
21 the dates in April, aren't we? April 1st, April 15th.

22 Ms. Bailey, is it amenable to do first in
23 the afternoon on the 15th?

24 MS. BAILEY: Certainly.

25 CHAIRMAN GRIFFIS: Yes? I don't see any

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 major difficulty with that, do you?

2 MS. BAILEY: And that's the afternoon that
3 Mr. May will be here, so --

4 CHAIRMAN GRIFFIS: Indeed. There is some
5 great symmetry to that, isn't there? Okay. Any
6 difficulty in April 15th, first in the afternoon,
7 which for us usually comes around one-thirty, two
8 o'clock? Any difficulty, the 15? No difficulty from
9 the appellant. Appellee is available on the 15th?

10 MR. PARKER: Yes.

11 MR. SULLIVAN: That's fine. Property
12 owner.

13 COMMISSIONER MAY: We should make it clear
14 for the record that we're supposed to start at one
15 o'clock.

16 CHAIRMAN GRIFFIS: Oh. I'm sorry.

17 COMMISSIONER MAY: We had a Zoning
18 Commission meeting the other night where a whole bunch
19 of people showed up at seven-thirty for what wound up
20 starting at about seven-ten.

21 CHAIRMAN GRIFFIS: Yes. I'm afraid I get
22 a little bit glib in late afternoons. I mean, we are
23 expected and it will be scheduled for one o'clock. I
24 got conflicting messages from the appellee, but I
25 understand that at least the government's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 representative will be here and clearly will be for
2 cross-examination of any of the rebuttal witnesses
3 that might be called.

4 MR. PARKER: That's correct.

5 CHAIRMAN GRIFFIS: So it would be limited.
6 Okay. And then property owner, Mr. Sullivan, you're
7 available the 15th at one o'clock?

8 MR. SULLIVAN: Yes.

9 CHAIRMAN GRIFFIS: Okay. I would
10 anticipate that -- well, frankly, we will go through
11 rebuttals. Depending on the cross-examination of
12 that, and then closing, I wouldn't anticipate that we
13 would take more than 45 minutes or so, but again, I
14 state, we'll get through what we need to, and that
15 will work out well.

16 Okay. Anything else. Questions?
17 Clarifications?

18 MR. SULLIVAN: Question. Clarification.
19 Will we be able to represent our motion to dismiss in
20 light of the evidence that we've heard on the merits
21 of the appeal?

22 CHAIRMAN GRIFFIS: I don't think you would
23 be precluded from bringing your motion again. I
24 think, in this kind of circumstance, I think the Board
25 would probably be more leaning towards just hearing

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the concluding rebuttal witnesses.

2 MR. SULLIVAN: Just for the purpose of
3 decision -- we have been through the hearing.

4 CHAIRMAN GRIFFIS: Right.

5 MR. SULLIVAN: I don't mean to reiterate
6 it now just to get out of April 15th. I've already
7 accepted the fact that we're going through the entire
8 hearing. For purposes of decision, I would like the
9 motion to stand, and based on what I said and based on
10 the evidence presented by the Zoning Administrator, I
11 think those two come together to guide you on how to
12 decide on that motion.

13 So for decision purposes, I would like the
14 motion to be reiterated just right now and stand. I
15 don't have anything else to say on it.

16 CHAIRMAN GRIFFIS: Okay. And previously
17 you had submitted something in writing, but I think it
18 would avail your cause and help the Board if you
19 wanted to resubmit perhaps even just a summation of
20 any motion that you want entertained and we could deal
21 with that.

22 MR. SULLIVAN: I can do that and I can do
23 that at whatever time the Board needs it to decide by
24 April 15th.

25 CHAIRMAN GRIFFIS: I would say as soon as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 possible and just get it served.

2 MS. WITHUM: Can we make it not the eve
3 of, which seems to be the typical MO of --

4 CHAIRMAN GRIFFIS: Okay. Without the
5 edits.

6 MS. WITHUM: -- the appellee? No, I mean
7 this sincerely. I mean when we get it one day, two
8 days before, it really doesn't give us adequate
9 opportunity to respond, which --

10 CHAIRMAN GRIFFIS: If we receive the
11 motion handed to us as we walk out here, it will be
12 fairly worthless because we won't have the time to
13 read it or to establish it. We're not requiring --

14 MR. SULLIVAN: I can file it by Friday.

15 CHAIRMAN GRIFFIS: That's where I'm going.

16 MR. SULLIVAN: I don't understand the
17 gratuitous comment, though, and I would like to clear
18 it up. We have never filed anything late. We serve
19 by hand-deliver as opposed to either no service at all
20 or regular mail. There.

21 CHAIRMAN GRIFFIS: Understandable.

22 MR. SULLIVAN: That's what we deal with.
23 That's our PR, I guess.

24 CHAIRMAN GRIFFIS: Okay. That being said,
25 I think it's known -- as we're no requiring, I'm not

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 going to set a deadline for -- well, I can set a
2 deadline for when motions are due. We would have them
3 due by -- it's going to have to be by the close of
4 business -- staff is going to correct me on this --
5 Wednesday, which would be tomorrow, so that it could
6 be given to the Board a week prior to the 15th.
7 Otherwise, it doesn't go out. Unless you want it in
8 your --

9 MR. SULLIVAN: Well, the week prior to the
10 15th is next week.

11 CHAIRMAN GRIFFIS: No, I know. I wanted
12 it a week ahead of time. You want it just in the
13 regular package?

14 MR. SULLIVAN: Does the package go out
15 Thursday? We could do it by Thursday at noon. Is
16 that all right? We can do it by tomorrow.

17 CHAIRMAN GRIFFIS: Well, the issue is
18 whether we want it for next Tuesday, which is not the
19 hearing date, or we want it for the 15th. I will be
20 clear. I was trying to go somewhere else with it.
21 We're going to take it for the 15th, which is then by
22 Wednesday next week, so that would get into packages
23 that are delivered to us on a Thursday, and that gives
24 us time to review it and it certainly gives everyone
25 else time if they are served. Clearly that's the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 deadline; it can always happen before that. Okay. Is
2 that clear?

3 MS. BAILEY: Mr. Chairman?

4 CHAIRMAN GRIFFIS: Yes.

5 MS. BAILEY: Next Wednesday's date is
6 April the 9th.

7 CHAIRMAN GRIFFIS: Right.

8 MS. BAILEY: Mr. Chairman, you had also --
9 well, the discussion involved Mr. Lyle Schauer
10 providing a copy of his resume. Do you still want
11 that?

12 CHAIRMAN GRIFFIS: Yes, we will have that
13 for the file.

14 Okay. Anything else? Any other
15 clarifications needed? Everyone is understanding what
16 we're doing? Very well. As we're about finished with
17 our formal, anyone have any good April Fool's jokes to
18 let us in on?

19 MEMBER ETHERLY: Can we reconvene as the
20 Zoning Commission and deal with the side yard issue
21 next week?

22 CHAIRMAN GRIFFIS: That's perfect. I
23 think we'll do that.

24 MEMBER ETHERLY: Excellent.

25 CHAIRMAN GRIFFIS: Let me bang the gavel

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 and we will reconvene. Okay. Thank you all very
2 much. We appreciate you being here this afternoon.

3 This would then conclude the 1st of April
4 2003 afternoon session.

5 (Whereupon, at 5:14 p.m., the public
6 hearing adjourned.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701