

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY
NOVEMBER 18, 2003

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 8:00 a.m., Geoffrey Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY GRIFFIS	Chairperson
CURTIS ETHERLY, JR.	Vice Chairperson
RUTHANNE G. MILLER	Board Member
DAVID A. ZAIDAIN	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

ANTHONY J. HOOD	Commissioner
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COMMISSION STAFF PRESENT:

Beverley Bailey, Office of Zoning
Clifford Moy, Office of Zoning
John Nyarku, Office of Zoning

OTHER AGENCY STAFF PRESENT:

Arthur Jackson, Office of Planning
David McGhettigan, Office of Planning
John Moore, Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

Lori Monroe, Esq.

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

8:11 a.m.

1
2
3 CHAIRMAN GRIFFIS: On the record. Good
4 morning, ladies and gentlemen. Let me call to order
5 the 18 November 2003 Special Public Hearing of the
6 Board of Zoning Adjustments of the District of
7 Columbia. I'm Geoff Griffis, Chairperson. Joining me
8 today will be Vice Chair Mr. Etherly and be assured
9 that any portion that he misses, he will be delivered
10 the entire transcript and required to read it.
11 Representing the Zoning Commission with us on this
12 case is Mr. Hood. Representing National Capital
13 Planning Commission this morning and always we do hope
14 is Mr. Zaidain.

15 I'm going to dispense with any openings
16 and directions. I will assume that everyone is
17 familiar with it. If there are people that are going
18 to giving testimony today that have not previously of
19 course, you will need to be sworn in. You will need
20 to fill out witness cards and I will instruct you on
21 all the other details if that is an occurrence we have
22 this morning.

23 With that, let's get right into it. I
24 wish everyone a very good morning and hope everyone
25 had a very good and restful sleep. We probably will

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1 get you out of here in time for breakfast. However
2 the rest of us will be staying here for quite some
3 time today. So let's move on.

4 First of all, we have rebuttal witnesses
5 and closings. That's what we're going to take care of
6 today. We have had delivered to us this morning, not
7 an understatement, a stack of new submissions. We
8 will deal with some of those submissions as it was
9 just handed to us not 15 minutes ago after our
10 rebuttals and closings. In this stack is a motion.
11 We will take up that motion at that time.

12 Let me address just one letter that came
13 in that I took some note on from a Mr. Bosco regarding
14 my behavior at one of the proceedings in this case.
15 He is saying that I inappropriately rebutted a
16 testimony. Just to clear the record, I don't rebut.
17 I don't present. I ask any question I please in fact
18 in order to get the substance of the case.

19 In citing Exhibit 103 which was dealing
20 with the emergency access and the dangers that are
21 attended to any sort of addition or continuing
22 problems, we have on all cases referrals to the
23 agencies one of which is the fire department for their
24 review of the application and its implication. There
25 isn't a whole lot of substance in the letter submitted

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1 the marshal in this case. It is assumed by the Board
2 that they have reviewed it for all the attendant
3 issues that would be important to them in order to
4 serve the properties and also the adjacent properties.
5 That being said, we will take into the record of
6 course Exhibit 313, November 16th, which is Mr.
7 Bosco's letter to me and also the fire marshal and
8 also Exhibit No. 103 which I cited is an exhibit in
9 this case.

10 That being said, let's move on and set up
11 the panel. If you wouldn't mind introducing yourself
12 this morning but also giving me an indication of
13 witnesses you will be calling and the order if you
14 know it at this point.

15 MS. DWYER: Certainly. Good morning. For
16 the record, Maureen Dwyer with Shaw Pittman
17 representing the Applicant. We will start with the
18 testimony of Chuck Anthony, the architect for the
19 project. He will be followed by Osborne George, the
20 traffic consultant. Then the final witnesses will be
21 Susan Piggot who has with her two of the staff that
22 actually monitor the Transportation Management Plan
23 ("TMP") on a daily basis.

24 CHAIRMAN GRIFFIS: So the two staff people
25 are also going to be giving testimony.

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1 MS. DWYER: Yes, very brief testimony.
2 Just their personal observations along with Susan's on
3 the current TMP operation.

4 CHAIRMAN GRIFFIS: Okay. Are you
5 anticipating any additional submissions into the
6 record this morning?

7 MS. DWYER: I believe we filed all of our
8 materials. There's one additional submission.

9 CHAIRMAN GRIFFIS: Okay.

10 MS. DWYER: These are copies of letters
11 that Ms. Piggott has distributed to parents from the
12 start of the school year concerning the school's TMP.

13 CHAIRMAN GRIFFIS: Okay. For everyone's
14 understanding, the last submission is the basis of
15 what we will be hearing rebuttal testimony on. Is
16 there any party that didn't receive that submission?

17 (Off microphone.)

18 CHAIRMAN GRIFFIS: Didn't receive?

19 (Off microphone.)

20 CHAIRMAN GRIFFIS: Which is now Exhibit
21 302 in the record.

22 PARTICIPANT: Are we talking about the
23 November 12th?

24 MS. DWYER: Yes.

25 CHAIRMAN GRIFFIS: Yes. I'm sorry. I

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1 should be very clear. November 12th. It was received
2 in the Office of Zoning on November 13th. It has
3 Exhibits A through E, one of which is the plan that
4 TMP. Everyone has that submission, correct? Okay.
5 So anything else that's coming in today, no one has
6 seen. We'll all see it at the same time. Fabulous.
7 In that case, do we need to call this and maybe do
8 something official?

9 MS. BAILEY: Mr. Chairman, just for the
10 record, good morning. I just wanted to say that this
11 Application No. 16970 of the National Child Research
12 Center. Perhaps that's sufficient for this morning,
13 Mr. Chairman.

14 CHAIRMAN GRIFFIS: Sufficient and
15 succinct. Thank you, Ms. Bailey. Also a very good
16 morning to you and also Mr. Moy and Mr. Nyarku who is
17 here. Ms. Monroe is representing Corporation Counsel.
18 Yes, Mr. Nettler.

19 MR. NETTLER: Good morning, members of the
20 Board, Mr. Griffis. Mr. Nettler for Cleveland Park
21 Neighbors. Are you going to set a time limit on the
22 clock for this?

23 CHAIRMAN GRIFFIS: Our hearing starts at
24 9:30 a.m.

25 MR. NETTLER: Okay.

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1 CHAIRMAN GRIFFIS: We are going to get
2 through this by then. I'm sorry. What's your
3 anticipation for your closing remarks? Time?

4 MS. DWYER: My closing remarks will
5 probably be about 15 minutes.

6 CHAIRMAN GRIFFIS: Okay. Let's go.

7 MS. DWYER: All right. I will introduce
8 the first witness, Chuck Anthony, and ask him to
9 proceed with his rebuttal testimony.

10 (Witnesses Sworn.)

11 DIRECT TESTIMONY

12 MR. ANTHONY: Chuck Anthony, Charles
13 Anthony Architects. I'm going to just address two
14 issues in my rebuttal testimony. First, I have three
15 points to make in regard to this application's
16 satisfaction of the standards for area variance relief
17 from the Zoning Regulation's requirement that each
18 principal structure be located on a single record lot.
19 Second, I have some comments about the tree plan and
20 the preliminary landscape plan that was submitted into
21 the record.

22 In regards to the practical difficulty
23 standard for variance relief, first, I'd like to note
24 that the current plan was very carefully designed to
25 integrate the carriage house into the existing grade,

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1 to maximize the number of mature trees to be saved on
2 the site and to preserve as much open playground space
3 on the property as possible. It is a respectful
4 neighborly addition to the property.

5 I also believe that the proposed carriage
6 house is entirely sympathetic to the Cleveland Park
7 Historic District and especially the rhythm, scale and
8 character of the Ordway streetscape. I think there is
9 actually a consensus of opinion amongst the Historic
10 Preservation Review Board ("HPRB"), the Cleveland Park
11 Historical Society's Architectural Review Committee
12 ("ARC") and even some neighbors that breaking the
13 project into multiple buildings or visually separate
14 structures is a preferable solution for this site,
15 certainly better than a large addition to the original
16 historic house, the site's true principal structure.
17 Both the playhouse and our proposal are differential
18 to the main house in scale and design and I would add
19 they are functionally accessory to it as well.

20 This concept of separate structures
21 minimizes the impact for all, for my client, for the
22 neighbors and for the neighborhood. To that end, I
23 believe this issue of principal structure record lot
24 has been manufactured merely as an impediment to the
25 project without the same regard for impacts on the

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1 neighbors and the neighborhood that we have endeavored
2 to mitigate with this plan.

3 I would submit that the proposed
4 configuration on balance and considering the
5 alternatives works to the benefit, not the detriment,
6 of the neighbors and the historic district or the
7 public good. I believe these factors evidence the
8 project satisfaction of the third prong of the
9 variance test that granting the variance will not
10 cause substantial detriment to the public good and
11 will not substantially impair the intent, purpose and
12 integrity of the Zoning Regulations or the Zoning map.

13 My second point. If you attempt to create
14 a separate lot with the plans as submitted for the
15 carriage house, it would not meet the side yard
16 setback requirements from the existing playhouse. If
17 the carriage house was moved to the west to allow for
18 the required side yard setback from the playhouse, the
19 carriage house could be encroaching on the required
20 side yard setback to the Little's property, In fact,
21 it would be over the Little's line.

22 Let me just show you quickly what that is.
23 If you can see this black and white version of the
24 earlier Ordway elevation. This is the playhouse.
25 This is the carriage house. In order to create a lot,

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1 essentially we need a property line that would be
2 approximately there in order to satisfy both the
3 setback requirements from a proposed structure on this
4 side and the setback requirement from the playhouse.
5 If that were to happen and this building attempted to
6 move over here, you can see that it would probably be
7 all the way over the Little's house.

8 Just quickly in plan, the same
9 configuration, a lot line there with side yard
10 setbacks here. This area would be displaced and would
11 have to be relocated elsewhere on the site. I'll
12 address that as I go on here. Thanks.

13 In addition, this separate lot created
14 solely for the carriage house would also require a
15 variance relief from the off-street parking
16 requirements. In the absence of such a variance, the
17 topography and layout of the site are such that a
18 significant loss of specimen trees and significant
19 grade changes would be required in order to carve an
20 entrance ramp and parking spaces into this new lot.
21 It's an idea that both the neighbors and the National
22 Child Research Center ("NCRC") oppose.

23 My third point. We've looked at the
24 potential of redesigning the project to address the
25 practical difficulties that I've just noted. We've

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1 looked at both reconfiguring the carriage house on a
2 separate lot and an addition to the main house. We
3 arrived at the following additional practical
4 difficulties.

5 As far as reconfiguring the carriage
6 house, the current placement is sited to have the
7 least impact on adjacent properties and make the best
8 use of topography. Pushing the building farther back
9 into the slope towards the center of the site will
10 result in a greater loss of mature trees. Such a
11 structure if underground would need additional light
12 wells and/or area wells to meet code requirements for
13 life safety and for light and ventilation.

14 Alternatively, if the revised carriage
15 house was not sunk into the ground, an above grade or
16 partially above grade structure would result in the
17 same loss of trees and reduce playground and open
18 space. The impact would also be more detrimental
19 visually to the adjacent properties. This revised
20 carriage house design would still require variance
21 relief from the off-street parking requirements or
22 face the attendant additional grade changes and loss
23 of trees a parking area would require. Again this is
24 an idea that both the neighbors and NCRC oppose. A
25 revised plan for the carriage house would also greatly

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1 increase project cost in terms of additional time,
2 design, construction, excavation, etc.

3 An addition to the main house. The
4 significance of the existing building and especially
5 their site and setting within the historic district
6 creates practical difficulties. As I alluded to
7 before, HPRB remarked that a plan that continued the
8 history of NCRC's use of the site with smaller
9 buildings rather than a single large building is the
10 preferred approach. A significantly larger addition
11 than that proposed to the main house or the principal
12 structure is inappropriate in terms of the historic
13 context, the neighborhood context and in terms of the
14 practical and efficient use of the building itself.

15 In summary, these alternatives create even
16 more practical difficulties than they resolve and they
17 are less desirable from both the NCRC and the
18 neighborhood perspectives. We are here to request
19 variance relief for what I believe on balance is the
20 best solution to this situation. For these reasons as
21 well as my previous testimony and written submissions,
22 I believe that this application has satisfied the
23 standards for granting variance relief from the
24 requirement that each principal structure be located
25 on its own record lot.

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1 The last issue I would like to address is
2 tree plan and the preliminary landscape plan. On June
3 10th, we submitted an exhibit of a number of trees
4 that showed the trees that will be removed from the
5 site. It's Exhibit No. 191 in the record. There's
6 also an accompanying letter from an arborist, Zimmer
7 and Associates, that's part of that exhibit. That's
8 the exhibit to my left.

9 CHAIRMAN GRIFFIS: Is there a difference
10 from the submission that we recently got and the past
11 submission?

12 MR. ANTHONY: When you say "recently,"
13 there's a landscape plan and then there's a tree
14 removal plan. The earlier one is this diagram with
15 the Xs through the trees to be removed.

16 CHAIRMAN GRIFFIS: Right. Exactly.

17 MR. ANTHONY: The more recent one is the
18 landscape plan which I'll show you.

19 CHAIRMAN GRIFFIS: Okay.

20 MS. DWYER: This one on exhibit board is
21 already on the record.

22 CHAIRMAN GRIFFIS: No, I understand. And
23 it's showing existing condition with the tree
24 removals.

25 MR. ANTHONY: Yes.

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1 CHAIRMAN GRIFFIS: Okay.

2 MR. ANTHONY: I'd like to note that there
3 are not trees between the existing NCRC building and
4 the Badami-Neely property that will be removed. I'd
5 also like to point out that of the approximately 21
6 trees that we have indicated to be removed from the
7 property nine of those were trees that were planted by
8 NCRC recently in 1994 and they are not significant
9 trees. To the extent possible, we'll replant those or
10 replace them in kind.

11 I'd just like to quote two sentences from
12 the arborist's letter. He states in his first
13 paragraph "In general, there's no danger to any
14 historic or quality specimen trees as a result of the
15 proposed construction." Then he goes on to talk about
16 different areas of the site and specifically the area
17 adjacent to the Little's property. "The three larger
18 trees by the Little's house are volunteer trees and
19 not specimen trees. There are two mulberries and a
20 black cherry. They are not appropriate for this
21 location due to the messy fruit, frequent shedding of
22 dead branches and potential becoming dangerous as they
23 get larger. None of these trees is historic or worth
24 preserving. Their removal could be easily justified
25 regardless of the future plans for the site."

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1 Then last week, we submitted a preliminary
2 landscape plan that shows the general locations and
3 species types that will be planted on the NCRC
4 property adjacent to the Little, Beckner and Badami
5 properties. If you could flip that over for me
6 please. This is a preliminary plan that would be
7 finalized for submission to HPRB as required in their
8 conceptual approval.

9 Our intent is to select species for a
10 particular situation along the property lines so they
11 can function appropriately for the long term. We
12 would invite the thoughts and suggestions of those
13 immediate neighbors in developing this design. I
14 would also note that an arborist will be consulted
15 during construction to assist in the protection of
16 trees that we've indicated to remain. That concludes
17 my rebuttal statement.

18 CHAIRMAN GRIFFIS: Excellent. Thank you
19 very much. What we're going to do in terms of process
20 is we're going to have Board questions after each of
21 the testimonies. Then we're going to finish all of
22 the testimonies and then we're going to bring back
23 everybody for cross examination. So first, Mr.
24 Anthony, let me start with what you've just said
25 "preliminary landscape plan." That's going back as

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1 you've indicated to HPRB. Is that correct?

2 MR. ANTHONY: Yes, it is.

3 CHAIRMAN GRIFFIS: Is it a public process
4 where you will get comments from the neighbors?

5 MR. ANTHONY: Yes.

6 CHAIRMAN GRIFFIS: So it wouldn't be
7 appropriate to have any sort of mark-ups here today.
8 Is that correct?

9 MR. ANTHONY: Well, I thought that it was
10 appropriate to show you the kinds of things we're
11 thinking about.

12 CHAIRMAN GRIFFIS: No, I'm perfectly aware
13 of that. What I'm going to try and stop is we are not
14 going to be dealing with this. We're taking this in
15 as a submission of the preliminary noting that it is
16 not final.

17 MR. ANTHONY: That's correct.

18 CHAIRMAN GRIFFIS: The Board finds that
19 this is in fact a substantial portion of what we need
20 to deliberate on. We need to see the final. Then we
21 will deal with it at that point, but I don't think
22 this will be the forum of which we're going to have
23 comments and have redesign. However I want people to
24 be able to ask questions that directly relate to what
25 you're proposing here.

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1 In terms of the tree and you've indicated
2 in your testimony now that there isn't any tree that's
3 being removed that's adjacent to the Badami property.
4 However in the testimony of the party represented by
5 Ms. Badami, her indication was that she feared that
6 the construction would take down trees. What are you
7 doing to remedy or to preserve or ameliorate any sort
8 of condition that might happen if that occurred?

9 MR. ANTHONY: Well, a couple of points on
10 that. One is I think that the exhibit that Ms. Badami
11 referred to or at least what I saw she was pointing to
12 a tree that was not the tree that she thought that she
13 was speaking of. There is a large tree right on the
14 property line between the two properties. It is not
15 our intent to disturb that tree. The earlier parking
16 scheme for that side of the site was withdrawn. As I
17 said, we would have an arborist involved in the
18 project for the protection of trees.

19 CHAIRMAN GRIFFIS: What does that mean
20 that someone's "involved in the protection of trees"?

21 MR. ANTHONY: Typically the arborist comes
22 out and stakes the root area or sometimes even the
23 season before may prune roots in a way in anticipation
24 of construction. It's certainly in our interest as
25 well as the neighbors that we preserve these trees.

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1 CHAIRMAN GRIFFIS: So this is done usually
2 as part of construction. Are you creating something
3 here? Is this a new situation?

4 MR. ANTHONY: No, this is something that's
5 very typical when you have large mature trees.

6 CHAIRMAN GRIFFIS: What's going to happen
7 if the effect of trees in construction may not be
8 evidenced for years? Has there been any discussion
9 from your end in analyzing this and coordinating all
10 the landscape if a tree was to die in three or four
11 years?

12 MR. ANTHONY: I think the biggest thing
13 that we've done is attempt to locate the proposed
14 construction away from these large trees that we all
15 want to save. That's the biggest step. It's to avoid
16 the drip line of those trees.

17 CHAIRMAN GRIFFIS: I see. So you are not
18 digging within the drip line which would damage the
19 roots which would kill the trees.

20 MR. ANTHONY: That's our general intent.

21 CHAIRMAN GRIFFIS: I see. Okay. More
22 importantly to basically what we are doing, you've
23 offered testimony. Of course, we are well aware of
24 your original testimony, but I want to clarify that
25 you've actually taken an interesting point in your

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1 testimony today. That is talking about the practical
2 difficulty if you had to do an alternative design.

3 I think we can understand that, but I
4 guess for clarity as we progress with this, it's clear
5 that the Board is weighing alternative designs or
6 anything else other than what is being proposed to us.
7 So it's appreciative to talk about creating practical
8 difficulties if you had to do something totally
9 different, but the fundamental basis would be what's
10 the practical difficulty that requires you to do what
11 you're proposing. That's covered in the previous
12 testimony so we don't need to get into that. I wanted
13 to make that clarification.

14 It is interesting what you've given us if
15 I understand correctly is the parties of opposition or
16 certain of have brought up the possibility that this
17 should actually be a subdivision. If I understand you
18 correctly, your subdivision isn't possible because it
19 would in fact create a noncompliant situation. Isn't
20 that based on the footprint of the building that
21 you're proposing now? Or is your testimony the fact
22 that if you subdivide you could not build upon that
23 lot?

24 MR. ANTHONY: Essentially my testimony is
25 that we could design many alternatives for this.

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1 You're right. That's not what we're here for. I'm
2 specifically looking to the point of another principal
3 structure on a separate lot and the practical
4 difficulties associated with that. If we were to
5 redesign and reconfigure the building and push the
6 building further back into the site, what I said was
7 that it creates more problems for us on many fronts,
8 from neighbors, from trees, from topography, costs,
9 all those kinds of issues.

10 CHAIRMAN GRIFFIS: Okay. If it was a
11 separate lot and a principal building on that separate
12 lot, could it be larger in mass than what you're
13 proposing? I don't know if you've looked at that.

14 MR. ANTHONY: I haven't looked at that.
15 I basically was taking the same program and pushing it
16 around.

17 CHAIRMAN GRIFFIS: Okay. Any other Board
18 questions at this time? Very well. Thank you very
19 much.

20 MS. DWYER: All right. Our next witness
21 is Osborne George.

22 (Witnesses sworn.)

23 DIRECT TESTIMONY

24 MR. GEORGE: For the record, Osborne
25 George, Transportation Consultant. Mr. Chair, we

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1 provided copies of extracts from three documents to
2 the Applicant, Transportation and Land Development
3 which is prominently referred to by Mr. Peterson in
4 his testimony, copies of extracts from the Traditional
5 Neighborhood Development Street Design Guidelines and
6 extracts from the Uniform Vehicle Code. I really do
7 believe that these documents speak for themselves with
8 respect to a number of the key issues which were
9 raised before the Board. I would like to use some of
10 these documents and perhaps other to address the
11 following key issues.

12 The first issue I would like to talk about
13 is a data collection. Again I would like to refer to
14 the fact that Mr. Peterson referred prominently to
15 Institute of Transportation Engineers ("ITE") and its
16 recommendations. I would like to refer to one of the
17 documents which ITE recommends very highly to
18 transportation professionals for the use in conducting
19 transportation studies. That document is actually
20 called "The Manual in Transportation Engineering
21 Studies."

22 On the very first page of the very first
23 chapter, I would just like to read into the record.
24 ITE says that "Motor vehicles continue to be the
25 principal means of transportation in the United

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1 States. Despite the problems of congestion, delay,
2 parking, pollution and safety, motor vehicles are
3 expected to dominate surface transportation for the
4 foreseeable future." Very importantly, it says
5 "Solutions to transportation problems and improvements
6 to transportation facilities and services can
7 reasonably develop after the magnitude, location and
8 extent of the problems or the need for improvements
9 are well understood." Perhaps the most important
10 sentence there says "Such understanding comes from
11 factual information gathered in an unbiased objective
12 manner and analyzed to present a clear and concise
13 picture of the nature of the problem and the impact."

14 I cited this and I would like to
15 underscore to the Board the methods that we used in
16 our data collection because as in many other fields,
17 the transportation engineering field recognizes that
18 a good database is essential to any analysis that one
19 performs. We've heard the maxim "Garbage in, garbage
20 out." ITE recommends specific procedures for
21 collecting data.

22 I would like to certify to the Board that
23 we utilize those procedures. We utilize the
24 procedures specified in the ITE manual which included
25 use of trained personnel. I would like to say

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1 specifically to the Board that the people that we used
2 were not involved in the study. In some cases, they
3 were not privy to the purpose of the study. They were
4 simply trained individuals who were taught in the
5 strategies and techniques of data collection.

6 I would like to say that we followed up
7 our data collection with field surveys by our
8 professional staff including myself. In just about
9 every situation, we did our data collection without
10 any prior notice to NCRC. Instead after the fact
11 after we collected the data, we would typically call
12 them to confirm whether there were any unusual
13 activities or so in order to ensure that our data was
14 truly representative of typical traffic conditions.

15 The second point I'd like to refer to is
16 the issue of level of service. Mr. Peterson used that
17 as what I would call "the opening solvo" in his
18 presentation, his written as well as his verbal
19 presentation to the Board. He points out that level
20 of service is not an appropriate analysis technique
21 for neighborhood streets.

22 Interestingly, he points out that there's
23 a point of disagreement. I think we are fully in
24 compliance. Nothing in the documents we submitted to
25 the Board discusses levels of service for Highland

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1 Place which was the focus of our analysis. Indeed we
2 pointed out that the analysis conducted for the area
3 roadway network was simply for the purpose of
4 providing a general background to indicate the
5 environment within which the site is located.

6 I would like to point out that the
7 definitive source or the definitive reference
8 regarding levels of service is the "Highway Capacity
9 Manual." That manual does provide analysis techniques
10 for analyzing urban intersections. This is what we
11 did. Again we considered that the issue of management
12 of the drop-off and pick-up operations of Highland
13 Place and off Ordway Street were the critical
14 considerations. Hence the reason we focused so
15 extensively on the Applicant's TMP.

16 MS. DWYER: Mr. George, if I could ask you
17 to move quickly perhaps to your closing points.

18 MR. GEORGE: Okay. I think we heard a lot
19 from members of the Board regarding what I would term
20 "the rules of the road" as far as vehicles in some
21 situations having to drive on the left-hand side of
22 the road in order to overtake vehicles as part of the
23 passing maneuver. In order to address this issue, we
24 submitted copies of the extracts from the "Uniform
25 Vehicle Code" which talks about operation on on-lane

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1 roadways.

2 Perhaps more importantly, I would like to
3 come closer to home and refer to Title XVIII of the
4 District of Columbia Municipal Regulations ("DCMR")
5 which deals with vehicles and traffic. I would like
6 to refer to Section 2200 of the DCMR Title XVIII,
7 Sections 2202.7 and 2202.8 which refers to situations
8 when it is quite permissible and in fact recognized as
9 a typical operation where vehicles would utilize the
10 left side of the roadway.

11 Finally I would like to close by just
12 referring to our supplementary observations. Our
13 initial evaluation on behalf of the school pointed to
14 the fact that there were minor operational constraints
15 during certain periods of the day. We have worked
16 with the Applicant to enhance and upgrade its TMP. We
17 have made observations throughout the most recent
18 weeks and we continue to find that the situation works
19 quite acceptably and quite safety. Thank you.

20 MS. DWYER: Thank you. Are there
21 questions of Mr. George?

22 CHAIRMAN GRIFFIS: Board questions? Mr.
23 George, the ITE report that you stated that outlines
24 the Traditional Neighborhood Development ("TND")
25 principles, is this some sort of professional

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1 regulatory document for your analysis? Or how does
2 this play into what you do?

3 MR. GEORGE: You are referring the TND
4 Principles document.

5 CHAIRMAN GRIFFIS: Yes.

6 MR. GEORGE: ITE is not a regulatory body.
7 It is a professional body which does extensive
8 research, analysis and recommends practices and
9 guidelines for the profession.

10 CHAIRMAN GRIFFIS: Okay. In your personal
11 professional capacity, do you subscribe to the new
12 urbanist mantra? Let's move on from that.
13 Specifically there's one point in your submission on
14 Chapter 13, page 29. It says that "Popular opinion is
15 that narrow streets slow speeds." However the
16 paragraph because it talks about looking at one
17 typical type of roadway based on size the street width
18 range from 20 to 36, they actually say that the speeds
19 may diminish but the accident rate on the narrower
20 streets of 20 feet is substantially higher than that
21 of a wider street. Do you agree with this opinion?

22 MR. GEORGE: 13, 29.

23 CHAIRMAN GRIFFIS: Second paragraph under
24 "Pavement Width."

25 MR. GEORGE: Yes, sir.

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1 CHAIRMAN GRIFFIS: It says "In their
2 analysis, speeds on urban streets that range from 20
3 to 25 feet found that streets widths had little effect
4 on average speed." Then it goes on to say "The crash
5 rate on major streets 20 feet wide was more than twice
6 that of major streets of 31.4 feet." Aren't they
7 saying that our popular convention or opinion is
8 incorrect?

9 MR. GEORGE: I think that key word there
10 was "The crash width on a major street."

11 CHAIRMAN GRIFFIS: I understand "major,"
12 but 20 feet wide, I think we can understand the
13 concept of what 20 feet wide is.

14 MR. GEORGE: Yes, I think the only thing
15 that I could interpret from this is that they are
16 referring to the level of usage on such streets. In
17 other words, with a narrower street if the volumes are
18 very high, you would expect to have a higher crash
19 rate. That is what I interpret this to be saying.

20 CHAIRMAN GRIFFIS: Okay. That's
21 interesting. I took it to say that people don't slow
22 down and they crash more often because they don't.

23 MR. GEORGE: I think the key is "major
24 street."

25 CHAIRMAN GRIFFIS: Okay. I understand

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1 that. So you are saying that based on the width of 20
2 feet that it gives them the level of volume that would
3 not slow them down. You would see a straightway
4 that's wide enough. There's probably two lanes.
5 There would be no reason to be slowing down.

6 MR. GEORGE: First of all, I think a
7 street of 20 foot width would probably have no
8 parking. Whereas streets of the greater widths that
9 you cited earlier would more than likely have parking
10 on one or both sides. A 20 foot street is probably a
11 roadway that has no parking. It refers to it as being
12 a major street. I think I would infer from that you
13 are talking about a street servicing relatively higher
14 volumes of traffic. Within the narrow widths, it
15 would expected that the crash or accident rates would
16 likely be higher.

17 CHAIRMAN GRIFFIS: Okay. And people don't
18 use their common sense when they drive. So what you
19 might do is refer me then the last paragraph of that
20 page and your point of major street versus a local
21 street which is what they are categorizing it here.
22 I'm not going to go too far into that.

23 If you go to page 35, it shows a diagram
24 of pull-off and what they call accommodating pass-by
25 trips. When the architect comes back for cross, I

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1 will ask him the same question. Was there any
2 analysis of creating a pull-off lane on the NCRC site?
3 It's not directly related to that diagram, but the
4 diagram is making my point.

5 MR. GEORGE: Yes, but I think the diagram
6 does not make your point. This is very illustrative
7 and what it is trying to do is to define the concept
8 of pass-by trips.

9 CHAIRMAN GRIFFIS: I understand that, but
10 let's look specifically at this case, Mr. George. One
11 of the major problems with this is drop-off and pick-
12 ups and congestion on the street. Right?

13 MR. GEORGE: Yes.

14 CHAIRMAN GRIFFIS: This was actually asked
15 a long time ago, but I'm bringing it back at this
16 point. Was there ever in your analysis in terms of
17 alternatives and how you might alleviate the potential
18 for problems in looking at creating a pull-off lane on
19 the NCRC site?

20 MR. GEORGE: I believe that concept was
21 talked about very early in the process as design
22 scenarios and site configurations were considered.
23 However, I believe it was discarded because of site
24 constraints which I think perhaps Mr. Anthony would
25 better describe.

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1 CHAIRMAN GRIFFIS: Okay.

2 MR. GEORGE: I think it was talked within
3 the concept of providing parking within the site
4 before it was learned that the site was not required
5 being in a historic district to provide parking and
6 things like that.

7 CHAIRMAN GRIFFIS: Right.

8 MR. GEORGE: It was examined, but not in
9 a serious way because of the other site related
10 constraints.

11 CHAIRMAN GRIFFIS: Okay. Thank you. Any
12 other questions?

13 MR. GEORGE: All right.

14 MS. DWYER: Then I will call Susan Piggott
15 up and with her is Tiffany Williams and Sergeant
16 Wilson, both of whom assist her in the current TMP
17 operation.

18 DIRECT TESTIMONY

19 MS. PIGGOTT: Good morning, Mr. Chairman,
20 members of the Board. My name is Susan Piggott. I'm
21 the Director of NCRC. My testimony today will address
22 just three issues, our current TMP, our Department of
23 Health licensing and some of the conditions that we've
24 proposed to the Board.

25 At the last hearing, the statement was

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1 made that NCRC's TMP began only when we filed our
2 current Zoning application. This is simply not
3 accurate. We've made a number of changes going back
4 to 1998 based on input from our staff, from our
5 parents and from our neighbors. Exhibit O to our
6 Supplemental Prehearing Submission documents these
7 improvements, shows that they go well beyond what the
8 BZA asked us to do and demonstrates our responsiveness
9 as a school.

10 This spring we met with District
11 Department of Transportation ("DDOT") and the opposing
12 neighbors to discuss further improvements to our TMP.
13 We implemented the changes this fall 2003 even though
14 we were not required to do this rather than wait until
15 the end of the case. The only change that we cannot
16 implement is to add four additional spaces for our
17 carpool line in front of the school. This is up to
18 DDOT and they are waiting for your decision before
19 moving forward.

20 The changes that we implemented this fall
21 are the following. We extended the drop-off time ten
22 minutes. We included compliance with our TMP in all
23 parent contracts. We implemented a series of
24 escalating sanctions including fines, suspension and
25 ultimate expulsion which we fully intend to stand

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1 behind. We added to two uniform personnel to maintain
2 safety and enforce our TMP. We have required all
3 parents and staff to place NCRC stickers their cars
4 for identification.

5 The results has been an improvement in two
6 key areas. By adding ten minutes to drop-off time, we
7 have virtually eliminated the double standing during
8 the morning peak. By adding the TMP to our contract,
9 our parents understand the seriousness of our
10 procedures and have responded with a commitment to
11 follow the rules. I have copies of the materials I
12 have send to parents this year. I can assure you that
13 they understand the importance of this and they are
14 complying.

15 We are extremely serious about
16 enforcement. I have copies of our traffic violation
17 forms as well as a sample letter sent to one of our
18 parents. The Council of our Board of Trustees and I
19 met with this parent and there's a memo describing
20 this meeting. The result has been no further
21 violations. Both Tiffany Williams whom you remember
22 is an NCRC teacher and carpool captain and Sergeant
23 Wilson who trains our traffic guards are here to
24 confirm that our TMP is working well. We are
25 committed to this for the long term.

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1 Moving on to Department of Health, there
2 was testimony that we are in violation of Department
3 of Health licensing due to the number of children in
4 each classroom. I have a letter from the Department
5 of Health giving us a permanent waiver until the new
6 classrooms are constructed. This clearly shows why we
7 need new space.

8 Last just to turn to some of the
9 conditions. First noise, there was testimony about
10 the noise associated with our pumpkin party last fall
11 and specifically our use of a PA system. The event
12 last year was unusual because we rescheduled it from
13 our usual Saturday to a Sunday since it was the first
14 day that our children were able to go outside since
15 the sniper attacks. This year we returned the event
16 to Saturday where it always had been and we did not
17 use the PA system and would agree to add this to our
18 proposed conditions as a requirement.

19 Second, enrollment. In our proposed
20 conditions, we have also agreed to provide the Zoning
21 administrator and the Advisory Neighborhood Council
22 ("ANC") information about our enrollment at the
23 beginning of each school year no later than October
24 15th. We've also agreed that there would be no
25 increase in our enrollment from our current number of

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1 171 until the new building is ready for occupancy.

2 At the last hearing, the question was
3 raised about whether more of our children could come
4 from the neighborhood. When we admit students, we are
5 balancing several factors when we form our classes:
6 siblings, children with special needs, diversity which
7 includes economic diversity because we do give
8 financial aid to a number of our students and
9 neighborhood children.

10 Our statistics show that we already
11 consider the ability to walk to school to be an
12 important factor in our admission process. This past
13 year we accepted 66 percent of the neighborhood
14 children who applied. By contrast, we accepted only
15 27 percent of the children with special needs who
16 applied and only 21 percent of the general applicant
17 pool.

18 In conclusion, I've watched and
19 participated in nearly every single carpool since the
20 beginning of the year. This is what I've come to
21 understand. The beauty of our carpool line procedure
22 is our ability to manage the unexpected. Our staff
23 understands the reason behind our procedures which is
24 to keep the street passable and safe so that when two
25 vehicles come down Highland Place there is room and

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1 space for those vehicles to pass. We don't just go
2 through the motions of the TMP, putting on our orange
3 vests or grabbing our walkie-talkies as we go out the
4 door.

5 When something unexpected happens such as
6 sudden rainstorm or a delivery truck that pulls up in
7 front of the school right at carpool time, we are able
8 to quickly adapt to these conditions. We have a
9 number of things that we can and do do. We can bring
10 out more staff. We can quickly reconfigure so that
11 we pull up only two cars in front of the school
12 instead of four and hold the cars back to leave a
13 space around the delivery truck. Or if the truck is
14 further down Highland instead of letting our cars pull
15 up to the first white line, we can hold them back to
16 the second white line further down Highland allowing
17 a space so there's always passable and safe room for
18 cars to come both ways down Highland Place. I believe
19 that this thoughtful flexibility is what makes our
20 carpool procedure unique and special. It's the reason
21 that it works so well.

22 Since 1998 BZA order, we have demonstrated
23 over and over that we are good neighbors. We
24 appreciate and value our residential site. We abide
25 diligently by BZA conditions and we are vigilant and

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1 responsive to our neighbors. We very much look
2 forward to return to the positive relationships that
3 we have shared with most of our neighbors in the past.
4 Thank you.

5 MS. DWYER: Do you want to proceed with
6 Tiffany Williams and Sergeant Wilson? All right.

7 DIRECT TESTIMONY

8 MS. WILLIAMS: Good morning, Mr. Chairman
9 and the Board members. My testimony is limited to
10 updating you on the operation of the TMP since the
11 start of the fall semester. As you know from our
12 previous testimony, I have been out there monitoring
13 our TMP for the last six years. As Susan testified,
14 we've put in place new procedures this fall and I
15 would like to provide you with first-hand knowledge of
16 how those new procedures are working.

17 Based on my personal observations on a
18 daily basis, the TMP does operate safely. The
19 extended time has reduced the number of cars waiting
20 and parents are obeying the rules. In summary, our
21 TMP continues to work well and conditions are even
22 improved this year.

23 I would also like to add that our TMP is
24 adjusted based on weather or other conditions. For
25 example, several weeks ago one of our neighbors was

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1 having work done to her house. There were two trucks
2 that were parked in the street all day. We adjusted
3 our TMP to accommodate her and we will continue to
4 accommodate our neighbors. Thank you.

5 CHAIRMAN GRIFFIS: Thank you.

6 SERGEANT WILSON: Good morning, everyone.
7 My name is Leo C. Wilson, Sr. I'm a retired
8 Metropolitan Police Department ("MPD") Sergeant. I
9 had been there 24 years with MPD. During that time,
10 I was employed on a part-time basis for Georgetown Day
11 School to assist with their traffic and TMP. Since my
12 retirement, I'm now the Director of Security and TMP
13 enforcer for Georgetown Day School. Also I'm a
14 consultant for Washington International School to help
15 set up Fields School, Archbishop Carroll School and
16 several other schools including Potomac School in
17 McLean, Virginia.

18 I was contacted near the end of the summer
19 by NCRC to assist them with their TMP program. I came
20 and assessed the situation. I took upon myself to
21 recommend three personnel to assist with the traffic
22 for the first 30 days. Once that was completed, we
23 cut it down to just two people. You needed one person
24 at Newark and 33rd Street NW to make sure that parents
25 do one complete circle so they won't be taking

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1 shortcuts in. Everyone has to drive down Newark, come
2 in from Highland Place and go out of 33rd. We have
3 one person in front directly across from a blind spot
4 they have to make sure when cars that are not
5 affiliated with NCRC is coming down Highland from 33rd
6 that there won't be an accident or any problems with
7 cars coming up. Since my personnel has been there,
8 there has not been a problem.

9 I was invited here for the hearing on the
10 28th of October to view a video. I watched the video
11 which I was quite surprised. According to the video,
12 there was a serious problem. I took it upon myself
13 from that day up through yesterday to come unannounced
14 to observe the situation.

15 What was reflected in that video does not
16 exist today. We have virtually no standing traffic on
17 Highland Place whatsoever. The only concern I had was
18 on Ordway. There are parents discharging their
19 children from the street side, the driver's side, of
20 the vehicle and walking up and down the street. Since
21 then, I have talked to these parents. Virtually that
22 does not exist anymore.

23 What the parents are doing now are taking
24 the kids out of the vehicle from the passenger's side
25 which puts them at the curb. Also they cross over to

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1 the north side of Ordway to use the sidewalk because
2 you virtually have no sidewalk on the south side of
3 Ordway. They walk down until they become parallel
4 with the entrance to the school and safely cross over.
5 When the parents leave, they still cross over and use
6 the sidewalk. We are getting total cooperation from
7 the parents as well as the staff. They have more than
8 ample enough staff members in front. I have counted
9 as many as eight, more than they need.

10 The unique thing is you have people
11 working in the community like contractors, lawn care
12 and so forth. They have a tendency to part their
13 vehicle on Highland Place on the south side. The
14 south side clearly states no parking anytime. What
15 impressed me is the fact that NCRC were able to put
16 staff out there so it does not interfere with the flow
17 of traffic.

18 Like I said, what I saw in the video does
19 not exist today. It's safe. The parents are starting
20 to use the sidewalks when they are walking the kids on
21 Highland Place. It does not have that much of a
22 backup of traffic. At the most, you would see the car
23 sitting in the double line maybe two to three minutes
24 tops. It is very safe.

25 I have a confession. My staff had

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1 virtually nothing to do with this. This was already
2 implemented before we came on board. We're committed
3 to stay with NCRC for the whole duration. Like I
4 said, they took it upon themselves. I commend them.

5 CHAIRMAN GRIFFIS: Good. Thank you very
6 much. Anything else?

7 MS. DWYER: That's it for our rebuttal.

8 CHAIRMAN GRIFFIS: Okay. You raised a
9 couple of points. Let me just get a clarification.
10 You're saying that on the south side of Highland there
11 are other non-NCRC trucks that would be illegally
12 parked. Is that correct?

13 SERGEANT WILSON: Yes, you have someone to
14 come work on the lawn.

15 CHAIRMAN GRIFFIS: That's fine. On Ordway
16 Street, you indicated that the parents discharged and
17 then walk on the north side.

18 SERGEANT WILSON: Yes.

19 CHAIRMAN GRIFFIS: So there's a sidewalk
20 on the north side and then they get to a place in
21 which they are perpendicular to the school and safely
22 cross.

23 SERGEANT WILSON: Correct.

24 CHAIRMAN GRIFFIS: What makes it safe to
25 cross there?

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1 SERGEANT WILSON: It's just a matter of
2 looking. When the cars are not coming, you just
3 cross. Also they have one to two staff members out
4 there in orange vests that also direct them when to
5 cross over.

6 CHAIRMAN GRIFFIS: So the staff members
7 are there at that point in the street.

8 SERGEANT WILSON: Yes.

9 CHAIRMAN GRIFFIS: And you're saying that
10 it's actually safer to cross perpendicular to a street
11 than walking down the street and making your way
12 across diagonally.

13 SERGEANT WILSON: Definitely.

14 CHAIRMAN GRIFFIS: I see. Ms. Piggott,
15 you indicated that 66 percent of the accepted students
16 were from the neighborhood. What's the definition of
17 the neighborhood? What's the boundary?

18 MS. PIGGOTT: Excuse me. I define that as
19 families that could walk to school from three to four
20 blocks distance to the school.

21 CHAIRMAN GRIFFIS: As these aren't these
22 beautiful rectangular urban streets and blocks that I
23 like, what is three blocks away?

24 MS. PIGGOTT: Well, it probably differs in
25 terms of which streets and blocks are longer than

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1 others.

2 CHAIRMAN GRIFFIS: So it goes two blocks
3 from Newark south.

4 MS. PIGGOTT: Yes.

5 CHAIRMAN GRIFFIS: A larger problem that's
6 obviously been testified about and there's evidence in
7 the record of the behavior of parents and of course we
8 have new testimony today that all this has been
9 remedied is how do you propose in addition to some of
10 the TMP management elements, for instances notifying
11 parents, to control the behavior of parents driving to
12 and from school when they are off the site, for
13 instances stopping at stop sign?

14 MS. PIGGOTT: Our TMP goes to what happens
15 right in the vicinity of the school. We advise. I
16 know when Sergeant Wilson was out at the school he
17 stood on the corner one day and just pointed out the
18 stop sign to our parents. Many of the neighbors in
19 the neighborhood just go through that stop sign that's
20 at the end of the street because it's not really truly
21 an intersection. Part of it goes into an alley and
22 part of it is one way coming toward --

23 CHAIRMAN GRIFFIS: But it truly a stop
24 sign, isn't it?

25 MS. PIGGOTT: Yes, it is and people should

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1 obey that. We haven't attempted to enforce that sort
2 of city law.

3 CHAIRMAN GRIFFIS: Okay.

4 MS. PIGGOTT: Our TMP, we have enforced u-
5 turns and double standing and illegal parking.

6 CHAIRMAN GRIFFIS: It's certainly
7 something that could be addressed in what you send
8 out, could it not?

9 MS. PIGGOTT: Sure.

10 CHAIRMAN GRIFFIS: I can't put my finger
11 on it right now, but in one of the letters to parents
12 outlying what should happen in terms of being
13 courteous to the neighborhood and driving safely and
14 being all that, couldn't you call that out as a
15 specific? "Please stop at all stop signs."

16 MS. PIGGOTT: Sure.

17 CHAIRMAN GRIFFIS: "Obeying all traffic
18 signals." I know it sounds ludicrous. It's carpool
19 etiquette which you indicated. It's in your first
20 submission and it's part of Exhibit O. The other
21 piece is that you also send out diagrams of how one is
22 to drive to the school and not. None of the stop
23 signs or intersection signals or whatever you need to
24 do at the intersections are identified during that.
25 Wouldn't that be also part of an important aspect of

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1 as people are looking at this how they would drive and
2 what they would have to do in order to get to and from
3 the school?

4 MS. PIGGOTT: Certainly. That would be
5 great idea.

6 CHAIRMAN GRIFFIS: Okay.

7 MS. PIGGOTT: When Sergeant Wilson was
8 helping a few days at the stop sign, we discussed
9 together the idea of putting that into the training
10 that we do of parents at the very beginning of the
11 year when parents are new and talking about those
12 issues as well as the ones that are in our TMP. It
13 would be just a part of a broader parent education.

14 CHAIRMAN GRIFFIS: I think that would be
15 very important. Perhaps most drivers today need that
16 education. We could open it up to the community or
17 something. In the conditions that are a part of
18 Exhibit M, are you still holding to that or are you
19 proposing that we will have new proposed conditions
20 submitted?

21 MS. DWYER: We would have new conditions
22 based on the testimony and the evidence of record.

23 CHAIRMAN GRIFFIS: Which means I can't go
24 through all these right now. Okay.

25 MS. DWYER: You could go through them and

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1 we could let you know which ones are going to change.

2 CHAIRMAN GRIFFIS: That's okay. The other
3 piece of this in discussion is - and clearly we're
4 going to need a very definite aspect, some of what you
5 have indicated in these proposed conditions and let me
6 see if that is maintained today - the issue of
7 enrollment. It is also the issue of onsite students.
8 From the conditions in terms of the original
9 submission, Exhibit M, you are indicating that we are
10 actually as you're proposing looking at two different
11 numbers. One is enrollment and one is the capacity of
12 onsite students.

13 MS. DWYER: That's right.

14 CHAIRMAN GRIFFIS: And you're maintaining
15 that the onsite students would be 120.

16 MS. DWYER: Yes.

17 CHAIRMAN GRIFFIS: And enrollment would
18 increase as you indicated today and also in the prior
19 submissions up to 171 to 181. Is that correct?

20 MS. DWYER: Yes, that's correct.

21 CHAIRMAN GRIFFIS: Okay. Are there any
22 other Board questions? Mr. Zaidain.

23 MEMBER ZAIDAIN: Yes, I have a quick one
24 for Ms. Piggott regarding the Department of Health
25 letter that was submitted.

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1 MS. PIGGOTT: Yes.

2 MEMBER ZAIDAIN: In reading through this,
3 I'm a little confused between what this says and what
4 your testimony was. It seems that in the fourth
5 paragraph down your proposed ratios are approved but
6 I believe in your testimony, you said that they were
7 permanently approved based on something else, a
8 conditional permanent approval, which I'm a little
9 confused about. What is this approval based upon and
10 is it temporary or is it permanent?

11 MS. PIGGOTT: The group size that's
12 mentioned in that fourth paragraph is the group size
13 that we've had for a number of years in the school.
14 While we weren't granted a waiver to do that, it was
15 sort of a de facto waiver because every year Licensing
16 came and looked at our numbers and our group sizes and
17 signed off on that. There was a complaint raised last
18 year about the number of students in the classroom.
19 Licensing came out and investigated and gave us a
20 waiver to maintain the number of children we've always
21 had. It was temporary the way it was written at that
22 point in time to be until this fall.

23 After that, we talked to them further and
24 we went through our statistics and looked over what
25 we'd done in the past. They agreed to give us a

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1 permanent waiver which is really an extension of what
2 we've always had in order that we can operate until we
3 can reduce the group sizes in those classroom by
4 adding our new classrooms.

5 MEMBER ZAIDAIN: So you can continue
6 operating until you reduce the sizes.

7 MS. PIGGOTT: Yes.

8 MEMBER ZAIDAIN: So when they come out and
9 you have submit your enrollment and statistical
10 figures to them, then they have been granting
11 temporary waivers. Now they've granted a permanent
12 waiver.

13 MS. PIGGOTT: Yes.

14 MEMBER ZAIDAIN: Okay.

15 CHAIRMAN GRIFFIS: Anything else?

16 MEMBER ZAIDAIN: No.

17 CHAIRMAN GRIFFIS: Any other questions?
18 Yes, Mr. Hood.

19 COMMISSIONER HOOD: I just want to ask
20 Sergeant Wilson a question. You mentioned that the
21 video in which the Board was privileged to see that
22 you were surprised at what took place. Is it that the
23 change that does exist today is because of some of the
24 measures that have taken place or was that just a day
25 that it just happened to have happened?

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1 SERGEANT WILSON: Apparently through the
2 changes that they implemented, there were cars -- When
3 I saw the videotape, I was shocked. In fact, when I
4 left here, I had a phone conference with my staff that
5 works out there and asked "What's going on?" because
6 I was seeing all this on the video. They assured me
7 that it doesn't exist. That's why I took it upon
8 myself and check. By them changing the arrival times
9 of spacing it out, you don't have that many cars
10 bunching up.

11 MEMBER ZAIDAIN: Okay.

12 SERGEANT WILSON: Therefore, like I said,
13 it's a lot better. The only thing you can't control
14 is people in the neighborhood. It's their way of life
15 walking down the street. You see that a lot. You
16 have a UPS truck sometimes won't stop for the stop
17 sign. If they can see they can get across and no cars
18 are coming, they just keep on going, but they made a
19 great improvement.

20 COMMISSIONER HOOD: So it existed but due
21 to the mitigation efforts that have been put in place
22 it now has gotten better.

23 SERGEANT WILSON: A lot better. Like 90
24 percent improvement.

25 COMMISSIONER HOOD: And you mentioned

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1 something. I think the Chairman asked this but let me
2 expand on this a little more. On Ordway Street, I
3 think you said the north side is where they walk down
4 the sidewalk. Where is the safe point for a child to
5 cross?

6 SERGEANT WILSON: The safest place I
7 recommend is directly across where you have steps
8 leading into the school. If they walk straight down,
9 they can get parallel where they can walk across.

10 COMMISSIONER HOOD: Is there a stop sign
11 or traffic light there?

12 SERGEANT WILSON: No, there is not. So
13 it's up to the parent or the adult to look both ways.
14 There are constantly big gaps in between traffic going
15 up and down Ordway. It's very safe to cross and the
16 fact that they have their own vested personnel out
17 there. They stand right out and you can see them.

18 COMMISSIONER HOOD: Okay. Thank you. Ms.
19 Piggott, what percentage of students do you have that
20 come by vehicle? You mentioned that in your rebuttal.
21 Was it 21 percent?

22 MS. PIGGOTT: I was talking about the
23 numbers of children that we accept.

24 COMMISSIONER HOOD: That's it.

25 MS. PIGGOTT: It came up last hearing

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1 about whether we could accept more children from the
2 neighborhood. The point I was making is we have a
3 significant number of children from the neighborhood.
4 We can only accept children for spaces that have. If
5 we have a young child apply for a class that has older
6 children in it, we can't make that fit.

7 COMMISSIONER HOOD: I'm interested in the
8 ones that you accept not from the neighborhood.

9 MS. PIGGOTT: Okay and what is your
10 question?

11 COMMISSIONER HOOD: What percentage was
12 it? You gave us some percentages.

13 MS. PIGGOTT: We accept 21 percent of our
14 total applicant pool.

15 CHAIRMAN GRIFFIS: Outside the
16 neighborhood.

17 MS. PIGGOTT: Yes.

18 COMMISSIONER HOOD: Okay. Thank you.

19 MS. PIGGOTT: No, of the total applicant
20 pool including neighbors.

21 CHAIRMAN GRIFFIS: What is it the
22 percentage of?

23 MS. PIGGOTT: Twenty-one percent of the
24 total applicant pool, everyone who applies to the
25 school.

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1 CHAIRMAN GRIFFIS: Is?

2 MS. PIGGOTT: Twenty-one percent.

3 CHAIRMAN GRIFFIS: I know. The 21 percent
4 is what?

5 MS. PIGGOTT: We accept approximately 21
6 percent of everyone who applies to the school.

7 COMMISSIONER HOOD: Whether they are in
8 the neighborhood or not, it doesn't matter.

9 MS. PIGGOTT: Yes.

10 CHAIRMAN GRIFFIS: So if you had 66
11 percent were from the neighborhood, we would assume
12 that the other percentage is not from the
13 neighborhood.

14 MS. PIGGOTT: No, what I'm saying is our
15 percentage of the students that we accept from the
16 neighborhood is higher as you can see than we accept
17 of the other categories that we break down.

18 CHAIRMAN GRIFFIS: I see. So 66 percent
19 is accepted from the neighborhood of the entire pool
20 and you accept only 20 odd percent of the entire
21 applications that come into the school. So there are
22 actually not comparative percentages is what I think
23 Mr. Hood was trying to get to the down of. Okay. You
24 indicated also that you have imposed fines. How much
25 are the fines?

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1 MS. PIGGOTT: There's one fine in the
2 sanction procedure. It's a \$250 fine.

3 CHAIRMAN GRIFFIS: And when is the fine
4 imposed? Is there a warning? Are there several steps
5 before a fine is imposed?

6 MS. PIGGOTT: There's a letter first.
7 After the letter, there's another letter with a
8 meeting with me. The fine is the third step.

9 CHAIRMAN GRIFFIS: And your TMP 2002-2003
10 indicates on the second page arrival times and
11 dismissal times. Arrival of 8:00, 8:35 a.m., 11:30
12 a.m., 12:40 p.m. Dismissal: 11:30 a.m., 12:30 p.m.,
13 3:00 p.m., 3:30 p.m., 3:00 to 5:00 p.m. Are those
14 still standing?

15 MS. PIGGOTT: The morning drop-off we have
16 extended from 8:30 a.m. to 8:50 a.m.

17 CHAIRMAN GRIFFIS: I see. So arrival and
18 dismissal times are fairly close and may in fact occur
19 at the same time.

20 MS. PIGGOTT: Do you mean the other times
21 of the day?

22 CHAIRMAN GRIFFIS: Yes, if you have an
23 arrival time at 11:30 a.m., you also have a dismissal
24 time at 11:30 a.m.

25 MS. PIGGOTT: The 11:30 a.m. arrival time

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1 is ten children or less that are only coming for one
2 special lunch program. It's not a carpool line.
3 Those parents park on Ordway. Some of them walk.
4 They are generally about six or seven cars that make
5 up that arrival.

6 CHAIRMAN GRIFFIS: Okay. And the carpool
7 lines are the earlier and the later then.

8 MS. PIGGOTT: And at 11:30 a.m. when the
9 morning children go home.

10 CHAIRMAN GRIFFIS: I see. Okay.

11 MS. DWYER: I have one follow-up point for
12 Sergeant Wilson in response to a question from Mr.
13 Hood. I think Sergeant Wilson testified that what he
14 saw in the video was not what he observed at NCRC.

15 CHAIRMAN GRIFFIS: Right.

16 MS. DWYER: Then Commissioner Hood asked
17 him if that meant that the situation existed but it
18 had improved. Sergeant Wilson can testify to this but
19 I think his testimony was that he never observed that
20 situation. Therefore his testimony was not -- I can
21 ask him.

22 CHAIRMAN GRIFFIS: Indeed. Did you ever
23 observe the condition that you saw in the video?

24 SERGEANT WILSON: No, I never did. That's
25 why I was surprised and I decided to come and observe

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1 it for myself because I wasn't on board at that time
2 when the video was taken.

3 CHAIRMAN GRIFFIS: Right.

4 SERGEANT WILSON: But from what I saw in
5 the video, I have yet to this day have seen since I've
6 been observing.

7 CHAIRMAN GRIFFIS: Seen that type of
8 condition.

9 SERGEANT WILSON: Right, where people were
10 everywhere parking, everywhere doing u-turns. I only
11 observed one u-turn violation on Ordway and it was not
12 affiliated with NCRC.

13 CHAIRMAN GRIFFIS: Okay. Good. Thank
14 you.

15 MS. DWYER: All right. Thank you.

16 CHAIRMAN GRIFFIS: You both have been here
17 through this proceeding. Is that correct?

18 SERGEANT WILSON: Yes.

19 MS. WILLIAMS: Yes, for the most part,
20 I've been at the last three I think.

21 CHAIRMAN GRIFFIS: Were you sworn at the
22 last hearing?

23 SERGEANT WILSON: Yes.

24 MS. WILLIAMS: I was sworn in the first
25 time I came in.

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1 CHAIRMAN GRIFFIS: Mr. Zaidain.

2 MEMBER ZAIDAIN: Mr. Wilson, how long have
3 you been on the job again?

4 SERGEANT WILSON: I retired from the MPD
5 August 1994 with 24 years of service.

6 MEMBER ZAIDAIN: No, I mean with NCRC.

7 SERGEANT WILSON: NCRC brought me on board
8 near the end of August.

9 MEMBER ZAIDAIN: The end of August, okay.

10 CHAIRMAN GRIFFIS: Any other Board
11 questions? If not, any other witnesses?

12 MS. DWYER: No, that concludes our
13 rebuttal.

14 CHAIRMAN GRIFFIS: Excellent. Let's move
15 to cross examination then. I was going to ask the
16 architect just about the drive aisle and all that and
17 I think it's fairly clear in my mind, the issues
18 attendant to that. We're going to move beyond that.
19 Do you want to start with this group cross and then go
20 back?

21 MS. DWYER: Certainly since they're all
22 here.

23 CHAIRMAN GRIFFIS: Okay. Let's go. Order
24 of cross. Mr. Nettler, do you want to be first?

25 MR. NETTLER: I think the ANC is first.

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1 CHAIRMAN GRIFFIS: Indeed. Have a seat.
2 Use that mike. That would be perfect.

3 CROSS EXAMINATION

4 MS. MacWOOD: For the record, my name is
5 Nancy MacWood. I'm representing the ANC 3-C. Hello
6 everyone. Good morning. Ms. Piggott, I just have a
7 couple of questions for you actually. In regards to
8 the Department of Health waiver, has the Department of
9 Health indicated what will happen regarding the waiver
10 if the special exception is not approved?

11 MS. PIGGOTT: No.

12 MS. MacWOOD: The waiver allows you to
13 have how many addition students in how many
14 classrooms?

15 MS. PIGGOTT: It allows us to have 17
16 children instead of 16 in two classes and 23 instead
17 of 20 in two other classes.

18 MS. MacWOOD: So if my arithmetic is
19 correct, one additional child in two classrooms and
20 three additional children in two classrooms.

21 MS. PIGGOTT: Yes.

22 MS. MacWOOD: So that's a total of eight.
23 Is that right?

24 MS. PIGGOTT: Yes.

25 MS. MacWOOD: Is it possible if the

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1 special exception is not approved that they would
2 require you to reduce the enrollment by eight possibly
3 by attrition or some other method?

4 MS. PIGGOTT: I don't know.

5 MS. MacWOOD: You don't know. Okay. Of
6 the 66 percent of neighborhood children that NCRC has
7 accepted, can you tell us what number that is 66
8 percent of? How many children applied?

9 MS. PIGGOTT: Yes. This past year 21
10 children - again I counted the children that could
11 walk within three to four blocks - applied. We
12 accepted 14. Of those 14, three of those families
13 decided to go to another school. So 11 of those
14 children enrolled.

15 MS. MacWOOD: All right. Thank you.
16 Sergeant Wilson. Have you ever worked for a child
17 development center before?

18 SERGEANT WILSON: No, mainly private
19 schools.

20 MS. MacWOOD: The schools that you
21 mentioned, GDS, Field, Washington International
22 School, have these schools significantly reduced the
23 number of car trips as part of their TMP?

24 SERGEANT WILSON: No, basically they
25 increased them as each year goes by.

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1 MS. MacWOOD: Doesn't the Field School by
2 zoning order use buses and actually children aren't
3 allowed to drive to the school?

4 SERGEANT WILSON: The seniors are allowed
5 to drive to the school and are allowed to park in the
6 lower lot. Field School does use limousine buses to
7 pick up quite a few of their kids.

8 MS. MacWOOD: At the Metro stations. Is
9 that correct?

10 CHAIRMAN GRIFFIS: We're already familiar
11 with their operations.

12 MS. MacWOOD: GDS I believe is --

13 CHAIRMAN GRIFFIS: Help me find out the
14 relevance of comparing his experience with other
15 schools and their drop-offs and pick-ups.

16 MS. MacWOOD: The relevance is one of the
17 issues in this particular case is whether the number
18 of car trips to and from the NCRC is causing a
19 dangerous situation.

20 CHAIRMAN GRIFFIS: I understand that.
21 Believe me. I've been here, but what you're asking
22 him to say is what? There is better ways of doing
23 this with other schools.

24 MS. MacWOOD: That in the course, he has
25 been consulting with other schools and I would guess

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1 given the schools that he's mentioned and the
2 familiarities some of us have with those schools'
3 plans that probably what he is recommended is a
4 reduction of car trips at those other schools. I'm
5 just curious why that isn't perhaps what he's
6 recommended for NCRC.

7 CHAIRMAN GRIFFIS: Okay.

8 MS. DWYER: But he's testified that there
9 was no reduction in car trips.

10 CHAIRMAN GRIFFIS: Right.

11 MS. DWYER: So he's already answered the
12 question.

13 SERGEANT WILSON: If I can be clear about
14 it, if you ask me to compare the other schools to
15 NCRC, there's not an issue at NCRC compared to the
16 other schools. NCRC is a lot smaller school. The
17 parents. Of all the schools I have dealt with doing
18 TMP, the parents have really adjusted quite well. You
19 explain to them the circumstances. For example,
20 taking kids out on the wrong side of the vehicle, they
21 stopped doing it. Crossing over using the sidewalk is
22 safe for the child. They are compliant.

23 CHAIRMAN GRIFFIS: Okay.

24 SERGEANT WILSON: You have some other
25 places. They don't. But it's not an issue at this

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1 point. It's very safe.

2 CHAIRMAN GRIFFIS: Okay.

3 MS. MacWOOD: Let me ask you another
4 question then, Sergeant Wilson. How often are you at
5 the NCRC?

6 SERGEANT WILSON: NCRC, I've been there
7 now going on three or three and a half weeks.

8 MS. MacWOOD: Are you there every day?

9 SERGEANT WILSON: Everyday.

10 MS. MacWOOD: Are you there at every pick-
11 up and drop-off?

12 SERGEANT WILSON: I get them sometimes
13 half way through the morning drop-off, but I'm there
14 in the afternoon as well as the evening.

15 MS. MacWOOD: Okay. Sergeant Wilson, are
16 you aware of the TMP that was for NCRC that was
17 approved by the Zoning Order in 1998 that has been in
18 effect at the school since that time?

19 SERGEANT WILSON: No.

20 MS. MacWOOD: So you don't have any
21 estimation as to why that plan hasn't been as
22 successful as the plan that you are currently under.

23 CHAIRMAN GRIFFIS: He said he doesn't know
24 it.

25 SERGEANT WILSON: No.

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1 MS. MacWOOD: I just have one other
2 question, Sergeant Wilson. You said that you saw the
3 Beckner video at the last hearing. Are you aware that
4 the Beckners testified that some of that video was
5 taped after the new TMP was implemented?

6 SERGEANT WILSON: I was told from the
7 testimony that there were two or three days I believe
8 that they testified that it was taken at that time.
9 I believe that was in the very beginning when my staff
10 came on board. Since then, there has been any drastic
11 improvement. There is not a safety issue from what I
12 can see at this point.

13 MS. MacWOOD: All right. Thank you.

14 CHAIRMAN GRIFFIS: Thank you. Next?

15 MR. NETTLER: Sergeant Wilson, let me
16 follow up on the last question that you responded to.
17 As you stated, you saw the video that was presented by
18 the Beckners, correct?

19 SERGEANT WILSON: Yes.

20 MR. NETTLER: Are you aware that there
21 were six dates during this school term that the NCRC
22 are now in that were shown on the video?

23 SERGEANT WILSON: I believe so.

24 MR. NETTLER: And the most recent one is
25 October 21st.

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1 SERGEANT WILSON: Yes.

2 MR. NETTLER: So on September 12,
3 September 29, October 2, October 8, October 16 and
4 October 21 which are the six dates that were
5 mentioned, were you at the NCRC at the time?

6 SERGEANT WILSON: No.

7 MR. NETTLER: So you started with NCRC on
8 what date?

9 SERGEANT WILSON: I started the first day
10 of school where I put staff up there. I came in.

11 MR. NETTLER: But you weren't personally
12 there on those dates.

13 SERGEANT WILSON: Not every day, no. I
14 was there for the first couple days that school
15 started.

16 MR. NETTLER: Since that time, you've had
17 staff there but you yourself have not been there.

18 SERGEANT WILSON: I have been going on and
19 off but not every particular drop-off/pick-up time,
20 no.

21 MR. NETTLER: And when you were there in
22 the beginning which was one or two days.

23 SERGEANT WILSON: Yes, to set up my staff.

24 MR. NETTLER: To set up your staff, okay.
25 How many pick-ups on those first and second days were

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1 you there?

2 SERGEANT WILSON: I was there in the
3 morning. I was there in the afternoon.

4 MR. NETTLER: You're aware that there are
5 five pick-ups and drop-offs.

6 SERGEANT WILSON: Yes, at that time we
7 were required to be there mainly for the peak morning
8 hours which we provided three people.

9 MR. NETTLER: And the staff that you have,
10 have any of them been here during the hearings?

11 SERGEANT WILSON: No.

12 MR. NETTLER: Did you ask any of your
13 staff members about those dates that were mentioned in
14 the video?

15 SERGEANT WILSON: Yes.

16 MR. NETTLER: Did you complain to those
17 staff members about what you saw in those videos on
18 those six days that were shown?

19 SERGEANT WILSON: Yes. I have talked to
20 my staff about it. We came up with a plan to improve
21 and one of the things is that the gentleman at Newark
22 and 33rd pointed out the stop sign to everyone whether
23 they are residents or commercial vehicles as well as
24 NCRC.

25 MR. NETTLER: So is that in the last two

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1 weeks?

2 SERGEANT WILSON: That has been for the
3 last three weeks.

4 MR. NETTLER: The last three weeks. So
5 you are aware that the video was showing a various
6 number of dates beginning in January 2002 up to
7 October 2003 which I guess is about almost 18 months.
8 I'm probably wrong. About a 18 month period or so or
9 more. Do you understand that?

10 SERGEANT WILSON: Repeat that.

11 MR. NETTLER: The video that you saw
12 represented a depiction of traffic situations from the
13 site beginning in January 2002 up until October 21,
14 2003.

15 SERGEANT WILSON: To be honest, I can't
16 really say for the simple fact that it's difficult to
17 identify which cars are which. If there is someone
18 who lives in the neighborhood coming home with their
19 child --

20 CHAIRMAN GRIFFIS: You understand. His
21 point is that this is small snippets from an 18 month
22 period. Do you understand that?

23 SERGEANT WILSON: Yes.

24 MR. NETTLER: You're talking about the
25 last three weeks in comparison with the 18 month

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1 period as having been a demonstration of some
2 compliance with a TMP that's now in effect.

3 SERGEANT WILSON: Yes.

4 MR. NETTLER: Okay. Thank you. Are you
5 aware of any ticketing that has gone on the last
6 couple of weeks of any of the school cars that have
7 been parked or that have brought children to the site?

8 SERGEANT WILSON: The only ticketing I
9 observed was a ticket put on vehicles that were parked
10 illegally.

11 MR. NETTLER: Do you know whose vehicles
12 those were?

13 SERGEANT WILSON: There was no indication
14 they were NCRC because NCRC staff have yellow stickers
15 on their rear sun visors. The vehicles I observed
16 didn't have yellow stickers.

17 MR. NETTLER: And so if a car that was
18 ticketed didn't have a NCRC sticker in it, it's your
19 assumption that it's not a NCRC staff car because you
20 assume that NCRC staff all have their yellow stickers
21 in their car. Is that correct?

22 SERGEANT WILSON: Correct.

23 MR. NETTLER: If I was to tell you that
24 two of the cars -- Strike that. Are you aware of the
25 type of vehicles that the personnel at the school

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1 drive?

2 SERGEANT WILSON: The personnel drive all
3 types of vehicles.

4 MR. NETTLER: Were you aware of --

5 CHAIRMAN GRIFFIS: Do you keep a license
6 plate directory or is there any record of that that
7 you're aware of that identifies the cars?

8 SERGEANT WILSON: From my understanding,
9 NCRC keeps a license plate for all staff.

10 MS. DWYER: I think Ms. Piggott can answer
11 that question better than Sergeant Wilson.

12 CHAIRMAN GRIFFIS: I understand, but
13 that's why he's being crossed and I think it's going
14 in the direction if he's aware of that. Does he
15 reference that list in order to assess whether it's a
16 staff car?

17 SERGEANT WILSON: Yes, we've been told for
18 example if someone in the neighborhood complains about
19 a vehicle. They give my staff the tag. We contact
20 the school. The school has a listing of everyone's
21 tag, the staff as well as the parents.

22 MR. NETTLER: If you've seen cars that
23 have been ticketed illegally, have you checked them or
24 your staff checks them against that list to see
25 whether they are cars of the staff at NCRC?

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1 SERGEANT WILSON: Have I done it? No.

2 MR. NETTLER: Ms. Piggott, are you aware
3 of any ticketing that's been done of staff members in
4 the last few weeks for illegal parking on Highland
5 Place?

6 MS. PIGGOTT: Yes.

7 MR. NETTLER: Were those staff cars that
8 didn't have school stickers as well?

9 MS. PIGGOTT: I'm aware of one and it did
10 have a school sticker.

11 MR. NETTLER: But it was ticketed. What's
12 the consequence of that staff member receiving a
13 ticket under your TMP?

14 MS. PIGGOTT: That staff member is in a
15 lot of trouble, Mr. Nettler, as you can well imagine.

16 MR. NETTLER: I'm sure.

17 CHAIRMAN GRIFFIS: Did you have to pay the
18 ticket?

19 MS. PIGGOTT: Oh, yes.

20 MR. NETTLER: You're not aware of any
21 other members of the staff receiving tickets.

22 MS. PIGGOTT: No.

23 MR. NETTLER: You're not aware of any
24 parents receiving tickets for illegal parking.

25 MS. PIGGOTT: No.

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1 MR. NETTLER: But is your testimony that
2 all of our staff members have stickers?

3 MS. PIGGOTT: Yes.

4 MR. NETTLER: Does that include the people
5 who you identified when you first testified who come
6 to the premises on a irregular basis to act as an
7 adjunct to your staff?

8 MS. PIGGOTT: No, it's the staff that we
9 employ.

10 MR. NETTLER: So the people that come as
11 adjunct and if they park illegal, so the people who
12 you've employed to operate this TMP wouldn't know if
13 they were staff or not, would they?

14 MS. PIGGOTT: No.

15 MR. NETTLER: Do you have license plates
16 for those cars as well that come to your site
17 regularly?

18 MS. PIGGOTT: No, we don't.

19 MR. NETTLER: With regard to the traffic
20 and issues, you haven't done anything to bring the
21 school into compliance with the previous orders
22 restriction against the number of staff coming to the
23 site, have you?

24 MS. PIGGOTT: To my knowledge, that's not
25 a condition that was imposed on us in the 1998 BZA

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1 Order.

2 MR. NETTLER: To your knowledge, there's
3 no condition on the number of staff.

4 MS. PIGGOTT: No.

5 MR. NETTLER: You made reference to the
6 event that was scheduled because it couldn't be held
7 on Saturday. Was there a condition in the 1998 Order
8 that authorized you to hold these events on Saturday
9 and Sunday?

10 MS. PIGGOTT: The condition that went to
11 that said that the normal hours of school operation
12 were from 8:00 a.m. to 5:00 p.m.

13 MR. NETTLER: Does that say then that you
14 can have events on Saturday or Sunday?

15 MS. PIGGOTT: No.

16 MR. NETTLER: So if it was stated in the
17 Order, it's your assumption that it was permissible
18 for you to operate.

19 MS. PIGGOTT: Yes, we assumed it to be a
20 normal school event since other schools have several
21 adjunct events each year.

22 MR. NETTLER: Are you aware whether those
23 other schools that have those events have within their
24 order authorization that they have on either night
25 time or weekend events?

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1 MS. PIGGOTT: No.

2 MR. NETTLER: So you are not familiar with
3 those orders.

4 MS. PIGGOTT: No.

5 MR. NETTLER: You're only familiar with
6 your order.

7 MS. PIGGOTT: Yes.

8 MR. NETTLER: I believe what you said in
9 your testimony was someone was at the intersections at
10 all times. Is that correct?

11 MS. PIGGOTT: This year we have not --
12 Well, what we do is we deploy our staff where we need
13 them. Again that's the beauty of the TMP.

14 MR. NETTLER: So your previous testimony
15 that someone is at those intersections at all times is
16 incorrect.

17 MS. PIGGOTT: At that time, we had for
18 example a person at the corner.

19 MR. NETTLER: Is it correct or not?

20 MS. PIGGOTT: Yes.

21 MR. NETTLER: So your statement that
22 someone is at every intersection at all times is a
23 correct statement.

24 MS. PIGGOTT: I'm not sure what you mean
25 when you say "every intersection."

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1 MR. NETTLER: I'm just referring to your
2 testimony.

3 MS. DWYER: Which testimony are you
4 referring to? Testimony today that you're cross
5 examining her on or testimony prior?

6 MR. NETTLER: Yes, today. You said today
7 that someone was at those intersections at all times.

8 MS. PIGGOTT: No.

9 MR. NETTLER: What is your testimony today
10 then?

11 MS. PIGGOTT: My testimony today is that
12 we are following our TMP and that it's a flexible one.

13 MR. NETTLER: So your testimony then
14 previously was that someone was at the intersections
15 at all times. That's not correct.

16 MS. PIGGOTT: That was last year.

17 MR. NETTLER: How many fines have been
18 imposed?

19 MS. PIGGOTT: No, fines have been imposed.

20 MR. NETTLER: Everybody has been compliant
21 with the TMP from your perspective.

22 MS. PIGGOTT: We don't expect for our
23 parents to be perfect. We have sent some first
24 violation letters and I have met with one parent, but
25 we have not even gotten close to the fine stage yet.

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1 We have every intention of doing that if we need to.

2 MR. NETTLER: Is that after the special
3 exception is approved?

4 MS. PIGGOTT: No, now. So far everyone
5 has complied after the first letter.

6 MR. NETTLER: What does it take to get to
7 a fine situation then?

8 MS. PIGGOTT: As I said previously, there
9 is a first letter that reattaches the TMP and reminds
10 everyone that it is in their contract that they are to
11 abide by the TMP. After that, there is another letter
12 and I meet with the family involved. I've done that
13 one time. I have told them that the next step would
14 be a fine, but everyone has complied to that point.

15 MR. NETTLER: You saw the video when it
16 was presented by the Beckners, did you not?

17 MS. PIGGOTT: Yes.

18 MR. NETTLER: There were six dates that
19 were identified in September and October on that
20 video. Correct?

21 MS. PIGGOTT: I don't recall the exact
22 dates.

23 MR. NETTLER: Did you go back and send
24 letters to any of the people who were identified in
25 that video or who you could identify in that video and

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1 send letters to them about their conduct?

2 MS. PIGGOTT: No. It was --

3 MR. NETTLER: Okay. Thank you. Ms.
4 Piggott, let me ask you about the letter of June 30th
5 that you referenced from the Department of Health.
6 Mr. Zaidain had asked you a question about this
7 letter, but there's nothing in this letter that says
8 that this waiver is dependent on you obtaining
9 approval of this special exception, is there?

10 MS. PIGGOTT: No.

11 MR. NETTLER: And there's nothing in this
12 letter that's contrary to what you said in your
13 original testimony today. There's nothing in this
14 letter saying that the waiver has been granted in
15 anticipation of you building another facility on the
16 premises, does it?

17 MS. PIGGOTT: No, not in this letter.

18 MR. NETTLER: I have no other questions.

19 CHAIRMAN GRIFFIS: Thank you. Next.

20 MS. DWYER: I have one question of the
21 witness on redirect.

22 MR. NETTLER: Doesn't that come after all
23 the people have cross examined?

24 CHAIRMAN GRIFFIS: It probably would be
25 more prudent.

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1 MS. DWYER: All right. I'll wait.

2 MR. HUNSICKER: For the record, I'm Steve
3 Hunsicker. I live at 3083 Ordway Street. Just a few
4 questions. First, Sergeant Wilson, can you tell me?
5 I believe I understood you have staff that is working
6 with you in connection with NCRC. Is that correct,
7 sir?

8 SERGEANT WILSON: Correct.

9 MR. HUNSICKER: Are they onsite for a
10 specific schedule during any given day?

11 SERGEANT WILSON: Yes, they are onsite for
12 the a.m. peak time.

13 MR. HUNSICKER: And how do you define the
14 a.m. peak time?

15 SERGEANT WILSON: 8:15 a.m. to 9:15 a.m.

16 MR. HUNSICKER: Okay. Is your arrangement
17 with NCRC pursuant to contract?

18 SERGEANT WILSON: Yes.

19 MR. HUNSICKER: What is the term of the
20 contract?

21 SERGEANT WILSON: The term of the
22 contract, we will provide two personnel every morning
23 during school hours from 8:15 a.m. to 9:15 a.m.

24 CHAIRMAN GRIFFIS: Do you mean "term" as
25 how long does it go for?

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1 MR. HUNSICKER: Correct.

2 CHAIRMAN GRIFFIS: Well, okay. How long
3 are you hired for?

4 SERGEANT WILSON: We're hired from year to
5 year from beginning of the school year to the end of
6 the school year. We're also being hired --

7 CHAIRMAN GRIFFIS: That's what sums an
8 annual contract.

9 SERGEANT WILSON: Yes.

10 CHAIRMAN GRIFFIS: Okay. Next question?

11 MR. HUNSICKER: I believe I understood
12 from your previous question is that you have no staff
13 onsite after -- Was it 9:15 a.m. you said, sir?

14 SERGEANT WILSON: Yes.

15 MR. HUNSICKER: Is it correct that you
16 bill by the hour, sir?

17 SERGEANT WILSON: Yes.

18 MR. HUNSICKER: How many hours generally
19 speaking have you billed since you've been hired?

20 CHAIRMAN GRIFFIS: I don't understand the
21 relevance of that.

22 MR. HUNSICKER: I want to ascertain
23 approximately how many hours Sergeant Wilson has been
24 onsite.

25 CHAIRMAN GRIFFIS: I understand the

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1 question, but why do I need to know it?

2 MR. HUNSICKER: It goes to the value I
3 guess of his observation.

4 CHAIRMAN GRIFFIS: For what point?

5 MR. HUNSICKER: Whether his observations
6 are based on a --

7 CHAIRMAN GRIFFIS: So your point is that
8 he can't make observations - I need another cup of
9 coffee - that are not opinionated because he's being
10 paid.

11 MR. HUNSICKER: No. My point is a simple
12 one. If his observation is based on say one hour, I
13 would argue that it is not as meaningful as it would
14 be if it's based on full-time presence. That's why
15 I'm simply --

16 CHAIRMAN GRIFFIS: Okay. I understand the
17 point. I think he's given answers and testimony to
18 when he is there onsite and when he isn't. So the
19 Board is aware of that. I now understand your point.
20 Another question?

21 MR. HUNSICKER: He answered when his staff
22 was on point. I believe his testimony indicates that
23 he has made occasional observations.

24 CHAIRMAN GRIFFIS: Right. I think he's
25 very clear as far as our understanding of when he is

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1 there and not. Sometimes he comes after the morning
2 session or drop-offs and all that.

3 MR. HUNSICKER: Right. My question is a
4 simple one, Sergeant Wilson. Approximately how many
5 hours of your time have you billed since this contract
6 has been implemented?

7 CHAIRMAN GRIFFIS: Let's move on. I
8 understand the question and I understand his answers.
9 Next question.

10 MR. HUNSICKER: There hasn't been an
11 answer to this question with respect, Chair. It goes
12 to identifying how many hours, the value of his
13 observation.

14 CHAIRMAN GRIFFIS: How many hours have you
15 billed to date?

16 SERGEANT WILSON: Billed to date for my
17 time?

18 CHAIRMAN GRIFFIS: Yes.

19 MR. HUNSICKER: Correct, sir.

20 SERGEANT WILSON: Zero.

21 CHAIRMAN GRIFFIS: Next question.

22 MR. HUNSICKER: Okay.

23 CHAIRMAN GRIFFIS: Wait a minute. How
24 could you have billed zero hours?

25 SERGEANT WILSON: I have not submitted a

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1 bill for my time at all. It's strictly for my staff.

2 CHAIRMAN GRIFFIS: Now we're getting into
3 the technicalities of it. When you submit a bill, how
4 many hours would there be?

5 SERGEANT WILSON: Right now, I'm looking
6 at least 60 hours so far depending on when this
7 hearing is over. Depending on how long I'm here
8 determines it.

9 CHAIRMAN GRIFFIS: See that.

10 SERGEANT WILSON: So far at least 60
11 hours.

12 CHAIRMAN GRIFFIS: We're racking it up.

13 MR. HUNSICKER: I have many more
14 questions, Sergeant Wilson.

15 CHAIRMAN GRIFFIS: I can't imagine how
16 much this costs.

17 MR. HUNSICKER: Ms. Piggott --

18 CHAIRMAN GRIFFIS: Actually it's a very
19 interesting point because if I understand what you're
20 trying to get to is his billable hours going to tell
21 us how much he's actually there to observe. Right?
22 Now we have to factor out how many hearings he's
23 actually been at. If everything attended to this, do
24 you understand why I didn't want to go into this? It
25 doesn't get us to where you want us to figure out.

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1 Let's move on.

2 MR. HUNSICKER: Okay. Ms. Piggott, you
3 indicated that TMP as presently implemented is a
4 flexible one such that you may or may not have people
5 at intersections is how I understood your testimony.
6 Is that correct?

7 MS. PIGGOTT: Yes, somewhat.

8 MR. HUNSICKER: When we talk about
9 intersections, could you identify the intersections
10 that are at issue?

11 MS. PIGGOTT: In the morning peak time,
12 one of the traffic guards that Sergeant Wilson hires
13 is at the intersection of 33rd and Newark Streets.
14 That was to help our parents learn that we have a one
15 way pass through.

16 CHAIRMAN GRIFFIS: Okay. Short answers.

17 MS. PIGGOTT: There is no other
18 intersection at which we have a person.

19 MR. HUNSICKER: Okay, but who on a day-to-
20 day basis implements the flexibility? Who makes the
21 decisions that a person at one spot is required for a
22 given time?

23 CHAIRMAN GRIFFIS: Right. Who directs the
24 flexibility?

25 MS. PIGGOTT: There's a carpool captain at

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1 each carpool. I'm out there at almost every carpool
2 every day. Ms. Williams is out there for three or
3 four carpools every day and every one has someone in
4 charge.

5 CHAIRMAN GRIFFIS: Wait a minute. So you
6 have three people making decisions on who's moving
7 where. The troops are moving, but three people are
8 calling those shots.

9 MS. PIGGOTT: Not at the same time. I'm
10 just saying we're out there.

11 CHAIRMAN GRIFFIS: I hope not, but who is
12 in charge? How do you actually have it not chaos and
13 people running down the block and up the block and
14 moving over to other intersections? I think that's
15 the point of the question, isn't it?

16 MS. PIGGOTT: Whoever is out there who is
17 senior in terms of our hierarchy. If I'm out there,
18 then I direct the carpool. If Ms. Williams is out
19 there and I can't be out there, she directs the
20 carpool.

21 CHAIRMAN GRIFFIS: I see.

22 MS. PIGGOTT: It's not chaotic at all.

23 CHAIRMAN GRIFFIS: So there's always only
24 one person at a time that's actually directing the
25 flexibility as you've described it.

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1 MS. PIGGOTT: Yes.

2 CHAIRMAN GRIFFIS: Okay.

3 MR. HUNSICKER: Is that correct, Ms.
4 Piggott? One person at a time?

5 MS. PIGGOTT: Well, we work together so
6 that the person who's at the white line can just let
7 us know what information we need to deal with.

8 MR. HUNSICKER: When you're saying "out
9 there" I take it you're referring to the front of NCRC
10 on Highland. Is that correct?

11 MS. PIGGOTT: Yes and also on Ordway.

12 MR. HUNSICKER: So is it one person on
13 Highland or is it one person on Ordway that is
14 coordinating this flexibility?

15 MS. PIGGOTT: In terms of the
16 coordination, there is one person who is coordinating,
17 but there are eight personnel generally out on
18 Highland Place either taking children out of cars or
19 working at the white lines.

20 CHAIRMAN GRIFFIS: Is the same person that
21 directs the flexibility on Highland also
22 simultaneously directing the flexibility on Ordway?

23 MS. PIGGOTT: No.

24 CHAIRMAN GRIFFIS: So you have a different
25 person on Ordway that's saying "We have chaos so move

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1 the troops north." Then there's a different person on
2 Highland.

3 MS. PIGGOTT: But there's no carpool line
4 on Ordway. The people that are on Ordway Street to
5 remind parents about u-turns, illegal parking and to
6 remind parents about walking and where they are
7 supposed to cross the street.

8 CHAIRMAN GRIFFIS: Right. But the person
9 standing on Highland if I understand - I'm sorry. I'm
10 being a little bit badly humorous - that's directly
11 the flexibility that you talked about on Highland is
12 not also responsible for understanding and making
13 directive calls on Ordway.

14 MS. PIGGOTT: No.

15 CHAIRMAN GRIFFIS: So there's a separate
16 person that's there.

17 MS. PIGGOTT: Or two.

18 CHAIRMAN GRIFFIS: Indeed. Two.

19 MR. HUNSICKER: Thank you. I have no
20 further questions.

21 CHAIRMAN GRIFFIS: Thank you. Next.

22 MR. BECKNER: Good morning, Mr. Chairman.
23 For the record, Bruce Beckner. 3225 Highland Place.
24 Ms. Piggot, how many staff people not counting the
25 folks supplied by Sergeant Wilson are involved on the

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1 street in implementing this TMP from the school?

2 MS. PIGGOTT: It depends upon the carpool
3 and it depends on how many people we can get out there
4 and what kind of situation we have. I would say that
5 on Highland Place there are at least six people in
6 orange vests at all times, sometimes eight and
7 sometimes more than that.

8 MR. BECKNER: Now are these people out for
9 every drop-off or pick-up event during the school day?

10 MS. PIGGOTT: Yes.

11 MR. BECKNER: Do these people have other
12 duties besides managing traffic?

13 MS. PIGGOTT: Yes.

14 MR. BECKNER: Some of them are teachers.
15 Isn't that correct?

16 MS. PIGGOTT: Some of them are teachers.

17 CHAIRMAN GRIFFIS: We're going a bit
18 beyond some of the testimony we've heard today and
19 we've heard all this.

20 MR. BECKNER: All right. Now the school
21 has had TMPs in place every year since you've been
22 charge of this school. Isn't that correct?

23 MS. PIGGOTT: Yes.

24 MR. BECKNER: And you've informed the
25 parents every year of what the plan is for the coming

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1 school year. Isn't that correct?

2 MS. PIGGOTT: That's correct.

3 MR. BECKNER: Is the parents compliance
4 this year with the TMP better or worse or the same as
5 compliance in the previous years in which you've run
6 the school?

7 MS. PIGGOTT: I think that there's been an
8 improvement in compliance with the TMP.

9 MR. BECKNER: And to what do you attribute
10 that?

11 MS. PIGGOTT: I think that we have been
12 clearer in our instructions to the parents. We've had
13 more of a practice period in our traffic hours. We've
14 been on the street more and we've put this into our
15 contracts with parents.

16 MR. BECKNER: Have you stated any policy
17 to the parents regarding the practice of parking their
18 cars and walking their children to school either
19 discouraging or encouraging that?

20 MS. PIGGOTT: No.

21 MR. BECKNER: Do you recall whether or not
22 you were present at the morning drop-off on Monday,
23 November 17 of this year?

24 MS. PIGGOTT: No.

25 MR. BECKNER: You don't remember?

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1 MS. PIGGOTT: Oh, this Monday.

2 MR. BECKNER: November 17th, yes.

3 MS. PIGGOTT: Yes.

4 CHAIRMAN GRIFFIS: Was that only
5 yesterday?

6 MS. PIGGOTT: I know.

7 MR. BECKNER: I'm going to show you a
8 series of photographs that were taken.

9 CHAIRMAN GRIFFIS: I'm not understanding
10 where this is going in crossing her testimony from
11 today.

12 MR. BECKNER: Well, Mr. Chairman, the
13 photographs show what appears to be a lawn care truck
14 parked. Ms. Piggott, I believe, referred in her
15 testimony to the flexibility of her plan. I wanted to
16 ask her with regard to this situation what she did to
17 deal with that if anything.

18 CHAIRMAN GRIFFIS: Okay.

19 MR. BECKNER: She just testified that the
20 plan was flexible.

21 CHAIRMAN GRIFFIS: Ask your question.

22 MR. BECKNER: So, Ms. Piggott, I'm going
23 to hand you this. I'll ask you to disregard the last
24 photograph because it says it was taken at 10:20 a.m.
25 Just look at the first three. Mr. Chairman, there are

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1 copies of this being lodged with the Secretary's
2 office. We just got these today.

3 CHAIRMAN GRIFFIS: There is what?

4 MR. BECKNER: There are copies of these
5 photographs being lodged with the Secretary's office.

6 MS. PIGGOTT: Okay.

7 MR. BECKNER: Do you recall seeing this
8 situation on the street on this Monday?

9 MS. PIGGOTT: I recall in the morning
10 carpool, yes, seeing this lawn care truck on the
11 street.

12 CHAIRMAN GRIFFIS: Let's go right to the
13 heart of the matter.

14 MR. BECKNER: What did you do to deal with
15 this situation if anything?

16 MS. PIGGOTT: Mr. Beckner, I think that
17 these pictures are misleading. They are still
18 photographs and so what you see is a lawn care truck
19 and cars parked on the other side of the street. Then
20 you see a car in the middle, but the car is moving
21 down the street. You can't see that in this picture.

22 CHAIRMAN GRIFFIS: Ms. Piggott, what did
23 you do? What's the flexibility and how was it dealt
24 with in this situation?

25 MS. PIGGOTT: In the pictures I'm looking

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1 at, there doesn't need to be an flexibility. The cars
2 are moving fine down the middle of the street where
3 they are supposed to be moving.

4 CHAIRMAN GRIFFIS: You don't recall having
5 to have done anything differently.

6 MS. PIGGOTT: No, I know what I would have
7 done if there had suddenly been a situation where it
8 looked like they might have been blocked.

9 CHAIRMAN GRIFFIS: Okay.

10 MS. PIGGOTT: I would have held the cars
11 back further.

12 CHAIRMAN GRIFFIS: That's fine.

13 MR. BECKNER: Look at the third picture
14 which has a Mercedes Benz. I'll show you the larger
15 picture. That car appears to be stopped on the line,
16 doesn't it?

17 MS. PIGGOTT: Well, it appears to be
18 stopped, but, Mr. Beckner, I don't think you can tell
19 that. From what I remember and I'm out there everyday
20 and see, there are often neighbors that jump out and
21 take pictures of a scene like that and the cars are
22 moving.

23 CHAIRMAN GRIFFIS: All right. So you
24 can't assess the situation because it's a still
25 photograph.

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1 MS. PIGGOTT: No.

2 MR. BECKNER: If I may comment.

3 CHAIRMAN GRIFFIS: I don't know if you
4 can. You're not being crossed. The question is going
5 to Ms. Piggott.

6 MS. DWYER: Mr. Chairman, I would object.
7 If we're going to have a series of questions of still
8 photographs taken at certain times when the witness
9 has testified to is the general procedures, the fact
10 that there is flexibility and she has also pointed out
11 that these photographs are not reflective of a
12 situation because there's no way of telling whether
13 the car is stopped or the car is moving.

14 CHAIRMAN GRIFFIS: Understood.

15 MS. DWYER: So I think the probative value
16 of doing this is nil and it's extending the cross
17 examination way beyond the initial scope of her
18 testimony which is five minutes of direct testimony.

19 CHAIRMAN GRIFFIS: Okay. I'm not sure
20 we're balancing time to time.

21 MR. BECKNER: I have a couple of questions
22 for Sergeant Wilson if I may. Sergeant Wilson, let me
23 just make sure. Your staff are routinely stationed at
24 the intersection of 33rd and Newark Streets.

25 CHAIRMAN GRIFFIS: Let's get right to the

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1 questions because each one of you are asking the same
2 thing.

3 MR. BECKNER: Is the other person directly
4 in front of NCRC on the street?

5 SERGEANT WILSON: Just about. It's
6 directly across from the blind spot.

7 MR. BECKNER: So that person is standing
8 on the other side of the street from NCRC or on the
9 same side.

10 SERGEANT WILSON: On the same side of
11 NCRC.

12 MR. BECKNER: What's that person's
13 function? What's he suppose to do?

14 SERGEANT WILSON: He can see traffic
15 coming in both directions and make that cars coming
16 from either direction can safely get across. He also
17 can identify any parents there or any persons dropping
18 off a child that doesn't have a proper sticker.

19 CHAIRMAN GRIFFIS: Okay. Next question.

20 VICE CHAIR ETHERLY: Mr. Chair, if you
21 could pause for a moment. I agreed with the objection
22 that was lodged regarding the question of Ms. Piggott.
23 However I do recall that Sergeant Wilson's testimony
24 did speak to the contingency of contract of vehicles
25 and other such vehicles in the neighborhood. I want

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1 to be careful about how I come back to this, but I
2 would like to hear Sergeant Wilson's comment on that
3 issue because we did open the door, Mr. Chairman with
4 that.

5 CHAIRMAN GRIFFIS: I understand that but
6 he wasn't crossing. He's clearly able when he started
7 crossing the Sergeant. If he wants to take those out
8 then --

9 VICE CHAIRMAN ETHERLY: I agreed with
10 that. I'm giving Mr. Beckner guidance to reach out to
11 Sergeant Wilson on that particular question.

12 CHAIRMAN GRIFFIS: You have to answer the
13 questions at this point. Further on that in terms of
14 direction, let's get right to the heart of the
15 question and what you're trying to poke a hole in
16 terms of the testimony. Get right to it. We don't
17 need a big stage set here.

18 MR. BECKNER: I think the witness was in
19 the middle of giving an answer. I'll let him finish.

20 SERGEANT WILSON: I was about to comment
21 about yesterday morning about the still photographs.
22 I witnessed everything that took place. What the
23 resident was doing was cars were coming and when the
24 car got parallel with the contract vehicle, she
25 stepped out, took the picture and step back. There

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1 was no time where there was an interruption with the
2 flow of traffic. The car continued up, dropped off
3 and kept going. There was no interruption in the
4 traffic whatsoever.

5 MR. BECKNER: So your testimony would be
6 that there was no standing traffic. That it was all
7 moving traffic.

8 SERGEANT WILSON: There was no standing
9 traffic that was parallel with that contractor vehicle
10 that would impede anyone from going up and down the
11 street.

12 MR. BECKNER: Okay.

13 SERGEANT WILSON: So there was nothing for
14 them to do.

15 CHAIRMAN GRIFFIS: Good.

16 MS. BAILEY: Mr. Chairman, the documents
17 that are being spoken about. Are we accepting those
18 into the record?

19 CHAIRMAN GRIFFIS: We haven't yet.

20 MS. BAILEY: I'm sorry, sir. I didn't
21 hear you.

22 CHAIRMAN GRIFFIS: We have not yet.

23 MR. BECKNER: Sergeant Wilson, the people
24 that are employed by you are not Metropolitan Police
25 Department officers. Is that correct?

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1 SERGEANT WILSON: No.

2 MR. BECKNER: Are you aware of the fact
3 that for instance Murray School does use Metropolitan
4 Police Officers?

5 CHAIRMAN GRIFFIS: This is what I'm
6 getting to. Bundle all the questions together.
7 Where are you going for him to answer?

8 MR. BECKNER: I wanted to know whether or
9 not there is any advantage in his view to having
10 Metropolitan Police Officers implemented at the NCRC.

11 CHAIRMAN GRIFFIS: Excellent question. Is
12 there any advantage?

13 SERGEANT WILSON: No, all depends on the
14 circumstance of the school and so forth. I'm familiar
15 with Murray School. I set it up. That's what they
16 specifically requested.

17 CHAIRMAN GRIFFIS: Okay.

18 MR. BECKNER: Metropolitan Police Officer
19 would have authority to cite people for traffic
20 violations. Would they not?

21 SERGEANT WILSON: No.

22 MR. BECKNER: They would not.

23 SERGEANT WILSON: Not if they're working
24 off duty, no.

25 MR. BECKNER: Okay. Nothing further, Mr.

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1 Chairman. Thank you.

2 CHAIRMAN GRIFFIS: Thank you very much.
3 Ms. Badami, have a seat. As we've already talked
4 about the photographs that have come in, I'm going to
5 have them into the record so we don't have any
6 controversy.

7 MS. DWYER: I would object. There's only
8 one day, November 17th. He has a whole series of
9 photographs. So the only one the witness was
10 questioned about was that one day.

11 CHAIRMAN GRIFFIS: That's right. November
12 17th there were three photographs.

13 MS. DWYER: And all the other photographs
14 should be excluded.

15 CHAIRMAN GRIFFIS: The last photograph is
16 incorrectly in time or labeled so we'll take the first
17 three that are in that you've seen. We'll take those
18 in. Is that clear, Ms. Bailey?

19 MS. BAILEY: Yes, sir.

20 CHAIRMAN GRIFFIS: Excellent. Thank you.

21 MR. BECKNER: Mr. Chairman.

22 CHAIRMAN GRIFFIS: Yes.

23 MR. BECKNER: I have copies of those three
24 photographs I want to show him just to make sure we're
25 in agreement as to what it is I'm showing him.

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1 MS. DWYER: What we were looking at when
2 you were questioning was one page with the three
3 photographs on it.

4 MR. BECKNER: Here's the three
5 photographs.

6 MS. DWYER: Right. Can I see the one page
7 with the three photographs?

8 CHAIRMAN GRIFFIS: Yes, why don't we just
9 submit that one page?

10 MS. DWYER: Just the one page rather than
11 the three photographs.

12 MR. BECKNER: The one page, Mr. Chairman,
13 has an additional photograph that the witness wasn't
14 questioned on. I was just trying to make it simple.

15 CHAIRMAN GRIFFIS: We'll let it slide in,
16 plus we save all that paper.

17 MS. DWYER: The last photograph is the one
18 that shows no cars on the street. We'll let that in
19 the record.

20 CHAIRMAN GRIFFIS: Okay. A single page
21 was accepted in and it will become Exhibit No.
22 something. Let's go.

23 (Discussion off microphone.)

24 MS. BADAMI: I'm Linda Badami from 3207
25 Highland Place. First to Ms. Piggott. You said you

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1 had extended the drop-off time in the morning.

2 MS. PIGGOTT: That's correct.

3 MS. BADAMI: Have you extended the drop-
4 off time in midday when the congestion is the worst?

5 MS. PIGGOTT: That's not a formal part of
6 our TMP. We do watch that situation that carpool when
7 the direction is enforced.

8 CHAIRMAN GRIFFIS: No. Is that correct?

9 MS. PIGGOTT: No.

10 MS. BADAMI: Sergeant Wilson, you said
11 that you had three guards. Were you present in the
12 first several weeks of school or was there just the
13 three guards? I don't remember.

14 SERGEANT WILSON: I had three individuals
15 present for the first three to four weeks of school.

16 MS. BADAMI: Okay. Are you aware that not
17 all the students enrolled in NCRC were attending
18 during the first few weeks of school?

19 SERGEANT WILSON: No.

20 MS. BADAMI: And you said you've been
21 coming the last three weeks unannounced to observe
22 traffic. Have you been in uniform during those times?

23 SERGEANT WILSON: The way I'm dressed now,
24 yes.

25 MS. BADAMI: And were you carrying a

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1 clipboard at that time?

2

3 SERGEANT WILSON: Yes.

4 MS. BADAMI: And were you visible to all
5 drivers at that time?

6 SERGEANT WILSON: In some cases, yes.

7 CHAIRMAN GRIFFIS: Do you think that would
8 affect the drivers that are going around seeing you in
9 your blue shirt and a clipboard?

10 SERGEANT WILSON: No.

11 CHAIRMAN GRIFFIS: So you don't think it
12 would have affected the behavior.

13 SERGEANT WILSON: It wouldn't have had an
14 effect because you have contractors that come there.
15 They see me standing there. They blow right through
16 the stop sign.

17 MS. BADAMI: For the guard that's standing
18 at 33rd and Newark, do they have the authority to wave
19 commuters through the stop sign?

20 SERGEANT WILSON: No.

21 CHAIRMAN GRIFFIS: Nothing else.

22 MS. BADAMI: That's all for this panel.

23 CHAIRMAN GRIFFIS: Right. Have we been
24 through everyone? All right. This is what we're
25 going to do. We're going to have redirect of the

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1 panel while it's here so we don't have to bring them
2 up again. Then at the very end if there's recross on
3 the redirect, we will call those individuals up. Ms.
4 Dwyer, when you're ready.

5 REDIRECT EXAMINATION

6 MS. DWYER: I just want to follow up on a
7 couple of questions. This is for Ms. Piggott. Mr.
8 Nettler asked you whether you had viewed the video and
9 you said "yes." Is that correct?

10 MS. PIGGOTT: Yes, that's correct.

11 MS. DWYER: And you also have testified
12 that you have been out at the site on a daily basis
13 over the last year and a half monitoring the TMP
14 operation. Is that correct?

15 MS. PIGGOTT: Yes.

16 MS. DWYER: In your opinion, does that
17 video in any way accurately reflect the TMP operation
18 over the last year and a half?

19 MS. PIGGOTT: Not in any way.

20 MS. DWYER: All right. Thank you.

21 CHAIRMAN GRIFFIS: Okay. Let's have the
22 architect and the transportation engineer up.

23 CROSS EXAMINATION

24 MS. MacWOOD: For the record, Nancy
25 MacWood for the ANC. This will be very quick. I only

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1 have a couple of questions. Mr. Anthony, you
2 testified this morning a bit about the HPRB. Did the
3 HPRB have any awareness of the need for variance
4 relief for this project?

5 MR. ANTHONY: I'm not sure. I would
6 assume so but I'm not sure.

7 MS. MacWOOD: You assume that HPRB knew
8 that there would be a need for zoning relief in this
9 case, a variance.

10 MR. ANTHONY: I'm really not sure what
11 they understood the case to be.

12 MS. MacWOOD: Let me rephrase the
13 question. Did HPRB address any zoning issues?

14 MR. ANTHONY: Not that I'm aware of, no.

15 CHAIRMAN GRIFFIS: And I would hope they
16 wouldn't.

17 MS. MacWOOD: In fact, were you there when
18 Steve Calcott, the staff member for Historic
19 Preservation Office --

20 MS. DWYER: Mr. Chair, this has already
21 been testified to. It's in the record as to what the
22 HPRB staff report says about zoning.

23 CHAIRMAN GRIFFIS: We have the staff
24 report in the record.

25 MS. MacWOOD: I just want to make it clear

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1 in the record that the HPRB did not consider any of
2 these zoning issues and there was never any
3 consideration of where a lot line would be or
4 anything.

5 CHAIRMAN GRIFFIS: Well, we won't take up
6 any of the historic issues.

7 MS. MacWOOD: Good. Mr. George, I just
8 have probably one question for you. The discussion
9 that you had with the Chairman about the 20 foot wide
10 street and the accident rate. In your estimation,
11 what would be the cause of high accident rate on the
12 20 foot wide street if as you postulated there likely
13 wouldn't be any parking on that street? I'm just
14 asking for your opinion.

15 CHAIRMAN GRIFFIS: Professional expert
16 opinion?

17 MS. MacWOOD: Yes.

18 MR. GEORGE: Could you repeat the
19 question? I want to make sure I get you.

20 MS. MacWOOD: Okay. What in your expert
21 opinion would be the likely cause of a high accident
22 rate on a 20 foot wide street if there wasn't any
23 parking on that street? You had mentioned that you
24 thought on a 20 foot wide street there likely wouldn't
25 be any parking on the street. What would be the

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1 cause?

2 MS. DWYER: I think the witness already
3 answered that and said it would be a major road with
4 a high volume of traffic.

5 CHAIRMAN GRIFFIS: All right.

6 MS. MacWOOD: Is that your answer? I
7 wasn't aware that it was his response to that
8 question.

9 MR. GEORGE: That was my response. I
10 think in the middle of the paragraph it referred to
11 our arterial street and the last sentence Mr. Chairman
12 pointed to it referred to a major street. So if you
13 talk about those two characteristics on a 20 foot
14 street, they could correlate to a high accident rate.

15 MS. MacWOOD: Are you suggesting that it
16 would be an arterial street because a 20 foot street
17 wouldn't be an arterial?

18 CHAIRMAN GRIFFIS: Okay. Are you going to
19 go too far into it? You're going to just review.

20 MS. MacWOOD: Yes.

21 CHAIRMAN GRIFFIS: It's fairly clear. I'm
22 sorry. I pulled an excerpt out of page 29 of Chapter
23 13 of Residential Neighborhood Streets of the TLD
24 actually. The second edition is where it's actually
25 cited from. I think it's clearer if you go back to

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1 what I was citing, the type of streets that are broken
2 down in terms of the dimension. Let's continue on.

3 MS. MacWOOD: All right. So just to be
4 absolutely clear and this is my last question, you
5 would say that for a 20 foot wide street that the
6 major cause would be the amount of traffic and it
7 would not be the line of the street whether it's a
8 curved street, whether there's parking. That it would
9 simply be the amount of traffic on the street. Is
10 that right?

11 MR. GEORGE: I think it relates to the
12 function of the street which is described in the
13 paragraph as an arterial street. It relates to the
14 other characteristics being a major street which is
15 defined in the last sentence. I think those two
16 characteristics.

17 MS. MacWOOD: All right. Thank you.

18 MR. NETTLER: Richard Nettler for
19 Cleveland Park Neighbors. Mr. Anthony, in your
20 testimony on the particular difficulty issue, you
21 testified that the lot issue was manufactured as an
22 impediment in this case. Who manufactured that issue?

23 MR. ANTHONY: Well, that is my opinion and
24 I think the opponents have.

25 MR. NETTLER: The opponents. So it's not

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1 really in the Zoning Regulations. It's just something
2 that has been manufactured by the opponents in this
3 case.

4 MR. ANTHONY: I think, yes.

5 MR. NETTLER: So your testimony is that
6 there is no prohibition against having more than one
7 principal building on a single subdivided lot.

8 MR. ANTHONY: That's not my testimony.

9 MR. NETTLER: So how was the lot issue
10 manufactured by those who are opposing this?

11 MR. ANTHONY: My point is that when you
12 look at this project on balance and you look at the
13 alternatives that it's not a position that promotes
14 the best solution for either the neighbors, for NCRC,
15 the neighborhood, the historic district, any of those.

16 MR. NETTLER: So in responding to the
17 proposal by NCRC, your expectation I gather from that
18 statement is that for the zoning adjustment and the
19 neighbors should only be concerned about applying some
20 of the Zoning Regulations but not all of the Zoning
21 Regulations.

22 MR. ANTHONY: That's not my testimony.

23 MR. NETTLER: Is it your testimony then
24 that --

25 CHAIRMAN GRIFFIS: Why don't you ask him

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1 what his testimony is rather than giving it to him?

2 MR. NETTLER: I've been trying to get that
3 and apparently every time I rephrase as to what it is,
4 he says that's not his testimony.

5 CHAIRMAN GRIFFIS: Okay.

6 MR. NETTLER: So what is it that's your
7 testimony about the manufacturers? Is it any
8 different than what you just said in terms of --

9 MS. DWYER: I think what he just testified
10 to was it was his personal opinion.

11 CHAIRMAN GRIFFIS: Is that correct?

12 MR. ANTHONY: That's correct. It's my
13 observation of this process and this particular issue.

14 MR. NETTLER: You didn't identify this
15 issue as one when you self-certified this application,
16 did you?

17 MR. ANTHONY: No, I didn't.

18 MR. NETTLER: You're aware of the side
19 yard requirements in a residential zone, are you not?

20 MR. ANTHONY: Yes.

21 MR. NETTLER: Are you allowed to locate a
22 building in a side yard of a principal building?

23 MR. ANTHONY: Out to a locate --

24 MR. NETTLER: No, in a side yard of a
25 principal building.

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1 MR. ANTHONY: Typically not.

2 MR. NETTLER: But you are locating another
3 -- Forget the two or more principal buildings on a
4 single subdivided lot. You are locating a building in
5 the side yard of an existing building, are you not?

6 MEMBER ZAIDAIN: Mr. Nettler, are you
7 referring to an accessory structure or a principal
8 building?

9 MR. NETTLER: Any structure under the
10 Zoning Regulations.

11 MEMBER ZAIDAIN: Well, there's a
12 difference.

13 MR. NETTLER: No, I'm not dealing with the
14 principal building issue. We're just dealing with the
15 side yard issue.

16 CHAIRMAN GRIFFIS: Just the side yard.

17 MEMBER ZAIDAIN: Well, he should clarify
18 the question.

19 CHAIRMAN GRIFFIS: The accessory in a side
20 yard is the question.

21 MR. NETTLER: The accessory or a
22 principal. The accessory buildings in a side yard.
23 Are you allowed to locate an accessory building in a
24 side yard?

25 MR. ANTHONY: Yes.

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1 MR. NETTLER: You are. And that's from
2 your understanding of the Zoning Regulations.

3 MR. ANTHONY: Yes.

4 MR. NETTLER: With regard to the location
5 of the building that you proposed to be constructed,
6 how far is it from the side yard of the west lot line?

7 MR. ANTHONY: Are you referring to the
8 carriage house?

9 MR. NETTLER: Correct.

10 MR. ANTHONY: It's --

11 MS. DWYER: Mr. Chair, I would object.
12 His testimony is on the practical difficulties in
13 trying to draw a lot line between the two buildings.
14 This is going back and questioning the plans and his
15 previous testimony.

16 MR. NETTLER: He's testified that if he
17 was to have to comply with the Zoning Regulations that
18 he would not have to meet the side yard setback
19 requirements.

20 CHAIRMAN GRIFFIS: Right.

21 MR. NETTLER: I'm asking him whether he
22 meets the side yard setback requirements with this
23 particular building right now.

24 CHAIRMAN GRIFFIS: That was my point in
25 going into all of this and looking at the alternatives

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1 and what might happen.

2 MR. NETTLER: I'm not going into the
3 alternatives. I'm going into this building right now.

4 CHAIRMAN GRIFFIS: Okay.

5 MR. NETTLER: Didn't mention the
6 alternative at all. Does it comply with the side yard
7 setback requirements?

8 MR. ANTHONY: Yes, it does.

9 MR. NETTLER: So just using this building
10 as you proposed it and the existing building, you're
11 saying that a lot line can't be drawn in a way that
12 would not lead to a violation of the side yard setback
13 requirements.

14 MR. ANTHONY: If I understand your
15 question correctly, yes.

16 MR. NETTLER: So that means that you could
17 subdivide this lot without raising a side yard setback
18 issue just with your proposal, wouldn't you?

19 MR. ANTHONY: No, not with my proposal.

20 MR. NETTLER: Well, wouldn't both
21 buildings still comply with the side yard setback
22 requirements as you presently propose them?

23 MR. ANTHONY: Not if you break off a
24 separate line, no.

25 MR. NETTLER: It depends on where you draw

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1 that lot line, isn't it?

2 MR. ANTHONY: I don't think there's any
3 line that you could draw based on the design that's
4 currently drafted.

5 MR. NETTLER: And you haven't done
6 anything that you've presented here in rebuttal that
7 shows you having done a theoretical - not using the
8 theoretical subdivision provisions of the Zoning
9 Regulations - but a theoretical subdivision of this
10 lot to show whether that is the case or not, have you?

11 MS. DWYER: I would disagree. I think he
12 drew on the drawing where the lot line would go.

13 MR. NETTLER: A lot line.

14 CHAIRMAN GRIFFIS: One hypothetical
15 scenario.

16 MR. ANTHONY: That's correct.

17 MR. NETTLER: But you haven't looked at
18 all just dealing with what's proposed as a building
19 and the existing building a lot line that would be
20 able to divide up these two lots into two lots that
21 would comply with the Zoning Regulations.

22 MR. ANTHONY: As I stated, I don't think
23 there is one.

24 MR. NETTLER: But you've only presented
25 one possibility. Is that correct?

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1 MR. ANTHONY: After having looked at what
2 I thought were the possibilities --

3 CHAIRMAN GRIFFIS: Yes. Answer.

4 MR. NETTLER: Let me ask you then. If you
5 drew a lot line down the half of that lot --

6 CHAIRMAN GRIFFIS: Mr. Nettler, I'm not
7 sure of the relevance for us to go through all the
8 scenarios. It's clear from his answer and I
9 understand that he did not present today a subdivision
10 that he thinks would work according to Zoning. Now
11 you're asking him to go in and investigate the
12 opportunities --

13 MR. NETTLER: No, I'm just saying.
14 Looking at the lot as it sits in front of us and you
15 can see it on the board up there and knowing the size
16 of the lot that it is and this is an R-1-A district.

17 CHAIRMAN GRIFFIS: Right.

18 MR. NETTLER: And the minimum lot width
19 requirements and his testimony that the buildings as
20 they sit there today meet all side yard, rear yard,
21 other requirements, drawing a line down the center of
22 that lot --

23 CHAIRMAN GRIFFIS: Again he has to look at
24 alternatives.

25 MR. NETTLER: Excuse me. No, I'm not

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1 looking at alternatives. I'm talking about the
2 building that he's proposing.

3 CHAIRMAN GRIFFIS: Right.

4 MR. NETTLER: Drawing a line down half of
5 that lot, where would the zoning violation be?

6 CHAIRMAN GRIFFIS: If he went to a
7 subdivision.

8 MR. NETTLER: Correct.

9 MS. DWYER: I would object. I think what
10 the witness has testified to is that he's looked at
11 all ways to draw the lot and the only way that he
12 could draw the lot was as shown between the two
13 buildings which creates a need for variance relief.

14 MEMBER ZAIDAIN: And that's based on the
15 design that was submitted. There are no alternative
16 designs.

17 CHAIRMAN GRIFFIS: The design was
18 something that was fascinating. What are we going to
19 do it?

20 MR. NETTLER: Excuse me.

21 CHAIRMAN GRIFFIS: Even if we came up with
22 an alternative one and get him to a point where he --

23 MR. NETTLER: I'm not talking about an
24 alternative building. I'm talking about the building
25 that he's designed which he says meets all other

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1 requirements. Intuitively if you just look at that
2 lot and divide it in half, you have two lots that
3 would in terms of the size meet the Zoning
4 requirements for a lot size. Then the question
5 remains then is that you have the building that is
6 being proposed. It's still sitting on that lot that's
7 being created which he says meets the side yard
8 requirements and purportedly meets the rear yard
9 requirements. Why doesn't it then meet the Zoning
10 requirements?

11 MS. DWYER: Mr. Chairman.

12 MR. NETTLER: Because the practical
13 difficulty.

14 CHAIRMAN GRIFFIS: So he went into the
15 practical difficulties of alternatives.

16 MR. NETTLER: I'm not dealing with
17 alternatives. I'm dealing with what's proposed.

18 MS. DWYER: Mr. Chairman, may I just
19 interject here? If Mr. Nettler feels that there is
20 another way to draw the lot line, that it was
21 incumbent upon him during the course of his direct
22 presentation to show that.

23 CHAIRMAN GRIFFIS: Right. We've already
24 done that.

25 MS. DWYER: This witness has testified

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1 that at looking at the site he could not find anyway
2 to draw the lot line that would not create a need for
3 variance relief.

4 CHAIRMAN GRIFFIS: Right.

5 MR. NETTLER: And I'm challenging his
6 credibility of that testimony because as you sit here
7 today if it meets the Zoning requirements in terms of
8 side yard and rear yard, drawing a lot line down half
9 of that lot wouldn't create a need for a variance at
10 all. Just drawing a lot line. Just look at it.

11 MEMBER ZAIDAIN: But you're saying without
12 any sort of expansion or additional building.

13 MR. NETTLER: No, with the additional
14 building that he's proposing sitting on the lot where
15 he's siting it.

16 MEMBER ZAIDAIN: So your rebuttal
17 testimony were readily --

18 MR. NETTLER: I'm not testifying.

19 MEMBER ZAIDAIN: You're trying to get to
20 the point that --

21 MR. NETTLER: It's one thing for him to
22 present to you a picture that creates a variance.

23 MEMBER ZAIDAIN: Let me finish my
24 question.

25 MR. NETTLER: -- whether there actually is

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1 a need.

2 MEMBER ZAIDAIN: But you're trying to get
3 to the point saying that you can take the design that
4 has been presented to this Board and draw a line that
5 will subdivide this lot and meet all the Zoning
6 requirements. Is that where you're headed?

7 MR. NETTLER: That's correct.

8 MS. DWYER: Then he should have done that
9 in his direct testimony. It's not this witness's job
10 or the purpose of cross examination of this witness to
11 make his case.

12 CHAIRMAN GRIFFIS: Right. That's where I
13 think we've exhausted, but I think the point is made,
14 Mr. Nettler. Do you want a follow-up question?

15 MR. NETTLER: Yes, I will follow up. Do
16 you know what the Self-created Hardship Rule refers to
17 under the area variance test?

18 MR. ANTHONY: Basically, yes.

19 MR. NETTLER: What is that?

20 MR. ANTHONY: I think the words are self
21 -evident that you can't create a situation of your own
22 doing that would require the variance.

23 MR. NETTLER: You don't think that applies
24 here.

25 MR. ANTHONY: I don't.

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1 MR. NETTLER: Let me ask you about your
2 comment regarding the variance relief for off-street
3 parking. Now it's your position, is it not, that as
4 the lot exists today because it's a lot located in the
5 historic district and because the present building
6 that sits on it is a contributing building that it
7 need not comply with the parking requirements?

8 MS. DWYER: I would object. It's not this
9 witness's position. It's the Board's position that
10 the Applicant is entitled to the parking waiver.

11 MR. NETTLER: Is it your position as well?

12 MR. ANTHONY: Yes.

13 MR. NETTLER: Now your testimony I gather
14 that is if you subdivide the lot, still the same lot,
15 still the same historic district, that because you've
16 subdivided the lot, you now need to comply with the
17 parking requirement.

18 MR. ANTHONY: Yes.

19 MR. NETTLER: And why is that?

20 MR. ANTHONY: Because it's a separate lot.

21 MR. NETTLER: In the historic district?

22 MR. ANTHONY: Without a contributing
23 building upon it.

24 MR. NETTLER: Without a contributing
25 building. So the fact that there's a contributing

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1 building on the lot, you're testifying, gives you the
2 opportunity to get a waiver for any new construction
3 on the lot.

4 MS. DWYER: That again is what the Board
5 found.

6 MR. NETTLER: Is that your position?

7 MR. ANTHONY: Yes.

8 MR. NETTLER: Have you seen any prior
9 Zoning decisions that support that?

10 MR. ANTHONY: Basically I read the
11 paragraph in the Ordinance and I think it's extremely
12 clear.

13 MR. NETTLER: Extremely clear, but you
14 haven't seen any prior Zoning decisions that have said
15 that.

16 MR. ANTHONY: Actually I read some of your
17 things but I think the Ordinance is really clear.

18 MR. NETTLER: You said that you'd have to
19 remove certain trees if you were to subdivide the lot
20 and comply with the Zoning Regulations. Can you point
21 which trees those would be?

22 MR. ANTHONY: Sure. I was referring that
23 if the building were to expand in this direction,
24 these larger mature trees in this area here.

25 MR. NETTLER: Okay. And how many mature

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1 trees are those?

2 MR. ANTHONY: I believe there's 9, 10, 12
3 or something like that.

4 MR. NETTLER: And how many mature trees
5 are being taken out for where the building presently
6 is being located?

7 MR. ANTHONY: Based on the arborist letter
8 and my own opinion, basically there are no mature
9 trees in that area.

10 MR. NETTLER: Is that because you're
11 distinguishing mature trees that are natural to the
12 site as opposed to mature trees that were planted
13 pursuant to some agreement between the school and the
14 community or some other trees?

15 MR. ANTHONY: I'm distinguishing between
16 size, caliper and species.

17 MR. NETTLER: So the answer is yes. And
18 why would you have to move the building forward to
19 comply with the subdivision requirements?

20 MR. ANTHONY: Because the building as
21 currently configured because it's immediately adjacent
22 to the playhouse would need to be squeezed in some
23 direction in order to comply with the side yard
24 setback requirements for both.

25 MR. NETTLER: Is that because that would

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1 put a building in the side yard of the building that
2 you want to construct?

3 MR. ANTHONY: This is in the alternative
4 mode. We looked at a lot line which I drew on the
5 drawing where there would be a setback from the
6 playhouse, then a property line and it required side
7 yard setback from this new lot. That distance would
8 require that the existing design be reconfigured in a
9 way which I was suggesting most likely and I think
10 it's the only alternative would be to expand the
11 building up further into the center part of the lot
12 which is where the most mature trees are and which
13 creates a number of other difficulties for us.

14 MR. NETTLER: The playhouse would be on
15 which lot then if you were to go forward with that
16 plan?

17 MR. ANTHONY: The playhouse would be on
18 the lot with the original house.

19 MR. NETTLER: With the original house, and
20 what about the possibility of drawing the line on the
21 other side of the playhouse so that it's on the same
22 lot as the new construction?

23 MS. DWYER: I'm trying to understand your
24 question. So you'd be drawing a lot line to create
25 two new principal buildings on a single record lot.

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1 MR. NETTLER: Well, would the playhouse be
2 considered a principal building? Obviously not. Had
3 you thought about drawing a line on the other side of
4 the playhouse then?

5 MR. ANTHONY: For this exercise, I did not
6 look at a lot line on that side.

7 MR. NETTLER: Okay. Thank you. You made
8 reference to the trees that were being removed that
9 were planted in 1994. Were you aware that those were
10 planted pursuant to some agreement?

11 MR. ANTHONY: I am aware that some of them
12 were but not all of them.

13 MR. NETTLER: Okay. Mr. George, a number
14 of documents were submitted with your testimony that
15 are excerpts from the TND Guidelines and Uniform
16 Vehicle Code and some other documents. You are
17 familiar with the documents that were submitted.

18 MR. GEORGE: Yes, sir.

19 MR. NETTLER: I notice that at least the
20 excerpts from the TND doesn't have a date on it. Do
21 you know what the date of that document is?

22 MR. GEORGE: I would just like to review
23 it to make sure I didn't submit the cover page.

24 MR. NETTLER: Well, you did submit the
25 cover page.

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1 MR. GEORGE: It says on the cover page
2 1997.

3 MR. NETTLER: That's not the most recent
4 book, is it? There's been a supplement to that book,
5 hasn't there been?

6 MR. GEORGE: There has been an update,
7 yes.

8 MR. NETTLER: Do you know whether the
9 update contains different information in it than the
10 book that you submitted?

11 MR. GEORGE: I believe I have a copy of
12 that and I don't believe that it's substantially
13 different.

14 MR. NETTLER: Was there a reason why you
15 only submitted portions of this and not the update or
16 the other portions of this book related to safety
17 issues, related to speed on these types of streets,
18 related to design speed, related to regulatory issues,
19 other things concerning this type of traffic issues
20 regarding a residential street and neighborhood?

21 MR. GEORGE: I believe a lot of the
22 Board's inquiry had to do with the delaying the use of
23 road ways in particularly Highland Place. I thought
24 that page 5, Section D2 of that document dealt with
25 that issue very concisely and clearly.

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1 MR. NETTLER: Do you know whether the way
2 in which that's dealt with in the 1999 supplement is
3 the same?

4 MR. GEORGE: I cannot say as I sit here.

5 MR. NETTLER: You can't say that.

6 MR. GEORGE: No.

7 MR. NETTLER: Are you familiar with the
8 provisions of the TND that deals with neighborhood
9 size and the section D of that document?

10 MS. DWYER: Is this information that we
11 filed on the record?

12 MR. NETTLER: No, you didn't.

13 MS. DWYER: Then I think it's beyond the
14 scope of the direct testimony.

15 CHAIRMAN GRIFFIS: Indeed.

16 MS. DWYER: Mr. George's testimony was
17 rebuttal testimony in response to an issue raised in
18 the course of the hearing. This is not the
19 opportunity to go into other areas of manuals or
20 regulations.

21 CHAIRMAN GRIFFIS: I agree.

22 MR. NETTLER: He submitted pages from a
23 manual to support his position. I'm asking if he's
24 familiar with other statements within that particular
25 manual.

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1 CHAIRMAN GRIFFIS: But we're not going to
2 go into the substance of the revisions that weren't
3 submitted in from 1999.

4 MR. NETTLER: No, I'm going to submit
5 those in response to his statement to make it complete
6 so that the Board would have a complete record of
7 that.

8 MS. DWYER: I would object to that. I
9 don't think there's any basis for the submission of
10 this additional material.

11 MR. NETTLER: I'm going to ask the Board
12 then to take judicial notice which it certainly has
13 the authority to do of the TND Guidelines 1999
14 Addition. Does it need for it to be submitted as
15 particular evidence in this rebuttal situation?

16 CHAIRMAN GRIFFIS: I don't have any
17 difficulty making note of it. I would take in the
18 page 5, Section D of the 1999. As Mr. George says,
19 he's looked at it and there's no substantive
20 difference between the two.

21 MR. NETTLER: I think it's worthwhile for
22 the Board to see whether that's correct.

23 CHAIRMAN GRIFFIS: That's the reason for
24 taking note of it.

25 MR. NETTLER: And whether his being

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1 selective in submitting only portions of it.

2 CHAIRMAN GRIFFIS: No, I'm not going to go
3 through the entire thing because I don't have the
4 entire package here.

5 MR. NETTLER: No, we will provide that to
6 you.

7 CHAIRMAN GRIFFIS: I know.

8 MS. DWYER: And again I --

9 CHAIRMAN GRIFFIS: We'll do this. We're
10 going to take the corresponding pages of 5, 6 and 7 of
11 that manual and that's been submitted here. That's
12 all we're reviewing for today. That's all that went
13 to the testimony and that's all we should be able to
14 compare.

15 MR. NETTLER: Mr. George, you commented
16 upon Mr. Peterson's reliance on the transportation
17 land development ("TLD") text. Do you recall that?

18 MR. GEORGE: Yes.

19 MR. NETTLER: You commented as well on the
20 use of the level of service and other aspects of that
21 testimony. Do you recall that?

22 MR. GEORGE: I do.

23 MR. NETTLER: Did you in preparation for
24 your rebuttal testimony regarding the TLD treatise
25 have an opportunity to review the TLD treatise?

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1 MR. GEORGE: Yes.

2 MR. NETTLER: Are you familiar with the
3 provisions of the sections of the TLD treatise that
4 deal with design considerations for residential
5 neighborhoods and streets?

6 MR. GEORGE: Yes.

7 MR. NETTLER: And are you familiar that in
8 planning and designing residential neighborhoods that
9 one of those design considerations is in particular
10 with very narrow streets, is a necessity for low
11 speeds, low traffic volumes or essential to the
12 creation and preservation of a high quality
13 neighborhood as one of the design considerations?

14 MR. GEORGE: Yes, page 13-2.

15 MR. NETTLER: And you are also familiar
16 with on page 13-3 with the treatise's treatment of the
17 concept of level of service --

18 CHAIRMAN GRIFFIS: Wait a minute. 13-3.
19 That's outside of what was submitted here. Right?

20 MR. NETTLER: Yes, that's correct.

21 CHAIRMAN GRIFFIS: Okay. I'm just trying
22 to be clear.

23 MR. NETTLER: This was actually part of
24 Mr. Peterson's testimony. 13-3.

25 CHAIRMAN GRIFFIS: Right.

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1 MS. DWYER: Then I would object.

2 MR. NETTLER: He's testified in rebuttal.

3 MS. DWYER: Mr. George has testified as to
4 what he's filed. We don't need to go back to what Mr.
5 Peterson filed.

6 MR. NETTLER: He just testified that in
7 preparing for his rebuttal testimony and his comments
8 on the statements made by Mr. Peterson that he
9 reviewed this TLD document in preparation for --

10 MS. DWYER: That's fine, but that does not
11 give you an opportunity to go back and then ask him
12 questions about every section of that document.

13 CHAIRMAN GRIFFIS: Right.

14 MS. DWYER: That's way beyond the scope of
15 the examination.

16 CHAIRMAN GRIFFIS: I tend to agree.
17 Pardon me?

18 MR. NETTLER: 13-3 is part of their
19 submission as well.

20 CHAIRMAN GRIFFIS: 13, page 3?

21 MR. NETTLER: 13-3. Correct.

22 CHAIRMAN GRIFFIS: Show me where that is.
23 I have page 29. Oh, I see in the residential streets
24 in the next section where the design consideration.
25 Is that what you're talking about?

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1 MR. NETTLER: Talking about street types.

2 CHAIRMAN GRIFFIS: That's two and then
3 "Street Types" is three.

4 MR. NETTLER: Correct.

5 CHAIRMAN GRIFFIS: Okay.

6 MR. NETTLER: So it's your position that
7 the statement made in this document should not be
8 considered or is something that it does not guide the
9 way in which you look at the impact of traffic
10 generated by this NCRC on the neighborhood.

11 MR. GEORGE: If you could be specific and
12 point me to the particular section.

13 MR. NETTLER: The section that states "The
14 service provided by residential streets should be
15 defined by slow speed and low volume characteristics
16 which are compatible with a liveable environment. The
17 level of service concept based on speed, freedom to
18 maneuver within the traffic stream is not appropriate.
19 The design of the street itself is intended to
20 actively discourage the driver from selecting a speed
21 based on the freedom to maneuver within the street
22 system. The LOS measure such as speed, volume to
23 capacity rate and density passengers/cars/miles/lanes
24 simply do not apply." Are you saying you disagree
25 with that statement?

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1 MR. GEORGE: No. I agree with it
2 completely.

3 MR. NETTLER: Okay. Are you familiar as
4 well from the same document with the discussion
5 regarding factors affecting speed in residential
6 areas?

7 MS. DWYER: Again I would ask if that is
8 material that we filed in the record.

9 MR. NETTLER: I'm not submitting it. I'm
10 asking whether he's familiar with the document in
11 preparation for his testimony about the factors for
12 affecting speed in residential areas which is in the
13 same document.

14 MS. DWYER: Again this is going beyond his
15 testimony on direct.

16 CHAIRMAN GRIFFIS: Right. It's going
17 beyond the scope of his rebuttal testimony today.
18 What document are you referring to?

19 MR. NETTLER: The same document.

20 CHAIRMAN GRIFFIS: Okay, but what section
21 of it? It's not part of the submission here.

22 MS. DWYER: But it's not a section that we
23 filed. This is not a section that he testified to.
24 It's beyond the scope of cross.

25 MR. NETTLER: So the sections of that

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1 treatise that deal with factors affecting speed, how
2 you deal with pedestrian, sidewalk locations.

3 CHAIRMAN GRIFFIS: We'll take it that
4 there are other sections that weren't submitted.

5 MR. NETTLER: Those were not things that
6 you felt were appropriate for this testimony today.
7 Is that correct?

8 MS. DWYER: That's not his testimony. His
9 testimony was limited to what he filed today.

10 CHAIRMAN GRIFFIS: Right and what I
11 understood him to say is that he was filing those
12 exhibits in order to address specific questions or
13 concerns of the Board or your perceived specific
14 concerns of the Board.

15 MR. GEORGE: That's correct, sir.

16 MR. NETTLER: And to address Mr.
17 Peterson's testimony about both whether the level of
18 service was appropriate or his comments about the
19 manner in which traffic should be handled or isn't
20 properly handled.

21 MR. GEORGE: No, I believe what I tried to
22 address was Mr. Peterson's statement both oral and
23 written that we were in disagreement as to whether the
24 concept of level of service was appropriate for a
25 local residential street.

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1 MR. NETTLER: So otherwise, you don't have
2 any disagreement with any portion of his testimony.
3 Is that correct?

4 MS. DWYER: I would object. That is not
5 what the witness said.

6 MR. NETTLER: I have no further questions.

7 CHAIRMAN GRIFFIS: Thank you. Can we take
8 five minutes? Then we have cross from the rest of the
9 parts. Off the record.

10 (Whereupon, the foregoing matter went off
11 the record at 10:34 a.m. and went back on the record
12 at 10:40 a.m.)

13 CHAIRMAN GRIFFIS: On the record.

14 MR. HUNSICKER: I'm Steve Hunsicker. I
15 live at 3083 Ordway Street. I just have a very few
16 questions for Mr. George I believe. Mr. George, you
17 introduced an excerpt from the Uniform Vehicle Code
18 2000. Do you recall that, sir?

19 MR. GEORGE: Yes.

20 MR. HUNSICKER: What was the particular
21 reason for that provision? Did you mean to reference
22 for your rebuttal?

23 MR. GEORGE: I'm trying to find a copy of
24 it right now. Again I thought a significant part of
25 the Board's inquiry had to do with the operations of

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1 traffic along Highland Place. I think the Uniform
2 Vehicle Code addresses the issue of how unlaned
3 roadways are utilized and I thought that would be
4 enlightening.

5 MR. HUNSICKER: Among the provisions you
6 submit are 11.305 and 11.306 which I guess address
7 limitations on overtaking on the left. Are those
8 provisions that you had in mind to address the Board's
9 concerns?

10 MR. GEORGE: I believe so, yes.

11 MR. HUNSICKER: Those concerns address
12 what we've called the double parking situation and the
13 cars pulling out into oncoming traffic near what has
14 been called "the blind curve on Highland." Is that
15 correct, sir?

16 MR. GEORGE: Well, it just addressed
17 generally the use of roadways that are not
18 specifically striped with lanes. I think both the
19 Uniform Vehicle Code and the City's traffic
20 regulations address those. That was the purpose for
21 including that section.

22 MR. HUNSICKER: In addressing the
23 situation of the double parking and the possibility of
24 traffic pulling into oncoming traffic near the blind
25 curve on Highland, did you ask yourself in reference

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1 to 11.305 as to the distance ahead that is clearly
2 visible to permit such overtaking as referenced in
3 11.305?

4 MR. GEORGE: I did not specifically
5 address that. I think the Code points out that in the
6 act of overtaking the vehicle must return to the
7 authorized lane which using the right side of the
8 roadway as soon as practical. It further says "In the
9 event that the passing moment involves the use of a
10 land authorized for vehicles approaching from the
11 opposite direction before coming within 200 feet of
12 any approaching vehicle." I agreed with that. It's
13 clearly consistent with the City's own regulations.
14 My testimony and my observations relate to the fact
15 that traffic is so heavily directional that the
16 situation is compromising that requirement or that
17 suggestion is not a frequent occurrence.

18 MR. HUNSICKER: Were you referring to
19 section 11.305 in that answer right there?

20 MR. GEORGE: Yes, I think I read a portion
21 of it.

22 MR. HUNSICKER: Do you see the reference
23 to "free of oncoming traffic for a sufficient distance
24 ahead"? Do you see that, sir?

25 MR. GEORGE: No. Which line?

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1 MR. HUNSICKER: I'm looking at the fourth
2 line of Section 11.305. Let me try to get to the
3 point. Do you have today an idea of approaching the
4 blind curve on Highland from the east as to the
5 distance that is visible ahead, specifically ahead in
6 to the oncoming lane of traffic?

7 MR. GEORGE: From what point?

8 MR. HUNSICKER: Approaching the blind
9 curve from the east?

10 MR. GEORGE: At what point from the curve?

11 MR. HUNSICKER: Well, from the perspective
12 of a car that is traveling in a westward direction
13 that has swung out into the oncoming traffic lane in
14 order to avoid the double parking lane. As it
15 approaches the blind curve, do you know the distance
16 ahead that is clearly visible at that point?

17 MR. GEORGE: I would say, Mr. Hunsicker,
18 saying "approaching" doesn't tell me anything. You
19 could be approaching from five feet away.

20 MR. HUNSICKER: Let's say ten feet away.
21 Do you know, sir?

22 MR. GEORGE: No, I don't.

23 MR. HUNSICKER: Do you know, sir, the
24 amount of distance that it would require a car to both
25 recognize an oncoming vehicle and to break to a stop

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1 if it were say traveling at 15 miles per hour?

2 MR. GEORGE: Yes.

3 MR. HUNSICKER: What is that distance?

4 MR. GEORGE: Fifteen miles per hour, I
5 believe if my memory serves correctly, is
6 approximately 22 feet per second. It takes
7 approximately with driver reaction time 1.5 to 2.0
8 seconds for reaction to achieve that. So I would say
9 if you multiply that if the 22 feet per second is
10 correct and that's my recollection, it perhaps would
11 be within 40 feet.

12 MR. HUNSICKER: Now would you agree that
13 the amount of distance required to stop in order to
14 avoid a vehicle in the oncoming lane might be relevant
15 to any concern that the BZA may have concerning the
16 traffic condition and whether or not it's dangerous or
17 not at the blind curve at Highland?

18 MR. GEORGE: I believe all of the
19 conditions that been described are relevant, the width
20 of the roadway, the fact that the directional split of
21 traffic is very heavily oriented to westbound traffic,
22 that there's very little eastbound traffic. I think
23 you heard testimony today regarding the positioning of
24 staff with appropriate dress for high visibility and
25 so on being in the area of that location. All of

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1 those factors taken into consideration would address
2 the speed and those potential situations you
3 described.

4 MR. HUNSICKER: Now I believe you made
5 reference to the Traditional Neighborhood Development
6 Street Design Guidelines and you've asserted Section
7 D I believe that is relevant to the Board's concerns.
8 Did you not think that the immediately following
9 chapter on safety would be relevant to the Board's
10 concerns?

11 CHAIRMAN GRIFFIS: Was that submitted?

12 MS. DWYER: Again I would object. That
13 was not submitted and it's beyond the scope of cross.

14 CHAIRMAN GRIFFIS: Let's move off this
15 because I'm sure there's a world of resources that we
16 would love to see. I can't see that production of
17 cross examination questions to elicit all those might
18 see.

19 MR. HUNSICKER: Okay. You made reference
20 to an estimated reaction a total distance for stopping
21 at 15 miles per hour. Would you accept that the same
22 reference that you used to assert Chapter D shows at
23 figure 11 that at 15 miles per hour --

24 MS. DWYER: Again I would object. This is
25 beyond the scope of his direct testimony.

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1 MR. HUNSICKER: -- the reaction and
2 braking distance would be 75 feet.

3 MS. DWYER: I object.

4 MR. HUNSICKER: And similarly --

5 CHAIRMAN GRIFFIS: Hold on. You have an
6 objection.

7 MR. HUNSICKER: I have another follow-up
8 question from the same figure.

9 CHAIRMAN GRIFFIS: Fabulous.

10 MS. DWYER: Object.

11 CHAIRMAN GRIFFIS: Now you have two
12 objections to the two part question and the objection
13 is what?

14 MS. DWYER: He's asking the witness to
15 testify to something that is not in the record and
16 that is beyond the scope of his direct testimony.

17 CHAIRMAN GRIFFIS: And what figure are you
18 referring to?

19 MR. HUNSICKER: It is not beyond the scope
20 of his rebuttal.

21 CHAIRMAN GRIFFIS: What figure are you
22 referring to?

23 MR. HUNSICKER: I'm referring to a figure
24 out of the same text that he has referred to although
25 --

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1 CHAIRMAN GRIFFIS: What's the page number
2 so I can look at it?

3 MR. HUNSICKER: It is page 16. It was not
4 part of the rebuttal submission.

5 MS. DWYER: That's not filed.

6 CHAIRMAN GRIFFIS: So let's move on.

7 MR. HUNSICKER: Mr. George, would you
8 agree with an authoritative text that indicated that
9 the total distance --

10 CHAIRMAN GRIFFIS: No, and I don't want
11 speculation based on text that I can't see.

12 MR. HUNSICKER: I'm asking him his
13 opinion.

14 CHAIRMAN GRIFFIS: I know, but I don't
15 really care about his opinion about a resource that
16 I'm not going to review and look at.

17 MS. DWYER: And I would submit he already
18 has given his opinion.

19 CHAIRMAN GRIFFIS: Let's go to cross on
20 the exhibits that are in the record that were
21 submitted today. Let me be very direct. I think it's
22 very clear that what is excerpted here for our review
23 is part of a larger text. The text deals with all
24 sorts of things designed for pedestrians, designed for
25 safety. There are numerous chapters, at least 13 as

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1 we have 13 Chapter submitted to us. So the Board's
2 fully aware that this isn't the whole universe of good
3 traditional neighborhood development and design, not
4 to mention the revision of 1999. That being said,
5 next question.

6 MR. HUNSICKER: With that, Mr. Chair, I
7 have no further questions.

8 CHAIRMAN GRIFFIS: Thank you. Next.

9 MR. BECKNER: No questions, Mr. Chairman.
10 Thank you.

11 CHAIRMAN GRIFFIS: There's no need to come
12 up for that. Ms. Badami.

13 MS. BADAMI: Just one for Mr. George.
14 Just to review, Highland Place is shaped like an L.
15 It's two ways and then it becomes one way coming in
16 from 34th Street, right, and Ashley Terrace is a dead
17 end and 33rd Street is a dead end?

18 MR. GEORGE: Yes, that's true.

19 MS. BADAMI: Then looking at your
20 traditional neighborhood development on page D-6,
21 connectivity, "DNT streets are interconnected. This
22 principle is central to DNT design. Cul-de-sacs and
23 other dead end streets are not part of a DNT." Does
24 this not make this entire page compromised?

25 MR. GEORGE: No, I don't think so.

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1 MS. BADAMI: Okay. I have a few to Mr.
2 Anthony. At the beginning of your testimony, you
3 talked about your design and that you had
4 intentionally broke up the facilities because that was
5 more in keeping with the neighborhood and that you did
6 not want to do - this is a direct quote - "not a
7 large addition to the main house." Is that correct?

8 MR. ANTHONY: Correct.

9 MS. BADAMI: You're aware that the
10 addition that you're planning to back of the main
11 house, the first floor is 329 square feet and the
12 first floor of my entire house is 328 feet. This is
13 from a submission that you've made.

14 CHAIRMAN GRIFFIS: So the question is?

15 MS. DWYER: I would just clarify the
16 question. It's a question as to the dimensions of the
17 building that he has designed.

18 MS. BADAMI: I'm asking --

19 MS. DWYER: I'm just not sure the witness
20 can respond as to the dimensions of your house.

21 MS. BADAMI: The witness has prepared this
22 document so I'm asking if he recalls the document that
23 he prepared that says that my house which is one of
24 the largest on the blocks, the first floor square
25 footage is actually a square foot less than the

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1 addition that is planned for the back.

2 CHAIRMAN GRIFFIS: The direct question is
3 isn't the addition a large addition. That's the
4 question, isn't it?

5 MR. ANTHONY: Relatively speaking, I
6 don't, but I'd like to say that the drawing that
7 you're pointing to there I don't think shows your
8 entire house.

9 MS. BADAMI: But it does list the square
10 footage.

11 MR. ANTHONY: Of your house?

12 MS. BADAMI: Yes, sir.

13 CHAIRMAN GRIFFIS: Okay. But I don't
14 care. Let's not get into that. That's in the record
15 and I'll review it. Your actual question is based on
16 the testimony today you said in Historic Preservation
17 Review and all that staying to the character that a
18 large addition to the main house wouldn't be
19 appropriate, but haven't you just designed a large
20 addition to the main house?

21 MR. ANTHONY: I would say that it's not a
22 large addition to the main house.

23 CHAIRMAN GRIFFIS: Okay.

24 MS. BADAMI: Do I have one of the largest
25 houses on Highland Place?

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1 CHAIRMAN GRIFFIS: Okay. Your next
2 question is --

3 MS. BADAMI: All right. Right on. I'm
4 moving on.

5 CHAIRMAN GRIFFIS: No. Listen to me.

6 MS. BADAMI: Okay.

7 CHAIRMAN GRIFFIS: I'm helping you out
8 here.

9 MS. BADAMI: Thank you.

10 CHAIRMAN GRIFFIS: What I want to do is
11 make sure you're being direct with your questions
12 though. So you say at the scale of your house and
13 other houses on the block it sets the scale and
14 character of the block, correct?

15 MS. BADAMI: I would say that.

16 CHAIRMAN GRIFFIS: And isn't this addition
17 proportionate to a standalone house on the block?
18 Doesn't that put it in the realm of large? Is that
19 your question?

20 MS. BADAMI: I wouldn't phrase it that way
21 but that works.

22 CHAIRMAN GRIFFIS: Let's hope not. We all
23 need to be unique. Yes or no?

24 MR. ANTHONY: No.

25 CHAIRMAN GRIFFIS: Okay. Now we're going

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1 into splitting hairs over large or small, so I think
2 I understand your point of putting it into context.
3 I'll let you continue with your questions.

4 MS. BADAMI: Great. Thank you. Thank you
5 for the help. Then you also said that the addition to
6 the accessory building is in keeping with the rhythm
7 of the Ordway houses. I believe to exemplify that
8 part of your submission, photo Ordway Street Existing
9 Condition photos. You are aware of this document.

10 MR. ANTHONY: Yes, I've seen that.

11 CHAIRMAN GRIFFIS: Exhibit E of the
12 submissions today.

13 MR. ANTHONY: I didn't address it in my
14 testimony, but I'm aware of that photograph.

15 MS. BADAMI: And you're aware in this
16 collage of photos that eight to ten feet of the
17 distance between the accessory building and the edge
18 of NCRC's property line is omitted. Therefore this is
19 actually not existing street conditions.

20 CHAIRMAN GRIFFIS: And you are talking
21 about the separation of the photograph from the little
22 photograph as labeled.

23 MS. BADAMI: No, I'm saying that even
24 accounting for that which is indicating that there's
25 not a picture there when you scale the accessory

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1 building --

2 MR. ANTHONY: The photographs are not
3 scale if that's what you're asking.

4 MS. BADAMI: So these are not existing
5 conditions.

6 MR. ANTHONY: It's just a photo montage
7 moving down the street. It's not to scale.

8 CHAIRMAN GRIFFIS: Right.

9 MR. ANTHONY: Now the drawings that are in
10 the record of the streetscape of Ordway and Highland
11 are to scale but flattened. I would stand by my
12 testimony.

13 MS. BADAMI: Okay, but the BZA should not
14 be able to reference this for any sense the rhythm of
15 Ordway.

16 MR. ANTHONY: They could. I think part of
17 that photograph was also indicating the topography of
18 the streetscape.

19 CHAIRMAN GRIFFIS: We're not going to be
20 looking at that photograph to scale.

21 MS. BADAMI: Right on. Okay, thank you.

22 CHAIRMAN GRIFFIS: Okay.

23 MS. BADAMI: Then you said in your
24 testimony in cross that if we move the proposed
25 addition of the accessory building back that 9, 10 or

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1 12 mature trees would be pushed back. I'm not seeing
2 them on either the topo map that you've submitted
3 before --

4 CHAIRMAN GRIFFIS: Does that go to Mr.
5 Nettler's question where he asked him to point out the
6 trees that would be removed? Is that where you're
7 asking?

8 MS. BADAMI: I wanted to see where the 9,
9 10 or 12 mature trees that he referenced are because
10 there are some minor trees that have been planted by
11 NCRC as a result of the 1994 condition. But he said
12 9, 10 or 12 mature trees and I wanted --

13 CHAIRMAN GRIFFIS: If they did an
14 alternative development, is that correct?

15 MS. BADAMI: Right. I'm wanting to see
16 where these mature trees are.

17 CHAIRMAN GRIFFIS: I think we understand
18 because he pointed out the portion south as this lays
19 out. That area would be impacted.

20 MR. ANTHONY: That's correct.

21 MS. BADAMI: It would impacted, but I'm
22 trying to point out that he's not correct.

23 CHAIRMAN GRIFFIS: I know, but we're not
24 going to count trees. He's not correct that there
25 might be trees removed.

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1 MS. BADAMI: That there are 9, 10 or 12
2 mature trees that are going to be removed.

3 CHAIRMAN GRIFFIS: Okay. How many are
4 there?

5 MS. BADAMI: I'm counting three.

6 CHAIRMAN GRIFFIS: Okay. Yes?

7 MS. DWYER: My objection is this is very
8 speculative because he pointed to a general area.
9 There is no design of the building so there's no way
10 of knowing. His expert opinion based on the caliber
11 of the trees was that 9 to 10 to 12 mature trees would
12 be removed.

13 CHAIRMAN GRIFFIS: Excellent point. I
14 think the point of the Board would be that there would
15 be larger area of impact or a different area of
16 impact. That's where I don't think it's productive to
17 count the number of trees. Good point though.

18 MS. BADAMI: I was just speaking on his
19 speculation.

20 CHAIRMAN GRIFFIS: He shouldn't have put
21 a number to it.

22 MS. BADAMI: Then you said perhaps I was
23 confused about the mature tree between our properties.
24 That actually was the one that I was referring to.
25 Are you aware that the drip lines are not the standard

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1 by which our arborist use to know where the roots are
2 of a tree?

3 MR. ANTHONY: That's certainly one
4 standard to use.

5 MS. BADAMI: But the drip line is not
6 always the standard. Is that correct?

7 MR. ANTHONY: I can't testify to what all
8 the arborist's standards are for protecting trees.

9 MS. BADAMI: And you are aware since
10 that's 100 year old tree that the tree roots are
11 condensed within that area.

12 MR. ANTHONY: I'm sure they are.

13 MS. BADAMI: Since you don't have a
14 construction plan, you can't tell me that there are no
15 heavy equipment that's going to run over the roots of
16 my trees.

17 CHAIRMAN GRIFFIS: That wasn't his
18 testimony.

19 MS. BADAMI: Okay, but he did speak that
20 the tree wasn't going to be damaged.

21 MS. DWYER: I think that what the witness
22 testified to was that the use of the arborist would
23 help ensure that any construction activity did not
24 damage the trees. The specifics of that would be
25 determined later.

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1 MS. BADAMI: Okay. Then moving on to more
2 about the trees, you're aware that all the trees that
3 are on my property which I think in my first
4 submission of evidence there are six to eight trees on
5 my property line between my house and the fence which
6 are not listed on your plans that would be affected by
7 the construction.

8 MR. ANTHONY: I would say that as I
9 testified the trees that are represented there with an
10 X through them are the trees that we anticipate losing
11 in this process.

12 MS. BADAMI: Okay, but I'm saying that all
13 the trees that would be affected are not listed on
14 this map.

15 MR. ANTHONY: Let me finish. So then
16 neighboring plant material and the trees that don't
17 have an X through them on that plan, it is our
18 intention to consult with an arborist and to do the
19 best we can to preserve and save those trees or
20 vegetation.

21 MS. BADAMI: Okay. That doesn't directly
22 respond to what I said but okay. Then even including
23 what you said about the drip drain, the maintenance
24 building cuts into three mature trees on the back of
25 the hill. You are aware of that, right?

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1 MR. ANTHONY: When you say cuts into them
2 what are you referring to?

3 MS. BADAMI: You testified because the
4 drip edge of the oak tree between our houses was not
5 necessarily going to be affected because of the drip
6 line. I'm asking about the maintenance building where
7 three mature trees' drip lines and root systems are
8 going to be affected.

9 MR. ANTHONY: As you stated in your
10 earlier question, drip line is not the only measure of
11 impact on tree and also there is considerable existing
12 impervious area both the existing shed and then the
13 concrete, etc. in that area and again it's not just my
14 opinion. There is a letter from the arborist in the
15 record as an evaluation of those trees on that
16 drawing.

17 MS. BADAMI: But the amount of impervious
18 soil is going to be drastically changed if you build
19 a new maintenance building.

20 MR. ANTHONY: It's not actually.

21 MS. DWYER: Was there a question there?

22 CHAIRMAN GRIFFIS: Are you asking that?

23 MS. BADAMI: Is it your testimony?

24 CHAIRMAN GRIFFIS: Correct. Is that
25 correct?

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1 MR. ANTHONY: My testimony is that there
2 is not a great additional amount of impervious area in
3 the maintenance building, but there is existing
4 sideway, shed, etc.

5 CHAIRMAN GRIFFIS: Next question.

6 MS. BADAMI: Okay. You talked about the
7 screening plantings that were going to be placed by my
8 property.

9 CHAIRMAN GRIFFIS: Ask your question.

10 MS. BADAMI: Your map indicates three
11 pieces of the playground equipment and two permanent
12 benches that are on the site. Since there are 15
13 pieces of playground equipment, I'm wondering where
14 they are going to be moved to especially the four
15 existing pieces of playground equipment that are going
16 to be displaced by the accessory building.

17 MS. DWYER: I would object. This is
18 beyond the scope of his direct testimony. He did not
19 testify as to playground equipment or relocation of
20 them.

21 CHAIRMAN GRIFFIS: Indeed.

22 MS. BADAMI: No, but he did talk about the
23 screening.

24 MS. DWYER: He talked about the screening
25 between the adjacent properties which is on your

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1 property line and the Little's property line.

2 MS. BADAMI: Right, so you can't talk
3 about that.

4 CHAIRMAN GRIFFIS: Next. Let's move on.

5 MS. BADAMI: But is that screening going
6 to cover the six pieces of playground equipment
7 between my house and the existing accessory building?
8 They are not listed on here but there are six pieces
9 of equipment there.

10 MR. ANTHONY: The playground design is
11 really not a part of that exhibit or a part of my
12 testimony or something that I can really state as to
13 what the design is.

14 MS. BADAMI: But you did have three pieces
15 of playground equipment in this and it's not the
16 accurate amount.

17 CHAIRMAN GRIFFIS: Next question.

18 MS. BADAMI: Right on. That's it. Thank
19 you.

20 CHAIRMAN GRIFFIS: Thank you very much.
21 Is there any other cross? Is there any redirect of
22 these witnesses?

23 MS. DWYER: I just have two questions of
24 Mr. George.

25 REDIRECT EXAMINATION

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1 MS. DWYER: There were a lot of questions
2 that were asked by Mr. Hunsicker concerning the blind
3 curve. I wanted to ask Mr. George. Is it true that
4 NCRC cars are not permitted to wait in line at the so-
5 called blind curve?

6 MR. GEORGE: That's correct.

7 MS. DWYER: Do you know approximately what
8 the distance is from the front of the school to the
9 white line which is where the cars begin standing?

10 MR. GEORGE: It's between 150 and 160
11 feet.

12 MS. DWYER: All right. Thank you.

13 CHAIRMAN GRIFFIS: Cross on the redirect
14 testimony? Any questions? Thank you all very much.
15 We have closing left. Is that correct?

16 MS. DWYER: That is correct.

17 MR. MOY: Excuse me, Mr. Chairman. Staff
18 would like to remind the Board that we still have the
19 joint motion of the parties in opposition.

20 CHAIRMAN GRIFFIS: Would you like to
21 remind me of that motion? It's a good reminder. This
22 is what I would like to do. Very well. Last matter
23 in the case then before we get to closing will be the
24 submission of the motion that was provided us. I
25 understand the motion is based on the submission of

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1 the DDOT observation, all of which was given to us
2 this morning. So I haven't had the full amount of
3 time to go through all of the information, but have in
4 fact reviewed and have talked to the Board regarding
5 it.

6 In terms of the motion, the substance of
7 the motion goes to whether we can have or should have
8 DDOT back for cross based on that submission. It
9 directly states that this is a joint motion of the
10 parties in opposition to require the appearance of
11 DDOT. Looking over the survey and the observation of
12 the DDOT's evaluation, I think it's incredibly clear
13 what it is and perhaps what it isn't. So I don't see
14 the need to continue the hearing and bring DDOT in for
15 cross examination.

16 We can't require them actually to be here
17 as in terms of subpoenaing them to show up. We can
18 certainly request them. What I would like to do is
19 keep the record open if there are submissions that
20 want to address this information. We can certainly
21 have that and we will go in that regime unless there
22 is any issue with that.

23 MEMBER ZAIDAIN: I actually have a
24 question. I would see a lot of this issue on the DDOT
25 report. I'm just trying to refresh my memory. We did

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1 not request this. This is just a supplemental report
2 that was given by DDOT.

3 CHAIRMAN GRIFFIS: Right.

4 MEMBER ZAIDAIN: Do we have to accept it?

5 CHAIRMAN GRIFFIS: We don't have to accept
6 it, but if we don't accept the DDOT report then we're
7 basically saying "Why." (1) We have to address that.
8 (2) Is it just because it came in today? If that's
9 so, then we would not accept frankly the inch and a
10 half of paper we received this morning. For that
11 matter, when do we go back to the record of not
12 accepting things?

13 MEMBER ZAIDAIN: Right.

14 CHAIRMAN GRIFFIS: The record has
15 maintained open. We never closed it. We never
16 limited it to any submissions which is why we continue
17 to get information. If we had closed it, then it
18 would be a much clearer case of what we would accept
19 or not accept. I don't have any difficulty taking it
20 in.

21 MEMBER ZAIDAIN: No, I've just never seen
22 an unsolicited supplemental report from DDOT before or
23 at least an evaluation like this. I just didn't know
24 what to make of it. I would agree with your stance in
25 letting the parties in opposition submit rebuttals to

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1 this but I personally will take this for what it is
2 which I'm still trying to figure out because I just
3 got it this morning.

4 CHAIRMAN GRIFFIS: That's probably what we
5 all should do, shouldn't we?

6 MEMBER ZAIDAIN: Right.

7 CHAIRMAN GRIFFIS: Rather than making it
8 something that it isn't. Good. Any other questions
9 from the Board?

10 COMMISSIONER HOOD: I would agree with
11 your synapses, Mr. Chairman, on accepting it and
12 allowing the parties to be able to comment, but I can
13 tell you, Mr. Zaidain, I have seen an unsolicited
14 report from the DOT. Anything you get anything from
15 them I guess we'd better be thankful. We'll just
16 leave it open.

17 CHAIRMAN GRIFFIS: Point well taken, Mr.
18 Hood. Good. Anything else? Okay. Any burning
19 comments from the parties in opposition to address
20 this motion? Is it clear? You don't have to take the
21 opportunity. I'm giving you the opportunity though.

22 MR. BECKNER: Mr. Chairman, as the author
23 of the motion, you say you're going to keep the record
24 open for submissions. Could you indicate for us how
25 long that's going to be?

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1 CHAIRMAN GRIFFIS: All that will go later,
2 but basically you understand that we're denying your
3 motion.

4 MR. BECKNER: No, I understand that. I'm
5 not going to reargue it here.

6 CHAIRMAN GRIFFIS: Right. Do you have any
7 question then of that substance or what you've heard
8 us say outside of what you submitted in writing?

9 MR. BECKNER: No, sir.

10 CHAIRMAN GRIFFIS: Okay. Thank you.

11 MR. BECKNER: Thank you.

12 CHAIRMAN GRIFFIS: In terms of schedule
13 and in terms of submissions, all that will be very
14 clear as we run through all of the pertinence of this
15 and I'll say this again but I'll say it now. If there
16 are questions of schedule once the decision date is
17 set, certainly call into the Office of Zoning and
18 either talk to Mr. Moy or Ms. Bailey and they will be
19 able to clarify what the actual schedule is and the
20 submission date. With that, yes?

21 MS. DWYER: Just one point I wanted to
22 make in terms of clarifying why this came in. At the
23 September 16th hearing when Ken Laden was testifying,
24 I believe it was Commissioner Hood who asked him
25 whether they were out there monitoring to see if the

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1 TMP was working. Ken Laden said that he was not but
2 that they would be sending people out there. That's
3 why this report came in at this time.

4 CHAIRMAN GRIFFIS: I see. Good point.
5 Anything else? Mr. Hood.

6 COMMISSIONER HOOD: No, I had more to do
7 with it than I thought. I didn't know I asked that.

8 CHAIRMAN GRIFFIS: It's your fault. When
9 you're ready.

10 MS. DWYER: All right. I'm ready. Good
11 morning, Mr. Chairman and members of the Board. It's
12 still morning. We started this hearing process on
13 February 11, 2003. After nine public hearings and
14 volumes of testimony, we believe we have met the test
15 and that we are entitled to the special exception and
16 variance relief.

17 What we are proposing is a continuation of
18 a use that has been at this location for over 73
19 years. During that period of time, there have been no
20 traffic or pedestrian accidents as a result of the
21 school's use, no injuries to students or neighbor's
22 children and no MPD reports of any problems associated
23 with the school's use. Even Lieutenant Rock testified
24 that he had never been called about any activity at
25 the school.

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1 The evidence of record establishes that
2 prior to the public announcement of its plan to
3 construct an addition NCRC had no history of any
4 serious complaints from neighbors regarding traffic
5 and had averaged only three complaints per school
6 year. You'll find that in Exhibit 87 at Tab N. Each
7 time NCRC immediately responded and addressed the
8 situation. It is also significant that in its 73 year
9 history the opposition can cite only one noise
10 incident, the use of a PA system which the school has
11 agreed not to use in the future.

12 Over the last 73 years and continuing
13 today, we had the same activities normally associated
14 with the school use. There are periods during the
15 morning, midday and afternoon when children are
16 dropped off or picked up. There are back to school
17 nights and pumpkin parties and there are
18 parent/teacher meetings that take place. These are
19 the same activities that take place at any other
20 school in a residential district. These are also the
21 same activities that took place when the children of
22 the opposition attended the school.

23 Even taking at face value the data
24 collected by the neighbors and used by their traffic
25 consultant, what you have are 12 minutes in the

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1 morning, 15 minutes at midday and 12 minutes in the
2 afternoon when cars are waiting to pick up children.
3 These are Exhibits 3A through 3C of Steve Peterson's
4 testimony. This is not an unsafe or untenable
5 situation. If it were, then no school in the District
6 would be permitted to operate. Further, this data was
7 collected over a year and a half ago in the spring of
8 2002 before many of the improvements were made to the
9 school's TMP.

10 In the Washington Ethical Society case,
11 the D.C. Court of Appeals stated that "the test is the
12 incremental impact from the additional number of
13 children." NCRC is adding 10 children and there is
14 nothing in the record to support a finding that 10
15 additional children will create an objectionable
16 impact. As Ken Laden testified, "Ten additional cars
17 or 20 additional trips over the day is not going to
18 have a significant impact."

19 Much of the opposition testimony focused
20 on existing conditions including area-wide traffic
21 issues which again is not the test. A special
22 exception applicant is not required to alleviate
23 existing traffic conditions in the area. As
24 Lieutenant Rock testified, his general impression of
25 traffic conditions in Cleveland Park is "horrendous"

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1 and he gets complaints daily regarding speeding, sign
2 violations and parking violations. NCRC is not
3 required to address this, but rather that behavior of
4 its own parents, its own staff and its own teachers
5 which it has.

6 Further as the expert testimony of NCRC's
7 traffic consultant established, once the new classroom
8 building is built traffic on Highland Place will be
9 reduced since children will be able to use an Ordway
10 Street entrance. By adding full day programs at the
11 school, the number of midday trips would also be
12 reduced. Thus, under the incremental impact test,
13 there is no basis in the record to find that the
14 additional of 10 children would have an objectionable
15 impact. Nor was there substantial evidence from the
16 opposition on this issue.

17 Even though NCRC is not required to
18 improve existing situations, the fact remains that it
19 has. The changes to its TMP over time and in
20 particular this fall have resulted in improvements.
21 The extended drop-off time in the morning and the use
22 of uniform police officers have resulted in a
23 situation that fully addresses any concerns as to the
24 queuing of cars or safety issues and does not require
25 the loss of parking spaces in front of the school or

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1 the creation of a one-way system.

2 The Office of Planning ("OP") testified
3 that NCRC met all of the requirements of the special
4 exception except for the standard related to traffic
5 and OP deferred to DDOT on that issue. DDOT
6 recommended three approaches to the BZA. Two of the
7 recommended approaches impact the neighbors either
8 through the loss of parking spaces in front of the
9 school or by making Highland Place one way. NCRC
10 believes that the third alternative recommended by the
11 DDOT, improvements to the existing TMP, can work and
12 submits that the evidence establishes that the TMP is
13 working. As DDOT stated in its April 14, 2003 report
14 "The benefit of a regulatory solution is that it could
15 be implemented quickly and if run properly positive
16 results would presumably be felt in a short period of
17 time."

18 You have heard testimony by NCRC and its
19 staff this morning that the TMP is in place and that
20 it is working. DDOT's concern with the TMP was
21 monitoring to ensure that people were abiding by the
22 new regulation. NCRC is committed to that and has
23 included its TMP in its contracts with its parents and
24 its staff and has a system of oversight and
25 enforcement.

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1 In summary, for the special exception, we
2 believe that we have demonstrated that we meet all the
3 requirements of Section 205. The OP supports that
4 with exception of the traffic issues in which it
5 defers to DDOT. DDOT has recommended three options,
6 one of which is the TMP which NCRC has implemented.
7 We believe we meet the test.

8 With regard to the area variance, the D.C.
9 Court of Appeals has established a three prong test.
10 The BZA must find that the property is unique by
11 reason of its size, shape, topography or other
12 exceptional condition, that this creates a practical
13 difficulty and that the variance will not impair the
14 intent, purpose and integrity of the zoning plan. We
15 believe that we fully meet the test for the second
16 principal building and the OP agrees with us.

17 First as the Court has stated in looking
18 at the unique or exceptional qualities of the site,
19 the combination of the factors may be used in
20 determining its uniqueness. In this case, we have
21 several unique factors which combine to create the
22 uniqueness and practical difficulty. The property is
23 the largest site in the neighborhood comprised of
24 45,000 square feet. It is an unusual through lot with
25 significant grade changes from Highland Place to

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1 Ordway Street. It is the only lot in the neighborhood
2 which has frontage and access on both Highland and
3 Ordway.

4 The site is also unusual in that it is
5 improved with three existing buildings, two of which
6 have been deemed contributing. The property has
7 significant open space with mature trees. Finally it
8 is located in a historic district and design
9 constraints have been imposed on the new construction.
10 Further as the Court held in both Monaco and National
11 Black Child cases, the BZA is allowed to apply more
12 flexible standard when a public service or non-profit
13 entity is the applicant. As the Court stated in
14 Monaco, "when a public service has inadequate
15 facilities for variance to expand into an adjacent
16 area in common ownership which has long been regarded
17 as part of the same site, then the BZA does not err in
18 considering the needs of the organization as the
19 extraordinary and exceptional situation or condition."

20 In this case, the evidence clearly
21 establishes the need for NCRC to expand its facilities
22 after 73 years of using the existing buildings. Even
23 the opposition testified to this at the last hearing.
24 As Dickson Carroll stated "Early on I visited the
25 school at the invitation of Ms. Piggott and it was

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1 clear that the school is cramped and does need some
2 remodeling and perhaps some expansion."

3 As the architect testified this morning,
4 the uniqueness of the site clearly presents practical
5 difficulties in terms of design in the new space. The
6 current plan allows the design that fits into existing
7 grade, maximizes light and air to below grade spaces,
8 retains mature trees on the site, preserves playground
9 open space and meets the HPRB requirements for
10 separate structures in keeping with the history of the
11 site. As the architect testified, to subdivide the
12 site would result at a minimum in a need for variance
13 relief from the side yard and parking requirements.
14 Redesign would also require that the new building lose
15 natural light and air or have to be build below ground
16 into an existing hillside.

17 In summary, we believe that on the record,
18 we meet the variance test. Not only will the
19 resulting variance not impair the intent, purpose and
20 integrity of the Zone plan, but we submit that it will
21 result in an improved plan for the site by preserving
22 the open space and topography and allowing for a
23 sensitive building addition.

24 During the course of these hearings, there
25 have been a number of issues that I would term "red

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1 herring" issues put into the record that we believe
2 have no bearing on either the special exception or the
3 variance. Nonetheless we have address each and every
4 one of these issues. For example, there was a
5 suggestion that the variance stemmed from the self-
6 created hardship of the Applicant. First of all,
7 self-created hardship is not applicable to any area
8 variance case. Second, we have established that the
9 property was historically one large lot dating back to
10 at least 1958. That's in Exhibit 191 on the record.

11 There was an issue raised of unclean
12 hands. We have established that the prior BZA
13 conditions were met. The concern with the prior order
14 and the concern going forward is whether the
15 conditions are clear. We submit that the BZA can
16 impose clear conditions that address the number of
17 students at any one time versus total enrollment, the
18 summer camp program, special events, a prohibition on
19 the use of PA equipment, etc. These are not new
20 issues for the BZA. These are standard issues in most
21 school cases.

22 An issue has been raised that the space is
23 too big and that the school will be back for an
24 enrollment increase. As the school's enrollment chart
25 indicates, it has a history of steady enrollment.

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1 Further any increase in enrollment would require a new
2 BZA case and a new public hearing process. Thus there
3 are ample protections for the community.

4 The statement was also made that this
5 preschool is unusually large. On the contrary, we
6 filed in the record the BZA orders for other child
7 development centers which include the Barbara Chambers
8 CDC which has 150 children, the Washington Hebrew
9 Center CDC that has 95 children and the St. Columbus
10 Preschool that has 90 children at any one time and a
11 total enrollment of 124.

12 An issue was also raised as to whether
13 this is a neighborhood school. While that has some
14 appeal, this is not a requirement in the regulations.
15 In fact, contrary to what Council member Mendelson
16 said, the preschool regulations do not date from 1958.
17 They were significantly revised in 1982 by the Zoning
18 Commission and we filed that information in the
19 record. When they were revised, they eliminated the
20 neighborhood requirement and imposed a new set of
21 standards.

22 I have here a copy of the Zoning
23 Commission's order which we can file in the record.
24 We did reference it earlier in our submission. It's
25 very interesting to note what the Commission decided

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1 when it choose to eliminate the neighborhood
2 requirement. At that point in time, Lindsey Williams
3 in fact was on the Commission. What the Commission
4 said is "limitation on attendance to children residing
5 in proximity to facilities is contrary to present day
6 needs and demands. The need for daycare services is
7 related to not only where people live but in how they
8 get to and from work and the nature of the programs
9 that are available such as programs run by or for
10 different religious or ethnic groups. Given the
11 requirement for the Board to assess the traffic and
12 parking impacts of proposed centers, the Commission
13 believes that it is unnecessary and inappropriate to
14 limit centers to children residing in the
15 neighborhood." Nevertheless as NCRC testified this
16 morning, it does give a preference to neighborhood
17 children.

18 An issue has been raised about
19 construction and storm water management measures. We
20 have submitted for the record the pertinent portions
21 of DCMR regulations that govern all of these areas.
22 NCRC will be required as with any applicant to comply
23 with the city's permitting and construction
24 requirements.

25 There was a concern in the record about

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1 the enforceability of conditions. First, the school
2 is committed to enforcing its TMP through its contract
3 with its parents. Second, the BZA has a zoning
4 compliance officer equipped in this and every case to
5 enforce all BZA conditions. Third, the issue of
6 enforceability is no different here than it would be
7 for every other school. Finally, NCRC has proposed a
8 liaison committee with the neighbors which provides an
9 additional mechanism for communication and
10 enforcement.

11 Finally there was a question raised as to
12 whether the structure is four stories or three stories
13 and requires additional variance relief. We believe
14 the record establishes that this is an existing three
15 story structure as measured from the front of the
16 building on Highland Place and that it fully complies
17 with the measuring requirements set forth under
18 Section 199.1. I would direct your attention again to
19 the transcript of the June 24th hearing on page 164.

20 While Mr. Nettler has suggested that the
21 lower level of the house cannot be considered a cellar
22 in one portion and a basement in the other, in fact
23 the Zoning Regulations treat lower levels differently
24 when it comes to the computation of FAR by using the
25 parameter wall method. This is no different. The

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1 lower level is clearly a cellar on Highland Place even
2 though it may be considered a basement at the rear.

3 As I stated when this case began, schools
4 are integral parts of viable residential communities.
5 All schools involve children arriving and departing
6 from the site. All schools involve the sound of
7 children's voices. All schools involve the occupancy
8 of a building by students. The opposition has not
9 identified a single feature of this school's operation
10 that is atypical for a school.

11 We have proposed conditions that address
12 any noise and traffic impacts, provide controls on the
13 number of students and basically shows the school's
14 responsiveness to its neighbors. Many of the
15 neighbors in opposition have children who attended the
16 school at a point in time when the school's enrollment
17 was virtually the same as it is today. The school's
18 activities were not objected to then even though they
19 included the same as exists today.

20 To the extent that there is a concern
21 about NCRC using its property for conferences, we have
22 proposed a condition limiting this to three times a
23 year and a requirement that we provide offsite
24 parking. If the BZA disagrees, then the number can be
25 reduced as the BZA sees fit.

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1 In closing, I want to reiterate the
2 standard set forth by the D.C. Court of Appeals in the
3 Glenbrook Road case. In that case which was a special
4 exception, the Court stated "The Board's function in
5 a special exception case is to determine whether a
6 reasonable accommodation has been made between the
7 school and the neighbors which does not interfere with
8 the legitimate interest of the latter." We believe
9 that we have demonstrated such a reasonable
10 accommodation. The school has agreed to limit
11 enrollment, to improve its TMP, to reduce the size of
12 its plans, to make adjustments to its programs and to
13 include enforceable conditions. What it cannot do is
14 abandon its plan. It needs both the additional space
15 and the ten additional children to meet its program
16 needs for the future.

17 The core opponents remain firm in their
18 position that they will oppose any expansion of the
19 use, even one child. As you will recall, the Beckners
20 testified that even if the school had an effective TMP
21 they still would not support any enrollment increase,
22 but that is not the legal standard. The evidence
23 overwhelming establishes the new space and the
24 incremental impact of ten additional children will not
25 be objectionable and that we meet the requirements for

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1 the special exception and variance under the Zoning
2 Regulations, under the prior decisions of this Board
3 and under the D.C. Court of Appeals.

4 In closing, I would also like to remind
5 the Board that we have the support of the D.C. Office
6 of Early Childhood Development which filed a letter in
7 the record pointing out that in Ward 3 alone there are
8 689 children on waiting lists for early childhood
9 centers. We ask for your support of our application.
10 Thank you.

11 CHAIRMAN GRIFFIS: Thank you very much.
12 Very well. At least none of you believe it. That
13 concludes our public hearing on this case. With that,
14 we're going to set this for the decision making and I
15 am going to set it for the 6th of January. As our
16 deliberation and public meetings happen the first
17 session of the month, I think December is a little bit
18 too fast as we are asking for a submission here. I
19 want to give adequate time to produce findings of fact
20 and conclusions. That being said January 6th. Ms.
21 Bailey, if you wouldn't mind, let's back from that the
22 submissions and the other dates if you would list
23 those for us.

24 MS. BAILEY: Mr. Chairman, before I do
25 that I just wanted to remind you December 23rd and

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1 also December 30th, there are no BZA hearings on those
2 dates. Those are around Christmas. I just wanted to
3 remind you of that.

4 CHAIRMAN GRIFFIS: It's a good reminder
5 actually. But that's not going to affect any of the
6 submission dates. What I'd like to do is as we've
7 done in previous cases which are quite large and
8 extensive especially with this record, let's have
9 final submissions two weeks before. If we can get
10 that before the 23rd and approximately set that for
11 Monday, the 22nd. That way it could be distributed to
12 the Board for their review substantially prior to the
13 6th of January.

14 MS. BAILEY: So those are the submissions,
15 Mr. Chairman.

16 CHAIRMAN GRIFFIS: That would be the
17 findings and conclusions.

18 MS. BAILEY: Findings. Okay. Then the
19 15th for the submissions then.

20 CHAIRMAN GRIFFIS: That would be good.

21 MS. BAILEY: Okay. Now the record is
22 going to be closed, Mr. Chairman, except for three
23 specific things that I have that the Board requested
24 or the Board anticipates to come in, one of which is
25 the response from the parties concerning the

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1 supplemental report that was filed by DDOT.

2 CHAIRMAN GRIFFIS: Right.

3 MS. BAILEY: Are we asking for proposed
4 conditions from Ms. Dwyer?

5 CHAIRMAN GRIFFIS: Yes, they are going to
6 be amended as they have given indication to today.

7 MS. BAILEY: Mr. Nettler, were you going
8 to file pages five, six and seven? Those were the
9 three things that I have, Mr. Chairman, other than as
10 you indicated the findings of fact and conclusions of
11 law.

12 CHAIRMAN GRIFFIS: Indeed. Board members,
13 are you aware of anything else? Okay, so those
14 submissions will come in on the 15th of December and
15 then findings will come in on the 22nd. Is that
16 correct, Ms. Bailey?

17 MS. BAILEY: Yes, sir.

18 CHAIRMAN GRIFFIS: Now I'll take questions
19 on the schedule and submissions if there are any
20 clarifications that are needed. Everyone is clear.
21 Fabulous. Then any other procedural questions I can
22 answer regarding this case? Very well. It has been
23 a pleasure to be through this. I say that with great
24 sincerity. Clearly this is a lot of information and
25 believe me, we will be looking at it in its entirety.

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1 So any submissions that come in of course should be on
2 point and succinct or as you want to put it and then
3 we'll look at it.

4 Of course the December 6th is a public
5 meeting. There is no additional testimony. As Ms.
6 Bailey just indicated the record is closed except for
7 that which we've just set and that is very specific.
8 So you can spread the word and you can also note. If
9 you decide to submit something in addition to what
10 we've just listed, it will not be accepted, meaning
11 it's not in the record and the Board will not see it.
12 Yes, Ms. Badami.

13 MS. BADAMI: You said January 6th for the
14 decision date. Did you say a time?

15 CHAIRMAN GRIFFIS: No. Our meetings start
16 at 9:30 a.m. and I'm not sure right now as I look at
17 my schedule which may not be the most current, it's
18 the first in the morning. But again going to that
19 point, our meeting don't have any additional
20 testimony. It is all deliberation. You are obviously
21 all welcome to be here but we will not be hearing from
22 anybody. In fact, you'll hear a lot from us. I would
23 imagine we'll put it -- Well, I don't know where we're
24 going to put it but it's going to be in the morning on
25 the 6th. Any other questions or clarifications or

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1 additional information? Now I've never known this
2 group to be so quiet. Fabulous. I thank you all very
3 much and I appreciate your patience with the Board.
4 Have a great day. Enjoy it before it pours and rains.

5 As you are leaving, if you wouldn't mean
6 getting out of the hearing room as quickly as possible
7 as we have a morning's 9:30 a.m. We need to finish
8 that by 12:00 noon as we have additional cases that
9 are filling our lunch hour. If I could have
10 everyone's attention just not to talk please because
11 we are proceeding with our hearing. If you have
12 conversation that needs to happen, it can take care
13 outside of the hearing room.

14 With that, I'd like to call to order the
15 normal public hearing of the morning of 18 November
16 2003. Dispense with the introductions as people that
17 have been here probably noted the plaques, but of
18 course representing the Zoning Commission is Mr. Hood.
19 Representing National Capital Planning Commission is
20 Mr. Zaidain. We will have our full mayoral appointees
21 out with us shortly.

22 The order of procedure for special
23 exception and variance is statement of witnesses, the
24 Applicant, Government reports including the OP, the
25 ANC, parties or persons in support, parties or persons

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1 in opposition, closing remarks by the Applicant.

2 Cross examination of witnesses permitted
3 by the Applicant or parties attendant to a case. Of
4 course the ANC within which the property is located is
5 automatically a party in the case. As you have just
6 probably heard in the last, it will attended to the
7 cases that we are about to hear. The record will be
8 closed at the conclusion of a hearing except for any
9 information that the Board would require. We will be
10 very specific on what is submitted and what is to be
11 submitted.

12 The Sunshine Act requires this Board to
13 conduct all hearings in the open and before the
14 public. We are able to however according to our rules
15 of procedure and the Sunshine Act enter into executive
16 session during or after a hearing on the case. That
17 would be of course for the purposes of deliberating on
18 a case or reviewing the record.

19 Let's take up any preliminary matters and
20 let me just ask if people present now have not already
21 done so they can turn off their cell phones and
22 beepers so we don't have a disruption in this rapid
23 fire morning session of which we have 25 minutes left
24 to do. Also in all sincerity I do appreciate the
25 applicants that are here this morning and their

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1 patience with us. Obviously you may have overheard.
2 That was a continuing case from February. We have I
3 think gone through probably close to 60 to 70 hours of
4 public hearing on it. It was good to get that
5 finished, but understand it did in fact eat into your
6 time. We absolutely appreciate your patience. Ms.
7 Bailey, do we have preliminary matters for the Board?

8 MS. BAILEY: Yes, Mr. Chair. There is a
9 request for a postponement of one of the cases this
10 morning and that is Application No. 17071, Edward B.
11 Rooths.

12 CHAIRMAN GRIFFIS: Okay.

13 MS. BAILEY: Are you representing the
14 Applicant, sir?

15 MR. CRICKMAN: Yes, Ken Crickman of
16 Jackson and Campbell.

17 MS. BAILEY: Please have a seat.

18 CHAIRMAN GRIFFIS: Good. Why don't you
19 have a seat and give us two minutes. Did you have
20 additional information to add regarding the request
21 for a continuance? It's my understanding of this
22 submission is that there's a need for additional time
23 to get the rest of the case presented.

24 MR. CRICKMAN: That's right.

25 CHAIRMAN GRIFFIS: So essentially you're

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1 not prepared to go forward with it today.

2 MR. CRICKMAN: That's correct.

3 CHAIRMAN GRIFFIS: Any questions from the
4 Board? Is there anyone else here attended to this
5 application, Case No. 17071, Bruce Dao? How would you
6 say that last name, D-A-O?

7 MR. CRICKMAN: Dao.

8 CHAIRMAN GRIFFIS: Is the ANC
9 representative here today? Not seeing anyone else
10 giving an indication of participating in this case,
11 are there any objections to granting the continuance?

12 COMMISSIONER HOOD: No objection.

13 CHAIRMAN GRIFFIS: Okay. Do you have a
14 proposed date for the Board to reschedule this?

15 MR. CRICKMAN: At least 60 days.

16 CHAIRMAN GRIFFIS: Right. Indeed. You
17 indicated at least 60 days. Ms. Bailey, do we have a
18 date that seems to work well?

19 MS. BAILEY: Mr. Chairman, I was just
20 advised that February 10th would be the earliest.

21 CHAIRMAN GRIFFIS: Okay. February 10th,
22 let's set it for the morning. Is that appropriate for
23 you, Ms. Bailey, from what you're seeing?

24 MS. BAILEY: Yes.

25 CHAIRMAN GRIFFIS: Very well. Let's do

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1 it. Any difficulty with the 10th of February?

2 MR. CRICKMAN: That's fine.

3 CHAIRMAN GRIFFIS: Thank you very much.

4 MR. CRICKMAN: Thank you.

5 CHAIRMAN GRIFFIS: Ms. Bailey, if there's
6 not any other preliminary matters, why don't we call
7 the first case in the morning then?

8 MS. BAILEY: That is Application No. 17072
9 of Maurice C. Walters and Mary Jean Pajak, pursuant to
10 11 DCMR §3104.1, for a special exception to allow a
11 two-story rear addition to a single family semi-
12 detached dwelling under section 223, not meeting the
13 lot occupancy requirements (section 403) and side yard
14 requirements (section 405). The property is located
15 in the R-4 District at premises 623 Constitution
16 Avenue, N.E. also known as Square 867, Lot 825.
17 Please stand so you can take the oath and raise your
18 right hand.

19 (Witnesses sworn.)

20 CHAIRMAN GRIFFIS: Allow me two seconds
21 here. No doubt, you brought hundreds of people to
22 testify for this special exception just like the
23 special exception we heard but they were unable to
24 stay. Is that correct?

25 MR. WALTERS: That's correct.

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1 CHAIRMAN GRIFFIS: Indeed. Okay. For the
2 record of course, that's great humor to start our late
3 morning. Indeed. I'm sorry. Did you introduce
4 yourself for the record?

5 MR. WALTERS: Maurice Walters.

6 CHAIRMAN GRIFFIS: Okay. Board members,
7 what I'd like to do is run quickly through this.
8 Clearly we've had sufficient submissions in the record
9 and it looks like the photographs that we have in the
10 record of the model are actually -- The model is
11 present here today for questions. This is a 223
12 Application. I would suggest that we'll give Mr.
13 Walters opening statement and then have questions from
14 the Board if there is no objection from the Applicant
15 or the Board. With that, why don't we turn it over to
16 you.

17 DIRECT TESTIMONY

18 MR. WALTERS: Okay. Is it okay for the
19 opening statement just to quickly walk you through the
20 design?

21 CHAIRMAN GRIFFIS: Sure. Absolutely.

22 MR. WALTERS: This is a house that my wife
23 and I live in at 623 Constitution in Capitol Hill in
24 the historic district. You can see an OP map here
25 that it's a unique structure. It sits back about 24

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1 feet from the street line. It was built in about 1880
2 and has existed pretty much that way since then.

3 You can see here. These are photographs
4 of Constitution Avenue. Our house is set back here.
5 Immediately to the east is an old C&P phone building
6 that converted to condominiums and then some more of
7 the townhouses that flank it to the west. Some close-
8 up shots of the house. It's a very modest house, two
9 stories in height. Shots of the front and then some
10 details and then some shots of the backyard. You can
11 see the adjacent C&P phone building to the side. This
12 is in the backyard looking to the back. Again that's
13 the C&P phone building and there's a two story garage
14 located at the rear of the structure.

15 The existing house is 700 square feet, a
16 one bedroom house. We're seeking to extend it to
17 create both a separate living/dining area and a second
18 bedroom within the house. In this plan here, you can
19 see this is the property line at the front and then
20 the 24-foot setback from the property line. The
21 existing house is 13 feet 9 inches wide by 26 feet
22 deep. It currently just has one big room with the
23 kitchen in the back.

24 Our proposal is to come off the back 18
25 feet eight inches with an addition and then a two

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1 foot, four inch deep bay window on the back to extend
2 it and create a separate living room and then
3 reconfigure the kitchen and work in a little powder
4 room under the stair. The backyard is currently a
5 little over 50 feet deep. With the extension, the
6 backyard will be about 30 feet deep by 18 feet wide.

7 The second floor of the front of the house
8 is basically staying intact with a little bit of
9 reconfiguring of the bathroom. Then a second bedroom
10 is added to the back and then over the little side
11 entry on the passage, a spiral stair leading up to a
12 roof on the back of the house that will have a green
13 roofing system on it.

14 The reasons for the special exception are
15 (1) a nonconforming side yard and (2) the lot
16 occupancy. The lot is 18 feet by 136 feet so it is a
17 semi-detached house. It has a four foot passage along
18 the side as it was built in 1880. We seek to extend
19 that by just bringing the line of the building back so
20 that brings up on one of the needs. Then the fact
21 that it is semi-detached, 40 percent lot occupancy
22 allowable, we're proposing to go to 60 percent and the
23 60 percent includes the side yard as required of the
24 lot occupancy of the house.

25 Getting into the elevations of the

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1 building, this is the existing front of the house.
2 The house was renovated in 1961 and there were some
3 things that were done that weren't quite in compliance
4 with what's the proper thinking of historic
5 preservation. The windows were bricked down. The
6 heads were lowered. They were bricked up at the
7 bottom and then six over six windows were put in. The
8 door was actually bricked up and the transom removed.

9 What we are proposing doing is opening the
10 windows back up to the heads and down a little bit and
11 actually out to the proper opening width and putting
12 in one over one windows which is appropriate for the
13 style of the house and then putting in a glass door
14 with a transom and then a slight decorative treatment
15 at the front door to keep the rain off the front of
16 the door.

17 On the rear of the house, you can see the
18 bay window on the back which would be made out of
19 fiber cement trim with doors and then the main body
20 out of masonry. The side of the existing house kept
21 intact with the exception of one low window in the
22 powder room to bring light into the powder room.

23 Then on the west side, this would be the
24 addition with the door into the side. The addition
25 will be in brick with two small windows, clear story

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1 windows in the living area and then brick going up
2 with some brick ties added to continue the pattern,
3 brick ties in a subtle soldier course just to give
4 some character to the side and then another soldier
5 course up above. Then the top parapet wall treated
6 with a fiber panel trim to bring the visual scale of
7 it down and then the bay window off of the back of the
8 house.

9 Lastly the view from the east. In the
10 area way of the adjacent building, there's an existing
11 masonry wall that occurs over there. It's about seven
12 and a half/eight feet tall. You can see where the
13 existing house presents that wall to that side and
14 then the addition would be built on top of that wall
15 going up to there and then the fence will be replaced
16 and the six foot high fence will continue to exist on
17 top of the building there.

18 You can see in the model just to get a
19 feel for the scale of the addition. This is the C&P
20 phone building to the east, the neighboring building
21 to the west. This is the extent of the existing house
22 and then the addition back here. So in closing we
23 seek to expand the house to make it a more livable
24 house, more viable property and also to restore the
25 front of the house in keeping with the character of

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1 the neighbor. Thank you.

2 CHAIRMAN GRIFFIS: Thank you very much and
3 of course we'll give you an opportunity for closing at
4 the end after you've heard from all of the other
5 reports. Let's take Board questions now. Mr.
6 Zaidain.

7 MEMBER ZAIDAIN: A couple quick ones. I
8 know you're going through a summary here but you
9 didn't mention the accessory structure in the back
10 that was subject of variance.

11 CHAIRMAN GRIFFIS: Right, in the 1970
12 variance of which was submitted into the record.

13 MEMBER ZAIDAIN: Right. How is that
14 accessory structure included in the lot occupancy? I
15 assume it's part of your calculation.

16 MR. WALTERS: Yes, it is.

17 MEMBER ZAIDAIN: Also the 24 foot front
18 yard setback I thought was interesting concerning most
19 houses in Capitol Hill are built all the way up to the
20 right of way line if not part of their building is in
21 the right of way line. Is that measured from the edge
22 of curb or from the edge of the right of way?

23 MR. WALTERS: From the edge of the right
24 of way.

25 MEMBER ZAIDAIN: So you're one of those

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1 lucky people that has your own front yard.

2 CHAIRMAN GRIFFIS: Yes, actually I was
3 struck with that too when I read it and had to look
4 back. But the photographs show fairly distinctly that
5 the standard rowhouse is moved substantially out
6 towards the street in a more tradition sense.

7 MEMBER ZAIDAIN: Actually in Capitol Hill
8 usually the right of way is always to the building and
9 most of those bay windows that you see project out
10 into the right of way.

11 CHAIRMAN GRIFFIS: That's what I'm saying.
12 This is the only one on the block that does that.

13 MEMBER ZAIDAIN: That's interesting.

14 CHAIRMAN GRIFFIS: We're not going to
15 spend time going into the speculation, but it probably
16 was the type of accessory building in a larger
17 development.

18 MEMBER ZAIDAIN: Right. And one other
19 question. I was just reading here. You are providing
20 separate living and dining areas. This isn't for a
21 separate unit, right? This is just additional
22 facilities in the house.

23 MR. WALTERS: No, it's just to make it a
24 proper size house.

25 MEMBER ZAIDAIN: Okay.

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1 CHAIRMAN GRIFFIS: Any other questions of
2 the Board? Excellent. I think the record
3 sufficiently shows and from your testimony today
4 clearly how you meet all the points of the section
5 223. I would normally read down and have you agree or
6 disagree. I'm not going to do that now as we have
7 great and sufficient information on it. It's fairly
8 clear one in the written testimony how this would not
9 impact the light, air or enjoyment of the adjacent,
10 essentially the adjacent as you said the converted
11 building to condos which actually that's an
12 interesting site section elevation that's showing on
13 that board.

14 One of the things that I think the Board
15 ought to be aware of also in the submission of the
16 record is that fenestration of windows on that area
17 actually are adjacent to the corridor. Is that
18 correct, Mr. Walters?

19 MR. WALTERS: That's correct.

20 CHAIRMAN GRIFFIS: So it's not as if those
21 are units looking out over the property that might
22 impact your privacy or yours might impact their
23 privacy.

24 MR. WALTERS: That's correct.

25 CHAIRMAN GRIFFIS: Okay. Good. If there

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1 are no other questions of the Board, let's move on to
2 the OP. Mr. McGhettigan is here with us. How are you
3 this morning, sir?

4 MR. MCGHETTIGAN: Fine. Thank you.

5 CHAIRMAN GRIFFIS: Good.

6 MR. MCGHETTIGAN: The OP would just like
7 to say on the record for our report lays out how the
8 Applicant meets the test and we recommend approval.

9 CHAIRMAN GRIFFIS: Thank you very much.
10 I think that's absolutely appropriate. Mr. Walters,
11 do you have any question or cross examination of the
12 OP?

13 MR. WALTERS: No.

14 CHAIRMAN GRIFFIS: And you have their
15 memo. Is that correct?

16 MR. WALTERS: Yes, I do.

17 CHAIRMAN GRIFFIS: Okay. Any Board
18 questions of the OP?

19 MR. MCGHETTIGAN: I have one.

20 CHAIRMAN GRIFFIS: Let's not take long.
21 But if you look at your aerial photo, it doesn't look
22 like the garage is showing. Do you know when this
23 photograph was taken or could it have conceivably been
24 taken prior to 1970?

25 MR. MCGHETTIGAN: I think it's just the

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1 shadow.

2 CHAIRMAN GRIFFIS: Is it the shadow? I
3 couldn't really tell. It's not important, of course,
4 but it was fascinating to me.

5 MR. MCGHETTIGAN: I think it's in the
6 shadow.

7 CHAIRMAN GRIFFIS: Perfect. Which means
8 it's set back from -- I can figure that out. Any
9 other government reports attendant to this application
10 that I'm not aware? It not, let's move on to the ANC.
11 Is there an ANC representative from 6-C here today?
12 It would have been kind of interesting to see them
13 here today. You took this through. They have
14 recommended approval. Their report was timely filed.
15 I don't have an exhibit number on it. Yes, Mr.
16 McGhettigan, do you have some data on that?

17 MR. MCGHETTIGAN: Yes, I have a letter
18 from fire and emergency medical services department.

19 CHAIRMAN GRIFFIS: Was that attached to
20 your report?

21 MR. MCGHETTIGAN: No, it was not. I
22 received it after my report.

23 CHAIRMAN GRIFFIS: Excellent. So you are
24 putting that in today.

25 MR. MCGHETTIGAN: Yes. They have no

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1 objection.

2 CHAIRMAN GRIFFIS: Okay. Thank you.
3 We'll put that in as an exhibit. Exhibit 26 was the
4 ANC Commission report 6-C. That's all that I have
5 attendant to this application at this time. Is there
6 anyone here either in support or in opposition to
7 Application No. 17072 that would like to give
8 testimony today? Not seeing any indication of
9 requiring testimony opportunities, let's go to any
10 final last comments, Mr. Walters, regarding your
11 application.

12 MR. WALTERS: No final comments.

13 CHAIRMAN GRIFFIS: Okay. Last questions?
14 I'm sorry.

15 MEMBER MILLER: I just want to note for
16 the record Exhibit 22 which is a letter from Capitol
17 Hill Restoration Society also in support of the
18 application.

19 CHAIRMAN GRIFFIS: Excellent. Thank you
20 very much. I'm sorry that I breezed over that. Very
21 well. Any other clarifications? Clearly, I think
22 that it's strong enough to move approval of
23 Application 17072 for the rear addition under section
24 223 for the premises of 623 Constitution Avenue N.E.
25 I would ask for a second.

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1 MEMBER ZAIDAIN: I'll second, Mr. Chair.

2 CHAIRMAN GRIFFIS: Thank you very much,
3 Mr. Zaidain. I know we've been abbreviated in this
4 but I think the record is ample and sufficient. It
5 addresses all of the requirements for the special
6 exception under 223. Last and not least of those
7 requirements is submitting proper elevations,
8 photographs, diagrams. It has been more than
9 sufficient in this case and it was very clear. Now
10 with the model in front of us, I think it's absolutely
11 clear on what the impact of this will be. So I would
12 entertain any other deliberation, comments on the
13 motion. If there are none from the Board, I will ask
14 for all in favor that they signify by saying aye.

15 (Chorus of ayes.)

16 CHAIRMAN GRIFFIS: Any opposed.
17 Abstaining.

18 (No response.)

19 CHAIRMAN GRIFFIS: If we could record the
20 vote.

21 MS. BAILEY: The vote is recorded as five,
22 zero, zero to approve the application. Mr. Griffis
23 made the motion. Mr. Zaidain second. Mr. Etherly,
24 Mr. Hood and Ms. Miller are in agreement. This is a
25 summary order, Mr. Chairman.

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1 CHAIRMAN GRIFFIS: I see absolutely no
2 difficulty in a summary order on this one. Yes, thank
3 you.

4 MS. BAILEY: The graphics that are up,
5 sir, will we be keeping those?

6 MR. WALTERS: Would you like to keep them?

7 MS. BAILEY: Yes.

8 MR. WALTERS: Okay.

9 MS. BAILEY: Thank you.

10 CHAIRMAN GRIFFIS: Let's be clear on that.
11 Anything that's present today, we're going to need
12 copies of submitted into the record. If you want to
13 make copies of it and submit it into the record, that
14 would be appropriate to do. If you are leaving
15 actually those color rendered, then of course those
16 won't be returned to you. They become an official
17 part of the record.

18 MR. WALTERS: They are the same drawings
19 as were submitted but they are just colored. Would
20 you would like color copies?

21 CHAIRMAN GRIFFIS: Ms. Bailey, do you have
22 any concern if we do not have the color or do you want
23 color submitted into the record?

24 MS. BAILEY: We don't have to, Mr.
25 Chairman. There's no opposition here.

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1 CHAIRMAN GRIFFIS: Right. I think it
2 would become more of an issue in an opposed case, but
3 it is clear that all these drawings are the exact
4 drawings that were submitted in package that were
5 going in. It just has color on these for better ease
6 of reading them. That being said, I think we have
7 everything we need to complete the record. If there
8 is something that you are aware of that you presented
9 today that isn't in the record, you can submit it in.

10 MR. WALTERS: I'm sorry. The only thing
11 would be the OP map on the left.

12 CHAIRMAN GRIFFIS: Map. Right.

13 MR. WALTERS: That's not in there. I can
14 take that off and leave it.

15 CHAIRMAN GRIFFIS: Excellent. Why don't
16 we do that.

17 MR. WALTERS: Okay.

18 CHAIRMAN GRIFFIS: Good. Is there
19 anything else that attends to this application?
20 Anything else, Ms. Bailey?

21 MS. BAILEY: No, sir.

22 CHAIRMAN GRIFFIS: Great. Thank you very
23 much. We appreciate your patience with this this
24 morning and hopefully you will enjoy your day. At
25 least you get out in time for lunch. With that, why

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1 don't we call the next case in the morning.

2 MS. BAILEY: Application No. 17069 of
3 5626-28 Connecticut Avenue Associates, pursuant to 11
4 DCMR § 3104.1 for a special exception to allow an
5 accessory parking lot (last approved by BZA Order No.
6 16233 dated July 27, 1998) under section 214. The
7 property is located in the R-2 District at premises
8 3831 McKinley Street, N.W. known as Square 1860, Lots
9 5, 6, 7, 17 & 18. Gentlemen, would you please stand
10 to take your oath?

11 (Witnesses sworn.)

12 DIRECT TESTIMONY

13 MR. McCANTS: Good morning, Mr. Chairman.
14 My name is Leonard McCants. I'm here representing the
15 Applicant, 5626-28 Connecticut Avenue Associates.
16 We're here requesting a reissuing of a special
17 exception for the property known as 5626-28
18 Connecticut Avenue. The property as I indicated is
19 located directly at 3831 McKinley Street N.W.,
20 Washington, D.C., Square 1860, Lots 5, 6, 7, 17 & 18.
21 The site is zoned R-2 and is located as I indicated on
22 McKinley Street. It is used as a parking lot for the
23 customers of MacGruder's Food Store which fronts on
24 1526-28 Connecticut Avenue.

25 Subject property is located on the north

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1 side of McKinley Street and is bordered by 39th Street
2 to the west and to the east right now, it separates
3 the parking lot from MacGruder's Food Store. The site
4 of the application is located within Advisory
5 Neighborhood Commission 3-G.

6 The most recent special exception for this
7 property was approved by this Board in an order dated
8 July 27, 1998. That order granted the special
9 exception for a period of five years. This Board
10 further conditioned its approval of 16 requirements
11 which are contained in that order and incorporated in
12 our application which is submitted herein. The
13 Applicant has met each of the conditions posed by that
14 order of July 27, 1998 and we are therefore requesting
15 a renewal of that special exception for the accessory
16 parking lot for 56 parking spaces.

17 With respect to the application, we met
18 the requirements of special exception for 56 parking
19 spaces. We are asking that we continue as an
20 accessory parking lot for MacGruder's Food Store and
21 the relief if granted will be in harmony with the
22 general purpose and intent of the Zoning Regulations
23 and map and will not affect adverse use of
24 neighborhood property in according with the said
25 Zoning Regulations and map.

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1 In terms of the criteria that's required,
2 for its previous approval on Application 16233
3 established at the subject lot complies with the
4 provisions of 11 DCMR 214 as an accessory parking lot.
5 The Applicant continued to meet the requirements of
6 section 214. The existing accessory passenger
7 automobile parking spaces are on the same lot and are
8 a part of the lot of which the main use is permitted.
9 This is required under section 214.1.

10 CHAIRMAN GRIFFIS: Without going through
11 all of 214 and you can have testimony to it, but your
12 submission is clearly that all of the provisions of
13 214 haven't changed since the last order. So the
14 parking lot hasn't moved.

15 MR. McCANTS: It hasn't moved.

16 CHAIRMAN GRIFFIS: It's still separated by
17 an alley. It's still used for parking and no cars are
18 parked over the property line, etc.

19 MR. McCANTS: That's correct.

20 CHAIRMAN GRIFFIS: Okay. We can move on
21 from there.

22 MR. McCANTS: Very good. Then I just want
23 to say in summary that we have a witness, Mr. Gary
24 Bortnick, who is a Vice President of the food store.
25 I just simply wanted to ask Mr. Bortnick for the

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1 record. You are associated with the parking lot in
2 what capacity, sir?

3 MR. BORTNICK: I'm a principal in the
4 business and we use the parking lot for our customers.

5 MR. McCANTS: All right. To your
6 knowledge, has the parking lot complied with the
7 previous Board order in terms of the special exception
8 and the conditions imposed on that special exception?

9 MR. BORTNICK: Yes, it has.

10 MR. McCANTS: Are you asking the Board to
11 reestablish the parking lot or to extent the special
12 exception on this particular lot for an additional
13 five years or so?

14 MR. BORTNICK: Yes, five years or more.

15 MR. McCANTS: Five years or more. All
16 right. Are we asking that the conditions that were
17 previously granted be incorporated in this request or
18 are you asking for some change in those requirements?

19 MR. BORTNICK: We with the ANC were
20 requesting that five changes be made to the previous
21 application.

22 MR. McCANTS: And what are they? Mr.
23 Chairman, we are referring to page --

24 CHAIRMAN GRIFFIS: Indeed. Do you concur
25 with all the ANC's proposed changes, deleting numbers

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1 two, seven, 12, 21 and 23?

2 MR. BORTNICK: Yes, I do.

3 CHAIRMAN GRIFFIS: In addition, you want
4 to modify condition number three.

5 MR. BORTNICK: That's correct.

6 MR. McCANTS: And the modification on
7 number three is what, sir?

8 MR. BORTNICK: The modification is in lieu
9 of having a parking attendant from the minute that we
10 open until the minute that we close to that he is
11 there during the core hours.

12 CHAIRMAN GRIFFIS: I see. Defined as
13 10:00 a.m. to 6:00 p.m.

14 MR. BORTNICK: Yes, sir.

15 CHAIRMAN GRIFFIS: Okay.

16 MR. McCANTS: In terms of the other
17 modification, I think that's self-explanatory in terms
18 of what we are asking for, deletion of certain other
19 items, Mr. Chair. I don't think it is necessary to go
20 through each and every one of them.

21 CHAIRMAN GRIFFIS: No.

22 MR. McCANTS: The point is that we're
23 requesting the modification of those in compliance
24 with the ANC recommendations.

25 CHAIRMAN GRIFFIS: Okay. Questions from

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1 the Board?

2 MEMBER MILLER: I just wanted to clear.
3 We are only talking about deleting 2(a), not all the
4 paragraphs under 2. Is that correct?

5 MR. BORTNICK: I believe that's correct.

6 MR. McCANTS: That's correct.

7 MEMBER MILLER: Thank you.

8 CHAIRMAN GRIFFIS: Is that right? I see.
9 So it's 2(a). I thought the entire 2 is coming out.

10 MR. McCANTS: No, Mr. Chair. We are just
11 requesting 2(a). The others we accept.

12 CHAIRMAN GRIFFIS: Here's my concern in
13 where we're going next. I think it's all well and
14 good. In fact, it's a great thing. You talked to the
15 ANC and had come to negotiation for the change and the
16 conditions and what goes and not. Now the Board needs
17 to look at it about what is appropriate for the Board
18 to condition. This brings up a specific point.
19 Within 30 days, you're going to repaint pedestrian
20 walkway in the parking lot. That's condition 2(b).
21 Within 30 days, you're going to repair the existing
22 ruts and place small boulders and planters on both
23 sides of the parking lot.

24 MR. BORTNICK: That's all been done.

25 CHAIRMAN GRIFFIS: Right. So why are we

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1 conditioning it? That's my point. I understand.
2 There are numerous conditions in all these 18
3 conditions that happen to go to restating our 23
4 conditions. Twenty-three conditions that in fact are
5 the regulations. You're required to do it whether we
6 condition it or not, for instances, maintaining or
7 removing snow and ice, maintaining the vegetation and
8 landscaping.

9 My point is - and I don't necessarily mean
10 unless you don't understand what I'm saying - there is
11 no reason for us to condition these things in an
12 order. It is without saying a requirement for you to
13 continue in this stuff. So I think we may clean up a
14 lot of this. Go ahead. Now you can comment.

15 MR. BORTNICK: Sir, that's what I was
16 trying to do with the ANC. Last winter during the
17 snow storm, we even testified. I'm not a D.C.
18 resident. I live in Montgomery County.

19 CHAIRMAN GRIFFIS: We hold that against
20 you a little bit, but not too much.

21 MR. BORTNICK: I know. I came down with
22 the store manager. We were the only ones that
23 shoveled basically our whole block. I found it as an
24 insult that they have to tell me that I'm supposed to
25 shovel my sidewalk. We actually made a path all the

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1 way up to the post office.

2 CHAIRMAN GRIFFIS: Right.

3 MR. BORTNICK: That's what we testified to
4 the ANC that why do you find it necessary after being
5 in business for 35 years and being a good neighbor
6 that you have to give us all these regulations. We
7 can't possibly plant any more hedges.

8 CHAIRMAN GRIFFIS: Right. For my purposes
9 in terms of regulating, the Board need to craft
10 conditions that we actually control.

11 MR. BORTNICK: Right.

12 CHAIRMAN GRIFFIS: So even if you weren't
13 removing your snow off your property, we actually have
14 no control over that. We couldn't go and enforce
15 necessarily that. There are other bodies. That's not
16 a great example to use but it goes to the direction
17 that we need to look. In terms of planting, that's
18 also in condition 2D, plant evergreens near the wall
19 on McKinley Street. That's been done within 30 days
20 of the previous order. Is that correct?

21 MR. BORTNICK: Yes, sir.

22 CHAIRMAN GRIFFIS: Those obviously will be
23 maintained.

24 MR. BORTNICK: Yes, sir.

25 CHAIRMAN GRIFFIS: Condition No. 6 says

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1 "the parking lot, retaining wall and adjacent
2 landscaping shall be maintained, policed, kept in
3 prime condition." Is that not, Board members, your
4 understanding of the regulations? Ms. Monroe, you can
5 also weigh in on that. The only thing specific with
6 that is if such policing should occur at least three
7 times a day and is it in this condition? Right. The
8 shopping carts would be retrieved. Do you retrieve
9 shopping carts three times a day?

10 MR. BORTNICK: I would say so. Yes, sir.

11 CHAIRMAN GRIFFIS: Okay. That would be to
12 your own benefit, wouldn't it?

13 MR. BORTNICK: I would say we do it a lot
14 more than three times a day.

15 CHAIRMAN GRIFFIS: How much do shopping
16 carts cost?

17 MR. BORTNICK: About \$120.

18 CHAIRMAN GRIFFIS: So you don't like those
19 walking away.

20 MR. BORTNICK: Not really. No, sir.

21 CHAIRMAN GRIFFIS: Okay. It seems like
22 it's a good condition to put in but a redundant
23 condition that clearly you're going to be attendant
24 to. But as it's already been crafted and all that,
25 what I want to do is take out some of that for we may

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1 need to look at that. Condition 11, again I think
2 it's fairly redundant. It is a requirement. I don't
3 think by taking any condition that we're lessening the
4 burden and responsibility of you, but certainly proper
5 gardening, mulching, trimming trees, I think the Board
6 needs to look at that one. Other comments?

7 MEMBER MILLER: I know you're going fairly
8 quickly through these. I'm not sure when you were
9 talking about the provision that was required by the
10 regulations anyway. Could you just maybe recite the
11 regulation if we're going to take it out? I'd like to
12 be sure that it is actually going to be covered by the
13 regulation.

14 CHAIRMAN GRIFFIS: Sure. We'll get to
15 that.

16 MEMBER MILLER: I think that was number
17 six, "Parking lot retaining wall and adjacent
18 landscaping shall be maintained, policed and kept in
19 prime condition."

20 CHAIRMAN GRIFFIS: Okay. Let's move on.
21 Anything else from the Applicant to present the case
22 today?

23 MR. McCANTS: Nothing other than just to
24 point out that we have a letter from the ANC which
25 supports this application with those modifications.

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1 CHAIRMAN GRIFFIS: Right. We'll get to
2 that as we've already touched on it. Let's move on.
3 Any other questions? Let's move to the OP then.

4 MEMBER MILLER: I just want to ask another
5 question.

6 CHAIRMAN GRIFFIS: Yes, sure.

7 MEMBER MILLER: About those conditions,
8 are there any other conditions you want to bring to
9 our attention that you think should not be included?
10 We will be deliberating on the conditions.

11 MR. McCANTS: He asked for more than five
12 years.

13 MR. BORTNICK: I would ask for more than
14 five years. I would ask for ten years based on our
15 past history of being there for 35 years and being a
16 good corporate citizen.

17 CHAIRMAN GRIFFIS: Did you bring that up
18 with the ANC?

19 MR. BORTNICK: No, sir.

20 CHAIRMAN GRIFFIS: You didn't talk about
21 timing with the ANC so they essentially assume the
22 adoption of the conditions that are in existence
23 today. Is that your understanding?

24 MR. BORTNICK: That's correct.

25 COMMISSIONER HOOD: Mr. Chairman, I just

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1 want to say something. The gentleman made a statement
2 and I forgot your name, sir.

3 MR. BORTNICK: Oh, Gary Bortnick.

4 COMMISSIONER HOOD: Mr. Bortnick, you
5 mentioned about shoveling snow. I really just want to
6 make a comment to you. Community groups look at these
7 sometime and while we may not be able to enforce those
8 issues because everybody actually is not a good
9 neighbor. It was not necessarily intended just to
10 your specific business, but a lot of precautionary
11 measures are put in place for their protection while
12 not being enforceable. So it's not necessarily
13 directed at you. I'm pretty sure from reading the ANC
14 letter, but they put those precautionary measures in
15 place because not everybody is a good neighbor.

16 MR. BORTNICK: I understand.

17 COMMISSIONER HOOD: I just wanted to
18 clarify that for the record. Thank you.

19 MR. BORTNICK: And my back can testify to
20 that, because last year I'm the one who did the
21 shoveling. Ms. Miller, did you want me to go through
22 these. There were a number of conditions that I would
23 have approached with the ANC, but I didn't know if
24 that was appropriate or not appropriate. I think a
25 number of these conditions are certainly common sense

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1 and I don't know why they are in my agreement with the
2 ANC.

3 CHAIRMAN GRIFFIS: Do you have specific
4 ones that you want to identify? Have you done that?
5 We can give you time if you don't. Actually why don't
6 you take a moment to do that as we go to Title 11
7 Section 2303 for parking lots.

8 MR. BORTNICK: Okay.

9 CHAIRMAN GRIFFIS: "Parking lots in any
10 district shall conform to the following provisions:

11 (a) is always devoted to parking. Access
12 lanes of parking areas shall be paved, maintained with
13 grade concrete or materials, combination of materials,
14 and others as if appropriate by the Department of
15 Transportation, structuring equivalent or better, all-
16 weather impervious surface;

17 (b) parking lots are designed so that
18 vehicles or any part of vehicles not present over
19 lines;

20 (c) no other use would be conducted;

21 (d) vehicular access within 40 feet of an
22 intersection;

23 (e) lighting used to illuminate wouldn't
24 conflict with anything else surrounding the area;

25 (f) parking lots shall be kept free of

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1 refuse and debris; shall be landscaped; landscaping
2 shall be maintained in a healthy growing condition,
3 neat and orderly appearance; landscaping with trees
4 and shrubs shall cover a minimum of five percent of
5 the total area, lot or area determined by the Board of
6 Zoning for the parking lot..." And it goes on.

7 There are other provisions that are
8 attendant to the parking lots but I think that hits
9 most of them. Is that clear?

10 MEMBER MILLER: Yes, thank you.

11 CHAIRMAN GRIFFIS: Sure. Okay. Now let's
12 go back to conditions.

13 MR. BORTNICK: I would say No. 4. The
14 reason with No. 4 is we do have a parking lot
15 attendant, but he's not a policeman. I don't believe
16 he has the authority. He facilitate the parking lot,
17 but he cannot stand out on McKinley Street and stop a
18 car for instances who might be making an illegal turn.
19 I brought that up in the past. No. 6, I think Ms.
20 Miller just brought up or someone brought up about
21 retrieving and it's to our benefit to retrieve those.

22 CHAIRMAN GRIFFIS: Right.

23 MR. BORTNICK: No. 8, "no discharges from
24 store operations shall be flushed into the alley of
25 the street." We haven't done that in 35 years so I

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1 don't know why we would start flushing things down the
2 alley now.

3 CHAIRMAN GRIFFIS: It's also not a Zoning
4 issues, is it? Okay.

5 MR. BORTNICK: Well, I guess you just
6 asked a question. I skipped over nine and ten because
7 I'm not clear what is a Zoning issue and what is just
8 good common business sense that we have to secure.
9 The Avalon reopened their theater about six months ago
10 and we put signs up "No Avalon parking" because of
11 this and we don't want to have Avalon theater goers to
12 park there.

13 CHAIRMAN GRIFFIS: Right.

14 MR. BORTNICK: Although we were approached
15 by the community to allow them to use our parking lot.
16 I said "Folks, you told me I can't use it."

17 CHAIRMAN GRIFFIS: Right.

18 MR. BORTNICK: So I'm not sure if nine and
19 ten could come out if it is a Zoning issue.

20 CHAIRMAN GRIFFIS: What's your
21 understanding of why the community wanted the changed
22 parking lot.

23 MR. BORTNICK: When the Avalon was there
24 in prior years, that people were not using our parking
25 lot at all hours of the night.

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1 CHAIRMAN GRIFFIS: But why would the
2 community care about that? Did they want them off the
3 streets and parked in your parking lot?

4 MR. BORTNICK: Noise. The movie theater
5 ends at 11:00 p.m.

6 CHAIRMAN GRIFFIS: I see. So heavy use.
7 Not your store hour use.

8 MR. BORTNICK: Right. Non-store use.

9 MEMBER MILLER: I'm not clear about your
10 position on nine and ten. Are you saying you'd rather
11 not restrict the hours?

12 MR. BORTNICK: No, I would rather not have
13 it in here. We do it anyway. I don't gain anything
14 by the Avalon parking or anybody. When my store
15 closes, we lock it up.

16 CHAIRMAN GRIFFIS: Okay. Now there's
17 another thing that we weigh with conditions in terms
18 of although you may not want it and you have a
19 business that this would certainly be the practice,
20 but this runs with the parking lot too.

21 MR. BORTNICK: Right.

22 CHAIRMAN GRIFFIS: So conceivably there
23 could be a new user next year and if this ran for five
24 years. We also keep that in mind. Okay. Anything
25 else that jumps out at you that we need to look at?

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1 MR. BORTNICK: The No. 11 about the
2 mulching and screening, we maintain that and always
3 have. Bumpers stops, No. 14. I don't know how
4 somebody would possibly hit an adjoining building. It
5 would have to be an awfully long car.

6 MEMBER MILLER: I don't understand. Do
7 you have those?

8 MR. BORTNICK: There are bumper stops.
9 There's walls. They would have to go through some
10 walls. There are bumper stops along the other, but
11 why it's stated in here, there's not really an
12 adjoining building. There's an alley in between the
13 parking lot and the other adjoining buildings. How
14 would a car park and hit a building? It would have to
15 go four feet across the alley.

16 CHAIRMAN GRIFFIS: Right.

17 MR. BORTNICK: So that one could come out.
18 The same way with No. 15. No. 19, it's repetitive.
19 We've done the decorative boulder. We've put in
20 trees.

21 CHAIRMAN GRIFFIS: What was the decorative
22 boulder for?

23 MR. BORTNICK: When they came up the
24 alley, there were trucks that were missing the turn.
25 So they would make a rut in the alley in the grass

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1 area.

2 CHAIRMAN GRIFFIS: I see.

3 MR. BORTNICK: Now if a truck, not
4 necessarily a MacGruder truck, there's also a paint
5 store there.

6 CHAIRMAN GRIFFIS: As opposed to bollard
7 or some sort of defined -

8 MR. BORTNICK: It's real big. They are
9 going to know when they hit it. They're not going to
10 move it.

11 CHAIRMAN GRIFFIS: It's No. 19, decorative
12 boulder condition.

13 MR. BORTNICK: So 19 would come out.

14 MEMBER ZAIDAIN: How was it made
15 decorative? I have to ask.

16 MR. BORTNICK: It was a pretty rock.

17 MEMBER ZAIDAIN: Was it nice?

18 MR. BORTNICK: It was a pretty rock and
19 then we planted some bushes around it. If they want
20 to run over the bushes, they're going to find out that
21 there's a four foot boulder.

22 MEMBER ZAIDAIN: So in a way, it was kind
23 of a trap. They didn't think the boulder was there.
24 They thought they would drive through it. Next thing
25 you know their transmissions on the road.

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1 MR. BORTNICK: Whatever. So when one of
2 those paint trucks hit it, they would know that they
3 had. No. 20, here again like the Chairman just stated
4 if we were not there in a year so that's something
5 they might want to leave in.

6 CHAIRMAN GRIFFIS: Yes.

7 MR. BORTNICK: No. 21, don't know why
8 that's in there. We haven't had a problem.

9 CHAIRMAN GRIFFIS: But 21's the one
10 they're asking to come out. Isn't that correct? The
11 ANC.

12 MR. BORTNICK: I thought it was 23.

13 CHAIRMAN GRIFFIS: Is it 23? In ANC's
14 letter, it says "To be deleted as to user truck seven
15 damage to the --, 12 additional screen and then it
16 lists 12 again. Is it all in condition 12, outflow of
17 traffic to 39th Street? I read that as a typo because
18 21 talks about the trucks exiting across the curb of
19 39th Street. Was that your reading in their letter?

20 MR. McCANTS: Apparently, I think you're
21 right, Mr. Chairman. That's apparently is a typo.

22 CHAIRMAN GRIFFIS: And that's supposed to
23 be condition 21 or some other condition?

24 MR. McCANTS: That is correct. Twenty-
25 one.

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1 CHAIRMAN GRIFFIS: Can you turn on your
2 mike?

3 MR. BORTNICK: That would make sense.

4 CHAIRMAN GRIFFIS: Turn on your mike.

5 MR. McCANTS: You're absolutely correct.
6 That should be 12 and 21.

7 CHAIRMAN GRIFFIS: So 21 is being proposed
8 to be taken out also.

9 MR. McCANTS: That is correct.

10 MR. BORTNICK: Then 22, we spoke of.

11 CHAIRMAN GRIFFIS: Right.

12 MR. BORTNICK: Of course, 23 was also a
13 recommendation to come out.

14 CHAIRMAN GRIFFIS: Right, of which you're
15 concurring.

16 MR. BORTNICK: Yes.

17 CHAIRMAN GRIFFIS: Okay. See that. We're
18 down.

19 MEMBER ZAIDAIN: Actually I have a
20 question.

21 CHAIRMAN GRIFFIS: Yes, Mr. Zaidain.

22 MEMBER ZAIDAIN: Going back to condition
23 9, you started to say something and I thought I knew
24 where you were going, but then I got confused. This
25 condition was put in to limit, is it the hours of

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1 operations or the hours of the operation of when you
2 are using the lot?

3 MR. BORTNICK: I think we tied it in with
4 what the hours of the store are.

5 MEMBER ZAIDAIN: Okay, and that was asked
6 to you by the community back when this order was
7 originally adopted.

8 MR. BORTNICK: Yes, it was.

9 MEMBER ZAIDAIN: And they came back to you
10 to say "Even though we asked your store to be closed,
11 we wanted to be able to use your lot after 9:00 p.m."
12 Did I understand your statement correctly?

13 MR. BORTNICK: That's correct. I just
14 want to point out that it's also a liquor store. It's
15 liquor, beer and wine.

16 MEMBER ZAIDAIN: Right.

17 MR. BORTNICK: We are governed by the
18 District ABC laws. I believe we can stay open. I
19 know before holidays we currently close at 9:00 p.m.
20 Before a holiday, you're allowed to stay open an
21 additional hour or two.

22 MEMBER ZAIDAIN: So basically what you're
23 saying is the community asked you to restrict your
24 hours from a tighter restriction than what you'd
25 normally be allowed to be open.

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1 MR. BORTNICK: No, absolutely not. They
2 asked us to just when the store closes that we don't
3 keep the lot open. That's when the store is open.

4 MEMBER ZAIDAIN: So the hours of your
5 closing at 9:00 p.m. Monday through Saturday was your
6 open policy.

7 MR. BORTNICK: Right.

8 MEMBER ZAIDAIN: But they asked you to
9 codify that in this order.

10 MR. BORTNICK: Right. We probably didn't
11 just pick up on this. We do stay open until 10:00
12 p.m. right before holidays because you're allowed to
13 by the ABC laws.

14 MEMBER ZAIDAIN: Okay, but as condition 9
15 -- I'm sorry. Did we change condition 9 to reflect
16 that?

17 CHAIRMAN GRIFFIS: No, we didn't make any
18 changes to condition 9, but you raise a very good
19 point of how many jurisdictions are there for hours of
20 operation.

21 MEMBER ZAIDAIN: That was my question.

22 CHAIRMAN GRIFFIS: Are you proposing to
23 take that out of a Zoning issue?

24 MEMBER ZAIDAIN: I was trying to get to
25 what his discussions with the community were because

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1 I found it to be somewhat interesting. If they are
2 telling him that they want his parking lot and his
3 store shut down at 9:00 p.m., did they come back to
4 him later on and say "Hey, why don't you let us use
5 your parking lot at 9:00 p.m.?"

6 CHAIRMAN GRIFFIS: The way I read
7 condition 9 and not having been there, the pertinent
8 point was obviously the gate not being closed down.
9 The first sentence says "It will be closed when the
10 operation is closed" and then they list the hours of
11 operation almost as if it's the requirement of when
12 that's when the gate closes and opens.

13 MEMBER ZAIDAIN: That's the way I read it.

14 CHAIRMAN GRIFFIS: I'm wondering though
15 and now the way it's written and all that, that
16 actually is defining the hours of operation.

17 MEMBER ZAIDAIN: Right and he's saying.
18 Tell me if I'm wrong about what your understanding.

19 MR. BORTNICK: Go ahead.

20 MEMBER ZAIDAIN: I think he says that his
21 understanding is this is a reflection of the law and
22 I guess under ABC rules you can stay open an hour
23 longer around the holidays. That may be the case but
24 if this provision stays what it is, you'd be in
25 violation of the order if you do that.

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1 CHAIRMAN GRIFFIS: That's right.

2 MR. BORTNICK: So I would like to take
3 this out. I would also like to point out that in the
4 District I don't believe you can make deliveries
5 before 7:00 a.m.

6 CHAIRMAN GRIFFIS: Right.

7 MR. BORTNICK: And trash pickups. It says
8 Monday through Saturday and between 9:00 a.m. and 6:00
9 p.m.

10 CHAIRMAN GRIFFIS: 9:00 a.m. and 3:00 p.m.
11 on Sunday.

12 MR. BORTNICK: 9:00 a.m. and 6:00 p.m. on
13 Sunday.

14 MEMBER ZAIDAIN: Well, I want to keep
15 delivery separate. I'm just talking about your
16 general hours of your operation. Delivery is a whole
17 other animal.

18 MR. BORTNICK: Well, I was still reading
19 No. 9 about the hours of operation.

20 MEMBER ZAIDAIN: Okay. Yes, because I
21 think he's started to come in.

22 CHAIRMAN GRIFFIS: I'm sorry. I did get
23 confused here.

24 MEMBER ZAIDAIN: Because there's nothing
25 in the order talking about deliveries.

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1 CHAIRMAN GRIFFIS: Okay.

2 MR. BORTNICK: That was No. 10.

3 MEMBER MILLER: Can I ask a question?

4 MEMBER ZAIDAIN: I'm sorry.

5 MEMBER MILLER: Would the Applicant be
6 okay with the first sentence in No. 9 but not the
7 second sentence?

8 MR. BORTNICK: Absolutely.

9 MEMBER MILLER: Because I think that's
10 what we're getting at.

11 CHAIRMAN GRIFFIS: Right. That's where
12 we're going.

13 MR. BORTNICK: I think that was a great
14 pickup by the Chairman.

15 MEMBER ZAIDAIN: Just to make sure, in
16 terms of your conversation with the community, did I
17 depict that correctly in the sense that they limited
18 your business but then they wanted to use your lot
19 after they limited your business?

20 MR. BORTNICK: No. The second part of
21 your statement is true. They did want to come back
22 and use our parking lot for the Avalon when they
23 reopened which I did find quite interesting.

24 MEMBER ZAIDAIN: After they told you that
25 they didn't want you --

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1 MR. BORTNICK: After they told us. They
2 basically wanted us when the store was closed they
3 wanted the parking lot closed, but they did not say
4 "You're going to open from 9:00 a.m. on Sunday morning
5 until 6:00 p.m."

6 MEMBER ZAIDAIN: Okay.

7 MR. BORTNICK: They basically just did not
8 want the parking lot open all night long.

9 MEMBER ZAIDAIN: Unless they were going to
10 use it.

11 MR. BORTNICK: That's correct.

12 MR. BORTNICK: I don't want to belabor the
13 point. That's what it is. I got what I wanted so
14 thank you.

15 CHAIRMAN GRIFFIS: I don't want to
16 mischaracterize the community's involvement. At least
17 when we talk about the community, I'm talking about
18 the ANC, the agency that we interact with.

19 CHAIRMAN GRIFFIS: Right.

20 MR. McCANTS: The ANC's interest in this
21 was just to ensure that there was no undue noise and
22 other kinds of distracting elements after these
23 various hours that's listed here. That's what their
24 concern was.

25 CHAIRMAN GRIFFIS: Right. Okay. We're

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1 making a lot bigger issue of importance out of a small
2 piece that we're just trying to figure out without the
3 representation and without having been through the
4 last of what the context was and what the concerns
5 were. Yes, Ms. Miller.

6 MEMBER MILLER: We don't have anybody here
7 from the community to testify on this. So we'll just
8 have to take this with a grain of salt, but when
9 you're talking about "they" were you meaning that
10 "they," the ANC, wanted the community to be able to
11 use the parking lot when the Avalon was opening or
12 not? Or did you mean some members of the community
13 did and some members don't want it open or what?

14 MR. McCANTS: The ANC did not and never
15 asked that they use the parking lot after hours. That
16 was never their intent.

17 MEMBER MILLER: Okay. I have a question
18 on a different condition which is No. 23 which may be
19 going out. The last sentence says "The Applicant
20 shall take and maintain minutes of the quarterly
21 meetings and submit those minutes upon filing for
22 continuance of special exception." I gather that's
23 what this is. I don't recall seeing any minutes in
24 the record. What's the story with that?

25 MR. BORTNICK: Okay. The story with that

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1 is after 1998 I met with an ANC rep. I'd go down to
2 the store and we'd walk the property and I did make
3 some personal minutes for our file and I believe I did
4 send a copy over to the ANC. Over the course of the
5 last three years, I called and said "Would you all
6 like to have a meeting?" They were supposed to call
7 and they said "There's no reason to meet. There are
8 not problems."

9 So we haven't had a meeting in a number of
10 years. We have a good working relationship. If
11 there's a problem, they either go in and talk to my
12 store manager or they pick the phone up and they call
13 me or my partner. So there aren't any minutes to show
14 you.

15 MEMBER MILLER: Okay. Thank you.

16 CHAIRMAN GRIFFIS: Good. Any other
17 questions of the Board at this time? Let's go to the
18 OP's report.

19 MR. MOORE: Good afternoon, Mr. Chairman
20 and members of the Board. I'm John Moore, OP. The OP
21 is standing in support of the application. There are
22 a couple of questions that I recommend for the Board.

23 CHAIRMAN GRIFFIS: Good.

24 MR. MOORE: Please take a look at the DDOT
25 report.

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1 CHAIRMAN GRIFFIS: Yes.

2 MR. MOORE: The OP toured the site with
3 DDOT and the manager of MacGruder's. The things
4 reflected in the DDOT report I think you should
5 consider. If you look at the bottom of page three in
6 the OP report, there's a photograph.

7 MR. McCANTS: Excuse me.

8 CHAIRMAN GRIFFIS: Yes.

9 MR. McCANTS: We never got a copy of that
10 report. Do you have an extra copy?

11 CHAIRMAN GRIFFIS: Do you have the DDOT's
12 report?

13 MR. McCANTS: No, I don't have this one.

14 CHAIRMAN GRIFFIS: Is that the one you
15 don't have?

16 MR. McCANTS: Yes, or OP report.

17 CHAIRMAN GRIFFIS: You don't have the OP
18 report either.

19 MR. McCANTS: No.

20 MR. MOORE: He can have mine.

21 CHAIRMAN GRIFFIS: Those were submitted
22 timely in the record. It's Exhibit No. 25 and then
23 Exhibit No. 24 is DDOT. They've been in the record.

24 MR. MOORE: I'll be glad to give you this
25 copy once I've made a couple of points here.

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1 CHAIRMAN GRIFFIS: Okay.

2 MR. MOORE: Again, Mr. Chair, if you look
3 at the photograph on the bottom of page three, this
4 shows the alley regarding the bumper stoppers.

5 CHAIRMAN GRIFFIS: Yes.

6 MR. MOORE: If you look, there are none.
7 We've asked the Applicant at that time if they would
8 consider putting some there because theoretically a
9 car could park there either at the front or back end.
10 The rear of the car if it went all the way up to this
11 curb is in the alley.

12 CHAIRMAN GRIFFIS: I see.

13 MR. MOORE: So we wanted the bumpers to be
14 put there to prevent cars from doing that. If you
15 look at the photograph on the top of page eight at the
16 entrance to the site, there's no sign that says
17 "Entrance." We asked them and they agreed to write
18 "Entrance" on the pavement itself. That should be in
19 the DDOT report. Your manager agreed that they would
20 do that.

21 MR. BORTNICK: Okay.

22 MR. MOORE: So I would caution in those
23 areas of things that are referenced in the DDOT report
24 that they are stating as conditions although they
25 should be picked up in 2303.

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1 CHAIRMAN GRIFFIS: Good, indeed. If
2 that's going to be difficult relative to that, let's
3 get copies of that stuff out. Does anyone have a nice
4 clean copy? That's excellent comments on that.

5 MEMBER ZAIDAIN: I had a quick question.
6 As I reading this, I was trying to envision this and
7 I'm looking at the DDOT report which you brought up.
8 To make sure I'm clear, the arrow marking on the
9 driveway off McKinley Street is needed to reinforce
10 that the vehicular exit is prohibited from that
11 driveway. That arrow would not be in the right-of-
12 way. Correct? That would be within the parking lot.

13 MR. MOORE: Within the parking lot, right.

14 MEMBER ZAIDAIN: Okay. So essentially if
15 I understand you correctly, there are three issues
16 that you brought up in OP's report and DDOT's. One is
17 the crosswalk markings between the parking lot and the
18 entrance to the store to be repainted.

19 MR. MOORE: They agreed to do that also.

20 MEMBER ZAIDAIN: I understand. Then a
21 narrow marking on the driveway off McKinley Street is
22 needed to enforce that vehicular exit from that
23 driveway and then you just mentioned the bumper
24 stoppers.

25 MR. MOORE: Yes.

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1 MEMBER ZAIDAIN: So there are really these
2 three issues have been brought up aside from the fact
3 that you recommended approval. Did I take words out
4 of your mouth?

5 MR. MOORE: There was one area that
6 Applicant couldn't control. People come east on
7 McKinley and make a left into the parking lot. One of
8 the neighbors came out and told us that it created
9 havoc there. So DDOT is going to put first a second
10 no left turn sign. There's one of the north side of
11 the block now. They are going to put one of the south
12 side to discourage people from taking a left into the
13 lot from McKinley. We told the neighbor that we'd
14 make sure that was put in there as a condition.

15 CHAIRMAN GRIFFIS: Okay.

16 MR. MOORE: So that will be changing in 30
17 days.

18 CHAIRMAN GRIFFIS: Good. Mr. Moore, do
19 you have any comments on some of what you've heard
20 today with the Board running through conditions
21 outside of those you've already mentioned? Basically
22 you're saying maintain the bumper stop condition which
23 is in there already. Any of the others?

24 MR. MOORE: To be appropriate and
25 diplomatic at the same time, I would recommend as you

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1 said that the Applicant adhere strictly to the
2 conditions of 2303 because in many cases, they did
3 meet the test as indicated in the our report, but just
4 marginally.

5 CHAIRMAN GRIFFIS: I see.

6 MR. MOORE: So I think they should
7 definitely look at 2303 instead.

8 CHAIRMAN GRIFFIS: Okay. Thank you.

9 COMMISSIONER HOOD: Mr. Chairman.

10 CHAIRMAN GRIFFIS: Yes.

11 COMMISSIONER HOOD: I wanted to ask Mr.
12 Moore also. Do you have a comment on what the
13 Applicant is asking for? He's obviously negotiated or
14 what was recommended was five years and he just stated
15 that he wouldn't mind having ten. Do you see any
16 problems?

17 MR. MOORE: We took that under
18 consideration and as I just indicated because the
19 Applicant met the conditions but not greatly met the
20 conditions, we didn't recommend a greater period.

21 COMMISSIONER HOOD: Okay. And I also just
22 wanted to thank you for your report. I think the
23 pictures really add to the report and give me some
24 insights on actually what's going on. Thank you.

25 CHAIRMAN GRIFFIS: Indeed. Ms. Miller.

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1 MEMBER MILLER: I just want a
2 clarification. Did you say they met the conditions
3 but marginally?

4 MR. MOORE: Yes.

5 MEMBER MILLER: Can you just elaborate a
6 little bit more on that?

7 CHAIRMAN GRIFFIS: He was just saying it
8 wasn't as good as it could be.

9 MR. MOORE: Some of the areas mentioned
10 there are ruts which were not all in the alley. Again
11 if you look at the photograph on page three, you see
12 where there's a big scar on the parking lot that's
13 been repaired. The lot should have been done. You
14 have several areas on the lot where they have actually
15 taken care of where there was a divot or something
16 which is meeting the standards but minimally. I guess
17 I would want to take another look at it in shorter
18 timeframe than ten years because that's not going to
19 get any better. But again if they took care of what's
20 under 2303, there would be no problems.

21 CHAIRMAN GRIFFIS: Understood. Are there
22 any other questions for OP? Does the Applicant have
23 any cross examination of the OP? Any questions?

24 MR. McCANTS: No questions.

25 CHAIRMAN GRIFFIS: Okay. Good. Thank

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1 you. That does take care of the DDOT report also. I
2 don't have any other notes of attendant government
3 reports on this application. Let's go to as we've
4 talked to now the extensive of the ANC 34-G report
5 which is Exhibit No. 22. They had listed in the
6 proposed changes to conditions and also enumerated
7 their support of this and this was appropriately and
8 timely filed. Is that correct? We're all set there.
9 Good.

10 That's all the submissions I have
11 regarding this application. Of course it goes without
12 saying that there was a previous order with the
13 conditions which we've been going to is in the record.
14 Let's go to any closing remarks.

15 MR. McCANTS: Mr. Chairman, we simply ask
16 the Board to grant the application with the
17 modifications as indicated here for a period of ten
18 years.

19 CHAIRMAN GRIFFIS: I see. Okay. Two
20 choices, Board. Let me have an indication whether you
21 want to proceed today or we can set this for decision
22 making next week. What we can do is actually have the
23 proposed conditions or keep the record open for
24 proposed conditions from the Applicant. I think we're
25 going to need additional time to deliberate and craft

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1 all these conditions. It would be wise just to set
2 this for a decision on Tuesday, if that's amenable or
3 I'm open if we want to try and fly through this right
4 now.

5 COMMISSIONER HOOD: The only issue I have,
6 Mr. Chairman, if we would move right now is this time
7 issue.

8 CHAIRMAN GRIFFIS: Okay.

9 COMMISSIONER HOOD: I would right now like
10 to see it at five years and remain five years.

11 CHAIRMAN GRIFFIS: Okay.

12 COMMISSIONER HOOD: First of all, they
13 brought it up earlier and why I understand they may
14 still be compliance, but I think it needs to be
15 revisited a lot sooner sometimes than later. That's
16 why I would be ready to proceed or if not. Whatever
17 is the Board's pleasure.

18 CHAIRMAN GRIFFIS: Any other comments or
19 questions?

20 MEMBER ZAIDAIN: I'm in a similar
21 position, Mr. Hood. I'm in the same position with him
22 on the timing and then as long as we address the
23 issues raised DCOP and DDOT, I would be ready to
24 proceed.

25 CHAIRMAN GRIFFIS: You want to move today?

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1 Okay. I'm fine. Let's entertain a motion if the
2 Board is so inclined to do it.

3 MEMBER ZAIDAIN: Can we move under a
4 motion and then have the conditions elaborated after
5 the motion?

6 CHAIRMAN GRIFFIS: Yes.

7 MEMBER ZAIDAIN: Okay. Then I'll move to
8 approve Application No. 17069 pursuant to 11 DCMR §
9 3104.1 for a special exception to allow an accessory
10 parking lot which was last approved by BZA Order No.
11 16233 in July 1998 under Section 214 at premises 3831
12 McKinley Street, N.W, with conditions as to be
13 discussed by the Board.

14 VICE CHAIR ETHERLY: Second it.

15 CHAIRMAN GRIFFIS: Thank you. Let's run
16 through the conditions and attend to your motion, Mr.
17 Zaidain. First of all, condition one would be for
18 approval of five years. Is that correct?

19 MEMBER ZAIDAIN: Correct.

20 CHAIRMAN GRIFFIS: Condition No. 2 would
21 be a parking attendant from MacGruder's shall be
22 present on the lot during all hours of operation. Is
23 that correct? That's current Condition No. 3.

24 MEMBER ZAIDAIN: Hang on just one second.

25 MEMBER MILLER: Is it all right if we

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1 clarify that the current Condition No. 2 would now be
2 out for deliberation purposes?

3 CHAIRMAN GRIFFIS: Exactly.

4 MEMBER MILLER: What I think what we're
5 doing is working with that order.

6 CHAIRMAN GRIFFIS: That's correct. Two is
7 to be removed so that Condition No. 2 in your motion,
8 Mr. Zaidain, is actually current Condition No. 3 which
9 is that a parking attendant would be present in the
10 lot during all hours.

11 COMMISSIONER HOOD: The core hours which
12 is what the ANC had asked for.

13 CHAIRMAN GRIFFIS: Okay. I'm sorry. The
14 core hours.

15 COMMISSIONER HOOD: Do we define core
16 hours or can we say just core hours in general? Are
17 the core hours 10:00 a.m. to 6:00 p.m.?

18 MR. BORTNICK: That's correct.

19 COMMISSIONER HOOD: Okay.

20 MEMBER MILLER: Do you want to put that in
21 or do we want to leave that for flexibility?

22 CHAIRMAN GRIFFIS: No, core hours don't
23 mean anything a year from now. I think we ought to
24 have a time in there.

25 MEMBER MILLER: Okay. So that was 10:00

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1 a.m. to 6:00 p.m.?

2 COMMISSIONER HOOD: 10:00 a.m. to 6:00
3 p.m.

4 MEMBER ZAIDAIN: Do you want to continue,
5 Mr. Chair?

6 CHAIRMAN GRIFFIS: Sure. I'll help you
7 out. There were some questions about removal of
8 Condition 4 which seems to now give a job description
9 of what the parking attendant is supposed to do. So
10 it's been proposed for that to be removed.

11 MEMBER ZAIDAIN: I would agree, Mr. Chair.

12 CHAIRMAN GRIFFIS: Okay.

13 MEMBER MILLER: Sorry, but I thought the
14 first sentence might be in. That there would be a
15 parking attendant to monitor the cars but the
16 description following would be out. It gets into
17 monitoring traffic beyond the parking lot almost.

18 CHAIRMAN GRIFFIS: Okay. If that's the
19 case, then that should be added to Condition No. 2.
20 We don't need two conditions saying that the parking
21 attendant needs to be there and they need to monitor
22 an entry of cars as a second condition. Would you
23 agree?

24 MEMBER MILLER: Right. Yes.

25 CHAIRMAN GRIFFIS: So I think we could

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1 just -- I don't know.

2 COMMISSIONER HOOD: Are we taking the
3 first line of Number 4?

4 CHAIRMAN GRIFFIS: Yes. The first line
5 No. 4 will go into the condition above it.

6 COMMISSIONER HOOD: I don't see the
7 significance.

8 CHAIRMAN GRIFFIS: Me, either.

9 MEMBER ZAIDAIN: It clarifies what the
10 attendant is doing. It's fine. Let's move on.

11 CHAIRMAN GRIFFIS: We can go down.
12 Indeed.

13 MEMBER ZAIDAIN: No. 5.

14 CHAIRMAN GRIFFIS: No. 5, "Parking on the
15 subject lot shall be exclusive for the patrons of
16 MacGruder's supermarket." I think that can just be
17 maintained. That's the intent.

18 MEMBER ZAIDAIN: Okay.

19 CHAIRMAN GRIFFIS: Six was going to be --

20 MEMBER MILLER: I'm sorry. You're just
21 going a little fast for me. Maintained. Do you mean
22 the whole No. 5 or just up to the supermarket? I just
23 want to be clear what you're doing on No. 5. "Parking
24 on the subject lot shall be exclusive for the patrons
25 of MacGruder's supermarket." We didn't really talk

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1 about what is it except on Sundays. "Only five spaces
2 shall be reserved for employees of MacGruder's."

3 CHAIRMAN GRIFFIS: Let's just add it's
4 "for the patrons and employees." I don't know why
5 we're going to micro-manage all this stuff. That's
6 three. Condition No. 6 was going to be --

7 VICE CHAIR ETHERLY: I believe you were
8 suggesting, Mr. Chair, the elimination of the first
9 sentence of current Condition 6.

10 CHAIRMAN GRIFFIS: That's right. We'll
11 pick up former Condition No. 6 saying "Policing of the
12 lot shall include the retrieval of the shopping carts
13 in the neighborhood streets and removal of debris in
14 alleys and areas immediately adjacent to the lot."
15 There it is.

16 MR. BORTNICK: Mr. Chairman.

17 CHAIRMAN GRIFFIS: Actually, I can't have
18 you talk because we're actually under a motion and
19 deliberating. Ms. Miller.

20 MEMBER MILLER: I'm sorry. I just want to
21 discuss No. 5 in relation to No. 9. We really didn't
22 talk about No. 5, "Parking on the subject lot shall be
23 exclusively for patrons and employees of MacGruder's"
24 which means that they never can let anybody else park
25 there for any other purpose. I don't know if that's

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1 really necessary for any adverse impacts on the
2 community. I guess we've touched a little bit upon
3 Avalon parking and that was never resolved. I'm not
4 sure why we should do that.

5 CHAIRMAN GRIFFIS: Well, it does find the
6 face of good business practice if they are only
7 allowed to use it when the store is open. Right? I
8 can imagine that the store is not going to allow
9 anyone else to park there unless they are shopping in
10 their store because why would they? I mean if a
11 customer comes, they are going to want to have a place
12 for them to park. Okay. We'll break our own rules.

13 MR. BORTNICK: I just wanted to say that
14 there's a number of shops. We don't stand alone.
15 I've personally asked people not to leave the lot and
16 go to the paint store or the cleaners or the bank.
17 You don't want to hear what the customers have said.
18 "I've been shopping here for 30 years and you don't
19 tell me that I can't walk to your..." It really is
20 silly.

21 CHAIRMAN GRIFFIS: Right. Give them a
22 copy of our order. I understand. That's your point.

23 MEMBER MILLER: That is part of my point.
24 It's part of the community and I guess we haven't
25 heard testimony as to why that's important to limit.

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1 CHAIRMAN GRIFFIS: Here's what I propose.
2 We have 23 of these things to get through. We have a
3 case that's starting at 1:00 p.m. We need to have
4 lunch. We also need to prepare for our afternoon.
5 Mr. Zaidain, I'm going to ask if you wouldn't mind
6 tabling your motion at this time in which case we
7 could pick it up under special public meeting on
8 Tuesday.

9 MEMBER ZAIDAIN: Yes. That seems good.
10 I'm still in support of the application. I think we
11 need some additional time and possibly some additional
12 information depending on how the Board feels on this
13 application.

14 CHAIRMAN GRIFFIS: Not information. We've
15 closed the record right now.

16 MEMBER ZAIDAIN: Okay.

17 CHAIRMAN GRIFFIS: We need additional time
18 to deliberate.

19 MEMBER ZAIDAIN: Okay. We should set it
20 for decision making. Maybe I made that motion in a
21 hasty fashion.

22 COMMISSIONER HOOD: Mr. Chairman,
23 unfortunately I will not be here next Tuesday, but I
24 won't be able to see the addition to the crafting.
25 I'm just trying to see how I can have my involvement

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1 because I'm definitely supportive of the application
2 -

3 CHAIRMAN GRIFFIS: We will work on getting
4 your involvement.

5 COMMISSIONER HOOD: -- with the exception
6 of the time. We can craft the additions.

7 CHAIRMAN GRIFFIS: Exception of the time,
8 do you mean the time period of the order?

9 COMMISSIONER HOOD: What Applicant
10 proposed.

11 CHAIRMAN GRIFFIS: Well, the motion before
12 us was for five years.

13 COMMISSIONER HOOD: Okay.

14 CHAIRMAN GRIFFIS: We'll make sure that if
15 you're not in attendance, we'll cover that. Not to
16 worry.

17 COMMISSIONER HOOD: Okay. Good.

18 CHAIRMAN GRIFFIS: Any questions then?
19 I'm sorry to do this. It is our difficulty because
20 our morning ran so far over.

21 MS. MONROE: Mr. Chairman.

22 CHAIRMAN GRIFFIS: Yes, Ms. Monroe.

23 MS. MONROE: Do you want proposed
24 conditions from the Applicant? I just think it might
25 be a good idea because they are more aware of the

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1 situation.

2 CHAIRMAN GRIFFIS: Yes. Indeed. We'll
3 leave the record open for proposed conditions that you
4 can provide us. Those need to be in by close of
5 business tomorrow or Thursday we can give you.
6 Otherwise we will not see them. I'm trying to do this
7 as quickly as possible so we're setting it for a
8 special public meeting next Tuesday. The Board
9 receives things out of the Office of Zoning on
10 Wednesdays so if you can get it in tomorrow. If not,
11 if you could give an indication that it will be in the
12 Office of Zoning by 3:00 p.m. which is what we set now
13 for the deadline, please update them on when it's
14 coming in. Then we'll be able to deal with it at that
15 point.

16 MR. McCANTS: All right. We'll have it in
17 by Thursday.

18 CHAIRMAN GRIFFIS: Okay.

19 MEMBER ZAIDAIN: And, Mr. Chair, just to
20 make things clean. This is a procedural issue, but I
21 think in order for us to accept additional information
22 I need to withdraw my motion. So I'm withdrawing it.

23 CHAIRMAN GRIFFIS: Is that correct?

24 MEMBER ZAIDAIN: Yes, I'll withdraw it.

25 CHAIRMAN GRIFFIS: Okay. So withdraw the

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1 motion.

2 MR. BORTNICK: Do you need us next
3 Tuesday?

4 CHAIRMAN GRIFFIS: No, it's a public
5 meeting. There won't be any additional testimony.

6 COMMISSIONER HOOD: Mr. Chairman. Let me
7 just interrupt.

8 CHAIRMAN GRIFFIS: Yes.

9 COMMISSIONER HOOD: If they are going to
10 craft some conditions, I think because we think it's
11 a straight through case and we're trying to get
12 through with it, but the ANC would also have to have
13 an opportunity to look at those conditions. Instead
14 of us rushing it, why don't we move it to your
15 decision meeting on December 2nd? When is the next
16 decision meeting?

17 CHAIRMAN GRIFFIS: The 4th.

18 COMMISSIONER HOOD: I think that way we
19 would be covered all the way around.

20 MS. BAILEY: It's December 2nd.

21 CHAIRMAN GRIFFIS: Okay.

22 COMMISSIONER HOOD: Not to mention I will
23 be here.

24 CHAIRMAN GRIFFIS: When does the ANC meet?

25 MEMBER MILLER: They can have a special

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1 meeting.

2 CHAIRMAN GRIFFIS: Okay.

3 COMMISSIONER HOOD: That ANC having served
4 with Ms. Renshaw meet twice a month, don't they?

5 CHAIRMAN GRIFFIS: Yes.

6 COMMISSIONER HOOD: They should be
7 applauded.

8 CHAIRMAN GRIFFIS: So be it. We'll leave
9 the record open for the proposed conditions for the
10 Applicant and the ANC. I guess the Board will make an
11 extra effort on its part based on the scheduling times
12 that we've had this morning to notify the ANC that the
13 record is left open for them to submit in the proposed
14 course. You ought to check in with the Office of
15 Zoning if the ANC doesn't send them to you. Yes.

16 MR. BORTNICK: Mr. Chairman, I would like
17 to just point out that I have established a very good
18 relationship with the ANC over the past years. I
19 would just assume to go with the five items that they
20 wanted that they agreed to remove. I don't want them
21 thinking that I came down here and pulled an end-
22 around. You and some other folks --

23 CHAIRMAN GRIFFIS: I'm sure the ANC will
24 know who to blame. I understand your concern. I
25 think we can make that known that the Board has

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1 entertained changing some of the conditions based on
2 the fact of (1) our jurisdiction and there are things
3 in there we can't condition. As the Chairman of this
4 Board, I don't think I can have this Board adopt them
5 and continue on with a condition. (2) We were looking
6 at clarifying some of the other conditions. Ms.
7 Monroe.

8 MS. MONROE: I was going to say I think
9 you can make it clear to the ANC that some of these
10 conditions were appropriate five years ago, putting in
11 a boulder, but they are no longer appropriate and they
12 did not say anything about that. So we want to make
13 sure that everybody's on the same page and knows
14 what's going on.

15 MR. BORTNICK: Okay. I just don't want
16 them thinking I turned anything around.

17 CHAIRMAN GRIFFIS: Yes. We don't have any
18 difficulty making that part of the record. So we'll
19 make sure that the ANC is well aware of where this is
20 coming from and who started this trouble.

21 MR. BORTNICK: Okay.

22 CHAIRMAN GRIFFIS: I think they will have
23 no trouble believing that.

24 MR. BORTNICK: If I knew it would be
25 twelve minutes, I would have brought lunch for

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1 everybody.

2 CHAIRMAN GRIFFIS: Right. Exactly.

3 MS. BAILEY: Mr. Chairman. Excuse me.

4 CHAIRMAN GRIFFIS: Yes.

5 MS. BAILEY: Just so that I can be clear.

6 We're having a decision on December 2nd at your
7 meeting. Is that correct?

8 CHAIRMAN GRIFFIS: Yes.

9 MS. BAILEY: And we're asking for the ANC
10 and the Applicant to respond. When are those
11 responses to be filed?

12 CHAIRMAN GRIFFIS: Now we can move it out
13 and it can be later, frankly at the last minute
14 whenever that is for you. Could it be the Wednesday
15 before?

16 MS. BAILEY: The Wednesday before, that's
17 the day before Thanksgiving. That may not be so
18 good. How about the Monday?

19 CHAIRMAN GRIFFIS: Okay.

20 MS. BAILEY: The 24th.

21 MR. McCANTS: When the submissions should
22 be filed.

23 MS. BAILEY: Submissions.

24 CHAIRMAN GRIFFIS: Yes, that's next Monday
25 so you bought two days.

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1 MR. McCANTS: Okay.

2 CHAIRMAN GRIFFIS: All right. Is that
3 clear?

4 MS. BAILEY: Are we going to hold the ANC
5 to that as well?

6 CHAIRMAN GRIFFIS: I don't know how we do
7 it.

8 COMMISSIONER HOOD: I think they meet the
9 4th. I don't want to sound like an expert on the ANC,
10 but I think they meet the second and fourth Mondays of
11 the month.

12 CHAIRMAN GRIFFIS: Let's see what we can
13 do. Up until the first, we'll take it from the ANC.

14 MS. BAILEY: Okay.

15 CHAIRMAN GRIFFIS: Thank you. We
16 appreciate that. Okay. Is there any other questions,
17 clarifications on that? Very well. Anything else for
18 the morning session, Ms. Bailey?

19 MS. BAILEY: No, Mr. Chairman.

20 CHAIRMAN GRIFFIS: Excellent. Then let's
21 adjourn the morning session of 18 November 2003.
22 Thank you very much. Off the record.

23 (Whereupon, at 12:48 p.m., the above-
24 entitled matter recessed to reconvene at
25 2:16 p.m. the same day.)

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2:16 p.m.

CHAIRMAN GRIFFIS: On the record. Very well. As we have come back to a bit of normalcy, let me update what we're going to do today in terms of schedule. We have the special public meeting set for 1:00 p.m. Not boring you with all the details, we are going to move that to the 25th of November which will be at 9:00 p.m. to decide a motion on the appeal which is Case No. 17054. As we have two appeals in the afternoon, I think we need to get right into those and move ahead with it.

The other is also if I'm correct set for a scheduled hearing depending on which way the motion goes on January 27th. So we're not in any way impacting that continuing schedule. So I think that's probably the most appropriate thing to do at that time.

With that, I can call then to order the afternoon session of 18 November 2003. This is of course the Board of Zoning Adjustments of the District of Columbia. My name is Geoff Griffis, Chairperson. Joining me today is Mr. Etherly, Vice Chair, Ms. Miller. Also here as Mayoral appointee representing the Zoning Commission is Mr. Hood and representing the

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1 National Capital Planning Commission is Mr. Zaidain.
2 Copies of today's hearing agenda are available to you.
3 They are located at the door where you entered into
4 the hearing room.

5 Let me run through a few things which you
6 all may be familiar with but should all be aware of.
7 All cases before the Board Of Zoning Adjustment are of
8 course public, but they are all recorded also.
9 Therefore I ask several things of you. First of all,
10 if everyone would turn off their cell phones and
11 beepers at this time so we don't disrupt the
12 proceeding.

13 Secondly, when you come forward to speak
14 to the Board, you will need to fill out two witness
15 cards. Witness cards are available at the table where
16 you entered into the hearing room and there are some
17 in front at the witness table. Those two cards go to
18 the recorder who sits to our right. Also when
19 addressing the Board once, the first time you do,
20 you're going to need to provide your name and your
21 address for the record so that the recorder knows who
22 to give credit to all the very important substantive
23 things you will tell us.

24 The order of procedure today for the
25 appeals of which we have two today. First, we have

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1 statements and then witnesses of the Appellant.
2 Second is the Zoning Administrator as the Government
3 official's case. Third would be the owner or the
4 lessee or the operator involved. Fourth would be the
5 ANC within which the property is located. Fifth would
6 be the intervenor's case and sixth would be rebuttal
7 and closing statements by the Appellant.

8 It should be absolutely clear this is
9 different than a special exception or variance meaning
10 there are not persons that testimony either in support
11 or in opposition. That will be clear in a few of the
12 specifics of the cases as we go through it. I will
13 make a point of addressing that. Cross examination of
14 course of witnesses is allowable by those that are
15 participating as parties in a case or intervenors.
16 The ANC as I stated within which the property is
17 located is automatically a party and a participant in
18 the case.

19 The record of all our cases will be closed
20 at the conclusion of the public hearing except for any
21 material that is requested by the Board. That will be
22 very specific material that would be requested and it
23 will be very specific on when that information is to
24 be provided into the Office of Zoning.

25 Of course, it should go without saying

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1 that after that is received, no other information is
2 accepted into the record. That's important because of
3 course the Board must deliberate solely on the record
4 that is created before us. It is very important to
5 pay attention to submissions and what is required
6 while the record is still opened.

7 The Sunshine Act requires that this Board
8 conduct all hearings in the open and before the
9 public. We can however enter into executive session
10 according to our own procedures in the Sunshine Act.
11 That would be for purposes of reviewing the record or
12 deliberating on a case. As I've stated as the record
13 is created before us, all our deliberations and the
14 decision on each case has to be based on that record.
15 Therefore we ask that people present today not engage
16 Board members in any conversation which may give the
17 appearance of gaining additional information outside
18 of the record that is created.

19 I consider any preliminary matters at this
20 time. Preliminary matters are those which relate to
21 whether we should as the Board hear a case today and
22 for any number of reasons if there are motions for
23 continuance or withdrawal or whether proper and
24 adequate notice has been provided or anything else
25 that you might think may stop us from proceeding this

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1 afternoon. If you have a preliminary matter, now
2 would be the time to raise it. You can give an
3 indication to the Board by just coming forward and
4 having a seat. I will say a very good afternoon to
5 Ms. Bailey and Mr. Moy from the Office of Zoning and
6 ask if there are any preliminary matters that they are
7 aware of for the Board at this time.

8 MS. BAILEY: Mr. Chairman, good afternoon.
9 No, sir, there are not.

10 CHAIRMAN GRIFFIS: Very well. Yes?

11 MS. GESALTI GILBERT: Yes, Laura Gesalti
12 Gilbert, representing the Department of Consumer and
13 Regulatory Affairs ("DCRA") and the Zoning
14 Administrator. I would just like to make mention of
15 one item since you stated that the Appellant would put
16 on the Appellant's case first in terms of the order of
17 the proceedings.

18 In my prehearing statement to the Board
19 that was filed last week, I had made a recommendation
20 to the Board beginning on page 14 and continuing on
21 page 15. The gist of my suggestion was that - I
22 purposely didn't do it in a motion because I thought
23 that then we'd be arguing a motion for hours and I
24 didn't want to do that - essentially there seem to be
25 several legal issues here which really need to be

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1 determined and that there's really no need to get into
2 testimony on a couple of these issues. Once those
3 legal issues have been determined, then of course
4 depending on the outcome or the Board's decision on
5 the legal issues, then the testimony would be
6 appropriate.

7 CHAIRMAN GRIFFIS: All right.

8 MS. GESALTI GILBERT: I just wanted to
9 reiterate that point because that would definitely be
10 in the interest of judicial economy and order and time
11 and so on.

12 CHAIRMAN GRIFFIS: Good. Are there any
13 other preliminary matters that people are aware of in
14 the second case in the afternoon, the Appeal of
15 Advisory Neighborhood Commission 2E, 17034? Any
16 other? Okay. Very well then. I'm going to call the
17 case and then we're going to talk about this within
18 the case hearing.

19 MS. BAILEY: Mr. Chairman, are we calling
20 the Stanton Park Neighborhood Association case?

21 CHAIRMAN GRIFFIS: Isn't that first on the
22 schedule?

23 MS. BAILEY: Yes, sir, but I heard you
24 talk about the second case in the afternoon.

25 CHAIRMAN GRIFFIS: Right. I just wanted

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1 to see if there are any other preliminary matters that
2 we needed to take up before we call the case.

3 MS. BAILEY: Okay. That is Appeal 17043
4 of the Stanton Park Neighborhood Association pursuant
5 to 11 DCMR §§ 3100 and 3101 from the administrative
6 decision of the Zoning Administrator in the issuance
7 of Certificate of Occupancy ("C of O") Permit Nos.
8 C051289 and C051290 to the Capitol Hill Healthcare
9 Group dated March 26, 2003 for Community Residents
10 Facility and Hospital. That's 60 beds and 60 parking
11 spaces respectively. Appellant alleges that the
12 Zoning Administrator erred by issuing the Occupancy
13 Permits where the proposed use is in violation of the
14 parking requirements. The subject premises are
15 located at 700 Constitution Avenue, N.E. It's also
16 located in Square 895 on Lot 76 and it is also located
17 in the R-5-D District. All those persons wishing to
18 testimony today would you please stand to take the
19 oath?

20 (Witnesses sworn.)

21 MS. BAILEY: Mr. Chairman, there are two
22 requests for intervenor status in this case.

23 CHAIRMAN GRIFFIS: Indeed. First, are you
24 including the ANC?

25 MS. BAILEY: There's a request from ANC 6-

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1 A and also from the St. James Parish, Fr. Richard E.
2 Downing.

3 CHAIRMAN GRIFFIS: Right. Ms. Monroe, we
4 don't require an application for status in an appeal
5 from the ANC, do we?

6 MS. MONROE: Ask me that again. What did
7 you say?

8 MEMBER MILLER: If I can comment on this,
9 Mr. Chairman.

10 CHAIRMAN GRIFFIS: Of course.

11 MEMBER MILLER: There are two ANCs
12 involved in this case.

13 CHAIRMAN GRIFFIS: Right.

14 MEMBER MILLER: One is located within
15 where the property is located. The other ANC which is
16 requesting party status is across the street from the
17 property.

18 CHAIRMAN GRIFFIS: So we have a borderline
19 ANC. Okay. Any questions or clarification of the
20 second from the Board?

21 MEMBER MILLER: There's case law that
22 supports giving great weight to an ANC that's located
23 across the street from an effected property. I don't
24 think there should be a question whether or not they
25 get party status. That's my position.

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1 CHAIRMAN GRIFFIS: Okay. Others?

2 COMMISSIONER HOOD: I would just concur
3 with my colleague, Mr. Chairman.

4 CHAIRMAN GRIFFIS: So the belief of the
5 Board is that somehow the two ANCs would represent
6 different views or rather the folks across the street
7 wouldn't be represented in their view in the other
8 ANC.

9 MEMBER MILLER: I don't think one ANC
10 would represent the interests of another ANC. I think
11 that the communities of both ANCs are affected and
12 both should participate.

13 COMMISSIONER HOOD: I would also say that
14 while I'm not that versed on the appeal process but in
15 the past when there's an abutting ANC and they've
16 filed to participate in the past, I know the
17 Commission and I believe the Board also has ruled
18 favorably and also given them status.

19 CHAIRMAN GRIFFIS: I think in terms of the
20 Board's proceedings, you'd probably find more contrary
21 to that, but I understand your point. Okay. Anything
22 else from the Board?

23 COMMISSIONER HOOD: If you notice, Mr.
24 Chairman, I preface myself by saying the Commission
25 first.

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1 CHAIRMAN GRIFFIS: Indeed. I did notice.
2 Okay.

3 MEMBER ZAIDAIN: I have a question.

4 CHAIRMAN GRIFFIS: Yes, Mr. Zaidain.

5 MEMBER ZAIDAIN: I'm apologize. I'm
6 searching through my file looking for the applications
7 and I do not see them.

8 CHAIRMAN GRIFFIS: Exhibit No. 22 is the
9 ANC. It also is stated in their letter of Exhibit No.
10 23.

11 MEMBER ZAIDAIN: Okay. Well, I guess my
12 general question is this is different from a variance
13 and special exception proceeding where the standards
14 are different. My question would be to Ms. Miller.
15 I understand the case law supports it. It doesn't
16 entitle it. What's the benefit of having both ANCs
17 involved when they are more than likely going to
18 advocate the same exact position?

19 MEMBER MILLER: I don't think that's
20 obvious. I think that communities can be affected
21 depending on where they are located. Where I'm
22 drawing from is a Court of Appeals decision which I
23 think is fairly controlling. In Georgetown Residence
24 Alliance, they cited Neighbors United For a Safer
25 Community v. D.C. Board of Zoning Adjustment. They

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1 said which I think is pretty straight forward that
2 "This court held that the views of the ANC whose area
3 was directly across the street from the proposed
4 facility were entitled to great weight under Section
5 1-261. Our rationale was that the BZA's decision
6 affected both ANCs and that therefore the written
7 reports of both ANCs were entitled to great weight."

8 MEMBER ZAIDAIN: So the case law does
9 support an entitlement.

10 MEMBER MILLER: It does because of the
11 proximity.

12 CHAIRMAN GRIFFIS: Was that an appeal?

13 MEMBER MILLER: Yes. Which one? Both of
14 them?

15 CHAIRMAN GRIFFIS: The last case you just
16 cited or were they variances?

17 MEMBER MILLER: I believe it's an appeal.
18 Neighbor Groups appealed to BZA regarding issuance of
19 building permits.

20 CHAIRMAN GRIFFIS: Okay.

21 MEMBER ZAIDAIN: Well that sounds like --
22 I obviously haven't read the case law. You're much
23 more versed in that than I am. If the case law
24 supports their entitlement to being an intervenor in
25 this application, then I would support it and I would

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1 suggest that we would amend our procedures to reflect
2 that as well.

3 CHAIRMAN GRIFFIS: Is that any and all
4 ANCs as intervenors?

5 MEMBER MILLER: I think it deals with
6 proximity. If you are directly across the street.

7 CHAIRMAN GRIFFIS: I understand. And the
8 listed unique concern is parking. Okay. If there are
9 no other comments from the Board, then actually let me
10 have everyone introduce themselves that's in front of
11 us now so we know who to address.

12 MR. EDWARDS: Mr. Chairman.

13 CHAIRMAN GRIFFIS: You can sit. Just turn
14 on your microphone if you wouldn't mind.

15 MR. EDWARDS: I believe there's also a
16 request for party status from St. James Church as a
17 preliminary matter.

18 CHAIRMAN GRIFFIS: That's correct. Yes.
19 We like to deal with one thing at a time. Yes.

20 MR. RICE: Cody Rice, ANC 6-A.

21 CHAIRMAN GRIFFIS: Okay.

22 MR. EDWARDS: Monty Edwards, Stanton Park
23 Neighborhood Association.

24 CHAIRMAN GRIFFIS: And Ms. Gilbert.

25 MS. GESALTI GILBERT: Again Laura Gesalti

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1 Gilbert, DCRA.

2 MR. TUMMONDS: Paul Tummonds with the law
3 firm of Shaw Pittman on behalf of the property owner,
4 Capitol Hill Group.

5 CHAIRMAN GRIFFIS: Okay. Ms. Gilbert, do
6 you have comment?

7 MR. CREWS: Sorry. I'm Bill Crews, ANC 6-
8 C.

9 CHAIRMAN GRIFFIS: Right. Let's start.
10 Mr. Crews, do you have an opinion on granting
11 intervenor status of the ANC 6-A?

12 MR. CREWS: I do have an opinion and it
13 would be favorable.

14 CHAIRMAN GRIFFIS: So you support their
15 participation. Okay. Yes?

16 MR. EDWARDS: Stanton Park would support
17 their status as intervenor. Excellent. Ms. Gilbert.

18 MS. GESALTI GILBERT: DCRA has no
19 objection to their intervention in this case.

20 CHAIRMAN GRIFFIS: Okay. Mr. Tummonds.

21 MS. GESALTI GILBERT: We're not interested
22 in setting a big precedent for other cases.

23 CHAIRMAN GRIFFIS: Nor are we. We're
24 going to stick to this case today.

25 MS. GESALTI GILBERT: This is just for the

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1 specific circumstances of this case.

2 CHAIRMAN GRIFFIS: We've lost a lot of
3 time so let's just focus on this one.

4 MS. GESALTI GILBERT: All right.

5 CHAIRMAN GRIFFIS: Mr. Tummonds.

6 MR. TUMMONDS: We have no objection to the
7 grant of intervenor status in this case, but I do
8 think that it's important to note the issue that Mr.
9 Zaidain brought up that this is an appeal case. This
10 is not a special exception case. I notice that
11 there's a lot of material in the record that's been
12 submitted by both the Appellant and letters in the
13 record, submissions, from the various groups
14 requesting intervenor status that I think really go to
15 a special exception case. So while I don't have a
16 problem with their requesting intervenor status, it
17 needs to be discussed and maybe we'll discuss this in
18 Ms. Gilbert's motion about really what this case is
19 about and what the decision that the Board will review
20 today is.

21 CHAIRMAN GRIFFIS: That's correct. I'd
22 say to be direct. I think what I'm hearing you say is
23 what are the relevancy of all the letters that have
24 been submitted. That's as I was being indirect in my
25 opening. That's something that I will address. Okay.

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1 Board members, direction? Is there any opposition to
2 the intervenor?

3 MEMBER ZAIDAIN: Can we have a second, Mr.
4 Chairman?

5 CHAIRMAN GRIFFIS: I'm sorry. Yes.

6 MEMBER ZAIDAIN: You threw a bomb scare in
7 my day and I lose track of all my papers.

8 CHAIRMAN GRIFFIS: You kind of lose your
9 focus, don't you?

10 MEMBER ZAIDAIN: What section in the Code?
11 We talked about the difference between intervenor
12 status and party status and how the standard is
13 different. Can somebody point me real quickly to a
14 standard in the Zoning Regs?

15 MS. MONROE: Mr. Zaidain.

16 MEMBER ZAIDAIN: Yes.

17 MS. MONROE: Look at 3199 because there
18 are definitions. The ANC within which the property is
19 located is automatically a party. It lists who's a
20 party in appeals and who's a party in applications.

21 MEMBER ZAIDAIN: Okay and that points to
22 3112.15. What is the parish name again?

23 PARTICIPANT: St. James.

24 MEMBER ZAIDAIN: St. James. ANC.

25 CHAIRMAN GRIFFIS: Ms. Miller.

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1 MEMBER MILLER: Sorry. We talked about
2 case law that said if you're located across the street
3 that the ANC was entitled to participate. Now looking
4 at your party status applications, there are residents
5 of the ANC 6-A that are adjacent to the property in
6 question. Is that correct? Can you maybe elaborate
7 on that?

8 MR. RICE: Yes. The property is located
9 on Square 895 which is bounded by 8th Street N.E.
10 which is also the boundary between ANC 6-C and ANC 6-
11 A. So ANC 6-A is directly across the street from this
12 property.

13 MEMBER MILLER: And are the residents of
14 6-C and 6-A affected differently by the property?

15 MR. RICE: Well, yes. The residents of 6-
16 C live to the west of the property and the 6-A live to
17 the east. There are different land uses in either
18 direction. There are specific parking concerns that
19 are unique to the residents of both ANCs.

20 CHAIRMAN GRIFFIS: Very well. Any
21 objection? Board members, last comments. Then I'll
22 take it the consensus of the Board is we will grant
23 party status to both 6-A and 6-C. Of course in all of
24 our cases, it would nice if you would combine. We
25 obviously don't allow any sort of repetition of case

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1 presentation, cross examination or anything like that.
2 As much as you coordinate, the better off we will all
3 be and you especially. So let's take up the next four
4 requests for party status in this case. If you
5 wouldn't mind just giving your name and address for
6 the record.

7 FR. DOWNING: My name is Richard Downing.
8 I live at 222 8th Street N.E., Washington, D.C. We're
9 the only adjoining property owner on the square with
10 the properties in question.

11 CHAIRMAN GRIFFIS: Right. Indeed. Any
12 questions from the Board? If there are no questions
13 from the Board, let's move on.

14 MEMBER ZAIDAIN: I have a question. You
15 said a lot of the issues we're going to discussing
16 here with parking. You have noted that you are the
17 only adjacent property, but do you feel like the ANC
18 -- First of all, which ANC are you represented in?

19 FR. DOWNING: 6-C.

20 MEMBER ZAIDAIN: 6-C, okay. Do you feel
21 like your concerns will not be represented by the
22 ANC's position?

23 FR. DOWNING: I have absolute total regard
24 for our ANC and for its ability to represent the
25 people within its boundaries. I think we have a

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1 particular perspective that being the adjacent
2 property owners that deserves to be represented by me.

3 MEMBER ZAIDAIN: Okay. Did your
4 organization participate in the ANC deliberations and
5 whether or not they should take a position or anything
6 like that?

7 FR. DOWNING: No. In fact, the truth of
8 the matter is we didn't know that this, whatever it
9 was, an exemption or whatever the change was, had even
10 occurred until we noticed that it was difficult to
11 park.

12 MEMBER ZAIDAIN: So by that time you
13 noticed --

14 FR. DOWNING: And that's one of the
15 concerns I have.

16 MEMBER ZAIDAIN: Okay. In either way, you
17 did not proceed. What I'm getting at is if you were
18 active and participating in developing the ANC's
19 position, then the ANC should be able to reflect what
20 your position is.

21 FR. DOWNING: I see.

22 MEMBER ZAIDAIN: That was not the case.

23 FR. DOWNING: No, sir. I'm sorry. I wish
24 I had that.

25 MEMBER ZAIDAIN: Okay. I just reiterate

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1 the Chair's statement regarding numerous intervenors
2 and parties coming into this process that need to be
3 specific on what your issues are and reiterating
4 positions is not going to help us in this process.
5 However, I think you've proven your point. I
6 appreciate that. So I have no objections, Mr. Chair.

7 CHAIRMAN GRIFFIS: Okay. Any other
8 questions from the Board? Let's go down there. Does
9 the ANC have any objection?

10 MR. CREWS: No.

11 CHAIRMAN GRIFFIS: 6-C?

12 MR. RICE: No.

13 CHAIRMAN GRIFFIS: I'm going to call 6-A
14 as a party in this, but who knows what I'm going to
15 do. I'll probably just run and go on. Any objection?

16 MR. RICE: No.

17 CHAIRMAN GRIFFIS: Okay. The Appellant?

18 MR. EDWARDS: Stanton Park has no
19 objection.

20 CHAIRMAN GRIFFIS: Very well. DCRA.

21 MS. GESALTI GILBERT: We have no
22 objection.

23 CHAIRMAN GRIFFIS: Mr. Tummonds
24 representing the Capitol Hill Group.

25 MR. TUMMONDS: No objection with my caveat

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1 I mentioned before.

2 CHAIRMAN GRIFFIS: Okay. Is this for
3 total clarification the case D.C. Capitol Hill Nursing
4 Center, Capitol Hill Hospital? Are they going to be
5 represented today differently? Are you representing
6 them, Mr. Tummonds?

7 MR. TUMMONDS: I am representing both,
8 yes.

9 CHAIRMAN GRIFFIS: So the Capitol Hill
10 Group is also part of -

11 MR. TUMMONDS: Is the property owner.

12 CHAIRMAN GRIFFIS: Indeed. But it's all
13 one entity. Is that correct? I can't say that. It's
14 one entity before us now.

15 MR. TUMMONDS: That's correct.

16 CHAIRMAN GRIFFIS: That's fine because I
17 have to get my program all set here. Then we now have
18 all our participants. So we're ready to go and pick
19 up the speed perhaps a little bit. We go back to Ms.
20 Gilbert. Ms. Gilbert has raised two points of which
21 did not come in as motions but I would like to have
22 everyone -- First of all, do the parties have copies
23 of the DCRA's submission? It is Exhibit No. 91. Does
24 the St. James Parish have that exhibit?

25 FR. DOWNING: Yes, sir.

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1 CHAIRMAN GRIFFIS: I reference everyone to
2 page 15. I think it would be expeditious to go
3 through these from the Board's point of view. What
4 I'd like to do is I will perhaps abbreviate them and
5 ask the participant in this case speak to these. The
6 first is going to be whether special exception Order
7 15542 has any continuing force and effect since the
8 District has been up-zoned to allow CBRFs which
9 provide housing for the handicapped as a matter of
10 right in the R-5-D zone. Of course that's the zone in
11 which this is located.

12 MS. GESALTI GILBERT: Excuse me. I think
13 possibly even before that the question would be if
14 there's any issue as to whether this nursing home is
15 housing for the handicapped. I did not see that being
16 challenged in the appeal.

17 CHAIRMAN GRIFFIS: Nor did I.

18 MS. GESALTI GILBERT: Okay.

19 CHAIRMAN GRIFFIS: Board members, do we
20 need to have people speak to that issue? Is it a
21 consensus of the Board that it is a clear point? Mr.
22 Zaidain?

23 MEMBER ZAIDAIN: You always catch me when
24 I'm reading through something. The point is is that
25 elderly home is a matter of right in that district.

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1 Am I ahead of you?

2 CHAIRMAN GRIFFIS: A half step before
3 that. The elderly are covered and has the access
4 handicapped.

5 MEMBER ZAIDAIN: Yes, I would concur with
6 that.

7 CHAIRMAN GRIFFIS: Yes, Board members.
8 All in favor of that? Does anyone want to speak to
9 that? Yes?

10 MR. EDWARDS: Thank you, Mr. Chair.
11 Stanton Park Neighborhood Association does not accept
12 that proposition.

13 CHAIRMAN GRIFFIS: Okay.

14 MR. EDWARDS: That proposition was not
15 developed until the prehearing submissions. Our
16 appeal was filed back in May and our appeal went to
17 the issuance of the C of O as being wrongfully
18 issued.

19 CHAIRMAN GRIFFIS: I understand that.

20 MR. EDWARDS: The theory as to why they
21 were issued came up in the prehearing submissions by
22 the property owner and DCRA.

23 CHAIRMAN GRIFFIS: Okay. I can understand
24 your point. However I think we're going more towards
25 not a presentation of a case or opinion, but actually

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1 to a fundamental understanding that we all need to
2 come to a consensus on or not. But that would be
3 whether under the Fair Housing Act part of the reasons
4 why the zoning was changed, part of the reason why
5 DCRA and all that, the point is whether elderly are
6 classified as handicapped.

7 MS. GESALTI GILBERT: I think not elderly
8 but residents of a nursing home.

9 CHAIRMAN GRIFFIS: I'm sorry. Members of
10 the nursing home.

11 MEMBER ZAIDAIN: Let me ask a point of
12 clarification here. Just to put it simply and please
13 don't present your case, just put this in a concise
14 sentence if you can. What is the reason you're
15 claiming why we should revoke the C of O? It's not
16 because of the use of the center. It's because of the
17 parking issue. Correct?

18 MR. EDWARDS: That's correct.

19 MEMBER ZAIDAIN: Okay. Well, this has
20 nothing to do with the parking issue.

21 MR. EDWARDS: Yes, it does have to do with
22 the parking issue.

23 MEMBER ZAIDAIN: How?

24 MR. EDWARDS: Because a community-based
25 residential facility ("CBRF") providing housing for

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1 the handicapped supposedly in this case that we found
2 out last week is the Zoning Administrator applied the
3 criteria for a group home whereas this Board has
4 previously treated this exact same facility with no
5 change in operation as a nursing home, skilled
6 nursing, licensed with over 500 employees and has
7 required a much higher level of parking. The second
8 problem we have is very plain words of the Zoning
9 Regulations. I would direct you to --

10 MEMBER ZAIDAIN: I really do not want to
11 start your case presentation. I don't think the
12 Stanton Park agrees with that issue. They should just
13 include that in their case presentation and we can
14 take it up then.

15 CHAIRMAN GRIFFIS: And here's the other
16 stuff we could do.

17 MEMBER ZAIDAIN: I don't mean to cut you
18 off.

19 CHAIRMAN GRIFFIS: It's up to the Board.
20 These are issues that are going to flush out. It
21 could conceivably have been more handled as a
22 preliminary matter. I thought we were going to get
23 through the first of these steps. It's obviously not
24 clear. Let's start the case. All this obviously will
25 be the substance of the case presentations and

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1 rebuttals if so be it. With that, let's proceed. In
2 which case, everyone can have a seat and be
3 comfortable except of course the Stanton Park
4 Neighborhood Association if they are ready to proceed
5 in presentation of their case.

6 MR. EDWARDS: We are. Thank you, Mr.
7 Chair.

8 CHAIRMAN GRIFFIS: Excellent.

9 MR. EDWARDS: First, let me provide copies
10 of my written testimony.

11 CHAIRMAN GRIFFIS: Did you say provide
12 coffee? You could win right now then. Maybe they
13 didn't catch that on the record.

14 MEMBER ZAIDAIN: The fact that he called
15 you "Your Honor" again.

16 CHAIRMAN GRIFFIS: No, the fact that I
17 give him a win with coffee.

18 MEMBER ZAIDAIN: Either way.

19 MR. EDWARDS: I would like to note that as
20 an attachment to my testimony I have an extract from
21 a presentation that was made by the MedLINK Hospital
22 and Nursing Home to the Department of Health on
23 October 2. I have the full text of that submission,
24 38 pages, one copy of which I'll provide to the
25 Secretary at this time.

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1 CHAIRMAN GRIFFIS: Okay. I'm sorry. What
2 is it?

3 MR. EDWARDS: These are the last three
4 pages attached to my testimony.

5 CHAIRMAN GRIFFIS: Last three pages
6 attached to your testimony. Okay.

7 MR. EDWARDS: They were requested by the
8 State Health Development and Planning Administration
9 ("SHDPA") in considering the certificate of need for
10 this hospital.

11 CHAIRMAN GRIFFIS: Wasn't that already
12 submitted? Irregardless.

13 MR. TUMMONDS: I would object to the
14 submission of that. I'm not sure the relevancy of
15 transcript of a certificate of need application before
16 the SHDPA comes out being.

17 CHAIRMAN GRIFFIS: That's true. Would
18 they be addressing zoning issues?

19 MR. EDWARDS: Yes, they would. It's not
20 a transcript. It specifies the number of patients.
21 It specifies the number of employees. It specifies
22 that there's been no change in the operation of this
23 facility. Those are the only three extracts I have
24 included.

25 CHAIRMAN GRIFFIS: So what you're doing is

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1 just fundamentally offering that as evidence of as you
2 just stated use, the employee count and the numbers.
3 Okay. Is that clear? I think we can look to that.
4 We can go to strike submission if it becomes
5 irrelevant. Before we proceed fully, is there any
6 other submissions that you have? Does Stanton Park
7 have any other submissions at this time?

8 MR. EDWARDS: We do not, Mr. Chair.

9 CHAIRMAN GRIFFIS: Okay. I'm going to set
10 a little bit of parameters here. We're going to run
11 the clock from zero up and what I'm going to do is
12 provide 30 minutes for the presentation of your case.
13 You obviously don't need to use all of that.
14 Obviously equal time will be given to all participants
15 in the case except to the ANC within which the
16 property is located which is not limited to time.

17 If you need more time than 30 minutes, of
18 course regulations state that we allow 60 minutes for
19 each side to present their case. I think that this is
20 fairly straightforward in terms of the information
21 that needs to be provided for our own deliberation.
22 Most of it is in the record at this point. I think
23 we're very clear on the issues. What I'd like to do
24 is to try to streamline the oral presentation of the
25 case so that we might have the full record and then

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1 begin our deliberation on it. Is that clear?

2 MR. EDWARDS: That's clear.

3 CHAIRMAN GRIFFIS: Is that clear to
4 everybody else?

5 (Chorus of yes.)

6 CHAIRMAN GRIFFIS: So what we're going to
7 do is actually I'm going to change what I've said in
8 the beginning. I'm going to put 30 minutes on the
9 clock and we'll run it down. Hopefully the buzzer
10 won't go off. I'll stop it in time if it goes beyond
11 that.

12 MS. GESALTI GILBERT: And we would like to
13 receive a copy of that submission. We have not seen
14 that.

15 CHAIRMAN GRIFFIS: You don't have that.
16 Do you have additional copies with you right now?

17 MR. EDWARDS: It's attached to my
18 statement.

19 MS. GESALTI GILBERT: Oh, I'm sorry. I
20 did not realize that.

21 MR. EDWARDS: The extract is attached.
22 The full 38 pages is what I gave to the Secretary.

23 MS. GESALTI GILBERT: That's what I'm
24 saying. I have not seen the 38 pages.

25 CHAIRMAN GRIFFIS: You gave the whole 38

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1 pages in?

2 MR. EDWARDS: Yes.

3 MS. GESALTI GILBERT: We have not seen the
4 pages.

5 CHAIRMAN GRIFFIS: And that's what the
6 objection is to. How is the 38 pages going to
7 facilitate in addition to the three pages that you've
8 already submitted? Why don't we just accept the three
9 pages that we have?

10 MR. EDWARDS: That would be fine. Just in
11 case anyone wanted to verify it, they would have it
12 available.

13 CHAIRMAN GRIFFIS: All right. We'll hold
14 it off. I'm not going to accept it as an exhibit at
15 this time. If it comes that we need it during the
16 case, we have it somewhere in the office. Okay. Then
17 whenever you're ready.

18 MR. EDWARDS: Mr. Chairman, my name is
19 Monty Edwards and together with me today is Drury
20 Tallant. Together we serve as co-chair of the Land
21 Use Committee of the Stanton Park Neighborhood
22 Association. Stanton Park is a civic association. It
23 works for the improvement of Stanton Park
24 Neighborhood. It represents the interest of the North
25 Capitol Hill community in the area bounded by East

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1 Capitol 10th Street N.E., H Street N.E. and 2nd Street
2 N.E.

3 We are appealing the Zoning
4 Administrator's issuance of March 26, 2003 of the two
5 C of O concerning parking requirements at the hospital
6 and nursing facility referred to as MedLINK. Those
7 are in the record as Certificates of Occupancy 51289
8 and 51290.

9 It is our position that these certificates
10 should not have been issued by the Board for two
11 reasons. There were outstanding orders of this Board,
12 Order No. 15549 issued in 1991 and a second order
13 issued in 1999 which specifically dealt with the
14 parking requirements and evaluated the needs for
15 parking in terms of number of employees, number of
16 patients. The most recent of those orders of the
17 Board, the 1999 Order, requires the facility to
18 provide more than three times as much off-street
19 parking as the combined parking requirements of the
20 two wrongfully issued C of O.

21 Further, a second point we raise is not
22 only the Zoning Administrator without authority to
23 disregard the prior Board of Zoning Administration
24 orders, but the Zoning Administrator did not have
25 authority to set the parking requirements for the C of

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1 O for the nursing home, CO51289, because the authority
2 to establish the parking requirement for a community-
3 based residential facility of over 16 persons is
4 specifically delegated and it is exclusive to the BZA
5 and not to the Zoning Administrator under 11 DCMR
6 2101.1.

7 Now in pursuing the Zoning Administrator
8 to issue the C of O requiring only 25 parking places
9 for this 117 bed nursing facility, Capitol Hill Group
10 argued that Nebraska Avenue, BZA Appeal 16716(A) which
11 was issued in October 2001 justified this result. But
12 Nebraska Avenue offers no authority for establishing
13 parking requirements under the admitted Zoning
14 Regulations regarding housing for the handicapped. In
15 Nebraska Avenue, the Deputy Zoning Administrator
16 determined the number of parking spaces on March 8,
17 1999. I should point out that from the time until the
18 formal application was filed there were a number of
19 these determinations that were made by the Zoning
20 Administrator that were there incorporated in the
21 final application that was filed.

22 The parking space requirement was
23 determined on March 8, 1999. Zoning Commission Order
24 869 which amended Zoning Regulations to allow housing
25 for the handicapped as a matter of right in the R-4

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1 zone did not become effective until April 30, 1999,
2 almost two months after parking determination on
3 Nebraska Avenue.

4 Now the factual situation in Nebraska
5 Avenue is also different from the factual situation in
6 this case. The Sunrise Facility which was the subject
7 of Nebraska Avenue was a yet to be constructed
8 facility. It was necessary to employ projections and
9 estimates in establishing the parking requirements.
10 The hospital and nursing home in the subject appeal
11 are existing facilities and the Board has over 12
12 years of actual experience that it has employed in
13 establishing the parking requirements based on the
14 operations of these facilities. The parking
15 requirements for these facilities were properly
16 established in the 1999 and 1991 orders of this Board
17 and those determinations should continue to guide the
18 Board in establishing the parking requirement needed
19 for an expanding number of employees, the expanded
20 operations, the additional employees, the additional
21 beds.

22 Now outside of any claim of precedent that
23 may be established by Nebraska Avenue, the Sunrise
24 Facility is materially different from the hospital and
25 nursing facility that comprise MetLINK. Sunrise did

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1 include the term "assisted living" in its name at the
2 time of the Nebraska Avenue case but currently refers
3 to itself as Sunrise Senior Living which is consistent
4 with its anticipated nature. It will likely be
5 primarily an independent living facility when it opens
6 in mid-December of this year. The pricing structure
7 supports this since the basic rental includes
8 apartment rent, meals, apartment cleaning, but if
9 assistance is required, it's provided only on an a la
10 carte basis at additional cost. Just assistance in
11 daily living tasks such as bathing or dressing incur
12 additional daily fees and medication administration
13 incur further daily fees.

14 Sunrise is not licensed as a nursing
15 facility. It will provide no skilled nursing
16 services. Sunrise offers a very different kind of
17 service. It will have significantly lower staffing
18 levels and will have a substantially lower parking
19 requirement than the Capitol Hill Healthcare Facility.

20 Stanton Park does not take any position.
21 We were not a party to the Sunrise Senior Living case
22 on Nebraska Avenue and whether or not it should have
23 been classified as a community-based residential
24 facility which provides housing for the handicapped
25 under the Zoning Regulations. However to claim that

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1 nursing home should also be so classified, we do take
2 exception to as being unreasonable.

3 The Zoning Administrator seeks to achieve
4 this erroneous result under the rationale which says
5 the Sunrise Facility provides housing for persons that
6 are impaired or limited in performing one or more
7 major life activities than a nursing home which
8 provides care for individuals with a greater degree of
9 impairment in performing major life activities should
10 also be classified as a CBRF that provides housing for
11 the handicapped.

12 To extent that argument would mean that
13 there would no longer be any need for the zoning
14 classification of healthcare facility or even hospital
15 since people that go to hospitals must be handicapped
16 because they go there to have physical impairments
17 corrected. During the period that they are under
18 anesthesia or certain kinds of medicine, they are
19 completely impaired.

20 The consequence of such a classification
21 for zoning purposes would be to make all such
22 facilities matter of right. According to the Zoning
23 Administrator exempt such facilities from the parking
24 requirement of the Zoning Regulations. If the concept
25 that matter of right means that zoning requirements

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1 for parking can be waived, then the Zoning
2 Administrator may seek to waive other zoning
3 requirements in the interest of matter of right.

4 The result would be that any facility that
5 you can convince the Zoning Administrator that it
6 serves a population of some degree of physical
7 impairment or limitation would be largely exempt from
8 Zoning Regulations as well as exempt from oversight by
9 this Board.

10 CHAIRMAN GRIFFIS: But you're not saying
11 that the ZA exempted them from parking requirement,
12 are you?

13 MR. EDWARDS: I am, Mr. Chair.

14 CHAIRMAN GRIFFIS: Well, the Zoning
15 Administrator established the parking that would be
16 provided. How is that an exemption from the parking?

17 MR. EDWARDS: If you will go to the first
18 attachment to my prepared statement which is the table
19 from Title 11.

20 CHAIRMAN GRIFFIS: No, I understand
21 there's a difference with what was attached to the C
22 of O for the parking and what 2101 might state in the
23 table, but you just stated that the ZA waived the
24 parking requirement.

25 MR. EDWARDS: Not that they waived. That

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1 they ignored.

2 CHAIRMAN GRIFFIS: They ignored the
3 regulation for the Board to establish parking.

4 MR. EDWARDS: Yes.

5 CHAIRMAN GRIFFIS: But that's different
6 than saying that they waived. Basically when you say
7 that to this Board, I take it as they required no
8 parking. That's not your belief. Is that true?

9 MR. EDWARDS: That's not my statement.
10 No, Mr. Chair. I apologize.

11 CHAIRMAN GRIFFIS: That's why I asked.
12 Continue.

13 MR. EDWARDS: They failed to refer the
14 matter to this BZA to determine the parking and they
15 themselves determined the parking and in so making the
16 determination used a very different standard than this
17 Board has used in the past and should use for this
18 facility.

19 CHAIRMAN GRIFFIS: Okay.

20 MEMBER ZAIDAIN: Again just to follow on
21 this question, I'm going to interrupt your testimony.
22 I have something along this same line. You also
23 stated that if they were to waive this requirement
24 which you've clarified to mean substitute, if
25 substituting a different requirement. If we were to

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1 substitute this requirement, what would keep them from
2 substituting other requirements that are special
3 exception regulated for these types of uses. What
4 other zoning requirements would there be?

5 MR. EDWARDS: I don't know at this point,
6 but it seems to be the argument that because they are
7 matter of right we should not impede their ability to
8 exercise that matter of right. That is the argument
9 that bothers me.

10 MEMBER ZAIDAIN: I understand that. I
11 guess my question is and this would take a full Zoning
12 Regulation analysis but for those uses that are a
13 matter of right, what subsidiary requirements are
14 special exception? I don't know of a lot of them.

15 CHAIRMAN GRIFFIS: Right. How do you
16 understand a matter of right use if there's a public
17 review and approval process required?

18 MR. EDWARDS: That is exactly what we're
19 asking for here, a public review process.

20 CHAIRMAN GRIFFIS: I understand that.

21 MR. EDWARDS: Not a Zoning Administrator
22 review.

23 CHAIRMAN GRIFFIS: I understand what
24 you're asking for, but how do you reconcile that? If
25 it's a matter of right use for our Zoning

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1 classification of use, how is it then that we would
2 require a public hearing and approval process?
3 Doesn't that fly in the face and contradict what a
4 matter of right use is?

5 MR. EDWARDS: We do not concede that this
6 nursing home should be a community-based residential
7 facility providing housing for the handicapped.

8 CHAIRMAN GRIFFIS: So you are trying to
9 appeal the distinction of the use.

10 MR. EDWARDS: I am appealing the
11 distinction of the use. I would go to the plain use
12 of the definition of the Zoning Regulations, Mr.
13 Chairman, page 114 that defines community-based
14 residential facilities.

15 CHAIRMAN GRIFFIS: Section 199?

16 MR. EDWARDS: Page 1-14, the definition
17 section. They do not have numbers in the definition
18 section. A copy of that is included as Attachment A
19 to the Statement of Capitol Hill Group if you have
20 that in front of you.

21 CHAIRMAN GRIFFIS: All right. What's the
22 exhibit number on that?

23 MR. EDWARDS: Exhibit A.

24 CHAIRMAN GRIFFIS: What's the record
25 exhibit number? Do you know?

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1 MEMBER ZAIDAIN: Are you referring to the
2 definitions in 199 that "If CBRF can show adult
3 facility...?"

4 MR. EDWARDS: Yes.

5 CHAIRMAN GRIFFIS: Do you have that one?

6 MEMBER ZAIDAIN: We've memorized that in
7 some other appeal cases.

8 MR. EDWARDS: The seven definitions.

9 MEMBER ZAIDAIN: Right.

10 CHAIRMAN GRIFFIS: We're very well aware
11 of that.

12 MR. EDWARDS: The second paragraph of the
13 preamble to that states that "If an establishment is
14 a community-based residential facility as defined in
15 this section, it shall not be deemed to constitute any
16 other use permitted under the authority of these
17 regulations."

18 CHAIRMAN GRIFFIS: We have that etched
19 upon our brain from another case.

20 MR. EDWARDS: "A healthcare facility is a
21 facility under this section that is licensed as a
22 skilled care facility or intermediate nursing care."
23 It qualifies and it is always qualified as a
24 healthcare facility.

25 CHAIRMAN GRIFFIS: Okay.

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1 MR. EDWARDS: And so qualifying to go to
2 the definition which was added to section 330 of the
3 Zoning Regulations as a part of the Fair Housing Act
4 litigation and it was added to that portion because
5 the purpose of that threatened litigation was to offer
6 equal opportunity for the handicapped to have housing
7 as non-handicapped people.

8 CHAIRMAN GRIFFIS: That's right.

9 MR. EDWARDS: And this is the section
10 having to do with boarding houses, rooming houses and
11 it's added there for that purpose. It is not added to
12 preempt the definition of nursing home, convalescent
13 home and hospital that the interpretation argued by
14 Capitol Hill Group would result in. You extend it to
15 nursing homes. You extend it to convalescent homes
16 and then you extend it to hospitals. Pretty soon
17 everything in the city that has any degree of impaired
18 residents is a housing for the handicapped. This BZA,
19 this Board's authority to determine parking on a case
20 by case public review process that takes into account
21 community concerns is obviate and the Zoning
22 Administrator makes those determinations on his own as
23 he did in this case.

24 MEMBER ZAIDAIN: So it's your argument
25 that this use does not fall under the CBRF. It's more

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1 under the use of a nursing home.

2 MR. EDWARDS: It does not fall under the
3 CBRF housing for the handicapped. It does call under
4 CBRF for nursing home which is healthcare facility.

5 MEMBER ZAIDAIN: I was hoping I wasn't
6 going to have to pull out the definition. Now I have
7 to.

8 CHAIRMAN GRIFFIS: But now of that impairs
9 whether it's a matter of right use or not no matter
10 all the distinctions that you're making. It is still
11 a matter of right use.

12 MR. EDWARDS: No, Mr. Chairman. In an R-4
13 zone, a healthcare facility can be provided only by
14 special exception as has been the case in the past.
15 This is R-5, but the requirement for special exception
16 applies to healthcare as it has always for this
17 Capitol Hill facility. That's why it came to this
18 Board in 1991 and 1999, because it was a nursing home.

19 MEMBER ZAIDAIN: Let me make sure your
20 argument's clear because this is obviously a
21 substantial point you're making. You're saying that
22 the use that's in debate here is classified as a
23 community-based residential facility, healthcare
24 facility so CBRF-D.

25 MR. EDWARDS: Yes.

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1 MEMBER ZAIDAIN: And you don't think that
2 330.5 subsection I applies to that definition when it
3 says "CBRF..." You do not think that applies to a
4 CBRF healthcare facility.

5 MR. EDWARDS: That's correct.

6 MEMBER ZAIDAIN: Where do you read that?
7 It seems like it's trying to encompass the whole
8 thing.

9 MR. EDWARDS: It seems like it does and I
10 think that's the very purpose that second paragraph in
11 the definition section of the Zoning Regs goes to.

12 MEMBER ZAIDAIN: What do you mean "second
13 paragraph"?

14 CHAIRMAN GRIFFIS: Is that the
15 definitions?

16 MR. EDWARDS: Page 114 of the definition
17 section.

18 CHAIRMAN GRIFFIS: 199, Definitions.

19 MEMBER ZAIDAIN: Right.

20 MR. EDWARDS: "Community-based residential
21 facilities."

22 MEMBER ZAIDAIN: Right.

23 MR. EDWARDS: Second paragraph.

24 MEMBER ZAIDAIN: Right. So what you're
25 arguing is that if it fits in the definition and so

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1 frightening similar to something that we just had to
2 deal with but if you're arguing that it's a CBRF
3 healthcare facility, then it can be nothing else.

4 MR. EDWARDS: That's correct. That it
5 cannot be.

6 MEMBER ZAIDAIN: So how can it not fit
7 into the 330.5(I)? How can it be nothing else?

8 MR. EDWARDS: Because of the second
9 paragraph under the Definition section. "If an
10 establishment is a CBRF as defined in this section
11 (Healthcare Facility), it shall not be deemed to
12 constitute any other use."

13 MEMBER ZAIDAIN: Exactly. So then why
14 does it not fit under 330.5? Can I get away from the
15 definition and look at 330.5 subsection I?

16 CHAIRMAN GRIFFIS: Community-based
17 residential facility.

18 MEMBER ZAIDAIN: Tell me how it does not
19 fit into that?

20 CHAIRMAN GRIFFIS: "Under the following
21 uses will be permitted the matter of right in the R-4
22 district."

23 MR. EDWARDS: I think that it could and I
24 think that it's the argument of Capitol Hill Group and
25 the Zoning Administrator that it could fit under that,

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1 but the result of fitting it under that is to obviate
2 any classification of nursing home, convalescent home,
3 hospital. Then anybody with any impairment or
4 disability would be covered under this.

5 MEMBER ZAIDAIN: Right, and I agree with
6 that. At least my initial take is that is why the
7 definition says "if it's this, it can be nothing
8 else."

9 MR. EDWARDS: That's correct.

10 MEMBER ZAIDAIN: You're saying it's not
11 really a "could." Either it is or it's not.

12 MR. EDWARDS: It is or it's not. That's
13 correct.

14 MEMBER ZAIDAIN: Right. So you're saying
15 that it is.

16 MR. EDWARDS: That it is. It is a
17 licensed healthcare facility. It is licensed skilled
18 facility or intermediate nursing care.

19 MEMBER ZAIDAIN: So you're saying that it
20 is a CBRF and it's matter of right.

21 MR. EDWARDS: No, I'm saying it is a CBRF
22 under healthcare facility.

23 MEMBER ZAIDAIN: Right.

24 MR. EDWARDS: Which in an R-4 or an R-5
25 zone can be operating only as a special exception.

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1 CHAIRMAN GRIFFIS: Do you see that cite?

2 MEMBER ZAIDAIN: Where do you see that?

3 I think in order to make clear of your point, point us
4 to a section in the Zoning Regulations either under R-
5 4 or R-5 that says a CBRF healthcare facility is only
6 allowed in as a special exception.

7 MR. EDWARDS: I would have to point you
8 that a CBRF of which encompasses the seven definitions
9 here in the definition section is allowed as a special
10 exception in an R-4 or R-5 zone.

11 MEMBER ZAIDAIN: Where does it say that in
12 the Zoning Regs?

13 CHAIRMAN GRIFFIS: Where does it say that?

14 MS. MONROE: Mr. Chairman, can I point to
15 359.1? It says "The healthcare facilities for 16 to
16 300 people shall be permitted as special exceptions in
17 R-5 districts to be approved by the BZA." That of
18 course is not including healthcare facilities for the
19 handicapped. That's the difference.

20 MEMBER ZAIDAIN: The difference is that
21 and tell me if you think I'm wrong, Ms. Monroe, but
22 does the definition of a healthcare facility as is
23 referenced in 359 the same as a CBRF healthcare
24 facility defined in section 359? Is that the same
25 thing?

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1 MS. MONROE: Yes, it's supposed to be.
2 It's supposed to carry over essentially. All the
3 definitions of CBRF there appear throughout the Regs
4 and this healthcare facility is the "CBRF" that's
5 defined in 199, the special exception type which would
6 not have handicapped. Those that have the handicapped
7 fall under the 330.5(I).

8 MEMBER ZAIDAIN: Then I guess what we're
9 dealing with if I understand your point is a conflict
10 within the Zoning Regulations of it saying in one
11 section that it's a matter of right and in other
12 section, it's saying that it's a special exception.

13 MS. MONROE: But the difference is if
14 there are no handicapped individuals in it, then it
15 wouldn't fall under the matter of right. The matter
16 of right is only if the ZA makes that determination
17 that it is housing for the handicapped. He's the one
18 under 335(I) that has to make that determination.

19 MEMBER ZAIDAIN: Okay. So I think therein
20 lies the debate is the fact that this elderly facility
21 is being deemed as handicapped which is throwing it
22 under the matter of right's CBRF provision. What I
23 understand Stanton Park's position is elderly is not
24 handicapped and therefore putting it under 359. Is
25 that correct?

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1 MR. EDWARDS: The other point is --

2 MEMBER ZAIDAIN: Is what I just said
3 correct just to make sure on that?

4 MR. EDWARDS: It's correct and I would add
5 to it that none of the CBRFs housing for the
6 handicapped is licensed by any government agency.
7 Whereas all healthcare facilities by definition are
8 licensed as skilled or intermediate nursing home.

9 CHAIRMAN GRIFFIS: I'm sorry. Are you
10 saying CBRFs for the handicapped are not licensed?

11 MR. EDWARDS: They do not require a
12 healthcare license. Whereas a healthcare facility
13 does.

14 CHAIRMAN GRIFFIS: How do you base that
15 comment?

16 MR. EDWARDS: Pardon.

17 CHAIRMAN GRIFFIS: I'm not understanding
18 where your understanding of that is.

19 MR. EDWARDS: A skilled nursing care has
20 to provide a certain level of nursing care,
21 intermediate nursing care, and received a license from
22 the Health Department.

23 MEMBER ZAIDAIN: Okay, now which use would
24 that be for, disabled or elderly?

25 MR. EDWARDS: Neither. Sunrise -

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1 MEMBER ZAIDAIN: So how does that help us?
2 I think what we're going to have to focus on is
3 whether or not elderly is disabled. So help us focus
4 on that.

5 MR. EDWARDS: All right.

6 MEMBER ZAIDAIN: And phrase your
7 comparison. You're doing apples and oranges
8 comparison. Delineate what's apples and what's
9 oranges.

10 MR. EDWARDS: Let's go back to Sunrise
11 Senior Living.

12 MEMBER ZAIDAIN: Okay.

13 MR. EDWARDS: They house the elderly.
14 They receive no license for a skilled nursing. They
15 were by this Board considered to be a CBRF housing for
16 the handicapped. Historically Capitol Hill Hospital
17 has always had a license from the Health Department as
18 a nursing home and has historically been treated by
19 this Board as a healthcare facility even to the point
20 of requiring the entire facility to be regulated by
21 this Board.

22 Whereas a hospital in an R-4 zone is a
23 matter of right because of the integrated nature of
24 it. The entire facility, its operations and the total
25 parking facility, has since 1991 been regulated by

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1 this Board and should continue. There's been no
2 change in operation. I would submit that the purpose
3 of the amendment to the Zoning Regs brought about by
4 the Fair Housing Act litigation was not intended to
5 undo the regulation of nursing homes, convalescent
6 homes and hospitals in the city.

7 MEMBER ZAIDAIN: Okay.

8 MS. MONROE: Mr. Chairman, can I just make
9 one point? Mr. Zaidain, about your question of the
10 conflict between 330.5(I) and 359 there, special
11 exception, it says in 330.5(I) that notwithstanding
12 any provision in this title to the contrary, once the
13 ZA makes a determination and whether or not that
14 determination is correct which is what's in question
15 here but once he makes the determination that there
16 are handicapped people there as residents, then
17 notwithstanding any other provision including 359 it
18 kicks it into a matter of right category.

19 MEMBER ZAIDAIN: Right, so that leads us
20 back to the issue of "is this handicapped."

21 MS. MONROE: The factual question.

22 CHAIRMAN GRIFFIS: Yes, if he made the
23 right determination.

24 MEMBER ZAIDAIN: Yes, if he made the right
25 determination. Okay.

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1 CHAIRMAN GRIFFIS: Yes, Ms. Miller.

2 MEMBER MILLER: Are you aware of any
3 regulation or case law related to the Fair Housing Act
4 that discusses what handicapped means?

5 MR. EDWARDS: Not in this jurisdiction
6 other than the Nebraska Avenue case which extended to
7 housing for the elderly. I believe there are some
8 cases in Puerto Rico but I'm not sure what the Zoning
9 Regulations or if they have a separate definition of
10 healthcare facility and housing for handicapped. So
11 no, I don't know.

12 MEMBER MILLER: Okay.

13 COMMISSIONER HOOD: Mr. Chairman.

14 CHAIRMAN GRIFFIS: Yes.

15 COMMISSIONER HOOD: I wondered if we have
16 access to Zoning Commission Order 869.

17 CHAIRMAN GRIFFIS: Do you mean do we have
18 it in the record now?

19 COMMISSIONER HOOD: Yes, it's not in the
20 record. I was wondering if we could get access.

21 CHAIRMAN GRIFFIS: Absolutely.

22 COMMISSIONER HOOD: I'll tell you why.
23 Some of us sat on that case and I hate to call on my
24 memory, but I think that was discussed in detail and
25 I think that order would definitely help us go down

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1 the right track.

2 MEMBER ZAIDAIN: And which part of the
3 regulations did that order implement?

4 COMMISSIONER HOOD: That was dealing with
5 the whole Fair Housing Act piece. I'm not going to
6 say which way I voted but I can tell you that all that
7 was discussed in detail and I think it would help us
8 if we would get the Zoning Commission Order 869.

9 MEMBER ZAIDAIN: 869?

10 CHAIRMAN GRIFFIS: Okay. We will put that
11 into the record.

12 COMMISSIONER HOOD: I believe that's the
13 correct order. I'm sure because that whole Fair
14 Housing Act was an issue.

15 MR. EDWARDS: I have one copy of the order
16 here if anyone would like to look at it now.

17 MS. BAILEY: Mr. Edwards, I can make some
18 copies if you'd like.

19 MR. EDWARDS: All right.

20 CHAIRMAN GRIFFIS: We're not going to
21 debate it now. We're going to put it into the record
22 for the Board's review. Okay. Let's continue then.

23 MR. EDWARDS: Thank you. I would now like
24 to turn to my point that parking requirements for
25 CBRF. In general whether they are with handicapped or

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1 whether they are a healthcare facility should be
2 determined on a facility-specific basis by this Board.
3 Because the CBRFs encompass youth rehab homes,
4 emergency shelters as well as healthcare facilities,
5 there are a total of seven very different classes of
6 facilities. In determining parking requirements, each
7 of the different classes of CBRFs will likely have
8 different criteria which may consist of the number of
9 residents, number of visitors, number of employees.

10 Thus unlike other portions of the table in
11 Section 2101 which is attached to my testimony, they
12 prescribed parking in terms of ratios, but the parking
13 requirements for CBRFs are to be determined by the BZA
14 on a case-specific basis in order to properly evaluate
15 the nature of the facility, the need to provide off-
16 street parking, the impact of any action on the
17 surrounding community. Requiring a ruling by the BZA
18 on parking does not detract from my facility's matter
19 of right status.

20 Proceedings before the BZA provide an
21 opportunity to determine the most appropriate
22 criteria, receive comments from the community and
23 evaluate the impact the requested action will have on
24 effected neighbors. That opportunity is not available
25 if the decision is made by the Zoning Administrator.

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1 Even within the specified classes of
2 CBRFs, there can be very different parking
3 requirements. For example, an independent living
4 facility has a different staffing requirement than an
5 assisted living facility and a different staffing
6 requirement than the skilled nursing required at a
7 nursing home. These considerations were taken into
8 account by the two BZA orders pertaining to the
9 Capitol Hill Group.

10 In 1991, it was the Capitol Hill Hospital.
11 In both orders, the BZA specifically considered the
12 number of beds, the number of employees in
13 establishing the parking requirement. In 1991, with
14 130 beds and 250 employees, 176 off-street parking
15 spaces were required. In 1999, with an expansion to
16 162 beds and 340 employees, the parking requirement
17 was increased 276 off-street spaces.

18 Now with 177 operating beds and 532
19 employees, the facilities have obtained C of O that
20 are the subject of this proceeding that would reduce
21 the parking requirement to 85 off-street parking
22 spaces. Employees have increased by over 50 percent
23 since 1999.

24 CHAIRMAN GRIFFIS: First of all, that's
25 all in your written submission. Also we're not going

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1 to be deciding on impact, negative or potential for
2 adverse impact on this. We need to know this is as it
3 is in appeal. It's very factually and legally based.
4 We need to stick to why you think it does push us to
5 the table 2101 to find why the Board decides the
6 parking ratio for this.

7 MR. EDWARDS: All right. Let me skip over
8 a portion of my testimony and go right to page five.

9 MEMBER MILLER: Excuse me. I just want to
10 ask one question before you move onto another subject.
11 You basically said that requiring parking
12 determination by the BZA doesn't take away from its
13 matter of right status. Are you aware of any instance
14 where a property has matter of right status and yet
15 the BZA can impose parking or other conditions on it?

16 MR. EDWARDS: The only other parking
17 that's reserved to the BZA is an ancillary thing under
18 chanceries I believe if I recall. I cannot speak to
19 it other than having seen it in the Regs.

20 CHAIRMAN GRIFFIS: Chancellories,
21 embassies, that kind of stuff.

22 MR. EDWARDS: I would point out that every
23 matter of right use has a certain parking requirement.

24 CHAIRMAN GRIFFIS: That we're aware of.
25 And again this isn't being waived from parking

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1 requirement. It's about who and how and what the
2 parking requirements establish.

3 MEMBER ZAIDAIN: I think that what Ms.
4 Miller's question is - and this is a good point and to
5 clarify it - where is there a matter of right use
6 where the use is allowed but there is some element of
7 development that has to come to us for review.
8 Correct?

9 MEMBER MILLER: Yes.

10 MEMBER ZAIDAIN: Off the top of my head,
11 there are certain things.

12 MR. EDWARDS: Height.

13 CHAIRMAN GRIFFIS: If I understand what
14 you're going to be bring up, you can certainly have a
15 matter of right project and decide to do things a
16 variance or special exception.

17 MEMBER ZAIDAIN: Right. Well, let's just
18 focus on special exception. You can do a variance for
19 anything.

20 CHAIRMAN GRIFFIS: Okay.

21 MEMBER ZAIDAIN: But for special
22 exception, yes, you can have a commercial building
23 downtown, but if you have a penthouse that's not
24 complying, you can come in for an 11 special
25 exception. That's the same premise.

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1 CHAIRMAN GRIFFIS: Okay.

2 MEMBER ZAIDAIN: Is that true?

3 CHAIRMAN GRIFFIS: Let's have the
4 participants address that as we go through.

5 MR. EDWARDS: Now can I turn to what will
6 likely happen to this facility in the future as if
7 these C of O are allowed to stand.

8 CHAIRMAN GRIFFIS: No. Why would that be
9 relevant for this appeal?

10 MR. EDWARDS: I think it is very relevant
11 because it shows the motivation for attempting to
12 reduce the amount of required parking so that this
13 parking can be made available when approximately
14 three-quarters of the facility is now vacant. It's
15 likely to be rented and if it can be rented with
16 additional parking, it would be highly desirable
17 feature.

18 CHAIRMAN GRIFFIS: So what you're saying
19 is part of the basis of your case to the appeal is if
20 there was in fact some long term plan on the ZA's part
21 to set this as a precedent so that he could establish
22 or facilitate what's happening on this project.

23 MR. EDWARDS: Not the Zoning
24 Administrator. I'm saying that the facts of this
25 facility where only the north tower portion on 7th

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1 Street is currently occupied.

2 CHAIRMAN GRIFFIS: Right.

3 MR. EDWARDS: All of Constitution Avenue
4 is vacant. All the facility on 8th Street is vacant.
5 The southern portion of 7th Street is vacant.

6 CHAIRMAN GRIFFIS: I understand all that.

7 MR. EDWARDS: In today's real estate
8 market, these will not remain vacant forever.

9 CHAIRMAN GRIFFIS: As you've stated in
10 your written submission.

11 MR. EDWARDS: With the 176 parking in this
12 underground garage if they can allocated 85 of them to
13 the nursing home and hospital, the balance of some 91
14 parking spaces could be available when they lease the
15 rest of the facility.

16 CHAIRMAN GRIFFIS: Totally understood.
17 Now that you've said and also in your written
18 submission, how does that help us determine whether
19 the Zoning Administrator made an error?

20 MR. EDWARDS: The Zoning Administrator
21 made an error by making a determination that under the
22 Zoning Regulations are reserved to this BZA.

23 CHAIRMAN GRIFFIS: I understand the
24 statement of the error you're asserting, but how is it
25 important for us to understand the potential use or

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1 future use or reconfiguration of it when what we're
2 trying to figure out is the very straightforward case
3 presentation of the Zoning Administrator erred and he
4 erred because of something?

5 MR. EDWARDS: And Mr. --

6 MR. TALLANT: Can I interject for a
7 moment? I would say that this is not the first error
8 on the part of the Zoning Administrator. At the time
9 that MedLINK sold the surface parking lot across 7th
10 Street which provided required parking, they placed
11 themselves in violation of BZA orders. Stanton Park
12 brought that situation to the attention of the Zoning
13 Administrator. The position of the Zoning
14 Administrator at this time - this is going back now
15 some two and a half or three years - said "They're
16 selling the hospital and it doesn't matter that they
17 sold the required parking."

18 CHAIRMAN GRIFFIS: I understand that. I
19 may not be being very clear, but this is not like a
20 special exception where we hear everything and this is
21 what's going to happen and this is why they did and
22 this is how they are malice and all that that we all
23 hear and we love hearing that and spending hours on
24 it. This is an appeal. What is your burden is to
25 show us that the Zoning Administrator made an error

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1 and we can see that clearly that there's an error
2 because of certain things. Really I'm not convinced
3 yet of the relevancy of you giving me evidence or
4 anecdotal information about the future prospects of
5 development or sale or vacancy or anything of that
6 point unless you can really help me understand. For
7 instances, why would the Zoning Administrator have
8 known that?

9 MR. EDWARDS: We're not claiming that the
10 Zoning Administrator did know that.

11 CHAIRMAN GRIFFIS: Good. I'm glad you
12 said that. Then it has no relevancy at this point in
13 my mind to the appeal.

14 MEMBER ZAIDAIN: And again you're not
15 arguing that if another use goes in this facility -
16 let's say a McDonald's - that the ZA is not going to
17 require them to meet their parking requirements for
18 that use, are you?

19 MR. EDWARDS: We are saying that there is
20 a section in the Zoning Regulations that says that
21 there's an increased intensity of the use that the
22 applicant has to come in with a revised parking plan.
23 I think it's over 25 percent increase. We know that
24 right now Capitol Hill Group is leasing all six of
25 their operating suites to the Ambulatory Surgical

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1 Group. It's highly likely that persons coming for
2 outpatient surgery are going to be accompanied by a
3 friend or a family member that will expect parking
4 while they're in there. That's already happened.
5 They haven't come to you. They haven't received the
6 licenses but it was testified to before the Health
7 Department on the 31st of October.

8 CHAIRMAN GRIFFIS: Follow-up question, Mr.
9 Zaidain?

10 MEMBER ZAIDAIN: No thanks.

11 CHAIRMAN GRIFFIS: Okay. Let's continue
12 then.

13 MR. EDWARDS: To resolve the problem,
14 Stanton Park urges this Board to rescind the C of O
15 issued to the nursing facility because the Zoning
16 Administrator had no legal authority to determine the
17 parking requirement for such a facility being a CBRF
18 whether housing for the handicapped or whether a
19 nursing home. Further the Board should require that
20 all the off-street parking spaces associated with the
21 underground parking facility be utilized by the
22 nursing facility and the hospital. This would be
23 consistent with the statement of MedLINK's chief
24 financial officer at the October 31, 2003 Department
25 of Health hearing that he expects all the underground

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1 parking facility spaces would be committed to the new
2 hospital and the nursing home.

3 As a more comprehensive resolution, the
4 Board should affirm the parking requirement
5 determinations of the prior orders. In the past, the
6 hospital and nursing home operations at this location
7 have been treated as an integrated operation and the
8 hearing on October 31 MedLINK stressed that
9 integration and co-location as a unique attribute
10 shared by only one other healthcare in this city. The
11 integrated regulation for zoning purposes should
12 continue. The entire facility should be regulated as
13 an entity rather than separate C of O for the hospital
14 and the nursing home.

15 Further the Board should require that the
16 hospital and nursing facility as well as any other
17 operations at this location file an updated
18 application with this Board proposing how to provide
19 the appropriate amount of off-street parking to
20 satisfy the increased intensity of use of this
21 facility. Thank you.

22 CHAIRMAN GRIFFIS: Thank you very much.
23 In your closing, let me see if I was clear because you
24 mentioned whether this is housing for the handicapped
25 or not as a CBRF, but you're maintaining one position

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1 on that. Isn't that correct? This is CBRF not
2 housing handicapped or disabled.

3 MR. EDWARDS: The definition of housing
4 for the handicapped treats it as a CBRF but under a
5 separate section of the Zoning.

6 CHAIRMAN GRIFFIS: Under 359.

7 MR. EDWARDS: And the parking requirement
8 of all CBRFs is to be determined by the BZA.

9 CHAIRMAN GRIFFIS: Right. Good.

10 MR. EDWARDS: If it's over 16.

11 CHAIRMAN GRIFFIS: Exactly. That's
12 unrefuted. Okay. Follow-up questions? Any
13 questions? Yes, Ms. Miller.

14 MEMBER MILLER: I just want to get a
15 clarification about where you think this facility
16 falls within the regulations. Did you think it falls
17 within 359.1?

18 MR. EDWARDS: I do not. I think it falls
19 as a healthcare facility under the definition of CBRF.

20 CHAIRMAN GRIFFIS: Right, but then you
21 have to go to a section under R-5 to find out what is
22 regulating for how you defined it.

23 MR. EDWARDS: Yes, that's correct.

24 CHAIRMAN GRIFFIS: That's what she's
25 asking you. Is it in 359.1? Is it in 330.5? Do you

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1 have the Zoning in front of you?

2 MR. EDWARDS: I don't have that in front
3 of me.

4 CHAIRMAN GRIFFIS: We're being unfair by
5 throwing that all around, aren't we? 359.1.

6 MR. EDWARDS: It should not be under that.

7 MEMBER ZAIDAIN: No, I wasn't going to
8 say. Co-counsel answered for him last time so I'm glad
9 she asked it again.

10 CHAIRMAN GRIFFIS: That is true.

11 MR. EDWARDS: It should not be under
12 330.5.

13 MEMBER ZAIDAIN: Where should it fall
14 under? You don't have the Zoning Regs in front of
15 you. I understand.

16 MR. EDWARDS: It should be treated as a
17 special exception in this zone.

18 MEMBER ZAIDAIN: From what I understand
19 and if upon further review - I'm sure we won't decide
20 this today and I'm assuming that - if my argument's
21 not yours, please tell me, but it's my understanding
22 that you're pushing for this to be treated under 359.

23 MR. EDWARDS: That's correct.

24 MEMBER ZAIDAIN: Okay.

25 CHAIRMAN GRIFFIS: As a healthcare

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1 facility.

2 MR. EDWARDS: As a healthcare facility in
3 an R-5 zone.

4 MEMBER ZAIDAIN: I think what's confusing
5 the Board is when you talk about 359 you're still
6 using the precursor of a CBRF healthcare facility
7 here. In further argument, you might just want to say
8 healthcare facility and not use the CBRF prefix.

9 MR. EDWARDS: It's necessary because the
10 CBRF of over 16 people is what imposes the parking
11 requirement to be determined by the BZA.

12 CHAIRMAN GRIFFIS: Right. That part is
13 confusing. There it is. Anyone have follow-up
14 questions from the Board?

15 CHAIRMAN GRIFFIS: Okay. Let's start with
16 cross examination. Does DCRA have cross examination?
17 Mr. Tummonds? Indeed. Does the ANC 6-C have any
18 cross examination? Father Downing, how would you like
19 me to refer to your party? Can I call it just "the
20 Parish"?

21 FR. DOWNING: Yes, sir. That would be
22 fine.

23 CHAIRMAN GRIFFIS: Good, because I like to
24 be very succinct when I run through all these things.
25 Does the Parish have any cross examination?

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1 FR. DOWNING: No, sir.

2 CHAIRMAN GRIFFIS: 6-A?

3 MR. RICE: No.

4 CHAIRMAN GRIFFIS: Man, we're not used to
5 this. We've just been through six hours of cross
6 examination this morning. Very good. In which case
7 what I'd like to do is next we will follow up with
8 DCRA. Let's take ten minutes, stretch our legs and
9 then we'll be back and we'll keep going through this.
10 Thank you. Off the record.

11 (Whereupon, the foregoing matter went off
12 the record at 3:34 p.m. and went back on
13 the record at 3:54 p.m.)

14 CHAIRMAN GRIFFIS: On the record. Very
15 well. Let's reconvene.

16 MS. GESALTI GILBERT: You are ready for me
17 to begin. Laura Gesalti Gilbert appearing on behalf
18 of the Zoning Administrator and the Department of
19 Consumer and Regulatory Affairs. I'd like to make a
20 couple of points at the outset in response to Mr.
21 Edwards's testimony or argument. First, I'd like to
22 just mention a hospital is not a CBRF and secondly,
23 I'd like to mention that there's no suggestion on our
24 part that there has been a change in the operations of
25 the MedLINK or Capitol Hill Nursing Center, only

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1 that's there's been a change in the law.

2 I'd like to spend maybe 15 or 20 minutes
3 of my time giving the legal arguments and then I'd
4 like to call Ms. Ogunneye who's the chief of the
5 Zoning Review branch to appear on behalf of the Zoning
6 Administrator. First I'd like to address the issue of
7 housing for the handicapped and essentially I'm
8 arguing from pages five through eight of my prehearing
9 statement. Essentially under the laws that exist now,
10 the Zoning Regulations, assuming that a nursing home
11 is a CBRF intended to be operated as housing for
12 persons with handicaps, then the nursing home is a
13 matter of right use in an R-4 district or a higher
14 zone district. As a result of that, the provisions of
15 section 350.4(f) and 359 are superceded.

16 In reviewing the provisions of the Federal
17 Fair Housing Act and the relevant case law, it is
18 clear that a legitimate nursing home would generally
19 meet the criteria for a CBRF which is intended to be
20 operated as housing for the handicapped. Under the
21 Fair Housing Act, it is unlawful to discriminate in
22 the sale or rental or to otherwise make unavailable or
23 deny a dwelling to any buyer or renter because of the
24 housing of a handicap. That is 42 USC Section
25 3604(f).

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1 A handicap is defined at 42 USC Section
2 3602(h) as it is in the District's current Zoning
3 Regulations to include (1) a physical or mental
4 impairment which substantially limits one or more of
5 a person's major life activities; (2) a record of
6 having such an impairment; or (3) being regarded as
7 having such an impairment. To rent as defined in the
8 Fair Housing Act includes to lease or sublease, to let
9 or otherwise grant for consideration the right to
10 occupy premises that are not owned by the occupant.
11 A dwelling means any building, structure or portion
12 thereof which is occupied as or designed or intended
13 for occupancy as a residence by one or more families.
14 Interestingly, a family is defined to include a single
15 individual. Thus a single handicapped person who pays
16 to occupy a portion of a building or nursing home as
17 their dwelling or place of residence is protected
18 under the Federal Fair Housing Act.

19 There are a number of cases that have
20 confirmed that nursing homes have to be considered
21 housing for the handicapped under the Fair Housing
22 Act. One of these cases, United States v. the
23 Commonwealth of Puerto Rico, was a case in 1991 in
24 which the U.S. District Court overturned a decision by
25 the lower court and Puerto Rico Zoning Agency that had

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1 refused to allow the Isla Verde Nursing Home to
2 operate in a residential district. The home housed 13
3 elderly handicapped persons. Under the Zoning law,
4 nursing homes could only be granted permits to operate
5 in an R-23 district by applying for a variance.

6 The court granted a preliminary
7 injunction. They stated that under the Fair Housing
8 Act it was illegal to refuse on the basis of a
9 handicap to make reasonable accommodations in rules,
10 policies, practices or services which such
11 accommodations may be necessary to afford such person
12 equal opportunity to use and enjoy a dwelling.

13 The second case is Hovsons v. Township of
14 Brick, 89 F 3rd 1096, a third circuit case from 1996,
15 where they addressed whether the township's refusal to
16 grant a variance to enable Hovsons to build a nursing
17 home in an R-2 district violated the Federal Fair
18 Housing Amendment Act. Essentially they decided that
19 it did. They determined that a nursing home should be
20 classified as a dwelling under the Federal Fair
21 Housing Act and the Third Circuit agreed stating that
22 the Township of Brick's argument that the proposed
23 nursing home is not a dwelling is without merit. For
24 the handicapped elderly person who would reside there,
25 Holiday Village would be their home very often for the

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1 rest of their lives. We therefore hold that the
2 proposed nursing home is a dwelling within the meaning
3 of the Fair Housing Act and they also determined that
4 the residents would meet the definition of handicapped
5 saying that the parties do not dispute that the
6 nursing home patients would be handicapped within the
7 meaning of the Fair Housing Act.

8 A third case, Lapid-Laurel LLC v. the
9 Zoning Board of Adjustment, another third Circuit case
10 that was decided in 2002 stated that "as an initial
11 matter there are two points on which the parties agree
12 or that are settled beyond dispute. (1) The future
13 residents of the facility that Lapid proposed to build
14 will be handicapped. (2) A nursing home like that one
15 that Lapid proposed qualifies as a dwelling within the
16 meaning of the statute." There are no District of
17 Columbia cases that are specifically on point.
18 However the Hovsons case was cited in the BZA's
19 decision in the Sunrise Assisted Living case, BZA
20 Appeal 16716(a).

21 We will get into testimony on this matter,
22 but before determining that the Capitol Hill Nursing
23 Center qualified as housing for the handicapped, DCRA
24 did require the Capitol Hill Healthcare Group submit
25 appropriate documentation including proof that it was

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1 properly established and licenses as a nursing
2 facility under the District of Columbia law. The
3 facility application is attached as an exhibit to my
4 pleading. I realized that I left out an affidavit
5 that they filed which I think I referred to in this
6 memo, but the affidavit was actually submitted by the
7 Capitol Hill Care Group and it is the same affidavit
8 that was submitted to us by the Capitol Hill Group
9 indicating the length of resident stay and so on.

10 CHAIRMAN GRIFFIS: That's an affidavit for
11 Henry Vaughn.

12 MS. GESALTI GILBERT: Yes.

13 CHAIRMAN GRIFFIS: Okay.

14 MS. GESALTI GILBERT: So based upon the
15 submissions by the Capitol Hill Group and the law
16 cited, that provision does not apply, therefore, DCRA
17 determined that the Capitol Hill Nursing Center
18 qualified as a CBRF providing housing for the
19 handicapped. Therefore under the amended Zoning
20 Regulations, the DCRA determined that the use was a
21 matter of right use in an R-5-D district in the
22 District of Columbia.

23 The next argument I'm not going to spend
24 any particular time on but I just note it beginning on
25 page nine of my memo. Since the nursing center is a

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1 matter of right use under the current Zoning
2 Regulations, the conditions in the BZA special
3 exception order have no continuing force or effect.
4 I think that's pretty much understood by everyone. I
5 have cited some law in support of that, but I think
6 it's pretty clear that once we have a matter of right
7 use that the conditions in a prior special exception
8 order no longer apply. It's in my memo if anyone has
9 any questions or you want me to go into that further,
10 I can.

11 I next wanted to concentrate on the fact
12 that the Zoning Administrator had the authority to
13 determine the appropriate number of required parking
14 spaces. Let me go back a little bit. Under the
15 Zoning Regulations as they were amended on July 30,
16 1999 in conformity with a consent agreement entered
17 into by the District of Columbia and the Justice
18 Department, section 330.5 of Title 11 of the Zoning
19 Regulations states that a CBRF provided that
20 notwithstanding any provision in this title to the
21 contrary, the Zoning Administrator has determined that
22 such CBRF that otherwise complies with the zoning
23 requirements of this title that are of general and
24 uniform applicability to all matter of right uses in
25 an R-4 district is intended to be operated as housing

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1 for persons with handicaps. So this use is permitted
2 as a matter of right use in an R-4 or higher district.
3 The Zoning Administrator determined that the Capitol
4 Hill Nursing Center qualified as housing for the
5 handicapped and therefore determined that it was a
6 matter of right use and that the Zoning Administrator
7 was required to treat it as a matter of right use and
8 to comply with zoning requirements of this title that
9 are of general and uniform applicability to all matter
10 of right uses.

11 On that basis, the Zoning Administrator
12 determined that the provision which was cited by Mr.
13 Monty Edwards pertaining to the parking requirements
14 for CBRF exceeding 16 persons in 11 DCMR 2101.1 where
15 it says that it's a CBRF for 16 or more persons, the
16 parking is as determined by the BZA. It was our
17 interpretation that this provision does not apply.
18 This provision was adopted for the special exception
19 uses.

20 Generally before this section was adopted,
21 all CBRFs for 16 or more persons were special
22 exception uses. Therefore because they required a
23 special exception, the parking would be as determined
24 by the BZA. However based upon the provisions of
25 section 330.5 that I just cited, that applied. The

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1 Zoning Administrator was required to look at the most
2 appropriate parking for this type of facility and not
3 to discriminate between housing for the handicap and
4 housing for persons who do not have handicaps. For
5 that reason, the Zoning Administrator looked to what
6 he considered to be similar uses being a rooming or
7 boarding house and that's the one that he selected.

8 I wanted to also mention that this
9 interpretation of the Zoning Administrator was
10 affirmed by the BZA in Appeal No. 16716(a) pertaining
11 to the appeal by the Nebraska Avenue Neighborhood
12 Association of DCRA's decision to issue a building
13 permit to the Sunrise Assisted Living Facility. I
14 draw your attention to page 13 of my prehearing
15 statement. In its conclusion of law, the BZA states
16 "the Board concludes that the Zoning Administrator
17 applied general and uniform zoning requirements
18 applicable to multi-family residences in an R-4
19 district such as parking requirements in his review of
20 the application for a building permit. Community
21 residential facilities for handicapped persons in the
22 multi-family districts are not subject to a greater
23 level of regulation than those that are applicable to
24 housing for non-handicapped persons." The Board
25 stated further "The Board concludes that the Zoning

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1 Administrator correctly determined the applicable
2 parking and loading requirements and that a ruling
3 from the Zoning Administrator was necessary because
4 the regulations do not set forth specific parking and
5 loading requirements for a community residence
6 facility in R-5-D zone." In the Sunrise case, the BZA
7 held that the Zoning Administrator had the authority
8 to determine the number of required parking spaces for
9 CBRF that qualified as a matter of right use.

10 That's essentially the gist of my
11 argument. I'd like to just a few questions of Ms.
12 Ogunneye and then if you have any questions I would be
13 happy to answer them.

14 MS. BAILEY: Excuse me. Ms. Ogunneye,
15 would you please spell your name for the record?

16 MS. OGUNNEYE: Sure. The first name is
17 Faye, F-A-Y-E. The last name is Ogunneye, O-G-U-N-N-
18 E-Y-E.

19 DIRECT EXAMINATION

20 MS. GESALTI GILBERT: I'm sorry. I've
21 been losing papers left and right here. Just give me
22 one more moment. Ms. Ogunneye, could you please state
23 your name for the record? I guess you just did.
24 Could you please state what your position is at DCRA?

25 MS. OGUNNEYE: Yes, I'm the Chief of

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1 Zoning Review Branch.

2 MS. GESALTI GILBERT: And can you explain
3 to me what your duties are in that position?

4 MS. OGUNNEYE: I review C of O as well as
5 building permit applications to ensure that they do
6 comply with the Zoning Regulations.

7 MS. GESALTI GILBERT: How long have you
8 been employed at DCRA?

9 MS. OGUNNEYE: Unofficially 18 months. As
10 a full time employee about 12 months.

11 MS. GESALTI GILBERT: For the record can
12 you state who is the Zoning Administrator?

13 MS. OGUNNEYE: Denzil Noble is the acting
14 Zoning Administrator.

15 MS. GESALTI GILBERT: And are you
16 appearing here on his behalf today?

17 MS. OGUNNEYE: Yes, I am.

18 MS. GESALTI GILBERT: Now I would like to
19 mark the C of O. I know these are already a matter of
20 the record in this case but I would like to mark the
21 C of O unless they are already in the record. Right?

22 CHAIRMAN GRIFFIS: They are already in the
23 record.

24 MS. GESALTI GILBERT: Okay. If then you
25 will just take a look at the two C of O that were

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1 issued that are the subject matter of this appeal.
2 Have you had an opportunity to review these C of O?

3 MS. OGUNNEYE: Yes, I have.

4 MS. GESALTI GILBERT: And have you had an
5 opportunity to review DCRA's records and files related
6 to the issuance of these C of O?

7 MS. OGUNNEYE: Yes, I have.

8 MS. GESALTI GILBERT: And have you also
9 had an opportunity to discuss the factors which led to
10 the issuance of C of O?

11 MS. OGUNNEYE: Yes, I have.

12 MS. GESALTI GILBERT: Have you also had an
13 opportunity to discuss the factors which led to the
14 issuance of these C of O with the Zoning
15 Administrator?

16 MS. OGUNNEYE: Yes, I have.

17 MS. GESALTI GILBERT: Can you just try to
18 briefly explain to the Board how it is that DCRA
19 determined to issue new C of O particularly for the
20 nursing home at 700 Constitution Avenue to the Capitol
21 Hill Healthcare Group?

22 MS. OGUNNEYE: Okay. At the time, the
23 Applicant came for a new C of O, the Zoning
24 Administrator determined that based on the amendments
25 to the Zoning Regulations in 1999 the facility

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1 qualified as a handicapped facility. The Applicant
2 provided an affidavit to that effect as well as a
3 certificate of licenser. The Norson (PH) Home as a
4 handicapped facility is a matter of right facility and
5 based on that we had no choice but to issue a C of O.

6 MS. GESALTI GILBERT: Now can you address
7 the choice of parking that -- Let me ask you one other
8 question. The prior C of O that existed for this
9 facility, was that subject to the BZA order? Did that
10 indicate that it was subject to the BZA order?

11 MS. OGUNNEYE: Yes, it did.

12 MS. GESALTI GILBERT: All right. That was
13 the reason for a new C of O. Was that why they came
14 in for a new C of O?

15 MS. OGUNNEYE: They came for a new C of O
16 because they had some use changes and the use changes
17 like I mentioned earlier had kicked them into section
18 330.5 which was a matter of right use. The Zoning
19 Regulations did not stipulate the parking requirements
20 for the facility and the Zoning Administrator
21 determined that based on similar uses for residential
22 facilities and the precedent of Sunrise case that
23 using the rooming house determination would be the
24 more restrictive application.

25 MS. GESALTI GILBERT: When you say "that

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1 would be the more restrictive application" what were
2 the others? More restrictive than what?

3 MS. OGUNNEYE: More restrictive than
4 regular multiple family residences requirement and it
5 didn't quite qualify as the assisted living
6 handicapped because that one had to be publicly
7 assisted which this wasn't.

8 MS. GESALTI GILBERT: Okay. Now I think
9 as I'm reading the Board here when you made a
10 reference to a change of use that's something that we
11 use. That's a term of an ours in DCRA's logo. Is
12 that fair to say that when somebody needs a new C of
13 O we may call it a change in use?

14 MS. OGUNNEYE: Correct.

15 MS. GESALTI GILBERT: So the nursing home
16 didn't change.

17 MS. OGUNNEYE: No, it didn't.

18 MS. GESALTI GILBERT: All right.
19 Essentially that's it. I have no further question.
20 I will happy to accept any questions or
21 clarifications.

22 CHAIRMAN GRIFFIS: Questions from the
23 Board? Mr. Zaidain.

24 MEMBER ZAIDAIN: I have two quick ones for
25 Ms. Gilbert. If I understood your earlier statement

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1 you were talking about the definition of disabled. If
2 I understood you correctly, I thought I heard you say
3 the definition of disabled as outlined in the Zoning
4 Regulations. I was wondering if you could point me to
5 that if I understood you correctly.

6 MS. GESALTI GILBERT: Right. I think I
7 did say that it's the same as in the Zoning
8 Regulations. I think that the Zoning Regulations
9 incorporates. Let me see if I can pull it out. I
10 think it may incorporate that definition from the Fair
11 Housing Act. It says anybody who is handicapped under
12 the Fair Housing Act in section 330. Yes. It says
13 "For the purposes of..." It's 330.5(I). "For the
14 purposes of this subsection a 'handicap'..." I think
15 it was handicap not disabled. It's the term.
16 "...means with respect to a person a physical or
17 mental impairment that substantially limits one or
18 more of such person's major life activities or record
19 of having or being regarded as having such an
20 impairment, but such item does not include current
21 illegal use or addition to a controlled substance."
22 So the principal part of that, apart from the addition
23 part was lifted right out of the Fair Housing Act.

24 MEMBER ZAIDAIN: Right. Would you agree
25 that 330.5(I) ties back into the definition of CBRF in

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1 its subdefinitions?

2 MS. GESALTI GILBERT: Yes.

3 MEMBER ZAIDAIN: I guess one thing that
4 raises my curiosity although this isn't directly
5 before us is why it's not including illegal use or
6 addition of controlled substances, but then the CBRF
7 definition incorporates that under (E). I guess
8 that's not really a big issue for us. Okay.

9 MS. GESALTI GILBERT: So yes, it's a CBRF
10 and it is a healthcare facility. It meets the
11 definition of a CBRF and it fits under (D) healthcare
12 facility.

13 MEMBER ZAIDAIN: Right.

14 MS. GESALTI GILBERT: But contrary to Mr.
15 Monty Edwards, we believe that it does constitute
16 housing for the handicapped.

17 MEMBER ZAIDAIN: Okay.

18 MS. GESALTI GILBERT: That a skilled
19 nursing facility or an intermediate nursing care
20 facility in most instances if not every instance will
21 constitute housing for the handicapped.

22 MEMBER ZAIDAIN: Okay.

23 MS. GESALTI GILBERT: In this case, we did
24 get the copy of the certification that they were a
25 skilled nursing facility and we did receive their

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1 affidavit and we did review the relevant case law and
2 the subject and we determined they were housing for
3 the handicapped on that basis.

4 MEMBER ZAIDAIN: Right, so it's on the
5 basis --

6 MS. GESALTI GILBERT: The affidavit does
7 indicate that the average length of stay for most
8 patients is 11 months. It also mentioned that 48 of
9 the patients have been at the facility for over a
10 year.

11 MEMBER ZAIDAIN: And that's how the
12 determination was based on was the affidavit and the
13 certification.

14 MS. GESALTI GILBERT: Right.

15 MEMBER ZAIDAIN: And that's what we should
16 focus on there.

17 MS. GESALTI GILBERT: Right.

18 MEMBER ZAIDAIN: Also I just had a really
19 quick semantical question in regards to your
20 submission. On page two, you talk about BZA Order
21 16407. You stated your argument about why this
22 doesn't apply, but then you've also talked about that
23 the BZA order expired after its own terms of two
24 years. I was looking through the order and I saw that
25 it said that approval shall be prepared of 10 years.

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1 Is that just a typo?

2 MS. GESALTI GILBERT: I guess so.

3 MEMBER ZAIDAIN: Okay. I just wanted to
4 make sure.

5 MS. GESALTI GILBERT: But I think they had
6 to do something within two years if I'm not mistaken.
7 I haven't read it recently, but I think they have to
8 take some action. They have to apply for a C of O or
9 they had to do something within a two year period
10 under that order.

11 CHAIRMAN GRIFFIS: You mean they didn't
12 activate the order.

13 MS. GESALTI GILBERT: I don't have it in
14 front of me. I think so. I think that's it.

15 CHAIRMAN GRIFFIS: I see. That's why it
16 expired at two years. There was no action on it.

17 MS. GESALTI GILBERT: They didn't submit
18 new plans for a proposed expansion.

19 MEMBER ZAIDAIN: I didn't see that in the
20 order.

21 CHAIRMAN GRIFFIS: Any extending order
22 unless you pull permanence for instance if it's for
23 construction, you have activated the order. It
24 doesn't last forever if you don't effectuate it.
25 That's what you're saying. Correct?

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1 MS. GESALTI GILBERT: It's my
2 understanding that they never did the proposed
3 expansion.

4 MEMBER ZAIDAIN: So if you get an order
5 and you don't apply for a permit, the order dissolves.

6 MS. OGUNNEYE: Right. Sometimes it's
7 stipulated in the back of the order.

8 CHAIRMAN GRIFFIS: Right. Here look at
9 this. The boilerplate stuff that we never read on our
10 orders when they go out.

11 MEMBER ZAIDAIN: That's probably why I
12 don't know it.

13 CHAIRMAN GRIFFIS: That's right.

14 MEMBER ZAIDAIN: Regardless the approval
15 was for ten years.

16 CHAIRMAN GRIFFIS: Anything else from the
17 Board? Do you have more questions?

18 MEMBER ZAIDAIN: No, that's okay. I'll
19 look up. Thank you.

20 MEMBER MILLER: I have a question.

21 CHAIRMAN GRIFFIS: Yes.

22 MEMBER MILLER: Ms. Gilbert, DCRA's
23 determination that nursing homes are to be considered
24 handicapped and covered under 330.5 is based on the
25 case law that you cite in your prehearing statement.

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1 MS. GESALTI GILBERT: Yes.

2 MEMBER MILLER: Is it based on anything
3 else?

4 MS. GESALTI GILBERT: It's no secret the
5 District was sued by Capitol Hill Healthcare Group.
6 The judge was basically persuaded and was ready to
7 enter a summary judgment against the District. I
8 don't think that's a secret.

9 MEMBER MILLER: I don't know exactly what
10 you're referring to. Is there some other D.C. case
11 that we can deal with?

12 MS. GESALTI GILBERT: No, I'm saying that
13 the Capitol Hill Healthcare Group sued the District of
14 Columbia for not having issued the C of O to it
15 relieving it from the conditions of the BZA order and
16 requested a C of O. When DCRA had not acted promptly
17 on that request, they filed suit for a declaratory
18 judgment. The court appeared to be pursued that they
19 did constitute housing for the handicapped. They did
20 not rule because we settled the matter.

21 MEMBER MILLER: So there isn't a D.C.
22 decision on that case.

23 MS. GESALTI GILBERT: There is not a D.C.
24 court decision on point. No.

25 MEMBER MILLER: I haven't read the cases

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1 that you cited yet, but it seems to me that when
2 you're arguing that a nursing home should be
3 considered under the Fair Housing Act, it seems like
4 the point is going to that they not discriminate on
5 the basis of the handicap, not other kind of
6 peripheral things that they shouldn't be required to
7 do other things such as parking. You've read the
8 cases, but that's basically my question. Do they
9 address other things or are they just trying to say
10 that "No, nursing homes shouldn't discriminate against
11 the handicapped on housing"?

12 MS. GESALTI GILBERT: I think that
13 probably you're correct, but certainly there's an
14 issue here in terms of the provision in the Zoning
15 Regulations. If it would all be a lot neater and
16 clearer if the Zoning Commission had made very clear
17 when they amended the statute what the parking
18 requirements would be or whether those parking
19 requirements applied or whether you'd have to go to
20 the BZA for the parking.

21 MEMBER MILLER: Basically the BZA cases
22 don't really go into those kind of issues.

23 MS. GESALTI GILBERT: Right.

24 MEMBER MILLER: I have a really basic
25 question here. I think you said something. Say the

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1 Zoning Administrator is the one that has the authority
2 now to make this decision. There seem to be
3 statements that says he's required to look to similar
4 uses in determining the appropriate number of parking
5 spaces. I want to know first of all where does it say
6 that in the regulations?

7 MS. GESALTI GILBERT: I think that what
8 we're relying on is in the -- I think that what I was
9 trying to say that. Well, essentially the practice
10 has been that where there is no specific parking
11 requirement that the Zoning Administrator looks to
12 similar uses, but there's no specific ratio indicated.
13 Then in this case because the housing for the
14 handicapped is to be treated similar to housing that
15 is not for the handicapped, we looked at what the
16 Zoning Administrator considered to be similar uses
17 being an apartment building or a rooming house or a
18 boarding home and determined that it was the similar.

19 MEMBER MILLER: I understand that.

20 MS. GESALTI GILBERT: Okay. I'm sorry.

21 MEMBER MILLER: That's fine. My next
22 question is is there something that precludes the
23 Zoning Administrator from looking right in his record
24 at the previous C of O where there was a BZA order
25 that was based on a whole hearing of the parking needs

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1 in the area?

2 MS. GESALTI GILBERT: My understanding is
3 that the Zoning Administrator was essentially
4 concerned in making his determination about other uses
5 throughout the city and not making a determination in
6 this facility that would impact other existing nursing
7 homes across the city and require parking in those
8 facilities. That would be out of line with what was
9 being required here. I think that was his principal
10 consideration. Now whether he could have looked at
11 the BZA order for guidance, I don't think there's
12 anything that specifically prohibits that. It's just
13 not in the Zoning Regulations.

14 MS. OGUNNEYE: If I may just add to that.

15 MS. GESALTI GILBERT: Sure.

16 MS. OGUNNEYE: Usually when someone
17 applies for a new C of O, we look at the previous C of
18 O and at that point since the use was a matter of
19 right use, the existing BZA order becomes nullified
20 because it's no longer applicable.

21 CHAIRMAN GRIFFIS: But where's your first
22 stop to look at how you could classify it for parking?

23 MS. OGUNNEYE: Once it's a matter of
24 right, we would go to section 2101.

25 CHAIRMAN GRIFFIS: Okay.

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1 MS. OGUNNEYE: Basically we would pick it
2 out of there. In situations where it is not explicit,
3 then we have to determine what's most similar and
4 apply that.

5 CHAIRMAN GRIFFIS: So your procedure is to
6 go directly not to the previous decision or ratio or
7 count, but rather your first step and stop is the
8 current regulations.

9 MS. OGUNNEYE: Correct.

10 CHAIRMAN GRIFFIS: Okay.

11 MEMBER MILLER: But you cite in your
12 prehearing statement, New York cases and Rathkoff for
13 the proposition that it's nullified if the law
14 changes. Is there any D.C. law on that?

15 MS. GESALTI GILBERT: No. In fact, it was
16 interesting. To me it seems that it's almost an
17 obvious situation because the cases that I found were
18 almost the opposite situation, for example, the
19 nonconforming use situation where you have a use that
20 was previously allowed and is now no longer permitted.
21 If the law is changed, you're still allowed to do it.

22 But in this situation, you have the
23 opposite situation where the law is more lenient. The
24 most significant thing in that material that I cited
25 was that the neighbors have no vested interest in the

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1 continuity of zoning according to the Rathkoff Law of
2 Zoning. That's essentially it.

3 MS. OGUNNEYE: Just to make an example.
4 If for instance there is a BZA order in an R-4 zone
5 for having an office building which we know is not a
6 matter of right and they do have approval for that if
7 someone else comes along in that property and decides
8 they want to revert it back to residential, then that
9 BZA order dies. If someone else comes along years
10 later and tries to reapply the BZA order, it cannot be
11 done because then it's dead.

12 MEMBER MILLER: We are in the situation
13 where though the use hasn't changed.

14 MS. GESALTI GILBERT: Right.

15 MEMBER MILLER: Nothing has changed except
16 the law and the parking needs as far as DCRA had
17 before it hadn't changed. So what appears to me is
18 that DCRA just didn't look at any of the findings made
19 for that specific location and just started looking at
20 other places around the city.

21 MS. GESALTI GILBERT: No. I think that
22 what DCRA did was DCRA looked at the regulations.
23 They didn't attempt to base it on the special
24 exception order because the special exception order
25 and the findings that have been made by the BZA in

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1 this special exception order the Zoning Administrator
2 had no further relevance to this situation since it's
3 now matter of right.

4 Now if BZA decides that it's something
5 that should be determined by the BZA after a hearing,
6 then that's a different situation. But I don't think
7 that the Zoning Administrator would have the basis to
8 go look at all of these different issues.

9 MEMBER MILLER: I don't want to pursue
10 this too much, but hypothetically if the law changed
11 and they weren't required to follow the BZA order
12 anymore - let's say that was the case - it still seems
13 to me that possibly that the best evidence of the
14 number of parking spaces that might be required would
15 be the findings that were made by the BZA based on an
16 evaluation and public hearing, etc. of the needs of
17 that particular area. It just seems like DCRA
18 disregards that.

19 MS. GESALTI GILBERT: I can only say that
20 it was not done and instead as Ms. Ogunneye said the
21 Zoning Administrator looked at the regulations and
22 looked at the uses in 2101, the parking.

23 MEMBER MILLER: Thank you.

24 CHAIRMAN GRIFFIS: Any other questions?

25 MEMBER ZAIDAIN: Just as a follow up to

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1 some of that conversation.

2 CHAIRMAN GRIFFIS: Yes, Mr. Zaidain.

3 MEMBER ZAIDAIN: In the alternative, isn't
4 it a kind of practice that when a use comes that it is
5 a matter of right but it's not accounted for in the
6 parking schedule, you look for the most restrictive
7 regulation of the closest use in the schedule?

8 MS. OGUNNEYE: Correct.

9 MEMBER ZAIDAIN: That happens fairly
10 frequently.

11 MS. OGUNNEYE: I wouldn't say frequently,
12 but yes, it does happen.

13 MEMBER ZAIDAIN: Okay.

14 CHAIRMAN GRIFFIS: Cross examination.
15 We'll start with Stanton.

16 CROSS EXAMINATION

17 MR. EDWARDS: Ms. Ogunneye, when you
18 determined the parking for the nursing home portion,
19 what evidence did you have as to the number of
20 employees that were currently employed by the nursing
21 facility at that time?

22 MS. GESALTI GILBERT: I'm going to ask
23 that the question be rephrased simply because Ms.
24 Ogunneye has already testified that she didn't
25 personally make the decision.

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1 MR. EDWARDS: She did testify that they
2 did review the criteria to determine what was the
3 appropriate level of parking.

4 CHAIRMAN GRIFFIS: Right, but Ms.
5 Gilbert's objection is the fact that she didn't
6 specifically do the individual review. She may not be
7 able to tell you the exact number. Are you aware of
8 the number? Can you tell us what the number of
9 employees were?

10 MS. OGUNNEYE: I'm afraid I can't.

11 CHAIRMAN GRIFFIS: And you can't because?

12 MS. OGUNNEYE: Actually the certificate of
13 license here says that they did provide those. They
14 made mention of the skilled and the nursing facility
15 staff members that were there. I'm sorry. Could you
16 repeat the question?

17 CHAIRMAN GRIFFIS: What was the number of
18 employees that was known to the Zoning Administrator
19 when they made the determination for the parking?

20 MS. OGUNNEYE: One hundred and seventeen.
21 I'm sorry. That's the number of beds. I'm sorry.

22 MEMBER ZAIDAIN: Did you guys know about
23 how many employees or did you just focus on the
24 certification and the affidavit?

25 MS. OGUNNEYE: No, we do know. Sixty-

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1 eight employees.

2 MR. EDWARDS: I believe you are looking at
3 a portion of their application that has to do with the
4 healthcare professionals. That does not encompass the
5 housekeeping staff --

6 CHAIRMAN GRIFFIS: You have to ask a
7 question. This is cross examination.

8 MR. EDWARDS: Is that correct?

9 MS. OGUNNEYE: I'm sorry. I can't answer
10 that.

11 MR. EDWARDS: With the page that you have
12 before you now of the application, please read the
13 titles of the entries on the last two lines on the
14 page that you had before you.

15 MS. OGUNNEYE: Okay. Housekeeping
16 services and others.

17 MR. EDWARDS: And with the table you were
18 just looking, did it include any housekeeping staff or
19 other in those 42 employees?

20 CHAIRMAN GRIFFIS: Okay. Just to refresh
21 of course this is all for our benefit. What are we
22 looking at?

23 MR. EDWARDS: We are looking at the
24 attachment to the prehearing statement of the DCRA.

25 MR. TUMMONDS: Mr. Chairman, I would

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1 question the relevancy of this question based on the
2 fact that Ms. Ogunneye has testified that the Zoning
3 Administrator's office used the interpretation of the
4 Zoning Regulations of the rooming or boarding house.

5 CHAIRMAN GRIFFIS: Right.

6 MR. TUMMONDS: The calculation is based on
7 the beds or units. It doesn't have anything to do the
8 number of employees.

9 MR. EDWARDS: I'll accept that. Thank you
10 very much.

11 MR. TALLANT: And we want to challenge
12 that also because one of the things that Ms. Gilbert
13 said was that the Zoning Administrator should look to
14 the closest relevant activity.

15 CHAIRMAN GRIFFIS: Okay. Either challenge
16 it in cross examination or at another time.

17 MR. TALLANT: I will. Now?

18 CHAIRMAN GRIFFIS: That's your cross.

19 MR. EDWARDS: Can I finish?

20 MR. TALLANT: I'll let Monty finish first.

21 MR. EDWARDS: Okay. Both of you testified
22 as to the events that led to the issuance of the C of
23 O. Now I believe you referred to litigation that was
24 on-going. Was that in the bankruptcy court?

25 MS. GESALTI GILBERT: That's correct.

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1 MR. EDWARDS: Now could you turn to the
2 actual C of O that were issued and confirm that the
3 date they were issued was March 26, 2003?

4 MS. OGUNNEYE: I'm sorry. Was that for
5 me? Yes.

6 MR. EDWARDS: Now perhaps this should go
7 to counsel but was there any determination of the
8 validity of any settlement as a result of that
9 litigation by the court?

10 CHAIRMAN GRIFFIS: How is that relevant to
11 this appeal?

12 MR. EDWARDS: Did the settlement ever go
13 before the court for approval in that litigation?

14 CHAIRMAN GRIFFIS: I understood your
15 question, but why is that relevant to this appeal?

16 MR. EDWARDS: I think my next question
17 will help.

18 CHAIRMAN GRIFFIS: It's probably best to
19 bundle them together so I understand.

20 MR. EDWARDS: Isn't it true that on the
21 date or the day following the issuance of the C of O
22 the next thing that happened in the bankruptcy court
23 was a voluntary dismissal of the suit brought by the
24 Capitol Hill Hospital Group against DCRA?

25 CHAIRMAN GRIFFIS: I still don't

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1 understand. How is that relevant to us getting to the
2 central question of this and most appeals is that the
3 Zoning Administrator made an error?

4 MR. EDWARDS: The testimony so far has
5 gone to the factors that led to the issuance of the C
6 of O. We have had an oblique reference to some
7 litigation.

8 CHAIRMAN GRIFFIS: So you're saying that
9 somehow this litigation made the Zoning Administrator
10 make an error.

11 MR. TALLANT: Ms. Gilbert testified that
12 because of --

13 CHAIRMAN GRIFFIS: First of all, Ms.
14 Gilbert didn't testify because she's an attorney.

15 MR. TALLANT: I'm sorry. She stated that
16 as a result of the litigation that DCRA felt compelled
17 to issue the C of O. This was because she believed
18 that a judge was about to issue a ruling against them.

19 CHAIRMAN GRIFFIS: Excellent. So the
20 question is did the Zoning Administrator issue the C
21 of O because they were being sued.

22 MS. GESALTI GILBERT: That's not the
23 reason for issuing the C of O. The C of O was issued
24 because as a result of the litigation we looked into
25 all of these issues and I was involved in doing the

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1 research. A couple of attorneys at Corp Counsel were
2 involved in doing the research. We came to the
3 conclusion that, yes, they were right. They had a
4 point. This was housing for the handicapped that
5 should be matter of right in an R-4 or higher zone.

6 CHAIRMAN GRIFFIS: And that was the basis
7 of the lawsuit.

8 MS. GESALTI GILBERT: Right. That was the
9 basis of the lawsuit.

10 CHAIRMAN GRIFFIS: So that's where the
11 facts and evidence came apparent to the Zoning
12 Administrator through you, the counsel, of how they
13 should look at this in terms of issuing the C of O.

14 MS. GESALTI GILBERT: Through myself and
15 the attorneys at Corp, yes.

16 CHAIRMAN GRIFFIS: Okay. Go ahead.

17 MR. EDWARDS: Mr. Chairman, may I submit
18 the complaint that was filed in bankruptcy and let it
19 speak for itself?

20 CHAIRMAN GRIFFIS: No, not in cross
21 examination, you don't submit evidence.

22 MR. EDWARDS: All right.

23 MR. TALLANT: Ms. Gilbert, you stated that
24 the Zoning Administrator did not have the capacity to
25 review the number of employees at MedLINK and make

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1 that a factor in their decision about the appropriate
2 level of parking. Is that correct?

3 MS. GESALTI GILBERT: I don't think I said
4 that.

5 MS. OGUNNEYE: I did.

6 MR. TALLANT: I'm sorry.

7 MS. OGUNNEYE: In determining the number
8 of parking required for this facility, it's just the
9 number of beds that is applied, not the number of
10 staff.

11 MR. TALLANT: And for guidance you stated
12 that DCRA looked to the rooming house type of
13 operation at Sunrise Assisted Living. Is that
14 correct?

15 MS. OGUNNEYE: Correct.

16 MR. TALLANT: Irregardless of the
17 difference in licensing and degree of healthcare
18 provided at the two facilities.

19 MS. OGUNNEYE: The affidavit that was
20 supplied to DCRA showed us enough evidence that the
21 facility did qualify as a handicapped facility which
22 was the basis for which we reviewed it under section
23 330.5.

24 MR. TALLANT: Then is there any nursing
25 home that would not so qualify?

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1 MS. OGUNNEYE: There's a possibility, yes,
2 if there were in another zone than the R-4.

3 MR. TALLANT: That has nothing to do with
4 the nature of the operation. If this were R-1, it
5 would be still be the same. I'm talking about the
6 type of operation at MedLINK.

7 MS. OGUNNEYE: I'm sorry. Could you
8 rephrase that?

9 MR. TALLANT: Is there any nursing home
10 like MedLINK that would not also be classified as
11 housing for the handicapped?

12 MS. OGUNNEYE: There's a possibility, yes.

13 MR. TALLANT: And can you explain that
14 possibility?

15 MEMBER ZAIDAIN: Are you asking her to
16 name them?

17 MR. TALLANT: Well, give me example of how
18 that could be.

19 MS. GESALTI GILBERT: I think that calls
20 for speculation. We argued that as far as we know
21 certainly in my prehearing statement I've suggested
22 that a legitimate nursing home would almost always be
23 considered housing for the handicapped. I think what
24 Ms. Ogunneye as testified is conceivably there's a
25 situation where there could be nursing home that

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1 didn't qualify for some other reason. Maybe it wasn't
2 a legitimate nursing. Maybe their residents only
3 stayed for a week at a time or something else.

4 MR. TALLANT: The question that I'm
5 trying to get to --

6 MS. OGUNNEYE: I think you didn't explain
7 that point I was trying to make which was the same
8 sort of facility in an R-2 zone would automatically
9 have to go before the Board because it would not be a
10 matter of right.

11 MR. TALLANT: Okay.

12 MS. OGUNNEYE: But the zone in which this
13 particular facility is in.

14 MR. TALLANT: The question I'm trying to
15 get to is the model that the Zoning Administrator and
16 DCRA looked to for guidance and in this case, they
17 looked to Sunrise Assisted Living which does not
18 provide the level of medical care that MedLINK does.

19 MS. GESALTI GILBERT: Conceded.

20 MR. TALLANT: That in fact MedLINK
21 Hospital is far more like a hospital which requires
22 one parking space for each bed and that if the Zoning
23 Administrator were looking for guidance, he should
24 have looked to the previous BZA orders. They should
25 have looked to the requirements for a hospital because

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1 the level of care at MedLINK is far closer to that of
2 a hospital than it is Sunrise Assisted Living.

3 CHAIRMAN GRIFFIS: Wait a minute. That's
4 a question actually. He meant to end on an upbeat.

5 MS. GESALTI GILBERT: I think that's an
6 argument rather than question.

7 CHAIRMAN GRIFFIS: It isn't now. Do you
8 agree?

9 MS. OGUNNEYE: I'm sorry. What am I
10 agreeing to?

11 MR. TALLANT: Given the level of medical
12 treatment provided at MedLINK Hospital and Nursing
13 Home should not the Zoning Administrator have looked
14 to the parking requirements for a hospital rather than
15 a rooming house where no medical facilities are
16 provided?

17 MS. OGUNNEYE: I do not agree. No.

18 MR. TALLANT: What is your argument for
19 not agreeing? Why is a rooming house --

20 MS. GESALTI GILBERT: I'm going to object
21 because I really think that Ms. Ogunneye is not
22 equipped to answer this question at this time. She
23 was not personally involved in making the decision.

24 CHAIRMAN GRIFFIS: Well, it's going to beg
25 the question that why isn't the person that can answer

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1 that question here.

2 MS. GESALTI GILBERT: Based on his
3 schedule this afternoon.

4 CHAIRMAN GRIFFIS: That's interesting. So
5 you brought somebody here.

6 MS. GESALTI GILBERT: We can still get him
7 here. He is on call. If you want to hear from him,
8 we can still get him. Okay. Go ahead.

9 CHAIRMAN GRIFFIS: The witness that you
10 brought here today certainly has some basis to begin
11 to answer these questions.

12 MS. GESALTI GILBERT: All right. Go
13 ahead.

14 CHAIRMAN GRIFFIS: It's a very quick
15 question in terms of why wouldn't you look to
16 something else but more importantly what made you look
17 to rooming house or a procedure leading to rooming
18 house to depict your parking?

19 MS. OGUNNEYE: We do have two exhibits
20 which are the two C of O and both uses have been
21 separated. They are on different floors. One C of O
22 is for the hospital side and the C of O is for the
23 CBRF. So both entities so to speak were addressed
24 according. The part that was hospital we applied the
25 parking for the hospital. The part that was CBRF we

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1 applied the parking stipulated as CBRF.

2 MR. TALLANT: And we are not disputing the
3 hospital portion.

4 CHAIRMAN GRIFFIS: Right, but she's
5 answering the question of why the CBRF wouldn't be
6 analogous to a hospital in the parking calculation.
7 So what you did was you found that the use and the
8 size was more analogous to a rooming house.

9 MS. OGUNNEYE: Right. The use itself
10 correct.

11 MEMBER ZAIDAIN: Just out of curiosity
12 which is more restrictive? The hospital is more
13 restrictive.

14 MS. OGUNNEYE: The hospital is more
15 restrictive but CBRF is no way a hospital.

16 MEMBER ZAIDAIN: Right. Exactly. But
17 like you testified here, you search for the most
18 appropriate use which in your mind was the boarding
19 house.

20 MS. OGUNNEYE: Right, which was the most
21 restrictive.

22 MEMBER ZAIDAIN: And you're asking her why
23 didn't you the hospital for that?

24 MR. TALLANT: It seems they used the least
25 restrictive comparable model, a nursing facility that

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1 they equated to a rooming house where no medical
2 services are provided.

3 CHAIRMAN GRIFFIS: Okay. So you answered
4 the question.

5 MEMBER ZAIDAIN: But I don't know if that
6 question that I directly proposed to her was answered.
7 Can you tell us why you didn't use a hospital for the
8 CBRF?

9 MS. OGUNNEYE: Because the CBRF part of
10 the application is not a hospital.

11 MEMBER ZAIDAIN: So you looked to a
12 boarding house in a use sense in your mind and the
13 boarding house was more appropriate in terms of use.
14 I think your testimony was that you could have looked
15 at it as a multi-family use but that was not as
16 restrictive as a boarding house.

17 MS. OGUNNEYE: Correct.

18 MEMBER ZAIDAIN: So the difference between
19 a boarding house and a hospital in your mind if I
20 understand you correctly was a boarding house is more
21 closer in use than a hospital was for the CBRF.

22 MS. OGUNNEYE: No, we wouldn't have looked
23 at the hospital at all in determining the CBRF. We
24 would look at only the uses that best suits the
25 residential use.

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1 MEMBER ZAIDAIN: Okay. Which would
2 exclude a hospital.

3 MS. OGUNNEYE: Correct.

4 CHAIRMAN GRIFFIS: And what's your
5 understanding of the activity that happens with the
6 CBRF?

7 MS. OGUNNEYE: It's a facility for
8 handicapped people that require assistance for getting
9 up, feeding themselves, bathing themselves, clothing
10 themselves and that require assistance from a
11 healthcare provider.

12 CHAIRMAN GRIFFIS: So how does that
13 happen? People have rooms that they live in and then
14 they have people come in and out.

15 MS. OGUNNEYE: Correct.

16 CHAIRMAN GRIFFIS: Okay.

17 MEMBER MILLER: I just want to follow up
18 on that because that's been festering in my mind as
19 well. This goes back to when you determined that this
20 was a nursing home that falls under 330.5(I). I think
21 you said you looked at the license and the affidavit
22 and the case law discussing nursing homes. I want to
23 know if you looked at the residents of this facility.
24 In what ways were they handicapped or did you just go
25 on those three areas that I just mentioned?

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1 MS. GESALTI GILBERT: I think that we
2 didn't attempt to look at in what ways they were
3 handicapped specifically.

4 MEMBER MILLER: I'm sorry. I know I
5 addressed this generally. I don't think you can
6 testify though, Ms. Gilbert, as to what you looked at.
7 Can you?

8 MS. GESALTI GILBERT: Okay.

9 MEMBER MILLER: So I guess Ms. Ogunneye
10 would have to testify to what they looked at. You
11 could argue as to what you think they needed to look
12 at.

13 MS. GESALTI GILBERT: Right.

14 MEMBER MILLER: Let's start with what you
15 did look at. Did you look at impairments they had or
16 anything like that in determining that they were a
17 nursing home that fell under 330.5(I)?

18 MS. OGUNNEYE: Yes, and that was why we
19 asked for the affidavit to prove that the facility in
20 fact was what is handicapped persons.

21 MEMBER MILLER: I assume the affidavit is
22 in the record, but maybe you could refresh our
23 memories as to what that affidavit shows about the
24 impairments of the residents.

25 MS. OGUNNEYE: I'll just read a couple of

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1 excerpts.

2 MEMBER MILLER: You don't have to read it.
3 If there's nothing in addition to what's in the
4 affidavit, I've just been shown the affidavit. If
5 there's nothing else you want to add to that, that's
6 fine.

7 MS. OGUNNEYE: No, there is nothing else.

8 MR. TALLANT: I believe that's all except
9 I would like to ask Ms. Gilbert for clarification.
10 When she was describing section 330.5, it sounded as
11 though your argument was very circular. That a CBRF
12 is a CBRF subject to the regulation by the Zoning
13 Administrator if the Zoning Administrator determines
14 that it is a CBRF. Is that correct?

15 MS. GESALTI GILBERT: No.

16 MR. TALLANT: You stated that if it's a
17 CBRF, the Zoning Administrator sets the parking.

18 MS. GESALTI GILBERT: No, I think what I
19 said is that if it's a CBRF that provides housing for
20 the handicapped then it's a matter of right use.

21 MR. TALLANT: But the question is who --

22 MS. GESALTI GILBERT: And the Zoning
23 Administrator determines the parking. So the
24 preliminary determination is does this facility
25 qualify as housing for the handicapped? And having

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1 decided that yes, this nursing home qualifies as
2 housing for the handicapped and is entitled to be to
3 a matter of right use in the zoned district in which
4 it's located, then based upon that determination, the
5 Zoning Administrator determines the parking.

6 I'd like to just say to the Board.
7 Clearly there is a question here and in terms of the
8 questions that you've raised, Ms. Miller, with respect
9 to the number of employees --

10 CHAIRMAN GRIFFIS: But this is not
11 speaking to the question.

12 MS. GESALTI GILBERT: All right. Go
13 ahead.

14 CHAIRMAN GRIFFIS: Sorry. We were getting
15 this rhythm of rapid fire and rapid answers. Any
16 further questions from cross examination?

17 MR. TALLANT: I suppose not.

18 MEMBER ZAIDAIN: I just want to make sure
19 that I understood the exchange here. I think your
20 question was who determines that housing for the
21 handicapped.

22 MR. TALLANT: Exactly.

23 MEMBER ZAIDAIN: And your answer is the ZA
24 does.

25 MS. GESALTI GILBERT: Yes.

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1 MEMBER ZAIDAIN: As underlined in
2 330.5(I).

3 CHAIRMAN GRIFFIS: That's correct.

4 MEMBER ZAIDAIN: Thank you.

5 MR. TALLANT: So the point of the question
6 was it seems that the whole thing is very behind
7 closed doors. There's no opportunity for the
8 community.

9 CHAIRMAN GRIFFIS: Okay. And I think you
10 pointed directly to it, but the regulations are very
11 clear on that aspect.

12 MR. TALLANT: That it should be the BZA.

13 CHAIRMAN GRIFFIS: No, that the direct
14 issue that Mr. Zaidain has brought up in terms of
15 making the determination whether it's for the
16 handicapped or not is the ZA's. It is not the BZA's.

17 MR. TALLANT: But if it's a CBRF for over
18 16 people.

19 CHAIRMAN GRIFFIS: I understand you're
20 going to parking now, but you have to understand the
21 first point and we also are dealing with the second.

22 MR. TALLANT: Okay. I'm an architect, not
23 a lawyer.

24 CHAIRMAN GRIFFIS: So am I. Anything
25 else?

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1 MR. TALLANT: No, sir.

2 CHAIRMAN GRIFFIS: Okay. Let's take. Mr.
3 Tummonds, yes.

4 MR. TUMMONDS: We still are in cross
5 examination, right?

6 CHAIRMAN GRIFFIS: We have to go through
7 anybody. No reason to interrupt. We will get to
8 everybody.

9 MS. GESALTI GILBERT: May I just say one
10 last thing? I would like to say that I would concede
11 that there is a distinction between a rooming house
12 and a nursing certainly in terms of the number of
13 employees and the impacts on the community. But I
14 don't think that's reflected in the Zoning Regulations
15 or in the parking requirements in the Zoning
16 Regulations.

17 CHAIRMAN GRIFFIS: Okay. Why don't we
18 save it for closing then?

19 MS. GESALTI GILBERT: Okay.

20 CHAIRMAN GRIFFIS: Ms. Gilbert.

21 MS. GESALTI GILBERT: I'm sorry.

22 CHAIRMAN GRIFFIS: You're far from done.
23 These people are chomping at the bit to get up here.

24 MS. GESALTI GILBERT: I'm sorry for
25 stumbling today. I'm really not that well this

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1 afternoon.

2 CHAIRMAN GRIFFIS: After this cross
3 examination, we will stopping the case. I have a date
4 set for this to continue on because then this Board
5 has the pleasure of starting the next appeal this
6 afternoon. So Mr. Tummonds.

7 MR. TUMMONDS: Ms. Ogunneye, in your
8 discussion of the factors you used to determine the
9 appropriateness of the parking levels if you were to
10 look at something in this case. Do you think that the
11 fact that say in a hospital where you would have
12 patients that are going to stay for typically of a
13 matter of a couple of days that it would have an
14 impact on the level of parking that would be required
15 in a facility maybe compared to a facility where
16 someone would live for a matter of months or a longer
17 period? In your opinion, would it be more likely that
18 someone was at the hospital they are going to be there
19 for a couple of days? It's a great degree of
20 likelihood you're going to go visit them.

21 MS. OGUNNEYE: Yes, because it's a short
22 time.

23 MR. TUMMONDS: So do you think the fact
24 that this facility is a facility for people who stay
25 for a longer period of time that is a more appropriate

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1 determination to say that the parking required for
2 this facility is more similar to a rooming or boarding
3 house than a hospital?

4 MS. OGUNNEYE: Correct.

5 MR. TUMMONDS: That's it.

6 CHAIRMAN GRIFFIS: Good. Let's go to 6-C.

7 MR. CREWS: Thank you, Mr. Chairman. I
8 have a question for --

9 MS. OGUNNEYE: Faye. Ogunneye.

10 MR. CREWS: Ogunneye. Excuse me. Can you
11 point to a provision in the Zoning Regulations that
12 requires you not to look at a hospital? It appeared
13 that you gave testimony that you were only looking at
14 the CBRF listing. Is there a regulation? I apologize
15 to the Board for not having the full comprehension of
16 the Zoning Regulations.

17 MS. OGUNNEYE: Okay. Section 2101.1 which
18 is the schedule of requirements for parking spaces
19 which is grouped into commercial buildings,
20 institutional and so on. A hospital is under
21 institutional and the CBRF is under residential use.

22 MR. CREWS: What did you testify in terms
23 of how much latitude the Zoning Administrator had to
24 determine parking requirements for CBRF? Can you
25 point to if there is a limitation on that where that

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1 is?

2 MS. OGUNNEYE: I'm not sure I understand
3 the question.

4 MS. GESALTI GILBERT: Could you rephrase
5 the question?

6 MR. CREWS: Let me ask you again what the
7 basis of determining parking requirements are for
8 CBRFs?

9 MS. OGUNNEYE: It's a residential use and
10 under the parking table we have the breakdown of
11 different types of residential uses that could apply.

12 MR. CREWS: So your testimony is that you
13 limited to the residential uses in the table in 2101.

14 MS. OGUNNEYE: Correct, which is what the
15 facility is.

16 MR. CREWS: Based on your understanding of
17 the use and as you may have been clear before that you
18 determined that it was closer to a rooming house
19 rather than other uses based on the actual use of the
20 facility.

21 MS. OGUNNEYE: The rooming or boarding
22 house is the most restrictive use that could be
23 applied under the residential use.

24 MR. CREWS: Under residential.

25 MS. OGUNNEYE: Correct.

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1 MR. CREWS: Is there a limit though that
2 you can only look at residential?

3 MS. OGUNNEYE: That's what it is.

4 MR. CREWS: That's your interpretation of
5 the Zoning ordinance. I have no further questions.

6 MR. RICE: Ms. Gilbert, with respect to
7 the Zoning regulations at DS-11 DCMR 2101.1, the
8 parking requirements, would it be fair to say that the
9 plain language of those regulations does not delegate
10 authority for CBRFs with more than 16 persons to the
11 Zoning Administrator?

12 MS. GESALTI GILBERT: That would be the
13 plain language. However section 330.5 says
14 "notwithstanding any other provision of this title"
15 which is the provision that deals with housing for the
16 handicapped.

17 MR. RICE: So your basis for saying that
18 despite the language of 2101.1, it's your
19 interpretation of this other section 330.5.

20 MS. GESALTI GILBERT: Correct.

21 CHAIRMAN GRIFFIS: Let me help you with
22 that question. It's not her understanding or
23 interpretation. Ms. Gilbert is in a legal term of art
24 notwithstanding.

25 MS. GESALTI GILBERT: Notwithstanding and

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1 regardless of what any other provisions in this
2 regulations said.

3 CHAIRMAN GRIFFIS: Which means it
4 overrides anything else that you can find anywhere
5 else.

6 MS. GESALTI GILBERT: Right.

7 CHAIRMAN GRIFFIS: Is that correct?

8 MS. GESALTI GILBERT: That's correct.

9 CHAIRMAN GRIFFIS: Okay.

10 MR. RICE: So your interpretation is not
11 withstanding any other provision. All decisions about
12 facilities are delegated to the Zoning Administrator.
13 Is that correct?

14 MS. GESALTI GILBERT: No, that's not what
15 I said. What I said is that under section 330.5, that
16 a CBRF that provides housing for the handicapped shall
17 be permitted as a matter of right in an R-4 or higher
18 district. As a number of the members of the Board
19 have raised that point that generally where you have
20 a matter of right use, you don't then turn the parking
21 requirement over to the BZA to determine.

22 MR. RICE: So because the requirement for
23 CBRFs with more than 16 is different than many other
24 cases in the Zoning Regulations you're saying that the
25 BZA should disregard the plain language of 2101.1?

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1 MS. GESALTI GILBERT: No. That's not what
2 I'm saying. I'm turning again to 330.5(I). It says
3 that "CBRF that otherwise comply with zoning
4 requirements of this title that are of general and
5 uniform applicability to all matter of right uses in
6 an R-4 district." In looking at that language, we
7 felt that we should go to the requirements that are of
8 general and uniform applicability to matter of right
9 uses in an R-4 district. That's what we looked at.

10 MR. RICE: All right. Thank you for
11 clarifying. With respect to the Nebraska Avenue case,
12 that case was mentioned in your statement. Did the
13 appellants in the Nebraska Avenue case specifically
14 challenge the Zoning Administrator's authority to set
15 parking requirements or were they merely disagreeing
16 with the amounts of parking that were required for the
17 development?

18 MS. GESALTI GILBERT: You know. I'd have
19 to read that decision over. I haven't read that in a
20 while. But I think the decision speaks for itself.
21 I think you can answer that question yourself
22 probably.

23 MR. RICE: The BZA order on page two
24 related to that case. It says "Under the..."

25 CHAIRMAN GRIFFIS: You can do that in your

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1 conclusions.

2 MR. RICE: All right. You're not aware of
3 anything on point with respect to that case as to the
4 challenge to the authority of the Administrator.

5 MS. GESALTI GILBERT: I would have to
6 reread the decision.

7 MR. RICE: Okay. Great. Thanks.

8 CHAIRMAN GRIFFIS: Does the Parish have
9 any cross examination?

10 FR. DOWNING: We have a song, Mr.
11 Chairman, and a question.

12 CHAIRMAN GRIFFIS: A song?

13 FR. DOWNING: "Over the river and through
14 the woods, to Grandmother's house we go." I wonder,
15 Ms. Ogunneye, if you would indulge me in thinking
16 about the elderly people who are residents of the
17 nursing facility at Capitol Hill or MedLINK or
18 whatever its name is. We can't be sure. Do you
19 really think that people would only visit their
20 relations there within two days of their coming or do
21 you think that they might be more inclined to visit
22 them regularly since that's where they live?

23 MS. OGUNNEYE: I'm afraid I really
24 couldn't answer that because I'm differ from other
25 people. I might. You might not. I really couldn't

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1 answer that.

2 FR. DOWNING: You were willing to answer
3 the attorney's question about two days. Okay.
4 Thanks.

5 CHAIRMAN GRIFFIS: Okay. Is that everyone
6 that's going to cross? I think I've gone through the
7 entire list. Am I correct? Excellent. We are at
8 5:05 p.m. We're going to continue this case. We will
9 come back at the continuation of the case. We are at
10 Mr. Tummonds' presentation of his case and then we'll
11 continue on from that. This will continue next week
12 on the 25th. We do have other cases for that
13 afternoon. However, we will also call this case.

14 Ms. Bailey, is that acceptable to this
15 schedule as you view it? It's going to be the third
16 case in the afternoon. Our afternoons start at 1:00
17 p.m. which means I can't tell you exactly when to show
18 up. However I can be fairly assured we're not going
19 to call this immediately at 1:00 p.m. You may want to
20 be close in proximity sometime after that. I would
21 say you'd be fairly secure in showing up at 2:00 p.m.
22 and being timely for the calling of this case. I'm
23 sorry. Mr. Moy. No wonder she was agreeing with me.
24 Anything else we need to do attending to this?

25 MR. MOY: No, I think we're fine.

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1 CHAIRMAN GRIFFIS: Excellent. Is everyone
2 clear on the date? The Board has not asked for any
3 additional submissions. Of course the record does
4 stay open as the continuation of this case but I don't
5 anticipate additional submissions before Tuesday. Of
6 course there will be perhaps the evidence that we
7 submitted in the case.

8 COMMISSIONER HOOD: Mr. Chairman, I would
9 just suggest that you make the transcript available to
10 my colleague because I will not be here next week and
11 he can read the record.

12 CHAIRMAN GRIFFIS: Okay. We will
13 certainly facilitate a full Board hearing on this
14 case. If not, then I'd appreciate everyone being here
15 this afternoon being patient with us and sticking
16 around during the bomb scare. Thank goodness nothing
17 ever happened. So let's move on and call the next
18 case in the afternoon.

19 You know what? Why don't we take a break.
20 We're going to take a 15 minute break. If the next
21 case could just get settled. My anticipation is that
22 we will go for two and a half hours on the next case
23 and then probably break for dinner and sent everybody
24 home. So we are probably looking at 7:30 p.m. or
25 close to 8:00 p.m. Thank you. Off the record.

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1 (Whereupon, the foregoing matter went off
2 the record at 5:10 p.m. and went back on
3 the record at 5:29 p.m.)

4 CHAIRMAN GRIFFIS: On the record. Very
5 well. Let's call the next case in the afternoon, Ms.
6 Bailey.

7 MS. BAILEY: That is Appeal No. 17034 of
8 the Advisory Neighborhood Commission 2-E pursuant to
9 11 DCMR §§ 3100 and 3101 from the administrative
10 decision of the Zoning Administrator in the issuance
11 of a final and binding ruling letter dated July 12,
12 2001, to the law firm of Shaw Pittman confirming the
13 ability to develop three lots on the east side of the
14 1500 block of 32nd Street, N.W. with three row
15 dwellings. Appellant alleges that the Zoning
16 Administrator's decision is flawed and contains
17 factual and legal errors. The R-3 zone property is
18 located in the 1500 block of 32nd Street, N.W. on the
19 east side in Square 1270 on Lots 19, 20 and 21.
20 Please stand to take the oath all those person who
21 will testifying today.

22 (Witnesses sworn.)

23 CHAIRMAN GRIFFIS: Okay. We're ready to
24 roll. Who are the players? What do we have? Why
25 don't we come up? First we have Mr. Birch

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1 representing the ANC 2-E, the Appellant. Is that
2 correct?

3 MR. BIRCH: That's right.

4 CHAIRMAN GRIFFIS: Very good. Thank you.
5 If you wouldn't mind just turning your mike on and
6 introducing yourself for the record.

7 MR. BIRCH: My name is Thomas Birch. I
8 live at 1240 29th Street, N.W.

9 CHAIRMAN GRIFFIS: Excellent.
10 Representing DCRA. There is not a representative from
11 DCRA with us today. See I told you we shouldn't have
12 taken a break. Representing the property owner.

13 MR. EPTING: John Epting with Shaw Pittman
14 representing the owner of Lots 19 and 20.

15 CHAIRMAN GRIFFIS: Lots 19 and 20.

16 MR. EPTING: Which is Strategic Georgetown
17 LLC and Georgetown 32nd Street LLC.

18 CHAIRMAN GRIFFIS: I see. Is anyone
19 representing the other lot which is 21? Is that
20 correct?

21 MR. EPTING: That's correct.

22 CHAIRMAN GRIFFIS: And that's of Miller
23 ownership.

24 MR. EPTING: That's correct.

25 CHAIRMAN GRIFFIS: And they are

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1 represented by Mr. Nettler. Is there a representative
2 that owner here? Not now. Okay. In which case, are
3 there any preliminary matters that anyone's bringing up
4 in terms of this case? Wow. Then let's go ahead.
5 I'm sorry. Did you introduce yourself?

6 MR. HALLEY: No, my name is David Halley.
7 I'm here on behalf of ANC 2-E.

8 CHAIRMAN GRIFFIS: Okay. So you are going
9 to assisting and presenting the case. Is that
10 correct?

11 MR. HALLEY: Yes, that's correct.

12 CHAIRMAN GRIFFIS: Excellent. In which
13 case let's get right into it unless there are Board
14 questions that are wanted to be taken up at this time.
15 Why don't we start with the presentation of the case?

16 MR. BIRCH: Thank you. ANC 2-E was asked
17 by residents of 32nd Street to look into the ruling of
18 the D.C. Zoning Administrator in the letter of July
19 12, 2001, granting the ability to develop three center
20 lots 19, 20 and 21 on the property located on the east
21 side of the 1500 block as a matter of right. Our
22 appeal to you as was stated on grounds that the Zoning
23 Administrator's decision is fraud and contained
24 errors.

25 The property proposed for development of

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1 five houses on 32nd Street was part of the Bowie-
2 Sevier house property owned by Herbert and Patrice
3 Miller. In 1998 in a letter to the neighbors, the
4 Millers committed to leaving these three center lots
5 undeveloped and open as green space as long as they
6 owned the Bowie-Sevier property. They still do own
7 that property.

8 Three years later then in 2003 the letter
9 before us was obtained by the Millers granting a
10 decision from the Zoning Administrator that the center
11 lots could be developed. The property was purchased
12 by two entities, Strategic Georgetown LLC and
13 Georgetown 32nd Street LLC formed in Maryland on
14 September 12, 2002 with the same managers, Darren
15 Phillips and Ryan Hill, the same addresses and same
16 agents. The sale of the property by the Millers
17 included a co-development agreement requiring the
18 developers to submit advanced copies of all designs
19 and plans for review and approval by the Millers.

20 ANC 2-E has been much involved in this
21 project. We reviewed plans to build five houses on
22 these lots at public meetings on December 3, 2003,
23 February 4, 2003 and April 1, 2003, all in advance of
24 review by the Old Georgetown Board and the Commission
25 of Fine Arts. These were issues having to do with

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1 design and historic preservation issues. Each time
2 ANC 2-E unanimously voted to reject the plans for
3 those houses as being incapable and out of scale with
4 others on the opposite side of 32nd Street and
5 destructive to the ambiance and character of this
6 exceptionally narrow street.

7 CHAIRMAN GRIFFIS: Let me interrupt right
8 here because you've testified on an interesting point.
9 You said that you actually plans on December 2002. Is
10 that correct?

11 MR. BIRCH: Yes.

12 CHAIRMAN GRIFFIS: And there are two
13 questions attendant to this. Why then are you
14 appealing the Zoning Administrator's letter and not
15 the plans?

16 MR. BIRCH: Why are we not appealing? I'm
17 sorry.

18 CHAIRMAN GRIFFIS: Why are you appealing
19 a Zoning Administrator's interpretative letter to the
20 Board and not appealing the plans that you reviewed?

21 MR. BIRCH: First of all, the plans have
22 still not been approved.

23 CHAIRMAN GRIFFIS: So they haven't been
24 through any sort of administrative review.

25 MR. BIRCH: No, they haven't. I'm sorry.

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1 I should have said that. They have been reviewed and
2 turned down each time at the Commission of Fine Arts.

3 CHAIRMAN GRIFFIS: And when you reviewed
4 the plans and they must have been more concept plans.

5 MR. BIRCH: They were concept. That's
6 right. They were always concept review.

7 CHAIRMAN GRIFFIS: On December 2, were you
8 aware that there was decision by the Zoning
9 Administrator which would allow the development of
10 these lots?

11 MR. BIRCH: No.

12 CHAIRMAN GRIFFIS: And when did you become
13 aware of the decision?

14 MR. BIRCH: I have to say I don't know
15 exactly when we became aware of that decision.

16 CHAIRMAN GRIFFIS: Were you aware in '02
17 that there would be problems in developing these lots?

18 MR. BIRCH: No.

19 CHAIRMAN GRIFFIS: So this was all very
20 amenable and friendly and everyone was excited about
21 seeing the development in December of 2002.

22 MR. BIRCH: No, actually not because what
23 we did know was the agreement, the letter, that the
24 Millers had sent on February 14, 1998 to our
25 Georgetown neighbors telling of their plans for the

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1 property on 32nd Street. This was property where a
2 nursing wing stood when the Bowie-Sevier property was
3 purchased by the Millers. They say that "our plan is
4 to remove the nursing wing on 32nd Street which
5 occupies a substantial portion of the property. We
6 plan to replace it with a single family home at the
7 north end of 32nd Street, two houses on the south end
8 and then an enclosed pool addition to the main. In
9 order to meet current zoning requirements, we are
10 reconfiguring, i.e. subdividing three of the existing
11 lots for these houses. No precedent being set by the
12 subdivision of these existing lots, this will result
13 in a decrease of one lot and a net reduction of about
14 10,000 square feet of built occupied space on the
15 western portion of the property. We're committed to
16 keeping the remaining three existing lots along 32nd
17 Street as green space, a planted bank open to the
18 street for as long as we own the Bowie-Sevier
19 property." So, no, there was not happiness in the
20 community when these plans were brought before the ANC
21 in December of 2002.

22 CHAIRMAN GRIFFIS: Because you didn't want
23 development based on the fact that you had a letter
24 from Mr. Miller promising that he would not develop
25 it.

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1 MR. BIRCH: Promising a different scale of
2 development.

3 MEMBER ZAIDAIN: I guess that it leads to
4 a big issue that I have with this appeal and I want to
5 make sure I'm clear on how we're proceeding here.
6 First of all, you've already stated that there's been
7 no approval of the plans. Are you planning on
8 providing those and are we going to be raising issues
9 with the plans or are we just dealing with the
10 subdivision?

11 MR. BIRCH: We're just dealing with the
12 subdivision in this appeal.

13 MR. HALLEY: If I could clarify. Actually
14 these lots were not subdivided. In 1998, some of the
15 lots on 32nd Street were subdivided. Lots 19, 20 and
16 21 were not subdivided because they had planned not to
17 try to develop them. So they left those alone. With
18 respect to plans that have been set forth with respect
19 to design as Mr. Birch indicated, they have gone
20 through the ANC, the Old Georgetown Board and the
21 Commission of Fine Arts. The developers having been
22 turned down at those levels have appealed the decision
23 of the Commission of Fine Arts to the Mayor's Agent.
24 The Mayor's Agent is awaiting a decision from the BZA
25 before hearing the case on five developed houses.

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1 They would like to develop five houses. If the ANC's
2 appeal here is successful, only three lots would be
3 available for development.

4 MEMBER ZAIDAIN: When you say "ANC's
5 appeal is successful" what does that mean? That means
6 that we would say that the letter is wrong.

7 MR. HALLEY: Correct. They would have to
8 go through the process of getting a variance or some
9 other sort authority to develop. That these lots
10 cannot be developed as a matter of right.

11 MEMBER ZAIDAIN: Okay. I guess this is a
12 gray area for me because as far as my term on the
13 Board, we've never dealt with an appeal that was not
14 tied to a permit. A permit to me is an official
15 action. I'm sorry I'm not entirely clear on what this
16 letter is. I'd like to hear some more testimony on
17 that. Switching to another gear, to my understanding
18 that this is coming in under 3112.2 which is "any
19 person aggrieved by any order..." My question here is
20 based on this letter here, who is aggrieved?

21 MR. HALLEY: Based upon the Zoning
22 Administrator's.

23 MEMBER ZAIDAIN: Yes, what does this
24 letter do? What right does this give them?

25 MR. HALLEY: Before the letter was issued

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1 and even after it, the neighbors in the area had
2 developed a compromise with the Millers that involved
3 the restoration of the Bowie-Sevier estate as well as
4 the destruction of the nursing wing home and the
5 construction of three townhomes. It was a very
6 contentious, long drawn out compromise between the
7 neighbors and the Millers.

8 MEMBER ZAIDAIN: Was there any Zoning
9 issues that dealt with that?

10 MR. HALLEY: I don't know if the matter
11 came before the BZA at the time.

12 MEMBER ZAIDAIN: The anecdotal stuff will
13 probably confuse us as we're getting a little low.
14 It's 6:00 p.m. and so we're almost topped out.

15 MR. HALLEY: Sure. The reason that it
16 aggrieves the neighbors who had relied upon the
17 Miller's commitment that they would have a certain
18 level of density in the neighborhood and the character
19 of the houses. So when they find out later that the
20 Millers had turned around and sought to develop these
21 lots --

22 MEMBER ZAIDAIN: Let's stop right there
23 for a second. Does the letter itself give them the
24 ability to do that?

25 MR. HALLEY: No, the letter itself. They

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1 would still have to go through a design review
2 process.

3 MEMBER ZAIDAIN: They would still have to
4 get a permit too. Right?

5 MR. HALLEY: I'm not sure about that, but
6 it does indicate that these can be developed as a
7 matter of right.

8 CHAIRMAN GRIFFIS: I'm sure about that.
9 If they're going to build houses, they are going to
10 get a permit.

11 MR. HALLEY: Right. Presumably. I guess
12 what I'm trying to say is I don't think any permit was
13 issued on the basis of this letter. I don't know for
14 certain.

15 MEMBER ZAIDAIN: Right. I'm still trying
16 to get who is aggrieved here. What the official
17 action and whose interests are at stake? Right now,
18 it seems like things are still in flux. I'm trying to
19 follow your discussion in regards to your discussion
20 with the developers, but in terms of the actions that
21 is before us I'm still need to get a handle. I'm
22 willing to hear anybody else's response on what's the
23 official action.

24 CHAIRMAN GRIFFIS: I think what he was
25 getting to was this. It's clear that the Board has

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1 the authority in the regulations that we are the body
2 that is the appeal body for any official
3 administrative decision about zoning, even that as
4 stated of the Mayor's if it's an official decision.

5 I don't think the Board refutes the fact that the
6 Zoning Administrator's interpretative letters are an
7 official statement and an official ruling. Thereby it
8 gets you here.

9 Mr. Zaidain is taking it to the next step
10 essentially saying to be colloquial on a late night
11 "So what?" With this letter, what does it actually
12 do? How could it aggrieve anybody because it is not
13 something that has to be used? It is not attendant to
14 plans that are about to be built. It may not be
15 effectuated. There's nothing that sends itself to be
16 effectuated. I think what Mr. Zaidain is saying that
17 you cannot build based on this letter anything that
18 would aggrieve somebody within the realm of zoning.

19 MEMBER ZAIDAIN: Right.

20 CHAIRMAN GRIFFIS: How is it that we can
21 entertain an entire appeal on it? Is it more
22 appropriate perhaps the comment of the time of which
23 permit documents are approved?

24 MEMBER ZAIDAIN: And that's basically
25 where I was going. In your appeal, it says "The

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1 decision was based on reversible legal and factuary
2 and erroneously granted the ability to develop the
3 lots in question as a matter of right." In my mind,
4 is that true? Can they take this letter and go out
5 and build it?

6 MR. BIRCH: Yes. Well the letter says --

7 MEMBER ZAIDAIN: Or is that opinion that
8 they can?

9 MR. BIRCH: The letter says that it can be
10 developed as a matter of right under zoning. So what
11 this letter signals to the community and various
12 specifically to the neighbors on 32nd Street and Q
13 Street who would be affected by whatever development
14 happens on these five lots is that this is a green
15 light for houses to be built there. Granted it has to
16 go through a process, but you see we're all ready
17 being presented with conceptual design plans for five
18 houses on these lots. So our reasons for coming to
19 you is to seek your assessment, your evaluation and
20 your judgment on what we consider to be a
21 misinterpretation and misapplication of the Zoning
22 Regulations.

23 MEMBER ZAIDAIN: I understand what you're
24 saying. But my point was with the letter and I'm
25 still trying elicit more of this. Is this an opinion

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1 that based on whatever they saw - and I'm not still
2 clear on DCRA was looking at when they responded to
3 this - it appears that they have the ability to
4 develop the properties? Is this an opinion letter or
5 is this for determination? Do you follow what I'm
6 saying? I just don't understand the legal weight of
7 this letter.

8 MR. HALLEY: I don't understand the legal
9 weight of it either but I don't feel that I'm in the
10 position to make that judgment.

11 MEMBER ZAIDAIN: I'm not discussing the
12 merits of your case. There may very well be an issue
13 here. I'm just concerned about two things: (1) the
14 policy and precedent that we set by acting these
15 letters as an appeal and (2) once we get into the
16 merits, how do we deal with it. What can we do? Does
17 it mean that normally it's in a permit and DCRA
18 revokes the permit? Then there's your answer.

19 MR. HALLEY: If they had a letter like
20 this going in to get the permit, wouldn't the permit
21 be issued by DCRA without question because there's a
22 matter of right?

23 MEMBER ZAIDAIN: I don't know the answer
24 to that.

25 MR. HALLEY: I think maybe that is part of

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1 the harm here. They can go in and get their permit.

2 CHAIRMAN GRIFFIS: That still doesn't
3 preclude you from appealing the permit.

4 MR. HALLEY: So the position here would be
5 the possibility that this case would have to come back
6 before the BZA after design approval and plans and
7 after the permits have been issued, but before any
8 construction takes place.

9 MEMBER ZAIDAIN: I'm just trying to figure
10 out if this is a right of appeal for instance. If
11 there's been a determination made and if somebody's
12 been aggrieved. Aggrievement to me - I'm just
13 thinking in my box of what we've seen so far and
14 that's why we're trying to work through this - would
15 be a permit's been issued, trees are now being cut
16 down or the ability for trees to be cut down is there,
17 the bulldozers are ready to tear down an historic
18 house. To me, that's aggrievement. This letter I'm
19 not sure if it's there or not. That's what I'm trying
20 to get an opinion to.

21 MR. BIRCH: I have to observe that the
22 point that you're raising, sir, is one that troubles
23 us often in these issues where design comes before
24 zoning. We go through the whole process with the ANC
25 and the Old Georgetown Board and the Commission on

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1 Fine Arts and concept and permit and then it turns out
2 that there's a zoning issue. There are those who have
3 raised the question "Shouldn't the zoning issue be
4 settled first so we know what property we're dealing
5 with and what can be built on it" and then start
6 looking at the plans and concepts and drawings.

7 MEMBER MILLER: I want to make the
8 comment. I think it's a shame that DCRA is not here
9 to answer for themselves. We do have in the record in
10 Exhibit No. 8 a letter from DCRA saying they consider
11 this to be a final and binding decision.

12 MR. BIRCH: Yes, we received it.

13 MEMBER MILLER: So it's my opinion then
14 that falls within the regulation that we're talking
15 about.

16 MEMBER ZAIDAIN: Which exhibit is that?

17 MR. BIRCH: We could not come before you
18 until we got that letter back.

19 MEMBER MILLER: Exhibit 8 which DCRA is
20 not here to speak for themselves. This is the only
21 thing that we have with respect to their opinion that
22 it's a final and binding decision. Since we've gotten
23 away from your merits for a minute. I want to ask.
24 I think timing is an issue because sometimes you can
25 come in now and we say "Why are you here now. Why

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1 don't you want until there's a building permit?" Or
2 if you come in later and we say "Why didn't you come
3 in earlier" and "When did you know about all this?"
4 So you're appealing a July 12, 2001 letter. I'm not
5 sure if the Chairman already asked you this, but when
6 did you find out about this July 12, 2001 letter that
7 you are now appealing?

8 MR. HALLEY: Well, I found out about the
9 letter in April 2003.

10 MEMBER MILLER: And how did you find out
11 about it?

12 MR. HALLEY: A neighbor forwarded it to
13 me. I'm sorry. Not somebody in my neighborhood, but
14 somebody in Georgetown but not in that area.

15 MEMBER MILLER: How did they find out
16 about it?

17 MR. HALLEY: I don't know and frankly I
18 don't even remember which neighbor it was that
19 forwarded it to me but it wasn't somebody on my block
20 because I forwarded then to the folks on my block.

21 MEMBER MILLER: So when there were these
22 ANC meetings in December 2002 and following, you all
23 didn't have this letter. You weren't aware of this
24 letter.

25 MR. HALLEY: I wasn't aware that any

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1 approvals had been given of this nature. No. In
2 fact, there was no construction on the property and
3 nothing being done on the property so there was no
4 reason to believe that anything had been done.

5 MR. BIRCH: I think a point was made maybe
6 in the case before us that these letters aren't
7 public. So you just discover them.

8 CHAIRMAN GRIFFIS: That's true and it
9 brings up an interesting point, the importance of
10 these letters. I don't think the Board in any
11 capacity is looking at these letters to diminish their
12 role and their importance. I think you're referring
13 to a Bannum case in which the Zoning Administrator had
14 an interpretative letter. In fact, one of the parties
15 was saying that timeliness goes to that letter. The
16 Board ruled in the fact that timeliness cannot go to
17 those letters. Basically you need to bring an appeal
18 based on an interpretative letter because it is a
19 private correspondence.

20 More importantly, it may or may not be
21 used. So it's won't effectuate itself. It won't
22 actually facilitate what might then be a physical
23 zoning issue. So the Board did not tie the timeliness
24 of that appeal to the interpretative letter.

25 We are in a different situation now as

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1 that somehow you have found this. No one is refuting
2 the fact that as an official administrative decision
3 it's appropriate to be appealed. I won't reiterate
4 everything but again it goes back what would be the
5 outcome of appeal or not appeal. It almost comes to
6 the fact that this letter doesn't have to be used, but
7 that's restating.

8 MR. HALLEY: If I can real quickly just
9 interject. At the Commission of Fine Arts and at the
10 Old Georgetown Board, the developers were putting
11 forward the project as one that they had a matter of
12 right to develop and there were questions from the
13 members of the Commission of Fine Arts and Old
14 Georgetown Board as to whether they had a right to
15 develop these lots.

16 That was important to them because at the
17 Commission of Fine Arts meeting, they said they did
18 not like to pass on the design for lots that didn't
19 have a right for development. That was about the same
20 time we found this letter. So we were able to at the
21 time to indicate that the matter was going to come
22 before the ANC.

23 MEMBER MILLER: When was that?

24 MR. HALLEY: That was in either April of
25 May 2003 whichever meeting the Commission of Fine Arts

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1 heard this.

2 CHAIRMAN GRIFFIS: Okay. As you stated
3 and restated now, there's an awful lot of people
4 waiting to see what happens here. Mr. Epting, do you
5 have anything to add to this debate to the timeliness
6 and also the relevancy of an appeal of the Zoning
7 Administrator?

8 MR. EPTING: Possibly.

9 CHAIRMAN GRIFFIS: You're not required.

10 MR. EPTING: I would and you'll notice
11 that we didn't file anything to oppose on timeliness
12 (1) because of the subsequent Bannum ruling which I
13 think this appeal is probably timely because of that
14 and (2) because it was an internal letter that we were
15 basing our decisions. But I think the importance to
16 the client though is because of this appeal, we've
17 been not able to proceed so far with the Mayor's Agent
18 although we are trying to get permanent approval.
19 Zoning in terms of Mr. Birch's question when you're
20 entering a historic district and you go to file your
21 permit, they actually require to have historic
22 approval first. I'm in Catch-22. If I can't get the
23 historic approval, I can't get Zoning approval.
24 That's the way they run the permit shop down there.
25 You cannot get Zoning signoff unless you have historic

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1 at least concept approval.

2 From our standpoint if this case is going
3 to be appealed, we would rather have it appealed now
4 before we go ahead and go through the expense of the
5 permits and all that thing and have a decision made.
6 I'd rather deal with it up front since we know that
7 they don't like the concepts that we're proceeding
8 under.

9 CHAIRMAN GRIFFIS: Okay. So on both
10 counts you think (1) it is timely and (2) that it is
11 an appropriate appeal element before the Board.

12 MEMBER ZAIDAIN: I wanted to hear what his
13 opinion was on our discussion regarding the letter and
14 whether or not it's right for appeal or not.

15 CHAIRMAN GRIFFIS: Do you want to address
16 that, Mr. Epting.

17 MR. EPTING: I do think it's right because
18 we are trying to act on this letter to do building
19 permits and to get approvals. We would like to
20 proceed to develop --

21 CHAIRMAN GRIFFIS: When you say "acting on
22 the letter" what does that mean?

23 MR. EPTING: We have plans that we are
24 trying to get approved through the design process and
25 now at the Mayor's Agent and tried to get processed

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1 through Zoning. If we get those approved, we're going
2 to proceed.

3 VICE CHAIR ETHERLY: It's almost like the
4 developer is the aggrieved one in the whole situation.
5 But to follow Mr. Zaidain's thinking, does the letter
6 serve -- I mean, the letter doesn't serve as some type
7 of rough shortcut for the process. You would still
8 have to go through the appropriate Zoning and permit
9 approvals. Is it your sense that with this letter in
10 hand that will allow you to expedite that approval
11 process? Is that how you are looking at using the
12 letter?

13 MR. EPTING: No. We'd still have to meet
14 all the other Zoning requirements. But what the
15 letter allows us to do if it's upheld is to file for
16 lots that don't meet the exact matter of right
17 standards. That's all it does. We still have to meet
18 all the other requirements. But at the same time if
19 I didn't have that letter, I'd need to be filing plans
20 and trying to work with the Zoning Administrator to
21 have to say "This is my theory on this" or it would be
22 rejected and sent to the BZA. So the letter is sort
23 of a first step before you go ahead and do some plans
24 to see if your argument holds water with the Zoning
25 Administrator.

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1 CHAIRMAN GRIFFIS: Right. I think what
2 Mr. Etherly's question directed and I think you've
3 answered it and let's see if I understand it is the
4 point that this is normal process. When you have a
5 question of zoning what you can do, you are often
6 referred and I would imagine the Office of Zoning
7 would refer to the Zoning Administrator to ask their
8 opinion. Is that correct?

9 MR. EPTING: That's correct.

10 CHAIRMAN GRIFFIS: Okay. Well there we
11 are. We seem to have some agreement. Mr. Zaidain.

12 MEMBER ZAIDAIN: Never mind. I thought I
13 had a question.

14 CHAIRMAN GRIFFIS: See. Now we have total
15 agreement. No, go ahead.

16 MEMBER ZAIDAIN: I don't have a question.

17 CHAIRMAN GRIFFIS: Anything else? Yes.

18 VICE CHAIR ETHERLY: I'm still struggling
19 with Mr. Zaidain's question. I thought it was a very
20 good one and perhaps this will just come out as we go
21 through the discussion if we do move forward. As Mr.
22 Epting was starting to lay out, what happens if they
23 don't have this letter? I'm thinking if the letter is
24 found to be problematic as a final order and we reach
25 some type of decision to "reverse the letter" so to

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1 speak, what is a practical effect of that? But
2 perhaps we'll just sort that out as we continue.

3 CHAIRMAN GRIFFIS: Maybe. There's not a
4 theory. We hypothesize and the fact that they could
5 go conceivably in my mind this interpretative letter
6 outstanding for a lot of different reasons, but
7 there's nothing precluding the next Zoning
8 Administrator to do an interpretation for exactly this
9 exact property and the situation and perhaps come up
10 with something different. I don't think that it has
11 an precedential value at all.

12 MEMBER ZAIDAIN: Is that true?

13 CHAIRMAN GRIFFIS: It may come away with
14 this letter.

15 MEMBER ZAIDAIN: That was going to be my
16 next question. How binding is the letter? Once you
17 have this, you get this letter. Six months goes by
18 and there's a new ZA. When you go back to the ZA to
19 pull permits, you show him this letter. Is it
20 possible that the ZA is going to have a different
21 interpretation? Do you have any recourse if that's
22 the case?

23 MR. EPTING: None.

24 MEMBER ZAIDAIN: I guess you could appeal
25 the denial of your permit based on that letter.

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1 MR. EPTING: Right. You understand this
2 situation from the Zoning Administrator's office. Ten
3 years ago when the Zoning Administrator was the same
4 and you had a letter like this, you could pretty much
5 rely on it. I think now what I said it's basically a
6 guide that we use to determine whether or not to
7 proceed with the project.

8 MEMBER ZAIDAIN: That's the statement that
9 leads me back to where I started from and how much
10 weight is this letter given? I'm still not sure about
11 that.

12 MR. EPTING: Right. I discussed that with
13 my client months away. The problem with that is
14 otherwise we are in the position of knowing we're
15 going to be appealed. I trust that if the appeal gets
16 denied -

17 MEMBER ZAIDAIN: They are going to appeal
18 the permit.

19 MR. EPTING: -- they are going to appeal
20 the permit. So I'm almost worse off at that point in
21 time from an equity standpoint than having it heard
22 now. I've never been one to say I don't want
23 something dismissed because I love getting things
24 dismissed. In this case if you know it's coming back
25 to you anyway, it seems one judicial way to deal with

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1 this is deal with this now.

2 MEMBER ZAIDAIN: That's the facts of the
3 situation and it may be correct but as this Board well
4 knows, every decision we make always gets thrown back
5 up to us at some point. I just want to make sure that
6 were following the right path on it.

7 CHAIRMAN GRIFFIS: That's an excellent
8 point to keep in mind. Yes, Ms. Miller.

9 MEMBER MILLER: It just seems to me that
10 the issues that are raised by this letter are zoning
11 issues that would be raised later at the building
12 permit stage and that it makes sense to deal with it
13 earlier in the process as Mr. Epting said before. The
14 developer puts in all these resources to get to the
15 building permit and then when we get to the building
16 permit, if it's appealed, you wouldn't revisit the
17 same issues. They either wouldn't exist anymore or
18 they would have already been adjudicated.

19 CHAIRMAN GRIFFIS: Perhaps. Let's
20 continue.

21 MR. BIRCH: I would like to ask Mr. Halley
22 to list the issues in the letter to which we take
23 exception?

24 CHAIRMAN GRIFFIS: Okay.

25 MR. HALLEY: Should I just proceed and

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1 then you all will make a decision at some point. I
2 don't know if a decision had been made.

3 MEMBER ZAIDAIN: I was just joking because
4 we raised a bunch of questions and I don't think
5 there's any answer to them.

6 CHAIRMAN GRIFFIS: I think what we're left
7 with now is we've voiced an awful lot of concerns. I
8 think some of it addresses and we're going to continue
9 with the appeal at this point.

10 MR. HALLEY: Okay.

11 CHAIRMAN GRIFFIS: Wasn't that clear with
12 my shrug?

13 MR. HALLEY: I took it to say so.
14 Essentially I can elaborate on any of the points that
15 you may wish me to. Given that it's this late, I'm
16 going to try to be pretty streamlined. If something
17 is confusing, just stop me.

18 CHAIRMAN GRIFFIS: Indeed, we will.

19 MR. HALLEY: The Zoning Administrator's
20 letter which I believe you all have a copy of has
21 basically five points that the ANC has a problem with
22 in the letter. The first has to do with employing the
23 exception provided by section 401.2 for the area. The
24 lots are 1573 square feet so they are too small under
25 R-3. Section 401.3 of the Zoning Regulations requires

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1 a larger lot area size.

2 There is an exception though in section
3 401.2. It allows 80 percent of the 401.3 size to be
4 used. It's basically a grandfather clause saying that
5 for property in 1957 when these things were enacted
6 we're not going to make something undevelopable before
7 you could develop. That's just the way that I would
8 read the Zoning Regulations.

9 Section 401.2 reads as follows: "Except
10 as provided in section 401.3 in the case of an
11 unimproved lot in single ownership on November 1, 1957
12 that has a lot area or width of lot less than that
13 specified in 401.3 for the district in which it is
14 located and that does not adjoin another unimproved
15 lot in the same ownership a structure may be erected
16 on the lot if both the lot area and the width of lot
17 are at least 80 percent of the lot area and width of
18 lot specified under section 401.3." And 401.3
19 requires an R-3 row dwelling and lot area of 2,000
20 square feet and 20 feet wide for the lot.

21 In the letter that Mr. Johnson wrote, the
22 Zoning Administrator, he said that the lots are
23 unimproved and were in single ownership on November 1,
24 1957. However on November 1, 1957, the lots were not
25 unimproved. There was a nursing home wing that

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1 straddled the three lots in question. So had he
2 applied that the November 1, 1957 standard to
3 improvement, he would have found that they were not
4 unimproved and therefore the exception of 401.2 would
5 not apply.

6 CHAIRMAN GRIFFIS: Are you submitting any
7 sort of evidence on the wing portion that was in the
8 lots?

9 MR. HALLEY: I have plenty here. I doubt
10 that the parties would refute that. In 1998 when the
11 Millers were going before the Commission of Fine Arts
12 and the Mayor's Agent they made statements. I have
13 those.

14 CHAIRMAN GRIFFIS: Why don't we just have
15 it provided in for the record because our deliberation
16 will be based on the record because it was created
17 here.

18 MR. HALLEY: Okay. Would you like me to
19 tell me what I have?

20 CHAIRMAN GRIFFIS: No, just pick one and
21 submit it.

22 MR. HALLEY: There's no actual statement
23 that this has been constructed and it's done.

24 CHAIRMAN GRIFFIS: Do you have plat that
25 shows?

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1 E-V-E-N-I-N-G S-E-S-S-I-O-N

2 (6:00 p.m.)

3 MR. HALLEY: I have a plat that you don't
4 have a based map for 1957. We have one for 1954 and
5 one for 1960. It's not in 1954 and it is in 1960. We
6 all have the Commission of Fine Arts sign off on the
7 building in 1956 and the C of O that was issued in
8 January 1958.

9 CHAIRMAN GRIFFIS: Submit whatever you
10 need to show it. Is the C of O going to tell me
11 there's an actual developed portion on all these lots
12 and certain on these lots and does it list all the
13 lots?

14 MR. HALLEY: Yes, it will.

15 CHAIRMAN GRIFFIS: Then whatever it is
16 that shows it and if we need more, we'll ask.

17 MR. HALLEY: It indicates the lots, yes.

18 CHAIRMAN GRIFFIS: Okay. Go ahead.

19 MR. HALLEY: Should I just bring this up
20 after?

21 CHAIRMAN GRIFFIS: Yes. We're just going
22 to create a list.

23 MR. HALLEY: Okay. So that because the
24 exception doesn't apply in the lots by the terms of
25 the Zoning Administrator's letter, less than the

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1 minimum square footage in section 401.3 they could not
2 be developed as a matter of right. That's the first
3 problem with the Zoning Administrator's decision.

4 The second is that for the exception of
5 401.2 to apply the lot must not adjoin another
6 unimproved lot in the same ownership. When the Zoning
7 Administrator's decision was issued, all lots were
8 under the ownership of Herbert and Patrice Miller.
9 The letter stated that it was the Zoning
10 Administrator's understanding that at the time of
11 development one or more of the lots will be owned by
12 or developed by separate companies.

13 MEMBER ZAIDAIN: Did you submit anything
14 in the record reflecting that or is that just in your
15 statement?

16 MR. HALLEY: Reflecting that they were --

17 MEMBER ZAIDAIN: A plat of ownership or
18 anything?

19 MR. HALLEY: No, I do have that too, if
20 you'd like. I also have the transfer deeds to the
21 current developers.

22 MEMBER ZAIDAIN: Yes, we'll need those in
23 the record.

24 MR. HALLEY: Sure. Even in the letter it
25 implies the idea that they're not at that time under

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1 separate ownership. Because that condition of section
2 401.2 wasn't satisfied again, the lot area exception
3 should not have been applied to the lots in question.

4 The third point is -- I think there's a
5 typo in the letter. The letter ruling states that the
6 subject properties meet the minimum lot width of 20
7 percent set forth in section 401.3 of the Zoning
8 Regulations. There's nothing about 20 percent of
9 minimum lot width that I found in the Zoning
10 Regulations. I think he meant to say 20 feet which is
11 what section 401.3 requires a minimum width of lot for
12 a row dwelling in this area.

13 He then states that the lots measure 20.5
14 feet along the front property line. However the front
15 property line is the wrong measurement to use. These
16 front property lines are on a skew. They don't go
17 north and south. The Zoning Regulations actually
18 provide for that. They say where the building line is
19 on a skew, the width of the lot should be the distance
20 between the side lot lines perpendicular to the access
21 of the lot taken where either side lot line intersects
22 the building line. That's 11 DCMR Section 199.1. So
23 the real measurement of the lot width, that's under
24 the definition of lot width. The 20.5 foot
25 measurement along the front property line was not

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1 appropriate. They should have done a measurement from
2 the side lot line to the other side lot line at a
3 perpendicular angle.

4 When you do that, the Office of Surveyor
5 map has a degree of angle that 32nd Street goes at and
6 it's between 20 and 21 degrees. When you use those
7 and you do simple trigonometric calculations, you find
8 that the lot width is somewhere between 19.15 and
9 19.27 feet. I have the trigonometric calculations if
10 you'd like using the cosine and the adjacent angle on
11 the hypotenuse.

12 MEMBER ZAIDAIN: I hate to be the one to
13 bring this up I guess but a lot of the things you're
14 saying are just kind of anecdotal assertions in the
15 letter. We need to see what you're talking about.
16 You're saying that the lot is less than 20 feet in
17 width. Can you give us something to substantiate
18 that? And I'm actually curious if Mr. Epting disputes
19 any of these facts. I guess not.

20 MR. HALLEY: He probably has a chance for
21 cross examination, right?

22 CHAIRMAN GRIFFIS: And a presentation of
23 his case.

24 MEMBER ZAIDAIN: I forgot. Sorry. It's
25 running late.

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1 CHAIRMAN GRIFFIS: I thought we were
2 having such a civil time with this appeal and now you
3 want people jumping up and objecting. Making a joke
4 of course. Let's continue.

5 MR. HALLEY: What I have here is actually
6 the D.C. Office of Surveyor map for lots 19, 20 and 21
7 on Square 1270. That has the angle of 32nd Street
8 listed as 20 degrees, 16.4 west. So it's between 20
9 and 21 degrees.

10 CHAIRMAN GRIFFIS: That would be real
11 helpful. Do you have copies of that?

12 MR. HALLEY: Yes, I do.

13 MEMBER ZAIDAIN: Is that what the ZA was
14 responding to?

15 MR. HALLEY: Well the ZA was actually
16 using a measurement along the front lot line which is
17 here also which is 20.5. But under the Zoning
18 Regulations, that's not the appropriate lot width
19 measurement.

20 CHAIRMAN GRIFFIS: Right.

21 MR. HALLEY: So because of this angle that
22 they note here.

23 MEMBER ZAIDAIN: Okay.

24 MR. HALLEY: I'll submit it.

25 CHAIRMAN GRIFFIS: Yes, that we should

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1 have up here now. Are you saying your measurements
2 were done off this? Is that correct?

3 MR. HALLEY: Well, I took this angle and
4 these measurements here that were on this map.

5 CHAIRMAN GRIFFIS: Have you noted the
6 building line on that?

7 MR. HALLEY: Right here.

8 CHAIRMAN GRIFFIS: Is it noted?

9 MR. HALLEY: Yes, let me show you one
10 other thing. Sorry for my disorganization. What I
11 did was I took the measurement here of 20.5 feet which
12 exists on this map and the angle here of 21 degrees or
13 20 degrees which is again on this map. I did it for
14 both and using just math which is math. There's no
15 disputing the laws of mathematics.

16 CHAIRMAN GRIFFIS: Okay. We won't dispute
17 that.

18 MR. HALLEY: Right. And I also have the
19 cosine tables just to show you the cosine of 20 or 21.
20 That had to be a calculation.

21 CHAIRMAN GRIFFIS: Of course this is all
22 on oral record. What we're going to do is have you
23 submit that now. Do you have copies of all that
24 calculation too?

25 MR. HALLEY: Yes.

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1 CHAIRMAN GRIFFIS: If you can just bring
2 to the far right to the Secretary. Do you have 20
3 copies of each of those?

4 MR. HALLEY: No, I don't. I have four
5 copies of those.

6 CHAIRMAN GRIFFIS: Okay. Can you put your
7 copies and let's give copies of the Board? We'll get
8 copies to all the participants.

9 VICE CHAIR ETHERLY: While that's being
10 done, Mr. Chair, given the length of our day, I'll
11 just make a little aside. I vote for the quote of the
12 day "Math being math."

13 CHAIRMAN GRIFFIS: Thank you.

14 MR. HALLEY: I don't know what they're
15 going to want me to submit. Is it okay if I collect
16 them up here and then bring them over to you after I'm
17 finished speaking?

18 MS. BAILEY: You said you have four
19 copies. May I have those?

20 MR. HALLEY: Yes. I have four copies.
21 I'm sorry. I didn't bring 20. I can certainly
22 provide that for you at a later time.

23 MS. BAILEY: You said you have four
24 copies.

25 MR. HALLEY: Yes, ma'am.

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1 (Pause.)

2 MR. HALLEY: Shall I continue or do you
3 want me to hold off for a second?

4 CHAIRMAN GRIFFIS: No, let's move ahead.

5 MR. HALLEY: This is just in conclusion of
6 that point. The lot widths are below the minimum
7 width of lot that are required by section 401.3. The
8 Zoning Administrator's ruling was in error.

9 The fourth point is that the letter ruling
10 applies an exception on top of an exception. The
11 exception of 401.2 for lot area applied but then he
12 also applied a two percent discretionary adjustment
13 from section 401.7 on top of that exception. I'm
14 sorry. Section 407.1. That's my dyslexia again. So
15 that he's applying an exception on top of an
16 exception. It seems that the application of the two
17 percent discretionary adjustment should apply to the
18 standard measurements, not the measurements that have
19 already been accepted.

20 The fifth concern is that the Zoning
21 Administrator applied the two percent deviation needed
22 for the lots to fall within the minimum lot area
23 without making the requisite finding. That Municipal
24 Regulations actually require that the Zoning
25 Administrator deem the deviations do not impair the

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1 purpose of the otherwise applicable regulations. The
2 letter ruling contains no finding or consideration as
3 to the impairment of the purpose of the otherwise
4 applicable Zoning Regulations.

5 Then finally the second to the last
6 sentence of the letter states that the lots comply
7 with the standards of section 401.3 of the Zoning
8 Regulations and can be developed as a matter of right.
9 It's an incorrect conclusion. The lots are not in
10 compliance with section 401.3 even by the terms of the
11 letter. They rely on exceptions and discretionary
12 adjustments from other sections, section 401.3 being
13 the standard measurements for lots. I tried to make
14 it quick. I'm sure it was slower than you thought it
15 would be. If anybody has any questions, I'll be happy
16 to them.

17 CHAIRMAN GRIFFIS: No, that's okay. Your
18 last point if I'm understanding it correctly it's just
19 redundant of your entire appeal.

20 MR. HALLEY: And it may be a typo but the
21 sentence is if it stands alone would suggest that
22 these lots meet the standard width and lot area
23 requirements of 401.3. They don't. Even by the
24 Zoning Administrator's analysis, they don't.

25 CHAIRMAN GRIFFIS: I see. Okay.

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1 MEMBER ZAIDAIN: I think that's probably
2 a logical conclusion. I just wish we had DCRA down
3 here to ask that question to.

4 CHAIRMAN GRIFFIS: Okay. Mr. Etherly.

5 VICE CHAIR ETHERLY: I just want to be
6 sure I understood what's reflected as the fourth point
7 on page three. I think I follow it.

8 MR. HALLEY: There's a type there that
9 401.7 should be 407.1. I apologize.

10 VICE CHAIR ETHERLY: No problem on that.
11 Perhaps what might be helpful if you could walk just
12 one more time very briefly through that. I think I
13 see as I try to follow the 80 percent and that logic
14 on the top of page two of the July 12th letter. Could
15 you just walk through that one more time so I'm more
16 clear on that?

17 MR. HALLEY: The 80 percent rule matter or
18 number four and the ANC's. I see what you're saying.
19 The two percent issue.

20 VICE CHAIR ETHERLY: Yes. Perhaps maybe
21 the best thing to do is essentially what we're talking
22 about is we're talking about that first full paragraph
23 on page two of the July 12th letter. Correct?

24 MR. HALLEY: Yes, sir.

25 VICE CHAIR ETHERLY: So applying the 80

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1 percent to 2,000 square feet which is the minimum lot
2 area for R-3, you agree with that step. That was
3 correct.

4 MR. HALLEY: That would yield a minimum
5 lot area of 1600 square feet. We don't agree that it
6 qualifies for the 80 percent. That's what our first
7 point is about.

8 VICE CHAIR ETHERLY: Okay. But the
9 argument about the Zoning Administrator giving an
10 exception on top of the exception, I just want to make
11 sure I understand where that's coming in.

12 MR. HALLEY: Sure.

13 VICE CHAIR ETHERLY: If you could just
14 highlight where you see the exception being placed on
15 top of the exception.

16 MR. HALLEY: Well the first exception was
17 moving it from 2,000 square feet down to 1600 square
18 feet. That was based on the exception in section
19 402.1, the grandfather clause.

20 VICE CHAIR ETHERLY: Okay.

21 MR. HALLEY: That 1600 square feet yields
22 a permitted lot size of -- Let's see. Hold on one
23 second. So 1600 square feet is the minimum lot size,
24 but applying the two percent that's still too large.
25 The lot sizes are below 1600 square feet. So they

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1 need to lower the required lot size a little more for
2 these lots to comply. He does that by applying the
3 two percent deviation bringing down the permitted lot
4 size to 1568 from 1600. So it goes from 2,000 to 1600
5 using 401.2 and then from 1600 to 1568 using 407.1.

6 CHAIRMAN GRIFFIS: But isn't Mr. Etherly
7 asking us do you disagree that the ZA has the
8 flexibility of two percent on 1600 square feet?

9 MR. HALLEY: Yes, we believe that the two
10 percent deviation applies only to the 401.3 standard
11 calculations and not to exceptions created under
12 section 401.2.

13 CHAIRMAN GRIFFIS: Where do you see that?

14 MR. HALLEY: We couldn't find any case law
15 either way on that actually.

16 CHAIRMAN GRIFFIS: And nothing in the
17 regulations.

18 MR. HALLEY: No.

19 CHAIRMAN GRIFFIS: But somehow in the
20 reading of 407.1 you found that.

21 MR. HALLEY: Real quickly that's one. I
22 don't know if this is something that would apply here
23 but in section 2000.2 of the Zoning Regulations it
24 does say that it's the intent of this title that
25 nonconformities may not be enlarged upon, expanded or

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1 extended nor may they used for a basis for adding
2 other structures or uses.

3 CHAIRMAN GRIFFIS: What are you reading
4 from? What section?

5 MR. HALLEY: Section 2000.2.

6 CHAIRMAN GRIFFIS: 2000.2 which is
7 nonconforming uses. That wouldn't apply to this.

8 MEMBER ZAIDAIN: 2000?

9 CHAIRMAN GRIFFIS: Yes, 2000.2. I
10 understand your logic and we'll take that under
11 consideration.

12 VICE CHAIR ETHERLY: Yes and you've
13 answered the question for me. I think perhaps from
14 myself and a couple of my colleagues you're being
15 probed some of the rationales underlying your
16 argument. I think it will bear some conversation. I
17 will of course be looking for some response as we go
18 through cross and all that good substance.

19 CHAIRMAN GRIFFIS: Thank you. One of
20 course is nonconforming structure so we're actually
21 talking about physical structure that you're not
22 allowed to add to unless there are certain things that
23 are in line with that. Okay.

24 MR. HALLEY: And finally this is a
25 rationale issue. It seems that where the Regs make an

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1 exception for something that's one thing. I think the
2 Zoning Administrator's discretion was basically for
3 the fudge factor in the end that if you have something
4 that's very close and that's before the Zoning
5 Administrator rather than having to go through the
6 whole process of seeking a variance, it give us two
7 percent wiggle room. We thought that it would be most
8 logically applied the standard complying lot width
9 rather than a response that would have to have
10 exceptions made for it.

11 CHAIRMAN GRIFFIS: Well I don't know if
12 that's following the legislative history of that
13 section because wouldn't you also think that as you
14 looked at Washington D.C. and the age and the
15 peculiarities of many structures would need that type
16 of flexibility in order so that you wouldn't have a
17 special exception or a variance based on the placement
18 of a few inches or a foot. So it's not just the fact
19 that if you have a perfect rectangle in this suburban
20 development but you're just off a hair is what I
21 understood you to say.

22 MR. HALLEY: Well, by area or width or
23 something like that. You have a slightly too small of
24 a lot. It's like a half foot too small or something
25 like that.

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1 CHAIRMAN GRIFFIS: Okay.

2 MR. HALLEY: Then the last thing I want to
3 mention when doing the research on this when looking
4 for what is unimproved, this nursing home wing
5 straddling these three lots, it's not defined improved
6 or unimproved in the Zoning Regulations, but the
7 Zoning Regulations definitions actually then refer you
8 to Webster's Unabridged Dictionary which I just wanted
9 to note for the record would apply in this
10 circumstance if there's any doubt that a nursing home
11 wing existing on the lots didn't constitute
12 improvement.

13 CHAIRMAN GRIFFIS: Okay. Are you aware of
14 what Webster's definition the ZA used in looking at
15 that?

16 MR. HALLEY: No, I'm not because they
17 didn't indicate.

18 CHAIRMAN GRIFFIS: Do you know the
19 Webster's definition you're submitting into evidence?

20 MR. HALLEY: I will if you'd like me to.

21 CHAIRMAN GRIFFIS: What's the Webster's
22 Dictionary Volume that you're taking it from?

23 MR. HALLEY: I believe that it's 1983. I
24 got it at the Georgetown Library. I can find out for
25 you. I have the title page, but it doesn't have the

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1 date.

2 CHAIRMAN GRIFFIS: That's all right. Why
3 don't you submit what you have in? Of course
4 everything you're submitting needs to go to all the
5 other participants too.

6 MR. HALLEY: I just gave all my copies to
7 her but I can get that to them at a later time if you
8 would like or I could get one copy back.

9 CHAIRMAN GRIFFIS: You already put in your
10 copies of the definition.

11 MR. HALLEY: No, I can give the definition
12 to them.

13 CHAIRMAN GRIFFIS: I see.

14 MR. HALLEY: I just gave her my copies of
15 the maps and the calculations.

16 CHAIRMAN GRIFFIS: Okay. I'm sorry. Mr.
17 Zaidain.

18 MEMBER ZAIDAIN: I just want some
19 clarification on what he just said.

20 CHAIRMAN GRIFFIS: Actually let me clarify
21 this procedural point.

22 MEMBER ZAIDAIN: Okay.

23 CHAIRMAN GRIFFIS: Submissions. All
24 submissions if I ask for anything I am also saying
25 that you have to serve everybody that's involved in

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1 this.

2 MR. HALLEY: Okay.

3 CHAIRMAN GRIFFIS: Just be aware of that.
4 Hold copies that you need and then provide them as we
5 will. Okay. Mr. Zaidain.

6 MEMBER ZAIDAIN: Just refresh my memory
7 because I was going to ask this as you were going
8 along. What is this supposed to demonstrate?

9 MR. HALLEY: Several things. That's the
10 map in the Office of the Surveyor.

11 MEMBER ZAIDAIN: Okay. This shows the
12 existing conditions of the lot.

13 MR. HALLEY: That's what they told me. I
14 asked them what I should use to show the existing
15 conditions of the lots and they said to use that which
16 is the most recent map that shows the square and the
17 folks in the Office of the Surveyor told me to use
18 that.

19 MEMBER ZAIDAIN: What is this?
20 Unfortunately it reminds me of trigonometry homework.

21 MR. HALLEY: What that does is it takes
22 the numbers that are on that map and applies them so
23 that we could get the actual lot width.

24 MEMBER ZAIDAIN: So this is correlated to
25 the plat from the Office of the Surveyor.

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1 MR. HALLEY: That's correct.

2 MEMBER ZAIDAIN: It's your data source and
3 then you do the calculations.

4 MR. HALLEY: Yes and they also include the
5 cosine tables in the back in case anybody doesn't
6 believe me.

7 MEMBER ZAIDAIN: Cosine tables. Good
8 Lord. Thank you.

9 CHAIRMAN GRIFFIS: Okay. Other questions?

10 MEMBER MILLER: I just have a general
11 question. Much of the argument is based on your
12 construction of the plain meaning of the regulations.
13 I think it would be fair to say. I've heard you say
14 that in some instances there was no case law. I just
15 want to confirm if that's so. Did you check to see
16 whether there was any legislative history or case law
17 that interpreted the provisions that you're dealing
18 with?

19 MR. HALLEY: I did check a while back.
20 I'm not saying that somebody else might not have found
21 something, but I did look to see why some of these
22 provisions were enacted or if there is any discussion
23 dependant they're enacted so their purpose and didn't
24 find anything of any help. I would find the dates
25 that they were enacted, but nothing more than that or

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1 nothing that would explain anything.

2 MEMBER MILLER: Thank you.

3 CHAIRMAN GRIFFIS: Any other questions?
4 Anything else to present at this time? No witnesses?

5 MR. HALLEY: No witnesses. I'll just
6 provide copies to everybody here of showing where the
7 nursing home wings existed in 1957.

8 CHAIRMAN GRIFFIS: Yes.

9 MEMBER ZAIDAIN: I have a question.
10 Obviously this letter proposed a subdivision plan
11 presented to DCRA. I mean something was submitted to
12 them or shown to them for them to issue this letter.

13 MR. HALLEY: I don't know if it was
14 subdivision. I think it might have just been
15 development. They probably didn't feel they needed to
16 subdivide at that time.

17 MEMBER ZAIDAIN: They just looked at the
18 existing lots.

19 MR. HALLEY: That's correct.

20 MEMBER ZAIDAIN: And you heard that from
21 DCRA. I just wanted to know what they looked at to
22 base this letter on.

23 MR. HALLEY: DCRA?

24 MEMBER ZAIDAIN: Yes.

25 MR. HALLEY: I don't know.

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1 MEMBER ZAIDAIN: Have you talked to them?

2 MR. HALLEY: No. All that I know is that
3 the Zoning Administrator reviewed the letter and found
4 that this still --

5 MEMBER ZAIDAIN: I saw that communication.

6 MR. HALLEY: Mr. Epting might be able to
7 answer that question since I believe he was the person
8 who was in contact with the Zoning Administrator.

9 MEMBER ZAIDAIN: That's actually a good
10 point. Are we supposed to subpoena the plans?

11 CHAIRMAN GRIFFIS: Can we subpoena the
12 plans?

13 MEMBER ZAIDAIN: Can we subpoena things?

14 CHAIRMAN GRIFFIS: No, we've been trying
15 to get that but no.

16 MEMBER ZAIDAIN: Okay, but you had no
17 conversations with DCRA to find out what they looked
18 at and what this letter was based on.

19 MR. HALLEY: No and Michael Johnson isn't
20 there anymore.

21 MEMBER ZAIDAIN: Right. thank you.

22 CHAIRMAN GRIFFIS: Anything else? Good.
23 Cross? No cross? Okay.

24 MR. HALLEY: You had indicated earlier
25 today about witness cards. Who shall I give my

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1 witness cards to?

2 CHAIRMAN GRIFFIS: I'm sorry. To the
3 recorder.

4 MR. HALLEY: Okay.

5 CHAIRMAN GRIFFIS: Great. In which case
6 we can move on. Let's take five minutes and get
7 ready. Then we'll come back. As we don't have the
8 Zoning Administrator or Government to present here, we
9 will go to Mr. Epting who is representing the owner of
10 two of the lots. Off the record.

11 (Whereupon, the foregoing matter went off
12 the record at 6:31 p.m. and went back on
13 the record at 6:40 p.m.)

14 CHAIRMAN GRIFFIS: On the record. Okay.
15 When you're ready.

16 MR. EPTING: I guess good evening at this
17 point. John Epting with Shaw Pittman. Ashleigh Horne
18 is also with me. We represent as I said Strategic
19 Georgetown LLC and Georgetown 32nd Street LLC, the
20 owners of Lots 19 and 20 in Square 1270 respectively.
21 The property owners are an automatic party to that
22 appeal under the Board's rules.

23 The appeal challenges the decision of the
24 Zoning Administrator which confirmed that Lots 19, 20
25 and 21 in Square 1270 could be developed as a matter

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1 of right. Through our Zoning expert, Armando Lourenco
2 we will demonstrate that the Zoning Administrator's
3 ruling is correct, reasonable and must be upheld by
4 the Board. The Board's legal standing in reviewing
5 appeals is clear. The BZA has jurisdiction that hear
6 the appeal and render a decision pursuant to D.C. Code
7 6-641.07(F). The Board has held that the Appellant
8 has a burden of proof pursuant to 3119.2 "To reverse
9 a Zoning Administrator's decision of approving the
10 issuance of building permit, the Appellant must show
11 by preponderance of evidence that the building permit
12 was issued in error because the proposed building
13 would violate the Zoning Regulations." That's Appeal
14 No. 16604, the Fairview Heights Neighborhood
15 Association case at pages two through three assuming
16 a conclusion must hold for a Zoning Administrator's
17 certification which are the basis for proceeding with
18 building permit. We have submitted copies of the
19 Fairview case and we have also submitted a copy of the
20 statement which we are going to go through tonight.

21 CHAIRMAN GRIFFIS: Is it up here?

22 MR. EPTING: It should be being passed to
23 you.

24 CHAIRMAN GRIFFIS: Okay.

25 MR. EPTING: Finally I'd like to proceed

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1 with our expert, Armando Lourenco. We've also
2 submitted his rèsùmè as a zoning expert. He's been
3 qualified before and I ask that you qualify him as an
4 expert in zoning.

5 CHAIRMAN GRIFFIS: Okay. Are there any
6 questions from the Board?

7 MEMBER ZAIDAIN: I have a question in
8 regards to what we're going to receive. Did you
9 submit a plan or whatever DCRA looked at when they
10 responded with the letter?

11 MR. EPTING: I didn't submit a plan but
12 what we'll go through. I submitted the basically the
13 record of the lots 19, 20 and 21, their dimensions.

14 MEMBER ZAIDAIN: These?

15 MR. EPTING: Different ones based upon the
16 Surveyor's Office. There were at one time attachments
17 to it his letter. I don't know why they're not in the
18 file anymore.

19 MEMBER ZAIDAIN: Can you produce those?

20 MR. EPTING: We're going to go through
21 those.

22 MEMBER ZAIDAIN: Great.

23 MR. EPTING: So I think I have everything
24 that was submitted to him. With that, I would like to
25 go ahead and turn it over to Mr. Lourenco.

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1 CHAIRMAN GRIFFIS: First let me. I was
2 asking the Board if there were any questions of Mr.
3 Lourenco in terms of qualifying him as an expert
4 witness. His rèsùmè is front. The pertinent point is
5 July 1998 through July 1999. Of course, he was acting
6 Zoning Administrator in that capacity and prior to
7 that was also part of the BLRA. As Mr. Epting has
8 stated, we have qualified him as an expert witness.
9 Does the ANC have any objection? Not voicing any
10 objections, any objection of the Board? We can take
11 it as a consensus of the Board and hear Mr. Lourenco
12 as an expert witness in D.C. Zoning.

13 MR. EPTING: Thank you.

14 MR. LOURENCO: Good evening, Chairman
15 Griffis, members of the Board. My name is Armando
16 Lourenco and I'm a private consultant on building and
17 land use, regulatory matters. Immediately to my
18 working as a private consultant, I served as an
19 Administrator of Building and Land Regulation of the
20 Department of Consumer of Regulatory Affairs. I also
21 served as the Acting Zoning Administrator of the
22 District of Columbia from July 1998 to August 1999.
23 Prior from that, from 1990 to 1994 I was the program
24 manager of the Permit Processing Division of the BLA.
25 In that capacity, I interacted almost daily with the

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1 Zoning Administrator in matters related to the C of O.
2 As a result of my past experience and my background as
3 a regulatory officer in land use matters in the
4 District of Columbia, I'm very familiar with the
5 Zoning Regulations and their implementation.

6 I was retained by the property owners to
7 review the Zoning Administrator's ruling of July 12,
8 2001 as well as all the pertinent aspects of the
9 development history of the lots in question to assess
10 the validity of the ruling and the ability of the lots
11 to qualify for application of the ruling. I concluded
12 that the ruling of the Zoning Administrator is valid
13 and that the current lot owners are entitled to
14 develop their respective properties in accordance with
15 it.

16 The properties in question, Lots 19, 20
17 and 21 in Square 1270 are located in Georgetown in
18 the 1500 block of 32nd Street. The lots are zoned R-3
19 and are proposed to be developed with row dwellings.
20 From what can be ascertained from the documents filed
21 with the BZA, the following conclusions can be drawn.
22 These lots were recorded in May 1881. A well check of
23 the Episcopal Home building foundation walls performed
24 in April 1957 confirms that the lots existed in that
25 present configuration before April 1957 and the

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1 garages previously existing on these lots have been
2 removed by them.

3 The appeal now is the ruling of the Zoning
4 Administrator, Mr. Michael Johnson, who by letter of
5 July 12, 2001 ruled that the lots could be developed
6 as a matter of right to erect row dwellings. The
7 Appellant's arguments are in the five different
8 aspects of the Zoning Administrator's ruling. First,
9 the Appellant claims that the lots were not unimproved
10 on November 1, 1957. Second, the Appellant argues
11 that on the date the ruling was issued the lots were
12 in the same ownership. Third, the Appellant claims
13 that the Zoning Administrator's finding that the lots
14 meet the minimum lot with section 401.3 is incorrect
15 because the width of 20.5 feet was incorrectly
16 measured along the street frontage. Fourth, the
17 Appellant argues that the Zoning Administrator erred
18 in applying the discretionary adjustment of section
19 407.1 to the exceptional case of a lot covered under
20 section 401.2. Finally the Appellant claims the
21 Zoning Administrator failed to make the finding that
22 the two percent discretionary adjustment granted was
23 "deemed by the Zoning Administrator not to impair the
24 purpose" of the Zoning Regulations. Obviously this is
25 quote from 407.1.

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1 Let's examine these five arguments in
2 light of the text of the Zoning Regulations and the
3 existing records on these lots. First, the argument
4 that the lots were not improved on November 1, 1957 is
5 inconsistent with available records. We know from the
6 records on file that on November 1, 1957 there was on-
7 going construction on the site of the future Episcopal
8 Church Home which included Lots 19, 20 and 21.

9 In fact, the records show that the
10 basement walls were surveyed in April 1957. This wall
11 check also shows that the garages formally located on
12 the lots had been removed and that the lots were
13 vacant. It was not until December 10, 1957, that is
14 five and a half weeks past the date limit specified in
15 401.2, that an application for C of O was submitted to
16 the Department of Licenses and inspections were done
17 by BZA. Much can be learned from their application.
18 That is Exhibit C in the owner's submission.

19 Given the natural aspiration of the
20 building owner to use a building as soon as it is
21 possible to obtain the C of O that sanctions its
22 completion, the date of the taking of the C of O
23 application is a good estimate of the earliest date
24 the owner considered construction completed. Anyone
25 familiar with development will have to agree with me

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1 that it is the way it always happens. We can
2 therefore establish that from well before April 1957
3 and until December 10, 1957 if not later Lots 19, 20
4 and 21 were part of a construction site and to the
5 Zoning Regulations, the true litmus test of the
6 existence of a legal established use of a lot is the
7 existence of the C of O that sanctions completion of
8 improvements on the lot.

9 This principle is well established in the
10 combined provisions of sections 101.5, 3203.1 and
11 3203.4. Section 101.5 forbids the use of the
12 construction of a building except in compliance with
13 11 DCMR. Section 3203.1 forbids the use of any
14 construction until a C of O is issued for it. Section
15 3203.4 forbids the issuance of a C of O to be
16 effective until construction is completed until "to
17 the point of availability of occupancy for use." This
18 has been a consistently accepted standard using the
19 enforcement of the Zoning Regulations and in the
20 vesting of grandfather rights.

21 In the case of the improvements erected on
22 part on Lots 19, 20 and 21 the C of O No. B9123 which
23 is Exhibit D was not issued until January 14, 1958.
24 One must conclude that Lots 19, 20 and 21 were
25 unimproved in early 1957, were still unimproved on

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1 November 1, 1957 and remained unimproved until January
2 14, 1958. That is also 11 weeks past the relevant
3 date specified in 401.2. The Appellant's first
4 argument is therefore incorrect.

5 The Appellant's second argument is also
6 without merit. Arguing that the Zoning
7 Administrator's ruling is invalid because it addressed
8 the condition that was not yet effective negates one
9 of the fundamental roles of the Office of the Zoning
10 Administrator. One cannot deny the ability of the
11 Zoning Administrator to clarify for any member of the
12 public who requests an interpretation how the Zoning
13 Regulations will be applied when certain conditions
14 are met.

15 This is a normal function of the Zoning
16 Administrator that occurs also daily. How else can
17 the Zoning Administrator discharge his/her duties.
18 What should the Zoning Administrator have done in the
19 present case, respond "I cannot issue a ruling at this
20 time. Go sell your properties and then I'll give you
21 a ruling"? The absurdity of such a position is
22 manifest. The Zoning Administrator's ruling is
23 clearly a conditional one as he writes that "It is my
24 understanding that at the time of development the lots
25 would be owned by separate companies or entities."

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1 Clearly if that condition is not fulfilled, the ruling
2 is not applicable. To that extent the Zoning
3 Administrator's ruling is correct and clearly
4 understood.

5 The ownership status of the lots at the
6 time the ruling is requested or issues is irrelevant.
7 The regulations do not restrict when rulings may be
8 requested or issued. Until an application to erect a
9 structure on such a lot is submitted, the actual
10 evaluation of the lot in light of section 401.2 does
11 not take place. Therefore until the Zoning
12 Administrator has to review and approve such an
13 application, the test on the separate ownership of the
14 lots is premature. Therefore, we are of the opinion
15 that Appellant's second argument is invalid.

16 As to the Appellant's third argument, the
17 lot width argument, it is at best irrelevant. Granted
18 the first sentence of the second paragraph of the
19 Zoning Administrator's letter has obviously
20 composition problem. The Appellant speculates that
21 the Zoning Administrator has elapsed and wrote 20
22 percent instead of 20 feet. An equally plausible
23 possibility is that the Zoning Administrator was the
24 victim of an unwanted word processing mishap that
25 wiped out part of a sentence and the reference to 20

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1 percent was intended but misstated within the
2 incomplete sentence. I note that if you add the words
3 "below that" between "20 percent" and "set forth" that
4 would make the sentence accurate and correct, just two
5 words missing.

6 More important than speculating on what
7 may have occurred during the editing of the letter is
8 to establish what the lot width requirement is and
9 whether the Zoning Administrator's conclusion is
10 erroneous or correct. Section 401.2 allows certain
11 lots, among those lots 19, 20 and 21, to be narrower
12 by as much as 20 percent and what otherwise would be
13 dictated by section 401.3. To that extent although
14 the Zoning Administrator's sentence is flawed, his
15 conclusion that the subject properties meet the
16 minimum lot width is correct because for lots under
17 the purview of section 401.2 such as Lots 19, 20 and
18 21 the minimum lot width is 16 feet, not 20 feet.
19 Dwelling on whether the lot width is 20.5 feet as
20 shown on the surveyor's plat or 19.22 feet as measured
21 using the Appellant's proposed methodology - and I
22 calculated that 19.22 feet is okay - but in this case
23 it's relevant for the case at hand.

24 The Appellant's fourth argument does not
25 stand the simplest scrutiny. The Appellant sustains

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1 that the Zoning Administrator should not apply the
2 discretionary adjustment allowed by section 407.1 to
3 anything other than the areas of widths specified in
4 the table of 401.3. This is arbitrary interpretation
5 that the text of the regulation involves. In effect
6 the minimum area width of this district are regulated
7 by the various sections within section 401. Some lots
8 are subject to the restrictions of 401.1. Others are
9 regulated by the provisions of 401.2. Others, the
10 majority, are regulated by section 401.3. A few lots
11 may benefit from the provisions of 401.4 and other
12 miscellaneous provisions are also contained in 401.5,
13 401.6 and 401.7.

14 407.1 states in relevant part "The Zoning
15 Administrator is authorized to permit a deviation not
16 to exceed two percent of the area of requirements of
17 sections 401 and 403 of this chapter." 407.1 does not
18 mention 401.3 or any other subsection of section 401.
19 One has to conclude that the area of requirements of
20 401.2 are also covered under this minor flexibility
21 authority granted to the ZA because it applies to all
22 areas determinations done under any of the subsections
23 of section 401. Therefore this fourth argument
24 results from the Appellant's flawed reading of 407.1
25 and as such should be disregarded.

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1 Finally, the claim that the Zoning
2 Administrator failed to make a finding that would be
3 required by section 407.1(b) is not supported by the
4 facts. First, the regulations authorize the Zoning
5 Administrator to permit certain deviations provided
6 the Zoning Administrator deems that those deviations
7 "do not impair the purpose of the otherwise applicable
8 regulations." The Zoning Regulations do not require
9 the Zoning Administrator to state such specific
10 finding in his/her rulings.

11 The Zoning Administrator is not mandated
12 to grant the deviations considered in 407.1. Since it
13 is a discretionary power, it is inferred that if the
14 Zoning Administrator chooses to exercise that
15 authority and rules to grant the deviation, he/she has
16 to have deemed that in doing so the purpose of the
17 otherwise applicable regulations was not being
18 impaired. Otherwise he/she would have ruled against
19 granting the deviations based on 407.1(b).

20 Secondly, the tone of the Zoning
21 Administrator's letter already denotes his concern
22 with not impairing the intent of the regulations. As
23 the Zoning Administrator, that is his/her first
24 enforcement duty and there is no reason to doubt his
25 commitment to it. The Zoning Administrator starts by

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1 noting that the subject lots had been recorded since
2 1881. To paraphrase Mr. Halley, this is not even the
3 case of grandfathering. It's the case of great-
4 grandfathering. This means that the existence of
5 these lots and their size have been in the public
6 domain for well over a century and are not a newly
7 created feature in this square.

8 Further, the Zoning Administrator
9 acknowledges that the properties are in the zoning
10 district R-3 which the proposed row dwelling
11 structures are a permitted use. Furthermore, the
12 proposed development will have to meet the other
13 requirements of the Zoning Regulations for R-3.
14 Nothing in the Zoning Administrator's letter
15 contemplates any exception from those rules. That is
16 the essence of the purpose of the Zoning Regulations
17 as stated in section 101.1 that is "to prevent a new
18 concentration of population, to prevent overcrowding
19 of land, to regulate the distribution of population,
20 business and industries so as to foster recreational,
21 educational and cultural opportunities and to further
22 economy and public services." Consequently
23 considering the Zoning Administrator's letter as a
24 whole which is evident that he considered the fact of
25 his discretionary decision on the purpose of the

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1 otherwise applicable regulations is all that was
2 required by him by section 407.1(b).

3 In conclusion, it's my opinion that the
4 Appellant has failed to make a creditable case on any
5 of the five arguments advanced in the appeal.
6 Therefore the appeal should be denied for lack of
7 basis of the text or intent of the regulations and for
8 lack of the substantiation. I thank you for the
9 opportunity to address the Board and I remain at your
10 disposal.

11 CHAIRMAN GRIFFIS: Thank you very much.

12 MR. EPTING: I'm just going to ask him one
13 question.

14 CHAIRMAN GRIFFIS: Sure.

15 MR. EPTING: Would you look at Exhibit I
16 which is the building plats for Lots 19 and 20? Would
17 a zoning administrator err by accepting the 20.5 width
18 as the recorded record lot? My understanding is that
19 the Surveyor's records are the official records in
20 D.C.

21 MR. LOURENCO: I know that such a
22 determination has been made in other cases where the
23 lot looks like a parallelogram like these that the
24 width of the lot measured along the line has been
25 accepted by the Zoning Administrator as the width of

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1 the lot as certified by the surveyor in the official
2 plat. That has occurred, yes.

3 MR. EPTING: But if you're presented this
4 building plat, would you accept that as the width of
5 the lot?

6 MR. LOURENCO: If I presented on what
7 quality?

8 MR. EPTING: As the basis for a double
9 permit as meeting the 20 foot width standard.

10 MR. LOURENCO: I probably would.

11 MR. EPTING: In addition, you indicated
12 that the lot would also meet the 20 percent standard
13 because the 19.22 complies with that.

14 MR. LOURENCO: Exactly. In this case, I
15 believe I stated that the width of the lot is really
16 irrelevant because once it's established that the lot
17 qualifies to be considered under section 401.2, the
18 minimum required lot width is 16 not 20. That's a
19 moot point in my opinion.

20 MR. EPTING: That concludes our testimony.

21 MEMBER ZAIDAIN: I have a question in
22 regards to the survey plat you're referencing. I'm
23 not entirely familiar about how plats are recorded.
24 Does it have to be surveyor stamped? This notice is
25 a fact so the stamp probably didn't come through, but

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1 is that true? Do you know what I mean? Certified by
2 a professional surveyor.

3 MR. EPTING: This is the Office of the
4 Surveyor's records.

5 MEMBER ZAIDAIN: Right.

6 MR. EPTING: You order this from them
7 based upon their record calculations.

8 MEMBER ZAIDAIN: But who is the
9 professional surveyor that certifies this?

10 MR. LOURENCO: The signature there of the
11 D.C. Office of the Surveyor.

12 MEMBER ZAIDAIN: I understand that. I see
13 that. I'm just using my experience in other
14 jurisdictions that there's a stamp. But in this case
15 in D.C. on those plats it's just the surveyor signing.

16 MEMBER ZAIDAIN: So he's professionally
17 certifying that this is true. Okay.

18 CHAIRMAN GRIFFIS: You can do it
19 independently which we often see and we have that
20 request that it has to be certified by an independent
21 surveyor. That's when it would be submitted in.

22 MEMBER ZAIDAIN: But it is just the fact
23 that it is signed by the surveyor means that it has
24 been professionally certified is correct.

25 MR. EPTING: Yes, that's correct.

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1 MEMBER ZAIDAIN: Okay. Thank you.

2 CHAIRMAN GRIFFIS: And if I understand
3 your testimony in terms of the lot width of 20 foot
4 required, you're saying that in fact in this instance
5 based on your review it's actually 16 feet because of
6 the 20 percent reduction which is 401.2 which allows
7 you to diminish the requirements for lot width to 80
8 percent of those in the table below. Is that correct?

9 MR. LOURENCO: That's correct.

10 MR. EPTING: But I would also not like you
11 to accept the definition of skew because this 32nd
12 Street is a straight line. I never understood that to
13 be a skewed lot. These property lines are straight so
14 you can find it either way, either it's 20.5 or it
15 meets the 16.

16 CHAIRMAN GRIFFIS: Understand.

17 MR. EPTING: We've laid that out in our
18 statement.

19 CHAIRMAN GRIFFIS: Right. Mr. Hood.

20 COMMISSIONER HOOD: Mr. Chairman. Mr.
21 Lourenco, I want to piggyback on what you just
22 commented on to make sure I understand. If you could
23 just walk me through, Mr. Lourenco, the process again
24 about the 80 percent rule which got us down to 1600
25 square feet which then took us down to the two percent

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1 which the Zoning Administrator has that flexibility
2 which got us down to being able to applying the two
3 percent deviation of 1600 square feet. Just walk me
4 through that process again. I understand about 401.2
5 but just generically walk me through.

6 MR. LOURENCO: If you're starting in
7 407.1.

8 COMMISSIONER HOOD: Okay, 407.1.

9 MR. LOURENCO: I agree with the comment
10 made earlier by Chairman Griffis about how this came
11 about. This section gives the Zoning Administrator
12 authority to allow deviations from several things but
13 the one that interests us here is the area of
14 requirements of section 401. It's the only one that
15 we're applying in this case. It's the only one he
16 applied.

17 COMMISSIONER HOOD: That gets us to the 80
18 percent.

19 MR. LOURENCO: So you go to the width
20 requirements of section 401 and if you go to section
21 401, you have to pick which one you're going to apply,
22 401.1, 401.2, .3, .4, .5. In the case of these lots,
23 these lots qualify to apply section 401.2.

24 COMMISSIONER HOOD: So it's established in
25 407.1.

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1 MR. LOURENCO: The area that yields from
2 the application of 401 to these lots is 1600 square
3 feet which is 80 percent of the volume that they would
4 be allowed.

5 COMMISSIONER HOOD: All right. Thank you.

6 CHAIRMAN GRIFFIS: Any other questions
7 from the Board? Cross examination?

8 MEMBER ZAIDAIN: Actually before we get
9 into this, I have a clarification question, Mr.
10 Epting.

11 CHAIRMAN GRIFFIS: Yes.

12 MEMBER ZAIDAIN: I see that you have - and
13 please bear with us here - the letter in question as
14 Exhibit A, the confirmation letter as Exhibit B. Which
15 of the exhibits were the attachments to the letter?

16 MR. EPTING: The Exhibit E at that time
17 shows the lots in question and the 20.5. I had an
18 earlier building plat for 19 and 20. I put in the
19 latest one which is Exhibit I. I had the 1881 survey
20 which I can submit to you. We have copies of that.
21 What I have to say about this survey. The 1881
22 records of the surveyors you can't photocopy. This is
23 a plat that we had traced several years ago. It's
24 orthatic in that respect but it's not a photograph.

25 MEMBER ZAIDAIN: You can't go down and

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1 copy them because of the age.

2 MR. EPTING: No. It's a sketch. So I'll
3 submit that too. Then I also presented with him the
4 C of O showing the date of improvement. The Zoning
5 Administrator had to make a decision on what day it
6 was improvement. I tried and he agreed with me that
7 the C of O was that day. So the C of O was the other
8 exhibit that he had.

9 MEMBER ZAIDAIN: That's G.

10 MR. EPTING: Yes.

11 MEMBER ZAIDAIN: So we're looking at G, I
12 and E.

13 MR. EPTING: Actually G is the second C of
14 O. I can't explain that one, but they went back at
15 some point in time and got a revised C of O. The
16 initial C of O is D, January 14, 1958.

17 MEMBER ZAIDAIN: I hope you understand
18 where I'm coming from. We're being asked to question
19 an alleged decision of the ZA and unfortunately DCRA
20 is not here so I hate to shift the burden onto you and
21 the Appellants, but we need in the record to
22 understand what the information that was used to make
23 this determination.

24 MR. EPTING: It is these very exhibits.
25 That's all the exhibits I have.

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1 MEMBER ZAIDAIN: Okay. Is there one more
2 thing that you're going to submit?

3 MR. EPTING: I submit the survey.

4 MEMBER ZAIDAIN: With the understanding
5 that it's a trace. That's understandable. But it's
6 your assertion that it's something that the ZA looked
7 at.

8 MR. EPTING: Yes.

9 CHAIRMAN GRIFFIS: So we have E, I, G, D
10 and 1881 survey.

11 MR. EPTING: That's correct. Also the
12 application which is C that shows like Mr. Lourenco
13 said that they were applying and D is they got it
14 later.

15 MEMBER ZAIDAIN: What C again?

16 MR. EPTING: C is the application.

17 MEMBER ZAIDAIN: The application for the
18 C of O.

19 CHAIRMAN GRIFFIS: So C and D.

20 MR. EPTING: I also had the 1919
21 Surveyor's office book showing the lots at that time,
22 the 20.5 width dimension which was part of the record
23 lots. Basically everything that I could find I showed
24 him and I've given you copies of all those materials.

25 MEMBER ZAIDAIN: Okay.

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1 CHAIRMAN GRIFFIS: Okay. Cross
2 examination?

3 CROSS EXAMINATION

4 MR. HALLEY: Hi, Mr. Lourenco. Just a
5 couple of quick questions. You've testified about
6 several of the Zoning Regulations. The one requiring
7 separate ownership of lots at the time of development
8 that you were talking about where it was not separate
9 ownership at the time of seeking the Zoning
10 Administrator's decision but rather that the lots
11 needed to be under separate ownership at the time of
12 development, the time the permits issued, do you
13 remember that?

14 MR. LOURENCO: Yes.

15 MR. HALLEY: Why do the regulations
16 require separate ownerships of lots at the time of
17 development?

18 MR. LOURENCO: I cannot speculate and I'm
19 not sure the speculation serves an purpose. It would
20 sound that if I own a lot that is too small or too
21 narrow and I don't own the adjoining lots I really am
22 stuck with the situation as is in regulations want to
23 grandfather my condition.

24 MR. HALLEY: So in other words if you own
25 both lots, you might have the chance to reconfigure

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1 the lots to make them conform rather than needing to
2 rely on the exception.

3 MR. LOURENCO: That would be an option
4 that I would have which I don't if I only own my lot.
5 But this is just speculation. I'm not sure exactly
6 why the regulations read the way they do.

7 MR. HALLEY: Okay. I'm going to have a
8 chance for rebuttal. Is that correct? I'm not going
9 to do rebuttal during cross.

10 CHAIRMAN GRIFFIS: That's correct. What
11 we have left after this is rebuttal and closings which
12 are all you.

13 MR. HALLEY: Okay. Can you tell me why
14 you tie the C of O to improvement even though the
15 regulations state that you should do otherwise?

16 MR. LOURENCO: I don't know of any point
17 where the regulations say that you should do
18 otherwise.

19 MR. HALLEY: I can show you. It's
20 actually section 199.2(g). It says "Words not defined
21 in the sections to have the meanings given in the
22 Webster's Unabridged Dictionary" and improved is not
23 defined in the section. Was that just ignored? Is
24 that what you are saying?

25 MR. LOURENCO: No. I know exactly what

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1 section you're talking about. You get to that point
2 when you have no other recourse. Once you have some
3 experience of enforcement of the Zoning Regulations,
4 it becomes very clear that the moment that defines
5 that point at which something is deemed by the
6 authorities that enforce these and other regulations
7 related to safety the point at which it's deemed that
8 a structure exists, was constructed correctly in
9 accordance with the plans, with the approvals by
10 Zoning and so on and so forth, that point is the
11 issuance of the C of O.

12 MR. HALLEY: Okay. So what about --

13 MR. LOURENCO: Until that point at best,
14 you may have a structure that is partially
15 constructed, did not reach the point where -- Let me
16 read from here. Section 3203.4 reads "If the erection
17 or alteration of a structure is contemplated" - which
18 is clearly this case - "a C of O for that structure
19 shall not be issued until the erection of alteration
20 is completed to the point of the availability of
21 occupancy for use except as provided" in the section
22 immediately after it which has to do with safety laws.
23 It has been held time and time again that this
24 issuance of the C of O sanctions the existence of the
25 legally established improvement in a lot that can be

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1 used and those rights are granted to the owner of the
2 structure. Until then at best you have a construction
3 site. You have a structure that may be completely
4 legal or in violation of the Zoning Regulations. No
5 one knows until it's established by final inspections
6 that everything was done according to what is
7 required.

8 The ZA obviously has to rely on some
9 timeline to determine whether there is an improvement
10 on the lot or not. The presence of a grandfather
11 structure is one thing. If it's being built, it's
12 when it's completed. So you get from the record that
13 the home that was being built on that site which
14 included these three lots was not completed on
15 November 1, 1957. Five and a half weeks later it was
16 probably still not completed. If you look at --

17 MR. HALLEY: Well, real quickly if you can
18 answer. Can you envision a situation which an
19 improvement doesn't require a C of O?

20 MR. HUNSICKER: A single family dwelling
21 but there is still a final building permit approval
22 that is required to sanction the fact that it was
23 constructed in accordance with the other regulations
24 here. If you look at the sign-offs from the
25 inspectors, fire signed on January 14th. Building

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1 signed on January 14th. Plumbing signed on January
2 10, 1957. Electrical signed on December 16, 1957
3 which leads me to believe that there were some
4 building and fire safety issues that weren't resolved
5 until another five and a half weeks later. So you
6 were 11 weeks past the deadline when you could
7 establish that an improvement had been completed and
8 was ready to be used.

9 CHAIRMAN GRIFFIS: So it's based on
10 convention, understanding what improvement is and also
11 based on the entire process of permit and approval
12 instead of occupancy.

13 MR. EPTING: It's also whether the Zoning
14 Administrator erred in relying upon a C of O issue
15 subsequent to that. Appellant have to show that he
16 did error in that. Was it reasonable for the ZA to
17 rely upon a C of O as the date when there was "an
18 improvement"?

19 CHAIRMAN GRIFFIS: Understood.

20 MR. HALLEY: Actually ZA never relied on
21 that for that purpose. He said it was unimproved in
22 the present day, not in 1957. So he never even went
23 back to that inquiry.

24 CHAIRMAN GRIFFIS: Without debate, we'll
25 make a note of that. Other questions?

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1 MR. HALLEY: No, I don't have any other
2 questions. Thank you very much.

3 CHAIRMAN GRIFFIS: Okay. Any follow up
4 questions from the Board? Sounds like we're moving
5 right along.

6 MR. EPTING: So based upon Mr. Lourenco's
7 testimony, the ZA's ruling was correct. The Appellant
8 have not shown a preponderance of evidence that the ZA
9 erred. We request that you uphold the ZA's decision
10 and dismiss the appeal. I would just like to note
11 that Mr. Lourenco did discuss all five elements of the
12 ANC appeal including the interaction between 407.1 and
13 401.2, that ZA could rely upon the C of O as the date
14 in which there was an improvement and that came after
15 the 1957 date, that the ZA did not err in stating that
16 the properties were required to be in separate
17 ownership at the time of development, that the ZA
18 didn't err in terms of the lot width and following
19 that the ZA didn't err in terms of the two percent
20 flexibility so there was no harm to the public because
21 he made that implicit in his letter. With that, we
22 conclude our testimony.

23 CHAIRMAN GRIFFIS: Good. Thank you. Then
24 is ANC ready to present rebuttal and closing this
25 evening?

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1 MR. HALLEY: Yes, they are.

2 CHAIRMAN GRIFFIS: Okay.

3 MR. HALLEY: In rebuttal, I would just
4 like to point out a couple of things, one of which I
5 just mentioned which was obviously the ZA was
6 considering what was going on on these lots in 1957.
7 He erroneously applied the unimprovement status from
8 the present day. But that being said with respect to
9 what was improved or not improved and what constitutes
10 improvement with all respect to Mr. Lourenco who by
11 his rèsumè obviously knows zoning, he's not the
12 regulations. I mean the regulations are the law, not
13 Mr. Lourenco's statements here. The law is in section
14 199(G-2) which is that if something is not set forth
15 in the regulations, we need to look to Webster's
16 Dictionary.

17 Webster's Dictionary for improved or
18 unimproved talks about anything. It could be the
19 erection of a wall which as Mr. Lourenco said happened
20 in April 1957. It doesn't need an actual regulatory
21 signoff for occupancy to be an improvement to land at
22 least under Webster's Dictionary. So that's the first
23 thing. The lots were cleared improved in 1957.

24 With respect to his speculation as to why
25 the regulations might require separate ownership of

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1 lots at the time of development, I do want to point
2 out that the lots are currently under separate legal
3 entity ownerships but these legal entities are owned
4 by the same people. So at the very top of the ladder
5 they still are under common ownership. For purposes
6 of whether or not they would have the power to seek a
7 variance and divide these properties and make them
8 comply with zoning requirements to make the lots large
9 enough to actually build upon, they have that within
10 their power as it is.

11 Finally, with respect to whether or not
12 the ZA actually needs to make a finding as to whether
13 the two percent exception is consistent with the
14 purposes of the Zoning Regulations, to say that just
15 by acting on granting the two percent variance and not
16 making any finding of it constitutes deeming it to be
17 within the purposes of the Zoning Regulations. So it
18 renders that whole provision extraneous. It's a basic
19 function of any statutory interpretation. You try to
20 interpret it so as to not render a provision
21 irrelevant. If that provision weren't necessary, why
22 would the drafters of the regulations have put it in
23 there to begin with. So it's an important and
24 necessary component of any ZA decision granting the
25 two percent exception, just so the exception is

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1 consistent with the purposes of the Zoning
2 Regulations. Given that, I would just like to thank
3 you all for your time and restate that the ANC
4 believes for the reasons set forth in its submissions
5 to the BZA that the ZA erred legally and factually and
6 that the decisions should be overturned or rendered
7 invalid. Thank you.

8 CHAIRMAN GRIFFIS: Thank you very much.
9 Okay. Yes?

10 MEMBER MILLER: Mr. Halley, it's late, but
11 I want to make sure I understand one of your points
12 which I don't. Did you say the lots are still owned
13 by the same legal entity? What was that?

14 MR. HALLEY: The lots are owned by two
15 separate corporations, two LLCs, but the LLCs have as
16 Mr. Birch stated in the beginning the same principles.
17 They were formed on the same date. They have the same
18 entities who are their registered agents. For all
19 intents and purposes, the owners of these two LLCs are
20 the same. So that for purposes of being able to
21 control what happens with these lots, they would be
22 able to redivide them. It's the fiction of the LLC
23 between the owners and the lots. So the impact as the
24 architect stated as much at one of the hearings at OGB
25 or Commission of Fine Arts that the separate structure

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1 is really created just to get around the Zoning
2 requirement.

3 MEMBER MILLER: Is that in the record
4 showing the ownership?

5 MR. HALLEY: Yes.

6 MEMBER MILLER: What you're just saying on
7 the record, is that in this record?

8 MR. HALLEY: The incorporation documents,
9 I have them. I did not bring them today because I
10 didn't know that it was going to come up.

11 MEMBER ZAIDAIN: Did the DCRA see those?
12 What did DCRA rely on?

13 MR. HALLEY: At the time that the decision
14 was rendered, the lots were all under Miller
15 ownership. They were not under the LLCs at that time.
16 The LLCs came about in the fall of 2002.

17 MR. EPTING: I'd object to this. The BZA
18 has no rule over this ownership. They are owned by
19 different entities, the Strategic Georgetown and
20 Georgetown 32nd Street LLCs. That to me meets the
21 requirements of the regulations to being separate
22 ownership. It's not the BZA's role I see. It's not
23 a zoning issue to pierce into who the ownership entity
24 is because you don't do that in any other case. You
25 make sure that the appropriate property owner is

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1 before you and that's what you have today.

2 CHAIRMAN GRIFFIS: Yes. I just would
3 uphold that objection, but we might go to the date
4 that they were put into separate ownership if that is
5 relevant to the Board.

6 MEMBER MILLER: Well, isn't the ownership
7 an issue at least at the time of the letter and that's
8 why we're talking about ownership?

9 MR. HALLEY: I think it's undisputed that
10 at the time of the letter all three lots were owned by
11 Herbert and Patrice Miller.

12 CHAIRMAN GRIFFIS: It's the dates not the
13 entities of today's LLCs.

14 MR. EPTING: But that's the whole
15 discussion we had about 401.2 which is actually
16 written in the present tense. There's a past tense in
17 1957 in terms of individual ownership and then there's
18 a present tense that does not. The ZA ruling is
19 written that at the time of development so it
20 contemplated later on once you got ready to go that it
21 would be owned by separate entities. That's what we
22 have created.

23 MEMBER MILLER: So then ownership is an
24 issue with respect to present day ownership. Is that
25 correct?

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1 MR. EPTING: No.

2 MEMBER MILLER: If the letter goes to a
3 time of development. Oh, because they're not even
4 developing it yet. Is that what you're saying?

5 MR. EPTING: That's right. The permits
6 are being filed by two separate ownership entities.

7 MEMBER ZAIDAIN: And the point there, that
8 brings it back to the whole issue with the letter.
9 The letter is giving an opinion saying "When you bring
10 this in for a permit they need to be in separate
11 ownership. We'll work to verify that." Correct?

12 MR. EPTING: That's correct. And that is
13 the way we have filed under separate ownership.

14 MEMBER ZAIDAIN: Yes, but your filing is
15 not in front of us. The letter is.

16 MR. EPTING: That's correct.

17 MEMBER ZAIDAIN: I mean if you filed it
18 and you got a permit and it was in front of us.

19 MR. EPTING: But if we would have waited
20 for this appeal after the permit had been issued,
21 there would be one in one entity and one in the other
22 entity which would comply with 401.2.

23 MEMBER MILLER: Maybe because it's late
24 and we're getting tired, but the if the ZA's decision
25 addressed at the time of development as opposed to at

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1 the time of the improvement in the past, then we would
2 need to know who the owners are going to be at the
3 time of development. Is that correct?

4 MR. EPTING: That's correct.

5 MEMBER MILLER: That isn't even now per
6 se, right? It's sometime in the future because we
7 don't have a building permit yet.

8 MEMBER ZAIDAIN: What do you mean when you
9 say "time of development," when a permit issued?

10 MR. EPTING: Permits. Yes, permits would
11 have to be issued and two different property owners.

12 MEMBER MILLER: There's no permit yet so
13 this is in the future, right?

14 MR. EPTING: But my point is that as long
15 as they are issued in two different property owners
16 you complied with that condition. So it's up to the
17 property owner to file in compliance with that.

18 CHAIRMAN GRIFFIS: Right, because you
19 wouldn't be in compliance if the ownership changed to
20 a single ownership and now you filed for permit.

21 MR. EPTING: That's right.

22 CHAIRMAN GRIFFIS: Right.

23 MS. HORNE: If I may, Mr. Lourenco
24 actually testified to that. He said that the letter
25 would be conditional and if they were not in separate

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1 ownership at the time of development, then whatever
2 effect it has would not be in effect.

3 CHAIRMAN GRIFFIS: That's right. It's an
4 excellent point that we skipped over and maybe not
5 fully digested it and Mr. Lourenco's description of it
6 that it is a conditional letter and it's conditioned
7 on what the permit documents will eventually show for
8 full review. Is that correct?

9 MR. EPTING: That's correct.

10 CHAIRMAN GRIFFIS: Okay. Which goes to
11 Mr. Zaidain's point about the letter.

12 MR. EPTING: I understand that. Maybe I
13 should not have conceded that.

14 CHAIRMAN GRIFFIS: Okay. I was going
15 somewhere else with that though. In terms of Mr.
16 Lourenco's statement today, is that going to be
17 submitted in writing for the record?

18 MR. LOURENCO: I'll submit it.

19 CHAIRMAN GRIFFIS: So we will have copies
20 and copies of course for the ANC to look at. Any
21 other questions for the Board or clarifications? Very
22 well. We can conclude this hearing on this appeal.

23 MR. EPTING: Thanks for hearing it.

24 CHAIRMAN GRIFFIS: Indeed. I appreciate
25 everyone's patience today and through the scare.

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1 Don't go anywhere because we have some procedural
2 things we need to get to. We need to set this for a
3 decision. We also have asked for a few things in
4 submission. I'm going to set some dates. I want to
5 get this done and decided very quickly. While Ms.
6 Bailey is looking for dates of which we can set the
7 decision, she will also review all those items that we
8 have asked for submission.

9 (Pause.)

10 CHAIRMAN GRIFFIS: Okay. Ms. Bailey, why
11 don't we go through your notes because they are
12 obviously better than mine in terms of submissions.

13 MS. BAILEY: I only have two documents,
14 Mr. Chairman. The ANC is to provide a copy of the
15 documents shown where the nursing home wing existed in
16 1957.

17 CHAIRMAN GRIFFIS: Okay.

18 MS. BAILEY: Then Mr. Lourenco's statement
19 that he read today. Those are the only two things
20 that I had.

21 CHAIRMAN GRIFFIS: Now the ANC feel
22 sufficient on the submission that you gave us that it
23 shows your point of the improvements on the lot or is
24 there another document you want to submit?

25 MR. HALLEY: I'm sorry. I guess there's

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1 another document that I would like to be able to
2 submit.

3 CHAIRMAN GRIFFIS: Okay. When can you get
4 that in? Close of business tomorrow, 3:00 p.m.?

5 MR. HALLEY: We can certainly try. Can
6 we give ourselves another day just to be sure?

7 CHAIRMAN GRIFFIS: Here's what I'm trying
8 to do. I'm trying to decide this first thing in a
9 special public meeting on Tuesday.

10 MR. HALLEY: The reason why I bring up
11 tomorrow is because that is when information is served
12 to the Board and it's by 3:00 p.m. In all
13 seriousness, I just want to see if that's obtainable.
14 If it isn't obtainable, we'll figure it out and I'll
15 deal with the schedule.

16 MR. EPTING: Mr. Chair, if it helps, we
17 can also submit which we didn't do is we have the
18 April 1957 wall check which would also show where the
19 improvements were.

20 CHAIRMAN GRIFFIS: Okay. The wall check
21 which is also going to get served on the ANC.

22 MR. EPTING: Yes.

23 CHAIRMAN GRIFFIS: Let's go through the
24 whole list and then we'll figure it out. I'm sorry.
25 You had the two pieces. So now we have wall check.

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1 We have the ANC submission and we have Mr. Lourenco's
2 statement of which I'm assuming it's already in. That
3 one's done.

4 MR. HALLEY: And Ms. Miller had asked for
5 the incorporation documents which I need to provide
6 because I hadn't brought them today.

7 MR. EPTING: I objected to that
8 submission.

9 CHAIRMAN GRIFFIS: Indeed. I think we
10 upheld the objection.

11 MR. HALLEY: I didn't hear that. I'm
12 sorry.

13 CHAIRMAN GRIFFIS: Yes. What I left over
14 for the Board is when they want any dates attendant to
15 the incorporation but I think we dispensed with that
16 unless I'm mistaken. Any opinions? Do you need an
17 additional submission on the incorporation?

18 MEMBER ZAIDAIN: No.

19 MEMBER MILLER: This is the ownership
20 issue that we had discussed.

21 CHAIRMAN GRIFFIS: Yes.

22 MEMBER MILLER: Okay. No I don't need
23 anything.

24 CHAIRMAN GRIFFIS: No, we don't need that
25 in which case wall check and your submission of the

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1 improvements Thursday 3:00 p.m.

2 MR. HALLEY: Yes.

3 MEMBER ZAIDAIN: Mr. Chair.

4 CHAIRMAN GRIFFIS: Yes?

5 MEMBER ZAIDAIN: I don't know if you
6 covered this or not, but a lot of the issues we're
7 dealing with are "DCRA said this and meant that. DCRA
8 said this and meant that." Are we going to hear from
9 DCRA?

10 CHAIRMAN GRIFFIS: Nope. We had the
11 opportunity and for goodness sakes they were here.
12 I'm not sure why they didn't present themselves. It
13 will reflect in the deliberation in terms of how we
14 decide this case as they had the opportunity. But,
15 no, I can't see how we change or give additional time
16 or anything in that respect. So Thursday at 3:00 p.m.

17 MR. HALLEY: Yes and that's 20 copies.

18 CHAIRMAN GRIFFIS: I don't know. Actually
19 we require 20. Ms. Bailey, how many copies do we need
20 of the submissions? 15?

21 MS. BAILEY: Fifteen.

22 MR. HALLEY: Okay.

23 CHAIRMAN GRIFFIS: There's a reason for
24 that but I won't go into it. So we can all go have
25 dinner. So everyone is okay on the dates? Excellent.

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1 The record is only open to receive that information.
2 Of course that will complete the record and will be
3 closed at 3:00 p.m. on Thursday. So if we don't get
4 that, it will be closed with or without the
5 submissions. We will set this for special public
6 meeting on next Tuesday which is the 25th. Set for
7 another 12 hour day on the 25th.

8 That is going to be the second decision in
9 the morning at 9:00 a.m. Of course that is our public
10 meeting in which there is no additional testimony. It
11 is the deliberation of the Board. You are certainly
12 welcome to be here to hear the deliberation but we
13 won't be having any sort of interaction or additional
14 testimony provided. So if that's clear, any other
15 questions or clarifications? Questions, yes?

16 MR. HALLEY: I forgot about this and I
17 apologize. Thank you for reminding me, Ms. Barbara
18 Hartman from the Citizens Association of Georgetown
19 had been here in the audience but had to leave at a
20 little after 5:00 p.m. She asked if the Citizens
21 Association could submit something for the record and
22 if you could leave it open for them to submit
23 something.

24 CHAIRMAN GRIFFIS: What would they submit?

25 MR. HALLEY: She said they were going to

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1 submit a letter.

2 CHAIRMAN GRIFFIS: Okay. In a special
3 exception or variance that would be absolutely
4 appropriate. We would take that in, but in regards to
5 the appeal we have the players and they are defined.
6 That's what we'll look to and deliberate on. In fact,
7 we have several appeals that people write in lots of
8 letters of support or a grievance. They are all
9 irrelevant to the appeal. I'm not sure unless you can
10 help me understand what the Citizens Association would
11 provide. I would have to say that we aren't able to
12 accept a letter of that nature. Okay. Very well.
13 Anything else? In which case, thank you all very much
14 and this would conclude the 18 November 2003 afternoon
15 session. Off the record.

16 (Whereupon, the above-entitled matter was
17 concluded at 7:35 p.m.)

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