

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

DECEMBER 2, 2003

+ + + + +

The Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

ZONING COMMISSION MEMBER PRESENT:

ANTHONY J. HOOD Zoning Commission Member

Office of Zoning STAFF PRESENT:

Clifford Moy
Beverly Bailey
John K.A. Nyarku

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

10:20 a.m.

CHAIRPERSON GRIFFIS: Good morning ladies and gentlemen, we're getting a late start this morning but this is, and I shall call to order, the 2nd of December, 2003 Board of Zoning Adjustment Public Meeting.

Let me say all good morning. My name is Geoff Griffis. I am Chairperson. Joining me today, of course, is the Vice Chair Mr. Etherly, also Ms. Miller. Representing the National Capitol Planning Commission is Mr. Zaidain and representing the Zoning Commission is Mr. Hood.

With us and keeping us well in order and trying to keep us on schedule are staff from Office of Zoning Mr. Moy and Ms. Bailey. Mr. Nyarku is also in an out assisting us as needed.

With that let's get right into it so we can make up some of our time. We have three cases to decide this morning. We are going to juggle the schedule as posted just a little bit and we will call the Connecticut Avenue Associates decision and the decision on 17022 of Edmund Burke will be the last decision of the morning. So with that I will turn and ask staff to call the first case for our deliberation

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1 this morning.

2 MR. MOY: Good morning, Mr. Chairman,
3 members of the board. As you've indicated the first
4 case for decision is Application No. 17069 of 5626
5 through 5628 Connecticut Avenue Associates pursuant to
6 11 DCMR ? 3104.1 for a special exception to allow an
7 accessory parking lot last approved by BZA Order No.
8 16233 dated July 27, 1998 under Section 214 in the R2
9 District at premises 3831 McKinley Street, N.W.
10 That's in Square 1860, Lots 5, 6, 7, 17 and 18.

11 On November 18, 2003 the board completed
12 hearing testimony on the application and scheduled its
13 decision for December 2, 2003. For the meeting the
14 board requested the following:

15 First, that the applicant amend a final
16 list of conditions based on the board's discussion on
17 November 18, 2003 and that was submitted by the
18 applicant on November 20th.

19 That's in your case folders as Exhibit 27.

20 A deadline for responses to the conditions from ANC
21 3-4G has not been received and that completes my
22 briefing Mr. Chairman.

23 CHAIRPERSON GRIFFIS: Thank you very much,
24 Mr. Moy. As the board will recall we began
25 deliberation on this moving towards a bench decision

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1 and had postponed it to today only based on the fact
2 that we were recrafting some of the conditions that
3 were proffered by the applicant and the ANC and so I
4 think it would be appropriate to revisit where we left
5 off.

6 MR. ZAIDAIN: As a maker of the original
7 motion, Mr. Chair, I'd be happy to remake it. I move
8 approval of Application No. 17069 of Connecticut
9 Avenue Associates pursuant to 11 DCMR ? 3104.1 for a
10 special exception to allow an accessory parking lot,
11 which was last approved by BZA Order No. 16233 dated
12 July 27, 1998 under Section 214 in the R2 district at
13 premises 3831 McKinley Street, N.W. with conditions to
14 be discussed.

15 MS. MILLER: I'll second that.

16 CHAIRPERSON GRIFFIS: Thank you. The
17 motion is before us and has been seconded. Let's move
18 right then into the conditions crafting and then full
19 deliberation on it. Did you want me to take up the
20 conditions Mr. Zaidain or did you want to run through
21 them?

22 MR. ZAIDAIN: Well, we started to go
23 through them in the last hearing and we've since
24 received a submittal dated November 20, 2003 which we
25 may want to use as the basis of our discussion and I

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1 don't know if Ms. Miller wants to chime in on that?

2 MS. MILLER: I would concur that we start
3 with the conditions that were recently submitted. I
4 think that they took out some of the conditions that
5 we had concerns about already.

6 CHAIRPERSON GRIFFIS: Good. And I think
7 to reiterate for everyone's re-review, the facts of
8 the matter the conditions that were proffered
9 previously, some of which were taken from the previous
10 order, a lot of which and our concern was based on the
11 fact that they were outside of the jurisdiction of the
12 board or, in fact, were irrelevant to the current
13 conditions of this application.

14 So, I think it's appropriate to pick up
15 the submitted conditions by the applicant and the
16 first, of course, is approval for five years. Is
17 there any discussion on that?

18 If not, we can move to the second
19 condition would be the parking attendant of Magruder's
20 would be present on the lot during the core hours of
21 operation and that's, I guess, the core hours
22 operation of the store, which is listed at 10:00 a.m.
23 to 6:00 p.m. and shall assist in keeping the alley
24 clear of vehicles or monitor the entry of the cars
25 from McKinley Street into the lot. Is there any

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1 edits, changes, additions, subtractions?

2 Condition No. 3, parking in the subject
3 lot shall be exclusively for patrons and employees of
4 Magruder's Supermarket. A sign indicating such
5 restriction shall be posted on the lot. Is there
6 discussion on Condition No. 3?

7 MS. MILLER: Yes. That's a condition I
8 have some concerns with. I think we heard a little
9 bit of testimony that the parking lot is sometimes
10 used by patrons of other businesses, somebody doing an
11 errand at another business or the parking lot
12 sometimes might be used for a larger purpose in the
13 future such as a theater event.

14 And, I don't see why the BZA should be
15 imposing this type of restriction. I think that this
16 type of restriction should be imposed if by anyone by
17 the business itself in consultation with the
18 community.

19 So I don't think it serves a zoning
20 purpose and I don't think it protects against any
21 adverse impact on the community so I would recommend
22 deleting that condition.

23 CHAIRPERSON GRIFFIS: I see.

24 MR. HOOD: I would agree, Mr. Chairman. I
25 don't even know if it's in our purview or that we can

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1 even enforce No. 3 and I also have questions about No.
2 5 when we get to it.

3 CHAIRPERSON GRIFFIS: Okay. Good. Now
4 would that preclude or -- would it preclude the store
5 owner from keeping the parking lot open outside of
6 business hours? So, when the store is closed could
7 others use it?

8 MS. MILLER: If we take this provision
9 out. It's just, it's up to the business to determine.
10 We're not requiring them to allow other patrons to
11 use it. We're just not restricting them from using
12 it.

13 CHAIRPERSON GRIFFIS: So in some sense if
14 we took Condition No. 3 out as it's been offered we
15 would not be establishing who could use the parking
16 lot or actually what the parking lot hours would be.

17 VICE CHAIRPERSON ETHERLY: And I think if
18 you take Condition 3 out you're doing as Ms. Miller
19 suggests and that is not trying to impact who can use
20 it but I think the issue of the when still comes under
21 Condition No. 5, which Mr. --

22 CHAIRPERSON GRIFFIS: Okay, we can pick it
23 up from No. 5 then. So, is it a consensus of the
24 board then to remove? So, we're now on to Condition
25 No. 4 as listed which would be our Condition No. 3. I

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1 would say it also is duplicative of our own
2 regulations.

3 It reads: "Parking lot retaining wall and
4 adjacent landscaping shall be maintained, policed, and
5 kept in prime condition." Our regulations state that
6 pretty clearly as a requirement for any approval.

7 VICE CHAIRPERSON ETHERLY: Mr. Chair, as
8 far as Condition 4 goes I appreciate the goal there
9 but I think in crafting conditions having nebulous
10 terms such as prime condition we're not really sure
11 what that is and from an enforcement action that might
12 be problematic.

13 CHAIRPERSON GRIFFIS: So you would support
14 removing it?

15 VICE CHAIRPERSON ETHERLY: Unless there's
16 an alternative to clarify the language.

17 CHAIRPERSON GRIFFIS: Others?

18 MS. MILLER: I actually lean towards
19 leaving this type of provision in. I think that it
20 sets out clearly some basics to maintaining the
21 parking lot and landscaping in good condition and I
22 think it would be hard for the general community to
23 find where these are all in our regulations.

24 We could change the word prime to good
25 condition or something like that if you have a

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1 problems with prime. I don't think it hurts to leave
2 something like this is.

3 CHAIRPERSON GRIFFIS: Others?

4 MR. HOOD: I would suggest that we leave
5 it in there but if it's already covered I don't really
6 have either one way or the other which way to go.
7 We're not hurting anything if we leave it in there and
8 if we take it out I believe it's covered in our
9 regulations.

10 CHAIRPERSON GRIFFIS: Good, as is
11 proffered and we need to move on to the others.

12 VICE CHAIRPERSON ETHERLY: That's fine.

13 CHAIRPERSON GRIFFIS: Why don't we leave
14 it in at this point. Five, we are: "The lot shall be
15 secured with a gate, chain or cable during all hours
16 that it is not in operation." Comments? Mr. Hood.

17 MR. HOOD: I think that that would go to
18 what we talked about earlier but as I looked at the
19 picture my recollection I see that that already exists
20 so I may just withdraw my comment because obviously
21 it's taking place up there from looking at the
22 picture.

23 CHAIRPERSON GRIFFIS: What's that?

24 MR. HOOD: It looks like there's a chain.
25 It already looks like it's already in progress.

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1 They're already doing it and obviously if it works
2 it's not broke. We don't need to fix it.

3 CHAIRPERSON GRIFFIS: Okay, but the
4 condition would go to maintaining that is that the way
5 you read it? It would basically mean a closing time
6 for the parking lot.

7 MR. HOOD: Obviously then that would
8 contradict what we did in No. 3 because if we're going
9 to leave it open for people to use after hours then if
10 it's closed in No. 5, I see a contradiction here.
11 That's why I said that when we were on No. 3.

12 CHAIRPERSON GRIFFIS: Okay. Ms. Miller.

13 MS. MILLER: I don't see a contradiction
14 in that it doesn't preclude them from allowing the
15 parking lot to operate at specific times or letting
16 other people use it. It just means when they're not
17 going to allow it to be used for purposes when it's
18 going to be closed it will be secured and I think it
19 may go to a safety issue.

20 MR. HOOD: I think Ms. Miller the way I
21 understood in your comments was that after hours we
22 didn't want to preclude, I think you said there was a
23 theater or something right next to it so people can
24 park on it if they choose to in agreement with the
25 store owner but if we're going to put a secured gate

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1 and chain I just see a contradiction there unless I'm
2 not following you.

3 MS. MILLER: Okay. Well what I'm saying
4 is it doesn't say that it has to be chained during
5 certain hours. Like it doesn't say it has to be
6 chained after 6:00 p.m. or not during core hours. It
7 just says it has to be chained when the lot is not in
8 operation.

9 It doesn't say when the grocery store is
10 not in operation so that if the business decides to
11 allow it to be open in the evening for the theater
12 purposes they won't chain it because it will be open.
13 It will be in operation.

14 MR. HOOD: Okay. So you're saying let's
15 leave it in there?

16 MS. MILLER: Yes.

17 MR. HOOD: Okay, I'm fine. I'm not going
18 to fight on that one.

19 MS. MILLER: Okay.

20 CHAIRPERSON GRIFFIS: Okay. Deliveries to
21 the store is there any concern with the delivery
22 times? There was no evidence in the record that that
23 was needing to be adjusted or changed and I think we
24 can keep that in unless there is anything else from
25 members.

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1 Going to seven, eight, nine, ten and
2 eleven unless there are specific -- well, my comment
3 would be these are redundant of the regulations
4 themselves.

5 "All areas to where the driver access lane
6 parking area shall be maintained. Paving material
7 specifically required, bumper stops specifically
8 required. Vehicle or any part of shall not be
9 permitted to project over any lot or building line or
10 on or over the public space.

11 No use shall be conducted, structures
12 built and lighting to illuminate parking lot and be
13 arranged so it doesn't direct -- so it is not directly
14 reflecting into adjacent properties."

15 All is stated clearly in our own
16 regulations, which means they may be well redundant as
17 conditions from this board and this order. They could
18 be removed. Let me hear any other comments on that.

19 VICE CHAIRPERSON ETHERLY: I would agree
20 with you, Mr. Chairman with regard to proposed
21 Condition 7 through 11. I do think Condition 12 we
22 did have some testimony to some extent about insuring
23 that appropriate signage was in place to direct
24 vehicles as to both exit and entrances for the lot.

25 So, I might be inclined to encourage

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1 retention of that proposed condition but once again
2 for seven to eleven I would agree that those would be
3 redundant and probably could be removed.

4 MR. ZAIDAIN: Mr. Chair, I agree with Mr.
5 Etherly's statement regarding Condition 12. That was
6 referenced in the DDOT report and while its not the
7 exact same wording as what DDOT was looking for I
8 think it achieves the same and we may want to
9 reference that in the final order. I'm talking -- I'm
10 referring to Condition 12.

11 CHAIRPERSON GRIFFIS: Okay, so we're all
12 in concurrence with seven through eleven.

13 MS. MILLER: I just have a comment about
14 seven through eleven. If these are all required by
15 the regulations then I would recommend that in our
16 written order we reference somewhere the regulation
17 that encompass them so that the community is on notice
18 where to look to see what's required.

19 CHAIRPERSON GRIFFIS: Okay. Gosh I hope
20 the regulations are referenced somewhere in these
21 orders, right? Okay, twelve this is in and let's pick
22 up the further discussion on number 12.

23 Mr. Etherly I think that also should be
24 maintained. The DDOT report, as stated, also brought
25 up some concerns about the maintenance of markings on

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1 the pavement so I think we should include in the
2 Condition 12 that all crosswalk markings between the
3 parking lot and entrance will be maintained in a
4 visible -- however we want to word it, fashion,
5 painted, re-painted as required.

6 The markings on the driveway off McKinley
7 Street also would be required to reinforce the
8 entrance and I think the applicant shall install
9 appropriate signs to advise vehicle operators not to
10 block sidewalks is appropriate in Condition 12 too.

11 Any additions, comments on that?
12 Opposition? Are there additional conditions that are
13 required for this application? Very well. We have a
14 motion before us. It has been seconded with
15 conditions as stated by the board. Is there any
16 further deliberation?

17 If there's no further deliberation then
18 let me ask for all those in favor to signify by saying
19 aye.

20 BOARD: Aye.

21 CHAIRPERSON GRIFFIS: And opposed?
22 Sustaining? Very well, why don't we record the vote
23 on that.

24 MR. MOY: Yes, the staff would record the
25 vote at 5-0-0 to approve the application with

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1 conditions on the motion of Zaidain, seconded by Ms.
2 Miller. Also in favor of the motion the chairman, Mr.
3 Etherly, and Mr. Hood. Would you like staff to go
4 over the changes in the conditions?

5 CHAIRPERSON GRIFFIS: Love to but we have
6 no time.

7 MR. MOY: Okay, conditions as recorded.

8 CHAIRPERSON GRIFFIS: Fabulous, thank you.

9 MR. MOY: The next case, application, is
10 the appeal Application No. 17034 of Advisory
11 Neighborhood Commission 2E pursuant to 11 DCMR ? 3100
12 and 3101 from the administrative decision of the
13 Zoning Administrator in the issuance of a final and
14 bidding ruling letter dated July 12, 2001 to the law
15 firm of Shaw Pittman confirming the ability to develop
16 three lots on the east side of the 1500 block of 32nd
17 Street, N.W. with three rural dwellings.

18 The appellant alleges that the Zoning
19 Administrator's decision is flawed and contains
20 factual and legal errors. The R3 zoned subject
21 premises are located in the 1500 block of 32nd Street,
22 N.W. That's on the east side in Square 1270, Lots 19,
23 20 and 21.

24 This case was convened by the board at its
25 special public meeting on November 25th, 2003. After

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1 discussion the board rescheduled the appeal for a
2 decision to its public meeting on December 2, 2003 and
3 that completes my briefing, Mr. Chairman.

4 CHAIRPERSON GRIFFIS: Thank you very much,
5 Mr. Moy. I suggest we pick this up somewhat fresh and
6 look at it and let me also -- well let me first say
7 that it's good to have Mr. Hood here in person that
8 can help and lend to the discussion on this appeal
9 brought to us by the ANC 2E.

10 I think it probably best if I just open
11 the discussion to board members if someone is so
12 inclined to begin the discussion or I will certainly
13 lead it if not. Yes, Mr. Zaidain.

14 MR. ZAIDAIN: Well, I think myself along
15 with everybody else that was in the room and
16 participating was probably fairly disappointed with
17 the outcome of the last proceeding in that we did not
18 make a decision.

19 Not to rehash all of my issues as I felt
20 we covered them and we debated them fairly well at the
21 last meeting but I do want to say that I still have my
22 concerns regarding whether or not we should be hearing
23 this appeal based on an opinion letter of the ZA for
24 the various amounts of reasons that we discussed at
25 the last hearing.

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1 But also for the fact that I think this
2 board should strive to create standards and precedents
3 that can lead to a clear cut way of how these appeals
4 can be dealt with and I think we did that in the past
5 or we've done that in the past when it comes to
6 timeliness and conclusions of fact and how we deal
7 with these cases.

8 But I am certainly not one to try to hold
9 up a decision of the board and I think that in
10 abstaining from the decision on the merits may have
11 done that or actually it did do that. I don't think
12 that's in dispute.

13 So in trying to figure out a way to
14 address the issue without holding it up I think the
15 best way to handle it is for the board to take a
16 position on whether or not we should be hearing
17 appeals of ZA opinion letters and do that in the form
18 of a motion.

19 And I'd be happy to make a motion to
20 dismiss this appeal based on the fact that it is not
21 properly before us in that this board will not be
22 hearing appeals of ZA letters and if anybody is
23 uncomfortable with the wording of that we can work on
24 it.

25 CHAIRPERSON GRIFFIS: I take that as so

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1 moved. Is there a second?

2 MS. MILLER: I'll second it.

3 CHAIRPERSON GRIFFIS: Thank you,
4 discussion?

5 MS. MILLER: I'd like to address whether
6 or not this is the final decision that's appropriate
7 for the board to take up. I think when we look at
8 this decision we don't decide that every ZA decision
9 is appropriate.

10 I think we have to look at it on a case-
11 by-case basis and 11 DCMR 3112.2 says any person
12 aggrieved by an order, requirement, decision,
13 determination or refusal made by an administrative
14 officer or body, including the mayor of the District
15 of Columbia in the administration or enforcement of
16 the zoning regulations may file a timely appeal with
17 the board as follows.

18 And, I think this is a decision by the ZA
19 that involves the administration or enforcement of
20 zoning regulations. There are several issues raised
21 in the letter and I think that there's enough evidence
22 in the record for us to make a determination at least
23 on some of the issues.

24 And one issue in particular, which is a
25 legal question involving whether or not the ZA applied

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1 for our 1.2 correctly in assessing the issue of
2 whether the property was improved as of 1957.

3 There's enough evidence in the record to
4 see whether or not the property was, in fact, improved
5 and it also involves a legal question as to what
6 improvement means, which is what we were discussing at
7 our last hearing. So for that reason I think that
8 there's a judicial issue here.

9 Also, all parties agree that they want us
10 to decide this issue because it's better to decide
11 this kind of issue early rather than later on. The
12 same issue will come back to us later and we have
13 enough facts to decide it today.

14 CHAIRPERSON GRIFFIS: Good. Thank you
15 very much. I think there are some realistic concerns
16 about hearing appeals on the zoning interpretive
17 letter. Mr. Zaidain.

18 MR. ZAIDAIN: Well, I just again since I
19 exhausted kind of my end of it I don't want to -- I
20 don't think this board should go into a huge prolonged
21 debate on the issue. I just think there are some
22 things that Ms. Miller has brought up that were not
23 brought up at the last hearing that I want to address.

24 First is, well the discussion of whether
25 or not this is a decision or not. I mean we clearly

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1 disagree on that perspective and I respect her
2 position.

3 Secondly, is the case-by-case basis of
4 whether or not we should hear this appeal is I do not
5 find that to be a good way to go because if you look
6 at it from a broader sense it gives the communities --
7 it gives no assurances to the community on what they
8 can appeal.

9 Under that approach in my mind if a
10 community gets a hold of a ZA opinion letter basically
11 what they will do is appeal it and see if it sticks
12 and see if the facts are there.

13 You know in this case, which you mentioned
14 there are facts that we can deal with to some extent
15 on whether or not we can decide the merit. I can
16 assure you that there will be instances that those
17 facts will not be there.

18 There is no plans in the public record.
19 There's a lot of speculative information that has been
20 presented and it's been presented in this case as well
21 so I think determining this on a case-by-case basis is
22 not a good way to go because it simply is not a clear
23 cut message on what can be appealed.

24 When you have a permit you have public
25 documents. You have a clear decision on what's been

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1 decided and everybody knows from the get-go what the
2 ground rules are.

3 And also in terms of all parties agreeing
4 again I reiterate my disappointment with the
5 intervener in this case because I think this issue
6 should have been raised by them.

7 However, it wasn't because they stated on
8 the record that it was more expedient for their client
9 to deal with this now but it does not guarantee that
10 their permit will not get appealed on some other issue
11 once it's issued.

12 VICE CHAIRPERSON ETHERLY: Mr. Chair.

13 CHAIRPERSON GRIFFIS: Yes.

14 VICE CHAIRPERSON ETHERLY: Just to very
15 briefly weigh in, I agree with Ms. Miller's
16 interpretation in this regard. I think over the last
17 couple of months we've struggled mightily with appeals
18 and more importantly the question of when an appeal is
19 properly before us. I think we've done well to sort
20 out when an appeal is late and I think we've taken
21 some very good steps to define that aspect of our
22 process.

23 I know Mr. Zaidain hates the phrasing that
24 I'm about to use, which is while he makes a good point
25 but I'll just be definitive in this. I disagree with

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1 the interpretation because I believe perhaps what
2 we're starting to do here is sort out the flip side of
3 the appeal question, which is okay I think we've
4 sorted out what's late and we've had some long dialog
5 on that in other cases.

6 This is perhaps one of the first blushes
7 at the question of well when is it too early? I would
8 say and I said this on the record last week, I am in
9 support of this type of step because although it might
10 perhaps open up the gates a little bit in terms of
11 what we deal with, I believe Ms. Miller's
12 interpretation about some of the aspects of this
13 particular case do well to support the belief that
14 this in indeed a final and binding decision of the
15 Zoning Administrator.

16 To an extent I'm somewhat tempted by Mr.
17 Zaidain's position in terms of the finality of a
18 permit once it's issued. I mean that is a very nice,
19 clear bright line step but perhaps with my dear
20 colleague Mr. Hood next to me this is an area that at
21 some point might merit some attention from the Zoning
22 Commission or perhaps some attention from this body as
23 we look at our rules of procedure going forward to
24 clarify even further what is perhaps the appropriate
25 starting point.

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1 But I think in this particular instance I
2 would err on the side of having parties both in
3 agreement that we want to get this sorted out sooner
4 rather than later and I think it is very -- it is
5 fairly consistent with where we've been on the issue
6 of sorting out interpretations of waste management,
7 interpretations of our own regs as it relates to
8 timeliness of an appeal.

9 So, I am in support of Ms. Miller's
10 interpretation and would be inclined to move forward
11 in that regard. Thank you.

12 CHAIRPERSON GRIFFIS: Mr. Hood.

13 MR. HOOD: Mr. Chairman, I want
14 clarification. Mr. Zaidain, you're moving to dismiss?

15 MR. ZAIDAIN: Yes, that's correct and
16 unfortunately I do not have the regs in front of me.

17 MR. HOOD: That's fine.

18 CHAIRPERSON GRIFFIS: The authority is
19 3100.2.

20 MR. ZAIDAIN: Right, that would be the
21 technical motion is moving to dismiss that based on
22 that this appeal does not meet the requirements of
23 3102.

24 CHAIRPERSON GRIFFIS: 3100.2.

25 MR. ZAIDAIN: 3112.2.

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1 CHAIRPERSON GRIFFIS: Excuse me.

2 MR. ZAIDAIN: I couldn't fit the zoning
3 code in my bag this morning.

4 CHAIRPERSON GRIFFIS: Additional comments?

5 MR. HOOD: Well, I'll just say not having
6 a chance to join in the discussion last week I proxied
7 my vote, I would think that that was the way to go
8 because I find it very common.

9 It was difficult and this being my first
10 appeal I was -- I found it very hard to actually come
11 to which way I was going to go on it. Maybe this may
12 be a way for us to deal with this in this case but I
13 will tell you that as far as the zoning commission
14 looking at that, that's something that may need to be
15 directed to the Zoning Commission in a formal setting
16 and maybe they'll look at that whole appeal process if
17 that's an issue for the board.

18 CHAIRPERSON GRIFFIS: Okay. Thank you
19 very much. This brought up an interesting point and
20 hopefully or this might be the last word. Ms. Miller
21 has cited 3112, which is actually pre-hearing
22 procedures for appeals, which is a good point to start
23 with and it's redundant too.

24 But I think more importantly we look at
25 3100.2, which is the jurisdiction authority and

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1 powers. The jurisdiction authority and powers is
2 direct and that is that this board as listed, the BZA,
3 shall also hear and decide appeals where it is alleged
4 that the appellant that there is an error in any
5 order, requirement, decision, determination or
6 refusal.

7 I think what I heard in the board there is
8 a strong consensus on clearly we want well defined,
9 well-scoped appeals that are brought before us and we
10 always look to that well documented so that the
11 argument is crystal as we have to deliberate on it.

12 That is not often the case in appeals.
13 The additional aspect of a determination letter from
14 the zoning administrator makes it even more
15 problematic. However, I think that we are, in fact,
16 required to do that based on our jurisdiction
17 authority and powers as listed in 3100.2. So, with
18 that we have a motion to --

19 MR. ZAIDAIN: Well, just to clarify before
20 -- aside from I think what you just mapped out was the
21 broader policy issue I guess of where I was going but
22 I'd say in my motion I'm stating that I don't feel
23 that this appeal meets those standards and that it is
24 not a determination, so just to make sure that the
25 issues here are clear.

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1 CHAIRPERSON GRIFFIS: Okay and I think one
2 of the things that goes to that that you spoke to last
3 is the fact that these letters are conditional. This
4 does not preclude or this does not allow the
5 development to proceed.

6 It still goes to the permitting. It still
7 goes through further zoning review. There are -- it
8 is not the end stop for a project; however, it is a
9 critical stage in any project.

10 Okay, I think positions are fairly clear.
11 The motion before us has been seconded. The motion
12 is to deny the appeal based on the lack of -- I'm
13 sorry to dismiss the appeal based on the lack of the
14 board's authority to hear it. Is that correctly
15 stated Mr. Zaidain?

16 MR. ZAIDAIN: That is correctly stated.

17 CHAIRPERSON GRIFFIS: Very well. Then let
18 me ask for all who is in favor of the motion to
19 signify by saying aye.

20 BOARD: Aye.

21 CHAIRPERSON GRIFFIS: Opposed.

22 BOARD: Opposed.

23 CHAIRPERSON GRIFFIS: And abstaining?
24 Very well, why don't we record the vote on that first
25 motion?

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1 MR. MOY: Staff would record the vote I
2 believe as one 1-4-0 on the motion of Mr. Zaidain.
3 This is to dismiss the appeal, seconded by Ms. Miller
4 to deny is Mr. Zaidain. Opposed to the motion the
5 chairman, Ms. Miller, Mr. Etherly and Mr. Hood.

6 CHAIRPERSON GRIFFIS: Thank you.

7 MR. HOOD: Actually I want to be recorded
8 as abstaining because I didn't oppose. I didn't vote.
9 I abstained because I wasn't really clear on what we
10 were doing or what -- I really wasn't and since I'm
11 not clear I want to abstain.

12 CHAIRPERSON GRIFFIS: Okay. That's
13 appropriate. Then the vote will be recorded to
14 reflect that.

15 MR. MOY: Then the final vote then is 1-3-
16 1, abstaining Mr. Hood.

17 CHAIRPERSON GRIFFIS: Thank you, Mr. Moy.

18 MR. ZAIDAIN: Mr. Chair just to kind of
19 round out that whole issue given the disposition of
20 that motion I'd be happy to participate in the merits
21 as best I can so we can take it from there.

22 CHAIRPERSON GRIFFIS: Very well. Let's do
23 that. Let's move right into then the merits of the
24 appeal that we heard. I think it should be fairly
25 clear that this hinges on one section of the zoning

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1 regulations 401.2 which the Zoning Administrator's
2 letter addresses in his determination.

3 And I think it's also clear on the record
4 and unrefuted that there is some unclear aspects of
5 the letter in that terminology and the sentence
6 structure and the admittance or non-admittance of
7 words. There is, of course, also the aspect of
8 listing 20 percent and what that went to or how that
9 might be dealt with. With that let me open it up if
10 anyone wants to take up further deliberation on that.

11 Interesting. I think this is again what
12 Mr. Zaidain was going to which I feel very strongly
13 about in terms of appeals is that it makes -- it makes
14 our role very difficult and what we take very
15 seriously in deliberating if there isn't great clarity
16 and I think this is not the worst but there is an
17 embodiment of so many outstanding issues that just
18 haven't come together.

19 I think we've all read, re-read Section
20 401 numerous times, 401.2. We may well have worn it
21 out in our own copies of the regulations in reading
22 and re-reading it and I am struck with the fact of
23 reading the first sentence.

24 "In case of an unimproved lot in single
25 ownership on November, 1957." Again when we read

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1 sections we do have to understand how each of the
2 sections relates to the previous and looking at 401.1
3 I think it's important to look at that in view of
4 401.2 in this aspect, 401.1 points to a case where a
5 building is located on May 12, 1958.

6 Meaning it may well and it could be argued
7 that the fact of 401.2 aspect of unimproved would be
8 over a matter of time not just the point at which
9 November 1, 1957. Otherwise, why are we listing on
10 May 12, 1958 a building and covering it in that
11 section?

12 If we look at how we dissect them 401.2,
13 we may obviously I think it would be a fairly straight
14 read that the lot must be unimproved on November 1,
15 1957.

16 I've thrown a little bit of an addition to
17 that but I think that's an important aspect to have
18 board discussion on at this point whether the facts go
19 to whether this was unimproved as of November 1, 1957.
20 Anyone find that pertinent? The wave must be building
21 somewhere. Yes, Ms. Miller.

22 MS. MILLER: I think what I was focusing
23 on last week were two things. One is that the ZA
24 erred initially by just concluding that the lots were
25 unimproved on July 12, 2001 and not even referring

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1 back to November 1, 1957 so that was the first error.

2 And then the second error was that they
3 were not unimproved, that the property was not
4 unimproved on November 1, 1957 and there was -- it was
5 uncontested I believe that the building was under
6 construction in 1957 and it got its C of O January 14,
7 1958 so by November 1, 1957 it was well underway.

8 So then we got into the discussion about
9 what does improved mean and interveners' argument
10 rests on improvement meaning getting the C of O and I
11 don't think that is supported by any legal authority.

12 So, and actually even concluded that the C
13 of O is issued upon a completion of an improvement so,
14 therefore, there must have been improvements along the
15 way.

16 In any event, I think that there is
17 substantial evidence in the record including
18 photographs and newspaper articles showing that this
19 building was under construction in 1957 for us to
20 conclude that the property was not unimproved in 1957
21 and, therefore, these property owners should not be
22 excepted 401.2. I'm not sure if I'm characterizing
23 that properly but it will fall within the exception of
24 401.2.

25 MR. ZAIDAIN: I think, I followed

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1 everything you just said there except for your initial
2 statement, which was that the ZA found, the ZA was in
3 error when they found that the project was or the land
4 was unimproved in 2001.

5 MS. MILLER: Right.

6 MR. ZAIDAIN: Where did that issue stem
7 from?

8 MS. MILLER: I think we have to look back
9 to his letter where I think he makes a statement that
10 the property was unimproved.

11 MR. ZAIDAIN: It says in '57. I just
12 didn't see the reference to 2001 because I was
13 understanding everything you were saying except for
14 that one point.

15 MS. MILLER: I have to find it in the
16 letter.

17 MR. ZAIDAIN: Okay.

18 MS. MILLER: I think he made a finding
19 that the property was unimproved on July 12, 2001,
20 which is the date of his letter. Oh, okay. Okay,
21 third paragraph, second line says the lots are
22 unimproved.

23 MR. ZAIDAIN: Oh, okay.

24 MS. MILLER: And were in single ownership
25 on November 1, 1957, so he was finding that the lots -

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MR. ZAIDAIN: Oh, were unimproved in the present tense. Well at least that's what we are and we are speculating that he meant but I see your point. Are you sure that that is not referring to the condition of the site in 1957?

I mean the way -- I mean the context of the regulations are ownership and improvement in 1957 so I'm not sure how. I don't know I'm not sure I totally agree with inferring that that is -- that's heading toward the present tense of 2001, well of 2001.

MS. MILLER: Okay. The way it's written it says the lots are unimproved meaning that --

MR. ZAIDAIN: And were, yes, that's true.

MS. MILLER: Now it doesn't matter to me because either way I think he erred.

MR. ZAIDAIN: Okay.

MS. MILLER: If he's concluding that they were unimproved on November 1, 1957 I think that that's an error and I think that's important for us to decide that since there were buildings under construction that they didn't constitute being unimproved as of that date.

MR. ZAIDAIN: Okay.

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1 CHAIRPERSON GRIFFIS: Others?

2 VICE CHAIRPERSON ETHERLY: I agree with
3 Ms. Miller's interpretation.

4 CHAIRPERSON GRIFFIS: Thank you.

5 MS. MILLER: I think that if we conclude
6 that the ZA erred with respect to its determination
7 whether the property was unimproved as of that date
8 then that decides that the property owners could not
9 come in as a matter of right by means of 401.2 and we
10 could just grant the appeal on that basis.

11 And, therefore, I would move that we grant
12 the appeal of the ANC 2E that the Zoning Administrator
13 erred in his July 12, 2001 letter granting the ability
14 to the property owners to develop the lots in question
15 as a matter of right.

16 VICE CHAIRPERSON ETHERLY: Seconded, Mr.
17 Chair.

18 MR. ZAIDAIN: As a course of deliberation
19 on that issue, I want to make sure that we're clear on
20 what we're determining here. You're not saying that
21 it's based on the C of O that was proffered? It was
22 based on the evidence of some sort of construction on
23 the property in that time frame, correct?

24 MS. MILLER: The evidence that the
25 property was unimproved in 1957.

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1 MR. ZAIDAIN: Well, because we got into
2 this long kind of day long discussion about what the
3 word improvement meant and I want to -- I just want
4 some clarification on what your stance is on that.

5 There was discussion on whether or not a
6 certificate of occupancy meant improvement but if I
7 understand your deliberation before you made your
8 motion that's not what you're basing it on. You're
9 basing it on evidence of some type of construction
10 activity within that time frame around 1957.

11 MS. MILLER: The evidence that I'm basing
12 it on are the newspaper articles that show the
13 building under construction.

14 MR. ZAIDAIN: Right.

15 MS. MILLER: I believe both the
16 interveners did not rebut that the building was under
17 construction.

18 MR. ZAIDAIN: Okay.

19 MS. MILLER: Actually, I guess, that's in
20 the record and also the fact that they were issued a C
21 of O on January 14, 1958 shows that the building must
22 have been under construction on November 1, 1957.

23 MR. ZAIDAIN: So there's not one thing
24 that you're saying constituted improvement. It was
25 these confluence of factors that led you to believe

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1 that it was improved.

2 MS. MILLER: The confluence of factors
3 that proved that there was a building under
4 construction on November 1, 1957.

5 MR. ZAIDAIN: Okay.

6 CHAIRPERSON GRIFFIS: So, Ms. Miller,
7 you're finding that the ZA erred in determining that
8 this was unimproved on November 1, 1957?

9 MS. MILLER: Yes.

10 CHAIRPERSON GRIFFIS: Okay. Mr. Hood.

11 MR. HOOD: I was just going to ask, you
12 actually answered my question, Mr. Chairman. So we
13 have established that this lot was not unimproved?

14 CHAIRPERSON GRIFFIS: Yes.

15 MS. MILLER: What Ms. Miller, what she's
16 implicating.

17 CHAIRPERSON GRIFFIS: Depending on the
18 outcome of the motion that may be established as the
19 board's position, yes.

20 VICE CHAIRPERSON ETHERLY: I mean just for
21 the purposes of discussion and follow-up to Mr. Hood's
22 question we did receive written submissions that were
23 contained in the appellant's submission regarding the
24 existence of a nursing home wing which was constructed
25 in 1956 that occupied and straddled the three lots and

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1 that's at page two of the appellant's appeal
2 application, which is Exhibit No. 1.

3 That claim was not refuted or otherwise
4 rebutted by the intervener's submission which is -- I
5 apologize for not having an exhibit number but it's at
6 page three of the bound copy of intervener's statement
7 in opposition to the appeal where the intervener
8 notes: "Although construction has started across a
9 small portion of the rear of the lots by November 1,
10 1957 it was not complete."

11 So with those two pieces of information I
12 am very much in support in Ms. Miller's argument
13 finding that there was indeed an improvement on this
14 property as of November 1, 1957.

15 CHAIRPERSON GRIFFIS: So, if I'm
16 understanding the statements of the board their
17 interpretation of the three terms that are used in the
18 section 401, unimproved structure and building, the
19 hierarchy as the board views it is that, that
20 unimproved is the general term of any type of, I'm
21 just not going to limit the word but any type of
22 improvement.

23 That would then also encompass a smaller
24 subset of structure so if there is a beginning of a
25 building or excavation, a structure coming out of the

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1 ground it is also encompassing improvement and the
2 building is the last piece of which it would, in fact,
3 be an enclosed structure able to or would receive a
4 certificate of occupancy. Is that how you're viewing
5 this Ms. Miller?

6 MS. MILLER: Yes.

7 CHAIRPERSON GRIFFIS: Very well. So, the
8 relevance of the certificate of occupancy that Mr.
9 Zaidain is talking to or asked you about falls away
10 for you because that isn't a pivotal milestone of
11 improvement or unimprovement.

12 MS. MILLER: I think even the intervener
13 said the C of O sanctions completion of improvements
14 so it doesn't establish an improvement. Also, I
15 believe that not all buildings have to get a C of O.
16 I don't think that residences have to get certificates
17 of occupancy and I don't think -- I think it's clear
18 that if there's a residence, there's a home on the
19 property that the property is improved.

20 CHAIRPERSON GRIFFIS: When you say
21 residence are you meaning single family home?

22 MS. MILLER: Yes, I'm meaning single
23 family home. Thank you.

24 CHAIRPERSON GRIFFIS: I see.

25 MS. MILLER: I also would say that my

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1 motion encompasses an error of the Zoning
2 Administrator to just make a determination that the
3 property is improved as of the date that its being
4 looked at. I think it has to go back to November 1,
5 1957.

6 CHAIRPERSON GRIFFIS: Okay, anything else?

7 MR. HOOD: I would just ask we have a
8 motion on the table. I think it was seconded, right?

9 CHAIRPERSON GRIFFIS: Yes.

10 MR. HOOD: I would just ask Ms. Miller to
11 restate the motion if you don't mind or if you can
12 come close.

13 MS. MILLER: Oh, no.

14 VICE CHAIRPERSON ETHERLY: If I could Ms.
15 Miller perhaps just to assist in that regard, of
16 course not to suggest that you need any but, once
17 again, I would.

18 As a seconder of the motion I would
19 understand to grant the appeal on the grounds that the
20 Zoning Administrator's decision embodied in the July
21 12, 2001 letter was flawed and did contain factual and
22 legal errors one of which from a factual standpoint
23 would be the fact that the lot was indeed improved as
24 of November 1, 1957.

25 And the flip side of that in terms of the

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1 legal error would be the Zoning Administrator's
2 determination of the lots' unimproved status as of the
3 present date being incorrect legally. The
4 interpretation should look back to November 1, 1957 as
5 you interpret 401.2. I hope that a fairly accurate
6 representation of the motion.

7 MS. MILLER: I think it is. I'm satisfied
8 with that. Are the other board members? Otherwise,
9 we can keep trying to restate it.

10 CHAIRPERSON GRIFFIS: Mr. Hood, are you
11 clear on what the motion is?

12 MR. HOOD: I hate to prolong it but
13 actually I'm not.

14 CHAIRPERSON GRIFFIS: Okay, my
15 understanding of the motion is that it would uphold
16 the appeal based on the fact that the Zoning
17 Administrator erred in his determination that the lot
18 was unimproved on November 1, 1957.

19 MR. HOOD: Have we established that the
20 lot was unimproved in 1957?

21 CHAIRPERSON GRIFFIS: That is what board
22 members are asserting, yes. Do you want further
23 discussion on that?

24 MR. HOOD: I don't know how much more I
25 could add. I don't know if the lot was unimproved. I

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1 don't understand so I guess maybe that's the problem
2 I'm having, the same problem I had last week.

3 CHAIRPERSON GRIFFIS: Okay and I think you
4 evidence an interesting problem. I mean where do we
5 look to the specific definitions of unimproved
6 structure and building? I mean certainly we get to
7 more specifics of aspects of structures and buildings
8 but unimproved seems to be a little open.

9 However, if we do take it into context of
10 401 and we look at 401.1 and it looks to when
11 buildings were existing as of May 12, 1958 whether
12 they were or no longer or are existing replacements of
13 buildings you look to the fact that there is an
14 important distinction between building structure and
15 unimprovement or improvement and 401.2 is going to
16 improvement or unimprovement.

17 It may well have been more appropriate to
18 look at this in under 401.1 in the direction of trying
19 to build a single family home on these lots that
20 meaning if you could or the Zoning Administrator was
21 able to determine if there was a building on the lot
22 as of May, 1958.

23 It could conceivably not have to come into
24 compliance with 401.3 if it was, in fact, in
25 compliance with other provisions so that Title 20

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1 through 25 and I'm sure we're all well aware one of
2 those aspects would be 2001, which goes to conforming,
3 well it deals with conforming and non-conforming
4 structures, conforming and non-conforming uses and the
5 provisions in the ability to make additions or
6 modifications to existing conditions. So that being
7 said --

8 MR. ZAIDAIN: Well, I would say the 2001
9 is much clearer than the regulations we're dealing
10 with here.

11 CHAIRPERSON GRIFFIS: Right, my point
12 being in bringing that all up is addressing Mr. Hood's
13 comment of not being clear on what's happening and I
14 think there is some un-clarity in this under 401.2 but
15 the motion is before us and that is the fact that the
16 Zoning Administrator made an error in his
17 determination under the provision of unimproved
18 November 1, 1957.

19 MR. HOOD: So what, this is the last
20 piece? I want to make sure I'm understanding because
21 it looks like I'm about to change something here.
22 401.2 would not apply to this case. It does not
23 apply, 401.2 because it is improved.

24 CHAIRPERSON GRIFFIS: Well that's not a
25 determination that I think this board is making at

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1 this time; however, it's a determination according to
2 the motion as I understand it is that it was an error
3 in looking at this specific lot as unimproved as of
4 November, 1957.

5 MR. HOOD: Is there a certain percentage,
6 and I don't know of it anywhere, a certain percentage
7 of how much structure should be built before we call,
8 determine whether it's improved or unimproved?

9 CHAIRPERSON GRIFFIS: Ms. Miller.

10 MS. MILLER: Yes. Mr. Hood you weren't
11 here for last week's discussion and that's okay.

12 MR. HOOD: I guess that's why I'm so
13 turned around and lost.

14 MS. MILLER: That's right and that's what
15 we were trying to grapple with last week and as far as
16 zoning law goes there's very little authority.
17 Unimproved in my research I found basically meant
18 undeveloped that the land was vacant "and unimproved."

19 And I was looking at legal cases and even
20 parking lots were considered improved and so if there
21 was any type of building on property that was
22 considered improved. Usually these terms are used
23 without any definition because people were just taking
24 them for granted.

25 I also looked at tax and finance law

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1 because they tax buildings and they use improvements a
2 lot in the tax laws and I think in 9 DCMR they started
3 taxing buildings when they were 65 percent improved.

4 So we're not bound by what our tax
5 department does but it can be a guide and I think we
6 can deduce even in this case that the building was
7 probably 65 percent improved if they've got a C of O
8 within a couple months later but I think that's too
9 high for zoning standards.

10 MR. ZAIDAIN: Right but the 65 percent of
11 the tax laws that's not, we're not making a
12 determination that that's what the meaning of improved
13 is. We're saying that the motion, as I understand it,
14 is that the evidence that was presented to us lends
15 some weight to the fact that these lots were improved
16 before 1957.

17 This was a newspaper article and all the
18 other evidence that was submitted. It's not -- we're
19 not citing the specific standards as being our basis
20 of determination.

21 MR. HOOD: Okay, thank you.

22 MS. MILLER: And I'm certainly not saying
23 it should be 65 percent to be considered improved.

24 MR. HOOD: Right.

25 MS. MILLER: And we looked in the

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1 dictionary. We were talking about this last and
2 unimproved was defined as not built on so I think --

3 CHAIRPERSON GRIFFIS: Well, it goes to the
4 same point that you brought up in terms of how you
5 would, if you relied on the certificate of occupancy,
6 Ms. Miller, as a single family residence wouldn't be
7 issued a certificate of occupancy which means if a
8 house is built there it would never be improved.

9 MR. HOOD: I'm clear, Mr. Chair. We can
10 proceed with the vote.

11 CHAIRPERSON GRIFFIS: Very well. The
12 motion is before us and seconded. I would ask for all
13 those in favor of the motion signify by saying aye.

14 BOARD: Aye.

15 CHAIRPERSON GRIFFIS: And opposed?
16 Abstaining? Mr. Hood, abstaining?

17 MR. HOOD: No, I'm not abstaining, I'm
18 supporting.

19 CHAIRPERSON GRIFFIS: Oh, I'm sorry I
20 didn't hear your vote. Okay, very well. Mr. Moy
21 would you mind recording the vote?

22 MR. MOY: Yes, sir. The staff would
23 record the vote as 5-0-0 to grant the appeal of ANC 2E
24 on the motion of Ms. Miller, seconded by Mr. Etherly,
25 also in favor of granting the appeal the chairman, Mr.

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1 Zaidain and Mr. Hood.

2 CHAIRPERSON GRIFFIS: Anything else for us
3 to do?

4 MR. MOY: We have the next case.

5 CHAIRPERSON GRIFFIS: Well then let's call
6 it.

7 MR. MOY: That is Application No. 17022 of
8 Edmund Burke School pursuant to 11 DCMR 3104.1 for a
9 special exception to allow an addition to an existing
10 private school and to increase the enrollment from 270
11 to 320 students and faculty and staff to 70 under
12 Section 206 in the R2 and R5D districts at premises
13 4101 Connecticut Avenue, N.W. and 2955 Upton Street,
14 N.W. That's in Square 2243, Lot 67 and 68.

15 On October 28, 2003 the board completed
16 testimony on the application and scheduled its
17 decision for on December 2, 2003. The board requested
18 the following post hearing documents.

19 First from the applicant testimony
20 provided by Martin Wells, specifically in references
21 to pages 54, 57 and 91 of the final report of the
22 Connecticut Avenue Transportation Study and that was
23 submitted on November 18, 2003 by the applicant and
24 that's in your case folders as Exhibit 191.

25 The board also requested any responses to

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1 the following documents from parties and ANC 3E, the
2 first a letter dates October 10, 2003 from Mr. Ease
3 with the second waste district and this response was
4 submitted from ANC 3F on November 18, 2003 and that's
5 identified as Exhibit 192.

6 The other post-hearing document the board
7 requested is the applicant's petitions that were filed
8 on the record. The Neighbors Allied for the
9 Reasonable Development of Schools made a submission on
10 November 24, 2003 and that's in your case folder as
11 Exhibit 196; however, this is untimely since the
12 deadline was November 18th as a note.

13 The board also requested any testimony
14 that was provided by Martin Wells from all parties and
15 there are no submissions on this response.

16 The ANC 3F was asked to provide a copy of
17 the current BZA order to the Howard University Campus
18 Plan. That was submitted on November 18, 2003.
19 That's identified as Exhibit 193.

20 The proposed findings of fact and
21 conclusions of law were submitted from the following:
22 the applicant, Sirius LLC represented by Mr. Thomas
23 Brown, and the Neighbors United for Livable Streets
24 and these are in your case folders as Exhibits 197,
25 195 and 199 respectively.

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1 Finally as a preliminary matter, Mr.
2 Chairman, we have submitted a motion to strike the
3 Burke and the District Department of Transportation
4 traffic studies as irrelevant. They were submitted by
5 Sirius LLC November 13, 2003 and that's in your file
6 as Exhibit 189. A corrected version was submitted the
7 next day and that's Exhibit 190.

8 Opposed to this motion document submitted
9 by Shaw Pittman on November 25, 2003. That's in your
10 case folders as Exhibit 198.

11 Post-hearing documents not requested by
12 the board are two. Number one is a letter dated
13 November 4, 2003 from Robert Brusilla, which staff
14 believes is a written statement that was given at oral
15 testimony on October 28th and that's Exhibit 188.

16 And last, a letter dated November 18, 2003
17 from Michele Brusilla, which staff believes is a
18 response to a rebuttal of a videotape presented by
19 Knowles and that's Exhibit 194. That completes the
20 briefing, Mr. Chairman.

21 Oh, one other thing too. The staff would
22 like to remind the board that the board is also to act
23 on the application, number one and two, to act on the
24 motion to dismiss on the issue of non-compliance.

25 CHAIRPERSON GRIFFIS: Right. Mr. Moy in

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1 your records we have two motions then to dispense
2 with?

3 MR. MOY: Yes, sir.

4 CHAIRPERSON GRIFFIS: Very well. I
5 suggest that we pick up the motion first of all to
6 strike evidence that was put into the record and I
7 would open a very brief discussion on that and I would
8 not be in favor of removing evidence that's in the
9 record.

10 For two points, a very general aspect of
11 it, I think this board has stated in numerous cases if
12 it makes any error it errs in receiving too much
13 information. The relevancy or irrelevancy can come
14 and be filtered by us in our own deliberations.

15 We have not excepted specific information
16 as irrelevant based on our own determination during a
17 hearing or on a motion in opposition and that I think
18 is also our purview and able to do.

19 To state that the fact that traffic
20 studies or any evidence or documentation to that
21 effect is not relevant in this case goes well beyond
22 my understanding of the issues involved in this and so
23 I would clearly not support striking that information.

24 Do others concur or differ?

25 MR. HOOD: I would concur with your

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1 statements, Mr. Chairman. While we can always accept
2 the information it's better to accept as much as we
3 can and then we can deal with it accordingly so I
4 would agree with your synopsis.

5 CHAIRPERSON GRIFFIS: Thank you, others?
6 In fact in support of that position is accepting the
7 entire Connecticut Avenue transportation study.
8 Certainly there are whole parts and parcels of that
9 that are not relevant, specifically relevant to this
10 case. Other comments quickly if there are?

11 MR. ZAIDAIN: I agree with your position
12 Mr. Chair.

13 CHAIRPERSON GRIFFIS: Okay, any
14 opposition? Very well then I take it as a consensus
15 of the board that we will have the information remain
16 on the record.

17 Going to the motion to strike or rather
18 going to the motion to dismiss for non-compliance I
19 think there's two aspects to this and, again, let me
20 start generally.

21 Clearly the board doesn't like having
22 orders based on our hearings not complied with. I do
23 not believe that this specific board or any board
24 previously to us ever made a decision and issued an
25 order and thought, well, they may comply. They may

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1 not. It doesn't really matter.

2 We think it's usually enough and I think
3 this board and specifically this board I know crafts
4 conditions that are measurable, enforceable and
5 understandable and that's a critical aspect of
6 everything we do.

7 That being said to have an applicant
8 before us not compliant with a previous order I don't
9 believe that we have any statutory authority to deny
10 solely based on that.

11 I think it was appropriate to hold it in
12 abeyance to hear whether that non-compliance may have
13 evidenced itself in other aspects that would go to a
14 denial and therefore the motion would be taken up and
15 perhaps granted. So I do not support the motion to
16 deny based on non-compliance. Others?

17 MR. ZAIDAIN: I agree, Mr. Chair.
18 Enforcement is a big issue obviously as we work
19 through these types of cases and we do end up
20 oftentimes issuing a lot of conditions to help
21 mitigate impacts of uses that we find to be
22 appropriate but unfortunately I don't see how we can
23 get involved with enforcement directly and I support
24 your position.

25 CHAIRPERSON GRIFFIS: Good point and

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1 obviously the enforcement comes out of DCRA. Others?
2 Any opposition or differing opinion than that stated?
3 Then we're not being too formal I can take it as a
4 consensus of the board then to deny the motion to
5 dismiss based on non-compliance.

6 Let's go to the total application and
7 begin deliberation on the merits. This came to us in
8 its form sometime ago and raised numerous issues of
9 that. In fact, re-reviewing the entire record this
10 past week I started with, in fact, the applications
11 for party status and some of the issues that were
12 raised thinking that that might project out what we
13 were going to discuss.

14 Some of them maintain to be very critical
15 issues. Some of them fell off but it was if we made a
16 whole list of issues that were brought up we had
17 everything from quality of life to property values to
18 environmental concerns.

19 We had, of course, parking, traffic,
20 number of students, number of faculty. What I think
21 is probably most important is to go into the issues,
22 the merits, the positions on each of these issues and
23 go down as part of our deliberation noting each board
24 member's position on that.

25 That will hopefully craft us into a motion

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1 in one direction or the other and depending on that
2 direction may also illustrate some condition. So, we
3 wanted to if folks are amenable I would say we take up
4 parking as a first issue attendant to the application.

5 The parking, there's a specific aspect to it.

6 First of all we have the existing building
7 and the requirements of the parking spaces that were
8 held under previous BZA orders. We have then the new
9 building that has parking count attendant to that.

10 It is my understanding and in looking at
11 this that 47 parking spaces would be required, total
12 zoning compliant parking spaces. That would be 21 at
13 the existing, of course that would be the moving of
14 several, three of the existing parking spaces to be
15 provided in the new building and that 36 in the new
16 would then be provided, so a total of 47 in the new
17 garage.

18 Let me see if I can, maybe I'll go to my
19 notes and get this whole matter correct, shall I? So
20 if we had 21 behind the existing, 36 in the new it
21 would be a total of 57 provided, 47 being required of
22 course we have and then there's other attendant issues
23 to that.

24 Looking at the Office of Planning, which
25 was Exhibit 62 in the record and their analysis of the

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1 parking, oh and let me just preface the fact that
2 there's a total number out there in terms of the
3 parking be it 71 or whatever the number is that have
4 included stack parking.

5 I think it should be clear. I know all
6 the board members are very clear when we talked about
7 counts and spaces we're talking about those that meet
8 the regulations of zoning and therefore can be counted
9 towards the parking requirement.

10 Now the parking requirement under this
11 special exception, of course, goes to the 2100. It
12 cannot be less than that but it is also in our purview
13 to understand that we could conceivable require more.

14 I think it has been adequately evidenced
15 and shown that the parking would be adequate and not
16 tend to create any adverse condition or impact on the
17 surrounding area with the addition of being able to
18 stack parking in. I think that alleviates any sort of
19 potential even further.

20 The new addition in OP is stating as
21 having a requirement of 37 spaces. Twenty-two spaces
22 would serve facility and staff. That's out of a total
23 of 35 and 15 spaces for the theater.

24 That's one per ten seats and they have
25 stated in their report and recommendations that the

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1 addition satisfies the parking requirement for the new
2 building, 36 underground spaces, three surface spaces
3 for the bus parking and 11 stacked, of course.
4 They're adding that in 24 and talking about the
5 existing condition.

6 The Department of Transportation had also
7 addressed this and one of the critical aspects of
8 their addressing parking and off street parking was
9 attendant to the event.

10 And they were giving the direction that
11 for any sort of events that parking, off site parking
12 and off street parking would be organized to be
13 available or to be required or for the use of
14 attendees of all those events.

15 Also that there would be a plan created
16 for visiting teams or events that would bring busses
17 that those also would be somehow parked off site and
18 certainly not on Upton or Van Ness Streets.

19 The ANC had stated that parking near and
20 around Burke is severely restricted and that the
21 neighborhood lacks places for parking based, of
22 course, on the residential but most important in their
23 statements based on the other institutional and
24 commercial uses in the surrounding area.

25 They had also stated that Burke students

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1 and faculty use parking on the residential streets
2 specifically on Upton. There was concern that
3 eliminating the parking on the existing the ANC had
4 stated eliminating the three parking spaces on the
5 lower end of the facility would force the relocation
6 of Burke vans.

7 I think attendant to that issue actually
8 that the new development and construction I believe
9 it's been shown would actually alleviate an awful lot
10 of what I might call the diversity of parking
11 requirements.

12 It isn't as if it's just a commercial
13 office building that people come in at 8:00, 8:30 and
14 leave at 5:00 or 6:00 but there are different sized
15 vehicles all of which I think could be accommodated.

16 I think there is an aspect of events and
17 specialty times where busses would be coming to the
18 site and need to be appropriately dealt with and I
19 think we should address that as we further deliberate
20 in this.

21 In terms of the other parties in
22 opposition, Knowles is bringing up the aspect of
23 whether the actual counts were made or not. I am not
24 persuaded by the argument of the opposition party that
25 this did not in the evidence shown or would not meet

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1 the zoning requirements for the parking.

2 I believe it was a difficult position to
3 take without obviously having the full documentation
4 in front of them but I don't believe that it was
5 strongly weighed or I was not strongly persuaded that,
6 in fact, they hadn't met the minimum requirements and
7 that perhaps the requirements were not calculated
8 correctly for our deliberation. Very well. Comments
9 on parking, positions.

10 MS. MILLER: I think that the parking
11 spaces do meet the regulatory requirements and I think
12 the fact that there is now going to be an underground
13 parking garage will improve the parking situation for
14 the neighborhood in that parents, I think we heard
15 testimony about parents who might be coming to
16 athletic event s, in door athletic events would be
17 allowed to park in the garage as opposed to on the
18 street.

19 And the same would be true for evening
20 events so that neighbors would no longer have the
21 problem of Burke parents parking on their neighborhood
22 streets, certainly during those periods.

23 CHAIRPERSON GRIFFIS: Others?

24 MR. HOOD: Mr. Chairman, I definitely
25 think that the parking issue is sufficient especially

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1 with the parking garage. I noticed, I think one of
2 the parties mentioned that the construction of the
3 garage would cause them detrimental, some harm and I
4 think that short inconvenience to relieve another
5 problem I think is a good way to go in this case.

6 CHAIRPERSON GRIFFIS: Good. It's an
7 excellent point that both of you bring up the fact
8 that this application is proposing to build
9 underground below grade parking which would alleviate
10 a large problem without a dramatic increase in the
11 demand as was evidenced in the applicant's statement
12 that the increase in the faculty and the staff, the
13 amount of parking that actually is being constructed
14 would provide well beyond just servicing that but
15 would take up some of the demand that's created by the
16 existing building and structure.

17 And I think if I'm hearing correct and I
18 know in my deliberation I put great reliance on the
19 Office of Planning's position on this and also DDOT's
20 and in the applicant's.

21 Further there are crafted parking rules
22 that the applicant has clearly stated and some of them
23 go to the students and the faculty staff registering
24 the vehicles from the schools with the school, the
25 discouragement of driving, certainly the encouragement

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1 of taking public transportation and that is -- also
2 the school programmatically prohibiting where
3 students, faculty and staff can park.

4 Clearly we have always held back on trying
5 to regulate public streets but that we certainly do
6 not preclude an applicant from setting up its own
7 program which Burke is doing at this point or is
8 proposing to do.

9 And then, of course, the assessment and
10 the assigning of parking to students do two things.
11 First of all, obviously it puts a student driver into
12 a parking space. Secondly, for the school's purposes
13 and the program it means that they're monitoring who
14 drives, who's registered to drive and who is not
15 registered to drive so I think that also facilitates
16 the proper performance of the parking and moves
17 strongly to alleviate any possibility of an adverse
18 situation.

19 We may talk about this further but I want
20 to address it very quickly and Mr. Hood has brought up
21 the fact of the construction of the parking garage and
22 clearly when we look at this special exception I think
23 we're looking to what the overall life effect is.

24 And that the short term as Mr. Hood has
25 put it of construction does not fall within what I

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1 understand to be our -- or has not been evidence to
2 fall within the purview of review of the special
3 exception but there may be more issues attendant to
4 that as we move on.

5 Okay, additional, anything else on that?
6 Let's move on then to I guess we could do students,
7 number of students. This is also some interest in
8 terms of there is a proposal stepping and that is from
9 300 students and then after a certain time period,
10 which we get into specifics on, of compliance to 320
11 for both of the buildings.

12 This incremental increase would be on
13 consecutive compliances with the TMP, the
14 Transportation Management Plan. Two aspects attend to
15 this. First of all I believe it is my understanding
16 and I think it should be the board's full
17 understanding that in review and deliberation on this
18 special exception we're doing it for 320 students.

19 Certainly the compliance aspect that's
20 been given to us is something to take into account and
21 I think may well be a good idea in terms of easing
22 that in and testing the TMP and possibly having the --
23 or having the flexibility of changing things but for
24 all clarity we are looking at special exception for a
25 total of 320 students. Yes. Anything?

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1 MS. MILLER: No.

2 VICE CHAIRPERSON ETHERLY: Mr. Chairman,
3 just to be sure that I am clear does that also cover
4 the issue and I might be premature on this regarding
5 the ramping up to 320 from the current status of the
6 campus to the completion of the new building?

7 One that I would be very happy if that's a
8 premature question because, of course, that
9 presupposes the approval of the project but do you
10 understand what I'm kind of raising there?

11 CHAIRPERSON GRIFFIS: Yes. I think the
12 board should be looking at it, it's my understanding,
13 I'm looking at it this way. First of all we have an
14 existing order that establishes what the criterion is
15 for the use of the current building and school.

16 What is before us now is the new
17 construction and the increase in enrollment and the
18 facts, et cetera. So that being said let's take a
19 hypothetical that the new building is not built. I do
20 not believe at this point in our deliberation that
21 anything would have impact on the previous order.
22 Does that address your question?

23 VICE CHAIRPERSON ETHERLY: I believe it
24 does. So the previous order, which gets us -- I
25 believe it does but perhaps I'm answering my own

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1 question. Maybe it's a more appropriate question to
2 deal with as we talk about implementation.

3 Perhaps the easiest way to raise it is
4 there an issue with or at some appropriate point
5 during our deliberation I would like to have some
6 discussion on the -- actually let me strike that. I
7 need to work that out in my head for a couple of
8 minutes before coming back to it.

9 Two seventy was the order, 295 is where
10 we're roughly at right now in practice and then
11 there's the issue of 320 which is what is being asked
12 for or what is being requested.

13 I'm perhaps talking more about a practical
14 question of that transition from Point A to Point C
15 but perhaps I'm thinking right now that it's not the
16 appropriate time to raise it.

17 So let me just flag that as an issue that
18 I'm struggling with and as we get deeper into the
19 deliberation it might be more appropriate to try and
20 sort that out.

21 CHAIRPERSON GRIFFIS: Okay.

22 VICE CHAIRPERSON ETHERLY: Thank you.

23 CHAIRPERSON GRIFFIS: Ms. Miller.

24 MS. MILLER: Just to try to clarify what
25 we're talking about I think my understanding is we're

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1 talking about going up to 320 students connected with
2 the new building being constructed as well as the TMP
3 being contingent upon the new building being
4 constructed so they're all connected.

5 VICE CHAIRPERSON ETHERLY: Yes.

6 MS. MILLER: And that doesn't preclude a
7 phasing in period from 300 to 320. It just says we're
8 looking at can this property encompass an enrollment
9 expansion up to 320.

10 VICE CHAIRPERSON ETHERLY: Yes, that is
11 absolutely correct.

12 MS. MILLER: Okay.

13 VICE CHAIRPERSON ETHERLY: Thank you, Ms.
14 Miller. Thank you, Mr. Chair.

15 CHAIRPERSON GRIFFIS: Okay, noting perhaps
16 some confusion of the board in my process of what I
17 was attempting to do here it may be more appropriate
18 to go to a motion on this and then begin to craft
19 conditions noting that we do need to talk about how
20 those conditions came out of the application in
21 relevancy to the important issues but is that what I'm
22 understanding the board may needs in terms of --

23 VICE CHAIRPERSON ETHERLY: No, I actually
24 was very appreciative of the gradual walk-through that
25 we were taking through the major issues.

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1 CHAIRPERSON GRIFFIS: Okay.

2 VICE CHAIRPERSON ETHERLY: Because it's a
3 complicated record and I think the discussion that you
4 were walking through was a good way to start so I
5 definitely at this point am not sufficiently confused
6 to warrant departed from what you were setting out,
7 Mr. Chair. I probably would be if we tried to go to
8 a motion right now.

9 CHAIRPERSON GRIFFIS: Okay, good. Well,
10 let's continue on then. Yes. No?

11 MS. MILLER: Well, I think when we're
12 doing our walk-through we just might want to keep in
13 mind the standards by which we're judging.

14 CHAIRPERSON GRIFFIS: Right.

15 MS. MILLER: You know is it in harmony
16 with the zoning regs and the zoning map and is it --
17 are conditions being created that might be
18 objectionable to noise traffic, number of students, et
19 cetera, impact on the neighborhood. I think we're
20 considering that in that context and then if we need
21 to add then we'll look at the conditions how they
22 affect it. That's how I see we're going.

23 MR. ZAIDAIN: I agree with Ms. Miller. I
24 think we need to kind of take on the broader issues of
25 whether or not they've met the test for special

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1 exception and look at these issues in light of that
2 and then because it seems like we're starting to drag
3 in some of the proposed conditions from the findings
4 of fact.

5 And I don't think it's appropriate to get
6 into those at this time because I don't think there's
7 a consensus on the board as of yet of whether or not
8 they've even made the special exception test.

9 CHAIRPERSON GRIFFIS: Very well. Let's go
10 to Section 206, private schools is a special
11 exception. Clearly we need to look at all these
12 issues that are an establish whether they are likely
13 to become objectionable.

14 Ample parking must be provided also. In
15 going through all the the issues that were brought up
16 that's exactly what I was trying to propose is elicit
17 one's opinions and positions on all these issues. We
18 have all of the evidence that's been presented and how
19 it's been presented by the applicant, the district
20 agencies and the parties in opposition.

21 If one feels that they are moved by one
22 position or a conglomeration of it this is the
23 appropriate time to do it. For instance, I find I can
24 rely and was persuaded by the Office of Planning's
25 position in terms of the number of students which

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1 proposed the increase to 320 and talked about the
2 incremental status.

3 And the basis or one of the strong basis
4 for this is that with the proposed increase comes the
5 new construction. The new construction is, as we've
6 talked about, alleviates some of the parking and also
7 in this the applicant has offered extensive traffic
8 and drop off and circulation works better with the new
9 construction. Certainly the enforcement plan, the
10 entire implementation of the TMP.

11 Therefore, OP was in support of that and I
12 think there should be -- I find I can rely strongly on
13 that. DDOT also sees, it's Exhibit 67 in the record,
14 supported the expansion of the students as it was
15 linked to a successful implementation.

16 The TMP clearly had extensive time to
17 monitor the site, the situation and also review the
18 traffic management plan. They have also indicated
19 that they are willing to continue working with the
20 applicant and neighbors in order to ensure the proper
21 implementation and success of the TMP.

22 I think that is something that is
23 substantive and strong to rely upon in terms of
24 determining that this would not tend to create an
25 adverse impact. Others.

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1 MR. ZAIDAIN: You mentioned the Office of
2 Planning report and the issues that were tackled in
3 that document and I agree that OP's report was very
4 substantive in giving, in proving the case that this
5 use is appropriate in this location and that the
6 applicant has put forth a solution to make it work.

7 I also give a lot of attention to OP's
8 report regarding alternative developments in this
9 site. What could be built matter of right and what is
10 being built as a special exception.

11 I think we need to keep in mind that this
12 is the Connecticut Avenue corridor and that higher
13 density uses are more appropriate in these locations
14 so in a way the TMP plan, which has been put forth by
15 the applicant, is probably, I would say probably more
16 mitigation than what we'd get from a high density
17 residential development going in at that location.

18 Although, the traffic patterns are
19 different but I think the TMP I've submitted to make
20 that work was adequate.

21 CHAIRPERSON GRIFFIS: So your point in
22 looking at what could be built as a matter of right is
23 putting it into a context of adverse impacts if the
24 zoning regulations allow 55 units as stated by the
25 Office of Planning which could -- which would in your

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1 view possibly create more traffic parking or --

2 MR. ZAIDAIN: Well, I'm not only saying
3 it's creating more. I mean it would be a different
4 animal clearly but I don't think you would have the
5 effort of somebody building a residential development
6 as you would with a school who I felt proved the case
7 that they were trying to at least deal with some of the
8 issues.

9 I mean clearly transportation is the main
10 issue here to me. I think use wise it's appropriate.

11 I did not support the opposition's contentions in
12 regards to noise impacts and as far as the students
13 straying from the site and impacts and we heard
14 conflicting testimony on whether or not they were
15 actually Burke students and where they were coming
16 from.

17 So it was really hard to gauge that issue
18 as well but in my mind I thought the whole case turned
19 on the TMP and as to where I'm at right now in the
20 deliberation I felt what the TMP has put forth was
21 fairly successful.

22 VICE CHAIRPERSON ETHERLY: Mr. Chair, I
23 would associate myself with Mr. Zaidain's remarks. As
24 I looked at 206.2 I felt that the arguments that were
25 presented on noise on the part of the parties in

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1 opposition were not compelling.

2 I agree with Mr. Zaidain in that I think
3 the challenge here really comes down to the issue of
4 traffic perhaps the otherwise objectionable conditions
5 component of 206.2 but for me I definitely would like
6 to flag concerns that I have regarding the student
7 enrollment piece here.

8 We had substantial testimony that spoke to
9 alleged impacts on the part of the Burke student
10 population and I would have to say that initially that
11 testimony was very troubling in terms of a number of
12 the items that were raised regarding experiences of
13 some of the adjacent property owners both large-scale,
14 some of the large scale residential developments as
15 well as some of the smaller scale individual single
16 family homeowners.

17 But I believe as we got further into the
18 testimony and we began to get some very good
19 participation from MPD around this issue, both from a
20 traffic standpoint and, more importantly, from a
21 neighborhood standpoint I felt that the issue or the
22 concerns that were raised about student impacts was
23 fairly successfully ut to bed.

24 You will recall that we did have some
25 substantial discussion on testimony from some of the

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1 adjacent large scale residential developments about
2 instances of trespass that were alleged on the part of
3 Burke students, noise. We had some discussion, of
4 course, regarding graffiti and what have you.

5 But I think as we got further into our
6 hearings and began to hear back from DCMPD surrounding
7 what kind of records they had regarding those types of
8 incidences or whether any large number of complaints
9 regarding those things.

10 For me I think that issue once again was
11 fairly clearly resolved so in terms of just as a
12 starting point as we kind of talk generally from a
13 206.2 standpoint I'll just note that I'm very
14 comfortable with regard to the noise component,
15 especially giving light to the consideration that we
16 are talking about the Connecticut Avenue corridor.

17 I believe that the testimony that we
18 received from traffic management personnel regarding
19 current practice with TMP implementation, testimony
20 that we received from DCMPD, both written and
21 otherwise regarding the current practice around the
22 vicinity of the Burke campus gave me a fair measure of
23 comfort with regard to the traffic impact.

24 But I'll just note that initially I did
25 have some substantial concerns on the student

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1 component but as we got further into the hearing I
2 think that was fairly ut to bed, put to rest for me.

3 MR. ZAIDAIN: I agree with most of the
4 things you've said. I mean the student issue in
5 terms of trespassing, I mean that's a hard thing for
6 use to measure and deal with because, like I said, we
7 heard conflicting testimony of where they were coming
8 from and we would hope that the school would do much
9 better in keeping them on campus.

10 One of the issues that was very troubling
11 to me was the blockage of the alley and the
12 restricting of people basically not being able to come
13 from their homes and use of that alley and while this
14 is such -- we have to deal with so many issues here
15 and balancing that with everything else, I did not
16 feel that that issue rose to the level of not
17 supporting the application.

18 However, that was something that was very
19 troubling to me and the school has put forth a TMP
20 that would deal with that and I can only encourage the
21 neighbors to follow up with DCRA and the Office of
22 Zoning's enforcement agent to make sure that that does
23 not keep happening.

24 CHAIRPERSON GRIFFIS: Anything else of
25 interest?

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1 MS. MILLER: I want to comment on the
2 student enrollment also and I know these issues
3 overlap into one another somewhat. I think I was
4 concerned a little bit by the fact that there are more
5 students on a smaller amount of property in this
6 school than other schools in the city and that the
7 density was an issue.

8 So, therefore, when we're talking about
9 increasing enrollment we have to keep that in mind but
10 I found that the increase in enrollment was offset so
11 much by other things that actually the situation
12 should be improved as a result.

13 The new building will give much more space
14 to the students. The pedestrian bridge will bring the
15 students off the sidewalks which was one of the
16 complaints. I think the TMP also has proven to
17 improve the situation so far and should improve it
18 further when the new building is built.

19 And the fact that also the student
20 enrollment may be phased in to see how it is working I
21 think supports the enrollment. Also I think when we
22 get to conditions we can see if any mitigation is
23 required but all in all I think it's offset by
24 improvement for the neighborhood.

25 CHAIRPERSON GRIFFIS: Okay, any other

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1 comments on the number of students? Clearly we're
2 finding now that the enrollment of 320 is either or is
3 not consistent with Section 206. The number of
4 faculty staff I think people have just touched on
5 that. Are there additional aspects to noise which has
6 just been discussed also? Any of the other findings
7 of it? Any other positions?

8 MS. MILLER: With respect to noise, again,
9 I think that it appeared that the situation is going
10 to be better than it is under the current situation by
11 the fact that the school is going to be reoriented
12 more towards Connecticut Avenue which is a main
13 thoroughfare and away from Upton Street.

14 And also they are also going to be having
15 this roof terrace, which again will take -- one of the
16 complaints was so many kids being in the alleys and on
17 the sidewalks. It will remove them somewhat from
18 that.

19 And they're relocating mechanical
20 equipment so that it is less offensive so and, again,
21 all in all it's more space for the children to be
22 indoors.

23 CHAIRPERSON GRIFFIS: You bring up an
24 interesting point in terms of the parties in
25 opposition and their positions on numerous -- they're

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1 oftentimes in direct conflict. You've talked about
2 noise now and students and noise not wanting them on
3 the street but then not wanting them in the building.
4 You talked about activity that not wanting --

5 MS. MILLER: What do you mean not wanting
6 them in the building?

7 CHAIRPERSON GRIFFIS: Well in terms of not
8 wanting the new building to be built so that they
9 wouldn't have interior spaces or talk about activity
10 of students on the streets but then also being against
11 having a dark school with it empty.

12 In terms of density you brought up another
13 aspect, which I think was critical to this in that the
14 density or per square footage or per acre per student
15 as one of the charts was laying out would be higher if
16 the existing conditions would be made. So if that is
17 a point of opposition then that is, in fact, being
18 alleviated by the proposed new construction.

19 In terms of the mechanical penthouse I
20 think the applicant did make a great effort in
21 locating that so as to diminish any sort of sound
22 impact but that to me was not of a huge issue.

23 And I think the reason I say that is
24 looking at the elevation itself the adjacent apartment
25 building to the proposed new construction is actually

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1 lower. The penthouse is well above the adjacent
2 apartment building if it is surrounded, which it would
3 be required under 411 and is in the proper setbacks
4 which also would be in conformance with the
5 regulation.

6 Two points to this. One, I think the
7 regulations are set forth in order to mitigate or
8 diminish if not remove all adverse impacts, therefore
9 by compliance I think you have to begin with a certain
10 understanding or finding that in fact there would not
11 tend to be an adverse impact.

12 Thirdly, based on the fact that this will
13 be higher than the adjacent building seems to speak to
14 the fact that the sound would have a difficult time I
15 think transmitting down rather than up as it would be
16 enclosed. Yes.

17 MS. MILLER: I actually was referring and
18 I was to --

19 CHAIRPERSON GRIFFIS: I know but I thought
20 I'd go in my own direction.

21 MS. MILLER: You know I was referring
22 though to the Upton Street people who were complaining
23 about air-conditioning.

24 CHAIRPERSON GRIFFIS: Yes.

25 MS. MILLER: Okay but I think your points

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1 are well taken about the apartment residents.

2 CHAIRPERSON GRIFFIS: We got to take them
3 down where we can get them. Okay, any other issues
4 attendant to the noise?

5 MR. HOOD: I would disagree with the
6 comments of my colleagues. We talk about the trash
7 compactors and the redirection and relocating of
8 those.

9 CHAIRPERSON GRIFFIS: Right.

10 MR. HOOD: The reorientation toward
11 Lincoln Avenue as opposed to the street so I think
12 there have been tremendous strides to correct their
13 noise issue.

14 CHAIRPERSON GRIFFIS: Okay. Anything, any
15 other aspects of that? How does the board feel about
16 limiting noise to a decibel level at the property
17 line?

18 MR. HOOD: Is that enforceable?

19 CHAIRPERSON GRIFFIS: Well, there's two
20 points to that and that's the critical aspect of it
21 whether there's enforceability. Two, there is a
22 sound, there is regulation attendant and directly
23 going to sound.

24 Third, I'm wondering as you take sound not
25 being a sound expert and not being one outlined

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1 specifically from my understanding in the zoning
2 regulations.

3 But if you're taking a sound check on the
4 property line what's to say it isn't actually picking
5 up sound that's being created outside the property?
6 Say there's no one on the property, nothing.

7 Sound is being created but the trucks on
8 the avenue or an airplane or the adjacent buildings
9 are creating 65 or 72 decibels of sound. What is to
10 happen in that circumstance? Are they in non-
11 compliance?

12 MR. HOOD: If we say 55 it would be 72.

13 CHAIRPERSON GRIFFIS: I see. Also is the
14 human voice regulated in the sound regulations does
15 anyone know?

16 MR. HOOD: I guess my question who is
17 going to stand out there? Is that actually done?

18 CHAIRPERSON GRIFFIS: We will.

19 MR. HOOD: Oh.

20 CHAIRPERSON GRIFFIS: We all take shifts.

21 MR. HOOD: Well, I'm going to pass on that
22 one.

23 CHAIRPERSON GRIFFIS: But in all
24 seriousness it could be done. If it's our condition
25 then we would have an aspect of which we would bring

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1 it into compliance or we would measure it. There are
2 those that enforce the sound regulations that
3 obviously have measuring devices.

4 I'm not going to go into and give my
5 understanding of it because I'm not an expert on it
6 nor do I know it all but if we decide to do it and
7 that's where I'm going Mr. Hood and you bring up the
8 aspect of it.

9 But what is it that the board believes
10 that we need to address or mitigate in terms of the
11 potential for adverse impact? Is it the noise created
12 with a building there now or structure and people
13 inside?

14 I'm not clear on first of all what a great
15 amount of noise would be and then how do we actually
16 regulate the audible aspects of the human voice? And
17 then how do we tie it to specifically a creation of
18 Burke because that's what we're trying to condition or
19 trying to limit?

20 MR. HOOD: Mr. Chairman, I believe there's
21 a noise ordinance already out there. I'm not sure if
22 that would suffice for what you're speaking of here
23 and I wonder if we look to that would that suffice for
24 us setting a decibel limit in this case?

25 CHAIRPERSON GRIFFIS: I think that's

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1 incredibly wise.

2 MR. HOOD: Leave it to the subject matter
3 experts.

4 CHAIRPERSON GRIFFIS: I think that's well
5 stated Mr. Hood. I mean I think first of all in terms
6 of the operation of the school and the time it's
7 during daytime. I think that the sound regulations
8 that are enforceable and need to be complied with in
9 this city may well address that situation on its own.
10 Others?

11 MS. MILLER: This may come up with respect
12 to conditions because I think the noise decibels that
13 were being discussed come from the school's own
14 management plan and then the question would be --

15 CHAIRPERSON GRIFFIS: Fabulous.

16 MS. MILLER: Can that be changed? Is this
17 set in stone?

18 CHAIRPERSON GRIFFIS: I'm not going to
19 change the management plan.

20 MS. MILLER: Okay.

21 CHAIRPERSON GRIFFIS: I would -- by all
22 means if this was not conditioned in the order it
23 wouldn't stop Burke from establishing that no one can
24 talk outside of the building but that's up to them to
25 manage and program.

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1 My concern is what this board actually
2 looks to one in curing the possibility of an adverse
3 impact and two then how do we make it logical,
4 understandable, enforceable which I'm not sure that is
5 -- it's not clear to me how that would be in this
6 instance.

7 MS. MILLER: I concur with what you're
8 saying and this may be getting ahead but my question
9 goes to their management plan being a part of our
10 order and therefore if we -- would we make any changes
11 if we don't believe that we should be regulating, for
12 instance, noise to that degree?

13 CHAIRPERSON GRIFFIS: If I understand your
14 position we could indicate and certainly it would be a
15 finding that we relied on the management plan that
16 addressed the sound creation at the property line and
17 felt that a condition of the board in that respect was
18 not required based on the fact of the management plan
19 that was presented and is part of the application.

20 MS. MILLER: That's not exactly my point
21 but I could go along with that. That's fine. I could
22 go along with that.

23 CHAIRPERSON GRIFFIS: Okay. Other issues
24 in terms of noise? Let's go to traffic then. Traffic
25 was talked a little bit about already. One the aspect

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1 of the alley but we have -- I think we need to spend a
2 few quality minutes looking at this one in terms of
3 the impact.

4 Traffic was and obviously is a large issue
5 for this area and this application. Let me hear from
6 folks in terms of what they were persuaded or not
7 persuaded on, drop off plans, pick up plans, points of
8 drop off.

9 We have a chart and clearly the opposition
10 has framed the morning drop off plan is unrealistic,
11 unworkable, unenforceable and unsafe. We do have the
12 address of the Office of Planning and the Department
13 of Transportation on this.

14 In fact, DDOT made a strong statement
15 indicating that the TMP had a positive effect on
16 traffic patterns in the immediate area and it also was
17 stated that it included aspects that were not included
18 in a previous application which we don't necessarily
19 need to get into. So, let me ask others.

20 MR. ZAIDAIN: Mr. Chair, this was the
21 biggest issue for me and obviously this was one that
22 we spent a lot of time on in terms of gathering
23 testimony.

24 It's difficult in deliberating this
25 because there were certain aspects that I felt it was

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1 a -- it could be managed and then there were some
2 aspects that I was troubled in seeing and I reference
3 the issue with the alley.

4 However, in looking at the TMP and how it
5 seeks to solve these problems I think it does do a
6 fairly good job in addressing those issues, for
7 example concentrating yet dispersing, if I could say
8 that.

9 It's concentrating a lot of the issues
10 with pick up and drop off towards Connecticut Avenue
11 but it's keeping things from being on Upton east of
12 the site and obviously, again, I thought the alley was
13 a clear concern and the TMP addresses that.

14 I think it's up to the school to make sure
15 that it's enforced and obviously up to DCRA and the
16 Office of Zoning to make sure that's enforced but in
17 general I felt that the TMP worked out well.

18 I don't think that the opposition pointed
19 out a lot of the issues that were existing that were
20 clearly negative but I feel that the TMP could solve
21 those problems if implemented and that's what we have
22 to go on. I think it's up to the school to implement
23 it and the district and the district to enforce it so
24 that's where I stand.

25 CHAIRPERSON GRIFFIS: Mr. Zaidain, you

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1 made an interesting point in terms of the existing
2 conditions and there was a statement by the traffic
3 expert of the applicant which addressed the ANC's
4 concern and that is by having differing drop off
5 points you're creating traffic problems in those
6 points.

7 And I believe it was I think DDOT also
8 indicated no it's actually a wise way to deal with
9 traffic to try and disperse it. So bringing it to
10 numerous locations rather than creating, which would
11 create congestion if all of it went to one place.

12 MR. ZAIDAIN: Right but all I was trying
13 to say in kind of using that two contradictory terms
14 was it's dispersing it in that sense but it's also
15 trying to concentrate it towards Connecticut Avenue,
16 not letting the issues go off into the neighborhood.

17 CHAIRPERSON GRIFFIS: I see.

18 MR. ZAIDAIN: That's kind of the way I saw
19 it.

20 CHAIRPERSON GRIFFIS: Okay, the whole
21 aspect of controlling the traffic that goes onto the
22 residential streets more specifically Upton, okay.

23 MR. ZAIDAIN: Right.

24 CHAIRPERSON GRIFFIS: Well put. Others?

25 MS. MILLER: I was persuaded by the

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1 Department of Transportation's conclusion that traffic
2 will be better with the new TMP. They concluded that
3 the TMP that would be implemented under the Burke
4 application with the requested student and employee
5 levels will result in better traffic flow and would
6 return to the student and employee population levels
7 approved by the BZA in 1983 but without the currently
8 proposed TMP.

9 There's already a TMP in place in which
10 DDOT's engineers have found the circulation plan to be
11 workable and safe from the standpoint of both vehicles
12 and pedestrians.

13 In OP's report, OP stated both OP and DDOT
14 believe that approval of the current application with
15 the TMP as modified by DDOT and OP recommendations
16 will be more likely to reduce possible negative
17 impacts than would a matter of right development
18 without these measures.

19 So, we already have evidence of some
20 things working very well and an opinion by DDOT that
21 things are going to be working even better than they
22 would if we didn't have the expansion.

23 CHAIRPERSON GRIFFIS: Excellent.

24 MR. HOOD: Mr. Chair.

25 CHAIRPERSON GRIFFIS: Yes.

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1 MR. HOOD: The traffic issue was a major
2 concern for me last time and also this time. While I
3 looked at the TMP I think there have been substantial
4 improvements going into that whole piece about
5 coexistent schools and R1 zones and whatnot.

6 But I think that the TMP plan, especially
7 if the school opposes it I think will definitely work
8 in a fashion which I think it will be a win-win for
9 both the residents and for the school.

10 I was impressed with the piece on the
11 definitive for the violations of the plan. As long as
12 that is enforced I think it would be critical because
13 humans will come out and just go through hours and do
14 what they need to do but it's going to be incumbent on
15 the school to be able to make sure that they really
16 enforce the TMP.

17 And also with my colleague, Ms. Miller, at
18 the hearing I believe it was stated that the
19 Department of Transportation also saw some
20 improvements of what could be done that were already
21 implemented of the TMP.

22 One of the main concerns that I can
23 appreciate is that all stacking and car pool
24 operations for the school will occur entirely on the
25 school property or property allowing the present lanes

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1 of traffic to continue a normal flow.

2 I think that is crucial and critical that
3 the normal flow is not obstructed and I think traffic
4 is a key issue and we need to make sure that the
5 school does its part to make sure that things flow
6 freely in that area.

7 CHAIRPERSON GRIFFIS: Well said Mr. Hood.

8 I think that is a critical aspect of the proposed new
9 construction. That is the queuing and how it is
10 brought off the street to the building and then
11 reintroduced into the traffic flow.

12 I don't think in an urban area that
13 everything can be without small impact or perhaps
14 tweaking that is needed or specific circumstances that
15 might arise. However, being with this site and the
16 specifics of it I think it is well designed to
17 facilitate the requirements of drop off and pick up.

18 The other aspect let me -- the TMP which I
19 think are strong pieces. First of all, as indicated,
20 the Metro benefits to students, the fair discount.

21 Also there are going to be penalties for
22 violations and there are different stages of penalties
23 and that being the first, second, third, fourth,
24 fourth being the most severe going to no enrollment
25 for the following year. The others are obviously

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1 first a warning and then monetary fines. That seems
2 to be a fairly serious and heavy recordation of
3 violations and also self enforcement of those. Yes,
4 others.

5 MS. MILLER: Oh, I just wanted to
6 highlight other strengths I think of the TMP, one
7 being the shuttle bus service which seems to be a
8 success and then the other being the stationing of off
9 duty uniformed police officers at the intersection of
10 Upton and Connecticut and Connecticut and the Burke
11 driveway both at morning and afternoon pick up.

12 I think that addresses traffic and it also
13 can address any concerns the neighbors had about
14 students and it's just an additional safety factor to
15 have in the neighborhood which I think is very
16 positive.

17 CHAIRPERSON GRIFFIS: Good. And also
18 going it does address the fact that there wouldn't be
19 pick ups on Upton so it's really as stated the overall
20 plan is looking to mitigate if not significantly or
21 totally reduce the large amount of impact on Upton
22 Street. Okay, are there other issues attendant to the
23 TMP, traffic? Yes.

24 MS. MILLER: I'm not -- I think this is
25 probably a separate subject but I just, I think just

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1 in case there's the whole issue of the school's
2 compliance plan and the enforcement committee and I
3 don't know if you want to discuss that now or at a
4 different time.

5 CHAIRPERSON GRIFFIS: Let me do this. As
6 we've already had a fairly long morning, why don't we
7 just take a quick five minute recess and then come
8 back to that aspect of the compliance committee and
9 then move on to the last additional issues.

10 (Whereupon, the above-entitled matter went
11 off the record.)

12 CHAIRPERSON GRIFFIS: Are there further
13 issues attendant to the traffic, TMP, any other
14 aspects that need our voicing at this time? To
15 recount, of course, we have addressed the entrance and
16 exit circulation on Connecticut Avenue, the new
17 driveway separate from the alley, the increase in
18 parking, the shuttle bus, the traffic control officers
19 and other aspects of the TMP.

20 That being said then let's move on and
21 take up I think in regards to the pedestrian bridge
22 unless there is opposition for board members it is
23 fairly clear that we are viewing this as part of this
24 application and an integral part of creating the
25 circulation between the two buildings.

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1 If there was obviously anything that
2 changed the fundamental aspects and substantive
3 aspects of this application then it would require
4 modification of any order if an order was issued on
5 this. Any other aspects people want to address in
6 terms of the pedestrian bridge?

7 I would like then to move on to -- oh, Ms.
8 Miller when we left off you were wanting to talk about
9 the compliance committee. I think it would be
10 appropriate to bring that up at this point and under
11 the guises of enforcement and, obviously, the
12 applicant has made a statement in terms of its
13 integral or stepping increase but the enrollment
14 contract requires TMP compliance.

15 The school neighborhood enforcement plan,
16 I think this is what you were going to the enforcement
17 committee with three neighbors, three Burke
18 representatives and a mediator if required, binding
19 arbitration and then costs fairly assessed. Are there
20 other aspects that you wanted to bring up and talk to?

21 MS. MILLER: I want to address the
22 composition of the committee as well as monitoring
23 aspect of it. I think there was -- I think I'll go to
24 monitoring first. I think we heard a theme I think,
25 at least I did, that some of the compliance plan was

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1 overly burdensome in its reliance on neighbors to
2 enforce it.

3 And so and in looking through the record,
4 specifically the enforcement plan states that the
5 school have trained personnel stationed at the key
6 management areas who will log infractions and they'll
7 have trained personnel, roving monitoring of other
8 impact areas and they will log infractions.

9 And I'm not sure who these trained
10 personnel are supposed to be but I don't think that
11 they should be neighborhood volunteers. I think that
12 would be overly burdensome on the neighborhood and
13 that may not be what this intends.

14 So, I would suggest that they be hired
15 personnel by the school unless the school gets some
16 other kind of volunteers to do this but they shouldn't
17 be neighbors and that these personnel should report
18 directly to one of the neighborhood volunteers on the
19 enforcement committee so that it doesn't appear that
20 they're just answering to the school and there's more
21 credibility.

22 So, I don't know. I was focusing on that
23 aspect of the monitoring and this whole logging
24 infractions and who's going to be watching in all
25 these different impact areas?

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1 CHAIRPERSON GRIFFIS: Okay. So you're
2 feeling though --

3 MS. MILLER: I don't think that was
4 flushed out.

5 CHAIRPERSON GRIFFIS: -- that the
6 responsibility of the neighbors should be limited not
7 precluding them from being very active but not
8 requiring that the total compliance and monitoring be
9 put upon the adjacent residents.

10 MS. MILLER: Right. I think that part of
11 this plan does rely on somebody being stationed at
12 these areas and I can see down the road that neighbors
13 may not want to fulfill that responsibility and I
14 don't think they should have to.

15 So, the school would have to have its own
16 personnel either hired or volunteer but it shouldn't -
17 - and maybe it's not intended to rest on the community
18 but that wasn't flushed out but I just want to make
19 sure that in our order that we're not subjecting this
20 to the neighbors having to fulfill this role.

21 CHAIRPERSON GRIFFIS: Okay.

22 MS. MILLER: Also with respect to the
23 composition of the committee I think we have two
24 different proposals. One is the schools that says
25 three would be Burke representatives and three would

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1 come from the neighborhood, I think two from -- one
2 from the south side of Upton Street, one from the
3 north and then one from other neighboring streets,
4 Connecticut, Tilden or Van Ness.

5 In any event I think DOT said that they
6 should be selected by the ANC, yes. DOT's July 3,
7 2003 report to Any Opment recommends that the
8 representatives of the neighborhood be designated by
9 the local advisory neighborhood commission.

10 So I just want to throw out to the board a
11 possible compromise between the two and that would be
12 that one -- well there would be the three members
13 designated by Burke however they want to choose their
14 own members and then the other three would be as
15 follows and you all can see what you think.

16 One member -- one would be a member of the
17 ANC or designated by the ANC. One member would be
18 from the 2900 block of Upton Street, chosen by a
19 majority vote of these residents, and one member would
20 be from one of the four other neighboring streets,
21 Connecticut Avenue between Tilden and Van Ness,
22 Tilden, 29th Street, or Van Ness chosen by a majority
23 vote of these residents.

24 I think this also differs from Burke's
25 recommendation as to how the members are selected. I

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1 think that they said something like the Upton Street
2 residents would choose them but I think that they
3 ought to be chosen by whoever is -- whoever they're
4 representing so that the member from the four other
5 neighboring streets would be chosen by a majority of
6 those residents.

7 MR. ZAIDAIN: When you say majority of
8 those residents you mean within that block, right?

9 MS. MILLER: Yes, yes whoever lives there
10 and then they would have to figure out how to do this
11 vote, apartment building, they would have an
12 opportunity to vote. I don't think I want to micro
13 manage how they vote but that's what I mean, yes.

14 And then also I think there was a question
15 about none of these members being, community members
16 being Burke parents and I would want to qualify this
17 that noone of the members would be Burke parents
18 unless no non-Burke parents volunteer to serve on the
19 committee because I don't know it's possible. Well
20 it's possible down the road that this is a burdensome
21 position that some neighbors may not want to
22 participate. You can disagree, you know.

23 CHAIRPERSON GRIFFIS: And Office of
24 Planning brought that up I believe and I had some
25 problem with that. If, as you're proposing which I

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1 think is a good idea that there is some sort of
2 election that's created by the block or the target
3 area that has to do it, why would we say if those
4 people wanted somebody on it that we would preclude a
5 Burke parent or someone with a student?

6 If the neighbors have decided that that's
7 the person they want representing them then so be it.

8 I don't think we want to project out so far that that
9 isn't a possibility because we're balancing now the
10 neighbors saying we can't make this too burdensome.

11 Well, they're going to have to rotate and
12 get everyone involved to do it for it not to be
13 burdensome on one person so I think a lot of the
14 specifics and going to your point of not micro
15 managing it is appropriate and I don't think that's
16 appropriate for us to decide. It can be decided in who
17 they choose.

18 MS. MILLER: I would concur with that.

19 CHAIRPERSON GRIFFIS: Okay. And are there
20 any discussions in terms of the fines to be levied for
21 violations? I think this may be the first application
22 that I've been involved with that the board is now
23 asserting its authority to levy fines. Next is
24 taxation of course. Any other concerns, questions?

25 MR. ZAIDAIN: Well is this, I want to make

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1 sure I understand. The money would be paid to the
2 District, right? I mean it is determining who's
3 levying the fines or where's the money going?

4 CHAIRPERSON GRIFFIS: Yes. No, and I
5 think that's an issue that's been brought up. I find
6 I can, I rely heavily on the logic of the applicant
7 indicating that the fines, the monies would go into an
8 escrow account.

9 MR. ZAIDAIN: Oh, that's right.

10 CHAIRPERSON GRIFFIS: They'd be
11 administered by a trustee that would actually write
12 the checks and that the monies would be expended in
13 order to improve the TMP component and if that wasn't
14 able to be done based on the required expenditures it
15 would be given to a charity.

16 I think that's a much better way rather
17 than having it get into the fighting of improvements
18 in the neighborhood that may not be specifically
19 relating to mitigating any of the adverse impacts that
20 tend to be or might be created.

21 MR. ZAIDAIN: Okay, that's clear. I mean
22 we'll really get into some fairly detailed conditions
23 and issues with this. How about I just say that?

24 CHAIRPERSON GRIFFIS: Okay. Anything
25 else? Enforcement? Yes, Mr. Hood.

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1 MR. HOOD: Mr. Chairman, I know we're
2 going to get into it in detail later but the
3 violations I think DDOT had recommended three
4 violations. I think the applicant was proposing up to
5 four violations I believe. Anyway --

6 CHAIRPERSON GRIFFIS: There are
7 differences between DDOT's and the applicant.

8 MR. HOOD: Right that's what I mean. Are
9 we dealing with that issue now or are we going to do
10 it when we craft conditions?

11 CHAIRPERSON GRIFFIS: We're dealing with
12 that right now.

13 MR. HOOD: Okay so I would recommend that
14 we adopt DDOT's recommendation.

15 MR. ZAIDAIN: I would concur with that.

16 CHAIRPERSON GRIFFIS: Let's be clear on
17 what DDOT's conditions are then. First of all the
18 first violation is a monetary \$250. Second is \$500.
19 There is no warning or address by the principal or
20 whoever the authority is, which is the applicant's
21 position.

22 The first violation is a sit down thing.
23 Look you violated. The second one is the monetary.
24 The third violation is what I have a little bit of a
25 problem with. The third violation according to DDOT

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1 is expulsion of the student. It seems pretty severe
2 as opposed to the fourth violation of the applicant
3 which goes through no enrollment for the next year.

4 MR. HOOD: And if it's a senior we then
5 notify the college. I don't understand what
6 significance that's going to have. Maybe I'm missing
7 the point.

8 CHAIRPERSON GRIFFIS: It's tough getting
9 into college. That may kick you right out.

10 MR. HOOD: If you got the money I don't
11 understand. I would agree though that maybe the
12 first, I would agree now that you mention it, Mr.
13 Chairman maybe the first violation should be dealt
14 with. Sit down. You're in violation and then maybe
15 move, maybe I will reconsider that.

16 CHAIRPERSON GRIFFIS: In which case the
17 only difference is that whether one is allowed to re-
18 enroll or whether they're expelled.

19 MR. HOOD: So that would now move to, as
20 far as DDOT that would move to the fourth infraction.

21 CHAIRPERSON GRIFFIS: Yes. If you're
22 holding to the opinion that there should be an
23 expulsion of a student at the fourth violation.

24 MR. HOOD: My initial comment was just on
25 whether it was three or four. That's kind of severe.

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1 They have a hard enough time keeping people in school
2 as it is so I'm not sure if that's the route that this
3 board wants to send that type of signal.

4 CHAIRPERSON GRIFFIS: Okay in which case
5 you may want to rely then on the applicant's
6 suggestion of the fourth violation which is not being
7 able to re-enroll the next year. If it was the middle
8 of the year you're out of school.

9 MR. HOOD: I would agree.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. HOOD: I would agree.

12 CHAIRPERSON GRIFFIS: Okay any other
13 comments on enforcement?

14 MS. MILLER: Am I correct that I think
15 that the applicant agreed to the monetary penalties
16 that DDOT suggested? There wasn't a disagreement
17 there.

18 CHAIRPERSON GRIFFIS: That's correct.

19 MS. MILLER: Okay so then I would defer to
20 the school with respect to how it disciplines its
21 students with respect to the whole expulsion question.

22 In essence, we just agreed on that anyway. Yes.

23 CHAIRPERSON GRIFFIS: Okay. This is the
24 most severe. I haven't seen everything of its
25 processes but this is the most severe I've ever seen

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1 in terms of enforcement and compliance with a proposed
2 TMP. I cannot imagine a parent with a student that is
3 at their third violation going towards the possibility
4 of not being able to re-enroll their child in the
5 school of their choice, not taking that very
6 seriously.

7 Frankly, I'd be taking it pretty seriously
8 a \$250 violation and I'm sure most will but with that
9 lingering at the extent you would never, I just, I see
10 this as incredibly strong and I think after the first
11 sit down of violation number one you would fall over
12 yourself not to start walking up that ladder. So, I
13 have great -- I think the board can have great
14 reliance on that aspect of the enforcement mechanism.

15 Okay, any other aspects to that?

16 MS. MILLER: I just want to make a point
17 with respect to the TMP and I think it may be in their
18 plan but I would say that the applicant should have
19 flexibility with concurrence from DOT to adjust the
20 TMP to remedy adverse traffic issues that may arise.
21 I mean when this is actually implemented that they
22 have flexibility to adapt to the real traffic
23 situation.

24 CHAIRPERSON GRIFFIS: Okay and I agree. I
25 mean I think that it's an issue with this. We get

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1 into all this detail and then we have to project out
2 every sort of change in the city. Is that an
3 appropriate place for the school neighborhood
4 enforcement plan committee? Would that be if DDOT
5 would come and work with that group and then be able
6 to bring flexibility to the TMP or how is that, how
7 are you seeing the flexibility written into this order
8 or into the management of the transportation
9 management plan? How does it come about?

10 MS. MILLER: Well, I think there may
11 already be a provision in there for it but I'm
12 envisioning in the future if one of the drop off
13 places is not working as well as they thought it would
14 that they would --

15 CHAIRPERSON GRIFFIS: I don't mean
16 specific. How would you implement the change? Where
17 does it come -- does the school district decide, okay,
18 we're going to change this so this is what we're going
19 to do differently?

20 MS. MILLER: Oh, well my proposal was that
21 they have to confer with DDOT, have them look at it as
22 well and say yes this makes sense to make the change.

23 CHAIRPERSON GRIFFIS: So what are you
24 saying?

25 MS. MILLER: It wouldn't be unilateral but

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1 it would be consulted.

2 CHAIRPERSON GRIFFIS: Right. So we're
3 going to say that we're going to condition, review an
4 approval of DDOT of any changes to the TMP?

5 MR. HOOD: Mr. Chair would that be better
6 suited for the advisory committee or whatever you call
7 it and then they could maybe take it to DDOT and
8 further steps if they need to at that time. I don't
9 see bringing DDOT in at that time while I agree with
10 the flexibility.

11 CHAIRPERSON GRIFFIS: Right.

12 MS. MILLER: I see the advisory committee
13 as more of an enforcement committee.

14 CHAIRPERSON GRIFFIS: Right.

15 MS. MILLER: Not making traffic judgments.

16 MR. HOOD: But should that be the body?

17 MS. MILLER: I don't see them having the
18 expertise.

19 MR. HOOD: Right, I agree but should that
20 be the body then that takes that and takes it to DDOT?

21 CHAIRPERSON GRIFFIS: Very well third
22 option is we note as one of our deliberative aspects
23 of facts that flexibility is required in order to
24 ensure a successful traffic management plan and we
25 would be open to that flexibility as it is documented

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1 the reasoning for the changes and then the outcome of
2 the changes.

3 MR. HOOD: Mr. Chairman, I don't want to
4 lose Ms. Miller's point. Maybe I shouldn't have
5 interrupted because I think she was -- I was just
6 throwing that out there for discussion.

7 CHAIRPERSON GRIFFIS: No.

8 MR. HOOD: But I think her point is valid.
9 If DDOT is where it needs to land then maybe that's
10 it but I was just -- I don't know if we fully
11 discussed that and satisfied her comments.

12 MS. MILLER: I think the school should
13 have flexibility. I just don't think it should be
14 unilateral. Otherwise they could just maybe do
15 whatever they want saying that, oh I don't think we
16 should have a shuttle bus anymore. We don't need it
17 or something.

18 I think there ought to be another body
19 there that's looking at this and DDOT seems to be the
20 one with the expertise and the one they've been
21 working with and that's why I suggest that flexibility
22 with DDOT.

23 MR. HOOD: I would agree.

24 CHAIRPERSON GRIFFIS: Excellent so we're
25 noting that there is flexibility that is required for

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1 the success of the TMP and it was based on the review
2 and concurrence of the DDOT. Okay. Harmony, do we
3 have harmony with the zoning intent in terms of this
4 special exception application?

5 Of course, Mr. Zaidain brought up an
6 interesting point early on that was adapted from the
7 Office of Planning and that is if I can elaborate a
8 little bit further on it that we're looking at a
9 proposed building or proposed new building that is
10 within the required aspects of the R5D neighborhood
11 meaning it is in conformance with the height and the
12 massing and et cetera, the FAR, about occupancy
13 parking.

14 So on the first step of course we look to
15 the fact that that is an aspect of harmony. There was
16 some in terms of the opposition extensive discussion
17 and documentation in the fact of how this isn't a
18 neighborhood related use.

19 I think use was thrown around quite
20 extensively by the parties in opposition. I think it
21 should be fairly clear that the zoning regulations
22 allow the use of schools in residential neighborhoods
23 and it is by special exception as the review process
24 but it establishes a compatible use.

25 This is not a use variance as one would

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1 then look to if this was not an allowable use. Now,
2 getting into the specifics, of course, I think the
3 aspect and the important aspects of the opposition was
4 the fact of the institutionalization of a residential
5 neighborhood and I know this board takes that very
6 seriously in looking at all applicants.

7 And specifically this application of how
8 do we balance the differing and mixed uses in an urban
9 area in order to create some sort of harmony and
10 maintain and preserve the residential aspect of it?

11 I think in particular and in specific with
12 this first of all Mr. Zaidain I thought stated it
13 quite well. We're looking at a very prominent corner
14 on Connecticut Avenue. There was some submissions in
15 the record regarding the fact that this is kind of put
16 in a large sea of residential and this is going to
17 stand out as quite different.

18 However, there is opposing information in
19 the record that showed just north is a large
20 commercial strip. There, of course, is a Metro
21 station. Further south there is high density
22 residential.

23 This is an urban neighborhood of varying
24 and mixed uses which one might argue makes it a very
25 successful place not that it is without its unique

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1 aspects of urban living but I do not believe that this
2 is an introduction of something that is overwhelmingly
3 distinct or in total opposition to a residential
4 neighborhood. In fact if schools are not acceptable
5 in residential neighborhoods I'm not sure where they
6 are appropriately located.

7 In terms of the design there was some
8 testimony in terms of the design of this and how it
9 doesn't integrate into as we don't have full authority
10 to go through the design review of this. Well maybe I
11 should just leave it at that then. Do others have
12 comments in terms of the harmony or any of the
13 opposition party statements with regards to this or
14 the Office of Planning?

15 MR. ZAIDAIN: Well, just very quickly thee
16 was a lot of discussion from the neighbors about
17 whether or not this is an appropriate design and the
18 impacts in terms of animation and I didn't agree with
19 it.

20 There was some testimony from the
21 opposition saying that this is too, this is a
22 neighborhood. We shouldn't need this much activity
23 and then we got other testimony saying that this is
24 going to darken the neighborhood. Schools don't
25 animate areas.

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1 And so it was somewhat contradictory in
2 that instance and, again, my biggest issue was
3 traffic. I think the opposition really established
4 their case in that. In terms of other issues dealing
5 with activity and whether or not this is an
6 appropriate use I really didn't think a substantial
7 case was made in that regard.

8 And I remember there were issues brought
9 up with kids running through the neighborhood and
10 whatever and whether one thinks that that's a good or
11 a bad thing for a neighborhood is I guess their
12 prerogative but I don't know maybe I should leave it
13 at that.

14 CHAIRPERSON GRIFFIS: Well what's your
15 position on kids in the neighborhood?

16 MR. ZAIDAIN: My personal position?

17 CHAIRPERSON GRIFFIS: Yes.

18 MR. ZAIDAIN: Well, I think that it's a
19 good thing.

20 CHAIRPERSON GRIFFIS: Okay.

21 MR. ZAIDAIN: But that's my position.

22 CHAIRPERSON GRIFFIS: Well and that's what
23 we're here to discuss. Others on that? There is
24 another aspect that was brought up in terms of the
25 construction issue. One was the blasting and whether

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1 there would be rock that needed to be blasted through
2 and then what sort of impact that might have on the
3 adjacent properties. I think that is clearly outside
4 of our jurisdiction.

5 There is provisions and regulations
6 regarding that on all construction issues. If all the
7 windows are blown out in the adjacent properties I
8 would certainly think that the city has regulatory
9 process in order to ensure that that situation is
10 remedied.

11 And so I do not believe it's appropriate
12 for us to get into that not into the sub grade issues
13 in terms of dewatering or any other aspect of that.
14 So that being said other pieces? Do people want to
15 make statements of whether they find this in
16 conformity or not? There it is. Last positions on
17 that issue.

18 Okay that exhausts my notes in terms of
19 what I wanted to walk through so why don't we go to
20 the next person's agenda item. Now are there
21 additional items that need to be discussed before we
22 move on to the next aspect of this?

23 MS. MILLER: The next aspect being
24 conditions?

25 CHAIRPERSON GRIFFIS: That would be

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1 probably a motion so that we can have some lunch.
2 Anything else?

3 MR. HOOD: I just had one quick thing.

4 CHAIRPERSON GRIFFIS: Yes.

5 MR. HOOD: You mentioned construction
6 management plan. Was that proffered?

7 CHAIRPERSON GRIFFIS: No, not that I'm
8 aware of.

9 MR. HOOD: Okay.

10 CHAIRPERSON GRIFFIS: Anything else?
11 Nothing else then? Then I see it is appropriate to
12 entertain this under a motion and draft conditions if
13 it so understood.

14 And so I would move approval of
15 Application No. 17022, the Edmund Burke School for the
16 special exception that would allow this new
17 construction to the existing private school and
18 increase enrollment to 320 students and faculty staff
19 to 70.

20 This is coming to us under Section 206.
21 This is two zones, split zone, R2 and R5D districts at
22 4101 Connecticut Avenue, N.W. and 2955 Upton Street
23 and I'd ask for a second.

24 MS. MILLER: Second.

25 CHAIRPERSON GRIFFIS: Thank you. Let's go

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1 right into the conditions then and I think someone can
2 offer an order of conditions. If not I'll just run
3 through it once again. Let's go to this one.

4 Although redundant I think it's
5 appropriate because of the specific issues that are
6 raised in this in terms of the aspects of the
7 construction I would suggest that the first condition
8 be that the application be constructed in accordance
9 with the plans prepared by Bowie Grid, the architects,
10 and that are marked in our record and I believe they
11 are. We do have Exhibit 4 and 117 and I believe
12 that's correct looking at those late last night. Any
13 questions, comments on that?

14 I would suggest that another condition
15 read as at the completion of the new building the
16 maximum enrollment shall be increased to 300 students
17 following the four satisfactory reporting periods as
18 has been outlined pursuant to the enforcement plan.
19 The maximum enrollment may automatically increase to
20 320.

21 For clarity, as put forth by the applicant
22 in their condition number two, I am removing the first
23 sentence of that condition. Okay, to be further clear
24 what we have is an existing BZA order and that BZA
25 order establishes how the existing facility.

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1 All the information in the record for this
2 application has been to address the new construction
3 and the increase in enrollment and staff. I don't
4 believe we have gone into such an extent to look at
5 what if it isn't constructed. What is the current
6 condition? What are those impacts?

7 So all I'm holding is if this building is
8 not constructed that as proposed, as in condition one,
9 that in fact it reverts back to using the original
10 building under the original order and if there are
11 modifications that are required of that original order
12 then that would come up in a different forum.

13 At this point I don't believe the evidence
14 is strong enough for us to address anything other than
15 that. Is that acceptable to you Mr. Etherly?

16 VICE CHAIRPERSON ETHERLY: Yes, it is.

17 CHAIRPERSON GRIFFIS: Okay, three, maximum
18 of facility and staff would be 60 until the new
19 building is complete following completion. Here we go
20 is another aspect but following completion of the new
21 building the maximum number of faculty and staff would
22 automatically increase to 70. Again, I think we need
23 to hold to what we are proposing. This may create
24 some complication but so be it.

25 Four is an important aspect and that is

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1 the school would fully implement and comply with the
2 school management plan. The school management plan,
3 of course, was created and drafted and it is part of
4 our documentation and it was submitted in the
5 applicant's pre-hearing submission as Exhibit 1. Any
6 questions, discussions?

7 MS. MILLER: In our earlier deliberation I
8 know we made some changes to some of their plans that
9 are attached. One in particular was, for instance,
10 the composition of the enforcement committee which may
11 or may not be in this management plan but I just want
12 to make sure that these plans that we are referencing
13 incorporate the changes that we made making our order.

14 CHAIRPERSON GRIFFIS: Okay.

15 MS. MILLER: Okay.

16 MR. ZAIDAIN: And, Mr. Chair, just a point
17 of clarification. I mean we're kind of conditioned.
18 We're dealing with two different things here. We've
19 got the plans and then we kind of have policies. The
20 next issues we're going to get into are traffic
21 management and the school management plan.

22 I would assume that they would have to
23 show some sort of proof of that to DCRA when they go
24 to pull a permit or before they get a C of O they'd
25 have to show some sort of --

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1 CHAIRPERSON GRIFFIS: Proof of what?

2 MR. ZAIDAIN: Compliance with this that
3 this is part of our order of these conditions.

4 CHAIRPERSON GRIFFIS: When they go to
5 permit?

6 MR. ZAIDAIN: Yes, when they go to permit
7 or was it something that they would get a C of O --

8 CHAIRPERSON GRIFFIS: They would comply
9 with these before they build.

10 MR. ZAIDAIN: Well that's what I'm asking.
11 It's just an administrative question.

12 CHAIRPERSON GRIFFIS: Well I think the
13 order would be attached to the permit.

14 MR. ZAIDAIN: Okay.

15 CHAIRPERSON GRIFFIS: And so, yes.

16 MR. ZAIDAIN: So they can't really show
17 that they've implemented this plan before they get a C
18 of O but once they get a C of O in order to maintain
19 zoning compliance they have to stay in compliance with
20 this order. That's basically what this is limited to
21 right?

22 CHAIRPERSON GRIFFIS: Right.

23 MR. ZAIDAIN: Okay.

24 MR. HOOD: Mr. Chairman, I have a
25 question. I'm looking at another set of findings.

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1 It's mentioned in one of the conditions about the TMP
2 and it says for use before and during construction.
3 Is that how the board members understood that the TMP
4 would also include construction?

5 CHAIRPERSON GRIFFIS: Yes, there are
6 aspects of the TMP that have already been implemented.

7 MR. HOOD: Inclusive.

8 CHAIRPERSON GRIFFIS: But again I mean
9 what I -- I can be persuaded or can be in the minority
10 on this but what we're looking at is a future
11 condition and that's what we're deliberating on at
12 this point.

13 I don't think we can address everything.
14 I think it's an important point to bring up, Mr. Hood,
15 and in fact I thought it made for a strong application
16 the fact that they were already implementing aspects
17 of what they're proposing as their management plan.

18 My goodness I think it would serve only
19 the school well if during construction they were able
20 to successfully drop off and have their students
21 picked up.

22 MR. HOOD: And that's my point. That's my
23 point. I understand that they've already done some
24 things already because I remember specifically that
25 question was asked and some things that they said were

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1 improving the neighborhood, said it wasn't.

2 But my question is in this TMP and I was
3 hoping somebody could pull it off the top of their
4 head because I can look through here and see but did
5 that include during the construction phases while I
6 know it can't all be mitigated but did some of that
7 address while pick up and drop off and everything was
8 going on while the construction was also taking place?

9 VICE CHAIRPERSON ETHERLY: You essentially
10 just want to make sure that there's no departure from
11 the TMP during construction?

12 MR. HOOD: Exactly, well also and was
13 there something in place for while the construction
14 was taking place and I want to thank my colleagues for
15 looking it up because I guess I was just too lazy to
16 do that.

17 VICE CHAIRPERSON ETHERLY: While we're
18 doing that Mr. Chair I would never accept any
19 characterization of Mr. Hood as being lazy or
20 otherwise. I just wanted to state that for the
21 record.

22 CHAIRPERSON GRIFFIS: Is there a specific
23 provision in the TMP for a construction period?

24 MR. HOOD: I'm sorry.

25 CHAIRPERSON GRIFFIS: I don't believe it

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1 was outlined. What? No, I don't either. I think
2 that's an excellent direction of the board to give the
3 applicant in looking at that that they would utilize
4 temporary provisions. I don't think it's appropriate
5 to rise to the level of a condition to the order but
6 it certainly would serve everyone if that happens.

7 I think there will be attendant
8 requirements for the construction and construction
9 vehicles and they're going to need to obviously
10 balance their schedule and their requirements during
11 that period. Does that suffice, Mr. Hood.

12 MR. HOOD: Yes, that suffices. It may be
13 another venue where that can be covered. I'm not sure
14 under permits or something for construction.

15 CHAIRPERSON GRIFFIS: Okay. Ms. Miller.

16 MS. MILLER: I was just going to note that
17 they would have the flexibility to alter their TMP
18 during construction based on that provision that we
19 were talking about giving them flexibility upon
20 conferring with DDOT.

21 MR. HOOD: Okay.

22 CHAIRPERSON GRIFFIS: Excellent.

23 MR. HOOD: I would agree.

24 CHAIRPERSON GRIFFIS: Number five is the
25 school shall fully implement and comply the

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1 enforcement plan which is noted in Exhibit 2 of the
2 applicant's pre-hearing submission. It is Exhibit 31
3 in our record which was amended to increase the fines
4 for the infractions and actually the increases were
5 attendant to the DDOT monetary value.

6 But again I think the board holds that the
7 four steps of the violations and penalties for
8 violations are appropriate if not incredibly stringent
9 and they would include the trespass of students on
10 private property as an infraction, limit the total of
11 infractions to no more than ten per week and exclude
12 from the compliance committee former -- well, that's
13 what we were removing. So, aspect D of five I would
14 propose be removed and the rest can remain. Any
15 questions, opposition to that additions?

16 Six is the school shall fully implement
17 and comply with the traffic management plan which is
18 contained in the applicant's pre-hearing submission
19 marked in the record as Exhibit 31 also. It includes
20 also the following aspects.

21 I think we can all see what those are
22 running down these several strong aspects of that
23 however are the training of school employees as to
24 what the TMP is, the implementation and the
25 enforcement of it.

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1 I think the awareness in education is an
2 integral part of any success of any plan and certainly
3 that of the TMP. The access into the parking
4 structure on Connecticut Avenue is also attendant to
5 our discussion and I think it's an appropriate and
6 strong aspect to it.

7 The registration of the vehicles as we've
8 talked about and displaying of the school permits to
9 identify vehicles associated with school students I
10 think we can hold and rely on.

11 D gives me some concern in terms of
12 prohibiting students even with Zone 3 permits and
13 faculty of the same established allowable parking
14 areas shall be strictly prohibited from the parking on
15 the 2900 block of Upton Street, N.W.

16 I would like to keep that in only because
17 it is noted as part of a management plan that the
18 school has drafted and is upholding but clearly it's
19 not a condition that I would write independently and
20 put in there but I think we can move on with that
21 unless others disagree.

22 MS. MILLER: I think we ought to amend it
23 to qualify it to be during school hours.

24 CHAIRPERSON GRIFFIS: Oh, indeed.

25 MS. MILLER: I think during the weekends

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1 or evenings when they're visiting friends or whatever
2 --

3 CHAIRPERSON GRIFFIS: So folks that live
4 in the neighborhood that actually go to school there
5 can actually park there on the weekend when they go
6 shopping? It makes some sense to me, okay noted so
7 that's during school hours or operation. We'll craft
8 that specific language noting that intent.

9 E is the school should maintain a formal
10 log of traffic and parking related comments received
11 from parents and neighbors, shuttle service.

12 MS. MILLER: Can I?

13 CHAIRPERSON GRIFFIS: Yes.

14 MS. MILLER: This may be a separate
15 condition or it may belong somewhere else but I just
16 want to raise it for somewhere. I think we had some
17 discussion about not having much jurisdiction about
18 construction but I think it's a good idea and it may
19 have been raised by another party to have a
20 construction liaison person, contact person, so that
21 during construction if neighbors have problems they
22 can contact someone at the school.

23 I mean it says the school shall maintain a
24 phone log of traffic and parking related comments
25 received from parents and neighbors. I don't know if

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1 this is a logical place to have a school contact for
2 any problems. I actually, maybe it's here, it
3 wouldn't even be limited to construction. It could be
4 for -- well here it is parking related comments.
5 Okay. Could we say that this includes construction
6 during period of construction?

7 CHAIRPERSON GRIFFIS: Yes. I think a
8 finding of ours can be that that was to be implemented
9 immediately so it does cover that timing around the
10 construction period.

11 MS. MILLER: Actually this goes to the
12 phone log, it doesn't go to the contact person.

13 CHAIRPERSON GRIFFIS: But it says the same
14 thing right or no?

15 MS. MILLER: No. Well one is -- I guess
16 somebody has got to be maintaining that phone log but
17 I think there needs to be a point of contact for the
18 neighborhood, like one, so they know who to call, one
19 person that's responsible. I don't know whether it
20 belongs right here or if we're going to get into
21 anything else related to construction.

22 Why don't we add it here that there be a
23 contact person at the school to receive parking
24 related traffic and construction related?
25 Construction is pretty short term so maybe --

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1 CHAIRPERSON GRIFFIS: I'm not going to put
2 construction in it.

3 MS. MILLER: Okay.

4 CHAIRPERSON GRIFFIS: If you want to put
5 aspects and there's a contact person I think that's
6 fine and that would actually move with the order. It
7 would move with the license.

8 MS. MILLER: That's right. That's right.

9 MR. ZAIDAIN: So, Ms. Miller, are you
10 suggesting that in lieu of a phone log there should be
11 a contact person?

12 MS. MILLER: No, in addition to a phone
13 log. I think a contact person and that obviously
14 traffic and parking related comments would cover
15 construction problems so that's fine.

16 CHAIRPERSON GRIFFIS: So we just add the
17 edict there's an identified person in charge of
18 maintaining and addressing the phone log so that
19 people know who they'd be calling if it's just an
20 answering machine and who to follow up with.

21 MS. MILLER: Right.

22 MR. HOOD: Mr. Chairman.

23 CHAIRPERSON GRIFFIS: Yes.

24 MR. HOOD: I also going back to the
25 construction management plan there is one, Exhibit 31,

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1 a construction management plan has been proffered and
2 it's Exhibit 31 and it's a whole list. We need to
3 make sure that piece is also incorporated into the
4 findings.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. HOOD: And conditions.

7 CHAIRPERSON GRIFFIS: In the findings?

8 MR. HOOD: I mean the conditions because
9 they proffered a temporary construction chain link
10 fence and all construction storage and trailers will
11 be limited to on site areas. All that is in Exhibit
12 31.

13 CHAIRPERSON GRIFFIS: Yes, I understand
14 that.

15 MR. HOOD: And that's basically what I was
16 looking for and Mr. Etherly found it for me. Thank
17 you.

18 CHAIRPERSON GRIFFIS: Okay and I'm very
19 opposed to having that as a condition of the order but
20 why don't we pick that up at the end after we get
21 through the 56 conditions. Number seven --

22 MR. HOOD: You being opposed to it, Mr.
23 Chairman, well anyway I'll wait until we deal with it
24 later because it's being proffered by the applicant.

25 CHAIRPERSON GRIFFIS: I understand.

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1 (Background discussion.)

2 MS. MILLER: Can I just articulate a new E
3 to cover the contact person so we have it?

4 CHAIRPERSON GRIFFIS: Yes.

5 MS. MILLER: That would be that the school
6 shall designate a contact person to receive traffic
7 and parking related comments from parents and
8 neighbors and shall maintain a phone log of such
9 comments. Is that okay?

10 CHAIRPERSON GRIFFIS: Sounds brilliant.

11 MS. MILLER: All right.

12 CHAIRPERSON GRIFFIS: F, any concern on F?
13 It's implementing the shuttle service. G, school
14 parents, enrollment contract will be bound to the
15 compliance plan.

16 H, evening events at the school, parents
17 would be required to use the school's parking garage.

18 School should make available off site parking and
19 shuttle service for evening events at which attendance
20 is expected to exceed the school garage capacity. Any
21 concerns on that?

22 I, school to work with DDOT to establish
23 parking locations for visiting athletic teams. I
24 think that goes, as it is in, I mean I think that goes
25 to the flexibility. That isn't the strongest

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1 condition ever crafted.

2 Unless there's language that would be
3 there I think it is clearly understood by the board
4 that this, that those locations would be for the
5 visiting athletic teams so that they would not first
6 of all be parking illegally, which would not be
7 allowed and would not be parking on the adjacent
8 residential streets.

9 Seven, I think we've addressed seven.
10 Seven goes to whether the pedestrian bridge or the
11 public galley is constructed or not constructed. I
12 would propose striking that condition.

13 First of all it starts off as use its best
14 efforts to secure approval. It's kind of a limited
15 time or undefined aspect of that. Secondly, I think
16 it's been strongly stated that we're looking at an
17 application that has a pedestrian bridge involved and
18 that condition doesn't to me go towards any mitigation
19 of the potential of an adverse impact. If the bridge
20 was not built I think it may in fact require a
21 modification to an order if issued. Any questions or
22 comments?

23 VICE CHAIRPERSON ETHERLY: I agree, Mr.
24 Chair.

25 CHAIRPERSON GRIFFIS: Okay, number eight

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1 make school -- eight goes to deliveries and making
2 efforts to eliminate non-school hour noise. Are there
3 comments on that?

4 MS. MILLER: It's pretty vague to say make
5 every reasonable effort to eliminate overdue non-
6 school hour noise including but not limiting to -- but
7 anyway I would say that, strengthen it by saying
8 deliveries and pick ups shall occur only during normal
9 working hours.

10 CHAIRPERSON GRIFFIS: Right, I would
11 agree.

12 MS. MILLER: I don't know what to do about
13 reducing bus engine noise.

14 CHAIRPERSON GRIFFIS: Right.

15 MS. MILLER: That doesn't seem to fall
16 there anyway.

17 CHAIRPERSON GRIFFIS: Not allowing the
18 milk truck to ring its bell upon delivery, okay.
19 Good. I think we can strengthen that condition and it
20 would be appropriate.

21 Number nine is the school re-initiate the
22 scheduling committee. This was also one of OP's
23 conditions which I think is an important one for
24 everyone involved from the other event areas, the
25 residents in the school themselves coordinating that.

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1 Any questions, comments on number nine?

2 Going to number ten, the school providing
3 enrollment and employment report each fall by October
4 1. Annual report of the TMP and the school management
5 plan and the compliance committee reports to the BZA
6 and the ANC.

7 We're crossing several thresholds of this
8 application this being one in terms of annual
9 reporting to this board. Previously I would have not
10 held that this was a worthwhile aspect to do.

11 However, now with the creation of a new
12 compliance officer I think this is an excellent
13 provision for us to keep updated on the annual
14 performance of our own conditions and of the plans
15 that are created by the applicant. Are there any
16 other concerns or additions, comments, questions on
17 that?

18 Going to eleven, the school would maintain
19 a noise level measured to the property line we
20 discussed. I had spoken about removing that but I'll
21 hear from others at this point.

22 MS. MILLER: I think we could remove it.
23 It's in their school management plan so.

24 CHAIRPERSON GRIFFIS: Right.

25 MS. MILLER: We don't need to repeat it

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1 here.

2 CHAIRPERSON GRIFFIS: And make it part of
3 the management plan and not a board condition. Very
4 well. Going to 12, the existing air-conditioning and
5 mechanical units, the school's east side property line
6 shall be located marked in the exhibit. That's
7 covered in number one which means we don't need it.
8 Anything else, additional conditions? Yes.

9 MS. MILLER: The fact that the school
10 doesn't have a cafeteria was a major issue in this
11 case because of the number of students that were
12 spilling out onto the street, sidewalk, alleys, et
13 cetera.

14 And I noticed in Burke's proposed findings
15 of fact and inclusions of law that they've stated that
16 OP recommended and they agreed to ensure that a
17 vending food machine service that's equal to that of
18 comparable private schools in the District.

19 And I would propose as a condition that we
20 add that they ensure that it has vending machines
21 equal to the best quality of vending machines not
22 quality as far as machinery goes but highest quality
23 of food as that used by any private school in the
24 Washington area.

25 It's an unusual condition but I think that

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1 the cafeteria issue was a really major issue and it's
2 hard to get at that. We're not going to require them
3 to have a cook, a chef, a kitchen, et cetera but I
4 think we can have, we can require them to have good
5 quality food in their vending machines that other
6 private schools are able to have. How do my board
7 members feel about that added condition?

8 CHAIRPERSON GRIFFIS: I think it's an
9 excellent condition although it's incredibly vague but
10 I think it does go to the aspect of the issue that
11 arose in terms of the cafeteria.

12 I think my position is I don't think we
13 want to preclude students from going and finding food
14 off site. In fact, we had some letters of support of
15 the application by business owners in one of the
16 petitions and clearly they rely on that.

17 But, yes, I think it is an important piece
18 to have viable, edible food as opposed to, we probably
19 shouldn't name names, however some healthy
20 alternatives in terms of so that students don't have
21 to leave school and could remain on campus.
22 Clarification Mr. Etherly advocating for certain
23 products?

24 VICE CHAIRPERSON ETHERLY: Oh no, oh no.

25 MS. MILLER: And we'll require a report as

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1 to what's in their vending machines in their report,
2 kidding.

3 CHAIRPERSON GRIFFIS: Yes, yes, part of
4 their annual report.

5 VICE CHAIRPERSON ETHERLY: An additional,
6 another condition that I'd like to suggest for
7 consideration is coming back to Mr. Hood's point
8 regarding the construction management plan.

9 CHAIRPERSON GRIFFIS: Good.

10 VICE CHAIRPERSON ETHERLY: The school, the
11 applicant did submit also at Exhibit 31 as attachment
12 3 of construction management plan and I think very
13 simply I'd like to suggest for consideration once
14 again following along Mr. Hood's reasoning language
15 that would simply state the school shall fully
16 implement and comply with the construction management
17 plan, Exhibit 3 to the applicant's pre-hearing
18 submission marked in the record as Exhibit 31.

19 It parrots language that is contained in
20 other aspects, other parts of the conditions as we
21 have presently laid them out. If you review that
22 attachment those conditions are for the most part
23 fairly standard and straightforward. I did want to
24 take a look at them from the standpoint of making sure
25 there wasn't anything necessarily too vague but I

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1 think it would be important to give consideration and
2 in an appropriate fashion and the conditions to the
3 impact of construction.

4 CHAIRPERSON GRIFFIS: Good. I think it's
5 an excellent point and I am convinced by Mr. Hood's
6 position on this and I think one of the most important
7 aspects which actually brings up one of the conditions
8 offered by one of the parties in opposition that is
9 where construction workers would park and this
10 construction management plan actually prohibits them
11 from parking on certain aspects that including Upton,
12 Van Ness and Tilden.

13 The other piece is of course, it's almost
14 a reiteration of some of the applicable regulations
15 that they would have to deal with whether we have this
16 or not but I think it's well said and stated and
17 clearly understandable and measurable. Yes.

18 MS. MILLER: In looking at the proposed
19 conditions from Neighbors United for Livable Streets
20 I think one of them that I already addressed was
21 having a contact person for traffic and parking
22 problems.

23 But another is the recommendation that
24 Burke shall develop and implement a landscaping plan
25 to minimize the school's impact on the residential

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1 neighborhood and I know we often have done that for
2 other schools. I think it's -- I would recommend we
3 include that condition as well.

4 CHAIRPERSON GRIFFIS: What condition?

5 MS. MILLER: Landscaping.

6 MS. BAILEY: Ms. Miller, what condition in
7 the Knowles report are you --

8 CHAIRPERSON GRIFFIS: She's looking at one
9 that indicates that Burke shall develop and implement
10 a landscape plan that minimizes the school impact on
11 the residential neighborhood.

12 MR. ZAIDAIN: Who would be the decision
13 maker on that?

14 CHAIRPERSON GRIFFIS: That makes sense to
15 me.

16 MR. ZAIDAIN: Who would be the decision
17 maker on whether or not it minimizes the impact? Are
18 you talking about submitting that to their neighbors
19 for their review?

20 MS. MILLER: No. Maybe I could --

21 CHAIRPERSON GRIFFIS: We haven't seen a
22 landscape plan. We haven't reviewed a landscape plan.
23 I didn't not any. The only point that that would go
24 to is the buffer zone that was brought up by one of
25 the parties in opposition which actually is going to a

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1 dimension setback if anything.

2 I mean looking at the plans that we have I
3 don't even know where a landscape buffer would go.
4 Where would it be appropriate, on the Connecticut
5 Avenue side, on the point at which the building
6 touches the adjacent building?

7 There's a couple problems I have with
8 that. First of all we've run into this before where
9 we condition that and then we haven't even seen a
10 landscape plan. We haven't reviewed it. The other is
11 as Mr. Zaidain just brought up what does it mean? How
12 do we define that? How would we --

13 MR. ZAIDAIN: I mean we've gotten in
14 trouble with that in the past with cases where we've
15 stated that and the next thing you know we're having
16 to reopen a record and hold more hearings and make
17 that determination ourselves. I don't agree with
18 doing that.

19 CHAIRPERSON GRIFFIS: And count the trees
20 and shrubs.

21 MR. ZAIDAIN: Exactly. There are existing
22 regulations and we can cite those in the order that
23 they will have to adhere to in regards to landscaping.

24 CHAIRPERSON GRIFFIS: This isn't a huge
25 green space that they're trying to animate with one

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1 structure or trying to hide a surface parking lot or
2 something of that aspect where landscape plays a
3 pivotal role.

4 I think there would be limited effect of a
5 large landscape plan. Secondly, I don't see anything
6 that was brought up by the opposition of which this
7 would tend to regulate or address.

8 MS. MILLER: I hear what my board members
9 are saying. I mean I think in general that it sounds
10 nice that there be attractive landscaping.

11 CHAIRPERSON GRIFFIS: It sure does.

12 MS. MILLER: And if our regulations
13 somewhat cover that, that's great. I think in general
14 that it's a mitigation for many institutional -- they
15 were talking about it during the hearings, the
16 appearance of these buildings residential versus
17 institutional and landscaping helps to make it more
18 attractive but if my board members are opposed to that
19 that's fine. I'm sure the school wants to make this
20 building as attractive as possible anyway.

21 CHAIRPERSON GRIFFIS: I would think so,
22 yes. Okay, other aspects? Anything else? We have a
23 motion before us with conditions. It has been
24 seconded.

25 VICE CHAIRPERSON ETHERLY: Can I hear

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1 those conditions?

2 CHAIRPERSON GRIFFIS: Okay, very well.
3 Anything else? We have the motion before us. It's
4 been seconded with conditions, last opportunity folks.
5 Then I would ask for all those in favor of the motion
6 signify by saying aye.

7 BOARD: Aye.

8 CHAIRPERSON GRIFFIS: And opposed?
9 Abstaining? Very well, Mr. Moy if you wouldn't mind
10 recording the vote.

11 MR. MOY: Staff would record the vote as
12 5-0-0. It's the motion of the chairman, seconded by
13 Ms. Miller to approve the Edmund Burke school under a
14 special exception with conditions as discussed.

15 CHAIRPERSON GRIFFIS: Anything else?
16 Anything else for the morning session, Mr. Moy?

17 MR. MOY: Not that I understand.

18 CHAIRPERSON GRIFFIS: Very well. If not
19 then I can adjourn the morning session of the 2nd of
20 December.

21 For those that are showing up for our
22 afternoon hearing we're going to take a short lunch
23 break. We will be back at 2:00 and we will start our
24 afternoon session and we do appreciate everyone's
25 patience.

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(Whereupon, the above-entitled matter was
concluded at 1:37 p.m.)