GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

MAY 4, 2004

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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
RUTHANNE G. MILLER	Vice Chairperson
CURTIS ETHERLY, JR.	Board Member
JOHN A. MANN, II	Board Member, NCPC

ZONING COMMISSION MEMBER PRESENT:

JOHN PARSONS	Commissioner, NPS

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Acting Secretary
JOHN NYARKU	Zoning Specialist

D.C. OFFICE OF CORPORATION COUNSEL STAFF PRESENT:

SHERRY GLAZER, ESQ.
LORI MONROE, ESQ.
JANICE SKIPPER, ESQ.

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

AGENDA ITEM PAGE

WELCOME/CALL TO ORDER:
Geoffrey Griffis 3

HOWARD HEU (PARKHILL, INC.)
APPLICATION NO. 17124 - ANC-6C: 5
ACTION TAKEN 6

APPEAL OF ADVISORY NEIGHBORHOOD COMMISSION 5B:
APPLICATION NO. 16998: 6
VOTE TO DENY MOTION FOR RECONSIDERATION 17
VOTE TO DENY MOTION TO STAY 19

THOMAS AND LINDA WALTZ
APPLICATION NO. 17139: 19
VOTE TO APPROVE APPLICATION 25

INTERNATIONAL CAMPAIGN FOR TIBET
APPLICATION NO. 17152 - ANC-2B: 27
VOTE TO APPROVE APPLICATION 32

JAMES AND JULIE EDMONDS
APPLICATION NO. 17138 - ANC-1B: 33
VOTE TO DENY APPLICATION 41

AFRICARE, INC.
APPLICATION NO. 17135: 42
VOTE TO APPROVE APPLICATION 72

BLOOM BUILDERS, INC.
APPLICATION NO. 17147 - ANC 3/4G: 72
VOTE TO APPROVE APPLICATION 101

ADJOURN:
Geoffrey Griffis 103

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

10:36 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. Please, forgive our brief delay this morning, but let me call to order the 3rd of May 2004 Public Meeting of the Board of Zoning Adjustment in the District of Columbia. My name is Geoff Griffis, Chairperson. Joining me today is the Vice Chair Ms. Miller and also Mr. Etherly. Representing the National Capital Planning Commission with us is Mr. Mann and representing the Zoning Commission is Mr. Parsons on several cases this morning.

Copies of today's hearing agenda are available to you. We do have a bit of a change in the schedule, which I will announce based on the schedule of the Members that need to fit into the decision making, those that actually heard the case, of course, need to be here for the deliberation. Of note, all proceedings before the Board of Zoning Adjustment are recorded. They are recorded in two fashions that you need to be aware of this morning.

First of all, the court reporter, who is sitting to my right, is creating the transcript. Secondly, we are being broadcast live on the Office of Zoning's website. So attendant to that, we ask, of

course, that people refrain from making any disruptive noises or actions in the hearing room, and I would also ask that you turn off cell phones and beepers, at this time, so that we don't have that disruption.

Of course, in our Public Meeting this is the time for deliberation by the Board. We will not be hearing from anybody in the audience, but we are awfully glad that you are here with us today. I do not believe we have any preliminary matters, but let me ask staff and also say a very good morning to Mr. Moy, representing the Office of Zoning, with us this morning close to me on my right and Mr. Nyarku, who is sitting further on the right. Corporation counsel attorneys are going to be shifting in and out depending on the case that is before us.

The first preliminary matter that I have, we will call and deliberate on Application 16998 first which is the Appeal of the Advisory Neighborhood Commission 5B. We will then go to the Waltz case number 17139 will be second, and third we will go to 17152, which is the International Campaign for Tibet.

Mr. Moy, any other preliminary matters for the Board?

MR. MOY: No, sir. There is a slight, I shouldn't say slight one, but there is a request for a

continuance which is 17124, but we can address that when we get to that case.

CHAIRPERSON GRIFFIS: Why don't we take that up right now then as preliminary as the first case Application 17124?

MR. MOY: Yes, sir. Then that case is, as you stated, Application No. 17124 of Howard Heu (Parkhill, Inc.), pursuant to 11 DCMR 3103.2, for a variance from the lot occupancy requirements under section 403 and a variance from the off-street parking requirements under subsection 2101.1, to allow the construction of a new flat (two family dwelling) in the R-4 District at premises 601 Massachusetts Avenue, N.E., Square 866, Lot 809.

The Board completed testimony on this application on March 16, 2004 and scheduled its decision on May 4, 2004. Post-hearing documents were requested and that the Board requested that both the ANC-6C and the Capitol Hill Restoration Society be served the documents. And we do have in the filing from the applicant a letter requesting a continuance which is dated April 16, 2004, identified as Exhibit 35. And finally, we also have a letter in support of that continuance from ANC-6C and a letter dated April 15, 2004, and that is identified as Exhibit 36.

CHAIRPERSON GRIFFIS: Very well. If there is nothing else on that, Board Members, I don't see any major disruption in allowing additional time before we deliberate on this, and in order to receive the subsequent information which we had requested, I will hear any opposition to that. I would propose rather than the May 18th of which would be a Special Public Meeting, that we set this for our regular scheduled Public Meeting of 8 June '04. And let me hear any other comments.

BOARD MEMBER ETHERLY: No objection, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you. If there is no objection noted, then let us move it to 8 June '04. The next case, Mr. Moy?

MR. MOY: Yes, sir. The next case is a motion for reconsideration and stay for Application No. 16998 of the Appeal of the Advisory Neighborhood Commission 5B, pursuant to 11 DCMR 3100 and 3101, from the Administrative Decision of David Clark, Director of the Department of Consumer and Regulatory Affairs for the issuance of Building Permit No. B, as in bravo, 425438 for the renovation of a warehouse for use by a community correction center.

The appellant alleges that DCRA erred by

issuing the building permit as the proposed use will allegedly be operated as a community based residential facility or halfway house and therefore in violation of the prohibition of new residential use in a C-M-2 District pursuant to section 801. The subject property is located in the C-M-2 District at premises 2210 Adams Place, N.E., Square 4259, Parcel 154/81.

I will just say that the Office of Zoning has received two motions for reconsideration and for a stay of the effect of the Board's final decision. One from the District of Columbia Department of Consumer and Regulatory Affairs which is dated April 5, 2004 and is identified as Exhibit 92 and from Bannum, Inc. which is dated April 14, 2004. We also have a facsimile copy dated April 13, 2004, and those are Exhibits 93 and 96.

Finally, the applicants have filed an opposition to DCRA's and Bannum's motions and for their stay and that is dated April 21, 2004 and is identified as Exhibit 97 in your case folders. That completes the briefing from the staff, Mr. Chairman.

CHAIRPERSON GRIFFIS: Thank you very much, Mr. Moy. I think that is a sufficient outline, so I won't go back into it. It is fairly clear what is before us. And let me open it up to brief discussion

and deliberation on whether we do reconsider our decision on this appeal from the Advisory Neighborhood Commission 5B.

BOARD MEMBER ETHERLY: If I may, Mr. Chair?

CHAIRPERSON GRIFFIS: Yes.

BOARD MEMBER ETHERLY: Thank you very much for the opportunity to speak on this. My comments will be very brief as will my suggestion for how we dispose of the motions that are in front of us. Perhaps from a procedural standpoint, I might suggest dealing with the motions separately, i.e., the motion for reconsideration first, perhaps, and then the motion to stay. And rather than prolong the discussion, Mr. Chair, I would simply move denial of the motion for reconsideration and invite a second of that motion.

CHAIRPERSON GRIFFIS: Second.

BOARD MEMBER ETHERLY: Thank you very much, Mr. Chair. I think just quite succinctly, Mr. Chairman, I don't believe any additional information has been offered to the Board that would suggest that there is grounds for reconsideration of the decision as it was written and issued by this office.

CHAIRPERSON GRIFFIS: Good. Thank you

very much. I think in addition to that, of course, that is an important threshold for us to take up any reconsideration. In addition, I think I would ask you my support of the motion in going back and reviewing albeit briefly, but certainly reading all the motions, I still have full faith that the Board did establish and fully deliberate and decide based on the fundamental aspects in the case and on the factual record.

I think there is enough exceptionally based deliberation to see the outcome and the flow of outcome from the findings of fact for our decision. Others?

VICE CHAIR MILLER: As my colleagues know, I was the dissenting member on this case and I feel even more strongly now that the order is in print and now that I have seen the motions for reconsideration that the order should be reconsidered for two reasons. I think that the majority's conclusion that the facility is not a correction or detention facility is not based on substantial evidence in the record and is contrary to legal conclusions drawn by both our Federal Court and Court of Appeals.

And I also believe that this Board has erred as a matter of law and this wasn't raised by the

1 parties in their motions, but I believe that the Board
2 has erred in relying on a narrow reading of the
3 legislative history of the regulation instead of the
4 plain words of the regulation. And by doing so, they
5 have rendered a regulation meaningless, which
6 adjuratory boards are not supposed to do if can be
7 avoided at all.
8 With respect to the substantial evidence
9 of record, one of the findings of this Board was that
10 the CCC is not a detention or correction facility, and
11 I would just like to note the case of Howard v.
12 Ashcroft found to the contrary and D.C. Court of
13 Appeals' decision in Armstead v. United States, also
14 found that a private halfway house that ran a work
15 release program under contract with the Department of
16 Corrections was a penal institution.
17 And I believe that the Board was relying
18 on the fact that because they had a work release
19 program of some sort, that these residents were not
20 inmates or were not confined, and I don't believe that
21 those terms are to be defined so narrowly and other
22 courts have found to the contrary.
23 Also, with respect to the plain meaning of
24 the regulation, the regulation we are looking at says
25 "temporary detention or correction institution on

leased property for a period not to exceed three years." And in this case, there doesn't seem to be any doubt that this is temporary not to exceed three years, that it does fall within the detention or correction institution definition and it is on leased property.

The Board was swayed by the fact that 30 years ago or so the legislative history showed that the temporary nature was, in a sense, of a short term solution for overflowing prisons while new facilities were being built. In this case, the temporary nature is different. It deals with residents being there for a temporary period of time, which is not to exceed three years.

Regardless of the specific situation, I think the Commission found that this type of facility was appropriate in this type of zone, whether it was for a three year period or whether it was until new prison facilities could be built. And I think that if we ignore the plain meaning of the words of the regulation and just look at the legislative history, then that would require the Zoning Administrator in almost every case to second guess the regulations and have to look up the legislative history. And I don't believe that that is what is required under the law.

There is a large body of case law that says that the plain meaning of the statute prevails and the statute may not be interpreted to render it meaningless. The most recent Court of Appeals case was Chagnon, which is March, it came out in March of 2004, which reverts the Board on another case in which they were reading into the statute words that weren't there. In this case, I think they want us to try to read the plain meanings of the words and I think that this Board has gone too far to ignore them and look at a situation that existed 30 years ago.

The law is intended to apply many years ahead of time, unless it can't have any meaning whatsoever, I think we need to apply the plain meaning. So for that reason, I would move to -- I mean, I vote against this motion and would support the motion for reconsideration.

CHAIRPERSON GRIFFIS: Thank you for that summary. Others?

COMMISSIONER PARSONS: Mr. Chairman, I don't really want to reargue this, but I think I need to respond to Ms. Miller's remarks about the legislative history. I think the public interest is what we are about here. To allow this kind of interpretation of that regulation to continue, to me

is a very dangerous precedent. A series of facilities of this type could proliferate through the city in these zones, which was certainly not the intent of those regulations. And for that reason, I would disagree with Ms. Miller, but I want to support the motion.

CHAIRPERSON GRIFFIS: Good. Thank you very much, Mr. Parsons.

COMMISSIONER PARSONS: I had a technical matter as to which motion. There are two before us.

CHAIRPERSON GRIFFIS: This is just the motion for reconsideration. The motion before us that has been seconded is to deny the motion for reconsideration.

COMMISSIONER PARSONS: Right.

CHAIRPERSON GRIFFIS: And then we will dispense with -- or is that what you are asking?

COMMISSIONER PARSONS: There is one from DCRA and one from Bannum, that's all I meant. Are they being combined in this motion?

CHAIRPERSON GRIFFIS: Yes.

COMMISSIONER PARSONS: Okay.

CHAIRPERSON GRIFFIS: Mr. Etherly you agree?

BOARD MEMBER ETHERLY: I agree.

CHAIRPERSON GRIFFIS: Okay. Ms. Miller brings up interesting points and, Mr. Parsons, I appreciate the comments in terms of, one, the intent of the regulations and, two, the interpretation. I think even in listening to Ms. Miller there is an interpretation going on of what the regulations are saying, and it may be different than others on the Board. I don't think we ever remove from looking at the intent of the regulation.

Clearly, we have been certainly in numerous cases where we read the actual words of the regulation or statute and we can have five people read it with five different interpretations of what it is. Some are written quite well, others are not. I think what we have, in this case, is that this was not a well articulated regulation. Temporary, itself, seemed to have occupied hours of our time in terms of the meaning as it is not defined in the regulations.

And so again, I think, as Mr. Parsons has said not rearguing the case because Ms. Miller brings up a lot of specifics that, I think, the Board did address and there is no need to readdress them here. I think it is fairly clear to us and I hold the strong feeling that we did have an excellent deliberation. I think the mere fact that we split on this and have

this ending vote shows that we have argued from every angle possible.

And again, I think, the difficulties looking at the plain words was difficult, in this case, and we therefore to and, in fact, everything that we do does look to what the meaning of the regulation or statute would be. So that being said, others? Ms. Miller?

VICE CHAIR MILLER: I just would like to say that, of course, when we deal with regulations, often they are not clear and we come up with different interpretations. And what I think is different in this case is the Board has come up with an interpretation that renders it meaningless and I don't believe that the Board is writing it out of existence. And in my understanding, is that is what the Zoning Commission is supposed to do. If there is a problem of this type of situation where we're not going to apply a regulation basically at all in any situation, we have said it can't apply any more, that's really, my understanding was, for the purview of the Zoning Commission and that a text amendment would be the proper course of action.

CHAIRPERSON GRIFFIS: Understood. But even in this summary of your position, you said that

the regulation was written so that while prisons are being built, we could temporarily house clients. I believe if you look back at the record, there was no evidence and there was no record and no one knew of any prisons that were being built. I mean, we can get into a lot of the substance of the piece. There is a point of which the regulation was written for and whether it was written in a certain time period, obviously it is in, so I agree with you that it does continue on until it is removed from the regulations.

But I think looking at the legislative intent gets to the substance and the meaning of the regulation itself. And I think that's what the Board looked at and found enough substantive information to base its findings on.

VICE CHAIR MILLER: Well, there is a difference. I mean, you could say that the motivation for the regulation was that emergency situation. But then it was left on the books. And I just think that the Commission must have made a determination, at least, that the zone was appropriate for that type of facility regardless of the motivating factor. And if it shouldn't be on the books any more, then I would think that would be up to the Zoning Commission to decide.

CHAIRPERSON GRIFFIS: Agreed. Others?

COMMISSIONER PARSONS: I have a question, Mr. Chairman.

CHAIRPERSON GRIFFIS: Indeed. Rather than making that a motion, why don't we go to, if there are no other comments and deliberation on this, we have a motion before us that has been seconded. The motion is to deny the motion for reconsideration. I would ask for all those in favor of the motion to signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: Aye. And opposed?

VICE CHAIR MILLER: Opposed.

CHAIRPERSON GRIFFIS: Abstaining? Mr. Moy?

MR. MOY: The staff would record the vote as 3-1-0 on the motion of Mr. Etherly, seconded by the Chairman, Mr. Griffis, to deny the motion for reconsideration. We also have in the file, Mr. Chairman, an absentee ballot from Mr. Zaidain, who was participating on the case, and his absentee vote would support the motion to deny, which would give a final vote as 4-1-0.

CHAIRPERSON GRIFFIS: Good. Thank you very much. Let's move on then.

BOARD MEMBER ETHERLY: Mr. Chair?

CHAIRPERSON GRIFFIS: Yes?

BOARD MEMBER ETHERLY: It would also be my intention to --

CHAIRPERSON GRIFFIS: Oh, I'm sorry.

BOARD MEMBER ETHERLY: -- make a motion for denial or move to deny the motion for a stay of the effect of the Board's final decision. And just as clarification for Mr. Parsons' consideration, that would be collapsing both the DCRA motion an the Bannum motion for the stay into the same motion, and that would be a motion for denial. I would invite a second.

VICE CHAIR MILLER: Could I just say that I would like to add a friendly amendment or whatever that we move to deny the stay as moot, since the motion for stay was -- or for a stay pending or reconsideration and we have determined not to reconsider. On those grounds, I would support it.

CHAIRPERSON GRIFFIS: Mr. Etherly?

BOARD MEMBER ETHERLY: Is that a second?

VICE CHAIR MILLER: It's a friendly amendment.

COMMISSIONER PARSONS: That's a request for a friendly amendment.

CHAIRPERSON GRIFFIS: Without complicating things, why don't we take that as a second, Ms. Miller, and deny the motion to stay and your comments in support of the motion?

VICE CHAIR MILLER: Fine.

CHAIRPERSON GRIFFIS: Mr. Etherly?

BOARD MEMBER ETHERLY: No disagreement, Mr. Chair. I would accept that as a friendly amendment.

CHAIRPERSON GRIFFIS: Okay. Any others? Comments? There is certainly more to comment, but I think that it is sufficient to say it is moot. If there is nothing further then, I would ask for all those in favor of the motion to signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: Opposed?

MR. MOY: The staff would record the motion as 4-0-0 and we also have the absentee vote from Mr. Zaidain, which would support the motion, and so that would give a final vote as 5-0-0. That was on the motion of Mr. Etherly, seconded by Ms. Miller.

CHAIRPERSON GRIFFIS: Thank you. Let's move on.

MR. MOY: The next application is 17139 of Thomas and Linda Waltz, pursuant to 11 DCMR 3104.1,

for a special exception to allow an addition to an existing single-family dwelling under section 223, not meeting the side yard requirement section 405 in the WH/R-1-B District at premises 4529 Lowell Street, N.W., Square 1605, Lot 67.

On April 6, 2004, the Board completed testimony on the application and scheduled this decision on May 4, 2004. The Board requested that the applicants submit revised elevation drawings. That was submitted. That was filed, dated April 20, 2004, and is identified in your case folders as Exhibit 29. There is also a response from the party opponent, Michael Sharpston, represented by Stephen Gell, the attorney, and that is dated April 27, 2004, and that is identified as Exhibit 30. And that completes the staff's briefing, Mr. Chairman.

CHAIRPERSON GRIFFIS: Thank you very much, Mr. Moy. Board Members, I'm sure you'll recall, we did ask several things to be submitted, as Mr. Moy has articulated. We have now in the record the elevation plans that show where the correct location of the fenestration, rather windows on that side. I think an important aspect to this application, of course, it is a 223 not meeting the side yard, is looking at what would be matter-of-right if they did comply with the

side yard.

The addition could extend back as far as it is now being proposed. What is at issue is how close to the property line it comes. The issues of great articulation opposition is the loss of privacy, specifically to the exterior deck in back. There would be nothing, in my understanding of this application, that would, in fact, preclude windows on that side of the applicant's house that would overlook an open exterior deck.

There was also issues of light and air and what it would block. What we have proposed, of course, it's just a second level addition and it is open below, which does allow continued or some continued air flow and light through that addition in the rear. Again, it was looking to the side yard aspects and not the dimension towards the rear of the property as that was not before us, and so we can assume that it is, in fact, conforming.

With that, I think it would be expeditious to continue under a motion to approve Application No. 17139, pursuant to the special exception that would allow the addition of the existing single-family dwelling under 223, which had not met the side yard requirements at 4529 Lowell Street, N.W., and I would

ask for a second.

VICE CHAIR MILLER: Second.

CHAIRPERSON GRIFFIS: Thank you. All right. Let me open it up to others that have any comments, deliberation on the motion.

VICE CHAIR MILLER: Well, I'll just make a little comment. Whenever somebody builds next door, does an addition, it almost always has some impact on light or privacy. And one area I was concerned about was the balcony and I saw that there is room for additional landscaping that would mitigate that. So I didn't find any other kind of impairment of light or privacy really that rose to the level of not granting this.

CHAIRPERSON GRIFFIS: Very well. Others? Yes?

COMMISSIONER PARSONS: I would like to talk to this issue of the windows. The windows, I assume, you have side by side of what was submitted and what was built. The window overlooking the adjacent neighbor's deck has been doubled in size and moved forward or moved toward the rear of the building. In looking at the floor plans, I see no reason to have done that. That is the room configuration hasn't changed and I don't see the

reason for those windows to be moved forward, which Mr. Gell is pointing out in his memorandum that these were not built according to permit, and do invade, if you will if that's the right term or potentially invade, the privacy on the deck in the adjacent neighbor's yard.

Mr. Gell suggested that they either be removed or opaqued. I'm not sure opaqued is the right answer, but it would seem to me that this room would be served well with the window as is depicted on the original drawing, rather than the double windows that exist now, and I just wanted to generate some discussion on that.

CHAIRPERSON GRIFFIS: It's an interesting point. I guess the difficulty I have is what is before us is the impact of the relief from the side yard.

COMMISSIONER PARSONS: Yes.

CHAIRPERSON GRIFFIS: And a fairly minimal relief. So if it's a given that this massing is allowed, even if they set it back and have a conforming side yard, the massing itself, the extension towards the rear is allowed.

COMMISSIONER PARSONS: Yes.

CHAIRPERSON GRIFFIS: Then what --

COMMISSIONER PARSONS: And the windows are none of our business.

CHAIRPERSON GRIFFIS: Right. Yes, so what brings us to being able -- you know, in that sense, Mr. Parsons, I would love to center those windows around the columns, because it makes me uncomfortable that there is a window right above a column. But I'm not sure why we would need to do that or should do that or whether we would have the jurisdiction to do that. Again, going towards a window looking out onto a open exterior deck, I wonder, first of all, what kind of privacy was expected from an exterior uncovered, unenclosed area, and that this massing is allowed to encroach back into the rear of the property.

COMMISSIONER PARSONS: Yes.

CHAIRPERSON GRIFFIS: How is it that one would not expect to be able to do that? Covering up the windows, I guess, the bottom line, I don't think-- two things I don't think that we actually have the strong jurisdiction to get in there and do that based on the evidence of the opposition that has been presented.

COMMISSIONER PARSONS: That's a fruitful discussion and in my view, privacy is a two way

street.

CHAIRPERSON GRIFFIS: Yes.

COMMISSIONER PARSONS: That is curtains will probably be applied to these windows.

CHAIRPERSON GRIFFIS: You're saying a two way street in terms of there is privacy looking into the room also?

COMMISSIONER PARSONS: That's correct.

CHAIRPERSON GRIFFIS: Which probably will need to be protected.

COMMISSIONER PARSONS: That's right.

CHAIRPERSON GRIFFIS: I see. Good point. Others? Excellent. I appreciate that being brought up. Okay. If there is no other discussion on this, than we have a motion before us. It has been seconded. I ask for all those in favor to signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: Aye. And opposed? Very well. Before we record the vote, Mr. Parsons, first of all, because I did overlook this, there were several things that Mr. Gell in addition also went into in terms of his submission.

COMMISSIONER PARSONS: Yes.

CHAIRPERSON GRIFFIS: And I think, first

of all, I'll take up item 2, which reads "The order is not intended to be interpreted as overriding building code requirements. Obviously, that doesn't need to be a condition of the order, because that is fact. We don't, in our decisions, ever override any sort of building or life safety requirements. Third, that there be a condition that our order goes to the plan submitted.

Also, that is included in every order that we have. It is actually the number one condition, although not enumerated, that we are approving plans that are submitted, which is why we have plans in this specific application submitted to show us. And so that would also not need to be specifically called out as it will be in order. So that any changes of probably most nature regarding this structure would either come before us or go under some other type of review. Okay. Mr. Moy, then.

MR. MOY: Yes, staff would record the vote as 5-0-0 on the motion to approve the application on motion of the Chairman, Mr. Griffis, seconded by Ms. Miller, also in support Mr. Mann, Mr. Etherly and Mr. Parsons.

CHAIRPERSON GRIFFIS: Thank you. Let's move on then.

1 MR. MOY: The next case application is
2 17152 of International Campaign for Tibet, pursuant to
3 11 DCMR 3104.1, for a special exception to waive the
4 rear yard setback requirements under subsection 774.2,
5 to allow an addition to an existing building in the
6 DC/C-3-C District at premises 1825 Jefferson Place,
7 N.W., Square 139, Lot 30.
8 On April 27, 2004, the Board completed
9 testimony on the application and scheduled its
10 decision on May 4, 2004. Before making -- well,
11 before scheduling its decision on May 4th the Board
12 requested that the applicant submit a certification of
13 historic eligibility and that was done and is
14 submitted in the case folder and was received on April
15 29, 2004, and that completes the staff's briefing,
16 Madam Chair.
17 CHAIRPERSON GRIFFIS: Thank you. And as
18 you have just stated, I am not on this case, and so
19 will be leaving and turn it over to the Vice Chair.
20 VICE CHAIR MILLER: Okay. I think I will
21 just recap some of the major facts of this case. This
22 property is located in the Dupont Circle Overlay Zone
23 in a medium-high density commercial zone. There is an
24 existing building that is a three story townhouse with
25 basement constructed in the late 1800s. Applicant is

proposing to add an addition to the historic building to provide space for an increase in staff and for conference and for presentation space.

In essence, the setback waiver is required to provide an addition that allows the building to be lower in height and compatible with historic preservation. As staff has indicated, we asked at the conclusion of the last hearing that the applicant submit a certificate by the State Historic Preservation officer, that the existing building is, in fact, a contributing building in a Historic District and that was submitted.

In that case, this building would not need any exemption from -- it would be exempt from all parking requirements. There was one request for party status by Peter Gambrills, who owns an abutting building. He didn't attend the hearing and the applicant represented that they had worked out their concerns and we denied the party status. This application is supported strongly by ANC-2B. OP supports it finding that the proposed addition and use conforms to the comprehensive generalized land use map, the comprehensive plan, goals and objectives for Ward 6 and the special exception test.

Specifically, applicant seeks relief from

774.1 and 774.9, that would require a 7 foot rear yard setback for the portion of the building that is above a height of 20 feet. The proposed height is about 47 feet at the middle of the rear of the building. The height allowed in this zone is 90 feet as a matter-of-right. Applicant in this case at the end of the hearing presented two possible roof designs. One was more interesting than the other.

In the event the one that is before us in the plans is a higher version than the alternative, which I guess applicant was saying they may have to resort to if the economics require that. But we took a look at that and decided that the relief that this order was going to would not affect the roof design. So whichever roof. Well, we can discuss this, but whichever roof they end up going with would be allowed under the order.

Specifically dealing with the special exception for the rear yard setback, the requirements that applicant has to meet are set forth in 774.3 through 774.6. 774.3 says that "Apartments and office windows shall be separated from other buildings that contain facing windows to a distance sufficient to provide light and air and to protect the privacy of building occupants."

774.4 says that "In determining distances between windows in buildings facing each other, the angle of sight lines and the distance of penetration of sight lines into habitable rooms shall be sufficient to provide adequate light and air." Office of Planning determined that while light, air and privacy would be affected to a certain extent by the addition, the impact would not be greater than that resulting from a conforming addition.

774.5 states that "The building plan shall include provisions for adequate off-street service functions, including parking and loading areas and access points." Because this building is a contributing building, it is exempt from the parking, so we didn't need to deal with that. Evidence at the hearing showed that there were minimal loading needs, mainly minimal office products that could be unloaded from the street. The Office of Planning was concerned about adequate maneuverability in the alley, but it was unrelated to the relief that was requested.

And I think Office of Planning had requested that the applicant consider providing an additional setback for the entire building, including ground level, which is not required by the regs, of 2 feet to give more maneuverability room in the alley

and the applicant rejected it and it's not really something that we can require.

774.6 "Requires the Office of Planning to coordinate reviews by other relevant District agencies." The Department of Transportation stated that the project should not have significant impact on traffic in the area. DPW did not submit written comments. But OP represented that it had discussed its concern about the alley with the DPW. The Housing and Community Development had no objections. Historic Preservation Office has approved the plans as consistent with the purposes of D.C. Historic Preservation Law.

That concludes my summary. So, I think, at this point, I would like to move approval and then we can hear other Board comments under motion. So I would move pursuant to 11 DCMR section 3104.1 to grant a special exception to waive the rear yard setback requirements under subsection 774.2 to allow an existing building at premises 1825 Jefferson Place, N.W., in the Application of International Campaign for Tibet No. 17152. Is there a second?

BOARD MEMBER MANN: Second.

VICE CHAIR MILLER: So at this point, I would like to open this up for comments by the Board

Members.

COMMISSIONER PARSONS: The only comment I always make is one of apology for me bringing up this roof issue. It has nothing to do with what we are here about. So what color or size roof they put on this building is not before us.

VICE CHAIR MILLER: Any other comments? Okay. Okay. Then why don't we call the vote then? All those in favor say aye.

ALL: Aye.

VICE CHAIR MILLER: Aye. Opposed?

MR. MOY: The staff would record the vote as 3-0-2 on the motion of Ms. Miller, the Madam Chair, seconded by Mr. Mann, also in favor of supporting the motion is Mr. Parsons. We have a Board Member and a Zoning Commission Member not participating on this case. I stand corrected. We have two Board Members not participating on this case.

The next case then --

VICE CHAIR MILLER: I'm wondering if we should just take a moment and see if we can locate the Chairman.

MR. MOY: Okay. Very well.

VICE CHAIR MILLER: I think he thought we were going to take longer than we did.

MR. MOY: Very good.

(Whereupon, off the record for a recess.)

CHAIRPERSON GRIFFIS: Very well. Let's continue on.

MR. MOY: Okay. Yes, Mr. Chairman, the next application is 17138 of James and Julie Edmonds pursuant to 11 DCMR 3103.2, for a variance from the minimum lot area requirements under section 401.3, to allow the conversion of an existing flat (two family dwelling) to a four unit apartment building in an R-4 District at premises 1325 Fairmont Street, N.W., Square 2860, Lot 819.

On March 30, 2004, the Board completed testimony on the application and scheduled its decision on May 4, 2004. In so doing, the Board requested the applicant submit the following: Post-hearing documents, a copy of the MRIS listing identifying the subject property and an economic analysis addressing uniqueness and other extraordinary or exceptional situation or conditions. And that is submitted by the applicant in your case folders as Exhibit 26.

We also have in the case folder an updated affidavit of posting to show that the property was posted for the requisite 15 days, and that is in your

case folders as Exhibit 27. The Board should note that the date on the affidavit of posting is April 20th and with 15 days, my math shows that it would be one day short, so the Board may want to waiver that, but that's to the Board's discretion. And that completes the staff's briefing.

CHAIRPERSON GRIFFIS: The affidavit is one day short or the posting itself?

MR. MOY: Yes, the posting. It is dated April 20th and 15 days would be May 5th.

CHAIRPERSON GRIFFIS: Okay. All right. I don't see any difficulty. In fact, the question is whether we would have to waive that as we have heard it. But does anyone have any objection to waiving the regulation for one day? Very well. Let's move on. Anything else then, Mr. Moy?

MR. MOY: No, that's it, Mr. Chairman.

CHAIRPERSON GRIFFIS: Okay. Thank you. Mr. Moy, that's a good summation on this. In addition to that, of course, we do have the Office of Planning's submission which is Exhibit 23 in this case. They did recommend denial of this application. We had ANC-1B, which also submitted a timely filed recommendation, Exhibit 22. The ANC was recommending approval. We did not have any parties in opposition.

And as you recall and what's interesting about this case and I think it's prevalent that this is not the first time we have had a case similar to this in terms of fact. There was perhaps some misunderstanding or some misinformation that was relayed. There was no official nature to that. There were several sources of information relating to whether this was a multi-family, meaning more than two units, dwelling in an R-4 Zone.

The MRIS, of course, was testified as providing some type of information. Of course, that is never relied upon for the official designation of conforming use or anything else in terms of the allowable massing, according to the Zoning Regulations. As you recall, there was also some testimony and submission by the applicant that someone in the Zoning Administrator's Office had mischaracterized how one calculates the allowable number of units available in an R-4 Zone.

Again, I don't find that that was very persuasive, because, I think, in the calculation and what was remembered to have been told may well have been misinterpreted or misunderstood. It doesn't really matter which party did the misinterpretation or the misinformation in that matter, as I think it,

first of all, would not have risen to the level of an official or final determination by the Zoning Administrator which one should have relied on.

Going to the test, of course, that is before us and that is for the area variance. Starting with the first, it is hard. I am not persuaded, first of all, with the exceptional situation that has been created here. It in an R-4 Zone and an easy reading of the regulation shows how to calculate what would be the allowable number of units to fit into this in terms of the conversion. In fact, I think, it is not unimportant to say we have had other applications before us for similar types of configuration and in this exact neighborhood.

So whether one would know of that or not, certainly in due diligence or perhaps even just talking to neighbors, it would probably come to light. But be that as it may, going to what the really unique characteristic is, I was not persuaded. Having to go then to the practical difficulty in the conversion, we did ask for, in order to kind of get, a better feel or understanding of what the practical difficulty in terms of how viable this project would be as a matter-of-right or as is being requested.

It's always difficult to fully rely on the

numbers, because, first of all, there is changing aspects of it. But, I think, more importantly it goes to really putting the Zoning Regulations into the relief from the Zoning Regulations into a realm of being market driven. Meaning, as these structures in certain neighborhoods in the District become more and more expensive as construction costs go up and up, do we then do away with the regulations of what is allowable in R-4 in order to make things economically viable to do projects?

Perhaps it isn't the Zoning Regulations that changed, but rather the product that is actually being built and offered. I do not think the regulations could fall to being diminished based on the market. Now, I do note the ANC recommending approval and the substance of a lot of the ANC's discussion and their reasoning for approval, I think, the Board fully supports also. But I can speak specifically of myself and that is here is a property that was under utilized or perhaps even badly utilized.

Certainly, I would like to see and I'm sure the Board shares the view of having this renovated, upgraded and having families or individuals living in it that would take care of it and also be an

integral part of the neighborhood and its surroundings. That being said, it doesn't rise to the level of adding units or, for that matter, subtracting units. That could be sufficiently provided for by a single-family home or a two unit or a three unit. All of them actually would rise to.

In terms of the public good though, ANC does speak to that, and I think this does meet the public good, because we can't get to the public good without getting through the first thresholds of the test itself. Going to whether it would impair the intent and integrity of the Zone Plan, that is very difficult to see how this would not. I was so moved that this was so good for the public and its surroundings. If this was to proceed based on the evidence and the facts in the record that we have now, there is absolutely nothing that I see that would preclude anyone else from being an application and the Board being bound by similar facts of the case to grant applications that would convert the entire block and every townhouse in sight to four or five or more units, for that matter.

And so I find that the last prong of the test, in terms of whether impaired intent with the Zone Plan and Map, cannot be passed. In fact, I do

1 believe that it may well, it would, in fact,
2 definitively impair the regulations. Others?
3 VICE CHAIR MILLER: I just want to add a
4 few comments with respect to the variance test. I
5 think in this case, it was clear that there wasn't
6 anything exceptional or different or unique about the
7 property itself. And so the applicant attempted to
8 make an argument that it was unique with respect to
9 zoning history, which has been upheld by the Court of
10 Appeals in Diaz Garate and by this Board in certain
11 situations, where there is a very strong and
12 compelling history of reliance upon official zoning
13 decisions of that nature.
14 And in this case, this just fell so far
15 short, he just said he asked a question to a Zoning
16 Assistant and relied on that. And I believe even at
17 the hearing he said that he didn't look at the Zoning
18 Regulations. And it just could not possibly rise to
19 the level of uniqueness with respect to zoning
20 history. Also, with respect to practical
21 difficulties, it is not enough that it is a bad
22 investment to meet that test, and that's basically the
23 case that he made, that he wouldn't get sufficient
24 return for what he paid.
25 We did give him the opportunity to come in

with appraisals and financial analyses to buttress his argument and that didn't happen. And I think it may not have happened because I think when he was at the hearing he may have realized that he was going to have difficulty even reaching the first threshold of uniqueness. And with respect to the ANC report to which we do give great weight, they did only address the third prong, which went to public interest impact, which the Chair has already addressed.

So I think this application does fall far short in requirements to meet the variance.

CHAIRPERSON GRIFFIS: Good. Others? Okay. If nothing further, it was pretty clear that this was, the base of this case was a financial practical difficulty. Although, there was weaved in the fact of this was -- this property was unable to meet the minimum area requirements, because the area requirements would go to the site, the lot itself that would accommodate them per 900 square feet, the number of units.

Again, the applicant put in that clearly they could not expand this and therefore it was a practical difficulty and went as far as saying that although the structure existed prior to the enactment of the Zoning Regulations, the enactment of the R-4

Zone in this did not preclude the use of this or any opportunity being foreclosed to an owner of this property. That being said then, anything else in addition? Any other items that we need to make note of? Very well.

If there is nothing further, then I would move denial of Application 17138 for the variance for the minimum lot area requirements under section 401.3, which would allow a conversion of an existing flat (two-family dwelling) into a four unit apartment building at 1325 Fairmont Street, N.W., and ask for a second.

VICE CHAIR MILLER: Second.

CHAIRPERSON GRIFFIS: Thank you. Deliberation on the motion that's before us? Additional comments? If none, then I would ask for all those in favor of the motion to signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: Aye. And opposed?

MR. MOY: Staff would record the vote as 4-0-1 on the motion of the Chairman, Mr. Griffis, to deny the application, seconded by Ms. Miller, also in support of the motion Mr. Etherly and Mr. Mann. And we have one Zoning Commission Member not participating

on the case.

CHAIRPERSON GRIFFIS: Thank you.

MR. MOY: The next application is 17136 of Africare, Inc., pursuant to 11 DCMR 3103.2, for a variance from the lot occupancy requirements under section 403, and a variance from the rear yard requirements under section 404, to allow an addition to an existing headquarters office of a charitable organization in the R-4 District at premises 440 R Street, N.W., Square 509, Lot 805.

On March 30, 2004, the Board completed testimony on the application, scheduled its decision on May 4, 2004, and requested that the applicant submit a roof plan, and that was filed by the applicant dated April 20, 2004, and is in your case folders identified as Exhibit 34. We also have received responses, timely responses from the party opponent, Barry Kreiswirth, and that exhibit is identified as Exhibit 35, dated April 27, 2004. And that completes the staff briefing, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you, Mr. Moy.

BOARD MEMBER ETHERLY: Mr. Chair, I would be very pleased to start off our discussion on this particular application, and I would perhaps preface my remarks by commenting that we are presented with a

somewhat complicated scenario, but not one that I believe is overly difficult. I will be speaking in support of the two variances, as requested, and then perhaps I would like to walk through my thinking as it relates to the three prongs that we are, of course, very familiar with with regard to the variance test.

First, of course, is the prong that speaks to the exceptional situation or condition, and we, of course, have had some substantial discussion of a number of cases that present the needs that may be offered by a non-profit organization. And I think, in this particular instance, that is one component of the exceptional situation and for the benefit of my colleagues, I'm referencing the Droudy case, of course, and Monaco. I do believe that those two cases are helpful and that the case has been satisfactorily made with regard to the programmatic needs of Africare, from the standpoint of its employees and its ongoing operations at the current site and in the present building.

I do, however, want to also guide my colleagues thinking with respect to the continuing constraints that have been discussed at length and I think in a very satisfactory fashion of the existing school building that the organization finds itself in.

A property that was constructed in 1883, if I recall correctly, with some very clear constraints as it relates to ceiling and floor heights, building columns and other aspects of the physical plan, which we received, what I felt to be quite compelling testimony from the architect on.

And so, therefore, I would strongly believe that that first prong has been met exceedingly well. Perhaps anticipating some concerns that may be expressed by my colleagues, I believe perhaps the piece where some discussion might be beneficial will be, of course, the practical difficulty prong, and I want to note that I am in agreement with the interpretation that has been provided by Corporation Counsel with regard to the application of the Droudy standard and the Monaco standard, in that neither one of those cases make the case for the second prong of the variance test.

We did receive, in the course of written submissions from the applicant, some language which would endeavor to apply the Monaco and Droudy language as it relates to the needs or objectives of a non-profit organization's programs as being sufficient for satisfying the second prong. And I want to note that I do not agree with that interpretation. However, I

do believe that when you look at the context of the existing building and the application, the plan that has been put before us, I do believe that there have been some practical difficulties that have been adequately identified by the applicant with regard to putting together a proposal that would be consistent with current zoning requirements.

The practical difficulties that I envision here, I'll begin, one, with respect to a piece that wasn't perhaps highlighted extensively by the applicant, but I believe something that is very critical here is the relationship of the existing Morse School to the annex that is before this Board in the current application. I believe it is very important that the Morse School, as a structure, in relationship to the proposed annex, if you will, deserves a measure of attention and consideration in terms of the placement of the annex and in relationship to the primary building.

So by that, I mean, in order to meet the side yard requirement, you could, of course, pull the rear of the proposed annex back from the point where it is currently suggested. But in turn to meet the programmatic needs that had been offered by the applicant, you would probably, not probably, you would

more than likely, and I believe we received testimony from the architect to this effect, you would have to cut into the existing courtyard to recoup some of that space that has already been lost.

Additionally, some of the parking that has been proposed underground in the current application would also perhaps be impacted in terms of loss of space if you had to cut into more of the courtyard space. What concerns me about cutting into the courtyard space, once again, is the interplay between the Morse School from a visual standpoint and also from an esthetics point, the interplay between the Morse School and the proposed annex. And I believe that the Morse School building itself is of a sufficient nature that there needs to be consideration given to maintaining the presence and, what's the other word I'm looking for, I'll just leave it at that, stature of the building, if you will.

So from a practical difficulty standpoint, I would be very concerned about a strict reading of the zoning requirement here that would result in a smaller courtyard that would, in my opinion, impinge upon the presence and esthetics placement of the Morse School building. Of course, I want to note to my colleagues that any additions to the Morse School

building itself are clearly out of the question here, giving some of the constraints that, I think, the applicant had talked through very extensively.

That would be my thinking on the practical difficulty aspect of this application. I would definitely like some comment, of course, on that particular prong. As it relates to the final piece of the variance test, perhaps it might be best to place my comments, if I could, in the context of the Office of Planning's report. And of course, my colleagues will recall that the Office of Planning is in opposition to the proposed variances. That opposition is consistent with the Office of Planning's earlier position or I should say position in the earlier application that was before this Board some years back. And that final prong, of course, is that the variance will not cause substantial detriment to the public good and would not impair the intent and purpose and integrity of the Zone Plan.

I believe what we have here is, in my opinion, a continuing asset to the community. That issue was discussed as some length in our prior application, but I believe it is very important that organizations of this type continue to find opportunities for a peaceful coexistence, if you will,

in our residential communities. And I think by virtue of the ANC support for this application that, in my mind, there is very little question that there is a detriment to the public good by the continued operation and presence of this organization in the Shaw Community, one of our more historic communities, I might add, here in the District of Columbia, from the standpoint of its ongoing contributions to the vibrancy of the city.

So in terms of just my opening comments, Mr. Chairman, without necessarily, at this point, putting it in the context of a motion, I will, at the appropriate time, be speaking in support or making a motion for approval of both variances for the aforementioned reasons and would, of course, invite the discussion, comments of my colleagues.

CHAIRPERSON GRIFFIS: Excellent.

BOARD MEMBER ETHERLY: Thank you.

CHAIRPERSON GRIFFIS: I don't disagree that, in fact, the Board has heard before the test for one uniqueness and practical difficulty as design constraints. And what I understand you saying is that you have an existing structure, an addition of which is being proposed, and in order to really give deference to the existing structure that has some

architectural stature, one would make the addition to accommodate that. And I am also understanding you to say that the courtyard that is created is also part of the submission by the applicant. It creates an open area that accommodates function, but also the openness and design sensibility of the block itself.

So I can understand your position in that realm. You also mentioned the interior constraints of the existing structure, and I know we did have that spoken to in terms of the existing stairs and also restrooms. As noted, the addition was going to accommodate a disproportionate amount of square footage for what we call the core elements, and that vertical circulation of stairs and also restrooms.

But OP holds the position that this could, in fact, be configured that it would not need the variance or perhaps would not need one or the other. It's a difficult position to take for the Board, I think, to think, you know, are there alternatives? But it does rise to a bit of interest, in my mind. So what is the practical difficulty that is so specific that it could not have been remedied to come in somewhat matter-of-right? I lay that out.

I want to digress for a moment to the beginning to say that this was, in fact, a use

variance that was granted by this Board. I do note that the party in opposition submitted quite a substantial, well, frankly, legal argument, it was supposed to be findings and conclusions, and raised a lot of new information on that. But what is interesting, well, first of all, let me just state I don't think he fundamentally understood the use variance and the area variance, the differences, and what the Board is to do or not to do.

But it does raise up the interesting point of is this a modification to the existing plans that were approved under a use variance? And, Mr. Etherly, in your talk and also in going to the applicant's submission, they were talking about how the original use variance was granted based on the existence of the structure on the site. Of course, use variance does run with the land, but being the fact that we have the structure that may well have gone fundamentally to making a case for a use variance wouldn't go, then you would need to modify the plans for which that use variance was granted.

Now, I don't think the order was so specific that the Board could reasonably answer that in this case. I think it is important to look at the fact that it was the use of this entire lot that was

spoken to and that, I believe, it is my position, in this specific case, not making decisions for any others, but in this specific case, we can look at this as a conforming use that is looking to add on to the lot of which it has been approved, and therefore we are at area variances.

So I lay all that out there for comment, if needed. Others?

BOARD MEMBER MANN: Mr. Chairman?

CHAIRPERSON GRIFFIS: Yes?

BOARD MEMBER MANN: I think this is, you know, a really difficult decision and there is a lot of information out there that has made this not so simple. But I think it is interesting that Mr. Etherly perhaps unwittingly raises something in my mind that leaves me questioning whether or not -- he talks about there has been some sort of office use center in a residential neighborhood. And I don't know if he meant to highlight that fact that this is an office use really in a residential neighborhood. And, I mean, I guess, you're saying that's okay in your mind.

BOARD MEMBER ETHERLY: In my mind, that question is not subject for discussion, because it has already been determined to be appropriate or perhaps

not being so coy about it, no, actually, I think I said it the way I wanted to say it.

BOARD MEMBER MANN: That clarification is good. I mean, you're right that does exist and that was debated in the previous action that allowed that office use to go in there.

BOARD MEMBER ETHERLY: But I will note perhaps as part of the discussion on the third prong that clearly there is the need to contemplate the impact of the operation there as part of our conversation and deliberation. So I didn't want to be mistaken as being flippant, saying that there is no place for giving consideration to that, because, of course, we have had some discussion about parking impacts and things along those lines.

But in terms of the operation and the programmatic needs, I am comforted by the continuing support of the ANC, which echos to support that was given on part of the community in the earlier application with regard to the operation and the programmatic uses of the site. I haven't heard anything which suggests that there have been any additional pressures parking or otherwise that have been created by the applicant.

Once again, of course, the current

application before us does include more than adequate parking and that has been identified or I should say acknowledged by OP. And I haven't see anything that suggests or heard anything from the testimony standpoint that would suggest that we might be opening the flood gates, if you will, to what essentially could be viewed almost as an embassy per se. Obviously, we had discussion about the diplomatic aspects of the operations of Africare.

But I would perhaps caution my colleagues not to necessarily mistake the use of that term diplomatic as a suggestion -- well, essentially, what we're eventually going to be talking about here is something that serves almost as an embassy in terms of the traffic that comes and goes. I didn't hear any testimony that suggested we're seeing that level of volume in the application here. So that was a long winded reply to your question, Mr. Mann, but it's an important point, but it's one that doesn't worry me.

CHAIRPERSON GRIFFIS: Well, there was evidence in the record of how many diplomats were coming in. In fact, that goes to some about the practical difficulty is they don't have a meeting room large enough to facilitate all the people that utilize the facility that are invited.

BOARD MEMBER ETHERLY: Absolutely. And I would treat that as part of my characterization or the applicant's characterization of their programmatic needs to be.

CHAIRPERSON GRIFFIS: Yes.

BOARD MEMBER ETHERLY: But I want to be very clear in distinguishing that perhaps from what might be the more traditional comings and goings in an embassy format or even a consular format where the traffic needs and/or the parking needs might be much more substantial than what I think we se here.

CHAIRPERSON GRIFFIS: Good. Ms. Miller?

VICE CHAIR MILLER: Well, with respect to the practical difficulty test, which I think is the one that we're all struggling with the most, with respect, there are two variances. One is for rear yard waiver and the other is lot occupancy. And with respect to the rear yard, I mean, I know in their application and in what Mr. Etherly was saying is that I think the rear yard has -- the practical difficulty with respect to the rear yard is that the building needs to be positioned or they would like the building to be positioned in a way to make the Morse School continue, they say its visual role is an important community landmark, so that the new annex does not

take away from the esthetics of that landmark building.

And I can appreciate that as a practical difficulty as to why you would have to site the building in a certain way. I'm struggling with the lot occupancy issue and I'm wondering if my colleagues might be able to help me on that as to why it has to be of the massing that it is. And what comes to my mind to some extent is some of the testimony of accommodating the core parts of the building, the mechanical parts, etcetera, leaving very little left for them to work with.

But I'm just not positive as to whether it could not have been a smaller building and therefore they wouldn't have had to seek this variance. So if my colleagues could comment on that, that would be helpful to me.

CHAIRPERSON GRIFFIS: Anyone want to pick that up? Let me see if I understand what you are asking for, that is you're talking about lot occupancy, why this can't be a smaller building and come in compliance. I think it's about 16.3 percent over the allowable. I'm not sure what that equates to specifically in terms of square footage. But what I know of the testimony, this is the way it was somewhat

presented.

First of all, a lot of what Mr. Etherly was really articulating is the rationale for the design, so the rationale for the massing itself. I think it makes some sense. Well, the testimony was that in the area that is now surface parking adjacent to the structure as you would put a structure, and as you note in the elevations there is an articulation of that small piece that seems to diminish the scale more in line with the residential townhouses adjacent to it.

So in talking about that, I think, an important aspect also is to remove the proposed addition from the existing structure. I think the testimony is that that makes some sense, actually have a division, so it appears as two structures even though, for Zoning Regulations, it is one.

Now, why does it need to be so big? Well, there is two elements that have now just been touched upon. One, you need to make that connection somewhere. The aspect of the covered area that connects the two buildings goes to lot occupancy. The massing itself and how it has been put on the site, one could say why isn't it just purely rectangular. And you will see if you move what is essentially on

the project north, on the top of the page and I'm looking at the ground floor plan that's part of the evidence here, really almost a third, roughly saying, is, you know, perhaps it's more appropriate to say back of the house functions. It's the stuff that has to be there to support the main function, and that's restrooms and janitor closets and storage and stairs, egress stairs.

If you look at the configuration that they have chosen to do in order to define this courtyard area and also make the connection to the existing structure, the stair is a very odd shaped piece. Most stairs would be a nice rectangle. It's a very efficient layout for a stair. This is not an efficient layout for an egress stair and it's based on the design decisions that have been made to connect to this building, and also to create the open space and the open courtyard.

I think one could take, and I think it was somewhat testified in the testimony, maybe not specifically as I'm going to say it, one could take the position that the massing here, although it's an increased lot occupancy, may actually create the appearance, the reality of more open space than if you came into compliance with the 100 percent lot

occupancy. I don't know that definitely, because I haven't laid this out, but I think that's essentially what is being stated here.

I don't disagree with the fact of trying to fit enough restroom fixtures within the addition that accommodates the entire lot or the entire structure takes up a disproportionate amount of space, meaning you need to have more of what you build in order to have those. They are also accommodating an elevator, which needs to be centrally located in order to be useful to the entire facility.

VICE CHAIR MILLER: So, I mean, I understand a lot of what you're saying goes to the core functions, which was presented in the testimony. Why is it required to be connected?

CHAIRPERSON GRIFFIS: Because you can't have two primary structures on a single lot.

UNIDENTIFIED SPEAKER: Been there.

CHAIRPERSON GRIFFIS: I think just off the top of my head.

BOARD MEMBER ETHERLY: And I'll note also, of course, that at Exhibit 34, part of the supplemental submissions, there was what I thought was very helpful detail that went to specifically how the annex use space has been divvied up, so to speak, in

terms of the programmatic needs and some of those core functions that I referenced and that the Chair referenced in response to your question, Ms. Miller.

I will also note, of course, that I think a number of things have been done leading up to this point in the process by the applicant to minimize as much as possible the impact. Of course, as the Chair noted, we are talking about what amounts to roughly a 16, almost 17, percent deviation or increase or what would otherwise be allowed here, but we have already seen, I think it was referenced in the testimony and in the written submission, that the annex footprint has already been reduced from what was originally proposed by pulling the front of the building away from the R Street property line.

And for me I think the Chairman perhaps summarized it somewhat better than I did in my opening remarks, and that is that when I look at the proposed interplay between these two buildings and the efforts to maintain an appearance in some aspects and in reality in others an open and airy lot that doesn't look as congested as it might otherwise be if it were done is more in step with the zoning requirements. That to me is a much more workable outcome.

So perhaps I'm also suggesting that with

the approval of the variances, while we, of course, are deviating from what is required under zoning, it might, in essence, help to better utilize the space from an Africare standpoint, but also from a community standpoint in terms of not simply creating a massive office complex that is going to overshadow the residential community adjacent to the proposed site.

VICE CHAIR MILLER: So I think what you're saying, and it might be the impression that I was getting from the drawings at the hearings, is that even though there is greater lot occupancy than what OP might have been recommending, that the feel or the appearance of the building is one of less massing. Is that --

BOARD MEMBER ETHERLY: That would be part of my argument and I think, as the Chair noted and as, of course, I would want to be clear to note, you know, OP doesn't buy that and that's fine. You know, I can simply agree to disagree with OP on this particular one, but I think it's a design and a proposal that works given the space constraints of the particular lot.

I think it maximizes in the best possible way the existing constraints, but also the strengths, the existing strengths of the existing building, the

Morse School, but allows the applicant to answer the programmatic needs in a way that doesn't simply put off for another two years, you know, what might be. I just think this gets the applicant where they need to be without doing a major disservice to the surrounding neighborhood.

CHAIRPERSON GRIFFIS: A quick clarification. OP is not recommending a certain lot occupancy. They are indicating that this does not meet the test for the relief from the lot occupancy.

VICE CHAIR MILLER: Right. I just thought I recalled something at the hearing where they were recommending perhaps an alternative design or placement of the building, and there was something like that and to me it was much less appealing than the design before us.

CHAIRPERSON GRIFFIS: Oh, I see. Okay.

BOARD MEMBER ETHERLY: Well, I think, if I recall correctly looking at the OP report, there was some specificity with regard to the rear yard setback and perhaps movement towards a more rectilinear design that would impact the courtyard space at what is the second full paragraph of page 3, but it would be my desire to not support movement in that direction, because I think, once again, that begins to interrupt

or disturb the vistas that are created within the property and probably also from outside of the property as you're looking in.

CHAIRPERSON GRIFFIS: Others?

BOARD MEMBER ETHERLY: Perhaps not hearing further discussion, Mr. Chairman, but remaining sensitive to perhaps the ongoing struggles of some of my colleagues, I would be comfortable to move motions separately with regard to the two variances. However, I could just perhaps play my hand and just move for both.

Mr. Chair, it would be my motion to move approval of Application No. 17136 on behalf of Africare, Inc., pursuant to 11 DCMR section 3103.2, for a variance from the lot occupancy requirements under section 403, and a variance from the rear yard requirements under section 404, to allow an addition to an existing headquarters office of a charitable organization in the R-4 District at premises 440 R Street, N.W., and I would invite a second, Mr. Chair.

CHAIRPERSON GRIFFIS: I'll second the motion for deliberation.

BOARD MEMBER ETHERLY: Thank you very much, Mr. Chair. I would posit that we have had rather substantial discussion, so I won't go through

entirely, but I will note that I do believe that the test here for the variance relief both with regard to rear yard and lot occupancy have been met in that, as we have discussed, the property is unique by reason of its exceptional narrowness, shallowness, shape, topography or other extraordinary or exceptional situation or condition.

As part of that analysis, discussion of case precedence as it relates to Droudy and Monaco with regard to the needs of a nonprofit organization, I think, are supportive of the first prong of the variance relief as it relates to both lot occupancy and rear yard.

However, I would also suggest that the existing constraints of the Morse School and the property, as the school is currently situated on the property, also create a uniqueness with respect to the property. With respect to the strict application of the Zoning Regulations causing exceptional or undue hardship, I do believe in this regard that if the applicant were compelled to strictly comply with the Zoning Regulations, that there would be a peculiar or exceptional practical difficulty with regard to the property.

And then finally, of course, with regard

to substantial detriment to the public good, I believe that the continued operation of Africare in the Shaw Community and in the District of Columbia at large is, in fact, supportive of the public good and the continuing vibrancy of this community. I will note for my colleagues, of course, that Africare has made itself open and available for use by the community on a regular basis of their existing facilities and will, of course, continue to do that should this application be approved.

And so with that, Mr. Chairman, I would be prepared to move forward with a vote.

CHAIRPERSON GRIFFIS: Thank you very much, Mr. Etherly. I would agree with a lot of your assessments with this case. First of all, I think Monaco is an important aspect or an important case to look at when viewing this application in terms of setting up its uniqueness.

The Office of Planning's report indicated that there was no uniqueness in shape or size of the property. I think Monaco leads us to the aspect of the nonprofits can, in fact, establish their exceptional condition based on their function in the requirements. There is evidence in the record that ties Monaco to this application in terms of the

importance of the neighborhood, the history and heritage of the neighborhood, also the existing facility themselves already on-site.

Going to the practical difficulty, I think you have hit quite a bit of the aspects, too. Once we have looked at the annex and the addition to the annex, what is it doing? It's actually supporting, as you say, the primary functions to this. Although, there is evidence in the record that they will be expanding their staff requirements, what is actually motivating the annex and, as you see, the actual amount of square footage being utilized is much more towards function space, and that is primary to what they do in terms of the conference rooms, in terms of the large auditorium. And then there is some kind of, I would even say, accessory or ancillary office space that's used on the third floor area.

One of the practical difficulties, of course, is they have the existing structure, which has, as is in the record, the masonry walls, the large staircase that was one of the original pieces. There has been slight reconfiguration of this structure in order to accommodate the existing headquarters. I guess one could actually argue well, why not gut the whole thing and reconfigure it. Going to that,

however, I think would rise also to a practical difficulty. And actually, one, fitting it all, two, putting in the amount of space that would be required based on the massing and the fenestration of the existing building, I don't think that it's reasonable to expect that that would be the logical first step.

Again, going to, I think, one of the most practical difficulties for the lot occupancy on this is the disproportionate amount of core factor that is being asked to be accommodated by the Building Code in the addition. It is essentially building quite a bit of square footage to accommodate the existing structure and a small portion of that, which is going to be occupied by the annex.

It is not unlike large commercial office building cases that we have brought before us that look to some sort of area variance based on the small footprint and based on the large core, and then the utilization of the floor itself becomes practically difficult.

One might say we have seen placement of cores in penthouses. We have seen FAR increases. We have seen quite a bit of area and special exceptions that go to that. I see that analogous in my deliberation in looking at something of this nature,

and I don't disagree that the design implications of aligning the rear of this and creating a central courtyard are important factors.

I terms of going to, and I think Mr. Mann brought up an excellent point, is here we have essentially a commercial use in a residential zone. What is the implication for that? And I think if we look to whether it would impair the intent and integrity of the Zone Plan or Map or, frankly, the public good, two aspects.

I will take the Zone Plan and Map. This has been granted a use variance, and so I will rely on the Board's previous decision and deliberation and the fact that it was not going to dismantle the zoning in this area or become in any way disruptive to the matter-of-right and conforming uses of the surrounding areas.

In terms of the public good, Mr. Etherly I thought was well said, in looking at what does this facility in this neighborhood or anywhere in the city, but specifically in this neighborhood, the pertinence of some of the community aspects that they are involved in, not the specific community aspects like they support the local flea market or, you know, all of that aspect, but there was a large amount of

testimony talking about how they are deliberately trying to continue to be an important facility, opening their doors, their large art collection that was testified to in terms of being able to be seen and appreciated, seen by the surrounding and, I dare say, probably the larger city community.

There is an important aspect of that in terms of its functioning and then in terms of the position of which it holds within the neighborhood itself. I think that's all I can add to Mr. Etherly's well stated position on this, but let me hear from others or if there's questions or concerns.

VICE CHAIR MILLER: I just want to say a few words. This is one that I have been struggling with, because I think it's somewhat of a close call. However, I will support the variance. I think that if you look at the test, the prongs of the test, that it does meet the uniqueness test specifically under Monaco, well, at least to one extent under Monaco, in that the needs of public service organizations are treated a little bit differently and are considered unique when considering that prong. It's also unique with respect to it shares the property with a landmarked historic school and had to configure its design in relation to that building.

With respect to practical difficulty, which is the one that has given me the greatest problem, I think there is evidence in the record that because of the siting with respect to the school, it has to be in a certain place and because it had to house many of the core functions, the restrooms, the air conditioning, the heating, the mechanical equipment, etcetera, there was not that much left for lot occupancy to provide the needs they were trying to meet for conference rooms and rooms for presentations.

Also, I mean, you could look at well, if they can't fit there, then maybe they should go to another location, and I think then you get to the testimony we heard about applicant's roots in the community and how important it is to the community for it to be located where it is, and I think that goes both ways. And in many cases, we have opposition to an expansion of an institutional use from the community and we haven't had that in this case, and I think that's an important factor.

We certainly did have opposition by a neighbor concerned about specific physical impacts and we can address that perhaps, but I think that that's an important factor, too, with respect to practical difficulty, that this community seems to be embracing

the institution and the alternative of moving is a huge practical difficulty. I think I will just leave it there. Thanks.

CHAIRPERSON GRIFFIS: Others, additional information? Let me just touch on one of the points of the opposition, party in opposition, of which we had talked about the noise from, well, the HV/AC equipment, and I think specifically there was some understanding on my part that there was complaints for the existing, and I would hope that the applicant, if this is to succeed, would look at perhaps repositioning anything that's existing that may well be creating disturbances for the adjacent neighbors.

But what we're looking at, of course, is what's being proposed, and we did ask for the roof plan of which was submitted into the record, and that to me clearly sets aside any concern that I had that the proposed accommodation of the mechanical systems would create some disturbance. I do not believe it would as it's on the top of the proposed annex. The cooling tower, of course, fits within a screening element. It's properly set back for the one to one distance from its height, so it will be upwards of the setback.

The screen wall itself is now on the plan

as being metal panels in the steel framework. That is a fairly rigid and, basically, it would be my understanding, it would set the sound going up. Already being well off the ground level, it seems to me, although one might well be able to hear it depending on which way the wind blows, I do not believe it would rise to the level of making it overly burdensome or burdensome at all. In fact, probably -- well, I won't say that. And it has been indicated that it would be painted and colored a light gray, which I think would make it not so visibly intrusive on the surrounding area.

One note, Ms. Miller, I will just bring it to everyone's attention. I think you did make a statement about this was a landmarked building and when you said that, I was rifling through my notes. I don't recall that this is landmarked at all. In fact, not seeing any sort of review by HPRB, I would even question if this is a contributing building in a historic district. I think that would, in fact, make it -- well, that would make this a different case in some respects. I'm not sure how substantively, but it may well. I don't know if others had an opinion or, Ms. Miller, you had an opinion.

VICE CHAIR MILLER: No, I'm sorry if it

came off stronger than it was. I think that applicants referred to the Morse School as an important community landmark and Mr. Etherly had said that the school dates back to the 1800s.

CHAIRPERSON GRIFFIS: Right.

VICE CHAIR MILLER: But putting them together does not make it an historic landmark.

CHAIRPERSON GRIFFIS: Of course, you may have now set someone's attention to go do a frivolous application or I should say. Okay. Anything else? Very well.

We have a motion before us that has been seconded. I would ask for all those in favor to signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: And opposed? Abstaining? Very well.

MR. MOY: The staff would record the vote as 4-0-1 on the motion of Mr. Etherly to approve the application, seconded by the Chairman, Mr. Griffis. Also in support of the motion, Ms. Miller and Mr. Mann. We have no Zoning Commission Member participating on this case.

The next case is Application No. 17147 of Bloom Builders, Incorporated, pursuant to 11 DCMR

1 section 3103.2, for a variance to allow the renovation
2 and reconfiguration of an existing building, formerly
3 known as the Broad Branch Market, for continued use as
4 a neighborhood market under subsection 2002.3, and a
5 variance from the rear yard requirements under section
6 404, and pursuant to 11 DCMR section 3104.1, a special
7 exception to establish a child development center, 60
8 children and eight staff, under section 205, in the R-
9 1-B District at premises 5608 Broad Branch Road, N.W.,
10 Square 1997, Lot 78.
11 The Board should note that on April 20,
12 2004 the applicant revised the project and withdrew
13 the zoning relief for the rear yard requirements.
14 Also on April 20th, the Board completed public
15 testimony on the application and scheduled its
16 decision on May 4, 2004. The Board did not request
17 any post-hearing documents, although the record was
18 left open to receive any written testimony that was
19 given in oral testimony on April 20th. And that
20 completes the staff's briefing, Mr. Chairman.
21 CHAIRPERSON GRIFFIS: Complete and
22 sufficient. Let's jump right into it. Of course, Mr.
23 Moy, we do appreciate that. We do have Office of
24 Planning's report, which is Exhibit No. 34, which I
25 think is important to look at and that is recommending

approval of the special exception, and also had comments in terms of the variance relief. We're going to be talking about that, of course, in our deliberation and the importance of what we're looking at and whether -- and what section we actually do go to.

I think of critical nature is the discussion or brief discussion on 2002.3 or .6 and there are other notes of that. Of course, we did have the DDOT recommending approval of the application and that is Exhibit No. 33. The Department of Health recommended approval of the child development center, and also gave an indication of the size of which it might be able to be licensed, Exhibit No. 28.

ANC-3/4G recommended approval of the use variance and also the special exception request. Exhibit No. 29 is the ANC's report and we'll get into some of the specifics, because there is a difference with some of the other aspects of the area variance in terms of that.

I think it's important to go first to -- well, let's go to the variances, I think, and then we can take up the special exception as we get through the rest of those pieces. Of course, what we have is the existence of the nonconforming use and whether now

we're looking at, depending on how our regulations are or which regulations we look to, one could say that this is just the structural modification of an existing, and which would be allowable under 2001.3 or you could go to 2002, which is a nonconforming use shall not be extended to portions of a structure not devoted to that nonconforming use at the time of enactment and the amendment of the title or to another structure.

And so what we have here in the case, I think, is very strong in terms of the aspects. Well, how do you modify this existing nonconforming use, which is allowable, in order to meet the contemporary requirements, that being Building Code, but most importantly life, safety and access, AZA access, how is that accommodated. And so is this just a modification to do this or is this, in fact, an extension?

Now, as I view extension, I really think if you have a base level and then, you know, let's think of it as a townhouse or a row dwelling and one might say you have the first floor and you have a use variance that's allowed for your trash transfer station on 1,000 square feet on the first floor of a townhouse. That's just to make it so absurd that

there can't be use in my example. Clearly, one would be precluded from extending, utilizing now the second floor or the third floor or the fourth floor, the first, second, third, extending that nonconforming use into that. I think that's pretty clear.

What we have here is something different though. Let's say, and I don't have the exact square footage, but to use just an example, we have an existing 5,000 square feet of the store and what it's asking to be able to do is move that 5,000, not even that 5,000, but less than 5,000 to an area where it can be accommodated for the Building Code, the lot safety and also the access.

So where do we go with that? Do we go to 2002.3? Do we go to 2002.4, which is ordinary repairs and alterations or modernizations may be made to the structure, or do we go to 2006 and use structures shall not be erected to house a nonconforming use? Comments?

VICE CHAIR MILLER: Well, I think that the plain meaning of the words in 2002.3 apply here, and that says "The nonconforming use shall not be extended to portions of a structure not devoted to that nonconforming use at the time of enactment or amendment of this title or to another structure."

I mean, clearly, we're talking about shifting the use to an area of the building where it was not before and I don't think it matters, at least with respect to this regulation, whether it's less square feet that's being utilized or not. It just says we're going to a new part of the building and that's where I think it governs.

I think that you can have an instance where you have a nonconforming use that takes up, say, the whole floor and you need to modernize that floor, then that falls under the modification for those purposes, but that's not the case here. We're moving to another part or they are moving to another part of the structure.

CHAIRPERSON GRIFFIS: Excellent. And I would absolutely agree that we're looking at 2002.3. In that, relief from it is a use variance?

VICE CHAIR MILLER: Well, if I'm not mistaken, I think that the applicant makes --

CHAIRPERSON GRIFFIS: What do you think?

VICE CHAIR MILLER: -- a case for a use variance here, and we should deal with the application before us. I mean, I think they can make the case for the use variance. It's harder than the area variance, so I'm not sure we have to determine whether an area

variance would be more appropriate or not.

CHAIRPERSON GRIFFIS: I see. So take on what has been submitted.

VICE CHAIR MILLER: And if they can --

CHAIRPERSON GRIFFIS: And how to phrase the interpretation.

VICE CHAIR MILLER: Exactly. If they can meet that tougher test and they make it, then why don't we just deal with it as presented?

CHAIRPERSON GRIFFIS: Excellent.

VICE CHAIR MILLER: Okay.

CHAIRPERSON GRIFFIS: I think we have concurrence. Mr. Mann?

BOARD MEMBER MANN: Yes, I agree.

CHAIRPERSON GRIFFIS: Indeed. Okay. Very well. Then we're looking at a use variance under 2002.3 and that, of course -- let me lay it out there and see if we need further information or comments on this.

Of course, as we have certainly mentioned, the structure of the property has previously served and is supported by the surrounding area to be a neighborhood market, and it was upwards of, if I recall correctly, 80 years in existence and certainly facilitates an excellent aspect of good urban living,

but that's my note.

The existing structure, of course, is -- well, let's go right to the use variance. What the case is before us is the fact that we have this use. Right now it needs to be upgraded and accommodated for several reasons. One, just based on the Building Code accessibility, the new laws that have been put in in terms of the renovation that would be required. But it also goes to the fact of, and I think fundamental to the use variance aspect, is even if those weren't aspects, let's look at -- well, those go to the primary aspect, that this isn't useable or a marketable space. If you obviously can't accommodate the requirements for the upgrade, you obviously won't be able to move people in or may set yourself up for a difficulty in terms of access.

There was clearly no detriment, well, clearly no detriment to the public good on this. We're talking about trip generations and there was an estimate of trip generations for the store itself. It was clearly going towards much more of the local neighborhood aspect. We did have some testimony that it may have created, well, some difficulty in that. I think the testimony really went more to the special exception, which we'll get to shortly.

Well, there was also some testimony by the applicant in terms of liquor license and whether one would be received. I guess, what was the exact wording? I can't remember the exact wording, but they were looking for it, couldn't find a liquor license is what it was, yes, interesting point. I don't see how that has any bearing on us or needs actually to be addressed, whether they have one or not. I personally don't see any difficulty in picking up a nice bottle of wine on the way home once in awhile and it certainly would make it convenient.

But nonetheless, that being said, I think the record sufficiently shows a strong case for this. I think it also doesn't hurt the case for the use variance in that this is not an intensity of use, but rather, frankly, a reconfiguration and I think that's what makes it almost on the edge of which way we go with this, whether this can be. I think the regulations are written such that it doesn't fit easily well into just coming under structural modifications or upgrades, and that Ms. Miller is correct in that we should go under a full use variance.

But I think that's all I have, at this point, on that. Is there other comments needed in

regards to that? Yes?

VICE CHAIR MILLER: I just think I will just address the three prongs as I see it here. I think it certainly meets the unique test in that it has been a neighborhood market for all those years and it's the only one of its kind on the block or in the area. Undue hardship, I think, it's interesting that the applicants made the case that if they didn't make it a market, the neighbors would make them make it a market by going to get it landmarked historically for that use. And public benefit, it's clearly serving the neighborhood or the community and there is no one out there saying they want it for any other use and they are clamoring for this use. So I think it falls very squarely within the three prongs.

CHAIRPERSON GRIFFIS: So the public support goes to the fact that it wouldn't be a detriment to the public good. Is that correct?

VICE CHAIR MILLER: Absolutely.

CHAIRPERSON GRIFFIS: Okay.

VICE CHAIR MILLER: If it benefits the --

CHAIRPERSON GRIFFIS: Right, just being clear that we're not running a popularity contest. But one of the important parts, and I don't know if I articulated it sufficiently enough, of course, one of

the uniquenesses and the practical difficulty is the existing structure and I think the importance, and I think we fully understand, the existing previous use, I mean, upwards of eight decades of it, which is the reliance.

And of course, as the applicant sufficiently submitted, the uniqueness does not necessarily need to arise directly from the land or the structure, but can be from the condition. This seems to have all of it, structure.

VICE CHAIR MILLER: Right.

CHAIRPERSON GRIFFIS: The condition, the previous use all alike, so there is no lacking for what I see as exceptionally unique conditions or the hardship in terms of accommodating the continued use. Okay.

VICE CHAIR MILLER: And I'm pretty sure we covered this, but just in case, I mean, I think that obviously the motivating factor is the bringing it up to code for plumbing and ADA and fire safety and all those things and that does cost a lot of money, and so there is also this. Well, there is a requirement to do it for all those reasons, and then there is the return that they would get from the market for the cost of doing all those things.

CHAIRPERSON GRIFFIS: Good. Yes?

VICE CHAIR MILLER: So all in all, if it's an area variance, a use variance, I mean, there's practical difficulty, there is undue hardship, there is public benefit, there is uniqueness. I think it's all here in this case.

CHAIRPERSON GRIFFIS: Excellent. Okay. Let's go to special exception then. We're looking at the establishment of a child development center that was for 60 children and eight staff, and that is under section 205 of the regulations. We have submissions related to the special exception. Actually, I think it's important to note we had, as I recall specifically, testimony not in opposition or necessarily in support, but it raised some very important understandings for the Board in looking at a child development center.

In one of the testimonies was the aspect of how do we know what this is or how it's going to be used or not, and I think it's an interesting point. I think there is nothing wrong. In fact, I think it's actually fairly -- well, maybe I shouldn't. I think we have sufficiently enough information to understand what approval of a special exception for a child development center would be on this site. We do have

the numbers, which is 60 children, and I do believe that we are looking at that number as on-site, and then the eight staff members, which would also be an on-site number.

We can, through experience and the testimony that has been provided, note what that would, in fact, create in terms of compliance with 205. In terms of meeting all the applicable codes and licensing requirements, the March 19, I believe it was, Department of Health memo recommended that approval, basically, recommending the fact that they could come into compliance based on the information that was provided to them, also in terms of assisting and satisfying the city's desire for licensed child care services.

In terms of the location and the design, some of the or one of the objectionable aspects to it was that there would be no screening. One of the conditions that we proffered by the applicant was to provide the screening at the area that was located adjacent to the outside space of the child care center. It seems to me that that would accommodate no matter who the actual provider or operator would be, would provide the same element that would diminish any sort of potential adverse condition on the surrounding

area or, specifically, on the direct adjacent neighbor.

The fact that they removed the rear yard relief request, I think, it also an important aspect of the design that really moved the structure and the massing away from the adjacent neighbors, and I think that really substantially diminishes whether that relates specifically. Well, it does relate specifically to the special exception.

There was the traffic engineer's report and that there was also the additional accommodations and recommendations, the traffic and parking study that was submitted that recommended certain aspects, and that is drop-off and pickup times and that would be mostly accommodating the schedules of the adjacent elementary school, so that they wouldn't overlap. I think that is an important aspect and a reality that should be accommodated.

It doesn't put into times, as I see it, for the child care center, unreasonable times necessarily for dropping off or picking up, and I certainly think that it could be accommodated reasonably well if everyone was aware of the requirements for that.

The minimal amount of parking was also

accommodated on the site. It looks as though, from the site plan that we had, that the required, I believe it's four spaces, could be accommodated. I think perhaps, well, you could certainly possibly even find more efficient ways to put a few more cars in there, but I think that that has been dealt with.

I can run through all of them, 205.5, 205.6, but I think it's sufficient to say that it's in the record and I do think the applicant's submission clearly lays out how each of those requirements have been met. I think the Office of Planning's report also is an excellent analysis in terms of the special exception request.

If I'm not mistaken, there was also testimony from the applicant that the applicant is going to add appropriate landscaping to the area, but wasn't there something of the existing large tree? Were they going to --

UNIDENTIFIED SPEAKER: The cherry tree?

BOARD MEMBER MANN: The cherry tree?

CHAIRPERSON GRIFFIS: They were going to preserve it. Right, they were preserving the cherry tree. That's right. Okay. Isn't there something about our American heritage with a cherry tree?

VICE CHAIR MILLER: It's the cherry tree

and the blue house.

CHAIRPERSON GRIFFIS: Well, I was going to let you talk about the blue house, because I get a little bit loopy when I get into that one. Okay. Let me let others then add on to anything.

VICE CHAIR MILLER: Well, what is different about this child development case is that we don't have the operator before us, and so we were kind of struggling with what kind of conditions we can or we should put here, and they are going to be less specific than they would be if the operator was here.

So I was just trying to rummage through and make sure I was looking at all the conditions that were proposed. Some of the conditions, the one that we were just referring to, like with respect to the cherry tree, that's in the ANC report, but basically that's not something that I would think we need to add to our order.

There are certain agreements that they have with the Redevelopment Team, as it's called, so that's the cherry tree and even in that case, they were talking about a day care center affording first priority preference to neighbors for admission to the child development center and there isn't even an operator, so there is no way to really enforce that.

And so that's not something we're obviously going to-- I wouldn't recommend that we would incorporate in our order.

So anyway, actually, I mean, there are things that they agreed to and I don't know that we need to put them in our order or not. I mean, there is one about the back of the entire property will be fenced in with a wood 6 foot high fence.

CHAIRPERSON GRIFFIS: Well, I think that is --

VICE CHAIR MILLER: Is that something we can do?

CHAIRPERSON GRIFFIS: Yes, I think that goes to the screening and it was one of the --

VICE CHAIR MILLER: Okay.

CHAIRPERSON GRIFFIS: -- areas of objection, so I think it would be appropriate as it has been proffered by the applicant.

VICE CHAIR MILLER: Yes.

CHAIRPERSON GRIFFIS: To put that in.

VICE CHAIR MILLER: And that's something that wouldn't change no matter who the operator was, so I think that is a good one.

CHAIRPERSON GRIFFIS: Okay. And what about aspects of the TMP?

VICE CHAIR MILLER: Yes.

CHAIRPERSON GRIFFIS: I mean, certainly, a lot of these have more encouragement. You know, and let me just note in terms of your comment, it would be different if there was an operator, and I had the same feeling. Although, if one was to think about it, if we had a new child development center being established, so that there is no history, there is nothing been before, so that we don't know what it would be, I think it would be no different than what we're doing in this aspect. We need to look at what is being proposed and then project out, through our knowledge, through the regulations and through other cases that we have seen.

VICE CHAIR MILLER: Yes.

CHAIRPERSON GRIFFIS: I think more often we see child development centers that are, in fact, in existence and then have either evidence for or not of objectionable conditions of which we end up perhaps maybe trying to remedy or diminish. Here we have a clean slate and laying it out, which I think goes to also the timing of it, and we may well want to look at something on the nature of three years for approval of the special exception, although I'm open to suggestions on that also.

One of the points, I think, from the traffic and parking study that was done on the TMP, of course, the TMP will be utilized by the owner of the property and, therefore, the CDC, the child development center. As I said, a lot of them go to what we don't necessarily need to say like parents and staff must legally park when dropping off or picking up students, obviously not a condition we would put on ours, because that's true and we don't regulate the parking.

But the one that says "The CDC drop-off and pickup periods should be dispersed and should not coincide with drop-off and pickup times at Lafayette Elementary School," I think that's important and I see no reason why they wouldn't want to try and coordinate that aspect. Of course, the other is the numbers of staff and children, which is part of what the applicant has requested. That's all I see at this point.

VICE CHAIR MILLER: Okay.

CHAIRPERSON GRIFFIS: Oh, there was the talk about the first priority to the neighborhood. I think we ought to have a monetary fine based on a proportion of the enrollment that is taken outside. Actually, that is a very big joke. I think that it is

a critical point and I support that 100 percent. I think that does go kind of beyond our jurisdiction in terms of regulating that. It is one of the top priorities of community's comments, and I think it is. Again, I can say in all seriousness, I think that is an important aspect to make this a community oriented, community utilized facility.

So I note that the applicant had testimony to the effect of who they are talking about running this is familiar with and the neighborhood is familiar also with, so I do not see why that wouldn't happen. And in terms of construction agreement, I also think that that is something that can be accommodated outside of this Board and should be done and I fully support it. Okay. Anything else?

VICE CHAIR MILLER: Well, I would just like to say that I certainly concur with your assessment of supporting a lot of these conditions, and just I'm glad that there are agreements already in place, it seems, and then the question for us is just what do we need to put in our order and what don't we.

CHAIRPERSON GRIFFIS: Good. So do we know what we're putting in our order?

VICE CHAIR MILLER: Well --

CHAIRPERSON GRIFFIS: I do. I'm wondering

if you do.

VICE CHAIR MILLER: I don't know how you want to proceed. I mean, I think that we should kind of reaffirm exactly which conditions are going to be in there, but I don't know if you want to go through the elements of meeting the special exception first and then do the conditions.

CHAIRPERSON GRIFFIS: I thought we just did that. Any other aspects of 205 you want to deliberate?

VICE CHAIR MILLER: Let me see. I think that they do meet the special exception test there.

CHAIRPERSON GRIFFIS: Let's proceed this way and then we can get into everything else. I would move approval of Application 17147 of Bloom Builders, Inc. That is the variance to allow the renovation and reconfiguration of the existing building. It is for the continued use of the neighborhood market under section 2002.3, and a special exception to establish a child development center and that development center is, of course, for the 60 children and eight staff under section 205, and this is at the premises of 5608 Broad Branch Road, N.W., and I would ask for a second.

BOARD MEMBER MANN: Second.

CHAIRPERSON GRIFFIS: Thank you very much,

Mr. Mann. I think we have well articulated the variance under 2002, and so I won't go back on that. I think 2005, perhaps everyone wasn't aware, but that's what I was walking through of all the aspects in terms of sufficient off-street parking, you know, the classic aspects and whether it's safe and appropriate conditions for pickup and drop-off of the children. Applicable code requirements can be met. Outdoor play space should be provided and located and designed, so it won't create any objectionable impacts.

We also have, of course, the whole design jurisdiction over everything involved in this application, which under special exception is at 205.6. I didn't see anything evidenced outside of what we have already talked about in terms of the applicant has already understood that they are going to be landscaping and then preserving some of the existing, the cherry tree and such.

There was no testimony that there was going to be off-site play areas provided, and so that was not the critical or not an aspect that we need. They will, of course, I can reasonable assure, utilize some of the other areas that are in the surrounding. Rather, the section goes to it would be unsafe to

utilize those off-site and I don't think there was any evidence that it would be, in fact, unsafe. And then the location of other centers in 1,000 feet, there was no evidence that that was done.

In terms of the conditions of the special exception, I think we talked about one, a time which I will hear from other Board Members on the time that we put on the special exception. The other was the first aspect of the TMP noting, of course, that there was a TMP done. The first aspect was that drop-off and pickup would be coordinated with the schedule of the starting and ending of the elementary school that's adjacent to the property.

VICE CHAIR MILLER: Let me just interrupt you.

CHAIRPERSON GRIFFIS: Sure.

VICE CHAIR MILLER: Just so that we're specific though. Are we going to adopt the language as presented regarding the drop-off and pickup. Can I read it and see if it's amenable to you all, so that we know exactly what we're putting in there?

The way it's presented, it says "The CDC drop-off and pickup period should be dispersed and should not coincide with drop-off and pickup times at Lafayette Elementary School. School begins at 8:45

a.m. and ends at 3:15 p.m." Is that amenable to you?

CHAIRPERSON GRIFFIS: Yes, I don't have any difficulty with that language.

VICE CHAIR MILLER: Okay. Yes.

CHAIRPERSON GRIFFIS: No, I know. I read parts of it, not the last part of it on the record previously. No, I think that's fine.

VICE CHAIR MILLER: Okay.

CHAIRPERSON GRIFFIS: I don't have any difficulty with doing that.

VICE CHAIR MILLER: So I think then the next question is there are six more conditions that are set forth in the TMP, and do we want to include any of them in our order?

CHAIRPERSON GRIFFIS: Okay. I'm sorry if I wasn't clear. I went through all those and, first of all, a lot of them, for instance, parents must legally park, 4.

VICE CHAIR MILLER: Another legal one.

CHAIRPERSON GRIFFIS: 2 and 3, which go to parents should be discouraged. Well, I mean, those are more directions in terms of management. I think the first addresses that. If they are to coordinate with Lafayette's opening and closing, well, then of course there will be a point of which that will be

specific on when dropping off and picking up will accommodate. I don't see anything useful in putting in a kind of direction of what should be discouraged.

VICE CHAIR MILLER: I agree.

CHAIRPERSON GRIFFIS: Unless we preclude them from dropping off and picking up, at those times, of which I really don't want to do, because that does become -- it seems to be more of the micromanaging of the program and I don't see any reason outside of the first that was evidenced in the record of how we should define when drop-off and pickup should happen, right, meaning that the impact of Lafayette being across the street is what was evidenced.

VICE CHAIR MILLER: Right.

CHAIRPERSON GRIFFIS: So us then saying and you are not allowed to do certain things goes a bit above and beyond.

VICE CHAIR MILLER: Sometimes we include a provision, such as number 7, which deals with staff assisting children to and from the cars.

CHAIRPERSON GRIFFIS: Right. Although, what I see as part and implicit in the licensing and also -- well, that's fine. I have no difficulty with that, which is staff persons of the development center should assist children to and from cars during peak

pickup and drop-off times. I think that's fine. Mr. Mann?

BOARD MEMBER MANN: I don't have any problem with it either. I'm just curious why would we put that in there? Isn't that something, again, a management issue?

CHAIRPERSON GRIFFIS: I think it is. I think the way I would get to going there as part of the provision of 205 is that it has to be reasonably designed or managed to have safe conditions for drop-off and pickup. It seems to go to that. I have not personally seen an application that I can remember that they didn't do that, but I don't think there's any harm in putting it in.

BOARD MEMBER MANN: Okay.

VICE CHAIR MILLER: Well, the only reason I would put it in is because the TMP found that it was necessary or a good idea to do it.

CHAIRPERSON GRIFFIS: Right.

VICE CHAIR MILLER: Yes.

CHAIRPERSON GRIFFIS: Agreed.

VICE CHAIR MILLER: Okay. All right. So that's number 2. Okay. With respect to 205.6, we have an agreement by the applicant to add appropriate landscaping around the property, surrounding the

property. I'm just throwing it out whether we need to put in a condition or not that they shall add appropriate landscaping.

CHAIRPERSON GRIFFIS: No, I don't see that as a condition. I don't think there is evidence enough in the record for me to understand exactly what the objection is nor to somehow design what the landscaping or write a condition that's actually measurable and enforceable. Love the word appropriate, but what's appropriate to me may not be to them. I think the citing itself and the revisions of the plans were sufficient and I think that, based on what's going to be there, I think that the applicant, the owner, quite frankly, will, on his own accord or her own accord, properly landscape the area.

VICE CHAIR MILLER: Okay. I just want to throw it out, but I also think that when an applicant agrees to do something in an application, that they would follow through and do it without our making it into a condition.

CHAIRPERSON GRIFFIS: Oh, I agree. No, I agree.

VICE CHAIR MILLER: Yes. So we'll note that they did that. Okay. That brings me to the third condition, which would be the back fence of the

entire property against the woods, a 6 foot high fence.

CHAIRPERSON GRIFFIS: Right. Right.

VICE CHAIR MILLER: Okay.

CHAIRPERSON GRIFFIS: That's number 3. Is that correct?

VICE CHAIR MILLER: On my count.

CHAIRPERSON GRIFFIS: Okay. Anything else?

VICE CHAIR MILLER: The time.

CHAIRPERSON GRIFFIS: It is now -- okay, let me hear.

VICE CHAIR MILLER: I think this one should be a shorter time, rather than a longer time, since we don't have the operator before us.

CHAIRPERSON GRIFFIS: For instance?

VICE CHAIR MILLER: And it's a new use. I don't know. Your three years that you suggested might be appropriate. I wouldn't say longer than that.

CHAIRPERSON GRIFFIS: Okay. Mr. Mann?

BOARD MEMBER MANN: Is that three years from like today?

VICE CHAIR MILLER: No.

CHAIRPERSON GRIFFIS: Three years from the issuance of the order.

BOARD MEMBER MANN: Three years from the issuance of the order. And when would they anticipate having an operator and starting operations?

CHAIRPERSON GRIFFIS: We can make a condition of three years from the opening of the child development center.

BOARD MEMBER MANN: Okay.

CHAIRPERSON GRIFFIS: I think I understand your concern, is that they haven't even built the facility.

BOARD MEMBER MANN: That's right.

CHAIRPERSON GRIFFIS: And it could take two years.

BOARD MEMBER MANN: Right.

CHAIRPERSON GRIFFIS: And then there wouldn't be any reason or there wouldn't be any history for us to look at in three years.

BOARD MEMBER MANN: Right.

CHAIRPERSON GRIFFIS: So we could do that. I mean, I think if I understand the Board's concern, it is the three year track record of functioning. Is that right?

VICE CHAIR MILLER: I would rather have the time be measured from the date of the issuance of the order than some date when they are operating, so

if that would mean four years instead of three years, I could go there. I think we really need to measure from the date of the order.

CHAIRPERSON GRIFFIS: Okay. Keeping consistent with other things in our standard operating procedures.

VICE CHAIR MILLER: Yes.

CHAIRPERSON GRIFFIS: Well, then I would say we would probably do five years. I mean, we often do three, five, 10, 15.

VICE CHAIR MILLER: Okay.

CHAIRPERSON GRIFFIS: Unlimited, a nice round number. Good?

VICE CHAIR MILLER: Good.

CHAIRPERSON GRIFFIS: Everyone's clear on that? There it is. Then boy, do we have a motion?

VICE CHAIR MILLER: Yes.

CHAIRPERSON GRIFFIS: Yes. There is a motion before us that has been seconded and now conditioned. Is there further deliberation or discussion on the motion? If not, then I would ask for all those in favor to signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: And opposed? Abstaining?

MR. MOY: The staff would record the vote as 3-0-2 on the motion to approve the application, the motion made by the Chairman, Mr. Griffis, seconded by Mr. Mann. Also supporting the motion, Mrs. Miller, the Vice Chair. We have a Zoning Commission Member not present and not voting, and we have a Board Member not participating on the case. This motion also includes three conditions.

Oh, I stand corrected. We have a Zoning Commission Member with an absentee ballot to approve the application with conditions as imposed by the Board, so that would bring the final vote as 4-0-1 as the final vote, and that's the absentee ballot of Mr. Hood, the Zoning Commission Member.

So as I was saying, we have three conditions to the approval. Shall I go over that or are we all set?

CHAIRPERSON GRIFFIS: Okay.

MR. MOY: Okay. Very good.

CHAIRPERSON GRIFFIS: Four conditions, the time is the last one.

MR. MOY: Time? Thank you.

CHAIRPERSON GRIFFIS: But we'll make sure it's all right. Very well. Thank you very much. I do believe we can do a summary order on this, Mr. Moy,

is that correct or not is it correct? That's what I would suggest unless the Board has any difficulty with that.

MR. MOY: Yes.

CHAIRPERSON GRIFFIS: Good.

MR. MOY: Yes, sir.

CHAIRPERSON GRIFFIS: Anything else for us in the morning session then?

MR. MOY: No, sir.

CHAIRPERSON GRIFFIS: Very well. Thank you very much. Then I can adjourn the morning session of the 3rd of May '04. In terms of returning for lunch, we're going to just take a quick 45 minutes, so we should be back by 1:45. We'll get right into the afternoon session and move quickly through it. Thank you all.

(Whereupon, the Public Meeting was concluded at 12:59 p.m.)