

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY
MAY 18, 2004

+ + + + +

The Public Hearing 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 MILLER	Vice Chairperson
CURTIS ETHERLY, JR.	Board Member
JOHN MANN	NCPC

ZONING COMMISSION MEMBER PRESENT:

ANTHONY HOOD	Vice Chairperson
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OFFICE OF ZONING STAFF PRESENT:

Clifford Moy	Acting Secretary
Beverley Bailey	Office of Zoning

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OFFICE OF PLANNING STAFF PRESENT:

Arthur Jackson	Office of Planning
Travis Parker	Office of Planning
Karen Thomas	Office of Planning

OFFICE OF CORPORATION COUNSEL PRESENT:

Alan Bergstein, Esq.
Lori Monroe, Esq.
Sherry Glazer, Esq.

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

9:55 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. May I call to order the public hearing of the Board of Zoning Adjustment of the District of Columbia for 18 May 2004.

My name is Geoff Griffis. I am Chairman.

Joining me today is Ms. Miller, the Vice Chair. Also Mr. Etherly our esteemed member. Representing the Zoning Commission is Mr. Hood with us all day today and representing the National Capital Planning Commission is Mr. Mann.

Copies of today's hearing agenda are available to you or for you. They are located where you entered into the hearing room. Please pick one up and you can see what we will accomplish for the rest of the day and where you are on the schedule.

Several very important technical aspects attended to all hearings before the Board of Zoning Adjustment and that is we are recorded. We're recorded in two fashions currently. First of all, the recorder who sitting on the floor to my right is creating a transcript which will go into the record.

Secondly, we are being broadcast live on the Office of Zoning's website.

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1 So, attended to both of those, there are
2 several things. First of all, we ask that people
3 please refrain from making any disruptive noises or
4 actions in the hearing room which would obviously
5 disrupt us getting the proper testimony into the
6 record and for us listening to it.

7 Also, I'd ask that people turn off cell
8 phone and beepers at this time also so that it does
9 not create any sort of disruptions.

10 When coming forward to speak to the Board,
11 there are several things that you will need to do.
12 First of all, two witness cards need to be filled out
13 prior to coming forward. Witness cards are available
14 at the table you entered into the hearing room and
15 also at the table where you will provide us testimony.

16 Those two witness cards go to the recorder who sits
17 to my right prior to coming forward.

18 When you do come forward to give testimony
19 to the Board, I'd ask that you make yourself
20 comfortable. You will need to state your name and
21 your address for the record when starting. You only
22 need to do that once and that will obviously give us
23 the appropriate information to give you all the credit
24 for the important things that you are going to tell us
25 this morning.

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1 That microphone in front of you should be
2 on and I will give you assistance on how to turn it
3 on.

4 We do ask that people also try to be
5 attended to turning the microphone off when they're
6 finished speaking. We do get feedback for some reason
7 on these microphones in front of us, but I will give
8 you instruction if that ends up happening.

9 The order of procedure for special
10 exceptions and variances is first we start with
11 statement, witnesses of the applicant.

12 Second, we hear from any government
13 agencies that are reporting on the application such as
14 Office of Planning or Department of Transportation.

15 Third, we will hear from the Advisory
16 Neighborhood Commission.

17 Fourth, we will hear from persons or
18 parties in support of the application.

19 Fifth would be persons or parties in
20 opposition.

21 Sixth, we give the opportunity for the
22 applicant to sum it all up and give us any
23 conclusions.

24 Pursuant to Section 3117.4 and 3117.5, the
25 Board has full jurisdiction to set time limits on each

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1 case presentation, party participation, and anything
2 else attended to the application.

3 Persons giving testimony are also provided
4 three minutes to tell us what they would like us to
5 know. We will assess our time restraints on each
6 application as we go forward if it is appropriate to
7 do so.

8 Let me just say though importantly in all
9 aspects of every application cross examination of
10 witnesses is permitted by the applicant and parties in
11 the case. The ANC within which the property is
12 located is automatically a party in the case.

13 This Board does have full jurisdiction
14 over limiting, directing, and making sure that all
15 cross examination is on point and within the
16 jurisdiction and facts of the case and again, I will
17 be more specific on individual items as needed.

18 The record will be closed at the
19 conclusion of each hearing on each application. So,
20 we ask that anything that you want us to know, you
21 tell us today or you submit it in writing and after
22 the conclusion of this hearing, of course, we would
23 only accept information that is specifically requested
24 by the Board and the Board will be very specific as to
25 what is to be submitted and when it is to be submitted

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1 into the Office of Zoning.

2 After that information is received, of
3 course, it goes without saying the record is then
4 finally closed. No other information is accepted into
5 the record.

6 That's important to note because the
7 record that's established before us based on the
8 transcript that we're creating, based on your personal
9 testimony and parties' testimony and also on any
10 written submissions, that creates our record. That
11 record is what this Board looks only at and
12 specifically at in determining its deliberation and
13 decision.

14 Attended to that, we ask that people
15 present today not engage Board Members in
16 conversations so that we do not give the appearance of
17 receiving information outside of that important record
18 that is being created before us today.

19 I believe that's all I need to say.
20 Perhaps I've said more than I should, but those are
21 all very important aspects to understand. If there
22 are any questions, of course, I would absolutely be
23 able to answer those when you come forward.

24 But, let us now consider any preliminary
25 matters. Preliminary matters are those which relate

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1 to whether a case will or should be heard today such
2 as requests for postponements, continuances or
3 withdrawals or whether proper and adequate notice has
4 been provided.

5 If you have a preliminary matter for the
6 Board, meaning if you believe the Board should not
7 hear a case today or you are not prepared to go
8 forward with a case today, I would ask that you come
9 forward and have a seat at the table as an indication
10 of having a preliminary matter.

11 I would say very good morning to Mr. Moy
12 who's with use from the Office of Zoning on my close
13 right. Ms. Bailey who is on my very far right and
14 also Ms. Monroe representing Corporation Counsel.

15 Is the staff aware of any preliminary
16 matters for the Board's attention at this time?

17 MS. BAILEY: Mr. Chairman, members of the
18 Board, and to everyone, good morning.

19 No, sir, staff has none.

20 CHAIRPERSON GRIFFIS: Good. Thank you
21 very much.

22 Then with that, I would ask that anyone
23 contemplating giving testimony today if you would
24 please stand and give your attention to Ms. Bailey.
25 She is going to administer the oath.

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1 MS. BAILEY: Please raise your right hand.
2 Do you solemnly swear or affirm that the testimony
3 you will be giving today will be the truth, the whole
4 truth, and nothing but the truth?

5 CHAIRPERSON GRIFFIS: Very well.

6 MS. BAILEY: Thank you, sir.

7 The first case this morning is Application
8 Number 17159 of Michael and Catherine Ryan pursuant to
9 11 DCMR 3104.1 for a special exception to allow a rear
10 addition to an existing single family semi-detached
11 dwelling under Section 223 not meeting the side yard
12 requirements at Section 405. The property is located
13 in the R-1-B District at premises 51-4 Sherrier Place,
14 N.W. also known as Square 1415, Lot 29.

15 Is the applicant here? Please have a seat
16 at the table.

17 CHAIRPERSON GRIFFIS: Good morning.

18 MR. GRINA: Good morning.

19 CHAIRPERSON GRIFFIS: Let me just have you
20 introduce yourselves for the record please.

21 MR. GRINA: Sure. My name is Peter Grina.
22 Office address is 1506 Wisconsin Avenue, N.W. I am
23 the architect representing Catherine and Michael Ryan.

24 CHAIRPERSON GRIFFIS: Okay.

25 MS. RYAN: Good morning. I'm Catherine

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1 Ryan. I live at 5104 Sherrier Place, N.W.

2 CHAIRPERSON GRIFFIS: Excellent. Thank
3 you very much.

4 I understand that as a -- just a brief
5 technical preliminary matter in this, did you submit a
6 revised plat that shows the change of the three feet
7 for the addition in the rear?

8 MR. GRINA: I spoke with someone in the
9 office. I have that today. Apparently, it did not
10 come down --

11 CHAIRPERSON GRIFFIS: You do? Excellent.

12 MR. GRINA: -- with that revision.

13 CHAIRPERSON GRIFFIS: Would you mind
14 putting -- do you have copies of it?

15 MR. GRINA: Yes, I do.

16 CHAIRPERSON GRIFFIS: Okay. Why don't we
17 -- if you wouldn't mind just bringing that up to staff
18 at this point and we can put that into the record and
19 then you've going to be presenting the case. Is that
20 correct?

21 MR. GRINA: Yes.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. GRINA: How many copies do you need of
24 the plat?

25 CHAIRPERSON GRIFFIS: Ms. Bailey, how many

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1 would you like?

2 MS. BAILEY: Five for the Board members
3 and three for staff. Four for -- four -- four for
4 staff. So, it's nine.

5 Do you have that many?

6 MR. GRINA: Yes.

7 CHAIRPERSON GRIFFIS: Excellent. Very
8 well. Is anyone else here attended to Application
9 17159 that is thinking about or will be giving
10 testimony today as persons -- not seeing any
11 indication of that.

12 Let me ask you first. You willing to
13 stand on the record with this case?

14 MR. GRINA: Yes.

15 CHAIRPERSON GRIFFIS: Excellent. I'm
16 going to run through a couple of things then just to
17 get this totally full on the record.

18 First of all, of course, the application
19 we have before us, the Office of Planning has
20 recommended approval. We will get to the Office of
21 Planning. We have three letters of support by the
22 adjacent neighbors and the abutting properties. Let
23 me walk through a couple of things.

24 Of course, Section 223 is -- as this Board
25 knows all to well perhaps, was one of my favorite

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1 sections in the regulations and it is perfectly
2 appropriate to a case of which was before us today.

3 Have you found any evidence that this
4 addition if granted would unduly impair light or -- or
5 air or use and privacy of the adjoining properties?

6 MR. GRINA: No, and we have reviewed it
7 with those neighbors and have letters of support from
8 both sides.

9 CHAIRPERSON GRIFFIS: Excellent. In your
10 expert opinion although you're not established as an
11 expert witness, but as the architect, the designer of
12 this is there any evidence that this would not be in
13 character with the original house or the surrounding
14 character of the architectural -- the surrounding
15 architectural character of the neighborhood?

16 MR. GRINA: No, we went to great lengths
17 to keep it much in keeping with the existing home and
18 neighborhood.

19 CHAIRPERSON GRIFFIS: Very well and the
20 lot occupancy is such that it does comply with coming
21 in under a special exception. Is that correct?

22 MR. GRINA: Yes, we're -- we're under 40
23 percent. We're at 36 percent I believe.

24 CHAIRPERSON GRIFFIS: Okay. And is there
25 any sort of evidence of speaking to the neighbors or

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1 presenting to the ANC or any other discussions that
2 would indicate that there is something that needs to
3 be done in terms of screening or lighting or any
4 changes that you haven't picked up on your design
5 criterium that the Board should get into?

6 MR. GRINA: No, none of -- none of that
7 came up.

8 CHAIRPERSON GRIFFIS: That's a safe
9 answer. Isn't it?

10 I mean we could get into design -- no,
11 let's not. Okay.

12 Is there anything else the Board should be
13 aware of?

14 MR. GRINA: Oh, we have a -- an updated
15 letter from the ANC. Subsequent to our original
16 application in review of the design, the owner decided
17 to deepen the back porch portion by three feet. Not
18 the enclosed portion of the addition, but just the
19 porch.

20 CHAIRPERSON GRIFFIS: Is that Exhibit
21 Number 26 in the record? Do we have that letter?

22 MR. GRINA: Their drawings were -- were
23 submitted and also we went back to the ANC and
24 presented --

25 CHAIRPERSON GRIFFIS: Indeed.

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1 MR. GRINA: -- the revision to them.

2 They --

3 CHAIRPERSON GRIFFIS: Did they change
4 their opinion?

5 MR. GRINA: No.

6 CHAIRPERSON GRIFFIS: Indeed. ANC
7 actually submitted a letter. It is Exhibit Number 26
8 in our record. Okay.

9 Anything else? Very well.

10 Questions from the Board? Indeed.

11 Let's hear from the Office of Planning.
12 Mr. Jackson is with us. Very good morning to you.

13 MR. JACKSON: Good morning, Mr. Chairman,
14 members of the Board.

15 My name's Arthur Jackson with the D.C.
16 Office of Planning and I'll briefly go through the
17 Office of Planning report on this application.

18 Essentially, the Office of Planning stands
19 on the record. However, just to point out the
20 conditions that are met by the -- by the applicant, we
21 think the application is in compliance with the
22 conditions under Section 223.

23 We find that the proposed addition would
24 not have -- impact the air and light and privacy and
25 the use of neighboring property owners particularly

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1 with the regard to the rear yard and we also find that
2 it would not -- it would be consistent with the street
3 scape and surrounding buildings and it does not need
4 the additional relief required -- allowed in terms of
5 lot occupancy and we think that the existing design
6 and -- of the building and building materials are such
7 that there's no additional treatment requirement --
8 required by the Board of Zoning Adjustment.

9 With that, we think that it is -- since it
10 meets the condition of 223, we think it's compliance
11 with the Section 3104.1 with regard to granting it the
12 special exception, it is consistent with the
13 comprehensive plan and the -- as noted, the ANC-3D did
14 recommend approval twice.

15 I'd also note that the Office of Planning
16 was -- was made aware of the three-foot addition and
17 we find that that still does not modify the conditions
18 that we outlined in our report.

19 On that basis, the Office of Planning
20 recommends approval of the special exception to extend
21 the existing nonconforming yard side of zero and seven
22 feet.

23 That concludes the Office of Planning's
24 summary and we're available for questions.

25 CHAIRPERSON GRIFFIS: Good. Thank you

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1 very much. Mr. Jackson, an excellent report as usual.

2 Is there questions from the Board?
3 Clarifications? Very well.

4 Does the applicant have any cross
5 examination of the Office of Planning? Do you have
6 any questions of his -- do you have his report?

7 MR. GRINA: Yes.

8 CHAIRPERSON GRIFFIS: You just received
9 the report. Excellent. Were you aware that they had
10 satellite photographs of your house?

11 MR. GRINA: We were just discussing that.

12 CHAIRPERSON GRIFFIS: Yes, indeed. Kind
13 of makes you all think. Doesn't it?

14 But, nonetheless, I -- I absolutely concur
15 with the Office of Planning's report and as I said,
16 it's an excellent report.

17 One of the pieces, of course, that's
18 critical the 223 is -- is to maintain the
19 architectural character and, of course, the drawings
20 do show that this would match the -- the material
21 that's used on the existing house. What is noted on
22 the plans as the cedar shingles which I think would be
23 of most interest and also pertinence to the
24 application.

25 Okay. Very well. Going down I don't have

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1 any other notes of other government agencies attended
2 to this application unless the applicant is aware of
3 any other agency that's submitted a report.

4 Then it has been noted that ANC-3D as
5 Office of Planning succinctly said approved this twice
6 which means we have to give them double emphasis in
7 our own deliberation.

8 Is any representative from ANC-3D here?
9 Not noting any indication of -- Mr. Finney, are you
10 going to --

11 COMMISSIONER FINNEY: I'm here, sir, as
12 the single member --

13 CHAIRPERSON GRIFFIS: Okay.

14 COMMISSIONER FINNEY: -- representative.

15 CHAIRPERSON GRIFFIS: Well, you -- you
16 don't -- do you -- you don't -- you're not going to
17 have anything to add to this application. Is that
18 correct?

19 COMMISSIONER FINNEY: No, sir.

20 CHAIRPERSON GRIFFIS: Okay. Thank you
21 very much and it is a great pleasure to see you.

22 That being said, we'll note as Exhibit
23 Number 23 and 26, the ANC submissions and -- and --
24 attended to this application.

25 Is there anyone else here attended to

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1 Application 17159 to give testimony either in support
2 or in opposition as persons?

3 Not noting any at this time, we'll turn it
4 over to you for any closing remarks if you have. Very
5 well.

6 Board questions? Clarifications?

7 If there is nothing, then I would move for
8 approval of 17159 of the Ryan household. That is of
9 the special exception to allow the rear addition to
10 the existing single family semi-detached dwelling
11 under Section 223. This site, of course, has not met
12 the side yard requirements under 405 at 5104 Sherrier
13 Place, N.W.

14 And I'd ask for a second.

15 COMMISSIONER MANN: Second.

16 CHAIRPERSON GRIFFIS: I was getting
17 nervous there. It took a little while on that second.

18 Okay. In all seriousness, of course, this
19 does meet just by the written application, the
20 submission. The Board did go through this full
21 application and looked at it and it does meet the test
22 for the special exception as -- as we've walked
23 through and also I think the Board can rely quite
24 heavily on the Office of Planning's report in its
25 support of this.

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1 We have a motion before us. It's been
2 seconded. Ask for all those in favor of the motion
3 signify by saying aye.

4 (Ayes.)

5 CHAIRPERSON GRIFFIS: And opposed? Why
6 don't we record the vote?

7 MS. BAILEY: The vote is recorded as 5-0-0
8 to approve the application. Mr. Griffis made the
9 motion. Mr. Mann second. Ms. Miller, Mr. Etherly,
10 and Mr. Hood are in agreement.

11 CHAIRPERSON GRIFFIS: Unless there's any
12 opposition from the Board, I would suggest that we
13 waive our requirements and issue a summary order on
14 this case.

15 MS. BAILEY: Thank you, sir.

16 CHAIRPERSON GRIFFIS: Thank you. Thank
17 you all very much. Enjoy.

18 Why don't we call the next case?

19 MS. BAILEY: Application Number 17158 of
20 JBG/Rockwood 1101 K, LLC pursuant to 11 DCMR 3104.1 to
21 reduce the number of required parking spaces from 161
22 -- from 121, excuse me, from 161 spaces to 121 spaces
23 by 25 percent until Section 2108 serving a proposed
24 mixed use office/retail building in the DD/C-2-C and
25 DD/C-3-C District at premises 1101 K Street, N.W.

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1 Square 316, Lots 817 and 818.

2 CHAIRPERSON GRIFFIS: Very well. Good
3 morning.

4 MR. NETTLER: Good morning. My name is
5 Richard Nettler. I'm here on behalf of the applicant.

6 This is -- we're seeking a special
7 exception as was just described by Ms. Bailey to allow
8 us to reduce the parking requirements on the site.

9 As you'll hear if you're so inclined from
10 the architect and from Ms. Romano on behalf of JBG,
11 actually, we're -- while we're reducing the number of
12 spaces and seeking this special exception, we're
13 actually providing more than the required spaces by
14 utilizing the vault space and we'd like to stand on
15 the record unless you'd like to hear more on it which
16 you're certainly -- certainly in your discretion.

17 We have support from a number of different
18 property owners in the neighborhood from the Advisory
19 Neighborhood Commission, from the Office of Planning.

20 I think DOT has submitted a separate statement as
21 well.

22 CHAIRPERSON GRIFFIS: Indeed. Let me --
23 let me interrupt you. Because we do have a party
24 application status for this and it's a -- a -- a party
25 -- oh, my goodness. In support. Joseph Duran.

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1 MR. NETTLER: No, I don't believe that
2 they're going to be here today.

3 CHAIRPERSON GRIFFIS: Okay. And I -- I --
4 I think we can take that as -- or just to make sure,
5 is Mr. Duran here? Not noting that. It is again in
6 support and I think we can take that into the record
7 as written testimony in support of the application.

8 I don't have any difficulty and I know the
9 -- the Board having already asked them, have no
10 difficulty stating in the record and if you wouldn't
11 mind, just -- you can finish your opening statement if
12 you -- if you --

13 MR. NETTLER: I was finished.

14 CHAIRPERSON GRIFFIS: Excellent. So,
15 let's run through. As you were saying, of course, we
16 do have the attended reports on this. The Office of
17 Planning and DDOT and I think we'll get into some of
18 those.

19 First of all, you made a statement in the
20 opening that although you're asking for a reduction to
21 the special exception, you're actually providing more.

22 For clarify, of course, the vault space parking is in
23 public space. Is that correct?

24 MR. NETTLER: That's correct.

25 CHAIRPERSON GRIFFIS: And it doesn't go

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1 directly to the requirements that would satisfy the
2 zoning regulations. Correct?

3 MR. NETTLER: That's correct.

4 CHAIRPERSON GRIFFIS: Okay. So, those
5 counts don't. What is the -- the -- well, there it
6 is. Let's move on.

7 Let me ask. There -- there are two lots
8 attended to this, 817 and 8 something else that or
9 818. Those are tax lots. Is that correct?

10 MR. NETTLER: That's correct.

11 CHAIRPERSON GRIFFIS: It's going to be
12 assembled into a single lot?

13 MR. NETTLER: Correct.

14 CHAIRPERSON GRIFFIS: Okay. And it's a
15 split, two different zones, the C-2-C and C-3-C?

16 MR. NETTLER: The DD/C-2-D, DD/C-3-C.
17 Correct.

18 CHAIRPERSON GRIFFIS: Okay. And so, the
19 whole building has been -- has been put together in
20 terms of the calculation for the zoning on -- how is
21 that done? Like how is the FAR calculated?

22 MR. NETTLER: Let me ask the architect to
23 give you that.

24 Can introduce himself.

25 MR. SAVILLE: Steve Saville from Davis

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1 Carscott Architects, 9869 Meetze Road, Midaland,
2 Virginia.

3 The C-2-C and C-3-C lots were combined in
4 their -- in their use. We had an 8.5. Let me
5 probably illustrate it better over at the --

6 CHAIRPERSON GRIFFIS: Let me see if I
7 understand that. Combined in the use or was it a
8 combined lot development?

9 MR. SAVILLE: Combined lot development.

10 CHAIRPERSON GRIFFIS: Indeed. We're going
11 to need to get him a microphone if -- if he's going to
12 stand that far away. Do we have the cordless? Oh,
13 that's right. Ms. Bailey, don't worry. Yes, that's
14 just -- that's perfect and, of course, you did have
15 the alley closing or we do have the legislation
16 attended -- attached to the application.

17 MR. SAVILLE: Right. What we had was lot
18 818 and lot 817. 817 being the C -- C-2-C which had
19 an eight and a half FAR. Our C-3-C had a 10.0 FAR.
20 We combined those to get our 277,000 square foot
21 building which we're only building 274,000
22 approximately. So, we're not maxing it out on the
23 FAR.

24 But, we -- we had our garage entry into
25 the area on the C-2-C area portion of the lot so that

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1 we reduced a lot of the square footage regarding FAR
2 into that area.

3 CHAIRPERSON GRIFFIS: Okay. And can you
4 walk through just very quickly how you did your
5 parking calculations?

6 MR. SAVILLE: Parking calculations were
7 based upon the first floor being the retail.

8 CHAIRPERSON GRIFFIS: Right.

9 MR. SAVILLE: And then add a separate
10 number attached to it with regard to the retail counts
11 and the rest of the building was calculated regarding
12 the floor space for office use and met that.

13 We were required to have 161 and we
14 squeezed in 162 without any vault spaces.

15 CHAIRPERSON GRIFFIS: Indeed. And you
16 have 16 corner offices on every floor.

17 MR. SAVILLE: That's right. You know,
18 it's -- let me get the perspective.

19 CHAIRPERSON GRIFFIS: No, it's a nice
20 perspective, but outside of our jurisdiction. Okay.
21 Is there any other questions from the Board at this
22 time for -- actually, did you introduce yourself?

23 MS. ROMANO: My -- my name is Chorman
24 Romano and I'm with the JBG Companies.

25 CHAIRPERSON GRIFFIS: Okay. Yes, Ms.

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1 Miller.

2 VICE CHAIRPERSON MILLER: I just want to
3 follow up because I -- I -- you probably understand,
4 but I don't. What -- what are the implications of a
5 combined lot development in two zones? Which it
6 sounds like what -- what your property is.

7 MR. SAVILLE: Essentially, we combine the
8 FARs from both lots and attribute that to the
9 building.

10 VICE CHAIRPERSON MILLER: Okay. Thank
11 you.

12 CHAIRPERSON GRIFFIS: Anything else? Any
13 other clarifications from the Board? Questions?

14 You really felt like you were there when
15 you read the applicant's submission. Didn't you? I
16 mean how many of you knew that there were so many
17 statues around this? Samuel Gompers' memorial. I
18 kind of enjoyed that. I'm going to have to go find
19 that having gone by this so many times and never seen
20 it.

21 Okay. If there isn't anything -- other
22 serious questions to ask, let us move on to other
23 reports, government reports attended to this
24 application of which I think are in -- very valuable
25 in the Board's further understanding of this and then

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1 we'll turn it over to the applicant for any closing
2 remarks that they might have.

3 With that, we have the Office of Planning
4 with us. It's Exhibit 29 and they are recommending
5 approval.

6 Good morning.

7 MR. PARKER: Good morning, Mr. Chairman.
8 Good morning, members of the Board. My name is Travis
9 Parker with the Office of Planning.

10 The Office of Planning did look at this
11 application in light of the considerations of 2108.3.

12 There are five different considerations for the Board
13 and for the Office of Planning in -- in special
14 exceptions of this nature.

15 We felt that due to the location of this
16 project near Metro systems, near Metro bus, the ample
17 amount of -- of parking in the neighborhood, and the
18 over abundance of parking in the building once the
19 vault spaces were considered that this project met the
20 requirements of a special exception and we recommend
21 approval and I'd be happy to go into more detail of
22 answer any questions as needed by the Board.

23 CHAIRPERSON GRIFFIS: Excellent. Thank
24 you very much.

25 Is there questions from the Board? Is

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1 there any cross examination from the applicant?

2 MR. NETTLER: No.

3 CHAIRPERSON GRIFFIS: No questions from
4 the applicant. Very well.

5 Thank you very much and again, an
6 excellent report and as -- as stated, they did walk
7 through all of the specific requirements which I know
8 the Board did -- have -- has done also.

9 I haven't enumerated all of those, but
10 it's very clearly laid out.

11 Of critical importance, of course, is --
12 is -- as we reduce the parking, it is a special
13 exception. It is a proximity to public transportation
14 which is obviously an important aspect to encourage.
15 This is, I think, more than centrally located in terms
16 of it's connectibility to the public transit system.

17 Let's move on then to DDOT. Is there a
18 representative from the Department of Transportation
19 with us today? Not noting any, we can note Exhibit
20 Number 30 that was in support and their exact
21 phraseology. DDOT has no objection to the proposal
22 and they do outline quite a bit of the adjacency and
23 also the use and how it meets their criterium for
24 support.

25 I don't have any other government agency

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1 reports attended to this application unless the
2 applicant's aware of any.

3 We do have a report from ANC-2F. Is the
4 ANC representative here today? 2F. It is Exhibit
5 Number 26. The report was timely filed and they were
6 recommending approval of the application.

7 Does the Board have any specific
8 information they want to highlight on that report? If
9 not, then we can move on.

10 Is anyone here attended to Application
11 17158 to give testimony today either in support or in
12 opposition? Persons to give testimony? Not noting
13 any indication, let's go to last Board questions,
14 clarifications.

15 This is a ten-story building. Is that
16 correct?

17 MR. NETTLER: Yes.

18 CHAIRPERSON GRIFFIS: Okay. I note on
19 page four in section C, the proposed building is
20 described as a office space on floors two to nine.
21 I'm certain that's a typo because there's ten stories
22 enumerated all the way else through the -- one, the
23 submission and also the application, but perhaps it
24 just proves that I read everything if nothing else.

25 I also know the DDOT experienced a fire in

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1 their offices which was another piece of fact that I
2 learned reading this application. It's amazing the
3 kind of information that we do note and that was, of
4 course, going to the footnote four that was saying why
5 they hadn't submitted a report into the record, but we
6 do have the report. It has now been established.

7 Okay. If there's nothing, then what's the
8 timing on the vault space? What sort of lease do you
9 sign? Not that it has any bearing or jurisdiction for
10 us, but is there a time limit with the District that's
11 being established?

12 MS. ROMANO: I'm not aware of any time
13 limits established with vault agreement, but we're in
14 the process of putting that application in and putting
15 the -- working on the vault agreement.

16 CHAIRPERSON GRIFFIS: Okay. Well, and --
17 and for total clarity, I know the Board has looked at
18 this and is -- is probably ready to move on this and
19 in the Board's -- in the Board's deliberation on this
20 application, we've removed the vault's parking from
21 out deliberation. It goes beyond the property line
22 which takes it out of even our jurisdiction for
23 zoning.

24 And I think the importance of it is -- and
25 the important aspect of the vault space is that that

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1 can come and go and so, clearly, this has to stand for
2 the special exception on its own and that being the
3 121 that's actually provided.

4 And it is my opinion in looking at all the
5 information and quite -- quite frankly the -- the --
6 the large amount of information which is why it was
7 easy to have the applicant stand on the record because
8 it was so full in their submission and -- and fact. I
9 believe that it does meet the test and should be
10 supported and I would move approval Application 17158
11 unless you have any closing remarks.

12 MR. NETTLER: No, I have no closing
13 remarks.

14 CHAIRPERSON GRIFFIS: Okay.

15 COMMISSIONER HOOD: I'll second.

16 CHAIRPERSON GRIFFIS: Thank you very much,
17 Mr. Hood.

18 I think, one, looking and -- and I think
19 great reliance can be made on the Office of Planning's
20 excellent report that was submitted that enumerates
21 all the aspects of Section 2108, but I also would note
22 in specificity the proximity to the Department of
23 Transportation the -- the reasoning for utilizing
24 aspects of where parking might be provided in my
25 support of the application and the motion, of course,

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1 and has been seconded. I take out deliberations from
2 Board Members comments.

3 Yes.

4 COMMISSIONER HOOD: I would just concur
5 with your statement of the Office of Planning report
6 meeting 2108.3 requirement.

7 CHAIRPERSON GRIFFIS: Excellent. Anything
8 further? Does anyone know where the Edmond Burke
9 statue is? It's just north of Square 316. Okay.

10 Motion before us. Been seconded. If
11 there's nothing further, then I ask for all those in
12 support of the motion signify by saying aye.

13 (Ayes.)

14 CHAIRPERSON GRIFFIS: And opposed?

15 MS. BAILEY: The Board has voted 5-0-0 to
16 approve Application Number 17158. Mr. Griffis made
17 the motion. Mr. Hood second. Ms. Miller and Mr. Mann
18 and Mr. Etherly are in agreement.

19 CHAIRPERSON GRIFFIS: Thank you very much,
20 Ms. Bailey. Unless there's any comments of opposition
21 from the Board, I suggest that we waive our
22 requirement and issue a summary order on this.

23 MS. BAILEY: Thank you.

24 CHAIRPERSON GRIFFIS: Good. Thank you.
25 Thank you all very much. Appreciate it. Enjoy the

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1 day.

2 Anything else left for us today?

3 MS. BAILEY: Yes, Mr. Chairman.

4 CHAIRPERSON GRIFFIS: Indeed.

5 MS. BAILEY: We do have another case.

6 CHAIRPERSON GRIFFIS: That I am aware.

7 Ms. Bailey, before you call the next case,
8 the Board's going to take five minutes. Let the
9 applicant that's next on the agenda as -- as listed
10 start setting up and we'll be back.

11 (Whereupon, at 10:26 a.m. off the record
12 until 10:40 a.m.)

13 CHAIRPERSON GRIFFIS: Very well. Let's
14 reconvene. Call the next case in the morning.

15 MS. BAILEY: Application Number 17164 of
16 St. Patrick's Protestant Episcopal Church pursuant to
17 11 DCMR 3104.1 for a special exception limited to the
18 modification of approved private school plans (last
19 approved by BZA Order No. 16852) to allow the use of a
20 portion of the basement for classroom purposes under
21 Section 206 (no change in the governing cap on
22 students and staff is proposed. The property is
23 located in the R-1-B District at premise 4925
24 MacArthur Boulevard, N.W. Square 1393, Lot 17, also
25 known as, 823.

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1 Mr. Chairman, members of the Board, there
2 are four requests for a party status. Two of the
3 requests are in opposition to the application and one
4 is a proponent for the project.

5 CHAIRPERSON GRIFFIS: Thank you. Let me
6 first ask the Neighbors United Trust, is it
7 represented today? Do you mind coming forward? If
8 you would introduce yourselves please.

9 MS. FELDMAN: I'm Nancy Feldman, 4911 --

10 CHAIRPERSON GRIFFIS: Can you turn your
11 microphone on please?

12 MS. FELDMAN: Okay. I'm Nancy Feldman. I
13 live at 4911 W Street, N.W. It's behind the building
14 and I'm a trustee and one of the two trustees
15 appointed by the trust to represent it before
16 administrative bodies.

17 CHAIRPERSON GRIFFIS: Okay. So -- and
18 with you is?

19 MS. VAN SIKLE: Tina -- Katherine Van
20 Sikle Demali, 4923 Ashby Street.

21 CHAIRPERSON GRIFFIS: Thank you and one of
22 you will be speaking at a time representing the
23 Neighbors United Trust. Is that correct?

24 MS. FELDMAN: We may split it up.

25 CHAIRPERSON GRIFFIS: Indeed. Okay.

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1 You've -- you've added a list of trustees and members
2 to Neighbors United with your application. This is a
3 full list?

4 MS. FELDMAN: Yes, that's the current
5 list.

6 CHAIRPERSON GRIFFIS: Okay. And Mr.
7 Scripsapth is a member?

8 MS. FELDMAN: Yes, sir.

9 CHAIRPERSON GRIFFIS: Is Mr. Lovendusky a
10 member?

11 MS. FELDMAN: Yes.

12 CHAIRPERSON GRIFFIS: Okay. And you were
13 granted party status in the previous special exception
14 of which this application is a modification of. Is
15 that correct?

16 MS. FELDMAN: Yes, Mr. Chairman.

17 CHAIRPERSON GRIFFIS: Any other questions
18 from the Board?

19 Would the applicant's representatives
20 introduce themselves for the record?

21 MS. PRINCE: You -- you didn't cover Mr.
22 Lovendusky's request for party status. Did you?

23 CHAIRPERSON GRIFFIS: No.

24 MS. PRINCE: Okay. Good morning. I'm
25 Allison Prince of Shaw Pittman. I'm here today in

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1 connection with the school's request to use a 320
2 square foot portion of the basement --

3 CHAIRPERSON GRIFFIS: Let me just
4 interrupt you. I don't -- I want -- I don't want you
5 to do your opening. I just want you to introduce
6 yourself.

7 MS. PRINCE: Oh, I'm sorry. I -- I miss
8 -- I'm sorry.

9 CHAIRPERSON GRIFFIS: And now, I can ask
10 as you've introduced yourself for the record, do you
11 have any objection to granting party status --

12 MS. PRINCE: I have no objection.

13 CHAIRPERSON GRIFFIS: -- to Neighbors
14 United Trust? Okay.

15 Board Members, any comments? Any
16 objections to granting Neighbors United Trust parties?
17 They clearly represent the adjacent and surrounding
18 area. They were granted parties in the previous
19 application.

20 Mr. Hood, comments?

21 COMMISSIONER HOOD: No, I just want to say
22 no objection.

23 VICE CHAIRPERSON MILLER: No objection.

24 COMMISSIONER MANN: I have no objection.

25 CHAIRPERSON GRIFFIS: Excellent. In which

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1 case, we take it as a consensus of the Board and grant
2 party status to the Neighbors United Trust.

3 Mr. Lovendusky is present. Correct?

4 MR. LOVENDUSKY: Yes.

5 CHAIRPERSON GRIFFIS: Mr. Lovendusky,
6 obviously, the first question we're going to need to
7 ask you is why you believe that you have some unique
8 or significant or distinct areas of -- of fact that
9 would not and is not represented by Neighbors United
10 Trust?

11 MR. LOVENDUSKY: I'm Michael Lovendusky at
12 -- I reside at 4920 -- 4927 MacArthur Boulevard, N.W.,
13 Washington, D.C.

14 Preliminarily, I might observe also that I
15 have letters from Mr. Lawrence Scripsapth requesting
16 that I represent Mr. Scripsapth and Mrs. Wright in
17 this proceeding in addition to myself and my wife.

18 We would have unique perspective inasmuch
19 as we were parties -- we are parties to the appeal to
20 the Court of Appeals challenging the fundamental
21 propriety of the two orders already existing in this
22 case upon which this application for modification is
23 based.

24 CHAIRPERSON GRIFFIS: Okay. Well, how
25 would that impact the proceedings for the modification

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1 condition 19?

2 MR. LOVENDUSKY: Well, we would -- we
3 would assert that this entire proceeding is irregular
4 inasmuch as it is -- constitutes a -- a ratification
5 of a violation of Order 16852-A and 16852.

6 CHAIRPERSON GRIFFIS: Okay. So, in terms
7 of your party application, you believe that -- that
8 Neighbors United cannot raise that objection or
9 preliminary matter to actually proceeding with this
10 modification?

11 MR. LOVENDUSKY: Neighbors United has
12 indicated to us that they are -- are intending to
13 focus on the practical use of the space. We are --
14 Lovendusky/Scripsapths are concerned about the -- the
15 legal improprieties attended upon the application.

16 CHAIRPERSON GRIFFIS: And how do you see
17 us having jurisdiction over the legal implications or
18 propriety of this in this proceeding?

19 MR. LOVENDUSKY: Well, certainly, the
20 Board is given tremendous discretion in the
21 interpretation of its own rules of procedure and
22 certainly the -- the court actually accords great
23 discretion into the interpretation of its own orders
24 and so, we believe that the Board actually if it
25 closely reads its own rules and follows its own

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1 procedures would find that this irregular to be
2 improper and -- and rule against it.

3 CHAIRPERSON GRIFFIS: It would be improper
4 based on our own regulations?

5 MR. LOVENDUSKY: Yes.

6 CHAIRPERSON GRIFFIS: Because we have a
7 legal proceeding above us?

8 MR. LOVENDUSKY: Well, I mean there's
9 several questions that this sort of brings me into the
10 -- some of the merits of our discussion.

11 CHAIRPERSON GRIFFIS: Um-hum.

12 MR. LOVENDUSKY: One of them is -- I mean
13 just to begin with one of them is attended upon the
14 actual notice that is announced as this proceeding
15 today. As a matter of fact, is this a proceeding with
16 regard to the modification of approved plans pursuant
17 to Section 3126 of the zoning regulations?

18 CHAIRPERSON GRIFFIS: You're asking that
19 as a question that should be answered by the Board?

20 MR. LOVENDUSKY: Well, yes, I mean there's
21 a notice that says that this is a proceeding for a
22 modification of approved plans. The zoning
23 regulations address the modifications of approved
24 plans at Section 3126. I'm just asking for a
25 clarification if that is, in fact, what this

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1 proceeding is all about.

2 MEMBER ETHERLY: Mr. Chairman, perhaps --

3 CHAIRPERSON GRIFFIS: Yes.

4 MEMBER ETHERLY: -- rather than getting
5 sucked into what might be a very deep vortex here in
6 terms of that question, my concern with -- with the
7 Lovendusky and -- and Scripsapth application would --
8 would be whether or not we're verging on questions
9 that are more properly set forward in an appeal format
10 as opposed to in this particular incidence.

11 MR. LOVENDUSKY: Well, the law is very
12 clear that the court accords great discretion to the
13 Board in its activities and especially with regard to
14 its interpretation of its own regulations.

15 MEMBER ETHERLY: But, in terms of your
16 party status application, Mr. Lovendusky, is -- is it
17 -- my -- my -- my concern still -- still attaches and
18 that is -- and I think I understand your answer. Your
19 answer is no, but my question is are the questions
20 that you're seeking to raise in this particular forum
21 for the modification, are they -- are they more
22 properly the subject of an appeal?

23 MR. LOVENDUSKY: No, the court has made
24 clear that all of the discussions of such matters have
25 to raised first before the Board itself.

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1 MEMBER ETHERLY: Okay. Thank you, Mr.
2 Chair.

3 CHAIRPERSON GRIFFIS: Well, thank you, Mr.
4 Etherly, and I think what you have done and I -- I
5 tend to agree that as a preliminary matter and in
6 terms of processing, clearly the Board looks at the
7 applications and can at such things as self-certified
8 applications look to see whether the proper relief is
9 being sought or any aspects that was not enumerated.

10 I still don't see how that rises to the
11 level of granting party status in this proceeding as
12 you're represented by the Neighbors United and I don't
13 see why they couldn't raise these preliminary matters
14 of whether the -- there is the proper one. The -- the
15 proper notification, the proper relief or the proper
16 procedure being followed.

17 MR. LOVENDUSKY: Well, the fact is that
18 they haven't. Lovendusky/Scripsapth has and I would
19 observe in the underlining orders upon which this
20 application is based, Lovendusky/Scripsapth were
21 granted party opponent status. So, it would seem to
22 be a departure from precedent as far as a recognition
23 of Lovendusky/Scripsapth for party status.

24 CHAIRPERSON GRIFFIS: Indeed and I totally
25 disagree with you there. It is absolutely no

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1 departure.

2 In fact, in the deliberations to granting
3 party status, it was of great concern that we had an
4 organization that represented all the neighbors and
5 then we granted numerous party status. Each of those
6 party statuses you will well recall met a uniqueness
7 or distinct aspect. One as -- as we go through had a
8 driveway that may have been impacted that was unique
9 and distinct from any other properties. One -- two
10 were location based and their proximity to the
11 property and how they would uniquely and distinctly
12 have been impacted if approved.

13 That was -- that was well deliberated and
14 I thought was properly decided in granting the party
15 status in the previous application and in this simple
16 modification, I don't see how again it -- you -- your
17 party application begins to rise to the level of being
18 unique or distinct as represented by the Neighbors
19 United Trust. I -- I don't see.

20 You've indicated that they have not raised
21 an issue that is of import to you, but they've also
22 not been afforded the opportunity to raise that issue.

23 We haven't begun.

24 As a preliminary submission, certainly,
25 they didn't, but there's nothing that precludes them

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1 to bring a preliminary matter or for that -- well, it
2 could be a preliminary matter or it could actually be
3 part and parcel of their case presentation.

4 Again, I'd ask you -- or -- or if there
5 are other Board questions or clarifications, I'll give
6 you an opportunity just to respond to that.

7 MR. LOVENDUSKY: I have no further
8 response. I mean I think I've said my perspective on
9 this.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. LOVENDUSKY: Would you care to see the
12 letters from Mr. Scripsapth?

13 CHAIRPERSON GRIFFIS: Certainly. I'm
14 sorry. If you wouldn't mind just handing it to staff
15 and they'll process them through.

16 For clarification, we're going to make
17 copies so all the Board -- oh, boy. It kind of tests
18 your reliability and reaction when the alarm goes off,
19 but frankly, we're kind of use to the alarm touching
20 off once in awhile. So, we'll see if it's actually
21 announced and, of course, if it is, then we will
22 obviously leave the building expeditiously, but I
23 imagine we're having tests again.

24 With that though, we're going to make
25 copies of all of that so the Board members can see

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1 that altogether.

2 Mr. Lovendusky, I believe that you
3 indicated 3127 is what this should be processed under
4 and I think that's -- maybe I didn't hear it
5 correctly, but I believe it should be 3129. That's
6 modifications of approved plans and I believe that
7 section goes to minor modifications.

8 MR. LOVENDUSKY: Well, that's -- you're
9 right. It is 3129 that I was referring to or
10 intending to refer to and I'm just asking the question
11 of whether the -- the notice for the hearing today
12 which discusses a modification of approved plans is a
13 reference to this -- the application is being heard
14 pursuant to 3129?

15 CHAIRPERSON GRIFFIS: You know, it -- it
16 -- it's an important aspect that the Board is -- is
17 actually probably bringing up on their own accord
18 about how this is actually packaged. Because quite
19 frankly, my inclination without hearing from all those
20 participants in this case is the fact that this is
21 actually coming in as I said as a modification of
22 condition number 19.

23 Now, of course, all orders that go out are
24 attached to the first condition whether enumerated or
25 not in the order. The first condition is the plans

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1 attended to the application. Those obviously are
2 reviewed, approved or denied and those are the plans
3 that we'll be held to.

4 This has a more specific aspect to it in
5 terms of the condition that enumerated what we looked
6 at and almost reemphasized the importance of what we
7 were talking about in terms of the addition and the
8 expansion to the building. So, when I looked at the
9 application, it -- it does go more towards that,
10 modification of that condition, which is probably a
11 more general aspect than just looking at this specific
12 section of modification of approved plans.

13 Others have comments? Ms. Miller.

14 VICE CHAIRPERSON MILLER: In assessing
15 this party status application, it sounds to me, Mr.
16 Lovendusky, like that you are asserting you should be
17 granted party status because you have legal arguments
18 to raise that Neighbors United Trust will not be
19 raising and when I look at our regulations governing
20 applications for party status, they say that in --
21 specifically 3106.3 says in considering any request
22 for party status, the Board shall grant party status
23 only if the person requesting party status has clearly
24 demonstrated that the person's interest will likely be
25 more significantly, distinctly or uniquely affected in

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1 character or kind by the proposed zoning relief than
2 those of other persons in the general public.

3 And so, my -- my problem here is I don't
4 see how those interests would be more distinctly
5 affected and it looks like you're getting redundant
6 representation were we to grant you party status as an
7 individual and in addition to being a member of
8 Neighbors United Trust.

9 And if you want to respond to that, feel
10 free to.

11 MR. LOVENDUSKY: I would observe that in
12 these proceedings when an institution is granted the
13 authority to locate in a residential neighborhood, the
14 neighbors have to face a situation of whether they are
15 going to attempt to institutionalize themselves to
16 respond to the institutionalization of their
17 neighborhood or that they're going to try to make a
18 defense against the special exception on their own and
19 in making a defense on their own, it relies upon the
20 volunteer efforts of each of the individuals who are
21 willing to spend their time and efforts to do so.

22 Neighbors United Trust has determined it
23 is going to make practical arguments against the
24 application. Another group of neighbors including
25 myself have made an effort and invested time in trying

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1 to understand the laws and procedures and regulations
2 relevant and hope to defend against the application on
3 those grounds.

4 We hope not to have to further
5 institutionalize the neighborhood to defend against
6 this institution and so, from concerns just about the
7 investment of resources and the ability of the
8 neighbors to defend against the institutional
9 impositions of a sophisticated applicant such as this
10 would ask that there be some sensitivity to the
11 ability of neighbors to make specialized arguments
12 dependent upon their interests and their willingness
13 to invest their time.

14 VICE CHAIRPERSON MILLER: Just to follow
15 up on that though, you make reference to another
16 group, but, in fact, you're coming in as an individual
17 and you are identified as a part of the Neighbors
18 United group.

19 MR. LOVENDUSKY: I am a -- that's true. I
20 am a member of Neighbors United Trust. So is my wife.
21 So is Mr. Scripsapth. So is Ms. Wright.

22 But, again as I mentioned, I mean
23 Neighbors United Trust has announced its intention to
24 defend against this application on practical grounds.

25 Lovendusky/Scripsapth have indicated their intention

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1 depend on legal and regulatory grounds.

2 So, I don't see that there is actually --
3 there -- there's just -- there's a job sharing.
4 There's an effort sharing going on here and -- and we
5 would hope that the Board be sensitive to the fact
6 that we do not want to institutionalize ourselves
7 further to have to rely upon any one entity to do
8 everything for the disparate interests of the
9 neighbors.

10 VICE CHAIRPERSON MILLER: I have one other
11 question. If we were to grant you party status, then
12 you would not be addressing the same issues that
13 Neighbors United Trust would be addressing?

14 MR. LOVENDUSKY: Correct. You know, Ms.
15 Miller, I would or members of the Board, I would
16 observe that implicit I think in your analysis here is
17 the -- is a -- a deference to an organization that if
18 it did not exist, then you'd be confronted with
19 numerous applications for party opponent status and we
20 have, in fact, the neighbors have, in fact, simplified
21 their request into two. One dealing with the
22 practical issues. One dealing with legal regulatory
23 issues.

24 CHAIRPERSON GRIFFIS: Important point.
25 Okay. Does the ANC have any -- oh, I'm sorry. Other

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1 -- other comments from the Board?

2 Does the ANC have any opinion on the party
3 application of Mr. Lovendusky combined?

4 COMMISSIONER FINNEY: As a single member
5 district, no.

6 CHAIRPERSON GRIFFIS: Single member
7 district representative does not. The applicant's
8 representative?

9 MS. PRINCE: I have a question --

10 CHAIRPERSON GRIFFIS: Okay.

11 MS. PRINCE: -- of Mr. Lovendusky. Were
12 you a member of the Neighbors United Trust in
13 connection with the underlying proceeding or did you
14 join after that proceeding? The original proceeding.

15 MR. LOVENDUSKY: I've been a -- I've been
16 a member of Neighbors United Trust from its inception.
17 So, even during the original proceeding.

18 MS. PRINCE: I -- I actually have no
19 objection to Mr. Lovendusky's request for party status
20 then because the Board grappled with this issue in
21 connection with the original application and accorded
22 him party status.

23 While I defer to the Board's judgment on
24 this matter, I -- I do not object to his request.

25 CHAIRPERSON GRIFFIS: Good. Thank you

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1 very much. I -- I think to clarify where I am in my
2 stance, first of all, in terms of looking at 3129
3 modification of approved plans, it's pretty clear
4 that, in fact, this although it's attended to a
5 modification of one of the conditions of the previous
6 order, this is a full stand alone application that is
7 coming before us. It has and will go through as the
8 application in the record before us. We'll walk
9 through all the criterium that is established for
10 determining the -- the -- the -- the approval or
11 denial of the application.

12 Of course, it's -- it's limited in focus
13 to the small aspect of the previous. It will not do
14 away with the previous order which will stand, but
15 that moves it out of 3129 as a modification.

16 Now, even further, looking at that then,
17 we need to look at the -- the -- the basis and the
18 facts that we're going to hear under this application
19 and again, I don't see how arguing the legal aspect of
20 whether the previous order is in -- in good stead or
21 is -- will be overturned or whether it has had time
22 enough to show its viability or reliability, I don't
23 think -- I don't see how that has any relevancy on
24 that.

25 And more attended to although we did

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1 establish party status in the previous proceedings as
2 again as I stated each of those were individually
3 proven to have something uniquely affecting them or
4 their property in establishing the criterium and then
5 granting the party status. I don't see the
6 applications rising to that in this situation as they
7 are represented and can, in fact, make their position
8 and opinion known through the Neighbors United Trust
9 and I'll let my opinion rest there.

10 Mr. Hood.

11 COMMISSIONER HOOD: Mr. Chairman, I also
12 am very skeptical and I'm looking at the letter that
13 was provided us from Mr. -- help with the
14 pronunciation. Is his name Scripsapth? Scripsapth.
15 Excuse me. It's a lot of what -- what I'm looking at
16 in the letter is a what if and I'm looking at two. It
17 says approval by the BZA would increase the likelihood
18 that St. Patrick would in time request a higher
19 student count.

20 I believe this minor -- minor modification

21 I don't believe they're asking for -- to increase the
22 cap. Are they?

23 CHAIRPERSON GRIFFIS: Absolutely not.

24 COMMISSIONER HOOD: And that concerns me
25 because I don't think this Board can operate on a what

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1 if something that -- that -- that may come in the
2 future. That's not before us at this particular time.

3 So, I have great cause and I'll leave my statement as
4 that.

5 MR. LOVENDUSKY: May I respond to that?

6 MEMBER ETHERLY: Perhaps before that, Mr.
7 Chair. I would agree, Mr. Chair, with -- with -- with
8 your -- what I believe is direction of your thinking
9 in terms of recommending denial of the -- of the party
10 application -- the party status application.

11 I am comfortable in that course because I
12 -- I -- I do believe that we -- we still have the
13 mechanism of the Neighbors United Trust of which Mr.
14 Lovendusky and Mr. Scripsapth, the two households, are
15 members of that trust.

16 I understand, of course, the argument that
17 the trust has decided to take a different tact with
18 regard to -- to argument here, but I don't -- I don't
19 see within the party status framework an opportunity
20 to use differences and strategy as -- as it -- as it
21 attaches to argument's sake forming the ground for
22 party status application.

23 I would further note that Mr. -- Mr.
24 Scripsapth through Mr. Lovendusky, of course, would
25 still have the opportunity to provide testimony that

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1 could in very concise fashion speak to some of the
2 legal arguments that -- that -- that they desire to
3 raise.

4 However, I'm -- I -- I share the concern
5 of -- of -- my colleague Mr. Hood with regard to the
6 -- the -- the legal argument. Just -- just -- I'm
7 just not swayed at this particular point and I just
8 don't think it's the appropriate venue for that.

9 So, I will be in -- I will not be in
10 support of the party status application of the
11 Lovendusky and Scripsapth households.

12 Thank you, sir.

13 CHAIRPERSON GRIFFIS: Mr. Lovendusky.

14 MR. LOVENDUSKY: Thank you. To respond to
15 Mr. Hood's concern that Mr. Scripsapth's request is
16 based on a what if, the -- the fundamental provision
17 of the regulation, Section 206.2, is based on a what
18 if. It is based on whether the private school shall
19 be located so that it's not likely to become
20 objectionable. Not likely to become objectionable.

21 And so, there is, in fact, a -- a
22 foreseeability question. There is a what if question
23 asked by the fundamental provision that the
24 application is based on.

25 CHAIRPERSON GRIFFIS: And that's

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1 absolutely so, but the -- the what if is based on us
2 projecting out what might be any sort of detrimental
3 impact on the facts that are before us not on what --
4 what is the possible hypothetical aspect of what an
5 applicant might do in the future.

6 We -- we don't -- we don't hypothesize on
7 what there -- what the strategy or the master plan or
8 what else is happening, but only looking at the facts
9 and as those facts are presented, what sort of impact
10 that they would make and I think that's what Mr.
11 Hood's comment was based on.

12 COMMISSIONER HOOD: Exactly, Mr. Chair.
13 Thank you.

14 CHAIRPERSON GRIFFIS: Okay. Let me -- let
15 me just go down the panel and I'll give you final
16 words, Mr. Lovendusky.

17 Ms. Miller.

18 VICE CHAIRPERSON MILLER: My feeling is
19 this. I -- I hear what Mr. Lovendusky says and I have
20 a concern that sometimes there are neighbors in a
21 community that might not be represented by an official
22 groups or whose interests might not be represented by
23 the ANC and that you stated that there are arguments
24 that -- that needed to be raised and, therefore,
25 that's why you were requesting party status, but when

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1 I look at the regs, I don't think that they really go
2 to that.

3 I think they go to being specifically
4 impacted in a unique way and that Mr. Etherly really
5 touched upon an avenue for you to get your concerns
6 addressed before us and that is by being able to
7 testify as an individual in the proceeding and -- and
8 set forth your argument and, therefore, I think I
9 would be in favor declining party status, but
10 certainly would be welcoming your arguments on those
11 issues.

12 CHAIRPERSON GRIFFIS: Others.

13 COMMISSIONER MANN: I'm -- I'm inclined to
14 agree with Ms. Miller.

15 CHAIRPERSON GRIFFIS: Thank you, Mr. Mann.

16 MR. LOVENDUSKY: Mr. Chairman.

17 CHAIRPERSON GRIFFIS: Yes, the -- the last
18 word for me. I think definitely, Ms. Miller, you've
19 -- you have said that yes, as a person, there's
20 testimony. Certainly that's appropriate and Mr.
21 Lovendusky wouldn't be precluded, but there's a --
22 there's a higher participation level as a member of
23 Neighbors United Trust. I don't see why he couldn't
24 participate in the party's case presentation.

25 With that, yes.

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1 MR. LOVENDUSKY: Would the Board and the
2 applicant be willing to continue this proceeding then
3 for us to equip Neighbors United Trust with the
4 arguments that Lovendusy/Scripsapth would otherwise
5 have made as a party opponent?

6 CHAIRPERSON GRIFFIS: Continue for what?
7 Five minutes. How much time do you need? I mean
8 you're here. Correct? You're prepared to make that.

9 MR. LOVENDUSKY: Well, I'm here for an
10 hour and I believe Neighbors United Trust is here for
11 an hour and then we have problems meeting -- going
12 into the afternoon and -- and that is a problem.

13 CHAIRPERSON GRIFFIS: You're going to have
14 to be on a microphone.

15 MS. FELDMAN: Mr. Chairman, I believe you
16 received a written submission from Mr. Lovendusky and
17 we would be happy to include that as part of our case
18 and if we have time, we do have some scheduling
19 problems here, but Ms. -- Mrs. Demali and I have
20 written authority from Neighbors United to allow other
21 people -- other trustees to participate or make a part
22 of our case and we'd be happy to give him some
23 minutes. Whatever you think would be appropriate.
24 Our presentation is very short.

25 CHAIRPERSON GRIFFIS: Excellent. Thank

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1 you very much. I think that's appropriate. Mr.
2 Etherly?

3 MEMBER ETHERLY: No. No, I'm -- I'm --
4 I'm completely fine with that. Perhaps Mrs. Feldman
5 before you step away, that would be -- then it would
6 be your desire to move forward today and not -- not to
7 support a request for a continuance of any type?

8 MS. FELDMAN: Yes, to move forward with at
9 least the -- the presentation in chief.

10 MEMBER ETHERLY: Okay.

11 MS. FELDMAN: We are asking for some other
12 things, but --

13 MEMBER ETHERLY: Thank you and I
14 appreciate --

15 MS. FELDMAN: Sure.

16 MEMBER ETHERLY: -- I appreciate that
17 flexibility.

18 MS. FELDMAN: Sure.

19 MEMBER ETHERLY: Thank you, Mr. Chair.

20 CHAIRPERSON GRIFFIS: Excellent. Any
21 other comments from the Board?

22 VICE CHAIRPERSON MILLER: I -- I think we
23 ought to move forward and see how far we get.

24 CHAIRPERSON GRIFFIS: Indeed.

25 MEMBER ETHERLY: So, just for the sake

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1 protocol, Mr. Chairman --

2 CHAIRPERSON GRIFFIS: Thank you.

3 MEMBER ETHERLY: -- I would -- I would
4 make a motion to deny the party status application of
5 Michael Lovendusky in concert with that of Lawrence
6 Scripsapth and invite a second.

7 CHAIRPERSON GRIFFIS: Second.

8 MEMBER ETHERLY: Thank you very much, Mr.
9 Chair. I think it's been adequately discussed. I --
10 I won't -- I won't provide any further detail.

11 CHAIRPERSON GRIFFIS: Tend to agree. Do
12 we have -- I'm sorry. Go ahead.

13 MEMBER ETHERLY: No. No, I -- I -- I
14 think it's -- it's just important to know that -- that
15 denial once again in my mind still leaves avenues open
16 for the appropriate arguments to be brought forward in
17 some measure. Clearly, you do not have the full scale
18 participation as a party, but if there were not that
19 avenue available, I might be at a different place.
20 But, with that avenue and with the flexibility that's
21 been offered by Neighbors United Trust, I think we can
22 still move forward and get -- get as many of the
23 arguments on the table as possible.

24 Thank you, Mr. Chairman.

25 CHAIRPERSON GRIFFIS: Thank you. Motion

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1 of course. Been second. Further deliberation? If
2 not, I'd ask for all those in favor of the motion to
3 signify by saying aye.

4 (Ayes.)

5 CHAIRPERSON GRIFFIS: And opposed? Why
6 don't we record the vote?

7 MS. BAILEY: The vote is recorded as 5-0-0
8 to deny party status to Michael Lovendusky/Scripsapth.

9 Mr. Etherly made the motion. Mr. Griffis second.
10 Ms. Miller, Mr. Mann, and Mr. Hood are in agreement.

11 CHAIRPERSON GRIFFIS: Okay. Then last
12 preliminary, we do have the request for party status
13 from Mr. or Ms. Sharon Coi. Is that correct? Are
14 they here? Not. It is a -- a party application. It
15 was a proponent.

16 Of course, one of the most important
17 aspects of being granted party status is the fact of
18 full participation in the hearing. As they're not
19 present today, I think we can if there's no objection,
20 take this in as written testimony in support of the
21 application.

22 COMMISSIONER HOOD: No objection, Mr.
23 Chair.

24 CHAIRPERSON GRIFFIS: Not noting any
25 objection, then does the parties/applicant/ANC have

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1 any comment on that?

2 COMMISSIONER FINNEY: No comments.

3 CHAIRPERSON GRIFFIS: Very well. Then
4 let's proceed. We'll take that in as written
5 testimony in support and if there are any other -- are
6 there any other preliminary matters for us Ms. Bailey
7 that you're aware of?

8 MS. BAILEY: No, Mr. Chairman.

9 CHAIRPERSON GRIFFIS: Okay. Very well. I
10 think we're ready to proceed. We have established our
11 parties in this.

12 Noting in the filing of the Neighbors
13 United which has now been granted a party status,
14 there was an indication of asking for a continuance.
15 Is that correct? I --

16 MS. FELDMAN: We are not sure of the --
17 the procedures of the Board and in courtroom-type
18 proceedings, a continuance just moves the whole thing
19 out without hearing anything. You just actually set a
20 new date if an appropriate excuse is given like
21 conflicts.

22 CHAIRPERSON GRIFFIS: That would be
23 similar here. What do you want to do?

24 MS. FELDMAN: And what I wanted -- what we
25 wanted to do was to say -- suggest that looking at the

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1 206 factors, we can't even decide not having
2 sufficient data that we've asked for whether we indeed
3 would like to oppose or not. We filed in opposition
4 because at the time, we had to get that in under a
5 time frame, but there are critical pieces of data that
6 are missing that we've asked for --

7 CHAIRPERSON GRIFFIS: Okay.

8 MS. FELDMAN: -- and we felt that if --

9 CHAIRPERSON GRIFFIS: Let's get to the
10 specific because I'm hearing we have scheduling
11 problems come 12:00.

12 MS. FELDMAN: Okay.

13 CHAIRPERSON GRIFFIS: What specific data
14 do you think you don't have outside of the
15 manufacturer of the HVAC systems?

16 MS. FELDMAN: You -- you all have our --
17 our submissions. Okay.

18 CHAIRPERSON GRIFFIS: I've even read it.

19 MS. FELDMAN: Thank you. Now, I have to
20 redo that.

21 Okay. We received on -- on -- or we
22 didn't, but on Friday, some material was -- was
23 provided, but not decibel -- new serial numbers for --
24 for actual units, but not the decibel levels which we
25 feel is important both to meet the noise requirements

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1 of the District of Columbia and --

2 CHAIRPERSON GRIFFIS: That's one.

3 MS. FELDMAN: -- to test. Okay.

4 CHAIRPERSON GRIFFIS: Next.

5 MS. FELDMAN: We can't tell from these
6 current plans how -- whether the units, now there are
7 ten of them that are -- that are set up, are in
8 permanent or temporary places because of construction.

9 That would have an impact on --

10 CHAIRPERSON GRIFFIS: Next one.
11 Placement.

12 MS. FELDMAN: Okay.

13 CHAIRPERSON GRIFFIS: Next.

14 MS. FELDMAN: The -- there has been no
15 noise testing that we are aware of. I mean noise is a
16 key factor under the 206 conditions. So, we were
17 trying to develop our own information. We couldn't
18 even hire an expert to review them because we don't
19 have the data.

20 Number of students, we were told
21 specifically by the MacArthur campus office manager
22 that because of soundproofing of this new basement
23 area they would be doing considerable preproduction
24 practice --

25 CHAIRPERSON GRIFFIS: Okay.

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1 MS. FELDMAN: -- in addition to a music
2 room.

3 CHAIRPERSON GRIFFIS: Concerned about use
4 consensus.

5 MS. FELDMAN: Okay. Also, we -- we've
6 been told music room, but the application is
7 classroom.

8 CHAIRPERSON GRIFFIS: Okay.

9 MS. FELDMAN: So, that's another thing.
10 Traffic. There is a new door that's letting out and
11 we don't know if that would be -- there was some
12 discussion about maybe an alarm or there would be
13 something else, but right now, it just looks like a
14 new egress onto to Ashby which was major privacy point
15 of contention, traffic contention in the underlying
16 case.

17 CHAIRPERSON GRIFFIS: Okay. Use --

18 MS. FELDMAN: We -- the -- also, if
19 preproduction practice or activities in the basement,
20 from our experience, that often would take place or
21 spill over until after school hours which would have
22 an impact on the traffic issues such as busing, the
23 shuttle bus --

24 CHAIRPERSON GRIFFIS: Okay.

25 MS. FELDMAN: -- the parent pickup, et

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1 cetera and we don't -- they -- they have not addressed
2 that. We've asked at the ANC meeting. They -- there
3 was some discussion, but it's not -- they really
4 didn't address preproduction activity.

5 That also had to do with the parking which
6 is another 206 factor that if it was after hours --

7 CHAIRPERSON GRIFFIS: No, I understand
8 206.

9 MS. FELDMAN: Okay.

10 CHAIRPERSON GRIFFIS: Just --

11 MS. FELDMAN: I'm so sorry.

12 CHAIRPERSON GRIFFIS: -- pull -- point
13 them for me.

14 MS. FELDMAN: Okay. So, the traffic, the
15 noise, and -- and parking. The factors that we --

16 CHAIRPERSON GRIFFIS: Right.

17 MS. FELDMAN: -- would need to address
18 with you --

19 CHAIRPERSON GRIFFIS: Any other specific
20 data that you do not have?

21 MS. FELDMAN: No.

22 CHAIRPERSON GRIFFIS: Okay. Very well. I
23 think I totally understand. First of all, the
24 specific information regarding the HVAC systems, the
25 placement, the size, the specifications of them.

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1 The use of the room is what you're talking
2 about in terms of hours, the intensity of the students
3 and all. We all also looking at the location. We
4 have an ingress and egress door and it's utilization
5 and what that might be the impact of. Of course, all
6 going and attended to 206.

7 Is the applicant prepared to address those
8 in specificity today in this case presentation?

9 MS. PRINCE: Absolutely.

10 CHAIRPERSON GRIFFIS: Geographic
11 documentation that will illustrate those aspects?

12 MS. PRINCE: Not graphic documentation.
13 We have verbal testimony.

14 CHAIRPERSON GRIFFIS: Geographic
15 documentation that might show the location of the HVAC
16 systems?

17 MS. PRINCE: I believe we do.

18 CHAIRPERSON GRIFFIS: Okay. I'm perfectly
19 prepared and I think we can fully evidence all of that
20 for your adequate understanding.

21 In terms of not having been able to test
22 the noise or have your own expert witnesses, this is
23 what I intend to do. First of all, in looking at this
24 application, we -- we will look at what this will
25 increase. We're not going back to analyze all of the

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1 units that were labored in the past application. What
2 we need to do is look at the threshold of which --
3 what will this add to and what will that impact be.

4 If -- if I'm making myself clear, if we
5 have a 320 square foot room just to throw that out
6 hypothetically, is that having to increase a ten-ton
7 unit that sits outside? Is it ten units? Is it three
8 one-ton units? I mean I think all of that is not in
9 the application at this point, but it's clearly what
10 the Board will ask very specifically.

11 If it shows that it, in fact, is sharing
12 one of the units in order to implement the -- the air
13 flow and heating and cooling down below, that will be
14 a factor. The point being I'm not sure how you would
15 have even taken an expert to analyze the sound on the
16 increase. You may well have been.

17 As we get through this, if we think that
18 that is something of -- that is prejudicing your case
19 presentation, I think that we could keep the record
20 open for that type of information or go -- or -- or
21 change accordingly.

22 MS. FELDMAN: Chairman Griffis, even if it
23 comes out today, we would not have a chance to examine
24 tests, consult, you know, that -- we want to have that
25 prepared for the hearing. We felt that that was the

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1 only way and also, you -- we don't know if any of the
2 materials that we submitted for the modification
3 request could be now included in this record. We --
4 it was for other things, but we had very elaborate
5 tabs with quotes.

6 For example, there was a point where you
7 -- you personally specifically asked the architect how
8 many units there would be outside and he said and
9 reiterated a few. There are now ten. Now, we don't
10 know how many related to the basement or the overall
11 extra necessities and we don't have -- at this point,
12 we can't even ask an expert to address that.

13 But, we felt that since he was an expert
14 and since you felt that was a reasonable answer, there
15 is some discrepancy here. It's either that it was way
16 out of whack as an estimate or that a basement has an
17 impact.

18 I mean these are things that we --

19 CHAIRPERSON GRIFFIS: Okay.

20 MS. FELDMAN: -- we feel idiotic not being
21 able to talk about, but we can't without data.

22 CHAIRPERSON GRIFFIS: Okay. And I -- I
23 fully understand your position and I think we can
24 assist you in getting to that point and if we can't
25 fully evidence or give you the opportunity today, we

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1 may end up having to continue -- continue this hearing
2 on another day.

3 MS. FELDMAN: Okay.

4 CHAIRPERSON GRIFFIS: What I'd like to do
5 is utilize the brief time that we do have today
6 though. So --

7 MS. FELDMAN: That would be --

8 CHAIRPERSON GRIFFIS: -- outside of that,
9 I have a full understanding of your interest in all of
10 these aspects and I will spend the time and focus, I
11 know the Board will also, in getting this information.

12 MEMBER ETHERLY: Mr. Chair, I --

13 CHAIRPERSON GRIFFIS: Yes, Mr. Etherly.

14 MEMBER ETHERLY: -- I would -- I would
15 agree with that course of action. It might also be
16 helpful to get some sense of what the timing
17 limitations are for us today as we shape what may be
18 another 45 minutes at best depending on what we've
19 heard about the schedule problems.

20 CHAIRPERSON GRIFFIS: Thank you very much.
21 Neighbors United, because you're at the table now is
22 indicated that you need approximately how much time to
23 present your case?

24 MS. FELDMAN: Let me just --

25 CHAIRPERSON GRIFFIS: That's going to be

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1 backwards. How much time does the applicant need?

2 MS. PRINCE: Ten minutes and I'm strongly
3 opposed to any continuance to accommodate the schedule
4 of Neighbors United.

5 CHAIRPERSON GRIFFIS: Okay.

6 MS. PRINCE: Obviously, this has been
7 schedule for several months.

8 CHAIRPERSON GRIFFIS: Indeed.

9 MS. PRINCE: And we've been denied use of
10 the --

11 CHAIRPERSON GRIFFIS: Indeed.

12 MS. PRINCE: -- space all this time in
13 anticipation of this hearing.

14 CHAIRPERSON GRIFFIS: Okay.

15 MS. PRINCE: So, we're ready to finish
16 today.

17 CHAIRPERSON GRIFFIS: And that should be
18 clear. We would continue this in order that --
19 because we didn't have information that was available
20 for us today for our own deliberation that we would
21 continue or keep the record open.

22 So, we're going to need to access pretty
23 -- well, there it is. So, we have ten minutes.

24 Neighbors United, ten minutes?

25 MS. FELDMAN: Ten minutes.

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1 CHAIRPERSON GRIFFIS: Indeed. We'll --
2 we'll set up an equitable time.

3 Does -- is the ANC -- I know, Mr. Finney,
4 you're the single member district. Is -- is the ANC
5 full represented that's going to present a case? Do
6 you know?

7 COMMISSIONER FINNEY: No, Mr. Chair.

8 CHAIRPERSON GRIFFIS: Okay. So, you'll be
9 just speaking as a single member district and we will
10 look --

11 COMMISSIONER FINNEY: That is correct.

12 CHAIRPERSON GRIFFIS: -- forward to that.
13 That being said, anything else, Ms. Miller?

14 VICE CHAIRPERSON MILLER: Well, I was just
15 wondering if Ms. Prince can address either in her
16 presentation or now whether or not you had received
17 requests for that information such as how many air
18 conditioners or how many students were going to be in
19 the room or the traffic implications of the door and
20 -- and what your response was.

21 MS. PRINCE: We have been actively
22 responding to requests from the Advisory Neighborhood
23 Commission and Neighbors United for months.

24 These requests far predate this
25 application. These requests predate our modification

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1 request. These requests go back to the construction
2 phase.

3 I have never received a volume of requests
4 of the level of specificity of these request. In 20
5 years, I have never provided serial numbers of HVAC
6 equipment. I have never been asked to test the
7 decibel level of residentially-sized unit.

8 Yet, we are responding to these requests
9 as they come. We hired a sound expert who actually
10 did measure decibel level. We are trying to be
11 accommodating.

12 However, this is an application involving
13 320 square feet. We have no interest in reliving the
14 five hearings that we went through to establish the
15 use in the first place and as you know, this Board is
16 charged only with evaluating the incremental impact
17 associated with this change.

18 So, I would like you to keep that in mind
19 as you evaluate our efforts to accommodate the
20 neighbors and keep them apprised of -- of answers to
21 any questions that they have asked us.

22 CHAIRPERSON GRIFFIS: Makes sense. Ms.
23 Miller.

24 VICE CHAIRPERSON MILLER: And I -- I just
25 have one other comment and I didn't hear the -- the

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1 case on the school in general, but when I hear an
2 issue with respect to parking, I don't really
3 understand how that would be relevant to this case
4 because it sounds like they -- the students are just
5 being -- participating -- changing rooms. I don't see
6 how that would possibly impact any increase in parking
7 or increase number of students coming out of the
8 building in general.

9 MS. PRINCE: Our view exactly and I would
10 like to note. We had an extensive ANC deliberation on
11 this matter at the beginning of the month with one of
12 the most extraordinary levels of questioning that I've
13 ever heard of and it concluded with support of
14 Advisory Neighborhood Commission 3D.

15 CHAIRPERSON GRIFFIS: Okay. Anything
16 further from the Board?

17 Any other preliminary matters? Anything
18 else we need to attend to? Any of the parties?
19 Participants? Applicant?

20 Very well. Let's go.

21 MS. PRINCE: Good morning. I'm Allison
22 Prince with Shaw Pittman. I'm here today in
23 connection with St. Patrick's school's request to use
24 a 320 square foot portion of a basement in an existing
25 school building for a classroom.

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1 As this Board is aware, the school use on
2 the site was established pursuant to BZA Application
3 Number 16852 dated March 25th of 2003 in which this
4 Board unanimously approved the special exception
5 request to permit a junior high on the site.

6 The plans approved in connection with that
7 case contemplated only storage or utility use in the
8 basement and that is why we are here before you today
9 to change the use that was shown in the original
10 plans.

11 We regard this as a simple case and we
12 want to be respectful of the Board's time. For that
13 reason, we are limiting the testimony today to the
14 project architect David Konapelsky. Not only is he
15 extremely familiar with all aspects of the plans, he
16 is highly familiar with the school's program and with
17 its operation on the site.

18 It should be noted that the school's
19 program will not change as a result of your approval
20 of the application.

21 The Office of Planning supports this
22 application with one condition regarding the use of an
23 egress stair door for emergency purposes only. We
24 have no objection to that.

25 ANC-3D as I mentioned supports this

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1 application and that support followed an
2 extraordinarily long deliberation with careful
3 consideration of many, many issues that will be raised
4 by the Neighbors United today and the application is
5 notably supported by one of the abutting families, the
6 Hoys, as shown per their request for party status
7 which you have treated as a letter of support since
8 the Hoys are not here today.

9 I would like to emphasize the narrow scope
10 of today's hearing. This is a newly filed special
11 exception application under 206 -- Section 206 to
12 allow classroom use of an existing storage space. It
13 is not a minor modification. We already filed a minor
14 modification request pursuant to Section 3129 and this
15 Board determined that the request was not sufficiently
16 minor to be processed under that section. Therefore,
17 we were advised to file a full-blown application and
18 that is what we have done.

19 The impact test set forth in Section 206
20 is relevant. It is really the only relevant test and
21 I urge you to enforce the narrow scope of this
22 application during the course of today's hearing.

23 I heard one comment at the outset about a
24 condition 19 in BZA -- the BZA order. I would
25 maintain that condition 19 doesn't require a

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1 modification at all in connection with this
2 application. Because condition 19 refers to a site
3 plan that accompanied the original application.
4 Exhibit 340 is site plan that showed the footprint of
5 the life safety addition.

6 And, in fact, our expansion of the
7 building was limited to that site plan and that formed
8 the basis for our initial understanding and the
9 initial ruling from the Zoning Administrator that
10 resulted in a building permit that Board approval was
11 not required to change the use of the basement from a
12 storage utility use to a classroom use.

13 Nonetheless, the opinion changed on that
14 issue and we're happy to be before you today so that
15 you can evaluate the incremental impact of this
16 proposed change in use.

17 If the Board has no questions, I'd like to
18 proceed with the testimony of our only witness, David
19 Konapelsky, an expert in architecture.

20 He was qualified as an expert in
21 connection with the original case. I don't believe
22 you need to re-quality him today.

23 CHAIRPERSON GRIFFIS: Good. Thank you
24 very much. I would tend to agree unless there's any
25 opposition from the parties. Very well. Let's

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1 continue.

2 Let me just make a quick statement about
3 condition 19. I do agree. In fact, I was looking.
4 Well, I'm not going to go too much further into it. I
5 mean the operative word in there is the site plan and
6 it's actually exhibited in the -- that condition. So,
7 it makes total sense that this would not impact it.

8 Let's move ahead.

9 MR. KONAPELSKY: My name is David
10 Konapelsky, 4404 Edgefield Road, Kensington, Maryland.

11 I'm the architect for St. Patrick's school.

12 Good morning, Chairman Griffis and member
13 of the Board. My name is David Konapelsky and I'm
14 here today on behalf of St. Patrick's Episcopal Day
15 School in connection with its request to use the
16 basement of the existing building at 4925 MacArthur
17 Boulevard, N.W. for classroom purposes.

18 I am the architect of record for
19 renovation of the building that was approved by the
20 Board in Order Number 16852 dated March 25th, 2003 and
21 I have detailed knowledge of the building.

22 As you are aware, the application that is
23 before you today involves only the school's use of the
24 existing basement. The school has received a
25 Certificate of Occupancy for school use of the

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1 remaining three floors of the building and has been
2 operating in the building since January 28th of this
3 year.

4 To put this application in context, it
5 involves only 320 square feet of the 7500 square foot
6 building.

7 When I appeared before this Board during
8 the spring and fall of 2002 in connection with the
9 original application for junior high, we had prepared
10 conceptual drawings for the renovation of the existing
11 building and the construction of a life safety
12 addition to the building.

13 Before we received approval in December of
14 2002, we had not yet done a comprehensive building
15 survey, not yet prepared detailed working drawings nor
16 had we fully examined all code related matters since
17 it would have been premature and expensive to do so
18 before receiving permission to operate. What we had
19 prepared and presented was appropriate and typical for
20 that point in the design process.

21 At the time of the BZA hearings, the
22 school did not plan to make a costly investment in the
23 installation of an automatic sprinkler system in the
24 building. A sprinkler system was not required because
25 of the building's history of school use.

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1 For that reason, I showed the basement
2 level for utility and storage use only. Absent a
3 sprinkler system, it would prove very difficult to
4 allow student use of the basement.

5 After the Board's December 2002 approval
6 of the application, we commenced a detailed survey of
7 the building, coordinated with structural, electrical,
8 mechanical, plumbing, civil, soil, and fire safety
9 engineers. Did investigative studying, testing of the
10 existing structure and began to prepare a total of 65
11 working drawings which entailed a full and complete
12 examination of all code related issues.

13 After collecting field research,
14 coordinating the building systems, coordinating with
15 BOCA Plan Review Engineers, D.C. Code Officials, and a
16 careful examination of the requirements of BOCA, we
17 determined that a second means of egress from the
18 basement level was required even for the use of the
19 space for only storage and utility purposes.

20 In addition, we determined that based on
21 the type of elevator required by D.C. and ADA codes to
22 meet our specific needs, the elevator machine room
23 required a 7 foot 6 clear ceiling height as did the
24 path of travel from that room to the second remote
25 egress stair. The required egress path occupies a

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1 considerable portion of the basement space.

2 In order to provide the necessary
3 clearance, the school is required to lower the
4 existing floor slab in the central basement room which
5 lies between the elevator machine room and the remote
6 egress stair.

7 In addition, in the course of preparing
8 the working drawings, it became apparent that a
9 significant amount of underpinning of the existing
10 building would be required. Field conditions revealed
11 a patchwork of existing structural framing requiring
12 new floor framing, steel beams, interior steel
13 columns, and footings in this area of the basement.

14 There was also an existing damaged
15 interior perimeter drain tile at the proposed music
16 room/slab area which required replacement. All these
17 factors required the need for excavation and a new
18 slab at a lower elevation.

19 Also, during the course of preparation of
20 the working drawing, St. Patrick's decided to upgrade
21 the fire safety level across the entire building by
22 installing an automatic sprinkler system in the
23 building. I had direct instructions from the school
24 officials to save the architectural feature of the
25 central Victorian stair and the sprinkler system in

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1 addition to upgrading fire safety, allowed the
2 original stair to remain. This decision eliminated
3 the previous impediment to student use of the
4 basement.

5 The confluence of all these factors made
6 it both reasonable and sensible to file working
7 drawings that included a classroom in a basement. The
8 sprinkler system would allow the space to be used and
9 a significant portion of the basement required
10 excavation for the egress pathways and the
11 underpinning even for storage or utility use.

12 We were extremely direct and forthright in
13 all our discussions with DCRA concerning this issue.
14 We made the decision to include the classroom in the
15 basement with full knowledge of the DCRA. We
16 performed the work pursuant to the valid permit that
17 was issued by DCRA in June 2003 in connection with
18 those plans.

19 At the time we were preparing the working
20 drawings and meeting with DCRA, we assumed that since
21 the change in the room from storage utility to
22 classroom affecting existing internal space and had no
23 affect on gross floor area, BZA review of the change
24 was not required.

25 During my cross examination at the July

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1 9th BZA public hearing, Chairperson Griffis made it
2 clear that building code and life safety issues are
3 not zoning issues and limited only in their worthiness
4 or their worth because other than that, the BZA has no
5 jurisdiction over building codes. Further, the life
6 safety upgrade of the basement level is a building
7 code issue. Further, the Zoning Division approved our
8 permit.

9 We not understand that this Board views
10 the conversion of utility to classroom space as a
11 significant enough change in the BZA approved drawings
12 to require additional approval.

13 While that was not all clear to us in
14 connection with the permit process as we worked
15 through code related issues, we are pleased to be here
16 today to present our plan and request your approval.

17 The question before you today is narrow in
18 scope. Will the use of the basement room as a
19 classroom result in adverse impacts due to noise,
20 traffic, number of students or other objectionable
21 conditions?

22 It is not difficult to evaluate the
23 impacts associated with the use of a 320 square foot
24 below grade basement for classroom purposes. The room
25 features one small window and will be used only during

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1 school hours, 7:30 a.m. until 4:00 p.m.

2 We are seeking no changes to the
3 conditions governing the operation of the building and
4 perhaps most important, we are not seeking any change
5 in the student cap of 40 and the faculty and staff cap
6 of 12 which includes eight full-time and four part-
7 time teachers.

8 Noise, sound emanating from the basement
9 will not adversely affect neighboring property. The
10 school plans to use the basement for a music room for
11 classes currently held on the second floor of the
12 building in a room that features two large windows
13 that span almost the entire height of the room. The
14 relocation to the basement will provide a benefit to
15 the immediate neighbors and the neighborhood as a
16 whole and our students who in -- who in next door math
17 won't hear it either.

18 The proposed music room is partially below
19 grade which will provide substantial sound buffering.

20 The basement foundation walls are a minimum of 18
21 inches thick. The internal walls are highly insulated
22 as well. Further, the room has only one window.

23 The relocation of the music room to the
24 basement will reduce the noise associated with music
25 instruction on the subject property. For that reason,

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1 the neighbors to the east of the subject property have
2 indicated that they support the use of the basement as
3 a music room because of the reduced potential for
4 noise.

5 Sound of HVAC equipment. The HVAC
6 equipment associated with the building was carefully
7 designed to honor our commitment to the neighbors and
8 our representations to the Board that we would use
9 only residentially-sized units.

10 When I testified before the ANC, I was
11 asked to speculate as to the difference in HVAC
12 requirements between utility and classroom use in the
13 basement. I guessed at that time that the equipment
14 was identical, but that classroom would entail
15 additional air changes.

16 Since that time, I learned from our
17 mechanical engineer that the HVAC requirements and
18 amount of system usage for the basement are identical
19 for storage utility and also for classroom use. The
20 heat pump that was specified and installed is
21 appropriate for either use.

22 Further, the exterior condensing unit
23 serving the basement is on the lawn side of the
24 building far removed from the Ashby Street neighbors.

25 Traffic. The relocation of the music room

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1 to the basement will have absolutely no affect on
2 traffic in the area. The school will continue the
3 shuttle bus system and car pool program required by
4 the previous order.

5 Parking. St. Patrick's provides a total
6 of 15 parking spaces on the site that have been more
7 than ample to address the school's needs. This
8 application does not contemplate any increase in the
9 number of parking spaces.

10 Number of students and faculty staff. As
11 I stated earlier, there will be no change to the
12 maximum number of students and faculty staff approved
13 in Order Number 16852. As I noted in the original
14 hearing on the application, the building code allows a
15 far greater number of students to occupy the building
16 than the zoning order. Since the zoning order is more
17 restrictive, it controls.

18 We strongly urge you to approve the
19 proposed additional classroom in the basement. It's
20 use will have no adverse impacts results -- resulting
21 from noise, traffic, number of students or other
22 objectionable conditions and will actually improve the
23 existing conditions through the relocation of the
24 music room from a less buffered location in the
25 building.

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1 We are not seeking permission to use the
2 basement to accommodate a use that is not already in
3 the building.

4 If your approval is not granted, we will
5 continue to accommodate the music room on the second
6 floor. This is not an effort to expand the school's
7 program in an indirect manner. Rather it is simply an
8 effort to use a room that exists and can serve
9 students more appropriately with minimal impact on the
10 neighborhood.

11 I would be pleased to answer questions
12 that you may have.

13 CHAIRPERSON GRIFFIS: Good. Thank you
14 very much.

15 Am I correct in understanding that the
16 utilization of the basement level -- first of all, it
17 is a basement or a cellar?

18 MR. KONAPELSKY: It's technically a
19 cellar.

20 CHAIRPERSON GRIFFIS: Cellar.

21 MR. KONAPELSKY: It's not a story. It's
22 not considered a story.

23 CHAIRPERSON GRIFFIS: Well, it supports
24 your statement that it didn't go to gross floor area,
25 but to the point that I was getting to is -- am I

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1 correct that you stated that the storage utility and
2 the classroom have the same heating and cooling load?

3 MR. KONAPELSKY: That's correct.

4 CHAIRPERSON GRIFFIS: Okay. So, they have
5 the same identical equipment requirement?

6 MR. KONAPELSKY: There -- there is a
7 minimum. I talked to Dwyer Engineers who's the
8 mechanical engineer of record, both the project
9 engineer and the senior project engineer, and they
10 both analyzed the -- the issue and said that the
11 minimum unit is a ton and a half and -- and that's
12 because it's a minimum unit of a ton and a half and
13 that serves both spaces.

14 CHAIRPERSON GRIFFIS: Okay.

15 MR. KONAPELSKY: Both functions.

16 CHAIRPERSON GRIFFIS: Good. And as you've
17 addressed the entire case list, I'm going to run down
18 all of this.

19 First of all, you indicated that this room
20 -- well, for clarification, you've said classroom in
21 one aspect and music in the other. Is there -- and I
22 think we're looking at this as a utilization of -- of
23 room in the basement. Because there's nothing -- I
24 don't think that we would condition -- there's nothing
25 rises to the level that would condition the music room

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1 has to be in the basement. I understand your -- your
2 -- your kind of illustration of the -- the -- the
3 possibility of sound attenuation in the basement
4 level, but there's nothing that precludes you now from
5 having a music room on the second floor. So, that's
6 just for base understanding.

7 This room utilization if approved would
8 follow in the same hours of operation as the previous
9 order. Is that correct?

10 MR. KONAPELSKY: That's correct.

11 CHAIRPERSON GRIFFIS: Okay. And is there
12 then any sort of -- and you've indicated that there's
13 no expansion of the number of students attended to
14 this either. Is that correct?

15 MR. KONAPELSKY: That's correct.

16 CHAIRPERSON GRIFFIS: The program is all
17 -- was -- is going to provide the same program for the
18 same number of students.

19 MR. KONAPELSKY: That's correct.

20 CHAIRPERSON GRIFFIS: So, you're saying
21 that there's no -- there's no increased traffic in
22 regards --

23 MR. KONAPELSKY: That's correct.

24 CHAIRPERSON GRIFFIS: -- to the
25 utilization of this?

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1 MR. KONAPELSKY: It's the same functions
2 as is there today.

3 CHAIRPERSON GRIFFIS: There wouldn't be
4 any increase in parking requirement or need for
5 parking.

6 MR. KONAPELSKY: That's correct.

7 CHAIRPERSON GRIFFIS: Because there isn't
8 an increase of students.

9 MR. KONAPELSKY: Correct.

10 CHAIRPERSON GRIFFIS: There's really no
11 increase in intensity of use of this building. Is
12 that correct?

13 MR. KONAPELSKY: That's correct.
14 Programmatically, a function is going from the second
15 floor to the basement.

16 CHAIRPERSON GRIFFIS: Noise. Noise seems
17 to rise to the level outside of the equipment of
18 intensity of how many people on the property and --
19 and what's going on. Would you tend to agree with
20 that statement?

21 MR. KONAPELSKY: Yes.

22 CHAIRPERSON GRIFFIS: Okay. And we
23 haven't -- we're not looking at any change of
24 population on the property.

25 MR. KONAPELSKY: That's correct. There is

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1 a egress stair and in my mind, it -- if there's a
2 fire, it'll be used and there's no reason to use it
3 otherwise and, in fact, on the exterior elevation,
4 it's in a paneled system and it's painted out. So,
5 it's -- it's for egress only.

6 CHAIRPERSON GRIFFIS: Okay. First of all,
7 let's clarify. You said in your opinion, but outside
8 of your opinion, is that going to be an alarm door?

9 MR. KONAPELSKY: Yes, the school agreed to
10 that at the ANC meeting that it could be an alarm.

11 CHAIRPERSON GRIFFIS: Okay. So, if
12 someone goes through that door, the alarm sounds and
13 all something breaks loose.

14 MR. KONAPELSKY: Um-hum.

15 CHAIRPERSON GRIFFIS: Okay. And now, I
16 don't fully understand what you just said about
17 panelized outside. What -- what are you talking
18 about?

19 MR. KONAPELSKY: On the exterior to --
20 there's -- there's an extra door on -- on the Ashby
21 Street side for -- to -- for this egress stairway and
22 it's within the existing footprint under the existing
23 porch and there is a wood panel treatment to that
24 elevation and this is -- this door became part of that
25 panel system. In other words, it's not highlighted in

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1 a different color with special trim designated as a
2 second door. It's -- it's -- it's meant to go away.
3 It's part of the -- the treatment architecturally of
4 the wall.

5 CHAIRPERSON GRIFFIS: Does that make
6 sense? So, what you're saying if I understand is that
7 this -- the door is actually cut of the same material
8 that's adjacent to it.

9 MR. KONAPELSKY: But, it's painted out.
10 It's a metal door because it's fire rated.

11 CHAIRPERSON GRIFFIS: I see. Okay. So,
12 it kind of makes it look like it's part of the
13 existing exterior facade.

14 MR. KONAPELSKY: Exactly.

15 CHAIRPERSON GRIFFIS: I see. Other
16 questions from the Board?

17 VICE CHAIRPERSON MILLER: You indicated
18 that the noise was going to actually decrease by
19 moving the music room down to the cellar basically.
20 The sound of the music is actually going to be buffered
21 in the cellar.

22 MR. KONAPELSKY: Yes.

23 VICE CHAIRPERSON MILLER: My question is
24 what's going to be on the second floor in its place?

25 MR. KONAPELSKY: It's -- it's -- it's a

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1 classroom. So, probably humanities or one of the
2 classes upstairs. The -- the -- the children actually
3 play bongo drums. You know, there's bongo drums in
4 the -- the music department. So, it's -- it just
5 seems very appropriate for that use to go down in the
6 basement.

7 COMMISSIONER HOOD: I have a question.

8 CHAIRPERSON GRIFFIS: Mr. Hood.

9 COMMISSIONER HOOD: Yes. In the Neighbors
10 United Trust submission, they mention about the
11 preproduction practice of theatrical music
12 productions. Is that part of what's taking place now
13 on the second floor?

14 MR. KONAPELSKY: I believe it is. Some --
15 some is on the main campus and some is there. So, I
16 think the point is that whatever is happening on the
17 second floor right now is going to happen in the
18 basement.

19 COMMISSIONER HOOD: So, you're not sure --

20 MR. KONAPELSKY: It's not increased
21 quantity of -- of activity.

22 COMMISSIONER HOOD: So -- so, you're not
23 sure right now what's happening on the second floor?

24 MR. KONAPELSKY: Right now, it's a music
25 room.

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1 COMMISSIONER HOOD: It's a music room, but
2 -- but I just asked was this preproduction which the
3 Neighbors United Trust was asking. So, there
4 obviously is some information that's unknown?

5 MR. KONAPELSKY: There -- there is a
6 production.

7 COMMISSIONER HOOD: I'm just going by your
8 -- your response to my question.

9 MR. KONAPELSKY: Yes.

10 CHAIRPERSON GRIFFIS: I think --

11 MS. PRINCE: We have Peter Baret and
12 Catherine Bradley from the school are both here and
13 could address that. This is not unknown information I
14 think. David's simply explaining that the second
15 floor uses could occur in the basement. The
16 preproduction use would not change.

17 COMMISSIONER HOOD: Okay. So, that's part
18 of the music program.

19 MR. KONAPELSKY: Right.

20 MS. PRINCE: Exactly.

21 MR. KONAPELSKY: I think my point is that
22 there is a production. There is music class.
23 Whatever they're doing right now is moving down in the
24 basement.

25 COMMISSIONER HOOD: Which exists now on

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1 the second floor?

2 MR. KONAPELSKY: They're not -- because of
3 the basement use, they're not increasing the activity.

4 CHAIRPERSON GRIFFIS: I think it's
5 misheard. Brings up an important point of just trying
6 to get a full understanding, but what I also -- it's
7 -- it's my opinion unless the -- the Board feels
8 differently is that we're not going in to analyze what
9 the actual program is and it -- it seems to me when
10 you say preproduction I think they may be doing
11 musicals. Maybe even The Sound of Music in the
12 basement and -- but, you know, outside of what's
13 happening, that -- that's happening within the
14 building. It's happening within the established
15 students. All of that -- as long as -- and -- and
16 within the hours of operation. That we've already
17 established.

18 I don't -- so, far nothing has been
19 brought to my understanding that's changed. That's --
20 that's increased above what we've looked at previously
21 and I think that's what we were doing.

22 COMMISSIONER HOOD: Mr. Chairman, all --
23 all I was doing was just asking is that part of their
24 musical criteria.

25 CHAIRPERSON GRIFFIS: Right. No, I --

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1 COMMISSIONER HOOD: I mean if it's all
2 inclusive, then to me that's a moot point.

3 CHAIRPERSON GRIFFIS: Yes.

4 COMMISSIONER HOOD: If it's already being
5 done --

6 CHAIRPERSON GRIFFIS: Right.

7 COMMISSIONER HOOD: -- there's nothing
8 being added. It's already taking place. It's taking
9 place on the second floor and preferably if I lived
10 next door, I would be glad for it to go to the
11 basement.

12 CHAIRPERSON GRIFFIS: Yes.

13 COMMISSIONER HOOD: The other thing, other
14 issues, and I don't want to rehash the old order, is
15 -- and I want to make sure that -- that we do stuff
16 realistic because --

17 CHAIRPERSON GRIFFIS: Good.

18 COMMISSIONER HOOD: -- I think it's from
19 -- you -- you mentioned it -- it -- the room being
20 used from 7:00 to 4:30 and I don't have it right in
21 front of me. 7:00 to 4:00 or whatever it was at
22 first. Is that realistic? Because I know you have
23 some students who may need extra help like myself when
24 I took music and -- and I know after 4:30 -- and I
25 just want to make sure that we're being real here and

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1 make sure that we're in compliance with the order as
2 -- as far as the neighbors are concerned. That stuff
3 is not taking place after 4:30 actually and that
4 things are not going on 6:30 in the evening and still
5 down there being used and I want to make sure that's
6 real before the -- we make a final decision.

7 CHAIRPERSON GRIFFIS: That -- it's an
8 excellent -- it's an absolute excellent point, Mr.
9 Hood, and -- and believe me, I think it was of great
10 concern of the Board in the previous and the hours of
11 operation that they've enumerated in this application
12 7:30 a.m. to 4:00 p.m. fortunately or unfortunately is
13 condition number four of the previous order. So,
14 that's where it is.

15 COMMISSIONER HOOD: So, that's -- that's
16 actually happening. Okay.

17 CHAIRPERSON GRIFFIS: Right.

18 COMMISSIONER HOOD: All right. Thank you.
19 Thank you, Mr. Chair.

20 CHAIRPERSON GRIFFIS: I tend to agree
21 though. Some people need extra help with bongos.
22 Okay.

23 Any other questions from the Board? If
24 there aren't any other further clarification
25 questions, let's move to cross examination.

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1 MS. PRINCE: I actually just had one point
2 that Mr. --

3 CHAIRPERSON GRIFFIS: Oh, I'm sorry. Go
4 ahead.

5 MS. PRINCE: -- Konapelsky left out and I
6 -- it may be relevant. There was an actual test of
7 the decibel level of the existing HVAC equipment and
8 he's prepared to discuss that.

9 MR. KONAPELSKY: A week ago Tuesday, Poly
10 Sonics who had been the expert witness when we had our
11 case the first time sent the representative out and he
12 did testing at three sites. One on the property line
13 on Ashby Street. One at a neighbor across the street
14 and one at the neighbor adjacent on the east side and
15 all decibel levels were within the limits of D.C.
16 requirements.

17 Furthermore, when he did that testing, the
18 school -- every thermostat was set below 65 degrees
19 and he had wait with his instrumentation for several
20 minutes because the school is on the flight path of
21 National Airport and some of the decibel levels of the
22 planes are over 75 and also MacArthur Boulevard, there
23 was a lot of traffic. So, we literally didn't get a
24 reading until we waited for some period of time when
25 things were -- we had a pocket of time where we could

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1 read hopefully just the mechanical equipment in -- in
2 all places. Then they were all below the decibel
3 levels required.

4 CHAIRPERSON GRIFFIS: Okay. Brings back
5 memories of the previous case of which we had --
6 actually, I learned a heck of a lot about how to read
7 decibel levels in sound and how it's not cumulative,
8 but it's wave and we won't go into that now.

9 MR. KONAPELSKY: And -- and one other
10 thing I might --

11 CHAIRPERSON GRIFFIS: Do you have a report
12 that you're submitting into the record so that the
13 Neighbors United Trust might have a copy of that also?

14 MS. PRINCE: We can submit that report and
15 present copies to Neighbors United.

16 CHAIRPERSON GRIFFIS: Do -- do you happen
17 to have a copy with you?

18 MR. KONAPELSKY: Yes.

19 CHAIRPERSON GRIFFIS: Oh, I see. Why
20 don't we --

21 MR. KONAPELSKY: One thing I'd like to
22 add, too --

23 CHAIRPERSON GRIFFIS: Yes.

24 MR. KONAPELSKY: -- if possible is that
25 the -- we had a -- a neighborhood meeting several

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1 weeks ago and the -- the issue of the noise came up
2 and since that time, we've talked to engineers. We've
3 talked to mechanical consultants. We've talked to
4 Poly Sonics and also the decibel levels are below
5 what's required, the school is -- is doing a -- a
6 planting plan to buffer the noise. They are going
7 regulate the times that the units are -- that the
8 units are on. There's -- there's a system in place to
9 even make the noise levels substantially lower --

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. KONAPELSKY: -- even though they're
12 within the tolerances at this time.

13 CHAIRPERSON GRIFFIS: Very well. And
14 we're into it. How many units do you have?

15 MR. KONAPELSKY: There are a total of ten
16 units spread throughout --

17 CHAIRPERSON GRIFFIS: Ten units. Why do
18 you have ten units for 7,500 square feet?

19 MR. KONAPELSKY: Well, because number one
20 is we had promised residential units and they're
21 residential units instead of using larger units.

22 Secondly, the building is zoned so there's
23 -- the -- the zones that they picked because it's an
24 old building with fire ratings. The stairs each need
25 their own unit. There's a little split system. Some

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1 of these units are very small.

2 CHAIRPERSON GRIFFIS: What does it mean
3 the zone outside of the zoning regulations? Zone in a
4 building?

5 MR. KONAPELSKY: It's the area of the
6 building that is being conditioned by that particular
7 unit.

8 CHAIRPERSON GRIFFIS: So, like the third
9 floor can be at 60 degrees and the first floor can be
10 at 80? Because one teacher likes it hot and one --

11 MR. KONAPELSKY: Right. Right.

12 CHAIRPERSON GRIFFIS: -- teacher likes it
13 cold?

14 MR. KONAPELSKY: Right.

15 CHAIRPERSON GRIFFIS: I see.

16 MR. KONAPELSKY: Also, it's -- it's
17 residential duct work on the inside and you need a
18 unit on the inside. Exterior unit needs to be so far
19 away with the refrigerant line. So, and also again,
20 you have three stairs. They each have their own
21 units.

22 CHAIRPERSON GRIFFIS: And where are they
23 located?

24 MR. KONAPELSKY: There are five on the
25 Ashby Street side. There are two on the east side

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1 which is the high side or the site where the parking
2 lot is and there are three on the lawn side and of the
3 three on the lawn side, one of them controls this --
4 the music room in the basement.

5 CHAIRPERSON GRIFFIS: There are five on
6 the Ashby side?

7 MR. KONAPELSKY: Yes.

8 CHAIRPERSON GRIFFIS: Which is the front
9 of the building.

10 MR. KONAPELSKY: The front is MacArthur.

11 CHAIRPERSON GRIFFIS: Okay. That's an
12 interesting point. Five. Three. All right. Okay.

13 Any other questions from the Board?

14 COMMISSIONER HOOD: Are they all a ton and
15 a half?

16 MR. KONAPELSKY: No, they vary, but
17 they're -- they're relatively small.

18 COMMISSIONER HOOD: Thanks.

19 CHAIRPERSON GRIFFIS: Vary up to what?
20 Three tons.

21 MR. KONAPELSKY: I would -- I would guess
22 three tons. I -- I don't have that information, but I
23 would say about three tons.

24 CHAIRPERSON GRIFFIS: Okay. Anything
25 else? Anything else, Ms. Prince?

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1 MS. PRINCE: Nothing else.

2 CHAIRPERSON GRIFFIS: Okay. Cross.
3 Questions.

4 MS. VAN SIKLE: Yes, thank you, Mr.
5 Chairman. It's Tina Van Sikle to do --

6 CHAIRPERSON GRIFFIS: Okay.

7 MS. VAN SIKLE: -- cross examination.
8 First of all, just to help in understanding the -- the
9 heat pump location and so forth, I've got some
10 pictures of these heat pumps on their -- and their
11 size that I'd like to --

12 CHAIRPERSON GRIFFIS: But, this is cross
13 examination.

14 MS. VAN SIKLE: Okay. And I'd like him to
15 verify that these are the units. So, I'm going to
16 give him a picture of this and also present one to the
17 Board.

18 CHAIRPERSON GRIFFIS: I'm sorry. Can you
19 give it to staff please? Can you hand those down?

20 MS. VAN SIKLE: Mr. Konapelsky, you've
21 identified the -- the heating units. You're
22 characterization of them this morning is in
23 significant contrast from the information provided to
24 us in October of 2003 and in specific, there were no
25 units in that list that were under three tons. Could

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1 you explain that difference? And here's -- here's the
2 list if you need to refer to the --

3 MR. KONAPELSKY: I -- I think there's --
4 one thing is we're talking about a basement and the
5 unit for this basement is on the lawn side, number
6 one. Number two, we had promised residential units.
7 We didn't go further than that. I'm not a mechanical
8 engineer. I didn't know if there was going -- the --
9 the quantity and size of these things.

10 It's a extremely complicated building
11 because part of building is 100 years old and the
12 other part is about 80 years old. We have fire
13 stairs. We fire separations.

14 CHAIRPERSON GRIFFIS: Okay. Before we go
15 too lengthy into this direction, first of all, what
16 was the question? The question is he at one point --
17 yes, let me -- let me restate it --

18 MS. VAN SIKLE: The question -- the
19 question is on his -- oh, excuse me.

20 CHAIRPERSON GRIFFIS: If -- your question
21 is he made a statement that none of these would be
22 less than three tons and now this morning, he said
23 there are units that are less than three tons.

24 MS. VAN SIKLE: Exactly.

25 CHAIRPERSON GRIFFIS: Okay. And your

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1 explanation and answer if I understand it is you're
2 not the mechanical engineer, but that you were looking
3 to design with the mechanical engineer residential
4 units?

5 MR. KONAPELSKY: Residential quality
6 units. That was our purpose and -- and to get them in
7 an old building --

8 CHAIRPERSON GRIFFIS: Okay. Next
9 question.

10 MS. VAN SIKLE: I want to confirm then is
11 this exactly correct that this is only a 1.5 ton unit
12 or are we talking about a three ton unit? Because
13 your evidence is -- shows to the contrary.

14 CHAIRPERSON GRIFFIS: Okay. The question
15 is -- the question is clear.

16 MR. KONAPELSKY: I was told to design that
17 space. It was a ton and half.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. KONAPELSKY: And there was no
20 difference.

21 CHAIRPERSON GRIFFIS: But, what the
22 question is --

23 MR. KONAPELSKY: -- on the lawn side.

24 CHAIRPERSON GRIFFIS: -- is -- is that --
25 is that unit in place?

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1 MR. KONAPELSKY: It is in place. It's on
2 the lawn side.

3 CHAIRPERSON GRIFFIS: It's services -- and
4 what's the tonnage of it?

5 MR. KONAPELSKY: I was told that that --
6 the -- I was told by the engineer that that unit
7 required for the space was a ton and a half. Now,
8 does that mean that it's taking care of the hallway
9 and it's a little larger, maybe.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. KONAPELSKY: He -- he -- I asked him
12 the question.

13 CHAIRPERSON GRIFFIS: That's all right.
14 The one specific unit that --

15 MR. KONAPELSKY: Mechanical versus --

16 CHAIRPERSON GRIFFIS: I understand. The
17 one specific unit that you're being questioned about
18 is a -- a one and a half ton unit. Correct?

19 MR. KONAPELSKY: Correct.

20 CHAIRPERSON GRIFFIS: Excellent. Next
21 question.

22 MS. VAN SIKLE: So, we still don't have an
23 answer. Is it one and a half or three?

24 CHAIRPERSON GRIFFIS: He just answered it.
25 One and a half tons.

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1 MR. KONAPELSKY: The -- the question --
2 the answer is that if we're talking about the
3 difference in heating mechanical utility storage
4 versus classroom, it's the exact same quantity that's
5 there. Whether that unit is larger and is supplying
6 the hallway that goes to --

7 CHAIRPERSON GRIFFIS: I understand that.

8 MR. KONAPELSKY: You know. So, it's --

9 CHAIRPERSON GRIFFIS: Let me see. Maybe
10 I'm not getting the -- the question.

11 MR. KONAPELSKY: The units that -- the
12 units that --

13 CHAIRPERSON GRIFFIS: I understand.

14 MR. KONAPELSKY: Okay.

15 CHAIRPERSON GRIFFIS: Let me try and
16 clarify because after all cross examination is for
17 ultimately the Board's purpose not any of yours to be
18 frank.

19 But, let me see. You're trying to
20 identify a specific unit and you want to know the size
21 of it?

22 MS. VAN SIKLE: I'm trying to clarify what
23 was a contradiction in information provided --

24 CHAIRPERSON GRIFFIS: Okay. And I
25 understand that.

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1 MS. VAN SIKLE: -- at this --

2 CHAIRPERSON GRIFFIS: You've established
3 the fact that there's contradiction.

4 MS. VAN SIKLE: Right.

5 CHAIRPERSON GRIFFIS: We have to move on
6 from that.

7 MS. VAN SIKLE: Okay. Fine. We'll move
8 on.

9 CHAIRPERSON GRIFFIS: Now, I want to
10 establish more factual information that we can
11 actually use and let's -- do you -- it seemed to me
12 that you were going to point it towards a specific
13 unit on the site. Is that correct or was -- I am not?

14 MS. VAN SIKLE: Right.

15 CHAIRPERSON GRIFFIS: Okay.

16 MS. VAN SIKLE: Mean that --

17 CHAIRPERSON GRIFFIS: What's the specific
18 unit? Is it on the lawn side?

19 MS. VAN SIKLE: No, that -- that there was
20 to just -- to show that there are five units on Ashby
21 Street because the Board was not clear where those
22 units were and that was the purpose of those pictures
23 and to get an assertion about --

24 CHAIRPERSON GRIFFIS: Do you care about
25 one specific unit on this property?

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1 MS. VAN SIKLE: I can about -- I can about
2 the Poly Sonics test which was apparently on all of
3 those units.

4 CHAIRPERSON GRIFFIS: Well, let's -- let's
5 take my questions and an answer and then we'll move on
6 to further issues.

7 MS. VAN SIKLE: Okay.

8 CHAIRPERSON GRIFFIS: Do you care about a
9 specific unit and want to know the size of it?

10 MS. VAN SIKLE: I wanted to know the size
11 of the one that was in the basement because there
12 seemed to be a contradiction.

13 CHAIRPERSON GRIFFIS: Where is it on the
14 site? Do you want to know the size of the unit on the
15 lawn?

16 MS. VAN SIKLE: Right.

17 CHAIRPERSON GRIFFIS: And the size of the
18 unit on the lawn is?

19 MR. KONAPELSKY: I need to look at that --
20 that sheet. The information I was trying to provide
21 is --

22 CHAIRPERSON GRIFFIS: I know. I don't --
23 yes, you really can't.

24 MR. KONAPELSKY: I don't know what the
25 answer is.

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1 CHAIRPERSON GRIFFIS: My question is --

2 MR. KONAPELSKY: I have to double check.

3 CHAIRPERSON GRIFFIS: You don't know the
4 one unit on the lawn? You don't know what size it is?

5 MR. KONAPELSKY: No, I have the serial
6 numbers. I don't know exactly what size it is. The
7 mechanical engineer said that -- the question to him
8 was what -- what is the quantity of heating and
9 cooling that would -- for either space and he said
10 that --

11 CHAIRPERSON GRIFFIS: I don't care about
12 space.

13 MR. KONAPELSKY: Okay. I -- I don't have
14 that --

15 CHAIRPERSON GRIFFIS: I got a condenser on
16 the lawn. What size is the unit that that's -- I
17 don't care where it's feeding. What size is it? Is
18 that a three-ton unit?

19 MR. KONAPELSKY: I'd have to check.

20 CHAIRPERSON GRIFFIS: What's the largest
21 unit you have?

22 MR. KONAPELSKY: I don't know. I have the
23 serial numbers. I'd have to ask their engineer.

24 CHAIRPERSON GRIFFIS: Who's the
25 manufacturer?

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1 MR. KONAPELSKY: Carrier.

2 CHAIRPERSON GRIFFIS: Could someone get
3 Carrier website? We'll pull the spec on it. Take us
4 five seconds. Okay. I'm kidding because they're not
5 going to do that.

6 Next question.

7 MS. PRINCE: May -- may I interject before
8 we get extensively into this HVAC analysis? This is a
9 -- a case about incremental impact as I said before.

10 CHAIRPERSON GRIFFIS: Indeed. I
11 understand.

12 MS. PRINCE: We have already submitted
13 testimony that there's no difference.

14 CHAIRPERSON GRIFFIS: Right.

15 MS. PRINCE: No difference in the
16 equipment that is required for the current approved
17 building in its current configuration and one that
18 changes the use in the basement.

19 I think discussions of serial numbers and
20 tonnage are highly irrelevant. They're extraordinary
21 for --

22 CHAIRPERSON GRIFFIS: I agree.

23 MS. PRINCE: -- this Board to consider
24 this.

25 CHAIRPERSON GRIFFIS: We had a cross

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1 examination and I was trying to get succinctly to it.

2 So, next cross question.

3 MS. VAN SIKLE: On the Poly Sonics
4 testing, did you do decibel testing for all the units?

5 MR. KONAPELSKY: We didn't do the lawn
6 side. We did the Ashby Street side.

7 MS. VAN SIKLE: Did you test all the units
8 on Ashby Street?

9 MR. KONAPELSKY: Yes, they were all on.

10 MS. VAN SIKLE: And what was the time of
11 day you did the testing?

12 MR. KONAPELSKY: I believe it was 12:00.
13 It's on the report.

14 MS. VAN SIKLE: Was that noon or midnight?

15 MR. KONAPELSKY: It was noon.

16 MS. VAN SIKLE: So, actually --

17 MR. KONAPELSKY: Between 11:00 and 12:00.

18 MS. VAN SIKLE: -- did you do any testing
19 at other times of the day when there would be no
20 planes flying?

21 MR. KONAPELSKY: No.

22 MS. VAN SIKLE: Did you have any decibel
23 readings from those units?

24 MR. KONAPELSKY: Yes, they were -- on this
25 report, they -- they range from -- depending on where

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1 they were taken from 54 to 55 down to 45 decibels.

2 MS. VAN SIKLE: So, you only have one test
3 at one hour of the day for one temperature regime and
4 one humidity regime. Is that right?

5 MR. KONAPELSKY: That's correct.

6 MS. VAN SIKLE: Was there any effort made
7 to extrapolate what other readings would be coming
8 from changes in temperature or humidity given that
9 we're only in May?

10 MR. KONAPELSKY: There's -- there's a
11 couple of things. One is that --

12 CHAIRPERSON GRIFFIS: Right. Let -- let
13 me see. How does that go to the straight relevancy of
14 whether there's a room occupied in the basement or
15 not?

16 MS. VAN SIKLE: Because it would be my
17 contention that with an increased load and increased
18 humidity and --

19 CHAIRPERSON GRIFFIS: How could there be
20 an increased load?

21 MS. VAN SIKLE: What do you mean an
22 increased load? There's an increased load of students
23 in the building over the storage.

24 CHAIRPERSON GRIFFIS: If the students are
25 -- but, if the students are --

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1 MS. VAN SIKLE: The storage don't have any
2 children in them.

3 CHAIRPERSON GRIFFIS: But, if the students
4 aren't increasing, where is the increase in load?

5 MS. VAN SIKLE: From having the students
6 in the basement.

7 CHAIRPERSON GRIFFIS: Okay. So, now
8 they're not somewhere else.

9 MS. VAN SIKLE: Right. They're not
10 somewhere else.

11 CHAIRPERSON GRIFFIS: So, aren't you
12 reducing the load? Which had -- which would have more
13 load? Well, I'm not --

14 MS. VAN SIKLE: That's -- that's an
15 architects -- I don't know.

16 CHAIRPERSON GRIFFIS: Actually, it's an
17 engineer's question. I know the architects get a lot
18 of grief on this stuff, but nonetheless --

19 MS. VAN SIKLE: Okay.

20 CHAIRPERSON GRIFFIS: -- next question.

21 MS. VAN SIKLE: What's -- what's --

22 CHAIRPERSON GRIFFIS: Ms. Miller, did you
23 have a clarification?

24 VICE CHAIRPERSON MILLER: I -- I -- well,
25 I would like to ask Neighbors Trust if they might

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1 proffer where this is going because I think we need to
2 focus on the difference in the impact from the
3 students being on the second floor to the students
4 being on -- in the basement and I don't hear that in
5 your cross and -- and that's where -- that's where you
6 need to focus.

7 MS. VAN SIKLE: Okay. Let me ask the
8 architect then if I might, what was the size of the
9 room on the second floor for the music that you're
10 doing currently?

11 MR. KONAPELSKY: I believe it's around 300
12 square feet. Maybe 250 square feet.

13 MS. VAN SIKLE: So, that's not exactly a
14 comparable size. You're not exactly going from --
15 you're increasing the -- the square footage size that
16 you have for use of music.

17 MR. KONAPELSKY: Not particularly because
18 you remember we need to have egress path to that door.
19 So, at -- at the end, it's very comparable.

20 MS. VAN SIKLE: And for the uses, you
21 indicated that there was preproduction capability and
22 I understand the Board is not that intrigued by that,
23 but one further augmenting question, do you know at
24 what times the students use the music room up on the
25 top floor?

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1 MR. KONAPELSKY: Yes, I -- I believe it --
2 there's two classes a day and they're generally I
3 think between 11:00 and 1:00, 11:00 to 12:00 and --
4 and 12:00 to 1:00. Approximately those times.

5 MS. VAN SIKLE: Are you familiar that the
6 school is interested in perhaps having chorale
7 practice at 8:35 in the morning in that room?

8 MR. KONAPELSKY: I didn't know that.

9 MS. VAN SIKLE: Can the representative for
10 the school confirm that that was in a description of
11 use?

12 CHAIRPERSON GRIFFIS: What -- why is that
13 pertinent?

14 MS. VAN SIKLE: Because it's much earlier
15 than the current use and -- and having a chorale --

16 CHAIRPERSON GRIFFIS: Does it go -- does
17 it go outside of what they're allowed to use?

18 MS. VAN SIKLE: I don't believe they've
19 ever had a chorale in the second floor.

20 CHAIRPERSON GRIFFIS: I -- I -- I
21 understand that. So, they don't have chorale on the
22 second floor. What precludes them from having one on
23 the second floor or on the first floor or in the attic
24 or in the basement?

25 MS. VAN SIKLE: I'm not sure, but I don't

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1 think it was presented as a chorale as part of the use
2 in the earlier BZA order. So, I'm suggesting it's an
3 increase in intense --

4 CHAIRPERSON GRIFFIS: I'm not even sure
5 what a chorale is, but nonetheless I'm not --

6 MS. VAN SIKLE: A choral --

7 CHAIRPERSON GRIFFIS: -- sure that we
8 precluded it within the -- within the program of the
9 -- of the school itself. I mean certainly, the Board
10 didn't go through and -- and have to enumerate and
11 articulate absolutely each and everything that was
12 going to function. There's a base level of frankly
13 common sense assumption of what a middle school is and
14 how it functions and if middle schoolers are putting
15 on productions or doing hoedowns or chorales or
16 whatever it is attended to the academic program, I
17 don't -- I don't see -- I don't see why that's of any
18 relevancy to us.

19 MS. VAN SIKLE: It's relevant to the
20 neighbors. Maybe it isn't relevant to you. So, that
21 was -- that's -- that's an issue.

22 CHAIRPERSON GRIFFIS: But, that's like
23 saying they're teaching political science and not
24 history.

25 MS. VAN SIKLE: But, political science

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1 does not create noise on the neighborhood.

2 CHAIRPERSON GRIFFIS: Oh, I don't know.
3 My political science -- you have a music program.
4 Don't you?

5 MS. VAN SIKLE: It was never conveyed as a
6 preproduction. It was conveyed --

7 CHAIRPERSON GRIFFIS: What's a
8 preproduction?

9 MS. VAN SIKLE: For a musical, you have
10 people going together to do chorus, to do singing.

11 CHAIRPERSON GRIFFIS: What do you take
12 music class for?

13 MS. VAN SIKLE: To do bongos and fife is
14 what was portrayed in the seventh grade program in
15 front of this BZA two years ago.

16 CHAIRPERSON GRIFFIS: You don't think
17 they're going to have a production at the end? Like a
18 final exam?

19 MS. VAN SIKLE: No.

20 CHAIRPERSON GRIFFIS: All right.

21 VICE CHAIRPERSON MILLER: I just want to
22 say we're not here to reexamine their music program.
23 We're really just here to look at the differences
24 between moving from the second floor to the basement.

25 MS. VAN SIKLE: And my contention is that

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1 the increase in size allows for greater intensity of
2 use and that's what I was trying to do with the cross.

3 So, that ends my questions.

4 CHAIRPERSON GRIFFIS: Anything else? Is
5 the ANC representative that will cross --

6 COMMISSIONER FINNEY: No, Mr. Chair.

7 CHAIRPERSON GRIFFIS: Thank you, Mr.
8 Finney.

9 Okay. Let's move on then to -- unless
10 there's any further redirect.

11 MS. PRINCE: I -- I do have one additional
12 comment. During the course of the cross examination,
13 we conferred the tonnage of the unit that was at issue
14 and it is 1.5 tons.

15 CHAIRPERSON GRIFFIS: One and a half tons
16 is the unit on the lawn. Is that correct?

17 MS. PRINCE: Correct.

18 CHAIRPERSON GRIFFIS: Okay. Then I think
19 we're ready to go to the Office of Planning.

20 MS. BROWN-ROBERTS: Good afternoon, Mr.
21 Chairman and members of the Board. I am Maxine Brown-
22 Roberts representing the Office of Planning.

23 On March 21st, 2003, the BZA by Order
24 16852-A approved the special exception request to
25 operate a middle school, grade seven to nine, for 40

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1 students not to exceed eight full-time and four part-
2 time faculty and staff.

3 As part of the application and approval,
4 the applicant submitted a proposed layout for the
5 basement that showed the location of the proposed
6 elevator stairway along with other utility rooms.

7 It's OP's understanding that further
8 refinement of the submitted plans would take place in
9 order to accommodate further internal and external
10 renovations to bring the building into compliance with
11 BOCA and AD code requirements. This was also stated
12 in condition 19 of the order.

13 As detailed by the applicant, the
14 installation of the elevator and other life safety
15 features, additional habitable space was created
16 without overstepping the condition of condition -- the
17 intent of condition 19 of the order.

18 OP believes that the emergency exit along
19 Ashby Street side of the building would have minimal
20 to no -- no negative impact on the community.

21 Additionally, the small portion of the
22 existing porch that will be enclosed will not greatly
23 affect the established form of the building.

24 Placing a classroom in the basement will
25 not increase the number of students, affect traffic to

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1 and from the school or introduce noise into the
2 neighborhood as the building is set back and buffered
3 from adjacent houses. The location of the classroom
4 and in particular music room in the basement will have
5 no minimal impact on them.

6 Proposed location of the music room in the
7 basement will have no impact on the required number of
8 parking spaces on the site as there will be no
9 increase in the number of faculty and staff.

10 As demonstrated in the BZA order, the
11 school fulfills the intent of the zoning ordinance and
12 zoning map that allows uses that are compatible to one
13 family residential areas to create a suitable
14 environment for family life. The proposed use of a
15 portion of the basement as a classroom will not alter
16 the capability of the school or the neighborhood.

17 All the conditions of the approval
18 relating to the operation of the school remain the
19 same.

20 The Office of Planning, therefore,
21 recommends that the Board of Zoning Adjustment approve
22 the application to use the room in the basement as a
23 classroom subject to the condition that -- that the
24 exit from the basement along Ashby Street will be used
25 only in emergency and for emergency drills.

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1 Thank you, Mr. Chairman.

2 CHAIRPERSON GRIFFIS: Thank you very much.
3 Just for complete understanding, well, there it is.

4 Questions from the Board? No questions
5 from the Board.

6 Excellent report and we do appreciate it.
7 It's a very complete.

8 Does the applicant have any cross
9 examination of the Office of Planning?

10 MS. PRINCE: No cross examination.

11 CHAIRPERSON GRIFFIS: Does Neighbors
12 United?

13 MS. FELDMAN: No, sir.

14 CHAIRPERSON GRIFFIS: Okay. Let's then go
15 to the report from ANC-3D which is Exhibit Number 27.
16 It is in the record.

17 Mr. Finney, did you want to present it or
18 you're going -- you're going to present your own
19 testimony. Is that correct? Why don't we take you
20 when -- when -- when you're ready? What do we have in
21 there?

22 Exhibit Number 27, ANC's -- unless the
23 Board has any information to enumerate on that, Mr.
24 Finney, why don't we turn to you as the single member
25 district for your testimony.

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1 COMMISSIONER FINNEY: Thank you. My name
2 is John Finney, 5275 Watson Street, N.W. I'm an ANC
3 Commissioner 3D04.

4 Good to see you again, Mr. Chair and other
5 members of the Board.

6 I come before you today as a single member
7 commissioner. The Chair of our Commission decided
8 that the letter should speak for itself and she also
9 had some other personal commitments.

10 I come to clarify the parliamentary
11 procedures and hearing that led to the results of the
12 ANC position as contained in the letter.

13 We had a very long hearing stretching late
14 into the night. At times, it was a little emotional.

15 It was quite divisive. A lot of information was
16 obtained.

17 We then had a discussion within the
18 Commission as to where -- what position we should
19 take. The Chair offered a resolution of disapproval
20 of the special exception contending among other things
21 that the school had violated your order in its actions
22 on this music room.

23 A substitute -- an amendment in the form
24 of a substitute was offered approving of the special
25 exception. A substitute amendment arguing that no

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1 adverse affects should flow from locating the music
2 room in the basement, i.e., cellar and that no
3 discernible public good would be served by keeping
4 that room closed and not used as a classroom.

5 That vote was approved. The substitute
6 amendment was approved by a 3-2 vote. That was the
7 majority view of the Commission. Whether it is
8 unanimous or 3-2, that is the judgment of the ANC-3D
9 on this case and I urge that its views be given great
10 weight by your Board.

11 Thank you, Mr. Chair.

12 CHAIRPERSON GRIFFIS: Good. Thank you
13 very much, Mr. Finney, and it is particularly nice to
14 see you here today again.

15 Questions for Mr. Finney as the single
16 member district. Any clarification of some of the --
17 yes, Ms. Miller.

18 VICE CHAIRPERSON MILLER: Mr. Finney, are
19 you in support of this -- the ANC vote?

20 COMMISSIONER FINNEY: Am I in support?

21 VICE CHAIRPERSON MILLER: Yes.

22 COMMISSIONER FINNEY: Since I sponsored
23 the substitute amendment, yes, ma'am.

24 VICE CHAIRPERSON MILLER: Thank you.

25 CHAIRPERSON GRIFFIS: Any other questions?

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1 COMMISSIONER FINNEY: I -- since you are
2 new to the Board, new since I last appeared, I led the
3 fight. I led at least the argument against the school
4 locating in that location. My view now is that the
5 die has been cast and we've got to find ways now to
6 live together. Thank you.

7 CHAIRPERSON GRIFFIS: Thank you, Mr.
8 Finney, and as succinct as that one, so is the
9 succinctness and directness of the actions of the ANC
10 which I think obviously will be given great weight.
11 It was well articulated.

12 If there's nothing further from the Board,
13 questions of Mr. Finney? Does the applicant have any
14 questions of Mr. Finney as a single member? Does
15 Neighbors United have any questions of Mr. Finney?
16 Very well.

17 Again, a pleasure. Thank you very much.

18 Let us move on. I do not have anything
19 else attended to the application in terms of
20 submission of reports, agencies, associations. I
21 think we're ready for the presentation of the party in
22 -- by the Neighbors United Trust.

23 As you've stated, you weren't sure which
24 position you were coming in. I'm going to ask you as
25 you begin your case presentation to state your

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1 position.

2 MS. FELDMAN: Yes, we are asking for a
3 deferral because we would like to be able to study the
4 information we just received two minutes ago and to
5 hire our own noise expert to test --

6 CHAIRPERSON GRIFFIS: Deferral of what?

7 MS. FELDMAN: Of your decision.

8 CHAIRPERSON GRIFFIS: Oh. Okay. I
9 understand that.

10 MS. FELDMAN: To -- to hold it open. Hold
11 the record open to receive additional information, our
12 response to things we're just getting today or that
13 have been promised today, but we haven't gotten yet.

14 CHAIRPERSON GRIFFIS: Okay.

15 MS. FELDMAN: And also we would like to --

16 CHAIRPERSON GRIFFIS: Are you a party in
17 opposition or support?

18 MS. FELDMAN: I think we have to say
19 opposition for the technical reasons, but -- but we
20 are telling you that if we got satisfactory answers on
21 the -- the factual information, we might withdraw our
22 opposition.

23 CHAIRPERSON GRIFFIS: Interesting. Okay.

24 MS. FELDMAN: And I'm not sure how you all
25 handle that as an administrative matter. I'm not, you

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1 know, an administrative lawyer. So.

2 CHAIRPERSON GRIFFIS: We can handle it. I
3 guarantee you.

4 MS. FELDMAN: Yes, okay. I may use the
5 wrong terminology and I apologize.

6 CHAIRPERSON GRIFFIS: Are you -- are you
7 prepared to present a case today then?

8 MS. FELDMAN: No, we just want to -- we
9 have time for our initial comments and we'd like to
10 just -- I -- I'd like to actually ask for two
11 housekeeping issues and -- and you can tell me if I'm
12 not doing that correctly.

13 CHAIRPERSON GRIFFIS: You know what helps
14 me just in my simple mind? When I ask a question,
15 let's get it answered and then I can hear the rest of
16 it. Are you prepared to present a case today?

17 MS. FELDMAN: We are prepared to state a
18 position today.

19 CHAIRPERSON GRIFFIS: No. Okay.

20 MS. FELDMAN: Okay.

21 CHAIRPERSON GRIFFIS: All right.
22 Housekeeping issues.

23 MS. FELDMAN: Housekeeping issues, what --
24 we -- there is a party in favor. You granted party
25 status, the Hoys.

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1 CHAIRPERSON GRIFFIS: No.

2 MS. FELDMAN: And they're not --

3 CHAIRPERSON GRIFFIS: Actually --

4 MS. FELDMAN: -- they're not here. You
5 said their comments would be accepted into the record.
6 We haven't seen them and we would like --

7 CHAIRPERSON GRIFFIS: Just for
8 clarification, do you understand we did not grant
9 party status to the Hoys?

10 MS. FELDMAN: Okay.

11 CHAIRPERSON GRIFFIS: Okay. You are the
12 only party in this case.

13 MS. FELDMAN: The Hoys are one of the
14 adjoining neighbors. We haven't seen their
15 submission. We would like the record to stay open so
16 we could look at it and respond if --

17 CHAIRPERSON GRIFFIS: No, their's was a
18 timely filing.

19 MS. FELDMAN: Okay.

20 CHAIRPERSON GRIFFIS: This is a public
21 record. It was your responsibility to look at the
22 file and see anything else that was in the file.

23 MS. FELDMAN: Oh, I didn't realize it --
24 it was even in -- there's anything in from them.

25 CHAIRPERSON GRIFFIS: There is.

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1 MS. FELDMAN: Okay.

2 CHAIRPERSON GRIFFIS: And it is. I'll
3 give you the exhibit number.

4 MS. FELDMAN: Okay.

5 CHAIRPERSON GRIFFIS: How come I don't
6 have that right in front of me? Oh, 20. Exhibit
7 Number 20.

8 MS. FELDMAN: Okay.

9 CHAIRPERSON GRIFFIS: Which means they
10 were actually in before Mr. Scripsapth which is
11 Exhibit Number 23.

12 MS. FELDMAN: Okay.

13 CHAIRPERSON GRIFFIS: And before Mr.
14 Lovendusky's which was Exhibit Number 22 if my math
15 served me from middle school.

16 MS. FELDMAN: Okay. More bongo drums I
17 think are called for.

18 CHAIRPERSON GRIFFIS: Never played them.

19 MS. FELDMAN: Okay.

20 CHAIRPERSON GRIFFIS: Okay.

21 MS. FELDMAN: The other thing is the
22 applicants spend about three-quarters of its minutes
23 and counsel, but its minutes addressing the issue of
24 whether they really needed to be here and the process
25 and the latter five minutes on the 206 factors, but --

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1 CHAIRPERSON GRIFFIS: Good point.

2 MS. FELDMAN: -- we would like to ask --
3 we don't want to rehash any of that and we really
4 think the 206 factors is where we come in here, but we
5 would like to ask the Board's indulgence to include in
6 the record our large many-tabbed submission for -- on
7 the modification request because that has what we
8 believe is a very detail refutation of all the things
9 said today about why they shouldn't be here.

10 Really if they didn't have to be here,
11 they wouldn't be here today, but --

12 CHAIRPERSON GRIFFIS: We made them come
13 here. We're pretty clear on why they're here.

14 MS. FELDMAN: Okay. But, a lot of
15 statements were made that we have refuted there and I
16 don't really want to get into that now --

17 CHAIRPERSON GRIFFIS: Nor do --

18 MS. FELDMAN: -- and wouldn't want to
19 rehash it.

20 CHAIRPERSON GRIFFIS: I think we
21 understand.

22 MS. FELDMAN: But, we don't want those
23 things to stand because we've had a problem with this
24 applicant where later if we don't actually say we
25 contest such and such statement, they will come back

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1 later and say and we said X and you didn't object.
2 So, we want to put an objection and say that we have
3 addressed all those issues in detail in our
4 modification opposition and if you would allow that to
5 be -- that packet to be included in the record, that
6 -- we would really appreciate that.

7 CHAIRPERSON GRIFFIS: You mean -- you mean
8 take it into the record?

9 MS. FELDMAN: Yes. Yes, it was in the
10 modification procedure that was kind of short-
11 circuited when they -- they withdrew it because they
12 then applied for a special exception, but that was
13 where we addressed these issues in detail and we
14 didn't want to do that again here and we -- we didn't
15 realize it would be a different panel.

16 I think that was a different panel. So,
17 at least some of the Board Members sitting here today
18 probably didn't even see that. We -- we just assumed
19 everyone would have flipped through it then and we
20 wouldn't have to fool with it now, but, you know,
21 obviously, that's not true.

22 So, if you could include that in the
23 record, we would appreciate it and then we wouldn't
24 have to waste time going through all these, you know,
25 statements about who did what to whom and so on.

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1 MS. MONROE: Mr. Chairman, can I just say
2 one thing. You can decide whether or not you want to
3 include it, but we need to be very precise as to what
4 she's talking about.

5 CHAIRPERSON GRIFFIS: Right. I know.

6 MS. MONROE: We need an exhibit number and
7 exactly --

8 CHAIRPERSON GRIFFIS: Okay.

9 MS. MONROE: -- what it is. I don't think
10 we would --

11 CHAIRPERSON GRIFFIS: What you're doing is
12 -- I don't see the relevancy to a lot of it. We -- we
13 -- whether you think the panel changed or not, the
14 Board is what it is and -- and the Board is consistent
15 overall most of the time and the issue is we -- we did
16 under the correct proceeding look at all that
17 information and we acted accordingly on our
18 deliberation decision and that's why we're here and
19 that's why we have a full independent special
20 exception as opposed to which quite frankly could have
21 been a -- a minor modification with a -- with a
22 regulation waiving of timing. We could have proceeded
23 under that. We've dispensed with all that.

24 MS. FELDMAN: Okay. But, it was -- it was
25 now discussed again at length for --

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1 CHAIRPERSON GRIFFIS: I understand that
2 and -- and --

3 MS. FELDMAN: -- you know, 17 minutes.
4 So.

5 CHAIRPERSON GRIFFIS: -- it's not just as
6 easy for you to say I just want to enter that into the
7 record.

8 MS. FELDMAN: Okay.

9 CHAIRPERSON GRIFFIS: Entering it into the
10 record brings it into the proceeding. Not only does
11 it bring it into the proceeding, every single Board
12 Member's going to read that. They -- we should keep
13 the hearings open in order to answer questions just
14 for clarification from the Board. That's going
15 through exactly what we did previously.

16 If you want to refute some of the
17 statements in the openings, that's fine and I think
18 you can easily do that.

19 MS. FELDMAN: Okay.

20 CHAIRPERSON GRIFFIS: You could frankly do
21 that also in a closing or a closing submission if we
22 keep the record open. I don't see any -- I don't see
23 any rationale to open the record to accept all those
24 filings that were attended to a different proceeding.

25 MS. FELDMAN: All right. May I ask if the

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1 record could stay open to allow us to get the
2 transcript of what counsel and the applicant just said
3 and --

4 CHAIRPERSON GRIFFIS: No.

5 MS. FELDMAN: -- provide this information?

6 CHAIRPERSON GRIFFIS: No. To address what
7 they've just said?

8 MS. FELDMAN: Yes.

9 CHAIRPERSON GRIFFIS: What specifically
10 are you trying to address?

11 MS. FELDMAN: I guess I was counting 17
12 minutes of saying why they really didn't have to come
13 here and why they had done -- and why they had filed
14 the correct things and why DCRA had looked at the
15 right things and honestly, we did all our homework on
16 that and found none of those things to be true.

17 CHAIRPERSON GRIFFIS: And -- and you know
18 -- none of what things?

19 MS. FELDMAN: DCRA didn't have the right
20 material in its file. In fact, it had nothing. It
21 didn't even have your order or the conditions or the
22 plans or anything.

23 CHAIRPERSON GRIFFIS: DCRA? What are we
24 talking? Oh, DCRA.

25 MS. FELDMAN: The -- yes, the -- the

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1 building permit people. They didn't even know they
2 were getting a modified set of building plans because
3 they didn't even have the original stuff to look at
4 and there were a number of instances and we have -- in
5 that material, we had tabs where counsel for the
6 applicant, this counsel, lectured the BZA on habitable
7 space and what had to be applied for and a lot of
8 other things that were inconsistently referred to
9 today.

10 So, that was why I had thought the
11 simplest thing was to just put that in where we've
12 already discussed all this.

13 CHAIRPERSON GRIFFIS: Okay. And it's
14 interesting fluff that we've heard on some of the
15 issues.

16 MS. FELDMAN: Okay.

17 CHAIRPERSON GRIFFIS: But, the Board is
18 very clear on what's within our jurisdiction and when
19 you start talking about what DCRA had, who possibly
20 saw or didn't see, it goes to Mr. Etherly's
21 articulated comment early on. That's more appropriate
22 under an appeal.

23 If you think that DCRA took an action
24 based on not having information or some error, that's
25 an appeal that comes directly to us, but until it

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1 comes in that manner and is packaged in that way,
2 whether we -- we definitely care, but we have no
3 jurisdiction over it. So, it is absolutely outside of
4 the -- the realm of relevancy.

5 MS. FELDMAN: Well, that is actually how
6 this come up. First as the complaint. Then as a
7 request for modification and then a special exception.

8 CHAIRPERSON GRIFFIS: I understand.

9 MS. FELDMAN: Okay.

10 MEMBER ETHERLY: Mr. Chair, I -- I would
11 continue to agree with the course of action that
12 you've laid out there. I -- I think we once again run
13 the risk of running into some minutia.

14 What -- what -- just as one Board member,
15 what I'm perhaps more interested in is -- is a
16 conversation about the question of the -- of the
17 continuance if you will. Because I think that's where
18 Neighbors United Trust is heading with this and -- and
19 that's perhaps a bigger question. One that I'm not
20 sure I'm with you on in terms of -- in terms of
21 supporting that.

22 MS. FELDMAN: Yes, I understand.

23 MEMBER ETHERLY: Oftentimes, clearly the
24 cases have been scheduled for quite some time and all
25 the players are here on the dance floor and I would

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1 just as presume try to finish it out, but, you know,
2 I'm -- I'm open to hearing more discussion there, but
3 -- but I just believe that the -- the introduction of
4 additional evidence with the caution that's been
5 offered by Corporation Counsel and -- and -- and with
6 the comments that the Chair just made, I think that
7 would be the appropriate course of action, Mr. Chair.

8 CHAIRPERSON GRIFFIS: Okay. Good. Ms.
9 Miller.

10 VICE CHAIRPERSON MILLER: I just want to
11 address neighbors. It seems to me what -- I -- I'm
12 probably going to sound like a broken record, but
13 basically, the way -- what I see us doing here is
14 trying to determine the incremental adverse impact, if
15 any, from moving the music class from the second floor
16 to the basement and -- and my question to you is if --
17 if you can focus on that, are there some things that
18 you need to look at? You need a few minutes now or
19 you need -- or want us to continue which is a -- a
20 bigger thing because you -- you need to submit in the
21 record something on that issue that you -- you don't
22 have access to now or you need just more time to look
23 at.

24 MS. FELDMAN: Okay. I don't think we can
25 suddenly summon up an expert, pay him, and get him to

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1 comment on this findings this second. So, I, you
2 know, this is --

3 CHAIRPERSON GRIFFIS: Oh, that's findings.

4 VICE CHAIRPERSON MILLER: Right.

5 MS. FELDMAN: Well, we just received a
6 Poly Sonics report that we didn't have before --

7 CHAIRPERSON GRIFFIS: Okay.

8 MS. FELDMAN: -- that says the decibel
9 levels are whatever.

10 CHAIRPERSON GRIFFIS: Ms. Miller -- what
11 Ms. Miller is saying and you have to relate that back
12 to the statement of the architect is that there has
13 been no change in the equipment there. From the --
14 from the utility storage to classroom --

15 MS. FELDMAN: Okay.

16 CHAIRPERSON GRIFFIS: -- there's no load
17 difference.

18 MS. FELDMAN: Okay.

19 CHAIRPERSON GRIFFIS: Meaning there's no
20 additional or subtraction of equipment.

21 MS. FELDMAN: With all due respect, that
22 is a statement they just made now and I'm assuming he
23 can make that under his expert rubric. We have never
24 heard that before and so, we can't ask our expert does
25 that make any sense to you that heating and cooling

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1 for a bunch of paper that's being stored someplace is
2 the same as for 20 sweaty bodies jumping around, you
3 know, hitting bongo drums and screaming their lungs
4 out.

5 Now, that's -- I mean I'm not an expert.
6 So, I can't tell, but we can't -- we don't have the
7 capacity simultaneously --

8 CHAIRPERSON GRIFFIS: But, it seems to me
9 in a sense --

10 MS. FELDMAN: -- to ask someone.

11 CHAIRPERSON GRIFFIS: -- when you think
12 about those 20 people being somewhere in the building
13 doing the same thing, how -- just common sense.

14 MS. FELDMAN: Okay.

15 CHAIRPERSON GRIFFIS: Let's -- let's all
16 put all engineering aside and just tell me why you
17 think that having those 20 kids playing instruments on
18 the second floor or in the basement somehow creates
19 additional requirements for equipment.

20 MS. FELDMAN: Okay. Just using common
21 sense because I have no credentials on this
22 whatsoever, you now have classroom space on the second
23 floor. It can be used for music, for whatever, but
24 they were intending to heat, cool, and do whatever
25 needed to be done as a classroom space up there.

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1 You had a basement that was not going to
2 be used and by the way, they never called storage.
3 They called utility and mechanical which has different
4 requirements.

5 CHAIRPERSON GRIFFIS: We have the drawing.
6 WE have the drawing.

7 MS. FELDMAN: Okay. But, she's referring
8 to it as storage. All they say and it was never
9 called storage.

10 CHAIRPERSON GRIFFIS: You know, we hear a
11 lot of things. Don't worry about that.

12 MS. FELDMAN: Okay. We had a staff cap
13 issue. That's why I'm sensitive to this.

14 CHAIRPERSON GRIFFIS: I -- no, I totally
15 understand your sensitivity.

16 MS. FELDMAN: Okay. Okay.

17 CHAIRPERSON GRIFFIS: But, I don't want
18 you to underestimate what the Board hears --

19 MS. FELDMAN: I'm sorry.

20 CHAIRPERSON GRIFFIS: -- and then how we
21 actually filter and deliberate on it.

22 MS. FELDMAN: Okay.

23 CHAIRPERSON GRIFFIS: But --

24 MS. FELDMAN: I -- I apologize. It seemed
25 common sensical to us that if you were treating

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1 heating, cooling, and other mechanical features of the
2 second floor as a classroom no matter what it's going
3 to be used for and then you suddenly add classroom
4 space to the basement and particularly something that
5 does kind of work up sweat as opposed to, I don't
6 know, Latin or something, then although I found Latin
7 to be pretty exciting, but most people -- and I'm sure
8 Mr. Finney did, too, but other than the two of us,
9 we're perverse. It seemed common sensical that you
10 would have to add more.

11 And what we've been trying to find out was
12 how much more and in our own none expert way, we
13 thought that in addition to adding some hearing,
14 cooling, and other support system for classroom in the
15 basement and basements also have their own unique
16 heating/cooling and, you know --

17 CHAIRPERSON GRIFFIS: Done. Okay.

18 MS. FELDMAN: -- mildew prevention --
19 okay.

20 CHAIRPERSON GRIFFIS: We're going to keep
21 the record open.

22 MS. FELDMAN: Okay.

23 CHAIRPERSON GRIFFIS: You're going to be
24 able to submit a written document that rebuts the
25 testimony you've heard today that there is no required

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1 increase in mechanical equipment --

2 MS. FELDMAN: Okay.

3 CHAIRPERSON GRIFFIS: -- for the
4 utilization or the application --

5 MS. FELDMAN: Okay.

6 CHAIRPERSON GRIFFIS: -- of the basement
7 level.

8 MS. FELDMAN: Okay.

9 CHAIRPERSON GRIFFIS: Let's move ahead
10 then.

11 MS. FELDMAN: Okay. Maybe we can -- my --
12 our -- our statement -- our position, you asked for
13 that. That seems reasonable.

14 CHAIRPERSON GRIFFIS: Still don't know.

15 MS. FELDMAN: I guess our position
16 technically has to be we would oppose it unless we get
17 this information, we can look at it, we satisfy
18 ourselves that it's reasonable. We are not re-
19 fighting the school use.

20 CHAIRPERSON GRIFFIS: Understood.

21 MS. FELDMAN: And we understand what
22 junior high, you know, what it means to run a junior
23 high school. We are looking at additional. You may
24 notice that the school focused a lot of verbiage on
25 how much more noise might or might not be generated

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1 from inside the school.

2 We really haven't -- we haven't dealt with
3 that at all and we don't -- we're not even interested.

4 CHAIRPERSON GRIFFIS: Okay.

5 MS. FELDMAN: One thing we didn't hear
6 them say today at all was that -- and what was her
7 name again? The manager. That Judy Barr, the
8 MacArthur Campus Office Manager misstated herself when
9 she told Tina that or Ms. -- Mrs. Demali that due to
10 the fact that they could soundproof the basement, they
11 were going to have much more than the upstairs music
12 program. They were going to have preproduction
13 practices and activities from main campus things.

14 Now, that -- you know, I was waiting to
15 hear Ms. Barr -- Mrs. Barr misstate herself. We are
16 only moving some things that we would have done anyhow
17 and even though we've heard kind of some things in the
18 positive, we haven't heard that this statement which
19 is really inconsistent and it's from a person in
20 apparent authority. We -- we're not hearing that --
21 that she was wrong. That they're not going to be
22 doing anything more than the junior high would have
23 done anyhow.

24 So, that's something. We are concerned
25 and Board Member Miller wasn't here for the incredibly

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1 torturously long previous proceeding, but there was a
2 lot of focus on Ashby Street, a small street that's on
3 the side of the school that used to be the main
4 entrance --

5 CHAIRPERSON GRIFFIS: Okay.

6 MS. FELDMAN: -- and now it's on MacArthur
7 and we -- what we wanted to point out was that
8 anything that added to impact on Ashby, parking,
9 traffic, noise was significant. You have not heard
10 anything about any kind of testing during the periods
11 that we really cared about which were evenings and
12 weekends. Because then we -- there was a lot of
13 ambient noise discussion in the previous hearing.

14 CHAIRPERSON GRIFFIS: Let's not bring Ms.
15 Miller up to speak.

16 MS. FELDMAN: But, what --

17 CHAIRPERSON GRIFFIS: Make your case
18 presentation.

19 MS. FELDMAN: Okay. We heard that there
20 was one testing at noon and this was after we had been
21 asking since October whether there was testing,
22 whether there could be testing, whether we could --

23 CHAIRPERSON GRIFFIS: Sound.

24 MS. FELDMAN: -- coordinate -- yes, sound
25 testing. Whether we could coordinate or perhaps

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1 suggest some -- some times and -- and so on and we
2 know that there's ambient noise during the day. We
3 have airplane flights. We have traffic on MacArthur.
4 We have some other things.

5 CHAIRPERSON GRIFFIS: What did you --

6 MS. FELDMAN: What we really cared about
7 was the echo affect on little Ashby Street and, in
8 fact, on W Street where I live of -- of noise in
9 isolation and we all were concerned about evenings and
10 weekends and -- and during the summer and at the April
11 community meeting, the school experts admitted that
12 that would actually be worse in the summer because it
13 would be -- you know, it would be isolated and it
14 would be more noticeable because you would have it
15 during times when there weren't other ambient noises
16 to -- to absorb it.

17 So, we have been asking for that for a
18 long time and you don't see anything in today's report
19 or anything else that would address the affect of
20 these units which are -- are pretty noisy at night
21 when there aren't -- or the weekends when there aren't
22 other disguising factors. We think that is a
23 legitimate concern.

24 CHAIRPERSON GRIFFIS: Okay. But --

25 MS. FELDMAN: One thing we --

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1 CHAIRPERSON GRIFFIS: On that, you -- you
2 keep going to the big picture.

3 MS. FELDMAN: Yes.

4 CHAIRPERSON GRIFFIS: And the Board went
5 through that and you have to -- you have to believe
6 whether you agree with our decision or not that we
7 were knowledgeable enough to assess what an impact to
8 heat and cool a building of this size and where those
9 units would go.

10 So, we're not, as you said yourself,
11 rearguing the past case. You're asking for sound
12 tests across the neighborhood at different seasons for
13 this equipment and the -- the critical aspect is for
14 us to understand as what is the incremental increase
15 if this room is utilized in the basement. That's what
16 you have to keep coming back to.

17 MS. FELDMAN: Yes, and we -- that's been
18 the hardest thing. Because it's only -- well, they
19 misstated and said it was 120, but it's 320. But,
20 that's not that big a space and so, we needed to know
21 what is this adding and all we could do at that time
22 not with specific numbers was to look back at the July
23 '02 testimony where you specifically asked how many
24 units would be around and they said a few and you said
25 a few and he said a few and we figured since he was an

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1 expert and you were knowledgeable, if it was that huge
2 a difference, at least some of it had to be
3 attributable to the basement and what we were trying
4 to ascertain was exactly how much that was and how
5 material it would be.

6 This is the first day we've ever heard
7 that suddenly there's no difference and it doesn't
8 even make common sense, but even if there's some, is
9 it important? Is it material? Will it affect us?

10 But, you know, we can't really answer that
11 until we have some data and, in fact, when that -- we
12 first asked for the units. We asked for the unit
13 numbers and counsel now said that's irrelevant and
14 that's annoying. You know, this is over details.

15 CHAIRPERSON GRIFFIS: Let's just get to
16 the --

17 MS. FELDMAN: They gave us -- they happily
18 gave us a set of numbers and it turned out to be an
19 old bunch of obsolete stuff that's not even available.

20 All of these things actually have decibel level.
21 When you -- you can check the decibel --

22 CHAIRPERSON GRIFFIS: Understood.

23 MS. FELDMAN: -- levels of equipment.

24 The other thing is there were hedges and
25 other shrubbery when early tests were made and they've

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1 all been trashed now. There are no -- there -- so,
2 even if there might be some foliage, there might be
3 some landscaping, this will be some years before it
4 would be mature enough to absorb noise.

5 We were never told whether the units --
6 since the picture you see has seven units on Ashby,
7 we're not told it's five, before it was two.

8 We don't know whether those are permanent
9 locations, whether those are permanent equipment.
10 It's very hard for us to intelligently advise whether
11 this is even going to be a material problem because of
12 this extra work and, you know, if it isn't, we'll --
13 we'd be the first to tell you, we don't do this for a
14 living. This is really hard for us to spend all these
15 hours.

16 We only picked the one thing of many
17 possible complaints that we thought was really pretty
18 important and that's this one.

19 CHAIRPERSON GRIFFIS: Noise.

20 MS. FELDMAN: Well, I mean this particular
21 unauthorized expansion was the only one of many, many
22 things that you know come up when -- when an
23 institutional use comes in, but this one.

24 The -- the traffic and parking which Board
25 Miller said she didn't think was relevant, if indeed

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1 there are going to be activities in the basement that
2 might spill over later -- I mean today was the first
3 time we heard no, it's going to stop at 4:00. It was
4 really much vaguer before. If really there isn't
5 going to be anything after 4:00, then I think the
6 carpool plan and the other things that were instituted
7 will be okay.

8 CHAIRPERSON GRIFFIS: Condition number
9 four, they have to comply. Don't -- isn't your
10 understanding that this building is not occupied by
11 students pass 4:00?

12 MS. FELDMAN: Well, we thought so, but it
13 sounded like this other activity was going to --

14 CHAIRPERSON GRIFFIS: Don't think -- we
15 have it --

16 MS. FELDMAN: Okay.

17 CHAIRPERSON GRIFFIS: -- you have the --
18 you have the previous order. How could they not?
19 Let's go on.

20 MS. FELDMAN: Okay. That -- we felt that
21 if there were activities in the basement that --

22 CHAIRPERSON GRIFFIS: I understand that.

23 MS. FELDMAN: Okay.

24 CHAIRPERSON GRIFFIS: What's your
25 understanding today?

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1 MS. FELDMAN: Today they said it would
2 only be 7:30 to 4:00.

3 CHAIRPERSON GRIFFIS: Okay. So, let's --

4 MS. FELDMAN: So, that maybe settled or --

5 CHAIRPERSON GRIFFIS: You don't believe
6 them. I understand that.

7 MS. FELDMAN: No. No, I --

8 CHAIRPERSON GRIFFIS: You don't believe
9 them. Let's move on.

10 MS. FELDMAN: That -- that -- actually it
11 squashes our concern about some after hours. We are
12 still concerned there would be more people engaged in
13 whatever this preproduction stuff is. So, you still
14 may have extra cars. We already have cars parking on
15 Ashby that belong to the school. We already have, you
16 know, some slippage in the rules and you have to be
17 reasonable. You can't, you know, complain about
18 everything, but if this was going to be additionally,
19 you know -- on -- on Ashby, a little one-lane street,
20 even like three or four extra things that aren't
21 suppose -- cars and so on, could make a problem.

22 CHAIRPERSON GRIFFIS: Understood.

23 MS. FELDMAN: Okay. So, those are still
24 some things that we have and, you know, we don't think
25 have provided us with enough information to -- to

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1 determine if this is really going to be a problem or
2 it's not going to be a problem and I'm trying to be
3 honest about this. I'm not just saying oh, we oppose
4 everything. Really, maybe we won't if it works out,
5 but we don't have enough data.

6 CHAIRPERSON GRIFFIS: Ms. Miller.

7 VICE CHAIRPERSON MILLER: I -- I just
8 think it's good to sift through these things so that
9 you just focus on what really may still be problems
10 and what aren't.

11 Because, I mean, I wasn't on the previous
12 case, but there is an order and that order addresses
13 parking. It -- it addresses hours of operation. It
14 addresses traffic and that's not going away. So,
15 that's not changing at all. So, that shouldn't be a
16 concern and I can't see how it is.

17 But, the question about the air
18 conditioners, I hear what you're saying that there
19 seems to be -- there might be ramifications from a
20 different use of space, from something that didn't
21 have any people in it to something that does have
22 people in it. That maybe that might affect the air
23 conditioning.

24 The testimony we heard today doesn't sound
25 like from the applicant that it does. That they had

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1 the same plans for with the same number of air
2 conditioners no matter how the building was being used
3 or in what spaces. I just -- it seems to me they --
4 they passed a new letter today that addresses decibel
5 levels or things like that.

6 Do you have -- do you have what you need
7 to go back to your expert? Because what the Chair has
8 said is he's going to leave the record open for you to
9 look at this issue, have your expert look at it, and
10 address it.

11 MS. FELDMAN: Yes, we do on the noise. I
12 think we now have a decent set and if we don't, we can
13 ask specific things and get additional information to
14 do whatever. I mean whatever the expert would want.
15 I don't know if -- we --

16 CHAIRPERSON GRIFFIS: Not necessarily.
17 Who are you going to ask? You mean you're going to
18 ask the applicant?

19 MS. FELDMAN: No, I mean -- I mean might
20 say and I also need this, this, and this and then we
21 would ask the school for it.

22 CHAIRPERSON GRIFFIS: This is not that
23 complicated of a situation.

24 MS. FELDMAN: You should hear the whine of
25 those things at midnight, you know.

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1 CHAIRPERSON GRIFFIS: How many of you have
2 compressors outside of your house? You don't have air
3 conditioning in your house?

4 MS. FELDMAN: I have window units.

5 CHAIRPERSON GRIFFIS: Those don't make any
6 noise.

7 MS. FELDMAN: Actually, they don't.

8 CHAIRPERSON GRIFFIS: Oh, my goodness.
9 Okay. Ms. Miller makes an excellent and articulated
10 statement. Is there anything you want to present in
11 terms of your final case presentation today?

12 MS. FELDMAN: No. Thank you.

13 CHAIRPERSON GRIFFIS: Good. Thank you
14 very much.

15 Board Members, questions? Is there cross
16 examination? Does the applicant have any cross? No?
17 No? Okay.

18 Is there anyone else here attended to
19 Application 17164 to give testimony today either in
20 support or in opposition? Not noting anyone else here
21 to give testimony in person.

22 We do have letters in the record and they
23 are on the evidence sheet.

24 Why don't we move on then to any closing
25 remarks that we have from the applicant. Okay. Yes,

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1 I'm sorry.

2 MS. PRINCE: Good afternoon. In closing,
3 I would like to reiterate I think what the Board has
4 already learned today and that is we're not seeking a
5 change to any operational conditions affecting this
6 school including hours of operations and it is those
7 conditions that form the basis of the Board's approval
8 of the underlying application.

9 We are only seeking permission to use the
10 basement for students -- a portion of the basement for
11 students. Therefore, you need to look at incremental
12 impact.

13 I believe you have more than adequate
14 information in the record today to judge the
15 incremental impact although I have no objection to
16 Neighbors United responding to information that we've
17 provided them.

18 I should note that we did provide
19 Neighbors United on Friday before this hearing by
20 their deadline with information on the incremental
21 impact of basement versus utility use of the basement.

22 So, that is not the first time they're seeing this
23 information. That was provided to the ANC Chairman
24 and to Neighbors United.

25 And I think it's above and beyond what

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1 would typically expected -- be expected in a case like
2 this. Nonetheless, we've tried to get out answers as
3 quickly as possible on all these matters.

4 With respect to impacts, it's -- it's
5 beyond argument that there would be traffic impacts
6 associated with this use or parking impacts. The
7 statement about Ashby Street is -- is -- is completely
8 offensive. We have a full-time security guard that
9 monitors Ashby Street to insure there's no school
10 parking and this would obviously have no affect on
11 that.

12 And because we're not affecting the cap in
13 anyway by this application, it just -- many of the
14 arguments simply do not make sense.

15 And if it all boils down to noise, I
16 believe that the HVAC associated with this building
17 has been scrutinized to a level that is beyond
18 anything this Board has ever seen and it was fully
19 within the Board's jurisdiction to attached more
20 conditions to the HVAC equipment in connection with
21 the original approval. They did not and we have now
22 an order that we're observing and we have equipment
23 that does not violate that order and is within all
24 legal limits of operation and will not change as a
25 result of this Board' approval of this application.

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1 So, I would like to just close in noting
2 we would greatly appreciate your approval of this
3 application. The school has obviously withheld any
4 use of this space by students since it's occupied the
5 building in January, but it would most definitely like
6 to begin occupancy of this space after the summer
7 months when the building is not used by students so
8 that in the fall the music room can be in place.

9 So, when you set time frames in connection
10 with the post-hearing submissions, I'd like you to
11 keep fall occupancy in mind.

12 Thank you.

13 CHAIRPERSON GRIFFIS: Thank you very much.
14 Board Members, any last clarification questions from
15 the applicant? Closing remarks were clear? Very
16 well.

17 You have identified your expert witness.
18 Is that correct or your expert?

19 MS. FELDMAN: No, we -- we have --

20 CHAIRPERSON GRIFFIS: Can you turn your
21 microphone on?

22 MS. FELDMAN: Sorry.

23 CHAIRPERSON GRIFFIS: Thank you.

24 MS. FELDMAN: No, we have interviewed a
25 few people, but we didn't know who we were going to

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1 need --

2 CHAIRPERSON GRIFFIS: Oh, my.

3 MS. FELDMAN: -- yet. So.

4 CHAIRPERSON GRIFFIS: Indeed. All right.

5 MS. FELDMAN: We didn't know what kind of
6 data we would --

7 CHAIRPERSON GRIFFIS: The Board has -- the
8 Board has thought to, and we need to decide this
9 definitely, to keep the record open for some sort of
10 submission from you regarding the increase requirement
11 for HVAC systems.

12 MS. FELDMAN: We'd also like to do
13 testing. We notice that the -- the -- the counsel
14 just said that they meet all requirements. Well, one
15 of the -- one of the noise requirements was -- is an
16 evening one and obviously, they don't know that --

17 CHAIRPERSON GRIFFIS: We don't have any
18 jurisdiction over the noise requirements. The
19 regulations are what they are for the noise and we
20 don't -- whether they break it or not has nothing to
21 do with us.

22 MS. FELDMAN: But, it does have to do with
23 whether noise as a 206 factor might be material here.

24 CHAIRPERSON GRIFFIS: It's a different
25 level of -- of -- of measurement quite frankly as we

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1 take it into a zoning issue.

2 MS. FELDMAN: Well, whether that might
3 tend to --

4 CHAIRPERSON GRIFFIS: Impact test?

5 MS. FELDMAN: -- it will b objectionable
6 because, for example, it -- it -- it's above the D.C.
7 rule, you know, the D.C. noise level requirements.

8 CHAIRPERSON GRIFFIS: I think every member
9 on this Board has seen enough of the -- of -- of sound
10 impact and -- and -- and fully understands the
11 difference in levels of what creates sound and doesn't
12 create sound. Those of us that sat on the previous
13 case have even more knowledge of the differing levels
14 of sounds for teenagers, for female, for boys, the
15 mix, the airplanes. Exactly.

16 MS. FELDMAN: We all have our ambient
17 hats.

18 CHAIRPERSON GRIFFIS: Yes.

19 MS. FELDMAN: Right.

20 CHAIRPERSON GRIFFIS: Yes. Again, I think
21 we could -- we could spend much to much time getting
22 to the minutia of a lot of this detail. I mean what
23 we level -- the level of impact for noise I think is
24 fairly clearly understood by all the Board Members in
25 terms of our requirements for review under 206.

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1 MEMBER ETHERLY: Mr. --

2 CHAIRPERSON GRIFFIS: Yes.

3 MEMBER ETHERLY: Mr. Chair, just perhaps
4 to kind of help kind of move us forward here, where I
5 think the discussion might be heading is how
6 aggressive this Board may want to be with scheduling
7 and -- and I would encourage my -- my colleagues to --
8 to consider remaining committed to an aggressive
9 schedule here.

10 I understand the difficulty that may be
11 encountered by Neighbors United Trust in terms of
12 securing an appropriate expert that you're comfortable
13 with to review the data and the information that's
14 been submitted here, but -- but I would -- I would
15 feel very strongly about not allowing too much time to
16 sort that out.

17 I mean clearly we have the date on the
18 calendar here and I would encourage you to move with
19 as much expedition as possible to -- to finalize that
20 decision.

21 Quite frankly, I don't need and just
22 speaking as one Board Member, I don't necessarily need
23 to see a National Geographic level study that responds
24 to the noise data that was submitted here. Because I
25 don't think -- I understand the principal behind the

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1 argument and that perhaps is enough for me as opposed
2 to seeing the full-fledged decibel breakout of -- of --
3 - of competing studies here. But, just as -- as
4 guidance, Mr. Chair, from my standpoint in terms of
5 scheduling, I would like us to -- to remain committed
6 to a very aggressive timetable in terms of --

7 CHAIRPERSON GRIFFIS: Good.

8 MEMBER ETHERLY: -- in terms of deciding
9 this case.

10 CHAIRPERSON GRIFFIS: Understood. Ms.
11 Miller, another quick comment?

12 VICE CHAIRPERSON MILLER: I -- yes, I -- I
13 just wanted to make sure that Neighbors is --
14 Neighbors are aware of -- there's really just one
15 question that i think is out there for your expert and
16 that is what's the difference in the noise from the
17 air conditioners if music -- if students are in a
18 classroom for music on the second floor versus
19 occupying the basement during school hours?

20 MS. FELDMAN: It's not an application just
21 for music. It's for a classroom.

22 VICE CHAIRPERSON MILLER: Whatever. But
23 there are students there instead of utilities. We've
24 heard from the applicant there's no difference.
25 They're going to have the same air conditioning

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1 equipment.

2 MS. FELDMAN: Okay.

3 VICE CHAIRPERSON MILLER: So, what you
4 would be asking -- not that I'm going to tell you how
5 to present your case, but this is the issue we're
6 looking at. Is would the air conditioners be --
7 should they be different because they are going to be
8 students down there or is that why, you know, there
9 are that many air conditioners and that -- it's a --
10 it's a -- not that wide an issue.

11 MS. FELDMAN: Okay.

12 MS. PRINCE: I do have one thought on a
13 possible approach to this issue. We're confident in
14 the information provided to us from our expert.

15 CHAIRPERSON GRIFFIS: Okay.

16 MS. PRINCE: So, we're more than willing
17 to have a condition of the BZA order --

18 CHAIRPERSON GRIFFIS: No. No. No.

19 MS. PRINCE: -- that limits us to the
20 HVAC, the number of units that we now have.

21 CHAIRPERSON GRIFFIS: That's just --
22 that's just -- that's getting into the absurd. We're
23 not writing any condition on this. This is -- we're
24 -- actually, we're giving more time than is needed and
25 -- and -- and giving more opportunity for this.

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1 I'm setting this for the special decision
2 making on May 25th. What you need to do is contact a
3 mechanical engineer. Give him the plans. Give him
4 the assessment and have him look at it. Ask him
5 specific questions on load occupancy for the basement,
6 difference from the overall building, just as Ms.
7 Miller has said. It should take him 15 minutes. Buy
8 him a good lunch and have it submitted in.

9 Ms. Bailey, when would that need to be in?

10 MS. BAILEY: May --

11 CHAIRPERSON GRIFFIS: I know that's going
12 to be tight.

13 MS. BAILEY: Can he come in this week? At
14 the end -- toward the end of this week?

15 CHAIRPERSON GRIFFIS: Can it be in by 3:00
16 Friday? It really doesn't -- I don't find it to be
17 that burdensome and frankly, we're -- we're going to
18 balance an awful lot here and my priority is balancing
19 the Board and their schedule. Setting this to our
20 decision making at another time just burdens us and we
21 have more to do on that day than can conceivably get
22 done in the ten hours that we're scheduled to be here.

23 MS. FELDMAN: You can't just rule on the
24 record at a later point? You have to have a meeting?

25 CHAIRPERSON GRIFFIS: I'm -- you know

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1 what? My -- my Board is prepared to decide today, but
2 that will not take your information and so, we're
3 giving you an opportunity and we'll decide this on the
4 8th.

5 Again, this is -- this is not an awful lot
6 of information that is needed for you to clarify your
7 position.

8 MS. FELDMAN: Okay. Thank you.

9 MS. BAILEY: Mr. Chairman, for
10 clarification for me, are we deciding this on May 25th
11 or on June 8th?

12 CHAIRPERSON GRIFFIS: May 25th.

13 MS. BAILEY: Okay.

14 CHAIRPERSON GRIFFIS: Special public
15 meeting at 9:00. Anything else? Board Members, are
16 you clear? Everybody clear?

17 MS. PRINCE: I'm not. Draft order. Do
18 you need it for post-findings from me?

19 CHAIRPERSON GRIFFIS: No. So, to
20 reiterate, the record's been kept only for one
21 submission by the Neighbors United.

22 Quite frankly, I'm not giving you an
23 opportunity to respond. You want to turn your mike on
24 and say that.

25 MS. PRINCE: We'll forego an opportunity

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1 to respond.

2 CHAIRPERSON GRIFFIS: Okay. I think it's
3 -- I think it's fairly clear what we're going to be
4 looking at and what's being put in the record and what
5 we've asked for. It should be absolutely clear for us
6 to take. We have all the information from the
7 applicant and we will look to any sort of rebuttal
8 information and -- and we'll be able to fully
9 deliberate on that.

10 That being said, last time, opportunity
11 just for questions, clarifications, procedural
12 situations. Okay.

13 This is set for the schedule then on the
14 25th which is next Tuesday. Okay. Very well.

15 Is there anything else attended to the
16 morning session then that the Board should pay any
17 attention to?

18 MS. BAILEY: No, Mr. Chairman.

19 CHAIRPERSON GRIFFIS: Thank you very much,
20 Ms. Bailey.

21 In which case, I'm going to adjourn the
22 morning session.

23 For those showing up for the afternoon
24 session, of course, it should be now. Amply clear
25 that we are --

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(Whereupon, the hearing was recessed at
12:52 p.m. to reconvene this same day.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

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2:24 p.m.

1
2 CHAIRPERSON GRIFFIS: Good afternoon,
3 ladies and gentlemen. Thank you very much for your
4 patience. Of course, our morning session went quite
5 far over and we had an executive session to accomplish
6 at our lunch period, but let me call to order the
7 afternoon session of the Board of Zoning Adjustment to
8 the District of Columbia for 18 May 2004.

9 My name is Geoff Griffis, Chairperson.
10 Joining me on the first case in the afternoon is Vice
11 Chair Ms. Miller and representing the National Capital
12 Planning Commission is Mr. Mann.

13 Copies of today's hearing agenda are
14 available for you. They are located where you entered
15 into the hearing room. You can pick them up and see
16 where you are on the agenda this afternoon.

17 Several important notes of technicality.
18 Of course, we are being recorded. The court reporter
19 that sits to my right will create the transcript.

20 Secondly, we are being broadcasted on the
21 Office of Zoning's website.

22 Therefore, we ask several things of you.
23 First, I'd ask that everyone turn off their cell
24 phones and beepers at this time. Also, I would ask
25 that everyone refrain from making any disruptive

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1 noises or actions in the hearing room while we conduct
2 our sessions.

3 Also when coming forward to speak to the
4 Board, please have two witness cards filled out.
5 Those witness cards are available at the table you
6 entered into and also the table where you will provide
7 testimony for the Board. Those go to the recorder
8 sitting on the floor.

9 When coming forward, you'll just need to
10 state your name and address once on the record. Make
11 sure your microphone is on so that can be picked up.

12 The order of procedures for special
13 exceptions and variances is first we hear from the
14 applicant and their case presentation and witnesses.

15 Second is any government reports
16 attended to the application.

17 Third, of course, is the ANC within which
18 the property is located.

19 Fourth is persons or parties in support of
20 an application.

21 Fifth is persons or parties in opposition.

22 Six, finally, is closing remarks, rebuttal
23 testimony by the applicant.

24 For -- or rather for appeals, of course,
25 we will start with statements and witnesses of

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1 appellant. Second would be the Zoning Administrator
2 or the Government official's case. Third would be the
3 case of the owner or the lessee or any intervener in
4 the case. ANC would be forth. Rather the interveners
5 would be fifth and six, we would have rebuttal closing
6 by the appellant.

7 Cross examination of witnesses is
8 permitted by the applicant and parties in a case. The
9 ANC within which the property is located is
10 automatically a party in the case and, therefore, is
11 able to conduct cross examination.

12 The record will be closed at the
13 conclusion of each hearing on a case except for any
14 information that is specifically requested by the
15 Board and we will be very detailed on what we are
16 expecting to be submitted and when it is to be
17 submitted into the Office of Zoning. After that
18 information is received, of course, the record would
19 then finally be closed and no other information would
20 be accepted into the record.

21 The Sunshine Act requires that the Board
22 hold its hearings in the open and before the public.
23 This Board may, however, consistent with its rules of
24 procedures and the Sunshine Act enter executive
25 session during or after a hearing on a case.

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1 Executive sessions are used by the Board in order to
2 review the record and/or deliberate on a case.

3 The decision of this Board in contested
4 cases must be based exclusively on the record that's
5 created before us. So, we ask people present today
6 not engage Board members in conversation so that we do
7 not give the appearance of receiving information
8 outside of the record -- outside of the record.

9 At this time, the Board will consider any
10 preliminary matters related to this afternoon's
11 schedule. Preliminary matters are those which relate
12 to whether a case will or should be heard today such
13 as requests for postponements, continuances or
14 withdrawal or whether proper and adequate notice has
15 been provided in a case.

16 If you believe the Board should not hear a
17 case this afternoon or you are not prepared to go
18 forward with a case, we'd ask that you come forward
19 and have a seat at the table as an indication of a
20 preliminary matter and we will entertain that.

21 Let me ask first if staff has any
22 preliminary matters for the Board. Well, there it is
23 and a very good afternoon to Ms. Bailey. Also Mr. Moy
24 sitting closer to my right with the Office of Zoning
25 and Ms. Glazer representing the Corporation Counsel.

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1 Ms. Bailey.

2 MS. BAILEY: Mr. Chairman and to all, good
3 afternoon.

4 Mr. Chairman, there is a -- there are
5 several preliminary matters having to do with Appeal
6 Number 17085. My understanding at this point is the
7 Board will be taking up the Marshall Heights Community
8 Development Organization Case and then dealing with
9 the appeal thereafter.

10 CHAIRPERSON GRIFFIS: Okay. Anything else
11 for our attention then outside of the specifics of the
12 case of which it is involved here?

13 MS. BAILEY: No, not at this point.

14 CHAIRPERSON GRIFFIS: Okay. Then I would
15 ask that anyone planning to provide testimony today to
16 please stand and give your attention to Ms. Bailey and
17 she is going to administer the oath.

18 MS. BAILEY: Do you solemnly swear or
19 affirm that the testimony you will be giving this
20 afternoon will be the truth, the whole truth, and
21 nothing but the truth?

22 Application Number 17148 of the Marshall
23 Heights Community development Organization pursuant to
24 11 DCMR 3103.2 for a variance from the side yard
25 requirements under Section 405 to allow the

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1 construction of a single-family detached dwelling in
2 the R-1-B District as premises 3034 Clinton Street,
3 N.E., Square 4319, Lot 72 and this is a continuation
4 case from the April 20th, 2004 public hearing.

5 CHAIRPERSON GRIFFIS: Thank you very much.

6 Good afternoon.

7 MR. MOODY: Good morning. Excuse me.

8 Good afternoon.

9 CHAIRPERSON GRIFFIS: You got me a little
10 happy there, but then I looked at the clock.

11 MR. MOODY: I don't want to go backwards.

12 That is for sure.

13 CHAIRPERSON GRIFFIS: Um-hum.

14 MR. MOODY: For the record, my name is
15 Kevin B. Moody. I'm here as a proponent on behalf of
16 Marshall Heights Community Development Organization.
17 Mailing address is 3939 Benning Road, N.E.,
18 Washington, D.C. 20019.

19 CHAIRPERSON GRIFFIS: You're here as the
20 applicant. Is that correct?

21 MR. MOODY: That is correct.

22 CHAIRPERSON GRIFFIS: Okay. Good. Let me
23 digress for one moment in terms of -- well, first, let
24 me ask is Mr. Wiggins here?

25 UNIDENTIFIED SPEAKER: He had to leave.

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1 He left his testimony with me if it's all right.

2 CHAIRPERSON GRIFFIS: He did? Okay.

3 UNIDENTIFIED SPEAKER: If it's all right
4 if I read it.

5 CHAIRPERSON GRIFFIS: Okay. Did Mr.
6 Wiggins give you any idea of whether he wanted to
7 pursue his party status application?

8 UNIDENTIFIED SPEAKER: I'm -- I am not
9 sure which --

10 UNIDENTIFIED SPEAKER: Yes, I have -- he
11 -- he did want to pursue it, but he's a surgical nurse
12 at George Washington and he was on his shift and he
13 had -- he couldn't change his shift.

14 CHAIRPERSON GRIFFIS: Okay. Mr. Wiggins
15 was called back to work on an emergency and therefore,
16 left --

17 UNIDENTIFIED SPEAKER: And he left his
18 statement.

19 CHAIRPERSON GRIFFIS: Left his statement.
20 Okay. I think what we'll do at this point in terms
21 of the application is not -- not grant the party
22 status application as we have a limited scope of the
23 hearing that's left and for him to participate fully
24 as a party. We do have his statement and we have the
25 previous statement. Of course, obviously, we'll

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1 accept those into the record.

2 So, let's continue on then. Let's open it
3 up. You've had revised drawings that were submitted.

4 Is there any other information you want to present at
5 this point?

6 MR. MOODY: If you would like for me to
7 give a -- a brief explanation, I would, but other than
8 what we presented --

9 CHAIRPERSON GRIFFIS: Very brief.

10 MR. MOODY: Very, very brief. We had end
11 up receiving a notice via through the Board and the
12 Office of Planning through Andrew Altman, then the
13 Director, dated back on the 6th of April and I'm
14 reading it verbatim. The Office of Planning
15 recommends approval of the variance from the side yard
16 requirements on condition that the width of the side
17 yard is four feet on both yards.

18 We took that. We had originally come back
19 in. We thoroughly listened to what the opposition had
20 as well as some of the comments that were briefly
21 mentioned. We did, in fact, revise the plan such that
22 we could provide a four foot side yard on either side
23 of the property and reduce the width of the house now
24 to 22 feet as well as still to have a garage so we
25 wouldn't have to worry about on-street parking.

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1 So, it is our belief that Marshall Heights
2 adhered to what we believed was an acceptable
3 alternative to be able to get this variance request
4 approved.

5 CHAIRPERSON GRIFFIS: Okay. And it didn't
6 change your drive aisle or anything of that nature?

7 MR. MOODY: Well, the main portion we
8 still are going to have to skew the driveway in order
9 to be able to access the driveway and that again is an
10 adherence to try to maintain the specimen tree that is
11 in the front yard.

12 CHAIRPERSON GRIFFIS: And what other sort
13 of precautions are you taking to maintain that tree?

14 MR. MOODY: Well, we've had a tree expert
15 that have come out that have indicated to us that the
16 tree is in healthy condition and the only
17 recommendations that they just said was to try to put
18 up tree protection devices during construction and as
19 best as we can to try to stay away from the tree.

20 CHAIRPERSON GRIFFIS: Okay. Anything
21 else?

22 MR. MOODY: No, sir.

23 CHAIRPERSON GRIFFIS: Questions from the
24 Board?

25 VICE CHAIRPERSON MILLER: I just want to

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1 clarify. So, the impact of the change is that the
2 width of the house is reduced and the driveway is
3 skewed from the -- is that in the plans where the
4 driveway is changed?

5 MR. MOODY: The -- the original proposal
6 that we came up with was a 24 foot wide house with one
7 foot side yard on one side and five feet on the other
8 side. Still steering the driveway around the tree.
9 So, that really didn't change as far as skewing the
10 driveway. The main difference predominately was as
11 opposed to one foot on one side and five on the other.
12 We centered the house such that we could have four
13 feet on both sides of the property.

14 VICE CHAIRPERSON MILLER: Thank you.

15 CHAIRPERSON GRIFFIS: Anything else? Is
16 there a representative from ANC-5A here? Do you have
17 any cross examination questions of the new information
18 that's been put into the record or on the testimony
19 that you just heard? If you do, just come forward and
20 make yourself comfortable. Go ahead.

21 COMMISSIONER THOMPSON: I always want to
22 push the wrong button.

23 CHAIRPERSON GRIFFIS: If you wouldn't
24 mind, just state your name and address for the record.

25 COMMISSIONER THOMPSON: Margaret Thompson,

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1 ANC Commissioner 5A11. My address is 2443 Monroe
2 Street, N.E., Washington and I would like to ask Mr.
3 Moody with the clearing of the lot behind the house,
4 if that -- how much clearance he is going to give the
5 house after it's been built for the four foot on
6 either side? How far to the rear will the lot be
7 cleared to have a -- I know the rear yard variance
8 there is none on that.

9 CHAIRPERSON GRIFFIS: Okay.

10 COMMISSIONER THOMPSON: But, I --

11 CHAIRPERSON GRIFFIS: I think I
12 understand.

13 COMMISSIONER THOMPSON: -- I didn't --

14 CHAIRPERSON GRIFFIS: A little far off the
15 testimony, but you've grabbed it in there with the --
16 with the side yard setbacks and what would be the
17 rear. How much are you clearing on the rear of the
18 property?

19 MR. MOODY: Certainly, it would be
20 impossible to be able to give you an exact square
21 footage, but the minimum required such that we can get
22 construction materials in the back such that we would
23 be able to do excavating as well as to have a --

24 CHAIRPERSON GRIFFIS: Do you do the
25 construction management for Marshall Heights?

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1 MR. MOODY: I oversee it.

2 CHAIRPERSON GRIFFIS: You oversee the
3 construction management?

4 MR. MOODY: Yes.

5 CHAIRPERSON GRIFFIS: So, how much is --
6 how much is estimated to be required for clearance to
7 get to the back of that building?

8 MR. MOODY: Sure. I would -- I would
9 guesstimate and say approximately 15 feet.

10 CHAIRPERSON GRIFFIS: So, you're going to
11 clear everything within 15 feet of the -- of the
12 proposed property line or the proposed structure line
13 at the rear?

14 MR. MOODY: That -- that would be correct
15 and the reason again for that whenever you are getting
16 the house sided, you have to end up having certain
17 minimum offset. So, that would, in fact, would have
18 to be the area in order to get the appropriate offsets
19 and to have machines to be able to get back there to
20 excavate the property.

21 COMMISSIONER THOMPSON: In building the
22 house, being under construction, if they start
23 constructing the house, the property will be consumed
24 with all the material and what have you in doing the
25 construction part of the house. All right. I'm

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1 getting myself confused.

2 When they start the house, how are they
3 going to or where are they going to put all of the
4 material necessary to build the house? Either they
5 have to put it the front yard or the rear yard.

6 CHAIRPERSON GRIFFIS: Right. I understand
7 your question. Two things.

8 COMMISSIONER THOMPSON: Um-hum.

9 CHAIRPERSON GRIFFIS: One, out of our
10 jurisdiction.

11 COMMISSIONER THOMPSON: Okay.

12 CHAIRPERSON GRIFFIS: It's means and
13 messes at construction. Two, what -- how are you
14 going to stage this?

15 MR. MOODY: Certainly. Whenever we submit
16 for building permit drawings, DCRA requires a certain
17 amount of information that we have to provide which --

18 CHAIRPERSON GRIFFIS: Yes. Yes. I don't
19 care about DCRA. How are you going to do it? Where
20 are you going to put all the material?

21 MR. MOODY: Certainly. Certainly. Well,
22 we would end up, sir, we would end up having a
23 proposed construction entrance. The house would be a
24 panelized house which basically means whatever the
25 amount of lumber that they can construct typically an

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1 erection crew within two to three days --

2 CHAIRPERSON GRIFFIS: Okay.

3 MR. MOODY: -- that would be the amount of
4 material --

5 CHAIRPERSON GRIFFIS: You going to store
6 anything off the property?

7 MR. MOODY: Other than like appliances
8 whenever we need them. Yes, they would be stored "in
9 the stores." But --

10 CHAIRPERSON GRIFFIS: Right. You -- you
11 -- you conceivably see a trailer out on the street or
12 anything of that nature?

13 MR. MOODY: Not for a one single family
14 detached house.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. MOODY: No.

17 CHAIRPERSON GRIFFIS: So, as I understand
18 what you just said, this house is going to show up in
19 big sections.

20 COMMISSIONER THOMPSON: Correct.

21 CHAIRPERSON GRIFFIS: So, you're going to
22 get these big walls coming in and they're going to tie
23 it together and they're going to store everything on
24 the property.

25 MR. MOODY: If -- if I could just make a

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1 slight modification.

2 CHAIRPERSON GRIFFIS: You sure?

3 MR. MOODY: Panelized houses all of the
4 wood and lumbers are cut --

5 CHAIRPERSON GRIFFIS: I understand.

6 MR. MOODY: -- at the site and then they
7 bring the wood there in places. So, it's not like a
8 panelized where they come in sections. They will just
9 direct them on site, but it's not like it'll be an
10 abundance of materials.

11 CHAIRPERSON GRIFFIS: I just bought my
12 daughter this building set and that's what we do. We
13 just build these things. It's beautiful. It's the
14 way they're going to build this house.

15 But, you're concern is just not having
16 materials everywhere, trucks filling the streets. Is
17 that correct?

18 COMMISSIONER THOMPSON: Well, okay. If
19 there's quite a bit of material that would have to
20 come in in order to build this --

21 CHAIRPERSON GRIFFIS: Um-hum.

22 COMMISSIONER THOMPSON: -- they would have
23 to trespass on the other neighbor's property if they
24 had the four foot, you know, clearance on either side.

25 I wouldn't think there would be enough clearance with

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1 the four feet.

2 CHAIRPERSON GRIFFIS: You know, what? I
3 think that's excellent advice. Get all your materials
4 in the back of the lot before you put up those side
5 walls so you don't have to trespass. Does that make
6 sense?

7 MR. MOODY: In theory. In practicality,
8 no.

9 CHAIRPERSON GRIFFIS: Or take it through
10 the center of the house.

11 MR. MOODY: The reason I say in theory,
12 things have a tendency to be able to walk away.

13 CHAIRPERSON GRIFFIS: Are you anticipating
14 you're going to have to utilize the properties
15 adjacent to construct this house?

16 MR. MOODY: Definitely not.

17 CHAIRPERSON GRIFFIS: Okay. Is that
18 clear?

19 COMMISSIONER THOMPSON: I guess that would
20 be it.

21 CHAIRPERSON GRIFFIS: Okay. I think
22 that's a -- I think that's a major concern. I mean
23 the -- the concern of the adjacent neighbors in the
24 ANC obviously is how -- how narrow this is at that
25 portion and that is for the functionality of it which

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1 is obviously within our jurisdiction and what we
2 weigh.

3 MR. MOODY: Certainly.

4 CHAIRPERSON GRIFFIS: And -- and it goes
5 -- somewhat limitedly, but it goes to just even the
6 construction of it. So --

7 MR. MOODY: Well, to answer that question,
8 per our --

9 CHAIRPERSON GRIFFIS: That actually wasn't
10 a question. So, the direction, of course, is just to
11 be mindful during the construction period --

12 MR. MOODY: Certainly.

13 CHAIRPERSON GRIFFIS: -- as -- as -- as
14 you're doing in terms of the design of it of what will
15 actually be, if approved, the proposed house and will
16 be situated so that they can be neighborly without
17 being intrusive.

18 Any other cross examination questions?

19 COMMISSIONER THOMPSON: I think that would
20 -- that would be it right now.

21 CHAIRPERSON GRIFFIS: Okay. Thank you
22 very much. Excellent questions.

23 Board Members, anything else for the
24 applicant? We don't have any other parties in this?

25 The Office of Planning is with us. Did

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1 they want to respond to the new submission?

2 MS. THOMAS: Mr. Chairman, Karen Thomas,
3 Office of Planning.

4 We submitted a supplemental reflecting the
5 applicant's submission of a four -- four foot wide
6 setback.

7 CHAIRPERSON GRIFFIS: Indeed. It's
8 Exhibit Number 35 in the record and it maintains your
9 position or it -- it clarifies your position in terms
10 of the four foot setbacks on each side that you would
11 support the application. Is that correct?

12 MS. THOMAS: That's correct.

13 CHAIRPERSON GRIFFIS: Okay. Does the
14 applicant have any questions of Office of Planning
15 regarding this?

16 MR. MOODY: No.

17 CHAIRPERSON GRIFFIS: Does the ANC have
18 any cross examination of the Office of Planning?

19 COMMISSIONER THOMPSON: No.

20 CHAIRPERSON GRIFFIS: No. Okay. I know
21 it's a long walk back up here, but I can give you time
22 to get here if you have one. You sure? Okay.

23 There it is then. Board Members,
24 questions of the Office of Planning? Okay.

25 I don't have any other Government reports

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1 attended to this that address the revised plans that
2 were submitted.

3 Let's go to persons to give testimony
4 first in support or in opposition. If you want to
5 just come forward and fill the table if there are that
6 many.

7 Good afternoon.

8 MS. NICKENS: Good afternoon. My name is
9 Paula Nickens. I live at 3024 Clinton Street, N.E.

10 For the sake of time, I went on the record
11 the last time. I also gave written testimony. I want
12 to say for the record that I am still opposed to the
13 Marshall Heights receiving this variance and the
14 reason I am opposed is because outside of the
15 properties, I don't know how they're going to get
16 anything on that property without using adjacent
17 properties. There's not enough room there.

18 And to me, looking at the site over and
19 over again, as neighbors, we've been down there
20 several times, we just don't understand how Marshall
21 Heights is -- with the tree sitting there, knowing the
22 city won't let them put down the tree, how they're
23 going to put property on it and I think the pictures
24 that Marshall Heights has given you is an -- is not a
25 clear picture of what that property actually looks

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1 like.

2 When the Home Again Initiative came to put
3 the poster up saying this is the Home Again
4 Initiative, the man putting up the poster had to stand
5 there for half an hour and wait for some of us to come
6 out and tell him where the sign was suppose to be
7 because he was perplexed. So --

8 CHAIRPERSON GRIFFIS: You mean he couldn't
9 find the property?

10 MS. NICKENS: Where was they going to put
11 a house and that's why he was perplexed.

12 CHAIRPERSON GRIFFIS: Oh, I see.

13 MS. NICKENS: I mean the pictures --

14 CHAIRPERSON GRIFFIS: Of course, this
15 isn't the most official guy you want to take advice
16 from putting up the signs. Right. I mean I don't
17 know.

18 MS. NICKENS: Well --

19 CHAIRPERSON GRIFFIS: But --

20 MS. NICKENS: -- if you look at --
21 visually look at the property coming in, driving the
22 streets --

23 CHAIRPERSON GRIFFIS: Right.

24 MS. NICKENS: -- you would not believe
25 that someone would put a house there.

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1 CHAIRPERSON GRIFFIS: I see.

2 MS. NICKENS: To visually look at the
3 property. I mean you have a picture of some --

4 CHAIRPERSON GRIFFIS: Based on the scale
5 of the houses around it and the size of the lots
6 around it.

7 MS. NICKENS: And the closer -- then the
8 tree.

9 CHAIRPERSON GRIFFIS: Right.

10 MS. NICKENS: The tree that's sitting
11 there. If they build there, if they put a driveway
12 there, the tree as big as it is has to have roots.
13 That -- that -- that cement driveway is not going to
14 last long there. It's going to crack up and break.

15 CHAIRPERSON GRIFFIS: The tree is just
16 about dead center on that lot.

17 MS. NICKENS: Exactly and if -- if they
18 come out their door, the -- the way they have the
19 house, they're going to run -- somebody chase them,
20 they're going to run smack into the -- the tree.

21 So, I -- I -- and -- and outside of that,
22 when we talk about that particular tree, it is living.
23 It's -- it's beautiful.

24 CHAIRPERSON GRIFFIS: Yes.

25 MS. NICKENS: It's -- it's -- it's our

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1 neighborhood and to see Marshall Heights staple when
2 the law says you cannot staple signs on our trees, I
3 want to know whether they're trying to kill it so they
4 can take it down and build the house right. Because
5 the house would be right if the tree wasn't there.
6 But, it's a big poster stapled on that tree. D.C. law
7 says you cannot affix anything to a tree.

8 So, I am still perplexed as I was the
9 first time. It's -- it's -- it's -- I'm very
10 perplexed that Marshall Heights and -- and this house
11 and -- and bringing in and -- and then looking at the
12 back of the house at Ms. Ware's house. She look out
13 her window, she'll still be able to see the trees that
14 have tumbled over from Isabel.

15 I'm just very perplexed at why would they
16 want to build a house at the end that they're building
17 it at and then to come to ask for a variance and not
18 ask -- be friendly. Both neighbors on both sides
19 don't want it there like that and I can assure you to
20 build anything on that property, they're going to have
21 to use the adjacent properties. They're going to have
22 to.

23 CHAIRPERSON GRIFFIS: What if they built
24 in the back portion of it?

25 MS. NICKENS: They would have to use it

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1 then, but the neighbors may accept it like that and
2 I'm quite sure they would and they probably will allow
3 them to use their properties.

4 CHAIRPERSON GRIFFIS: You mean just for
5 construction, they'd have to utilize the adjacent
6 properties?

7 MS. NICKENS: Yes.

8 CHAIRPERSON GRIFFIS: That's 30 feet wide
9 going in there once you get around the tree.

10 MS. NICKENS: But, you got to get around
11 the tree and then you're talking about putting a trunk
12 to -- to dump off equipment in there.

13 CHAIRPERSON GRIFFIS: I see.

14 MS. NICKENS: Where they going to put it
15 at?

16 CHAIRPERSON GRIFFIS: I don't know.

17 MS. NICKENS: And then you have the fire
18 hydrant there. Where they going to -- how are they
19 going to get this trunk that they're talking about
20 building on this property up there. You come friendly
21 and -- and maybe the neighbors will say come on. You
22 can utilize my property and build, but to put it at
23 the front of the house with that big tree sitting
24 there.

25 Put a driveway in there. We looking at

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1 every time they get a driveway every few years it's
2 going to crack up. We don't know how far the roots of
3 that tree is down and -- and we know by living there
4 what roots of a tree can do to you house. We know
5 that.

6 CHAIRPERSON GRIFFIS: Okay. Thank you
7 very much.

8 MS. NICKENS: You're welcome.

9 MS. TATE: My name is Fannie Tate. I --

10 CHAIRPERSON GRIFFIS: You need your
11 microphone on. Thanks.

12 MS. TATE: I'm sorry.

13 CHAIRPERSON GRIFFIS: That's okay.

14 MS. TATE: My name is Fannie Tate at 3015
15 Clinton Street, N.E. in Washington.

16 I'm one of the neighbors and I'm also --
17 Eric Wiggins has also given me his statement. So, I
18 can tell you what he has said and then I can offer
19 mine if -- however --

20 CHAIRPERSON GRIFFIS: Does he have it in
21 writing?

22 MS. TATE: He has it in writing, but he
23 only gave me one copy.

24 CHAIRPERSON GRIFFIS: That's okay.

25 MS. TATE: So, I'll be glad to give her --

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1 CHAIRPERSON GRIFFIS: I'll go run copies.

2 MS. TATE: Oh.

3 CHAIRPERSON GRIFFIS: Okay. I won't.

4 MS. TATE: I know you won't.

5 CHAIRPERSON GRIFFIS: But, we'll have some
6 copies made.

7 MS. TATE: But, if she'll make a copy,
8 then I can tell you what --

9 CHAIRPERSON GRIFFIS: Yes, and we'll put
10 -- we'll put it in the record. I assure the --

11 MS. TATE: -- what she said.

12 CHAIRPERSON GRIFFIS: We can -- we can
13 wait on that.

14 MS. TATE: Okay.

15 CHAIRPERSON GRIFFIS: Oh, thanks, John.

16 MS. TATE: To reiterate what Paula has
17 said, Ms. Nickens has said, if you actually look at
18 the property, there is a big tree there. Now, we know
19 that -- and -- and we have water problems in that
20 neighborhood. We know that their roots, now they
21 might not be able to see it by the naked eye, but you
22 -- when you're walking on it, you feel them.

23 We have had to -- one of the neighbors has
24 had to -- actually had the root come up under his
25 basement.

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1 CHAIRPERSON GRIFFIS: Okay.

2 MS. TATE: And -- from outside and -- and
3 mind you, this is a property that's low. His property
4 sits up. So, this is a root that has gone down
5 through his property and under and has come up through
6 his basement. Before they could see him his house,
7 they had to tear up the basement and get that root.

8 Part of that root we believe is part of
9 this tree.

10 CHAIRPERSON GRIFFIS: Interesting.

11 MS. TATE: And so, therefore, if you're
12 going to build something and not dig and you're going
13 to lay and you know how concrete gets laid. You're
14 only digging a little bit and you lay that. Then
15 eventually, this root is going to come up through the
16 person's house and it's not my house, but it's still a
17 neighborhood.

18 CHAIRPERSON GRIFFIS: That's an
19 interesting point.

20 MS. TATE: And --

21 CHAIRPERSON GRIFFIS: Why do you care?

22 MS. TATE: Well, it's because it's the
23 neighborhood and we care about our neighbors. We're
24 like family on our block.

25 CHAIRPERSON GRIFFIS: No. No. But -- but

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1 to --

2 MS. TATE: And this is -- this is --

3 CHAIRPERSON GRIFFIS: -- to be serious,
4 though, how would that impact the neighborhood? I
5 mean here we are looking at a variance for side yards.

6 MS. TATE: Because of the fact that we're
7 -- we're basically built on a swamp.

8 CHAIRPERSON GRIFFIS: Okay.

9 MS. TATE: You know, years -- we didn't
10 know that when we bought the properties.

11 CHAIRPERSON GRIFFIS: Okay.

12 MS. TATE: But, if they don't put a
13 retaining wall in the back, they're talking about
14 building and they're not talking about clearing off in
15 the back or putting a retaining wall or anything.
16 When it rains and -- and God knows it's just like the
17 cicadas only come 17 years. We never know when it's
18 going to flood.

19 CHAIRPERSON GRIFFIS: Right.

20 MS. TATE: That water -- if you're not
21 clearing that off, it's going to come down and then
22 it's going to run over into other people's property.

23 CHAIRPERSON GRIFFIS: I see. So, it --
24 just putting a structure first of all where they're
25 proposing it and not doing any sort of remediation in

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1 the back will have a negative impact on the
2 surrounding area based on what the water flow --

3 MS. TATE: That also and the fact that --

4 CHAIRPERSON GRIFFIS: -- and the -- water
5 management will be.

6 MS. TATE: -- once they bring in the
7 prefab and lay it, I'm sure that the deck's not going
8 to be put on first. So, how are they going to go
9 around and -- unless the -- like you said, unless you
10 put all the equipment in the back, all the materials
11 in the back. They're going to have to drive around
12 it. Four feet is not going to let a truck go through
13 to go around to the back --

14 CHAIRPERSON GRIFFIS: Understood.

15 MS. TATE: -- and fix anything.

16 CHAIRPERSON GRIFFIS: Okay.

17 MS. TATE: We're going to have to go to
18 the neighbor next and ride -- because there's plenty
19 of property between them and ride around his property
20 to get to the back. Now, if they get permission,
21 fine, but they're Section 8. So, I don't know if they
22 can give permission or not. They're renting.

23 So -- but, my main concern is -- is we
24 want it uniform with the house. We don't care if it
25 goes back. If it's built back, but we want it uniform

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1 and we want it right.

2 I've been there 23 years. We haven't had
3 any property problems. Marshall Heights is coming in
4 and they're talking about building in and like you
5 just said, bringing in a house and sitting down.

6 So, you know, who's to know how
7 structurally safe it's going to be.

8 CHAIRPERSON GRIFFIS: Well, there's a
9 whole big agency that'll take care of that one.

10 MS. TATE: Right. I understand that.

11 CHAIRPERSON GRIFFIS: Unless it's like
12 Dorothy's house and it just kind of lands there.

13 MS. TATE: And just --

14 CHAIRPERSON GRIFFIS: Okay.

15 MS. TATE: But --

16 CHAIRPERSON GRIFFIS: What -- what are
17 your other concerns that we haven't heard about?

18 MS. TATE: What's that?

19 CHAIRPERSON GRIFFIS: That's what I'm
20 asking you.

21 MS. TATE: Oh.

22 CHAIRPERSON GRIFFIS: Do you have any
23 other?

24 MS. TATE: Well, the Eric's --

25 CHAIRPERSON GRIFFIS: Yes, we have Eric's

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1 letter and obviously, we'll -- we'll read this.

2 MS. TATE: You'll read that.

3 CHAIRPERSON GRIFFIS: Is there any other
4 items in terms of your personal testimony?

5 MS. TATE: Basically, the -- just the --
6 the space in between and not actually being able to
7 walk around it.

8 CHAIRPERSON GRIFFIS: Right.

9 MS. TATE: Eric decides to put a fence
10 up --

11 CHAIRPERSON GRIFFIS: Right.

12 MS. TATE: -- he can't walk around his
13 house.

14 CHAIRPERSON GRIFFIS: Right. Four feet
15 isn't enough for them to get around the house.

16 MS. TATE: Four feet really isn't enough
17 for anything. If you're talking about a house, it's
18 not like all of us are level. You're talking about
19 Eric's house that sits up and --

20 CHAIRPERSON GRIFFIS: Right.

21 MS. TATE: -- you're talking about a
22 property that's going to be down.

23 CHAIRPERSON GRIFFIS: I see.

24 MS. TATE: Level-wise, I don't know
25 exactly how many feet, but he's going to be looking

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1 down and his property goes back and up.

2 CHAIRPERSON GRIFFIS: Um-hum.

3 MS. TATE: So, how are you going to put a
4 house that's going to be level that you're not moving
5 back, you're not clearing out and I guess whoever the
6 property owner is will have to worry about the rest of
7 the property that's all the way in the back and
8 around. Because it's one of actually the largest
9 properties --

10 CHAIRPERSON GRIFFIS: Um-hum.

11 MS. TATE: -- and nothing's being cleared
12 past -- from here to there.

13 CHAIRPERSON GRIFFIS: Right.

14 MS. TATE: And so, you know, that's there
15 problem, but if a person's coming in and they can't
16 afford to clear it, then what's happening with the
17 property that's coming in? What's going to happen
18 with the trees falling and going across and hitting
19 Mrs. Ware's house, you know, or falling and hitting
20 Eric's house if they're not going to at least clear a
21 portion of it so that there is no -- no problem of a
22 tree falling. Because this is what's happened before.
23 The tree fell over and it hit the property and hit
24 Eric's house and this is property from there. So,
25 who's to say it's not going to happen again.

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1 CHAIRPERSON GRIFFIS: Okay.

2 MS. TATE: So --

3 CHAIRPERSON GRIFFIS: Good.

4 MS. TATE: -- we're concerned about the
5 clearing and the space around the house.

6 CHAIRPERSON GRIFFIS: Excellent. Thank
7 you.

8 MS. TATE: Okay. Thank you.

9 CHAIRPERSON GRIFFIS: Anybody else to give
10 testimony today? I suppose.

11 VICE CHAIRPERSON MILLER: Can I ask a
12 question, Mr. Chairman?

13 CHAIRPERSON GRIFFIS: Yes.

14 VICE CHAIRPERSON MILLER: I just -- I do
15 want to make sure that I understand what your concerns
16 are and that is -- my question is are you concerned
17 about a house being on that property at all or -- or
18 the -- where they plan on putting the house?

19 MS. TATE: A house being on there at all
20 really because the space is so small --

21 CHAIRPERSON GRIFFIS: Could you turn on
22 your microphone please?

23 MS. TATE: Oh, I'm sorry.

24 CHAIRPERSON GRIFFIS: That's all right.

25 MS. TATE: I keep forgetting about -- I'm

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1 awfully sorry.

2 CHAIRPERSON GRIFFIS: That's all right.

3 MS. TATE: I'm concerned about a house
4 being on there at all because of the small area and
5 the tree and the hydrant and how a person's going to
6 put a -- a property there.

7 CHAIRPERSON GRIFFIS: What about a house
8 in the back portion?

9 MS. TATE: In the back part, that might
10 make a difference.

11 CHAIRPERSON GRIFFIS: I see.

12 MS. TATE: It might make a difference.

13 VICE CHAIRPERSON MILLER: How about the
14 question of uniformity in the neighborhood?

15 MS. TATE: Actually, uniformity doesn't
16 make a difference because there we -- in our area,
17 there are a lot of houses that -- some are vertical
18 where the entrance is on the side. Some are in the
19 front. Horizontal so to speak. The entrance is on
20 the front. So, there's no really uniformity.

21 We have different houses that are built.
22 All of our houses don't look alike. So, that -- and
23 -- so, it really doesn't make a difference as long as
24 it's a nice house.

25 VICE CHAIRPERSON MILLER: So, are you

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1 concerned about the placement of the house in the
2 front because four feet side yards still aren't
3 enough, it's still too crowded --

4 MS. TATE: It's -- it's crowded.

5 VICE CHAIRPERSON MILLER: -- and the tree
6 roots?

7 MS. TATE: And the tree roots. Right.

8 VICE CHAIRPERSON MILLER: Okay. Thank
9 you.

10 CHAIRPERSON GRIFFIS: Any other questions?

11 MS. FINNEGAN: May I say something?

12 CHAIRPERSON GRIFFIS: Yes.

13 MS. FINNEGAN: I haven't been sworn in
14 though.

15 CHAIRPERSON GRIFFIS: Then you have to
16 stand and give your attention to Ms. Bailey.

17 MS. BAILEY: Raise your right hand please.
18 Do you solemnly swear or affirm that the testimony
19 you will be giving today will be the truth, the whole
20 truth, and nothing but the truth?

21 MS. FINNEGAN: Yes, I do.

22 CHAIRPERSON GRIFFIS: Very well. Just
23 give me your name and your address please.

24 MS. FINNEGAN: Susan Finnegan, 3064
25 Clinton Street, N.E.

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1 CHAIRPERSON GRIFFIS: Excellent and I
2 would just have you turn off your mike at this time
3 and that way we won't get the feedback.

4 Go right ahead.

5 MS. FINNEGAN: Okay. Reading their burden
6 of proof, I would reject their -- their request for
7 side variance based on their requirement to be in
8 harmony with the rest of the neighborhood because the
9 rest of the neighborhood has more than four feet on
10 each side. The rest of the neighborhood does not have
11 a curved driveway and the rest of the neighborhood
12 does not have a tree in the front yard.

13 CHAIRPERSON GRIFFIS: Mr. Wiggins, the
14 adjacent neighbor, doesn't have four feet off of his
15 property line.

16 MS. FINNEGAN: He's got how much?

17 CHAIRPERSON GRIFFIS: It looks to me from
18 the plans that are shown that it's approximately less
19 than four feet.

20 MS. FINNEGAN: So, if that new neighbor
21 were to construct a fence, it would be even less.

22 CHAIRPERSON GRIFFIS: It couldn't be less
23 from the property, but go ahead. Let me not interrupt
24 you.

25 MS. FINNEGAN: So, those are -- those are

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1 my contentions. They're asking -- they're saying that
2 it would be -- it would -- they could build this house
3 without detriment to the public good and my contention
4 is that it would be a detriment to the public good
5 because of the harmony of the neighborhood.

6 CHAIRPERSON GRIFFIS: Okay.

7 MS. FINNEGAN: And because of the -- the
8 fact that it's a prefabricated house when these houses
9 were built 70 years ago and -- and that they're not
10 going to -- most of the houses -- all of the houses go
11 up to the alley line and it's cleared property. They
12 don't want to clear the rest of the property. They
13 don't want to -- want to clear, you know, 15 feet from
14 the structure line and there's a lot of property left
15 that is just completely filled with felled trees and
16 they maintain that if they were to clear it, it would
17 be much more expense and excavation would be costly,
18 but also difficult to do. Yet, they're willing to --
19 they're willing to just go halfway and we say that if
20 they do want to build something, they should go the
21 entire way.

22 CHAIRPERSON GRIFFIS: Understood.

23 MS. FINNEGAN: Does that make sense?

24 CHAIRPERSON GRIFFIS: Do you find anything
25 unique about this lot?

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1 MS. FINNEGAN: I'm sorry.

2 CHAIRPERSON GRIFFIS: Do you find anything
3 unique about this lot?

4 MS. FINNEGAN: Unique?

5 CHAIRPERSON GRIFFIS: Yes.

6 MS. FINNEGAN: Other than it's very narrow
7 up in the front and very wide in the back. Unique to
8 the neighborhood you mean?

9 CHAIRPERSON GRIFFIS: Yes.

10 MS. FINNEGAN: And the tree in the middle.

11 CHAIRPERSON GRIFFIS: Okay. Seems to be
12 some uniqueness to it.

13 Do you think there's any practical
14 difficulty in putting a house here?

15 MS. FINNEGAN: Yes, I do.

16 CHAIRPERSON GRIFFIS: Interesting. Okay.
17 And what would that practical difficulty be?

18 MS. FINNEGAN: The fact that they want --
19 they're not willing to compromise on the placement of
20 the house or the -- the width of the house.

21 CHAIRPERSON GRIFFIS: So, you're saying
22 the -- huh. Okay. Good. And you find that the
23 placement of the house as they have proposed it is not
24 in harmony with the neighborhood for the issues that
25 you've now stated. Is that correct?

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1 MS. FINNEGAN: Yes.

2 CHAIRPERSON GRIFFIS: Okay. Ms. Miller.

3 VICE CHAIRPERSON MILLER: Would you have
4 an objection to the house being placed in the back?

5 MS. FINNEGAN: No.

6 VICE CHAIRPERSON MILLER: Okay.

7 CHAIRPERSON GRIFFIS: Any other questions?
8 Very well. Does the applicant have any cross
9 examination of the panel?

10 MR. MOODY: No.

11 CHAIRPERSON GRIFFIS: No?

12 MR. MOODY: No.

13 CHAIRPERSON GRIFFIS: Okay. Does the ANC
14 have any cross examination?

15 COMMISSIONER THOMPSON: No.

16 CHAIRPERSON GRIFFIS: No questions. Last
17 opportunity for the Board. Very well. Okay. Thank
18 you all very much. Appreciate you coming down.

19 Ms. Miller, final questions for the
20 applicant?

21 VICE CHAIRPERSON MILLER: I'm wondering if
22 the applicant has a response to what was just said?
23 Particularly with --

24 CHAIRPERSON GRIFFIS: Why don't we just
25 ask them for their closings?

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1 VICE CHAIRPERSON MILLER: Well,
2 particularly with respect to, gosh, what was it,
3 putting the house in the back. Because that's
4 basically what I hear them say that that's not
5 objectionable.

6 MR. MOODY: Certainly, I would love to be
7 able to respond to that.

8 Although not impossible, it was clearly
9 stated by our licensed civil engineer that it is just
10 not practical and the reason when I'm saying
11 practical, it would require a massive amount of
12 excavation. It would require removal of some mature
13 trees as well as the new laws on the book as far as
14 not removing trees. It would also require retaining
15 walls. The more that you end up moving the earth
16 which goes into direct contradiction to some of the
17 items that they will mention as far as overflow onto
18 their properties, the less disturbance obviously, the
19 less amount of different type of runoff that would be
20 calculated.

21 So, just putting the house in the rear
22 again is not impossible, but just totally impractical
23 due --

24 VICE CHAIRPERSON MILLER: How about the --

25 MR. MOODY: -- due to the topography and

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1 the condition of the property and just also wanted to
2 address the concerns as far as the fact that they feel
3 that we would have to intrude upon the adjacent
4 properties.

5 We built this house in numerous locations
6 and smaller width houses than these and once we end up
7 putting up silt fence around the edge which would be
8 our limits of disturbance, we have not adhered nor
9 have we crossed over and whenever you're doing that,
10 just the way that you do construction any type of
11 patio or steps or anything that would need to be in
12 the rear of the property, obviously, you would do that
13 and then work forward.

14 So, there would never ever be a need for a
15 large vehicle to ever have to go in the rear of the
16 property because it would be done construction due to
17 construction methods.

18 VICE CHAIRPERSON MILLER: Did you have a
19 tree expert look at the tree that we've heard concerns
20 about?

21 MR. MOODY: We did. The tree person, the
22 landscape gentleman said that the tree was in
23 excellent condition now and if at all possible, we
24 should try to save the tree and that -- and that is
25 what our intentions are. Obviously, I think any

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1 person on the Board as well as on this side would
2 realize that whenever you do cut into roots,
3 obviously, it could potentially affect the health of
4 the tree and I'm not sitting up here telling you that
5 it wouldn't, but all that we can do is try our best to
6 protect the tree and maintain it as a specimen tree.

7 VICE CHAIRPERSON MILLER: Thank you. Mr.
8 Chairman, I would just like to also ask Office of
9 Planning one question.

10 CHAIRPERSON GRIFFIS: Okay.

11 VICE CHAIRPERSON MILLER: And that is
12 these neighbors have testified that the house even
13 with the four foot side yard would be out of harmony
14 with the neighborhood and I'm wondering if you could
15 comment on that?

16 MS. THOMAS: To what extent?

17 VICE CHAIRPERSON MILLER: How it may be in
18 harmony with the neighborhood, the character of the
19 neighborhood or not?

20 MS. THOMAS: We believe the compromise
21 would put it more in harmony with the neighborhood.
22 At four feet, obviously, you don't have the width.
23 This is the best that they can do given the limits of
24 where they need to build the house.

25 VICE CHAIRPERSON MILLER: So, it's Office

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1 of Planning's position that it's not so out of harmony
2 with the neighborhood with --

3 MS. THOMAS: As we state --

4 VICE CHAIRPERSON MILLER: -- that is
5 objectionable?

6 MS. THOMAS: -- as we stated in the
7 report, yes.

8 VICE CHAIRPERSON MILLER: Thank you.

9 CHAIRPERSON GRIFFIS: Good. Any other
10 questions from the Board? Okay.

11 There's a lot more you can do in terms of
12 protection of the tree. You don't just try your best.
13 You ought to use a tree expert and you ought to -- you
14 ought to graph out the roots of it. They ought to
15 have an expert tell you where you can dig and how you
16 can dig and whether the foundation is too deep,
17 whether you put it on piers or whether you pour a
18 foundation. There's a lot of things and I would
19 suggest that you take that under account.

20 Not to mention it'll raise the value of
21 your house with a beautiful tree. That most be over
22 80 years old in the front of the property if this is
23 approved.

24 So, taking that under advisement, if
25 there's nothing further. Oh, yes. Last moment.

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1 COMMISSIONER THOMPSON: I have a --

2 VICE CHAIRPERSON MILLER: A proclamation?

3 No. Okay.

4 COMMISSIONER THOMPSON: No, it's regarding
5 the front footage which is 30 feet.

6 CHAIRPERSON GRIFFIS: Yes.

7 COMMISSIONER THOMPSON: And according to
8 the requirements in 401.3 was to be a 50 foot lot with
9 a minimum of a -- be 80 feet --

10 CHAIRPERSON GRIFFIS: Right and that was
11 one --

12 COMMISSIONER THOMPSON: -- 80 percent the
13 minimum. Pardon me.

14 CHAIRPERSON GRIFFIS: -- part of your --
15 part of your written submission.

16 COMMISSIONER THOMPSON: Yes, right.

17 CHAIRPERSON GRIFFIS: And you were asking
18 the Board to suggest whether they needed a additional
19 relief --

20 COMMISSIONER THOMPSON: Correct.

21 CHAIRPERSON GRIFFIS: -- from the minimum
22 width requirement.

23 COMMISSIONER THOMPSON: Correct. That
24 would also take care of some of the side yard
25 variance, the four feet, of which they speak of air

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1 space instead of actually linear footage as far as the
2 harmony goes with other properties.

3 CHAIRPERSON GRIFFIS: Does the applicant
4 have a brief opinion on that?

5 MR. MOODY: It was our opinion that per
6 our original meetings with the planning staff that we
7 were in for what we believe was the only variance that
8 we needed which was the side yard requirement.

9 CHAIRPERSON GRIFFIS: I think we're going
10 to have to take the opinion of those that have looked
11 at the application. If you look at the definition of
12 lot width, of course, you're going to a requirement of
13 50 feet for the zoned district in which it is. Yet,
14 clearly there is as -- as is -- as was submitted, this
15 is what they've called the flag lot which means it has
16 a very narrow portion and a very deep portion.

17 Well, the -- the definition of lot width
18 was right in front of me a moment ago, but now it
19 isn't. So, I'll find it again.

20 It goes to the -- well, I'll just
21 paraphrase the understanding of it. It goes to an
22 average.

23 An irregularly shaped lot, if you have a
24 beautiful rectangle which we think all these are in
25 terms of our regulations, clearly the width is -- is

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1 one dimension. The depth is another and the total
2 area is one and something that's so irregular, it says
3 you take an average and I would just say without going
4 through our own calculations of it, those that have
5 looked at this fairly closely, I would tend to not
6 dispute their finding on that.

7 Now, I can also say that this is -- this
8 -- if it is an issue as it -- it pursued through, the
9 Zoning Administrator would kick it back out as needing
10 further relief if it gets that far and that's all I
11 can really tell you at this point.

12 Does that make sense? No, it doesn't make
13 sense. Yes. Well, it shouldn't. It's our zoning
14 regulations. If it made sense, what fun would be
15 have.

16 But, in all seriousness, let me just state
17 it very quickly again so everyone understands and the
18 -- the zoning regulations are next door in the office.

19 There's also staff there that can perfectly explain
20 if you need to.

21 What you need to do is essentially
22 establish an average width of a lot that's irregularly
23 shaped. So, in the back rear portion of this lot, it
24 is -- I have no idea how wide it is. We have
25 documentation on my other file that shows how wide it

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1 is, but it's clearly -- it may well be 90 feet.

2 MS. FINNEGAN: Mr. Chair, I think the OP
3 report at page two has a chart which --

4 CHAIRPERSON GRIFFIS: Oh, the original
5 one. Right.

6 MS. FINNEGAN: -- which details the
7 numbers.

8 CHAIRPERSON GRIFFIS: It indicates a lot
9 width of?

10 MS. FINNEGAN: Well, it shows the front
11 end lot, rear lot width and then the average.

12 CHAIRPERSON GRIFFIS: Yes. Yes, I don't
13 know. Okay. All right. Well, there it is. Why
14 don't we have you calculate it? Show us what the lot
15 width is. Not right now actually. We're going to
16 have you submit it in. Okay.

17 Anything else?

18 MS. TATE: Excuse me. Can I say something
19 in -- in sort of a rebuttal? I don't know if that's
20 proper or not, but he was saying that he could -- it
21 did not -- that they could not clear back because of
22 the -- the depth or -- or the -- the reach out. Every
23 house over there up to a certain point --

24 CHAIRPERSON GRIFFIS: Okay.

25 MS. TATE: -- goes back --

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1 CHAIRPERSON GRIFFIS: Okay.

2 MS. TATE: -- and then up and out. It's
3 clear. Every house back there is clear.

4 CHAIRPERSON GRIFFIS: Right.

5 MS. TATE: And there -- there are steps
6 that go into the back area. So, it's not -- and they
7 all have retaining walls. So, it's not like it's
8 something out of the ordinary. This is something in
9 keeping and if you're going to keep in -- in -- where
10 all of the houses are going to be alike, then he
11 should put a retaining wall up there even if -- you
12 know, you understand what I'm saying? All the houses
13 that are on the hill --

14 CHAIRPERSON GRIFFIS: Right.

15 MS. TATE: -- his is lower. So, it's not
16 going to be a difference.

17 CHAIRPERSON GRIFFIS: The regulations
18 don't require them to be -- to be exact, identical, to
19 be in a beautiful harmony.

20 MS. TATE: Okay.

21 CHAIRPERSON GRIFFIS: It just means
22 somewhat of a -- a harmony that isn't so disruptive to
23 the zone plan and map and all that.

24 But, let's -- we've kind of strayed --

25 MS. TATE: Right. I know. I -- I

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1 understand.

2 CHAIRPERSON GRIFFIS: -- quickly away from
3 actually the relief they're actually here for which is
4 limited to the side yard.

5 MS. TATE: The side.

6 CHAIRPERSON GRIFFIS: The required eight
7 feet on each side. They only have four feet and so,
8 what we're doing is just trying to establish what is
9 the impact. First of all, we have to establish
10 whether there's uniqueness and out of that uniqueness
11 there's a practical difficulty and if that is met,
12 then we go to whether it impairs the intent and
13 integrity of the zone plan or if it impairs the
14 integrity of the public good. Does it go against the
15 public good?

16 We've let things -- a lot of things come
17 in just to fill and a full understanding of how this
18 building sets in because it -- it is somewhat relevant
19 in that they're trying to set this at the narrow
20 portion and so, for the Board to understand well,
21 what's the controversy in the narrow portion? It does
22 seem -- as Board Members have said, it seems to be in
23 harmony. It puts the building in line. But, maybe it
24 doesn't put it in harmony with the rest of the
25 character of the neighborhood because the lot is so

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1 narrow there.

2 We've explored a little bit on the rear.
3 In order to establish what -- what my understanding
4 from this testimony and from the past hearing which I
5 thought was much -- there was more time and it was
6 actually addressed to why it wasn't being built in the
7 rear. Not necessarily a civil engineering feat that
8 can't be accomplished. As we can put people on the
9 moon, but civil engineers didn't do that.

10 But, the -- the issue is that there's an
11 -- there's a certain amount of economic feasibility of
12 doing that. I mean it -- it's -- as -- as the
13 testimony as I've heard it is it's a -- it's a large
14 scale project to do something of that nature, cutting
15 so deeply into the -- into the hill and clearing it
16 and then putting a house there.

17 Okay. Last thing and then we have to go.

18 MS. NICKENS: And -- and that's what I --
19 I truly have a problem with. They have required this
20 piece of property or will require -- get this piece of
21 property from the city --

22 CHAIRPERSON GRIFFIS: Right.

23 MS. NICKENS: -- at no cost. I had to pay
24 for my property.

25 CHAIRPERSON GRIFFIS: Right. I

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1 understand.

2 MS. NICKENS: So, any amount of money that
3 they spend --

4 CHAIRPERSON GRIFFIS: Right.

5 MS. NICKENS: -- trying to make it
6 conducive --

7 CHAIRPERSON GRIFFIS: Right.

8 MS. NICKENS: -- or neighbor friendly, I
9 -- I would think they would want to do it.

10 CHAIRPERSON GRIFFIS: I --

11 MS. NICKENS: And they're not trying to be
12 neighbor friendly with us in -- in no way.

13 CHAIRPERSON GRIFFIS: I understand and --
14 and believe me I totally understand your position. It
15 -- it also came out last and we haven't lost that
16 believe me. Even though we go through all these
17 applications, we keep them very well situated on a
18 small portion of our brain.

19 MS. NICKENS: Okay.

20 CHAIRPERSON GRIFFIS: And we do have the
21 full record on that and that's -- it -- it is well
22 within our understanding. Okay.

23 Anything else from the Board? Last
24 questions. Ms. Miller.

25 VICE CHAIRPERSON MILLER: I -- I just have

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1 a -- a big picture question and that is -- I mean my
2 understanding is that your corporation develops
3 housing on vacant properties, you know, and my
4 question is I guess if -- if this property turns out
5 to be ill suited or you -- you couldn't get the
6 variance for this property, would you be developing on
7 other property instead? Would that be the
8 consequence?

9 MR. MOODY: Certainly and just to bring a
10 little bit of clarity, this is one of the properties
11 -- excuse me. To bring a little clarity, this is one
12 of the properties that Marshall Heights Community
13 Development Organization acquired through a bundle of
14 properties awarded to us via the Home Again Initiative
15 Program.

16 One thing is Marshall Heights does not own
17 this property yet. Marshall Heights cannot take
18 ownership to this property until such time that we
19 have a building permit in hand.

20 So, for instance, if this variance was
21 denied, Marshall Heights would call the Mayor's office
22 back up, say we went through BZA, it did not get
23 approved, here's your lot, do whatever it is that you
24 so planned to do with it.

25 But, if we obtain the variance, we would

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1 continue through with the architectural and
2 engineering drawings, you know, that are substantially
3 completed and once it is completed, then we will pay a
4 price for the lot and move forward with development.

5 VICE CHAIRPERSON MILLER: And -- and just
6 as a follow-up on that then, was this property that
7 was determined by the city for housing?

8 MR. MOODY: Oh, absolutely. Absolutely.
9 The -- the criteria was that we had to build a home
10 onto the property, but obviously, they as well as we
11 realized that we would have to come in front of you to
12 be able to get a yes in order for us to move forward.

13 VICE CHAIRPERSON MILLER: Thank you.

14 MR. MOODY: You're welcome.

15 CHAIRPERSON GRIFFIS: Anything else from
16 the Board? Any last questions? Very well.

17 We thank you all very much for being here.

18 I need to set this for a decision making
19 and I would like to set it for -- for a special public
20 meeting on the 25th. Second case in that. Going to
21 be a nice long day.

22 Okay. In which case we're going to make
23 our decision and, of course, in our -- in our special
24 public meeting, I'm not going to go into that. In our
25 -- in our public meetings, we obviously don't have any

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1 additional testimony. It's our deliberation.

2 We have the record that's full in front of
3 us. We haven't had an opportunity to read Mr.
4 Wiggins' letter and such of that nature. I don't want
5 to just rush this into a bench decision.

6 So, I've set it off for next week. We
7 will early in the morning starting at 9:00 start
8 deciding cases. This will be the second on a schedule
9 of decisions.

10 As I say, we won't have any further
11 testimony. There's nothing else that needs to come
12 into the record. It's full. You are absolutely
13 welcome to be here and hear our deliberation. You'll
14 hear our decision and then the order will be issued.

15 So, with that, I thank you all for coming
16 back down here this afternoon. Appreciate all the
17 additional information that has been put into the
18 record and I will answer any quick procedural
19 questions at this time.

20 MR. MOODY: You had said that we don't
21 have to be -- would you encourage it or the only thing
22 we would be doing is just looking at you deliberate.
23 We wouldn't be able to say a word.

24 CHAIRPERSON GRIFFIS: That's true, but we
25 always encourage you to look at us. No, it has no

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1 bearing, impact. You're here. You're not here. In
2 fact, we're broadcast live on the web. You can be
3 wherever you want and watch it. Clearly, the order is
4 a final decision. That is the effective decision of
5 the Board and that will be issued after our
6 deliberation.

7 If you want to hear how we get to a
8 certain decision, that's -- that's the pertinence and
9 the critical aspect of it.

10 Okay. Everyone else clear?

11 MS. FINNEGAN: Will you be accepting
12 written testimony --

13 CHAIRPERSON GRIFFIS: Could -- can you
14 turn your mike on and your question is will we be
15 written -- accepting any written testimony on this?
16 Absolutely not.

17 MS. FINNEGAN: Okay.

18 CHAIRPERSON GRIFFIS: This is the ending
19 of our hearings. After this, the record is closed.
20 No other additional information actually is accepted
21 into the record. We will not deliberate on anything
22 else outside of the record. So, we have -- we have
23 everything that we need.

24 Did you have something particular that you
25 thought might be coming in? Okay. Very well.

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1 Thank you all very much.

2 Mr. Moy.

3 MR. MOY: Just a clarification for the
4 staff, was there anything further on the lot width or
5 has that been resolved?

6 CHAIRPERSON GRIFFIS: Oh, good point.
7 That's right. You're going to -- you're going to
8 submit in your -- your lot width.

9 MR. MOODY: If I could try to maybe help
10 expedite, I have that information right here if that
11 would be --

12 CHAIRPERSON GRIFFIS: See that. It's
13 already submitted. No, you're going to go right next
14 door. You're going to put it into the record.

15 MR. MOODY: Thank you.

16 CHAIRPERSON GRIFFIS: Excellent. Okay.
17 If there's nothing else, let's call the next case
18 then.

19 MS. BAILEY: This is an appeal and it --
20 the number is 17085 of Larry and Louise Smith and Mary
21 Ann Snow pursuant to 11 DCMR 3100 and 3101 from the
22 administrative decision of the Zoning Administrator in
23 the issuance of Building Permit Numbers B424724,
24 B451616, and others to Chris Doefler and Folger Park
25 North, LLC for the construction of three flats.

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1 Appellant alleges that the Zoning Administrator did
2 not properly apply the provisions of Subsection 401.2
3 and other sections of the zoning regulations. The
4 site is located in the CAP/R-4 district at 206, 208,
5 and 210 D Street, S.E., Square 763, Lots 26, 27, and
6 28.

7 Member of the Board, there are several
8 preliminary matters having to do with this case.

9 Mr. Nettler is sitting at the table, Mr.
10 Chairman. So, I'm assuming that he'll start first.

11 CHAIRPERSON GRIFFIS: Thank you very much.

12 Mr. Nettler.

13 MR. NETTLER: Well, I just came up here
14 first since it's our appeal, but I -- Mr. Aguglia I
15 believe has the preliminary matters that he would like
16 to pursue.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. AGUGLIA: Thank you. My name is
19 Richard Aguglia with the law firm of Hunt and Williams
20 representing the intervener Folger Park North, LLC in
21 opposition to the appeal.

22 I will be very brief and succinct. The
23 applicant -- the -- the neighbors -- the neighbors who
24 have filed this appeal have registered ten objections
25 in what I will call --

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1 CHAIRPERSON GRIFFIS: Let me just be
2 clear. Are you -- are you going to be succinct in
3 preliminary matters?

4 MR. AGUGLIA: Yes.

5 CHAIRPERSON GRIFFIS: Are you --

6 MR. AGUGLIA: This is -- succinct in my
7 preliminary matter.

8 CHAIRPERSON GRIFFIS: Okay. Let's go.

9 MR. AGUGLIA: I'm moving -- I am moving
10 that you dismiss the appeal.

11 CHAIRPERSON GRIFFIS: That's always a
12 great way to start to know --

13 MR. AGUGLIA: Okay.

14 CHAIRPERSON GRIFFIS: -- what we're --

15 MR. AGUGLIA: Moving to dismiss the
16 appeal.

17 CHAIRPERSON GRIFFIS: Okay. All right.

18 MR. AGUGLIA: They have raised ten
19 objections to the issuance of the building permits for
20 the subject property at 206, 208, and 210 D Street,
21 S.E. They have raised an 11th objection at the 11th
22 hour which I will also discuss.

23 CHAIRPERSON GRIFFIS: Okay.

24 MR. AGUGLIA: Of the ten objections that
25 were raised, three were withdrawn. This is all in

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1 my --

2 CHAIRPERSON GRIFFIS: Right. This is in
3 your written submission.

4 MR. AGUGLIA: Of May 10th. Yes.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. AGUGLIA: Three were withdrawn.

7 CHAIRPERSON GRIFFIS: Excellent.

8 MR. AGUGLIA: The other seven relate to
9 construction without having obtained the necessary
10 variances for lot size and width which this Board
11 granted in -- in Application Number 17108.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. AGUGLIA: Therefore, I submit to you
14 that those objections are moot. All right.

15 We come now to the 11th objection. The
16 11th objection was filed on May 6th.

17 In order for it to be a valid objection,
18 it must have been first raised with DCRA and this --
19 this relates to a side yard variance.

20 CHAIRPERSON GRIFFIS: Um-hum.

21 MR. AGUGLIA: The requirement for a side
22 yard variance. It must have first been raised with
23 DCRA, denied by DCRA, and then it would project an
24 appeal by the neighbors to this -- to this Board and
25 that was not done.

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1 So, this -- this objection is premature
2 because there is no basis for it.

3 I would also point out that under the
4 Board's rules there's a 14-day time requirement to
5 file their prehearing statements. This was filed 12
6 days before the hearing instead of 14.

7 I would also note that unfortunately the
8 -- none of the pleadings were served. They were not
9 served on me. They were not served on DCRA.

10 CHAIRPERSON GRIFFIS: Which pleadings
11 weren't served?

12 MR. AGUGLIA: The -- the 11th-hour
13 objection of the side yard variance by the neighbors.

14 CHAIRPERSON GRIFFIS: So, the --
15 commission wasn't served on you?

16 MR. AGUGLIA: Was not served on me. I --
17 I -- we -- we stumbled across it by reviewing the file
18 yesterday and then called counsel who provided me with
19 a copy yesterday. It was not served on DCRA. I
20 called the Office of Planning. They did not have a
21 copy. Called the ANC. I was unable to reach ANC-6B.

22 So, I do not know if they received a copy or not.

23 But, even -- even assuming it was properly
24 served, again, it's beyond -- the Board's rules called
25 for all statements from the -- from the -- from the --

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1 from the neighbors who are appealing a 14-day
2 requirement. So, they missed the 14-day requirement.

3 Also, I would submit to you that under the
4 rules, they're clearly beyond the 60-day period when
5 they knew or should have known that the permits were
6 issued. The construction took place in June of last
7 year. June and July. This is filed May 6th of 2004.

8 They also violate the ten-day under roof
9 rule. Property was under roof roughly in January of
10 2004. This objection was filed May 6th, 2004.

11 CHAIRPERSON GRIFFIS: What was the date
12 the roof was on?

13 MR. AGUGLIA: I'm informed in January of
14 2004 the property was under roof.

15 CHAIRPERSON GRIFFIS: Mid-January?
16 Beginning of January?

17 MR. AGUGLIA: The end of January 2004.

18 So, I would also submit to you that the
19 11th objection is moot by the granting of the variance
20 for all the same reasons that we reached in 17108
21 after a very long and extensive hearing of approvals
22 by DCRA. Seven different approvals over a 13-month
23 period.

24 And then finally, I would submit that the
25 purpose of the side yard requirement is for light and

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1 air and that was --

2 CHAIRPERSON GRIFFIS: Well, don't argue it
3 if you think it's moot.

4 MR. AGUGLIA: Okay. I will not argue it
5 if it's moot. Okay.

6 CHAIRPERSON GRIFFIS: We'll get to that
7 perhaps.

8 MR. AGUGLIA: All right.

9 CHAIRPERSON GRIFFIS: Let me ask you a
10 quick question in terms of the -- as you've indicated
11 the 11th objection which is the side yard, you said
12 something to the effect it first needs to be raised by
13 DCRA. Then --

14 MR. AGUGLIA: Raised to DCRA --

15 CHAIRPERSON GRIFFIS: Raised to DCRA.

16 MR. AGUGLIA: -- by neighbors and then
17 it's either granted or denied. If it's granted, my
18 clients would have gotten a stop work order. If --

19 CHAIRPERSON GRIFFIS: Granted. Denied by
20 DCRA.

21 MR. AGUGLIA: Yes, and then if it's --
22 then if it's denied by DCRA, they take an appeal to
23 this Board.

24 CHAIRPERSON GRIFFIS: So, your
25 understanding of the process is the neighbors should

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1 have appealed to the BLRA or should have made
2 something known to DCRA for their official action?

3 MR. AGUGLIA: Yes.

4 CHAIRPERSON GRIFFIS: Well, isn't the
5 permit the official action by DCRA that's appealable
6 by the neighbors?

7 MR. AGUGLIA: I think the process is. You
8 go to DCRA as they did in the first case.

9 CHAIRPERSON GRIFFIS: How did they go to
10 DCRA in the first --

11 MR. AGUGLIA: They went to DCRA and said
12 that they were -- my clients were acting without --
13 without a permit and they got a stop work order and
14 then that was rescinded because, in fact, they did
15 have a stop work order.

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. AGUGLIA: Advise them that they did
18 not have the proper variances and -- and -- and --

19 CHAIRPERSON GRIFFIS: Right.

20 MR. AGUGLIA: -- DCRA refused. Then --

21 CHAIRPERSON GRIFFIS: I understand your
22 point.

23 MR. AGUGLIA: -- then rejected the appeal.

24 CHAIRPERSON GRIFFIS: So, you -- you --
25 it's your understanding that there's actually two

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1 steps to this. One, DCRA needs to issue a stop work
2 order or not and then someone can bring an appeal.

3 MR. AGUGLIA: Correct. If -- if -- if
4 they refuse to bring it --

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. AGUGLIA: -- the -- the stop work
7 order -- to issue a stop work order, then the
8 neighbors are filing an appeal.

9 CHAIRPERSON GRIFFIS: Before we spend a
10 lot of time on this and have huge objections by most
11 of the legal counsel in the room, that wouldn't be
12 correct. Once the official decision, any official
13 decision by the Mayor or -- or any official body
14 relating to zoning is appealable to us, there is a
15 two-step process. Well, there is a two-step process.

16 The first step is an official decision.
17 The second is straight to us appeal.

18 So, unless I'm absolutely horrendously
19 incorrect, I can be corrected, let's move on.

20 Any other quick questions on that before
21 we hear from Mr. Nettler? Anything further on -- on
22 -- on that -- on -- on the motion to discuss then?

23 MR. AGUGLIA: That's my -- those are my
24 points, sir.

25 CHAIRPERSON GRIFFIS: Okay. Excellent.

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1 Mr. Nettler, response.

2 MR. NETTLER: Thank you.

3 CHAIRPERSON GRIFFIS: Do you want to first
4 address just service of the May 6th --

5 MR. NETTLER: Well, the services -- let me
6 just add. I -- I was out of town yesterday. I had
7 heard that Mr. Aguglia had called Ms. Rustad. That he
8 had not received it and Ms. Rustad had asked our
9 secretary as to whether she had mailed them out. I
10 understood that her representation was that she had
11 mailed them all out, but having heard that he has not
12 received it and the Office of Planning did not receive
13 a copy, I can't tell you today that it actually was
14 mailed out as represented to us at the time that it
15 was.

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. NETTLER: So, I -- I can't tell you
18 that. That's a short answer to that aspect of it and
19 -- and if there is more time that somebody needs
20 whether it's DCRA or Mr. Aguglia to deal with that
21 issue, I'll come around back to that, but that's
22 something that this Board can certainly give them more
23 time to do. I -- but, it's not a basis for a
24 dismissal of the -- of the matter.

25 But, I'd rather go to the other issues

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1 that are raised in terms of the --

2 CHAIRPERSON GRIFFIS: Right.

3 MR. NETTLER: -- timeliness and -- and --
4 and the filings that were made by us.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. NETTLER: First of all, I think that
7 your statement with regard to this two-step process is
8 absolutely correct. Actually, the -- the regulations
9 -- while -- while the appellants and any other
10 neighbors or those who object to permits that may be
11 issued can certainly raise objections prior to the --
12 if they are aware of the -- the fact that permits are
13 being considered, can raise those objections to DCRA.
14 That's not the basis upon which an appeal is filed
15 with --

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. NETTLER: -- with the Board.

18 CHAIRPERSON GRIFFIS: As much as I like to
19 hear how right I am, let's get to the substance of --

20 MR. NETTLER: And in -- and in terms of
21 the timeliness, I think that's also been addressed by
22 the Court of Appeals in Sisson v. D.C. Board of Zoning
23 Adjustment which says that your time begins to run
24 from when the -- the final permit is issued not all
25 the steps along the way and -- and we clearly -- I

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1 think we filed it something like within ten days. Our
2 appeal was filed something like within ten days of --
3 of the permit being issued for the interveners.

4 More importantly in this situation,
5 however, that permit -- a stop work order was issued
6 on that permit because of a failure to comply with the
7 zoning regulations.

8 The applicant as I've learned today from
9 the individuals here from the Department of Consumer
10 and Regulatory Affairs, misrepresented to this Board
11 and to us at the last hearing that, in fact, there was
12 some indemnification or some hold harmless agreement
13 between the applicant and DCRA that allowed them to go
14 forward. Rather what I understand happened was that
15 the applicant was -- went forward because they filed a
16 -- a application for a -- for variances albeit not all
17 the variances in our view that were necessary and
18 DCRA's position was that in light of the application
19 being filed that no further action would be taken
20 until that -- those variances were addressed by this
21 Board.

22 CHAIRPERSON GRIFFIS: But, that's --
23 that's not an illogical position to have. Is it?

24 MR. NETTLER: Well, it's -- illogical for
25 whom?

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1 CHAIRPERSON GRIFFIS: DCRA.

2 MR. NETTLER: No, it isn't. No.

3 CHAIRPERSON GRIFFIS: Okay.

4 MR. NETTLER: I'm not saying that their
5 position's illogical. I'm just trying to give you the
6 context in which certain representations were made
7 here about what the -- what was -- what the facts are
8 in terms of these issues that have been raised with
9 regard to the motion to dismiss and, in fact, what
10 happened was -- so, the appeal had been filed from the
11 -- from the permit that was given and from prior
12 permits. There was a application that was
13 subsequently filed some months later as a result of
14 the action taken by DCRA.

15 And on February 10th, understanding that
16 this matter -- this appeal and the application were
17 going to be heard at the same time, the applicants and
18 the appellants filed their prehearing statement. The
19 prehearing statement was filed more than 14 days
20 before the hearing was to be held. Actually, it was
21 filed 14 days of the hearing that was scheduled.

22 This Board had at the time stated that if
23 it was able to get to the appeal after the application
24 on the date in which it was scheduled, it would do so.

25 But, that was not the case and it was scheduled for

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1 this day instead.

2 Nevertheless, prior to that application
3 being heard when we thought the appeal and the
4 application were being heard on the same day, after
5 discussions with the Office of Planning, we raised the
6 issue about the side yard being -- that there being a
7 violation of the side yard and --

8 VICE CHAIRPERSON MILLER: Excuse me.
9 That's a very important issue and I just want to get
10 that straight. When did you raise the issue of the
11 side yard?

12 MR. NETTLER: It was in a -- a supplement
13 to our prehearing statement of February -- I think we
14 said that on February 23rd was the filing that we made
15 on the side yard issue.

16 OP had raised it on February 17th. We
17 filed a supplemental statement on February 23rd
18 raising the side yard issue and this Board stated in
19 its -- at its April 6th meeting to decide the
20 application.

21 I'm quoting from the Chairperson at the
22 time. "Let me note the fact that also in the
23 submissions is the proposed findings and conclusions
24 by the neighbors in opposition to the application who
25 brought up the issue whether a side yard was required

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1 under Section 405. I believe is the section
2 regulating side yards. I will note that I do not
3 believe we'll have any deliberations on that issue as
4 we have an application before us that is asking for
5 certain and specific relief which was not a variance
6 from the side yard requirement."

7 Anything, of course, outside of that
8 request for relief because it was their -- what their
9 request for relief was is needed ---- if needed and
10 not requested and granted will be picked up by the
11 Zoning Administrator in permit processing and if it
12 wasn't in conformance, would be sent back to us in
13 order for further review and relief.

14 Well, the fact is it is no further permit
15 processing because the permit was issued in August and
16 there -- and since the -- the Zoning Administrator
17 allowed the applicant to go forward under that permit
18 while this proceeding -- while these matters were
19 proceeding before the Board, there is no opportunity
20 for the Zoning Administrator to then go back and look
21 at the permit again since there -- based on your
22 approval of the other variances, they're simply going
23 to proceed under the permit that was issued in August
24 and no action will be taken by the Zoning
25 Administrator unless in the context of this appeal,

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1 you direct the Zoning Administrator to do that.

2 So, as a consequence of what you stated in
3 your -- at the time of your decision on April 6th, we
4 then filed the supplemental -- a second supplemental
5 -- filed a supplemental statement on May 6th noting
6 that the only issue we believed which was still
7 outstanding in light of the mootness of the other
8 issues was the side yard issue which would -- could
9 not be addressed by the -- by the Zoning Administrator
10 because there had already been a permit issued and
11 there wasn't going to be a new permit issued in which
12 to give the Zoning Administrator the opportunity to
13 address that issue.

14 VICE CHAIRPERSON MILLER: Let me interrupt
15 you for a second. Why couldn't you have raised that
16 issue in your September 12th appeal? It was the same
17 permit you were appealing.

18 MR. NETTLER: It was the same and I and I
19 recognize that we didn't raise it at that time. I'm
20 just saying we supplemented it later after discussion
21 -- discussions with the Office of Planning and
22 recognizing that it was an issue that was a basis for
23 consideration because of the -- the failure to comply
24 with that provision of the regulations as well. We
25 raised it --

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1 VICE CHAIRPERSON MILLER: No, my question
2 is -- is it -- why is it untimely?

3 MR. NETTLER: Our belief is that -- we --
4 we were challenging the permits on the basis of their
5 failure to comply with area -- with a whole host of
6 area requirements for this property. That the -- if
7 the -- if we had not raised it at the time that the
8 appeal was supposed to have been heard -- would have
9 been heard, then certainly we couldn't come back and
10 raise it again.

11 But, this appeal has not been heard. We
12 had asked for the appeal to have been heard prior to
13 the application being heard.

14 We became aware of their -- of that as an
15 issue. We supplemented our statements before and
16 raised that issue as a -- as an issue.

17 The Board I think somewhat mistakenly
18 based on some representations that were made at the
19 hearing thought that this would be a matter that would
20 be heard by the Zoning Administrator, but the fact is
21 it will not and so, the Board didn't address it at its
22 -- in -- in it's consideration of the application that
23 was filed although raised by the Office of Planning
24 and us and this is the only other opportunity for
25 someone to consider that issue.

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1 And we -- we think in light of those
2 facts, in light of the fact that we raised it at an
3 appropriate time and that, in fact, we raised it
4 before the hearing on the application, that it's
5 properly before you.

6 CHAIRPERSON GRIFFIS: When -- is it your
7 testimony that you or when is it your position that
8 you actually amended your appeal to include this
9 issue?

10 MR. NETTLER: It would be my position that
11 we -- when we filed our -- when we filed our
12 supplemental statement with regard to the application
13 of the appeal that was going to be heard and which
14 was heard by this Board. I don't if it was -- I don't
15 if it was -- the exact date. I don't know if it was
16 the beginning of March/end of February.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. NETTLER: I'm sorry. The date -- I
19 don't have a date in front of me.

20 CHAIRPERSON GRIFFIS: But, it's the first
21 supplement.

22 MR. AGUGLIA: May I be heard?

23 CHAIRPERSON GRIFFIS: Just a second.
24 February 10th?

25 MR. NETTLER: February 10th was our first

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1 prehearing statement.

2 CHAIRPERSON GRIFFIS: Right. So, it's
3 going to be after February.

4 MR. NETTLER: Right. It's February 23rd I
5 said.

6 CHAIRPERSON GRIFFIS: Oh, I'm sorry. You
7 did have a date.

8 MR. NETTLER: Right.

9 CHAIRPERSON GRIFFIS: The 23rd. Okay.

10 MR. NETTLER: We attached that as an
11 exhibit to our May 6th statement where we first raised
12 it back then.

13 CHAIRPERSON GRIFFIS: Okay. Anything else
14 to clarify at this point? Go ahead.

15 MR. AGUGLIA: All right. Again, the
16 background. The cases that discussed the need for a
17 side yard variance were decided in 2001 and 2002.

18 In February of 2003, my clients provided
19 the neighbors at the ANC meeting with complete plans
20 of the property which showed no side yard. That's
21 February of 2003.

22 All right. The permits were issued for
23 the foundation in June -- I believe June of 2003 and
24 then for the remainder of the improvements in July of
25 2003.

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1 The appeal brought by the neighbors was
2 September 12th, '03. It did not include any reference
3 to a side yard variance. None.

4 So, the representation is now made that
5 the first -- by the -- Mr. Nettler that the first time
6 it was brought into play was February 23rd, '04 and I
7 submit to you that that is far beyond the -- the rules
8 of the Board for the time limits involved which is 60
9 days from the issuance of the permit.

10 MR. NETTLER: If I might respond just
11 briefly.

12 First of all, the appeal was -- the appeal
13 challenging the issuance of the permit was filed
14 timely and that's from the building permit having been
15 issued and that's consistent with what the District of
16 Columbia has -- Court of Appeals has said in Sisson.

17 The fact that the -- the -- all the appeal
18 would have had to have stated -- there's no -- as --
19 as long as that -- as long as that building permit is
20 being challenged, it is not -- we're not precluded
21 from raising the issues or -- or supplementing those
22 issues in that appeal. There's nothing in the
23 regulations or in any court decisions that precludes
24 us from supplementing the -- the basis upon which
25 those decision -- upon which that --

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1 VICE CHAIRPERSON MILLER: Mr. Nettler, is
2 there -- is there something that -- a court case or
3 anyplace where it affirmatively says that?

4 I think that is the issue. I think your
5 point is that as long as the appeal is being heard,
6 you can supplement your grounds or your issues as long
7 as they're related to the appealed -- to the -- to the
8 permit that was appealed, but I -- I don't know. Is
9 -- is that said anywhere? I haven't read that.

10 MR. NETTLER: Well, I can say that --

11 VICE CHAIRPERSON MILLER: You're saying
12 it's not precluded. Is it affirmatively stated
13 anywhere?

14 MR. NETTLER: I can't tell you today
15 whether that is. I -- I just received Mr. Aguglia's
16 filing today on this issue. As a matter of fact, I
17 just received it here today on this issue. I do not
18 -- he said that he faxed it to my office sometime
19 early this morning, but I was here early this morning.

20 CHAIRPERSON GRIFFIS: Well, there are
21 certainly cases that -- not necessarily 100 percent on
22 point, but do speak to not your position and that is
23 precluding those aspects that can be appealed and why
24 I say not on point, I mean we have -- I know Norman
25 Stone. There's also the Woodley Park I believe not

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1 being --

2 MR. NETTLER: My case is both and the --
3 and the distinction in those cases --

4 CHAIRPERSON GRIFFIS: Were that they were
5 revisions to -- to permits.

6 MR. NETTLER: Right. Correct. When -- in
7 -- in Woodley Park, I was with the Corporation
8 Counsel's Office at the time. Woodley Park was an
9 attempt when the -- when the applicant revised their
10 permit to go back --

11 CHAIRPERSON GRIFFIS: Right.

12 MR. NETTLER: -- and reach the first prior
13 permit that had been issued and when Woodley Norman
14 Stone -- although we may disagree on this, in Woodley
15 Norman Stone, it was the discovery that there had been
16 plans that were being used that were not the same
17 plans and the question was whether the issues that
18 were raised on the new plans were different from the
19 permits that had been issued six or seven months
20 later.

21 CHAIRPERSON GRIFFIS: Right.

22 MR. NETTLER: Whether that was. That's
23 not this issue here.

24 CHAIRPERSON GRIFFIS: Okay.

25 MR. NETTLER: Because this is the issue

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1 solely from the only appeal that's been brought and
2 the question is whether -- having appealed it timely,
3 whether you can expand the basis upon the appeal to
4 deal with all of the zoning issues that would apply to
5 the permit that -- the building permit that was
6 issued.

7 CHAIRPERSON GRIFFIS: Okay.

8 VICE CHAIRPERSON MILLER: Right.
9 Especially when -- oh, I'm sorry.

10 CHAIRPERSON GRIFFIS: Before we get to
11 far, let me interrupt. Because let -- let -- let me
12 see if I can narrow the scope of what we're discussing
13 here.

14 Mr. Nettler, do you have any issue in
15 terms of as -- has been addressed here as items one
16 through ten?

17 MR. NETTLER: We've already stated that in
18 our May 6 filing that we don't.

19 CHAIRPERSON GRIFFIS: Right. And so, what
20 we're actually talking about just for total
21 clarification, of course, and focusing our attention
22 is the 11th issue and that's the side yard.

23 Okay. Ms. Miller.

24 VICE CHAIRPERSON MILLER: I mean in this
25 case, the plans haven't changed. So, there was

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1 nothing new after September that -- that -- that I've
2 heard that precluded you from raising this issue in
3 September. Is that correct?

4 MR. NETTLER: There was nothing precluding
5 or from requiring us to have raised the --

6 VICE CHAIRPERSON MILLER: No, I
7 understand. I understand. There's that -- there's
8 that side that, you know, the -- the appeal's ongoing
9 and -- and you believe that as long as the appeal's
10 ongoing and -- and you appealed the permit, you're
11 free to raise whatever issues relate to that permit.

12 MR. NETTLER: Right.

13 VICE CHAIRPERSON MILLER: Okay.

14 MR. NETTLER: The fact that it's --

15 VICE CHAIRPERSON MILLER: But --

16 MR. NETTLER: Exactly. Because the fact
17 that it's under roof is actually irrelevant once that
18 permit is -- once that appeal has initially been
19 filed. The appeal has been filed. I'm sorry.

20 VICE CHAIRPERSON MILLER: Okay. No. No.
21 I understand that, but we've also just -- also said
22 well, we don't know if there are cases that actually
23 say that's true, but -- but okay. Maybe. Because the
24 regulations don't seem to preclude it.

25 On the other hand, our regulations go to

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1 60 days from when maybe you are aware of something and
2 -- and we often allow amendments or -- or new appeals
3 based on changes in plans or extenuating circumstances
4 and I'm just trying to ask you if there were any
5 extenuating circumstances here or --

6 MR. NETTLER: Well, I don't think that the
7 extenuating circumstance issue is what applies. That
8 -- that would apply if you didn't file an appeal
9 period possibly, but in -- in changing the rules on
10 when an appeal should be filed, the -- and as the
11 court said in Sisson, you file it 60 days -- you file
12 the appeal itself 60 days from the building permit
13 that's been issued. Not all the little permits along
14 the way and whether you can raised another issue in
15 that appeal that goes to that permit that's been
16 issued is -- has nothing to do in our view with a
17 timeliness issue. Because once you -- once you've
18 raised it, it's the applicant who proceeds to their --
19 on their peril by continuing to construct rather than
20 having the -- all the issues raised on appeal
21 addressed.

22 But, the normal course as you know is that
23 an applicant goes before the Zoning Administrator
24 before starting to build and gets advice from the
25 Zoning Administrator or -- or if they have a self

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1 certification, has -- does -- does a self
2 certification here as to what -- what type of relief
3 they -- they think -- they believe that's necessary
4 and -- and the -- the Zoning Administrator either
5 makes a decision to issue a permit or makes a decision
6 that these are the types of relief that's required or
7 the applicant simply comes here with a self
8 certification and if they don't self certify to all
9 the things that are required, then the applicant again
10 proceeds at their own risk.

11 Because if they go back and try and get
12 the permit which is what I thought the Board was --
13 the Chairman was saying at -- at the April decision
14 hearing is what he expected to have happen here with
15 the side yard issue or at least thought was going to
16 happen with the side yard issue, then the matter would
17 come back before you as the Chairman said as I just
18 read from the transcript.

19 That's not what's happening here. We have
20 an appeal that's been filed timely. We have an appeal
21 that's been filed timely under the Court of Appeals
22 decision. We have a variety of issues that were
23 addressed on the appeal. Some of those have become
24 moot because of an application and we believe that
25 it's -- it's not -- we're not precluded from -- from

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1 addressing another issue in the granting of that
2 permit prior to this matter being heard.

3 MR. AGUGLIA: May I be heard?

4 CHAIRPERSON GRIFFIS: Yes. Is DCRA going
5 to respond to this at all? You're not required of
6 course, but thought I'd give you the opportunity.

7 MS. BELL: Good afternoon. My name is
8 Lisa Bell and I'm the Senior Counsel for DCRA.

9 What we can say initially with regard to
10 the motion to dismiss is that we were not served with
11 either of these pleadings and we received them here
12 today. So, we are at a great disadvantage with regard
13 to our issue -- what our -- what our position would be
14 with regard to the side yard.

15 I -- we can say that we understand Ms.
16 Miller's clarification of the issue and we, too,
17 believe that is indeed the issue. Whether or not a
18 supplement appeal can be raised or supplement basis or
19 grounds can be raised once a timely appeal has been
20 taken.

21 But, because this issue is obviously new
22 to us, we just received it sitting here today, we're
23 not in a position to -- to take a position.

24 CHAIRPERSON GRIFFIS: Okay. And that's
25 important to note.

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1 There is a uniqueness to this and I don't
2 think the Board could look to say we do it one way or
3 we do it the other and well -- but, for matter of
4 fact, we do look at the absolute specific areas that
5 are being appealed and that's where we limit the scope
6 of the appeals and that -- that may well come under
7 the preliminary proceedings of an appeal or not.

8 This seems to be an interesting and unique
9 as I say aspect that -- that through another
10 proceeding, the original appeal and the basis and the
11 specificity of the appeal has become moot and yet now
12 there's a new issue that has come up at a different
13 time that may keep it alive and I think that is also
14 one of the levels that the Board is having some
15 difficulty in. Is can it hang its hat to keep that
16 appeal alive just on this one issue when conceivably
17 that issue isn't timely filed within the original
18 appeal?

19 Before I get all the additional response
20 to my nonlegal analysis, let me go -- because you had
21 something to respond to.

22 MR. AGUGLIA: Yes, the February 23rd
23 submission by the neighbors was in our variance case
24 not in this case and the Board made it very clear
25 right from the outset that you were not going to

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1 consolidate these cases. That you were going to hear
2 the variance case first and separately and then you
3 would hear this neighbor's appeal just as we are here
4 today.

5 So, is -- so, it's -- it's -- so, the
6 first filing that we have in this case 17085, the
7 neighbor's appeal that they are contesting the
8 issuance of the permits for failure to have a side
9 yard variance, it was May 6th and that's why the Board
10 has the 60-day rule from the issuance of the permit
11 and that's why the Board has the ten-day under roof
12 rule just for this very occurrence. Because it's
13 unfair to allow them to bootstrap themselves into an
14 argument to -- to prolong the appeal when my clients
15 have taken action based upon your approval of the
16 variance to go forward and continue building the
17 property.

18 That's why that rule is in there to
19 prevent this very problem which I call equitable
20 estoppel.

21 MR. NETTLER: And -- and I think that's
22 absolutely wrong.

23 The -- the -- the rule is in there in
24 terms of the time requirement so that the applicant
25 can be put on notice as of the date the permit is

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1 issued that there is a challenge to the permit being
2 issued and that was done here.

3 The -- the normal situation has a stop
4 work order being put in place and the applicant
5 holding off doing anything until this Board decides
6 whether he's -- the applicant is entitled to relief
7 and then the Zoning Administrator will deal with it in
8 that context.

9 As the Chairman said, this was a unique
10 situation. The understanding -- we had an appeal that
11 was filed before the application. There was a
12 potential -- at least an understanding that the
13 application would be heard first on the same day as
14 the appeal. The Office of Planning and we raised the
15 same issue with regard to the side yard.

16 The applicant wasn't on -- you know,
17 wasn't prejudiced by it. The applicant decided to go
18 forward from August when the stop work order was first
19 issued to simply go forward and build assuming that it
20 was going to get the relief, all the relief that it
21 needed before it filed for what relief it actually
22 even needed. Before you -- before any decision was
23 even made by the -- by the Zoning Administrator as to
24 what relief was needed.

25 And if you look at the memo that was sent

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1 to the Board on that that's dated October 31st, 2003
2 which was two months later, it's -- it's pretty
3 cryptic as well. I mean it just -- it just says that
4 the -- there's a variance from 401.3 for the
5 continuous construction of three lots on three
6 substandard lots not meeting the minimum lot width and
7 area requirements and 401.3 deals with all of these
8 requirements, setbacks, side yards, lot area, lot
9 widths. All of these different things.

10 And -- and -- and then this Board
11 ultimately decided and when it granted the
12 application, obviously wasn't to hear the appeal that
13 day, but the side yard issue had already been raised
14 and the fact that we simply supplemented the -- the
15 prehearing statement for an issue that we had already
16 raised three months earlier doesn't in anyway
17 prejudice the applicant.

18 The permit was appealed. It was appealed
19 on a variety of different grounds. The fact that we
20 supplemented it is not precluded by any decision that
21 I've heard Mr. Aguglia refer to and it's not precluded
22 by any rule of this Board or any rule of the zoning
23 regulations. Excuse me.

24 CHAIRPERSON GRIFFIS: Does DCRA have an
25 opinion on whether that appellant's precluded from

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1 adding issues to an appeal?

2 MS. BELL: Mr. Chairman, actually, DCRA, I
3 think, would like an opportunity to take a look at it
4 and research it.

5 CHAIRPERSON GRIFFIS: Okay.

6 MS. BELL: We are at a real disadvantage.

7 CHAIRPERSON GRIFFIS: I know and I don't
8 mean to put you on the spot. I'd give you an
9 opportunity.

10 This -- this -- it's a -- it's -- it's not
11 a -- it's not a clear and direct thing to really
12 decide on very quickly. I mean in one aspect, we
13 could look at the -- that the 11th objection is a new
14 appeal, you know, and -- and therefore, it does come
15 under the -- the timing of 60 days and it comes under
16 the timing of and the critical aspect of under roof or
17 we look at it as amending the -- the original appeal
18 and that the timing is set by the original appeal.
19 What is the ramifications for each, of course, are
20 clear.

21 However, what -- what isn't is when it was
22 exactly amended and what -- what type of -- what type
23 of opportunity does one have to amend.

24 What, I think, is absolutely clear is that
25 most of the parties weren't prepared to argue and

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1 discuss this at this point and I thought we might at
2 least get the Board a little bit of understanding of
3 the positions of the parties, but I think we're going
4 to have to have a limited time to have this addressed
5 for the Board's deliberation and decision.

6 I'll hear from others if they disagree or
7 agree or whatever they want to say.

8 VICE CHAIRPERSON MILLER: Procedurally, I
9 think there's also a question of whether the appeal
10 needs to be amended. If -- if Mr. Nettler is saying
11 that it's just another argument in the appeal, then --
12 then that's a procedural question I'd be interested in
13 -- in seeing. Because if it needed to be amended,
14 then there's a question of whether you should have
15 amended it earlier or -- or whatever.

16 But, I think this is kind of a question of
17 first impression at least since I'm been on the Board
18 and I think it's an important question that -- that
19 will affect other cases. When you -- when parties
20 file an appeal, they file a statement in support of
21 that appeal and they articulate the grounds for that
22 appeal and that puts the applicant on notice.

23 Now, Mr. Nettler is saying that well,
24 they're just on notice that the building permit or
25 whatever is being appealed not necessarily all the

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1 grounds for it. So, I think it is a -- an issue that
2 I would definitely appreciate seeing addressed and
3 thought through and, you know. That's it.

4 MEMBER ETHERLY: Mr. Chair, I'm -- I'm --
5 I'm inclined to agree with my colleague Mrs. Miller.

6 The -- the question that's perhaps been
7 somewhat swirling around in my head is for Mr. Nettler
8 and I guess to an extent I'm massaging a little bit of
9 the contours of -- of the -- the logical extension of
10 your argument. Would there be under your argument any
11 limitation on what can be appealed then pursuant to
12 this -- to the underlying application based on your
13 argument?

14 What I'm trying to get a sense of is -- is
15 I'm worried that if -- if I bite the apple you're
16 offering, doesn't that essentially open the -- keep
17 the door open for an appeal of anything pursuant to
18 that permit if you put it in -- if you put it in any
19 of your earlier submissions under the prior appeal?

20 I wouldn't be surprised if that's a
21 confusing question because I'm not quite sure if I
22 understand what I'm asking myself, but to an extent,
23 I'm trying to say okay, let me -- let me accept your
24 argument for the sake of discussion, but my worry is
25 does that simply create too much of a whole to walk

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1 through. So, essentially what happens is you take
2 your shot in one -- in one appellant setting, but
3 you've submitted your -- your prehearing statement or
4 some other submission that puts a few other arguments
5 out there that you keep in your back pocket and then
6 depending on what happens in the first item, you can
7 come back later and say but wait a minute. We did
8 raise this in the original appeal.

9 MR. NETTLER: No, because I think -- I
10 think that goes too far. I think what -- I mean I
11 think the Chairman's right. This is a unique
12 situation.

13 The -- the fact of the matter here was
14 there is a -- you know, when you refer to the fact
15 that there was ten issues being appealed here, there
16 were a lot of issues that were of concern in this
17 matter. It's not the typical situation where you have
18 a -- the typical situation is you either have an
19 appeal that comes from a building permit having been
20 issued period or you have a -- and that's what Sisson
21 recognizes which is why you don't have piecemeal
22 appeals happening. You have a permit being issued or
23 you have a recognition that construction is going on
24 and so, you're appealing it from the -- the time that
25 you know there's construction, but you have this 60-

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1 day period that's -- that's applicable to it.

2 And the issues that got raised in that I
3 don't think they preclude you from challenging that
4 permit. They certainly preclude you from saying well,
5 if I didn't raise it in that appeal, I can raise it in
6 some other context. That's clearly -- I don't think
7 that's what I'm arguing here.

8 What I'm arguing here is that because the
9 unique situation here where the application got put
10 together with the -- with the appeal at least to the
11 parties' understanding beforehand which is why both
12 parties filed prehearing statements on both the appeal
13 and the application together because there was a
14 belief that there was going to be some -- it being
15 heard not necessarily at the same time, but one after
16 the other and that -- that got supplemented because it
17 was recognized by us and the Office of Planning that
18 all of the relief wasn't being covered.

19 That's not -- that's not normally going to
20 happen in this situation. As I said, normally, either
21 there's a stop work order and you have all those
22 issues or even when you have applications that are
23 filed as we've heard earlier today and someone thinks
24 that there's another issue that should have been
25 raised, sometimes the Board has said well, we're going

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1 to get advice from the Zoning Administrator or the
2 Corporation Counsel's Office and allow that issue to
3 be dealt with because if we don't think it's worth it
4 going back to the Zoning Administrator to be addressed
5 or they'll say this is a self certification.

6 It goes -- and if you come before the
7 Zoning Administrator and you haven't addressed all the
8 issues that -- that other people think you should have
9 been issuing, you know, you're proceeding at your own
10 risk and it may be appealed.

11 That -- but, that's not what happened
12 here. Because the consequence of what was done here
13 by proceeding forward albeit misrepresenting that they
14 had some -- some indemnification or something like
15 that with the city, but by proceeding forward, the
16 stop work order being lifted and by this issue being
17 raised in the application that not all the relief
18 being sought and the -- and the -- the Chair
19 recognizing or thinking that the issue is going to be
20 addressed by the Zoning Administrator, we felt it
21 incumbent upon us to make sure that the issue was part
22 of a supplemental filing even though we had already
23 raised the issue before.

24 I don't -- I just don't think this is the
25 type of situation you're regularly going -- you're

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1 going to see happen. I think it's a unique situation
2 and I don't think it's one that allows for someone to
3 appeal on one issue and because they haven't raised
4 it, then appeal on another issue.

5 CHAIRPERSON GRIFFIS: From the Board?

6 COMMISSIONER HOOD: Mr. Chairman.

7 CHAIRPERSON GRIFFIS: Yes.

8 COMMISSIONER HOOD: For clarification,
9 obviously, we -- we need to make sure everyone has the
10 adequate information. We're definitely not going to
11 be deciding this appeal today. I'm -- I'm just trying
12 to see the direction we're going.

13 Because I'll be frankly honest --

14 CHAIRPERSON GRIFFIS: I was about to call
15 the vote.

16 COMMISSIONER HOOD: Oh. Well, right --
17 the way I'm standing right now to me it looks like
18 it's a different appeal. So, that's why I want to
19 know which direction we -- we're going in.

20 CHAIRPERSON GRIFFIS: Okay.

21 COMMISSIONER HOOD: Which --

22 CHAIRPERSON GRIFFIS: Yes, I think we're
23 going to have to have the participants address this --
24 this issue and I think what we'll do is articulate the
25 specific issues that we're going to have them address.

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1 My concern is just as looking at
2 scheduling when we would do this or schedule to do it.

3 Because it seems like there's an initial
4 decision by the Board. First of all, we have a motion
5 before us to dismiss and we're going to need to
6 dispense with that and obviously, this briefing would
7 go to that.

8 All right. Any other questions from the
9 Board? Clarifications? Okay. Is there last
10 statements that need to be said?

11 MR. NETTLER: The -- the only thing I
12 would add is that referencing back to the -- the
13 comments made by the DCRA on -- and the service issue
14 notwithstanding what -- what's represented I think --
15 and I think it would be appropriate to give DCRA an
16 opportunity to address what we've raised and the issue
17 that's been raised in this motion which gives us a --
18 which would give both parties an opportunity to
19 address the issue in terms of the notice of appeal as
20 well since they're -- my -- our secretary's belief
21 that she may have served this. That apparently at
22 least four of the parties here have not received --
23 did not receive a copy of the documents until -- some
24 of whom today.

25 So, I think having us address the -- the

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1 legal issue that you raised and then having -- giving
2 other parties the opportunity to as well be in a
3 position to address the limited issue that's raised in
4 our -- in our supplemental prehearing statement would
5 probably best -- in our view be the best way of
6 proceeding.

7 CHAIRPERSON GRIFFIS: Sir, I'm not sure if
8 I follow. What you're saying is the -- you want folks
9 to address the side yard issue?

10 MR. NETTLER: No. No, DCRA wants to --
11 the issue that's been raised here in terms of the
12 motion to dismiss.

13 CHAIRPERSON GRIFFIS: Right.

14 MR. NETTLER: This is something that we --
15 in response to what we filed, it was something that we
16 just received today --

17 CHAIRPERSON GRIFFIS: Right.

18 MR. NETTLER: -- in here. That would give
19 us an opportunity to brief that issue for you.

20 CHAIRPERSON GRIFFIS: Right.

21 MR. NETTLER: And would give DCRA the
22 opportunity to brief that issue as well.

23 CHAIRPERSON GRIFFIS: Correct.

24 MR. NETTLER: And I think it's -- it's
25 just a consequence of the filing by us apparently not

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1 having been served on them the way it should. I'm
2 just saying not -- not that the -- the information in
3 that is addressed in that document.

4 CHAIRPERSON GRIFFIS: Okay. But, you said
5 something about there's the legal issue and then
6 there's the other issue. Which I'm not sure what the
7 other issue is.

8 MR. NETTLER: I'm -- I'm sorry.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. NETTLER: I -- I just meant the -- the
11 dismissal issue and the -- a couple of the issues --

12 CHAIRPERSON GRIFFIS: Good. Right. And
13 -- and I don't -- and I think the Board is with my
14 understanding that I -- I do believe that there's --
15 that two parties are at a disadvantage of what we're
16 actually discussing because they didn't have
17 everything that we have, but with that then, I'll hear
18 from you last.

19 MR. AGUGLIA: Well, I understand what
20 you're saying, sir, is that you would prefer to
21 adjourn this meeting and then have the parties brief
22 the issue. Will my motion to dismiss still be on the
23 table?

24 CHAIRPERSON GRIFFIS: That's exactly what
25 we're going to -- that's what was making us delay is

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1 not being able to proceed past the motion to dismiss.

2 So, it would absolutely be the preliminary matter
3 that's brought up when we reconvene.

4 And I think -- I think that's essentially
5 the basis of what we're asking to be addressed by
6 everybody.

7 Ms. Miller.

8 VICE CHAIRPERSON MILLER: I just want to
9 clarify. Is it agreed that the only issue that's
10 still remaining is the side yard issue?

11 CHAIRPERSON GRIFFIS: Already done.

12 VICE CHAIRPERSON MILLER: Yes. Okay.

13 CHAIRPERSON GRIFFIS: In writing and now
14 twice on the record. Okay. Good. So, let's -- let's
15 go down and clarify exactly what we want to be
16 briefed.

17 Ms. Miller, did you want to start?

18 VICE CHAIRPERSON MILLER: Oh, all right.
19 I can. My initial I -- I guess I could say is
20 appellant's appeal of the permits on grounds of the
21 side yard issue untimely as it was not raised in the
22 original appeal and not based on new information that
23 wasn't previously available then and appeal of permits
24 on other grounds is now moot.

25 That's my basic question, but the -- but,

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1 the more general question also is is there a time
2 limit from when -- for when grounds for an appeal
3 related to the original decision can be raised? You
4 know, is that up until when this Board makes a
5 decision or is it within 60 days of -- of the decision
6 that's being appealed? I think you understand it
7 okay.

8 If you don't, please.

9 CHAIRPERSON GRIFFIS: Is that understood?

10 Okay.

11 MR. AGUGLIA: I do understand.

12 CHAIRPERSON GRIFFIS: Okay. That's good
13 news. Okay.

14 VICE CHAIRPERSON MILLER: And -- and I
15 assume my colleagues agree with my framing of the
16 question that way or do you want to add anything?

17 CHAIRPERSON GRIFFIS: Right. It revolves
18 around the aspect of whether it was timely and whether
19 the issue can be raised as -- as amended to an
20 original appeal. So, the original appeal basically
21 sets your -- sets your place before us and we'll let
22 it -- well, I think -- I think we don't need to be
23 anymore specific about it. Because you could really
24 start going into a lot of different things. So, when
25 is the time that that door is closed on new issues

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1 that are coming in and I think it would rest with this
2 Board in defining the appeal once it's before us.

3 But, that being said.

4 VICE CHAIRPERSON MILLER: I -- I guess I'd
5 also want to add just as on the side. We talked about
6 procedurally whether or not an appeal would need to be
7 amended if -- if the new issue is being raised or if
8 it's just another argument or grounds within the
9 appeal. So, therefore, it would not need to be
10 amended.

11 CHAIRPERSON GRIFFIS: Okay. I think -- I
12 think that's well said. I think setting out the
13 generality of it. Obviously, there are all sorts of
14 different arguments on which issue you're going to
15 take. What would preclude is there any court cases
16 that substantiate preclusions from adding to appeal,
17 et cetera.

18 Anything else then that we would need from
19 the Board perception? Everybody clear then what we're
20 limitedly asking for? All set? Understood? Okay.

21 How long do you need to do this? 6:00
22 back? Take a short dinner break.

23 MR. NETTLER: Two weeks.

24 MR. AGUGLIA: That's fine with the
25 understanding that all pleadings between parties will

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1 be hand delivered.

2 CHAIRPERSON GRIFFIS: Two weeks?

3 MS. BELL: Two weeks is fine, but I -- I
4 also am very concerned about the service issue. So,
5 if you want responsive pleadings to this or do you
6 just want the initial briefing where everybody has the
7 same deadline and nothing will be submitted in
8 response?

9 CHAIRPERSON GRIFFIS: Yes, I think -- I
10 think this -- quite frankly, the Board has spent a
11 great deal of time looking at this ourselves and I
12 don't think we're going to need responses to all the
13 submissions.

14 MS. BELL: Okay.

15 CHAIRPERSON GRIFFIS: So, I think we'll
16 have one submission from everybody. I think it's
17 pretty -- well, I think it will be informative.

18 If it comes down -- we're obviously going
19 to schedule something. So, that will be limited time
20 for oral address of each of the submissions.

21 MS. BELL: Okay.

22 CHAIRPERSON GRIFFIS: I do not and I
23 certainly hope this won't need to be belabored much
24 further because I'm anticipating that submissions will
25 bring great clarity to the Board.

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1 That being said let's set it up for -- two
2 weeks would put this on the 15th of June. Is that
3 correct?

4 Two weeks we'd go to submission. Is that
5 -- yes, that's a better understanding. One, two.
6 That's puts us to the 8th when they're due.

7 MR. NETTLER: Two weeks is the 1st.

8 CHAIRPERSON GRIFFIS: Okay. I'm sorry for
9 the delay on this. A two-week submission will work
10 roughly. We're going to give you a little extra time
11 after the first.

12 The difficulty is there's not anyway we
13 can hear or decide anything until the 22nd of June.

14 Ms. Bailey, do we have time in the
15 afternoon on the 22nd of June, first case?

16 MS. BAILEY: What's scheduled right now is
17 Georgetown Day School, Mr. Chairman. So, did you want
18 to add it to that -- to the -- party to the --

19 CHAIRPERSON GRIFFIS: That's not going to
20 take all afternoon. Is it?

21 MS. BAILEY: Well, with the schools, these
22 days we never know.

23 CHAIRPERSON GRIFFIS: Oh, is that a
24 school? You know, we can't delay this. We can't
25 delay this very -- any longer. I think we're going to

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1 have to do that. First case in the afternoon on the
2 22nd of June.

3 Is everyone available for that date? The
4 22nd? Okay.

5 And what we're going to do is -- as Ms.
6 Bailey seriously states which is appropriate, this has
7 been scheduled and blocked for the entire afternoon if
8 not more. Who know? We probably have other sessions
9 for it. So, what I'd like to do is obviously for the
10 preliminary matter coming in, we'll bring up the
11 motion to dismiss.

12 If for some reason the appeal continues on
13 which it may well depending on that decision as a
14 preliminary matter, we're going to have a -- a limited
15 time that will be set in order to proceed. If we get
16 through the entire proceedings, great. If not, we'll
17 utilize the time that we have more efficiently than we
18 have today and -- and then we'll see whether we need
19 to schedule more time.

20 Mr. Nettler.

21 MR. NETTLER: I -- just to help in doing
22 that, I can at least represent today that if the
23 appeal does go forward, I don't expect to be spending
24 more than ten minutes.

25 CHAIRPERSON GRIFFIS: Okay.

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1 MR. NETTLER: If -- if at all. If that
2 much.

3 CHAIRPERSON GRIFFIS: Okay. Good. Wow.
4 That was like divine. Ten minutes and we had music.
5 Okay.

6 You have any difficulty in that? What I'd
7 do -- in fact, what I'll do right now is I'll indicate
8 that we'll -- we'll allow 60 minutes to dispense with
9 the issues that we have and any -- any time in
10 addition to that we would have to do it some other
11 day. Does that make sense?

12 MR. AGUGLIA: Understood.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. AGUGLIA: So, the 60 minutes includes
15 argument on the motion?

16 CHAIRPERSON GRIFFIS: Sixty minutes
17 actually is going to include everything.

18 MR. AGUGLIA: Everything?

19 CHAIRPERSON GRIFFIS: Board questions,
20 motions, preliminaries, case presentation. If we
21 start at 1:00, this would end at 2:00 or we'd call the
22 next case.

23 MR. AGUGLIA: Understood.

24 CHAIRPERSON GRIFFIS: Okay. I don't --
25 looking at the morning schedule, of course, I haven't

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1 reviewed any of these cases at this point. The
2 morning schedule looks to be -- looks to be fine.

3 Obviously, today's schedule was thrown off
4 because we did have a -- a special public meeting
5 which took us over for our own decision making that
6 ran the afternoon late, but I would think that we
7 would be fairly timely on that date. Okay.

8 In which case, then I regret that we had
9 -- not able to dispense of this totally in anyway it
10 was going this afternoon, but there it is and we will
11 resume on the 22nd.

12 We'll look to submissions then. The
13 submission date June 1st, of course, is a holiday.
14 The office will be closed. We'll look to the second.

15 Ms. Bailey, is that correct?

16 MS. BAILEY: Mr. Chairman, unless you have
17 some strong disagreement since it won't be heard until
18 the 22nd to give the participants maximum time to
19 prepare, would the 15th be appropriate for a response?

20 CHAIRPERSON GRIFFIS: Is it -- is there a
21 great necessity to take more than two weeks on this?
22 And let me just put it in -- in direct correlation.
23 It would be expeditious for the Board if we had it on
24 the 1st or the 2nd for our own scheduling purposes and
25 the time that we'll need to take a look at it.

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1 So, is there any -- is there any -- is --
2 is there any even limited requirement for additional
3 time on this? Two weeks? Two weeks is satisfactory?

4 MR. AGUGLIA: Whatever you want, sir, as
5 far as --

6 MR. NETTLER: June 2nd.

7 MR. AGUGLIA: It's fine with us.

8 MR. NETTLER: June 2nd.

9 CHAIRPERSON GRIFFIS: Okay. I'm really --
10 I'm open to the fact of giving you more time if you
11 need it, but -- okay.

12 MS. BAILEY: June 2nd it is.

13 CHAIRPERSON GRIFFIS: Let's do it the 2nd.
14 Okay. Anything else? Any other questions,
15 clarifications? Everybody clear? Submissions?
16 Submission date? We're all set. Very well.

17 Thank you very much. Do appreciate you
18 being down here this afternoon. We'll look for those
19 submissions.

20 Ms. Bailey, anything else for us this
21 afternoon?

22 MS. BAILEY: No, Mr. Chairman.

23 CHAIRPERSON GRIFFIS: I thank you very
24 much then. If there's no other business for the
25 Board, then I can adjourn the afternoon session of 18

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1 May 2004.

2 (Whereupon, at 4:14 p.m. the hearing was
3 concluded.)

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