

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

APRIL 12, 2005

+ + + + +

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 G. MILLER	Vice Chairperson
CURTIS L. ETHERLY, JR.	Board Member
JOHN A. MANN, II	Board Member
ANTHONY HOOD	Board Member

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Deputy Secretary
BEVERLEY BAILEY	Zoning Specialist
JOHN NYARKU	Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL:

SHERRY GLAZER, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

JOHN MOORE	Office of Planning
TRAVIS PARKER	Office of Planning

This transcript constitutes the minutes from the meeting held on April 12, 2005.

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1 9:52 a.m.

2 CHAIRPERSON GRIFFIS: Good morning, ladies  
3 and gentlemen. Let me call to order the 12th of April  
4 2005 morning public hearing of the Board of Zoning  
5 Adjustment to the District of Columbia. My name is  
6 Geoff Griffis, Chairperson. Joining me today is Ms.  
7 Miller, the Vice Chair, and our esteemed colleague,  
8 Mr. Etherly.

9 Representing the National Capital Planning  
10 Commission with us this morning is Mr. Mann and --  
11 well, that will do for the morning session. Copies of  
12 today's hearing agenda are available for you. They  
13 are located where you entered into the hearing room.  
14 They are on the wall. Pick it up and you can see what  
15 we will get through this morning, where you are on the  
16 chronology.

17 Several very important things that I'll go  
18 through, perhaps quite quickly, but they are important  
19 to understand in the opening remarks. First of all,  
20 all proceedings before the Board of Zoning Adjustment  
21 are recorded. They are recorded in two fashions.  
22 First, and most important, is the court reporter who  
23 is sitting on the floor to my right.

24 He is creating the official transcript for  
25 all that is going to occur today in front of us.

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

3 Attended to both of those there are  
4 several important aspects. I would ask that people  
5 turn off their cell phones and beepers at this time so  
6 we don't disrupt any transmission or the concentration  
7 of anyone giving testimony before us.

8 Prior to coming forward to present  
9 evidence and testimony we ask that you fill out two  
10 witness cards. Witness cards are available for you at  
11 the table where you entered into the hearing room.  
12 They are also available at the table where you will  
13 provide testimony. Those two cards would go to the  
14 recorder prior to coming forward and providing  
15 testimony. That is obviously so we can spell your  
16 name right on the transcript and give you all the  
17 credit of those important aspects that you will state.

18 When coming forward make yourself  
19 comfortable. I'm going to ask that you just state  
20 your name and address for the record one time before  
21 speaking and then proceed with what you need to  
22 address. The order of procedure for special  
23 exceptions and variances is as follows: First, we  
24 will hear from the applicant and the presentation of  
25 their case and any witnesses they may have.

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1                   Secondly, we will hear from any Government  
2 agencies reporting in the application; Office of  
3 Planning, Department of Transportation, whoever has  
4 submitted into the application. Third, we'll hear  
5 from the advisory neighborhood commission within which  
6 the property is located.

7                   Fourth we will hear from persons or  
8 parties in support of an application. Fifth we will  
9 hear persons or parties in opposition to an  
10 application. Sixth, we will give the opportunity for  
11 the applicant to summarize, conclude, or provide  
12 rebuttal testimony depending on the involvement of the  
13 entire case presentation.

14                   Cross examination of witnesses is allowed  
15 by the applicant and the ANC which is a party in the  
16 case. It is also an element allowed by parties in a  
17 case. Parties would be established at the beginning  
18 of a case and we will take that up as each case is  
19 specifically warranted.

20                   The record will be held closed at the  
21 conclusion of the hearing on this case basically when  
22 we finish today. I would hope that we wouldn't have  
23 to continue any of the cases on the schedule this  
24 morning. Everything that should be in the record  
25 should be presented today either in writing or orally

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1 before the Board.

2 It is important to understand that because  
3 at the conclusion of the hearing the record will be  
4 closed. That means no other information would be  
5 accepted into the record. And the Board would not  
6 deliberate or decide on any additional information  
7 that isn't provided in the record.

8 The Sunshine Act requires that this Board  
9 conduct its hearing in the open and before the public.  
10 This Board may enter executive session both during or  
11 after a hearing on a case for the purposes of  
12 deliberating on a case or just reviewing the record on  
13 a case. This would be in accordance with our rules,  
14 procedures, and regulations. It would also be in  
15 accordance with the Sunshine Act.

16 We must, as I say, base our decisions  
17 exclusively on the record that's created before us so  
18 we emphasize the fact of getting all the information  
19 that you think is pertinent for our review into the  
20 record today. We also ask that people present not  
21 engage board members in private conversations this  
22 afternoon or this morning so that we do not give the  
23 appearance of receiving information outside of the  
24 public record.

25 At this point let me say a very good

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1 morning to Ms. Bailey from the Office of Zoning  
2 sitting on my very far right, and Mr. Moy also with  
3 the Office of Zoning sitting closer to my right. Ms.  
4 Glazer in between is with the Office of Attorney  
5 General.

6 Ms. Bailey will administer the oath for  
7 anyone that is wishing to testify today or thinking  
8 about testifying. I ask that if you are planning to  
9 provide testimony for the board today, if you would  
10 please stand and give your attention to Ms. Bailey.

11 MS. BAILEY: Please raise your right hand.  
12 Do you solemnly swear or affirm that the testimony  
13 that you will be giving today will be the truth, the  
14 whole truth, and nothing but the truth?

15 ALL: I do.

16 MS. BAILEY: Good. Thank you all very  
17 much. Ms. Bailey, a very good morning again to you.  
18 At this time the Board will consider any preliminary  
19 matters. Preliminary matters are those which relate  
20 to whether a case will or should be heard today. A  
21 request for postponements, withdrawals, whether proper  
22 and adequate notice of the application has been  
23 provided are elements of a preliminary matter. Ms.  
24 Bailey, are you aware of any preliminary matters for  
25 the Board's attention at this time?

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1 MS. BAILEY: Mr. Chairman, members of the  
2 Board, and to everyone, good morning. No, sir. Staff  
3 does not have any at this time.

4 CHAIRPERSON GRIFFIS: Very well. I would  
5 ask that anyone present having a preliminary matter if  
6 they would come forward at this time and have a seat  
7 as an indication of having a preliminary matter. Not  
8 seeing anyone storm the table at this point, I think  
9 we are ready to call the first case in the morning.

10 MS. BAILEY: Application No. 17301 of  
11 George Giagtzoglou and Sarah Simmons pursuant to 11  
12 DCMR 3104.1, for a special exception to allow a side  
13 addition to an existing single-family detached  
14 dwelling under section 223, not meeting the side yard  
15 requirements, that's section 405. The property is  
16 located in the R-1-B District at premises 5717 Chevy  
17 Chase Parkway, N.W. It's also known as Square 1999,  
18 Lot 78.

19 CHAIRPERSON GRIFFIS: Good morning to you  
20 both. I'm going to have you turn your microphone on.  
21 There's a button on the base in the center and the  
22 light is going to come on towards the mike.  
23 Excellent. If I could have you both introduce  
24 yourselves with your name and address.

25 MS. SIMMONS: Good morning. My name is

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1 Sarah Simmons. I'm the owner of the property in  
2 question. My address is 5717 Chevy Chase Parkway.

3 CHAIRPERSON GRIFFIS: Excellent.

4 MS. SAMMIS: My name is Kim Sammis. I'm  
5 the architectural designer of the project and I do  
6 happen to live up the street at 5805 Chevy Chase  
7 Parkway at N.W.

8 CHAIRPERSON GRIFFIS: Excellent. Very  
9 well. Board members, I think the case is entirely  
10 complete and I would ask the applicant if they are  
11 prepared to stand on the record at this point.

12 MS. SIMMONS: Yes, I am.

13 CHAIRPERSON GRIFFIS: Excellent. Are  
14 there any questions, follow-up from the Board? Any  
15 clarifications that are required? You clearly don't  
16 have a distinct bias against greenhouses but want to  
17 do something a little bit more structurally sound. Is  
18 that correct?

19 MS. SIMMONS: That's correct.

20 CHAIRPERSON GRIFFIS: Excellent. Very  
21 well. If there are no questions from the Board at  
22 this time, let's go straight to the Office of  
23 Planning. If the Office of Planning would like to  
24 stand on the record also, they have presented an  
25 excellent case, Exhibit No. 23, or analysis I should

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1 say. Do you have the Office of Planning's report?

2 MS. SIMMONS: Yes, we do.

3 MS. SAMMIS: Yes, we do.

4 CHAIRPERSON GRIFFIS: Excellent.

5 A very good morning to you, sir.

6 MR. MOORE: Good morning, Mr. Chair, and  
7 members of the Board. I'm John Moore, Office of  
8 Planning. We, indeed, stand on the record.

9 CHAIRPERSON GRIFFIS: Mr. Moore, we  
10 absolutely appreciate your graphics as always. Is  
11 there any questions from the Board regarding the  
12 Office of Planning's report? Not noting any  
13 questions, does the applicant have any cross  
14 examination of the Office of Planning? Any questions  
15 of the Office of Planning?

16 MS. SIMMONS: No. I just really  
17 appreciate the thoroughness and just the incredible  
18 design features that he has put on there. I thought  
19 it was great.

20 CHAIRPERSON GRIFFIS: Free photographs.  
21 It's kind of a collectable.

22 MS. SIMMONS: Kinda cool.

23 CHAIRPERSON GRIFFIS: One of those Office  
24 of Planning things. I have a great collection of  
25 them. Okay. Very well. If there is nothing further

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1 for the Office of Planning, again, Mr. Moore, we  
2 absolutely appreciate it.

3 It's an excellent report and entirely  
4 complete analysis of the 223. I don't have any other  
5 attended agency reports unless the applicant is aware  
6 of anyone else that has submitted in terms of  
7 Government agencies. It's not in the historic  
8 district. Is that correct?

9 MS. SAMMIS: No. And you have the ANC  
10 letter?

11 CHAIRPERSON GRIFFIS: Right. We're  
12 getting to that, which is ANC-3G which is Exhibit No.  
13 21. Is the ANC representative today Ms. Beach, Allan  
14 Beach? Is that Ms. or Mr.?

15 MS. SAMMIS: Mr.

16 CHAIRPERSON GRIFFIS: Mr. Beach. Indeed.  
17 Not noting any ANC members here today, I would take  
18 note, as I said, Exhibit 21 which is in support.  
19 Okay. Anything further? Any clarifications from the  
20 Board at this point? Very well. I don't have any  
21 other submissions, Government agencies or ANC. We do  
22 have Exhibit No. 9 which is somewhat of a petition in  
23 support.

24 Let me ask if anyone is here present today  
25 to provide testimony in Application 17301 either in

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1 support or in opposition? Persons to provide  
2 testimony can come forward at this time. Not noting  
3 anyone here to present individual testimony, I will  
4 turn to the applicant for any closing remarks that you  
5 might have.

6 MS. SIMMONS: I would just really  
7 appreciate it if you would do this. I really  
8 appreciate all the time and energy that went into it.

9 MS. SAMMIS: And is it possible to get a  
10 bench decision today?

11 CHAIRPERSON GRIFFIS: Indeed. Good  
12 closings. That being said, as I started out, the 223,  
13 first of all, is an excellent section in the  
14 regulations that was adopted fairly recently with our  
15 regulations and history. It's important in this  
16 fashion.

17 When the regulations were adopted in 1958  
18 we essentially created all these nonconforming  
19 existing structures, these beautiful townhouses and  
20 these row dwellings and, much like yours, single-  
21 family detached that were all of a sudden against the  
22 regulations.

23 We realize that having a variance for all  
24 of this was a really high threshold to come in to try  
25 and do small accommodating aspects like you have

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1 presented so we decided -- the Zoning Commission  
2 decided to write in a special exception and that's  
3 what we have here before us today.

4 A special exception, of course, has to go  
5 and prove the fact that this would not tend to  
6 adversely affect the light and air of your adjoining  
7 neighbors or the use and privacy of those adjoining.  
8 There is clearly no evidence that this would have an  
9 adverse impact.

10 In fact, the thoroughness of the Office of  
11 Planning's report and that of your own presentation in  
12 written form in the record shows that it, in fact,  
13 supports the elements of meeting the test for special  
14 exception. I would, therefore, move approval of  
15 Application 17301 for a special exception to allow a  
16 side addition to the existing single-family detached  
17 dwelling under Section 223. This does not meet the  
18 side yard requirements under 405 at the premises of  
19 5717 Chevy Chase Parkway N.W. I would ask for a  
20 second.

21 MR. ETHERLY: Second, Mr. Chair.

22 CHAIRPERSON GRIFFIS: Thank you very much,  
23 Mr. Etherly. I think it is very clear obviously there  
24 is a structure there we can see in the plans and it is  
25 almost a reconfiguration of the existing condition.

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1 I think it is absolutely appropriate to move ahead  
2 with this. I'll open it up to any others for comments  
3 at this time. Not noting any other deliberation by  
4 the Board, we do have a motion before us that has been  
5 seconded. I would ask for all of those in favor  
6 signify by saying aye.

7 ALL: Aye.

8 CHAIRPERSON GRIFFIS: Opposed? Very well.  
9 Why don't we record the vote.

10 MS. BAILEY: Mr. Chairman, the vote is  
11 recorded as four, zero, one to approve the  
12 application. Mr. Griffis made the motion, Mr. Etherly  
13 seconded, Mr. Mann and Mrs. Miller are in support, and  
14 we don't have a Zoning Commission member with us at  
15 this time.

16 CHAIRPERSON GRIFFIS: Good. Thank you  
17 very much, Ms. Bailey. I don't see any reason why we  
18 wouldn't waive our rules and regulations and issue a  
19 summary order on this unless a Board member has any  
20 difficulty with that. Not noting any objection to  
21 that, why don't we do that.

22 MS. BAILEY: Thank you, sir.

23 CHAIRPERSON GRIFFIS: There it is. Thank  
24 you very much.

25 MS. SIMMONS: Thank you very much.

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1 CHAIRPERSON GRIFFIS: Very thorough.  
2 Let's move on then to the next case of the morning.

3 MS. BAILEY: Application No. 17303 of  
4 Thomas Stehle, pursuant to 11 DCMR 3104.1, for a  
5 special exception to allow a rear porch addition to an  
6 existing flat under section 223, not meeting the lot  
7 occupancy (section 403), open court (section 406) and  
8 nonconforming structure (subsection 2001.3). The  
9 property is located in the R-4 District at premises  
10 1223 Girard Street, N.W. (Square 2856, Lot 35).

11 CHAIRPERSON GRIFFIS: Good morning.

12 MR. STEHLE: Good morning.

13 CHAIRPERSON GRIFFIS: I'm going to have  
14 you introduce yourself for the record.

15 MR. STEHLE: My name is Thomas Stehle. I  
16 live at 1223 Girard Street, N.W., Washington, D.C.

17 CHAIRPERSON GRIFFIS: And you brought with  
18 you today the big guns from the ANC.

19 MR. SPALDING: Commissioner Philip  
20 Spalding. I represent ANC-1B and I live at 1929 13th  
21 Street.

22 CHAIRPERSON GRIFFIS: Indeed. Just to  
23 note, Board members, I actually live in this  
24 neighborhood one block north of the subject property  
25 and I would open it up to any questions. I do not

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1 have any additional knowledge of the application  
2 outside of what was delivered to me and I think I can  
3 fairly and impartially review this but I'll open it up  
4 to any questions from Board members.

5 MR. ETHERLY: No questions, Mr. Chair.

6 CHAIRPERSON GRIFFIS: Excellent. Thank  
7 you. Does the applicant have any difficulty in me  
8 continuing on this case?

9 MR. STEHLE: No.

10 CHAIRPERSON GRIFFIS: Does anyone here  
11 present with us attended to this application have any  
12 difficulty with me continuing on this case? Does the  
13 ANC?

14 MR. SPALDING: No problem.

15 CHAIRPERSON GRIFFIS: Excellent. Then  
16 let's move ahead. We've got another 223 here and, as  
17 you can see, we often do these fairly expeditiously.  
18 I would ask the applicant if they are prepared to --  
19 actually, you could summarize. We do have a letter in  
20 the record. I'm not sure if you have seen Exhibit No.  
21 26 that raises some concern and opposition to the  
22 application. It's from Carolyn Serfass at 500 E  
23 Street, N.E. However, they own a house at 1236  
24 Harvard Street. Are you familiar with this? Have you  
25 seen this?

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1 MR. STEHLE: I have not.

2 CHAIRPERSON GRIFFIS: Okay. Then we  
3 should get you a copy of this. They had attempted to  
4 contact ANC-1B, the commissioner for this block, but  
5 were unsuccessful. They have stated they are opposing  
6 the application because the rear yards of all these  
7 properties are completely exposed since the parking  
8 lot of the Carlos Rosario Charter School occupies most  
9 of the south side of the 1200 block of Harvard Street,  
10 any special exception will break the "rearscape," and  
11 rearscape is in quotes, of this long block and  
12 visually impact the neighborhood.

13 Subject properties undergoing extreme  
14 changes with many renovation projects -- did I say --  
15 the subject neighborhood is undergoing extreme changes  
16 with many renovation projects underway. We strongly  
17 feel that the zoning laws, especially for property  
18 currently nonconforming, must be met and upheld so  
19 that the texture of the original buildings is  
20 maintained.

21 Are Mr. and Mrs. Serfass here present? Is  
22 anyone else here attended to this application 17303,  
23 persons to provide testimony today? Very well. So  
24 what I'm going to do is walk through, of course, the  
25 special exception. I know you are very familiar with

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1 it. You have submitted in a very thorough and  
2 complete written statement addressing all the special  
3 exception requirements.

4 Do you want to just -- it's totally up to  
5 you how you deal with this. I would say that you  
6 could stand on the record for the entire piece but you  
7 may want to address, in fact, this letter how this  
8 would or would not impact -- visually impact the  
9 neighborhood's architectural character and such.

10 MR. STEHLE: Sure. First of all, I would  
11 like to stand on the record as presented but with this  
12 new evidence I would say that the design of the  
13 addition was very much in keeping with the character  
14 and will enhance the rearscape certainly more than  
15 doing nothing. In fact, at the moment if you look  
16 from Harvard Street you see a door to nowhere at the  
17 rear of the house which is a little disconcerting for  
18 anyone. That would remove, at least, that negative  
19 aspect of the view from there.

20 CHAIRPERSON GRIFFIS: You stated in your  
21 written submission in looking, Board members, at  
22 Exhibit 5 which is the photographs, you stated the  
23 fact that originally this had a second story  
24 enclosure.

25 MR. STEHLE: It did.

1 CHAIRPERSON GRIFFIS: And by the color of  
2 the brick but also there's a door there with a  
3 transom.

4 MR. STEHLE: Exactly.

5 CHAIRPERSON GRIFFIS: Okay. So what  
6 you're saying is it is actually bringing back what was  
7 more originally in character walking out that second  
8 floor --

9 MR. STEHLE: Exactly.

10 CHAIRPERSON GRIFFIS: -- so that people  
11 wouldn't think that first step is a doozey when you  
12 come out of the second floor.

13 MR. STEHLE: And the design is not  
14 extraordinarily contemporary. It's contextual and the  
15 materials that are chosen are durable and give the  
16 appearance of permanence and not a temporary structure  
17 attached to the house but it will give a permanent  
18 which, frankly, from that view which is essentially  
19 straight on, would be an enhancement of the area, I  
20 believe.

21 CHAIRPERSON GRIFFIS: This is a  
22 fascinating piece. Actually, some of the history of  
23 this is this came in for a variance previously. Is  
24 that correct?

25 MR. STEHLE: Yes. In 1989 there was a

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1 dilapidated porch which was no longer structurally  
2 sound. In order to have a useful porch the previous  
3 owner had pursued a variance to add about a foot and  
4 a half to the dilapidated porch to make 7.5 feet and  
5 that variance was granted. In fact, this enclosure  
6 simply encloses that. It does not expand or alter  
7 that area of variance.

8 CHAIRPERSON GRIFFIS: I wonder if this  
9 would have been a 223 prior and not a variance? In  
10 any case, okay. Any other questions from the Board?  
11 Very well. If there is nothing further, let's move  
12 ahead then to the Office of Planning. Mr. Mordfin is  
13 with us and also he has submitted an excellent report.  
14 I'll turn it over to you.

15 MR. MORDFIN: Good morning, Chairman, and  
16 members of the Board. I'm Stephen Mordfin with the  
17 Office of Planning. The applicant is requesting a  
18 special exception approval to enclose an existing rear  
19 deck and construct a second story above it for a flat  
20 within the R-4 zone district.

21 The existing deck was the subject of BZA  
22 Application No. 15018 which permitted the expansion of  
23 a conforming use not in conformance with the minimum  
24 lot width, maximum lot occupancy, and minimum court  
25 width. The applicant now request relief to permit

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1 this building addition onto a nonconforming structure  
2 for a conforming use.

3 The proposed building addition is in  
4 conformance with Section 223 in that it is a flat in  
5 a zoned district in which the use is permitted. It  
6 will not unduly affect light and air as a rear yard  
7 more than twice the minimum required will be provided.

8 It will not unduly compromise use and  
9 enjoyment of neighboring properties since it will have  
10 no windows or other openings on the east side and will  
11 provide an open court 4.42 feet in width on the west,  
12 a distance similar to the existing open court. It is  
13 designed to be residential in appearance when viewed  
14 from the alley and from Harvard Street.

15 It will maintain a lot occupancy of 61.7  
16 percent, less than the maximum 70 percent permitted,  
17 and will not permit the introduction or expansion of  
18 a nonconforming use. Therefore, the Office of  
19 Planning recommends approval of the application as  
20 submitted by the applicant.

21 CHAIRPERSON GRIFFIS: Excellent. Thank  
22 you very much. It's an interesting point that we are  
23 actually here for 223 as opposed to the last one we  
24 just heard, 222, which is nonconforming for the side  
25 yard. This is just under 2001.3.

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1                   It's actually not impacting anything,  
2 right? I mean, it's not going toward lot occupancy,  
3 rear yard, anything of that nature, but the mere fact  
4 that it needs a special exception because it's  
5 nonconforming but it's not really having any impact on  
6 anything else. Wow, glad I didn't have to assess this  
7 one whether it came here or not.

8                   Very well. Do you have any cross  
9 examination of the Office of Planning, Mr. Stehle?

10                   MR. STEHLE: No. I was pleasantly  
11 surprised by the thoroughness and the graphics and  
12 everything. I was very impressed.

13                   CHAIRPERSON GRIFFIS: Good. Thank you.  
14 Appropriately so. Do Board members have any cross or  
15 questions of the Office of Planning? Very well. Not  
16 noting any additional questions of the Office of  
17 Planning, let's move ahead. This is not in an  
18 historic neighborhood as noted.

19                   ANC-1B is present. Let me also give you  
20 the opportunity to cross OP or the applicant at this  
21 time or present your report.

22                   MR. SPALDING: I have no intention of  
23 crossing either Office of Planning or the applicant at  
24 this time.

25                   CHAIRPERSON GRIFFIS: Very good.

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1 MR. SPALDING: And you do have our copy of  
2 the letter and the vote that was taken in full  
3 support. The single member district commission did  
4 poll the neighborhood and found no objection to this  
5 change. As you just noted, it is not in an historic  
6 district.

7 I think this comment about the rearscape  
8 is rather unusual. I have seen Mr. Stehle's design  
9 from the back of the building. It seems fully  
10 consistent with the neighborhood so we will just stand  
11 on what we have submitted.

12 CHAIRPERSON GRIFFIS: Excellent. They  
13 talk about the Carlos Rosario. This has more view  
14 than is normal off an alley or is it just someone  
15 looking across the alley at this property?

16 MR. SPALDING: I'm really not sure.

17 CHAIRPERSON GRIFFIS: Okay. Very well.  
18 Thank you very much. It is Exhibit No. 23, the ANC's  
19 report. Any question from the Board? Very well.  
20 Does the applicant have any cross examination of the  
21 ANC?

22 MR. STEHLE: No.

23 CHAIRPERSON GRIFFIS: Good. There it is  
24 then. I don't have any other attended reporting  
25 agencies. We do have letters of support, Exhibit 21

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1 and also Exhibit 22 of neighbors. We have the letter  
2 of opposition which we have already addressed, Exhibit  
3 No. 26.

4 Is there anyone else here attended to  
5 Application 17303? Persons present in opposition or  
6 in support to provide testimony can come forward at  
7 this time. Not noting any others present to provide  
8 testimony, Mr. Stehle, let's turn it over to you for  
9 any opening remarks or summations you might have.

10 MR. STEHLE: No, I think that's  
11 everything. I'm very happy to entertain any questions  
12 of the Board but if it's possible to have a bench  
13 decision, that would be appreciated.

14 CHAIRPERSON GRIFFIS: Excellent. Thank  
15 you very much. Is there any other question from the  
16 Board? Clarifications? One quick question. Why  
17 didn't you enclose the bottom level?

18 MR. STEHLE: I have tenants and I wanted  
19 to give them as much opportunity to enjoy the yard as  
20 I do.

21 CHAIRPERSON GRIFFIS: Excellent. Okay.  
22 Very well. If there's nothing further, I think the  
23 application is full and prepared to move forward. I  
24 would move approval of application 17303. This would  
25 be for a special exception of 223 for a nonconforming

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1 structure which, obviously, comes in in 2001.3. You  
2 know, in 2001.3 -- well, I'll save it. this would be  
3 for the addition on the property of 1223 Girard  
4 Street, N.W. and I would ask for a second.

5 MS. MILLER: Second.

6 CHAIRPERSON GRIFFIS: Thank you, Ms.  
7 Miller. What I was going to say is 2001.3, of course,  
8 allows for additions or alterations to structures as  
9 a matter of right but they have to conform with the  
10 lot occupancy. What's interesting here is it doesn't  
11 conform to the lot occupancy by a small percentage as  
12 we have seen in the applicant's, and also in the  
13 Office of Planning's report.

14 Anyway, the same case in terms of the  
15 special exception. No matter what the nonconformity  
16 is it's fairly clear and there has been evidence that  
17 this would not -- in fact, does not impact the light  
18 or air, privacy, or enjoyment of the adjacent  
19 properties.

20 I think a very persuasive point was the  
21 distance of the rear yard and the openness of it in  
22 terms of enclosing that. Obviously that's a big  
23 impact that we often look at in terms of how it would  
24 look or impact the light and air to the adjacent  
25 properties with a substantial rear yard and the

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1 openness.

2 With no evidence or testimony of the fact  
3 that it would, I think it's a very strong case. and I  
4 obviously support it. I'll open it up to any further  
5 deliberation by the Board. If there is nothing  
6 further, then we do have a motion before us that has  
7 been seconded. I would ask for all of those in favor  
8 to signify by saying aye.

9 ALL: Aye.

10 CHAIRPERSON GRIFFIS: Opposed?

11 Abstaining? Very well.

12 Ms. Bailey, why don't we record the vote.

13 MS. BAILEY: Mr. Chairman, the vote is  
14 four, zero, one to approve the application. Mr.  
15 Griffis made the motion, Mrs. Miller seconded, Mr.  
16 Mann and Mr. Etherly are in agreement, and there is  
17 not a Zoning Commission member here.

18 CHAIRPERSON GRIFFIS: Good. Thank you  
19 very much. Again, I don't see any reason why we  
20 wouldn't waive our rules and regulations and issue a  
21 summary order on this unless Board members have any  
22 difficulty with doing that. Not noting any  
23 opposition, why don't we do that. Thank you very  
24 much.

25 MR. STEHLE: Thank you.

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1                   CHAIRPERSON GRIFFIS: Appreciate it.  
2 Appreciate the thoroughness of the application that  
3 has allowed us to move so expeditiously through it.  
4 Good luck.

5                   MR. STEHLE: Thanks very much.

6                   CHAIRPERSON GRIFFIS: Indeed. Let's call  
7 the next case of the morning if we're ready.

8                   MS. BAILEY: Application No. 17302 of  
9 Nonprofit Community Development Corporation of D.C.  
10 pursuant to 11 DCMR 3103.2, for a variance from the  
11 maximum height requirements under subsection 770.1 to  
12 construct a new 7-story condominium building with  
13 ground floor commercial in the C-2-B District at 2750  
14 14th Street, N.W., Square 2667, Lot 73, also known as  
15 849.

16                   CHAIRPERSON GRIFFIS: You know, Board  
17 members, let me just also open it up here. Fourteen  
18 years living in Columbia Heights and I haven't seen so  
19 many applications come through. Here we are again,  
20 another Columbia Heights application. I would  
21 reiterate my statement previously.

22                   I don't have any additional information or  
23 knowledge but this is in my neighborhood. I'm not  
24 within a 200-foot radius but I would throw it out  
25 there if anyone has any difficulty in me continuing on

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1 this case.

2 If there is no objection from the Board,  
3 I will have the applicants introduce themselves and  
4 they can also address if they would have any  
5 difficulty in me as a committed, dedicated Columbia  
6 Heights -- oh, I probably shouldn't say all that,  
7 should I? In any case, if you have any difficulty in  
8 me continuing on this case. Let me have you introduce  
9 yourselves for the record, please.

10 MS. OWENS: Michelle Owens. You want my  
11 address?

12 CHAIRPERSON GRIFFIS: Sure.

13 MS. OWENS: 8523 Cameron Street, Silver  
14 Spring, Maryland.

15 MR. HENDERER: My name is Peter Henderer  
16 and I'm from McCandish Holton at 1111 East Main  
17 Street, Suite 1500, Richmond, Virginia 23219. My home  
18 address is 4506 Hanover Avenue, Richmond, Virginia  
19 23221.

20 CHAIRPERSON GRIFFIS: And you are what to  
21 the applicant?

22 MR. HENDERER: I'm counsel for the  
23 project.

24 CHAIRPERSON GRIFFIS: Okay.

25 MR. MORRIS: My name is William Morris.

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1 I'm the architect for the project. I am at 60 Market  
2 Street, Gaithersburg, Maryland 20878.

3 CHAIRPERSON GRIFFIS: Good. Okay. Anyone  
4 have difficulty in me continuing on this case?'

5 MS. OWENS: No.

6 CHAIRPERSON GRIFFIS: Any questions of me?

7 MS. OWENS: No.

8 CHAIRPERSON GRIFFIS: Okay. Let's move  
9 ahead then. I'll turn it over to you to open up and  
10 present the case.

11 MS. OWENS: Again, I'm Michelle Owens.  
12 I'm the managing director of NPCDC. As you know, we  
13 are a nonprofit corporation engaged in neighborhood  
14 revitalization through construction and renovation of  
15 housing in at-risk neighborhoods in D.C.

16 Since '94 our projects have involved the  
17 renovation of over 350 units of housing, single family  
18 and apartments, Anacostia Petworth, Upper Georgia  
19 Avenue and now Columbia Heights. Our projects have  
20 been exclusively affordable housing units. We are  
21 here today to request a height variance at the  
22 Columbia Heights location.

23 We feel that the variance is necessary to  
24 accomplish the mission of both the RLA Revitalization  
25 Corporation and NPCDC. As you met, here with me today

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1 is Bill Morris, our architect, and Peter Henderer, our  
2 attorney. Both of them can speak about the details of  
3 our request. I thank you for your consideration of  
4 our petition and that should cover about the first  
5 three pages of what we gave you and Peter can take it  
6 from here.

7 MR. HENDERER: We have some copies of our  
8 remarks for your review.

9 CHAIRPERSON GRIFFIS: Excellent.

10 MR. HENDERER: I will not read through  
11 them word for word but I will summarize them and get  
12 through them quickly. If there are any questions that  
13 you have, please feel free to interrupt me and ask  
14 them.

15 CHAIRPERSON GRIFFIS: Good.

16 MR. HENDERER: We'll start by telling you  
17 a little bit about the development at Parcel 5.  
18 Parcel 5 is located at 2750 14th Street, N.W. and  
19 Columbia Heights. The development plan calls for 77  
20 parking spaces in the subsurface parking deck, 19,770  
21 square feet of commercial space on the ground level,  
22 and 56 residential condominium units in the seven-  
23 story building.

24 The property is currently zoned C-2-B for  
25 the zoning map. It has 24,000 square feet of area.

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1 The plan is to do a contemporary type structure to  
2 house all of these features.

3 NPCDC purchased the property from the  
4 RLARC. In doing so they entered into a Land  
5 Development Agreement, the LDA, which consistent with  
6 the nonprofit purpose of the developer calls for  
7 having 50 percent of the residential condominium units  
8 to be affordable dwelling units which will be for sale  
9 to households earning less than 50 percent -- earning  
10 at different levels below the area median income as  
11 defined by the U.S. Department of Housing and Urban  
12 Development.

13 One of the challenges that NPCDC has  
14 encountered now that the project is underway and under  
15 construction is that as they have gotten into the  
16 preleasing phase on the commercial space they have  
17 discovered that the building is not as attractive to  
18 high quality retail tenants when they have eight-foot  
19 high ceilings in the commercial space.

20 In order to fit all of the desired units  
21 into the building, one of the limitations that they  
22 had to do was create a eight-foot ceiling in the  
23 ground floor commercial space. One of the things that  
24 they have discovered at this point is that the high  
25 quality retail tenants are not as interested in eight-

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1 foot high ceilings.

2           There is a letter in our package from  
3 Vanguard Realty Group which is the project realtor  
4 that provides some testimony to that effect. And we  
5 have the project manager here today who can testify to  
6 that effect as well.

7           This only came up during the construction  
8 and preleasing phase because the nonprofit NPCDC is  
9 primarily a housing developer and focused on housing  
10 issues and creating the right mix of affordable units  
11 and so simply discovered this issue in the development  
12 process.

13           Before proceeding with this variance  
14 request it considered other alternatives. One of the  
15 alternatives was to remove a floor of the building and  
16 to try to raise the ceiling height. Unfortunately, by  
17 raising the ceiling we would have to eliminate an  
18 entire floor of residential units and that was  
19 unfortunate and would jeopardize the transaction and  
20 the desired goal of providing as many affordable  
21 dwelling units to the neighborhood.

22           Additionally, one of the concerns was  
23 pursuing a PUD process which was a very thoughtful  
24 suggestion that the Office of Planning put forward.  
25 Unfortunately, the PUD process will take longer than

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1 our construction schedule permits. By the time the  
2 PUD process is completed we will probably be on the  
3 4th floor of the building rendering the PUD decision  
4 fairly moot. The variance seems to be the only route  
5 that we could go to achieve the desired relief that we  
6 would like to do.

7 Obviously the goal here is to try to get  
8 the 12-foot high ceiling so that we can have higher  
9 quality of life in the neighborhood and provide the  
10 higher quality of tenant that the nonprofit really  
11 believes the neighborhood deserves, that it would be  
12 consistent with the Land Development Agreement, and  
13 the nonprofit's desire to produce the highest quality  
14 neighborhood amenities possible for the social  
15 revitalization of Columbia Heights.

16 I would like to talk a little bit about  
17 the criteria for the variance and why we believe that  
18 this project meets the criteria for the variance. I  
19 have quoted the statute for you but I will not recite  
20 it for you because I'm sure you all know the statute.  
21 Obviously there are four prongs here. One is the  
22 issue that the property be subject to an extraordinary  
23 or exceptional situation or condition.

24 We believe that the property here is  
25 subject to an extraordinary or exceptional situation

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1 or condition because it is incumbered by the Land  
2 Development Agreement which requires the 50 percent  
3 ADUs and there is actually a daycare center that is  
4 required as well.

5 We have signed a lease for a daycare  
6 center to take up a significant component of the  
7 commercial space. The combination of the Land  
8 Development Agreement and the nonprofit purpose of the  
9 developer in tandem together to create a situation  
10 that is quite unique amongst properties. The 50  
11 percent ADU requirement is exceptionally high amongst  
12 comparable developments so that makes for a very high  
13 level of ADUs and something that really distinguishes  
14 this property from other properties.

15 We are aware that the OP has asserted that  
16 the LDA alone is not sufficient to create a unique  
17 purpose to the property, a unique quality, but we  
18 believe that, in fact, the combination of two factors,  
19 both the restricted covenants of the LDA combined with  
20 the nonprofit purpose of the developer, go to making  
21 the property unique and that is manifested in the 50  
22 percent ADUs and the childcare center on the property.

23 The second criteria is that the property  
24 be subject to practical difficulty on the property.  
25 Obviously the practical difficulty here is the ability

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1 to create the kind of socially beneficial development  
2 that we would like to create.

3 The interest that we have had from tenants  
4 in the eight-foot ceiling space has been really  
5 substandard tenants that we fill don't contribute  
6 fully and efficiently to the kind of neighborhood that  
7 we would like to create in the Columbia Heights area.

8 The premium retail tenants really require  
9 the 12-foot high ceiling. Obviously our leasing  
10 agents can testify to that but we really believe that  
11 presents a practical difficulty. I note that it is not  
12 an economic hardship issue. It is really a practical  
13 difficulty.

14 We could get the rent from other tenants  
15 but they are not the kind of socially desirable  
16 tenants that we would like to see in that space to  
17 meet the nonprofit purpose and our goal of doing  
18 community revitalization in the neighborhood and  
19 providing the right kind of street scape that would be  
20 attractive and beneficial for the neighborhood.

21 Finally, we note that the relief can be  
22 granted without substantial detriment to the public  
23 good. The ANC is here and has provided a letter to  
24 that effect saying that it would not have an adverse  
25 impact on the neighborhood. The Office of Planning

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1 did not seem to feel that it would have an adverse  
2 impact in the neighborhood if granted.

3 We believe that clearly having the  
4 additional height in the building will provide better  
5 quality of commercial tenant in the neighborhood and  
6 contribute positively to the neighborhood if the  
7 variance is granted.

8 The next prong obviously is that it will  
9 not substantially impair the intent, purpose, and  
10 integrity of the zone plan. In this case we believe  
11 that the relief that would be granted would be minor  
12 enough by the additional eight feet on the building  
13 that it would not substantially impact the  
14 neighborhood.

15 The building is adjacent to a five-story  
16 building on one side and a six-story building on the  
17 other so an additional eight feet on a seven-story  
18 building will not really change the roof line of the  
19 neighborhood. Our project architect has some  
20 illustrations to that effect so that you can see a  
21 mockup of what that additional height would look like  
22 so that you can see that it would not have an adverse  
23 impact on the zone plan.

24 We do note that the OP suggested that by  
25 granting the variance it would actually weaken the

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1 variance requirements. We disagree with that. We  
2 obviously think that the granting of the variance is  
3 appropriate in this instance because it's the only  
4 remedy that can be provided in this situation under  
5 the time frame that we have.

6 We feel that there may be some concern  
7 that granting this variance would create unwanted  
8 future precedence for other variances that might be  
9 requested in the future. We would suggest to you that  
10 the uniqueness of the property would make that a  
11 nonconcern for the BZA.

12 Because the property has 50 percent ADUs,  
13 because there is an LDA in place, and the nonprofit  
14 purpose of the developer with the 50 percent ADUs and  
15 the daycare center, that makes the property  
16 sufficiently unique that other applicants simply  
17 wouldn't have that same combination of circumstances  
18 making their properties unique.

19 We also note that the nonprofit will not  
20 profit from the variance. Not only does the LDA  
21 restrict the profits but obviously as a nonprofit if  
22 their commitment is to plow their proceeds back into  
23 the community and this is not something that they are  
24 doing simply to gain additional revenue out of the  
25 project but merely to enhance the quality of life in

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1 the neighborhood and to build the best possible  
2 development that they can at the location.

3 Just to summarize our arguments then as to  
4 the legal requirements of the variance, we believe  
5 there is an exceptional situation or condition in the  
6 form of the restrictive covenants combined with the  
7 nonprofit purpose of the developer that is manifested  
8 in the 50 percent ADUs and the childcare center that  
9 make the property unique.

10 There's an exceptional situation or  
11 condition that would create a practical hardship on  
12 the NPCDC by impairing their ability to develop the  
13 highest possible quality of life development for the  
14 neighborhood.

15 The proposed additional height would not  
16 have an adverse impact on the neighborhood and the  
17 additional height is not inconsistent with the zoning  
18 plan. We have a few people here who can provide some  
19 additional testimony on this issue. I think Arnie  
20 Litman would like to say something to that effect.

21 Arnie, do you want to come up?

22 CHAIRPERSON GRIFFIS: Good. Before we  
23 move on to have them adopt that testimony, let me ask  
24 you a couple of legal analysis questions and  
25 clarifications. You made a broad statement that would

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1 jeopardize a transaction, certain elements. You've  
2 also just stated restrictive covenants. The  
3 restrictive covenants and the transaction come out of  
4 the award from NCRC and the LDA that was signed,  
5 right?

6 MR. HENDERER: Yes.

7 CHAIRPERSON GRIFFIS: Which was basically  
8 the contract which ratifies everything that is  
9 required. My first question is didn't then the NCRC  
10 put out an RFP and award something that was  
11 unrealistic and was unable to be built?

12 MR. HENDERER: No, they didn't. The  
13 question is not whether it's economically viable. The  
14 project is economically viable. The question is the  
15 quality of life, the quality of tenants.

16 CHAIRPERSON GRIFFIS: What I'm hearing you  
17 say is that if you build it as it was awarded and NCRC  
18 required it, then you actually don't have a retail  
19 base. You have something that's going to be boarded  
20 up or just empty because no one wants it. It does  
21 seem to be fairly unrealistic to go 30, 60, 80 AMI  
22 units and expect it all to work.

23 MR. HENDERER: Well, there can be other  
24 tenants other than retail in the space but we believe  
25 that it's the retail tenants that will provide the

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1 higher quality of life for the neighborhood.

2 CHAIRPERSON GRIFFIS: Where is the retail  
3 tenants proposed to be, on the 14th Street or the  
4 Girard Street side?

5 MR. LITMAN: Both.

6 CHAIRPERSON GRIFFIS: So where's the  
7 daycare center?

8 MR. LITMAN: The daycare center is taking  
9 some of the retail space on Girard Street and some  
10 below grade space on the Girard Street side.

11 CHAIRPERSON GRIFFIS: Okay. Did you want  
12 to state your name and address for the record?

13 MR. LITMAN: Yes. Arnie Litman, 3331 22nd  
14 Street, S.E., Washington, D.C.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. LITMAN: Though I am the project  
17 manager, I'm speaking here today as a real estate  
18 broker with 30 years experience doing commercial  
19 leasing in both downtown office buildings and retail  
20 shopping centers throughout the city.

21 My experience in leasing this space has  
22 been that the more typical quality tenants, whether  
23 you like them or not, a Starbuck's, dry cleaners,  
24 different banks that we talked to, Dunkin Donuts,  
25 Caribou Coffee. These people are really interested in

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1 a higher ceiling. Even the ceiling we have here today  
2 is eight feet, six inches so you've got to imagine  
3 walking into a restaurant or some other establishment  
4 where the ceiling is kind of impinging upon certainly  
5 a taller person.

6 The dry cleaners aren't interested because  
7 they can only get one layer of clothes while in a 12-  
8 foot ceiling they can actually get two layers of  
9 clothes and a conveyor belt so they really are  
10 substantially increasing their space.

11 What I have found is that tenants who  
12 don't object to any ceiling height have been Cash 2  
13 go, First Cash, Ace Check Cashing. They just want to  
14 be in the neighborhood because they feel there is a  
15 real draw there.

16 I have met with several Chinese  
17 restaurants, mostly carry-out variety, not sit-down.  
18 And food providers who have really had no experience  
19 in the business. I have also met with three people  
20 who want to open up a liquor store in the area.

21 The problem is not economic. The problem  
22 is that we made a commitment to Council Member Graham  
23 and to Mayor Williams when we met with him when we  
24 first adopted this project. We made a commitment to  
25 NCRC that we would bring them quality tenants and we

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1 have made a commitment to the ANC when we first met  
2 them that we were going to try to improve the  
3 neighborhood, improve the quality of life of everybody  
4 that lives there now.

5 We even made a commitment that out of the  
6 profit that would be made in this, \$250,000 would be  
7 set aside to establish a subsidy so a neighborhood  
8 business could move into the shopping -- in the retail  
9 area. We have several retail people. Two of them are  
10 already in the area. Their leases are up in two years  
11 and they want to relocate to our property.

12 The problem that we faced in talking to  
13 them was they are now in areas that have 12 and 14-  
14 foot ceilings. For them to come into an establishment  
15 now that has an eight-foot ceiling they are really  
16 giving up storage space and display space and an  
17 ability to make money for themselves.

18 These other tenants that I mentioned, the  
19 check cashing, the carry-out restaurant, the liquor  
20 stores, they are all willing to pay our rents. It's  
21 not a matter of the place is going to end up being  
22 boarded up. We don't believe they are going to end up  
23 being boarded up.

24 It's a matter of the commitment that we  
25 made to NCRC, to Mayor Williams, to Council Member

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1 Graham, and to the ANC of bringing in quality tenants  
2 and somebody that was going to enhance and improve the  
3 neighborhood. We just don't feel that with the lower  
4 heights that we could have.

5 I know in the back of your minds it's  
6 like, "Gentlemen, shouldn't you have seen this  
7 earlier?" Yes. The building was designed by an  
8 architect. He passed away in the middle of the  
9 development. We caught it kind of late in the game  
10 and OPD did offer us an out. However, we are now 30  
11 feet deep into the ground.

12 We are laying our infrastructure next  
13 week. We are pouring the concrete base within two  
14 weeks. There is no stopping us. The bank commitments  
15 are there. The money is being spent. The contract  
16 commitments are there for the contractor. The project  
17 is well underway. It has strict deadlines, strict  
18 adherences. We have other commitments, not just banks  
19 but to NCRC to complete the project.

20 We are sorry. There is no turning back.  
21 We are just looking for this variance because it is  
22 our only way out to bring the quality tenant we feel  
23 we need and are committed to bringing to Columbia  
24 Heights.

25 CHAIRPERSON GRIFFIS: Good. Thank you.

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1 If I understand you correctly, your testimony to the  
2 fact of the ceiling height goes to one, the  
3 flexibility which obviously opens up the opportunity  
4 of differing retailers and that is today and perhaps  
5 give years from now when leases are up.

6 MR. LITMAN: And forevermore.

7 CHAIRPERSON GRIFFIS: Right. And so it  
8 limits your ability and breadth of who might be  
9 interested in that so that the flexibility obviously  
10 goes into, as I understand you saying, the quality of  
11 type of retailer that would go in there.

12 MR. LITMAN: Correct. And I know that OPD  
13 supports that position because I know they are working  
14 with other developers to increase retail height. Our  
15 problem is coming to you now late in the game. But we  
16 know that throughout the city the DCBIA, other  
17 developers are all after the increased height. We  
18 know that. This is just late in the game and that's  
19 why we seek the variance.

20 CHAIRPERSON GRIFFIS: I understand what  
21 you're saying. They are all after the increase in  
22 height. DCBIA is an association, not a developer. Am  
23 I correct?

24 MR. LITMAN: Yes.

25 CHAIRPERSON GRIFFIS: And so what you're

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1 saying, if I understand -- tell me if my understanding  
2 is correct. Because we are so height-impinged in this  
3 city, if you raise the first floor in order to, if I  
4 understand you correctly, get high quality or  
5 flexibility of retailers, if you raise that first  
6 floor to 16 or 20 feet, it would give you also a  
7 clarification in egression.

8 You may be looking at the ceiling height  
9 but that doesn't go to what the slab height is because  
10 you've got two feet above this drop ceiling. If you  
11 go to raising that retail, well, you are obviously  
12 losing something above it because you are at your  
13 height restriction.

14 Is that what you're saying? DCBIA and  
15 other folks in the city and the Office of Planning are  
16 working on increasing the availability of higher  
17 retail on the first floor without impacting what might  
18 be above without losing a floor of the building?

19 MR. LITMAN: Yes. In our case in this  
20 scenario, we are seeking four feet for the retail  
21 space which takes from eight to 12 feet. As well as  
22 since we have the ability, the additional four feet  
23 would be spread over the other six floors of  
24 residential. Again, the thinking there was we have 50  
25 percent affordable units. There is no other

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1 development in Washington, D.C. that is offering 50  
2 percent affordable housing as well as 50 percent  
3 market.

4 The idea there was that we have this  
5 ability to enhance not just market units but everybody  
6 who is buying in this building. There was an  
7 opportunity to increase a product for the less wealthy  
8 as well as the wealthy across the board. It just  
9 seemed like the right thing to do.

10 CHAIRPERSON GRIFFIS: Okay. Is the Zoning  
11 Commission taking up any of this in terms of overlays  
12 or text amendments looking at retail height on  
13 buildings? Are you aware of that? Is that happening?

14 MR. LITMAN: I believe it's happening but  
15 it's not something that we're involved in. We are  
16 single-building purpose.

17 CHAIRPERSON GRIFFIS: Sure. Sure. I'm  
18 just wondering whether you had any understanding of  
19 them actually looking at it. I'm sure the Office of  
20 Planning probably knows.

21 MR. LITMAN: I have third-hand knowledge  
22 that there is some kind of proposal whereby by  
23 increasing the retail height in a building it will not  
24 affect the overall height of a building's restriction.

25 CHAIRPERSON GRIFFIS: Right.

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1 MR. LITMAN: I don't --

2 CHAIRPERSON GRIFFIS: Well, we've touched  
3 and danced on it a couple of times. Certainly we have  
4 retail in arts overlays that require 50 percent or  
5 more of a first floor. It's certainly not something  
6 that the Zoning Commission is unaware of and the  
7 difficulties in making that are what you lose  
8 obviously if you have a double height space on the  
9 first floor.

10 But let's move ahead. Ms. Miller,  
11 questions?

12 MS. MILLER: I have a few questions. The  
13 issue with the higher ceilings not being anticipated  
14 earlier. Was it not anticipated before you entered  
15 into the LDA?

16 MR. LITMAN: Before we went to --

17 MS. MILLER: Before you entered into the  
18 LDA.

19 MR. LITMAN: That's correct. The original  
20 architect had drawn it so that we could maximize the  
21 height and every floor was eight feet. Bill Morris  
22 had taken over in mid-stream and it's just something  
23 that the not-for-profit and myself really didn't focus  
24 on because we were more focused on the 50 percent  
25 affordability component and how we were going to mix

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1 in the condominium documents and how that mix was  
2 going to arrange. Then as soon as we began talking to  
3 retail tenants, this problem began to appear.

4 CHAIRPERSON GRIFFIS: Let's not get too  
5 far into it. Let's get very simplistic here in the  
6 chronology. Were the CDs 100 percent when the LDA was  
7 signed?

8 MR. LITMAN: Were the CDs 100 percent?  
9 No, they were not.

10 CHAIRPERSON GRIFFIS: Exactly. The issue,  
11 to direct the question back to Ms. Miller which I  
12 think she's exploring, you signed the contract on this  
13 before the actual documentation was 100 percent  
14 complete.

15 MR. LITMAN: Correct.

16 CHAIRPERSON GRIFFIS: They were in locked  
17 program financing setup and then you started  
18 completing your documents and design.

19 MR. LITMAN: Correct.

20 CHAIRPERSON GRIFFIS: Okay.

21 MR. LITMAN: And we had no leasing  
22 activity prior to construction.

23 CHAIRPERSON GRIFFIS: Sure.

24 MS. MILLER: Okay. And then the LDA was  
25 part of a larger master plan for the revitalization of

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1 the 14th Street corridor and Columbia Heights.

2 Correct?

3 MR. LITMAN: That's correct.

4 MS. MILLER: So if you didn't have the  
5 restrictions of the LDA and you were deciding how you  
6 could build this building without getting a variance,  
7 what would your option be? Would one of them be less  
8 affordable housing units? I know you just addressed  
9 the issue of taking off one floor which wouldn't be  
10 economically viable.

11 MR. LITMAN: Speaking as a capitalist and  
12 not for the not-for-profit, yes, I would advocate  
13 fewer affordable dwelling units and more market units.  
14 However, the not for profit is the developer. They  
15 are the ones that hired me to assist them in this and  
16 that is their mission. That is their commitment and  
17 it's one that I really do support in spite of my  
18 previous statement.

19 MR. HENDERER: It's also worth noting that  
20 the affordable units in the project are not  
21 sequestered into one portion of the project. They are  
22 marbled throughout the building. The building  
23 contains a mixture on each floor of one-bedroom, two-  
24 bedroom, and three-bedroom units so that you don't  
25 have all the three bedroom units together.

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1           You don't have all the two-bedroom units  
2 together. They are all mixed. The affordable and  
3 market rate are mixed because the project goal is to  
4 provide that certain mix of different family sizes,  
5 different incomes in one project.

6           CHAIRPERSON GRIFFIS: Is this the basis of  
7 your being awarded the property do you believe?

8           MR. HENDERER: It was a significant  
9 component of it, I believe, yes.

10          CHAIRPERSON GRIFFIS: Okay. What's the  
11 master plan you were talking about?

12          MR. LITMAN: The master plan?

13          CHAIRPERSON GRIFFIS: Yeah. I mean, it's  
14 in the written submission, too, that this is in  
15 accordance with the master plan for the area. What is  
16 that?

17          MR. LITMAN: That is something that the  
18 city has drawn up for development in Columbia Heights.  
19 As you are well aware, NCRC or RLARC has many parcels  
20 of land in Columbia Height that they are in the  
21 process of developing now or have issued RFPs for and  
22 developers in developing Columbia Heights.

23          MS. MILLER: What does that mean the city  
24 has drawn up?

25          MR. LITMAN: I think the city has an

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1 overall master plan of development and where they  
2 would like to see it. I think an agency like NCRC is  
3 an instrument unto which the city gets these parcels  
4 of land developed whether by themselves or through --

5 CHAIRPERSON GRIFFIS: I think we are going  
6 to take OP task and see if they have this master plan.

7 MS. MILLER: Right.

8 MR. LITMAN: Of course, with the  
9 assistance and direction of --

10 CHAIRPERSON GRIFFIS: Let's move ahead  
11 then. So you weren't actually noting a specific plan  
12 that you were looking at or it was your understanding  
13 that this was fitting into?

14 MR. LITMAN: No.

15 CHAIRPERSON GRIFFIS: Okay.

16 MS. MILLER: Could you just also -- I'm  
17 sorry.

18 MR. LITMAN: Except that I do note that  
19 the mayor is committed to creating a lot of affordable  
20 housing in the city and the not-for-profit was -- one  
21 of its guiding missions was to cooperate with that  
22 initiative from the mayor's office.

23 MS. MILLER: I guess I have two other  
24 follow-up questions. The commitments that you made  
25 reference to to Council Member Graham and the mayor,

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1 are these written commitments, verbal commitments?

2 What are you alluding to?

3 MR. LITMAN: In meetings we had with the  
4 mayor's economic development branch and with Council  
5 Member Graham himself we told them when we were  
6 getting their support for this exactly what our  
7 commitment was. If you read the LDA it is specific in  
8 there about bringing neighborhood businesses in and  
9 rental subsidy to enable these rental businesses to  
10 come in and be able to afford the rents.

11 I was just handed a note that says that  
12 the 14th Street urban renewal area is part of the  
13 city's master plan that you asked me about earlier.

14 MS. MILLER: Okay. And my last question  
15 is can you elaborate how the height increase is not  
16 inconsistent or is consistent with the zone plan?

17 MR. HENDERER: I think Bill can answer  
18 that. Do you have some pictures, Bill, that you can  
19 show us?

20 MR. MORRIS: We have the picture -- I'm  
21 sorry. Again, I'm Bill Morris, the architect. There  
22 are some photographs in the application packet which  
23 show context of some of the neighboring buildings some  
24 of which are 10 stories in height. I would say, yes,  
25 the proposed height is in conformance with the context

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1 and the height of the surrounding area.

2 CHAIRPERSON GRIFFIS: What are some of the  
3 heights of the adjacent buildings, photographs or not?  
4 If you go south on 14th Street, which is the adjacent  
5 building, how tall is that?

6 MR. MORRIS: The adjacent building is  
7 approximately 65 feet from my counting bricks. It's  
8 six stories of 10-foot stories.

9 CHAIRPERSON GRIFFIS: Okay. So you have  
10 approximately 65. This would be a little bit higher  
11 than that. What about across the street? Is it a  
12 shorter building? A taller building?

13 MR. MORRIS: Across the street there is a  
14 10-story building which is taller than our proposed  
15 higher building. It is, I would say, approximately 70  
16 to 80 feet without doing an exact measurement.

17 CHAIRPERSON GRIFFIS: Wow. Is that a new  
18 building?

19 MR. MORRIS: It's a 10-story building that  
20 has been there some number of years.

21 MR. LITMAN: There's also a nine-story  
22 building in the area adjacent to that one.

23 CHAIRPERSON GRIFFIS: The one across the  
24 street, is it residential?

25 MR. MORRIS: Yes.

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1 CHAIRPERSON GRIFFIS: Is there anything  
2 else in it?

3 MR. MORRIS: There is ground-floor retail.

4 MR. LITMAN: Yes. In the new Amsterdam  
5 building there's four retail tenants. In the building  
6 to the south of us it's all residential.

7 CHAIRPERSON GRIFFIS: When was the  
8 Amsterdam built, do you think? Or do you know?

9 MR. LITMAN: I don't know but my guess  
10 would be -- I know it was renovated within the last 20  
11 years.

12 CHAIRPERSON GRIFFIS: In your knowledge of  
13 projects and development does it look like some of  
14 that was built in the last 20 years?

15 MR. LITMAN: No.

16 CHAIRPERSON GRIFFIS: Okay. So  
17 contextually if we are talking about it, this building  
18 is 10 stories is what your testimony was? It's  
19 considerably higher than 60 feet. Is that correct?

20 MR. MORRIS: Correct.

21 CHAIRPERSON GRIFFIS: And it has retail on  
22 the first level?

23 MR. LITMAN: Yes.

24

25 CHAIRPERSON GRIFFIS: So it's comparable

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1 to the product that you're looking at putting here.  
2 Does it look like an original building in the  
3 corridor, do you think? Over 30, 40 years old?

4 MR. LITMAN: Yes, it does.

5 CHAIRPERSON GRIFFIS: I see. Okay. Any  
6 other questions?

7 MR. ETHERLY: Yes, Mr. Chair. Just  
8 briefly on the issue of the Amsterdam, how would you  
9 describe the ceiling heights on the Amsterdam retail  
10 spaces?

11 MR. LITMAN: They are between 12 and 16-  
12 feet high in the retail spaces. It is one of the new  
13 Amsterdam tenant whose lease is up in two years that  
14 is contemplating coming over. It's a convenience  
15 store. I believe their's is 16-feet high. For them  
16 to go from 16-foot to 8-foot ceiling won't work.

17 MR. ETHERLY: Considerably unworkable.  
18 It's indicated in the submittal at Exhibit No. 6,  
19 which is the February 4th submittal outlying the  
20 variance request, a number of the entities that have  
21 already either shared a -- have given you a rejection  
22 with regard to the request for retail space. Have  
23 those rejections come in the form of letters or have  
24 they been primarily verbal.

25 MR. LITMAN: Verbal. I can name some.

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1 MR. ETHERLY: It's indicated in the  
2 record, Starbuck's, 7-Eleven, Subway, Quiznos,  
3 Montgomery Donuts, H&R Block, Gambrel Kidney Dialysis  
4 Center, and a score of other users. Would you be able  
5 to, Mr. Litman, give a rough estimate or ballpark  
6 figure in terms of how many rejections you have?

7 The reason I'm asking is I just want to  
8 kind of nail down the fact. I think I'm in agreement  
9 with you that you are running into some difficulty but  
10 I just want to make sure that we are very clear in  
11 terms of establishing that. How many rejections would  
12 you say you've received?

13 MR. LITMAN: I would say we're at about 15  
14 right now.

15 MR. ETHERLY: About 15. And most of these  
16 rejections have been handled by herself personally.  
17 Correct?

18 MR. LITMAN: Yes.

19 MR. ETHERLY: Okay. It would be your  
20 testimony that one of the clear rationales or one of  
21 the clear reasons that you're hearing these rejections  
22 has been the healing site -- I'm sorry, the ceiling  
23 height. That has been specifically referenced to you?

24 MR. LITMAN: Absolutely.

25 MR. ETHERLY: Okay. Is it your testimony

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1 that were the ceiling height to be raised you would  
2 perhaps be able to resuscitate some of these current  
3 tenants -- some of these perspective tenants who  
4 currently have said no to the space?

5 MR. LITMAN: Absolutely.

6 MR. ETHERLY: Okay. Let me get a sense  
7 also that there is another subtle issue here that I  
8 wanted to kind of explore that I think also goes to  
9 the ceiling height piece. Clearly the retail piece is  
10 a big component of this but there is another aspect of  
11 the discussion that was included in the February 4th  
12 letter and that involves what you're going to be doing  
13 with some of the additional height in terms of  
14 spreading it out through the rest of the building.

15 In particular those residential units on  
16 floors two through 7. One, I want to be sure in terms  
17 of the overall design of the building it's noted on  
18 what would be page 3 of the February 4th letter, and  
19 I'm reading the second sentence of the paragraph under  
20 "Residential Challenges" that, "There is no  
21 distinction between units as to size, location,  
22 ceiling height, or building amenity."

23 No. 1, that means that with respect to  
24 your affordable dwelling units versus your market rate  
25 units there's no difference in terms of size and

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1 amenity. They are all mere images of one another.

2 MR. LITMAN: Correct.

3 MR. ETHERLY: With respect to the  
4 additional space that you would have to "play with"  
5 were your variance applications successful, that  
6 additional space would that get spread out equally  
7 among the affordable dwelling units or would it go  
8 more to the market rate units?

9 The reason I'm asking, and then I'll be  
10 quiet and let you answer because you all are chomping  
11 at the bit, but there is a discussion about because of  
12 the high percentage of affordable dwelling units you  
13 are recognizing or asserting that you may encounter  
14 challenges with respect to the sales of the market  
15 rate units so you are trying to really bulk up as much  
16 of the amenity conversation as possible with respect  
17 to this property.

18 I want to be sure I'm not reading that to  
19 mean you are going to take all that space and throw it  
20 into the market rate units as a way of just trying to  
21 make them as strong as possible for perspective  
22 purchasers or tenants.

23 MR. LITMAN: Thank you for bringing it up  
24 because I didn't want my only emphasis in height to be  
25 in the retail space. What we have found, and we are

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1 totally committed to the 50 percent affordability.  
2 What we are finding in talking to some market people,  
3 not all but there are some who say, "I can move up the  
4 street for roughly the same dollar per square foot and  
5 have 20 percent affordable."

6 The affordable, as you can imagine, as  
7 some negative connotation to it. We are addressing it  
8 you can look at these units and you would not know  
9 which are affordable and which are market. They are  
10 all going to be indistinguishable from each other.  
11 One of the arguments we want to make for adding this  
12 extra space to all the units is not just to make the  
13 market units better but to make the affordable  
14 dwelling units better for two reasons.

15 No. 1, in 20 years -- which sounds like a  
16 lifetime to some but it's the blink of an eye to  
17 others -- in 20 years these affordable dwelling units  
18 and the owners of these affordable dwelling units have  
19 all restrictions lifted and they can sell those. They  
20 can't flip them in the meantime. They can't make  
21 greater than a five percent profit per year for 20  
22 years but at the end of 20 years free and clear they  
23 all become market units so it's got that 20-year  
24 component.

25 We want all the units to be the same. We

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1 don't want somebody to say up and down units or  
2 anything else. They are indistinguishable from each  
3 other. What we're finding is that in order to entice  
4 some of the market purchasers now to buy these, we do  
5 need to give them something better than what they can  
6 buy up the street for the same dollar per square foot  
7 cost.

8           While that doesn't sound like a lot, I  
9 think it's eight inches per unit that we're adding,  
10 while it doesn't seem like a lot, it does enable us to  
11 give larger window openings. It does give a more open  
12 feeling. It does enable us to do some other, which  
13 I'll defer to the architect, architectural things that  
14 can be done in the unit to make it better. Every  
15 single unit, every single purchaser has advantages of  
16 these benefits bar none.

17           MR. ETHERLY: Any of the other panelists  
18 want to respond to that?

19           MR. MORRIS: I think Arnie said it quite  
20 well but, just to reiterate, every single unit, all  
21 affordable units, all the market units, benefit  
22 equally. Since we have 50/50 all floors benefit and  
23 we have affordable units on every single floor  
24 including the top floor of the building.

25           MR. ETHERLY: Okay. Let me come back to

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1 a question, and I apologize momentarily for using your  
2 first name, Peter, but I did not catch your last name.

3 MR. HENDERER: It's Henderer.

4 MR. ETHERLY: Henderer?

5 MR. HENDERER: Henderer, yes.

6 MR. ETHERLY: Mr. Henderer, from the  
7 standpoint of the variance test, of course, you spoke  
8 briefly to the Office of Planning's concern about the  
9 couching of the variance analysis or your argument  
10 within the terms of what you're stuck with based on  
11 your agreement with RLA.

12 I recall, and I don't have the case site  
13 in front of me, but let me start broadly. You've  
14 taken a look at some of the variance case law.  
15 Correct?

16 MR. HENDERER: Yes.

17 MR. ETHERLY: Has there been -- I'm  
18 recalling case law but I could be mixing apples and  
19 oranges here and I might invite my colleagues to help  
20 me out as well, regarding the issue of nonprofit  
21 purposes being used as part of rationale or as part of  
22 satisfying one particular prong of the variance test.  
23 It could be the Monaco case that I'm thinking of but  
24 I'm not certain about that.

25 What I'm curious about is in those

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1 particular cases I'm hazarding a guess whether or not  
2 those cases involved nonprofits that were utilizing  
3 the property itself for their own purposes. For  
4 example, in the Monaco case was it a nonprofit that  
5 was inhabiting the subject property and had very  
6 particular nonprofit purposes that went to how they  
7 were utilizing the property.

8 Here we have something a little different.  
9 Clearly we're not talking about the Nonprofit  
10 Community Development Corporation going into the  
11 property. You're not looking to utilize office space  
12 or create any kind of space in this property for  
13 yourself. It's clearly a part of your mission and  
14 it's very much a part of the agreement that you have  
15 with RLA, if not in terms clearly in terms of the  
16 spirit of the conversation.

17 Is there any way to kind of melt those  
18 two? It's a little bit of, I won't say, a softball  
19 question but it might be a little bit of a stretch but  
20 do you see any type of consistency there in terms of  
21 perhaps that thinking?

22 MR. HENDERER: To a certain extent but I  
23 would like to emphasize that it is really a  
24 combination of factors that make this the exceptional  
25 situation that it is, and that is it is the

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1 combination of the developer having the nonprofit  
2 purpose and the desire through its organizational  
3 structure to create the high quality environment that  
4 they desire create to the development combined with  
5 the development agreement through the LDA which is a  
6 set of restrictive covenants which encumbers the  
7 property which together produce the exceptional  
8 situation on the property.

9 MR. ETHERLY: And it's your sense that the  
10 LDA if we were to -- I think part of your written  
11 submission anticipated the concern that some board  
12 members might have that doesn't this open up a  
13 slippery slope if you accept as grounds for a variance  
14 a contractual kind of corner that you painted yourself  
15 into.

16 Does that open up the door to further  
17 applicants down the line saying, "Wait, I have a  
18 contract and it's saying I have to do this and, as a  
19 result, I should get a variance." Part of your  
20 response to that, I'm thinking, or I'm reading, is  
21 it's very unusual to have such a high percentage of  
22 affordable dwelling units.

23 Help me understand a little bit of that  
24 and perhaps this comes back to Mr. Litman, or even  
25 perhaps back to the nonprofit, Ms. Owens. With

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1 respect to the number of affordable dwelling units  
2 that you typically might see in terms of this type of  
3 project, what --

4 MS. OWENS: Ten to 20 percent.

5 MR. ETHERLY: Ten to 20 percent. And you  
6 are currently at?

7 MS. OWENS: Fifty.

8 MR. ETHERLY: Fifty percent. Okay. Are  
9 there any other 50 percent LDAs or developments out  
10 there that you know of presently or possibly in the  
11 pipeline even?

12 MR. LITMAN: None.

13 MR. ETHERLY: Okay. Thank you. Thank  
14 you, Mr. Chair.

15 CHAIRPERSON GRIFFIS: Thank you, Mr.  
16 Etherly. Others?

17 MS. MILLER: Just following up on that.  
18 I kind of asked this question before but separate from  
19 the LDA could the goals of the "master plan" be  
20 accomplished without seeking a variance in this case  
21 or a PUD? It would mean less affordable housing or  
22 you just couldn't do it at all or what would it result  
23 in?

24 MR. HENDERER: Well, I think the challenge  
25 is what kind of quality of life do we want to provide

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1 in the 14th Street development corridor. The question  
2 is going to be do we create something at this point in  
3 time that provides for not only higher quality of  
4 retail and commercial tenant today but also in the  
5 future, or do we simply have a lower quality tenant  
6 and we accept that sacrifice as part of the  
7 development plan. Of course, you can continue to  
8 revitalize the 14th Street redevelopment corridor.  
9 However, this would be -- it would not as strong.

10 It would not provide the same kind of  
11 quality of life that we believe that we can provide if  
12 we take this measure now. We really believe that  
13 we're at an important juncture in the opportunity to  
14 develop something here that is particularly special  
15 and particularly high quality to provide a lastly  
16 positive social impact on the neighborhood.

17 MS. MILLER: And just to clarify, it's 50  
18 percent affordable housing and this is unique within  
19 the city?

20 MR. HENDERER: Yes, it is. Most of the  
21 other LDAs out there are in the 10 to 20 percent ADU  
22 range. However, because we have a nonprofit developer  
23 here, we are not looking to make a big profit on this.  
24 The profit that any surplus revenue from this gets  
25 plowed back into the nonprofit purposes of the

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1 nonprofit most of it going into the neighborhood.  
2 That is the reason why we're at 50 percent AUDs and  
3 that's part of the unique component of the property.

4 MS. MILLER: Thank you.

5 CHAIRPERSON GRIFFIS: Anyone else?

6 MR. MANN: I have a question. Can you  
7 explain to me again why you can't or don't want to  
8 seek the PUD?

9 MR. HENDERER: The PUD process is a very  
10 thoughtful suggestion put forward by the Office of  
11 Planning but, unfortunately, we're in the construction  
12 process right now and the PUD process would take long  
13 enough, probably in the six to 12-month range, that by  
14 the time the PUD process would reach its conclusion,  
15 we would be at about the 4th floor construction and  
16 the decision would be rendered moot.

17 MR. MANN: So you anticipate seeking  
18 relief from BZA is the quicker way to go? That's the  
19 reason for doing this?

20 MR. LITMAN: It's not just quicker but  
21 because of the predicament we're in where we are  
22 already under construction, it truly is the only  
23 relief that we can seek. It's not expeditious. It's  
24 the only avenue that we have at this point in time.

25

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1 CHAIRPERSON GRIFFIS: Your point is if you  
2 went through the PUD the time it takes to get all that  
3 set down to the hearing, when you say it would be  
4 moot, the point is the first level would be built so  
5 even if they granted you a 100-foot variance to the  
6 building, it wouldn't change the first floor because  
7 it's done. You don't have the time to pursue relief.

8 MR. LITMAN: Correct.

9 CHAIRPERSON GRIFFIS: Anything else? It's  
10 a difficult situation. I want to just see if I'm  
11 clear. You keep throwing around this socially and, in  
12 fact, in the written submission you also say  
13 politically and economically important fascinating  
14 descriptions of development scenarios. Obviously it's  
15 part of the uniqueness that's here.

16 Let's explore a little bit more of the  
17 retail and in terms of the height it's socially and I  
18 think what you're touching upon in a lot of sense and  
19 throwing around some of the importance of 14th Street.  
20 Aren't you talking about animating the area around it  
21 to the impact that this building brings to the  
22 neighborhood itself? That goes to what kind of  
23 retailers you have, what kind of utilization, what  
24 kind of activities on the sidewalk. Those are  
25 important aspects. Am I correct?

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1 MR. HENDERER: Absolutely. The nonprofit  
2 recognizes that the commercial space fronting on both  
3 14th Street and Girard is the way that the building  
4 interacts with the public on the sidewalk. It is the  
5 public's interface with the building so it's very  
6 important to have high quality retail in those spaces  
7 and high quality commercial tenants because that's  
8 what shapes the neighborhood. That's what shapes the  
9 foot traffic. That's what help form the character of  
10 the neighborhood for many, many years to come.

11 CHAIRPERSON GRIFFIS: That's what is so  
12 important about the quality or type or flexibility of  
13 the retail tenants that you can accommodate in this  
14 trial.

15 MR. HENDERER: Absolutely.

16 CHAIRPERSON GRIFFIS: I see. Okay.

17 Mr. Etherly.

18 MR. ETHERLY: Thank you, Mr. Chair. Let  
19 me come back again real quickly to the LDA and just  
20 ensure that I understand this particular process.  
21 When the Nonprofit Community -- I'll say Nonprofit CDC  
22 just for shorthand purposes. When you came to this  
23 project was there -- how was this parcel made  
24 available? It was in the hands of RLA, correct?

25 MS. OWENS: What was it called then?

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1 MR. LITMAN: Yes. The RLARC and CRC had  
2 issued an RFP. It was open for any developer to  
3 submit. There was a public hearing. I believe they  
4 called it a serrate. Many developers came up and  
5 presented their ideas.

6 MR. ETHERLY: Okay.

7 MR. LITMAN: And we were just one of many  
8 who presented our ideas but we were the only one that  
9 has such a high component of affordable dwelling  
10 units.

11 MR. ETHERLY: Okay. And all of the  
12 conditions that you've referenced, some specifically,  
13 some very broadly, all of the restrictive covenants,  
14 all of the requirements that attach to the partial  
15 were part of the RLA's or NCRC's RP, if you will. All  
16 of that was included as part of the -- the logical end  
17 of my question is if there were different developers  
18 sitting at this table they would be dealing with the  
19 same requirements as well?

20 MR. LITMAN: No. The RFP was such that  
21 they said, "We are looking for some affordability  
22 component."

23 MR. ETHERLY: Okay.

24 MR. LITMAN: And we are the ones that  
25 ultimately negotiated the 50 percent affordability

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1 component with the NCRC.

2 MR. ETHERLY: Okay.

3 MR. LITMAN: We believe -- well, let's put  
4 all the cards on the table. This was not the  
5 strongest developer bidding for this parcel. I  
6 absolutely believe that one of the reasons -- not one  
7 of but the reason that this weaker development, and  
8 I'm talking economically, this weaker developer was  
9 granted this award was because of this higher  
10 component of affordable dwelling units and the  
11 commitment they had shown in the past to not just say  
12 it but to live up to it.

13 MR. ETHERLY: So while it might not be  
14 correct to say that the 50 percent affordable dwelling  
15 unit or affordable housing requirement was part of the  
16 requirement, RLA's or NCRC's RP wanted affordable  
17 housing as part of a proposal.

18 MR. LITMAN: Yes.

19 MR. ETHERLY: Wanted a mixed development,  
20 so to speak, in terms of affordable and market rate  
21 and wanted a retail component.

22 MR. LITMAN: Correct. And wanted some  
23 ability to bring in neighborhood retail. They didn't  
24 just want chains but they wanted somebody from the  
25 neighborhood who either had an established business

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1 and needed to be relocated because some of the other  
2 buildings were being torn down or leases were up and  
3 looking for a better establishment. Somebody from the  
4 neighborhood.

5 MR. ETHERLY: So let me turn back to --

6 MR. LITMAN: As well as childcare center.  
7 That was very definitely one of the require -- well,  
8 yes, requirements that they wanted in the development.

9 MR. ETHERLY: Okay. Let me then turn back  
10 to counsel. Have you come across in your assessment  
11 or your survey of variance case law, have you come  
12 across instances where, as you've said, restrictive  
13 covenants or other such conditions like this have been  
14 used as grounds for satisfaction of that first prong?

15 In particular, I'm getting at the issue of  
16 would you agree or disagree that typically that first  
17 prong speaks to a physical condition of the property  
18 or would this type of condition satisfy that first  
19 prong?

20 MR. HENDERER: Well, the first prong is  
21 fairly broad and you're right. In the broader sense  
22 it does talk about exceptional narrowness,  
23 shallowness, shape of a specific piece of property at  
24 the time of the original adoption of the regulations,  
25 or by reason of exceptional topographic conditions.

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1                   But it continues to say, "Or other  
2 extraordinary or exceptional situation or condition."  
3 We think this is one of those other extraordinary or  
4 exceptional situations or conditions. While the other  
5 criteria there described physical attributes of the  
6 lot, we believe that this is one of those other  
7 extraordinary or exceptional situations or conditions.

8                   MR. ETHERLY: Okay. But you would not be  
9 in a position to say that you have come across case  
10 law that necessarily explores that last half of it?

11                   MR. HENDERER: No, I have not.

12                   MR. ETHERLY: Understood. Understood.  
13 Thank you, Mr. Chair.

14                   CHAIRPERSON GRIFFIS: This might be a good  
15 seque then to Ms. Miller. Ms. Miller.

16                   MS. MILLER: I wonder if you could  
17 elaborate a little bit further on the restrictive  
18 covenants that are binding the property.

19                   MR. HENDERER: The restrictive covenants  
20 are embodied in the LDA. I believe we have copies of  
21 that. Don't we?

22                   CHAIRPERSON GRIFFIS: We have the LDA.

23                   MS. MILLER: We did get that this morning.  
24 Maybe you can tell us where it is or touch upon  
25 what --

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1 MR. HENDERER: The entire LDA is of record  
2 and forms the entire body of it is a set of  
3 restrictions on the property. It governs what can be  
4 developed on the property including the 50 percent  
5 ADUs, including the childcare center. It governs --

6 MS. MILLER: Okay. I didn't know if there  
7 was separate from the LDA. So you're saying the LDA  
8 contains all these restrictions which are covenants.

9 MR. HENDERER: Yes. Everything in the LDA  
10 is of record and it imposes requirements upon the  
11 developer in terms of how the property is developed  
12 and what is to be developed and what the developer may  
13 take out of the property which is limited. There is  
14 a limited profit but, of course, a lot of that has to  
15 be put back into the property.

16 CHAIRPERSON GRIFFIS: Good.

17 MS. MILLER: Okay. If you could just  
18 explain one thing then. How is this -- you  
19 characterize it as LDA is a set of restricted  
20 covenants. How is that different from a sales  
21 contract or a regular agreement?

22 MR. HENDERER: Well, a sales contract  
23 obviously isn't of record. The LDA is of record and  
24 forms an encumbrance on the property. An ordinary  
25 sales contract or other unrecorded document is not an

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1 encumbrance on the property because it's not of record  
2 in the land records.

3 This is a component of the property. Any  
4 successor owner and title would obviously be subject  
5 to this encumbrance on the land and encumbrance on the  
6 fee ownership of the land. It does form a component  
7 part of the character of the land because it is of  
8 record.

9 MS. MILLER: Thank you. That answers my  
10 question. If you want to add something, go right  
11 ahead.

12 MR. LITMAN: If it answers your questions,  
13 I'll remain silent.

14 MS. MILLER: Okay. Thank you.

15 CHAIRPERSON GRIFFIS: Weren't you going to  
16 go to the court citation that also spoke to  
17 restrictive covenants or other elements of the  
18 nonprofit?

19 MS. MILLER: I'll be happy to reference  
20 it.

21 Are you familiar with the case of Monaco  
22 versus. D.C. Board of Zoning Adjustment, 1979 Court of  
23 Appeals case?

24 MR. HENDERER: Not entirely, no.

25 MS. MILLER: It is a case that involves a

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1 nonprofit and it also involves covenants. It  
2 addresses how these factors are different and allows  
3 more flexibility for the Board in considering a  
4 variance. Covenants do add to the uniqueness  
5 analysis.

6 CHAIRPERSON GRIFFIS: Good. Mr. Etherly  
7 and Ms. Miller are talking about the same court case  
8 which is often cited for this Board. Monaco is a very  
9 important case in establishing numerous things of  
10 which now govern how we process variances.  
11 Specifically looking at that was the nonprofit and the  
12 courts found that nonprofits in that particular case,  
13 and the Board has evolved in looking at it in an  
14 expanded form.

15 As Ms. Miller has just briefly touched on  
16 is the fact of the lessening burden or the lessening  
17 threshold of establishing uniqueness based on the  
18 performance or the product of which the nonprofits do.  
19 Mr. Etherly is absolutely correct that most  
20 applications of this or utilizations of this court  
21 case go to the expansion, the physical expansion of a  
22 nonprofit in a certain building.

23 They are expanding their own programs and,  
24 therefore, are having a hard time and need to expand  
25 the building that they are in and the uniqueness may

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1 not absolutely be there. This is another form or  
2 iteration not totally unheard before but one that I  
3 think may fit, at least, our understanding of the  
4 utilization of Monaco.

5 MS. MILLER: I would also add that this  
6 case, as well as some other court of appeals cases, do  
7 say that when we're considering the uniqueness of the  
8 property that we can indeed consider conditions and  
9 situations that affect the property, not just the  
10 topography of the property.

11 CHAIRPERSON GRIFFIS: Okay. Exceptional  
12 situations. Very well. Anything further for the  
13 applicant? Any questions? Why don't we move ahead  
14 then and get through the other aspects of the case  
15 presentation. We obviously will return to the  
16 applicant for any other closing unless they have  
17 anything further they want to present at this time.

18 MR. HENDERER: I think we are complete.

19 CHAIRPERSON GRIFFIS: Good. Let's move  
20 ahead then. Let's go to the Office of Planning who is  
21 with us, Mr. Parker.

22 MR. PARKER: Good morning, Chairman  
23 Griffis, members of the Board. I'm Travis Parker with  
24 the Office of Planning. The project that's in front  
25 of you right now, the building that is proposed as a

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1 variance, is a wonderful project on the corridor. It  
2 has an excellent retail component as proposed, unheard  
3 of ratio of affordable housing that is very desirable.

4 While there is no specific plan for the  
5 14th Street corridor that the Office of Planning has,  
6 it is part of a housing priority area. This is a  
7 project that has a lot of amenities that the city  
8 would like to see. It also proposes a density that is  
9 larger than what is allowed in the zoning district.  
10 The combination of those two is exactly what a PUD  
11 process was designed to accomplish. There is nothing  
12 unique about the property itself that allows for  
13 additional height.

14 The NCPC when they put out the request for  
15 proposals for this site had an excellent agenda in  
16 asking for a high level of affordable housing and  
17 asking for ground floor retail and getting this exact  
18 project. The project that was designed and LDA that  
19 was signed was exactly what the city and NCPC would  
20 like to see.

21 CHAIRPERSON GRIFFIS: NCRC.

22 MR. PARKER: NCRC. Excuse me. I'm sorry.  
23 Unfortunately, NCRC does not have the authority to  
24 require the BZA to approve variances on a property.  
25 this project is one that should be going through the

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1 PUD process as a review of its amenities in exchange  
2 for increased density.

3 It's inconceivable that when this project  
4 was designed the amount of experience in the design  
5 team and architecture and commercial real estate and  
6 residential real estate did not know that a seven-  
7 story building in a six-story district would have to  
8 be designed in a substandard way, that eight-foot  
9 retail and eight-foot residential were substandard and  
10 very difficult to lease.

11 In fact, members of OP met with the  
12 nonprofit last year well before this was designed and  
13 this was submitted and when the project was in the  
14 design phase to discuss ways to get extra height.  
15 This is a situation where the applicant has chosen to  
16 design a substandard building, submit building permit  
17 requests for a substandard building and start  
18 construction and come before the Board of Zoning  
19 Appeals when it's too late to go through the PUD  
20 process.

21 While it is now difficult to go through  
22 that PUD process, it's important to find other ways to  
23 accomplish what we would all like to see in this  
24 building. We would all like to see this retail and we  
25 would all like to see it at 12 feet. We would like to

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1 see good uses in there. OP would like to come up with  
2 ways to do that but we cannot recommend a variance in  
3 order that we circumvent a PUD process.

4 I'll go through the individual variance  
5 tests. Clearly any LDA, any sales contract in and of  
6 itself is not a hardship or is not a unique situation.  
7 If for-profit developers were developing 50 percent  
8 ADUs, they would be able to make the same arguments.  
9 Simply because we have a nonprofit status there should  
10 absolutely be some leeway design. However, it's what  
11 results from the project.

12 Nonprofits do provide great projects like  
13 this one that provide large amounts of affordable  
14 housing. Regular developers don't do that. Or, if  
15 they do, they get credit for it through the PUD  
16 process. This is the same sort of situation that  
17 should result when a nonprofit comes before us. OP  
18 does not support circumventing this process by coming  
19 to the Board to expediently and more inexpensively  
20 approve what should be a PUD.

21 CHAIRPERSON GRIFFIS: Thank you very much.  
22 We appreciate the directness of your report.

23 Ms. Miller, questions?

24 MS. MILLER: I have a few questions. What  
25 is the public policy behind a project like this going

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1 through the PUD process instead of the variance  
2 process?

3 CHAIRPERSON GRIFFIS: Public policy.

4 MS. MILLER: Well, what is it that makes  
5 that important?

6 MR. PARKER: The PUD process is designed  
7 to take into account amenities that a project like  
8 this one provides to the community at large.  
9 Wonderful retail space. A large, large percentage of  
10 affordable housing and grant extra density. In this  
11 case an extra floor, a 7th floor in a six-story  
12 district.

13 Whereas a variance procedure, as everyone  
14 here well knows, is designed to take into account  
15 negative things about the property, reasons why it  
16 can't be done in an acceptable way. The fact that  
17 there is already a building permit issued on this lot  
18 and that the building is under construction defeats  
19 that purpose and shows that the project can be done on  
20 the lot as it exist today.

21 MS. MILLER: We've had cases before where  
22 they could have gone either route. I'm not sure if  
23 you are aware of it. One of the ones I'm thinking of  
24 is the Fort Lincoln case which is theoretical lots.  
25 Office of Planning, I think, advised the applicant

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1 that they ought to go the PUD route and they instead  
2 chose the variance route. Office of Planning, in my  
3 recollection, ended up supporting that, I gather,  
4 because -- I don't know, because there was no adverse  
5 impact by doing that or it wasn't contrary to public  
6 interest.

7 MR. PARKER: I would assume that there  
8 were unique situation to the property and that there  
9 was a practical difficulty to doing it as a matter of  
10 right. Whereas, in this situation the building is  
11 under construction as a matter of right and could be  
12 built as a matter of right.

13 Now, clearly, we are willing to find ways  
14 to make this project happen. I think sinking the  
15 first floor while it doesn't create the most optimum  
16 retail space would allow 12-foot ceilings. No request  
17 has been made to just grant a three or four-foot  
18 variance for the ceiling heights in the retail.  
19 Instead it's a 10-foot story to apply to the whole  
20 building.

21 The residential would still be viable at  
22 its current heights and perhaps some compromise could  
23 be made but we don't support the entire project going  
24 through as it is as it should have been done in a  
25 planned-unit development. I think there are

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1 compromises that can be made to find what is best for  
2 everyone here.

3 MS. MILLER: Is there some regulation or  
4 statute that precludes going for a variance where the  
5 applicant might also go for a PUD?

6 MR. PARKER: You can always apply for  
7 either one but what I'm saying is they are different  
8 standards. There's a positive standard to a PUD where  
9 you are applying for extra density in exchange for  
10 wonderful amenities like this project contains.

11 MS. MILLER: It just sounds to me like if  
12 they can apply to either one and they apply for a  
13 variance and they meet the variance test --

14 MR. PARKER: What I'm saying is this  
15 doesn't meet the variance test.

16 MS. MILLER: You're saying it doesn't meet  
17 the variance test.

18 MR. PARKER: Clearly not.

19 MS. MILLER: Not just because it could go  
20 for a PUD?

21 MR. PARKER: No. It should go for a PUD  
22 because it can meet the PUD standards and clearly  
23 does. It clearly does not meet the variance  
24 standards.

25 CHAIRPERSON GRIFFIS: Let me make

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1 absolutely clear Mr. Parker I don't hear him stating,  
2 and correct me, that because they could have gone for  
3 a PUD then you can't grant them a variance but rather  
4 looking at the analysis of a variance, you don't  
5 believe that they make that test. And on all the  
6 elements they are trying to make the test of the  
7 variance it fits appropriately within a PUD review and  
8 approval.

9 MR. PARKER: That is correct.

10 CHAIRPERSON GRIFFIS: And a PUD is a  
11 vehicle which looks at the entire zoning of that area.  
12 It looks at the adjacent zoning and kind of throws it  
13 all into a mix to do something unique and it is to be  
14 a higher quality of urban design and architectural  
15 design and provide amenities to the area.

16 With the balance of providing amenities  
17 there is kind of a melting of the massing of a  
18 building so you may have a little bit extra lot  
19 occupancy or little extra height that is accommodated  
20 in order to effect an amenities package. Okay.

21 MS. MILLER: Okay.

22 CHAIRPERSON GRIFFIS: But there is nothing  
23 requiring one to go for one or the other.

24 MS. MILLER: Okay. Well, I'm glad we had  
25 that --

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1

MR. PARKER: Different standards.

2

3

MS. MILLER: So while we are discussing the variance then, I think that one of your points that you consider the LDA a sales agreement and they have characterized it as a set of covenants which encumber the property.

4

5

6

7

8

MR. PARKER: Self-imposed covenants. They weren't on the property before the sales contract was signed.

10

11

MS. MILLER: Okay. So would you say that is a self-imposed hardship?

12

13

MR. PARKER: Indeed.

14

MS. MILLER: Are you familiar with the Monaco case?

15

16

MR. PARKER: I'm not.

17

MS. MILLER: Okay. Well, I think we might have mentioned it to you before in the context of standards for variance being more flexible with nonprofits because of their mission. It also makes reference to covenants being an exceptional condition on the property.

19

20

21

22

23

CHAIRPERSON GRIFFIS: Aren't those historic restrictive covenants in Monaco?

24

25

MS. MILLER: Well, that may be a

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1 distinction which Mr. Parker is making that is self-  
2 imposed.

3 MR. PARKER: I think that is a  
4 distinction. I think that also there still needs to  
5 be a basic address -- a basic meeting of the test that  
6 I don't believe even for a lower standard applies to  
7 this case. I think there clearly is no physical  
8 characteristic involved and a sales contract in and of  
9 itself does not apply even to a lower standard for an  
10 exceptional situation.

11 CHAIRPERSON GRIFFIS: It's an interesting  
12 point. Mr. Parker, I think, is very persuasive and  
13 this whole thing is appropriately brought by the  
14 Office of Planning. I'm glad we have it. Let's look  
15 at the past proceedings of the Board in other  
16 applications.

17 Ms. Miller, you brought up Fort Lincoln  
18 and it was also stated, and I believe that was also an  
19 NCRC award. Look at the impact and what we are trying  
20 to do here and we've got all this commercial going  
21 here and we have all this residential. The point we  
22 were pushing them to do a PUD is what do they have,  
23 like 50 variances on the property? In all reality it  
24 was six or seven or maybe nine.

25 When you start adding up all those

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1 variances you kind of wonder why aren't they going  
2 through a whole review process and a PUD standard. It  
3 seems to me, I don't think any other Board members sat  
4 on it, but the incinerator site in Georgetown which we  
5 had actually an FAR variance for.

6 It was the same issue as they were built,  
7 or at least starting to be built and it was an award  
8 through a Government agency, I believe. DACD was  
9 involved and maybe the RLA. Here was an issue of  
10 tenants that had fallen out economically and it was  
11 falling apart.

12 In order to fulfill the obligation with  
13 the city award of this and to fulfill the development,  
14 there was a variance brought. I think we have proof  
15 shown and we denied a lot so it is, I think, an  
16 important deliberation and information for the Board  
17 to look at this.

18 MS. MILLER: I have one other question for  
19 Mr. Parker. You don't find it a unique situation with  
20 respect to this property that a nonprofit organization  
21 is trying to accomplish a goal of the city of  
22 providing affordable housing to a unique extent 50  
23 percent and do it in a way that also combines good  
24 retail for the area in accordance with the city's  
25 goals as well?

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1 MR. PARKER: I think what you're getting  
2 into is trading amenities for density. What you're  
3 talking about is exactly what the Zoning Commission  
4 looks at.

5 MS. MILLER: I understand that but we were  
6 saying the Zoning Commission can look at the same  
7 thing in a different context. Looking at it in the  
8 variance context in which we're looking at it, it  
9 seems unique to me at this point.

10 MR. PARKER: I think the unique or special  
11 situation that the Board of Zoning Appeals looks at is  
12 what exist before the project happens. What the  
13 Zoning Commission looks at is what is going to exist  
14 after the project happens. Is that a good way to look  
15 at it?

16 MS. MILLER: It doesn't answer it to me.

17 MR. PARKER: Okay.

18 MS. MILLER: I just wonder why if this  
19 isn't unique, I can't imagine the same thing  
20 happening --

21 MR. PARKER: That when we come for  
22 variances we're looking at existing unique situations,  
23 not what the end product is going to be. A variance  
24 should address a unique situation that exist now that  
25 prevents something from happening as it should.

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1       Whereas this is something that we want to happen and  
2       we want to change our standards to allow to happen.  
3       I guess that's the way that OP would look at it.

4                   MR. MANN:  You said that as far as OP was  
5       concerned there were potential compromises that could  
6       have been made?

7                   MR. PARKER:  And still could.  I think  
8       this building could be designed to allow a 12-foot  
9       retail height either by sinking the first floor, which  
10      does lower the quality of the retail but it would  
11      allow different uses.  If the Board is leaning towards  
12      approval, I would suggest an approval for just the  
13      commercial rather than the full 10-foot and allowing  
14      for a complete extra story.

15                  MR. MANN:  And with that compromise then  
16      that would still require some variance.  Would it not?

17                  MR. PARKER:  Absolutely.

18                  MR. MANN:  Okay.  But just not the full  
19      variance.

20                  MR. PARKER:  Not a 10-foot variance.

21                  MR. MANN:  I see.

22                  MS. MILLER:  And why is that?  I'm sorry  
23      to interrupt you.  I just want to make sure we  
24      understand that.  Why are you recommending that?

25                  MR. PARKER:  Well, it seems that although

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1 arguments that have been made by the applicant in  
2 terms of practical difficulty have been for the type  
3 of retail that will come in and the residential has  
4 been addressed to a lesser degree.

5 MR. MANN: Did OP discuss these proposals  
6 with the applicant?

7 MR. PARKER: Yes.

8 MR. MANN: So maybe the --

9 MR. PARKER: I think the applicant can  
10 make a -- yeah. Absolutely. Well, I apologize. We  
11 may not have discussed a compromise in the amount  
12 granted. We did discuss lowering the ground floor.

13 MR. MANN: But those are the two that --

14 MR. PARKER: Absolutely.

15 MR. MANN: Okay. Thank you.

16 CHAIRPERSON GRIFFIS: Anything else?  
17 Anything else from the Board?

18 MS. MILLER: Just one follow-up. It  
19 sounds like your suggestions would decrease the  
20 quality of the building or the quality of life for the  
21 tenants or whatever. I'm wondering why would you  
22 recommend that?

23 MR. PARKER: We are trying to maintain the  
24 integrity of the zoning regulations.

25 MS. MILLER: Because of the height? How

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1 high it is is impacting the zoning?

2

3 MR. PARKER: We would like to see this  
4 building built as it's proposed and if the Board  
5 chooses to do that, we will accept that. We don't  
6 support the precedent that is created and the  
7 situation that exist and do not feel this is the  
8 appropriate arena for this application.

9 CHAIRPERSON GRIFFIS: Anything else?  
10 Cross examination of the Office of Planning?

11 MR. HENDERER: We have no cross  
12 examination but we would like to offer a few points to  
13 address some of the points raised by the Office of  
14 Planning.

15 CHAIRPERSON GRIFFIS: Good. We'll take it  
16 up at conclusions. If there is no cross of the Office  
17 of Planning, then, Mr. Parker, thank you very much,  
18 unless the ANC has any cross of the OP. None. Very  
19 well. Let's move ahead then to other Government  
20 reports or agencies that are addressed in the  
21 application. I don't have any other notes except ANC-  
22 1B which is Exhibit No. 23 so let's move ahead to the  
23 ANC presentation at this time.

24 MR. SPALDING: Phil Spalding representing  
25 ANC-1B. I live at 1929 13th Street. I think the

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1 applicants have done a remarkable job this morning of  
2 explaining their situation and the building and their  
3 reason for coming before you. We'll stand on the  
4 letter that we have submitted to you. If you have any  
5 questions, I would be glad to answer them.

6 CHAIRPERSON GRIFFIS: Good. Thank you  
7 very much. Any other Board members have any questions  
8 of Mr. Spalding? Does the applicant have any cross  
9 examination of the ANC? Any cross?

10 MR. HENDERER: No.

11 CHAIRPERSON GRIFFIS: Let me ask you then  
12 in this hearing can you recount any of the kind of  
13 testimony or reaction to this as they discuss the  
14 building?

15 MR. SPALDING: On the part of the  
16 commission?

17 CHAIRPERSON GRIFFIS: Yeah.

18 MR. SPALDING: The commissioners were very  
19 strongly supportive of this building and this specific  
20 design. They were very resident with the problem of  
21 the height of the commercial space. In our  
22 neighborhood, which you're familiar with, Chairman  
23 Griffis, we have a mixture of older buildings and  
24 newer buildings and we have a mixture of older shorter  
25 retail spaces and a lot of contemporary taller retail

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1 spaces. We have a mixture of businesses.

2           Unfortunately, in a lot of the spaces we  
3 do have shorter retail spaces and they have collected  
4 retail tenants that have not been an amenity to the  
5 community. Specifically increasing the space, the  
6 height, in this commercial part of the building would,  
7 indeed, we believe attract the kind of retail client  
8 that can help serve and develop the community.

9           The commission was also very resonant with  
10 the difficulty of doing so at the expense of losing  
11 any of the affordable housing component. Affordable  
12 housing is just a touch zone to each and every member  
13 of our commission. We are in a part of the city that  
14 is developing very quickly.

15           We are doing everything we can to  
16 accommodate transit oriented development, higher  
17 density, anything that we can do. In doing so we are  
18 constantly looking for any opportunity to maintain and  
19 also increase the supply of affordable housing. The  
20 idea of increasing the commercial space at the cost of  
21 the affordable housing did not sit well with the  
22 commission. They want both.

23           CHAIRPERSON GRIFFIS: Thank you. Anything  
24 else? Any other questions? Good. Thank you very  
25 much again. We appreciate it. I think that is very

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1 informative.

2 Okay. Let's move ahead then. Let me ask  
3 if there is here present today persons to provide  
4 testimony in Application 17302, persons in support of  
5 the application? Persons in opposition to the  
6 application? No further testimony then. Very well.  
7 Let's turn it over to you for any closing or  
8 summations.

9 MR. LITMAN: It's going to come at you in  
10 two parts if it's okay. In some of the questions that  
11 have been raised by Office of Planning and Development  
12 there's a couple of things that need to be brought up.  
13 No. 1, you were informed about a meeting that took  
14 place before.

15 One of the members of the not-for-profit  
16 had met with OPD in regard to some transferable  
17 development rights from the studio theater to add two  
18 stories to the building. It had nothing to do with  
19 the additional retail space. It had nothing to do  
20 with making any of the units any larger. It was  
21 specifically in the TDR in regarding to adding two  
22 floors to the building.

23 CHAIRPERSON GRIFFIS: Is this a receiver  
24 zone?

25 MR. LITMAN: Pardon?

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1 CHAIRPERSON GRIFFIS: Is this --

2 MR. LITMAN: We did not.

3 CHAIRPERSON GRIFFIS: But is this a  
4 receiver zone? Could you use TDRs on this project?

5 MR. LITMAN: Well, no is the short answer.

6 CHAIRPERSON GRIFFIS: Good, because I  
7 don't like long answers.

8 MR. LITMAN: No is the only answer. There  
9 was a long process that was involved and we had time  
10 frames that we had to live up to with NCRC or we would  
11 be in violation of our LDA at that point in time.  
12 That meeting took place but it was strictly to add two  
13 floors to the building and the determination was made  
14 it could not be done timely and perhaps not even  
15 overtime. That's No. 1.

16 No. 2 is we did discuss with OPD the  
17 option of going down to add retail space. From a  
18 retail standpoint we object to that because it's just  
19 not a good environment when you are walking downstairs  
20 to enter an establishment. It's obviously the safety  
21 and all that. There is a loss of integrity when you  
22 are going down a space to enter into it for retail.

23 But more importantly is the fact that our  
24 building is adjacent to metro. We had to have  
25 meetings with metro and get some special exceptions

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1 and understandings with metro in order to build the  
2 building as deep as we are building it because we are  
3 going three stories down, two levels of parking, and  
4 one for below-grade office space.

5 To add any additional space there is a  
6 term it's an area of influence. To go down any deeper  
7 would cause metro major concerns so that was just  
8 ruled out from the beginning and I thank the architect  
9 for bringing that to my attention because I had  
10 forgotten that when they meet with OPD and we did talk  
11 about that.

12 The only last thing I'm going to add is  
13 OPD had mentioned that we are trying to add 10 feet to  
14 the building. That's incorrect. We are only trying  
15 to add eight feet to the building. All the other  
16 comments I'm going to let Peter Henderer close with.

17 CHAIRPERSON GRIFFIS: What's your current  
18 floor-to-floor design on the residential?

19 MR. MORRIS: The current design is 8'9"  
20 floor to floor.

21 CHAIRPERSON GRIFFIS: And that would give  
22 you a clear ceiling height of what on the interior?

23 MR. MORRIS: 8'0".

24 CHAIRPERSON GRIFFIS: So you have 8 feet.  
25 Now you are proposing to 9'5" and 10'9" on the top

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1 floor so 9'5" which gives you a ceiling height of  
2 what?

3 MR. WARREN: 8'9".

4 CHAIRPERSON GRIFFIS: Okay. Let's go  
5 ahead.

6 MR. WARREN: I'm sorry, Mr. Chairman.  
7 That is 8'8". Quick math.

8 CHAIRPERSON GRIFFIS: Okay. And that is  
9 when you were testifying to the fact of adding eight  
10 inches to every unit and it doesn't matter what it  
11 was, the 20, 30, 80 market, everyone gets it.

12 MR. WARREN: Correct.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. HENDERER: Thank you. That's very  
15 helpful. I would also like to note that the  
16 characterization of the LDA is merely a sales  
17 contract. It's not entirely accurate. It is a set of  
18 covenants. It's a full-land development agreement.  
19 That's what LDA means. It is a commitment to develop  
20 a particular piece of property in a particular manner.

21 When the RLA sells a property they do  
22 enter into a land development agreement with the  
23 developer although some of the terms of that are  
24 negotiated certainly. Certainly there are components  
25 of that which are standard. While some of that is

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1 negotiated, some of that is not. Obviously we did  
2 negotiate for 50 percent ADU. That is a very  
3 important component towards winning that project. I  
4 have been passed a note here to describe some  
5 comparable projects.

6 Tivoli Square at 40 units is 20 percent  
7 ADU. Keynon Square at 153 units is 20 percent ADU.  
8 Highland Park with 250 units is 20 percent ADU.  
9 Barcelona at 33 units is 20 percent ADU. Verona at 30  
10 units is 20 percent ADU. Heights of Columbia, our  
11 project, is 50 percent ADU so we are dramatically over  
12 the other comparable projects which really adds to the  
13 uniqueness of the property.

14 So just to summarize, I believe we do meet  
15 the criteria for a variance. We do have an  
16 exceptional situation or condition in the combination  
17 of the restricted covenants of the LDA combined with  
18 the nonprofit purpose. We have the exceptional  
19 situation of condition which creates a practical  
20 hardship by impairing the ability to provide the  
21 highest quality of life through the development,  
22 through the selection of tenants.

23 The proposed additional height would not  
24 have an adverse on the neighborhood and the proposed  
25 additional height is not inconsistent with the zoning

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1 plan. We respectfully appreciate the Board of Zoning  
2 Adjustment's consideration this morning and thank you  
3 for your time.

4 CHAIRPERSON GRIFFIS: Good. Thank you  
5 very much. Let me just clarify what I think the Board  
6 should be looking at and I believe the Board's  
7 understanding of this LDA is. First of all, the LDA  
8 is essentially the contract of purchase. As the  
9 Office of Planning stands, it is very understandable  
10 to me and they are saying, "Well, look. Okay, so you  
11 all got together and you decided what to do. Why is  
12 that a practical difficulty? You all created it."

13 Not their words but I'm trying to be very  
14 extreme in understanding this. From the Board  
15 perspective this is not a market purchase so it's not  
16 as if Wiker put this on and you guys responded and  
17 were the highest bidder and now you are saying, "But,  
18 look, we paid too much for this project. We've got to  
19 do all these things."

20 There's a unique program that was part of  
21 the award of this and that's what the LDA is  
22 memorializing. That aspect of all these pieces of the  
23 design, the urban design, the social impact, the mix  
24 of unit types and affordability, and also providing in  
25 the retail.

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1 I think that's what the Board has to take  
2 under consideration whether that raises to the level  
3 of practical difficulty and also whether it obviously  
4 goes to the uniqueness or the special circumstance.  
5 Out of that, is it appropriate for us to award a  
6 variance. Obviously we can go into the public good.

7 Then the critical aspect I hear Office of  
8 Planning putting forth is, my gosh, the zone plan.  
9 We've got to look at the zoning regulations. We've  
10 got a height restriction here. How can you do away  
11 with that when, in fact, it would be of bad  
12 precedential value.

13 What is to stop someone else and that is  
14 really the way we look at this and what we are having  
15 to deliberate on is what we have to look at is if we  
16 were to approve this, could the person across the  
17 street come in and say, "You have to give us this  
18 height because you gave the variance to them." I  
19 mean, the basis of which we could not deny somebody  
20 else because they have the same circumstance.

21 That's why we always start with uniqueness  
22 and then build upon it. I think it's all out for us  
23 here and the question now is to the Board whether we  
24 are ready to proceed today, whether we need additional  
25 information, or whether we need additional time to

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1 deliberate.

2 Before I get a response to that, quickly  
3 we have spoken of could you not change the dimension.  
4 Could you not go for the eight foot. Again, we are  
5 not a PUD process. We are not going to design it with  
6 you here. You came in for 8 feet and it's 8 feet up  
7 or down unless you wanted to amend your application  
8 right now and I haven't heard that come from the  
9 applicant.

10 I think if we wanted to have different  
11 varieties of heights looked at, then we could ask for  
12 more time and have that put into the record. I think  
13 it's pretty clear what we are looking at. I'm  
14 prepared to go however the Board would like to proceed  
15 today.

16 Mr. Etherly, you have a comment?

17 MR. ETHERLY: Thank you very much, Mr.  
18 Chair. Just a comment in response to inquiry. I  
19 would also be very comfortable in moving forward  
20 today. I want to be very clear with respect to the  
21 appreciation I have for the Office of Planning's  
22 analysis of this particular application. I don't take  
23 the Office of Planning's analysis in a negative way.

24 I take it very simply as perhaps  
25 highlighting that there is a better or clearer process

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1 for this particular application which may, in essence,  
2 be true but I don't necessarily think it's completely  
3 determinative of our ability to move forward today.  
4 I'm prepared to move forward today, Mr. Chair.

5 CHAIRPERSON GRIFFIS: Good.

6 MR. ETHERLY: I simply wanted to once  
7 again note that I do appreciate the Office of  
8 Planning's report and Mr. Parker is sticking by his  
9 guns.

10 CHAIRPERSON GRIFFIS: Indeed. It's an  
11 excellent analysis as we have come to expect. Let me  
12 digress for two seconds. I wanted to note on the  
13 public record Exhibit No. 22 which was another filing  
14 that was from SoCo Heights, the neighborhood  
15 association within which this property is actually  
16 located.

17 It's one of the associations that is  
18 expressing their support of the request. It is signed  
19 by Mr. Ventura, the president. I know we have all  
20 reviewed that. Okay. What else? Let me hear from  
21 others. Proceed today? Are we ready to roll?

22 MS. MILLER: I'm ready.

23 MR. MANN: I'm really on the fence about  
24 this. If we want to proceed today, then I'm certainly  
25 going to make a decision today but I'm less certain,

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1 I think, than other Board members.

2 CHAIRPERSON GRIFFIS: Okay. Very well.  
3 Let's move ahead.

4 MS. MILLER: Okay. At this point then I  
5 would like to move to approve Application No. 17302 of  
6 Nonprofit Community Development Corporation of D.C.  
7 pursuant to 11 DCMR Section 3103.2 for a variance from  
8 the maximum height requirements under subsection 770.1  
9 to construct a new seven-story apartment (condominium)  
10 building with ground floor commercial premises -- with  
11 ground floor commercial at premises 2750 14th Street,  
12 N.W.

13 MR. ETHERLY: Second, Mr. Chair.

14 CHAIRPERSON GRIFFIS: Thank you both very  
15 much. Ms. Miller.

16 MS. MILLER: With respect to our analysis  
17 for a variance, I would suggest that this is clearly  
18 a unique situation in which we have a nonprofit  
19 corporation attempting to build a project in  
20 accordance an LDA which has restrictive covenants in  
21 it and which is in accordance with a revitalization  
22 plan of the District of Columbia.

23 The applicant has shown a practical  
24 difficulty in being able to provide 50 percent  
25 affordable housing which was the key component of the

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1 LDA and also a practical difficulty in providing  
2 quality retail.

3 They have shown that they have tried to  
4 get quality retail and have been rejected, I believe,  
5 at least in 15 circumstances. By getting the relief  
6 they seek they will be able to attract quality retail  
7 which will benefit not only the tenants of the  
8 building but the neighborhood as a whole.

9 They will also be able to attract tenants  
10 for the building and allow them to make all of the  
11 units equally attractive. Further, I believe it's not  
12 inconsistent with the public interest. It's not  
13 inconsistent with the zone plan and that the height is  
14 in the context of other buildings around it.

15 Office of Planning did not object on that  
16 basis. It's clearly in the public interest. I think  
17 that one only has to have listened to the counsel  
18 discussing even with Office of Planning how we are  
19 going to get more affordable housing in this city.  
20 Here we have a project that is unique and that it is  
21 offering the highest amount of affordable housing,  
22 that being 50 percent. It's clear that this project  
23 is certainly in the public interest.

24 I think that Office of Planning raised the  
25 issue of the fact that the covenants were entered into

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1 voluntarily and that might be considered a self-  
2 inflicted hardship. However, when we do our analysis  
3 for area variances, undue hardship, self-imposed  
4 hardships are not a factor. That may be a factor in  
5 a use variance but it's not a factor in an area  
6 variance.

7 I understand that Office of Planning has  
8 some concern that this might be a way for parties to  
9 circumvent the PUD process in the future and that  
10 would undermine the whole zoning regulations.  
11 However, I think that this is a unique situation. It  
12 doesn't open the door for that.

13 We've had two situations, I think, since  
14 I've been on the board where it could have gone either  
15 way. One was Fort Lincoln and this case. There may  
16 have been another one. In any event, I don't think it  
17 has opened the door, our considering variances, where  
18 the application might go forward as a PUD instead. I  
19 think that covers it for me as far as my initial  
20 comments.

21 CHAIRPERSON GRIFFIS: Mr. Etherly.

22 MR. ETHERLY: Thank you very much, Mr.  
23 Chair. I would definitely associate myself with the  
24 remarks of Mrs. Miller in all of the aspects of her  
25 analysis. I think she hit it right on the head. I

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1 would note additionally that I believe Monaco does  
2 offer us a little bit of a ledge, if not a full-  
3 fledged door, if you will, with regard to looking at  
4 nonprofits in particular.

5 I am very, very sensitive to the concerns  
6 of the Office of Planning as it relates to perhaps  
7 taking that first fledgling step down a slippery slope  
8 but I don't think we are necessarily there just yet.  
9 I think Monaco, once again, speaks to the uniqueness  
10 often times that a nonprofit brings to the table with  
11 respect to zoning and land use.

12 I think this is a very surgical and  
13 conservative use of Monaco as we look at the issue of  
14 uniqueness and practical difficulty here. Clearly as  
15 Mrs. Miller has indicated, I think the case has been  
16 made with respect to the difficulties that have been  
17 encountered by the applicant as it relates to the  
18 leasing of retail space which is clearly pursuant to  
19 the LDA a very critical part of this particular  
20 property.

21 I think the real key aspects of the  
22 variance test have been satisfactorily met here. As  
23 Mrs. Miller indicated with respect to substantial  
24 detriment and integrity of the zoning regulations I  
25 think that aspect of it in keeping with the upcoming

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1 opening of the National's home stand here, that's the  
2 home run part as far as this piece goes.

3 I've been kind of in a dicta mode over the  
4 last few weeks so I'll continue that trend and just  
5 kind of make a comment as it relates to not  
6 necessarily the substance here, but I think this Board  
7 is perhaps going to be confronted with the dilemma  
8 that the Office of Planning was very good to point  
9 out, when we are confronted with applications that  
10 perhaps might be better suited for PUDs, P-U-Ds, if  
11 you will.

12 But I think this is a very useful step for  
13 this Board to take because as this city continues to  
14 grapple with questions around inclusionary zoning and  
15 other tools or arrows in the quiver, if you will, to  
16 continue to facilitate affordable housing, especially  
17 in this market which is a very dynamic and very fast-  
18 paced one.

19 I think it's an important step to have  
20 some type of, I don't want to call it an outlet valve  
21 because that perhaps minimizes the importance that, I  
22 think, this body will have to play in the resolution  
23 of some of those very critical questions for the city.  
24 I think this is a very appropriate step and use of the  
25 zoning regulations. None of that is necessary to get

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1 to the outcome that I'm reaching so with a nod towards  
2 Mr. Parker, I'm not attempting to set a new precedent  
3 or new standard here.

4 I want to be very clear about that. I say  
5 that also for my colleagues. Just speaking very  
6 broadly I think as we deal with the issue of  
7 affordable housing, we have a project here which  
8 clearly has as its fundamental aim the creation of  
9 affordable housing in a way that doesn't create any  
10 artificial divisions, if you will. We are talking the  
11 same exact unit.

12 Whether you're talking market rate or  
13 affordable dwelling unit, we're talking the same  
14 amenities for all of the tenants. We're not talking  
15 about a building that is going to have two classes, if  
16 you will, of spaces for tenants. We are talking about  
17 the addition of amenities that will make this building  
18 a competitive building from a market standpoint and  
19 also, of course, for those tenants in the affordable  
20 dwelling units.

21 I think this is precisely the type of  
22 thinking and the type of project that we need to see  
23 more of in the city. Not only in the 14th Street  
24 corridor but throughout our city and it's going to be  
25 a challenge that many developers and many builders for

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1 profit and nonprofit are going to face. I'm very  
2 pleased that my colleagues are open to considering  
3 avenues, creatively or otherwise, to help facilitate  
4 this process. With that, Mr. Chair, I'm prepared to  
5 move forward. Thank you.

6 CHAIRPERSON GRIFFIS: Others? Mr. Mann.

7 MS. MILLER: Go ahead.

8 MR. MANN: No, go ahead.

9 MS. MILLER: All right. I just wanted to  
10 add one other comment that was important to me. I  
11 looked at this case even like separate from the LDA,  
12 was there a practical difficulty in accomplishing the  
13 mission here of providing the 50 percent affordable  
14 housing and quality retail for a neighborhood that  
15 clearly needs it.

16 I find that certainly the applicant  
17 addressed the question of going down deeper and  
18 brought to our attention the fact that this was not  
19 possible because of metro and they are already going  
20 down. There really was nowhere else to go it seems  
21 but up the way they have.

22 CHAIRPERSON GRIFFIS: Mr. Mann.

23 MR. MANN: I am probably inclined to go  
24 ahead and support this case but not because the  
25 applicant had a particularly strong case actually. I

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1 thought that actually the questions and the  
2 deliberation of the Board members has convinced me  
3 more than the applicant's strong case. There were too  
4 many questions I had and too many things that I didn't  
5 understand when we started this. Were it not for  
6 particularly the arguments that Ms. Miller, I don't  
7 know that I would have been able to go that way so I  
8 would like to thank you for kind of providing some  
9 insight that wasn't otherwise provided that should  
10 have been.

11 CHAIRPERSON GRIFFIS: Good. Appreciate  
12 that, Mr. Mann. Very well. We've heard from the  
13 Board. I think it's fairly clear where it's going.  
14 Let me just conclude then with a couple of statements.  
15 First of all, I think Mr. Parker made a very  
16 convincing and strong case and very technical analysis  
17 of which is very important for us to look at.

18 It is, as always, one of the elements of  
19 which we need to take into account and address whether  
20 we agree or disagree and how we move about. I'm sure  
21 of the fact -- we've talked about the NCRC and this is  
22 the RLARC, the predecessor -- shares some  
23 responsibility in this. First of all, this was, as is  
24 in the record, and as of the other properties that  
25 we've seen come through this Board, a public process.

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1           It was an award that was made of which the  
2 LDA program was all established. Why wasn't there a  
3 point at which the reality of what the impact is in  
4 terms of providing this good product? The reality of  
5 the process wasn't taken into account and fully  
6 addressed and moved ahead. Maybe it was the PUD.

7           Maybe there are better things that could  
8 have come out of it. I don't want to see this in  
9 terms of process setting a precedent of, "Look, it's  
10 easy enough. Just come in and it's a fast way to get  
11 through things." Or to have a great reliance on the  
12 NCRC or RLARC in saying, "Look, if we award it they'll  
13 give it to you," because that's clearly not the case.

14           Mr. Mann, I think you're absolutely right  
15 that the Board has taken a lot of time to try and make  
16 this successful based on what we have before us and  
17 based on the reality of how we are able and the  
18 jurisdiction of which we are able to approve things.

19           I think the uniqueness, as Ms. Miller has  
20 laid out and I think articulated perhaps a little  
21 differently, that this is unique in the aspects of the  
22 special circumstances around it. We do have a public  
23 award. It is based on a specific program and it's  
24 based on a developer that is not looking to add a  
25 floor for profit but rather add a floor in order to

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1 accommodate the reality of the cost of building a  
2 building and 50 percent.

3 If we look at 20 -- we didn't get into  
4 this, but I think the Board is fairly familiar with  
5 20, 30, 60, 80 percent of AMI and what that means in  
6 terms of a sale or rental of a unit having had that  
7 argument successfully and unsuccessfully before  
8 numerous times and know kind of the universe that  
9 we're talking about.

10 This is a huge project to be putting on,  
11 especially in a condo market of today's situation in  
12 the city and looking at the difference between 8' and  
13 8'8" in terms of what that means for residential  
14 units. That wasn't as persuasive as the success of  
15 the retail on the first floor. We are fighting a  
16 height limit here.

17 In order to really make that useful and to  
18 accommodate not just in addition to the requirements  
19 of the LDA but I think in terms of the importance of  
20 14th Street, there wasn't a lot of talk about the  
21 surrounding area and the commercial corridor of which  
22 14th Street used to be and what it is now going to be.

23 I mean, what haven't we seen that is  
24 happening up there? I mean, the Tivoli was mentioned  
25 which was a PUD which we didn't see but we have seen

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1 every single other of those parcels. This is parcel  
2 5. We've seen 24, 15, 27. I mean, you know, all the  
3 others are probably on their way. The point of all  
4 this talk about the rejuvenation.

5           Actually it's kind of the return of what  
6 it used to be which is interesting that the building  
7 across the way which is probably original character or  
8 some period before. The point is the character is  
9 what was able to be built there and what is successful  
10 and trying to return it in order to accommodate the  
11 quality of retail and the liveliness of the street and  
12 the design aspect. It's very persuasive to look at  
13 how difficult that is or the practical difficulty that  
14 arises out of that.

15           Very well. Let me end with that. Mr.  
16 Etherly.

17           MR. ETHERLY: Thank you, Mr. Chair. I  
18 just wanted to highlight also as we talked about  
19 retail I wanted to note that Mr. Parker did note that  
20 if the Board was amenable to moving forward he had  
21 suggested perhaps a different height stipulation.

22           I wanted to just kind of come back to the  
23 chair's earlier point about not wanting to kind of  
24 further tinker with the project in terms of kind of  
25 trying to second guess, I think, what has been very

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1 credible testimony with regard to the issue of retail  
2 experience.

3 I wanted to note that Mrs. Miller had  
4 touched on the issue of going deeper into the ground.  
5 I think what also was very clear through the  
6 presentation was the importance of street front retail  
7 in particular.

8 As the Chair talked about, the historic  
9 character of 14th Street from a retail standpoint and  
10 where we are now heading hopefully towards a revival  
11 of that character I think is very important that the  
12 retail be maintained at the street level to help  
13 continue to encourage that pedestrian traffic.

14 I think, last but not least, I said it  
15 obliquely but I want to be sure to say it very clearly  
16 that the Nonprofit Community Development Corporation  
17 is to be applauded for being so aggressive with that  
18 affordable housing unit component.

19 As was clearly stated, 50 percent is a  
20 very high number and not one that is very frequently  
21 talked about in today's real estate parlons, once  
22 again, nonprofit or for-profit, so the organization is  
23 definitely to be commended along with the entire  
24 development team for setting such a bar. I'm very  
25 hopeful that others will continue to rise to that bar

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1 that you have established. Thank you Mr. Chair.

2 CHAIRPERSON GRIFFIS: Thank you. Anything  
3 else? Very well. We have a motion before us that has  
4 been seconded. Let me ask for all those in favor of  
5 the motion signify by saying aye.

6 ALL: Aye.

7 CHAIRPERSON GRIFFIS: Opposed?  
8 Abstaining? Excellent. Ms. Bailey, if you wouldn't  
9 mind recording the vote.

10 MS. BAILEY: Mr. Chairman, the vote is  
11 recorded as four, zero, one to approve the  
12 application. Mrs. Miller made the motion, Mr. Etherly  
13 seconded, Mr. Mann and Mr. Griffis are in agreement.  
14 There is not a Zoning Commission member here at this  
15 time. Are we doing a full order, Mr. Chairman, or  
16 summary order?

17 CHAIRPERSON GRIFFIS: Unless Board members  
18 object, I think we can issue a summary order on this.  
19 I just want to make absolutely clear obviously any  
20 order that we issue first condition, stated or not,  
21 would be the approval is based on the plans that were  
22 submitted in the application.

23 The applicant's submitted plans do show a  
24 16-foot slab-to-slab of the first and then the 9'5"  
25 floor-to-floor height except for the top level which

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1 was of an increased height of 10'9". In the  
2 application the overall height then provided would be  
3 the 74.25 feet.

4 I think just for clarity, Board members,  
5 there was some back and forth. OP was saying it's 10  
6 feet and the applicant indicated it's actually 8 feet.  
7 We are looking at the total height variance to 74.25  
8 which is kind of split in between. It's 9.245' as the  
9 65 feet is the allowable height of it. What else was  
10 I saying?

11 MS. BAILEY: Mr. Chairman, just for  
12 clarity, are you saying that we should add a condition  
13 indicating that Exhibit No. 10 are the plans that  
14 accompany this approval?

15 CHAIRPERSON GRIFFIS: No. It would be --  
16 every condition obviously in our orders are that it is  
17 to be built based on the plans that were submitted and  
18 reviewed and approved so, no, I'm not saying we are  
19 actually writing a condition but I'm just clarifying  
20 for the Board and perhaps the applicant's perspective  
21 that this is what would obviously go down to the  
22 zoning administrator for process on this.

23 MS. BAILEY: Thank you.

24 CHAIRPERSON GRIFFIS: Okay. Anything else  
25 then? I believe we did indicate we would waive our

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1 regulations and requirements and issue a summary order  
2 unless there is any objection from the Board members.  
3 Any objection, Ms. Miller? You want to say that?

4 MS. MILLER: No objection.

5 CHAIRPERSON GRIFFIS: Thank you. I'm not  
6 afraid of hanging out there on my own but it's always  
7 fun to have people with me. Very well. I think  
8 that's it then. We'll issue a summary order on this.  
9 Anything else for the Board at this time, Ms. Bailey?  
10 Any other business for the Board in the morning  
11 session?

12 MS. BAILEY: No, Mr. Chairman.

13 CHAIRPERSON GRIFFIS: Does the applicant  
14 have any questions on process or procedure at this  
15 point?

16 MR. HENDERER: No further questions.  
17 Thank you for your time.

18 CHAIRPERSON GRIFFIS: We thank you very  
19 much. We appreciate you putting the time and effort  
20 in making a case for us today. Good luck. I think  
21 the Board is looking forward to seeing this come to  
22 fruition.

23 That being said, no other business, I  
24 would like to adjourn the morning session of the Board  
25 of Zoning Adjustments.

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1 (Whereupon, at 12:06 p.m. off the record  
2 for lunch to reconvene at 1:26 p.m.)  
3

4 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

5 1:26 p.m.

6 CHAIRPERSON GRIFFIS: Good afternoon,  
7 ladies and gentlemen. Let's call to order the  
8 afternoon session of the Board of Zoning Adjustments  
9 of April 12, 2005. My name is Geoff Griffis,  
10 Chairperson. Joining me today is Vice Chair Ms.  
11 Miller and also Mr. Etherly. Representing the  
12 National Capital Planning Commission with us is Mr.  
13 Mann, and representing the Zoning Commission with us  
14 this afternoon is Mr. Hood.

15 Copies of today's hearing agenda are  
16 available for you. If you have to check it, please  
17 check that you're in the right room. We only have one  
18 on the agenda this afternoon so you should know why  
19 you're here. Several very important and serious  
20 aspects in the opening statement I will go through but  
21 perhaps very quickly.

22 First of all, all proceedings before the  
23 Board of Zoning Adjustment are recorded. They are  
24 recorded in two fashions, the most important of which  
25 is the transcript that's being created by the court

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1 reporter sitting on the floor to my right. Secondly,  
2 we are being broadcast live on the Office of Zoning's  
3 website.

4 Attended to both of those we ask several  
5 things. First of all, I ask that everyone turn off  
6 their cell phones and beepers at this time so we don't  
7 disrupt the transmission of creating a transcript and  
8 also on the broadcast. Secondly, we do ask that  
9 people in coming forward to speak to the Board that  
10 they have filled out two witness cards.

11 Witness cards are available at the table  
12 where you entered into the hearing room. They are  
13 also available at the table in front of us where you  
14 will provide your testimony. Those go to the recorder  
15 prior to providing testimony to the Board.

16 I would ask that witnesses when they come  
17 forward provide their name and address for the record.  
18 You only need to do this once. Obviously that will  
19 let us give you credit for all the important aspects  
20 that you will testify to today.

21 The order of procedure for a special  
22 exception this afternoon is as follows. First, we'll  
23 have the presentation of the case by the applicant.  
24 Second, we will run through all the Government reports  
25 attended to the application. Third, we'll hear from

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1 the advisory neighborhood commission. Fourth, we will  
2 go to persons or parties in support of the  
3 application. Fifth would be persons or parties in  
4 opposition to the application. Sixth, finally we will  
5 have rebuttal testimony summations and closings by the  
6 applicant.

7 Cross examination is permitted by the  
8 applicant, the ANC, and also the parties in the case.  
9 There is nothing that prohibits this Board from  
10 establishing directions and times for cross  
11 examination but I will be very specific if we need to  
12 get into defining areas or times on cross examination.  
13 Otherwise, it is often untimed periods in our hearing  
14 for cross examination.

15 The record will be closed at the  
16 conclusion of the hearing on this case except for any  
17 material that is specifically requested by the Board.  
18 We will be very specific on what is to be submitted  
19 and when it is to be submitted into the record. It's  
20 important to understand that aspect and that statement  
21 because we will only be deliberating on decisions on  
22 the record that's created before us so it is critical  
23 to get information into the official record.

24 Attended to that also the Sunshine Act  
25 requires us to conduct all our proceedings in the open

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1 and before the public. This Board may enter into  
2 executive session both during or after hearing on a  
3 case and that would be for the purposes of reviewing  
4 the record and/or deliberating on the case. That  
5 would be in accordance with the Sunshine Act and is  
6 also in accordance with our rules and regulations.

7           However, in all of those aspects whether  
8 we are reviewing the case or deliberating on it, we  
9 will need to deliberate solely on the record that is  
10 created before us. As I say, we ask that you provide  
11 everything that we need to know into the record today.  
12 I also ask that people present not engage Board  
13 members in private conversations this afternoon so  
14 that we don't give the appearance of receiving  
15 information outside of the public record.

16           I don't see any reason why we wouldn't  
17 conclude our afternoon session by 6:00 but I'm the  
18 worst at predicting time on these things as the record  
19 will show. So if we get close to that, we'll figure  
20 out what we do but I don't anticipate going well  
21 beyond that if at all.

22           At this point let me ask that people  
23 present today if they would -- well, let me say a very  
24 good afternoon to Ms. Bailey sitting on my very far  
25 right with the Office of Zoning and Mr. Moy. Closer

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1 Ms. Glazer representing the Office of Attorney General  
2 is with us also.

3 Ms. Bailey is going to swear everybody in  
4 so I would ask that those people present today that  
5 are going to provide testimony if you would please  
6 stand and give your attention to Ms. Bailey.

7 MS. BAILEY: Is there anyone in the back  
8 who will be testifying this afternoon? Please raise  
9 your right hand. Do you solemnly swear or affirm that  
10 the testimony you will be given today will be the  
11 truth, the whole truth, and nothing but the truth?

12 ALL: I do.

13 MS. BAILEY: Thank you.

14 CHAIRPERSON GRIFFIS: Good. Thank you all  
15 very much. At this time the Board will consider any  
16 preliminary matters. Preliminary matters are those  
17 which relate to whether a case will or should be heard  
18 today. Request for postponements, withdrawals, or  
19 whether proper and adequate notice of the application  
20 are elements of preliminary matters.

21 Ms. Bailey, are you aware of any  
22 preliminary matters for us at this time?

23 MS. BAILEY: No, Mr. Chairman.

24 CHAIRPERSON GRIFFIS: Very well. If  
25 anyone here present have any preliminary matters for

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1 the Board, they can come forward. If not, why don't  
2 we have the panel introduce themselves. Actually,  
3 not.

4  
5 Ms. Bailey, why don't we call the first  
6 case and we'll move right into it.

7 MS. BAILEY: Thank you, sir. That is  
8 Application No. 17300 of St. Patrick's Protestant  
9 Episcopal Church pursuant to 11 DCMR 3104.1 for a  
10 special exception to allow an increase in the student  
11 enrollment at a private school (last approved under  
12 BZA Order No. 16852-A), from 40 to 60 children, under  
13 section 206 of the zoning regulations. The property  
14 is in the R-1-B District and it's at 4925 MacArthur  
15 Boulevard, N.W. (Square 1393, Lot 17).

16 CHAIRPERSON GRIFFIS: Excellent. Thank  
17 you. Very well. Are we ready?

18 MS. PRINCE: Good morning, Chairman --  
19 afternoon, Chairman Griffis and members of the Board.  
20 I'm Allison Prince with Pillsbury, Winthrop, Shaw,  
21 Pittman. Same law firm, just bigger. I'm pleased to  
22 be here today in connection with the request of St.  
23 Patrick School for a phased increase in enrollment  
24 over a three-year period from 40 students to 60  
25 students at 4925 MacArthur Boulevard. In addition,

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1 the school is seeking permission to allow the students  
2 to walk between the main campus on White Haven Parkway  
3 and the subject site under limited circumstances.

4 The original approval of the school on  
5 this site spanned five lengthy hearings. While there  
6 was extensive support of the application, there was  
7 also deep opposition from many neighbors who were  
8 extremely concerned about the establishment of a small  
9 junior high school on a site that was formerly  
10 approved for a school for adult education.

11 Fortunately, the operation of the school  
12 over the current and past academic years has  
13 demonstrated, as St. Patrick's maintained throughout  
14 the hearings, that the school can function well on the  
15 site and with minimal impacts on the neighborhood.  
16 The operation of this school at 4925 also has had  
17 significant positive traffic effects on the main  
18 campus due to the Board-imposed carpool program and  
19 physical improvements to traffic circulation on that  
20 campus.

21 St. Patrick's maintained from the outset  
22 that the building could easily accommodate its ideal  
23 program size of 60 students. The building was  
24 purchased and evaluated with 60 students in mind. The  
25 building code would allow more students but 60 has

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1       been and remains the ideal number.

2                   As you'll recall, the original application  
3       was for 60 students. Given the level of community  
4       angst over potential impacts, the Board compromised at  
5       40 students and clearly required a return visit to  
6       this Board for any increase in enrollment.

7                   As you consider this application, I urge  
8       you to consider only the incremental impact of 20  
9       additional students. This Board already devoted five  
10      hearings to examining the original application. Now  
11      this Board need only examine the impact of 20  
12      additional students.

13                  As you are aware, the school operates  
14      pursuant to an extraordinarily detailed list of 20  
15      conditions. We maintain that those conditions so  
16      define and limit the school's operations that the  
17      impacts of the school use on the property and the  
18      neighborhood will be minimal regardless of student  
19      enrollment levels. The Board has created conditions  
20      that specifically and clearly address noise and  
21      traffic and other potential impacts associated with  
22      the use.

23                  While some of the original opponents  
24      remain opposed, even the ANC, which strongly opposed  
25      the original application, did not pass a resolution to

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1 oppose this increase. Two supportive commissioners  
2 filed a support letter. One of the most immediately  
3 affected families is not opposed. Yet, there are  
4 those who remain opposed and I ask you to consider  
5 their input carefully. They had made some incorrect  
6 assumptions.

7 Many have assumed that an increase in  
8 students means that there will be a significant  
9 increase in the number of children outside during the  
10 one daily break which is now and will remain less than  
11 one hour. That assumption is not correct. Many have  
12 assumed that a 50 percent increase in the number of  
13 students means a 50 percent increase in the amount of  
14 noise. Our noise expert will demonstrate that that  
15 assumption is flatly wrong.

16 In evaluating the incremental impact of 20  
17 students, you need to focus on noise and traffic as  
18 was done in the original hearing. As Peter Barrett  
19 will describe in his testimony, the traffic impacts  
20 will be absolutely minimal. The original analysis by  
21 the traffic engineer presented to this Board presumed  
22 a student enrollment of 60. In addition, the noise  
23 impacts are currently minimal and will continue to be  
24 so.

25 St. Patrick's engaged its original sound

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1 experts, Polysonics, to demonstrate that the existing  
2 noise levels are well within acceptable limits and  
3 will continue to be so with an increase in enrollment.  
4 This Board can reject this application only if it  
5 finds specific identifiable, quantifiable impacts  
6 relating to the increase.

7 In the D.C. Court of Appeals case  
8 involving the Washington Ethical Society School  
9 involving the BZA's rejection of that school's request  
10 for an increase in enrollment of 15 students, the  
11 Court reversed the Board's denial and noted that  
12 generalized conclusory findings of impact are not an  
13 acceptable basis for rejecting an application.

14 This whole concept was revisited by the  
15 Court in connection with the Georgetown University  
16 case. In that case the court noted that a general  
17 concept that an increase would result in magnified  
18 impacts is simply not acceptable. You must find hard  
19 evidence to support any conclusion that this  
20 application would result in adverse impacts.

21 So here we have a highly regulated school  
22 use in the residential zone. Yet, the presence of  
23 multiple conditions has had no effect on the on the  
24 school's ability to thrive in this location. Perhaps  
25 the best evidence of that is its stellar compliance

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1 record.

2 In approving the original application this  
3 Board truly created a win/win situation. It allowed  
4 the school to go forward. Yet, it incorporated into  
5 the order protections that were deemed critical to  
6 protect the neighborhood. The increase of 20 students  
7 and the continuation of all of those conditions with  
8 the exception of introducing the ability to walk  
9 between the campuses will not create any objectionable  
10 impacts and should be approved by this Board.

11 Our first witness is Mr. Peter Barrett,  
12 the head of school. Dan Spector is also here and  
13 seated behind us to answer any highly specific  
14 questions related to the program.

15 MR. BARRETT: Good afternoon.

16 CHAIRPERSON GRIFFIS: Good afternoon.

17 MR. BARRETT: My name is Peter Barrett.  
18 For the past 11 years I've had the pleasure of being  
19 the head of school at St. Patrick's Episcopal Day  
20 School and Nursery through grade eight school of about  
21 480 students located on two campuses in the Palisades  
22 section of the District of Columbia.

23 In that role I have had the further  
24 pleasure of appearing before the Board of Zoning  
25 Adjustment from time to time to discuss matters

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1 appropriate to this Board. I appreciate the  
2 opportunity to appear before you today to present St.  
3 Patrick's request for an increase in our MacArthur  
4 campus 40-student enrollment cap phased in across a  
5 three-year period.

6 The request is for no increase in the  
7 2005/2006 school year. An additional ten students in  
8 the 2006/2007 school year and a further additional 10  
9 students for the 2007/2008 school year. Over all the  
10 request is for an increase from 40 to 60 students on  
11 the MacArthur campus.

12 To orient members of the Board who are  
13 less familiar with St. Patrick's configuration, let me  
14 offer some history. St. Patrick's has been a  
15 wonderful presence in the Palisades for close to half  
16 a century. Founded as a nursery school in the  
17 basement of St. Patrick's church, then located at  
18 Foxhall and Reservoir Roads N.W., the day school began  
19 adding elementary grades in 1967 and the first grade  
20 six class graduated in 1974.

21 Our nursery school through grade six  
22 students have long called the White Haven campus  
23 located at 4700 White Haven Parkway N.W. their home.  
24 In September 2001 St. Patrick's began adding a grade  
25 seven and eight program and the first grade eight

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1 graduated in 2003.

2 In January 2004 that program moved from  
3 rented space into its new home at 4925 MacArthur  
4 Boulevard N.W. called the MacArthur campus. The  
5 request that is now before you concerns the enrollment  
6 cap at the MacArthur campus.

7 I trust that St. Patrick's request comes  
8 as no surprise to you, particularly those of you who  
9 have shared with me the pleasure of our earlier  
10 proceedings concerning the MacArthur campus. When St.  
11 Patrick's originally applied for a special exception  
12 for the MacArthur campus, we sought a maximum  
13 enrollment of 60 students.

14 The building and the program have been  
15 designed for 60 students. The program becomes even  
16 better at 60 students and we have always said that we  
17 would return for an increase in the enrollment to 60  
18 students and never request an increase beyond 60  
19 students. Our operation in the building across the  
20 last 15 months has further convinced us that an  
21 enrollment of 60 students is right for the program and  
22 the site so here we are this afternoon.

23 We regard ourselves as fortunate, really  
24 blessed to have had the opportunity to relocate our  
25 grade seven and eight program to 4925 MacArthur

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1 Boulevard. The MacArthur campus building is a lovely  
2 building which renovated well and is now even  
3 lovelier.

4 The half acre property on which it sits is  
5 similarly lovely and its location on the main  
6 thoroughfare of a wonderful section of the District of  
7 Columbia not far from our main campus provides these  
8 early adolescent students with a space that is very  
9 much their own even as they maintain an important  
10 relationship with a larger institution of which they  
11 are a part.

12 With this fabulous opportunity for St.  
13 Patrick's comes some real responsibilities. We are  
14 confident we have met those responsibilities, that we  
15 have fulfilled the promises, implicit and explicit,  
16 that we have made to the St. Patrick's community and  
17 to the larger communities of which we are a part, to  
18 the Palisades and to the broader District of Columbia.

19 First, we have promised to create a superb  
20 educational program for middle school-aged students,  
21 one that provides an important option for families who  
22 are eager to educate their children in the District of  
23 Columbia but have found middle school seats in short  
24 supply as they have investigated independent schools.

25 Even as we strengthen this emerging

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1 program, we are confident that we have fulfilled that  
2 promise and would like to make that promise available  
3 to more students and their families. Second, we have  
4 promised to comply with all 20 of the conditions set  
5 forth by the Board of Zoning Adjustment.

6 Those conditions deal with items both  
7 large and small but our compliance has been the same  
8 for both small and large. Every condition has been  
9 met with the same level of vigilance and compliance  
10 across the close to 15 months of our occupancy and  
11 this in a setting of intense scrutiny by our neighbors  
12 where any shortcomings would be readily noticed.

13 Third, we have promised to maintain the  
14 MacArthur campus building and the property on which it  
15 sits to a high standard. The renovation of the  
16 building preserved and even enhanced the charm of the  
17 building, something that is obvious on the exterior to  
18 passersby and becomes even more obvious to those who  
19 inhabit the building on a daily basis and those who  
20 visit.

21 Our landscaping plan has added 15 new  
22 trees and a proliferation of other plants to the  
23 property and we replaced the overgrown under-  
24 maintained yew hedge that had long marked the borders  
25 of the property with a beautiful, fresh hedge that is

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1 worthy of its location along MacArthur Boulevard.  
2 The only sizable tree that we removed, and that only  
3 of necessity, was replaced with an oak of significant  
4 size.

5 Finally, we have promised to be good  
6 neighbors and to be responsive to concerns expressed  
7 by those around us. We have made that point clear by  
8 our scrupulous compliance with the BZA conditions by  
9 our respectful landscaping plan and our maintenance of  
10 the property and by our regular meetings with  
11 neighbors, itself a condition of the BZA order.

12 I hope that we have earned the trust of  
13 our neighbors, that they have recognized that we are  
14 serious when we say we want to be good neighbors and  
15 that we know how to be good neighbors. Taking nothing  
16 for granted, we will continue to strive to earn their  
17 trust.

18 I would like to make a few observations  
19 about this specific request for an increase in our  
20 enrollment cap at the MacArthur campus. First, I  
21 would like to offer two explanations as to why we  
22 would like to increase the enrollment cap at all.

23 As I noted above in creating our grade  
24 seven and eight program, we wanted to provide an  
25 exceptional educational environment both for current

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1 students at St. Patrick's and for students from other  
2 schools whether students from other independent  
3 schools or students from public schools interested in  
4 enrolling in an independent school for the first time.

5 In the 2004/2005 year, the current year,  
6 all but one of our grade seven spaces were taken by  
7 students already enrolled at St. Patrick's. We could  
8 accept only one new student from outside St.

9 Patrick's. While we have additional seats available  
10 for outside students this year, it is difficult for  
11 families to recognize St. Patrick's as an alternative  
12 when space is so limited. So an increase in the  
13 enrollment cap will enable us to do a better job of  
14 fulfilling our promise to create a fresh new viable  
15 option for families in the District of Columbia.

16 Second, by increasing the critical mass of  
17 the program we are able to round out class sizes to  
18 provide an even greater range of talents and broader  
19 choices socially for our students, and to provide a  
20 deeper pool for such important extra curricular  
21 activities as our choirs, both vocal and handbells,  
22 our dramatic presentations, and our sports teams.

23 With only 40 students in grades seven and  
24 eight fielding sport teams with a full complement of  
25 players can be tricky sometimes, as our girl softball

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1 players without a team the last two seasons can  
2 attest. Thankfully, we are playing softball this  
3 season but with a team of girls from grade five  
4 through grade eight playing teams from other schools  
5 comprised of seventh and eight graders. But the point  
6 is that just as a school can be too large, a school  
7 can also be too small. We regard 60 students as our  
8 Goldilocks size, not too large, not too small, but  
9 just right.

10 Next I would like to address the timing of  
11 our request. Our grade seven and eight program has  
12 been at 4925 MacArthur Boulevard for about 15 months  
13 now. We have demonstrated our intention to comply  
14 with all conditions of the Board's order and perhaps,  
15 more important, we have demonstrated our ability to  
16 comply with all conditions of the order.

17 I recall a lot of testimony during the  
18 Board's hearing about our inability to implement and  
19 monitor our transportation plan, for example, and  
20 about our parent's inclination, or maybe  
21 disinclination, to comply with it. By now it's clear  
22 that we can implement and monitor that plan and that  
23 our parents will comply with it. It's clear that we  
24 can and will comply with every other condition of the  
25 order. If we couldn't comply, or didn't intend to

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1 comply, that would be plenty obvious by now.

2           Furthermore, we have timed this request in  
3 a manner that reflects the admission cycle for  
4 independent schools. The admission cycle for the  
5 2005/2006 school year is now all but complete. Our  
6 acceptances for the grade seven class entering  
7 September 2005 will reflect no increase in our  
8 enrollment. We will be at 40 students for the  
9 2005/2006 school year.

10           When a new admission cycle begins next  
11 fall for enrollment in the 2006/2007 school year, we  
12 would like to have the Board's approval for an  
13 additional 10 students so that admission officers and  
14 perspective parents alike will know just what will be  
15 available for the following year.

16           While we have returned the Board a little  
17 more than a year after we occupied 4925 the final 10  
18 new students requested in this phased approach would  
19 not set foot on the MacArthur campus until September  
20 2007, a full three and a half years after initial  
21 occupancy. It seems to me difficult to argue that we  
22 are moving too quickly with this request. I hope  
23 you'll agree.

24           In the final analysis, of course, your  
25 decision concerning our request to increase the

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1 enrollment cap at St. Patrick's MacArthur campus will  
2 come down to impacts. As I recall the Board's  
3 decision meeting concerning our initial request for  
4 special exception, it was obvious that the Board was  
5 not interested in automatic increases or in time  
6 limits or whatever but there was no clear guidance  
7 about just when to come back, although it was clear  
8 that we had better have a strong record of compliance  
9 when we did return.

10 Furthermore, although I expect others to  
11 dip into the transcript of that meeting for passages  
12 that bolster their own positions, in the final  
13 analysis after all the dipping is done I think the  
14 Board at that time decided in favor of a completely  
15 new hearing during which it could assess the impact of  
16 a certain number of additional students. As our  
17 statement sets forth, any such impact would be  
18 minimal.

19 Having demonstrated beyond any reasonable  
20 doubt that we can and will comply with all applicable  
21 conditions, let me touch on each of the possible areas  
22 of impact identified in Section 206. First, traffic.  
23 The impact here would be negligible because the  
24 additional students would arrive at and depart from  
25 school on the shuttle bus there would be no new

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1 arrangements or mechanisms necessary. At most the  
2 additional students would require one additional  
3 shuttle bus run in the morning and likely one  
4 additional bus run in the afternoon.

5  
6 Furthermore, each of the three morning  
7 shuttle bus runs would carry fewer students per run so  
8 the unloading time and the resulting impact on  
9 MacArthur Boulevard traffic at any one time would be  
10 correspondingly reduced.

11 By the way, we have timed the unloading of  
12 a week's worth of morning shuttle bus runs. The  
13 Friday schedule is a little different because students  
14 begin that day with chapel on the White Haven campus  
15 but on Monday through Thursday, February 14th through  
16 February 17th, the longest unloading time was 59  
17 seconds for the first shuttle run, 49 seconds was the  
18 quickest, and one minute, 30 seconds for the second  
19 bus run. One minute 12 seconds was the quickest.

20 Our separate request for students to be  
21 able to walk from the White Haven campus would also  
22 further reduce but not necessarily eliminate what is  
23 admittedly pretty insignificant vehicular traffic  
24 transporting late-arriving students to the MacArthur  
25 campus. With respect to faculty and staff traffic,

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1 St. Patrick's seeks no additional faculty and staff  
2 beyond what the Board has already approved so there  
3 will be no additional faculty and staff traffic than  
4 was already envisioned.

5 Number of students and faculty and staff.  
6 Obviously, this case is about the impact of the number  
7 of students. With respect to faculty and staff, as I  
8 just noted, St. Patrick's seeks no increase in the  
9 number of faculty and staff beyond what the Board has  
10 already approved.

11 Parking for faculty, staff, and visitors.  
12 This zoning regulations require eight parking spaces  
13 for the approved eight full-time and four part-time  
14 faculty members. The existing order requires a  
15 minimum of 15 parking spaces. Currently those 15  
16 spaces are not fully utilized as they are not frequent  
17 visitors to the campus. This request will not result  
18 in the need for any additional parking spaces.

19 Noise. So it is that we come down to the  
20 crux of the matter in this case, the sound of  
21 children's voices, just as we did in our original  
22 application. I will ask our sound expert to provide  
23 testimony with respect to the negligible impact of the  
24 requested 20 students on noise emanating from the  
25 campus. All of it -- all of it confined to about 40

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1 minutes out of the seven-hour day and all of it in the  
2 context of a school located on a major thoroughfare  
3 for cars, trucks, and buses as well as the flight path  
4 for National Airport.

5 I will also note that you have received  
6 the minutes of the four quarterly meetings we have had  
7 with the neighbors since we occupied the MacArthur  
8 campus. Perhaps you noticed as you read those  
9 documents that not once in those minutes does there  
10 appear any expression of concern about student noise.  
11 Not once.

12 Yes, St. Patrick's writes those minutes  
13 but they are circulated with neighbors, those who  
14 attended and those who didn't, for any revisions to  
15 make sure that they are thorough, accurate, and fair  
16 before being considered final. Only once for the  
17 minutes of the January 2005 meeting have I ever  
18 received revisions to the minutes and that had to do  
19 with a storm water system maintenance issue.

20 I bringing this matter up at this time as  
21 some neighbors may be intent on padding the record at  
22 quarterly meetings from this point forward. But the  
23 fact is that we have talked about storm water  
24 management issues and exterior paint colors and  
25 installation of an alarm on a side door that shouldn't

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1 be and never has been used by students and a  
2 restrictive covenant and HVAC sound, important items  
3 all, but we have never talked about the sound of  
4 students on the campus.

5 That should tell you something about the  
6 current impact of 40 students on the MacArthur campus  
7 when no close-by neighbor has ever regarded the sound  
8 of students as a matter of sufficient importance to  
9 raise at four quarterly meetings across a 15-month  
10 period.

11 We have requested only one other change in  
12 the conditions of the Board's order, a change that  
13 would allow students to walk between campuses at the  
14 beginning and the end of the school day under certain  
15 circumstances. Overall such a change would allow a  
16 measure of flexibility of movement between locations  
17 with a likely decrease in the amount of vehicular  
18 traffic between them, particularly if late-arriving  
19 students can walk down to the MacArthur campus rather  
20 than wait to be retrieved by car from the White Haven  
21 campus.

22 In approaching the Board with such a  
23 request, we have also secured a renewed agreement with  
24 the Lab School of Washington to allow any students who  
25 walked between the White Haven campus and the

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1 MacArthur campus to rely on an off-street route  
2 through the Lab School in order to avoid walking along  
3 lower White Haven Parkway where there are no sidewalks  
4 at this time.

5 In light of the report from the Office of  
6 Planning, I should probably address why a phased  
7 approach with an initial increase of 10 students and  
8 an automatic 10 student increase makes sense now when  
9 the Board rejected the concept of an automatic  
10 increase from 40 to 60 with our initial application.

11 In fact, it seems to make sense for many  
12 reasons. Primarily because we know so much more now  
13 than we knew at the time of our original application.  
14 We now know, for example, that the school functions  
15 well on the site. We now have an established shuttle  
16 plan and we now know that it works. We now know that  
17 the understandable fear of direct drop-off by parents  
18 was unfounded. We now know that the noise impacts are  
19 minimal.

20 Finally, and perhaps most important, we  
21 now know that this Board has in place a rigid and  
22 effective enforcement mechanisms, perhaps the  
23 strongest of its kind, the three strikes and you're  
24 out rule. If now or at anytime in the future whether  
25 the enrollment is 40, 50, or 60, the school engages in

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1 a pattern of violations, the entire special exception  
2 approval will be jeopardized. This Board has created  
3 a mechanism that simply eliminates any perceived risk  
4 associated with the increased enrollment.

5 If you are to approve St. Patrick's at the  
6 level of 50 students now to go into effect in the fall  
7 of 2006 without an automatic increase the following  
8 year, as recommended by the Office of Planning, we  
9 would lose a full year in the process given the  
10 independent school admission cycle I described  
11 earlier. If we were to open in the fall of 2006 with  
12 50 students, we would measure the incremental impacts  
13 in the fall and winter of 2006 to 2007 and then file  
14 early in 2007.

15 However, by that time the admission cycle  
16 for the fall of 2007 would be virtually over and  
17 completely over by the time of a written order from  
18 the Board preventing us from capturing any further  
19 increase to 60 students until the fall of 2008.

20 The request before you at this time has  
21 the final additional 10 students entering in the fall  
22 of 2007. Given our demonstration that the incremental  
23 impacts associated with 20 additional students would  
24 be minimal, we urge you to approve this application  
25 with a phasing as proposed. Requiring the school to

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1 return to the Board to secure approval for the final  
2 10 would be taxing on this Board and on the school's  
3 and the neighbor's resources with no clear benefit.

4 We have already had a total of six  
5 hearings to establish the school including the use of  
6 the basement. Today is our seventh. I urge you to  
7 recognize the extensive hearing history, the school's  
8 outstanding record of compliance, and this Board's  
9 strong enforcement mechanism and grant the phased  
10 approval of 20 additional students at this time.

11 I appreciate your patience as I have  
12 presented St. Patrick's proposal to you. Confident  
13 that we have demonstrated that the impact of the  
14 requested additional students will be minimal and that  
15 we have proven that we can fulfill our promises to the  
16 community and determine to see to it that we continue  
17 to fulfill those promises, I am pleased to ask the  
18 Board of Zoning Adjustment for approval of our  
19 request. Thank you.

20 CHAIRPERSON GRIFFIS: Thank you very much.

21 MS. PRINCE: We have only one other  
22 witness if you have questions for Mr. Barrett. Would  
23 you like to hold those off until you hear from Mr.  
24 Brenneman, our sound expert, or you could ask them  
25 now?

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1                   CHAIRPERSON GRIFFIS: No. Actually, let's  
2 go into question now because the sound is going to be  
3 very specific to that issue. Let me start off saying  
4 I think the quota of the day has not ben reached. We  
5 know so much more than we knew then and I hope we can  
6 all say the same thing.

7                   On that aspect, quite frankly, as I sat on  
8 the case, but do you want to describe a little bit  
9 more where this is located in conjunction with the  
10 main campus? This goes directly to the aspect of  
11 walking. I know there's an awful lot of written, and  
12 you've touched upon some of it, but it may be  
13 important. You ran across very quickly you have an  
14 agreement with Lab School because there's no  
15 sidewalks.

16                   MR. BARRETT: Yes. Right.

17                   CHAIRPERSON GRIFFIS: Well --

18                   MR. BARRETT: The MacArthur campus is  
19 located exactly half mile from the White Haven campus.  
20 If students were to leave either the gymnasium area  
21 where they meet the shuttle bus or from the school  
22 office area, once they leave St. Patrick's property on  
23 White Haven Parkway there are no sidewalks to the west  
24 of us. Once they get to MacArthur Boulevard they are  
25 fine.

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1                   From White Haven Parkway to 4925 MacArthur  
2 there are sidewalks all along the way. But from St.  
3 Patrick's to MacArthur there are not. We have  
4 actually been located on MacArthur Boulevard before.  
5 Our rented space was at 4880A MacArthur Boulevard. We  
6 were concerned about the safety of walking students at  
7 that time.

8                   Remember at that location we weren't  
9 operating under any transportation management plan or  
10 whatever so we did from time to time walk between  
11 campuses. That was quite a bit closer. So at that  
12 time we reached an agreement with the Lab School that  
13 allowed us to pass through their campus.

14                   Basically if you are coming from the  
15 MacArthur campus along MacArthur Boulevard you would  
16 pass White Haven Parkway, pass the firehouse there,  
17 and turn left into what is known as the wetlands path  
18 that goes through the Lab School campus. It also  
19 added a nice bucolic touch to the city school  
20 experience. We would go along the wetlands path and  
21 up a stairway, an exterior stairway, that would lead  
22 us directly to St. Patrick's property. Am I operating  
23 at too high a level of detail, Mr. Chairman?

24                   CHAIRPERSON GRIFFIS: I don't know. I  
25 think we've hit it for what we needed. It's either

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1 affected or not.

2 MR. BARRETT: It seemed such an innocent  
3 question.

4 CHAIRPERSON GRIFFIS: Right. Exactly.  
5 Doesn't it? A little bit of perhaps a digression but  
6 Board members, four of us, at least, actually just  
7 reviewed and approved that fire station so that may  
8 help also visualize that corner. Okay. I think that  
9 puts it in some perspective. Let's now talk about the  
10 reasoning and the rationale and then the timing for  
11 the walk.

12 It was one of the critical -- one of the  
13 aspects of the last application was obviously how  
14 students got to and from. They are dropped off at one  
15 location and then all brought on the shuttle buses.  
16 You've indicated two very important aspects in my mind  
17 in looking at this. One, there may be an increase of  
18 a morning and an afternoon shuttle bus.

19 MR. BARRETT: Yes.

20 CHAIRPERSON GRIFFIS: And you are wanting  
21 under limited circumstances the availability of  
22 walking. The two questions I have is what are more of  
23 those limited circumstances? You've got late  
24 students. You've got afternoon, end of day, and such.  
25 Let's talk a little bit more about that. And then

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1 talk to us about why that doesn't open the entire  
2 door.

3 If I have a student late and, as I recall  
4 the last, and perhaps just common sense will tell you  
5 as a parent, your student is going to be late, about  
6 to be late, missing the shuttle, why isn't that  
7 bringing them to drive 50 feet from the school and  
8 drop them off and act like you walked all the way?

9 MR. BARRETT: Fair question. Fair  
10 question. What they would have to do would work  
11 exactly the way our shuttle bus system works now.  
12 They have to arrive at school and check in with either  
13 the teacher on duty, the administrator on duty.

14 CHAIRPERSON GRIFFIS: At the main campus?

15 MR. BARRETT: At the main campus.

16 CHAIRPERSON GRIFFIS: That's where  
17 attendance is taken. You're late there, you're on  
18 time there and not at the other facility.

19 MR. BARRETT: Exactly. So once they've  
20 checked in there, then if they have parental  
21 permission we sought at the beginning of the school  
22 year, then they could proceed to the MacArthur campus  
23 but only under those circumstances. They couldn't  
24 walk from Safeway or some other location.

25 CHAIRPERSON GRIFFIS: Okay. What would

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1 happen then if they just showed up at the middle  
2 school, had not checked in? Would they be sent back?

3 MR. BARRETT: No. I think there would be  
4 a larger issue there. I mean, that would be like a  
5 direct drop-off essentially, anything that is not in  
6 compliance with the transportation management plan.  
7 Not that we've had any but it would be treated as a  
8 violation. I think we'd be gracious enough and allow  
9 the student to remain there on the MacArthur campus  
10 but we would deal with the parent immediately.

11 CHAIRPERSON GRIFFIS: Okay. And that's  
12 laid out how you do that in your own transportation  
13 plan.

14 MR. BARRETT: Yes.

15 CHAIRPERSON GRIFFIS: Right. Okay.

16 MR. BARRETT: One other thing, if I may,  
17 that idea of late-arriving students. That doesn't  
18 generate a lot of vehicular traffic from the MacArthur  
19 campus or in between campuses. We do have an  
20 administrative staff member who goes and collects.  
21 They do check in. We know how many are waiting to be  
22 picked up. We go gather them up and drive them down.

23 I noted in one of the letters that was in  
24 itself regarded as a violation of the transportation  
25 management plan. I'm not quite sure what it is we are

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1 supposed to do with late-arriving students but that  
2 seems a fairly straightforward way to get late-  
3 arriving students to the MacArthur campus with limited  
4 vehicular traffic.

5 CHAIRPERSON GRIFFIS: How many would you  
6 anticipate walking in the morning and then the  
7 circumstances after school?

8 MR. BARRETT: Right. You asked for what  
9 other -- there's late arriving. There could be a  
10 situation where a student has arranged to work with a  
11 faculty member at school at the MacArthur campus  
12 before the first shuttle bus so that may be a reason  
13 that a student would walk down earlier.

14 We're not projecting a really significant  
15 number of students walking in the morning. Now that  
16 the weather is nicer we are doing much better with  
17 respect to on-time arrivals. During the winter we  
18 could have three, four, sometimes five students come  
19 late and that might occasion two trips in between  
20 campuses.

21 CHAIRPERSON GRIFFIS: That's due to the  
22 weather, you said?

23 MR. BARRETT: That's what the parents told  
24 us, yes.

25 CHAIRPERSON GRIFFIS: I've got to use that

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1 at work.

2 MR. BARRETT: Try it, yes. We wouldn't  
3 imagine there would be more than two or three students  
4 who would have other reasons to go down -- to walk  
5 down to the MacArthur campus in the mornings.

6 CHAIRPERSON GRIFFIS: And that's the  
7 morning. Afternoons?

8 MR. BARRETT: Probably fewer. I mean,  
9 they're all leaving at the same time.

10 CHAIRPERSON GRIFFIS: Right.

11 MR. BARRETT: So it was suggested that  
12 students who have an early dentist appointment, we  
13 talked about orthodontists last time and we'll talk  
14 about dentists this, that they might walk up to the  
15 MacArthur campus to be picked up up there. Somebody  
16 who has an independent study, sports commitment rather  
17 than the regular sports commitment, might walk up to  
18 the MacArthur campus for dismissal to that. That in  
19 itself discourages parents coming down to the  
20 MacArthur campus for any number of reasons.

21 CHAIRPERSON GRIFFIS: Okay. So some of  
22 these, I understand, would be anticipated.

23 MR. BARRETT: Yes.

24 CHAIRPERSON GRIFFIS: So, as you said,  
25 permission of the parents and there would be something

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1 with the school. Those --

2 MR. BARRETT: We would ask for parental  
3 permission at the beginning of the year. You know,  
4 can your child walk between campuses or not.

5 CHAIRPERSON GRIFFIS: I see. So that's  
6 the blanket one.

7 MR. BARRETT: Correct.

8 CHAIRPERSON GRIFFIS: Okay. Then you  
9 think there would be anticipated ones that you would  
10 develop, have an understanding, and then a count of  
11 students that would be utilizing that.

12 MR. BARRETT: Yes.

13 CHAIRPERSON GRIFFIS: If you are involved  
14 in the sports activity or something of that nature.

15 MR. BARRETT: Right.

16 CHAIRPERSON GRIFFIS: Okay. Then, lastly,  
17 I think for my understanding, what is the negative  
18 impact that we should understand of students walking?

19 MR. BARRETT: I'm unaware of it.

20 CHAIRPERSON GRIFFIS: Okay. Let me open  
21 it up to any other questions. Ms. Miller?

22 MS. MILLER: To start I have a question  
23 for Ms. Prince. We are very familiar with the  
24 Georgetown University cases. We just decided that on  
25 remand recently. I note in the Court of Appeals

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1 discussion they characterized the enrollment increase  
2 at issue in that case as a modest increase. I'm  
3 wondering in this case how you might address that  
4 given that this is -- well, one of the parties. Well,  
5 not one of the parties, one neighborhood group  
6 characterized this as a 50 percent increase and 20 is  
7 half of 40.

8 CHAIRPERSON GRIFFIS: As far as  
9 Georgetown, not everyone on the Board read all of  
10 that. Put in perspective that with modest what the  
11 court was talking about is an enrollment with an  
12 increase up to 6,016 so it was an increase, if I  
13 recall correctly, of about 387. Is that right? Okay.  
14 So that's what they were calling modest.

15 Ms. Prince.

16 MS. PRINCE: Well, I consider this to be  
17 a modest increase. I consider it to be modest because  
18 50 percent of a small number is still a small number.  
19 We have 40 children operating in that building. I  
20 myself have spent time in the building and I'm always  
21 taken with how empty it is. There are literally empty  
22 classrooms during every class period and Dan Spector  
23 can attest to that.

24 By the way, we have a schedule of all the  
25 class periods. I think a very small number, a 50

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1 percent increase in that very small number remains an  
2 extraordinarily small number for a junior high  
3 program. I think the more applicable case is the  
4 Washington Ethical Society case I mentioned. In fact,  
5 the numbers are almost identical.

6 What I just urge you to look at so  
7 carefully is what are the specific negative impacts  
8 that would be associated with 20 additional students.  
9 I urge you to ask yourselves how does the replacement  
10 of a yew hedge relate to additional students? How do  
11 efforts to reconcile storm water management issues on  
12 the site relate to additional students? Is there a  
13 relationship?

14 I would argue there is no relationship.  
15 I would argue there is no evidence in the record  
16 despite many of the letters in opposition that finely  
17 details and demonstrates how 20 additional students  
18 will have any adverse impact.

19 MS. MILLER: Thank you. I have some  
20 questions for Mr. Barrett. I'm wondering how do you  
21 -- well, I believe that your enrollment right now is  
22 exactly 40. Is that right?

23 MR. BARRETT: Correct.

24 MS. MILLER: How do you get to exactly 40  
25 because we have heard in these kind of cases where

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1 schools or universities have trouble predicting how  
2 many students they are going to accept, etc., so how  
3 do you get to exactly 40?

4 MR. BARRETT: The experience you're  
5 describing is how we operate on our other campus with  
6 440 students. We recognized very early on that we  
7 couldn't operate in the same way. For example, we  
8 couldn't accept up to 43 students and expect over time  
9 magically that we would be down to 40.

10 Essentially when we have a seat, we issue  
11 a contract. If we don't have a seat, we don't issue  
12 a contract. That hurts us essentially. It exposes us  
13 to empty seats in a way that we wouldn't under other  
14 circumstances. Given the nature of the assurances that  
15 we made on that campus, we don't think we have any  
16 other choice. When we have a seat, we make an offer.  
17 If we don't have a seat, we're not playing roulette  
18 there to hope that we get down to 40.

19 CHAIRPERSON GRIFFIS: Is it somewhat  
20 different, though, than establishing the beginning  
21 class. You testified today and also, as I recall,  
22 from the last application this was a demand within  
23 your school essentially.

24 MR. BARRETT: Yes.

25 CHAIRPERSON GRIFFIS: You had a group of

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1 students that were progressing through and at this  
2 critical age there was no option within St. Patrick's.  
3 It's often difficult to get in anywhere else so you  
4 have a controlled classroom size essentially.

5 MR. BARRETT: Right.

6 CHAIRPERSON GRIFFIS: You opened up your  
7 statement today saying you often don't even have a --

8 MR. BARRETT: For this current year we  
9 were able to accept one student so there is -- when we  
10 are determining how many seats we have available, we  
11 have that given or nearly given group moving from  
12 grade six to grade seven. That's our starting point.  
13 Then it's whatever the difference between that group  
14 moving up and whatever else we have available. We  
15 have a given eight-grade size so I'm not sure --

16 CHAIRPERSON GRIFFIS: Unless families move  
17 away or your 4th graders go straight to college or  
18 something of that nature, it's pretty much controlled  
19 what your classroom size is going to these grades.

20 MR. BARRETT: Yes. Still we want to have  
21 students from the outside. Again, there are spaces  
22 for students from the outside because the eight grade  
23 class that's graduating is larger than our current 7th  
24 grade class. It makes it difficult to extend a number  
25 of offers beyond what the difference is between 40 and

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1 the size of our class that's moving up.

2 CHAIRPERSON GRIFFIS: I'm sorry to  
3 interrupt you, Ms. Miller, but following on Ms.  
4 Miller's question then, okay, so 40 you were pretty  
5 exact on.

6 MR. BARRETT: Yes.

7 CHAIRPERSON GRIFFIS: If you went to 60,  
8 do you lose that exactness?

9 MR. BARRETT: I think we would have to  
10 continue to operate in the same way. Our assurances  
11 to the neighborhood and to the community don't change.  
12 We have made it very clear that 60 students at the  
13 MacArthur campus means 60 students at the MacArthur  
14 campus. We have taken that burden on. So be it.

15 MS. MILLER: So do you control it with a  
16 wait list instead of accepting people?

17 MR. BARRETT: Yes. And we also let the  
18 admission process run a little longer as well  
19 recognizing that we could lose some kids that are  
20 under contract, particularly before the July 1 binding  
21 date.

22 MS. MILLER: Why is 60 the number and any  
23 number over 60 not desirable or workable or whatever?  
24 Why is 60 the magic number?

25 MR. BARRETT: If no other reason is

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1 available to me, I would say we have promised that we  
2 would never accept -- never seek any enrollment above  
3 60. That's another one of the assurances that we have  
4 made to the neighborhood. Quite frankly, I think,  
5 that seems right now that we occupy that building, now  
6 that we've lived in it for 15 months.

7           Actually, I think we've had testimony by  
8 the architect that we could actually fit a significant  
9 number of more students in that building but we're not  
10 interested in doing that. A school c/an be too small.  
11 It can be too large. We don't want it to be too large  
12 and I think 60 is just about right.

13           MS. MILLER: Okay. There was something I  
14 didn't exactly follow. You are adding 20 more  
15 students but you going to be keeping to the one-hour  
16 break?

17           MR. BARRETT: It's actually a 40-minute  
18 break.

19           MS. MILLER: Forty-minute. So you would  
20 be increasing the number of students outside at that  
21 time?

22           MR. BARRETT: Right. What we would likely  
23 do at a full enrollment of 60, I've said that the  
24 lunch recess time would remain exactly the same.  
25 Actually, we would probably go from 40 minutes to 45

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1 minutes so it's all but identical. Rather than doing  
2 groups of two as we do now, we would do groups of  
3 three so it would be rather than two recesses of 20  
4 minutes, it would be three of 15. The end result  
5 would be roughly the same number of students outside  
6 at that time as we have now.

7 MS. MILLER: And how many students fit on  
8 a shuttle bus?

9 MR. BARRETT: We have two buses. One is  
10 28 student capacity and the other is a 32 study  
11 capacity. The smaller bus is preferable for this  
12 reason, it cuts down on the loading and unloading  
13 time. Well, if they are going to the MacArthur campus  
14 it cuts down on the unloading time on the other end.

15 The times I gave you, the timing of the  
16 unloading of the students, we would like to keep that  
17 as short a period as we can for two reasons. We stop  
18 on the bus pad at 4925. We don't want to cause any  
19 difficulty for metro bus, No. 1. No. 2, we stop  
20 traffic behind the bus on MacArthur Boulevard,  
21 outbound traffic, so we want to limit any backup of  
22 traffic behind the bus as it unloads students.  
23 Therefore, we would rather use the smaller size bus.

24 MS. MILLER: So if you added 10 students  
25 or 20 students, you would still have the same amount

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1 of additional buses which would be one. Is that  
2 correct?

3 MR. BARRETT: Yes.

4 MS. MILLER: And how would it affect the  
5 unloading time, the difference of 10 students?

6 MR. BARRETT: Well, it's spread across  
7 three shuttle runs rather than two shuttle runs. I  
8 think it would be roughly the same. If anything, a  
9 little better with fewer students per bus. Fewer  
10 students per bus, per run.

11 MS. MILLER: The Office of Planning has  
12 suggested perhaps increasing to 10 students instead of  
13 20 so you're saying it would be better with 20  
14 students?

15 MR. BARRETT: Oh, no, it's not better. I  
16 mean, it just is. I mean, we could keep the specific  
17 impact that you are talking about now which is, it  
18 seems to me, the impact on traffic on MacArthur  
19 Boulevard as the bus unloads in the morning.

20 MS. MILLER: Right.

21 MR. BARRETT: It's not better at 60 but we  
22 could keep it right about what it is now or even a  
23 little better if they are distributed across the three  
24 shuttle bus runs in particular. One bus run might be  
25 about the same, maybe a little longer in unloading,

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1 and the other two would be less.

2 MS. MILLER: Okay. Oh, the path that the  
3 students walk between the main campus and the  
4 MacArthur campus.

5 MR. BARRETT: Yes.

6 MS. MILLER: They go through the Lab  
7 School.

8 MR. BARRETT: Correct.

9 MS. MILLER: What else do they pass by?  
10 Do they pass by residences or what?

11 MR. BARRETT: They are in between Ashby  
12 Street, which is the cross street on MacArthur, and  
13 what's the library on? On V Street. There are  
14 residences in between Ashby and V. From that point  
15 through to the firehouse, for example, is all  
16 commercial and educational, for that matter, OLV. It  
17 would only be in between Ashby and V Street that they  
18 pass by residences and it's commercial, educational,  
19 and whatever you call a firehouse.

20 MS. MILLER: Okay. Right. I guess my  
21 final question is you made reference to this three  
22 strikes and you're out condition.

23 MR. BARRETT: Yes.

24 MS. MILLER: How does that really impact  
25 your operations if at all?

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1 MR. BARRETT: It underscores the  
2 importance to us and to our parents of complying with  
3 each and every condition. It has a way of focusing  
4 our attention on compliance in a way that under other  
5 circumstances maybe a school wouldn't be as focused on  
6 compliance. We are. We have to be given that  
7 enforcement mechanism.

8 MS. MILLER: What if it wasn't there?  
9 Would you still be focused on compliance?

10 MR. BARRETT: Absolutely. We have made a  
11 set of promises and we are going to fulfill those  
12 promises. We have fulfilled those. You can take that  
13 mechanism away and we're still going to be intent on  
14 fulfilling those promises.

15 MS. MILLER: Thank you.

16 CHAIRPERSON GRIFFIS: Mr. Mann.

17 MR. MANN: You started operations at this  
18 location in January of 2004?

19 MR. BARRETT: Yes.

20 MR. MANN: So more or less the second half  
21 of the school year?

22 MR. BARRETT: Correct. Almost exactly,  
23 yes.

24 MR. MANN: And at that time did you have  
25 -- did you start with 40 students?

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1 MR. BARRETT: There were 39 students at  
2 that time so we have essentially been fully enrolled  
3 for both academic years that are occupancy spans.

4 MR. MANN: Okay. The bus goes on a  
5 clockwise route that takes nothing but right turns?

6 MR. BARRETT: Correct. Yes.

7 MR. MANN: So it takes considerably  
8 longer, I guess, to get from the MacArthur campus to  
9 the White Haven campus.

10 MR. BARRETT: Correct. Yes.

11 MR. MANN: But that bus route seems to be  
12 working just fine. Is that correct?

13 MR. BARRETT: Yes.

14 MR. MANN: Can you remind me how many  
15 faculty and staff are authorized?

16 MR. BARRETT: Authorized eight full-time,  
17 four part-time.

18 MR. MANN: And how many are there right  
19 now?

20 MR. BARRETT: Six full-time, five part-  
21 time.

22 MR. MANN: And do you anticipate that it's  
23 going to increase to the authorized mode?

24 MR. BARRETT: At full enrollment I would  
25 expect -- full enrollment at 60 I would expect that it

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1 would, yes.

2 MR. MANN: Okay. Thank you.

3 CHAIRPERSON GRIFFIS: Good. Anything  
4 else? Yes, Mr. Hood.

5 MR. HOOD: Mr. Chairman, I have a few  
6 questions. Basically clarification. Unfortunately,  
7 Mr. Barrett, I did not participate with the firehouse  
8 and everything else so I'm trying to get some  
9 orientation here between campuses. I didn't see  
10 anything in the file that would help me. We're  
11 talking about going down the street with no sidewalks.  
12 I just don't see the correlation. Unfortunately, I  
13 hate to have you step all the way back just for my  
14 benefit so I can come up to speed.

15 Let me just ask you first, you mentioned,  
16 and I want to get the phrasing, you called off a roll  
17 of things that you now know. Previously when you came  
18 in on BZA Case No. 1685-2A, which when you requested  
19 for those 60 -- the level to be 60 students at that  
20 time, now that you're asking for another 60 you were  
21 rejected by the BZA to maintain, I guess, 40 which is  
22 cap.

23 MR. BARRETT: Correct.

24 MR. HOOD: Right. But you requested 60.

25 MR. BARRETT: Correct.

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1 MR. HOOD: So why is it -- did you know  
2 something then that you still know now? I mean,  
3 explain that to me.

4 MR. BARRETT: Fair enough. I think that  
5 because it was an entirely new enterprise at that  
6 location, there was a lot we didn't know at that time.  
7 I think particularly a lot of the opposing testimony  
8 focused on those things that the opponent said  
9 wouldn't work.

10 For example, I continue to see in some of  
11 the opponent's letters reference to our complicated  
12 transportation management plan. There was a lot of  
13 testimony that, "It can't work. It's too complicated.  
14 It will take too much supervision." Really all that  
15 it means is that we check roll in one campus, put  
16 students on a bus, and then go to the other campus.

17 That's not too difficult to monitor. In  
18 fact, some people argue that schools exist to take  
19 roll so it's kind of a core activity of ours. There  
20 was a lot of conversation about whether -- they said  
21 that St. Patrick's parents would ignore the  
22 transportation management plan, that it would be  
23 inconvenient for them to come to the White Haven  
24 campus to drop off their students.

25 Instead, they are going to drive right to

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1 the MacArthur campus and drop their children there.  
2 Well, interesting. Across 15 months nobody has.  
3 Nobody has. There were so many things, and those are  
4 two excellent examples, I think, that opponents said.  
5 Either it can't be done or won't be done but we've  
6 done them.

7 The things I ticked off there in talking  
8 about what we know now are examples of those things  
9 that we didn't know when it was an entirely new  
10 enterprise that we do know now that we've been in  
11 operation for a 15-month period.

12 MR. HOOD: Let me ask you, from your main  
13 campus down to, I guess, the campus on Ashby Street,  
14 and you can correct me if --

15 MR. BARRETT: MacArthur, yes.

16 MR. HOOD: They don't cross MacArthur  
17 Boulevard.

18 MR. BARRETT: That's correct. They will  
19 not under any circumstances cross MacArthur Boulevard.  
20 Taking the Lab School route they would cross White  
21 Haven and then they would cross some lettered streets.  
22 They would cross, I think, U and V and King. U, V, W.  
23 Excuse me.

24 MR. HOOD: Now, someone from the school is  
25 going to be monitoring? How is that actually going to

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1 work?

2 MR. BARRETT: In terms of the workers?

3 MR. HOOD: Yes.

4 MR. BARRETT: They would not accompany the  
5 walking students. A student who -- let's say a  
6 student who will be working with a faculty member  
7 before school starts and before the first shuttle bus  
8 runs. That would be a time the student would walk.

9 That student would arrive on the White  
10 Haven campus at about 7:30, check in with the faculty  
11 member or the administrator who is on duty that  
12 morning so that we know that student has arrived  
13 there. Then that student would then walk from the  
14 White Haven campus to the MacArthur campus. We are  
15 monitoring the arrival at both ends. We are not  
16 monitoring the in between.

17 MR. HOOD: So you have somebody dedicated  
18 just to kind of -- you know about how much approximate  
19 time. You have somebody dedicated just to monitor  
20 that when the students arrive?

21 MR. BARRETT: Well, that individual  
22 already monitors arrival for transportation via the  
23 shuttle bus. It's not a new mechanism.

24 MR. HOOD: For the shuttle but I mean for  
25 the walkers.

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1 MR. BARRETT: It would be the same  
2 individual checking that individual in, that student  
3 in when he or she arrived.

4 MR. HOOD: So the shuttle bus, to be  
5 frankly honest from reading it, it does sound like  
6 it's a lot labor intensive but it's working?

7 MR. BARRETT: Yeah. It's actually a  
8 simple matter.

9 MR. HOOD: Okay. Let me ask you,  
10 previously you were supposed to be reporting on -- one  
11 thing about conditions. We put conditions in there  
12 because we expect for them to be carried through.

13 MR. BARRETT: Yes.

14 MR. HOOD: In one of the submittals it  
15 mentioned there was not a report given to the  
16 liaisons. Have you been doing that?

17 MR. BARRETT: That reference is to the  
18 report on our carpool program that we are bound to  
19 file with DDOT each year. I think there's a July 1  
20 report in your packet. We reported to DDOT. We  
21 reported to ANC-3D and, I was surprised to notice as  
22 I reread the conditions, we are also to report it to  
23 the Community Liaison Committee.

24 We have not -- there has only been one  
25 such report. It was a July 1, 2004, report. We did

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1 not report that to the Community Liaison Community.  
2 A member of the Community Liaison Committee who is the  
3 chair of ANC-3D has had that since July 1 but we did  
4 not -- I did not convey it to the quarterly meeting.  
5 We have one a week from tonight. It will be conveyed  
6 to them at that time. It is true that we did not  
7 convey the July 1, 2004, report.

8 MR. HOOD: Okay. And I can't put my hand  
9 right on it but it was in the Neighbors United Trust  
10 submittal and it mentioned that the only time it was  
11 received by the ANC chair was when she apparently  
12 asked for it.

13 MR. BARRETT: No, that's incorrect. The  
14 letter -- let me pull -- there is a letter to Ken  
15 Laden that is dated July 1, 2004. What it does is  
16 report on the carpool counts, the average vehicle  
17 occupancy counts that we did during the 2003/2004  
18 school year. If we go to the back of that, the CCs  
19 listed are Mrs. Alma Gates, Chair, Advisory  
20 Neighborhood Commission 3-D, and ANC-3D commissioners.  
21 No one had to ask for it.

22 MR. HOOD: Okay. Other than to help me  
23 more with my orientation, you probably have provided  
24 it in other cases, but if you have something to show  
25 me. This is what I'm working with. This is not

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1 really helping me.

2 CHAIRPERSON GRIFFIS: Right. The OP's  
3 aerial.

4 MS. GLAZER: Excuse me. I just wanted to  
5 point out the applicant's counsel handed me a document  
6 during questioning. I think it relates to your  
7 question, Mr. Hood. I think this document is already  
8 in the record.

9 CHAIRPERSON GRIFFIS: Is it?

10 MS. PRINCE: The document is simply a plat  
11 that was attached to the original application.

12 MS. BAILEY: Mr. Chairman, it's located at  
13 Exhibit No. 9.

14 MR. HOOD: This can help but I was looking  
15 for something a little more --

16 CHAIRPERSON GRIFFIS: Yeah.

17 MR. HOOD: I don't want to say idiot proof  
18 because I'm not an idiot but a little more simple for  
19 me to understand.

20 MR. BARRETT: Is there any place where you  
21 can pick up on the Mac -- excuse me, pick up on the  
22 White Haven campus on that map?

23 MR. HOOD: You know what? I guess maybe  
24 if you could show me.

25 MS. PRINCE: Put little arrows on the map

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1 to show the walking group?

2 MR. HOOD: Yes, show me where we are on  
3 the walk. What I'll do is hand this back to staff.  
4 If you could draw it for me, that would help me.

5 CHAIRPERSON GRIFFIS: On this page is the  
6 main campus shown?

7 MS. PRINCE: On the plat that I submitted  
8 to Mr. Hood the main campus is just off the bottom of  
9 the plat. It takes us only as far as -- it takes us  
10 only to U Street but it depicts the walking route  
11 which we would follow MacArthur Boulevard in between  
12 4925 and you would cross over the alphabetical streets  
13 in between, U, V, and W. You cross over each of those  
14 streets.

15 You walk in front of the series of  
16 commercial establishments and the CVS and then you  
17 cross White Haven and you make a left in to the Lab  
18 School campus. You traverse the campus along an  
19 established path. That puts you right on White Haven  
20 Parkway directly across the street from the gymnasium.  
21 There is a sidewalk every step of the way.

22 MR. HOOD: I have some arrows on here.

23 MS. PRINCE: I put the little arrows on.

24 MR. HOOD: It just took me a little while  
25 to figure it out. Okay. This helps me. But you're

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1 on MacArthur Boulevard. Right? When you leave the  
2 site going back to the White Haven.

3 MR. BARRETT: If you are moving from the  
4 MacArthur campus to the White Haven campus you begin  
5 on MacArthur Boulevard, yes.

6 MR. HOOD: So you don't make a left and  
7 cut -- if I'm leaving the site and going back to the  
8 main campus, I'm not going to make a left and cut  
9 through the neighborhood?

10 MR. BARRETT: You make a left only when  
11 you pass the fire house which, I assume, is -- okay,  
12 you make a left only when you pass the firehouse and  
13 onto the Lab School campus.

14 MR. HOOD: Okay. Let me study this and  
15 maybe I'll figure it out. Thank you. Thank you, Mr.  
16 Chair.

17 CHAIRPERSON GRIFFIS: Can you pass down  
18 your arrows?

19 MR. HOOD: Can I have it returned back?

20 CHAIRPERSON GRIFFIS: All for one, one for  
21 all, you know. Okay. Mr. Etherly.

22 MR. ETHERLY: Thank you very much, Mr.  
23 Chair.

24 Mr. Barrett, thank you very much for your  
25 statement. It definitely has been very helpful

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1 getting a sense of how we have progressed over the  
2 past 15 months. I wanted to just very quickly run  
3 through a couple of the items. Mr. Hood alluded to  
4 the submittal at Exhibit No. 25 which is the Neighbors  
5 United Trust, April 3rd, 2005, document.

6 I wanted to run through a couple of items,  
7 at least a couple of the key items that I have felt  
8 kind of emerged from that document. Some of it may be  
9 questions directed to you. Some may be directed to  
10 counsel. I wanted to first deal with the issue as  
11 it's outlined on page 3 with regard to the shuttle bug  
12 -- I'm sorry, the shuttle bus service. Pardon me.

13 Let's first deal with just kind of the  
14 text of the submittal. It speaks to, of course, in  
15 the event that students arrive late to the White Haven  
16 campus in order to get those students over to the  
17 other campus, provisions do have to be made to  
18 transport them. Do you have a sense of how frequently  
19 that situation occurs or maybe even an average sense  
20 of how frequently you have to deal with that?

21 MR. BARRETT: I would imagine it occurs  
22 almost daily. Dan Spector can help me with that but  
23 I would imagine it's almost daily, or certainly  
24 several times a week that we run those shuttles.  
25 Again, as I suggested earlier, it's more frequent

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1 during the wintertime. It never goes away.

2 MR. ETHERLY: Okay. Perhaps when we do  
3 get to Mr. Spector it would useful to kind of run  
4 through -- what I think would be helpful is getting a  
5 real firm sense of how many shuttle bus trips we are  
6 actually talking about, one in terms of the scheduled  
7 trips, but then also perhaps trying to factor in those  
8 unscheduled trips.

9 MR. BARRETT: The shadow bus itself makes  
10 no unscheduled trips.

11 MR. ETHERLY: So for those students who  
12 arrive late, how are they transported?

13 MR. BARRETT: In exactly the way -- okay,  
14 let me step back. When a student arrives late, that  
15 student goes essentially to the front desk at the main  
16 campus. What the individual at the front desk does  
17 normally is then contact the person at the front desk  
18 on the MacArthur campus.

19 I have done it from time to time whether  
20 I drew the short straw that morning or what. What I  
21 do is I call down there and say, "I have so and so  
22 here. Who else are you missing?" "Well, there's one  
23 other student so we are going to hang for a few  
24 minutes."

25 Then to Judy, who is the staffer there,

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1 "Would you come up in about 10 minutes and pick up so  
2 and so who is late." Hopefully by that time the other  
3 individual would be there as well. In the meantime  
4 she may find out that the other individual is sick and  
5 is not coming in.

6           There's a lot of voice communication  
7 between the main campus and the MacArthur campus so  
8 that they know -- we know who they're looking for.  
9 They know we have them and that they should come up  
10 and gather them up. They do that by car. It's a  
11 personal vehicle.

12           MR. ETHERLY: So it's a personal vehicle?

13           MR. BARRETT: Correct.

14           MR. ETHERLY: Okay. So as you indicated  
15 on page 12 of what would be Exhibit No. 4, I guess  
16 it's kind of referred to as the January 28th  
17 submittal, it's an administrative staff person who  
18 would take a personal vehicle.

19           MR. BARRETT: Correct.

20           MR. ETHERLY: Is it your experience and  
21 testimony that happens generally at least once a day  
22 or do you have -- I'm trying to get a sense of how  
23 many trips does that generate in addition to the  
24 shuttle bus.

25           MR. BARRETT: Right. I believe -- uh, I

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1 believe that the maximum on any particular day would  
2 be twice. Generally speaking I think it would be once  
3 a day and then presumably there are some days when we  
4 are lucky and we don't do it at all. I can't imagine  
5 that there have been many times across the year when  
6 we have done it -- we have run more than two trips in  
7 that personal vehicle which, regrettably, is not an  
8 SUV, to get late-arriving students from the White  
9 Haven campus to the MacArthur campus.

10 MR. ETHERLY: Okay. Would it be -- would  
11 it then perhaps be an overly aggressive assumption to  
12 hazard a guess that you might see an uptick in that  
13 type of activity with the addition or introduction of  
14 20 new bodies?

15 MR. BARRETT: If the walking provision is  
16 not approved, then I think that is a fair assumption  
17 on your part, yes. But with the walking it would  
18 hopefully reduce, if not eliminate, those trips except  
19 in foul weather.

20 MR. ETHERLY: Okay. I would like to move  
21 briefly to the issue of activity on the paved parking  
22 lot as is noted in the Neighbors United Trust letter  
23 staying on page 3 for a moment. There is a reference  
24 to student activity on the paved parking lot. Could  
25 you speak a little bit to your understanding or

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1 awareness of any of that type of conduct?

2 MR. BARRETT: Right. I think that  
3 reflects what's gone on across the winter in fouler  
4 weather or when there is snow on the ground and what  
5 not. The students would gravitate more towards the  
6 paved parking area for their play. We haven't -- we  
7 actually have just reseeded the area. We beautifully  
8 landscaped it soon after we moved in but we haven't  
9 gotten hold of the lawn area.

10 That has kind of pushed students up toward  
11 the parking lot. The idea is to have them using the  
12 grassy area and the terrace not for recreation per se  
13 but for being outside. The terrace overlooks  
14 MacArthur Boulevard. They have been using the paved  
15 area as well.

16 MR. ETHERLY: But you would characterize  
17 that as primarily a winter occurrence, not necessarily  
18 a --

19 MR. BARRETT: Well, it's going to persist  
20 into this spring because, as I said, we just seeded it  
21 and we are trying to get hold of that lawn area. Once  
22 that's established, I think as we move into next fall,  
23 for example, the ability to use the grass area will be  
24 complete, I think.

25 MR. ETHERLY: At present what is the

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1 school's policy with respect to the concrete paved  
2 area in terms of student activity? It's open to  
3 student activity and student use?

4 MR. BARRETT: I think the reason that it  
5 has essentially been open is that we recognize that  
6 the grassy area beginning in the winter time has been  
7 largely unavailable. Looking ahead I would like to  
8 focus student activity, outside student activity on  
9 the grassy area and not on the paved area.

10 MR. ETHERLY: Okay. Final question and  
11 then I am done for the moment, Mr. Chair. I just  
12 wanted to speak a little bit to page four of the  
13 Neighbors United Trust submittal with respect to the  
14 issue of storm water, in particular some of the runoff  
15 that was referenced with regard to Ashby Street and  
16 MacArthur Boulevard. In particular, kind of the  
17 adjoining property.

18 We have, I believe, some photographic  
19 submittals which speak to some of the sandbagging that  
20 has been done on the Scrivseth property. To the  
21 extent you may be aware of it or familiar with it,  
22 could you speak a little bit to any concerns or  
23 problems that you have encountered with respect to  
24 storm water and runoff on the subject property?

25 MR. BARRETT: I would characterize storm

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1 water issues as among the most important matters that  
2 we've been dealing with down there. As I said to Mr.  
3 Scrivseth at one point, storm water issues at that  
4 location aren't new. They have been there forever.

5 What is new down there is that Mr.  
6 Scrivseth and Ms. Wright are now living next door to  
7 a neighbor who actually wants to correct them. We  
8 have been -- we have spent a considerable amount of  
9 staff time working on storm water issues down there.  
10 They are real. I think we have finally begun to get  
11 a handle on them.

12 We had, I think, across the last two weeks  
13 torrential rainstorms and in neither of those  
14 rainstorms it's my understanding did any of our water  
15 leave 4925 MacArthur Boulevard and head into the  
16 Wright/Scrivseth property next door. We do have -- we  
17 have a storm water management system in place.

18 Part of our discovery process when we dug  
19 up the system at a certain point and found it filled  
20 with construction debris, two by fours, other  
21 materials which we have removed. We now have several  
22 layers of sandbags at the corner of the parking lot or  
23 the edge of the parking lot that faces their property.

24 We have also been -- we met on Monday,  
25 March 28th, a representative of the D.C. Department of

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1 Environmental Health Administration, Mr. Green, and  
2 the D.C. Department of Health, Bureau of Environmental  
3 Quality, visited the MacArthur campus to view the  
4 operation of the storm water management system.

5 Mr. Green is inspector for the Water Shed  
6 Protection Division. Mr. Nwangwu is an Environmental  
7 Engineer for the Water Shed Protection Division. This  
8 is a summary of our conversations with those folks  
9 from the Health Department.

10 Mr. Green returned to the campus and asked  
11 that the school make two adjustments to the site. He  
12 asked that the school extend the curve and gutter  
13 along the west side of the property to the end of our  
14 property. That is the side, I believe, that is  
15 contiguous with the Wright/Scrivseth property.

16 He also asked that the school raise the  
17 curb that runs along the catch basin on the west side  
18 of the parking lot by six inches. Clearly he was  
19 unimpressed by our sandbagging which has been entirely  
20 successful now in preventing overflow.

21 Extending the curb along the west property  
22 line will help ensure that runoff from the parking lot  
23 does not flow into the neighbor's yard. Also raising  
24 the curb height at the catch basin will help ensure  
25 that water does not overflow in unusually heavy rains

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1 into the neighbor's property.

2 The school agreed to both of these  
3 requests. Drawings have been submitted to the  
4 Department of Health for review and approval and will  
5 begin the work to make those adjustments as soon as we  
6 get that approval.

7 One other recommendation that Mr. Green  
8 made was that we permanently attach downspout  
9 extenders on the east side of the property, repair,  
10 replace a stone cap -- capstone on the wall running  
11 along MacArthur Boulevard, that we continue to monitor  
12 an area in the yard that pools when it rains, and that  
13 we remove a two by four board that was used in the  
14 construction of the storm water catch basin. We have  
15 made all of those changes that were recommended.

16 The point being that we are working with  
17 the folks from the Department of Health who monitor  
18 these situations. Our immediate concern is with the  
19 Wright/Scrivseth property. We think we have attained  
20 that one. We now obviously have a recommendation that  
21 we make permanent the provisions that are allowing us  
22 to tame that problem.

23 With respect to runoff directly onto  
24 MacArthur Boulevard, it seems to me that if enough  
25 rains falls in a short enough period of time, we're

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1 going to shed some water directly onto MacArthur  
2 Boulevard. We don't want to shed it onto the  
3 Wright/Scrivseth property but we are making every  
4 effort in consultation with District officials to  
5 resolve the storm water issues that have long existed  
6 at that property finally.

7 MR. ETHERLY: What, in your opinion,  
8 precipitated the Department of Health visit to the  
9 site? Was that a regularly scheduled visit?

10 MR. BARRETT: I wouldn't guess that it was  
11 a regularly scheduled visit. I think it probably  
12 reflected neighbor concerns about runoff issues.

13 MR. ETHERLY: Okay. Then one final  
14 question for counsel, and this is kind of an overall  
15 perspective type of question. As we review and as we  
16 prepare to kind of get into, shall we shall, further  
17 discussion around conditions, I want to be sure that  
18 I'm clear on kind of counsel's or the applicant's  
19 posture relative to conditions.

20 Maybe the storm water piece is a good kind  
21 of jumping off point. To an extent the storm water  
22 issue, taking Mr. Barrett's statement about the  
23 historic -- the history around the storm water  
24 management issues on this property, that in and of  
25 itself is not necessarily something that counsel would

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1 assert is driven by student presence on the property.

2 That's just a fact of the property that  
3 the applicant is attempting to ameliorate through its  
4 storm water management plan. With respect to other  
5 conditions that have been discussed around the  
6 previous BZA order and what may be discussed here  
7 today, is it the applicant's contention that the  
8 conditions that are presently included are sufficient  
9 for 60 as well as the current 40?

10 Is that essentially kind of your sense?  
11 It's touched on in the Neighbors United letter and  
12 it's a little bit of a nuance. I just wanted to be  
13 sure that's not an inappropriate characterization of  
14 the position of the applicant. The conditions that  
15 you currently have in place it would be your  
16 contention are sufficient for 40, of course, and would  
17 also be so for 60.

18 MS. PRINCE: That is, in fact, our  
19 contention. If you walk through the conditions, and  
20 they are detailed, all 20 of them, they clearly  
21 reflect the climate at that time which was concern  
22 over noise and traffic. The conditions are very, very  
23 highly specific with respect to any and all noise  
24 impacts and set out the carpooling plan on the main  
25 campus and the shuttle arrangement, all of which we

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1 now know are functioning well.

2 I can't argue with success. This plan has  
3 worked beautifully. It is heavily monitored by a  
4 concerned group of neighbors and it functions well.  
5 I cannot imagine another condition that would make it  
6 function any better than it already does. When the  
7 shuttle buses arrive they don't stay on the pad any  
8 longer than we said they would when they load. They  
9 take the length of time we said they would.

10 One factor after another through the  
11 course of operation of the school has demonstrated  
12 that what we said was going to happen has, in fact,  
13 happened. If this Board feels that there is a  
14 condition that we haven't anticipated that might give  
15 a heightened level of security to the impacts  
16 associated with 20 more kids, we are certainly willing  
17 to consider that but a tremendous amount of time and  
18 effort and thought went into these 20 conditions and  
19 they are working.

20 MR. ETHERLY: Thank you. Thank you, Mr.  
21 Chair.

22 MR. MANN: I have just a quick question of  
23 clarification. Do you enroll 7th, 8th, and 9th  
24 graders, or just 7th and 8th grades?

25 MR. BARRETT: The approval is for 7th,

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1 8th, and 9th. We do not have a 9th grade program.

2 MR. MANN: Okay. Thank you.

3 CHAIRPERSON GRIFFIS: Go ahead.

4 MS. MILLER: Mr. Barrett, my understanding  
5 is that you have this traffic management plan that is  
6 largely responsible for your perception that there are  
7 no adverse impacts on traffic. My question is is it  
8 more than what's in the order? Is there a separate  
9 plan or is what we see in the conditions the traffic  
10 management plan?

11 MR. BARRETT: I think the condition itself  
12 sets out the parameters of that. We have a separate  
13 carpool initiative that governs the functioning of our  
14 White Haven campus. But with respect to transporting  
15 students from the White Haven campus to the MacArthur  
16 campus, it's simply the shuttle bus plan as outlined  
17 in skeletal form in the order.

18 MS. MILLER: Maybe I'm missing something  
19 but I thought that perhaps that there were sanctions  
20 for violating the traffic management plan. For  
21 instance, if parents did drop off the students at the  
22 MacArthur Boulevard campus instead of complying with  
23 the conditions that there were some sanctions on them.

24 MR. BARRETT: That would go to condition  
25 20.

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1 MS. MILLER: Those are the sanctions. So  
2 the school doesn't have its own sanctions?

3 MR. BARRETT: Oh, no. A parent -- what we  
4 have informed our families is that inability or  
5 refusal to follow the shuttle bus system or the  
6 transportation plan to the MacArthur Boulevard  
7 jeopardizes the enrollment of the student.

8 MS. MILLER: Where is that? Is that  
9 stated anywhere?

10 MR. BARRETT: It's in our parent handbook.

11 MS. MILLER: It's in your handbook?

12 MR. BARRETT: Yes.

13 MS. MILLER: Okay.

14 MR. BARRETT: I suppose if you look, and  
15 I don't have that available at the moment, but if you  
16 looked at our parent handbook we set out very clearly  
17 how arrival at the MacArthur campus and departure from  
18 the MacArthur campus will work. Just a quick example,  
19 we have -- I guess this goes to our orthodontic  
20 testimony of earlier -- a student arriving late at  
21 school from an off campus appointment after 9:00 a.m.  
22 may arrive directly on the MacArthur campus.

23 If you're merely late, you have to come to  
24 the White Haven campus. But if you have an  
25 appointment and you're returning after 9:00 a.m., you

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1 can go directly to the MacArthur campus. It's in our  
2 handbook. I've just been handed an e-mail that  
3 apparently I sent out in January, just some reminders.  
4 The pertinent ones here, no direct drop-off of  
5 students at the MacArthur campus, and there's another  
6 one about parking only in the parking lot down there.  
7 So the parent handbook and a series of communication  
8 normally by letter or by e-mail.

9 MS. MILLER: Okay. I just want to be  
10 thorough here because some schools have like a series  
11 of sanctions like if they violate the TMP the first  
12 one might be a warning, second one might be a fine,  
13 third one might be suspension, expulsion, etc.

14 MR. BARRETT: Right.

15 MS. MILLER: Do you have anything like  
16 that?

17 MR. BARRETT: We don't have that tiered  
18 system. We just throw them out, yes. One paragraph  
19 concludes here that, "We need to have your cooperation  
20 in these matters. Indeed, that corporation is so  
21 important that I must remind you that failure to  
22 follow the directives above will endanger your child's  
23 standing at St. Patrick's." There is no tiered system  
24 as you say other schools have. We haven't found that  
25 it's necessary. Perhaps we might but, at this point,

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1 we have not found it necessary.

2 MS. MILLER: And no one has violated it?

3 MR. BARRETT: Correct.

4 MS. MILLER: Okay. Thank you.

5 CHAIRPERSON GRIFFIS: Excellent. If  
6 there's no other questions, let's move ahead.

7 MS. PRINCE: Lest we not forget our sound  
8 expert, Rob Brenneman is here from Polysonics.  
9 Polysonics, as you may recall, performed the initial  
10 sound study on the campus that we submitted in  
11 connection with the original application.

12 Scott Harvey from Polysonics presented  
13 both written and oral testimony. Rob has not been  
14 qualified as an expert by this Board so I have his  
15 resume. Basically he's a mechanical engineer which is  
16 what sound engineers are. News to me.

17 He has extensive work in the land use  
18 arena and in examining impacts associated with  
19 proposed uses. His most recent case that was of  
20 interest to me involved a pet hotel in a residential  
21 complex so I think he knows sound effects on  
22 residential neighborhoods well. I'm going to submit  
23 his resume and ask that you qualify him as an expert.

24 CHAIRPERSON GRIFFIS: Was the pet hotel in  
25 the District?

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1 MR. BRENNEMAN: It's in Bethesda.

2 CHAIRPERSON GRIFFIS: Oh, okay.

3 Excellent. Any questions from the Board? They are  
4 taking a look at it. I'll give them a moment and fill  
5 the air space here since we're talking to a sound  
6 engineer. Actually, as I recall, reflecting on the  
7 past, Polysonics actually did -- obviously gave some  
8 great testimony.

9 I think to increase the level of  
10 understanding from the Board's perspective of all  
11 these sound reports that we have gotten subsequently  
12 in applications and prior probably didn't fully  
13 understand what they were looking at. I thought it  
14 was a fascinating endeavor.

15 In fact, one of the amusing -- not to note  
16 an opinion either way but an amusing anecdote that I  
17 recall the last application, all to fill time while  
18 the other Board members look at your resume, was the  
19 test that you set some of the students up and said,  
20 "Go play on the yard. Don't worry about those sound  
21 disks in the corner of the property. Just play as you  
22 will."

23 They monitored, in all seriousness, the  
24 sound without the students knowing that they were out  
25 there playing so we had that report. I think the

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1 lesson learned, and correct me if I'm incorrect, is  
2 that sound essentially is not cumulative so we had all  
3 this testimony and it was said again today, this is in  
4 the air, space, whatever it is, the airplanes are  
5 coming over.

6 MR. BRENNEMAN: That's correct.

7 CHAIRPERSON GRIFFIS: And the cars that  
8 are going back and forth and they set a certain  
9 decimal level in the area. If you had kids or you had  
10 something else, it's not cumulative and, my gosh, it's  
11 all getting louder here all the time. Rather, it's  
12 set to a certain level and so the loudest thing is  
13 what you will hear.

14 MR. BRENNEMAN: That's pretty much  
15 correct. I'll review all those types of issues in my  
16 testimony.

17 CHAIRPERSON GRIFFIS: Good. Let's see if  
18 we can get it for you. Testimony, that is. Any  
19 questions on establishing any recommendations the  
20 Board would like to ask the expert witness? Is the  
21 ANC represented today? Is the ANC member here? Not  
22 having the ANC member, I think we can move ahead if  
23 there is no objection.

24 MS. MILLER: I have a question.

25 CHAIRPERSON GRIFFIS: Oh, good. By all

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1 means.

2 MS. MILLER: What do you mean by project  
3 history? What kind of role did you play in general?  
4 What does that reflect?

5 MR. BRENNEMAN: As a lead engineer on this  
6 so actually going to the sites, analyzing what kind of  
7 noise issues there are, how to measure accurately what  
8 types of issues there are, and in determining, one,  
9 the impact and, two, if there is how to meet local  
10 codes and helping the developers or clients be in  
11 compliance with whatever local jurisdictions.

12 MS. MILLER: These are all land use zoning  
13 cases or what?

14 MR. BRENNEMAN: There are some zoning  
15 cases such as the pet hotel one.

16 MS. MILLER: Is the pet hotel on this  
17 list?

18 MR. BRENNEMAN: At the time I don't  
19 believe that is on there.

20 MS. MILLER: What's the name of that one?

21 MR. BRENNEMAN: That is actually for  
22 PetSmart.

23 MS. MILLER: Okay.

24 CHAIRPERSON GRIFFIS: You are divulging  
25 our schedule and what to expect soon? What she's

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1 going to actually is a critical question, and that is  
2 a lot of these are vibration measurements or aspects.  
3 Were all of these -- were elements of most of these  
4 measuring human noise, kids? Any schools? Anything  
5 comparable in terms of measurement of impact that  
6 we're looking at here?

7 MR. BRENNEMAN: I have dance studios.

8 CHAIRPERSON GRIFFIS: Right.

9 MR. BRENNEMAN: I have done residential  
10 noise from one living space to another living space.

11 CHAIRPERSON GRIFFIS: What does that mean?

12 MR. BRENNEMAN: For example, basically  
13 transmission through walls, partitions.

14 CHAIRPERSON GRIFFIS: I see.

15 MR. BRENNEMAN: Ceiling, floor assemblies.

16 CHAIRPERSON GRIFFIS: Inside. So that is  
17 human noises that are being made inside a residential  
18 unit through to another one.

19 MR. BRENNEMAN: That's correct.

20 CHAIRPERSON GRIFFIS: I see.

21 MS. MILLER: And my last question is where  
22 are these, in the District of Columbia or are they  
23 outside our jurisdiction?

24 CHAIRPERSON GRIFFIS: Most of them are in  
25 the metro D.C. area. For example, that would be

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1 Montgomery County and Prince George's County,  
2 Maryland, and Fairfax County, Prince William, and  
3 Loudon in Virginia.

4 CHAIRPERSON GRIFFIS: District noise is  
5 much better than most.

6 MS. MILLER: Okay. Thank you.

7 MR. BRENNEMAN: That would be my argument  
8 that noise doesn't change as you cross the District  
9 lines.

10 MS. MILLER: Thank you.

11 CHAIRPERSON GRIFFIS: It has to be proven.  
12 Okay. Very well. Are there any other concerns,  
13 questions? If there are no concerns, I think we can  
14 move ahead as an expert witness and hear Mr.  
15 Brenneman's testimony. Let's do it.

16 MR. BRENNEMAN: Good afternoon. My name  
17 is Robert Brenneman. I'm an acoustical consultant for  
18 Polysonics Corporation. I've been employed by  
19 Polysonics for two years and work at the Washington,  
20 D.C. office which is located at 5115 MacArthur  
21 Boulevard.

22 Before joining Polysonics I worked for two  
23 and a half years for Harley Research and Development  
24 where I designed and developed automotive exhaust  
25 systems for cars such as the Acura TL, the Acura CL,

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1 and the Honda Civic Coupe, including their acoustical  
2 design bringing my total practical work experience in  
3 the field of acoustics to about six and a half years.

4 My office at Polysonics is about two  
5 blocks from the subject site so I'm familiar with the  
6 typical noise sources in the general area around the  
7 school even beyond the time that I spent conducting  
8 noise studies at the site.

9 My purpose here today is to support the  
10 fact that increasing the student body from 40 to 60  
11 students will not result in any significant noise  
12 impact to the surrounding community. Noise created by  
13 the students on the property will not be higher than  
14 noise levels that exist there presently from  
15 transportation noise sources such as vehicle traffic  
16 on MacArthur Boulevard or from aircraft fly-overs from  
17 Reagan National Airport.

18 Taken independently of other noise  
19 sources, the increase in noise levels from 60 students  
20 would be insignificant and for all practical purposes  
21 nearly imperceptible over those of 40 students.

22 I would like to begin by discussing some  
23 basic acoustics so that everyone can have a better  
24 understanding of the acoustical terms that I use and  
25 the fundamental principles of sound that are the basis

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1 for my analysis and conclusions.

2 Sound levels are measured using the  
3 decibel scale and are reported in terms of decibels.  
4 Sound levels are typically measured according to an A-  
5 weighted measurement scale listed in terms of DBA.  
6 The A-weighted measurement scale best simulates the  
7 human ear's response to sound.

8 To give you an understanding of how loud  
9 sound levels are take the following examples  
10 considering the human voice. The normal speaking  
11 voice at a distance of two feet is about 65 decibels.  
12 A raised speaking voice at two feet, which one may use  
13 to address a large crowd without a microphone, ranges  
14 from about 70 to 75 decibels.

15 The addition of sound levels is not linear  
16 but logarithmic and this is a very important point.  
17 This is because the human ear also hears  
18 logarithmically. To illustrate this important  
19 difference, consider the following example. If I take  
20 270 DBA sound sources and play them at the same time,  
21 they don't add to 140 DBA. Rather, they yield 73  
22 decibels because sound is added logarithmically.

23 For two sources of the same level, the  
24 result in sound level when you add them together is  
25 only a three decibel increase. The scale ranges from

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1 zero where the sound is so quiet that you can't hear  
2 it to 120 DBA defined as a threshold of pain where the  
3 sound actually is so loud that it would physically  
4 hurt and be painful to your ears.

5           Since you now have an understanding of how  
6 sound works and how loud it can be, I would like to  
7 talk to you about how much of an increase in sound  
8 makes in the overall noise that we hear in a  
9 perceptible sense. There are four increases that you  
10 should remember.

11           According to published acoustical studies  
12 a 1 DBA increase in sound level is imperceptible to  
13 the human ear. A 3 DBA increase is barely  
14 perceptible. A 5 DBA increase is clearly perceptible.  
15 And a 10 DBA increase results in a substantial change  
16 and is taken by the ear to be about twice as loud.

17           It is this fundamental knowledge of sound  
18 that forms the basis for my analysis and conclusions  
19 which I would like to now address. On March 18, 2005,  
20 I conducted an onsite precision sound level  
21 measurement survey to determine both the ambient  
22 noise, which is the level of noise in the environment  
23 without children present, and the noise level of St.  
24 Patrick's students present at the site.

25           This is the second of two of these types

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1 of tests performed for the school that Polysonics has  
2 conducted. The purpose of the first test conducted  
3 three years ago in April of 2002 by another senior  
4 consultant was to determine the potential noise impact  
5 that the 40 students at the school may have on the  
6 surrounding community or, as the purpose of our recent  
7 second test, was to determine the noise level  
8 increases that would result by increasing the student  
9 body at the school from 40 to 60 students. The reason  
10 I bring this to light this earlier test is because the  
11 two tests yielded results that were very similar in  
12 nature.

13           During the second test performed about  
14 three and a half weeks ago, students from the existing  
15 40 student seventy and eight grade classes were  
16 allowed outside during their lunch period from  
17 approximately 11:25 a.m. to 11:50 a.m. and given the  
18 opportunity to congregate, socialize, and play. The  
19 children were not given instruction on how to act and  
20 were given free reign over the open area of the  
21 school.

22           The activities that the students  
23 participated in included conversation, running, and  
24 ball tossing. While the first test conducted by  
25 Polysonics featured 17 students, approximately 20 to

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1 25 students were observed outdoors at any given time  
2 for this test resulting in about a 50 percent increase  
3 in the student body.

4 A sound level meter was initially set up  
5 at the southeastern property line of the lawn area  
6 about halfway between the retaining wall and the  
7 beginning of the parking lot. Measurements began  
8 prior to the students' arrival outside and concluded  
9 after their departure indoors in order to establish a  
10 comparison between the noise from students to the  
11 ambient noise levels.

12 A roving meter technique was used to  
13 measure student's noise levels. This means that the  
14 meter was moved periodically as necessary in order to  
15 place the meter in close proximity to the students to  
16 more accurately establish the highest noise levels  
17 associated with the students. This occurred  
18 approximately three times during the survey.

19 Traffic and aircraft were also counted and  
20 noise levels recorded. The maximum instantaneous  
21 noise levels along with the noise source that created  
22 them were monitored and recorded. Please note that  
23 this was the closest measurement position to the  
24 roadway used during the survey so that the highest  
25 noise levels from MacArthur Boulevard vehicle traffic

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1 for the property were not recorded as the meter could  
2 have been placed closer to the roadway.

3 CHAIRPERSON GRIFFIS: Was it the same  
4 location as the prior study?

5 MR. BRENNEMAN: I don't know the details  
6 of that. I know there were two positions. I know the  
7 one location was along the southern border so it was  
8 probably very similar.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. BRENNEMAN: The overall survey was  
11 approximately one hour in duration. The major ambient  
12 noise sources around the site included aircraft from  
13 Reagan National Airport and truck and bus traffic on  
14 MacArthur Boulevard. The site is in the direct flight  
15 path of the airport meaning that fly-overs occur  
16 immediately overhead.

17 MacArthur Boulevard is a major  
18 thoroughfare adjacent to the property. Of these major  
19 transportation noise sources for the site, airplanes  
20 were observed to travel past the property -- sorry.  
21 Airplanes were observed to fly over the site about  
22 once every two minutes while heavy trucks and buses  
23 were observed to travel past the property about once  
24 every three minutes.

25 Airplanes flying directly overhead

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1 produced noise levels ranging from 70 to 81 decibels  
2 while heavy trucks and buses traveling on MacArthur  
3 Boulevard yielded noise levels ranging from 62 -- I'm  
4 sorry, 66 to 72 DBA and 62 to 68 DBA respectively.

5 CHAIRPERSON GRIFFIS: Can I interrupt you?

6 MR. BRENNEMAN: Yes.

7 CHAIRPERSON GRIFFIS: There's extensive  
8 written submission that you're following which is  
9 excellent and I think the Board has all reviewed that.

10 MR. BRENNEMAN: Okay.

11 CHAIRPERSON GRIFFIS: Why don't we cut to  
12 the chase and get to the fun part. A little drum roll  
13 and tell us the conclusions are. You mentioned the  
14 students. I'm looking at 63 to 73, 78 DBA.

15 MR. BRENNEMAN: That's correct.

16 CHAIRPERSON GRIFFIS: Then compare that to  
17 -- let's get real simplistic, compared to then the one  
18 every two minute air flight over. What is the reality  
19 of what we're looking at from a sound perspective?

20 MR. BRENNEMAN: The reality of the  
21 situation is that the highest levels from the  
22 students, which were from their infrequent yells or  
23 screams, were recorded to be about 68 to 73. Those  
24 are no higher than the major transportation sources  
25 such as the aircraft fly-overs and the truck and bus

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1 traffic on MacArthur.

2 CHAIRPERSON GRIFFIS: Okay. If I  
3 understand your beginning and opening sound lesson,  
4 kids screaming at the top of their lungs is 73  
5 decibels on site. Right? I'm across the street or  
6 wherever it is in proximity.

7 MR. BRENNEMAN: Right.

8 CHAIRPERSON GRIFFIS: And an airplane is  
9 going over and a car is going over and the airplane is  
10 at a close distance fly-over which is 81 decibels. I  
11 will still hear this student?

12 MR. BRENNEMAN: You can hear but it's not  
13 adding to the overall sound level on the property or  
14 around the property.

15 CHAIRPERSON GRIFFIS: So from a sound  
16 level it's not, as you said, additive. It's  
17 logarithmic.

18 MR. BRENNEMAN: That's right.

19 CHAIRPERSON GRIFFIS: It's not cumulative  
20 so I'm not getting more sound. I'm more hearing the  
21 airplane going over, still hearing that student but  
22 that's the environment of sound.

23 MR. BRENNEMAN: That's right. I would  
24 like to point out also that an airplane fly-over is  
25 significantly longer in duration than an infrequently

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1 heard scream or yell from a student is going to be.

2 CHAIRPERSON GRIFFIS: I see. Have you met  
3 my daughter? No, she doesn't scream at all. Okay.  
4 So I think I'm pretty clear on that. Let's see if  
5 others have any other questions in that regard.

6 MR. ETHERLY: Yes, Mr. Chair.

7 CHAIRPERSON GRIFFIS: Mr. Etherly.

8 MR. ETHERLY: So just to be sure I'm very  
9 clear, the sound doesn't kind of stack up on top of  
10 itself such that I'm hearing the airplane, as Mr.  
11 Chairman mentioned, the truck, the car, and the kids.  
12 They don't add up such that it becomes louder. I just  
13 hear more of it.

14 MR. BRENNEMAN: That's essentially  
15 correct. They are not going to add to the overall  
16 sound that's there although you can hear the  
17 individual sound sources differently.

18 MR. ETHERLY: Okay. Let me pop over to  
19 Mr. Barrett and then come back to you for one final  
20 question.

21 MR. BRENNEMAN: Sure.

22 MR. ETHERLY: Does that -- do those test  
23 conditions, Mr. Barrett, somewhat approximate what we  
24 would have in terms of children outside of any one  
25 time?

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1 MR. BARRETT: If we -- under 60, you mean.  
2 Right?

3 MR. ETHERLY: Yes.

4 MR. BARRETT: If we move to the -- we're  
5 not at two groups within a 40 minute period, if we  
6 move to three groups within a 45 minute period, then  
7 it would either approximate or it would be identical  
8 to what the projected situation would be.

9 MR. ETHERLY: Okay. If you could  
10 characterize it or quantify it, how many more bodies  
11 would need to have -- I kind of chuckled with the  
12 Chair as you described the experiment, if you will.  
13 They were given free reign over the play area.

14 MR. BARRETT: That's right.

15 MR. ETHERLY: I shutter to think. If you  
16 could quantify how many additional bodies would there  
17 need to be out there in order for there to be a  
18 measurable or quantifiable uptick in the noise level?

19 MR. BARRETT: Well, as I mentioned, 3  
20 decibel increase in sound, which is barely  
21 perceptible, would be a doubling of whatever your  
22 noise source is. Taking the kids by themselves and  
23 forgetting about how they add into any of the  
24 transportation noise sources, you would need 80  
25 students to make an increase where you can start to

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1 tell that there's actually something else going out  
2 there. To make a clear change or clear distinction,  
3 it would be more than that.

4 MR. ETHERLY: Okay. So at least 60 or so  
5 more bodies would need to be out there to get you that  
6 incremental 3 decibel increase.

7 MR. BARRETT: I think that's -- let me  
8 correct if I can. During our test we had about 20 or  
9 25 students outside so that doubling would be in the  
10 neighborhood of then 40 or 50.

11 MR. ETHERLY: Okay.

12 MR. BARRETT: So almost they would have to  
13 be all outside at the same time to begin to tell.

14 MR. ETHERLY: Okay. Now, this perhaps  
15 steps outside of your area of expertise but I think  
16 it's a little bit of the spirit behind why we are  
17 spending some time talking about this and why the  
18 applicant went to the expense of having you do your  
19 survey.

20 MR. BARRETT: Right.

21 MR. ETHERLY: That is getting to a little  
22 bit of the psychological aspect of sound which is  
23 tougher to measure if possible at all to measure. Are  
24 you in a position or is there anything you can speak  
25 to with regard to that aspect of this analysis because

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1 perhaps as an individual I might be more willing to  
2 stomach the sound of a truck going by or airplanes  
3 overhead but there perhaps might just be something  
4 that is more innately troublesome, if you will, about  
5 a screeching seventh or eight grader.

6 I'm not suggesting, of course, that any of  
7 your august patrons at the school are screeching, but  
8 is there anything that you can offer or speak to in  
9 that regard?

10 MR. BRENNEMAN: That is very difficult.  
11 As you do say, there is a psychological aspect to it.  
12 The field of acoustics in general does try to account  
13 for that. It's a very experimental type of field  
14 where the measured data is then reflective of the  
15 theory and not vice versa. To get a quantifiable  
16 aspect or answer to you, it's very difficult.

17 MR. ETHERLY: Okay. You heard a little  
18 bit of the exchange we had regarding some of the  
19 concerns about play on the paved area. Just to be  
20 sure about the logistics of your experiment, were you  
21 in the vicinity of that paved area or were you  
22 somewhere different relative to that paved area?

23 MR. BRENNEMAN: We had started about half  
24 way between the retaining wall and the beginning of  
25 the paved area. The students were about 50/50 between

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1 the pavement and the yard. But we did -- as I said,  
2 we kind of used a roving technique so we did move  
3 closer when we felt the need was there to do so.  
4 There was that period of time that we did measure up  
5 there. Our measurements also do reflect when students  
6 were playing or doing activities on the pavement.

7 MR. ETHERLY: Would it be your position  
8 that if students were, in fact, simply on the paved  
9 area, let's say the concentration of activity and free  
10 reign to -- what was the phrase? -- congregate,  
11 socialize, and play, if that were all focused more on  
12 the paved area, would you be in a position to make any  
13 kind of statement characterizing an increase in sound  
14 relative to the adjacent property? For example, would  
15 that result in a higher decibel level relative to the  
16 adjacent property?

17 MR. BRENNEMAN: Pavement does tend to be  
18 more reflective because it's a harder surface than  
19 what a yard would be but this gets into a little bit  
20 of what we call sound power. I don't believe the  
21 human voice is powerful enough to get it to a point  
22 where you would get a lot of reflection off the  
23 ground.

24 By power, I mean, for example, an airplane  
25 is making the same amount of noise thousands of feet

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1 up in the air on the ground as a student is 15 or 20  
2 feet away. That gives you an idea of how powerful a  
3 plane is. That power helps to penetrate objects and  
4 be more reflective. But in a worse case, if you were  
5 getting a pure reflection off the ground, you would  
6 double the sound and that's your 3 decibel increase  
7 which is barely noticeable in a worse case.

8 MR. ETHERLY: Okay. Thank you. Thank  
9 you, Mr. Chair.

10 CHAIRPERSON GRIFFIS: Good. Anything  
11 else? Ms. Miller.

12 MS. MILLER: I think in the written  
13 statement that we have from you, you made a statement.  
14 I don't have it right in front of me but to the effect  
15 that human voices are not regulated under the D.C.  
16 noise code.

17 CHAIRPERSON GRIFFIS: Conclusions, last  
18 page.

19 MS. MILLER: Here we go.

20 CHAIRPERSON GRIFFIS: Human voices exempt  
21 from D.C. noise codes. Is that correct?

22 MR. BRENNEMAN: I believe this was --  
23 there is a section -- I believe this came up at the  
24 last testimony that I wasn't privy to. I believe  
25 there is a section that does say that.

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1 MS. MILLER: But you're not sure?

2 MR. BRENNEMAN: Maybe counsel can.

3 MS. PRINCE: We intended to avoid this  
4 issue simply because there appears to be a conflict in  
5 the noise code. There is a section of the noise code  
6 that says clearly and unequivocally that the human  
7 voice is not regulated. There is, however, another  
8 section that would appear arguably to contradict that  
9 so that is not part of our direct testimony today, the  
10 statement that the human voice is unregulated.  
11 Rather, we would simply take the position that the  
12 human voice is inherently compatible with the  
13 residential zone.

14 MS. MILLER: Okay. I was just wondering.  
15 Since you've testified that you have these projects in  
16 surrounding jurisdictions whether or not that's the  
17 case in those jurisdictions, whether they are  
18 considered in their zoning cases.

19 MR. BRENNEMAN: A lot of those  
20 jurisdictions regulate at adjacent lot lines what a  
21 noise source. Usually it's a mechanical noise.

22 MS. MILLER: I was asking about human  
23 voices.

24 MR. BRENNEMAN: Human voices from my  
25 experience around the local jurisdictions they tend to

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1 vary.

2 MS. MILLER: Okay. When you do noise  
3 analysis or the whole noise analysis area, do they  
4 ever differentiate between positive noise and negative  
5 noises or what noises are more pleasant than other  
6 noises? Like, for instance, in this situation  
7 comparing children's voices to airplanes or trucks?

8 CHAIRPERSON GRIFFIS: Babies screaming in  
9 a waterfall.

10 MS. MILLER: Construction. You know,  
11 whatever. Are they quantified in any way or not?

12 CHAIRPERSON GRIFFIS: There are some local  
13 jurisdictions that in addition to an overall noise  
14 level also specify a particular frequency that goes  
15 along with that noise level.

16 If you have a tonal, pure tone like you  
17 might hear from a tuning fork, those are often  
18 regulated from what I've seen in my experience because  
19 it tends to be a little bit more intrusive or more of  
20 a nuance, if you will. The human voice is not that  
21 way.

22 MS. MILLER: This is my question. It may  
23 just be a subjective thing. Some people might find  
24 one noise, a bird chirping, appealing and somebody  
25 else might find it annoying. I don't know. When you

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1 say that in this case the sound of children's voices  
2 gets mixed in with the sound of airplanes or trucks,  
3 is that a positive -- could it be a positive impact or  
4 is it a negative or it's not quantified in any way?

5 CHAIRPERSON GRIFFIS: It kind of goes to  
6 what Mr. Etherly was exploring, is that correct, in  
7 trying to get to the psychology of noise? We can  
8 measure the level that it's creating but some noises  
9 impact us differently than others.

10 MS. MILLER: Right.

11 MR. BRENNEMAN: That's fair to say.  
12 That's why it's very difficult for me to say because  
13 you would have to have an individual speak to you  
14 about that.

15 MS. MILLER: Okay.

16 CHAIRPERSON GRIFFIS: So your retired Air  
17 Force pilot enjoys the sound of airplanes flying  
18 overhead but never had children so absolutely can't  
19 handle the kids' noises across the street. Oh, was my  
20 mike on? Okay.

21 MS. MILLER: I also want to make sure I  
22 get your point on this. Did you say that at some  
23 point that the number of children outside at one time  
24 would change the decibel level and did you put that at  
25 80?

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1 MR. BRENNEMAN: No. My understanding is  
2 that the actual number of students outside is not  
3 going to change. We measure about 20 or 25 out at one  
4 time which is going to remain from my understanding.  
5 To get an actual increase that you start to perceive,  
6 it would take two times that number which would put  
7 you at 40 or 50. Almost the entire school out at one  
8 time.

9 CHAIRPERSON GRIFFIS: To get a perceivable  
10 decibel change you would have to double the students  
11 outside?

12 MR. BRENNEMAN: That's correct, to get  
13 three decibels, which you start to perceive.

14 MS. MILLER: Right. Is there a level at  
15 which it would be objectionable?

16 CHAIRPERSON GRIFFIS: Can you answer that  
17 question?

18 MR. BRENNEMAN: I don't think I can answer  
19 that question. It depends on what you find -- that  
20 gets into the subjectivity to the whole thing.

21 CHAIRPERSON GRIFFIS: You can tell us the  
22 decibel level that the number of students would  
23 generate if we asked you.

24 MR. BRENNEMAN: I can tell you how many  
25 students it would take to get a clear change in sound

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1 from what is there which would be a five decibel  
2 change.

3 MS. MILLER: Okay.

4 CHAIRPERSON GRIFFIS: I'm not clear on the  
5 question like how he would answer it was  
6 objectionable. I mean, that gets back into, I think,  
7 what we all have to figure out for ourselves  
8 essentially, what is a noise level that is not  
9 acceptable or what type of noise is objectionable.

10 MS. MILLER: We could at least say it's  
11 the 120 threshold pain level.

12 CHAIRPERSON GRIFFIS: If that's where  
13 you're going with it, and that's a very serious  
14 question, then how many people would it take to get to  
15 120? Could a human voice reach that decibel level?

16 MR. BRENNEMAN: I don't think you could.  
17 There's not enough property space to get you there.

18 CHAIRPERSON GRIFFIS: Right. Clearly  
19 that's not even possible.

20 MR. BRENNEMAN: It's not a feasible  
21 situation.

22 CHAIRPERSON GRIFFIS: Here's another thing  
23 I don't think the Board has really touched on but  
24 let's get to it very quickly. There's a big  
25 difference. My neighbors, very enjoyable people, but

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1 they like to throw parties a lot so there's a  
2 difference when it's two of them sitting around having  
3 dinner but it's a big difference when 40 of them are  
4 over there. Why is that? Why do they go so much  
5 louder if this isn't cumulative, these human voices?  
6 It's darn loud at night. Why is that happening?

7 MR. BRENNEMAN: That may be, again, a  
8 perception, too. For example, sometimes you may not  
9 notice traffic when you step outside but at other  
10 times you do. Maybe at night you tend to notice it  
11 more.

12 CHAIRPERSON GRIFFIS: But you're saying  
13 there's no decibel level difference between two people  
14 sitting in an apartment and 40 people in an apartment?  
15 Don't their voices increase in order to conduct  
16 conversation over other conversation? Doesn't the  
17 level of voice increase?

18 MR. BRENNEMAN: As I shared before, if you  
19 are raising your voice that's anywhere from five to 10  
20 decibels over a normal speaking voice.

21 CHAIRPERSON GRIFFIS: So conceivably  
22 there's a difference of voice level, decibel level,  
23 that more people would generate as opposed to two  
24 people having a candlelight dinner and 40 people  
25 having a beer bash.

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1 MR. BRENNEMAN: There could be.

2 CHAIRPERSON GRIFFIS: Is there a  
3 difference between two kids outside playing chess and  
4 20 kids playing kickball? You should say yes because  
5 your study actually says it. Not that analogy but a  
6 normal conversation you're saying is 53 to 58 decibel  
7 levels. Is that right?

8 MR. BRENNEMAN: That's what we measured,  
9 yes.

10 CHAIRPERSON GRIFFIS: Okay. And then  
11 general playing, running and ball tossing, I can  
12 imagine that's only an increased voice. Right?  
13 Whether the activity demands that or not.

14 MR. BRENNEMAN: With the activity,  
15 exactly.

16 CHAIRPERSON GRIFFIS: And that's an  
17 increased decibel so 68 to 69. That's clearly from a  
18 pedestrian standpoint louder. Right?

19 MR. BRENNEMAN: Yes. It's greater than 5  
20 decibels. You can start to clearly hear.

21 CHAIRPERSON GRIFFIS: Certainly a  
22 difference. Okay.

23 MS. MILLER: Okay. But it also depends  
24 how far away we are from the noise. I mean, in the  
25 chairman's example the property is right next door and

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1 in this situation I understand that the property is  
2 fairly buffered.

3 MR. BRENNEMAN: That is correct. Distance  
4 is a mitigation technique. In this case we are about  
5 15 or 25 feet in that range away from the children and  
6 the acoustical laws for this basically say that every  
7 doubling of distance is 6 decibels decrease so the  
8 sound level at 20 feet if you go back to 40 feet away  
9 from the source, you're going to be decreasing your  
10 noise about 6 decibels.

11 CHAIRPERSON GRIFFIS: Interesting. Does  
12 that make sense?

13 MS. MILLER: Yes. I have one other  
14 question/comment as to the significance of the  
15 testimony in general. My understanding is they are  
16 not changing the number of students outside at one  
17 time during recess in any event.

18 MR. BRENNEMAN: That's correct.

19 MS. MILLER: So you're just really saying  
20 that there wasn't an adverse impact before and you  
21 measured, again, and found the same situation?

22 MR. BRENNEMAN: That's exactly right. We  
23 went back three years later, measured exactly the same  
24 thing with three to eight more kids outside and  
25 basically we found the exact same thing as far as

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1 transportation noise and the student noise.

2 MS. MILLER: Okay. Thank you.

3 CHAIRPERSON GRIFFIS: Mr. Etherly.

4 MR. ETHERLY: Thank you. One last  
5 question and I promise I'm done. I just want to be  
6 sure I'm clear on this piece of it. Would there be a  
7 difference if we just -- I understand the cumulative  
8 effect and the conversation that we've had between  
9 Mrs. Miller and the Chairman's questions.

10 Is there any difference, noticeable or  
11 otherwise, if we just focus on the peak measurements  
12 if you introduce more kids? I understand, of course,  
13 that it's the applicant's testimony that you're not  
14 going to have more than essentially your study group  
15 out at any one time but let's say for whatever reason  
16 you did.

17 If you increase the number of individuals  
18 out there, do the peak measurements change such that  
19 clearly there perhaps is no cumulative increase in the  
20 noise level that I might discern if I'm the adjacent  
21 resident but I might hear a difference in terms of  
22 peak measurements.

23 Maybe the answer to the question is not so  
24 much perception but maybe the peak measurements change  
25 so in the Chairman's analogy the peak levels that he

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1 might perceive with respect to a dinner party change  
2 relative to the peak levels he might hear with the  
3 beer bash next door.

4 MR. BRENNEMAN: I can speak to in this  
5 case the peak or maximum instantaneous levels were  
6 from the screams of the children which are pretty  
7 infrequent. In that case I would say the probability  
8 goes up of having more individual -- maybe more of the  
9 same type of peak that taken as a whole quantity  
10 wouldn't add to the overall sound that you would hear.

11 I would say there is a change that you can  
12 add a 73 decibel scream and a 73 decibel scream and  
13 get 76 for a very short duration in time. Like I  
14 said, if you look at the aircraft fly-overs that go up  
15 to 81 at times for a significantly longer duration of  
16 time, that seems pretty insignificant.

17 MR. ETHERLY: Okay. Thank you. Thank  
18 you, Mr. Chair.

19 CHAIRPERSON GRIFFIS: Good. Anything else  
20 from the Board? Any other questions? Very well.  
21 Thank you very much.

22 MR. BRENNEMAN: You're welcome.

23 CHAIRPERSON GRIFFIS: Quite informative.  
24 What do we have next?

25 MS. PRINCE: That's completes our

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1 presentation. Unless the Board has further questions  
2 for us you can proceed.

3 CHAIRPERSON GRIFFIS: Excellent. Any  
4 other follow-up questions from the Board? Okay. I  
5 don't see any indication that we do have any. Is the  
6 ANC here to present their case today? The ANC is not  
7 present. Is that correct? Okay. Let's go to the  
8 Office of Planning then. Yes. We'll go to the Office  
9 of Planning and then we'll probably take like a five  
10 or 10-minute break and then we'll get to the  
11 testimony. Okay.

12 MS. BROWN-ROBERTS: Good afternoon, Mr.  
13 Chairman and members of the commission. I'm Maxine  
14 Brown-Roberts representing the Office of Planning. I'm  
15 just going to summarize two things. Regarding the  
16 increase in students but the Board did not support the  
17 incremental increase and our recommendation was based  
18 on that because the applicant requested an incremental  
19 increase and the Board did not support it in the first  
20 application and, therefore, we just thought that we  
21 should continue in that vein.

22 Regarding allowing the students to walk  
23 between the campuses, we do not believe that this will  
24 cause any problems in the functioning of this school.  
25 However, we recommend that the situation be monitored

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1 so that the situation does not develop where there is  
2 a large number of students walking instead of taking  
3 the shuttle bus.

4 The Office of Planning believes that the  
5 school has met the requirements of Section 206.2 and  
6 206.3 in that there is not likely to be any  
7 objectionable situation regarding noise, traffic, or  
8 the number of students and there is ample parking for  
9 teachers, visitors, and this situation will not  
10 change.

11 The special exception meets the intent of  
12 the zoning regulation. Therefore, the Office of  
13 Planning recommends approval of the special exception.  
14 Thank you, Mr. Chairman.

15 CHAIRPERSON GRIFFIS: Excellent. Thank  
16 you very much. Let's go to Board question. Ms.  
17 Miller first.

18 MS. MILLER: Ms. Roberts, I think that you  
19 recommend an increase of 10 students but not 20. What  
20 would be our detailed evidentiary findings upon which  
21 we would base denial of the remaining 10 that are  
22 requested?

23 MS. BROWN-ROBERTS: As I stated, I think  
24 that we went back and looked at the situation that was  
25 presented to us and that the Board at the time had

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1 wanted to not give any incremental increases without  
2 any review and we were looking in that vein. That's  
3 how we came down.

4 MS. MILLER: I can appreciate that that it  
5 looks like a more gradual increase but based on what  
6 we've heard today, can you identify any adverse  
7 impacts that would result from the 10 more students  
8 that the applicant is requesting?

9 MS. BROWN-ROBERTS: No, I don't think so.  
10 We did the full analysis and I don't think granting 20  
11 additional students based on continuing with the  
12 conditions that were imposed would cause any  
13 additional impact.

14 MS. MILLER: With respect to the walking  
15 issue, what is the adverse impact of students walking  
16 to the school instead of taking the shuttle bus from  
17 the main campus?

18 MS. BROWN-ROBERTS: I don't think that we  
19 saw it as basically an issue of the children walking  
20 but I think what we're doing is taking into  
21 consideration some of the issues that came up in the  
22 original application. There was some testimony from  
23 the community and how we came to getting to  
24 instituting the shuttle bus. They think that is what  
25 we built on. At that time I think there was testimony

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1 that the neighbors had some concerns about the  
2 children, the noise and the other things that may come  
3 from children walking.

4           Since we have the condition that there is  
5 supposed to be a shuttle bus that goes back and forth,  
6 unless we were going to change that whole condition,  
7 then that is why we wanted to keep that so we don't  
8 have more children walking than taking the shuttle bus  
9 unless we are going to consider taking the whole  
10 shuttle bus system out.

11           MS. MILLER: Did you receive any comments  
12 from DDOT in regards to this application?

13           MS. BROWN-ROBERTS: Well, we had  
14 conversations. I had conversations with DDOT and it  
15 went along the vein that they did nothing that --  
16 increasing the number of students and the walking  
17 would have any direct impact on transportation and,  
18 therefore, they were really not going to submit an  
19 analysis so I left it at that.

20           MS. MILLER: Okay. I guess my last  
21 question is because I know DDOT sometimes is mixed on  
22 these kind of things but couldn't it be perceived as  
23 a plus to have a student walk instead of a car pick  
24 them up? I mean, it's less traffic on the road.

25           MS. BROWN-ROBERTS: I agree and I think

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1 DDOT would agree with that. However, I go back to  
2 that there is a condition about the shuttle bus so I  
3 think if you wanted to open that up and look at the  
4 whole condition regarding the shuttle bus, then I  
5 think that would be appropriate, too.

6 MS. MILLER: Okay. Thank you.

7 MR. HOOD: Mr. Chairman. Ms. Brown-  
8 Roberts, I just want to ask you, as Mrs. Miller just  
9 stated, it seems like we are still doing a gradual  
10 attempt. We are still eventually are going to get  
11 there to the 60 which the applicant has requested  
12 early on and they have asked for a gradual phase-in  
13 this time and the Office of Planning is recommending  
14 10.

15 Is there ever going to be a point -- and  
16 you may not be able to answer this. I may have to  
17 direct it to the applicant -- that you just say it's  
18 too much for the site or the two sites and we need to  
19 stop here. Do we have a stopping point?

20 MS. BROWN-ROBERTS: Quite frankly, I mean,  
21 when we did our first recommendation we had  
22 recommended approval of 60 students. However, in the  
23 course of trying to -- you know, the neighbors came  
24 out and they had some issues and some of them we  
25 hadn't considered. Also the applicant offered to do

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1 40 students after certain things were brought up so we  
2 supported the 40 students.

3 MR. HOOD: Okay. I mean, the shuttle bus  
4 obviously must be working pretty good. Why are we  
5 still just gradually doing it? Why don't we just get  
6 there?

7 MS. BROWN-ROBERTS: I think that is the  
8 same question I have. If we are going to allow the  
9 students to walk, then why do we have the shuttle? I  
10 think that does open up that question do we want to  
11 look at the shuttle bus system and say, well, all the  
12 children all to do is check in over at MacArthur and  
13 then walk over and then you don't need a shuttle bus.  
14 I mean, I'm not recommending that but it's something  
15 they may want to look at, too.

16 MR. HOOD: I don't know if I would go that  
17 far to undue what is working. I just don't if I would  
18 go that far because I don't know what else to open up.

19 MS. BROWN-ROBERTS: But at the same time  
20 I don't want to have a situation where, okay, we have  
21 a shuttle bus and maybe it doesn't come up that you  
22 have more kids walking because as a parent you sign up  
23 and then, oh, you know, it's okay to be a little late  
24 and then you have more children walking.

25 MR. HOOD: That's a good point. You bring

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1 up a good point.

2 MS. BROWN-ROBERTS: I mean, people tend to  
3 get a little lackadaisical after a while but, then  
4 again, Mr. Barrett says that there are very strict  
5 rules regarding this thing so maybe it's sufficient.

6 MR. HOOD: I'm very surprised that the  
7 shuttle bus is working as good as what I'm hearing to  
8 be frankly honest. Normally, like you say, people get  
9 complacent and they start doing their own thing.

10 CHAIRPERSON GRIFFIS: I think there's a  
11 couple of things that we probably ought to go back to  
12 in terms of the original application. I think the  
13 Board initially had some concerns about how the  
14 shuttle bus was going to be implemented.

15 Looking at this now, Mr. Hood, and looking  
16 at it previously, I think the issue is that there has  
17 never been an opportunity to drive to this campus or  
18 this facility, right? The drop-off is always at the  
19 main campus and we went through that here also on how  
20 they do it and how they get it through so you're  
21 bringing everybody all the same place. That's where  
22 you go. There's no other choice.

23 There's never been an alternative so  
24 that's why I think it's working so well. Getting the  
25 students from there up to the other, I think, is well

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1 managed. I think we are talking about two different  
2 issues. You brought up doing away from the shuttle  
3 bus service and I don't see any reason to have that  
4 discussion here because I think it's working and I  
5 think it needs to continue.

6 Otherwise, you will get into the melding  
7 of where do we actually go and where do we have to go.  
8 Keep it as is, the shuttle bus. I thought you were  
9 pushing it. I think I'm correct. Why are we looking  
10 at these levels of increases? Why are we talking  
11 about 10 now when the request is to go to 60 from 40?  
12 Let me put some perspective on that also because I  
13 think the Board -- I can speak for myself when I  
14 looked at this in the application.

15 We had a new application, a new program,  
16 a new school that was going into this building which  
17 was a different type of academic situation, adult  
18 which was different than this grade level. There was  
19 a 1962 order that was denied for an increase that went  
20 up to 75 and it was a huge amount of increase up from  
21 20, whatever the specific are.

22 That was the kind of basis in my mind  
23 looking at this at that initial application was, you  
24 know, here a previous Board looked at it and said,  
25 "Wow, 75 is just too much." And we're being asked to

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1 kind of look at 60 and it's different kids. We don't  
2 really know. We haven't seen this implemented. We  
3 haven't seen the program work. We don't know.

4 I don't think the Board ever -- I should  
5 say I didn't ever anticipate that we would be going  
6 through every two years looking at a 10-student  
7 increase so I think it's appropriate to be looking at  
8 up to 60 at this point unless we can get to a level  
9 that we can say no.

10 I mean, my gosh, at 10 we see a measurable  
11 impact or at 20 we see an outrageous impact or there  
12 is some measurability. I haven't seen any evidence  
13 today that shows me much difference between 10 and 20  
14 let alone the impact of 60 together.

15 MR. ETHERLY: Just to close your comment,  
16 that was where, I believe, Mr. Hood's question was  
17 going for the Office of Planning. The Office of  
18 Planning hasn't looked at a cutoff number at which it  
19 would say that's too much.

20 MS. BROWN-ROBERTS: No.

21 MR. ETHERLY: You haven't looked to see if  
22 80 or 90?

23 MS. BROWN-ROBERTS: Oh, no.

24 MR. ETHERLY: Because I think part of it,  
25 and this was a little bit of the undercurrent in the

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1 transcript that was offered by Neighbors United in  
2 their submittal. This is not necessarily a question  
3 for Office of Planning but just as we're talking here  
4 part of the undercurrent is we have a good track  
5 record in essence and I'm not characterizing it this  
6 way but I think the Neighbors United concern is, you  
7 know, the applicant is simply saying, "Hey, we have 15  
8 months of good behavior. Reward us."

9 Part of the question is what is to stop  
10 the reward train from coming back to the station next  
11 here and the year after that. So part of Mr. Hood's  
12 question is where does the reward train stop because  
13 this property can't hold anymore? I think that's a  
14 different question perhaps to reach today, but I think  
15 the question to OP was had OP thought of that and OP  
16 is not reaching that question today.

17 MS. BROWN-ROBERTS: No.

18 MR. ETHERLY: Thank you, Mr. Chair.

19 CHAIRPERSON GRIFFIS: Good.

20 MR. HOOD: I think that question -- I know  
21 it's nothing we need to restate but eventually. I may  
22 not be here but if you keep on, it's going to get to  
23 a point of stop gap where you need to stop it because  
24 eventually it will get to an adverse impact. That was  
25 my whole question.

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1           Actually, you're right, Mr. Chair. I had  
2 two questions in one because I wanted to know what's  
3 the difference between the 10 and the 20 and going to  
4 60. Anyway, I'll leave it alone.

5           CHAIRPERSON GRIFFIS: Good. And I think  
6 this house can only fit so many and the classroom  
7 numbers are there which start to limit the size of  
8 expansion. Okay.

9           MS. MILLER: I think the applicant will  
10 probably address this in closing but I have heard them  
11 testify that 60 is their final number, that is what  
12 the building and the program is most suited for.  
13 Actually I read, I believe, in the papers that they  
14 were willing to enter into covenant to that effect.  
15 I don't think this is a case where it's going to keep  
16 creeping.

17           CHAIRPERSON GRIFFIS: Good. Anything else  
18 from the Office of Planning? Very well. Any cross  
19 from the applicant?N

20           MS. PRINCE: No cross from the applicant.

21           CHAIRPERSON GRIFFIS: Oh, indeed. Very  
22 well. Thank you very much. Let's move ahead then.  
23 I don't have any other Government reports attended to  
24 this application. As Ms. Miller, I think, alluded to,  
25 we had our hopes set on DDOT either submitting a

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1 report or showing up.

2 With that being said, they were in  
3 discussion with Office of Planning so we'll leave it  
4 at that. We still don't have the ANC here. Is that  
5 correct? The ANC is not here to present? Let's just  
6 make note of that. The ANC's report, which is Exhibit  
7 No. 27, is there clarity on what that actually says by  
8 any Board member?

9 They are okay with the walking and the  
10 increase in enrollment gives them some concern. I  
11 guess my direct question was the vote of four, three  
12 to one. I know there was some concern about whether  
13 that actually was a passable vote by the ANC's bylaws.

14 MS. MILLER: And that was --

15 CHAIRPERSON GRIFFIS: It was not.

16 MS. MILLER: No.

17 CHAIRPERSON GRIFFIS: Their own footnote  
18 indicates that. Okay. So we'll take that under  
19 advisement. Does the applicant have any comments on  
20 the ANC Exhibit No. 27?

21 MS. PRINCE: Simply to confirm that your  
22 understanding is correct. The ANC resolution did not  
23 carry and two of the commissioners who voted in favor  
24 of the school's request did file a letter this  
25 morning. They noted it as a dissenting opinion. I

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1 would argue it's not a dissent because there wasn't an  
2 adverse determination by the ANC. Nonetheless, they  
3 should weigh in as well.

4 CHAIRPERSON GRIFFIS: Okay. I want to  
5 make sure that we have those. Do you know what the  
6 exhibit numbers are?

7 MS. PRINCE: It came in last night. It  
8 would probably be the last logged in exhibit. I was  
9 unable to get a copy. I mean, not an official copy.

10 MR. HOOD: Ms. Prince, is one of those  
11 commissioners single member district or was it two  
12 single member? Was one of those commissioners the  
13 actual --

14 MS. PRINCE: SMD.

15 MR. HOOD: Right.

16 CHAIRPERSON GRIFFIS: Okay.

17 MS. MILLER: I just want to comment. I'm  
18 not sure whether this was said or not. There were two  
19 votes and one of the votes did carry and that was to  
20 approve the walking question.

21 CHAIRPERSON GRIFFIS: The ANC will allow  
22 students to use their feet. Very well. Okay. Let's  
23 do this. Let's take 10 minutes to stretch our legs  
24 and we'll resume and get right into the people present  
25 to give testimony and then we'll go through the litany

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1 of other submissions of testimony.

2 (Whereupon, at 3:53 p.m. off the record  
3 until 4:19 p.m.)

4 CHAIRPERSON GRIFFIS: Very well. Let's  
5 resume. Ready to give testimony? Who else is here  
6 present, persons to give testimony? Excellent. You  
7 want to come up and make yourself comfortable. You're  
8 here in support? Okay. Whichever wants to go first.  
9 Why don't we start with our regular order and we'll  
10 take persons in support.

11 MR. SPENCER: Good afternoon. My name is  
12 William Spence Spencer and I live on 2825 49th Street  
13 in the Palisades neighborhood. I wanted to as a  
14 neighbor express my strong support for St. Patrick's  
15 application increase to 60 students. I want to do  
16 that for two reasons. The first reason is that St.  
17 Patrick's as an institution has gone out of its way to  
18 honor the commitments that it's made to the  
19 neighborhood at large.

20 They have assiduously tried to build a  
21 consultative mechanism and a good basis for resolving  
22 whatever disputes that exist. I am unaware of any  
23 real disputes in their execution of all the agreements  
24 that they did for the Ashby campus. I think it's been  
25 a wonderful example of that.

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1           The second reason why I support this is  
2 perhaps even more important and that is that as  
3 somebody who cares a lot about the Palisades and the  
4 neighborhood at large, I do believe that institutions  
5 like St. Patrick's are good for the neighborhood. I  
6 know that you guys are looking at huge mansions  
7 sprouting retaining walls the size of the Rock of  
8 Gibraltar.

9           This is not one of those cases. This is  
10 an educational institution that is adding value to our  
11 community. It makes the Palisades a better  
12 neighborhood to live in. I am a big support of that.  
13 As a matter of fact, my daughter is a student in the  
14 eight grade there. Like I said, 60, I think, is a  
15 good number and I urge you guys to support the  
16 application.

17           CHAIRPERSON GRIFFIS: Excellent. Thank  
18 you very much. Questions from the Board? Ms. Miller.

19           MS. MILLER: As we are taking a close look  
20 at how successfully things are operating, I'm  
21 wondering if you have an opinion on the conditions,  
22 whether you think they're working, whether you think  
23 any of them are not working.

24           MR. SPENCER: I think that by in large  
25 despite all the odds it really is working very, very

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1 well. Again, I've got to speak as a parent. The  
2 shuttle bus rule is religiously enforced. A lot of  
3 the things that people thought, I guess, two or three  
4 years ago when the first application came through were  
5 just going to be incredibly unweltdy. They really are  
6 panning out and it's been a real positive surprise for  
7 me.

8 MS. MILLER: This is probably a silly  
9 question but you're a neighbor, right, as well as a  
10 parent. How does your child get to school? Does it  
11 have to go to the main campus and then come back?

12 MR. SPENCER: Yes. We drop our child off  
13 at the main campus and she gets on the bus and goes to  
14 school.

15 MS. MILLER: Now, are you in walking  
16 distance of the school?

17 MR. SPENCER: Yes, and she can walk back.  
18 She has walked back but it has worked very well and we  
19 don't have much of a choice anyway as parents.

20 MS. MILLER: How is it she can walk back  
21 but she can't walk to?

22 MR. SPENCER: I don't know. I hate to say  
23 this. I don't question the rules. I only have to  
24 follow them.

25 MS. MILLER: Okay. And how close are you?

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1 MR. SPENCER: Four-tenths of a mile.

2 MS. MILLER: This is just a preference  
3 question. Would it be your preference to walk your  
4 child to school if you could?

5 MR. SPENCER: You know, with my daughter  
6 and with our own schedules it's six of one and a half  
7 dozen of the other. Sometimes the weather is bad. I  
8 mean, walking today is a much better option than  
9 walking in January so more often than not we drive  
10 anyway.

11 MS. MILLER: Okay. Just for curiosity as  
12 a parent of an eight grader. Is that correct? Would  
13 you allow your child to walk alone to school from  
14 home?

15 MR. SPENCER: Yeah.

16 MS. MILLER: Okay. And she walks home  
17 alone. Is that correct?

18 MR. SPENCER: She has, or with friends.  
19 They go up the trial.

20 MS. MILLER: Okay. Thank you.

21 CHAIRPERSON GRIFFIS: Good. Any other  
22 questions? Excellent. Is there any cross examination  
23 from the applicant? Any cross? No cross. Very well.

24 You participated in the last case. Is  
25 that correct? The original application or not?

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1 MR. SPENCER: I sent a letter of support.

2 CHAIRPERSON GRIFFIS: Okay.

3 MR. SPENCER: I think I talked briefly.

4 CHAIRPERSON GRIFFIS: Good. We appreciate  
5 you being here again and certainly will take under  
6 consideration your testimony.

7 Let's move ahead then. If there aren't  
8 any others in support, Mr. Lovendusky, I believe, is  
9 ready to move ahead with his testimony.

10 MR. LOVENDUSKY: Thank you, Mr. Chairman,  
11 and members of the Board. I'm Michael Lovendusky and  
12 I am here on behalf of myself and my wife. We reside  
13 at 4927 MacArthur Boulevard, immediately across Ashby  
14 Street from the St. Patrick's junior high school at  
15 4925 MacArthur Boulevard.

16 In the last proceeding, the proceeding  
17 that resulted in order 16852, you granted my wife and  
18 I party opponent status and you may recall our  
19 participation from that time. I am here today on  
20 behalf of my wife and myself to oppose most of the  
21 application. I would say that we do not have any  
22 problem with the proposed change with regard to  
23 allowing the students to walk to the school.

24 Indeed, we would urge the Board to require  
25 all of the students to walk to the school all of the

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1 time because, indeed, if that happened, we would know  
2 for sure that the school was there to serve and  
3 benefit the residents of the Palisades and the  
4 residents of the District of Columbia. In fact, as I  
5 will explain in a minute, that is probably not the  
6 case but that is why we would support the permission  
7 to allow the students to walk to and from the campus  
8 all of the time.

9 I would observe one other thing, though,  
10 with regard to the application with regard to walking  
11 to and from the school. As I understand it just from  
12 the testimony today, it envisions having the students  
13 walk across Lab School property. I would just be  
14 curious to know whether anyone bothered to ask the Lab  
15 School whether it had any problems with it. That was  
16 just something that occurred to me.

17 CHAIRPERSON GRIFFIS: Actually, I believe  
18 I'll verify that when the applicant comes up but I  
19 believe they did give a statement that they had an  
20 agreement with Lab School. That may have just been  
21 quickly said but that's what I heard.

22 MR. LOVENDUSKY: Excellent. I would also  
23 take a moment just preliminarily to pick up on an  
24 observation that Mr. Etherly made in his cross  
25 examination or examination of the school witnesses.

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1 It actually played off of a statement that Mr. Barrett  
2 made in his direct testimony and that testimony, you  
3 may recall, went into some detail extolling the  
4 virtues of the shuttle bus system to the extent that  
5 they had bothered to measure the seconds it took to  
6 unload the buses.

7 In fact, they were succeeding in their  
8 originally planned execution of unloading the shuttle  
9 buses. Mr. Etherly picked up on the other side of the  
10 coin and inquired as to whether there were instances  
11 where the students who did not make the shuttle bus  
12 other wise had to arrange for vehicular transportation  
13 to the campus.

14 That was a perfectly -- that was a very  
15 insightful question inasmuch as the order 16852 itself  
16 requires that, "The applicant shall monitor compliance  
17 with the shuttle bus system daily and make such  
18 compliance a condition of student enrollment."

19 Indeed, the easiest way to comply with the  
20 express instructions of the order is to track the  
21 students who have to have extra vehicular  
22 transportation because it didn't make the shuttle bus.  
23 In fact, in reply to Mr. Etherly it was discovered  
24 that Mr. Barrett could not answer the question as to  
25 how many students required transportation beyond the

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1 shuttle bus.

2 He estimated that maybe it was twice a  
3 day. Maybe it was once a day. Maybe there would be  
4 some days when there were none. In fact, he also  
5 indicated that the school keep track at both campuses  
6 of precisely the number of individuals who require the  
7 extra transportation.

8 Yet, he was unable to provide that  
9 information to you, yet that information is exactly  
10 what would provide the information necessary to comply  
11 with the express instructions of the order and to be  
12 able to answer Mr. Etherly's question. In fact, the  
13 Lovendusky's would submit that this whole aspect of the  
14 discussion and your analysis really goes to the true  
15 crux of the matter for us.

16 That is the fundamental credibility about  
17 the representations by the school and its  
18 representatives. I would say that there are two  
19 elements of credibility in this regard. One is  
20 whether what they say is complete. In the instance  
21 that I just cited to you we have evidence to suggest  
22 that the evidence that they have presented today is  
23 not complete as far as being reliable and as far as  
24 establishing their credibility beyond reproach.

25 Secondly, the other element would be

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1 whether what they can say can be relied upon. I would  
2 submit to you relied upon not only by the neighbors  
3 but by the Board itself. Here I would submit to you  
4 that the evidence is to the contrary, that the  
5 representations cannot be relied upon.

6 Mr. Barrett was profuse in making promises  
7 to you and to us today. One of the first promises he  
8 made to you was a promise that the school would keep  
9 its enrollment to be 60 students and no more than 60  
10 students. Merely six years ago in 1999 school  
11 officials testified to something quite different with  
12 regard to the elementary school.

13 In fact, I think it was Mr. Barrett  
14 himself who promised that there would be no additional  
15 grade levels beyond the elementary school, no  
16 additional students, no additional teachers, no  
17 additional cars. That was only in 1999.

18 Yet, by 2003 Mr. Barrett was back before  
19 you and telling you that evidently what he said in  
20 1999 was not to be believed because, after all, they  
21 were expanding beyond the grade six. They were  
22 expanding to grade seven, they were expanding to grade  
23 eight, they wanted 60 students and, oh, by the way, a  
24 few months later they expanded to grade nine.

25 The neighbors have struggled with those

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1 representations and the fact that they were not true.  
2 We have struggled with wanting to believe that the  
3 school, in fact, and its officials do honor their  
4 commitments faced with the information to the  
5 contrary. We have struggled wanting to learn from the  
6 past so as not to have to experience the misfortunes  
7 of the past again and that is for the Lovendusks the  
8 crux of the matter before us today.

9           It's also especially important to us in  
10 light of the information that we have and we can rely  
11 upon that benefactors of the school have purchased 40  
12 acres at 1801 Foxhall Road to construct a high school.  
13 Now, if they are going to construct a high school,  
14 this has several important implications for the  
15 neighborhood, for the Palisades.

16           First of all, the question then becomes  
17 for us that there would be three campuses to this  
18 private school and that these campuses would all  
19 involve some kind of transportation scheme that would  
20 impose itself upon the transportation systems of the  
21 Palisades.

22           It raises questions in our mind whether  
23 the high school would be for the 10th and 11th and  
24 12th grades or whether it would be for the 9th and  
25 10th and 11th and 12th grades, in which case it would

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1 have questions as to whether the middle school across  
2 the street from us would, in fact, be serving the 9th  
3 grade or not.

4 It also has questions for us as to whether  
5 the class sizes in the high school could be expected  
6 to remain the same class sizes as are in the  
7 elementary school and in the middle school right now.  
8 Are we really to believe they are to build a high  
9 school that will have in its grades only 20 students  
10 per grade? Or will the high school, in fact, be built  
11 to accommodate a much greater number of students?

12 In which case, the middle school cap at 60  
13 is an incredible cap and cannot be relied upon today  
14 or any other day as being a genuine indicator of what  
15 the intentions of the school administration is for its  
16 high school, its middle school, and its elementary  
17 school.

18 Mr. Barrett made other promises. Mr.  
19 Barrett made a promise that the school would improve  
20 educational opportunities to which we answer, "To  
21 whom?" I was glad to see that Mr. Spencer was here to  
22 testify that he is beneficiary of the school's  
23 location in our neighborhood.

24 I wished there were 40 parents here today  
25 who could testify that their children were benefitting

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1 from the location of St. Patrick's school in our  
2 neighborhood. In fact, we know as a matter of  
3 testimony from the prior proceedings, and as a matter  
4 probably of the omission of testimony to be a fact in  
5 today's proceedings, that most of the students  
6 enrolled in St. Patrick's do not live in the  
7 Palisades.

8 They do not even live in the District of  
9 Columbia. They live in Maryland. They live in  
10 Virginia. Those who live in the District of Columbia  
11 live in other neighborhoods and not in the Palisades.

12 I would submit to you that the zoning  
13 regulation that you must evaluate in approving this  
14 application gives greater priority to the opinions of  
15 the residents nearby and adjoining the subject  
16 property. That's us, the Lovendusky's, and our  
17 immediately nearby neighbors. The same neighbors who  
18 in hundreds opposed the application for the  
19 establishment of this middle school in the middle of  
20 our residential neighborhood.

21 So I would submit it would be a perfectly  
22 appropriate inquiry to ascertain where do these  
23 students come from? Can they walk to work? Do they  
24 live in the Palisades? Do they even live in the  
25 District of Columbia?

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1 Another interesting promise we heard today  
2 was a promise to preserve and enhance the exterior of  
3 the building and grounds. I would observe to you that  
4 it's an interesting promise because with regard to the  
5 construction of the sensible life support addition to  
6 the one side of the building, that life support  
7 addition apparently doubles the size of the structure  
8 on the property.

9 It is about equal to the size of the house  
10 in at least its appearance. What it, in fact, has  
11 done it has destroyed the residential nature of the  
12 building and transformed it probably permanently into  
13 an institutional building. That has two implications  
14 of concern to us.

15 One is that it will likely never again be  
16 a residence. It will always be an institution in the  
17 heart of our residential community. Secondly, it  
18 proves the falsity of the representations the school  
19 made to you two years ago in the original application  
20 to establish the middle school. Those representations  
21 went to the fact that the preceding use of the school  
22 has a facility for education was not going to be  
23 changed.

24 Yet, in all the preceding uses of the  
25 school, first as an educational -- most recently as an

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1 educational facility for psychiatrists and before that  
2 as an educational facility for young children, those  
3 uses were always able to be contained in the  
4 residential structure that had historically remained  
5 intact on that property.

6 Only since the acquisition by the property  
7 by St. Patrick's has it been changed, probably  
8 forever, into an institutional site by the addition of  
9 something of a structure that is clearly not  
10 residential in nature.

11 CHAIRPERSON GRIFFIS: Couple more minutes.

12 MR. LOVENDUSKY: One of the questions that  
13 was raised, I cannot remember by which Board member,  
14 but it was a question as to whether all the conditions  
15 of the existing order were operating satisfactorily  
16 and without surprise we heard that the school thought  
17 they were.

18 I can tell you without any doubt that  
19 perhaps the most critical element of the order is not  
20 working at all. That element is the condition that  
21 goes to the enforcement of the order itself. The  
22 enforcement condition or order 16852 will occur in  
23 three situations.

24 CHAIRPERSON GRIFFIS: Is this condition

25 No. 20?

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1 MR. LOVENDUSKY: I don't have the number  
2 in front of me.

3 CHAIRPERSON GRIFFIS: Okay. Go ahead. I  
4 think it is.

5 MR. LOVENDUSKY: The condition will occur  
6 if the private school admits violating the same  
7 condition three times within five years. It will  
8 occur if the private school pays three fines for  
9 violating the same condition three times in five  
10 years. It will occur if the Department of Consumer  
11 and Regulatory Affairs fines after hearing the private  
12 school has violated the same condition three times  
13 within five years.

14 The school has never admitted violating  
15 any law, regulation, or Board of Zoning Adjustment  
16 condition with one exception and that exception  
17 happened today. That exception happened today when  
18 Mr. Barrett replied to Mr. Hood's question as to  
19 whether or not they had complied with the expressed  
20 requirement of the order with regard to notifying the  
21 community of its compliance with its transportation  
22 system. Mr. Barrett acknowledged that the school had  
23 not.

24 It is unlikely that the school will very  
25 often admit violating any law, regulation, or Board of

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1 Zoning Adjustment and its acknowledgement today was  
2 probably inadvertent and probably regretted by Mr.  
3 Barrett.

4 Secondly, the school has never paid a fine  
5 for violating a condition in its 57 years of presence  
6 in the District of Columbia despite the established  
7 violations of Board orders relating to the elementary  
8 school. The question then becomes the reasonableness  
9 of basing the enforcement of any of these orders upon  
10 the Department of Consumer and Regulatory Affairs as  
11 provided by the enforcement condition itself.

12 The enforcement condition is the last of  
13 20 conditions and it is immediately seen that the  
14 Board provides the school 40 free offenses every five  
15 years. That is, the private school can violate every  
16 one of the 20 conditions twice every five years  
17 without reaching the threshold of an appearance before  
18 you for termination and modification of its orders for  
19 granting the special exception.

20 In fact, the condition allows more than 40  
21 free offenses every five years because the Department  
22 must first find that there has been a violation after  
23 a hearing. The question confronting the Board is  
24 whether there is any mechanism for enforcement of  
25 Board conditions and, in fact, there was none then and

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1 there is no today because the system that we put in  
2 place doesn't work.

3 I can tell you that as a matter of fact  
4 because Mrs. Lovendusky and I have filed at least five  
5 complaints with the compliance review program  
6 specialist in the D.C. Office of Zoning. The first  
7 one occurred just days after you issued order 16852.  
8 Another one occurred on May 2nd of 2003. Another one  
9 occurred October 3rd of 2003. Another occurred on  
10 October 6th of 2003. Another one occurred on  
11 September 17th of 2003. I can give you details if you  
12 so require.

13 Now, I do acknowledge that all of those  
14 complaints for violating the expressed conditions of  
15 order 16852 occurred during the construction phase of  
16 the school but that's what the law provides. Not only  
17 does the law itself expressly provide that the  
18 conditions of an order apply during the construction  
19 phase, we can rely upon the representations of the  
20 counsel for the school itself, the woman who is  
21 sitting behind me, who submitted to you in a pleading  
22 before this Board before you issued order 16852 that,  
23 in fact, all of the orders that you were contemplating  
24 would be in full effect and force during the  
25 construction phase.

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1                    Yet, when push came to shove, when it came  
2 time to actually test the words that had been put to  
3 you, it failed. The violations were not noted. They  
4 were dismissed as having occurred during the  
5 construction phase and, therefore, being somehow  
6 irrelevant despite the contrary representations of the  
7 school's counsel and the express language of the  
8 District of Columbia law itself. So the system  
9 doesn't work. This enforcement condition does not  
10 work and it cannot work.

11                    So that is one thing that we think has to  
12 be revisited if there is any hope of stabilizing the  
13 residential community around the middle school now at  
14 4925 MacArthur Boulevard, a school that we don't  
15 necessarily believe is going to remain a St. Patrick's  
16 institution very long because we don't think it's  
17 going to work very well with the high school that they  
18 must be planning at this time because we cannot  
19 imagine a high school limited to 20 students per  
20 grade.

21                    So for all of these reasons, Mrs.  
22 Lovendusky and myself would ask you to perhaps grant  
23 the proposal to allow walking to and from the middle  
24 school campus but to reject the increase in students  
25 above 40 students. Certainly 15 months has not been

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1 enough time to test whether the system is working  
2 itself, especially in the face of the failure of the  
3 enforcement condition of order 16852.

4 Even beyond that we would submit to you  
5 it's not going to because in just a short matter of  
6 time they should be able to tell you what their master  
7 plan is for the high school at 1801 Foxhall Road.  
8 Then perhaps we can all evaluate whether the middle  
9 school makes sense for St. Patrick's students and the  
10 neighbors and the District of Columbia. Thank you for  
11 your time.

12 CHAIRPERSON GRIFFIS: Good. Thank you  
13 very much. I do appreciate it. I will note, of  
14 course -- well, I won't then. A couple of very  
15 important issues you brought up. Let me first go back  
16 to one of the middle ones and that is talking about  
17 these promises that are often made. You know, "We  
18 promise we're not going to increase. We promise  
19 there's no additive grades."

20 What's interesting is when I actually  
21 started on this Board not too long ago almost -- well,  
22 I would say every kind of academic application that  
23 came through and some others that came through was  
24 always in the beginning they told us they would never  
25 increase. They told us that this would never happen.

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1 I have to say recently, and we go through a lot of  
2 these, we don't hear much of that anymore.

3 I think a lot of it has to do with coming  
4 to the reality of there's nothing -- in many senses it  
5 shouldn't be believed. There's nothing more important  
6 from the Board's perspective, unless we condition, you  
7 cannot increase, you cannot add this in, you cannot do  
8 this or that which we don't do, then there's no  
9 reliance on that.

10 I guess the real point of it is, and I  
11 think what this Board has come to do, we look at the  
12 application that's in front of us and we have to  
13 assess what's being asked. What you're asking us to  
14 do and what has happened before is very, very  
15 difficult to do and that's why I think we've kind of  
16 moved away from bantering back and forth whether there  
17 are broken promises or not because we look very  
18 specifically at the facts. In order to look at the  
19 intentions and to judge an application's specific  
20 facts on the perceived or projected intentions is an  
21 impossibility for the Board to do.

22 You do bring up an interesting point,  
23 though, in terms of the high school and what impact  
24 that might be. I didn't hear you talk a lot about  
25 necessarily why that would impact this application and

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1 this facility. If the 9th grade goes up, if the high  
2 school becomes big, whatever it is, that may well be  
3 another application in front of us at some point but  
4 I wasn't sure what the link was in terms of the  
5 increased enrollment application that we have before  
6 us today.

7           The second aspect that I want to touch  
8 upon, your condition 20 is what you're talking about.  
9 I have to say I agree with you 100 percent. I think  
10 the condition is an absurd one, one that was written  
11 with great and good intentions of trying to establish  
12 a compliance mechanism for our orders. I, quite,  
13 frankly think that it is a step beyond our  
14 jurisdiction and authority in trying to condition a  
15 compliance mechanism in.

16           Your own testimony supports my view that  
17 it wasn't -- it didn't do what it was supposed to do  
18 even if it was -- even if it was called upon to do it.  
19 I don't think it could actually do what we thought it  
20 might. I may well support removing it from the next  
21 iteration of this if it moves ahead successfully.

22           Then also to go into some of the  
23 specifics, of course, this Board doesn't do  
24 compliance. This Board does approvals and denials.  
25 Compliance comes out of DCRA. We did and do have a

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1 compliance officer position in the Office of Zoning  
2 which was a step which was established by the director  
3 in order for review of orders and compliance with  
4 those orders.

5           Again, there is no enforcement mechanism  
6 within the Board or the Office of Zoning. Any the  
7 compliance officer wouldn't enforce our orders but  
8 would, rather, look at whether there was a potential  
9 violation and then give note to DCRA or the Zoning  
10 Administrator for them to follow up and provide the  
11 enforcement. I think that still will work  
12 appropriately but, again, I underscore the fact that  
13 I agree with you, that I don't think an applicant is  
14 likely to come and admit violation.

15           I think we may well not have an  
16 enforceable or jurisdictional order by precluding an  
17 applicant to come with a new application or demanding  
18 a modification at some point. I'm going to leave it  
19 at that and let others. Are there questions or  
20 comments?

21           MR. LOVENDUSKY: May I respond to your  
22 remarks?

23           CHAIRPERSON GRIFFIS: Most certainly.

24           MR. LOVENDUSKY: With regard to the idea  
25 of removing condition 20 from any future order thereby

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1 removing the enforcement condition if, in fact, you  
2 visit the commentary of several members of the Board,  
3 at the time order 16852 was approved, I would say a  
4 plurality of the members of the Board at the time  
5 found condition 20 the enforcement provision to be the  
6 keystone condition upon which they were willing to  
7 move forward with the establishment of the middle  
8 school itself.

9 If, in fact, the Board decided to remove  
10 the enforcement provision itself, I would suggest you  
11 are removing the keystone for the presence of the  
12 middle school itself and the grant of the original  
13 special exception.

14 Certainly you could not remove it in the  
15 absence of any enforcement provision, especially in  
16 the face of the lack of enforcement of any condition  
17 by the Department of Consumer and Regulatory Affairs.  
18 There would be nothing left to protect the  
19 neighborhood from any imposition by the school in  
20 excess of the remaining 19 conditions as it would  
21 will.

22 I would observe further that the  
23 acknowledgement that the enforcement condition itself  
24 cannot work and does not work and will not work  
25 suggest that the only power that is of critical

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1 important to be exercised by this Board in matters of  
2 this nature is its fundamental authority to permit the  
3 special exception in the first place.

4 By going back to your root authority in  
5 the zoning regulations to protect the stability and  
6 the quiet of the neighborhood, of the residential  
7 neighborhoods, to the benefit of the individuals who  
8 live in the neighborhood itself, I would submit to you  
9 that under those important tests you would have to  
10 confront the fact that hundreds of the neighbors  
11 immediately nearby and adjoining this particular site  
12 objected to the establishment of the middle school and  
13 objected that it would destroy the stability and the  
14 quiet nature of our residential neighborhood.

15 Thereby, you would have to move not only  
16 to limit the school to its current 40 students but, in  
17 fact, to entertain notions from the neighborhood to  
18 remove the special exception.

19 CHAIRPERSON GRIFFIS: Good. Let me ask  
20 you because it's very strong testimony. I'm not going  
21 to get into the dispute of numbers and hundreds or  
22 whatever it is. That doesn't particularly interest me  
23 or bother me either way.

24 You said that they came and testified in  
25 the last that this would destroy the residential

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1 neighborhood. Is there evidence today then even in 15  
2 months of operation that the residential neighborhood  
3 has been destroyed or the nature of the quietness or  
4 any of the particular pieces that you enjoy?

5 MR. LOVENDUSKY: Again, I'm here for  
6 myself and for Mrs. Lovendusky today.

7 CHAIRPERSON GRIFFIS: Sure. Sure.

8 MR. LOVENDUSKY: I believe that many of  
9 the neighbors have concerns in many directions. Our  
10 fundamental concern has always been, again, the crux  
11 of whether or not we can believe the school will live  
12 within the constraints of 40 students, or even 60  
13 students when, in fact, in the face of our own  
14 experience with this particular school in our  
15 neighborhood, every application that is made to this  
16 Board has been to expand.

17 It has been a history of relentless  
18 expansion and its history of relentless expansion has  
19 always been approved by this Board and it has been  
20 approved in instances that are tantamount to rewarding  
21 it for bad behavior.

22 CHAIRPERSON GRIFFIS: So your concern is  
23 that it's not destroyed now but it will be because the  
24 continued expansion will make this an entirely  
25 academic neighborhood.

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1 MR. LOVENDUSKY: Yes, sir.

2 CHAIRPERSON GRIFFIS: The Palisades would  
3 disappear and it will just be good schools everywhere.

4 MR. LOVENDUSKY: Yes, sir. In support of  
5 our concern is our reading of the daily newspapers,  
6 especially the Northwest Current does a good job of  
7 covering Board activities. I would note --

8 CHAIRPERSON GRIFFIS: Too bad they're not  
9 here to hear that. Oh, they are here.

10 MR. LOVENDUSKY: I would note that what we  
11 read is we read that this Board receives numerous  
12 applications by numerous private schools. The  
13 applications are never to reduce enrollment. The  
14 applications are never to maintain enrollment. The  
15 applications are forever to expand and increase  
16 enrollment.

17 CHAIRPERSON GRIFFIS: True.

18 MR. LOVENDUSKY: More times than not the  
19 Board approves the expansions.

20 CHAIRPERSON GRIFFIS: But, to be fair,  
21 they don't need to bring an application to decrease  
22 enrollment or to maintain enrollment, right? We  
23 wouldn't see any of those. Or to close up shop, you  
24 know? If the school closes, they don't need our  
25 approval.

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1 MR. LOVENDUSKY: But, in fairness, you see  
2 numerous applications by numerous private schools  
3 always to expand usually granted.

4 CHAIRPERSON GRIFFIS: Right. I don't  
5 disagree with that. Many of them are actually timed  
6 so we have them coming back with regularity. Okay.  
7 Questions?

8 MS. MILLER: Yes. Mr. Lovendusky, you  
9 live within 200 feet of the school?

10 MR. LOVENDUSKY: Yes, ma'am.

11 MS. MILLER: What I'm hearing you say is  
12 that you are concerned that the school won't live  
13 within the constraints of even 60 students and you are  
14 concerned about enforceability of that. Is that  
15 correct?

16 MR. LOVENDUSKY: That's part of our  
17 concern.

18 MS. MILLER: That's part of your concern.  
19 My question goes to that concern. The applicant  
20 represented that they offered a covenant to neighbors  
21 located within 200 feet of the property that would  
22 limit the enrollment forever to 60. The neighbors  
23 opted to reframe from participating in that covenant.  
24 Did you reframe from that? Did you consider that?

25 MR. LOVENDUSKY: We certainly did. We

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1 evaluated it very carefully. We evaluated not only  
2 the original covenant that was offered by the school  
3 at the time of order 16852. In fact, I solicited from  
4 counsel for the private school, I asked the question  
5 in one of the meetings, the community meetings,  
6 whether or not the original covenant was available.  
7 The initial answer was yes. The subsequent answer was  
8 no, that they had improved the covenant and they  
9 offered a slightly changed covenant for our  
10 consideration.

11 Well, upon further consideration of the  
12 slightly improved covenant, I would gather slightly  
13 improved from the school's perspective and not  
14 necessarily from any of the neighbor's perspective,  
15 that the covenant was basically worthless because the  
16 most that the covenant would provide would be that in  
17 its violation a holder of the covenant would then be  
18 able to go to Superior Court and inaugurate a law suit  
19 against the school for the violation of the covenant.

20 But there is no precedent in Superior  
21 Court of upholding such covenants. There is no  
22 precedent indicating what the damages of the violation  
23 of the covenant might, in fact, be. There's no  
24 suggestion that even a finding by Superior Court would  
25 enable some kind of special enforcement of the

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1 covenant itself against the institution.

2 In fact, when you consider the fact that  
3 it would require the retaining of an attorney or the  
4 commitment of one's own time and resources to  
5 prosecute litigation in Superior Court against a  
6 school that is represented by one of the most powerful  
7 and influential law firms in the District of Columbia,  
8 if not the east coast of the United States, it did not  
9 seem like a very good idea to barter away whatever  
10 little influence we might have with you in a forum  
11 such as today to allow them to wave a piece of paper  
12 around saying, oh, they have relinquished their  
13 willingness to oppose because they have signed a  
14 covenant so we elected not to sign that covenant.

15 MS. MILLER: Okay. Thank you.

16 CHAIRPERSON GRIFFIS: Any other questions?

17 MR. ETHERLY: Yes, Mr. Chair.

18 CHAIRPERSON GRIFFIS: Yes.

19 MR. ETHERLY: Thank you very much for your  
20 testimony, Mr. Lovendusky. One of the prisms that --  
21 well, actually let me jump to the question instead of  
22 kind of prefacing it and maybe I'll raise the point  
23 later. With respect to concerns of traffic, there are  
24 a number of letters that have been submitted into the  
25 record which kind of speak a little bit to some of the

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1 exchange that you heard me go through and that you  
2 referenced with Mr. Barrett.

3 Have you yourself had occasion to witness  
4 or observe any traffic related issues as it pertains  
5 to either shuttle bus trips or any of the one or two  
6 trips that might be generated by an administrative  
7 member in a personal vehicle picking up another  
8 student? Have you had an opportunity to observe that?

9 MR. LOVENDUSKY: Generally, no. I  
10 occasionally see the shuttle bus arrive on my way out  
11 the door to work every day.

12 MR. ETHERLY: Okay.

13 MR. LOVENDUSKY: But generally, no. I  
14 have not been able to monitor myself the extra  
15 vehicular traffic or the shuttle bus performance.

16 MR. ETHERLY: Okay. And that, of course,  
17 is not to necessarily suggest it isn't happening or it  
18 is happening but just in terms of your personal  
19 experience.

20 Further, with respect to the issue of  
21 noise, have you had occasion to make any observations  
22 or do you feel you are in a position to make an  
23 observation about noise as it relates to the current  
24 campus relative to your property?

25 MR. LOVENDUSKY: Two replies to that

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1 question. One, I would say that personally I am  
2 typically not at home during the operation of the  
3 school hours after the students arrive so I do not  
4 personally know whether they are noisy or not.

5 But I would observe more generally with  
6 regard to their noise expertise and their  
7 representations about how any noise of the students  
8 outside is lost and the noise of the aircraft travel  
9 and truck travel and bus travel on MacArthur  
10 Boulevard, the one thing that seems to be missing  
11 about all this analysis is that the airplanes that fly  
12 over our neighborhood, they take off and as they  
13 approach our neighborhood they grow louder.

14 As they are over our neighborhood they are  
15 very loud to the point where you cannot have a  
16 conversation. As they travel on, the noise of the  
17 airplane diminishes. So it is with buses and trucks.  
18 The noise that one would hear of the students wouldn't  
19 occur during the optimum time of the noise of the  
20 aircraft or the bus or the truck. It would happen in  
21 those quiet moments in between. That's when you would  
22 hear the students.

23 In fact, the students more likely than not  
24 can't be conversing very much when the aircraft is  
25 overhead themselves because they can't hear one

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1 another talk. They would be conversing most likely in  
2 the quiet periods between the aircraft noise and the  
3 bus noise and the truck noise. Therein, I think, lies  
4 the concern among some of my neighbors with regard to  
5 the noise. The student noise is constant relative to  
6 the intermittent noise of aircraft, buses, and trucks.

7 MR. ETHERLY: Okay. With respect to one  
8 of the submittals, Exhibit No. 29, and it's a letter  
9 which was offered by Ms. Alma Gates regarding  
10 landscaping. We have not had an opportunity to kind of  
11 engage in a dialogue with the applicant about that but  
12 I wanted to at least set it up and flag it for the  
13 applicant to speak to in closing.

14 With respect to landscaping in particular,  
15 Mrs. Gates' letter notes, one, whether it's  
16 construction related impacts or just overall  
17 landscaping regarding a number of trees on the  
18 property and, in particular, the yew hedge. Would you  
19 be able to speak to based on your proximity to the  
20 property your observations surrounding two existing  
21 trees on site and, in particular, the hedge?

22 MR. LOVENDUSKY: Yes. Thank you, Mr.  
23 Etherly. I would observe, first of all, that Mrs.  
24 Lovendusky and myself sort of come out neutral on the  
25 landscaping issue but I appreciate an opportunity to

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1 spend one minute speaking about the landscaping. What  
2 has happened as the neighborhood has traded through  
3 the agency of the school the loss of a number of very  
4 mature trees and in exchange we have received a number  
5 of very young trees.

6 We have experienced the loss of a mature  
7 yew hedge that did contribute significantly to the  
8 softening of the sounds from that particular location  
9 and also which hid invisibility some of the activities  
10 of that location.

11 But I would observe that old hedge had  
12 been erroneously pruned for many years and was not  
13 really a healthy hedge so it was removed and the  
14 school has planted many young yews which in time will  
15 grow up to be, I'm sure, just as useful of a hedge for  
16 all purposes as the one that was lost. But  
17 fundamentally we've lost old plantings and mature  
18 plantings for young plantings. In the long run that  
19 might be good if any of us are there in the long run.

20 MR. ETHERLY: Okay. Now, a little bit of  
21 the preparatory remark that I was contemplating. As we  
22 walk through your testimony and the written  
23 submission, probably just by virtue of scheduling, I  
24 think one of the inadvertent or indirect filters that  
25 perhaps we are all working through is having had the

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1 recent benefit of going through the Georgetown remand  
2 case.

3 Mrs. Miller referenced that a little  
4 earlier. Obviously that, to an extent, was very much  
5 influenced by the remand that was sent back to us from  
6 the Court of Appeals sometime last year. In  
7 particular there's a portion that speaks quite  
8 explicitly to what this Board should find itself in a  
9 position to do relative to looking at the issue of  
10 student enrollment, albeit a very separate and  
11 different case. A different context talking about a  
12 university which may, indeed, have a lot of attended  
13 circumstances that don't attach here.

14 I think part of the general gist of the  
15 language there is somewhat instructive here as we look  
16 at the issue of student enrollment in particular and  
17 being certain that we are tying any constraints on  
18 student enrollment to clear adverse impacts that we  
19 are endeavoring to mitigate.

20 That's why I walked through a little bit  
21 of the conversation around traffic and the shuttle bus  
22 and, in particular, some of the additional trips  
23 involving late students. And then also talking a  
24 little bit about the landscaping because I want to be  
25 sure that there is an adequate opportunity to explore

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1 any of those alleged adverse impacts very, very  
2 clearly because I was concerned with the bulk of your  
3 letter.

4 I thought it was a very interesting  
5 discussion, especially as it relates to the philosophy  
6 and thinking behind middle schools versus high  
7 schools. But I was concerned that we didn't  
8 necessarily have the level of detail that we needed  
9 around adverse impacts. I wanted to be sure just to  
10 kind of peruse that.

11 In essence what I've heard thus far has  
12 been additional trips that may be generated by virtue  
13 of students who are late on campus to the White Haven  
14 campus for transportation over to the MacArthur  
15 Boulevard campus.

16 We talked a little bit about storm water  
17 damage which may or may not necessarily be  
18 attributable to the operation of the campus but just  
19 might simply be a fact of life in that particular  
20 parcel. We've talked a little bit about noise. Would  
21 there be other explicit adverse impacts that you might  
22 want to acknowledge or touch upon that we haven't  
23 perhaps hit?

24 MR. LOVENDUSKY: I believe your summary  
25 would be the most concrete adverse impacts that Mrs.

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1 Lovendusky and myself would be concerned with but they  
2 are all very much wrapped in with what we can expect  
3 to be happening with the location of the school in the  
4 middle of the residential district.

5 That goes to the credibility of the  
6 testimony of the school representatives, and also what  
7 the likelihood future of the site is should, in fact,  
8 the middle school location or its limitation to 40 or  
9 50 or 60 students not work into their master plan for  
10 the construction of their high school, at which point  
11 we could expect them to want to sell their school  
12 probably to another institution and, therefore, since  
13 it would be an institution who would be the preferred  
14 buyer, to the extent they can expand the special  
15 exception now, it will increase the marketability of  
16 that school to a greater number of potential buyers.  
17 All these are fundamental to our concerns in addition  
18 to the items that you've remarked upon.

19 MR. ETHERLY: If I might say, I understand  
20 the thinking behind that. I think we would be hard  
21 pressed to find a place within which to couch that  
22 from the standpoint of the special exception analysis  
23 so I want to be sure that is fairly clearly but I  
24 understand the point.

25 The other piece that I want to be sure to

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1 add, and then I'll let you close your point and I'll  
2 be done, Mr. Chair, is that is it your testimony that  
3 of those additional -- of those, shall we say, adverse  
4 impacts that I've kind of touched upon, perhaps storm  
5 water to a lesser extent, to clearly talking a little  
6 bit about the traffic component, some of your concerns  
7 around noise, it would definitely be your testimony  
8 that an additional 10 students or an additional 20  
9 students, whether it's the 10 that's offered by Office  
10 of Planning but, as I indicated, they would have no  
11 objection to going to a full 20. It would be your  
12 testimony that those 20 students would further  
13 exacerbate those adverse impacts from your standpoint.

14 MR. LOVENDUSKY: Yes.

15 MR. ETHERLY: Okay.

16 MR. LOVENDUSKY: I would observe there is  
17 actually -- there was one important omission from your  
18 list and that is the impossibility of the enforcement  
19 condition of order 16852.

20 MR. ETHERLY: Okay.

21 MR. LOVENDUSKY: That even deprives the  
22 neighborhoods of the ability to police it ourselves,  
23 a duty that we've never really wanted. But if even  
24 that duty is denied us, then there is no way of  
25 enforcing any of the conditions of any order regarding

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1 the school.

2 If I could just make three quick  
3 observations. Thank you for acknowledging your  
4 receipt of my April 8th letter. There's a  
5 typographical error in footnote No. 3. The Wall  
6 Street Journal article was from April 6th, not April  
7 16th since, in fact, my letter was April 8th.

8 Secondly, I am not familiar with the  
9 Georgetown decision that you have wrestled with but I  
10 gather from the questions put to the school witnesses  
11 earlier that one element of it has to do with the  
12 magnitude of an enrollment increase. The question was  
13 -- well, I mean, a 50 percent increase sounds like a  
14 large increase. The reply from the counsel for the  
15 private school was, "Well, a 50 percent increase of a  
16 small number is still a small number."

17 I would submit to you that the small  
18 number must be considered in relationship to the  
19 reason it was a small number in the first place which  
20 was because we are here imposing a middle school in  
21 the middle of a residential community and that any  
22 number, whether it be small or large, is going to be  
23 a completely new imposition into the heart of a  
24 residential community.

25 The zoning regulations are intended to

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1 protect the stability and the quiet of residential  
2 communities and that any special exception will likely  
3 degrade that stability. Therefore, I would submit to  
4 you that it's a small number for a good reason and  
5 that a 50 percent increase is still 50 percent.

6 CHAIRPERSON GRIFFIS: Good. I disagree  
7 with your interpretation of what special exceptions  
8 actually are but we don't need to go further into  
9 that. I think we've gone into it. Mr. Etherly brought  
10 up the Georgetown remand. Actually, the Court struck  
11 us down because this Board didn't show any evidentiary  
12 reasonings or facts, basis in the record to deny an  
13 increase.

14 In fact, the Court said that there was  
15 nowhere in the record that gave a rationale basis for  
16 the Board to conclude that they could not increase.  
17 Really it was more what Mr. Etherly was going to is  
18 show us what the factual basis that we can rely on or  
19 should be deliberating on that would move us to not  
20 allow an increase. I think we have what we need for  
21 the record. It was a very strong order and I think it  
22 had a huge impact on obviously the Georgetown case and  
23 perhaps others that have been before us and perhaps  
24 are going to be.

25 Yes, Mr. Etherly.

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1 MR. ETHERLY: Thank you, Mr. Chair. I  
2 just wanted to hit one final question. Mr.  
3 Lovendusky, you are perhaps fortunate or unfortunate  
4 to be kind of the lone witness or the lone testimony  
5 as it relates to opposition here so I wanted to hit a  
6 few things that were raised in other letters.

7 One final piece that I found raised only  
8 in one letter. This is Exhibit No. 30 which was a  
9 letter from Howard Fenton and Nora Carbine at 4915  
10 Ashby Street. They reference an issue around trash.  
11 They do not necessarily suggest that an increase in  
12 trash per se is coming from the school.

13 Really it seems to be kind of on the fence  
14 as to whether there is any identifiable increase in  
15 trash but I wanted to just explore that with you any  
16 experience or observations that you might be able to  
17 offer in terms of trash relative to your property or  
18 since the school has been in operation over these past  
19 15 months.

20 MR. LOVENDUSKY: Thank you. Mrs.  
21 Lovendusky and I would confirm that there has been an  
22 increase in trash in the neighborhood since the school  
23 has been located there. It is impossible for us to  
24 attribute it necessarily to the school's presence but  
25 there has been an increase of trash in the

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1 neighborhood.

2 MR. ETHERLY: Okay. Thank you. Thank  
3 you, Mr. Chair.

4 MR. HOOD: Mr. Chair.

5 CHAIRPERSON GRIFFIS: Yes.

6 MR. HOOD: I just have a few questions.

7 Mr. Lovendusky, I'm looking at your April  
8 8, 2005 letter. You mentioned about the track record  
9 and not having enough time to, I guess, have a set  
10 pattern of exactly how things are going to work. In  
11 other words, not enough track record so they shouldn't  
12 be coming at this point in time asking. What is your  
13 opinion of what is, I think, a year and some months  
14 actually? What is your time table?

15 MR. LOVENDUSKY: Thank you, Mr. Hood.  
16 Thank you, Mr. Hood. I would submit that under the  
17 circumstances we could have expected predictably that  
18 the school would be on its best behavior for the year  
19 immediately following the grant of order 16852.  
20 I think that under the circumstances of their plans of  
21 building a high school, again in our neighborhood,  
22 that they will have to move forward in their planning  
23 in very short order.

24 Inasmuch as the application before you  
25 today doesn't envision increasing the enrollment

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1       itself until 2007, I would submit to you that you  
2       could deny the application today, allow the current  
3       situation to exist for another full year at which  
4       point we would have two full years of experience with  
5       the school.

6                   At that time it would give them another  
7       year to provide you with the details of their planning  
8       for the high school and we would be able to evaluate  
9       -- we, the Board and the neighbors, would be able to  
10      evaluate whether their three-campus scheme, in fact,  
11      makes sense from a general District of Columbia  
12      perspective, and that there would be still time enough  
13      then to grant them an appropriate increase if  
14      necessary for the middle school in time for the 2007  
15      class plus the construction of their high school.

16                   MR. HOOD: Mr. Lovendusky, you obviously  
17      have more history on this whole scenario than I do.  
18      Is it your understanding -- I'm getting from you that  
19      this school is supposed to be just for neighborhood  
20      residents. Is that what you understood?

21                   MR. LOVENDUSKY: It is the Lovendusky  
22      position, Mr. Hood, that special exceptions should be  
23      for the benefit of the residents of the District of  
24      Columbia. The special exception power with regard to  
25      residential communities is based on the preservation

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1 of the stability and the quiet of the residential  
2 neighborhood.

3 That means the neighborhood of District of  
4 Columbia residents. If, in fact, the applicant is not  
5 benefitting the residents of the District of Columbia  
6 and in residents of the neighborhood in which they  
7 want to locate, I would submit that the Board should  
8 think twice and very carefully about whether this  
9 applicant in this special exception does, in fact,  
10 provide benefits to the District of Columbia since you  
11 have to admit it taking properties out of the  
12 residential tax base.

13 It's burdening the District of Columbia  
14 with impositions on our facilities that our paying tax  
15 payers do provide for. The closer the institution is  
16 actually to providing services to the District of  
17 Columbia and to the residents in the neighborhood  
18 where it wants to locate, I think the more favorable  
19 the neighborhood will be towards the institution and  
20 the more favorable the Board's evaluation should be.  
21 The more removed the applicant is from the genuine  
22 interest of the residents and tax payers of the  
23 District of Columbia, the more the Board should think  
24 very hard about granting any application.

25 MR. HOOD: But our charge is to protect

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1 the residents and the businesses of the District of  
2 Columbia. Let me just say in your letter, when I read  
3 your letter it's different from what you're testifying  
4 because you say most live in Maryland and Virginia,  
5 which you've stated, and a few live in Spring Valley  
6 or other D.C. neighborhoods.

7           So you are lumping other -- for example,  
8 you're saying the folks in my neighborhood or other  
9 neighborhoods across the city are also causing impacts  
10 because we are coming over and going to school there.  
11 That's why I went to the first question. Is it your  
12 understanding this was just supposed to be for the  
13 neighborhood?

14           MR. LOVENDUSKY: Yes, sir. I understand.  
15 Thank you. I believe that the law looks to the  
16 interest of the residents of the District of Columbia  
17 wherever they might live. Now, I do go one step  
18 further as you suggest to say that in this instance  
19 since they are locating their multiple facilities  
20 close in one neighborhood, that there should be an  
21 extra hard look at the impact of the neighborhood  
22 itself.

23           If St. Patrick's was suggesting that it  
24 was going to build its high school in another quadrant  
25 of the District of Columbia, I don't believe the

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1 residents of the Palisades would have a problem with  
2 that. I believe that we would be more supportive of  
3 the idea of it because the fundamental concept behind  
4 St. Patrick's overall plan is the decentralization of  
5 their school into multiple campuses relying upon  
6 busing among the campuses which is an imposition on  
7 the overall traffic scheme of the District of  
8 Columbia.

9 Now if, in fact, the schools were located  
10 in different parts of the District of Columbia, it  
11 would be wholly appropriate for an evaluation district  
12 wide of the traffic impact but you would know that the  
13 impact on the traffic perspective alone is not going  
14 to be inordinately upon one neighborhood like it is  
15 today and like it will be tomorrow.

16 MR. HOOD: I appreciate that but I guess  
17 I wanted you to retract that because our charge is to  
18 protect the safety and health of the residents of the  
19 District of Columbia. It doesn't say the residents of  
20 Palisades or the residents of North Fishing Park or  
21 the residents in Columbia Heights. I just found that  
22 was just taking it a little step too far.

23 Let me just ask this final question. You  
24 mentioned the shuttle bus which, amazing to me, is  
25 actually working. Would you agree? Even though I

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1 know you're not home so I don't how much you know  
2 what's going on with that but it's actually working  
3 from what the record reflects.

4 MR. LOVENDUSKY: It would be interesting  
5 to know in response to Mr. Etherly question the number  
6 of students who need special extra shuttle bus  
7 transportation on a daily basis.

8 MR. HOOD: The one's who need the doctor's  
9 excuse and running late.

10 MR. LOVENDUSKY: Yes. Again, beyond that,  
11 the question would become what the plans would be for  
12 a shuttle bus system involving three campuses which is  
13 one more than any other private school has in the  
14 District of Columbia. Other than that, I have  
15 witnessed some of the shuttle bus deliveries in the  
16 morning and I would agree with Mr. Barrett's  
17 observation that they do exit the shuttle bus quite  
18 efficiently. So, to that degree, I agree that the  
19 shuttle bus system is working but beyond that I don't  
20 know.

21 MR. HOOD: Okay. Thank you very much.

22 CHAIRPERSON GRIFFIS: Twenty eight kids,  
23 58 seconds. Unbelievable. Okay. Couple of things,  
24 Mr. Lovendusky. I think you've made some excellent  
25 points. You know, it's interesting because we can

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1 easily say we had the Philips theoretical lot up  
2 recently before the Board and one of the biggest  
3 concerns for the Board was why are we seeing this now?  
4 Why aren't we seeing with everything else that's  
5 anticipated or hearing about it or whatever it is.

6 Let's bring them all together. You know  
7 what? If we had the power to do that, it would be  
8 done. I can tell you assuredly that we don't which is  
9 a disappointment but we have to take applications  
10 specifically on their own merit individually and  
11 that's the difficulty.

12 I mean, Office of Planning does great  
13 plans and hopefully, and I have great faith that they  
14 are, looking at those kind of aspects that you're  
15 bringing up, a master plan. Why aren't we looking at  
16 this from a much bigger perspective. It will only  
17 benefit you as a resident, me as a resident, and,  
18 frankly, the schools also. The difficulty is this  
19 isn't the forum. I know it's frustrating for Board  
20 members sometimes when we look at these things and  
21 think, wow, we should probably know what's going to  
22 happen next.

23 But, again, it goes back to this whole  
24 point of listening to pie-in-the-sky promises or  
25 trying to hypothetically predict what the intentions

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1 of applicant's are. We can't get into that because we  
2 just don't have the vehicle to, one, measure it and,  
3 two, to do anything about it if we have a good  
4 understanding.

5 We have to look at the factual basis  
6 that's created before us and look and balance on what  
7 is requested and whether that meets the test that we  
8 have before us. It is an unfortunate thing at certain  
9 junctures. However, it's the system that we have set  
10 before us.

11 Let's move ahead then unless there's other  
12 comments, questions for Mr. Lovendusky. Again, thank  
13 you very much and appreciate you spending the  
14 afternoon with us and providing all of this. Let's go  
15 to the applicant then if there's nobody else present,  
16 persons to give testimony.

17 Ms. Prince, are you bringing any rebuttal  
18 witnesses?

19 MS. PRINCE: One brief bit of rebuttal  
20 testimony. One short closing statement.

21 CHAIRPERSON GRIFFIS: Okay. Please  
22 restate, or state. If I'm not mistaken, you have an  
23 agreement with Lab School and confirm that and also  
24 just address how many specifically students there are  
25 not making the shuttle, however you're categorizing

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1 it.

2 MR. BARRETT: We do, in fact, have an  
3 agreement with the Lab School for the use of that  
4 passage, if you will, from our White Haven campus to  
5 MacArthur Boulevard -- maybe that's Reservoir Road  
6 right there -- so that the students can proceed off  
7 the road. Is that the response -- is that the  
8 particular question we had?

9 CHAIRPERSON GRIFFIS: Yes. They don't go  
10 through the wetlands but they go by it.

11 MR. BARRETT: They say wetlands path.  
12 There's a foot bridge that takes them through the  
13 wetlands. They won't disturb the wetlands in any way.

14 CHAIRPERSON GRIFFIS: Good.

15 MR. BARRETT: I'm confident.

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. BARRETT: A couple other items. I  
18 heard testimony that most of the students at the  
19 MacArthur campus are from Maryland and Virginia.  
20 Fifty-five percent of the students at the MacArthur  
21 campus are D.C. residents. Whether that meets the  
22 test I don't know but 55 percent is somewhat more than  
23 50 percent of our MacArthur campus enrollment.

24 CHAIRPERSON GRIFFIS: So what is that, 23  
25 students?

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1 MR. BARRETT: Twenty-two, yes.

2 CHAIRPERSON GRIFFIS: I didn't do so well  
3 in math.

4 MR. BARRETT: A couple of other items  
5 about the transportation management plan and the  
6 monitoring of that. Condition 7 has four  
7 subcategories to it having to do with walking to  
8 school. I've informed Mr. Spencer that is daughter is  
9 welcome to walk from home to school. I think there  
10 are probably other reasons --

11 CHAIRPERSON GRIFFIS: How many do you  
12 actually have that do walk?

13 MR. BARRETT: I think across town we  
14 usually have three or four who can and do walk, at  
15 least from time to time.

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. BARRETT: Or ride their bicycles.

18 CHAIRPERSON GRIFFIS: Okay. And they come  
19 directly to the school?

20 MR. BARRETT: They do not come to the  
21 White Haven campus. They go directly from home to the  
22 MacArthur campus.

23 CHAIRPERSON GRIFFIS: Okay. How is it  
24 understood that is an appropriate way to go? Do they  
25 have at the beginning of the year the proximity?

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1 MR. BARRETT: It says that students who do  
2 not walk to school or arrive at the subject property  
3 by public transportation will be required to arrive at  
4 the gymnasium. We have defined it as walking from  
5 home to school.

6 CHAIRPERSON GRIFFIS: Okay. So the  
7 beginning of the year you have their address and maybe  
8 they sign an agreement being in the school or whatever  
9 they do.

10 MR. BARRETT: We know who they are. And,  
11 as it happens, where they live.

12 CHAIRPERSON GRIFFIS: Indeed.

13 MR. BARRETT: Also included is the round  
14 trip route that I believe Mr. Hood asked about  
15 earlier, the on-loading and off-loading procedures and  
16 then monitoring compliance. Part D says the applicant  
17 shall monitor compliance with the shuttle bus system  
18 daily and shall make such compliance or condition of  
19 student enrollment.

20 The fact that I was unable to quantify how  
21 many students were picked up having been late one day  
22 or another, we do, in fact, check in every student  
23 arriving for school so that we can look back on our  
24 materials. They are checked in if they are on the  
25 bus. We note if they're walkers, we note that they

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1 have been transported otherwise from the White Haven  
2 campus to the MacArthur campus, and we note when they  
3 are absent. We have those daily sheets that show that  
4 we are monitoring compliance.

5 My inability to respond to that question  
6 with 100 percent accuracy should not obscure the fact  
7 that on a daily basis as the order calls for we shall  
8 monitor compliance with a shuttle bus system daily.  
9 We do that and we do it well. That's part of the  
10 reason it works as well as it does. I want to make  
11 that point very clear.

12 Secondly, I think, to look at the  
13 landscaping. There was testimony that there's been a  
14 loss of a number of very mature trees. As I testified  
15 earlier, we have removed one tree because it probably  
16 wasn't planted too close to the wall when it was  
17 planted but the roots were too close to the stone  
18 perimeter wall.

19 Following, I think, hurricane Isabel we  
20 were concerned about the integrity of the wall and the  
21 tree itself so we removed it. Actually that is  
22 directly across from the Lovendusky property. We  
23 replaced it with an oak of significant size. That is  
24 the only -- no, excuse me. There were two small  
25 ornamental trees which had been planted too close

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1 together and had badly broken branches that we also  
2 removed. Only one tree of significant size have we  
3 removed.

4 There is also a beech tree that is in very  
5 poor condition. We were concerned about that long  
6 before we initiated construction. There were gashes  
7 in the tree. We had it evaluated by an arborist. We  
8 understood that within the neighborhood it was a  
9 favored tree.

10 Actually, one of the letters refers to it  
11 as the beloved beech tree. We did our best during  
12 construction to protect that tree, to maintain it.  
13 I'm not sure that it will survive. It's hard to make  
14 the argument that our construction promoted the well  
15 being of that tree, but it would also be difficult to  
16 argue that our construction caused its demise.

17 So we have not lost a number of very  
18 mature trees. We have added and landscaped  
19 beautifully there. We look forward to the continued  
20 growth of those and maturing of that landscaping.

21 One reason I enjoy listening to Mr.  
22 Lovendusky is that there are so many new ways that I  
23 can be called an untrustworthy lying scoundrel. One  
24 of the particular wrinkles I liked today was that when  
25 it appeared that I had actually told the truth in

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1 response to Mr. Hood, that I had done so  
2 inadvertently. That referenced the DDOT report on the  
3 carpool. That kind of captures the kind of gotcha  
4 nature of a lot of these instances.

5 We filed our report, our carpool  
6 performance, with DDOT and with ANC-3D and the chair  
7 of ANC-3D who is a member of the community liaison  
8 group on July 1, 2004. What I said in response to Mr.  
9 Hood's question is that I failed to convey it to the  
10 community group, although one member of it had it. I  
11 think if that constitutes significant failure, we'll  
12 take care of that and we will do that a week from  
13 tonight.

14 Finally, with respect to 60 students, I  
15 don't know how many different ways to say it. We made  
16 an offer to the community to put it in a covenant that  
17 we would never seek more than 60 students at the  
18 MacArthur campus. I'll repeat that now and leave it  
19 at that. Thank you.

20 CHAIRPERSON GRIFFIS: I think we probably  
21 have a couple more questions from the Board but it's  
22 fairly clear that if this moves forward for 60 that it  
23 would be 60 and obviously there would have to be an  
24 additional request for special exception. There was  
25 an issue brought up by Mr. Lovendusky in terms of

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1 compliance but I'll let it go due to the lateness of  
2 the hour.

3 Ms. Miller, do you have questions of the  
4 applicant?

5 MS. MILLER: I do. I just want to start  
6 with a comment and then go to the question. It seems  
7 to me that walking to and from school is such a basic  
8 that I don't even understand what it's an issue. You  
9 proposed even as a modified condition with respect to  
10 walking something that is so specific about the path  
11 that they have to actually follow, etc., etc. I'm  
12 wondering why is that necessary?

13 MR. BARRETT: I think that kind of basic  
14 right, if you will, or ability to walk to school,  
15 pertains particularly when you are walking from home  
16 to school. What we didn't want to happen was that  
17 this walker rule would allow some subversion of the  
18 transportation management plan. Since they would be  
19 walking -- that's No. 1.

20 No. 2, since they would be walking from  
21 one campus of ours to another we wanted to make sure  
22 they could do so safely. Lower White Haven is a  
23 difficult one. You end up walking in the street on  
24 lower White Haven so that's why we wanted to be very  
25 specific about that.

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1           With respect to students walking from home  
2 they are on their own until they get there. We're not  
3 seeking to put any parameters around that. But once  
4 they've checked in with us their hours and we want to  
5 make sure that their course from one campus of ours to  
6 another is manageable and safe.

7           MS. MILLER: Okay. This may come down to  
8 the Board's deliberation on that condition. We've  
9 been moving in the direction of having conditions that  
10 go to zoning. If this is actually a safety for the  
11 children, it may be more appropriate in your student  
12 handbook or whatever.

13           MR. BARRETT: It's entirely a safety  
14 matter for us.

15           MS. MILLER: And then I also want to make  
16 sure then, if you can bring it to my attention, if  
17 there is any condition in here that's going to be  
18 limiting walking. It seems like you were adding this  
19 condition because it was perceived that was limited,  
20 that you couldn't walk, you had to take the shuttle  
21 bus.

22           MR. BARRETT: In fact, I think maybe the  
23 Neighbors United submission that argues that the  
24 manner in which we are handling late-arriving students  
25 now is a violation of the transportation management

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1 plan. Some way or another we are going to have to get  
2 later-arriving students from the White Haven campus to  
3 the MacArthur campus.

4 The walker language is one way in which we  
5 can do that. I believe there may be some parents who  
6 won't sign the blanket permission form and will likely  
7 continue to run a private vehicle up and back and  
8 would do that in foul weather in any event. When we  
9 refer to walking, as we read the order, it only means  
10 walking from home. That's how we read it.

11 MS. MILLER: As of now.

12 MR. BARRETT: Yes.

13 MS. MILLER: Okay. Now, the other point  
14 I want to cover if we adopt all the conditions of the  
15 previous order, then we are condoning all of them and  
16 saying they are all necessary. I just want to make  
17 sure I understand some of them that aren't totally  
18 transparent. One is the no organized sports. Where  
19 do they take place?

20 MR. BARRETT: They are always off site.  
21 We use D.C. fields. We have used the field at  
22 Jelleff. We use the field and gymnasium on the White  
23 Haven campus.

24 MS. MILLER: Okay. And condition No. 5  
25 says that the property is not occupied by students for

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1 a minimum of two months during the summer session.

2 What is the rationale for that?

3 MR. BARRETT: I think there was the hope  
4 that there would not be a summer program of any  
5 description there. By requiring at least two full  
6 months or just a minimum of two months that would  
7 eliminate the possibility of a summer program.

8 When we close up on June 10th, or we  
9 graduate on June 7th, I believe, this year, and we  
10 close up on June 10th, there will not be students in  
11 that building again until the day after Labor Day.  
12 It's of little consequence to us that we are not going  
13 to run a summer program down there. This portion of  
14 the order prevents it and we are not seeking any  
15 change in it.

16 MS. MILLER: And how is that building used  
17 during those two months?

18 MR. BARRETT: Only by faculty members who  
19 occasionally come in and do work there. It's not used  
20 for any other purpose. Notice that the condition  
21 specifically references students. It doesn't  
22 reference faculty and staff.

23 MS. MILLER: Also, do you have any  
24 preferential system for D.C. residents or students in  
25 the neighborhood?

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1 MR. BARRETT: No.

2 MS. MILLER: And do you know how many  
3 students you have or what percentage from the  
4 neighborhood?

5 MR. BARRETT: That's 55 percent that are  
6 from the District of Columbia. I'm not sure what the  
7 percentage is from the neighborhood.

8 MS. MILLER: Okay. Thank you.

9 MR. ETHERLY: Two very quick and fairly  
10 brief follow-ups. I just want to be sure I'm clear  
11 with respect to the rebuttal testimony on the issue of  
12 trees. The one tree that was removed due to its  
13 proximity to the stone perimeter wall, was that the  
14 yew hedge?

15 MR. BARRETT: No. The yew hedge actually  
16 followed the stone retaining wall wrapped around from  
17 Ashby onto MacArthur. I was pleased to hear Mr.  
18 Lovendusky characterize what was there. It was very  
19 poorly maintained and a real eyesore.

20 We had thought originally, and I think  
21 Mrs. Gates references this in her filing, that we had  
22 thought that we could prune it back pretty severely  
23 and get it to regenerate but that was clearly not the  
24 case. We have replaced it with -- I'm not a fan of  
25 yew hedges. I actually hate yew hedges. We replaced

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1 it with a gorgeous set of yews that it really enhances  
2 the property.

3 MR. ETHERLY: Okay. Mrs. Gates' letter  
4 also referenced the white ash as well that was at the  
5 northwest corner of the property and was cut down  
6 after its roots were exposed.

7 MR. BARRETT: That is precisely the yew  
8 we're referring to, the one that was too close to the  
9 wall, yes.

10 MR. ETHERLY: Okay. Let me come back just  
11 very briefly to put a pin in this issue on the  
12 practice with late-arriving students. It sounds like  
13 part of the application -- part of your contention  
14 would be that issue could be very helpfully mitigated  
15 with the ability to walk between the two campuses.

16 MR. BARRETT: Yes. Yes.

17 MR. ETHERLY: But just in terms of putting  
18 a pin, so to speak, on the numbers, I don't think I  
19 necessarily need to wait for a submittal or anything  
20 analyzing that but it would be your testimony that on  
21 average it may happen once per day. Maybe if it's a  
22 particularly active day you might have two late-  
23 arriving students for which an administrative person  
24 might have to make a trip but it doesn't happen every  
25 day. Some days it happens once and some days it

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1 doesn't happen at all.

2 MR. BARRETT: Right. I think that late-  
3 arriving students is a fairly common occurrence. I  
4 think my testimony earlier was, and you used the  
5 numbers one and two, I think, that generally speaking  
6 each day one vehicle trip is sufficient to handle --

7 MR. ETHERLY: The late arrivals.

8 MR. BARRETT: -- late arrivals.

9 MR. ETHERLY: Okay.

10 MR. BARRETT: And that sometimes from time  
11 to time we have made two trips in a single day.

12 MR. ETHERLY: Okay. In all honesty, I  
13 wouldn't necessarily be inclined to treat that one  
14 trip of one vehicle necessarily as the car that gets  
15 you over the tipping point, so to speak, and we have  
16 utter chaos because of that one additional trip.  
17 Because it does add another vehicle on the road that  
18 is attributable to St. Pat's, I just had to be sure I  
19 had a firm sense of it.

20 Finally, we talked a little bit about the  
21 black top and this wasn't part of the rebuttal  
22 testimony but it also was raised in Mrs. Gates'  
23 letter. That is the issue -- I just want to be sure  
24 I'm clear.

25 Is it your preference to have the black

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1 top, the paved parking area available for use during  
2 those times when the landscape's face is not available  
3 or would the school be amenable to some type of  
4 condition? It's an interesting little issue here  
5 because I don't think we've heard a lot of oral  
6 testimony but I think there is enough written  
7 testimony to suggest, even though they haven't  
8 necessarily said it outright, I think there's enough  
9 testimony to suggest there might be a concern  
10 regarding the noise created by students who are on the  
11 paved area relative to that adjacent property. I just  
12 want to be sure I'm correct. What is the current  
13 policy in terms of students?

14 MR. BARRETT: They can use both the paved  
15 and the grassy areas during that lunch recess time.

16 MR. ETHERLY: Okay. And then also Mrs.  
17 Gates' letter referenced a door that is on that side  
18 of the subject property that is accessible for student  
19 use in terms of ingress and egress.

20 MR. BARRETT: Yes.

21 MR. ETHERLY: Is that a door that's used  
22 primarily just for lunch and/or recess?

23 MR. BARRETT: Students should not be using  
24 -- there are two doors that go directly into the  
25 parking lot from the common room and from the life

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1 safety addition, one in each location. I'm sorry, I'm  
2 not recalling that particular reference in her letter  
3 but generally they shouldn't be used by students but  
4 I don't know that we have a prohibition against that.

5 MR. ETHERLY: Okay. And then just one  
6 final reference, once again, with respect to the paved  
7 parking area. There was a reference to occasions  
8 where you may have students retrieving recreational  
9 equipment, badminton or shuttlecocks from adjacent  
10 property.

11 MR. BARRETT: Yes.

12 MR. ETHERLY: Are you aware of any  
13 incidents along those lines?

14 MR. BARRETT: I am aware of, I think, one  
15 that occurred this week. I think the shuttlecock was  
16 the projectile in question. I have reviewed our  
17 procedures with Dan Specter who has, in turn, reviewed  
18 them with the teachers and the students down there.  
19 The students are not to be retrieving lost play items  
20 from contiguous properties.

21 MR. ETHERLY: So is there a formalized  
22 lost shuttlecock policy?

23 MR. BARRETT: One is emerging. One is  
24 emerging as we speak.

25 MR. ETHERLY: A little bit of humor. But

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1 in all seriousness, you've communicated to your  
2 students that should equipment of that type go onto an  
3 adjacent property, they are not to retrieve it  
4 themselves.

5 MR. BARRETT: That's correct.

6 MR. ETHERLY: Okay. Thank you, Mr. Chair.

7 MS. MILLER: I have a couple more.

8 CHAIRPERSON GRIFFIS: Indeed you do. Ms.  
9 Miller.

10 MS. MILLER: I just looked at a couple  
11 other conditions that I want to ask you about.

12 MR. BARRETT: Sure.

13 MS. MILLER: No. 17 says, "The applicant  
14 shall install fencing as shown on the site plan along  
15 the southern property line at the applicant's expense  
16 if requested by the abutting property owner." I  
17 assume that has either been done or not done depending  
18 on what the abutting property owner requested.

19 MR. BARRETT: We have worked closely -- we  
20 did work closely with the Mr. Scrivseth and Ms. Wright  
21 to design and install a fence at that location and it  
22 has been installed.

23 MS. MILLER: So that's done. Okay.

24 MR. BARRETT: Done. Yes.

25 MS. MILLER: So if we're looking to a

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1 future order, that condition may not be necessary if  
2 it's been done and exist.

3 MR. BARRETT: Correct.

4 MS. MILLER: Okay. How about No. 19,  
5 "Expansion of the building on the subject property  
6 shall be limited to the area necessary for access as  
7 shown on the applicant's site plan."

8 MR. BARRETT: And we, in fact, in at least  
9 one of our offers on the restricted covenant I think  
10 we made an offer that we would not make any effort to  
11 expand the building beyond the existing footprint and  
12 that still stands. We've done al the expanding we're  
13 going to do there.

14 MS. MILLER: But there is still room you  
15 could expand if you wanted to.

16 MR. BARRETT: Well, there's lovely green  
17 space area there. Sure.

18 MS. MILLER: Okay.

19 MR. BARRETT: But it's not our intention  
20 now, nor will it be in the future.

21 MS. MILLER: Okay. One other question.  
22 Are your students allowed to study outside?

23 MR. BARRETT: Yes.

24 MS. MILLER: Where do they do that?

25 MR. BARRETT: They can do it out in the

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1 grassy area. I think more commonly it would be done  
2 on what we call the terrace area which overlooks  
3 MacArthur Boulevard. I would think the neighbors  
4 wouldn't know they were there if they were out on the  
5 terrace. I think we have provided seating for 24.  
6 There are 24 chairs out there and tables as well.  
7 There are a good number of students who could be  
8 sitting there.

9 MS. MILLER: Are they supervised out  
10 there?

11 MR. BARRETT: Yes. All outside activity  
12 would bring adult supervision.

13 MS. MILLER: So if a student is just  
14 studying outside, there is an adult there?

15 MR. BARRETT: I think realistically if  
16 there's a single student out there or two, you know,  
17 we probably would move in and out but, no, we're not  
18 going to supervise each and every student in that  
19 example.

20 MS. MILLER: Okay. I'm looking at  
21 condition No. 1 and I'm not trying to find you in  
22 violation. I'm just looking at whether it makes sense  
23 to me whether I understand what it says. It says,  
24 "All outdoor activity involving students shall be  
25 conducted on site and shall be recreational in

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1 nature." It sounds to me like that could preclude a  
2 student from studying which I don't see why the zoning  
3 board would --

4 MR. BARRETT: That's how we have chosen to  
5 read that.

6 MS. MILLER: Okay. I think that does it.

7 MR. BARRETT: I think also recreation in  
8 some way was meant to be put up against organized  
9 sports activity, that it was restorative and  
10 recreational in nature and not organized athletic  
11 activity. That is how I understood it. There is  
12 recreation and knowledge as well I would submit. I  
13 didn't take it to preclude studying outside.

14 CHAIRPERSON GRIFFIS: Passive and active  
15 recreational activities.

16 MS. MILLER: But just to understand that  
17 also because we haven't heard testimony about this,  
18 they can have a recreational game of kickball or  
19 something, they just can't have an organized team  
20 sport?

21 MR. BARRETT: Yes. Kickball would be  
22 difficult at that location. They might toss a ball  
23 around, though. They might play catch.

24 CHAIRPERSON GRIFFIS: But no codified  
25 rules or competing teams visiting.

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1 MS. MILLER: Okay. Thank you.

2 CHAIRPERSON GRIFFIS: But, in all  
3 seriousness, one of the issues was, and I think you  
4 stated it, the space limits that.

5 MR. BARRETT: Yes.

6 CHAIRPERSON GRIFFIS: I mean, you're not  
7 striping this for a soccer game.

8 MR. BARRETT: Correct.

9 CHAIRPERSON GRIFFIS: It was a concern  
10 that there would be an awful lot of organized activity  
11 on the lawn and so that's what it was for.

12 MR. BARRETT: Yes.

13 CHAIRPERSON GRIFFIS: I think the  
14 intention is in one but the wording is awful so I'm  
15 not sure we want to revisit it but maybe we will. For  
16 clarification, and hopefully the final on this, you  
17 stated in the testimony today and previous that there  
18 is a 40 minute time for recess and lunch period.

19 MR. BARRETT: Correct.

20 CHAIRPERSON GRIFFIS: That is when the  
21 students go outside. When would they have the  
22 opportunity to be outside?

23 MR. BARRETT: There was a voice whispering  
24 in my ear there is no time when an individual student  
25 would be out there unsupervised. I mean, the only

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1 time students are outside are during that 40 minute  
2 and there's adult supervision at that time.

3 CHAIRPERSON GRIFFIS: I think my  
4 recollection is that condition one was really talking  
5 about monitoring those times.

6 MR. BARRETT: Yes.

7 CHAIRPERSON GRIFFIS: I mean, conceivably  
8 you are absolutely right. You would be in violation  
9 if a student brought Chaucer out and sat under the big  
10 oak tree and read it alone in the middle of the day.

11 MR. BARRETT: Right. I was answering in  
12 a very narrow sense that if there were only one child  
13 who chose to go out at lunchtime and everybody else  
14 decided they had something inside to do, would we --  
15 you know, that's a very narrow response to your  
16 question or narrow way to understand it. Generally  
17 the only time -- not generally. The only time they go  
18 out is within that 40-minute period and they are  
19 supervised at that time.

20 MS. MILLER: Let me just ask you this. In  
21 some schools I believe 9th graders may have a free  
22 period. Is that not the case at your school?

23 MR. BARRETT: They do not have free  
24 periods. In fact, did we not give you -- you have the  
25 schedule there.

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1 CHAIRPERSON GRIFFIS: We have the  
2 schedule.

3 MR. BARRETT: They do not have a free  
4 period. Remember, we don't have 9th graders there.

5 MS. MILLER: Oh, you don't have 9th  
6 graders?

7 MR. BARRETT: No, 7th and 8th grade only.

8 MS. MILLER: But you will have 9th  
9 graders.

10 MR. BARRETT: Again, the order allows  
11 that. We don't have a high school program at this  
12 time.

13 MS. MILLER: So you don't know -- well,  
14 maybe you do know. Do you know when you start to have  
15 9th graders whether you might have a free period for  
16 9th graders in contrast to 8th graders?

17 MR. BARRETT: I don't have a clue.

18 MS. MILLER: Okay. There's been some  
19 discussion about condition No. 20 not being a very  
20 effective means of enforcement. In fact, it's a very  
21 different from most special exception cases, if not  
22 all special exception cases that I'm aware of with  
23 respect to schools.

24 I'm not aware of that kind of condition  
25 being any other one. We are aware of sometimes there

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1 being a time limit put on instead so that the school  
2 has to come back to be reexamined, say, in a period of  
3 five years, 10 years, 15 years. I'm wondering if you  
4 have an opinion on a term limit being put on this  
5 school instead of condition No. 20.

6 MS. PRINCE: I'll address that issue.  
7 This Board specifically rejected the concept of a term  
8 at the time of the original approval. We would be  
9 strongly opposed to the imposition of a term on the  
10 school's operation. A substantial investment has been  
11 made in the property. The school requires certainty.  
12 I think this case is all about certainty and knowing  
13 the number of students that you can admit.

14 With the numerous independent schools that  
15 I'm familiar with, I am not familiar with any junior  
16 highs that operate with a term. I have seen some  
17 child development centers operate with a term. I  
18 think that is extraordinarily unusual.

19 In fact, we submitted a document in  
20 connection with the original case outlining the  
21 numerous secondary schools that do not have any type  
22 of term limit -- I would be happy to resubmit that --  
23 for the very reason that it's hard to make an  
24 investment in the property and then have the entire  
25 approval jeopardized.

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1           As for condition 20, condition 20 is a  
2 rough condition. That's an extremely demanding  
3 condition for any school and I have not seen it used  
4 in any order. The school has demonstrated that they  
5 can meet even that stringent a condition and I think  
6 they deserve some credit for that.

7           As for the accusation that the entire  
8 compliance process doesn't work, Mr. Lovendusky's five  
9 complaints were met with a response. He just didn't  
10 like the response, and the response was that the order  
11 did not cover the construction phase. As you will  
12 note from Mr. Lovendusky's own statement, the dates of  
13 each of the letters were prior to occupancy of the  
14 building.

15           The compliance specialist at the time,  
16 Toyevello, did a categorical denial of his complaints.  
17 Now, I don't think that means it didn't work. I think  
18 that just means that a finding was not made in Mr.  
19 Lovendusky's favor.

20           CHAIRPERSON GRIFFIS: Okay. I think that  
21 brings it to it. There's probably one last thing.  
22 Let me just follow up on that. That was the  
23 compliance issue I was going to and I'll be succinct.  
24 I think it would be very difficult to measure the  
25 entire compliance of our orders during a construction

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1 period as the first order and condition would be  
2 compliance with the plans that we approve so obviously  
3 those have to be built.

4 Also, in terms of any sort of zoning order  
5 and compliance with that order, it goes to the  
6 physical development and/or operation of it and  
7 certainly that can't be realized until all of those  
8 temporary, as in construction, those temporary  
9 elements have come to full fruition.

10 Mr. Etherly.

11 MR. ETHERLY: Thanks, Mr. Chairman. I'm  
12 done.

13 CHAIRPERSON GRIFFIS: Thank you, Mr. Hood,  
14 for kicking him under the dias. Let's move ahead. Is  
15 there anything else? Why don't we turn to the  
16 applicant then for any closing and summation.

17 MS. PRINCE: Brief closing remarks. Thank  
18 you for your time and your detailed questions. We  
19 believe that the record demonstrates that the  
20 incremental impacts associated with 20 additional  
21 students, that's 40 versus 60, will be minimal.

22 The unrefuted testimony of the sound  
23 expert established that the sound levels are almost  
24 exactly what we said they would be and that they are  
25 not likely to change substantially in connection with

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1 the proposed. I need to remind this Board we're  
2 talking about 45 minutes a day.

3 There's more noise that emanates from most  
4 single-family houses in the course of a day -- over  
5 the course of a day than emanates from this use over  
6 the course of 45 minutes. The traffic will not  
7 increase. In fact, vehicular trips between the two  
8 campuses are very likely to decrease if the walker  
9 language is approved.

10 And there should be no concern about  
11 creeping enrollment. Sixty is not a new number.  
12 Sixty has been the number from the beginning. Our  
13 original request was for 60. In the face of  
14 substantial opposition we modified that original  
15 request to 40 with an automatic increase to 60 after  
16 one year of demonstrated compliance with the  
17 conditions.

18 The Board did not grant that automatic  
19 increase. Because they did not grant that automatic  
20 increase, we are here again today asking for 60.  
21 We're not looking for a reward for compliance.  
22 Rather, we're simply renewing our original request  
23 that has been part of the school's proposed use of  
24 this property since it first looked at the property in  
25 2001. We are simply demonstrating and using the

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1 demonstrated compliance as evidence of a lack of  
2 adverse impacts.

3 The only reason we don't have a recorded  
4 covenant limiting us to 50 is because we couldn't find  
5 a beneficiary. We made the offer several times. The  
6 covenant was modified at the request of a lawyer who  
7 works with the Neighbors United Trust, Nancy Feldman.

8 Any other changes to the covenant were  
9 minimal and the enforcement mechanism is the same as  
10 the enforcement mechanism for any covenant I've seen  
11 judicial. We've had seven hearings. We have a  
12 stellar compliance record and I think that should be  
13 enough to allow approval for this case at this time  
14 for 60.

15 CHAIRPERSON GRIFFIS: Good. Thank you  
16 very much. Okay. As we are at about 5 of 6:00 I  
17 suggest that we call it a day at this point and set  
18 this for decision. Ms. Bailey, if it's appropriate  
19 with your schedule and ours, I would set this for a  
20 special public meeting and decide this on the 26th of  
21 April. That would be in two weeks.

22 Board members, I have not anticipated  
23 keeping the record open for any additional filings.  
24 This would just allow us to deliberate on all that  
25 testimony that we have heard today, look at the

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1 previous order, and also the new evidence. I think  
2 that's ample time unless there is any concern from the  
3 applicant on that date, the 26th. Not noting any, why  
4 don't we do that. Yes, Ms. Bailey.

5 MS. BAILEY: Special public hearing at  
6 9:00 a.m. that morning, Mr. Chairman?

7 CHAIRPERSON GRIFFIS: I think we hold it  
8 at 9:30.

9 MS. BAILEY: At 9:30?

10 CHAIRPERSON GRIFFIS: Yes.

11 MR. HOOD: Would 10:00 a.m. be an  
12 inconvenience? I'll try for 9:30 but --

13 CHAIRPERSON GRIFFIS: Let's set it now.  
14 Let's set it now. Very well. The timing will be  
15 flexible but we would anticipate calling a special  
16 public meeting at 10:00 which means we would probably  
17 call the hearing at 9:30 as we always do on time  
18 exactly and get through a couple of cases in the  
19 morning and then probably break and just call a  
20 special public meeting.

21 Okay. With that, though, it will happen  
22 on the 26th in the a.m. Unless there is anything  
23 further from the Board members, staff, or the  
24 applicant has any questions?

25 MS. PRINCE: Draft order?

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1 CHAIRPERSON GRIFFIS: I certainly wouldn't  
2 reject it. Is it possible to get that in by the 26th?

3 MS. PRINCE: I'm happy to get it in by the  
4 26th. Typically you like it in advance. We can do it  
5 as quickly as we need to.

6 CHAIRPERSON GRIFFIS: Excellent. Okay.  
7 Let's do that then. We can have it in by 3:00 on  
8 Wednesday next week. That would give ample time for  
9 getting it out to all the Board members and we'll go  
10 from there. Excellent. Anything else?

11 MS. BAILEY: Mr. Chairman, sorry.  
12 Commissioner Hood had wanted to see on a map where  
13 both campuses are.

14 CHAIRPERSON GRIFFIS: Oh, right.

15 MR. HOOD: Mr. Chairman, I think I can  
16 forego that. Thank you.

17 CHAIRPERSON GRIFFIS: Okay. That's fine.  
18 Actually, if we still have those questions, that's not  
19 something that wouldn't be inappropriate to do in  
20 executive session. We can set that out as we have  
21 that in the record. Okay. Anything else?

22 MS. MILLER: Well, Mr. Mann and I were  
23 just discussing that this is an unusual case. When we  
24 have also have been considering conditions, we have  
25 asked the parties to give the rationale for the

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1 conditions. I don't know whether they want to do that  
2 in this case or not.

3 CHAIRPERSON GRIFFIS: No.

4 MS. MILLER: No? We don't want to do it?  
5 Actually, you have for your modification.

6 CHAIRPERSON GRIFFIS: You're saying all 20  
7 conditions?

8 MS. MILLER: I'm not saying they need to  
9 but --

10 CHAIRPERSON GRIFFIS: Indeed.

11 MS. MILLER: We are going to be looking --  
12 I think we are going to take a fresh look at all 20 of  
13 the conditions. If you want to -- you can correct me  
14 if I'm wrong. If you want to make any changes or if  
15 you think that we wouldn't understand the rationale  
16 for a condition, you should feel free to address that.  
17 That would help us in our deliberation.

18 MS. PRINCE: We will do so.

19 MS. MILLER: Okay. Thank you.

20 CHAIRPERSON GRIFFIS: Okay. Last piece  
21 then. If we're going to do that, and it has been an  
22 excellent vehicle for obviously any condition that we  
23 put in an order the Board is very strict in looking at  
24 its measurability for compliance but also for its  
25 intent of what it's supposed to condition. Therefore,

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1 the condition should be understandable.

2 Let me just say, as Ms. Miller has  
3 indicated that we might have a fresh look at all the  
4 conditions, I think we will do so with the evidence  
5 that is appropriately before us in the record that has  
6 been established today.

7 I wouldn't want you going back and  
8 investigating further or giving rationales and  
9 arguments for removing or changing conditions in a  
10 previous order which we haven't really heard a lot of  
11 testimony on. I don't anticipate that but I just want  
12 to give a direction and maybe quell some concerns on  
13 the Board, mine personally that I'm going through in  
14 looking at 20 conditions and having to get back into  
15 a previous record that actually isn't before us.

16 We obviously have talked about condition  
17 20 which is a critical one. We're modifying the  
18 conditions that are before us now and I think anything  
19 else that would fit within that aspect of even  
20 wordings as in condition one that may bring it a  
21 little bit more clear for the continuation of this.  
22 Okay. That's enough.

23 MS. PRINCE: One comment.

24 CHAIRPERSON GRIFFIS: Sure.

25 MS. PRINCE: We have a commitment to the

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1 community with respect to this application as to what  
2 we were seeking.

3 CHAIRPERSON GRIFFIS: Right.

4 MS. PRINCE: I do not want to view this as  
5 an opportunity to overhaul any existing conditions  
6 that would in anyway change what they mean to the  
7 community. I think we need to probably focus more on  
8 explaining where necessary what we think the  
9 conditions mean and we will not use this as an  
10 opportunity to restructure conditions because I think  
11 that's not a fair way to deal with the community.

12 CHAIRPERSON GRIFFIS: Excellent. That's  
13 much better said than I did but that's exactly the  
14 intention. The Board doesn't want to open it up in  
15 new directions.

16 Okay. Very well. There we are then.  
17 Anything else? Good. Thank you all very much.  
18 Appreciate everyone being here. With that let's  
19 adjourn the afternoon session.

20 (Whereupon, at 6:02 p.m. the meeting was  
21 adjourned.)

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