

GOVERNMENT OF THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENTS

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PUBLIC HEARING

+ + + + +

In the matter of:

APPEAL OF GEORGETOWN RESIDENCE - Case No. 16246
ALLIANCE

Hearing Room 220 South
441 4th Street N.W.
Washington, D.C.

Wednesday,
July 16, 1997

The above-entitled matter came of for hearing,
pursuant to notice at 2:55 p.m., Susan Morgan Hinton, Chairperson,
presiding.

PRESENT:

SUSAN MORGAN HINTON	Chairperson
LAURA M. RICHARDS	Assistant Chairperson
MAYBELLE TAYLOR BENNETT	
BETTY KING	
SHEILA CROSS REID	

STAFF PRESENT:

GLADYS HICKS	Acting Zoning Administrator
MADALIENE DOBBINS	Office of Zoning
REGINALD LYONS	Office of Zoning
TRACEY ROSE	Office of Zoning
BEVERLY BAILEY	Office of Zoning

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WITNESS
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Proponent

Wesly Byrd 52

Francis Goodwin 70

Beverly Jost 73

Barbara Zartman 78

Zoning Administrator

Gladys Hicks 85

Opponent

Craig Davitian 205 215

EXHIBITS:
IDENTIFICATION IN EVIDENCE

FOR

Petitioner 1 - 17 84

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2
3 CHAIRPERSON HINTON: Ms. Rose we're ready to
4 call the next case.

5 MS. ROSE: The next case is appeal number 16246
6 of the Georgetown Residence Alliance, pursuant to the DCMR 3105
7 and 3200.2, from the administrative decision of Gladys Hicks, Acting
8 Zoning Administrator, Building and Land Regulation Administration,
9 Department of Consumer and Regulatory Affairs made on January 16,
10 1997, to the effect that approving an application for renovation to
11 Poulton Hall for a child care center does not require approval from the
12 Board of Zoning Adjustment for the facility in a R-3 District at premises
13 1421 37th Street, N.W. and 3610-12 P Street, N.W. (Square 1248,
14 Lots 161, 162 and 835).

15 Would all persons wishing to testify in this appeal
16 please rise to take the oath? Would you raise your right hand?

17 (Witnesses sworn in.)

18 I guess you're going to do preliminary matters?

19 CHAIRPERSON HINTON: Yes. Let's deal with
20 preliminary matters first. Would the Appellant and the Intervener
21 come forward? Can we have name and home address for the record
22 please?

23 MS. DWYER: My name, for the record, is Maureen
24 Dwyer. My home address is 1406 Coventry Lane, Alexandria, Virginia
25 22304.

26 CHAIRPERSON HINTON: For the Intervener.

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1 MS. DWYER: For the Intervener, Georgetown
2 University.

3 CHAIRPERSON HINTON: Thank you.

4 MS. SALLEY: My name is Andrea Salley. I am
5 Assistant University Counsel of Georgetown University. And my home
6 address is 3110 33rd Place, N.W., Washington 20008.

7 CHAIRPERSON HINTON: Thank you.

8 MR. CROCKETT: Good afternoon, Madam
9 Chairman, my name is Don Crockett. I represent the Petitioner here,
10 GRA. And my address is 37 Q Street, N.W.

11 CHAIRPERSON HINTON: Thank you. Everyone
12 here needs to speak up a little bit. Okay, so everyone can hear.

13 As a preliminary matter, we have a motion to dismiss
14 and we have a motion in opposition to dismiss.

15 MS. KING: Excuse me, before we start this I'd like to
16 -- if I may. You will note, colleagues, that on August 20, 1996, Wesly
17 Byrd copied her letter to Charles Ruff to me. I was then employed as
18 the Director of the Ombudsman here called two different services in
19 the mayor's office. I saw the letter. I've taken no part at all in any
20 matter relating to this case, and therefore I do not feel that there is any
21 reason to recuse myself. But I did have prior knowledge of this letter,
22 which I had forgotten and which I reread in preparation for this
23 meeting.

24 CHAIRPERSON HINTON: Okay, thank you.

25 MR. CROCKETT: Madam Chairman, before we get
26 going, I understand that a motion to dismiss is normally a preliminary

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1 matter. However, the motion which they have raised is -- laches and
2 equitable estoppel which must be decided upon all the facts in the
3 case.

4 So it would appear to me that there would be no point
5 in going forward with the motion until after all the evidence in the case
6 has been presented here this afternoon. So that the motion can be
7 presented in context rather than putting the facts in piece -- If we go
8 this way, we're going to have to pull out all our witnesses for one set
9 of facts and it's going to take about three times longer than we had
10 anticipated.

11 I would suggest that we go forward with the evidence
12 and consider the motion to dismiss after the evidence is in.

13 MS. DWYER: Madam Chair, if I may respond, the
14 facts that are in question with regard to the motion are facts in terms
15 of the chronology and when the Appellant, in this case, had actual
16 notice. I think the record speaks for itself. The facts we're referring to
17 do not need further testimony, they're based on letters and materials
18 that are already filed on the record. Indeed, one of the bases is the
19 August 20th letter by the Appellant to Corporation Counsel which
20 provides a basis for a knowing that the Appellant at that point in time
21 had actual notice of the Zoning Administrative's decision. So I don't
22 think there's a need for a lot of witnesses in terms of the facts, in
23 terms of the prejudice to Georgetown University. We filed that in the
24 form of an affidavit that is in the record. So there's no need for
25 additional testimony as to the cost or prejudice to Georgetown.

26 CHAIRPERSON HINTON: Very good, Ms. Dwyer. I

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1 had a question. I think it would be preferable to deal with the motion
2 to dismiss before we get into the merits of the hearing itself. And
3 there is enough information in the record that we most likely will not
4 need to call any witnesses in order to make this decision.

5 The notion to dismiss filed by the Intervener deals
6 with two issues it seems to me: laches and equitable estoppel.
7 Because we've read it, so just very briefly tell us what that is.

8 MS. DWYER: Madam Chair, we really filed our
9 motion on the basis of three grounds: timeliness, laches, and
10 estoppel. Even if an appeal is found to be timely, it can still be
11 dismissed on the basis of laches. So that's a little different and
12 therefore there are three bases for this.

13 CHAIRPERSON HINTON: Okay.

14 MS. DWYER: It is the University's position that this
15 appeal should have been filed a lot earlier in order for the Appellant to
16 preserve its rights to be able to file this appeal. The University has
17 proceeded with plans for this project with full, constructive and actual
18 notice to the community. The University began with a meeting with
19 the Zoning Administrator to receive her confirmation that this was
20 indeed a matter of right use.

21 There were public hearings in the spring of 1996 while
22 the project underwent review by the all-Georgetown Board and the
23 Commission of Fine Arts. Those hearings are publicly noticed, the
24 community is invited to attend and, in fact, did attend.

25 In May of '96, the University advised Advisory
26 Neighborhood Commission 2-E at its meeting which included

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1 representatives of the Georgetown Resident's Alliance. That is was
2 proceeding forward with the project and that the Zoning Administrator
3 had in fact determined that the child care facility was an accessory
4 use and did not require BZA review and approval.

5 Subsequently, a representative of the alliance met
6 with Ms. Hicks, met with Mr. Hampton Cross. And then on August
7 20th filed a letter with Corporation Council hoping to overturn the
8 Zoning Administrator's decision. There is no question that at least as
9 of August 20, 1996, the Appellant had actual notice that a decision
10 had been made by a Zoning Administrator.

11 CHAIRPERSON HINTON: Okay. I think we
12 understand that. And I want to take this one point at a time because I
13 think it will be easier for the Board to make the decision. So can we
14 have the Appellant address the issue of timeliness in response?

15 MR. CROCKETT: Well, the issue certainly was
16 raised with the community beginning in May of 1996. That's when the
17 issue was first raised at an ANC meeting. And I think there is no
18 question that by August when Commissioner Byrd wrote the letter to
19 Charles Ruff, that the issue had been crystallized and we knew
20 exactly what it is and that's what she put in her letter. Asked the
21 Corporation Counsel to render a legal opinion with respect to the two
22 opposing positions. And that letter was written in August. Now at that
23 time at the meeting with Hampton Cross, and this is what I was
24 saying, is that all of the facts in the testimony that we wouldn't put on
25 or not for you, but in that meeting with Hampton Cross, the Acting
26 Zoning Administrator and others, at the end of that meeting, Ms. Byrd

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1 and others will testify, that Mr. Cross instructed his staff not to process
2 the permits and not to do anything until the Corporation Council had
3 weighed in and ruled with respect to the legal issue.

4 MS. BENNETT: When did that meeting take place?

5 MR. CROCKETT: The meeting was on, I believe, the
6 19th of August and the letter to Mr. Ruff was written the next day on
7 the 20th.

8 CHAIRPERSON HINTON: Was there any response
9 to that letter?

10 MR. CROCKETT: There was never a response from
11 Mr. Ruff. However, after Christmas on December 28th, Mr. Cross
12 wrote a letter, and that's in the record, to Ms. Byrd. Basically stating
13 that he was responding on behalf of Mr. Ruff, and he didn't say he
14 consulted with Mr. Ruff, he said he had consulted with Corporation
15 Council. And that as a result of that and discussions with his staff,
16 that he had concluded that he was going to go along with the Acting
17 Zoning Administrator's legal position.

18 CHAIRPERSON HINTON: And the date of that
19 letter?

20 MR. CROCKETT: My memory is December 28,
21 1996.

22 MS. KING: Do we have a copy of that?

23 CHAIRPERSON HINTON: I have not seen that letter.

24 MR. CROCKETT: Yes that letter is attached to our
25 brief as Exhibit 5, I believe.

26 CHAIRPERSON HINTON: Attachment A.

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1 MR. CROCKETT: Our brief in chief, not the
2 opposition, but our brief filed in here. I believe it's Exhibit 5. I'm sorry,
3 it's December 27th.

4 CHAIRPERSON HINTON: We're looking for it.

5 MS. RICHARDS: Do you have the letter that
6 Hampton Cross wrote? Not the December letter, but the letter that
7 pursuant to which he said he was not going to go forward with the
8 issuing the permits until Corporation Council had ruled?

9 MR. CROCKETT: That was not a letter. That was an
10 oral statement that Mr. Cross made at the meeting which was heard
11 by those of us who were in attendance.

12 MS. RICHARDS: Were there representatives, Salley,
13 of the Resident's Alliance at that meeting?

14 MR. CROCKETT: No, there were ANC
15 representatives and others. The University was not at that meeting.
16 And of course his staff.

17 So, December 27th is the date that Mr. Cross did that.
18 And his words were, I might as well put this in the record since some
19 of you don't have it before you. He says, "This is in response to your
20 letter to Charles Ruff, Corporation Council, concerning the proposed
21 child development center located at 1421 37th St. N.W. I am aware of
22 a number of objections raised about the proposal. However, after
23 consulting with Corporation Council, the Acting Zoning Administrator
24 and reviewing the concerns of all parties involved, the Department of
25 Consumer and Regulatory Affairs has made the decision to issue
26 alteration and repair permits for the proposed child development

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1 center."

2 Okay? Now that was on the 27th. Now on the 16th of
3 January, a little more than two weeks later, then the Acting Zoning
4 Administrator signed off on all the things and approved the amended
5 application, which by the way had been filed in September.

6 So we had the amended application filed in
7 September. We had Mr. Cross responding to the August letter in
8 December. And then in the middle of January we have the Acting
9 Zoning Administrator signing the plans and signing off on the zoning
10 approval. And then the permits were actually issued on January 31st.
11 Our appeal was filed on March 12th. The reason for the delay,
12 obviously in filing the appeal, was that it had to a membership meeting
13 of our association after the membership was presented with the facts
14 and voted. Then the appeal had the -- file.

15 CHAIRPERSON HINTON: Very good.

16 MS. DWYER: Madam Chair, if I may respond to that.

17 CHAIRPERSON HINTON: Well, I think we have all
18 the information we need to make the decision. It seems to me,
19 members, that based on the briefs that have been submitted and what
20 we have heard here in testimony, that this appeal is filed timely. The
21 Appellants attempted to work through DCRA before the building
22 permits were issued. They waited for a response which is normal.
23 They were told prior to their written request, they were told in a
24 meeting that there would be a response and that nothing would
25 happen before the response came. So they had every reason to
26 believe that something would happen. And the appeal was filed less

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1 than three months after the notification from DCRA and the permits
2 were released. So I believe that this is a timely appeal.

3 MS. RICHARDS: Yes, I would agree. I think that
4 certainly Hampton Cross's announcement of he was withholding --
5 made giving appeal then less than --

6 CHAIRPERSON HINTON: Very good. Let's move on
7 to the second issue in the motion to dismiss.

8 MS. DWYER: The second basis for our motion to
9 dismiss was on the basis of laches, that the Appellant waited too long.
10 Even if you find that the appeal was timely, that the Appellant waited
11 too long to preserve its rights to the prejudice of, in this case,
12 Georgetown University.

13 And I would point out some additional facts that are in
14 the record. The building permit that was issued January 31 of 1997
15 was the seventh building permit for this project. There were six
16 permits issued beginning in August and September of 1996. And I
17 would also state for the record that we, in light of those permits being
18 issued, there was a pattern of continuous recognition by DCRA and
19 approval of the child care facility as an accessory use.

20 The first step in the filing of a building permit is the
21 sign off by Zoning as to zoning approval. And for each of those
22 permits, the decision was made by the Zoning Administrator that the
23 project was a matter of right use. The Appellants in this case were
24 well aware of those permits being filed when they met with DCRA and
25 other city officials beginning in August of 1996 and thereafter. They
26 had full notice that the permits were being filed, were being processed

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1 and that the University was undertaking significant expense in
2 proceeding forward with its plans for the project.

3 We have attached as an affidavit to our motion, a
4 listing of the expenses incurred by Georgetown University. In reliance
5 on the many city approvals and in reliance on the fact that the
6 community, while raising questions, had chosen not to take a formal
7 appeal. Even though as far back as May of '96, they knew of the
8 decision of the Zoning Administrator and that the University was
9 proceeding forward.

10 The costs that the University has incurred today are
11 significant. And we believe that the doctrine of laches would operate
12 as a bar to allowing this appeal to go forward. Even if the appeal was
13 timely filed, the Appellant in this case, to the detriment of the
14 University, waited, sat on its rights and did not pursue the appeal
15 process. And instead allowed the University to incur the expenses
16 that it did incur over approximately that ten month period.

17 CHAIRPERSON HINTON: At what point did the
18 University become aware that the community felt that there would
19 been an error in this decision and they intended to pursue it?

20 MS. DWYER: The University was aware of the
21 community's concerns, and in the beginning of the May 1996 meeting,
22 they -- had said we're going to inquire into and protest this. But the
23 University continued to meet with the community, continued to answer
24 their concerns and it was not until a full ten months later that the
25 appeal was actually filed. By that point in time, the University had
26 assumed that it was answering all the questions. And that the

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1 community was not going to pursue a formal appeal process.

2 CHAIRPERSON HINTON: Did the community ever
3 indicate that? That all the questions were answered and they did not
4 intend to pursue?

5 MS. DWYER: The community, based on the record,
6 never communicated to the University that it was giving up any of its
7 rights nor did it say it was pursuing an appeal. It never indicated that it
8 was formally filing an appeal.

9 CHAIRPERSON HINTON: So that was an
10 assumption on the University's part?

11 MS. DWYER: Right. And the University believes it
12 was a reasonable assumption. It, on a monthly basis, was meeting
13 with the community, no appeal was filed beginning in May of 1996, the
14 community received notice of all the permit applications, it knew as of
15 December that six permits had already been issued for the project,
16 and no appeal had been taken from those permits. And I think the
17 University's reliance on the fact that as of that point in time, no appeal
18 had been filed, and that the seventh building permit was being issued
19 was reasonable reliance. And to their significant cost and expense by
20 virtue of the delay by the Appellant.

21 CHAIRPERSON HINTON: Okay. Thank you.

22 MS. RICHARDS: I have a question. Once we
23 determine that it's filed within a reasonable time, since we have no
24 statute. Doesn't that obviate arguments on the laches? Why isn't
25 laches purely equitable? And if it's reasonable, why doesn't laches
26 sort of drop out of the picture?

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1 MS. DWYER: The filing can be timely for purposes of
2 the Board's jurisdiction, but still not be reasonable in light of what the
3 Appellant knew and in light of the prejudice suffered by, in this case,
4 the University as a result of their delay.

5 MS. RICHARDS: I mean, we decided it's reasonable.
6 So that's sort of like, we look at the laches arguments when we look at
7 the reasonableness because we don't have any formal deadlines.

8 MS. DWYER: When you look at the laches argument,
9 the principle thing you look at is the resulting prejudice to the
10 Defendant or, in this case, the University. And even if it could be
11 argued that the filing was timely for purposes of the Board's own rules,
12 it may still be barred by the doctrine of laches because of the
13 significant prejudice to the other side.

14 And in this case, we would submit that the prejudice
15 to the University by virtue of the fact that the Appellant chose to
16 explore other avenues rather than file the formal appeal and allowed,
17 in this case, seven building permits to be processed and issued,
18 operates to such prejudice to the University that it's barred by laches.

19 CHAIRPERSON HINTON: How many of those
20 building permits were released before the letter by Hampton Cross
21 back to the community?

22 MS. DWYER: Six of the seven were released before
23 the Hampton Cross letter.

24 CHAIRPERSON HINTON: So the community had
25 been given an assurance that the determination will be made before
26 the building permits would be released.

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1 MS. DWYER: I'm sorry, I'm not sure I understand
2 your question. The community given an assurance by whom?

3 CHAIRPERSON HINTON: By Hampton Cross that
4 he would look into the issue and there would be a determination
5 before the project moved forward.

6 MS. DWYER: I'm not sure what assurances Mr.
7 Cross gave the community. And the University, as was stated, was
8 not present at any meeting with Hampton Cross. I believe the Zoning
9 Administrator was at that meeting and perhaps could be asked.

10 CHAIRPERSON HINTON: Why don't we hear from
11 the Appellant then? Would you like to speak about laches?

12 MR. CROCKETT: Yes, I think I have given you my
13 recollection of the testimony that's going to be given here as to Mr.
14 Cross's instructions with respect to that. And I think the Chair has
15 repeated that correctly. The community was told that DCRA was
16 going to do nothing. And with respect to issuing the permits until after
17 there had been a resolution of this primary legal issue. Which is
18 whether they had to come to the BZA first or whether they could go
19 ahead under their theory. And that happens to be a fact.

20 Now, laches and estoppel are related equitable
21 theories. The primary aspects of equitable theories are that the
22 person who is trying to avail themselves of equity, must have clean
23 hands and must proceeded in good faith and relied, in detriment, upon
24 something that the other party did.

25 Now, once we understood what was happening here,
26 we made an effort to head this thing off at the pass by going to Mr.

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1 Cross and ultimately to Corporation Council to avoid what we're
2 having here today. And that was reasonable for us to do that.

3 Because had the Corporation Council actually taken
4 the time to look at this legal issue and issue a ruling, I don't believe
5 that we would be here today. And if he had don't that, I think the
6 result of that legal ruling would have been that the University has to
7 come to the BZA to get an exception to build a child care center. And
8 then they would have filed an application, we would have had a public
9 hearing, there would have been an order, there would have been
10 conditions and they could have gone ahead.

11 The University chose to hang everything on its own
12 legal interpretation, taking the chance which we believe was
13 overwhelming. That when this Board or a Court took a look at it, that
14 they were wrong and that they have to come to the BZA, under both
15 Section 205 and Section 210 for an exception before they can
16 construct and operate a child care center for sixty kids.

17 There are two reasons why laches doesn't apply.
18 Number one is the theory of rightness. Under administrative law,
19 litigants are generally required in administrative processes to exhaust
20 all the possibilities before the agency before they take an appeal. In
21 this case, the agency is DCRA and this body acts as the Appellant
22 body. So we had a duty to exhaust our administrative remedies. And
23 indeed, had we filed the appeal in May, we might well have been
24 hearing the argument from the University that oh well, this isn't right
25 for review yet because, you know, the permits haven't been issued.
26 So, I think what we did follows basic principles of administrative law as

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1 well as being perfectly reasonable. It's the most efficient thing to cut
2 these things off at the pass and get these decisions made where they
3 should have been made.

4 As to the technical question of laches, I think that was
5 disposed of, quite effectively, by the Court of Appeals in the situation
6 where there were almost identical facts. And that's the Gotto case,
7 which we cite in our brief. And at page 925 of the Atlantic Reporter in
8 that case, the Court said as follows: We look first to the record before
9 the Board as to the timing of the claim in order to determine whether
10 there was any unreasonable delay. Gotto began work on the kiln in
11 November 1974. Gattisman and Hinton learned by June 1975 that the
12 administrator had decided that no permit was necessary. During that
13 seven month period, which was from when they found out about it until
14 they got the decision from the agency, Gottisman and Kag (PH) were
15 working with the administrative process to attempt to prevent
16 construction of the kiln. Then the Court states, "That delay is
17 reasonable and cannot be held against them."

18 Now that's exactly the same thing that happened
19 here. We got into the process, we were in the process, we were
20 attempting to head this thing off at the pass and finally we got a
21 decision. The decision went forward, and we appealed. So I can't
22 see conceivably how the Board could find that the delay was
23 unreasonable.

24 CHAIRPERSON HINTON: Okay.

25 MR. CROCKETT: Now with respect to the prejudice.
26 We're not disputing, in their affidavit I assume that their costs are their

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1 costs.

2 CHAIRPERSON HINTON: Is this estoppel or are you
3 still on laches?

4 MR. CROCKETT: Well, laches is whether there is
5 prejudice as a result of unreasonable delay.

6 CHAIRPERSON HINTON: Okay.

7 MR. CROCKETT: What is prejudice? Well, they
8 went ahead and they built the center. Now, they knew when they
9 went ahead, the permits weren't issued until January 31st. We had
10 our public meeting on February 11th and passed a resolution to
11 appeal. And that was only, you know, twelve days after. I'm not
12 charging them, necessarily, with notice of our meeting, but minutes
13 were reported, a lot of people attended. There was no question after
14 all that we went through over this entire process that we were going to
15 appeal this issue to the Board. They knew that. We knew that. If
16 they didn't know that, all they had to do was call and ask. And we
17 would have told them that it was a dead certainty that we were coming
18 here with this legal issue. So, they knew what the lay of the land was
19 and they decided to go ahead and do the construction anyway.

20 Well, that takes me to the next case which is Spier v.
21 Barry. And that's cited at page 9 of our opposition. And that is the
22 doctrine of deliberate choice, I mean, you can't claim laches when you
23 consciously put yourself in the position that you call prejudice. And
24 that's exactly what they did here. And in the Spier case, that
25 argument was leveled against the city in that case. And the Court
26 held that if the trier of fact were to find that the district, armed with

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1 such knowledge, attempted without adequate justification to present
2 the Court and community with the fate of -- plea, this would severely
3 undercut the district's claim of manifest and justice. And the Court
4 went on to cite the case of Graham Corp. vs. Board of Zoning Appeals
5 in Connecticut. For "period incurring of expenditures on excavation
6 immediately following issuance building permit did not commend itself
7 to any equitable consideration. Where the land owner should have
8 known, appeal is likely." The Court observed "the difficulty in which
9 the -- find itself on this matter of expense was one of its own
10 deliberate choice."

11 So I think that is where we are. Any prejudice that
12 they may have sustained by going forward with this is their own
13 choice. Now, our position here is not that the child care center is
14 necessarily inappropriate in the location or that anything is wrong with
15 it. And we are not asking that it be enjoined or held up. What we are
16 asking is that the University be required to come in here and file an
17 appropriate application and give the community a public hearing. And
18 that this Board issue the requisite order with any conditions it finds
19 necessary to govern that child care center in that location.

20 CHAIRPERSON HINTON: Okay. I think we
21 understand that.

22 MS. DWYER: Madam Chair, a point of clarification
23 here. There is a factual discrepancy in the record and I'm not sure
24 how we're going to resolve it. Perhaps the Zoning Administrator can
25 or perhaps we need to ask Mr. Hampton Cross. Counsel for the
26 Appellant has stated that on August 19th, they met with Mr. Cross and

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1 he advised them that there would be no processing of any building
2 permits for the project until he had heard from Corporation Council.
3 Subsequent to that meeting, there were four building permits issued,
4 in late August and in September. So obviously permits were being
5 processed and the statement by Counsel that they were relying on Mr.
6 Cross's statement to them that nothing would be done. I think it's
7 important for us to clarify that for the record as to whether or not that
8 statement was ever made by Mr. Cross, since there's nothing in the
9 record to support it and everything in the record indicates otherwise.

10 MR. CROCKETT: Well, this is my exact point about
11 putting the testimony on first.

12 CHAIRPERSON HINTON: And I understand. And I
13 think what's important at this point is that there was indeed a letter
14 back from Hampton Cross which indicates the response was
15 forthcoming. And so I think when we get into the case, if we get to the
16 case, we can talk about that in detail. But indeed there was a letter of
17 response from Hampton Cross that came in December.

18 MS. DWYER: That letter was subsequent to the
19 issuance of four building permits and I guess --

20 CHAIRPERSON HINTON: But it was prior to the
21 issuance of the building permit that's being appealed.

22 MS. DWYER: And I guess my question for the record
23 is why is the time running from the January 31st building permit for the
24 purpose of laches? As opposed to the issuance of the building permit
25 back in August?

26 MR. CROCKETT: The evidence will show that we

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1 were totally unaware that these building permits had issued and were
2 going under the assumption that none would. We didn't find out about
3 that until after we got a freedom of information request after January.
4 So we didn't even know about it.

5 CHAIRPERSON HINTON: I would recommend to the
6 Board members that the Intervener has not made the case barring this
7 appeal on the basis of laches. Is there any disagreement? Very
8 good. Estoppel?

9 MS. DWYER: The third basis is estoppel and that
10 also is set forth in our motion. There are essentially four elements of
11 estoppel in the leading case of *White vs. DC Board of Zoning*
12 *Adjustment*. The first is a party acting in good faith. The second
13 requirement is that the party act on affirmative acts of a municipal
14 corporation. The third requirement is that it make expensive and
15 permanent improvements in reliance on that affirmative act. And four,
16 that the equity strongly favor the party invoking the doctrine. Do we
17 believe in this case all four elements of estoppel are met?

18 In terms of good faith reliance on the acts of the
19 municipal corporation, the University proceeded to meet all procedural
20 and substantive requirements of the city. It started with the initial
21 meeting with the Zoning Administrator back in November of 1995
22 which confirmed that this was a matter of right use. Subsequently, it
23 filed, processed and received approval for all-Georgetown Board and
24 Commission of Fine Arts review. The processing of those applications
25 for final review, again, requires the signature of the Zoning
26 Administrator, that the project complies with zoning and is a matter of

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1 right use. The University continued to prepare the building permit
2 applications for filing. The initial step in filing all the building permit
3 applications is, again, the signature by the Zoning Administrator, that
4 the project complies with zoning. Otherwise, there's no technical
5 processing of the permit because there's no need to process the
6 permit if it first has to come to the Board. All of the building permits
7 that were filed from the summer of 1996 through the fall and winter of
8 '96 were all signed by the Zoning Administrator as complying with
9 zoning and not requiring any Board of Zoning Adjustment or review.

10 The University was entitled to rely on the decisions of
11 the Zoning Administrator and the other permit officials, these are the
12 individuals who are authorized and in power to make those decisions.
13 The University had no reason to believe that a late appeal would be
14 filed in March of 1997 since the project by that point in time had been
15 known to the community for a year and a half. All of the questions to
16 the University's understanding were being answered. The city
17 continued to issue the building permits and to indicate that the project
18 was a matter of right use.

19 I think the record evidences that the University acted
20 in good faith. There was no intention to hide the project from anyone.
21 It went through full public hearings, full notice to the community, all
22 building permit applications were published in the DC Register, there
23 were monthly meetings with the community in which the University
24 reported on the progress of the project, where things were and
25 continued affirmative acts by the city indicating that this project was
26 being processed and approved as a matter of right use under long

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1 standing precedent and long standing interpretation of the zoning
2 regulations.

3 I think the record evidences that as a result of its
4 reliance on these affirmative acts of the city, the University made
5 expensive and permanent improvements and that the equities favor
6 the University in terms of the operation of the doctrine of estoppel.

7 CHAIRPERSON HINTON: Thank you.

8 MR. CROCKETT: Madam Chairman, we have gone
9 over the Spier case which deals also with the principle of estoppel.
10 But I would make this observation, prior to receiving this motion last
11 Friday, we were aware that there had been meetings between the
12 University and the Acting Zoning Administrator early on. But none of
13 us had ever seen the October 30, 1995, letter. Which is attached as
14 Exhibit B to the motion to dismiss. In reading that letter, I think it
15 comes across very clearly that the University itself had gone in to the
16 Acting Zoning Administrator with its own legal theory as to how it was
17 going to get out and around the requirement of coming in before the
18 BZA for an exception application. And they went down and they
19 talked to the Zoning Administrator, gave the Zoning Administrator their
20 view of law and after that meeting wrote this self-serving letter to her
21 which she then signed. Now, these secret meetings were never
22 disclosed to the rest of us. And I don't think that when a major
23 university goes in secret and attempts to persuade the administrator of
24 its view of the law, which is contrary to the regulations as written. I
25 mean, all you have to do is look at 105, 205 and 210 and there's no
26 way that they can get around coming before this Board with an

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1 application for a child care center. And yet they had this theory, they
2 went in and they sold it, and I don't think that that necessarily indicates
3 good faith.

4 The fact that they knew what the regulations said,
5 they knew it was a problem, they knew what we thought, they knew
6 what the case law was, and then they knew everything that happened
7 after we went down and met with Hampton Cross. So, there was
8 actually no good faith when they went ahead and started construction.
9 They knew we were going to appeal, they knew it was a highly visible,
10 important issue and they went ahead nevertheless. And so I would
11 just refer the Court again to the Grand Court case cited in Spier vs.
12 Barry in which the Court said the difficulty in which Plaintiff finds itself
13 on the matter of expense, that the expense was one of its own
14 deliberate choice. So there was no detrimental reliance.

15 CHAIRPERSON HINTON: Well, not only that but,
16 and correct me if I'm wrong, as you said earlier, the Appellant is not
17 requesting that all of the renovations be torn down. The Appellant is
18 requesting that the University make an application to the BZA for
19 special exception and have the child development center reviewed
20 under what the Appellant sees as the proper zoning regulations.

21 MR. CROCKETT: That's correct.

22 CHAIRPERSON HINTON: So, the prejudice to the
23 Intervener would be to make an application to the BZA. Is that right?

24 MR. CROCKETT: Correct.

25 CHAIRPERSON HINTON: It's not removing what has
26 been constructed, it's not a loss of one million dollars that have been

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1 spent.

2 MR. CROCKETT: That's correct.

3 CHAIRPERSON HINTON: Unless the Board would
4 deny the special exception.

5 MR. CROCKETT: Which we don't believe is likely.
6 What we believe is likely when the matter becomes properly before
7 the Board is that after the public hearing there would probably be
8 some conditions that don't exist now. Because there are no
9 conditions at all.

10 CHAIRPERSON HINTON: Very good.

11 MS. BENNETT: Madam Chair, I need to make a
12 comment. I guess I'm a little concerned about the characterization of
13 an applicant's conversation with district officials as being secret.
14 Many times, I know, we encourage an applicant to go and talk with the
15 Office of Planning or an applicant to go and talk with any number of
16 people. It is their right to do so. They don't have to cart in everybody
17 from the neighborhood when they do so. I understand about the
18 visibility that this -- case has and certainly when there are community
19 meetings and whether they are convened by members of the
20 community or by the applicant. Then certain kinds of sharing will take
21 place, you know, especially when there has been a conversation or so
22 with University officials and District Officials. Saying it's made by an
23 applicant to a city official in secret is going a little bit beyond what I
24 would have expected this to be characterized as.

25 CHAIRPERSON HINTON: Thank you. Any other
26 comments from the Board?

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1 MS. RICHARDS: I had a question. I wondered
2 whether we were going to hear from the -- preliminary part of this
3 proceeding because I wanted to get additional light on, you know, the
4 decisions can issue the various permits. This after Hampton Cross
5 had given the community some assurances otherwise. Perhaps there
6 were issues with some understanding. I -- the nature with -- permits
7 which I'm sure they would have used. But I would like to have that
8 part of this case explored.

9 CHAIRPERSON HINTON: Well, I would agree and I
10 would think that we would get to it in the case in chief unless it would
11 bear on your decision to make a determination on estoppels.

12 MS. RICHARDS: Well, I think it does sort of bear on
13 the equitable estoppel issue. I think that this is probably the most
14 appropriate time to hear that, although I'm willing to defer it if --

15 MS. RICHARDS: Ms. Richards, down at this end we
16 couldn't hear what you were saying you would like to do.

17 MS. RICHARDS: Yes, I wanted to hear Ms. Hicks
18 address her decision to issue the various permits in the fall of '96, you
19 know, after the Appellants had indicated they were operating under
20 some oral assurances from Hampton Cross. Because I think that
21 what she may have to say on that matter bears on the Appellee's or
22 the Intervener's equitable estoppel. I'm trying to find out the extent to
23 which they were relying on municipal actions.

24 MS. DOBBINS: But you wouldn't get that from Zoning
25 Administrator, you would get that from the applicant. I don't know that
26 you need to hear it to decide these legal issues that are before you.

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1 MS. RICHARDS: Well, I want to know. She issued -
2 - process, nothing is going to be processed.

3 MS. DOBBINS: I understand what you're saying.

4 MS. RICHARDS: Intervener said something was
5 processed. Now, Ms. Hicks knows more about that than anybody
6 else.

7 MS. KING: The permits that were processed, are
8 they under appeal? DO you know?

9 MS. DOBBINS: No they are not.

10 MS. DWYER: The permits that were processed are
11 affirmative acts by the city in which we were relying. And I would also
12 point out that the work that was done pursuant to those permits was in
13 full view of everyone in the community. There was no secret that
14 there was demolition going on. There was work being done on the
15 premises during that entire time period. We had six separate permits
16 before this last permit in addition to the sign off before the all-
17 Georgetown Board and Fine Arts, in addition to the two letters to the
18 Zoning Administrator.

19 CHAIRPERSON HINTON: Right. And we
20 understand that.

21 MS. RICHARDS: If you wanted the bridge the case in
22 chief that's fine so long as at some point it's covered.

23 CHAIRPERSON HINTON: Absolutely. It will need to
24 be covered at some point. On the premise of equitable estoppel, I
25 believe the Intervener has not made the case.

26 MS. BENNETT: And can you share with us why you

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1 feel that way? I was there with you on the laches and on timeliness.

2 CHAIRPERSON HINTON: Did I lose you Ms.

3 Bennett?

4 MS. BENNETT: And I guess what turned me around
5 on laches had to do with the common acceptance to the fact that one
6 tries to exhaust all of the administrative remedies. And that there
7 were some meeting between the Appellants and Hampton and there
8 was a logical reasonable reason to wait to find out how that fell out
9 and so on and so forth. Now, when we get to estoppel, what seems to
10 have been challenged most was the good faith reliance. And what I
11 heard Mr. Crockett weigh heavily, at least in my hearing of it, had to
12 do with challenging whether or not there was really a good faith that
13 has to be demonstrated.

14 And then secondly, he quoted the Spier case which
15 says, you know, if you kind of hurried up and spent a lot of money
16 then you're taking a risk.

17 CHAIRPERSON HINTON: What I'm thinking is that
18 any building permit can be appealed. And this case is not about
19 building permits that went before. This case is about the building
20 permit that was released on January 31st. And the community has a
21 right to appeal it.

22 The letter from Hampton Cross came very late in
23 December with the determination that this child development center
24 did not need to go to the BZA. So later in December, the community
25 found out that determination, in fact, by the Zoning Administrator was
26 being upheld by Hampton Cross. And then, within a month the

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1 building permits were released. And within two weeks, the community
2 had a meeting, it decided, it voted to file an appeal.

3 Whatever the University may have accomplished
4 between January 31st and the middle of February when the
5 community voted to file the appeal is all, that I feel, is potentially
6 prejudice. Not all the construction that happened afterwards.

7 MS. BENNETT: I see.

8 CHAIRPERSON HINTON: Not before or after that
9 because before is not being appealed. Between the date that the
10 letter came from Hampton Cross, which was late in December, the
11 building permit was issued January 31st, so that was one month, and
12 the community voted to file an appeal mid-February.

13 So two weeks from when the building permit was
14 released, the community had taken a vote. The University, and I
15 agree with the Appellant on this point, if the University wanted to know
16 if there was going to be an appeal, they could have, I think, looked into
17 that issue. It's clear to me and the information that's in the record that
18 as far back as, I think it was, May or at least August, Wesly Byrd was
19 working on this issue. And if the University really wanted to know,
20 they could have contacted her. I mean, they had the name of an
21 individual. It's not like this is some unknown entity that the University
22 couldn't possibly have asked because they didn't know who it was.

23 So, the claim that the University didn't know that an
24 appeal was coming along and that they had every reason to think that
25 because other building permits had been released that this one would
26 be no problem. I think that that's really not very reasonable.

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1 MS. DWYER: Madam Chair, for the question of
2 estoppel, you look at the pattern and the history of the affirmative acts
3 of the municipal corporation. And you have a consistent series of
4 affirmative acts by the District of Columbia government, in the form of
5 a Zoning Administrator from November of '95 through January of '97
6 indicating in every point that this was a matter of right project and that
7 all zoning requirements had been met. Beginning with the initial
8 meeting, the transmittal to the all-Georgetown Board, transmittal to
9 Commission of Fine Arts. And you cannot ignore the entire history of
10 those acts by the District of Columbia government.

11 CHAIRPERSON HINTON: Well, we're not ignoring
12 them, but neither will we say that because one permit was released,
13 then the next permit automatically would have to be released. I don't
14 think it happens that way. There were a number of different permits
15 and each one was reviewed on its own merits.

16 MS. DWYER: Right. But, I mean, the issue of zoning
17 approval and whether the project, there were technical issues with
18 each permit. But on the issue on whether this was a matter of right
19 zoning use, the city consistently for the entire year and a half said yes
20 it is a matter of right use. It does not require Board of Zoning
21 Adjustment approval.

22 And I think for estoppel, you need to look at that entire
23 year and a half and whether the University was reasonable in relying
24 on the continued statements by the city, the continued affirmative acts,
25 that regardless of what anyone said, regardless of what one neighbor
26 might think. This was a matter of right use, did not require Board of

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1 Zoning Adjustment review and I think when you look at the year and a
2 half it was entirely reasonable for the University to rely on the
3 consistent acts of the city. Unlike the Spier case, there was no
4 change in the law, no amendment to the zoning regulations that said
5 we're changing the way we interpret accessory use and it no longer is
6 going to include a child care center.

7 CHAIRPERSON HINTON: Right. And the part from
8 your own brief that I have a problem with is D. And that is that the
9 equity strongly favored the party invoking the doctrine and I don't find
10 that that is true. And that is an and clause which means it has to be A,
11 B, C, and D -- And I don't find that that's true.

12 MS. DWYER: And I guess I would ask on what basis
13 in the record would the equities, in this case, favor the Appellant and
14 not the University?

15 CHAIRPERSON HINTON: I think to a great extent
16 we'll get into that when we hear the merits of the case. But, first of all,
17 the Appellant has demonstrated that they tried to have this decision
18 reviewed. And in fact waited for a response which did come although
19 it took a long time.

20 In addition, what is the inequity to the University? I
21 mean, I find no inequity to the University either to hear the appeal or to
22 have to submit an application for special exception. If there was
23 something constructive that would come into question as to whether it
24 would have to be torn down, I could understand that. But I just don't
25 find how the equities favor the party.

26 MS. DWYER: Well, let me make two points. One is I

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1 included in my motion a prior BZA order in which this Board pointed
2 out that the fact that an Appellant chooses other avenues and may go
3 through, you know, DCRA or the City Council or some other avenue,
4 does not thereby extend their right to take the appeal. So I think the
5 fact that they pursue other remedies as opposed to filing the appeal is
6 not entirely --

7 CHAIRPERSON HINTON: Right and there are at
8 least two cases that go the other way and say that because an
9 Appellant chose to pursue other methods, that reasonable time will not
10 be held against them. So, we're not agreeing on that point.

11 MS. DWYER: And in terms of the equities to the
12 University, the University has a matter of right use to a child care
13 facility. And has already proceeded to construct the facility, to get all
14 the necessary approvals, to pay for all the changes to the plans, to
15 hire the teachers, hire the personnel and enroll the students. There is
16 no guarantee that by filing an application and going through the BZA
17 process, the application is automatically going to be granted that
18 would allow the child care facility to go forward. Unless, this Board
19 and this community is going to prejudge the other case. So I think
20 there is substantial prejudice to the University, in that, it has already
21 spent the last year and a half doing everything the city has required it
22 to do to get the permission, to operate and construct this facility. And
23 to now say that you must go through yet another process, which is a
24 concessive case hearing and which no one can foresee what the
25 result will be, is no prejudice to the University. In that, it's no big deal
26 because it's just going through the process. I think it is an inaccurate

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1 statement of what the University is faced with.

2 MS. RICHARDS: How many children are currently
3 involved?

4 MS. DWYER: I'm not sure. I know that when the
5 University did its lottery in the spring, University employees, it had
6 enough responses to fill up all 60 places in the center.

7 MS. RICHARDS: Were you anticipating that you'd be
8 prejudiced by having to shut down the facility and sent the children
9 elsewhere?

10 MS. DWYER: That is always a possibility in any
11 appeal. What the outcome is is unknown.

12 MS. RICHARDS: I mean, are you anticipating that if
13 we go to hearing on the second case that -- that you would have to
14 shut down during the pendency of that act especially --

15 MS. DWYER: No, the University is of the opinion that
16 if we go to a hearing on the merits, that this Board would find that the
17 Zoning Administrator's determination was correct. And that, like every
18 other college and university in the District of Columbia, it's an
19 accessory use to a college and university use. And we feel very
20 strongly about this case on the merits. But we also believe that on
21 these equitable issues, that the delay that the University has been
22 faced with argues against even getting to a hearing on the merits.

23 CHAIRPERSON HINTON: What delay has the
24 University been faced with?

25 MS. DWYER: The delay by the Appellant in filing the
26 appeal. By waiting from last May until this past March to file this

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1 appeal has prejudiced the University in that it has already gone
2 forward with building permits, construction plans and the planning for
3 the operation of the center. Basically, the laches and estoppel issues.

4 CHAIRPERSON HINTON: Did the University stop
5 anything once the appeal was filed? Did they stop construction, stop
6 enrolling, stop hiring?

7 MS. DWYER: No, the University has not stopped
8 since the appeal has been filed.

9 MS. BENNETT: Then how was the prejudice
10 demonstrated?

11 MS. DWYER: The prejudice is up until the time of the
12 filing of the appeal. And we've listed in our affidavit all of the costs
13 incurred by the University. Obviously if this Board were to rule on the
14 basis of the appeal that the Zoning Administrator was incorrect, then
15 the University might be faced potentially with closing the center or
16 having to go through a Board of Zoning Adjustment process or all of
17 those issues. But the University, by the time this appeal was filed, had
18 already substantially completed all of the work necessary for the
19 operation of the center, had, you know, the lottery to determine the
20 students that would be enrolled at the center, and had made
21 significant legal and financial commitments.

22 MS. KING: When was that lottery held? What were
23 the dates of that lottery?

24 MS. DWYER: I'll try and find that out for you.

25 MS. KING: April?

26 MS. DWYER: The lottery was in April which is the

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1 same month that the University found out about the appeal.

2 CHAIRPERSON HINTON: The appeal was filed in
3 March.

4 MS. DWYER: Yes.

5 MS. KING: And what date in April was the lottery?

6 MS. DWYER: I'll ask Andrea Salley to answer that.
7 She knows.

8 MS. SALLEY: I believe it was the entire month of
9 April. The University found out about the appeal in the beginning, I
10 think, the 3rd or 4th of April.

11 MS. KING: The 3rd or 4th of April you say?

12 MS. SALLEY: Yes.

13 MS. RICHARDS: Madam Chairperson, I think that we
14 should give a sort of rule on the third element of their motion to
15 dismiss, equitable estoppel. Or even carry that part of the motion to
16 the case.

17 CHAIRPERSON HINTON: Well, I agree. I
18 recommended that the Intervener has not made the case for equitable
19 estoppel.

20 MS. BENNETT: And we got into the extension
21 because I was asking you why not.

22 CHAIRPERSON HINTON: So, what's your position?

23 MS. RICHARDS: Why don't we just go ahead and
24 rule because whatever ruling we make or any aspect of the motion will
25 remain in the -- And we can always revisit that.

26 MS. BENNETT: I would agree. And for purposes of

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1 moving forward, the discussion has helped me because, I think, I'm
2 not certain that I'm convinced of the equities necessarily automatically
3 favored the Intervener. If there were any part of that that I felt less
4 sound about, that probably would be it. But if as Ms. Richards
5 suggests, this can be revisited when we fill out the record with some
6 more information, because right now we're dancing around the facts.
7 You know what I'm saying? We're trying to stay preliminary when
8 we're up to our knees in alligators at this point.

9 MS. RICHARDS: We can hear every fact in the case
10 and then decide to reopen the motion to dismiss if we wanted to.

11 CHAIRPERSON HINTON: Before we do that, Ms.
12 Dobbins how does that sound to you?

13 MS. BENNETT: She would rather it be much cleaner,
14 I'm sure.

15 MS. DOBBINS: Of course. The only reason I would
16 prefer that is that it's a preliminary matter. It makes a determination
17 whether, in fact, you should, in fact, proceed with the case on the
18 merits. If you make that decision up front and determine for some
19 other reason on your own motion during the case or on your own
20 during the case that it should be dismissed or otherwise, you can still
21 do that. I mean, you can make some determination going on other
22 basis later on in the case if you choose to do that.

23 CHAIRPERSON HINTON: I think that would be
24 preferable. We're going to deny the motion to dismiss. And we'll hear
25 the case.

26 MS. DOBBINS: Is that a consensus by the Board?

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1 MS. BENNETT: It is.

2 MS. DOBBINS: It is a consensus to deny the motion
3 to dismiss. So the Board is free to hear the case of the appeal on the
4 merits.

5 CHAIRPERSON HINTON: Right.

6 MS. DWYER: Madam Chair, I have one other
7 preliminary matter. I would just ask if the record could be
8 supplemented with some of the requirements for standing. We've
9 reviewed the record before you and I don't know who the Georgetown
10 Residents Alliance is. Whether it is a nonprofit corporation, who its
11 members are, how it is specifically agreed by this. And I think it would
12 be helpful if the record could be supplemented, perhaps, in a direct
13 testimony with some statements as to who the alliance is and how
14 specifically they are agreed by this.

15 CHAIRPERSON HINTON: Thank you. That is a
16 requirement of any Appellant that not only the appeal be timely filed
17 but that the person and party be agreed. So, I'm expecting that that
18 will come in in testimony today.

19 MS. BENNETT: You can certainly question them
20 about that.

21 CHAIRPERSON HINTON: Great. Let's go ahead
22 with the Appellant's case.

23 MR. CROCKETT: Very well. I think that with the
24 colloquy that we had in the motion to dismiss that the issue before the
25 Board here today is very clear. It is simply, what we view to be a
26 fundamental legal issue as to whether or not the University, in

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1 proposing a child care center for 60 children in the middle of an R-3
2 zone, was required to comply with Section 205, which specifically
3 addresses child care centers and residential zones. And also Section
4 210, which requires the University to come in for a further exception
5 processing when it either wants to change an approved use in the
6 campus plan or go forward with an approved use. So that's the issue.

7 And our witnesses today will go into that. And our
8 first witness who is going to go through the chronology of this
9 particular community dispute is Wesly Byrd.

10 MS. BYRD: Good afternoon.

11 CHAIRPERSON HINTON: Before you begin, just to
12 get a sense of the time that's expected. Can you give me
13 approximately how much time it will take to put on your case?

14 MR. CROCKETT: I would hope that it's short. Not
15 counting any cross examination, I would hope that we would be done
16 in an hour.

17 CHAIRPERSON HINTON: In an hour. How many
18 witnesses do you have?

19 MR. CROCKETT: We just have Ms. Byrd and Fran
20 Goodwin and Barbara Zartman and Beverly Jost. There are some
21 Intervener witnesses also, but that's not part of our case.

22 CHAIRPERSON HINTON: Right. So approximately
23 one hour. Thank you.

24 MS. BYRD: I would like to ask Madam Chairman that
25 a letter I wrote to the community be made part of the record. It might
26 help you follow my testimony as well.

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1 CHAIRPERSON HINTON: Could you bring the letter
2 up to me? The first thing we want to start with, can you tell us who
3 GRA is? What kind of community group you are? Who you serve?
4 And what your standing is in the community and how you're aggrieved
5 by this decision of the Zoning Administrator.

6 MR. CROCKETT: Wesly is an officer. I am a
7 chairman. I can do that if you would prefer.

8 CHAIRPERSON HINTON: Whoever can do it most
9 efficiently.

10 MR. CROCKETT: All right. Let me give it a shot.
11 The Georgetown Residents Alliance is a community civic organization
12 which was incorporated as a nonprofit corporation in the District of
13 Columbia around about July 31st or August 1st of last year. It's
14 purpose --

15 MS. DWYER: Which year?

16 MR. CROCKETT: 1996. It's purpose is to further the
17 interest of the residents and give its members the vehicle to do the
18 things such as we're doing here to day which individuals cannot do on
19 their own. Ms. Goodwin, who is a neighbor to the facility, and others
20 are members. And we are here on their behalf.

21 Also the issue that is posed by this particular child
22 care center is a district wide issue. It is an issue that will recur. It is
23 broader than the simple child care center. Because they're arguing
24 they have a legal position that will apply to other situations. This is an
25 issue of broad -- which our association, our alliance is of utmost
26 importance to the zoning issues in the foreseeable future.

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1 CHAIRPERSON HINTON: How many members are
2 there?

3 MR. CROCKETT: We have approximately 150
4 members.

5 CHAIRPERSON HINTON: And how is this group
6 aggrieved by the decision?

7 MR. CROCKETT: The group is aggrieved by the
8 decision in that Ms. Goodman and all neighbors near the child care
9 center, in our belief, are entitled to a public hearing, then an exception
10 proceeding before this Board pursuant to Section 205. And also
11 they're entitled to a public exception proceeding pursuant to Section
12 210 under the campus plan. And that the University has gone forward
13 with the agreement of the Acting Zoning Administrator to do this in
14 contravention of the zoning regulations.

15 CHAIRPERSON HINTON: Thank you. Unless there
16 are questions from the Board members, I think we'll continue.

17 DIRECT TESTIMONY

18 MS. BYRD: Good afternoon. My name is Wesly
19 Byrd. I am the ANC commissioner for the area that encompasses the
20 child care center and I'm a member of the Georgetown Residents
21 Alliance and head of their zoning committee.

22 In the summer of 1996, I received a phone call from
23 Fran Goodwin who lives in the 3500 block of P Street N.W. -- The
24 University had notified her that they intended to place a child care
25 center for 60 children a half of block from her house. She asked me to
26 please look into the matter.

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1 I had met Mr. and Mrs. Goodwin in 1989 when we
2 had worked together on BZA case 15005-3610 and 3612 P Street,
3 part of the proposed site for the child care center. Four townhouses
4 had burned on the site and the BZA approved 2 replacement
5 townhouses in 1989 order.

6 At 614 8th Street I pulled all the documents that
7 related to the child care center. What was uncovered was substantive
8 as well as procedural irregularities. First the substantive. The 6/26/96
9 application clearly states the land in question is zoned R3. Every child
10 care center on R3 land requires a special exception by the BZA. St.
11 John's Church, Little Folks, the Montessori School have all appeared
12 before the ANC as a prerequisite or a first step in their seeking a
13 special exception from the BZA.

14 Georgetown University's land is the same zoning as
15 this church and these schools. As I look through the 205 zoning
16 regulations it was clear that the very issues that concerned Mrs.
17 Goodwin, traffic backing up on her one-way street, parking and over
18 concentration of child care centers in her neighborhood, would all be
19 covered in a special exception hearing.

20 It seems that the Zoning Administrator has allowed
21 child care centers on other campuses without a BZA hearing. But as
22 the American University ANC Commissioners unanimously stated two
23 wrongs don't make a right. The University claims that the child care
24 center will be accessory to the university and therefore a hearing is
25 not required.

26 We all remember the power plant case. That was

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1 accessory to the University and that required a hearing.

2 In my possession was a copy of the University's plat
3 for the main campus of the University. The main campus is all on lot
4 number 1 and the eastern part of lot number 1 runs down 37th Street.
5 The child care center is outside the principal lot and therefore cannot
6 be classified as accessory.

7 Not only is the University required to follow R3 zoning
8 regulations but also the University must adhere to campus plan
9 regulation. And let me just go back to the R3 regulations just for a
10 second. The community several years ago there was a move in the
11 city council to change that zoning to institution. And there have been
12 over the years procedures to try to change that zoning. The
13 community has fought very hard over the years to keep the R3 zoning.
14 It's very important. But it equally is important to follow the regulations
15 of the R3 zoning. It doesn't do any good to have it if the regulations
16 aren't followed.

17 Campus plan regulations go beyond the R3 zoning.
18 And they are clear. They were clear when I looked at it. All activities
19 to be conducted on the campus must be outlined in the campus plan.
20 Janet Jordan who is the ANC assistant at my request last spring read
21 the entire 1990 approved campus plan that was approved by the BZA.
22 Not place in that entire thick document is a child care center
23 mentioned. It is not part of the approved campus plan.

24 Specifically the campus plan states the use of Poulton
25 Hall will remain unchanged from its present use. On page 64 of the
26 campus plan the current uses of Poulton Hall are outlined as follows:

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1 educational, departmental, print shop, theatre, post office. The future
2 use which is a column for future use says unchanged. Clearly a child
3 care center is a change in use.

4 Again the campus plan on page 63 states that 3610
5 and 3612 P Street is currently green space. That's where the fire was
6 so it's now -- There's no building on it. But per BZA Order 15005 the
7 future use will be 2 student-facility townhouses.

8 Neighbors like Mrs. Goodwin who participated in the
9 campus planning process won't lie upon this document and if any
10 changes are going to be made to this document a BZA hearing is
11 clearly required.

12 Now when I was at 614 8th Street and reviewing the
13 626 application there were also procedural flaws. The building permit
14 application was for a child care center at 1421 37th Street N.W. on
15 three lots, 835, 161 and 162.

16 But Georgetown University had a problem. DCRA
17 cannot issue a building permit for three lots. So Georgetown
18 University crossed off the three lots and replaced them with lot 162.
19 But the University created two problems when they crossed off the
20 three lots.

21 One. The top of all building permit applications state
22 "erasing, crossing out, whiting out, or otherwise altering any entered
23 information will void this application." So Georgetown voided their
24 application by crossing out the three lots.

25 Second problem. When they crossed off the three
26 lots they replaced it with lot 162. But lot 162 is not located at 1421

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1 37th Street but rather at 3610-12 P Street.

2 The third problem. The University changed the date
3 of the application to 8/6 from 6/26. I'm not sure why they crossed out
4 the application date but by doing so they created another problem. As
5 you can see the Commission of Fine Arts stamped the application
6 received June 28th, some six weeks earlier than the new application
7 date.

8 On August 19, 1996, Mr. Crockett, President of the
9 GRA, Barbara Zartman, Guy Gwinn, Mrs. Goodwin, Beverly Jost,
10 Chairman of ANC 2E and myself met with Hampton Cross, Director of
11 DCRA. The substantive and procedural problems were raised with
12 Mr. Cross. He issued 2 directives.

13 1.) The new head of Permit Processing would require
14 the procedural flaws in the application to be fixed.

15 2.) DCRA would not give zoning approval to the child
16 care center until after Mr. Ruff had reviewed the matter.

17 At which time Mr. Cross asked me to submit my
18 findings to Mr. Ruff. Note for the record that the next day that letter
19 was submitted to Mr. Ruff. And I submitted that letter as the ANC
20 Commissioner for the subject site. I was also confident after leaving
21 the meeting with Mr. Cross that no building permits would be issued
22 for the subject site.

23 In the meantime the community's response to the
24 issue is as follows:

25 1.) At the September 1996 ANC meeting, ANC 2E
26 reiterated its earlier action that the BZA hearing was required in order

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1 for the University to use R3 land as a child care center. Those ANC
2 minutes are attached to our 2nd brief.

3 2.) The American University ANC unanimously voted
4 that a BZA hearing was required and stated publicly that the Zoning
5 Administrator should never have approved a child care center on the
6 AU campus without a BZA hearing.

7 3.) The Fogey Bottom (PH) ANC unanimously voted
8 that a BZA hearing was required for the child care center.

9 4.) The Foundation for the Preservation of Historic
10 Georgetown an effected property owner within 200 feet has a letter in
11 the record pointing out the law requiring a BZA hearing.

12 August 15, 1996 a quarterly meeting between the
13 University and the community was held. The University was again put
14 on notice that a BZA hearing is required for the child care center.

15 CHAIRPERSON HINTON: What date was that?

16 MS. BYRD: August, I believe, 15th. So you had May,
17 August 15th and those minutes are attached to our brief as well. And
18 September.

19 As part of their brief, the University has submitted a
20 partial transcript of the quarterly meeting in which they offered to give
21 the community, Gladys Hicks's "decision." I'd just like to note for the
22 record that the University never gave me and to my knowledge
23 anyone else in the community a copy of that "decision." And the first
24 time I ever saw that October 1995 "decision" was when Wilkes, Artis
25 served me with their brief last weekend.

26 Not only did the University withhold the October 1995

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1 letter and again -- They weren't under any obligation to give it to me
2 but they said they would and they didn't. But as the record shows I
3 repeatedly submitted requests to DCRA for documents in the child
4 care center case. On October 10, 1996, January 27, 1997, February
5 3, 1997 and a full year request on March 4, 1997.

6 In the requests to DCRA for documents including the
7 FOIA request they never produced, they meaning DCRA, never
8 produced the October 1995 letter.

9 My August letter to Mr. Ruff was never answered by
10 Mr. Ruff himself. Instead Hampton Cross wrote me on December 26
11 stating that DCRA intended to issue alteration repair permits. You will
12 notice that most of my requests to DCRA for documents were in
13 January. They were in January because I didn't know when Gladys
14 was actually going to sign the permit application and I didn't want to
15 miss or be late in filing the appeal. And that was why in January I filed
16 so many requests with DCRA for documents because I was trying to
17 actually get her decision because I couldn't come over here until I had
18 an actual decision from Gladys.

19 In the documents made available by DCRA you
20 should note that the Zoning Administrator signed the permit
21 application on 1/16/97. The Zoning Administrator signed the
22 unverified plat on 1/16/97. And she signed the building plan on
23 1/16/97 which go well beyond lot 835. And I maintain that she should
24 have never signed the building plans attached to the permit
25 application because they go well beyond the lot in the permit
26 application, lot 835.

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1 So in conclusion, the Zoning Administrator erred in
2 giving zoning approval without a special exception hearing because
3 the land is zoned R3, because it's contrary to the approved campus
4 plan, because the application signed by the Zoning Administrator was
5 a voided application, and because the plat signed by the Zoning
6 Administrator was unverified and because the building plans signed by
7 the acting Zoning Administrator go well beyond the permit application.
8 Thank you very much.

9 CHAIRPERSON HINTON: What was the lot number
10 on that building permit application?

11 MS. BYRD: 835 and the building plans go over into
12 lot 161 and lot 162.

13 CHAIRPERSON HINTON: Thank you.

14 MR. CROCKETT: Ms. Byrd, can I ask you another
15 question? At the February 11, 1997 meeting of the Georgetown
16 Residence Alliance did you present a motion that the Alliance take an
17 appeal from the acting Zoning Administrator's decision?

18 MS. BYRD: Yes, sir.

19 MR. CROCKETT: And what was the result of that
20 motion?

21 MS. BYRD: There was a unanimous vote.

22 MR. CROCKETT: To appeal?

23 MS. BYRD: To appeal.

24 MR. CROCKETT: Thank you. I have no further
25 questions.

26 CHAIRPERSON HINTON: I have a question, Ms.

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1 Byrd. Did any representatives of the University ever contact you prior
2 to January 31 to see if the issues had been resolved to your
3 satisfaction, the issues regarding whether the zoning determination
4 was correct?

5 MS. BYRD: No, they never contacted me and just for
6 your information, the University, there have been several community
7 hearings recently like at the American University ANC and the
8 University has made statements that in fact they were in contact with
9 Chuck Ruff and Chuck Ruff himself reviewed this case. And Chuck
10 Ruff made the determination so they clearly knew the issue was in
11 front of corporation counsel and they were clearly in contact or they
12 said publicly they were in contact.

13 So no, every statement I made was that I intended to
14 appeal and however, I had to do it when there was something to
15 appeal. I couldn't do it because Wilkes, Artis told that Gladys Hicks
16 had made a decision.

17 CHAIRPERSON HINTON: Well, that clears up the
18 timing issue. Are there questions from the Board members?

19 MS. REID: I do.

20 CHAIRPERSON HINTON: Okay. Ms. Reid.

21 MS. REID: Did you submit a copy of your testimony
22 to the secretary?

23 MS. BYRD: No, but I will.

24 MS. REID: Please do.

25 MS. BYRD: Yes, ma'am.

26 MS. REID: All right and the other thing is in your

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1 testimony you stated that -- I think I heard you say that the campus
2 plan that had been approved some time ago did include a child care
3 center but it did not.

4 MS. BYRD: The 1990 campus plan had no mention.
5 No ma'am. I couldn't --

6 MS. REID: All right. This is where I was confused. I
7 thought you were saying that there was something in there about a
8 campus plan but the address as to where that lot in the campus plan
9 was supposed to erected was erroneous. Did you not say that?

10 MS. BYRD: Well, let me go back and just try to
11 answer your question.

12 MS. REID: All right.

13 MS. BYRD: There are 3 lots in question and 2
14 addresses. It's a corner. There's 37th Street and there's P Street.
15 1321 37th Street is currently the post office, a printing shop, etc.

16 The printing shop has according to the University
17 testimony at the public meeting has been moved. And they're now
18 putting a child care center in to Poulton Hall. What for 1421 37th
19 Street the campus plan says there will be no change in future use of
20 Poulton Hall.

21 Now moving a printing shop out and putting a child
22 care center I believe is a change in use. Furthermore, the campus
23 plan regulations state in 210 all activities to be conducted on the
24 campus must be outlined in the campus plan. Now a child care center
25 would clearly be an activity of a campus. It is not outlined anywhere
26 that I can find or that our ANC assistant can find.

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1 MS. REID: Well, does it say activity or does it say
2 building or structure?

3 MS. BYRD: Activity.

4 MS. REID: Okay. Now is there a difference between
5 an activity and a building? You're saying -- This building, the
6 opposition isn't in regard to erection of this physical entity, this
7 physical building.

8 MS. BYRD: They're using the building -- It's a use.

9 MS. REID: Okay. So you're saying that it's prohibited
10 then to use this facility as a child care center.

11 MS. BYRD: No, I'm sorry. It's not prohibited but they
12 must come to the BZA.

13 MS. REID: Without BZA approval?

14 MS. BYRD: Right to amend their campus plan.
15 Because the campus plan no where states that they were going to
16 operate a child care center. And in regulation 210 it says all activities
17 on the campus must be outlined on the campus plan.

18 Now the second thing is on the two addresses, 3610
19 and 3612 P is here. The BZA -- There's an order. 15005. And 15005
20 says that the University can construct 2 townhouses for students or
21 facility. It's in their campus plan that it's currently green space
22 because there was a fire. And that the future use would be these 2
23 townhouses.

24 Now they want to change it to incorporate part of the
25 child care center. Again you've got to come to the BZA for a hearing.

26 MS. REID: Okay. And you said that there were 3 lots

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1 that were then combined to one lot.

2 MS. BYRD: No, they didn't do a subdivision. No.

3 MS. REID: On paper.

4 MS. BYRD: Well, on paper they crossed off and --

5 MS. REID: Right.

6 MS. BYRD: Yes, ma'am.

7 MS. REID: And you're saying that that was --

8 MS. BYRD: Well, what happened is when they
9 crossed it off and I guess I didn't finish this -- When they crossed it off
10 to 162, it didn't correspond to the address. Lot 162 isn't at 1421 37th
11 Street. Then they crossed that again so you'll notice that the permit
12 application that's in front of you is for lot 835. So they whited it all out,
13 the 162, and then put lot 835.

14 And so what's in front of you is 1421 37th Street Lot
15 835. I have no problem with that because 835 is at 1421 37th Street.
16 But the building plans that are attached to the permit that has been
17 approved that's under appeal, the building plans go beyond 835.
18 They go into lots 161 and 162.

19 CHAIRPERSON HINTON: That's very clear what
20 you've said but we need to look at the plans. They were not
21 forwarded to us and --

22 MS. REID: Yeah because this becomes very
23 confusing.

24 CHAIRPERSON HINTON: So let's look at the plans.

25 MS. REID: Also just one other quick question. You
26 stated that the plans could not be altered and because of the fact that

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1 the change in the lots constituted alterations and that is essentially
2 voided out the --

3 MS. BYRD: At the top of the permit application, it
4 says any crossing out --

5 MS. REID: Whiting out or otherwise altering any --

6 MS. BYRD: -- Entered information --

7 MS. REID: -- entered information will void this
8 application.

9 MS. BYRD: So the acting Zoning Administrator
10 signed, gave zoning approval to a voided application.

11 MS. REID: Okay. Thank you.

12 CHAIRPERSON HINTON: I'm going to ask you a
13 question since I haven't had a chance to review the larger plans.
14 What part of the child development center is on lots 161 and 162?

15 MS. BYRD: Playground equipment, sheds and
16 dumpster. There's a dumpster pad. There are pictures in our original
17 brief and that's of lots 161 and 162. So it's a big dumpster pad, a
18 shed, a fence and playground equipment.

19 MS. RICHARDS: The university council accrued
20 some monthly meetings that had taken place with members of the
21 community during the contested period. Could you amplify were those
22 generally attended or generally noticed meetings?

23 MS. BYRD: Let me go through and tell you the
24 meetings that I believe the University came to and where the child
25 care center was discussed and if I've missed something I just wasn't
26 at the meeting. Okay.

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1 May of 1996 ANC meeting. You will note in the
2 minutes that as a matter of fact I was not at the meeting but they did
3 discuss the case and the ANC voted to protest.

4 Secondly, the August ANC meeting, the University
5 came back and the child care center was discussed. The September
6 ANC meeting Father O'Donovan attended. No action was taken but
7 the minutes reflect he was told you've got to go to the BZA.

8 MS. RICHARDS: So it's ANC's meetings that --

9 MS. BYRD: No, wait a minute. I'm sorry. There was
10 an August quarterly meeting, August 15, where I brought all of these
11 problems and the University and there's discussion in there where it is
12 clear that we made the case that they have to go to the BZA.

13 I believe that was the last time that the University
14 came to a meeting to discuss it except when I went to the American
15 University ANC to make a presentation they also made a presentation.
16 American University ANC voted unanimously to support my position.

17 MS. RICHARDS: I just wanted to make sure that the
18 University hadn't been calling additional meetings other than the ANC.

19 MS. BYRD: No, ma'am.

20 CHAIRPERSON HINTON: Okay. Are there any
21 other questions from the Board members? Is there cross examination
22 by the Intervenor?

23 MS. DWYER: No.

24 CHAIRPERSON HINTON: Do you have other
25 witnesses?

26 MR. CROCKETT: Yes. We will call Mrs. Fran

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1 Goodwin.

2 CHAIRPERSON HINTON: I guess -- Do we need to
3 ask the Government if they have cross examination questions?

4 MR. LYONS: If there is nothing to preclude that,
5 Madam Chair.

6 CHAIRPERSON HINTON: Okay. Thank you.
7 Please go ahead.

8 MR. CROCKETT: Ms. Goodwin.

9 DIRECT TESTIMONY

10 MS. GOODWIN: I'll be very brief. You have a letter
11 from me in your folder. My husband, Guy Goodwin, and I have been
12 resident owners of a dwelling at 3524 P Street for 22 years and we are
13 respectfully requesting a full hearing, BZA hearing, on a proposed
14 child care facility. We strongly believe that under the law neighbors
15 close to the proposed site and the public in general have a right to a
16 public hearing before this Board on issues bearing on this child
17 development center and the Georgetown University campus plan.

18 As property owners adjacent to the GU campus, we
19 believe that the DC Government should require the University to follow
20 all zoning regulations and procedures. As a -- dwindling number of
21 residents we believe this is our only protection and assurance that the
22 campus plan will be followed. We are very strongly advocating that
23 the process, the established process, for this kind of thing is protected.

24 I would just like to make that point and to say that I
25 was really kind of disheartened when I came down here today but
26 after this hearing I'm really impressed with the work that you do and I

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1 feel the process is in good hands. So regardless of how this works
2 out, just as one resident, I would just say thank you for this very
3 serious work that you do.

4 I would also mention that you have a letter in your file
5 by Chiswell Langhorn who wrote on behalf of the Georgetown
6 Historical Society. So I'm just going to say a very little more other
7 than to say that my husband and I have been involved ever since we
8 first moved to Georgetown in this kind of thing. We had worked with
9 the Georgetown Citizens Association in years gone by and we expect
10 to continue that kind of work because we care about the
11 neighborhood.

12 The University is a huge matter to us. It's a good
13 University and a good neighbor and I was really upset that when the
14 letter came through the mail slot saying this is what we are going to
15 do. We're going to build a child care facility. It's going to be for 60
16 pupils. Laid it all out. I believe the letter was maybe two and a half
17 pages long saying we're going to do this and this and this. Now if you
18 have any objections just please let us know. We'll be glad to visit with
19 you but this is what we're going to do.

20 And indeed this is what they did do. It's been a
21 successful technique I think that was used in that the child care center
22 is practically ready to open and I was disappointed with that kind of
23 approach by the letter in the mailbox announcing the decision. And I
24 would really stress that the University should not and I don't think
25 really means to make substantive changes in the campus plan without
26 prior consultation. And we request that the waiver of the BZA hearing

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1 be revoked and that the University should not permitted to present
2 their decision to the residents that they have completed without going
3 through this very fine process that you have. Thank you.

4 CHAIRPERSON HINTON: Thank you. Any
5 questions from the Board? Any questions on cross examination? No.
6 That's it. Thank you.

7 MR. CROCKETT: Our next witness will be Beverly
8 Jost.

9 CHAIRPERSON HINTON: Do you need a break?
10 Could we just take a very quick 5 minute break before we start?
11 Thank you. Off the record.

12 (Whereupon a brief recess was taken.)

13 CHAIRPERSON HINTON: On the record. Can we
14 have your name and home address please?

15 DIRECT TESTIMONY

16 MS. JOST: Yes, I'm Beverly Jost. My address is
17 1410 34th Street N.W.

18 MR. CROCKETT: Now Ms. Jost, would you tell us
19 what your position was in May of 1996?

20 MS. JOST: Yes, I was Chairman of ANC 2E.

21 MR. CROCKETT: And did you attend the meeting of
22 the ANC on May 6, 1996?

23 MS. JOST: Yes, I did.

24 MR. CROCKETT: Could you tell the Board what
25 occurred at that meeting and what actions the ANC took?

26 MS. JOST: One of the items on our agenda was the

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1 Georgetown University child care center. We had a discussion about
2 what had occurred on -- that the BZA had signed off on this. And after
3 a discussion a motion was made and I would like to read the motion.

4 "ANC 2E will inquire into and protest the omission of
5 the zoning variance." I made the motion and the motion was
6 seconded by Commissioner Dolmeyer (PH). We then had an
7 amendment that was proposed to that motion which was not
8 accepted. And so the motion stood and it was a unanimous vote.

9 MS. KING: Excuse me. Would you reread the motion
10 please? Just the motion.

11 MS. JOST: Yes, I will. The motion was "ANC 2E will
12 inquire into and protest the omission of the zoning variance."

13 MS. KING: Thank you.

14 MR. CROCKETT: Now, Ms. Jost, did you understand
15 the term "variance" to mean anything specific or was that just in
16 general? Do you recall what that referred to?

17 MS. JOST: Well, we had had some previous
18 experience with St. John's Episcopal Church that had a preschool.
19 And about probably a couple of months before we had people from St.
20 John's come over and ask us if we would approve the change of use
21 and that they had to go before the BZA. They would like the support
22 of ANC 2E.

23 So we understood what the zoning variance was
24 based on having had that happen on O Street. And this was on P
25 Street so we knew what the zoning variance was.

26 MR. CROCKETT: Now if I told you that a variance is

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1 something, a very stringent procedure to get exception for lot size and
2 that an exception is a different thing would that make any difference of
3 what a variance is?

4 MS. JOST: Probably not.

5 MR. CROCKETT: Okay. But I take it then that you
6 believe that the term "variance" meant that they had to come before
7 the BZA?

8 MS. JOST: What that meant to me is there was a
9 change of use and that with a change of use the zoning status was to
10 be changed and therefore there must be a public hearing, an
11 opportunity for the neighbors to have their voices heard.

12 MR. CROCKETT: Okay. Could we go onto the
13 meeting in September? On what date did that occur?

14 MS. JOST: That occurred on September 10th.

15 MR. CROCKETT: And were you in attendance at the
16 meeting?

17 MS. JOST: Yes, I was.

18 MR. CROCKETT: And could you just tell the Board
19 what occurred at that meeting?

20 MS. JOST: Yes. Again I was Chairman of ANC 2E.
21 And I heard through our administrative assistant before the meeting
22 that Father Leo O'Donovan from Georgetown University would like to
23 attend the meeting. The only time that he could attend the meeting
24 was between 7:00 and 7:30. And I said that we would love to have
25 you come. That is our community comment time.

26 So he came to the meeting and I think he probably

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1 was about the third person to speak. At that point, he asked the
2 community if they would work with Georgetown University and create
3 sort of a working group to deal with the issues of the child care facility.
4 After some discussion, it was clear that we were not taking a vote.
5 We do not take votes during community comment time and we
6 reiterated the fact that we would not have some sort of working group
7 because we were going to protest the lack of zoning appeal to you,
8 the BZA.

9 MS. KING: This was in what month?

10 MS. JOST: That was September 10th.

11 MR. CROCKETT: Now the ANC then on September
12 10th was still intent on going forward with its appeal if and when the
13 DCRA issued a final decision, is that correct?

14 MS JOST: Yes, and if I can just read this. It says,
15 this is in our minutes, "Corporation council has our petition for the
16 project to go before the BZA and no action will be taken before that
17 decision has been reached." In other words, we will not enter into
18 some working agreement. We were actually appealing to corporation
19 council for their decision.

20 MR. CROCKETT: To your knowledge, Ms. Jost, from
21 that time until you went off the ANC, was there any change in the
22 ANC's view?

23 MS. JOST: There was absolutely no change in their
24 view. In fact, as I walked my dogs and don't usually work too close to
25 the University, I did, I was so shocked to see that everything was
26 going forward as if there was going to be no appeal or protest. I was

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1 just a neighbor at that point, a private citizen. I was shocked.

2 MR. CROCKETT: No further questions.

3 CHAIRPERSON HINTON: Are there any questions
4 from the Board? Any cross examination questions? Ms. Dwyer? Ms.
5 Hicks? Any more witnesses?

6 MR. CROCKETT: One more witness. I would like to
7 call Barbara Zartman.

8 DIRECT TESTIMONY

9 MS. ZARTMAN: Good afternoon.

10 MR. CROCKETT: Ms. Zartman, would you state your
11 full name and address for the record?

12 MS. ZARTMAN: It is Barbara Zartman and I live at
13 1642 35th Street N.W.

14 MR. CROCKETT: Are you an officer of the
15 Georgetown Residence Alliance?

16 MS. ZARTMAN: Yes, I am.

17 MR. CROCKETT: And what position do you hold?

18 MS. ZARTMAN: I'm the treasurer.

19 MR. CROCKETT: Were you in attendance at a
20 meeting with Hampton Cross on August 19, 1996?

21 MS. ZARTMAN: Yes, I was.

22 MR. CROCKETT: Could you recount what the
23 purpose of that meeting was?

24 MS. ZARTMAN: It was an effort to put before Mr.
25 Cross the depth of the concerns we had about the precedent that
26 would be set if use could be changed on the campus without

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1 submitting the campus plan to the review of the BZA. We believed
2 that Ms. Hicks in all her good intent had made an error in extending
3 accessory use to cover such a fundamental change. We wanted to
4 make sure that Mr. Cross understood how serious it was and to ask
5 for his help in pulling apart what looked to us to be a very complex,
6 difficult and changing set of facts before it was irreparable.

7 We had had such help before in seeking some
8 guidance on the use of Papa Johns project across the street from my
9 home.

10 MR. CROCKETT: Now at the conclusion of that
11 meeting could you tell the Board what you recall were Mr. Cross's
12 comments to those in attendance and any instructions to his staff?

13 MS. ZARTMAN: He asked very particularly that the
14 new head of the permit desk, he asked to join us in the room. She
15 had not been part of the meeting before. He told her basically what
16 had transpired in the course of the meeting and said I do not want any
17 permits issued on this project until we have clearance on the legal
18 issues.

19 He winked at us and said I don't want any mistakes. I
20 don't want any inadvertent permits. I don't want any permits to be
21 issued until we have a ruling from the corporation council. And she
22 went out and indicated she would immediately instruct her staff
23 accordingly.

24 MR. CROCKETT: Are you aware now that permits
25 were indeed issued sometime later?

26 MR. ZARTMAN: I am now aware. I had no idea that

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1 any permits had been issued. I think this was clear from the
2 September meeting at the ANC. We didn't think any permits had been
3 issued by the September meeting.

4 MR. CROCKETT: Now have you been made aware
5 of a letter which was filed as an exhibit to a motion to dismiss by
6 Georgetown University which is -- and I'll show it to you as Exhibit B to
7 that motion? A letter dated October 30, 1995. Have you ever seen
8 that letter before?

9 MS. ZARTMAN: Only as part of the papers for this
10 hearing.

11 MS. BENNETT: What was the date of that?

12 MR. CROCKETT: The date of that letter was October
13 30, 1995.

14 CHAIRPERSON HINTON: And what was your
15 answer?

16 MS. ZARTMAN: I had not been aware of it until I saw
17 the papers in connection with this hearing.

18 MR. CROCKETT: Now during the course of the
19 discussions between the residents and Georgetown University after
20 May 1996 had you heard discussions of an informal ruling by the
21 acting Zoning Administrator that Georgetown claimed it was relying
22 upon?

23 MR. ZARTMAN: Yes. At the May ANC meeting
24 Andrea Salley presented for the first time to my knowledge the
25 University's plans for the child care center. And she indicated that in
26 fact there had been a meeting with as I remember her describing it the

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1 head of Zoning. That they had been advised that they were going to
2 be able -- That they received an informal opinion that they could go
3 ahead with this without a hearing.

4 And she further went on to say that they had this in
5 writing. At ANC meeting, there was a request for copies of such a
6 letter in writing. We were told that one would be provided.

7 The next day I called Hampton Cross's office and got
8 the person who was acting for him and asked if they could provide a
9 copy of such a letter. No one seemed to understand that there had
10 been any meeting with Georgetown University about a child care
11 center. They agreed that they would undertake to find out if such a
12 letter existed.

13 I subsequently called several other people including
14 Ms. Hicks's office to find out if there had been a letter written. I spoke
15 to at least one person whose name I'm sorry I have not made record
16 of who was in charge of a secretarial support group who indicated that
17 they had searched and there was no such letter in connection with a
18 child care center at Georgetown University.

19 As the record is clear from the August meeting of the
20 quarterly BZA endorsed meeting with the University, again we asked
21 the University for copies of that letter. Again we were told oh gosh we
22 were on vacation but we'll get it for you. And to the date of the receipt
23 of these papers, never was a copy of that letter made available. So
24 we had no way of knowing that in fact that Ms. Hicks had ruled on the
25 basis of what she had said, what purportedly we were responsible
26 knowing and responding to.

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1 But it was not from earnest effort.

2 MR. CROCKETT: I have no further questions.

3 CHAIRPERSON HINTON: On the basis of hearing
4 that that discussion had been made, is that what prompted that
5 meeting with Hampton Cross?

6 MS. ZARTMAN: I believe it was going down and it
7 was Rusty Byrd's looking down at the records of what was there. We
8 had no idea that things had progressed and the fact that I couldn't find
9 any letter from DCRA to the University I certainly didn't think that
10 things were moving along to the point where an action would be
11 required on our part. And then on the assurances that we received
12 that nothing would be done, I confess we didn't go looking for permit
13 issuances.

14 And construction activity on that campus without
15 permits being issued is no new thing to us. They can do many things
16 without permits and they have done some things without permits that
17 probably should not have done.

18 CHAIRPERSON HINTON: I think you have
19 answered my question. Are there any questions from the other Board
20 members? No. Any cross examination, Ms. Dwyer?

21 MS. DWYER: No.

22 CHAIRPERSON HINTON: Ms. Hicks?

23 MR. CROCKETT: Madam Chairperson, that
24 completes the testimony of our witnesses. And at this time I would
25 move the Board that all of our exhibits which have attached to our
26 brief for opposition for the motion to dismiss and are denominated as

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1 Petitioner's Exhibits 1 through 17 be admitted into evidence.

2 (The documents referred to were
3 marked for identification as Petitioner's
4 Exhibit 1 through 17 for identification.)

5 CHAIRPERSON HINTON: Everything that you have
6 submitted is already in the record.

7 (The documents referred to having been
8 previously marked for identification as
9 Petitioner's Exhibits 1 through 17 were
10 received in evidence.)

11 MR. CROCKETT: That completes our case except
12 for legal argument. If you would like me to make that now, I will be
13 happy to do it. If you would rather that I wait until after -- I don't know
14 what your preference is with respect to that.

15 CHAIRPERSON HINTON: Okay, the Vice Chair
16 prefers that you wait until closing arguments.

17 MR. CROCKETT: That will be fine.

18 CHAIRPERSON HINTON: Great. Very good. Next
19 we have the Zoning Administrator. Ms. Hicks.

20 DIRECT TESTIMONY

21 MS. HICKS: Good afternoon ladies and gentlemen.
22 My name is Gladys Hicks. I am the Acting Zoning Administrator for
23 the District of Columbia. I am employed by the District of Columbia. I
24 serve at the pleasure of the citizens of the District of Columbia, the
25 mayor, Mr. Hampton Cross who is the DCRA Administrator, and Ms.
26 Patricia Montgomery who is the BLR Administrator.

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1 I have served as the Acting Zoning Administrator from
2 1994 to the present. Previously I have worked as the Deputy of
3 Zoning Administrator from 1988 to 1994. And I've also worked a
4 number of years as a zoning engineer for the -- city government in the
5 Zoning Administrator's office. Prior to that, I've worked in private
6 industry as a specialist, architectural engineer. And also as an
7 architect. And so forth and so on.

8 The educational background. I have obtained a
9 Bachelor's of Science degree in architectural engineer from
10 Tennessee State University. My major was architectural engineering.
11 My minor was -- engineering. It's a five year program. I have also
12 received a Master of City Planning at Howard University. I obtained
13 that degree in June 1980. And my major was city and regional
14 planning.

15 Since over 20,000 building permits are issued on a
16 fiscal year basis, Zoning Administrator's office is busy. We meet a lot
17 of people. We have a lot of meetings. All meetings are open to the
18 public. I never have closed our meetings.

19 The Zoning Administrator's office was established on
20 May 12, 1958, to interpret the D.C. zoning regulations and to review
21 all building permit applications and certificate of authenticity
22 applications. All applications that are deemed not to comply with the
23 D.C. zoning regulations after careful thought and research, those
24 applications are referred to the Board of Zoning Adjustment. And
25 please make no bones about it, I have written literally thousands upon
26 thousands of Board of Zoning Adjustment memorandum that have

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1 come before this Board. I am not shy about writing a Board of Zoning
2 Adjustment memorandum, but if I deem that it is necessary.
3 Sometimes it is not a very easy decision to come to the conclusion as
4 to whether a uses permit is a matter of right or whether a use would
5 be denied and referred to the Board of Zoning Adjustment.

6 The subject property, Poulton Hall, is zoned R-3
7 residential. It is an existing building. Currently there is a building
8 permit issued for alteration and repair work in the interior of the
9 building. There is no new construction on the main building on the
10 structure. However, on a separate lot there is an accessory tool shed.
11 Also there, on the application, is a fence that is being put on the
12 property.

13 Mr. Hampton Cross, Ms. Pat Montgomery, Ms. Nicole
14 Jeffers and myself, we have sat in many meetings with the
15 community. We have tried, to the best of our ability, to try to resolve
16 all issues. And on the initial meeting I stated my position on the
17 matter.

18 That I felt like the structure was located on a campus
19 plan map as a mix-use educational building. My position was that the
20 proposed child care development center was permitted as an
21 accessory use to the existing mix-use building. And at each meeting
22 that I've had, I have stated my position. And I think we've done the
23 best we could on trying to resolve each issue at the Department of
24 Consumer and Regulatory Affairs to the best of our ability.

25 The community came to a point where they did not
26 want to accept the Zoning Administrator's decision. And there was a

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1 request for the Corporation Council to review the facts pertaining to
2 Poulton Hall and the proposed use. Yet Mr. Hampton Cross, who is
3 the DCRA director, and myself met with Mr. Charles Ruff, who was
4 then the head of Corporation Council, on Wednesday, August 28,
5 1996, at 11:00 a.m. We went over all the issues involved.

6 MS. KING: What was the date again please?

7 MS. HICKS: August 28, 1996 at 11:00 a.m. And it is
8 noted in an appointment book that I keep. My appointment book is
9 open for the public and anyone else who wants to come in to discuss
10 zoning matters with me. But all the meetings on this particular issue
11 were always held, the ones that I had attended, in the director's office.

12 Again back to the meeting on August 28, 1996, with
13 the head of Corporation Council's Office. We laid everything out on
14 the table. Mr. Ruff, and I'm quoting him, indicated that he did not feel
15 like that --

16 MR. CROCKETT: Your Honor, excuse me, Madam
17 Chair. I feel at this time I've got to make an objection. We're getting
18 into heresy here. She's going to testify what Mr. Ruff said. I want an
19 objection on the record that that kind of heresy is objectionable. That
20 if Mr. Ruff had something to say, he should have been here as a
21 witness or should have put it in writing. We've heard absolutely
22 nothing from Mr. Ruff. And to have it come in as hearsay in this
23 fashion is totally improper.

24 CHAIRPERSON HINTON: The objection is noted.
25 Ms. Dwyer?

26 MS. DWYER: Madam Chair, I would just say that I

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1 don't think that heresy rules apply to preclude what Ms. Hicks is about
2 to say. She was in attendance at the meeting. We've already heard
3 from community representatives about what Mr. Cross said. And I
4 that think this is entirely appropriate for Ms. Hicks to relay her own --

5 CHAIRPERSON HINTON: Thank you. Ms. Richards,
6 I'm going to defer to your legal expertise. I think in the past we have
7 admitted heresy. Have we not?

8 MS. RICHARDS: That's right. We're not bound to
9 formal rules of evidence and we take heresy and we accept it for what
10 it's worth and rely on the contents to be accurate.

11 CHAIRPERSON HINTON: Thank you. So the
12 objection is overruled. Please continue.

13 MS. HICKS: Thank you. Mr. Ruff's opinion was that
14 no fraud had occurred. He felt like --

15 MS. BENNETT: I can't hear you. Can you speak up?

16 MS. HICKS: Okay. Mr. Ruff felt like no fraud had
17 occurred on the lot numbers situated on the building permit
18 applications. He felt like it was sloppy filing out of the permit
19 application. And Ms. Pat Montgomery and Ms. Jeffers were
20 eventually asked to have the permit application corrected. So there
21 was not any just out and out erasure.

22 One application was voided. If you go to the permit
23 application section where all the issue permits are kept in LL-35, you'll
24 see a voided out application. It is attached to the building permit
25 application that was corrected. And if you look on the back of the
26 corrected permit application, you'll see in the restrictions of the permit

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1 a signed statement by Ms. Nicole Jeffers indicating that the new
2 application submitted by Patricia Cooper for clarification on 09/05/96.
3 And this was to clarify what lot numbers corresponded with what work
4 was being done.

5 Also Mr. Ruff, in discussing the information that we
6 laid out on the table and presented to him, agreed with my decision.
7 And he asked me if there was a recourse for the community to follow if
8 they did not agree with the Zoning Administrator's decision. And I
9 said, yes. They can file an appeal with the Board of Zoning
10 Adjustment.

11 CHAIRPERSON HINTON: Does that conclude your
12 testimony?

13 MS. HICKS: Yes, that concludes my testimony at this
14 point. And I'm open for any questions.

15 CHAIRPERSON HINTON: Thanks. Are there
16 questions from Board members? Let me just start down at this end.
17 Ms. Bennett?

18 MS. BENNETT: Yes. Ms. Hicks, your assessment
19 was that Poulton Hall was a mixed-use educational building?

20 MS. HICKS: Well, if you look at the campus plan
21 map, it's designated as a mixed-use educational building. It has a
22 number of uses in the building.

23 MS. BENNETT: Okay. In the description of what is
24 entailed in mixed-use, typically on campus plans, I'm just talking in
25 general now, is it the practice to itemize each and every one of those
26 uses? Do you know what I mean? In other words, if there's a mixed-

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1 use building, must it say instruction, administration, mechanical? I
2 mean, does it usually have any itemized uses or is there some general
3 understanding of what is embraced within the --

4 MS. HICKS: Okay. From an interpretation
5 standpoint, not only I but the previous Zoning Administrator, we have
6 understood that the mixed-use/educational use category would leave
7 the door open for accessory uses to the University. It would not
8 necessarily need a special exception.

9 If this were a new construction, like they had at the
10 child care center at Trinity College. That case was referred to the
11 Board of Zoning Adjustment for new construction. But on existing
12 buildings where you had mixed-uses, it has been the practice that if
13 we have deemed the use after getting information and researching
14 what the proposed use is about. We had been approving applications
15 to introduce certain accessory uses on the campus.

16 MS. BENNETT: The reason I'm asking is not to set a
17 trap. The reason I'm asking is the Zoning Commission considers
18 mixed-use in a little bit different fashion. We consider mixed-use as
19 housing and arts and commercial office and retail and like that. So
20 that it does kind of leave the door open for a host of different kinds of
21 uses.

22 However, when you get on a campus plan, I was not
23 certain how the Zoning Administrators Office interpreted mixed-use
24 and what can go into it. Because I wouldn't know, for instance, not
25 having dealt with it to the extent you have, whether or not Poulton
26 Hall, if someone said mixed-use/educational. Does that mean part of

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1 it could be used for dormitory, part of it could be used for instruction,
2 part of it could be used for student services, part of it could be used for
3 bookstore? You know what I'm saying?

4 So, I'm not real clear what it would embrace.

5 MS. HICKS: Okay. The logic behind this particular
6 approval was that, when you have a mixed/educational use building, a
7 child care development center is considered an educational use. In
8 my opinion and in the past Zoning Administrator's opinion, it has been
9 something when introduced to an existing building, did not need a
10 special exception. Now, whether the Zoning Commission has a
11 different definition of mixed-use. This issue has never come up
12 before. This is the first time that it's ever come up in a -- area.

13 MS. BENNETT: Okay. I'm trying not to get confused.
14 Let me just go to the other question. Where we talk about on a
15 campus that is dedicated to post-secondary education and we talk
16 about a mixed-use/educational facility, the understanding or the
17 interpretation by the Zoning Administrator that a child development
18 center, which does not address directly the post-secondary
19 educational mission of the University, all be it an educational use --

20 MS. HICKS: Yes, but it serves the University. That is
21 correct the University population.

22 MS. BENNETT: I see. And so in that respect it is
23 accessory.

24 MS. HICKS: That is correct. That is the way that we
25 had been approving the child care centers on University campuses
26 and existing mixed-use buildings previously.

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1 MS. BENNETT: In an instance where we are not
2 dealing with a post-secondary educational use, or let's say a child
3 care center in an office building. Is that then considered accessory or
4 does it not necessarily have to have a kind of stand alone C of O?
5 Well, I mean, a stand alone designation as a use in and of itself. As
6 opposed to being accessory to the use of an office building whose
7 employees needs --

8 MS. HICKS: It depends upon how it's operated. If it's
9 operated by the office for the office employees, it's deemed to be an
10 accessory use to the office use because it's serving that particular
11 population in the office. If it's a private child care center that takes
12 anybody and everybody in on an open city-wide basis then, I would
13 consider that as a principle use of the building. But whether it's an
14 accessory use or a principle use, it still has to be licensed under the
15 day care center. And we would always issue a certificate of
16 occupancy posting the number of children, age group, also the
17 number of teachers, staff and other employees. And we'd make sure,
18 certify, that the facilities meet all of the building -- requirements. That
19 certificate is issued. And then the copy is then taken to the child care
20 --

21 MS. BENNETT: The license.

22 MS. HICKS: The license and purposes.

23 MS. BENNETT: Okay. Thank you.

24 MS. HICKS: You're welcome.

25 CHAIRPERSON HINTON: Ms. Reid, do you have
26 any questions?

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1 MS. REID: Yes, I do. Continuing with that train of
2 thought, the mixed-use/educational building definition, I kind of, when
3 hearing that, thought in terms of it being a child development facility
4 but also possibly for training of teachers, educational facility for the
5 University.

6 MS. HICKS: A lot of the Universities, especially when
7 you have elementary education teachers being taught, this type of
8 facility is also used as an educational training ground for the students
9 at the University.

10 MS. REID: That was my immediate thought when
11 you said mixed-use/educational. If you had said mixed-use, then
12 when you say mixed-use/educational child care facility, I thought in
13 terms of it being the type of facility that would be a training of the
14 students in education as a possibility of its use.

15 MS. KING: Is it the use that they intend?

16 MS. REID: Well, they could use it for that.

17 MS. HICKS: It could be used on any University
18 campus for that particular use.

19 MS. REID: That was my question. And the other one
20 was in reference to your letter of June 6, 1996 where you render your
21 opinion as to the use of the building. Now, in a letter in which you --
22 your determination or your ruling on a particular case, is that a matter
23 of public information? Because the problem I'm having is to hear it
24 stated that there was no knowledge of the fact that there was a letter
25 that you had written. Actually I thought it was a letter in 1995. Wait a
26 minute.

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1 MS. KING: She signed a letter written by Andrea
2 Salley on October 30, 1995.

3 MS. HICKS: This is a -- letter that I concur and agree
4 with the opinion.

5 MS. BENNETT: But the one she's looking at first is
6 June 6, and it's generated on your stationary.

7 MS. REID: 1996.

8 MS. KING: Yes but that's the year following.

9 MS. REID: I understand that. That's what I'm saying.
10 In 1995 basically you concurred with the opinion of Andrea Salley and
11 was your letter made public? In other words, how is it that they could
12 not know that that was your decision at that time? Over a year ago.

13 MS. HICKS: Now when they called my office, I was
14 not told that anyone was searching for a letter.

15 MS. REID: Well, what I'm leading to is on August
16 28th. You met first with your colleagues Pat Montgomery, Mr. Ruff --

17 MS. HICKS: The initial meeting what this issue was
18 brought up, Mr. Richard Netler was there, Ms. Wesly Byrd and some
19 other community members were in Hampton Cross's office on the
20 11th floor. That was way before August.

21 MS. REID: Was that after your decision had been
22 rendered? Why were they coming to meet with you? I thought they
23 were coming to meet with you because they objected to your decision.

24 MS. HICKS: The community has never been to room
25 333. And they, to my knowledge, had never requested a meeting with
26 me through my secretary, who is Ms. -- All meetings were requested

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1 through Hampton Cross who is the DCRA Director. And that's how I
2 found out about the issues. And the first initial meeting in Hampton
3 Cross's office was --

4 MS. REID: What was the date?

5 MS. HICKS: I don't recall the date because it's not on
6 my calendar. It's on Hampton Cross's calendar. It was an
7 appointment made with Hampton Cross.

8 MS. REID: Okay but what I'm asking is you gave a
9 date of August 28th. What was that meeting?

10 MS. HICKS: It was a meeting here at 441 4th Street
11 N.W. Hampton Cross and I came from 614 H Street N.W. about a
12 letter that was written making some allegations and -- some
13 information that they wanted an administrator's opinion on.

14 MS. REID: Okay but that was in response to your
15 having given a decision on this particular case. I'm trying to set up a
16 chronological timeline as to how things occurred. There was a letter
17 of complaint or whatever.

18 MS. KING: August 20th, the one --

19 MS. REID: Right and you all were meeting to
20 discuss. But your letter in which you rendered your decision, I'm
21 asking, had come out prior to that. That was what basically initiated
22 the meeting with Hampton Cross.

23 MS. HICKS: I don't know what initiated the meeting
24 with Hampton Cross. All I can tell you is that the first meeting was in
25 the earlier part of 1996, with Mr. Netler, Ms. Byrd and some other
26 community members. And I did tell them what my decision was of that

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1 particular case. That the use was permitted as a matter of right as an
2 accessory use.

3 MS. REID: What date was that?

4 MS. KING: It was prior to August 20th?

5 MS. HICKS: It was prior to August 20th, yes.

6 MS. KING: A day or so prior?

7 MS. HICKS: No. It was months earlier.

8 MS. KING: Months earlier?

9 MS. HICKS: Every meeting I had reaffirmed how I
10 felt.

11 MS. BENNETT: And that is stated clearly in the June
12 6th letter to Andrea Salley.

13 MS. REID: And then there is the June 6th letter in
14 which you reaffirmed your position. So, what I'm trying to ascertain,
15 Ms. Hicks, is when did they know what your decision was? When did
16 the public know what your decision was?

17 MS. HICKS: All I can tell you is that at the initial
18 meeting with Mr. Netler, I expressed my opinion on the matter. Now
19 that was, I don't have it on my calendar, but I would say approximately
20 maybe April or May, somewhere along there of 1996. And my opinion
21 never wavered at any subsequent meeting.

22 CHAIRPERSON HINTON: Okay. Do you have any
23 other questions?

24 MS. REID: Yes, one other quick one. The application
25 that we have on which it was indicated that there had been some
26 crossing out. You're saying that this application was replaced with a

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1 corrected application in which you acted on?

2 MS. HICKS: Okay, I can't see the copy.

3 MS. REID: Well, this is the one that, you know, you
4 said it was sloppy. The Corporation Council said that it was not
5 fraudulent, it was sloppy. And that application, are you saying, was
6 replaced with a corrected application that has been attached to the
7 building permit?

8 MS. HICKS: That was attached to the voided out
9 building permit application. And it's on the record in LL-35.

10 MS. REID: If that was voided, then what replaced it?

11 MS. HICKS: Okay. A new permit application
12 indicating the corrected lot number.

13 MS. REID: And you have that?

14 MS. HICKS: I did not bring a copy, but it is on file.

15 MS. REID: Okay. Can you obtain a copy of that?

16 MS. HICKS: Obtain a copy. Because the old
17 application is attached to the application for clarification.

18 MS. REID: -- understands that this was boarded out
19 and that there was another application that replaced this application
20 that would considered to be bonified.

21 MS. HICKS: That's correct, yes.

22 MS. REID: And I'd ask staff to obtain a copy of that
23 for us.

24 MS. HICKS: And that's why the note is on the back of
25 the actual building permit application indicating that a new application
26 had been submitted, and what date it had been submitted. And it was

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1 submitted for clarification purposes. And Ms. Nicole Jeffers signed the
2 application.

3 CHAIRPERSON HINTON: We're going to ask Ms.
4 Hicks to submit a copy of that for the record.

5 MS. REID: Thank you.

6 CHAIRPERSON HINTON: Ms. King, do you have
7 any questions?

8 MS. KING: Yes. Ms. Hicks, both Ms. -- and Ms. Byrd
9 have testified that on or about the 19th of August Mr. Hampton Cross
10 gave orders to his staff that no permits were to be issued until there
11 was a meeting or consultation with Charles Ruff of the Corporation
12 Council. Were you present at that meeting even though it's not on
13 your calendar?

14 MS. HICKS: Yes I was at the meeting.

15 MS. KING: And did you hear Mr. Cross --

16 MS. HICKS: It is my understanding that his order was
17 that the alteration and repair permit for the child care center on the
18 interior of the building not be issued. That was my understanding.
19 That permit was not issued until January.

20 MS. KING: I see. Okay.

21 MS. HICKS: So, he gave us instructions that if
22 anything was filed for alteration or repair, hold it until we got the
23 clearance. So that's why it was not issued until January.

24 MS. KING: Now, you're saying that you've met with
25 Charles Ruff and others on August 28th. Was it on the basis of that
26 August 28th meeting that Pat Montgomery signed -- Hampton Cross a

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1 letter on December 25th or was there further consultation for the
2 Corporation Council?

3 MS. HICKS: I do not know whether there were any
4 further consultations with the Corporation Council. I was just present
5 at one meeting on August 28, 1996, at 11:00 a.m.

6 MS. KING: And on the basis of that meeting with
7 Corporation Council, you went ahead and issued what permit?

8 MS. HICKS: The building permit for alteration and
9 repair.

10 MS. KING: The one that Mr. Cross had previously
11 said to -- to issue.

12 MS. HICKS: Said to hold if it came into the permit
13 system.

14 MS. KING: So, that was issued many months prior, I
15 gather, to the response to the ANC 2-E letters. Is that correct? ANC
16 2-E wrote a letter on the 20th of August and it was their understanding
17 that Mr. Cross had given instructions that no permits were to be
18 issued until there was a response to their inquiry from Charles Ruff,
19 which was in fact dated on the 27th of December. But in fact,
20 between the 28th of August and the 27th of December, a number of
21 permits were issued. Is that correct?

22 MS. HICKS: For exterior work.

23 MS. KING: Exterior work on -- 835 --

24 MS. HICKS: On the lots. I believe, those permits
25 were for an accessory -- But the actual work on the interior of the
26 building, that permit application was held when it came into the system

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1 and was not issued for the renovation work on the interior until
2 January.

3 MS. KING: Okay. So the permits that were issued
4 were from lots 161, 162. Is that correct?

5 MS. HICKS: I have to find the permit application.
6 Okay the building permit numbered B-406311 was issued on January
7 31, 1997 for 1421 37th St. N.W.

8 MS. KING: I'm asking about the permits that
9 apparently were issued sometime between August 20th and the 27th
10 of December. What permits were those?

11 MS. HICKS: Well, for lots 161 and for 162.

12 MS. KING: No. I mean any permits that you issued
13 between the 20th of August and that one that you referred to in
14 January. From the testimony, I gathered that there were a number of
15 permits that were issued. Is that correct? During that autumn/early
16 winter period?

17 MS. HICKS: I still have a copy of two permit
18 applications and let me see --

19 MS. BENNETT: Those are the permits on which the
20 Intervener claimed they were relying.

21 CHAIRPERSON HINTON: And this is very interesting
22 because -- Well, I guess I shouldn't interfere. I'll let Ms. Hicks answer
23 the question.

24 MS. HICKS: I'm trying to see if I find copies of the six
25 permits that were issued. Those are the applications. I need the
26 exact permits that were issued.

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1 CHAIRPERSON HINTON: I am looking for the
2 permanent applications that we have here and I found two. One for lot
3 161, one for lot 162. Both of them describe the work as a fence. One
4 is a fence, one is a fence and a shed. And under existing uses they
5 both say, mixed classroom office and print shop. And under proposed
6 uses they both say the same as above. So these building permit
7 applications don't reference the child development center at all.

8 MS. RICHARDS: What's the number on that permit?

9 MS. KING: They are not for the Poulton Hall --

10 CHAIRPERSON HINTON: Yet there are different
11 lots.

12 MS. HICKS: They are the two smaller adjacent lots.

13 MS. KING: Which are a part of the campus plan or
14 described as what kind of use?

15 MS. HICKS: Well, the map is covered and labeled as
16 mixed/educational use. So the playground is on --

17 MS. KING: So, these are not the two lots that were
18 for buildings were burned down and are designated for building two
19 townhouses?

20 MS. HICKS: For faculty and student housing.

21 MS. KING: But it's not the same lot. This is not 162.
22 And Poulton Hall which she says is -- But my question remains from
23 earlier testimony we were told that lots 161 and 162 were designated
24 for the development of two townhouses for faculty or student use
25 which is not mixed/educational purposes.

26 MS. HICKS: That's on an old Board of Zoning

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1 Adjustment case. And the structures were never built. And, as far as
2 I'm concerned, if you look at that page of the filing order if you don't
3 build or file for a certificate of occupancy within six months, the order
4 is no longer valid.

5 CHAIRPERSON HINTON: What does the master
6 plan say about those lots - 161 and 162?

7 MS. HICKS: I have relied on the campus plan map
8 and designated its mixed/educational use.

9 CHAIRPERSON HINTON: You didn't refer to the text
10 to see if there was anything more specific?

11 MS. HICKS: I could not locate anything any more
12 specific then we had on our records.

13 I think it's 835. But let me check the record to be
14 sure.

15 CHAIRPERSON HINTON: We were on -- Ms. King, I
16 think, was asking questions. We'll get back to that after your
17 questions.

18 MS. KING: No, but it is germane to my question. I
19 adopt that as my question. Whatever you say, I say. Ask your
20 question again and it will be my question.

21 MS. HICKS: Lot 835 is posted on Building Permit
22 No. B-401311.

23 MS. KING: Dated?

24 MS. HICKS: January 31, 1997.

25 CHAIRPERSON HINTON: That's the building permit
26 for the interior renovation.

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1 MS. KING: Of Poulton Hall.

2 MS. HICKS: Yes, renovations of Poulton Hall.

3 MS. KING: And so the permits that you issued on the
4 28th of August for lots 161 and 162 were for exterior work on those
5 two vacant lots.

6 MS. HICKS: For a fence and an accessory
7 structure -- a shed -- which are permitted in any zone.

8 MS. REID: It would be August what?

9 MS. KING: August 28th, the same day as the
10 meeting with Charles Ruff.

11 Now is Lot 161 part of the campus plan?

12 Is Poulton Hall this large building at the corner of
13 T Street in Square 1248, the large blue building?

14 MS. HICKS: It is right at the corner of 37th and P
15 Street, the big blue building.

16 MS. KING: The big blue building?

17 CHAIRPERSON HINTON: You are going to have to
18 speak so that it's on the record. Our reporter is having trouble --

19 MS. KING: We're looking at this document.

20 MS. HICKS: I also have to reference back to the
21 builder's plat, which gives me the dedicated streets, which is P Street
22 and 37th Street. And then try to look at the orientation as it relates to
23 the map.

24 MS. KING: But that large blue structure in that block I
25 presume is Poulton Hall, at the corner of 37th and P Streets, on the
26 properties east of 37th Street, Appendix C.

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1 I'm looking at a document called Properties East of
2 37th Street, Existing in Future Utilization Ownership, Appendix C of
3 Exhibit 13.

4 CHAIRPERSON HINTON: I think it's the appellant's
5 exhibit. Is that from the master plan or the campus plan?

6 MS. KING: Is this your exhibit?

7 MR. CROCKETT: Yes.

8 MS. KING: It's the appellant's exhibit.

9 MS. HICKS: From the campus plan?

10 CHAIRPERSON HINTON: Mr. Crockett.

11 MS. KING: Exhibit 13?

12 MR. CROCKETT: Exhibit 13 you're looking at is
13 pages 63 and 64 of the campus plan.

14 MS. KING: Okay, 63 is up, the area in question; that
15 large structure that is colored blue at the corner of P and 37th. Is that
16 Poulton Hall?

17 MR. CROCKETT: Are you asking me, Ms. King?

18 MS. KING: I'm asking anybody who can answer me.
19 Is that Poulton Hall?

20 MR. CROCKETT: Yes, that's Poulton Hall.

21 MS. KING: And is this yellow bit over here -- Is that
22 Lots 161 and 162?

23 MR. CROCKETT: Lots 161 and 162 --

24 MS. KING: In yellow to the --

25 MR. CROCKETT: In yellow on existing and in orange
26 on future. They're existing on the left-hand side --

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1 MS. KING: Oh, I see.

2 MR. CROCKETT: -- and future on the right-hand
3 side.

4 MS. KING: Okay.

5 MR. CROCKETT: So on the existing side, what is it --

6 MS. KING: On the existing side those -- Oh, I see
7 what we've got. Oh, interesting.

8 Okay. This is existing, and the blue is Poulton Hall.
9 Then there's this white area which I guess is no man's land. And what
10 is on this map as 3610, 3612, is Lots 161 and 162, is that correct?

11 MR. CROCKETT: That's correct.

12 MS. KING: Okay. Under existing that is student,
13 faculty, staff residences.

14 Under future -- and I gather this has to do with its
15 faculty, staff, graduate student residences -- So apparently nowhere in
16 the campus plan are Lots 161 and 162, mixed used institutional,
17 educational support or anything of that ilk. Is that correct?

18 MS. HICKS: There are two maps of reference. Now
19 the map that I made the determination from was this map here which
20 shows the pink. It's labeled mixed use, main campus -- educational
21 support.

22 MS. KING: Can you show me which --

23 MS. HICKS: Right here. And I think it's 161.

24 MS. KING: This is capture land use. And is that an
25 official part of the campus plan?

26 MS. HICKS: It is my understanding that these are

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1 pages from the official campus plan.

2 MS. KING: This white piece here would seem to be
3 the same as 3610, 3612, which is I understand Lots 161 and 162.
4 And therefore on this map it appears in white.

5 MS. HICKS: This is 161 and 162 here.

6 MS. KING: And over here in future it shows the
7 faculty, staff, graduate student residences. Is that correct?

8 And up here the existing shows student faculty, staff
9 residences. Future shows faculty, staff, graduate student residences.

10 MS. HICKS: This is showing -- It's hard to tell
11 whether all of this -- Let me see what the width of this is. It's 25.5 --

12 MS. KING: No, here it is right here.

13 MS. HICKS: I'm trying to see how far it goes over to
14 the alley. So it goes from this point to the alley all the way back over.

15 MS. KING: This map shows that this specific area is
16 161 and 162.

17 MS. HICKS: That's right. Right here, the edge of the
18 alley. And it's faculty --

19 Let me take a look at the shading, because the
20 shading --

21 REPORTER: Ladies, I'm sorry, but you need to have
22 a seat and speak into your microphones so that we can pick you up.

23 MS. KING: Thank you, Ms. Hicks. It's quite clear
24 from the maps that we were looking at just now that Lots 161 and 162
25 are designated both in the existing and the future campus plan for
26 student faculty, staff residences.

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1 MS. HICKS: Okay.

2 MS. KING: I have no questions.

3 CHAIRPERSON HINTON: Thank you. Ms. Richards,
4 questions.

5 MS. RICHARDS: One questions.

6 You've testified that as of August 28th 1996 the
7 Corporation Counsel had weighed in and said that your analysis was
8 correct. So I guess at that point -- was there -- and the community's
9 being apprised. And if the Corporation Council had sort of blessed
10 your matter of right analysis, why was there a delay until January in
11 issuing the Poulton Hall renovation permit?

12 MS. HICKS: I don't know. Only Hampton Cross and
13 Mr. Ruff could -- Because the correspondence was handled -- Okay,
14 there was a letter requesting -- and also a verbal request from
15 Hampton Cross to get a Corporation Council opinion. There was also
16 a letter to Mr. Ruff of which did not really obligate me to reply. So it's
17 up to Mr. Cross and Mr. Ruff to reply. So I don't know.

18 MS. RICHARDS: Well at the conclusion of the
19 August 28th meeting when Mr. Ruff essentially said, well, you're right,
20 then were you instructed to nevertheless not to issue a building permit
21 for Poulton Hall?

22 MS. HICKS: No, not at the meeting, no, with Mr. Ruff
23 and Hampton Cross.

24 MS. RICHARDS: Why was one not issue d
25 then since? Apparently the determination had been made at a pretty
26 high level that it was okay to proceed.

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1 MS. HICKS: I don't know. I just could not answer that
2 for you.

3 MS. RICHARDS: As far as you know your analysis
4 was correct, and that was the only responsibility or authority to act on
5 the matter that you had.

6 MS. HICKS: That is correct, because the
7 correspondence was written to Mr. Ruff and also to Mr. Cross.

8 MS. RICHARDS: Did you have further interaction
9 with anybody involved in this case after that on these issues, until
10 January when the permit was issued?

11 MS. HICKS: I can't recall at this point.

12 MS. RICHARDS: Well, thank you.

13 CHAIRPERSON HINTON: I have a question, Ms.
14 Hicks.

15 Under Zoning Regulation, Section 210 -- under
16 210.4 -- there's a requirement that all activity on a campus plan, either
17 present or proposed -- on activity on a college or university campus,
18 either present or proposed, be shown on the campus plan.

19 Are you familiar with that regulation?

20 MS. HICKS: Yes, I am.

21 CHAIRPERSON HINTON: 210.4(d).

22 MS. HICKS: Yes.

23 CHAIRPERSON HINTON: When you're reviewing
24 permits for a child development center on a college or university
25 campus, do you look into the campus plan to see if that description of
26 activity has been anticipated by the campus plan?

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1 MS. HICKS: In the majority of cases, yes.

2 CHAIRPERSON HINTON: So usually you would.

3 Are you saying that should be done?

4 MS. HICKS: As a practice, yes, that should be done.

5 And I was aware, Lot 161 and 162, that there had been
6 some -- adjustment action, and it was never -- the structures were
7 never built, so the lots are vacant.

8 CHAIRPERSON HINTON: I understand that on this
9 particular lot. But my question is sort of broader. And that is, when
10 you're reviewing a new use at a university, whether it's in a new
11 building or existing building, do you look at the campus plan to see if
12 that use is anticipated or included in part of the campus plan?

13 MS. HICKS: As a standard practice, yes.

14 CHAIRPERSON HINTON: And was it done in this
15 case?

16 MS. HICKS: In this case I relied upon the Board
17 of Zoning Adjustment order, and also the campus plan maps. And I
18 don't recall whether I went through all of the campus plan documents.

19 CHAIRPERSON HINTON: Now the BZA final order
20 approved the use of Lots 161 and 162 for residential use, did they
21 not?

22 MS. HICKS: Yes, it did.

23 CHAIRPERSON HINTON: So how did you take that
24 approval and apply it to accessory use of a child development center?

25 MS. HICKS: On the two vacant lots which is 161 and
26 162, the Board of Zoning Adjustment's approval had expired. They're

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1 vacant lots. Under the zoning regulations you're allowed an
2 accessory detached structure on a vacant lot, so you're allowed to
3 erect a fence.

4 CHAIRPERSON HINTON: So your review of the
5 fence and the shed on Lots 161 and 162 was completely independent
6 of the child development center. There was no connection at all.

7 MS. HICKS: I had to take into consideration
8 everything that was involved on all three lots.

9 CHAIRPERSON HINTON: So there is a connection.

10 MS. HICKS: There is a connection, and --

11 CHAIRPERSON HINTON: And you approved the use
12 of Lots 161 and 162 for the use of the child development center as the
13 outdoor play area.

14 MS. HICKS: Yes, because under Section 201 a
15 playground is permitted; in any R-1 zone. Starting in the R-zone
16 you're allowed to have a play area. It's not a prohibited use in any
17 residential zone, whether it's accessory to a play area or any other
18 type of facility.

19 CHAIRPERSON HINTON: And I guess the question
20 is, is it an allowed use on lots that are designated as residential in a
21 campus plan.

22 MS. HICKS: A playground, yes -- would be permitted.

23 CHAIRPERSON HINTON: In an designation of
24 faculty, staff and graduate student residences.

25 MS. HICKS: In my opinion if the lot is still vacant,
26 yes.

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1 CHAIRPERSON HINTON: Okay.

2 MS. HICKS: If you use it in an interim use, this play
3 area.

4 MS. KING: The copies of permits filed by Wilkes Artis
5 are the defective ones where there's been scratching out and so forth,
6 and indicates that in Lot 162 existing use or uses of the building and
7 properties, classrooms and offices', print shop. And that the proposed
8 use is child care center, classrooms and offices.

9 I presume that when you supplied us with your final
10 permit which has corrected with no scratchings out and so forth, with
11 that misinformation will also be corrected on that final permit that was
12 issued on --

13 MS. HICKS: On January 1997.

14 MS. KING: No. Well, I'm not sure.

15 Starting date of work, September '96. It's the permit
16 from Lot 162. It says the existing use is classrooms, offices and print
17 shop; and the proposed use is child care center, classrooms and
18 offices, which is clearly not the case. So I presume that that's one of
19 the permit applications that Mr. Ruff considered to be not fraudulent,
20 but sloppy and that that was replaced.

21 MS. HICKS: Now the building permit that I'm familiar
22 with that we did correct was the one that was issued in January. But
23 what I can do, I can do a complete search of the files.

24 MS. KING: Okay, here's another permit for 162,
25 which says, existing use, mixed classrooms and office print shop;
26 proposed use same as above.

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1 MS. HICKS: Yes.

2 MS. KING: And here's 161; existing use, mixed
3 classrooms, office and print shop; proposed use, same as above.

4 So presumably those have all been corrected. These
5 are in fact the defective permits, and the permits that you are going to
6 provide to us are in fact the corrected ones.

7 MS. HICKS: I would have to check and see what's on
8 file. Now the permits that I'm familiar with that was corrected was the
9 permit application --

10 MS. KING: For 835?

11 MS. HICKS: It was issued in January '97.

12 MS. KING: That was for 835, for Poulton Hall.

13 No, what I'm concerned about is the question of whether the
14 existing use --

15 MS. HICKS: Whether the other lies were corrected.

16 MS. KING: -- being inaccurate on the applications for
17 161 and 162.

18 MS. HICKS: What I can do is I can go down to the
19 LL-35 an request all copies, and see whether the permits were
20 revised. Also there is a procedure where if a wrong lot and square
21 number is typed in or put on, you can come back and file for revisions.
22 I can do a thorough research of the matter.

23 MS. KING: Well there seems to be one sloppy copy
24 and one neat copy. But in all copies the existing use seems to be
25 mixed educational use, where as far as I can tell, it's an empty lot that
26 was designated as residential.

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1 MS. BENNETT: Say that again, Ms. King.

2 CHAIRPERSON HINTON: Oh, that's true.

3 MS. KING: In the Wilkes Artis filing -- I'm in
4 Section E, a whole bunch of permits.

5 MS. BENNETT: Okay.

6 MS. KING: Okay? And you will see that in all of
7 them, on the first page of the permit under existing use or uses of
8 building or property, classrooms, offices and print shop.

9 CHAIRPERSON HINTON: Even on the ones where
10 -- This one in particular is for a Lot 162 which is not the lot that
11 Poulton Hall is located on, and it still says classroom, office and print
12 shop.

13 MS. KING: And the proposed use is the same as --

14 MS. HICKS: Above.

15 MS. KING: Above.

16 CHAIRPERSON HINTON: Or the proposed use is
17 the child care center on Lot 162 in this case.

18 MS. KING: So it's very confusing.

19 Here's 161, mixed classrooms, offices, print shop.

20 CHAIRPERSON HINTON: Same as No. 13.

21 MS. KING: And proposed use is the same as above.

22 CHAIRPERSON HINTON: So Ms. Hicks will provide
23 all of those copies to the file, on the corrected and updated permit
24 applications.

25 CHAIRPERSON HINTON: -- written report. If they
26 have not been corrected there's always an opportunity to be -- if it's

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1 necessary to request a revision to an existing permit and correct lot
2 numbers. But I will research and find out.

3 CHAIRPERSON HINTON: But it goes pretty far
4 beyond lot numbers.

5 MS. HICKS: I will research and find out what's going
6 on.

7 MS. BENNETT: Well, it is far beyond just the lot
8 numbers. I mean the accuracy of the stated use, both existing and
9 intended, is at the heart of what is the discrepancy or the several
10 discrepancies we're finding here.

11 MS. KING: And to the heart of the basic issues as to
12 whether it's a zone variance or not.

13 CHAIRPERSON HINTON: Yes, absolutely.
14 Are there any other questions from the Board of
15 Ms. Hicks?

16 MS. RICHARDS: I have none.

17 CHAIRPERSON HINTON: Appellants have
18 cross-examination of Ms. Hicks?

19 Before you start that, we've just gone past 6:00, so we
20 need to assess our time. I'm assuming cross-examination will go
21 very quickly. And then we have the interveners case.

22 Ms. Dwyer, how long do you anticipate? So with any
23 luck we'll be out of here until 7:00. Everybody good until then.

24 Let's finish cross of Ms. Hicks.

25 MR. CROCKETT: While we're on the administrative
26 end of things, Madam Chairman, we had a couple of interveners here

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1 today who were prepared to give their testimony, but they're willing to
2 submit their letters in lieu of testifying, if that was okay with the Board,
3 so that they wouldn't have to stay until after this was all over.

4 Well, I'm informed that some of the interveners who
5 are later in the procedure here would like to submit their statements in
6 writing so that they could leave, and not have to give them orally.

7 CHAIRPERSON HINTON: Well, interveners need to
8 be recognized at the beginning of the hearing, because they have
9 rights to cross-examine and things like that; and interveners need to
10 show why they have a right to be a intervener.

11 MS. RICHARDS: Do you mean persons in support of
12 your case?

13 MS. ZARTMAN: Do you mean persons in support of
14 your case?

15 CHAIRPERSON HINTON: There is no provision for
16 persons in support of the appellant's case.

17 MS. ZARTMAN: These are community organizations
18 that wish to have their groups affiliated with the GRA efforts, and --

19 MS. RICHARDS: Well, persons seeking party status,
20 okay.

21 MS. ZARTMAN: They can be interveners allowed
22 with the GRA case?

23 CHAIRPERSON HINTON: I think it's too late to
24 request to be an intervener.

25 MS. RICHARDS: We were using a wrong term.
26 There were party status, and we don't necessarily foreclose people

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1 from being granted party status if they don't speak up at first.

2 Why don't you hear from them individually?

3 CHAIRPERSON HINTON: Is there party status an
4 appeal? I don't think there is.

5 MS. RICHARDS: They want to like join the
6 appellant's case. They want to join.

7 MS. ZARTMAN: We sort of went to school on the
8 Papa John's case, and I think we learned then that the party status
9 was the wrong term, but I think organizations sought to be interveners
10 and support, so that they're rights are protected without being totally
11 dependent on the actions of GRA. These are other community
12 organizations.

13 CHAIRPERSON HINTON: And see that's different in
14 an application. In an application there are persons for parties;
15 persons and parties. In an appeal there is the appellant and then
16 there are interveners, and interveners have to have a very sure
17 interest in the case.

18 For instance, the owner of the property is always
19 granted intervener status. Other people who want to be interveners
20 have to show why they need to be interveners in the case. They can't
21 just be groups who are in support of your position.

22 I mean, if you remember in the very beginning of the
23 hearing the first thing that GRA had to do was show how GRA
24 specifically was agreed by this decision. And anyone else who would
25 want to be involved in this case would also have to meet that burden
26 of showing why they are specifically agreed.

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1 MS. ZARTMAN: In some cases these are community
2 organizations that are not physically located within the bounds of
3 historic Georgetown, which are the membership limitations of the
4 alliance.

5 CHAIRPERSON HINTON: So they're probably not
6 specifically agreed by this decision.

7 MS. ZARTMAN: They are even closer to some of the
8 properties involved in the alliances.

9 MS. RICHARDS: I guess whether you want to do it
10 now or later it doesn't matter, but I think you need an inquiry. I think
11 you need to make a decision to exclude people based on a better
12 evidentiary basis.

13 CHAIRPERSON HINTON: Mr. Lyons, what's your
14 recollection on the burden to meet to be an intervener?

15 MR. LYONS: You've got to have a specific interest in
16 the outcome of the Board's decision. There is no provision for
17 persons in support or opposition; you have to have a direct interest.

18 MS. ZARTMAN: Well certainly any decision
19 that allows the university to use its property without coming for BZA
20 approval would affect all of the communities that surround the
21 campus, and it was in the interest of protecting that standing and that
22 precedent -- I believe the Citizens Association of Georgetown was
23 allowed to be an intervener in support in the Papa John's case,
24 because I think it had a far less direct impact on Cagman, what
25 happens in Foxhall, and what happens in Berleath, and what happens
26 in the other communities that surround the university.

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1 And they are specifically by the membership criteria of
2 GRA, prohibited from being members of GRA.

3 MS. RICHARDS: -- geographic strangers to the area,
4 then they could not assert kind of a general citizens interest,
5 representative of citizens interest in the outcome of the case for it's
6 presidential value. But if they're closer --

7 MS. ZARTMAN: The abutting neighborhoods or the
8 neighborhoods that abut the campus itself.

9 MS. RICHARDS: It's hard to say without hearing from
10 the actual persons who want to come up.

11 MS. ZARTMAN: If you would leave the record open
12 for them to perfect their arguments as to why this would be important.
13 Unfortunately the clock is --

14 CHAIRPERSON HINTON: The problem with that is
15 then there's no opportunity for cross-examination. But can we just
16 give that some thought and sort of a make a decision at the end. I'm
17 assuming they have left by now, or are they still here?

18 MS. ZARTMAN: Three have. Could their letters in
19 support be made part of the moving papers of GRA simply as an
20 indication of the broader interest in the matter.

21 MS. RICHARDS: That's kind of an -- with amicus
22 filing. You take it for the weight of its worth.

23 CHAIRPERSON HINTON: I would agree to that if
24 Ms. Dwyer has no objection.

25 MS. DWYER: No objection.

26 CHAIRPERSON HINTON: Very good.

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1 Mr. Lyons was still try to look and see what the rules
2 were.

3 MR. LYONS: If they Board wants a definition of a
4 party -- In an appeal we go down through the appellant and others, the
5 lessee, operator, the ANC. But fifth, any other person who is
6 permitted by the
7 Board to intervene in accordance with 3315.12 of this chapter;
8 3315.12 reads, "At the time of the hearing on the appeal the Board
9 may in its discretion for good cause shown, permit persons who have
10 a specific right or interest in that will be affected by action on the
11 appeal to intervene in the appeal for such general or limited purpose
12 as the Board may specify."

13 MS. BENNETT: Now that ought to clear it all up.

14 CHAIRPERSON HINTON: Yes, Ms. Dwyer?

15 MS. DWYER: Madam Chair, there have been several
16 court cases in general for intervention. In these type of proceedings
17 it's a standing requirement for someone who has a very specific injury,
18 not the generalized concerns of the community. So I think in this case
19 these letters, they would not qualify as intervener status, but again we
20 have no objection to them going in the record simply as evidence of
21 community sentiment on the issue.

22 MS. BENNETT: And support the appellant's case, but
23 not as interveners.

24 MS. DWYER: Correct.

25 MS. BENNETT: Very good, I agree. Thank you.

26 MR. CROCKETT: Thank you.

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1 Ms. Hicks, first of all I wanted to attempt to clarify
2 something about the meetings that you recalled.

3 I would inform you that Mr. Nettler has never been
4 associated with this particular problem. So if you met with Mr. Nettler
5 it wasn't on this problem.

6 My associates inform me that Mr. Nettler was involved
7 in the Papa John's case, and that there were meetings involving that
8 back about the time of May that you were talking about. An it was the
9 same cast of characters that were here today, but it was on another
10 case.

11 Could it be that because you remember Mr. Nettler
12 that that was the Papa John's case and not this one?

13 MS. HICKS: Anything is possible because I attend so
14 many meetings on a daily basis.

15 MR. CROCKETT: With respect to your meeting with
16 Mr. Ruff, I understood you to say that you went through the problems
17 with the applications, and the crossing out and all of that sort of thing.
18 Was that the primary question that you were raising with Mr. Ruff?

19 MS. HICKS: No, there were meetings to discuss all
20 the issues involved in the letter, and the main issue was the use; use
21 of Poulton Hall as a child care center.

22 MS. KING: The August 20th letter?

23 MS. HICKS: The discussion was about the use,
24 along with any other matters that were in the letter.

25 : But the letter is Ms. Byrd's letter. You're referring to
26 Ms. Byrd's letter, is that correct?

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1 MS. HICKS: Yes, which requested Corporation
2 Council opinion.

3 MS. KING: Thank you. No, I just want to clarify that.

4 MR. CROCKETT: Now was it your understanding in
5 this meeting with Mr. Ruff that he gave you an opinion with respect to
6 whether or not BZA approval would be required for this particular child
7 care center?

8 MS. HICKS: He did not feel that Board Zoning
9 Adjustment approval was required.

10 MR. CROCKETT: Now you say he did not feel. What
11 did he say?

12 MS. HICKS: He said that he -- Let me get the
13 phrasing correct.

14 His opinion was that the use was permitted as an
15 accessory use to Poulton Hall, and it did not require Board Zoning
16 Adjustment approval. And if the community did not agree with the
17 opinion at this point, he asked me what was the recourse.

18 I told him the recourse was to apply for an appeal of
19 my decision for the Board of Zoning Adjustment.

20 MR. CROCKETT: So basically he was saying that
21 this is an issue that should be decided by the Board of Zoning Appeals
22 and if necessary the Court of Appeals, on an appeal that the
23 community would take.

24 MS. HICKS: If the community did not agree with my
25 decision.

26 MR. CROCKETT: Okay, fair enough.

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1 Ms. Hicks, I want to try and clarify something that I
2 didn't understand with respect to how you define an educational
3 use -- mixed educational use at Poulton Hall.

4 Did that have anything to do with the fact that
5 teaching 3 to 6 year olds is an educational use similar to teaching 18
6 to 22 year olds, or was it something else?

7 MS. HICKS: No matter what level you're teaching at
8 it's an educational use.

9 MR. CROCKETT: So in your view you don't draw any
10 distinction between teaching college students or toddlers? That's all
11 an educational use.

12 MS. HICKS: I would deem it to be an educational
13 use, yes.

14 MR. CROCKETT: Now, there is another concept of
15 accessory use. For instance if they were going to change the print
16 shop in Poulton Hall let's say into a classroom, would that be an
17 accessory use?

18 MS. HICKS: Yes.

19 MR. CROCKETT: If they were going to change the
20 print shop to a power plant, would that be an accessory use?

21 MS. HICKS: An power plant would be a principal use.

22 MR. CROCKETT: Would be a principal use?

23 MS. HICKS: Yes.

24 MR. CROCKETT: As opposed to an accessory use,
25 university use?

26 MS. HICKS: That is correct.

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1 MR. CROCKETT: Can you give me any other
2 examples of what kind of a use on a university campus would be a
3 principal use and not an accessory educational use.

4 MS. HICKS: Not at hand, no.

5 MR. CROCKETT: Now, we've discussed Lots 161
6 and 162, and I think everybody now understands that those two
7 vacant lots appear on the latest version of the campus plan as being
8 for faculty, staff, graduate student residents.

9 Now looking at page 63 of the campus plan, which is a
10 colored chart of showing existing uses on the one side and future uses
11 on the other side, I believe Lots 161 and 162 are denominated by that
12 address on P Street, which is 3610 and 3612.

13 Does that appear to be the case to you?

14 MS. HICKS: Yes.

15 MR. CROCKETT: And they are located behind
16 Poulton Hall, which is located on the corner of P and 37th, right?

17 MS. HICKS: Yes.

18 MR. CROCKETT: Now Poulton Hall is colored in
19 blue, so it's shown as institutional educational support, correct? And
20 3610 and 3612 P Street are colored in yellow, which is an approved
21 used of student faculty, staff residents, correct?

22 MS. HICKS: Yes, on Appendix C, yes.

23 MR. CROCKETT: Right on the existing.

24 Now on the future Poulton Hall remains the same and
25 the color changes for 3610 and 3612 -- and now it's called faculty,
26 staff, graduate student residents, correct?

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1 MS. HICKS: Yes, on Appendix C.

2 MR. CROCKETT: Right.

3 Now when you receive an application for a building
4 permit, and you have this use, faculty, staff, graduate student
5 residents, suppose that when the application came in there was no
6 reference made to Poulton Hall, but that it suggested that it was
7 applying to construct a child care center on those two lots which are
8 residential use.

9 Would that have made nay difference in your decision
10 as to whether or not the university was required to get BZA approval?

11 MS. HICKS: I have previously stated that new
12 construction of a child care development center on any campus would
13 require a special exception. And I cited one case which was Trinity
14 College, which I refer for a special exception, and there was new
15 construction.

16 MR. CROCKETT: Now you make the decision
17 between construction and use. Now why is there a distinction
18 between constructing a child care center and changing something like
19 a print shop in a vacant lot into a child care center? In other words,
20 changing the use rather than new construction.

21 MS. HICKS: If you are working within the confines of
22 an existing building it's considered an alteration and repair; it is not
23 considered new construction. And we have t look at the proposed use
24 for the alteration and repair.

25 On the vacant lots when we think of a structure we
26 have to think of whether it's an accessory structure or a principal

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1 structure, and then we also look at the use of the structure.

2 MR. CROCKETT: Okay, well on the --

3 CHAIRPERSON HINTON: Mr. Crockett, could you go
4 back to the table.

5 MR. CROCKETT: On the two vacant lots, what were
6 the structures that were to be constructed there?

7 MS. HICKS: A detached accessory structure and a
8 fence.

9 MR. CROCKETT: But those were to be a playground
10 and storage facilities, and waste facilities for a child care center, is that
11 correct?

12 MS. HICKS: I have no knowledge of a waste facility.
13 I have knowledge of -- I recall a play area. There may have been
14 something issued for a dumpster pad which would be considered
15 accessory. It's not a principal use.

16 MR. CROCKETT: But the use that the property was
17 going to be put to was going to be used as a playground facility as
18 part of a child development center, isn't that correct?

19 MS. HICKS: Yes.

20 MR. CROCKETT: And that was new construction on
21 those lots, was it not?

22 MS. HICKS: It was new construction of an accessory
23 structure.

24 MR. CROCKETT: Accessory to what, the child care
25 facility?

26 MS. HICKS: Accessory to -- Yes, to the child care

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1 center.

2 MR. CROCKETT: Now, I'd like to ask you, you are
3 familiar with the definition in the zoning regulations of accessory use.
4 I will read that for the record because it's only one sentence.

5 "A use customarily incidental and subordinate to the
6 principal use, and located on the same lot with the principal use."

7 Now did you take into consideration that definition that
8 an accessory use must be on the same lot?

9 MS. HICKS: I took into consideration the definition
10 that an accessory structure would not necessarily -- does not have to
11 be on the same lot with the principal structure.

12 MR. CROCKETT: Okay. So you were just looking at
13 construction, an accessory -- You can construct something accessory
14 on a lot. But you weren't looking at use.

15 MS. HICKS: I was looking at use, and I was also
16 looking at the type of structure, which is an accessory use. An
17 accessory structure under -- There have been many building permits
18 issued where, let's take for example, a single family dwelling. You
19 have two lots. You can have your principal structure on one lot, and
20 you can build a detached garage or tool shed -- any type of accessory
21 structure with an accessory use on another lot, and not have to
22 combine the lots. They do not always necessarily have to be on the
23 same lot.

24 MR. CROCKETT: But isn't that kind of thing an
25 exception that is in the zoning regulations for lots adjacent to vacant
26 lots for building garages and that sort of thing. Isn't there a specific

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1 provision in the zoning regulation for those?

2 MS. HICKS: Okay, what section are you referencing?

3 MR. CROCKETT: That's Section 203, Accessory
4 Buildings.

5 CHAIRPERSON HINTON: Mr. Crockett, isn't there a
6 definition for accessory building?

7 MR. CROCKETT: Yes. That's Section 203, in which
8 in the R-1 district they allow a private garage, private stable. Other
9 buildings or structures customarily incidental to use is permitted in R-1
10 districts.

11 CHAIRPERSON HINTON: No, in that definition
12 section there's a definition though. It's under Building Common
13 Accessory, and it also requires the building to be on the same lot.

14 MR. CROCKETT: At any rate, I just wanted to make
15 clear, Ms. Hicks, that obviously in this case the incidental use that the
16 university apparently was urging was to be conducted on three
17 separate lots, and I just don't understand when they come in and they
18 say, we're going to put a child care center on three lots -- over three
19 lots -- and make a new center, including a playground -- two
20 playgrounds -- and an integrated unit, that that could be considered as
21 an accessory use as defined in the regulations because that definition
22 says that such an accessory use by definition has to be on this same
23 lot.

24 CHAIRPERSON HINTON: May I ask a question in
25 the middle of your cross-examination?

26 MR. CROCKETT: Please.

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1 CHAIRPERSON HINTON: Because I'm the chair,
2 right?

3 The plans that we have in the record don't seem to
4 indicate the different lots, and I was wondering if Ms. Hicks recalls
5 whether the plans that were submitted for these building permits in
6 fact showed the difference between Lot 835, 161 and 162.

7 Was it clear on the plans that there were three
8 separate lots?

9 MS. HICKS: It was clear to me that there were three
10 separate lots involved. There's a miscellaneous provision under
11 Chapter 25, which we often use on a day-to-day basis. There is
12 provision which would allow a detached accessory structure to be on
13 its own lot. Let me see if I can find the reference.

14 CHAIRPERSON HINTON: I think we need to move
15 on.

16 MR. CROCKETT: All right, I'll try and do that.

17 CHAIRPERSON HINTON: If you find that, Ms. Hicks
18 you could submit that for the record.

19 MS. HICKS: Okay, that will be fine.

20 MS. BENNETT: She's saying that there's a regulation
21 that she uses regularly in Chapter 25, which allows a detached
22 accessory structure to be on its own lot.

23 MS. HICKS: Let me correct that by saying there is
24 one in the zoning regulations. I have to locate it. But I looked under
25 the miscellaneous provisions. I can't find it. But it's there somewhere
26 because we have issued many many permits in that manner.

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1 CHAIRPERSON HINTON: Okay. And we're going to
2 allow that to come in.

3 MS. HICKS: Yes. I'll try to locate that for you.

4 MR. CROCKETT: I have not further questions.

5 CHAIRPERSON HINTON: Thank you, Mr. Crockett.

6 Ms. Dwyer, do you have any questions?

7 MS. DWYER: We have no questions.

8 CHAIRPERSON HINTON: No. Very good.

9 I didn't expect that.

10 The owner -- this would be the intervener -- the
11 owner, lessee, or operator of the property involved.

12 Why don't we take a five minute break before we
13 start.

14 (Whereupon, the foregoing matter went off the record
15 at 6:33 p.m and went back on the record at 6:50 p.m.)

16 CHAIRPERSON HINTON: Okay, we're back. That
17 was a long five minutes.

18 MS. SALLEY: Good evening Madam Chair and
19 members of the Board. For the record, my name, again, is Andrea
20 Salley, and I'm the assistant university counsel at Georgetown. Here
21 with me is Maureen Dwyer and Steve Sher of Wilkes, Artis, Hedrick &
22 Lane. Steve Sher is our land planner.

23 Also here today with me in the audience is Kathleen
24 Santora, the secretary of the university, Linda Greenan, the special
25 assistant to the president for Community Relations, a number of other
26 faculty and administrators at Georgetown, and the new director of the

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1 child care center, Marilyn Krone.

2 I thought I'd begin by giving the Board a little
3 background and a brief background about some of the information
4 about this case.

5 Several years ago the university identified Poulton
6 Hall, which as you've heard is an existing building within our campus
7 boundaries as an ideal site for the child care center. We wanted to
8 make sure that we could locate the center in Poulton Hall, and so we
9 met with the zoning administrator in October of 1995. This was long
10 before we filed any of the building permits for this project.

11 The zoning administrator told us that we could
12 establish the center in the building as a matter of right without BZA
13 review or approval. She confirmed her decision in writing as you've
14 heard in November of '95, and then again in June of '96. Relying
15 on her decision the university proceeded with the project.

16 The university's intention all along was to do the right
17 thing; to check with the right people, and before we applied for a
18 building permit, and to make sure that we were able to do this. We
19 wanted to do this in an open an above-board manner, so that
20 everyone knew about it, and that's why we met with the zoning
21 administrator.

22 It's also why we met with the community, which we
23 did on three different occasions. We met with ANC 2E on May of
24 1996 and advised them about the project, told them that we had met
25 with the zoning administrator, and what her determination was.

26 We also met with the ANC again in August and in

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1 September of 1996. And as you've heard, we also went to the BZA
2 quarterly meeting, which is mandated by this board as part of our
3 campus plan in August of 1996, and again discussed the child care
4 center and what the determination of the zoning administrator had
5 been.

6 At each of the ANC meetings that we went to I just
7 wanted to make the point that the university had requested that a
8 working group be established to try to address any concerns that any
9 member of the community might have. And in September, the last
10 time that we went to the ANC, Father O'Donovan even again
11 suggested that a working group be established.

12 The university also went door-to-door to people in the
13 neighborhood early on to advise them about the project. So the point
14 is that the university was trying to be open and to tell everybody about
15 our plans as we knew them.

16 Now talking about Poulton Hall, the building has
17 always been used as a university building, and with the child care
18 center the university would continue to use it for university and
19 university support functions.

20 The university routinely changes university uses in its
21 buildings without coming to the Board of Zoning Adjustment. For
22 example, we change our uses from classrooms to administrative
23 offices, and this is important for universities to be able to do this; to be
24 able to have flexibility to deal with changing needs on university
25 campuses.

26 Some of our buildings have had many changes of

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1 uses. For example, Old North, which is a building next to Healy, was
2 originally used as a dormitory, then it was used as the -- parts of it
3 were used as the university's post office. And then later on the use
4 was changed to classrooms and administrative offices, which is what
5 the building is being used for today. All of that was done without any
6 BZA review or approval.

7 Poulton Hall itself has changed university uses over
8 time. There have been a number of different changes, and we will get
9 into that later.

10 This case before the Board is no different than those
11 other substitutions of university uses.

12 The zoning administrator's determination, which is
13 now almost two years ago, was based on precedent. Appellants
14 argue that this case is establishing precedent. We believe that this
15 case is not precedent setting, but rather is following precedent.

16 References were made to the co-generation facility.
17 This is not a case about co-generation, thank goodness. The
18 university has learned. A co-generation facility required a new
19 addition. It required additional square footage, and that's why that
20 case came before this board.

21 But getting back to the precedent. Since 1984 there
22 have been consistent administrative rulings by both past and present
23 zoning administrators as well as by this board, that child care centers
24 on university campuses that are restricted to the children of faculty,
25 staff and students, are indeed permitted as a matter of right, and that
26 no additional special review is needed by the Board.

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1 A number of other colleges have child care centers on
2 their campuses as a matter of right, and this is the precedent also that
3 I was referring to. Those campuses are American University, Trinity
4 and Catholic College.

5 If the zoning administrator in this case had not
6 allowed Georgetown University Center to proceed as a matter of right,
7 she would have been overturning the decisions of the two prior zoning
8 administrators, as well as this board.

9 This afternoon we will be responding to all of the
10 issues that appellants have raised, and we'll be summarizing the
11 statement that we submitted for the record.

12 I would like to present now our land planner who is
13 Steve Sher. I believe that this board has qualified Mr. Sher on
14 numerous occasions as an expert in the area of land planning, and I
15 would ask that the Board do so this evening. Thank you.

16 CHAIRPERSON HINTON: Before we go to Mr. Sher I
17 have a question.

18 MS. SALLEY: Sure.

19 CHAIRPERSON HINTON: When the university
20 relocates a use from one building to another within the campus, does
21 the university look at the campus plan to see if that use -- if the new
22 location of the use is compatible with the campus plan?

23 MS. SALLEY: Yes.

24 CHAIRPERSON HINTON: And was that done in this
25 case?

26 MS. SALLEY: Yes. Mr. Sher will get into a detailed

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1 discussion of that.

2 CHAIRPERSON HINTON: Okay.

3 If the university found that the new location of the use
4 was not compatible with the campus plan, would the university
5 understand of its own volition that they had to come before the BZA
6 for a modification to the campus plan?

7 MS. SALLEY: Yes. If there needed to be a change to
8 the campus plan we would understand that.

9 CHAIRPERSON HINTON: Okay, thank you.

10 MR. SHER: Madam Chair, members of the Board, for
11 the record, my name is Steven E. Sher. I'm the director of Zoning
12 Services with the law firm of Wilkes, Artis Hedrick & Lane.

13 As I have listened and read and digested it, it seems
14 to me that there are four issues that are the heart of this appeal;
15 1) whether the special exception is required under Section 205 for a
16 child care center; 2) whether the child care center is a valid university
17 use; 3) whether the child care center can occupy an existing building
18 on a campus; 4) whether the child care center is in compliance with
19 the university campus plan.

20 All of those issues in my mind also can sort of come
21 around to what may in fact be the overriding question in this appeal;
22 what degree of flexibility do the zoning regulations give a university in
23 the use of its existing buildings.

24 Let me deal with those issues one by one; a) whether
25 a special exception is required under Section 205.

26 The proposed use for this child development center is

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1 not a child development center for zoning purposes in this case. This
2 use will be a subset or subcategory of college or university use. It's
3 similar to the book store, the cafeteria, the library, or other
4 components of university use, which if they weren't part of a university
5 use, wouldn't be permitted at all in a residential district. So I could not
6 go in an R-3 district an open a book store, but clearly
7 universities -- every university I know of has a book store, a library, a
8 cafeteria and so forth.

9 This is not going to be as you heard -- I think it was
10 Ms. Hicks talk about it before. The only reason that this use gets a
11 separate certificate of occupancy is because of its relationship to the
12 licensing requirements. You need to get C of O in order to get the
13 child development center licensed. And this will be licensed. It will
14 meet those requirements of the District government for licensing. But
15 for zoning purposes it is part of the university use, and therefore a
16 special exception under Section 205 is not required.

17 That then leads to the next question; whether this
18 particular child care center is a valid university use.

19 As you heard some discussion, the center is going to
20 be open only to children of students, faculty, and staff of the university.
21 The director of the center will be a faculty member of the Department
22 of Pediatrics, and I think in response to -- I'm not sure whose question.
23 One of the board members asked is this somehow going to be
24 involved in the teaching program of the university. It is. It is going to
25 be opened for an involve observation by students in the way of
26 internships and observations. As they go on there will be paid

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1 professionals who operate the classes and run the center, but it will
2 also be involved as a teaching experience as part of the university.

3 Child care centers are common place in colleges and
4 universities both in the District of Columbia and across the country.
5 You've heard reference that Catholic, Howard, American, Trinity have
6 child development centers on their campuses. There are more than
7 870 colleges and universities across the United States that have a
8 child care center that is accessory; that is for the students, faculty and
9 staff of those particular colleges and universities, and that's in the
10 United States.

11 The zoning administrator and the Board of Zoning
12 Adjustment have already determined that a child care center is a
13 legitimate part of university use, and that no separate approval is
14 required. And I refer you to BZA Order No. 14082, attached there's
15 Exhibit 5 to the statement which we've handed you before.

16 Finding of fact No. 5 in that order. And that is on
17 page 2 of the order; read in part, "As long as the child development
18 center was restricted to children of employees and students of the
19 university, it was an accessory use and did not require further
20 approval of the Board."

21 I think that's dispositive of the question of whether this
22 is a legitimate university accessory use of not.

23 I then get on to the third question; whether the child
24 care center can occupy an existing building on a campus.

25 As you heard Ms. Salley introduce before, Poulton
26 Hall is already devoted to university use. It has been since it was built

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1 in 1947. The uses in the building have changed over time in part, and
2 none of that has required BZA approval. And if you look under Tab 2 -
3 - Exhibit 2 of the statement -- you will see two different certificates of
4 occupancy issued for Poulton Hall; one in February of 1957, one in
5 August of 1967 for somewhat different subsets of university use, but
6 no BZA approval was required in order to make those changes in use.

7 There are many other examples of buildings on the
8 campus where the uses have been changed, and we've referenced
9 some of those in our statement.

10 The renovation for a child care center does not
11 constitute a change of use for zoning purposes. Universities are able
12 to reallocate uses within existing buildings, as long as those uses are
13 all universities uses. Now that means that they could not open this
14 child development center to the community at large; then it goes
15 beyond the boundary of being a university use. It doesn't mean that
16 the university could put in some use in this building which has no
17 relationship to the university at all, and say, well, we're leasing the
18 space to them; it's a university use. That's not the case here. This is
19 a child development center, exclusively for the children of students,
20 faculty and staff of the university, and as such it is a proper university
21 use.

22 Now BZA approval is required under the regulations
23 for college and university uses, for new buildings, for additions to
24 existing buildings, no matter how large or how small. If I added one
25 square foot to this building we'd be to the Board, because that
26 requires board approval.

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1 The occupancy of an existing not now devoted to
2 university use, and not shown on the campus plan for university use,
3 would require board approval, and changes of uses of existing
4 buildings where there is a BZA order that authorized the construction
5 of that building, and that that order somehow limited its use.

6 For example, if this board had authorized the
7 construction of a parking garage and said, this building shall be a
8 parking garage, the university could not converted that parking garage
9 to a classroom building without coming back to the Board.

10 But none of those conditions are present with respect
11 to Poulton Hall. It's not a new building, it's not an addition to a
12 building; it is an existing building already devoted to university use,
13 and there's no order of the Board that says this building shall be built
14 and limited to these purposes.

15 So in my opinion, the university may reallocate the
16 uses within the building, may change from one subset of university
17 use to another, as long as it remains a legitimate accessory use.

18 That brings me around to the next question; whether
19 the child care center is in compliance with the university campus plan.

20 If you look at Figure 4 there are seven categories
21 of -- and that's attached as part of Exhibit 3, Tab 3, on the statement
22 we gave you. That is the land use plan for the campus, and it
23 specifies seven use categories.

24 CHAIRPERSON HINTON: The first map behind
25 Tab 3.

26 MR. SHER: It's labeled in the lower left-hand corner,

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1 "For Future Land Use", page 31, lower right-hand corner. And if
2 you're going down the left-hand side of that map or plan, there are all
3 the various use categories that relate to those colors on that map;
4 mixed use, hospital, medical/education, educational/sport, hospital
5 zone, and so forth. I won't read them all; you can read them.

6 Poulton Hall is already devoted to educational and
7 educational/sport uses.

8 CHAIRPERSON HINTON: Can you show us where
9 Poulton Hall is?

10 MR. SHER: It is --

11 CHAIRPERSON HINTON: This pink one? Oh, I
12 found it.

13 MR. SHER: It is right below the "P" in P Street, below
14 Visitation Convent and school.

15 CHAIRPERSON HINTON: South of the Visitation
16 Convent, right. Thank you.

17 MR. SHER: And in fact, I think Ms. King before
18 realized the discrepancy between the colors on that map and the
19 colors on the other map, which is the one that's attached.

20 CHAIRPERSON HINTON: You're going to get into
21 that.

22 MR. SHER: I'm not going to be able to explain that
23 because I don't know why this one's blank. But I didn't do it, but there
24 it is. You can look at them and there it is.

25 MS. KING: What you're describing as the blank
26 space is Lot 161, 162, and they are white.

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1 MR. SHER: Right. They are white on this map and
2 shown in two different colors on Figure 20, which you looked at
3 before.

4 MS. KING: The ones which are residential.

5 MR. SHER: Right.

6 MS. KING: So in any case they are not mixtures,
7 educational, recreational; they're either nothing or residential.

8 MR. SHER: They're nothing or something, but they
9 don't appear in that category.

10 MS. KING: Nothing or residential.

11 MR. SHER: Right.

12 CHAIRPERSON HINTON: So on this map the
13 category is mixed use, main campus, education, educational support.
14 Is that right?

15 MR. SHER: Correct.

16 MS. KING: That's for --

17 MR. SHER: Poulton Hall.

18 MS. KING: -- Lot 835, is that not correct?

19 CHAIRPERSON HINTON: That's the right lot, yes.

20 MR. SHER: It's 835, right.

21 MS. KING: However there is no designation on this
22 map that you're referencing for Lots 161 and 162 --

23 MR. SHER: That appears to be correct.

24 MS. KING: -- no use designation whatsoever.

25 MR. SHER: That appears to be correct.

26 MS. KING: Which on the other maps however is

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1 designated -- the following map in your submission, in both cases it's
2 designated as a residence.

3 MR. SHER: Correct.

4 CHAIRPERSON HINTON: You were telling us how
5 this is consistent with the campus plan.

6 MR. SHER: Right. And I had gone through the fact
7 that there are these seven categories; Poulton Hall itself, education,
8 educational support.

9 Of all the seven categories, I can't see one anymore
10 closely fitting the child care center than educational or educational
11 support. It's not existing commercial; it's not the central utility plan, it's
12 not the hospital zone, etc.

13 There's an important part of the campus plan which I
14 don't think anybody has yet focused on, and that is a section which is
15 part of the chapter or section on planning factors. And it is the need
16 for flexibility. And it is specifically identified on page 24 of the campus
17 plan, and we've cited some of that language in the statement.

18 CHAIRPERSON HINTON: Which tab is that?

19 MR. SHER: Well it's not in the tab, but it's at
20 page -- It is at the bottom of page 11, and going over to the top of
21 page 12 of the statement.

22 CHAIRPERSON HINTON: Okay.

23 MR. SHER: And that particular section says, "Like all
24 institutions of higher learning, Georgetown's future is one that will
25 depend in large measure on its ability to adapt to rapid social change
26 and technological development. Flexibility is a key ingredient in

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1 meeting future challenges; thus flexibility forms an essential element
2 of the campus plans."

3 The university certainly in its plan, and the Board in
4 approving this plan, I believe clearly understood that things were going
5 to have to be looked at and dealt with over time. And the categories
6 were intended to be broad to accommodate things that were not
7 known at the time or that may have changed since the plan was done,
8 but that were generally consistent with the overall thrust of the plan.

9 The plan itself cites the MRI, the magnetic resonance
10 imaging facility. It was a technology that wasn't even known at the
11 time that the previous plan was prepared, and yet had to somehow be
12 accommodated. Now that had to come to the Board because they
13 were building an addition to the hospital to accommodate the MRI
14 facility. But it still had to fit within some category of the plan, and
15 that's why the plan is pretty broad when it talks to educational and
16 educational mixed use.

17 If you look further at the plan -- and we haven't
18 provided those sections; we can if you don't have the plan or want to
19 look at them -- there are examples of buildings that are to be devoted
20 to educational, educational mixed use. And they include things like
21 motor pool, general shops, logistical center, other general support
22 areas; transportation management, the transportation center.
23 Libraries are included within the category of educational mixed use.

24 So it's a pretty broad category, and all of those things
25 are intended to fit within that category.

26 CHAIRPERSON HINTON: You lost me, I'm sorry.

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1 What list were you reading from just now?

2 MR. SHER: There are specific buildings identified in
3 the plan, and the plan describes these at pages 33, 34 and 35 of the
4 campus plan book itself. And it describes buildings that are identified
5 on the plan to be built within the category of educational and
6 educational mixed use. And those buildings as I said include, in one
7 case, facilities for the motor pool, general shops, logistical center and
8 other general support areas. In another case the Transportation
9 Management Center, in another case, the library. The library addition
10 was designated as an educational mixed use facility.

11 So I was going I think to a question that Ms. Bennett
12 posed earlier about, what does the campus plan mean by mixed use,
13 and educational mixed use in particular, because that is a term that
14 Zoning Commission uses in different ways when it talks about mixed
15 use.

16 Again, the point is, I don't see any more appropriate
17 category in this plan for a child care center than the
18 educational/educational mixed use category.

19 Another issue that's been raised here is the question
20 of whether an accessory use or an accessory building, or even an
21 accessory structure must be on the same lot.

22 Now, colleges and universities are kind of strange
23 animals when it comes to lot configurations. There may be one
24 college or university in the District that's on one lot, but if you think
25 about all of the major colleges and universities -- George Washington
26 University, Howard University, Catholic University, American

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1 University, Georgetown University; they are divided in some part by
2 public streets, so they couldn't possibly be on one lot. And yet the
3 university uses fit the campus as a whole.

4 So that if you have wherever -- you've got the Marvin
5 Center for GW, which is located on 21st Street. It's on a particular lot,
6 but it serves the whole campus. And you can't say, well, it only could
7 be accessory to the lot that it's on. It just isn't and it doesn't. It serves
8 the whole campus. And the fact that the university happens to be
9 divided into multiple lots I think doesn't reduce or eliminate or change
10 the fact that these uses are still accessory to the campus as a whole.

11 If you were to somehow say, that whatever went on in
12 Poulton Hall could only be accessory to Poulton Hall, then if we have
13 a print shop, we can't use that print shop to print things for the uses
14 across the street? It just doesn't make any sense. And it's just
15 inconsistent with the whole concept of the distribution of uses around
16 the university campus.

17 So in some respects you could say that the campus is
18 the lot; that the uses that go within the campus are all interdependent
19 and serve one another.

20 With respect to the two vacant lots, I think as
21 Ms. Hicks indicated, there was a prior BZA order for construction of
22 two row houses on those lots. It permitted but did not require the
23 construction of those two row houses. It expired of its own validity
24 when no permits were filed with respect to it, and it's no longer valid.
25 Even if the university wanted to build those two houses under that
26 order it couldn't do it. So that order in itself I don't think has any

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1 relevance to what happens here.

2 The university is proposing to use that area of land
3 essentially as incidental to the child development land; it's accessory
4 to the accessory, if you will. And I don't believe that that is
5 inconsistent with the campus plan. These are not buildings, they're
6 structures. It is a situation where as some point in the future those
7 two houses might get built. I don't know that the university has any
8 plans to do that now or how long this child development center will
9 stay in Poulton Hall. If it proves to be a rousing success it may have
10 to wind up going somewhere if the space isn't big enough. But that's
11 a future situation.

12 The issue here is, can that open area be legitimately
13 apart of the accessory use of the child development center at Poulton
14 Hall. I believe it can, notwithstanding the designation on the campus
15 plan map.

16 It is therefore my conclusion that the proposed child
17 care center is a proper university function; that it will be located within
18 a building already devoted to university use for educational support
19 purposes; that the acting zoning administrator properly determined
20 that the use of part of the existing Poulton Hall for the child care center
21 did not constitute a change of use within the meaning of the zoning
22 regulations; and that BZA approval was not required. And I believe
23 that the decision of the zoning administration should be upheld and
24 the appeal should be denied.

25 CHAIRPERSON HINTON: Thank you.

26 I have a number of questions. Do you mind if I start?

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1 Your testimony about why you don't have to comply
2 with 205 was convincing, but you didn't talk about why you don't have
3 to comply with 210, and I don't understand that.

4 The way I read 210 -- It says, "Use as a college or
5 university, institution of higher learning, including --" and then it lists
6 hospital, dormitory, fraternity, sorority -- "shall be permitted if approved
7 by the BZA."

8 It doesn't say construction of the building. It doesn't
9 say in addition to a building. It says a use. So can you explain why
10 this use as a child development center isn't subject to 210.1.

11 MR. SHER: Because the building already is devoted
12 to a university use.

13 CHAIRPERSON HINTON: Well, every building on
14 the campus is devoted to university use, isn't it?

15 MR. SHER: Yes.

16 CHAIRPERSON HINTON: This is what troubles me,
17 and I'm too tired to put it in a question, so I'm going to explain it; then
18 you can answer.

19 The way you seem to explain this is, anything that the
20 university does is a university use, and therefore can go in a university
21 building. And it seems to me that actually the whole reason that we
22 have campus plans is so everyone can understand where certain uses
23 are going to go, and what the impacts of those uses might be, so
24 everyone can sort of anticipate and maybe look out for those things.

25 I mean surely, if you read that land use category that
26 said -- I think it was educational and educational support. What

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1 couldn't go in there?

2 MR. SHER: Hospital uses.

3 CHAIRPERSON HINTON: Well that's because
4 there's a specific category where hospitals --

5 MR. SHER: Yes. There are six other categories, and
6 uses that are more properly in the six other categories don't belong in
7 this one.

8 CHAIRPERSON HINTON: Where is it the zoning
9 regulations that it says that, if you're building a building or adding a
10 building you need a special exception, but if you're changing a use
11 you don't need one?

12 MR. SHER: I'm not sure that it explicitly says that, but
13 I think that's the theory behind any use and/or building. If I have a
14 building now that's devoted to an office building, I don't need
15 anybody's permission to continue to use that building as an office
16 building. I don't need anybody's permission to move Tenant A out and
17 Tenant B in. I don't need permission to renovate that building and
18 break it up into 500 tenants or consolidate it all into one tenant; it's still
19 an office building.

20 In this case the use classification here is university
21 use. I don't have the right to go independently and make this building
22 a book store.

23 CHAIRPERSON HINTON: I don't think it's university
24 use. I think the use classification is education, and educational --

25 MR. SHER: All right, I'll buy that too. It's university
26 use, subset educational/educational mixed use. If that gets to some

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1 level of comfort -- I'm not sure I agree, really. Because I think you
2 have to define the uses within the terms of the zoning regulations.
3 And the zoning regulations talks about college or university.

4 CHAIRPERSON HINTON: They also talk about child
5 development center, don't they?

6 MR. SHER: Right, but that's not what this is.

7 CHAIRPERSON HINTON: This isn't a child
8 development center?

9 MR. SHER: No, it's a college and university use.

10 CHAIRPERSON HINTON: Interesting. So we have a
11 director of the child development center. She I guess has no place to
12 work?

13 MR. SHER: I'm sorry?

14 CHAIRPERSON HINTON: You don't have a child
15 development center?

16 MR. SHER: We have a facility that will be licensed as
17 a child development center --

18 CHAIRPERSON HINTON: Okay, that's pretty clear.

19 MR. SHER: -- but for zoning purposes it is a
20 university use.

21 CHAIRPERSON HINTON: You could say that about
22 anything that's on a university. This is getting absurd, so I'm not going
23 to continue.

24 Students of what curriculum are going to participate in
25 this child development center?

26 MR. SHER: It is my understanding that there will be

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1 students from the nursing program and from the Department of
2 Pediatrics.

3 CHAIRPERSON HINTON: I need to think about that.
4 Ms. Bennett, do you have questions?

5 MS. BENNETT: Yes, but I think I need a moment to
6 get it together.

7 CHAIRPERSON HINTON: Ms. Reid.

8 MS. REID: Clarification. In Section 210 colleges and
9 universities are one zone. It appears to me that -- and saying that use
10 of the college/university as an academic institution of higher learning,
11 isn't this pertaining to the use of the property to establish the college
12 and university, as opposed to -- I'm saying that it seems that it's
13 saying to establish the college/university you have to have the BZA
14 approval, and I guess the campus plan has to be developed. But
15 once established, then -- or the particular use they're in, a particular
16 site in that university after it has already been established is what
17 we're dealing with here.

18 CHAIRPERSON HINTON: Right, which normally
19 come before us as further processing of the campus plan, special
20 exception.

21 MS. REID: But what I'm trying to get an
22 understanding about is that, if 210 pertains to the establishment of a
23 college and university, which requires BZA approval, once that has
24 been established, and then the campus plan is developed, then the
25 campus plan itself, if there are any changes there, and you have to
26 come to the BZA for that. And if there are some uses that are not

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1 necessary.

2 CHAIRPERSON HINTON: No, it doesn't say
3 establishment, it says use.

4 MS. REID: Well, use; the same thing. The same
5 thing, Ms. Hinton. It says use of the college/university. That is the
6 establishment. You can't use it unless it's established as a college or
7 university. We're talking about the initialization of the campus or
8 university in 210.

9 And once established by the BZA -- week, I want to
10 get some other input from someone else who may know more about it.
11 This is the way it appears to me: that once it's established, the
12 campus plan they have to comply with. In other words, you can't have
13 a university or college unless it's under 210 and established by the
14 BZA or it has been approved by the BZA. You can't just arbitrarily
15 develop a University unless it has BZA approval. Now, that's my read
16 on that.

17 MR. LYONS: That would only apply to residential
18 zones as required by the regulations.

19 MS. REID: This is. This is R-1. That's what I'm
20 saying. Is it the establishment of the university or college itself has to
21 have BZA approval?

22 MR. LYONS: In those residential zones, yes.

23 MS. REID: All right. So what I'm saying is that noted
24 to what we're talking about here in regard to a particular aspect of the
25 campus plan that has already been approved. I mean, this campus
26 and the university itself has already been established -- BZA approval.

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1 That's what does it and regulation.

2 MS. KING: But what Mr. Sher is saying is that once
3 an accomplished plan has been established and approved by the
4 community and the University and the BZA that then we should all turn
5 our backs and allow them to make any amendments to it that they see
6 fit within the broad, general category of educational purposes. Is that
7 not what you were saying? In other words, it's merely a license to do
8 what you will.

9 MR. SHER: No. It's a license for us to operate within
10 the plan approved by the Board. I don't believe that the regulations
11 intend to acquire a college or university to come back to the Board
12 every time it intends to rearrange the use within an existing building if
13 that use is consistent with the categories of the campus plan. And I
14 think that's what that language in the campus plan is.

15 MS. KING: Now, you're referring to Poulton Hall not
16 the rest of your plan for this.

17 MR. SHER: Well, I'd refer to any part of the plan.

18 MS. KING: So, you're saying that the two plots of
19 land which are separated from Poulton Hall by a green space and a
20 public alley are --

21 MR. SHER: I don't believe there's a public alley in
22 there. The alley is on the other side of those lots, I believe.

23 MS. KING: No, it's not.

24 CHAIRPERSON HINTON: There's something in
25 between.

26 MS. KING: There is an alley. Even on your plan have

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1 got a secret crossing.

2 MS. BENNETT: It's a driveway.

3 CHAIRPERSON HINTON: It's a driveway.

4 MR. SHER: If you look at tax-plat, which is attached
5 under Tab 1 of our statement, this is out of the Sanborne Atlas Plats,
6 and you look at the second of the two. There appears to be a ten foot
7 wide public alley to the east of lot 161. But I don't believe there is an
8 alley separating 162 from 835.

9 MS. KING: Well, where's the original -- because the
10 plan -- that plan that you took away to reorganize the chaos that we've
11 made of it.

12 CHAIRPERSON HINTON: Now, doesn't this show
13 four lots there instead of two along P Street?

14 MR. SHER: Well, 161 and 162 are the two eastern
15 lots there. And everything else there is all part of 835. What was,
16 appears to be, old 115, 117, 141. All of that's been combined into
17 835.

18 CHAIRPERSON HINTON: I was looking at this, that
19 shows four lots.

20 MS. KING: And I was looking at this.

21 MR. SHER: Well, the tax-plat is the one that shows
22 the existing lot configurations. I don't believe there's a public alley
23 between there but may be wrong.

24 CHAIRPERSON HINTON: Okay. That's a driveway.
25 And 835 is adjacent to 162.

26 MS. KING: Is that a driveway that belongs to the

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1 University?

2 MR. SHER: Yes. I don't believe there's a public alley
3 in there.

4 CHAIRPERSON HINTON: Okay.

5 MS. BENNETT: That gets me to my question. And
6 that is assuming that if something already has a designation on it like
7 educational/educational support, and the child development's
8 considered in compliance with, if that use designation, and can
9 therefore be located in a building already designated for that use, talk
10 to us, then, about 161 and 162. For which there have been
11 faculty/student resident's use and then faculty/graduate student use -
12 residential again - for which there had been the permission by the BZA
13 to do that. Which indeed was vacant and I guess is still vacant. And
14 now will be devoted to a use that was not embraced within the
15 educational/educational support. To the extent that what was
16 supposed to happen on 835 also spilled over into 161 and 162.
17 Would it not suggest that even if we agreed with the former suggestion
18 that there's something a little amiss about the use of those two lots for
19 the same purpose? And which is, that's all right, you're used to my
20 compound questions, that's why you're an expert up there. We'll just
21 give you expert status because we see you a lot. And when we start
22 looking at some of the exhibits in the submissions, seeing what they
23 are supposed to be, intended to be used for. I'm talking now about
24 lots 162 and 161. You know, mixed/educational uses -- above. When
25 in fact, the description of existing use is incorrect when you look at
26 what's happening on it. Right now it's vacant. And there seem to be

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1 some discrepancies in the description of what's happening as it hit the
2 permit application. So I guess we're as confused about those two and
3 what the intentions were and whether or not they are as safe, in your
4 view, as the location of the principle child development center
5 activities within the Poulton Hall, lot 835. Or as they say, the neatly
6 wrapped up, in your view, as you seem to have felt the other is.

7 MR. SHER: I think the other is probably more neatly
8 wrapped. I'm not sure that that means that the other two lots are
9 unwrapped or not sufficiently wrapped.

10 MS. BENNETT: Right. Because then an opportunity
11 for us to exercise flexibility.

12 MR. SHER: Well, if the University were proposing to
13 build a building, to house a child development on that lot or any lot, we
14 would be back here before the Board. We are proposing to put the
15 center itself in Poulton Hall. This is incidental play space. With some
16 respects, it could be compared to any other -- the structures on 161
17 and 162 are accessory structures. They could be to the University
18 use of the child care center in Poulton Hall.

19 MS. KING: But we're talking about something that is
20 separated by a planting area, by one case has referred to as a new
21 driveway, by a dumpster enclosure from the early childhood daycare
22 center at Poulton Hall. So, there's a great deal of preparation. I
23 mean, it isn't even budding? Is it?

24 MR. SHER: I would say it's in a budding property.
25 But I don't know whether you, you know, the lot's certainly a budding --

26 MS. KING: Then perhaps this plan, which of course

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1 has no lot numbers on it but I think we've figured out where the lots
2 are, doesn't -- I mean, there's a wooden fence, there's a planting
3 area, there's a driveway which is here referred to as a new driveway,
4 and then there is a storage shed. There's a whole line of things.
5 There are wooden fences, metal fences, a dumpster enclosure and a
6 storage shed. All of which intervene between Poulton Hall and the
7 play area. And the play area has different -- tile, safety surfaces. It
8 has like two -- walks. It has metal fences. It has concrete pads. It
9 has, you know, it's not just, you know, there's an open space and let's
10 go play. I mean, it is a development of those two residential plots as
11 something completely different than residential plots. And in fact, the
12 dumpster and the storage shed seem to be on one of those two plots.
13 They are not numbered of course but nevertheless they are there.
14 That is what gives me -- not so much Poulton Hall, but the defects in
15 the apparent applications for permits for those two lots of land. And
16 for the way they are going to be used. Because the permit says that
17 they are presently being used as -- or your educational, I don't know,
18 something or other. I can't remember.

19 MR. SHER: Well, it is clear that they're now vacant.
20 That prior to the construction there was no --

21 MS. KING: That is not clear on the application that
22 Ms. Hicks approved.

23 MR. SHER: Okay. We need to get to the bottom of
24 that. And I can't answer that right now. Ms. Hicks is going to look at
25 the permits, and we're going to look at the permits. And we'll give you
26 the best information that's available. I can't give you any more than

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1 what you know right now on that issue.

2 It is my feeling essentially that the open area to the
3 east of Poulton Hall, which includes some property which is on lot 835
4 itself and some property which includes lots 161 and 162 is all
5 incidental to the general college and university use. That if we were
6 proposing to build a building on that property, that would be a proper
7 subject for review and approval on inquiry by the Board. If we are
8 building incidental structures, in my mind, they are like fences,
9 flagpoles, benches, retaining walls, or any other class of incidental
10 structures which get built all the time, without your approval. And I
11 think they fall more into the latter categories than the former. And in
12 that respect I think it is a defensible position for a Zoning Administrator
13 to say that is legitimately related to a use that is also legitimately
14 permitted.

15 MS. RICHARDS: I'd like to ask a questions that is
16 related to the Chair's question earlier. Why do citizens give up their
17 right to comment on adverse impacts simply because a facility is going
18 to be limited to children of people affiliated with the college? Why --
19 It's a right.

20 MR. SHER: I could surmise or speculate or attempt
21 to suggest that there are differences between one and the other. The
22 baseline answer is the regulations create that difference.

23 Again I could not operate a cafeteria in my house in
24 an R3 district. But a university could operate a cafeteria. So how am I
25 different from the University? Well I am. They're it and I'm me.

26 Why does the University have the right to operate a

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1 child care center and I don't if I lived in Georgetown. Because that's
2 what the regulations say.

3 MS. RICHARDS: But maybe a child care center is
4 not as intrinsically related to the University although very common
5 perhaps not as necessary to the operation of a University as let's say
6 the need to feed students.

7 MR. SHER: If you work for the University or if you go
8 to the University and have a child, you may child care to be as
9 intrinsically necessary as being able to get a hamburger at lunchtime.
10 I have a wife who works in a nursery school and I know the value of
11 these things and I know how they are related to what people think they
12 have in the way of needs for child care and stuff like that.

13 It's not only universities that have child care centers
14 as accessory uses. International organizations. You have banks.
15 You have law firms. You have all kinds of institutions that are large
16 enough and that have enough people that require that service that
17 provide it.

18 MS. RICHARDS: And my second question is if this is
19 all as straightforward as you would suggest why was there so much
20 difficulty in just going forward on the matter of right scenario? Why the
21 attenuated process of dribbling out the building permits? Why the
22 need to get an opinion in August and then act on it in January?

23 MR. SHER: You're asking me why the District felt the
24 need to attenuate the process? I can't answer that question. In the
25 process of the work that I do there is hardly a client that I meet with or
26 advise that I do not tell we need to confirm this with the District. We

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1 need to go down and meet with the Zoning Administrator.

2 Ms. Hicks probably can't count the number of times
3 that she and I have sat down across the table and I have related a set
4 of facts to her about what it is that I would like to do and she will tell
5 yes or she'll tell me no. Or she'll tell that's a matter of right or that's a
6 trip to the BZA.

7 But prudence and foresight on our part suggests that I
8 can tell a client what I think the regulations mean but if I want to know
9 what the District is going to tell me what those regulations mean I pick
10 up the phone or I take a cab or I take the Metro depending on what
11 the circumstances are. Because that is the only way that I can some
12 semblance of an ability to rely.

13 I will just note that the District has never disagreed
14 with the position taken here. The Zoning Administrator ruled. She
15 ruled again. The corporation council looked at it. The Director of
16 Department of Consumer Regulatory Affairs looked at it. And
17 everybody continues to agree.

18 MS. KING: However, the applications appear to be
19 defective.

20 MR. SHER: Well, as I said, I'm not sure whether
21 we've got all the right pieces of paper in front of us.

22 MS. KING: Well, if the applications are defective do
23 you not feel that that's a great impediment going forward for this
24 process?

25 MR. SHER: I would have to answer that I'm not sure I
26 know what the defect is. I mean in all due respect to that language on

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1 the top of the building permit form, if I had written down the wrong lot
2 number and somebody said to me --

3 MS. KING: I'm not talking about the lot number now.
4 I'm talking about the use, the present use as recorded of 161 and 162.

5 MR. SHER: I'm not sure that that would render the
6 permit null and void because I think what the issue here is what was it
7 that the Applicant proposed. And I think it's pretty clear from the plans
8 what the Applicant proposed. I think on the basis of that the Zoning
9 Administrator and District could reach a conclusion about whether that
10 was a permitted use or not.

11 CHAIRPERSON HINTON: In this case, in all due
12 respect, I don't think that that answers the question and it's something
13 that troubles me too. And that is with the diligence you've shown in
14 meeting early with the Zoning Administrator and writing letters and
15 getting signatures, how in the world could so many building permits be
16 applied with the wrong addresses, the wrong lot numbers and the
17 wrong uses.

18 MR. SHER: I think there were 2 permits, both filed at
19 the same time that suffered the same defects.

20 CHAIRPERSON HINTON: There are 3 that we found
21 so far.

22 MR. SHER: Well, I'm aware of two so I'm going to
23 have to go back and look as you suggested. We need to look. I'm
24 aware that there were 2 that -- The permits were issued in early
25 August and then they were reissued or as Ms. Hicks says I think they
26 were voided and then on the basis new applications, new permits

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1 were issued in late August of 1996.

2 CHAIRPERSON HINTON: But you can't explain to us
3 today -- I can understand we need to research --

4 MR. SHER: I did not have any personal involvement
5 with the processing of the permits.

6 CHAIRPERSON HINTON: Maybe Ms. Salley can
7 address that?

8 MS. SALLEY: I didn't directly process the permits
9 either.

10 MR. SHER: That's right. I'd have to go look.

11 CHAIRPERSON HINTON: Who did? Whose
12 responsibility is that at the University?

13 MS. SALLEY: The -- facilities.

14 MS. RICHARDS: Is someone here because that gap
15 between August and January I find puzzling because if you know in
16 August it should have a green light. I don't see why you waited until
17 January because --

18 MS. SALLEY: We didn't wait. We didn't wait.

19 MS. RICHARDS: There is no evidence of doors
20 being beaten down to get that last permit out.

21 MS. SALLEY: Well, we were trying to get the last
22 permit as quickly as we could.

23 MS. RICHARD: Is there someone here who could
24 sort of speak to that process?

25 MS. SALLEY: Well, it's up to the city to be able to
26 issue the last permit.

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1 MS. RICHARDS: I mean what you were being told. I
2 mean what happened if your Facilities person went to the permit
3 section and corporate counsel says you can issue this. You don't
4 issue it and etc. and then they must have been told something. That
5 explanation might shed a little light on the thought process of the time.

6 MS. BENNETT: You know typically and I don't know
7 if this will address your concern, Ms. Richards, but most universities
8 have their own kind of public -- and they're called like Facilities
9 Management or something such thing. Those staff members kind of
10 do the leg work on getting permits and the like. Often there's a
11 disconnect between what they do and when you get to General
12 Counsel's office or when you get to the Vice President's office.

13 You know that's kind of down on the ground stuff
14 versus when you get here.

15 MS RICHARDS: Normally that is down on the ground
16 but by the time you drag Mr. Ruff into it, it's no longer down on the
17 ground.

18 MS. SALLEY: We didn't drag Mr. Ruff into it.

19 MS. KING: You didn't find it curious that you go the
20 permits for 161 and 162 at the end of August and it wasn't until the
21 end of January, I mean during that hiatus, September, October,
22 November, December, January, nobody on your staff is saying to Ms.
23 Hicks or Mr. Cross or anybody where is the permit for Poulton Hall.
24 Why do we have the permits for these residential lots and not for
25 Poulton Hall?

26 MS. SALLEY: We got a demolition permit for the

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1 interior of Poulton Hall in September which is when we began
2 demolition.

3 MS. KING: Have we seen the copies of that?

4 MS. RICHARDS: All right. So that sheds some
5 additional light.

6 MS. KING: Have we seen a copy of that?

7 CHAIRPERSON HINTON: Okay. Any other copies
8 of that? Would you submit that for the record?

9 MS. SHER: Yes.

10 CHAIRPERSON HINTON: Thank you. Are there any
11 more questions of the Intervenors?

12 MS. REID: Are there any other permits that you may
13 have?

14 CHAIRPERSON HINTON: We really need to just
15 stay the issue of this appeal.

16 MS. REID: No, I'm just saying if there are any other
17 building permits that have been issued that we haven't seen we need
18 to have them.

19 CHAIRPERSON HINTON: Having to do with this
20 child development center?

21 MS. REID: Yes. What did you think I said?

22 CHAIRPERSON HINTON: Okay. You said any other
23 building permits.

24 MS. REID: Of course, I mean those that pertain to
25 this particular case only.

26 MS. SALLEY: Madam Chair, we would submit

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1 something from the person who actually processed the permits to
2 show that she had tried to get the permits out as quickly as possible if
3 that would be helpful to you.

4 CHAIRPERSON HINTON: Yes. That would be great
5 and if the person could also explain how so many errors got onto
6 those permit applications.

7 MS. RICHARDS: Frankly, the -- told us that you
8 actually did have a permit to start demolishing Poulton Hall in
9 September, you've answered my question. You were all systems go
10 by September while apparently the opposition thought that they were
11 quietly exhausting their administrative remedies on that.

12 CHAIRPERSON HINTON: Okay. Any more
13 questions? Cross examine?

14 MR. CROCKETT: Mr. Sher, I would like to test
15 certain of the propositions that you have posited here this evening.
16 Under your position on the Zoning Regulation, could the University
17 build a bookstore on lots 161 and 162 without BZA approval?

18 MR. SHER: No.

19 MR. CROCKETT: Well, let's suppose that the -- with
20 the construction that had been previously approved by the BZA and
21 had constructed some residences on those two lots. And suppose
22 that they had decided that that was a good place for a bookstore and
23 they were going to put that into the two residences. Could they do
24 that? Just convert the residences into a bookstore without BZA
25 approval?

26 MR. SHER: Assuming that the BZA order limited the

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1 use of those properties to single family dwellings, no.

2 MR. CROCKETT: Okay. Could the University take a
3 large home, let's say a large home that existed on that same property,
4 which was being used for faculty and staff, and turned it into a child
5 care center without BZA approval?

6 MR. SHER: Used for faculty and staff purposes?

7 MR. CROCKETT: Residences.

8 MR. SHER: Residences. And turned it --

9 MR. CROCKETT: Just changed its use.

10 MR. SHER: The hypothetical has to be more precise
11 in terms of how did the University acquire that property and what, you
12 know, that's not what's the current fact. So tell me, did the University
13 acquire that property in code of the Board's approval and use it for
14 housing or did they just own it forever and want to use it for something
15 else?

16 MR. CROCKETT: Let's just assume that when the
17 campus plan was approved, the large home was occupied by faculty.
18 And that it was shown as a residential faculty use on the campus plan.
19 And the University now wants to turn it into a child care center without
20 any exterior renovation. Does that require BZA approval?

21 MR. SHER: If it was shown on the plan for faculty
22 housing, I think the answer would probably be no.

23 MR. CROCKETT: All right. Now the two lots in
24 question, 161 and 162, are shown on the current campus plan as for
25 residential use. What is it in the regulations that permits the University
26 to change the use of those two lots to a child care center use?

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1 MR. SHER: Well, I think I tried to answer that
2 question before and I'll try to give the same answer again. I think that
3 the use of those lots with incidental structures. The dumpster, the --,
4 the fence and the other things is incidental to the University use (child
5 care center) permitted in Poulton Hall. And therefore would be
6 consistent with that.

7 MR. CROCKETT: Okay. If the University wished to
8 change Poulton Hall into a hotel for guests of the University without
9 any exterior changes, would it have to obtain BZA approval?

10 MR. SHER: I'd have to look at the campus plan and
11 see what is the most appropriate category for University hotels if there
12 is such a thing.

13 I think the answer to that would probably be yes if it
14 was a legitimate college or university subset, and I know of many
15 college and universities that do provide hotels on their campuses to
16 house their guests and visitors of one sort or another. I would say
17 yes.

18 MR. CROCKETT: All right. Even though there might
19 be a dramatic change of use and impact on the surrounding
20 residential neighborhood?

21 MR. SHER: I don't believe, again --, the way I define
22 use that that would be a change in the University use. It is no different
23 in my mind then all the things that have occurred on this campus and
24 other campuses where uses of buildings change from one subset of
25 University use to another.

26 CHAIRPERSON HINTON: May I ask a point of

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1 clarification? Your question was if it was a residential use and it was
2 changed to a hotel?

3 MR. CROCKETT: No ma'am. I was asking with a
4 specific reference to Poulton Hall. If they wished to change Poulton
5 Hall into a hotel facility.

6 CHAIRPERSON HINTON: Would it need to go to
7 BZA.

8 MR. CROCKETT: Right.

9 CHAIRPERSON HINTON: And your answer was
10 yes?

11 MR. SHER: No, my answer was no. I think that that
12 would most likely, again, looking at these use specifications fall within
13 that broad category of educational support.

14 MR. CROCKETT: Would your answer be the same if
15 the University wanted to relocate the University band and all the
16 practice rooms in Poulton Hall which backs up on the backyards of
17 rowhouses?

18 MR. SHER: Yes.

19 MR. CROCKETT: Okay. Now let's assume that
20 instead of creating a child care center that the University decided to
21 keep Poulton Hall as primarily a print shop that decided to use lots
22 161 and 162 as a waste consolidation area for the chemicals and ink
23 wastes from the Poulton Hall print shop. And this waste area was
24 necessary as an accessory use to the print shop facility in Poulton
25 Hall. Would the University be able to use those two lots for that
26 purpose because it was related to the print shop operation in Poulton

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1 Hall without BZA approval?

2 MR. SHER: Without the construction of a building?

3 MR. CROCKETT: Right.

4 MR. SHER: I believe so.

5 MR. CROCKETT: I have no further questions.

6 CHAIRPERSON HINTON: Okay.

7 MS. BENNETT: Please permit me. Poulton Hall
8 could have the -- they changed to house a hotel like use because the
9 use, you believe, is in compliance with the general and broad category
10 of educational and educational support?

11 MR. SHER: Yes. Knowing that many --

12 MS. BENNETT: Not because the students are going
13 to be trained in hospitality careers.

14 MR. SHER: No. Well again, that wouldn't surprise
15 me if that were to happen either. Knowing that many colleges and
16 universities just, I'd probably want to research that and be able to
17 prove it, but knowing that many colleges and universities do provide
18 hotel like accommodations for their visitors and guests on their
19 campuses, it would appear to me that I could argue that that is a
20 legitimate accessory type use to a major college or university, like a
21 Georgetown. And that if that is therefor the case, then what category
22 does that fit into best under the campus plan? And it would appear to
23 be that use, that category of educational/educational support.

24 Now, you take a hotel like the Statler up on the
25 campus of Cornell University. The school hotel administration runs
26 that thing, you know. That's why it's in the middle of their campus, but

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1 it's, you know, just a part of their campus like any other building on
2 that campus. There are other Universities that do the same thing.
3 Georgetown, to my knowledge, doesn't have a School of Hotel or
4 Restaurant Administration. And I don't think they've got programs in
5 that, but we are hypothetical here of course, but maybe that would be
6 an opportunity. I don't know.

7 You asked it. Not me.

8 CHAIRPERSON HINTON: Under 210.4-D it says, "A
9 description of all activities conducted or to be conducted on the
10 campus and of the capacity of all present and proposed campus
11 development." And that's one of the four specific things that are listed
12 that must be included on the campus plan. So, my question is, in the
13 campus plan you talk about uses that you either have or you plan to
14 have, if a use comes along that's not mentioned in the campus plan
15 even though it might fit within that broad category, how is it that you
16 don't think that that activity has to be addressed in the campus plan in
17 specifics and talk about the capacity? For instance, the hotel. If you
18 have a campus plan that doesn't say anything about a hotel, and I'm
19 assuming you do, and then you decide oh, we need a hotel that has
20 10,000 rooms in it. But because it's a hotel for the University and
21 we're only going to house alumni students and students families and
22 faculty and --

23 MS. BENNETT: And guests.

24 CHAIRPERSON HINTON: And guests. We don't
25 even have to put it in our campus plan as long as we can put it on a
26 land use category that's University.

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1 MR. SHER: Well, if you're talking about a building
2 that's big enough to house a 10,000 room hotel, I guess. I don't know
3 that there is one. And I don't know if the hypothetical is valid.

4 CHAIRPERSON HINTON: Well, but how does it pass
5 that requirement of that D that says "all activity conducted or to be
6 conducted and the capacity of all present and proposed", I mean, I
7 don't understand how you're meeting that requirement.

8 MS. BENNETT: But technically, if you had a Poulton
9 Hall and you wanted to accommodate a -- hotel and you needed to do
10 all the things that are required to do it, wouldn't you 9 times out of 10
11 end up coming back here for modification?

12 MR. SHER: Most likely. I mean, I would probably
13 have to do stair towers or something that provide means of -- to do
14 that. You know, we're talking hypotheticals. I don't know that the
15 hypothetical fits.

16 MS. BENNETT: -- And all kinds of that stuff.

17 MR. SHER: But if you're asking me is it theoretically
18 possible to take Poulton Hall and convert it to a hotel? I don't even
19 know. You know, I don't know what the inside of the structure is in
20 terms of corridors and windows and all the rest of those things. It
21 might not be possible. But assuming it is possible, you know, take the
22 hypothetical and push it to that limit. I think that that is correct. I think
23 that if the University took the post office and wanted to relocate it from
24 Poulton Hall to, you know, some other part of the campus and replace
25 that post office with faculty offices, they wouldn't have to come to the
26 Board to do that.

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1 CHAIRPERSON HINTON: Okay. But is there a post
2 office ever discussed in the campus plan, that there is a post office or
3 there's ever going to be one?

4 MR. SHER: I think it may be mentioned in the
5 Appendix. But I'm not sure. Let me look real quick.

6 CHAIRPERSON HINTON: I don't know. My --
7 concerns here is that a child development center was never written
8 about, included or anticipated as part of the campus plan for anywhere
9 on the campus.

10 MR. SHER: But that is precisely the situation that this
11 plan talked about the magnetic resonance imagery, the MRI. The
12 previous incarnation of this plan, the one that preceded this did not
13 ever mention an MRI. At the time that that plan was done, the
14 technology didn't exist.

15 CHAIRPERSON HINTON: Right.

16 MR. SHER: Yet the University, in the intervening
17 period between after that plan was prepared, the technology came
18 around. And the hospital and medical center said this is a great thing.
19 We need to have this. Now, again, they came to the Board because
20 the construction of that facility required an addition to the, you know,
21 physical square foot addition to the hospital building. If they had been
22 able to find a room like this in the hospital that could have suited the
23 MRI technology and could have fit within the building, they wouldn't
24 have had to come to the Board to do that.

25 Just like if they wanted to take an area in the hospital
26 that's now a physician's office and make it an operating room. They

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1 wouldn't have to come to the Board to do that.

2 And if they wanted to expand the post office to take
3 over all of Poulton Hall. And take the print shop, and the drama
4 department, and all the other things in there. They wouldn't have to
5 come to the Board to do that either.

6 CHAIRPERSON HINTON: But none of those are new
7 uses. Are they?

8 MR. SHER: Well the MRI was a new use if you
9 believe --

10 MS. KING: Yes. But that was the case you brought --

11 MR. SHER: But I brought it only because it required a
12 new building.

13 MS. BENNETT: But he brought it to us because it
14 needed a building.

15 MR. SHER: Or an addition to the existing building.

16 CHAIRPERSON HINTON: And that goes back to
17 where is it in the zoning rights that say if it's a building, it has to come -
18 - if it's a changing use it doesn't. I don't see that anywhere that it
19 refers to a building.

20 MR. SHER: Well, I think that is, I tried to answer that
21 before and I don't think I have any better answer at this point. It's the
22 whole theory of what requires approval and what doesn't. If I have an
23 existing building --

24 CHAIRPERSON HINTON: It sets precedent.

25 MS. BENNETT: And history.

26 MR. SHER: Yes. In a word, yes.

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1 MS. BENNETT: The historical interpretation of what
2 is required.

3 MS. KING: And --

4 MR. SHER: Yes.

5 CHAIRPERSON HINTON: All right. Any other
6 questions. Ms. Hicks, any questions?

7 MS. HICKS: None.

8 CHAIRPERSON HINTON: Okay. Are we done. Oh
9 you have?

10 MR. SHER: I'm done.

11 CHAIRPERSON HINTON: Okay. The Appellant has
12 --

13 MS. BENNETT: The Appellant has done cross ex.

14 CHAIRPERSON HINTON: No, the Appellant has
15 rebuttal and closing statements.

16 MS. SALLEY: Madam Chair, can I ask a question?
17 Could we submit a closing statement in writing for the record, so that
18 we won't take up any of your time?

19 CHAIRPERSON HINTON: You don't get a closing
20 statement. The Appellant.

21 MS. SALLEY: Just now. To sum up our issues and
22 what we've talked about right now.

23 CHAIRPERSON HINTON: I don't think so.

24 MS. SALLEY: -- So we thought maybe --

25 MS. RICHARDS: We filed that report -- ask for it in
26 appeals --

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1 CHAIRPERSON HINTON: Not from the Intervener,
2 from the Appellant.

3 MS. RICHARDS: From both sides. Would we have
4 before?

5 CHAIRPERSON HINTON: No. Not on appeal.

6 MS. RICHARDS: I'm perfectly willing to wait.

7 CHAIRPERSON HINTON: Well, let's ask the
8 Appellant. Do you have an objection to the Intervener submitting a
9 summary of issues?

10 MS. BENNETT: The Appellant needs to give us the
11 final permit. Is that correct?

12 CHAIRPERSON HINTON: Yes.

13 MR. CROCKETT: The problem with that is that it
14 would turn into another legal brief and I don't know what they might
15 file. But I would have to respond to it, and I'd prefer not to. In that
16 vein, we just received their statement together with the attachments at
17 the hearing. And I would like to respond to some of those
18 attachments. I mean, these are BZA orders they're now relying on
19 that we never have been told about. If that's relevant as we read
20 them, I would like to be able to respond to those BZA orders, give our
21 views as to what they mean. But whether or not they should be
22 allowed to file something I really don't know your procedures, I'm new
23 here so.

24 MS. RICHARDS: Sometimes it -- too.

25 CHAIRPERSON HINTON: How lengthy of a
26 summary are you thinking about?

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1 MS. SALLEY: Not very long.

2 MS. KING: How long is that?

3 CHAIRPERSON HINTON: A page?

4 MS. SALLEY: Five pages.

5 CHAIRPERSON HINTON: Five pages?

6 MS. RICHARDS: A five page summary might do.

7 CHAIRPERSON HINTON: Okay. Five page
8 summary.

9 MR. CROCKETT: Can we respond?

10 CHAIRPERSON HINTON: To the five pages? Yes,
11 you can respond to the summary and you can respond to this.

12 MR. CROCKETT: At the same time.

13 CHAIRPERSON HINTON: Yes.

14 MR. CROCKETT: That would be fine.

15 CHAIRPERSON HINTON: Okay.

16 MR. LYONS: I would make a suggestion in the --
17 perhaps, if it's possible.

18 CHAIRPERSON HINTON: It's always useful. Will
19 you be giving your rebuttal and closing statement at this point or do
20 you want to --

21 MR. CROCKETT: Yes. It's not going to take very
22 long and I'd rather get it done now. And before we leave the witness, I
23 would like to make one more point for the record. Mr. Sher was
24 qualified as an expert and I can't remember, I mean, he wasn't
25 qualified but he was presented as an expert.

26 I would however for the record want to put my

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1 objection on that his testimony should be considered as legal
2 argument for the purposes of this proceeding rather than testimony as
3 to the meaning of the zoning regulations. I mean, he has given his
4 opinion as to what the zoning regulations mean. That is the issue
5 before the Board to determine. It's for the Board to determine what
6 the meaning of the zoning regulations are. He's given his opinion. I'm
7 going to give you my opinion now. And so I object to having his
8 testimony considered anything but legal argument.

9 MS. BENNETT: Hold on.

10 CHAIRPERSON HINTON: That's a problem.

11 MS. BENNETT: That is a problem.

12 CHAIRPERSON HINTON: And I want to make clear,
13 he was presented as an expert and accepted by the Board as an
14 expert.

15 MS. BENNETT: As he had been on many occasions.

16 MR. CROCKETT: But the question was the subject
17 matter. And what we got into was his interpretation of the regulations.

18 CHAIRPERSON HINTON: Yes.

19 MS. BENNETT: As he has used them as a planner
20 and in his various professional capacities over many years.

21 CHAIRPERSON HINTON: Right.

22 MR. CROCKETT: Well, I understand. But I just want
23 my objection to be on the record.

24 CHAIRPERSON HINTON: Okay. It's on the record.
25 We won't talk about it.

26 MS. DWYER: Madam Chair, we have one last

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1 witness.

2 MR. CROCKETT: I'm sorry.

3 CHAIRPERSON HINTON: You do?

4 MS. DWYER: Mr. Davitian.

5 MS. BENNETT: Who?

6 CHAIRPERSON HINTON: Oh, I'm sorry. I'm very
7 sorry.

8 MS. KING: Was he sworn in earlier? Were you
9 sworn in earlier sir?

10 DIRECT TESTIMONY

11 MR. DAVITIAN: Yes. Good evening. Madam Chair,
12 Members of the Board, my name is Craig Davitian. I am an ANC
13 Commissioner. My address 3012 1/2 R Street. I presently am an
14 ANC Commissioner. I was also an ANC Commissioner during the
15 period of time that we've discussed this afternoon and this evening.

16 I will just briefly want to respond to the other two
17 commissioners who spoke and gave you their remembrance and
18 opinion of what happened and what was discussed and commented at
19 the ANC meetings. And what our understanding or at least my
20 understanding was to the meetings.

21 My understanding and recollection is that Georgetown
22 University came of course three times essentially begged the
23 community. I know, in May and especially September I have a vivid
24 memory of Father O'Donovan coming and almost literally begging the
25 community to take the University up on its offer of sitting down at a
26 table and discussing this and coming up with conditions of which the

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1 University would voluntarily make itself committed to responding.

2 I also remember at the September meeting myself
3 from the Commission's chair at the table urging the community to take
4 that offer. The several things that sort of concern me today hearing
5 the term "community." You yourself have used it. The community has
6 appealed this.

7 My opinion is the community has not appealed this. A
8 small organization appealed this in early 1997. My opinion of the
9 community is more representative of what happens at ANC meetings.

10 I was never invited to this organization's meetings. I
11 didn't know when they were. My understanding of the meeting that
12 they cited in early 1997 was a relatively extremely small sliver of the
13 community that actually discussed this. My opinion is that if the
14 community listened to the University's proposals and plans in May, in
15 August and in September of 1996. And I recall in May of 1996 which
16 became my first understanding of this project 1.) that it was a right of
17 use that they had already been before the Zoning Administrator who
18 had already been signed off.

19 And I want to say that as early as May I had an
20 understanding that the permitting project was well underway. And if it
21 wasn't as early as May then it was certainly as early as August that I
22 had an understanding that permits were being done and in the cycle
23 and things were going along smoothly.

24 It's also been difficult for me to understand as I sat
25 here and listened today how many of the people who were on this
26 commission, the ANC Commission that is, and regular attendees,

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1 members of the community, had no understanding of what was going
2 on until late in 1996 when they were at the same meetings that I was
3 and learned of this as early as May of 1996.

4 One other point that you had mentioned. You had
5 asked the question I think early on in today's afternoon that I wrote
6 down that I wanted to make sure I brought up was why the Appellees I
7 think it was didn't just call up Ms. Byrd or someone like that, a member
8 of the Residence Alliance, and it just struck me at the time of well, why
9 didn't a member of the Residence Alliance or a member of what is
10 now the Appellants call up someone at the University.

11 And that made me again realize or think back to these
12 meetings, the ANC meetings, where representatives of the University
13 had begged the community to sort of avoid what we're going through
14 now by sitting down and going through this.

15 Finally, my understanding is that in September we as
16 an ANC decided to not pursue an appeal of this matter. But rather we
17 knew because it had been presented that Ms. Byrd had asked the
18 corporation counsel to look into this issue.

19 It was the feeling of at least myself and I can't speak
20 for others but I believe it was also the consensus of others not to get
21 out ahead of corporation counsel or ANC Commissioners or
22 volunteers. And the corporation counsel, it's their business to decide
23 these issues. It was the feeling of myself at least and I think that the
24 minutes bear that out to take a wait and see approach to see what
25 corporation counsel did. I think that bears out by September minutes
26 corporation counsel has our petition. No action will be taken before

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1 that decision has been reached.

2 So I guess my understanding is that the ANC never
3 dealt with this issue after September. That we waited -- Our decision
4 was to sort of wait and see what corporation counsel did and then
5 review it at that point if someone brought it up. And in fact it wasn't
6 even brought up on the September agenda and it never has been
7 since.

8 It's not been something that the ANC has taken a
9 position on with an appeal or not in my opinion. And any appeal that
10 was done subsequently was done without the authority of the ANC.

11 CHAIRPERSON HINTON: Did you say you were a
12 former commissioner?

13 MR. DAVITIAN: Former and present.

14 CHAIRPERSON HINTON: Former and present.

15 MS. KING: And there was no discussion after
16 August? None in January?

17 MR. DAVITIAN: There was no discussion at an ANC
18 meeting after September of 1996. And in fact one last point is I don't
19 believe there was ever discussion at the ANC meeting against the
20 merits of a child care center.

21 In fact, at the May meeting I made a motion that was
22 not passed but just to pass it on its merits. I don't know that I ever
23 recall any discussion against a child center per se. There was
24 discussion between, pick whatever time in the morning, 8:00, let's say,
25 whether there might some parents dropping off kids and whether this
26 might create a difficulty.

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1 But that was also tempered with well, we're getting rid
2 of a printing shop and we're getting rid of a stinky, smelly use that
3 brings big trucks to drop off printing dye and all the other negatives
4 that would be associated with a printing shop. So I believe other than
5 some minor difficulties that should have been worked out long ago, I
6 think if members of the community had taken up the University to sit
7 down and talk at the table, it was the consensus that the
8 neighborhood is getting a better end of the deal here. We're getting a
9 child care center all be it for the University employees at which some
10 of them actually live in the neighborhood. We're getting rid of a print
11 shop.

12 So there was not an urgency of the ANC to deal with
13 this, to appeal it, to derail it. That's my memory.

14 CHAIRPERSON HINTON: Okay. Any questions
15 from the Board?

16 MS. REID: Which ANC is this?

17 MR. DAVITIAN: 2E. One last point since you
18 mention 2E. There was a letter which I saw which is probably a part
19 of your record I believe from ANC 2A which in the first sentence cites
20 a reference to 2E which is my ANC's request of -- They wrote it in
21 support saying that because 2E has asked them to look into it. And
22 that certainly never happened.

23 Our ANC never asked any other Advisory
24 Neighborhood Commission to ever take an opinion, a position, on the
25 issue.

26 MS. RICHARDS: How big is your ANC?

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1 MR. DAVITIAN: There is 8.

2 CHAIRPERSON HINTON: This is submitted by --
3 Chairman -- And just for the record we do have a letter in the record
4 that contradicts what you are saying.

5 MR. DAVITIAN: What letter is that?

6 CHAIRPERSON HINTON: It's from a former
7 chairman of ANC 2E. Beverly Jost.

8 MR. DAVITIAN: What part does it contradict?

9 CHAIRPERSON HINTON: Well, it says on May 6th
10 the ANC took up the matter of the child care center.

11 MR. DAVITIAN: Right.

12 CHAIRPERSON HINTON: At the -- meeting. Six
13 members were present. Five constitutes a quorum. There was a
14 motion to inquire and protest the omission of the zoning variation. The
15 motion passed unanimously.

16 MR. DAVITIAN: That's correct. Nothing I said is
17 contradictory to that. What I said was that in September, if you look at
18 the September meeting minutes, there was discussion and a
19 consensus of the ANC to -- We realized that corporation counsel was
20 already examining this issue. And what we said why get out ahead of
21 corporation counsel. We're going to take -- We've made ourselves
22 look foolish enough already. Why look even more foolish? Get out
23 ahead of corporation counsel. Start taking actions. When the experts
24 downtown, i.e. corporation counsel, is reviewing the issue.

25 We're going to take a step back, do the intelligent
26 thing. Let the experts come up with a ruling. If it's a ruling -- Then we

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1 have the option of either reexamining it or treating it as -- or something
2 else.

3 MS. KING: In this resolution --

4 MR. DAVITIAN: Pardon me?

5 MS. KING: And this resolution you've described was
6 passed by the ANC?

7 MR. DAVITIAN: It was not a motion passed because
8 it was part of community comment which Ms. Jost had pointed out
9 during hers but it is reflected as the consensus of the ANC in the
10 September minutes.

11 CHAIRPERSON HINTON: And the ANC has not
12 changed that position since September. That's what you're saying.

13 MR. DAVITIAN: That's correct. There has not even
14 been a formal or even an informal public discussion of it to have it
15 change.

16 CHAIRPERSON HINTON: Thank you.

17 MS. KING: So the ANC 2E has taken no position on
18 this issue? Is that what you are saying?

19 MR. DAVITIAN: Since September.

20 MS. KING: It has taken no position?

21 MR. DAVITIAN: Since September of 1996.

22 MS. KING: No position on this petition which was
23 generated in January?

24 MR. DAVITIAN: That's correct.

25 MS. KING: So 2E has not taken a position on this
26 petition for this appeal or whatever you call it?

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1 MR. DAVITIAN: That's correct.

2 MS. REID: And your name?

3 MR. DAVITIAN: Craig Davitian. Is that all?

4 MS. BENNETT: Madam Chair, we have cross
5 examination of this witness.

6 CHAIRPERSON HINTON: Thank you.

7 CROSS EXAMINATION

8 MR. CROCKETT: I'm sorry but I have to ask a few
9 questions. Mr. Davitian, do you speak for anybody besides yourself
10 here today?

11 MR. DAVITIAN: No, as I think I said in the beginning
12 that I couldn't speak for the others. That I was speaking from of what
13 my understanding and memory was. Let me add that nor has any
14 ANC commissioner spoken on behalf of the ANC today.

15 MR. CROCKETT: You spoke of the consensus at the
16 September meeting. Who were the individual commissioners other
17 than yourself who formed that consensus?

18 MR. DAVITIAN: It was unanimous.

19 MR. CROCKETT: Everyone?

20 MR. DAVITIAN: It was unanimous and the reason I
21 say that if you look at the totality of our minutes and you've got three
22 months of minutes to look at, the minutes will always give if it does
23 exist they will give a pro and a con. They'll give a positive opinion and
24 a negative opinion. And not only is my memory that everyone agreed
25 with this consensus but the minutes bear that out. It says
26 "Corporation counsel has our petition for the project to go before the

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1 BZA. No action will be taken before that decision has been reached."
2 There is no further statement of well, commission so and so has
3 disagreed with this or something like that.

4 So not only from my memory but this bears it out that
5 it was unanimous. Or if it wasn't unanimous no one raised the
6 concern.

7 MR. CROCKETT: Mr. Davitian, could the ANC ever
8 change or vote to change the May resolution? Was there ever a vote
9 to change the resolution that was passed in May to protest the lack of
10 the BZA variance for this project? Yes or no?

11 MR. DAVITIAN: Well, as I said before --

12 MR. CROCKETT: Was there ever a vote?

13 MR. DAVITIAN: No there was not because it was on
14 the September community comment. But I don't think we would be
15 doing the public service if we held to -- if we changed our consensus
16 blindly by what we had said in May. Circumstances had changed.
17 This was now an issue before corporation counsel. And you don't
18 need a vote to take no action or to table something temporarily until an
19 agency downtown is researching it and coming up with an opinion.
20 That doesn't require a vote to do.

21 MR. CROCKETT: Was the appeal which was
22 authorized by the main resolution filed in March or April of this year?

23 MR. DAVITIAN: Could you repeat that question?

24 MR. CROCKETT: Was the appeal which was
25 authorized by the unanimous vote of ANC 2E on May 6, 1996 filed in
26 March of this year?

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1 MR. DAVITIAN: No.

2 MR. CROCKETT: No further questions.

3 MR. DAVITIAN: I don't look at that filing that occurred
4 in 1997 as a valid legal act.

5 CHAIRPERSON HINTON: Why do you say that?

6 (Pause.)

7 CHAIRPERSON HINTON: All right. Very good. Is
8 that all?

9 MR. CROCKETT: That's all for this witness.
10 Summary.

11 CHAIRPERSON HINTON: Yes.

12 MR. CROCKETT: I will try and be brief. The problem
13 with the legal arguments we heard here today is that they bear no
14 relationship to the regulations. This is fantasy land.

15 We have a set of regulations which has been passed
16 by the Zoning Commission with which we are all familiar. And we
17 have Section 205 which goes to use, to the use of a child care center
18 in a residential community. Now the reason for that is it doesn't have
19 anything to do with construction. It has to do with the fact that if you
20 are going to put 60 kids and the facility and the parents and everything
21 coming into the residential community, that's that always going to
22 create a change and problems. So that's why it's in there. Because
23 that has been specified as a problem in a residential community that
24 requires prior Board approval.

25 Now this particular area is in the middle of a
26 residential community. It's not back on the back of the campus where

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1 it's not near any residences. You have heard today that it backs on
2 rowhouses and the lady who is only 2 doors down. So that's going to
3 affect all these people.

4 The regulation has no exemption whatsoever for the
5 University. And I would point out that condition number 4 of the
6 campus plan which is on page 36 of the campus plan requires the
7 University to demonstrate and I quote "compliance with the applicable
8 provisions of the Zoning Regulations."

9 Now that to me means Section 205. They have
10 residential lots in residential areas and they have to comply with the
11 residential zoning.

12 Nothing exempts the University, a church or anyone
13 else from those use requirements. They all have to come here.
14 That's what the regulations say.

15 Also we have the campus plan. Now in our brief and I
16 won't bore you with this. We have gone over it in our brief. The
17 campus plan is a concept plan only. It finds out the uses and then it
18 requires the University to submit an application for further processing
19 whenever it wants to change one of those uses.

20 Now if the University wants to change the use of the
21 parking lot in the middle of the campus and bring it out and put it in the
22 residential neighborhood, obviously it's going to have to go back and
23 we're going to have to have another public hearing because all of
24 these issues were sorted out in the first public hearing that resulted in
25 the plan. And if you sort all of these issues out and decide that the
26 uses are going to be such and such and then the University can

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1 rearrange them whenever it wants to without approval then the whole
2 plan is meaningless.

3 So we submit that if the Section 210 and the campus
4 plan have any teeth at all that this argument that was made here is
5 just specious. And as the Chair pointed out and we pointed out in our
6 brief, the University, as part of the approved plan in 1990, was
7 required to list all of the uses. Child care center is not among those.
8 So for that very reason alone and it wanting to create a new use that
9 was not discussed before, it's got to come in again even under the
10 campus plan. Even if there were no Section 205, it would have to
11 come in because it's proposing a new use that hasn't been considered
12 by the public in a public hearing. And it's a major change in the
13 campus plan. Therefore we think that that's what it is.

14 Now, their definition of accessory use, as we saw
15 today, is in conflict with the regulations it has to under the same lot. In
16 the Citizen's Coalition, the power plant was on the same lot and that
17 was our large plat that we gave you that shows you lot 1.

18 Your accessory use definitions are different in lot 1
19 and they are outside the boundaries of the main campus where you
20 have a lot of residential lots. And so that whole thing breaks down
21 there too.

22 So, the teaching of Citizen's Coalition, however, is
23 that the cogenerator power plant facility was on the plan. It was
24 approved. But when the University wanted to actually do it, they had
25 to come back with the specific plans so that it would be subjected to
26 the process. And that any conditions on that new use, the use that

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1 had been approved, but the actual implementation of the use, would
2 be placed on that particular facility.

3 And that's what they did when they came back to this
4 very Board on the same two lots and asked for permission to build the
5 townhouses that were already approved as part of the plan.

6 So, our position is simply that the Zoning
7 Administrator's decision was not really based upon a firm and sound
8 reading of the regulations. That under the campus plan, Poulton Hall
9 is designated as a print shop/miscellaneous uses. Lots 161 and 162
10 are residents. The University has changed this, both uses without
11 Board approval. And we believe that that is contrary to the
12 regulations. And that they should be required to file an application,
13 that we have a public hearing, and that the Board, after that hearing
14 and taking evidence, issue an order listing any conditions that are
15 necessary to protect the residents and the children who are going to
16 be coming through these residential streets on their way to this school.

17 There are lots of parking issues. And what the
18 University has attempted to do in this case is to say to us, you're not
19 entitled to a hearing. We're going to do it. You have to take our word
20 that we'll do it right. And, you know, you just have no recourse except
21 to talk to us. We don't believe that's right.

22 The system here is if they want to do something that's
23 going to be a major change in the campus plan, a major change in the
24 neighborhood, we have 205 and 210 to protect us. We have the
25 public hearing. The Board puts on the conditions it feels necessary to
26 protect the safety of the citizens and the students and everyone. And

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1 that's what needs to happen here.

2 And I would hope that the Board would come to a
3 quick conclusion on this. Rule in our favor. And we could go forward
4 with this and get it done so that it doesn't hold up what looks to be a
5 sound project. But there are no conditions on it. And we find that
6 unacceptable.

7 CHAIRPERSON HINTON: Thank you.

8 MS. REID: I'm sorry. One quick question before you
9 leave. Did I understand you to say the University had come to this
10 Board subsequent to their -- about their campus plan to request
11 changes or to get variances or special exceptions?

12 MR. CROCKETT: Yes, and I'm sorry. With respect to
13 these two lots, 161 and 162, which were on the campus plan at the
14 time, it was before the new campus plan, it was in the old campus
15 plan, they were designated as faculty residence. But they had to
16 come back under the terms of the plan when they wished to construct
17 them and bring in the specifics of the plans and so forth and so on for
18 the Board to consider before they could go ahead with the
19 construction. Even though the residency had been approved in
20 concept.

21 MS. BENNETT: And that's typical of the further
22 process --

23 MR. CROCKETT: -- everybody because it is a
24 change. It's something that the community has not had an opportunity
25 to consider.

26 CHAIRPERSON HINTON: Thank you.

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1 MR. CROCKETT: Any further questions?

2 CHAIRPERSON HINTON: No.

3 MR. CROCKETT: I thank you very much for your
4 indulgence.

5 CHAIRPERSON HINTON: Okay. We have some
6 materials that are coming in. I think everybody knows what they've
7 been asked to submit. If you're not sure please talk to Mr. Lyons, and
8 maybe tomorrow or, not right now, but any other time. Just to be sure
9 what it is the Board expects.

10 What kind of dates do you have for us, Mr. Lyons?

11 MR. LYONS: Madam Chair, I would recommend that
12 the submissions that the Board has requested be filed by August 11th,
13 with service on the other parties to the appeal. Responses and
14 proposed findings would then be due August 25th. And the Board at
15 its September 3rd meeting will consider a decision in the application.

16 CHAIRPERSON HINTON: And draft orders may be
17 submitted?

18 MR. LYONS: Yes, proposed findings are due August
19 25th.

20 CHAIRPERSON HINTON: Proposed findings. Very
21 good.

22 MR. CROCKETT: I'd just make one request that the
23 filings that are going to be made on August 11th be hand delivered or
24 faxed to me so that I have sufficient time to --

25 MR. LYONS: They must be served the same day that
26 they're filed with the Board. They must be served to the parties on the

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1 same day.

2 MR. CROCKETT: I understand that, but they get
3 served by mail. I'm asking that it be stipulated that they be hand
4 delivered or faxed.

5 MR. LYONS: It would be same day mail.

6 CHAIRPERSON HINTON: Very good. Is that it?
7 Adjourned. Off the record.

8 (Whereupon, at 8:35 p.m., the above-entitled matter
9 concluded.)

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