

1 CHAIRPERSON GRIFFIS: Excellent.

2 Is there any opposed?

3 COMMISSIONER MITTEN: I just want
4 to -- I'm not going to vote in opposition, but
5 I do just want to register my concern which
6 is, I think the appropriate role for the
7 Northeast Neighbors for Responsible Growth
8 would have been as a witness for the Zoning
9 Administrator to get whatever facts in the
10 record that they need and not have them as an
11 intervener. Because I don't think that -- I
12 think the main reason why they're here is what
13 they articulated in the party status
14 application. But I appreciate the fact that
15 we're -- that there isn't an objection and I
16 won't vote in opposition. But generally, I
17 don't think that this is the best way to
18 introduce their testimony into the record.

19 Thank you.

20 CHAIRPERSON GRIFFIS: Thank you.

21 Others? Any voices to opposition?

22 If not, then we'll take that the

1 CHAIRPERSON GRIFFIS: Excellent.

2 Is there any opposed?

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4 to -- I'm not going to vote in opposition, but
5 I do just want to register my concern which
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10 record that they need and not have them as an
11 intervener. Because I don't think that -- I
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13 they articulated in the party status
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15 we're -- that there isn't an objection and I
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1 when I read it. So, I'm glad to know that I
2 wasn't. So, I concur that that testimony that
3 is attributed to me is actually Mrs. Miller.

4 CHAIRPERSON GRIFFIS: I don't
5 know. It's right here in writing.

6 VICE CHAIRPERSON MILLER: And I
7 stand by that testimony.

8 CHAIRPERSON GRIFFIS: It's black
9 and white.

10 Can I refute that my name is
11 attached to some things in our transcripts?
12 Okay. Good enough. Good clarification. And
13 let's move ahead then.

14 Anything else? Any other
15 preliminary matters? Procedural?

16 Very well, Mr. Gannon, it's all
17 you.

18 MR. GANNON: Thank you and I
19 appreciate the correction of Vice Chair Miller
20 and as long as you recognize that I wasn't
21 aware of the error in the transcript when --

22 COMMISSIONER MITTEN: It will come

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1 in handy for me later that this has been
2 clarified.

3 Thank you.

4 VICE CHAIRPERSON MILLER: And
5 actually, we will bring it to the Office's
6 attention so they can change it on the
7 website.

8 MR. GANNON: Well, thank you
9 again.

10 Since Appellant Appletree filed
11 this building permit application on February
12 9th of this year, it has consistently
13 maintained that it is entitled as a matter of
14 right to enlarge the building at the subject
15 property premises and that its application
16 falls within exceptions to otherwise
17 applicable lot dimension and parking
18 regulations because this building predates May
19 12th, 1958, and is a contributing structure in
20 an historic district.

21 If it falls within the exceptions
22 in Sections 401.1 and 2100.5 of the Zoning

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1 Regulations, then use of the premises as a
2 charter school, as a public charter school,
3 would be a conforming use.

4 The Zoning Administrator in a
5 letter sent to Appletree on April 28th
6 concluded otherwise but to this day he has not
7 yet explained publicly how he reads the two
8 provisions repeatedly invoked by Appletree.

9 Since his decision, the Board has
10 expressly rejected the Zoning Administrator's
11 attempt in another case to depart from the
12 Board's consistent reading of the historic
13 parking exception in Section 2100.5 and we
14 will respectfully ask you to reiterate your
15 reading of Section 2100.5 in this appeal.

16 But our case under Section 401.1
17 is if anything on the text of the provision
18 even more clear by its plain terms. Section
19 401.1 grandfathers lots that were improved on
20 May 12th, 1958. It allows buildings on those
21 lots to be enlarged or rebuilt without regards
22 to the lots' own dimensions as long as the

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1 building itself meets all of the requirements,
2 including those for percentage of lot
3 occupancy, floor area ratio, building heights,
4 rear and side yards, parking to name a few.

5 In other words, the only thing
6 that the provision actually grandfathers are
7 the immutable characteristics of a lot that
8 was already improved in 1958, its total area
9 and its width.

10 In this case, Appletree's proposed
11 project would meet all the other requirements
12 in the Zoning code and denying its building
13 permit on the grounds that this project is
14 nonconforming has the effect of rendering the
15 exception in 401.1 superfluous.

16 As we've explained in our brief,
17 which is Exhibit 21 in the case, and we've
18 already seen evidence that you're familiar
19 with it, we believe that our readings of
20 Section 401.1 and 2100.5, which are consistent
21 with the text of those provisions and this
22 Board's relevant previous decisions, are

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1 sufficient to reverse the Zoning
2 Administrator's denial of Appletree's permit.

3 We note that between February and
4 October of this year, the Zoning Commission
5 had twice adopted an emergency text amendment
6 that attempted to do two things. First, to
7 update the definition of public schools in the
8 Zoning Regulations to expressly include public
9 charter schools in conformity with what the
10 Office of Planning characterized as
11 Congressional command. And with prior
12 consistent practice over a period of 10 years.

13 The second to increase many of the
14 area regulations for public schools in
15 residential zones, in particular.

16 As we've explained in our brief,
17 if the Board bases its decision on new lot
18 width and lot area requirements in the
19 emergency rule-makings, we believe it would be
20 on shaky ground, but we don't think you have
21 to get to that point in order to decide this
22 appeal.

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1 But I think that I can go through
2 the two legal arguments at a little more
3 length to make sure that we're all on the same
4 page, or at least that you understand our
5 positions.

6 Our argument on Section 401.1
7 about lot width and lot area, we believe is a
8 straightforward reading of the provision and
9 we assume that the provision should be
10 construed if reasonably possible in a way that
11 does not render it superfluous and give
12 meaning to its language.

13 The language of Section 401.1 is
14 at the top of page 5 of our brief. If you
15 want to look to that. I assume you're
16 familiar with it.

17 It states, 401 means that when a
18 building was on a lot in 1958 that building
19 can be enlarged or replaced if it complies
20 with all of the provisions of the Zoning
21 Regulations except for lot area and lot width.

22 CHAIRPERSON GRIFFIS: And do you

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1 not read that provision then as other
2 provisions of this title as it would go to
3 even other provisions of lot dimensions?

4 Do you think it still exempts it
5 even though this new provision they might talk
6 about additional requirements for lot
7 dimensions. You're saying that if it's in the
8 realm of lot dimension, it's exempted under
9 401.1?

10 MR. GANNON: No. I believe it is
11 only exempt from lot width and lot area. The
12 phrasing in the rule is lot area -- a lot --
13 with a lot area or width of lot or both.

14 CHAIRPERSON GRIFFIS: Okay. So,
15 your reading on that is then as the Zoning
16 Commission did amend 401.3 --

17 MR. GANNON: Yes. It did.

18 CHAIRPERSON GRIFFIS: -- that it
19 still addresses that?

20 MR. GANNON: We believe that this
21 still addresses that because the provision
22 says that the building was located on the lot

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1 in 1958, it is a lot that today, the lot area
2 or width of lot or both is less than that now
3 prescribed assuming that the emergency rule-
4 making were still in effect today. But, you
5 know, on the date that the Zoning
6 Administrator made his decision and believed
7 that the emergency rule was in effect back in
8 April. That on that day it was on a lot with
9 lot area or width of lot or both. It was less
10 than that prescribed by 401.3, as amended by
11 the emergency text amendment. And, therefore,
12 the building could not be enlarged or replaced
13 unless it complied with all other provisions
14 of the title.

15 And the word "other" there can do
16 nothing else except refer back to lot width or
17 lot area or both and we think that's exactly
18 what the Board said in the decision of -- it's
19 2002 decision in Appeal No. 16830 that we've
20 attached to Tab F on our brief. The ANC 2A
21 and Richard J. Price appeal. I mean, that was
22 an appeal in which the Board said 401.1 "means

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1 that a replacement for a pre-1958 building on
2 a nonconforming lot is permitted so long as it
3 meets all zoning requirements 'other' than lot
4 width." Now, in that instance lot area wasn't
5 at issue but the text of the provision gives
6 us no reason to distinguish between lot width
7 or lot area or both as the text says.

8 And we believe it's important to
9 note that 401.1 mentions nothing about use.
10 Nothing about whether the use is changing.
11 Nothing about whether the use is remaining the
12 same. It grandfathers lot width and lot area
13 and it does so without regard to use.

14 As I mentioned at the beginning, I
15 think the purpose of 401.1 is to grandfather
16 the immutable characteristics of a lot that
17 was improved in 1958. And these are things
18 that are not going to change. The lot is too
19 small. It's too small an area or too small in
20 width. But everything else still has to be
21 okay including, in particular, percentage of
22 lot occupancy.

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1 So, we can't get too abusive.
2 Anyone who is taking advantage of 401.1
3 because it still has -- the subject property
4 still has to comply. The proposed building
5 still has to comply with all of the other
6 limitations, including percentage of lot
7 occupancy, FAR, all of those other provisions.

8 And there's no dispute that we
9 comply with any of those. There's just the
10 dispute about the parking. And so we believe
11 that this is consistent with 401.2 which comes
12 right after it.

13 If you look at the two provisions
14 together, they function to talk about that
15 they have different trigger dates. One is in
16 the end of 1957 and one is in 1958. But 401.2
17 grandfathers -- is a partial grandfathering
18 clause for unimproved lots and it essentially
19 allows a 20 percent exemption from the lot
20 area and lot width requirements for a lot that
21 was unimproved.

22 And so if the lot already was

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1 improved in 1958, then the applicable
2 provision is 401.1, which specifically says.
3 I mean it's phrased in terms of a prohibition.
4 But it specifically says that a replacement
5 for the building is permitted as long as you
6 meet all of the other requirements.

7 Unless the Chair or the Members of
8 the Board have different suggestions, I think
9 that the best way to proceed in discussing
10 this further would just be to respond to some
11 of the points that have been made in the ANC's
12 written report that's in the record, because
13 we're not exactly sure what Mr. Keys or Mr.
14 Crews are going to say about the way they
15 construe the provision.

16 But if you look to the ANC's
17 written report which is Exhibit 23 in this
18 case, they do make a few points that we think
19 are unfounded and we disagree with. I'm
20 assuming that without anybody objecting, that
21 nobody has a problem with our discussing 401.1
22 at this point?

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1 CHAIRPERSON GRIFFIS: Do we have
2 any questions?

3 No. Let's keep going.

4 MR. GANNON: First, the ANC report
5 contends that Appletree concedes that a public
6 charter school is a nonconforming use under
7 the emergency text amendment in Zoning
8 Commission Case No. 06-06. And I think that
9 it's clear from our brief and other filings
10 already in the file that this is just not
11 true, that Appletree has repeatedly maintained
12 that even assuming the text amendment applies,
13 it's proposed use is conforming to the Section
14 401.1 and the parking provision. This is made
15 clear in the letter we sent to the Zoning
16 Administrator on March 6th. It is in the
17 file. In the notice of appeal that we filed
18 with the Board on June 27th and in the brief
19 that we filed on November 7.

20 Second, the ANC report contends
21 that the most recent use of the subject
22 property was a conforming use. But this isn't

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1 true if you take the ANC's view of the minimum
2 lot width requirements. Because under 401.3,
3 if you look to the table, a private club in an
4 R-4 District would be an all-other structure.
5 And it would need to be on a lot that's 40
6 feet wide. And this lot is not 40 feet wide.
7 It's 36 feet wide.

8 And so even the current use, the
9 previous use, was nonconforming with regard to
10 lot width under the ANC's own reading. And
11 that's to say nothing of parking. We will get
12 more to what the parking situation is on the
13 lot later.

14 Third, the ANC report contends
15 that the opening clause of 401.1 -- 401.1
16 begins by saying "except as provided in
17 Chapters 20 through 25 of this title." And
18 they contend that this means that someone must
19 independently satisfy all of the provisions in
20 Chapters 20 through 25.

21 And as we noted in our brief,
22 however, the way the provision is constructed,

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1 it's generally a prohibition. It's a
2 prohibition on replacing pre-1958 buildings
3 on nonconforming lots, except in certain
4 circumstances. And they're basically two
5 classes of exceptions contained in the
6 sentence.

7 One is, unless it complies with
8 all of the provisions of the title, except for
9 lot area and lot width, the other class of
10 exceptions is except as permitted in Chapters
11 20 through Chapter 25. And so there are all
12 sorts of nonconforming uses, extensions,
13 enlargements, replacements of nonconforming
14 uses if structures are destroyed. Or certain
15 limited instances in which you need to have
16 that exception built into 401.1, otherwise
17 there would be a prohibition on not enlarging
18 or replacing, unless you complied with
19 everything else in the title.

20 And we think that this, although
21 it might sound counter-intuitive at first.
22 This is not an unusual reading of any of the

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1 provisions in the zoning code. Every district
2 in the zoning code has a provision that begins
3 with the exact same phrase to talk about what
4 are the permitted uses.

5 So, if you go to an R-1 District
6 in Section 200.4, it beings. "Except as
7 provided in Chapters 20 through 25 of this
8 title in any R-1 District. No building shall
9 be used except for one or more of the uses
10 listed in this chapter." So, it's exactly the
11 same structure except for Chapters 20 through
12 25. There's a broad exception in the
13 beginning. It's a catch-all that applied to
14 special cases back there in that part of the
15 zoning regulations.

16 Nothing is permitted except what
17 we allow you here. And that's exactly the way
18 we think 401.1 is constructed. And so we
19 think that the ANC is incorrect in construing
20 this initial clause as requiring Appletree's
21 application, Appletree's building permit
22 application to comply with all of the

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1 provisions in Chapters 20 and Chapter 21, in
2 addition to complying with what we contend is
3 the exception that is contained in the back
4 part of Section 401.1.

5 And if you look at a couple of the
6 provisions in Chapter 20, in particular, we
7 think that it becomes clear that requiring an
8 Applicant to -- a building permit applicant to
9 comply with not only the exception in 401.1
10 but also the provisions in Chapters 20 -- in
11 Chapter 20, in particular, that would render
12 401.1 superfluous because if you take, for
13 example, Section 2002.5 it reads. It's a
14 short provision. A structure devoted to a
15 nonconforming use like ours, which is
16 nonconforming right now because it's a private
17 club on a lot that's only 36 feet wide. A
18 structure devoted to a nonconforming use shall
19 not be enlarged, except if the enlargement is
20 to be devoted to a conforming use.

21 So, that would mean that there
22 would be no enlargement possible here on the

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1 basis of use and, therefore, we would not be
2 able to take advantage -- that 401.1 would
3 never have any independent meaning. Because
4 the only reason why we don't comply with the
5 lot width and lot area requirements is use
6 dependent.

7 And it is the facts that we are in
8 one of the parts of 401.3 that requires more
9 than 36 feet of width. And, therefore, we
10 will always have a nonconforming use for any
11 of those provisions. And, therefore, we would
12 always be barred by 2002.5 from expanding,
13 enlarging the structure that is currently
14 devoted to a nonconforming use.

15 And, therefore, 401.1 would be
16 useless to anyone in those circumstances. And
17 this reasoning is exactly parallel to the way
18 in which the Board has previously construed
19 provisions like 405.8 and 401.2, recognizing
20 that in these independent -- meaning to these
21 provisions.

22 Questions on that? Should I spend

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1 more time on that?

2 CHAIRPERSON GRIFFIS: Let me just
3 ask for clarification.

4 Were you maintaining that the
5 position that this was a nonconforming use for
6 this structure based on the requirements of
7 the lot width and dimension requirements?

8 MR. GANNON: Well, the definition
9 of nonconforming use is not all -- I think, is
10 not entirely clear here because lot width
11 would normally be something that would make
12 you a nonconforming structure.

13 But what I was trying to get at
14 and the thing that makes, I think, it a little
15 bit confusing and the point where I think I
16 may have confused some of you by talking about
17 whether it's use dependent.

18 CHAIRPERSON GRIFFIS: I understand
19 that. I understand that phrase as it's use,
20 because it is use dependent. And everything
21 is essentially use dependent because we can
22 talk about structure, with the structure has

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1 to go to use in any of the designations that
2 we have. It looks like a town house, but if
3 you put an office in it, it's not a
4 residential allowable in an R-1, 2 or 3.

5 MR. GANNON: Exactly. And 401.3,
6 depending on what your number is, about how
7 wide your lot is, just to take this as an
8 example. You know, a 36-foot lot will be
9 compliant for some uses, but not others.
10 So, what that means is it's really a
11 nonconforming structure? Well, it depends.
12 It depends on what it's being used for. And
13 so that was what I would say is that
14 currently, that the only thing that would make
15 this allegedly a nonconforming use or a
16 nonconforming structure is lot width or lot
17 area. Those are the only provisions. And
18 they are both spoken to by 401.1, which
19 mentions nothing about being dependent upon
20 what type of use you have or whether you're
21 changing from a conforming use to a
22 nonconforming use or whatever. And in this

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1 instance, just as one of the initial points I
2 made in response to the ANC's written report,
3 that even under their interpretation of the
4 lot width requirements, the private club that
5 was there before has to be a nonconforming
6 structure or a nonconforming use, depending on
7 how you want to construe that term in this
8 context. Because in order to comply with
9 401.3, it would need to be 40 feet wide.

10 CHAIRPERSON GRIFFIS: Right. I
11 understand where you're going. I think that
12 is a little bit confusing, but we'll move
13 ahead. Because, quite frankly, I think we
14 look at use as allowable in the zoned
15 district. And that would be a definition --
16 defining point of whether it was conforming or
17 not conforming use.

18 And then you could go to the
19 specifics of the site and property to find out
20 elements of conformity or nonconformity. But
21 they would be -- well, it would be my read
22 that the regulations address that as a

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1 structural nonconforming.

2 MR. GANNON: Well, in that
3 instance then the relevant regulation 2001.3
4 which says, enlargements may be made to a
5 nonconforming structure.

6 CHAIRPERSON GRIFFIS: Of lot
7 occupancy.

8 MR. GANNON: As long as lot
9 occupancy and the enlargement must conform to
10 use and structure requirements. And then
11 again there that that would be meaningless.
12 401.1 would not allow the exceptions for lot
13 width and lot area.

14 The exceptions that 401.1 creates
15 for lot width and lot area would be rendered
16 meaningless if you were required to conform to
17 those provisions in 2001.3 in the instance of
18 a nonconforming structure.

19 And, therefore, in order to give
20 meaning to the exception in 401.1, we think
21 that you should read it exactly as it reads
22 and exactly as you read it in the 2002 appeal

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1 that I quoted to you before and that is
2 included in Tab F in our brief.

3 CHAIRPERSON GRIFFIS: Okay.

4 MR. GANNON: Should I move to
5 parking?

6 CHAIRPERSON GRIFFIS: Yes. Unless
7 there are any other questions? Let's go
8 ahead.

9 MR. GANNON: As to parking, the
10 subject property has been certified by the
11 state historic preservation officer as
12 contributing to the character of the Capitol
13 Hill Preservation District. The certification
14 is contained on pages 2 and 3 of Exhibit 15 in
15 the case file.

16 And under Section 2100.5, the text
17 of which is quoted at the bottom of page 7 in
18 our brief and I note that the Board is
19 familiar with it. As it says, no additional
20 parking spaces are required to change a
21 contributing structure's use or to expand the
22 existing building in the way that the Board

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1 has generally construed it, notwithstanding
2 objections by Jeffries/Mitten. And we think
3 that this established by decisions of the
4 Board that are discussed on page 7 through 9
5 of our brief. Several of them are attached at
6 Tabs G, H, I and J in our brief. I think that
7 the most salient one is the Board's order in
8 D.C. Hampton that came this last July.
9 Therefore, it came after we filed our appeal
10 in this case.

11 But the reason we think it is
12 significant is because the Board specifically
13 reaffirmed what it called its long-standing
14 and consistent interpretation and it said that
15 Section 2100.5 operates, this is a quote
16 "operates to waive the requirement for
17 additional parking spaces for new construction
18 when you have a contributing structure."

19 And the cases -- the other
20 decisions that we cited in the brief establish
21 that this is relevant to both changes of use.
22 That's the part that Jeffries and Mitten has

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1 disagreed with. And also to new construction.

2 And we think here that there is
3 basically just a factual question that has
4 been introduced by the ANC. The ANC's written
5 report on page 2 claims that there are
6 currently 10 parking spaces on the subject
7 property. And, you know, we think that this
8 is just mistaken and obviously so.

9 I think that the easiest way to
10 explain this is in two ways. And one is to
11 look to --

12 MEMBER ETHERLY: You mind if I
13 interrupt real quick? Pardon me, for
14 interrupting, but perhaps before we get to the
15 factual piece, let me back up a little bit.

16 Under your argument, is it --
17 let's stay way from the factual piece of the
18 parking for a moment. Is it your
19 interpretation that if it were contributing to
20 the historic character and you had five spaces
21 on the property, does your reading of 2100.5
22 allow you to remove the existing parking if it

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1 were on site?

2 MR. GANNON: No.

3 MEMBER ETHERLY: Okay.

4 MR. GANNON: No. We are, you
5 know, I don't know, the Board has to decide
6 that question in this case. We're not asking
7 you to decide that question, that 2100.5
8 begins, no additional parking spaces shall be
9 required. You know, I suppose there could be
10 some sort of debate of what is additional.
11 But under the circumstances, no. We do not
12 contend that we can take away existing parking
13 spaces.

14 And if you turn to Tab B in our
15 brief, you'll see just the zoning data summary
16 that went in with our building permit
17 application. And over on the right-hand side
18 there in discussing parking, it says that the
19 building has been certified in sites 2100.5
20 and notes that no existing parking is
21 indicated at the subject premises, subject
22 property. And says, assume three spaces there

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1 are no spaces at the property currently. But
2 given the space that's there, assume three
3 spaces and provided parking is three spaces.

4 And so what we've done is we've
5 looked to -- we've tried not to destroy
6 existing parking spaces. But the truth is,
7 that there are currently, legally zero legal
8 parking spaces at the premises because none of
9 them are stripped and marked as would be
10 required by 2117.3 in the zoning code.

11 A surveyor examined the property
12 early on and found no evidence of any parking
13 spaces that had been previously marked.

14 The ANC in its written report
15 claims that there is room for 10 legal spaces.
16 In the committee report at the ANC they said
17 there are seven legal spaces. But, you know,
18 we think that this is just not going to be
19 true, if you look at the circumstances of the
20 back of the property there and we think it's
21 important to begin by pointing out that there
22 are currently zero legally marked spaces.

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1 And so we're sort of working at a
2 disadvantage in trying to come up with a
3 hypothetical about how many existing spaces
4 there are to insure that we're not destroying
5 parking spaces as Mr. Etherly raised the
6 question of.

7 I think, perhaps, the best way to
8 deal with this would be a little bit visually.
9 I do have an exhibit here. I brought enough
10 copies for everyone to share. I'm not exactly
11 sure how we should go about --

12 CHAIRPERSON GRIFFIS: How many do
13 you have? How many do you have?

14 MR. GANNON: I have at least 15.

15 CHAIRPERSON GRIFFIS: Okay. Good.
16 Why don't we put -- distribute them out to the
17 parties and visitors that are here and then
18 Ms. Bailey will take the rest and distribute
19 to us.

20 MEMBER ETHERLY: As Mr. Gannon --
21 perhaps as the sheets are being distributed,
22 let me kind of come back to this parking.

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1 So, if under your line of
2 argument, if there are no legally recognizable
3 or legally recognized parking spaces under the
4 current definitions and it's a contributing
5 building, there would be no requirement to --
6 I'm not articulating this the right way.

7 But what I'm trying to get at
8 perhaps is and this is a hypothetical. Things
9 that I hated in law school, by the way.

10 But, perhaps what troubles me
11 about your interpretation is that, because I
12 think part of what we may very well hear from
13 Mr. Keys is that, well, wait a minute. There
14 is some evidence and we're going to
15 demonstrate it that there was some existing
16 parking being utilized on the site, whether it
17 was stripped spaces or not stripped spaces.
18 Maybe we'll get into, maybe we won't. I'm not
19 desirous of getting too deep into that.

20 But my point is, is the existence
21 of parking spaces under your argument
22 dependent on whether or not they are legally

1 stripped and in accordance with the current
2 zoning regs. Or is it inappropriate to say,
3 no. The zoning regs contemplate what can
4 actually be utilized on a site for parking.

5 And so if there were a prior use
6 that was utilizing parking and let's say that
7 is, hey. Lo and behold, 10 spaces. Aren't
8 you beholding to maintaining those 10 spaces
9 in place?

10 MR. GANNON: Well, you know, I
11 think that -- I don't want to fight your
12 hypothetical, but I think that at the end of
13 this and I think that the exhibit that I just
14 distributed is intended to avoid or having to
15 get into that discussion. But I think that it
16 leads into this because what this is -- this
17 is what we think is a good faith attempt to
18 figure out how many spaces can actually fit in
19 the lot that is there.

20 CHAIRPERSON GRIFFIS: Good. I
21 think it's productive to go right to the
22 diagram because it's pretty self-explanatory.

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1 MR. GANNON: Yes. And I think
2 attached to the back of the diagram are some
3 photographs because there was only one
4 photograph in the record up until now. There
5 are a couple at the beginning that are of the
6 front of the building which is basically
7 irrelevant to the parking question.

8 But once you get in, you see lots
9 of pictures in the back of the building. And
10 so you can see what we're working with. The
11 current building that is there in between two
12 other buildings with some fences going all the
13 way back.

14 And if you actually flip to the
15 very last page, you sort of get the best view
16 of the whole lot, which is looking down from
17 the roof of the subject property. You can see
18 there that there's a gate. A fence in the
19 back with a gate. There are fences along both
20 sides.

21 So, if you flip back to the front,
22 I think that the reason why I stress so much

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1 that there are no legal spaces currently
2 marked is that we feel like in order to prove
3 that we aren't destroying existing parking
4 spaces, that you know, we don't want to be put
5 in the situation of having to engage in an
6 exercise of going out of our way to create
7 parking spaces that are legal on the lot now
8 in order to figure out how many parking spaces
9 we need for the proposed use.

10 And so we think that this is a
11 good faith attempt. But we think that it's
12 important to recognize in the nature of the
13 inquiry that right now there are no spaces on
14 the lot.

15 And, Mr. Etherly, you were asking
16 about whether the zoning regulations just
17 require us to recognize that you can park
18 there and there are spaces there. I mean, I
19 don't think that the zoning regulations would
20 contemplate that if people have been parking
21 in haphazard ways that don't actually conform
22 to the provisions of the parking code or the

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1 parking chapter in the zoning regulations,
2 that we would be obligated to maintain parking
3 spaces that don't comport with -- that we'd be
4 accused of destroying existing parking spaces
5 by destroying parking spaces that are not
6 compliant right now.

7 And so this is an attempt, this
8 diagram here, is just a sketch and was
9 prepared by the same architect that did the
10 plans that are already in the record, is not
11 an expert opinion, but it is just a visual to
12 help us understand what we're working with
13 here.

14 The ANC has commented that the
15 back portion of the lot that we're looking at
16 here is 36 feet wide and 77.7 feet long deep,
17 and therefore could fit 10 parking spaces.
18 And, you know, we just don't see how that
19 could be possible. And I think we should just
20 talk briefly about the constraints. And
21 they're all kind of here on the map.

22 CHAIRPERSON GRIFFIS: Okay.

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1 MR. GANNON: If you would go to
2 the back of the building, you see that there
3 is a fire escape stairwell coming down from
4 the second floor. There is a stairwell going
5 down into the basement. There are two air
6 conditioner units on the back of the building.
7 You can see these in the photographs.

8 And you need landings in front of
9 the stairwells.

10 CHAIRPERSON GRIFFIS: We'll get
11 that. We have the nine by nine and it's going
12 to be in accordance with the regulations.
13 We're going to count parking spaces that meet
14 all the requirements in the zoning
15 regulations.

16 You've laid out an option for
17 three. I can see another option that makes it
18 four. But with the parameters and in the
19 reality of what you're showing, I think the
20 case is there.

21 MR. GANNON: Let me discuss a
22 couple of facts of the additional constraints

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1 here.

2 One is that when -- that there is
3 definitely room across for 90 degree parking
4 because you would need to have a 20 foot aisle
5 behind a 19 foot parking space that would need
6 to be 39 feet wide. We don't have 39 feet.
7 And, in fact, we don't have 36 feet.

8 And so if you think that we could
9 put four spaces across, just straight in, we
10 don't have 36 feet at any point of the lot
11 right now, because the building on the left is
12 encroaching. You can't see it as well on this
13 diagram as you can see it in the plat that is
14 in the surveyor's plat that's actually Exhibit
15 5 in the file. You can see clearly that the
16 property on the north is encroaching across
17 the property line. That's the fence that runs
18 along the property there has a stone wall at
19 the bottom of an iron fence that encroaches by
20 eight inches. And that the carriage house in
21 the back encroaches.

22 And so what that means is that at

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1 no point along the left do we actually have a
2 space that goes all the way to the property
3 line. The property lot is actually 36 feet
4 wide. But because of the encroachments, we
5 can't use the space there.

6 On the right-hand side, the
7 building on the south, the right-hand side of
8 the diagram, is also intruding onto the lot,
9 up to where the building is. Then there's a
10 wooden fence that runs all the way back to the
11 back of the property.

12 On this diagram, you see there's a
13 notation for a one foot wall. That's on the
14 assumption that under Section 4117.12, that
15 open parking spaces would need to be screened
16 from continuous residential property by a
17 solid stone or brick wall that's 42 inches
18 high. Or I think we'd planted evergreens or
19 trees.

20 And so even though we don't have
21 36 feet across from the left-hand side, we're
22 also losing space on the right-hand side. And

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1 so this is an attempt to lay out spaces with
2 a 17-foot aisle, that are at less than 60
3 degrees. And because we think that you need
4 to have a clear aisle behind any row of two or
5 more spaces, you know, it looks like this is
6 the best thing we can do.

7 I would be happy to entertain
8 comments from the Chair or anyone else about
9 proposed other arrangements. But, you know,
10 we think under the circumstances, and this is
11 why I was talking so much about the fact that
12 there isn't parking right now, that having
13 gone through good faith attempts to figure out
14 what a legal parking arrangement would be,
15 having established that we think that that is
16 three parking spaces, having not heard from
17 the Zoning Commissioner that there is some
18 other way that he would grant the Zoning
19 Administrator, that he would grant, you know,
20 a deviation in order to allow us to have less
21 than nine space or something like that.

22 We think it would be extraordinary

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1 to require us to find exceptions or take
2 advantage of discretion of the Zoning
3 Administrator in order to figure out how many
4 spaces are currently on the lot that we need
5 to save in order to figure out how to apply
6 2100.5's requirement that no additional spaces
7 need to be created.

8 And so that's how we came up with
9 the proposed provided parking of three spaces
10 and the assumption of three spaces.

11 And, you know, frankly, we just
12 think that the allegation in the ANC's report
13 that there's room for 10 cars there. There
14 may be room for 10 cars there, but it
15 certainly isn't in any way that would conform
16 with the zoning code. And, especially given
17 that there are gates on the back of the
18 property. You can't drive in at all portions
19 of the lot.

20 CHAIRPERSON GRIFFIS: I think we
21 understand that. You can change the gate
22 location is you needed to. Obviously, that's

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1 not an original gate on that back side. You
2 could move. But you could do also three
3 parallel or perpendicular to the property.
4 Right? You said it is 77.7 feet. That would
5 allow you 19 feet away from the property at
6 its most deep. One would obviously move away
7 from the stairs. And then you could have one
8 more on the alley side. With a 20-foot drive
9 aisle that would get you in and out.

10 MR. GANNON: But there's not 20
11 feet because it's not 39 feet wide.

12 MR. GANNON: No. It would be
13 length. I would need 60 feet. Two, four and
14 six. It doesn't matter. The question is, I
15 think your visual objective here is
16 understandable enough, noting the difference
17 between three, four or ten spaces and the
18 viability of each of those.

19 I don't have any other questions
20 on that.

21 Ms. Miller?

22 VICE CHAIRPERSON MILLER: I just

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1 want to make sure I understand your argument,
2 though. I understand what you're saying about
3 how many spaces you could fit. Is it your
4 reading of the regulation that you're not
5 required to provide any parking spaces because
6 none existed? Or is it that you are required
7 to provide only as many as could fit in that
8 area?

9 MR. GANNON: We think that we
10 understand that notwithstanding the fact that
11 there are currently zero legal parking spaces
12 that, reasonably construed, there could be
13 three there, and, therefore, we think that by
14 providing -- by proposing three spaces under
15 the new use that we have not destroyed
16 existing parking spaces.

17 And, therefore, we are -- we don't
18 need to create -- we're not violating 2100.5,
19 which is no additional parking spaces shall be
20 required, because we're also not subtracting
21 from parking spaces.

22 And so, you know, I don't need to

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1 make a fetish over the fact that there are
2 currently zero legal spaces. I think that, as
3 the chair pointed out, the difference between
4 three and ten is substantial.

5 And, you know, we think that given
6 the constraints that we're working with here,
7 you know, we would be surprised to find that
8 you have to go so much out of your way in
9 order to concoct a current parking arrangement
10 in order to figure out what you need to save.

11 And so that's -- this is how we
12 came up with three. And so we're not arguing
13 that the right number is zero.

14 BOARD MEMBER ETHERLY: Let me
15 follow up very quickly on Mrs. Miller's point,
16 and I agree with the chair that I think we're
17 fairly close to finishing this particular line
18 off. But are you doing it -- under your
19 argument, are you doing it just out of the
20 generosity and largess of your client?

21 Or are you doing it because you
22 read the zoning regs to require that if you

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1 can fit a legal space in there, whatever is a
2 limit of what you could fit, that's your
3 parking requirement? It's a subtle point, but
4 I think it prefaces an important one, which is
5 to understanding your reading.

6 Is it your argument that, hey,
7 we're not required to provide anything. There
8 is not anything back there now, so, hey, if we
9 wanted to, we could set up shop and not put
10 nary a parking spot and stripe back there.
11 But in keeping with the spirit of the regs, we
12 can get three, maybe four, legally sized
13 spaces back there.

14 MR. GANNON: Yes, we think -- you
15 know, we think under the circumstances, given
16 -- you know, if there is going to be a dispute
17 about three versus four, then, you know, I
18 think that the Board should consider the fact
19 that the real number now is zero.

20 BOARD MEMBER ETHERLY: Okay.

21 MR. GANNON: But --

22 BOARD MEMBER ETHERLY: Understood.

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1 MR. GANNON: -- you know, we do
2 think that it is a good faith attempt to
3 comport with the regulations and not to --

4 BOARD MEMBER ETHERLY: Okay.

5 MR. GANNON: -- not to try to
6 destroy existing parking spaces.

7 BOARD MEMBER ETHERLY: Okay.
8 Thank you.

9 Thank you, Mr. Chair.

10 COMMISSIONER MITTEN: I actually
11 have some questions on this that are going to
12 be a little bit different. As you know, I
13 don't necessarily agree with the
14 interpretation about parking that the BZA has
15 had. I'm going to come from a little bit
16 different perspective, and just note that you
17 -- I believe you noted that there is a text
18 amendment on which we will have a hearing that
19 we will discuss whether or not that long-
20 standing interpretation will be precluded by
21 a clarification in the zoning ordinance.

22 But just help me walk through my

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1 view of things. There was a club prior --
2 there was a club use of the property prior,
3 and let's assume that you're 100 percent
4 accurate, we all agree -- let's assume that we
5 all agree that there are no legal parking
6 spaces.

7 And so in one sense there is a
8 grandfathering for the number of parking
9 spaces that would have been required for the
10 club, which had a certificate of occupancy, I
11 assume. First, is the certificate of
12 occupancy for the club use something that you
13 can provide for the record?

14 MR. GANNON: I have not seen it as
15 of yet, and I don't know what it said. It
16 would have been a relatively high number. I
17 think that it -- just in order to comport with
18 what's there, if you do the math, some of
19 these numbers were actually contained on the
20 Exhibit B that we included.

21 We just did it as a hypothetical
22 by looking at assembly uses under the relevant

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1 chart in the parking provision and counting up
2 the occupant capacity in the basement and the
3 first floor and saying that, according to the
4 square footage on those two floors, that they
5 could hold 110 occupants, and, therefore, that
6 would require 11 spaces.

7 COMMISSIONER MITTEN: And you're
8 basing that particular -- you're basing that
9 on which -- refer me to what you're looking at
10 in --

11 MR. GANNON: I'm sorry.

12 COMMISSIONER MITTEN: -- the
13 ordinance when you go from use of -- as
14 assembly and then the 11 spaces, if you would.

15 MR. GANNON: Under -- we have
16 assembly, places of public assembly, in the
17 chart under 2101.1, which for all districts
18 other than C4 and C5 requires one for each 10
19 seats of occupancy capacity.

20 COMMISSIONER MITTEN: Which page
21 are you on?

22 MR. GANNON: Page 21-6 --

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1 COMMISSIONER MITTEN: 21-6.

2 MR. GANNON: -- of the zoning
3 regulations.

4 COMMISSIONER MITTEN: Okay. So
5 this is going to -- this is actually relevant
6 for -- this is relevant for -- this is where
7 the certificate of occupancy will come in
8 handy, because if it's a certificate of
9 occupancy for assembly hall, then it would
10 make sense that you were in that section. If
11 it was for club, then you would be in a
12 different -- I would think you would be under
13 all other uses.

14 So, you don't have to calculate
15 all of that right now, but if you could submit
16 --

17 MR. GANNON: Understood.

18 COMMISSIONER MITTEN: -- for the
19 record the certificate of occupancy, and then
20 we could figure out -- and if you would share
21 your calculation, then based on what the
22 certificate of occupancy says, what the

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1 existing requirement would have been for that
2 use. So that's -- in some interpretation,
3 that could be a grandfathering of X number of
4 spaces.

5 MR. GANNON: I think I -- I
6 certainly understand your point about
7 submitting the --

8 COMMISSIONER MITTEN: Okay.

9 MR. GANNON: -- C of O.

10 COMMISSIONER MITTEN: Do you not
11 understand my -- well, just tell me, based on
12 the certificate of occupancy after you get it
13 --

14 MR. GANNON: Right.

15 COMMISSIONER MITTEN: -- just tell
16 me what you believe --

17 MR. GANNON: How many spaces they
18 needed to have, whether or not they actually
19 had them.

20 COMMISSIONER MITTEN: For that
21 use, exactly.

22 MR. GANNON: So it could say 40.

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1 COMMISSIONER MITTEN: Right.

2 MR. GANNON: Just theoretically
3 speaking.

4 COMMISSIONER MITTEN: Right.

5 MR. GANNON: And you want to know
6 if the theoretical number was -- whatever the
7 theoretical number was.

8 COMMISSIONER MITTEN: Right.

9 MR. GANNON: Understood.

10 COMMISSIONER MITTEN: And then,
11 for determining the number of spaces for a
12 school --

13 MR. GANNON: Yes.

14 COMMISSIONER MITTEN: -- it's
15 based on number of students and --

16 MR. GANNON: It's based on number
17 of teachers, actually.

18 COMMISSIONER MITTEN: Okay.
19 Number of teachers, right, okay.

20 MR. GANNON: And staff members.

21 COMMISSIONER MITTEN: And what's
22 the number?

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1 MR. GANNON: Teachers and staff
2 members.

3 COMMISSIONER MITTEN: What is that
4 number, for --

5 MR. GANNON: Before the emergency
6 text amendments and the --

7 COMMISSIONER MITTEN: No. What's
8 the number that was proposed in your
9 application to the -- to DCRA?

10 MR. GANNON: We assumed 15
11 employees. It's 12 to 15, so that would --
12 for two spaces for every three employees, that
13 would be a requirement of 10 spaces.

14 COMMISSIONER MITTEN: Okay. So
15 that's where the 10 came from.

16 MR. GANNON: That's where our 10
17 came from, yes.

18 COMMISSIONER MITTEN: Okay. Okay.
19 I just need --

20 MR. GANNON: And I guess probably
21 the 10 in the ANC's written report I guess is
22 your question.

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1 COMMISSIONER MITTEN: Okay. And
2 then, since it's not based on -- as it is in
3 many cases on floor area --

4 MR. GANNON: Right.

5 COMMISSIONER MITTEN: -- if it
6 were, would you agree with this
7 interpretation, if there were -- needed to be
8 an extrapolation based on the increased size
9 of the building, and let's just roughly say
10 you're doubling it, would you say that half of
11 the spaces could be attributable to one part
12 of the building and half would be attributable
13 to the other, if one were to make an
14 interpretation that the increased size of the
15 building triggered a new requirement?

16 MR. GANNON: You know, I think
17 that's a very difficult question to address,
18 just because the regulations don't tell us how
19 to map changing from one metric to another
20 when you're talking about --

21 COMMISSIONER MITTEN: I know.
22 But, you know, you've taken on our zoning

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1 ordinance, and you have -- you know, you have
2 gone through and it's very -- it's very
3 arcane, and you've done a great job at looking
4 through it. So I'm confident that you could
5 at least come up with a position.

6 MR. GANNON: I understand what
7 you're saying, and I think that -- that that
8 sounds like a reasonable proposal. I think
9 that under certain circumstances there might
10 be different ways to slice the way the
11 physical space works, because if it's done by
12 staff members -- the metric here is staff
13 members. And as you say, that's different
14 from square footage.

15 If we were expanding an office
16 building, we were adding a certain number of
17 square feet, and we had to figure out what the
18 additional spaces were -- even under your
19 reading -- we're looking at 2100.6 and the
20 increased intensity of use, and all of that --
21 we would be able to easily map what the
22 increase is and only need to provide parking

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1 spaces for the addition.

2 And so the question here is: how
3 many staff members are we adding, when the old
4 calculation wasn't based on staff members?
5 And so --

6 COMMISSIONER MITTEN: Right. I'm
7 asking --

8 MR. GANNON: -- I think --

9 COMMISSIONER MITTEN: -- for your
10 interpretation of that particular --

11 MR. GANNON: And I think that
12 given that we're essentially close to doubling
13 the building, that that might be a reasonable
14 way to figure out how many spaces to attribute
15 to the new use.

16 COMMISSIONER MITTEN: Okay.

17 MR. GANNON: I think that under
18 certain circumstances -- if, for example, the
19 third floor or the basement or one of the
20 parts of the new space really isn't
21 attributable to staff in any way, maybe under
22 certain unusual circumstances -- and the truth

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1 is I haven't tried to figure out how it would
2 map under this project.

3 It may be -- maybe dividing it in
4 half wouldn't make the most sense. And, I
5 mean, I do think that if -- you know, if the
6 Zoning Commission is amending the way to
7 address intensity of changes and intensity of
8 use, that it would help all of us in trying to
9 construe this, if it addressed moving from one
10 metric to another.

11 You know, we're trying to figure
12 out how much to attribute to the -- how much
13 increase in -- how much to attribute to the
14 addition, because you only have to provide
15 spaces, even under Chairperson Mitten's --

16 COMMISSIONER MITTEN: Right.

17 MR. GANNON: -- interpretation for
18 the additional space or the additional
19 whatever, on the conforming structure, on the
20 contributing structure.

21 CHAIRPERSON GRIFFIS: You can see
22 how tortured it gets when you start doing

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1 that.

2 MR. GANNON: Yes. I mean, because
3 -- so, you know, it used to be an office
4 building. You know, in 1958, it was an office
5 building.

6 CHAIRPERSON GRIFFIS: And that's a
7 good point to start with, because it goes back
8 to Ms. Mitten's original comment of asking for
9 the certificate of occupancy. You have some
10 sort of documentation that shows its use at
11 May 11, 1958, meaning it would be
12 grandfathered for the parking requirement on
13 the next day, on the 12th of 1958. Is that
14 right?

15 MR. GANNON: You know, that
16 information is not in the record right now,
17 except in the form of the staff report to the
18 Historic Preservation Review Board, which
19 generally talks about the history of the
20 property.

21 I'm not sure they gave a year for
22 which the Knights of St. John and Women's

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1 Auxiliary came in there.

2 CHAIRPERSON GRIFFIS: Okay.

3 MR. GANNON: And so they came in
4 sometime in the mid to late '60s. L.P.
5 Stewart Brothers were the owners in the late
6 1950s. And there were a couple of different
7 uses going on then.

8 CHAIRPERSON GRIFFIS: Let me see
9 what -- what I see -- in the exhibits that
10 you've just put in, and the photographs, it's
11 pretty clear that this is a different
12 architectural typology than the rest of the
13 block. So --

14 MR. GANNON: And it has been since
15 the 19-teens.

16 CHAIRPERSON GRIFFIS: Right. So
17 to support the fact that it was a different
18 use. But I would add on some detail to what
19 Ms. Mitten has requested in terms of
20 certificate of occupancy, because just the
21 prior certificate of occupancy I don't think
22 would make much difference to us, if it's not

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1 dated before 1958.

2 MR. GANNON: Well, but why --

3 CHAIRPERSON GRIFFIS: Because that
4 wouldn't establish the grandfathering of the
5 parking under 2100.

6 COMMISSIONER MITTEN: But it does,
7 because if there was a certificate of
8 occupancy that was issued, even if -- and, you
9 know, if it was issued in error, that's a
10 whole other can of worms.

11 CHAIRPERSON GRIFFIS: Right.

12 COMMISSIONER MITTEN: But then,
13 the -- presumably, there was an associated
14 parking requirement.

15 CHAIRPERSON GRIFFIS: I see. But
16 the fact that you could present a certificate
17 of occupancy would mean that it was properly
18 granted in there or the calculations would
19 have been done. I agree with that. I think
20 any -- at any point, any of that documentation
21 would be supportive of your case presentation.

22 MR. GANNON: But now it -- sounds

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1 like we're talking about two different
2 certificates of occupancy now.

3 CHAIRPERSON GRIFFIS: No.

4 MR. GANNON: Because we're talking
5 about one --

6 CHAIRPERSON GRIFFIS: I'm talking
7 about finding any of them.

8 MR. GANNON: -- one is the
9 previous use.

10 CHAIRPERSON GRIFFIS: That's
11 right.

12 MR. GANNON: And then, the other
13 would be the use as of May 12, 1958, which
14 would be relevant to 2100.6. But the thing
15 that would be relevant to 2100.5 is the fact
16 that it's a contributing structure, which is
17 not --

18 CHAIRPERSON GRIFFIS: Yes.

19 MR. GANNON: -- to May 12, 1958.

20 CHAIRPERSON GRIFFIS: Well, we can
21 get into the arguments of 2100.5 and .6,
22 because I've done it all too many times. But

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1 I think it's appropriate.

2 MR. GANNON: I could provide you
3 with transcripts, if you want to read them.

4 COMMISSIONER MITTEN: We'll just
5 all waive -- remember what I said? And that
6 will be the argument. But I think that it's
7 important, to the extent that you're relying
8 on a prior use, for some grandfathering
9 element that it was legal. And the way you
10 establish that is a certificate of occupancy.
11 So --

12 CHAIRPERSON GRIFFIS: Right. And
13 I agree with that. I think it's actually
14 important to establish that, rather than,
15 frankly, it's conjecture and it well may be
16 correct. But at this point, we'd need that.

17 Okay. What else do we need to
18 know on the parking? Other comments,
19 questions, clarifications?

20 (No response.)

21 Let's move ahead.

22 MR. GANNON: So we think that, you

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1 know, as we've described in our brief, those
2 are the primary two issues that we raised. We
3 think that the emergency text amendments are
4 largely irrelevant to the case, because they
5 did not amend these two provisions of the
6 zoning code. Obviously, as Chairperson Mitten
7 pointed out, and as the brief makes clear, we
8 have concerns about aspects of the rulemaking.

9 And we do think that right now the
10 emergency text amendments have lapsed. As of
11 last Friday, the 0606 rulemaking that the
12 Zoning Commission voted on at the end of
13 September has still not been published in the
14 D.C. Register, so we're not sure whether it
15 will become final on the day of publication or
16 at some point after that.

17 But we think that that's largely
18 irrelevant to the decision the Board has to
19 make in this particular appeal, because we
20 think that whether or not the emergency text
21 amendments were in place that it should not
22 have qualms about treating public charter

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1 schools as public schools.

2 As the Zoning Commission
3 recognized in the course of the rulemaking,
4 Congress has mandated that the District of
5 Columbia treat charter schools the same as
6 public schools. There is a reason why there
7 are more than 50 charter schools, public
8 charter schools in the District, and the BZA
9 has not had to decide any special exception
10 proceedings in order to allow them to operate
11 as public charter schools, even though, you
12 know, that -- they're not private schools.

13 And so, you know, we think that
14 unless you want to hear more about that, I
15 don't -- I don't really want to belabor that.
16 And I think that unless you have further
17 questions, I'll wait to see what the
18 intervenors and the Zoning Administrator have
19 to say.

20 COMMISSIONER MITTEN: Could I just
21 make a comment on that one -- on the last
22 point, which is that I just do want to

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1 emphasize that the Zoning Administrator
2 brought -- you know, one of the things that
3 came to our attention in the emergency
4 rulemaking was the fact that the specific
5 language of the ordinance precluded charter
6 schools from being considered public schools.
7 And one of the key elements of the emergency
8 was to include charter schools within the
9 definition of public school.

10 MR. GANNON: We certainly
11 understand that, and we think that that -- we
12 think that that rationale for an emergency
13 makes sense to us in a way that talks about
14 changing the lot size and lot area
15 requirements, we have not seen a similar
16 explanation of why that was as --

17 COMMISSIONER MITTEN: Yes, I don't
18 want to debate it. I don't want to get into
19 the --

20 MR. GANNON: I understand that.

21 COMMISSIONER MITTEN: -- because
22 you were suggesting that --

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1 MR. GANNON: I take your point. I
2 agree with you.

3 COMMISSIONER MITTEN: Okay.
4 Thanks.

5 CHAIRPERSON GRIFFIS: Very well.
6 Anything else? Questions, clarifications?

7 (No response.)

8 Let's move ahead.

9 While they're getting set up, you
10 weren't calling any witnesses, is that
11 correct?

12 MR. GANNON: That's correct.

13 CHAIRPERSON GRIFFIS: Okay. Very
14 well. We're ready. Just touch the base of
15 that mike and turn it on. Perfect. Thank
16 you.

17 MR. LONG: Good afternoon. My
18 name is Sinclair Long. I am counsel for the
19 Office of the Zoning Administrator. And I'm
20 accompanied -- or I accompany Mr. Bill Crews,
21 the Zoning Administrator. Mr. Crews will
22 present the arguments on behalf of the Office

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1 of the Zoning Administrator.

2 MR. CREWS: Thank you, Mr.
3 Chairman, and members of the Board. It is
4 always a pleasure to be here. In defending my
5 actions, I would provide the following
6 testimony -- that building permits must comply
7 with the zoning regulations in effect on the
8 date the permit is issued, or, as in this
9 case, on the date the decision is made to deny
10 the application.

11 I might, just as an aside before I
12 get much further in, issue what I think might
13 be a correction in the agenda where it talks
14 about a proposed addition to an existing
15 public charter school. And just to make it
16 clear -- and I don't think there is any
17 misunderstanding -- but the school is not
18 existing at this location at this time.

19 CHAIRPERSON GRIFFIS: Correction
20 to our agenda? Is that what you're saying?

21 MR. CREWS: Yes.

22 CHAIRPERSON GRIFFIS: Yes. Okay.

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1 MR. CREWS: The application by
2 Apple Tree was filed on February 9, 2006. The
3 Zoning Commission adopted the emergency text
4 amendment on February 13, 2006, just four days
5 later, well before a routine time that a
6 zoning review would be made. An initial
7 review of the plans was made on March 11th,
8 and the decision letter was dated April 28,
9 2006, while the emergency text amendment was
10 in effect.

11 I think we've also realized that
12 the validity of the Zoning Commission's action
13 on adopting the emergency text amendment is
14 not within the BZA's jurisdiction; only my
15 action is. Under the text amendment in effect
16 on April 28, 2006, a public school in an R-4
17 residential district required a lot size of at
18 least 9,000 square feet and a lot width of 120
19 feet, neither of which did the applicant have.

20 The applicant -- or the appellant,
21 excuse me, mistakenly claims, I believe, that
22 Section 401.1 would allow this pre-1958

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1 building to be grandfathered in for any use.
2 But before I get to that argument, I'd also
3 take up their argument that Section 401.1
4 allows an existing lot with less than the lot
5 area or width required to be replaced or
6 enlarged, if it complies with all other
7 provisions of this title.

8 And we've -- in the discussion of
9 the parking just now, I believe the appellant
10 has admitted that they do not comply with the
11 required parking for the existing use. So, in
12 effect, they would not be able to use 401.1 to
13 be grandfathered in for the lot size.

14 They basically are saying that the
15 -- they argue that 2100.5 doesn't require any
16 more additional parking, but there should be
17 parking -- should have been parking for the
18 current use. And as I'll get to the parking,
19 I'll show you where I think the existing
20 parking is.

21 CHAIRPERSON GRIFFIS: Let me
22 understand you. So in your review of this,

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1 because it was obviously well before his
2 arguments, you looked at 401.1 and said this
3 can't be pertinent here, because it doesn't
4 comply with the parking requirement.

5 MR. CREWS: No. I'm just saying
6 that that's what they were stating right now.
7 I look at it a little bit differently in terms
8 of whether or not the 401.1 actually applies
9 for this particular use. But they were saying
10 that they complied with every other provision,
11 so that they would qualify under 401.1. But
12 they've admitted that they were not compliant
13 with the parking.

14 CHAIRPERSON GRIFFIS: Okay. But I
15 guess --

16 MR. CREWS: Not the additional
17 parking based on the new use or the new
18 addition, but the existing parking. They're
19 saying there was no parking there.

20 CHAIRPERSON GRIFFIS: Right.

21 MR. CREWS: So they weren't
22 compliant with the parking.

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1 VICE CHAIRPERSON MILLER: I don't
2 get that. I'm sorry. How are they not in
3 compliance with the parking? If they're
4 saying they were in a conforming structure,
5 they were required to have more parking, why
6 wouldn't they be in compliance, pursuant to
7 2100.5?

8 MR. CREWS: If you would grant me
9 a consultation. 21.5 affects the provision of
10 additional parking or new parking.

11 VICE CHAIRPERSON MILLER: What
12 provision were they out of compliance with?
13 What parking provision were they not in
14 compliance with, then?

15 MR. CREWS: Well, we -- actually,
16 I think under the private club, they -- and
17 the square footage, I figured out that they
18 should have seven parking spaces, and they're
19 claiming that they do not have seven. And
20 also, I've been suffering from a severe head
21 cold, and I need to have a little drink of
22 water.

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1 CHAIRPERSON GRIFFIS: Yes, please.
2 Go ahead. And I don't see any reason why Mr.
3 Parker can't testify. I mean, he's got -- are
4 you calling him as a witness? I mean --

5 MR. CREWS: Well, let me call him
6 as a witness to explain this, yes.

7 MR. PARKER: It was our
8 understanding that this project would have --
9 would have had a requirement of 10 spaces, I
10 believe, for its previous use. It was
11 grandfathered, because it was built before
12 1958. But it was still non-conforming for
13 parking.

14 And 2100.5 would exempt them from
15 providing new parking for a new use under --
16 whether it does or not, but it only affects
17 the new parking that would be required by a
18 change of use or an addition. It doesn't make
19 them conforming for the previous parking
20 requirement.

21 CHAIRPERSON GRIFFIS: Interesting.
22 If you wouldn't mind stating your name for the

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1 record.

2 MR. PARKER: Sorry. Travis
3 Parker.

4 CHAIRPERSON GRIFFIS: And the
5 capacity in which you're here today?

6 MR. PARKER: As a witness for Mr.
7 Bill Crews.

8 CHAIRPERSON GRIFFIS: And how
9 would you have knowledge or be a witness for
10 the Zoning Administrator on this particular
11 project?

12 MR. PARKER: I was involved with
13 him in reviewing this project.

14 CHAIRPERSON GRIFFIS: In this
15 particular project?

16 MR. PARKER: Yes.

17 CHAIRPERSON GRIFFIS: Okay. So
18 let me ask you, then, if something is deemed
19 grandfathered, meaning it is incorporated as
20 a non-conforming because of the adoption of
21 the zoning regulations, isn't that established
22 in the fact that it is conforming to the

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1 zoning regulations?

2 If you read 2100.1, all buildings
3 and structures erected from May 12, 1958, on
4 have to provide the parking. Those before
5 don't. I understand it's not conforming to
6 today, but doesn't that implicitly and
7 directly say that that conformity is a -- non-
8 conforming is conformity?

9 MR. PARKER: No more so than if
10 the building were built at 80 percent lot
11 occupancy before 1958. It would still be non-
12 conforming for lot occupancy, and, therefore,
13 would not fall under 401.1. It would be --

14 CHAIRPERSON GRIFFIS: I totally
15 agree. And there aren't four other sections
16 in the regulations that specifically deal with
17 that condition, as there are in the parking.

18 What's your question?

19 VICE CHAIRPERSON MILLER: No, I
20 wanted to interject that 401.1 doesn't state
21 that it conforms with all other provisions of
22 the title. It said that it complies with all

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1 other provisions of the title, and I think
2 there's a difference between being a non-
3 conforming structure or property and complying
4 with the provisions of the title. I think
5 there's a distinction there.

6 MR. PARKER: So you're saying it
7 complies with the parking because it was built
8 before 1958, in the same way that it would
9 comply with the lot occupancy because it was
10 built before 1958?

11 VICE CHAIRPERSON MILLER: I'm not
12 making a statement. I'm raising a question.
13 But to me, they have different meanings, and
14 I guess I'm raising the question that if you
15 have a regulation that allows for
16 grandfathering, or whatever, then -- and it's
17 in compliance with that regulation, then it
18 seems to me that, yes, perhaps it may be in
19 compliance with the provisions of this title.

20 COMMISSIONER MITTEN: I think
21 there's an important legal distinction here,
22 and there may be layers of it that I can't

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1 even express. But I think the threshold
2 question is: was it legally non-conforming or
3 not?

4 Because if it doesn't have a
5 certificate of occupancy, if it never had a
6 certificate of occupancy for the club -- and
7 I don't know if you have the certificate of
8 occupancy, Mr. Crews, to submit for the record
9 -- but if that wasn't a legal use, then it's
10 not legally non-conforming as to the club use
11 for anything.

12 So I think that -- so I think we
13 need to figure out legally non-conforming
14 versus just non-conforming, because nothing
15 could be grandfathered if it wasn't legal. So
16 I think we need to explore that.

17 And then, I think it's also a
18 legal matter as to what Mrs. Miller was asking
19 about, which is, what does "complies with all
20 other provisions of this title" mean? Does
21 that mean that there's no legal non-
22 conformity, or does a legal non-conformity

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1 create compliance?

2 And I think that's something that
3 we'll probably have to get briefs on, because
4 it's a -- it may end up being the pivotal
5 issue in the analysis.

6 VICE CHAIRPERSON MILLER: I just
7 also want to add specifically, though, if the
8 Zoning Administrator determined that 401.1
9 didn't comply -- didn't apply because the
10 appellant here was out of compliance with the
11 provision of this title, I guess I would ask,
12 which provision was the appellant out of
13 compliance with? And I guess the Zoning
14 Administrator said with respect to parking, so
15 I guess I would, then, say, well, which
16 parking provision were you looking at, that he
17 was out of compliance with?

18 MR. CREWS: I'm looking at this as
19 as a private club, which -- not the assembly
20 list in 2100, but the "all other uses," and
21 based on the square footage of the building
22 that there were seven parking spaces required.

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1 It's about 4,200 square feet and 600 square
2 feet requires one parking space each.

3 COMMISSIONER MITTEN: Mr. Crews,
4 do you have a certificate of occupancy for the
5 club?

6 MR. CREWS: I have a copy of a
7 1969 certificate of occupancy that -- but I'm
8 not prepared to submit it into evidence until
9 I am able to doublecheck and make sure there
10 isn't something more recent. But that January
11 29, 1969, certificate of occupancy grants to
12 the Knights of St. John and the Ladies
13 Auxiliary the use all and basement on the lots
14 at 138 12th Street, N.E., for the purpose of
15 Fraternal Order Knights of St. John and
16 offices.

17 And, again, as we have discussed,
18 that there has not always been the correct
19 application of putting down a use of the --
20 using a term of the zoning regs on the
21 certificate of occupancy. But I -- my
22 interpretation of that would be a private

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1 club.

2 CHAIRPERSON GRIFFIS: I think we
3 should have that in. It doesn't preclude you
4 from searching further back.

5 COMMISSIONER MITTEN: I think we
6 may have broken your stride there as you were
7 making your presentation. I think you were
8 going to -- I thought you perhaps were going
9 to deal with the issue, notwithstanding the
10 parking issue, the validity of -- or the
11 applicability of 401.1.

12 MR. CREWS: Exactly. I'll --

13 COMMISSIONER MITTEN: Okay.
14 Because I'm dying to hear that part.

15 MR. CREWS: Okay. Well, again, I
16 believe that applicant mistakenly claims that
17 401.1 allows this pre-1958 building to be
18 grandfathered in for any use. I believe this
19 is an overly broad interpretation of this
20 section and contrary to the required
21 interpretation of the regulations.

22 As we have noted before, and as in

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1 previous Board orders, that Section 401 and
2 its companion grandfather Section 401.2 were
3 included in the regulations when the minimum
4 lot dimensions were added in order to afford
5 protection against the application of the
6 minimum lot dimensions when no other
7 protection was available to smaller,
8 preexisting lots.

9 However, this lot is only non-
10 conforming for certain uses, not all, and
11 Section 401.1 should not be applied for this
12 particular use. This lot is not non-
13 conforming for the allowable uses such as two
14 rowhouses, two flats, or a conversion to an
15 apartment building of four units, based upon
16 the lot size and provisions of Section 401.3,
17 thereby negating the need for the "no other
18 protection available" protection of 401.1.

19 And if we read, as we've talked
20 about before, reading the regulations in their
21 entirety, if I could direct you to Section
22 101.1 that states that the interpretation and

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1 application, the provisions of this title,
2 shall be held to be the minimum requirements
3 adopted for the promotion of public health,
4 safety, morals, convenience, order,
5 prosperity, and general welfare, to provide
6 adequate light and air, to prevent undue
7 concentration of population and overcrowding
8 of land, and to provide distribution of
9 population, business, and industry, and use of
10 land that will tend to create conditions
11 favorable to transportation, protection of
12 property, civic activity, and recreational,
13 educational, and cultural opportunities, and
14 that will tend to further economy and
15 efficiency in the supply of public services.

16 The Zoning Commission determined
17 that to further promote these goals, the
18 emergency text amendment was needed. The
19 Zoning Commission recognized the need to
20 clarify that public charter schools are public
21 schools, and the need to provide adequate lot
22 size and width for a public school to operate

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1 in ways that are consistent with the intent
2 and goals of the zoning regulations.

3 And I, again, mention that the
4 correctness of the Zoning Commission's action
5 is not properly before us today in this forum.
6 But what is in front of us is the
7 interpretation made by myself that the text
8 amendment did apply for the proposed new use
9 of this property as a public school, that the
10 Zoning Commission adopted the amendment to
11 further the goals of Section 101, and that the
12 hold that Section 401.1 allows any use for
13 every undersized lot is contrary to the intent
14 and stated purposes of the regulation.

15 The applicant is not barred from
16 using their property for any number of uses
17 requiring less than 36-foot width of lot or
18 less than 4,230 square feet of lot. Again,
19 this is an adequate size for two rowhouses,
20 two flats, or a conversion of the existing
21 building into four apartments.

22 I believe to hold otherwise

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1 creates a stunning in-run around the intent of
2 the regulations.

3 The appellant also claims a
4 mistake was made in rejecting the application,
5 because adequate parking was not provided, and
6 claims that Section 2100.5 bars any additional
7 parking from being required. Appellant had
8 also included past BZA cases indicating the
9 BZA's interpretation of 2100.5, not requiring
10 additional parking even for additions to new
11 uses to historic buildings.

12 And I note that BZA Case 17459
13 specifically referred to myself as the current
14 Zoning Administrator, and I note that that
15 argument in that case was May 2nd, and that
16 the order was dated July of this year, both
17 coming after I made the decision in this case.

18 As I've said before, I always
19 appreciate the Board's authority to clarify my
20 task. However, I find nothing in the cases
21 cited by the appellant to indicate that 2100.5
22 allows existing parking to be reduced,

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1 contrary to Section 2100.10. And, again, I
2 believe that the appellant has agreed that
3 existing parking could not be reduced.

4 The current or immediate past use
5 was a private club, which parking requirements
6 were seven, as we mentioned before. And while
7 the building pre-dates 1958, and is historic,
8 it also provides parking. Even the appellant
9 has provided you with pictures of an asphalt
10 back -- rear yard. Almost the entire rear
11 yard is paved for parking. My estimate is
12 that there are six spaces -- six spaces are
13 currently existing -- although lacking the
14 needed striping.

15 And it seems clear to me that
16 Section 2100 -- I guess it's clear to everyone
17 -- does not allow the appellant to simply
18 ignore the existing parking stations, even
19 though they may be in violation of not
20 maintaining the striping. And I'd like to
21 introduce into evidence my drawing of the --
22 what I believe would be the existing parking.

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1 BOARD MEMBER ETHERLY: If I could,
2 Mr. Chair, I'll jump in and throw a question
3 out as I did. When the other drawing was kind
4 of getting tossed about, we're about to have
5 the battle of the drawings. And hopefully
6 this is a question, Mr. Crews, that's a lead-
7 in for where you're heading, because I don't
8 want to upset your flow, as Mrs. Mitten
9 indicated.

10 But perhaps what I'm getting a
11 little caught up on now is so -- so what
12 establishes what the relevant parking level
13 should be for the property. On one end of the
14 spectrum we have an office use that was at
15 some point in existence, and that was 10
16 spaces, depending on who you listened to. But
17 let's say for the sake of discussion it was 10
18 spaces.

19 You're going to give us a little
20 bit of an indication of how you get to six or
21 maybe seven-ish. But where in the zoning
22 regulations does -- I'm just confused on,

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1 well, how do you select which number it is?
2 Which regulation or what part of that chart
3 allows you, as the Zoning Administrator, to
4 sort out, you know, which one of those numbers
5 -- it sounds like there's just a lot of wiggle
6 room there that I'm trying to work my way
7 through.

8 MR. CREWS: Well, I'm not sure I
9 quite understand your question, other than
10 that in the chart, if it's -- if it's clearly
11 covered under the -- under a certain
12 provision, like office use, then you would
13 follow that. And I think what we have here is
14 a question of a private club being the most
15 immediate prior use, since it's -- you know,
16 right now, Apple Tree has bought the thing and
17 the club is not there anymore. But that was
18 the most immediate one.

19 And, you know, we talked about
20 whether it was assembly, and I don't think --
21 I don't believe it's an assembly, and so there
22 isn't an actual -- the term "private club"

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1 doesn't actually show up in the chart in
2 Chapter 21. And so I'm going with the catch-
3 all phrase at the end of all other uses, all
4 districts, one for every 600 square foot of
5 gross floor area and seller floor area.

6 BOARD MEMBER ETHERLY: Okay. That
7 answers my question.

8 MR. CREWS: Was that your
9 question?

10 BOARD MEMBER ETHERLY: Yes.

11 MR. CREWS: Okay, good.

12 BOARD MEMBER ETHERLY: Thank you.

13 MR. CREWS: I wasn't sure if it
14 was more difficult or not than that.

15 What I've provided with you are
16 four sheets that -- the first one being a
17 graphic representation of the locale based on
18 the District of Columbia Office of Chief
19 Technology Officers, Geographic Information
20 System, known as CITRICS, showing you the --
21 basically, this is giving you that portion of
22 that square. I've got an arrow pointing to

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1 the rear yard of 138 12th Street, N.E.

2 The format of this particular
3 slide shows paved area in this grayish color
4 that is the alley going vertically down, and
5 then also showing the pavement in the rear
6 yard of 138 12th Street. Immediately behind
7 that is a 2005 aerial photo of the property,
8 also showing the paved back yard -- rear yard
9 of the property. This darker area here is the
10 shadow from the neighboring building, and so
11 -- and I'm sure for most of you that's not
12 very clear, but --

13 CHAIRPERSON GRIFFIS: I think we
14 get what you're trying to --

15 MR. CREWS: And then, the third
16 sheet is a picture I took this morning of the
17 property from the alley showing the asphalt
18 and showing the gate to the left allowing
19 access to the rear yard. And then, finally is
20 a conceptual drawing that I have created from
21 an enlargement of the first sheet showing the
22 places for potential for six spaces. This is

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1 not to scale, but I do have this grid paper --

2 CHAIRPERSON GRIFFIS: Okay. I
3 think we can believe you on this. We know the
4 conventional requirements for the space. Let
5 me ask you a couple of quick questions on
6 this.

7 MR. CREWS: Sure.

8 CHAIRPERSON GRIFFIS: First of
9 all, is this the analysis you did in terms of
10 reviewing for permit requirements and
11 sufficiency on the submissions, or is this
12 presented for today?

13 MR. CREWS: This is presented for
14 today to show the analysis done, why I believe
15 that they required more parking spaces than
16 they were --

17 CHAIRPERSON GRIFFIS: Sure. And
18 that's helpful, that's understandable. So
19 this would be standard for you in reviewing
20 this in terms of the compliance of this
21 proposed permit in addition to this existing
22 structure, for you to go through and calculate

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1 the parking that could have been there.

2 MR. CREWS: Right. And this is --
3 and I think the intervenors will have a
4 witness that will testify that there was --
5 has been actual parking. This has been used
6 for parking --

7 CHAIRPERSON GRIFFIS: Did you talk
8 to them when you were reviewing your -- the
9 permit that was before you?

10 MR. CREWS: No. I just assumed
11 that there was parking, because it looked like
12 it was -- you know, it had a gate and --

13 CHAIRPERSON GRIFFIS: And then --

14 MR. CREWS: -- you know, at that
15 point.

16 CHAIRPERSON GRIFFIS: -- and I
17 don't take issue, and I don't think we need to
18 mention it, because I think we're very
19 familiar with it, but I do have one question
20 on the specificity of this graph. This
21 doesn't -- the one parallel or perpendicular
22 to the property doesn't take into accordance

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1 the stairs that drop down into that. Would
2 that move into the difficulty of accessing to
3 the angled parking?

4 MR. CREWS: No. I think that that
5 would be -- that would potentially call into
6 question the sixth space, whether or not that
7 would actually fit there because of the stairs
8 coming down there.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. CREWS: It's possible you can
11 flip it over. This is actually only using 72
12 feet, and you could potentially -- I
13 apologize, because I didn't take into account
14 the staircase -- but you could potentially
15 flip it over.

16 CHAIRPERSON GRIFFIS: So you could
17 mirror that --

18 MR. CREWS: Right.

19 CHAIRPERSON GRIFFIS: -- with the
20 other access down here.

21 MR. CREWS: Right.

22 CHAIRPERSON GRIFFIS: And is that

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1 standard for you also to do, to kind of
2 redesign? As we know where the gate and
3 access is in the rear portion of this, would
4 that be also what you would do in order to
5 calculate what is the grandfathered parking
6 spaces of a permit submission?

7 MR. CREWS: Well, I think sort of
8 -- in order to try and figure out, I mean,
9 this GIS system is -- is really a great tool
10 now that we have this ability to actually look
11 at what's there as opposed to what the
12 applicant brings to the application.

13 CHAIRPERSON GRIFFIS: Okay. But I
14 guess I'm trying to get the level of what your
15 understanding was, because I don't -- I don't
16 disagree with -- I fully understand your
17 statement saying you looked at the existing
18 condition and saw there was availability for
19 the provision of parking. So there was an
20 assumption on your point that, look, there's
21 parking that has been provided.

22 MR. CREWS: Right.

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1 CHAIRPERSON GRIFFIS: We don't
2 question that. But I just now wonder how far
3 you go into that, or how far we should review
4 in terms of what -- your decision and what it
5 was based on, in terms of your conjecture of
6 how many they actually could provide.

7 MR. CREWS: Well, I --

8 CHAIRPERSON GRIFFIS: I guess
9 asking it a different way, I'm -- asking it a
10 different way, what significance actually is
11 this to us in looking at this appeal?

12 MR. CREWS: Well, my basic thought
13 is is that it supports the fact that we were
14 not contrary to 2100.5 in saying that -- in
15 disagreeing with the Board's interpretation,
16 but that there were, in fact, existing parking
17 that should not be reduced to the three that
18 the applicant has asked.

19 CHAIRPERSON GRIFFIS: Okay. All
20 right.

21 MR. CREWS: Or was provided.

22 CHAIRPERSON GRIFFIS: That's an

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1 excellent point. So I'm with you there. When
2 you were reviewing this, it was very clear to
3 you that a reduction of parking was not
4 allowed. When you reviewed this, what was the
5 number that you set on?

6 MR. CREWS: Well, I think it was
7 five, and then I've added the sixth one. But
8 I think that's the mistake, so I would go with
9 the -- with five.

10 CHAIRPERSON GRIFFIS: Okay. What
11 else?

12 COMMISSIONER MITTEN: Can I just
13 ask a question on that point? Is it -- I
14 imagine that you see a lot of applications
15 where, especially in the environment we have
16 now, where there's a lot of conversions and a
17 lot of new construction or additions where you
18 have to -- you basically have to interpolate
19 the number of spaces, because people haven't
20 either maintained the parking or maybe they
21 haven't used their rear yard for parking, but
22 now they're intensifying it. And how do you

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1 routinely handle that issue? Do you have to
2 make those interpretations routinely?

3 MR. CREWS: Yes, we do. And the
4 -- part of it is looking at pictures to see if
5 there are actually cars there from the aerial
6 photos at various years. We have 2005 and
7 2003 right now that are very accessible. We
8 sometimes ask them to bring in their own
9 photos.

10 In this particular case, there was
11 information from the neighbors and other
12 concerned people and talking about this that
13 the rear yard was used for parking. And so,
14 then, that's what, you know, we looked at in
15 terms of figuring out, you know, are they
16 going to be -- you know, is it being used for
17 parking or not? The asphalt is a pretty big
18 giveaway on this.

19 Last week we were here talking
20 about a rear yard and whether or not there was
21 a parking space available there. And while
22 there was 20 feet there, so that there could

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1 have been a parking space, there was no
2 evidence that there was an -- that it was
3 actually used as parking, and so I discounted
4 the fact that that had been a parking space.

5 But in this case with the asphalt
6 pavement, it definitely looked like that, and
7 information from neighbors and just that
8 because of the concerns of this particular use
9 and the correspondence that I got and comments
10 that I got from neighbors and the ANC
11 Commissioner at the time, that it was used as
12 parking.

13 COMMISSIONER MITTEN: Okay. So
14 for you it's important, the actual use of a
15 yard like that is important. And then, I
16 guess in this case, since we don't have the
17 striping, did you find that the prior user
18 sought to maximize the number of cars that
19 they could get on the lot?

20 MR. CREWS: Well, that's my
21 understanding is that, again, the -- you know,
22 the actual use of a flat open space versus how

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1 it's striped can vary greatly. And with a
2 private club where the people are all there at
3 the same time you could stack park back there,
4 and, you know -- or, you know, park in the
5 aisle, you know, a variety of different ways
6 of actually in reality putting cars there
7 versus what I've tried to draw in terms of
8 what the requirements are for the 9 by 19, and
9 at this angled parking the 17-foot wide aisle.

10 COMMISSIONER MITTEN: Right. I'm
11 just trying to make the connection between --
12 or to choose between -- we have one drawing
13 that shows it could have been three, and then
14 we have another. But if you're looking at,
15 okay, what was past practice, it matters to
16 you what past practice was --

17 MR. CREWS: Right.

18 COMMISSIONER MITTEN: -- they
19 parked. And the past practice was they would
20 seek to maximize the number of spaces. You
21 can only count legal spaces. If they had
22 sought to maximize the number of legal spaces,

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1 then it's however many one can draw on a
2 drawing, and they would be the right size and
3 have the right kind of accessibility.

4 MR. CREWS: Right.

5 COMMISSIONER MITTEN: Is that
6 right?

7 MR. CREWS: Yes.

8 VICE CHAIRPERSON MILLER: Mr.
9 Crews, I, for one, am having trouble following
10 how you're determining -- it sounds like they
11 were not in compliance with the parking
12 requirement. And it sounds to me like you
13 said, okay, the last use that they were
14 authorized for was a private club. And then,
15 you looked at a 2100 schedule and went to the
16 all other uses.

17 Okay. But we're dealing with a
18 historic building, correct? And, therefore --
19 and we don't have the certificate of
20 occupancy, so we don't know whether or not
21 they were credited for any spaces, whether or
22 not they were grandfathered, whether or not

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1 any parking was really required for them.
2 Isn't that correct? Are you just conjecturing
3 because there was an open space, and based on
4 anecdotal history some cars parked there? Do
5 you then pick a number and that's the number,
6 if they don't meet, they're out of compliance?

7 MR. CREWS: Well, I'm trying to
8 assume that people are -- attempt to be in
9 compliance, and so that if they had and were
10 using parking, that they were -- that that was
11 parking that was part of the requirement.

12 But the real problem in your
13 question is whether or not the certificate of
14 occupancy indicates anything about available
15 parking or required parking, and I just don't
16 have any confidence that in the past that that
17 type of detail was articulated on certificate
18 of occupancies with any degree of consistency
19 or accuracy.

20 As I say, the copy of the
21 certificate of occupancy I have here says
22 nothing about parking. So that doesn't tell

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1 me that they didn't require parking or that
2 they did have parking. Just because of my
3 experience in the imprecision of how
4 certificate of occupancies have been filled
5 out.

6 VICE CHAIRPERSON MILLER: Yes, I
7 understand. I hear what you're saying, but
8 then it sounds to me like you're making a
9 determination that they're out of compliance,
10 because you're looking at an open space and
11 figuring they can fit some cars there, and
12 that just doesn't seem to me like a fair or
13 fully reasoned way to determine that someone
14 is out of compliance.

15 MR. CREWS: Well, it's my
16 understanding that the space was being used
17 for parking, and so, therefore, it would be my
18 interpretation of -- because parking is a
19 valuable commodity, especially in this
20 particular neighborhood, that off-street
21 parking, if it's being used for parking,
22 should continue to be used for parking rather

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1 than relying on, you know, conjecture that --
2 or an argument that it was -- well, it was
3 existing before 1958, so it gets grandfathered
4 in for all of those spots that it would have
5 required.

6 If parking is being used for
7 parking, we should count it, and we should
8 maintain it, because the parking is so -- so
9 critical to the intent of the zoning.

10 VICE CHAIRPERSON MILLER: Okay.
11 Let me ask you this, then. This particular
12 appellant I assume has the building now as
13 vacant, it's not being operated as a club.

14 MR. CREWS: Yes.

15 VICE CHAIRPERSON MILLER: Is it
16 out of compliance now because it doesn't have
17 the seven or whatever parking spaces?

18 MR. CREWS: Well, you know, I
19 think we're in a period of transition. I'm a
20 bit flexible in saying that, well, you know,
21 the most current previous use was a club,
22 required seven parking spaces, there are five

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1 or six that are available, and that those
2 should be maintained.

3 They would get credit as a
4 grandfather for the one or two spaces that
5 aren't there, and maybe never were there
6 legally, and that under your interpretation of
7 2100.5 they don't need to provide the
8 additional three spaces to come up to the 10
9 for their proposed use as a school.

10 So that, you know, the bottom line
11 still is is that there are five or six spaces
12 available and that have been used for parking
13 and that should remain under 2100.10 for
14 parking.

15 VICE CHAIRPERSON MILLER: Okay. I
16 don't want to belabor this, but I just want --
17 I want -- I need to get this. So if you're
18 saying that there were five or six spaces that
19 were used by the previous owner of the club,
20 how do we really know that there were -- they
21 used five or six spaces? Is it just because
22 you say that they fit? I mean, we aren't --

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1 again, we don't have proof in a certificate of
2 occupancy. We don't -- I think there's a
3 disagreement as to how many spaces --

4 CHAIRPERSON GRIFFIS: The physical
5 layout doesn't support this design that's
6 being purported to count the parking. And
7 there's a fence in back. You can't park these
8 two. I think your question is excellent.

9 VICE CHAIRPERSON MILLER: Okay.

10 CHAIRPERSON GRIFFIS: How are you
11 establishing -- it's the same question we've
12 asked now several times, but how are you
13 establishing what is the existing parking
14 which can't be reduced? Because you're
15 talking a lot about use, which I think we
16 fully understand and support. If something is
17 being used, we need to obviously not remove it
18 from more -- from conformity or move it even
19 further away from conformity.

20 But, so I can follow you until I
21 look at your diagram when you start saying,
22 well, seven parking spaces should be provided,

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1 because they are maximizing the parking in the
2 rear; look at their use.

3 Well, if we look at their use,
4 then we need to look at how it's used. And
5 then, we go to we can only count those that
6 are conforming to the regulations. Well,
7 you've taken down their fence and even
8 purported to remove the entire back enclosure
9 to flip the parking to make it -- to maximize
10 it even more.

11 I understand that, but there's a
12 disconnect between, then, how do you establish
13 what the existing parking is? And I think
14 that's your question.

15 MR. CREWS: Yes. Well, again, I
16 was trying to conjecture a way of fitting in
17 spaces using all of the current. My
18 understanding from the way the club worked was
19 that they stack parked, and so they used the
20 gate and then just parked one behind another.
21 And when they all got ready to leave, they all
22 got in their cars and backed out and left.

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1 And so I'm trying again to figure
2 out based on that space being used for
3 parking, how many spaces could be legally
4 created there? It would necessitate changing
5 the fence.

6 CHAIRPERSON GRIFFIS: Okay. Good.
7 But this diagram that you showed us does
8 necessitate changing the fence.

9 MR. CREWS: Yes.

10 CHAIRPERSON GRIFFIS: Okay. Last
11 question to follow up on Ms. Miller's
12 question. Where -- all right. What else?

13 MR. CREWS: Well, I just want to
14 summarize, then. The validity of the Zoning
15 Commission action is not before the Board
16 today. Section 401.1 when read in the context
17 of Section 101.1 and previous BZA rulings
18 provides protection when no other protection
19 is available for these smaller lots.

20 But here the lot is conforming for
21 single-family row dwellings, for flats, and
22 for apartments. And so that protection of

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1 401.1 is not needed, and the applicant should
2 be held to the new text amendment, because of
3 the impacts of schools as determined by the
4 Zoning Commission.

5 And, again, on the parking, that
6 not 2100.5, but 2100.10, should apply to
7 maintain the existing five to six potential
8 parking spaces, and that the appeal should be
9 denied.

10 Thank you.

11 CHAIRPERSON GRIFFIS: Excellent.

12 Thank you very much.

13 Questions?

14 COMMISSIONER MITTEN: I had
15 another question for Mr. Crews, on your
16 interpretation of 401.1 and 401.2 as the --
17 except when no other -- you know, the sort of
18 relief of last resort. Is there anything else
19 that you referred to to -- in making your
20 interpretation of those sections? I mean, did
21 you go back into prior iterations of the
22 ordinance to see how it was worded? And did

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1 it evolve in a certain way? Or are you just
2 really just reading the zoning ordinance
3 itself and taking it as a whole?

4 MR. CREWS: Well, I'm taking it as
5 a whole. I really, quite frankly, didn't have
6 time to do that type of exhaustive research on
7 this or any particular case I guess that I
8 review. But I think that it -- it was greatly
9 influenced by, in looking at this and making
10 sure that -- that it would not apply because
11 of the intent of the Zoning Commission in
12 adopting the emergency text amendment, that it
13 -- you know, that was -- there was a need to
14 include charter schools as public schools, and
15 the Zoning Commission I think in its wisdom
16 realized that schools in neighborhoods create
17 impacts and require various lot dimensions and
18 widths.

19 And in looking at this, in looking
20 at 401.1, that -- and previous BZA cases where
21 it is is -- talks about the protection of last
22 resort, that this particular parcel is usable

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1 for the uses I mentioned, and that it was --
2 it was important to apply the emergency text
3 amendment to this particular proposed new use.

4 COMMISSIONER MITTEN: Thank you.

5 VICE CHAIRPERSON MILLER: Mr.
6 Crews, in your interpretation of 401.1, are
7 you reading an additional exception into
8 401.1, other than the beginning phrase that
9 says "except as provided in Chapters 20
10 through 25 of this title"?

11 MR. CREWS: I don't believe so.

12 VICE CHAIRPERSON MILLER: Well,
13 are you accepting the provision related to
14 public schools from the application of 401.1?

15 MR. CREWS: I think for this --
16 for the particular use, yes, that because this
17 was a public school and because the Zoning
18 Commission had adopted the emergency text
19 amendment that the intent of the Zoning
20 Commission was to require public schools to be
21 located on lots of minimum size, and that it
22 was then incumbent upon me to carry out their

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