

1 intent as the Zoning Administrator.

2 VICE CHAIRPERSON MILLER: Yes, I
3 understand what you're saying in general. I
4 was just posing the question as one for, you
5 know, statutory construction. It sounded like
6 you were reading in -- it sounds like still
7 you're reading in another exception there.

8 And also, looking at the Zoning
9 Commission order, they added a new section in
10 401. They added like 401.8, but they didn't
11 modify 401.1. And I'm just wondering, when we
12 looked at 401.1 in conjunction with 401.3 and
13 previous cases, we applied the same reasoning
14 regardless of what the numbers were, whatever
15 the minimum lot area -- "numbers" meaning what
16 was attributed for minimum lot area or minimum
17 width.

18 MR. CREWS: I'm not quite sure I'm
19 following you, but --

20 VICE CHAIRPERSON MILLER: Again,
21 I'm looking at this order, really, for the
22 first time. But it looks like they added a

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1 different category and different measurements
2 into 401.3, but it doesn't look like they
3 changed the relationship between 401.1 and
4 401.3.

5 MR. CREWS: All right. Well, I'm
6 not sure if that was an oversight on their
7 part or not.

8 CHAIRPERSON GRIFFIS: Any other
9 questions from the Board? Clarifications?

10 (No response.)

11 Is there anything else in the
12 presentation? Two things. Are you
13 anticipating a written submission on this
14 case?

15 MR. CREWS: We'd be glad to do
16 that if the Board would request it and provide
17 time.

18 CHAIRPERSON GRIFFIS: Okay. We'll
19 see how that goes. I don't see that we need
20 it right away, at this point.

21 Very well. You said no less than
22 three times a statement that I don't fully

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1 understand. Perhaps you can help me address
2 your concern that the validity of the zoning
3 regs is not before the Board today.

4 MR. CREWS: Well, the appellant,
5 in their pre-statement documents or pre-
6 hearing documents, tended to raise that
7 question of whether or not there was an
8 emergency, whether or not it was adopted --

9 CHAIRPERSON GRIFFIS: I see.

10 MR. CREWS: -- correctly, and I
11 don't believe that this is the appropriate
12 body for that, that that would be something
13 they would have to take up with the Circuit
14 Court of Appeals.

15 CHAIRPERSON GRIFFIS: Okay. I
16 absolutely would agree with that. There it
17 is. What else? Anything else?

18 (No response.)

19 Very well. Let's move ahead.
20 Cross?

21 MR. GANNON: Just a few questions.

22 I just want to be clear about

1 exactly how many spaces, Mr. Crews, you think
2 that we needed. You've backed away, and I
3 just want to confirm, from the six spaces in
4 the diagram by saying that the space on the
5 upper right couldn't fit there in light of the
6 stairwell. Is that true?

7 MR. CREWS: That's what I'm
8 afraid, that unless we flip them -- and that's
9 why I apologize on the lack of drawing skills,
10 I guess.

11 MR. GANNON: The satellite photos,
12 I guess. They missed this fire escape.

13 MR. CREWS: Right. And the
14 question of whether or not if you flipped it
15 if they would fit -- this was only -- my
16 diagram only used 72 feet.

17 MR. GANNON: Right.

18 MR. CREWS: And whether or not if
19 you flipped it that there would be room by the
20 air conditioning compressors on the south side
21 of the building, and whether the stairwell
22 would work in here. And I guess I'm willing

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1 to, you know, give up that sixth space.

2 MR. GANNON: But not the two that
3 are behind the fence.

4 MR. CREWS: No. I think that the
5 -- you know, that that could be -- that
6 particular space can be -- could be
7 articulated and used either with retractable
8 gates or --

9 MR. GANNON: But, historically,
10 there has never been a legal space configured
11 there that way.

12 MR. CREWS: Yes. I mean, my
13 understanding is that they probably never
14 really had the legal configuration, but just
15 parked in there in a stacked method.

16 MR. GANNON: So it's assuming that
17 there are five spaces, there are the three
18 that you have in as angle parking, and then
19 the two that are buried behind the gate
20 currently, the fence currently. Assuming that
21 there are five available spaces there, does
22 that -- that means that they were out of

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1 conformity with your calculation of seven as
2 being required for all other uses?

3 MR. CREWS: Right, yes. But,
4 again, that would go back to the -- well, yes,
5 it would be out of conformity with -- for the
6 seven. They could be grandfathered in, and
7 they would get a credit for the two that
8 aren't there.

9 MR. GANNON: And then, so your
10 denial letter says that we needed 10 spaces.
11 Why is that?

12 MR. CREWS: Well, that would be
13 what the requirement would have been for the
14 school, the total use, and without subtracting
15 the spaces that would have been grandfathered
16 in.

17 MR. GANNON: So the denial letter
18 means that you did not do the 2100.5
19 calculations before April 28th?

20 MR. CREWS: It probably is a
21 mistake to say 10 spaces, when five should
22 have been --

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1 MR. GANNON: So for the Board's
2 information, the denial letter is Exhibit 13
3 in the file, and Exhibit 15, again, I think.

4 So it was a mistake because we
5 actually needed five?

6 MR. CREWS: Right.

7 MR. GANNON: Assuming we would
8 have removed the gate to determine what spaces
9 could sort of be legally shoehorned in there
10 now.

11 MR. CREWS: Yes.

12 MR. GANNON: And that's the
13 typical analysis that you engage in in order
14 to apply 2100.5?

15 MR. CREWS: Well, not 2100.5, but
16 Chapter 2100 in its entirety.

17 MR. GANNON: Because -- are there
18 other provisions in 2100 that you're dealing
19 -- in Chapter 21 that you're dealing with that
20 deal with grandfathering? Why else would you
21 need to be comparing previous parking?

22 MR. CREWS: I'm not quite sure I

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1 understand your question.

2 MR. GANNON: You said generally
3 that this is the type of analysis you do to
4 determine how many spots are potentially
5 legally available in a lot that isn't
6 currently striped as having legal parking
7 spots. And you say that this is not
8 necessarily the analysis that you generally do
9 for 2100.5, for applying 2100.5, but for
10 generally applying Chapter 21. And so I was
11 wondering, you're talking about other
12 instances of grandfathering or --

13 MR. CREWS: Oh, no, let me back
14 up. Let me back up. I'm sorry. This was,
15 again, before -- this was when -- before the
16 Board made its determination in --

17 MR. GANNON: In July?

18 MR. CREWS: -- in July, excuse me,
19 yes.

20 MR. GANNON: That it reaffirmed
21 its previous interpretation.

22 MR. CREWS: Right. Right. So

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1 that at that point I was feeling that 2100.6
2 applied rather than 2100.5.

3 MR. GANNON: So does that mean
4 that you have an opinion about Chairperson
5 Mitten's questions about how to calculate
6 increased intensity of use when you move from
7 a metric like square footage that would be
8 relevant to office space or all other
9 structures to a metric like number of staff
10 members or teachers in a public school?

11 MR. CREWS: Well, I have a way of
12 considering moving from one use and the
13 required parking and what's available for that
14 to a different use using a different metric,
15 but then taking the existing -- and, again,
16 under this -- in April where I was focusing on
17 2100.6 rather than 2100.5, to go to the fact
18 that because it was an addition and a new use
19 that the additional spaces would be required.

20 MR. GANNON: But they were -- if
21 2100.6 applied, they would only be required if
22 the increased intensity was more than 25

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1 percent, correct?

2 MR. CREWS: But you are nearly
3 doubling the size of the building, I think.

4 MR. GANNON: But I thought you
5 told us that there is a way to change metrics.
6 So we're going from a required space -- a
7 requirement of seven spaces to a requirement
8 of 10 spaces. Or, I mean, how -- what are the
9 numbers you're using in order to calculate the
10 25 percent increase in intensity of use?

11 And especially which parts are
12 attributable? This was Chairperson Mitten's
13 question -- which parts are actually
14 attributable to the addition? Because that's
15 the only thing that 2100.6 would require us to
16 provide parking for, is my understanding.

17 MR. CREWS: I'm not sure I have an
18 accurate response right now, but I'd be glad
19 to supplement the record.

20 MR. GANNON: Okay. Then, moving
21 on from parking, and just very briefly on the
22 401.1 questions, so it sounds like, under what

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1 Chairperson Mitten referred to as the theory
2 of 401.1 being the exception of last resort,
3 that your theory would be that 401.1 would
4 only apply if the lot were too small for any
5 potential use in an R-4 district?

6 So this building that has never
7 been a residence must, under the chart in
8 401.3, be one of the two things that are less
9 than 36 feet wide, a row dwelling and flat or
10 a one-family semi-detached dwelling, or a
11 conversion to an apartment house I guess?
12 Three different things.

13 MR. CREWS: Again, reading the
14 ordinance in its entirety, and -- with the
15 immediacy of the Commission's action, it
16 appeared to me that 401.1 was not applicable
17 in the use -- in the change of use to a public
18 school.

19 MR. GANNON: But only because it's
20 to a public school? Because of the emergency
21 text amendment? Of if it had been a change in
22 use to anything except for a row dwelling and

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1 flat or a one-family semi-detached, which
2 would be inapplicable because the lot is wide
3 enough that it doesn't -- that it meets those
4 requirements?

5 MR. CREWS: State that again. I'm
6 sorry.

7 MR. GANNON: I guess I'm just --
8 it's a question that Ms. Miller already asked
9 you, I guess.

10 CHAIRPERSON GRIFFIS: No, I'd like
11 to hear it. It's a good question.

12 VICE CHAIRPERSON MILLER: It's a
13 key question. I think you should ask it
14 again.

15 MR. GANNON: So the question is
16 that you think that it was an exception only
17 for a change to use as a public school, in
18 light of the emergency text amendment, because
19 there are still some uses, even though they
20 are uses for which the building has never been
21 used, that the lot could be conforming for.

22 So 401.1 included, by virtue of

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1 the emergency text amendment, a prohibition on
2 changing to the use of public school that was
3 different from changing to any other use?

4 MR. CREWS: That's factored into
5 my consideration exactly, that the pendency of
6 the change in use and the emergency text
7 amendment, that it appeared to me to be that
8 the intent of the Zoning Commission was to
9 require a new use as a public school to comply
10 with the new lot requirements.

11 MR. GANNON: So if they were to
12 amend our -- the chart in 401.3 to increase
13 the minimum lot width or minimum lot area for
14 any other use that currently is covered by all
15 other structures, that, too, would be a sort
16 of phantom exception to the grandfather clause
17 in 401.1?

18 MR. CREWS: I don't believe it --
19 I wouldn't care to answer that hypothetical.

20 MR. GANNON: Okay.

21 COMMISSIONER MITTEN: Can I ask a
22 followup question on this general topic?

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1 Because it came up recently in a case before
2 the Commission where an opponent to a case was
3 suggesting that the sort of legislative
4 history of a particular provision in the
5 ordinance was relevant to the interpretation
6 of the ordinance when there wasn't any
7 ambiguity in it, in the ordinance itself,
8 because it was pretty -- it was a very
9 explicit section.

10 And I'm wondering -- and I don't
11 necessarily expect a response right now, but,
12 you know, from all sides, about sort of where
13 -- and I very much appreciate the fact that
14 you care about the intent of what the Zoning
15 Commission is trying to accomplish, because to
16 the extent that there is gray area we would
17 want those interpretations made in line with
18 our intent.

19 But I'm just wondering to the
20 extent that we do draft the ordinance
21 imperfectly from time to time, notwithstanding
22 OMB's help, that where do you -- where does

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1 the line -- where is the line drawn where you
2 can go back and go outside the ordinance if
3 there -- you know, how much ambiguity has to
4 exist, or how many pieces of, you know -- of
5 the -- this is kind of like interpreting the
6 comprehensive plan.

7 You can always find a section that
8 you can hang your hat on, but there may not --
9 there may be a section in the -- you know, in
10 the comprehensive plan that's explicit, but we
11 don't have to conform with every piece. But
12 in the zoning ordinance, we do if it's
13 explicit.

14 So I just was hoping that maybe in
15 an additional submission you could opine about
16 when it's appropriate for you to go back and
17 look at our intent versus the -- what appears
18 to be a fairly explicit direction from -- you
19 know, in 401.1 and 401.2. Just, you know, how
20 do you see yourself being able to reach
21 outside the document?

22 And I know from time to time you

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1 clearly would, because there is a clear
2 ambiguity sometimes. And it seems here that
3 there is much less ambiguity, and so I -- I
4 just wonder about that. So if you could
5 address that in an additional submission, I'd
6 appreciate it.

7 MR. GANNON: I guess I just had
8 one last question, Mr. Chairman, for Mr.
9 Crews, which is whether you are submitting the
10 1969 C of O.

11 CHAIRPERSON GRIFFIS: Yes.

12 MR. CREWS: Well, I think --

13 CHAIRPERSON GRIFFIS: We've
14 already talked about it. It has to come into
15 the record.

16 MR. CREWS: Yes. And then, yes.
17 So I'll submit it, and then we'll verify
18 whether it's the latest or --

19 CHAIRPERSON GRIFFIS: That's fine.
20 We can deal with it in any way we want. We'll
21 make copies. Make sure you leave with it
22 today.

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1 MR. CREWS: Okay.

2 MR. GANNON: Thank you.

3 CHAIRPERSON GRIFFIS: Is that it?

4 (No response.)

5 Okay. Does the ANC have any cross
6 of Mr. Crews, of the Zoning Administrator?
7 Any cross questions? Mr. Keys?

8 (No response.)

9 Very well. Thank you very much.

10 Let's move ahead, then. Let's
11 move to the ANC's presentation, if they would
12 like.

13 MR. ALBERTI: Good afternoon.

14 CHAIRPERSON GRIFFIS: Good
15 afternoon.

16 MR. ALBERTI: It's a pleasure to
17 be back. I'll try not to make a habit of
18 this.

19 My name is Nick Alberti. I am
20 representing ANC-6A.

21 You know, my presentation now has
22 changed, because a lot of the points I was

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1 going to cover have been covered, so I'll try
2 to keep this short.

3 CHAIRPERSON GRIFFIS: Okay.

4 MR. ALBERTI: But I would like to
5 address some of the things that have been said
6 here.

7 And, you know, the parking issue
8 is -- I mean, the one question that hasn't
9 been addressed to me is: had enforcement been
10 done, or been carried out on this property,
11 how many spaces would have been required? And
12 I think that that is sort of the metric that
13 you have to look at when you consider what --
14 the historic parking that existed there.

15 And I think that, you know, even
16 -- it was pretty clear to me from all that has
17 been said that that's going to be somewhere
18 between, at minimum, four spaces, because, as
19 Mr. Griffis said, he can -- he can spot four
20 spaces there just from the diagrams that he
21 has seen.

22 But I think that that needs to be

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1 considered. Maybe in their follow up the
2 Zoning Administrator could address that.

3 And I will tell you that, just for
4 the record, that parking has -- that that lot
5 has been used for parking, and has been used
6 for the 20 years that I have been familiar
7 with it. And, typically, it was stacked
8 parking if there was a lot of people parking
9 there.

10 Okay. One of the things I want to
11 address is this issue of whether the proposed
12 use is a conforming use or not, and whether
13 the existing use is a conforming use. The
14 representative for the appellant claimed that
15 the historic use is non-conforming due to lot
16 dimensions, but then, in another statement has
17 stated that the proposed use is conforming.

18 Well, either they're both
19 conforming or they're not conforming, because
20 the issue of conformity deals with lot
21 dimensions in both cases.

22 CHAIRPERSON GRIFFIS: Area

1 conformity.

2 MR. ALBERTI: Pardon?

3 CHAIRPERSON GRIFFIS: The
4 structure conformity, the area conformity.

5 MR. ALBERTI: Well, the statement
6 was is that the historic use was non-
7 conforming because the lot width was not
8 appropriate. And the chart -- the public
9 school is non-conforming, because the lot
10 width is not appropriate, as well as the other
11 lot dimensions.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. ALBERTI: So I would say that
14 the proposed use is a non-conforming use.

15 As I read 401.1, it says that all
16 other -- that all other provisions of the
17 title need to be followed. Well, you know,
18 when I -- the one provision that only got
19 talked about briefly was 22 -- 2002.5, and
20 this is a provision that talks about the
21 expansion of non-conforming uses, of
22 properties that are non-conforming.

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1 And so, again, I'm assuming I'm --
2 I'm going on the premise that the proposed use
3 is non-conforming. And if you grant that this
4 proposed use can go into the historic
5 structure, then that's a non-conforming use,
6 and what the applicant is asking is to expand
7 a non-conforming use. And 2200 -- 2002.5 says
8 that you cannot expand a non-conforming use
9 unless the expansion is devoted to a
10 conforming use.

11 And it was stated that that law is
12 moot, because in all cases you could never --
13 you could never expand the non-conforming use.
14 But that's not true, because there are
15 conforming uses that you could expand this
16 building to. You could build a residence on
17 the back of that building. You could expand
18 this building to create a residence, and that
19 would be a conforming use in this -- in this
20 R-4 district.

21 So I think that attention needs to
22 be paid to 2002.5 in considering whether the

1 Zoning Administrator erred, and not, as we
2 believe, correctly denied these permits.

3 CHAIRPERSON GRIFFIS: Can I ask
4 you a question on this, a clarification of
5 your point? Section 2001 -- here's what I'm
6 trying to understand, because there seems to
7 be a melding in your assertion that use and
8 structure conformity -- or in my mind, I
9 always think about it use and area conformity
10 are the same, or meld. And the area
11 requirements, then, allow for use or non-use,
12 and, therefore, create a conforming or non-
13 conforming use.

14 Straightforwardly said, how is
15 that you're making this point? How do you
16 reconcile Chapter 200, 201, where use is as a
17 matter of right, that begin in R-1? And then
18 uses -- of course, it builds on. This is
19 cumulative, our zoning is cumulative. Are
20 those uses as a matter of right somehow area
21 defined, or are they specific to the general
22 district of which they're a matter of right?

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1 Meaning as I look through the
2 matter of right uses, am I going to find in R-
3 1 one-family detached dwellings are allowed?
4 Because that's a use, right?

5 MR. ALBERTI: Right.

6 CHAIRPERSON GRIFFIS: Is that use,
7 then, not allowed based on some dimensional
8 requirements?

9 MR. ALBERTI: Well, I think, as
10 you said, I mean, use and dimensions are --
11 kind of go together. I mean --

12 CHAIRPERSON GRIFFIS: No, you said
13 that.

14 MR. ALBERTI: Oh.

15 (Laughter.)

16 CHAIRPERSON GRIFFIS: I was just
17 restating your case.

18 MR. ALBERTI: I guess what I'm
19 trying to understand here is -- and it hasn't
20 been addressed -- is whether this use as a
21 public school is a non-conforming use, or
22 whether the structure is non-conforming. I

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1 mean, I think that's a key question here.

2 And the structure is obviously
3 non-conforming for this use. You can't
4 separate the two.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. ALBERTI: For this use, that
7 structure --

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. ALBERTI: -- is non-
10 conforming.

11 CHAIRPERSON GRIFFIS: That's more
12 clear than you said it before. All right.
13 Let's go ahead.

14 MR. ALBERTI: Okay. I think those
15 are really just -- I mean, like I said, I
16 wanted to keep this brief. And those are the
17 only points I really wanted to make. I think
18 you've heard a lot of the facts here in this
19 case, and I thank you for your time.

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

22 Before you go far, Mr. Alberti,

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1 we're just going to take questions. Do you
2 have cross? Yes. Any questions, further
3 questions from the Board? If not, yes, Mr. --

4 MR. GANNON: Just a couple of
5 quick questions. I was wondering, what's the
6 number of members of the ANC that constitute
7 a quorum?

8 MR. ALBERTI: At our ANC meetings?

9 MR. GANNON: Yes.

10 MR. ALBERTI: The number is --
11 well, it's still five.

12 MR. GANNON: Okay.

13 MR. ALBERTI: It's five.

14 MR. GANNON: And at the
15 September 14th meeting, that's when the report
16 was adopted for this?

17 MR. ALBERTI: I would have to
18 check. I don't know.

19 MR. GANNON: Oh. I think,
20 actually, I mean -- I'm sorry. I don't want
21 to --

22 MR. ALBERTI: I have a letter

1 before the Board that says -- if that's what
2 it says in the first line of the letter, then
3 --

4 MR. GANNON: That's what it says
5 in the first line of the letter.

6 MR. ALBERTI: That is --

7 MR. GANNON: How many members were
8 present at that meeting?

9 MR. ALBERTI: I would have to go
10 back and take a look at the minutes. If the
11 letter says a quorum was present --

12 MR. GANNON: The letter does --
13 where does the letter say a quorum was
14 present? This is --

15 MR. ALBERTI: The letter is in the
16 file at Exhibits 19 and 23. I can show you my
17 copy if you want a copy.

18 MR. GANNON: Sure.

19 CHAIRPERSON GRIFFIS: It doesn't
20 appear. We've looked at it, actually.
21 There's a note Ms. Miller already made that
22 there wasn't a quorum indicated in this

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1 letter.

2 MR. GANNON: Okay. That's all on
3 that. One separate --

4 MR. ALBERTI: Well, I believe that
5 there was. I'd have to check, verify it, but
6 I do believe there was a quorum present.

7 MR. GANNON: Okay.

8 CHAIRPERSON GRIFFIS: Why don't we
9 have that submitted into the record, just a
10 quick note. We'll put it in there, and we'll
11 attach it to this letter.

12 VICE CHAIRPERSON MILLER: When you
13 do that, you might as well say what the vote
14 was, then. I know you said it was unanimous,
15 but we don't know how many people voted. It
16 would just be good to have if you're
17 supplementing.

18 MR. ALBERTI: Sure. Would it be
19 just appropriate to send you a copy of the
20 minutes? Or an excerpt from the minutes, just
21 to verify that?

22 CHAIRPERSON GRIFFIS: Whatever is

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1 the clearest, cleanest, and simplistic.

2 MR. ALBERTI: Whatever. All
3 right. Sure.

4 MR. GANNON: I have the draft
5 minutes from the September 14th meeting that
6 were voted on at the October 12th meeting on
7 your website. And it does say unanimous, just
8 like the letter does. But I'm wondering -- so
9 when did the ANC vote on the written report
10 that was submitted to the BZA?

11 MR. ALBERTI: When did -- I'm not
12 sure. On the written support -- okay. When
13 did we -- I don't have the -- I don't have --
14 it would have been at the December meeting.

15 MR. GANNON: The September
16 meeting, you mean?

17 MR. ALBERTI: Well, okay, let me
18 look at the meeting. At the September
19 meeting.

20 MR. GANNON: Okay.

21 MR. ALBERTI: Yes.

22 MR. GANNON: And is the written

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1 report that you submitted on November 3rd
2 substantively the same as what the ANC voted
3 on on September 14th?

4 MR. ALBERTI: The written report
5 that I submitted on when?

6 MR. GANNON: November 3rd, the one
7 that the BZA has in its file. It's
8 substantively what the ANC voted on on
9 September 14th?

10 MR. ALBERTI: Yes, it is.

11 MR. GANNON: The minutes for the
12 September 14th meeting indicate that you moved
13 to adopt the report of the Economic
14 Development and Zoning Committee, and it was
15 passed without objection.

16 MR. ALBERTI: That's correct.

17 MR. GANNON: Were any changes made
18 to the committee report by the ANC when it
19 adopted the committee's recommendation?

20 MR. ALBERTI: I would have to go
21 back and look at the minutes.

22 MR. GANNON: The minutes don't say

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1 anything about it. It says that they -- it
2 passed -- you moved to adopt the report, and
3 it was passed without objection.

4 MR. ALBERTI: If the minutes do
5 not reflect any changes to the committee's
6 report, then there would not have been.

7 MR. GANNON: And then, I'm
8 wondering if you can tell me why, then, the
9 minutes say that Apple Tree -- this is a quote
10 -- "Apple Tree is required to provide at least
11 seven parking spaces," but the written report
12 that you submitted says Apple Tree -- that 10
13 spaces can be required.

14 I'm just wondering where the
15 difference between seven and ten crept in
16 between the committee report that didn't talk
17 about 10 and the written report, and whether
18 the ANC -- when did the ANC vote on the
19 written report that reflected 10 spaces, is
20 the question. That's all.

21 MR. ALBERTI: Well, I can't -- I
22 can't track the changes. And the committee's

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1 report is what it is. I mean, those are the
2 statements that were made, I have to assume,
3 at the meeting. This was the letter that was
4 submitted as part of the agenda package. Do
5 you have the agenda package?

6 MR. GANNON: I don't know. I have
7 the minutes from the September 14th meeting.

8 MR. ALBERTI: But you don't have
9 the agenda package?

10 MR. GANNON: I don't.

11 MR. ALBERTI: If you go back and
12 -- our agenda packages are on the website, and
13 I believe --

14 MR. GANNON: Do you mean the
15 package from the committee on the September
16 14th meeting?

17 MR. ALBERTI: No, the package of
18 documents that the ANC has in front of them
19 when they vote on items.

20 MR. GANNON: Okay.

21 MR. ALBERTI: So when they vote to
22 approve this report, or this letter to the

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1 BZA, they would have had a draft copy before
2 them.

3 MR. GANNON: Okay. You know, I
4 don't want to take a lot of time on this. The
5 only question is, it seems that the only thing
6 in the minutes reflects a talk about seven
7 parking spaces, but the written report came in
8 with 10 parking spaces. And so I'm looking at
9 the requirement --

10 MR. ALBERTI: Again, you're
11 looking at two different minutes. You're
12 looking at minutes of the BZA Committee, and
13 then you're looking at minutes of the ANC
14 meeting. And, again, at the ANC meeting, the
15 Commissioners would have had before them a
16 draft copy of this letter.

17 And, you know, I would have to go
18 back and review exactly the content of those
19 to answer your questions completely, but I do
20 believe that it was -- essentially, this
21 letter that you have here today was the one
22 that was before the Commissioners when they

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1 voted to send this.

2 MR. GANNON: Okay. Thanks very
3 much.

4 CHAIRPERSON GRIFFIS: Anything
5 else? Mr. Keys, any cross?

6 (No response.)

7 Thank you very much, Mr. Alberti.

8 MR. ALBERTI: Thank you.

9 CHAIRPERSON GRIFFIS: Okay. Let's
10 move ahead. Mr. Keys?

11 COMMISSIONER MITTEN: Mr.
12 Chairman, I just want to say that I need to
13 leave, but I will be looking forward to
14 reading the rest of the record that you folks
15 create here tonight, and any additional
16 submissions. So thank you.

17 CHAIRPERSON GRIFFIS: Perfect.
18 Thank you very much.

19 MR. KEYS: Mr. Chairman, we'll be
20 brief. Mr. Faling, would you introduce
21 yourself for the record? State your name and
22 your address.

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1 MR. FALING: My name is Herb
2 Faling. I live at 143 11th Street,
3 essentially behind the property at 138 12th
4 Street.

5 MR. KEYS: With reference to the
6 exhibits that Mr. Crews put in the record, I
7 would direct your attention to the --
8 actually, I'm referring to the appellant's
9 exhibits, the diagrams put in. And I'm
10 referring to the very last page, the last
11 photograph.

12 Is your house -- does that appear
13 on that photograph?

14 MR. FALING: Yes.

15 MR. KEYS: Can you identify it for
16 the Board, or if you can hold that up and
17 point to where your house is located.

18 MR. FALING: It is the white
19 house, which is at the top of the carriage
20 house, just to the right of the carriage
21 house.

22 MR. KEYS: Do you have a clear

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1 view from the rear of your house to the
2 parking lot of the subject property?

3 MR. FALING: When my garage door
4 is open, yes, I do.

5 MR. KEYS: How long have you lived
6 in that house?

7 MR. FALING: Nineteen years.

8 MR. KEYS: Have you ever observed
9 that rear area of the subject property being
10 used for parking?

11 MR. FALING: Yes.

12 MR. KEYS: Can you describe how it
13 has been used for parking?

14 MR. FALING: Well, when it was
15 used with the -- when it was used by the club,
16 they would stack park, stack their parking in
17 there. On average, I would say that they
18 would get between nine and ten cars in on the
19 lot, and there was spillover parking. There
20 was parking in the alley. They would use it
21 periodically, sometimes twice a month,
22 sometimes once a month. It wasn't used on a

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1 regular basis.

2 MR. KEYS: And how would they
3 manage the utilization of the fences when they
4 were parking cars back there?

5 MR. FALING: They would just slam
6 the gates open and bring the cars in and just
7 pull them forward alongside each other.

8 MR. KEYS: Thank you, Mr. Faling.
9 I have no more questions for Mr.
10 Faling.

11 CHAIRPERSON GRIFFIS: Anything
12 else on that?

13 MR. KEYS: Yes. I'd like to just
14 briefly articulate our support for Mr. Crews'
15 position on how you apply 401.1, and also how
16 you interpret the parking regulations. But
17 there is an additional thought that I'd like
18 to offer.

19 I think that the applicant -- or
20 the appellant may have said it best. One of
21 his earliest statements was that I'm asking
22 the Board not to render 401.1 superfluous, and

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1 I think that's the crux of his entire
2 position.

3 But what that means is that he
4 really wants you to look at it in isolation,
5 without regard to the context of the remaining
6 regulations and the regulatory scheme, and
7 also without regard to the Zoning Commission's
8 evident concern about the exact use that they
9 propose.

10 Ms. Mitten I think has raised a
11 valid question, and that is, what are the
12 regular -- what are the relevant standards of
13 statutory construction that would be
14 applicable in an administrative proceeding for
15 determining the intent of a legislature or a
16 legislative intent in a rulemaking exercise?
17 I think it is relevant.

18 I think that this Board is
19 required to construe the regulations broadly,
20 with an intent -- because they are regulations
21 that are designed for the public welfare --
22 that they have to be construed with that end

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1 in mine.

2 The Zoning Commission has made a
3 finding with respect to its view of the public
4 welfare in terms of size of lots that are
5 appropriate for this particular use, and I
6 think that ought to be respected by this Board
7 as it looks at how to construe these
8 regulations.

9 There's one thing I wanted to
10 point out that I thought was useful. Whenever
11 I see an interpretation of a regulation,
12 particularly one in isolation, I like to
13 envision or ask myself, what -- how can I
14 extend this? How would this apply generally?
15 Get out of the particular situation, and let's
16 take the principle that's being advanced and
17 apply it generally.

18 And if you look at this, the
19 suggestion is 401.1 means that any substandard
20 lot in the R-4 district can be used for a
21 public school, as a matter of right. That
22 result I think is unnecessary. But if you

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1 take the appellant's view that 401.1 cannot be
2 superfluous and must be respected, then that's
3 the result you have.

4 It also means that a lot that
5 conforms to the 1958 standards of 40 feet by
6 4,000 feet only can be used for a public
7 school, if it had a special exception. It
8 also means, under the current regulations, the
9 current regulations meaning the emergency
10 regulations which we assume will be final
11 shortly, and I'm imagining this -- let's
12 imagine a lot that is 9,000 square feet but
13 only 115 feet wide.

14 That lot, under the regulations,
15 would require a special exception in order to
16 be utilized for a public school. But yet
17 appellant argues these regulations -- 401.1 --
18 compels this Board to nonetheless permit a
19 matter of right use on a substandard lot. I
20 think that result is absurd, and I think it's
21 unnecessary.

22 With respect to the parking, I

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1 think that the information that Mr. Faling has
2 provided with the analysis and the framework
3 that Mr. Crews had provided suggests that one
4 of the things that the appellant has done is
5 simply avoid mention, and I think you can look
6 at his brief and you can look at the
7 appellant's prior submissions to Mr. Crews in
8 vain for any reference to the rear area of
9 that property being either asphalt covered or
10 having any suggestion of parking.

11 This is the first time -- today is
12 the first time that the appellant has put
13 forth any evidence that it wants to talk about
14 the parking use of that rear area. And I
15 think it's very relevant. The private club
16 use is a seven-space requirement, and that
17 requirement I think is relevant to the
18 inquiry, because just as he wants to look at
19 401.1 in isolation he also wants to look at
20 2000 or 2100.5 in isolation.

21 But the entire Chapter 21 is
22 relevant, and 2100.10, which says essentially

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1 that it can provide parking. There are
2 conditions and there are stipulations as to
3 when you can remove and reduce that parking.

4 And let's make it very clear: it
5 is the appellant's expansion of this property
6 that is causing the reduction in the parking
7 that is being provided by this property. And
8 that is over its last use. I still think that
9 use is a relevant use, and I'd be happy to
10 submit something once Mr. Crews produces the
11 certificate of occupancy that would elaborate
12 on that.

13 In conclusion, I'm going to urge
14 that the Board accept Mr. Crews' explanations
15 of his reasoning and his rationale, and find
16 that the appellant is in error in challenging
17 the Zoning Administrator and uphold the
18 decision.

19 CHAIRPERSON GRIFFIS: Thank you.

20 Cross of the witness?

21 MR. GANNON: Just one quick
22 question. Mr. Keys, you said that you think

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1 today is the first time that Apple Tree has
2 mentioned that there could be parking in the
3 back of the lot?

4 MR. KEYS: I think he can save
5 that for closing. He doesn't need to cross
6 examine me.

7 CHAIRPERSON GRIFFIS: Unless he
8 adopts that his witness spoke to the other --
9 Mr. Keys is the attorney representing. But it
10 is a statement. You might address it in
11 closing.

12 Anything else?

13 MR. GANNON: We'll have closing
14 today, even though we'll have written
15 submissions later?

16 CHAIRPERSON GRIFFIS: Yes, you're
17 about to in a few minutes. Any other cross?

18 (No response.)

19 ANC?

20 (No response.)

21 All right. Go.

22 VICE CHAIRPERSON MILLER: Mr.

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1 Keys, I have a question for you. I just want
2 to make sure I understand your point, which I
3 think is an interesting one. And that is that
4 401.1 would permit, under your theory, matter
5 of right use of a substandard lot for any uses
6 other than public schools, because --

7 MR. KEYS: No, it would permit a
8 public school in any substandard lot in the R-
9 4 district.

10 VICE CHAIRPERSON MILLER: No.
11 Under your interpretation, though, you would
12 accept public schools based on the Zoning
13 Commission's text amendment, which fully paid
14 attention to public schools.

15 MR. KEYS: Well, I would take Mr.
16 Crews' rationale. I think on the one hand you
17 look at the last phrase in 401.1. And to the
18 extent that it talks about compliance with
19 other sections of this title, and it
20 specifically directs you to the parking
21 sections, I think you find a problem with
22 parking.

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1 So I think in the first instance
2 4101 doesn't apply for that reason. And I
3 think if it -- if you can't get there, if that
4 doesn't do it for you, I think you need to
5 look at, you know, the overall structure of
6 the regulations and the purpose the Zoning
7 Commission adopted it, because to do otherwise
8 simply opens the door.

9 VICE CHAIRPERSON MILLER: Yes, I
10 understand. I just wanted to --

11 MR. KEYS: And, you know, the
12 regulations -- the regulations, admittedly,
13 aren't perfect. These are a very complicated
14 set of regulations that have evolved over 50
15 years, and to the extent that we had to put --
16 draw a line in the sand in 1958 and say uses
17 prior to that are grandfathered, hopefully
18 that will become less relevant as time moves
19 on. But we're still carrying these old
20 properties forward with us, and these old
21 circumstances.

22 VICE CHAIRPERSON MILLER: I just

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1 want to make sure, though, for your reasoning
2 with respect to treating public schools
3 differently it's just public schools. Is that
4 correct? Because it doesn't make sense in the
5 realm of --

6 MR. KEYS: Well, we're treating
7 public schools differently because the Zoning
8 Commission called them out as being the basis
9 for --

10 VICE CHAIRPERSON MILLER: Okay.

11 MR. KEYS: -- rulemaking.

12 VICE CHAIRPERSON MILLER: Okay.
13 That's what I wanted to pin down.

14 MR. KEYS: But you would also
15 apply -- the same reasoning would apply to any
16 other -- any other use that you could imagine
17 that somehow -- if someone amended 403 again
18 in the future, changed a parameter, created a
19 new use in 403, I think you'd have the same
20 kind of question, whether you want to apply
21 that to every substandard lot.

22 401.1 looks to 403.1 for its

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1 content. And as 403.1 changes, you have to
2 ask yourself, is that really what we want to
3 do? Do we want to make every substandard lot
4 eligible for this new situation?

5 VICE CHAIRPERSON MILLER: One
6 other question. How is the expansion causing
7 the reduction in parking?

8 MR. KEYS: It's simply -- well,
9 first off, and very obviously, it's reducing
10 the area available for parking.

11 VICE CHAIRPERSON MILLER: How
12 much?

13 MR. KEYS: The expansion, as I
14 understand it, is 30 feet deep by the full
15 width of the lot. So it's taking about 40
16 percent -- between 40 and 50 percent of the
17 available surface area of the lot away. I
18 don't know what rear structures or rear
19 entrances they're going to have that are going
20 to require a further setback, so the effective
21 area of parking I think will have been reduced
22 dramatically.

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1 MR. FALING: The expansion of the
2 building is 30 feet. Then, there was a green
3 area, and I believe it was a 10-foot wide
4 walkway to the alley, or it may have been
5 five-foot wide walkway to the alley. But the
6 way they had it configured it reduced any
7 potential parking to three spaces. That was
8 all that was left of the asphalt area.

9 MR. KEYS: May I ask if the actual
10 plans are a record in this case, the actual
11 plans submitted to the applicant? I'd request
12 --

13 CHAIRPERSON GRIFFIS: Which plans?
14 The permit plans?

15 MR. KEYS: The permit plans. I
16 mean, do you have in the record a site plan
17 showing what was proposed for the layout of
18 the property that the Zoning Administrator
19 evaluated?

20 MR. GANNON: Mr. Chairman?

21 CHAIRPERSON GRIFFIS: I don't know
22 if these are the ZA --

C-TAB 22

1 MR. GANNON: I suggest you look at
2 Exhibits 4 and 5 in the file. 4 is a
3 surveyor's plat that points out where the new
4 building would be, and 5 is four or five
5 different plans for the new proposed use.

6 CHAIRPERSON GRIFFIS: Is Exhibit 5
7 that which was submitted for the Zoning
8 Administrator's review?

9 MR. GANNON: It's not everything,
10 but it is excerpted from that, is my
11 understanding.

12 CHAIRPERSON GRIFFIS: Okay.

13 VICE CHAIRPERSON MILLER: Is
14 Exhibit 4, I guess, what the Zoning
15 Administrator was making the calculations on?
16 I mean, your estimate, your projections of how
17 many spaces would fit? No? No, it was on --
18 okay.

19 CHAIRPERSON GRIFFIS: Still, the
20 question stands. How are you calculating what
21 is the number of which is reduced or not? I
22 mean, why is 21.10 relevant to this? Have we

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1 shown clearly that --

2 MR. KEYS: Well, right now, I
3 mean, you're examining the existing use. The
4 existing use is the use verified by the last
5 certificate of occupancy.

6 CHAIRPERSON GRIFFIS: Yes.

7 MR. KEYS: Private club, seven
8 spaces.

9 CHAIRPERSON GRIFFIS: Where are
10 you getting the seven spaces? Just based on
11 the calculations --

12 MR. KEYS: Straight calculation
13 based on the 2101.1 table of requirements
14 under all other uses. And if you'll look at
15 the seller area --

16 CHAIRPERSON GRIFFIS: Our
17 difficulty is that it's not shown that it
18 actually was used that way for seven required
19 -- regulation required parking. And this CO
20 doesn't state the number of parking spaces to
21 be provided.

22 MR. KEYS: I don't think

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1 certificates of occupancy ever state the
2 number of parking spaces to be provided.

3 CHAIRPERSON GRIFFIS: I don't
4 think I'd be that definitive, but --

5 MR. KEYS: I think it's a general
6 case. Usually, it's in the application.

7 CHAIRPERSON GRIFFIS: Right. No,
8 I don't disagree there. Okay.

9 VICE CHAIRPERSON MILLER: Okay.
10 One more question. This may be obvious to
11 other people, but it isn't to me. So it says
12 that we have the certificate of occupancy that
13 was put in the record, which may or may not be
14 the last certificate of occupancy received.

15 But anyway, that's the one we
16 have, and it says that it was issued for the
17 following purpose, and then it says Fraternal
18 Order Knights of St. John and offices. So my
19 question is: how do we know that this was for
20 a club or an office or what? Based on the
21 certificate of occupancy.

22 MR. KEYS: I think if you look at

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1 the definition of "private club," and I assume
2 that the --

3 VICE CHAIRPERSON MILLER: Excuse
4 me. Maybe we should have the Zoning
5 Administrator answer this first, since he --
6 he is the one --

7 MR. KEYS: I'm sorry. You didn't
8 address it to him.

9 VICE CHAIRPERSON MILLER: I know.
10 I know. Excuse me. Okay.

11 MR. CREWS: So how do we know that
12 it's a private club. I think just from the
13 assumption of the -- of a Fraternal Order
14 Knights of St. John, in the -- for lack of a
15 better terminology, just the common
16 terminology -- use of the terms, it sounds --
17 Fraternal Order means, you know, a group of
18 people I would say. Knights of St. John, it
19 just seems to me that that's a private club.
20 It's not something that's -- you know, it
21 would be akin to the Knights of Columbus, the
22 Elks or the Eagles, just, again, from common

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1 awareness I guess more than anything.

2 MR. KEYS: Ms. Miller, if I could
3 ask you, if you look at the attachment, the
4 exhibit to the brief that was submitted today,
5 you'll see a letter from appellant's
6 architect, and we relied on that
7 characterization. They describe it as a
8 private club. I assume they have more
9 information than we do, because they
10 identified it first being property of the
11 Archdiocese of Washington and it was
12 transferred to the Knights in 1968.

13 CHAIRPERSON GRIFFIS: I don't
14 think we need any more on it.

15 VICE CHAIRPERSON MILLER: We also
16 have anecdotal testimony and --

17 MR. KEYS: I think the one -- the
18 thing that may throw you is the fact it says
19 "offices."

20 CHAIRPERSON GRIFFIS: And it
21 shouldn't because the definition says club --

22 MR. KEYS: Private club.

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1 CHAIRPERSON GRIFFIS: -- private,
2 a fraternal, social, or educational, and it
3 goes on to say for the premises, only the
4 members and their guests, and office space and
5 activities shall be limited to the necessary
6 and customary incidental to maintaining the
7 membership.

8 Okay. What else? Other
9 questions?

10 VICE CHAIRPERSON MILLER: No.

11 CHAIRPERSON GRIFFIS: Very well.
12 If there's nothing further, if you are ready,
13 we'd have summation remarks. And I would
14 note, yes, our procedure is we will close the
15 hearing, we'll close the public hearing. We
16 allow you this opportunity to make closing
17 remarks and summations of what you presented
18 today.

19 Clearly, we've indicated there's a
20 list of things we're going to have put into
21 the record, and we'll run down all of those.
22 However, this would be the end, as a -- yes,

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1 this would be the end of any public hearing on
2 this.

3 So with that, let's move ahead.

4 MR. GANNON: That's fine by us. I
5 just have a few points to make. I mean, I
6 think that a lot of our responses to the
7 arguments that have been raised by Mr. Crews
8 at the ANC and by Mr. Keys, I didn't see the
9 reply brief he said he submitted today. Is
10 that something that has been submitted in the
11 record?

12 CHAIRPERSON GRIFFIS: It is. I
13 assumed you had a copy.

14 MR. GANNON: I'll assume that I'll
15 address this in particularity in any written
16 submission rather than in my closing statement
17 right now, since this is the first I've seen
18 of it.

19 But assuming that the gist of
20 his oral testimony was essentially to say
21 things that were similar to what Mr. Crews has
22 said, I'll respond to some of those things

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1 right now. One thing I was asking in that
2 brief cross examination there, I just wanted
3 to point out today is not the first time that
4 Apple Tree has mentioned the lot on the back
5 of the subject property.

6 If you'd turn to Tab B in our
7 brief, it included that cover sheet for the
8 building permit application, which
9 specifically had the discussion of parking
10 that I pointed to you before, that talked
11 about existing parking, none indicated. The
12 lot width permits angle parking only, assume
13 three spaces. So I just wanted to straighten
14 that out.

15 Also, I think that what I said in
16 the opening still holds true. We believe that
17 401.1 says nothing about particular uses. It
18 speaks specifically in terms of exception from
19 lot width and lot area requirements, or both,
20 as appropriate.

21 And it would be our position that
22 when the Zoning Commission amends the zoning

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1 regulations that it is the text of the
2 regulations that is the law. It's the only
3 thing that is actually voted on by the
4 Commission, and it's your duty as the BZA to
5 be the authoritative interpreter of the
6 regulations before they go to court, is that
7 -- you're supposed to interpret the zoning
8 regulations.

9 And so I think that when the
10 regulations are not ambiguous, as Chairperson
11 Mitten even indicated, that 401.1 is not in
12 this instance, that we do think it would be
13 inappropriate to look beyond the fact that
14 this year the Zoning Commission, which was
15 actually amending other parts of 401, adding
16 other subsections at the end of 401, but did
17 not amend this one, I think to say that they
18 sub silencio added a new exemption to 401.1
19 saying that except for public schools, or
20 except for anything else that we come to add,
21 because the provision is not phrased in use-
22 specific terms -- and this goes back to the

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1 colloquy you and I had at the beginning, Mr.
2 Chairman. We think that it speaks directly to
3 this particular situation.

4 Chairperson Mitten, before she
5 left, asked about prior iterations of Section
6 401.1, asked Mr. Crews if he was basing his
7 construction of the provision on that. I just
8 wanted to point out that that 401.1 has
9 effectively not changed since 1958. If you go
10 back and look at the 1958 zoning regulations,
11 there are lots of words in italics, which the
12 Zoning Commission doesn't do any more,
13 throughout the provision.

14 But, basically, the only
15 substantive difference turns out to be a non-
16 substantive one. At the beginning, instead of
17 saying except as provided in Chapters 20
18 through 25, it says except as provided in
19 Chapter 7. And in the 1958 zoning
20 regulations, Chapter 7, the various parts of
21 it, essentially walked through what now lives
22 in Chapters 20 through 25 of the zoning code,

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1 non-conforming uses, all the way down through
2 miscellaneous.

3 And so, in that sense, you know,
4 we think that the text is there. We think
5 that the best way to give meaning to it is our
6 construction. And in his remarks Mr. Keys
7 pointed out that our reading means that a
8 substandard lot can be used as a public -- by
9 a public school as a matter of right.

10 And that's true. We also think
11 that's true for residential uses, and every
12 other matter of right use allowed in an R-1 or
13 R-2 or whatever the particular district
14 involved in, because 401.1 isn't specific to
15 R-4.

16 But we do have to meet -- a public
17 school or whatever else the use is has to meet
18 every other provision that is relevant to the
19 area and dimensional restrictions, the
20 percentage of lot occupancy requirements, FAR,
21 everything else. And it does need to be a
22 matter of right use appropriate to the

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1 district.

2 And so I think that it is true
3 that this would allow public schools to be
4 used on substandard lots. But I think that is
5 exactly the same way that it allows only
6 substandard lots with regard to lot width or
7 lot area, because the lot was improved in
8 1958.

9 And the exact same thing is true
10 with regard to residents. I mean, Mr. Keys
11 can come up here and say this means you can
12 have on a substandard lot a residence, as a
13 matter of right, in an R-4 or whatever. And,
14 yes, that's true, it's a matter of right use.
15 It complies with every other provision in the
16 zoning regulations.

17 And in terms of the debate about
18 whether it's a conforming use or non-
19 conforming use, or conforming structure or
20 non-conforming structure, I think that we
21 agree with the view that the Chairman was
22 advancing earlier in the proceeding that use

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1 and structure aren't necessarily exactly the
2 same thing.

3 And when I commented in my opening
4 remarks about the ANC's report, I said that
5 they said we admit that we have a non-
6 conforming use. And I -- when I responded to
7 that I said, even in terms of the ANC's own
8 analysis, the current use is non-conforming,
9 or the previous use was non-conforming. The
10 private club use would be non-conforming,
11 because it was on a lot that wasn't 40-feet
12 wide.

13 And so I think we were talking in
14 different terms on each other's papers there.
15 But I don't think it changes the underlying
16 argument there.

17 If we move on to parking, I think
18 that the main thing that has been revealed
19 today is that, I mean, I suspect that the
20 Zoning Administrator did not go through the
21 same analysis that he did today. We have a
22 denial letter that says we needed 10 spaces,

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1 and he -- he has admitted that that was
2 probably erroneous, because we probably needed
3 five spaces or maybe six spaces, and I'm
4 surprised.

5 This goes back to the exchanges I
6 was having with Mr. Etherly at the beginning
7 of the hearing. I would be surprised if the
8 Board were to construe 2100.5, which says no
9 additional parking spaces shall be required,
10 as meaning that we need to go to the extent of
11 removing fences and creating -- doing all
12 sorts of things to reconfigure that lot.

13 You know, one thing that wasn't on
14 Mr. Crews' diagram was anything to take
15 account of that provision that required the
16 one-foot screen between contiguous residential
17 uses. I'm not sure whether he thinks that
18 that's required under the provision that I
19 cited in my opening remarks.

20 But in this instance, you know, we
21 believe that we made, at the time we bought
22 the property, at the time that we filed for

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1 the building permit application, which was
2 before the emergency text amendments were
3 adopted by the Zoning Commission, that a
4 reasonable look at the property showed that
5 there was space for three legal spaces, and
6 that's the schematic that we submitted to you.

7 And we believe that under the
8 circumstances it would be extraordinary to
9 have the Board construe the no additional
10 spaces requirement to mean that we need to
11 jump through extra hoops in order to create
12 spaces that are only hypothetical, because we
13 know we are not talking about the actual
14 historic use.

15 Nobody at the hearing is
16 contending that we are accountable for stacked
17 parking in that lot once or twice a month
18 where there's somebody there to open up the
19 gates and move everyone in and out. And so
20 because that's not the case, we're in this
21 hypothetical world of trying to construct what
22 is a reasonable amount of parking spaces to

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1 preserve.

2 And we believe that we've given
3 you a good faith effort in doing that, and,
4 therefore, that we are not destroying existing
5 parking spaces.

6 And I think that those are our
7 main points. Everything else -- as you can
8 see, I believe that the Board, in its
9 questions today, has demonstrated that it
10 understands our arguments well. And we look
11 forward to the list of things that we'll be
12 submitting further arguments in writing on.

13 Thank you very much.

14 CHAIRPERSON GRIFFIS: Excellent.
15 Thank you very much. Let's start there.

16 Ms. Bailey, if you wouldn't mind
17 -- oh, do you have questions? Yes, indeed.

18 VICE CHAIRPERSON MILLER: I just
19 have a couple of clarifying questions. One is
20 I just want to understand the relationship
21 between the enlargement or the proposed
22 enlargement and the parking spaces. I think

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1 you said when you bought the property you saw
2 that there was space for three spaces. And
3 then, I heard from the intervenor something
4 about your enlargement would reduce the number
5 of spaces that would be available.

6 MR. GANNON: Well, I mean, this is
7 the debate we're having. But we clearly
8 reduced the area available behind the
9 building. I mean, that --

10 VICE CHAIRPERSON MILLER: You
11 already did that.

12 MR. GANNON: Well, no, we haven't
13 done that. We're asking -- we're seeking a
14 building permit that would allow us to bump
15 out the back of the building --

16 VICE CHAIRPERSON MILLER: Okay.

17 MR. GANNON: -- you know, so that
18 it would be as big as the two buildings are,
19 the two residences on either side. So we
20 would build out as much of the lot as those
21 two residences already do, and you can see
22 this on Exhibit 4, which is that surveyor's

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1 plat, which shows that the size of the
2 addition is nearly -- it's nearly twice as big
3 in -- it's about twice as big in square feet,
4 because it's -- it actually includes a
5 separate story.

6 So it's not on the map, it's not
7 actually -- it doesn't come out in two
8 dimensions as being twice as big, but it does
9 move back, you know, quite a bit. And so it
10 -- it takes 30.2 feet, it moves the back wall
11 of the building back by 30.2 feet. But we
12 believe that we configure the three spaces
13 differently, and we still have three spaces.

14 And so rather than having a 17-
15 foot aisle along one side where you go in and
16 have angle parking, we will remove the fence
17 and come straight up the back and have three
18 spots that are perpendicular to the alley.

19 And so we believe we're not
20 destroying parking spaces, even though we are
21 destroying space that has been currently used
22 for parking in a sort of haphazard, non-

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1 conforming way.

2 CHAIRPERSON GRIFFIS: Anything
3 else?

4 VICE CHAIRPERSON MILLER: One
5 other question. To your knowledge, how common
6 or uncommon are lots -- are substandard lots
7 that have schools on them?

8 MR. GANNON: I think that this is
9 -- I don't know of any public charter schools
10 that would have so-called substandard lots.
11 I mean, and, historically, because there was
12 no size requirement, it hasn't been an issue.
13 D.C. Public Schools operated schools on much
14 larger lots historically than the kinds of
15 schools that have been created over the last
16 10 years or so have been.

17 And so I think that the Zoning
18 Commission was cognizant of this when they
19 adopted the rule earlier this year. And so
20 non-conforming under the new rules? Probably
21 still not many, but I don't know.

22 VICE CHAIRPERSON MILLER: So your

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1 answer goes just to public schools -- public
2 schools, charter schools. It doesn't go to
3 private schools or --

4 MR. GANNON: Well, private schools
5 are all special exceptions.

6 VICE CHAIRPERSON MILLER: I know
7 that, right.

8 MR. GANNON: And so, you know, I
9 actually -- I haven't done any type of
10 analysis to discover how many special
11 exceptions granted for private schools have
12 included variances or other sort of leeway on
13 lot size requirements.

14 VICE CHAIRPERSON MILLER: Okay. I
15 just thought I'd ask, since -- in case you
16 had. Thank you.

17 CHAIRPERSON GRIFFIS: Did you have
18 a question, Mr. Mann?

19 MR. GANNON: Mr. Chairman, there
20 is one other thing I didn't mention in my
21 closing remarks, in my summation. I just
22 wanted to explain the series of questions that

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1 I had for Mr. Alberti or from the ANC. I just
2 noted the thing that you had noticed -- you
3 said was already noted on your copy of the
4 ANC's written report, which was that it did
5 not make -- it did not note the number of
6 persons necessary for a quorum or explain how
7 many were there as would be required by the
8 provision in the regulations dealing with
9 that, which is in 3115.1(d).

10 And then, the other set of
11 questions about this odd discrepancy between
12 the minutes, which talked about seven spaces,
13 and the final report that talked about 10
14 spaces, was about the fact that in 3115.1(g)
15 it -- the report has to indicate that the vote
16 on the -- what the vote on the motion to adopt
17 the report to the Board was.

18 And it does indicate that it was
19 unanimous, but that clearly assumes that there
20 actually was a written report on which they
21 were voting, and Mr. Alberti's answers seemed
22 to indicate that there was a written report on

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1 which they were voting. But I was just trying
2 to figure out what explained the discrepancy
3 between the minutes, which did not
4 substantively match what ultimately was
5 submitted to the Board of Zoning Adjustment.

6 CHAIRPERSON GRIFFIS: Okay. Do
7 you want us to address that, or is it
8 addressed?

9 MR. GANNON: Well, I think that,
10 you know, I don't know how you deal with the
11 technical deficiency about the fact that it
12 didn't do one of the things that something
13 that is entitled to great weight needs to do
14 according to the zoning regulations, and --

15 VICE CHAIRPERSON MILLER: What we
16 do is we might not grant the ANC great weight,
17 and so I think that it's good that you brought
18 that point out, and the ANC can cure that. At
19 this point, the record is still open. By
20 submitting another letter that has been
21 ratified by the ANC asserting that there was
22 a quorum and what you voted on and what the

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1 vote was, and that it was duly noticed, all
2 those things that are written in that
3 provision.

4 CHAIRPERSON GRIFFIS: Anything
5 else?

6 (No response.)

7 Good. Let's turn to -- yes. No?
8 Okay. Ms. Bailey, we're going to take care of
9 this first.

10 MS. BAILEY: The appellant, Mr.
11 Chairman, requested to respond to the brief
12 that was filed by Mr. George Keys today.

13 CHAIRPERSON GRIFFIS: Right.
14 Response. Okay, good.

15 MS. BAILEY: Mr. Crews indicated
16 that there might be -- Mr. Crews indicated
17 that there might be additional Cs of O that
18 exist for this property, and he -- if so,
19 there was a request to have those put into the
20 record.

21 ANC-6A is to file documentation to
22 verify the ANC's vote on the appeal. They may

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1 also provide clarification of any
2 discrepancies, as discussed here today.

3 Mr. Alberti, you indicated that
4 you would provide that, sir.

5 Mrs. Mitten indicated that when
6 appropriate -- asked the question, when is it
7 appropriate for the property owner or the
8 Zoning Administrator to go back and take a
9 look at the zoning regulations where there may
10 be ambiguity that exists?

11 And I'm not sure, Mr. Chairman,
12 whether the Board wants proposed findings of
13 fact and conclusions of law.

14 CHAIRPERSON GRIFFIS: Let's start
15 with a couple of these. The last piece, in
16 terms of the request to indicate and submit
17 when it's appropriate to go back into the
18 legislative history of interpretation, I don't
19 think we need something so general as that to
20 be addressed in the record here, unless others
21 feel differently.

22 VICE CHAIRPERSON MILLER: Perhaps

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1 she just meant when they're making their legal
2 arguments they can just address statutory
3 construction with respect to making that
4 assessment. If we look at the legislation on
5 its face, or when you can go --

6 CHAIRPERSON GRIFFIS: That's fine.
7 That's not -- I don't see that as an
8 individual submission, but rather it should be
9 --

10 VICE CHAIRPERSON MILLER: No.

11 CHAIRPERSON GRIFFIS: --
12 intertwined with the case presentation.

13 VICE CHAIRPERSON MILLER: Right.
14 With the legal arguments, yes.

15 CHAIRPERSON GRIFFIS: Right. We
16 can find that at the end, the findings and
17 conclusions, the draft orders. But before we
18 do that, we're going to have -- the primary --
19 I think the primary step in terms of the
20 record maintaining -- being maintained open is
21 the response to Mr. Keys' submission. And, of
22 course, Mr. Gannon, the ANC, and Mr. Crews are

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1 going to balance out -- respond to that. That
2 will come into the record.

3 I will say that that response for
4 -- so that we don't extend this a huge amount
5 of time for filings. Obviously, any of that
6 information will be, then, put together in the
7 findings and conclusions and the
8 interpretations of that response.

9 We also had -- yes, as indicated,
10 we're going to have the ANC address the 3115,
11 the C of Os if any others are found. And we
12 had one more provision in terms of the
13 calculations in the parking, Mr. Crews, if the
14 record were left open. However, I will not be
15 requiring that. I think that goes beyond any
16 of the germane arguments, of which we have
17 before us today.

18 It went to the provision of 2100.6
19 and how one would hypothetically calculate the
20 intensity of use. I think we've focused
21 directly on 2100.5 and its jurisdiction to
22 this or not. Unless other members feel

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1 differently on that, I think that just opens
2 us up to a large opportunity for and need for
3 responses and reresponses to address what
4 would need to be addressed. Yes.

5 MR. GANNON: Just very quickly,
6 can we assume that the Board will decide this
7 on the basis of the current version of 2100.5?
8 If the Zoning Commission is hearing next
9 Monday amendments -- they're having a public
10 hearing on Monday on potential amendments to
11 2100.5.

12 CHAIRPERSON GRIFFIS: Gosh, I hope
13 they invite us.

14 MR. GANNON: I'm sure that you
15 could submit comments for the public record.

16 CHAIRPERSON GRIFFIS: I just said
17 that on the record.

18 Yes, absolutely. The hearing that
19 happens on Monday would have no bearing for
20 us. This is --

21 MR. GANNON: If you move quickly
22 enough, certainly not. If they, you know,

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1 decide to adopt emergency text amendments or
2 something, that would change things.

3 VICE CHAIRPERSON MILLER: I don't
4 know. I really have to think about it. I
5 mean, on the one hand, Mr. Crews was dealing
6 with, did he make an error based on the law
7 that was in effect at the time? And that
8 wouldn't have been this one.

9 CHAIRPERSON GRIFFIS: And I don't
10 think he ever swayed from that. There's no
11 way. I mean, that's --

12 VICE CHAIRPERSON MILLER: Yes.

13 CHAIRPERSON GRIFFIS: I don't see
14 how -- we could not legally go back in time to
15 the point at which Mr. Crews was reviewing
16 this.

17 MR. GANNON: We mentioned that in
18 the last paragraph of our brief. We think
19 that that's a consistent reading of -- I think
20 the provision is 3204, but the provision that
21 says that we need to evaluate it on the basis
22 of the law at the time the building permit was

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1 issued.

2 CHAIRPERSON GRIFFIS: I think we
3 have concurment from the members that are here
4 present now, and I don't see why we would ever
5 waiver from that.

6 MR. GANNON: Okay. Thank you.

7 CHAIRPERSON GRIFFIS: Okay. All
8 right. So that being said, how much time do
9 we need to get that in? How much time? The
10 responses -- is two weeks ample time to
11 respond to the submission of Mr. Keys today?

12 MR. GANNON: One week would be
13 fine with us.

14 CHAIRPERSON GRIFFIS: One week?
15 Can the ANC respond, or want to respond, in a
16 week? Can you also get the -- okay.

17 Come on up. Make yourself
18 comfortable. The statement you said, as long
19 as it doesn't require a vote from the ANC --
20 and my understanding is from your ANC letters
21 that you are the authorized representative of
22 the ANC.

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1 MR. ALBERTI: Yes, that's correct,
2 and that's what I was asking you to clarify.
3 That there is no further authorization needed
4 for submissions to this --

5 VICE CHAIRPERSON MILLER: Not if
6 that's what they've authorized you to do. But
7 I don't know if --

8 MR. ALBERTI: Our meeting is on
9 December -- I believe the letter validating
10 what was done in September will be authorized
11 --

12 CHAIRPERSON GRIFFIS: Okay. But
13 some clarification --

14 VICE CHAIRPERSON MILLER: Okay,
15 good.

16 CHAIRPERSON GRIFFIS: -- in that
17 opportunity -- window of opportunity, the
18 clarification of the authority of you to
19 continue to represent the ANC, because
20 statutorily, if you read the regulations, you
21 are supposed to have an ANC vote for
22 everything that's presented to us. So it's a

1 dry -- here's the resolution, we have voted,
2 here is the vote.

3 MR. ALBERTI: Okay.

4 CHAIRPERSON GRIFFIS: There is
5 latitude, my understanding of the ANC's law,
6 and also the regulations and our regulations,
7 so just build that into the sentence.

8 MR. ALBERTI: Yes, okay.

9 CHAIRPERSON GRIFFIS: Or we can do
10 that. I think it will facilitate -- it also
11 gets the communication of authorities going.

12 Okay. Mr. Crews, obviously, any
13 time you find C of Os that's coming in --

14 MR. CREWS: Right.

15 CHAIRPERSON GRIFFIS: Go ahead.

16 MR. CREWS: Because of the
17 holiday, so we would require at least a couple
18 of weeks.

19 CHAIRPERSON GRIFFIS: Holidays?
20 What holidays?

21 (Laughter.)

22 Two weeks, you said, or -- yes.

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1 Yes, no, that makes total sense. What date
2 are we talking? Ms. Bailey, for Tuesday here,
3 if we did two Tuesdays from today at 3:00?

4 MS. BAILEY: December 5th.

5 CHAIRPERSON GRIFFIS: December
6 5th? The 5th? That's the submissions we just
7 talked about? Okay. The 5th, pencil that in.
8 We're going to get all of this together.

9 I think it makes sense to set this
10 for our normally scheduled public meeting,
11 which would be January 9th, which means if we
12 had findings and conclusions seven days prior
13 -- Ms. Bailey, that would be -- pardon me?
14 Right, we need to deal with the holidays on
15 that. That's the 2nd, isn't it?

16 MS. BAILEY: Let's see.

17 CHAIRPERSON GRIFFIS: Monday is
18 the 1st. January 1st is Monday, 2nd is --

19 MS. BAILEY: Yes, Mr. Chairman.

20 CHAIRPERSON GRIFFIS: -- January
21 2nd.

22 MS. BAILEY: Sure.

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1 CHAIRPERSON GRIFFIS: The 3rd is
2 the national BZA holiday, and the 4th --

3 (Laughter.)

4 Well, what's the preference in
5 terms of filing? Prior to the 1st? It would
6 be that Friday at 3:00? Mr. Gannon? It's
7 either going to be that, or it's going to be
8 that Wednesday, the 3rd.

9 MR. GANNON: I think that I would
10 prefer Wednesday, the 3rd.

11 CHAIRPERSON GRIFFIS: Okay.
12 Wednesday, the 3rd, additional time. Ms.
13 Bailey, you don't see any difficulty with
14 that, do you?

15 MS. BAILEY: No, sir.

16 CHAIRPERSON GRIFFIS: Excellent.
17 So let's start that. That will be the
18 findings and conclusions on the 3rd of January
19 at 3:00. That gives ample time to get that
20 out to the Board for the final meeting on the
21 9th. Problems?

22 VICE CHAIRPERSON MILLER: No. I

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1 just want to comment, though. I think, you
2 know, findings and conclusions, I think it's
3 more conclusions I think when we're dealing
4 with how to interpret whether an error was
5 made, that most of the emphasis would be on
6 legal argument as opposed to too many findings
7 of fact.

8 CHAIRPERSON GRIFFIS: Absolutely.

9 VICE CHAIRPERSON MILLER: Okay.

10 CHAIRPERSON GRIFFIS: Absolutely.
11 Believe me, I just used the nomenclature that
12 we always close with -- this is obviously an
13 appeal, and it's based much more on the legal
14 issues, of which we've held to, I think, very
15 well and successfully as opposed to maybe some
16 other appeals, successfully pointed on the
17 issues at hand.

18 That being said, we've got much
19 more time than just a week to get any other
20 responses. I think we can do an added week on
21 the week of -- Ms. Bailey, the 12th at 3:00
22 for those responses? As that first submission

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1 comes in on the 12th, that's all cobbled
2 together, and then you do what you will with
3 it as you put together your last draft orders.
4 Yes.

5 MR. CREWS: And just to clarify,
6 so for the 12th, all I'm on the hook for is
7 the additional C of Os?

8 CHAIRPERSON GRIFFIS: And an
9 opportunity to respond to Mr. Keys'
10 submission.

11 MR. CREWS: Oh, and Mr. Keys.
12 Okay. Because I thought that was --

13 CHAIRPERSON GRIFFIS: Right. On
14 the 5th, right. We're moving that to the
15 12th.

16 MS. BAILEY: Mr. Chairman, is it
17 okay if I just repeat everything?

18 CHAIRPERSON GRIFFIS: Yes,
19 absolutely.

20 MS. BAILEY: Okay. The
21 submissions are due December 5, 2006. The
22 responses to those submissions are due

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1 December 12, 2006.

2 CHAIRPERSON GRIFFIS: First
3 submissions on the 12th. I just changed it,
4 gave more time, just because we're so far off.

5 MS. BAILEY: Okay. The first
6 submission, then, is due December 12, 2006.
7 The findings of fact are due on January 3,
8 2007. And then, the Board has scheduled a
9 decision for January 9, 2007.

10 CHAIRPERSON GRIFFIS: Exactly.
11 Okay. There it is. Any questions?
12 Procedurals? Dates? Are we all set?

13 (No response.)

14 Excellent. Thank you all very
15 much. We do appreciate it.

16 Ms. Bailey, is there any other
17 business for the Board this afternoon?

18 (No response.)

19 If there's no other business,
20 let's adjourn.

21 (Whereupon, at 6:36 p.m., the
22 proceedings were adjourned.)

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C-TAB 23

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY

JANUARY 9, 2007

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:00 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice-Chairperson
CURTIS ETHERLY, JR.	Board Member
JOHN A. MANN, II	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

JOHN PARSONS Commissioner (NPS)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Sr. Zoning Specialist
ESTHER BUSHMAN	General Counsel

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:
LORI MONROE, ESQ.

The transcript constitutes the minutes
from the Public Meeting held on January 9,
2007.

1 by Mr. Etherly. Also in support of the motion
2 Mr. Griffis, the Chair, Mrs. Miller, the Vice
3 Chair, and Mr. Mann.

4 CHAIRPERSON GRIFFIS: Good. Thank
5 you very much, Mr. Moy. Let's move ahead
6 then.

7 MR. MOY: I believe the next case
8 for decision, Mr. Chairman, is the appeal case
9 which is Appeal No. 17532 of AppleTree
10 Institute for Education Innovation, Inc.,
11 pursuant to 11 DCMR 3100 and 3101, from the
12 administrative decision of the Zoning
13 Administrator, Department of Consumer and
14 Regulatory Affairs to require BZA special
15 exception approval for a proposed addition for
16 a public charter school.

17 The Appellant alleges that the
18 Zoning Administrator erroneously relied upon
19 the Zoning Commission's February 13, 2006,
20 emergency rulemaking to require additional on-
21 site parking spaces. The subject property is
22 located in the R-4 District at premises 138

1 12th Street, N.E. That's in Square 988, Lot
2 820.

3 On November 21, 2006, the Board
4 completed public testimony, closed the record,
5 and scheduled its decision on January 9, 2007.
6 The Board requested the following -- rather,
7 the Board requested a number of post-hearing
8 documents including proposed findings of fact
9 and conclusions of law. All these documents
10 were filed timely and staff has identified two
11 potential preliminary matters and I'll raise
12 those as I go through the filings.

13 The first filing is a letter from
14 ANC-6A to document their voting for great
15 weight and that is identified as Exhibit 31 in
16 your case folder. We also have a filing from
17 the Northeast Neighbors for Responsible
18 Growth, party in opposition, identified as
19 Exhibit 32.

20 In this filing the opposition
21 party also included copies of certificate of
22 occupancy which the Board did not ask for

1 other than from DCRA and I'll leave that for
2 the Board to define rather broadly or narrowly
3 for acceptance into the record.

4 There is also a filing of the
5 appellant in response to the intervenors reply
6 brief. That is identified as Exhibit 33. We
7 also have the proposed findings of fact and
8 conclusions of law from the appellant, from
9 the party in opposition. Those are identified
10 as Exhibit 35 and Exhibit 36 respectively.

11 Finally, Mr. Chairman, we have a
12 potential preliminary matter which is the
13 motion to enlarge time to accept DCRA's
14 proposed findings of fact and conclusions of
15 law to submit on January 8, 2007. That should
16 be Exhibit 37. Of course, the draft proposed
17 order which is Exhibit 38 from DCRA. Does
18 that make any sense, any of this, Mr.
19 Chairman?

20 CHAIRPERSON GRIFFIS: Total sense.
21 However, what is your first preliminary
22 matter?

1 MR. MOY: Exhibit 32 which is the
2 filing from the Northeast Neighbors for
3 Responsible Growth.

4 CHAIRPERSON GRIFFIS: Right.

5 MR. MOY: I only raise that
6 because the Board requested, or rather allowed
7 DCRA to file additional certificates of
8 occupancy to demonstrate previous use. Only
9 DCRA and the party in opposition did likewise
10 so I leave that to the Board whether that was
11 your intent or not --

12 CHAIRPERSON GRIFFIS: Right.

13 MR. MOY: -- to allow from other
14 parties.

15 CHAIRPERSON GRIFFIS: I'll hear
16 from other Board members but I thought we kind
17 of sent them out to find whatever they could
18 in that respect. There is no reason I would
19 say to preclude that Exhibit 32 from coming in
20 unless others have different opinions. Not
21 noting any different opinions I'll move that
22 in.

1 The second is a bit more of
2 concern to me in terms of the motion to
3 enlarge time. Let me just hear comments on
4 that. It was delivered to us actually
5 yesterday. Let's briefly get into that.

6 Ms. Miller.

7 MS. MILLER: I don't have a
8 problem accepting that into the record because
9 it's a consent motion and it was supported by
10 good cause for filing late in that I believe
11 the attorney was ill and no parties have
12 claimed prejudice as a result.

13 CHAIRPERSON GRIFFIS: Did you have
14 time to review it or read it?

15 MS. MILLER: I did.

16 CHAIRPERSON GRIFFIS: Others?

17 MR. MANN: I'm not particularly
18 concerned about the fact that it was delivered
19 as of yesterday. If it had been this morning
20 that might have been a different situation.

21 CHAIRPERSON GRIFFIS: Perfect.

22 Mr. Etherly, any concerns?

1 MR. ETHERLY: No objections.

2 CHAIRPERSON GRIFFIS: Good. We
3 take it as a consensus then and we'll also
4 accept that into the record. So we have the
5 record full, Mr. Moy, I don't think there are
6 any other preliminary matters then attended to
7 that and we can move ahead with our
8 deliberations. Is that correct?

9 MR. MOY: Yes.

10 CHAIRPERSON GRIFFIS: Thank you.
11 Then let's do. To frame this a little bit in
12 my perspective, all appeals have their
13 complications and difficulties. This appeal
14 in particular I feel, although we are put into
15 the shoes of the Zoning Administrator, I feel
16 badly that the Zoning Administrator had to
17 look at this in many respects but the fact
18 meaning we had a text amendment that was
19 implemented.

20 There was an application that was
21 a permit, let's say. It obviously had to come
22 in under review of that new text. As the

1 Board members know, not often when you write
2 things are things perfectly clear or, in fact,
3 specifically set.

4 I guess my concern, just to put it
5 on the record, is I feel as though we are
6 testing the changes in the zoning regulations
7 based on a specific instance. Sometimes that
8 works well. I don't think that worked
9 particularly smoothly in this case.

10 Let me also say in assessing, as
11 we'll get into the details, fundamentally
12 reading the regulations now over and over
13 again and how it deals with the public schools
14 and it deals with public schools and
15 residential areas, I think it was an excellent
16 update of our regulations to include public
17 charter schools in the definition of public
18 schools.

19 I would add to my own assertion
20 and analysis of the regulations in its direct
21 reading that, in fact, DCMR Title 11 deals
22 differently with public schools than it does

1 with other structures or uses in a residential
2 area and, in fact, is less restrictive. That
3 is shown in numerous ways.

4 However, dramatically in ways of
5 height which it is allowed to be far in excess
6 of that of a matter of right residential
7 structure. That is one element that was
8 changed by the Zoning Commission but it was
9 not changed in terms of its less restrictive
10 nature. Although it went from 90 feet in two
11 of the zoned districts to 60 feet, of course,
12 the matter of right height is 40 feet.

13 My point being as I looked at this
14 in the very beginning and now will get into
15 this deliberation, I looked at the zoning
16 regulations as being less restrictive in its
17 designation and forming, massing of public
18 schools in the residential districts. That
19 being said, I'll open it up to others to begin
20 direct deliberation on the appeal element.

21 Ms. Miller.

22 MS. MILLER: Okay. The appellant

1 in this case appealed basically on four
2 grounds. I want to start with whether or not
3 they were exempt from 206.1 pursuant to 401.1.
4 Then I guess I should -- let me back up.

5 I think the error alleged is that
6 the ZA required BZA approval for AppleTree,
7 which is a charter school, enlargement and use
8 as a charter school as a special exception
9 pursuant to 206.1 and required AppleTree to
10 provide 10 parking spaces on site.

11 I think, as you were saying, this
12 came about because Zoning Commission enacted
13 on an emergency basis 206.1 which said use as
14 a public school that does not meet the
15 requirement of Chapter 4 of this title, or as
16 a private school shall be permitted as a
17 special exception in an R-1 district if
18 approved by the Board of Zoning Adjustment.
19 Charter schools have been determined to be
20 public schools.

21 The first issue presented, or at
22 least I would like to address, is whether

1 AppleTree is exempt from 206.1 pursuant to
2 401.1. That comes into play because 401.3
3 sets forth minimum lot area and minimum width
4 of lot requirements for various structures.

5 The public school was set forth in
6 that chart and there is no dispute that
7 AppleTree does not meet those requirements but
8 401.1 provides an exception to structures
9 meeting those requirements.

10 It says, "Except as provided in
11 Chapters 20 through 25 of this title, in the
12 case of a building located May 12, 1958, on a
13 lot with lot area or width of lot or both,
14 less than that prescribed in 401.3 for the
15 district in which it is located, the building
16 may not be enlarged or replaced by a new
17 building unless it complies with all other
18 provisions of this title."

19 If you translate it, I think that
20 means it can be enlarged or replaced provided
21 it complies with other provisions of this
22 title and AppleTree was doing an enlargement

1 here.

2 CHAIRPERSON GRIFFIS: Did you say
3 translated?

4 MS. MILLER: That's the way I
5 interpret it. I think the first question is
6 does AppleTree fall within this exception. I
7 think there is no dispute it was improved
8 before May 12, 1958. There's no dispute that
9 it doesn't meet the lot and -- it doesn't meet
10 the requirements set forth in 401.3.

11 Then the question is does it
12 comply with all other provisions of this
13 title? I think DCRA and the intervenors say
14 that it doesn't comply with the parking and
15 that's when we got into parking. There are a
16 few different issues that skip around.

17 CHAIRPERSON GRIFFIS: I think
18 that's on track.

19 MS. MILLER: Okay. If we go to
20 the parking, the appellant says it does comply
21 with the parking because it has been certified
22 as a contributing structure in an historic

1 district. We have consistently interpreted
2 2100.5 as exempting those buildings from
3 additional parking. Therefore, they say there
4 is no additional parking required and would
5 agree with that. Should we discuss that one
6 first? Do others have differing views on
7 that?

8 CHAIRPERSON GRIFFIS: Why don't --

9 MS. MILLER: There's more to say
10 about it actually.

11 CHAIRPERSON GRIFFIS: Yes, but why
12 don't we start with your discussion on 206 and
13 also 401.

14 MS. MILLER: And then go back to
15 the parking?

16 CHAIRPERSON GRIFFIS: Yes.

17 MS. MILLER: Okay.

18 CHAIRPERSON GRIFFIS: I think they
19 are distinct and they break down into those
20 elements. I appreciate it. That's an
21 excellent outline of your deliberation and
22 analysis. I think I agree. Let me pose what

1 I saw.

2 First of all, hearing the
3 testimony of the Zoning Administrator here
4 before us and in the appeal, it was very
5 apparent there was great concern as there was
6 new text to review and approve or deny permit
7 applications based on the exact intention and
8 the letter of the Zoning Commission.

9 Obviously that is laudable and
10 what should be done. However, now we are
11 faced with stepping back from that instance
12 and looking at it more globally. Again, I go
13 back to my difficulty in reading the
14 regulations and reading the letter and the
15 intent of 401.1.

16 I think as you look at, and we
17 have the markup from the Zoning Commission, of
18 course, of the text and their amendments in,
19 and you look at the extent and the sections of
20 400 that it went into and then 206 and the
21 extent of which it was deliberated and changed
22 in 401.3, the calculation is the same. Yet,

1 401.1 stood as we read it today. The letter
2 and the exact reading and the exact letter of
3 that exempts this application.

4 I don't see how I can move any
5 other direction without reinterpreting which
6 would essentially be rewriting the regulations
7 by a decision in that manner. I obviously
8 can't get into the head of the Zoning
9 Commissioners but in many respects their
10 decisions need to live beyond the persons that
11 talked about it and have to be deliberate, or
12 rather have to be usable in their written
13 form.

14 I think that we are left with
15 401.1 for today as it is written. Therefore,
16 I believe that it is an exemption clause of a
17 lot that is in existence May 12, 1958, and
18 this application, or rather permit, did fit
19 within that parameter. Others?

20 MS. MILLER: Yeah. I just want to
21 add the next argument, I think, of DCRA. The
22 intervenor said even if they fell within the

1 exemption that the Zoning Commission really
2 intended to eliminate that exemption for
3 public schools.

4 CHAIRPERSON GRIFFIS: Right.

5 MS. MILLER: And it's not written
6 anywhere so we had to look within the record
7 as to what is the evidence in the record. I
8 agree with you that the evidence, I think, is
9 to the contrary that they did this rulemaking
10 twice. They amended the regulations that
11 surrounded this particular regulation so it
12 was basically in their face in the text.

13 Also not only was it in the text
14 that they were looking at but there was
15 attached to, I think, the appellant's pleading
16 e-mails that show that this precise issue was
17 brought to the Office of Planning's attention
18 before the second reading and no change was
19 made.

20 I think it's hard for us to just
21 leap to the conclusion that -- well, I think
22 the Zoning Administrator said this must have

1 been an oversight. I think that is a big leap
2 for us and I don't think it's appropriate
3 under proper statutory construction.

4 CHAIRPERSON GRIFFIS: Excellent.

5 MR. MANN: I also think it's
6 fairly easy to agree with that position. It
7 just seems like it is bolstered by the fact
8 that even the definition of public school was
9 changed which means that there were certain
10 attention to detail paid that seems like it
11 would have been, I don't know, almost
12 impossible to believe that an oversight was
13 made that 401.1 couldn't have been changed as
14 well.

15 CHAIRPERSON GRIFFIS: Right.
16 Good. Okay. Anything else on that aspect
17 then? Let's move into the last piece of that,
18 of course, which is unless it complies with
19 all other provisions of this title which gets
20 into the parking provisions and whether it
21 was, in fact, in compliance with all of the
22 other provisions.

1 This, again, is a very complicated
2 one only because of the fact of the
3 regulations change the designation of use that
4 may have been consistent with a property that
5 existed before the regulations were
6 enforceable, meaning the designation of this
7 -- well, I would say to begin with I believe
8 it is my deliberation that one of the findings
9 of fact is that this building was not built as
10 a residential and it is a different form and
11 mass than the surrounding residential.

12 As we look at the history of its
13 use in the past C of Os it was up to the date
14 clearly not residential but was designated,
15 although not on the actual C of O we could
16 find that it would fit within the designation
17 of la private club which would be an allowable
18 use in the R4 district. What was the parking
19 requirement? What was actually provided and,
20 therefore, what would be necessitated in the
21 provision of the now as proposed charter
22 school?

1 We had in the presentation
2 differing views of it. I was not so persuaded
3 by the Zoning Administrator in saying what the
4 Zoning Administrator needed to do was go in
5 and see how many legally fit on the site. I
6 think, again, it's a difficult position to be
7 in as we aren't looking at, one, a striped or
8 even counted parking positions in the C of O,
9 for one, or even in the existing condition.

10 However, there are a couple of
11 things that led me to believe that we wouldn't
12 go and redesign it to maximize the legal
13 spaces because, one, when it was originally
14 built there was a structure, an accessory
15 structure that was not used for parking which
16 was removed. There was an original assumption
17 that the entire area wasn't parked.

18 There was a chain link fence with
19 an opening that obviously would make it
20 difficult as we saw in some of the diagrams to
21 do a total of upwards of 10 spaces or nine.
22 There is an egress there that was accommodated

1 down. There are obviously egress areas. Then
2 there are drive isles and the like. What we
3 are charged with, of course, is to look at
4 what should have been the exact spaces that
5 would have been provided. I'll open it up for
6 people's discussion on that.

7 MS. MILLER: This was basically I
8 thought very messily presented. I think the
9 question here was the regulation says no
10 additional spaces and the question was what
11 was there before? How many would be -- what
12 would be additional? I don't think the Zoning
13 Administrator had really properly determined
14 what was there before.

15 We have discussed the question of
16 it isn't just what may have been required for
17 the use that was allowed because spaces may
18 have been credited. I think it looked to be
19 that case that the previous use may not have
20 been able to fit the amount of spaces that
21 were required as well.

22 I think what we ended up doing was

1 looking and seeing how many spaces would
2 actually fit there. I believe the appellant
3 has said three. It wasn't that they weren't
4 willing to provide more but that more did not
5 fit there.

6 I don't think there was evidence
7 in the record that the previous use had more
8 than three spaces. I think there was only
9 evidence that looking at a chart the previous
10 use might have been required to but that may
11 have been waived and credited.

12 CHAIRPERSON GRIFFIS: Good. I
13 think it is somewhat complex in its lack of
14 specific facts. I don't disagree that the
15 Zoning Administrator should have looked at
16 this and saying how did it comply with the
17 previous use and maximize the parking.

18 However, then we had anecdotal
19 testimony and some evidence that they could
20 stack parking in it. They could fill the
21 entire area and park it up. That to me was
22 fine. However, that wouldn't go to satisfy

1 the required parking so we had to step back
2 from that.

3 It's an interesting piece that I
4 think one of the briefings put in there the
5 illustration of you wouldn't count -- this
6 isn't exact but they give you the illustration
7 you wouldn't count the parking if you were
8 parking the entire front yard. I thought,
9 wow, that opens up a Pandora's Box because, of
10 course, we don't allow parking in the front
11 yard.

12 It held some truth to me in my
13 thought process because it isn't like we would
14 just go and look at the existing condition and
15 see how many were dumped there but rather how
16 it would have -- in review and issuance of a
17 C of O how it would have complied. Based on
18 the history obviously we have the potential
19 for some grandfathering.

20 So I am in agreement with you as
21 we looked at the logical layout, the existing
22 condition that the assessment of three that

1 were provided would be a correct calculation
2 on the existing lot. Others? I think that
3 goes to the two instances which, again, are
4 the substance of what we are talking about
5 here.

6 One is the addition to the
7 structure. The other is the use change. Both
8 of those are factored into looking at is there
9 more parking required. I think each is
10 addressed in looking at the previous
11 condition. The requirement for the private
12 club and then the requirements for a charter
13 school and how it is calculated based on the
14 existing condition and then the provision of
15 free parking. Others?

16 MS. MILLER: I'm just not sure if
17 I follow your last point because my
18 understanding of 2100.5 I believe is not
19 affected by the change in use. No additional
20 parking would be required because it's an
21 historic structure regardless of its use.

22 CHAIRPERSON GRIFFIS: Right.

1 MS. MILLER: You're saying its use
2 is just affected by 206.1?

3 CHAIRPERSON GRIFFIS: No. What
4 I'm saying is both of those elements were
5 addressed by the Zoning Administrator and had
6 to have been addressed in its first review and
7 whether it would be in accordance with the
8 regulations. I agree with you that 2100
9 addresses each of those whether it be use
10 change and/or the addition to the structure.

11 Okay. What else?

12 MS. MILLER: If we find, which I
13 would, that AppleTree is exempt pursuant to
14 401.1, then we don't need to reach the other
15 issues that were raised but not really fully
16 addressed at the hearing with respect to the
17 actions of the Zoning Commission such as
18 whether the emergency rules were in effect or
19 whether there actually was an emergency.

20 I would suggest we don't even
21 reach that because if we find that they're
22 exempt even if they were in effect. We're

1 assuming they were in effect.

2 CHAIRPERSON GRIFFIS: Agreed.

3 Other elements?

4 MR. ETHERLY: If I might, Mr.
5 Chair, as we move into deliberation, could I
6 inquire what then would be your parking
7 number? I think I'm inclined to follow your
8 argument but perhaps I'm just following up on
9 Mrs. Miller's question of, let me just make
10 sure I understand you, what would your parking
11 number be.

12 CHAIRPERSON GRIFFIS: The parking
13 number would be the maintenance and provision
14 of three spaces. There were arguments in
15 every direction on that. There were arguments
16 that it should be reviewed and required to
17 maximize the amount that you can or was put
18 there. There was the other extreme which
19 said, "Look, yeah, there's nothing striped.
20 There's nothing saying parking. There's no
21 parking sign. Then we have no parking."

22 I don't agree with either of

1 those. I think there is a rationale in
2 between and that rationale in between does go
3 to looking at how it could be parked in
4 accordance with the size of drive isles, but
5 also in accordance with the structure that is
6 currently there. I add the chain link fence
7 as one of the structures there because, if I'm
8 not mistaken, there is evidence in the record
9 that shows that was a permanent construction.

10 All of that is the foundation of
11 previous approvals of which I am not
12 questioning but rather building the foundation
13 and getting to today's existing condition.
14 With that, I was looking at the calculation of
15 what would have been required, what was then
16 provided based on the existence of the
17 structure, and then also based on the historic
18 character of the building.

19 MS. MILLER: I just want to add
20 that in the brief of appellant in response to
21 intervenor's reply brief at page 4 they
22 discuss about how they made a good faith

1 attempt to determine how many spaces could
2 constructively fit on the property. They came
3 up with three spaces.

4 I don't think we had evidence to
5 the contrary. We had evidence that the club
6 might be required to have seven spaces but we
7 don't have any evidence that they actually
8 have seven spaces or seven spaces could
9 possibly fit there. We only heard testimony
10 about stacking sometimes for club nights.

11 CHAIRPERSON GRIFFIS: Right. The
12 architect's testimony that they were assuming,
13 although nothing was marked, striped, or noted
14 in the C of O, that they were assuming that
15 there were three there based on the size,
16 access, ingress, egress of the fencing and the
17 size requirements. Other issues or elements?

18 Mr. Moy, do you have in your
19 possession any --

20 MR. MOY: Yes, sir.

21 CHAIRPERSON GRIFFIS: -- absentee
22 ballots?