GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY,
MARCH 1, 2005

+ + + + +

The Public Meeting convened in Room 220 South, 441 4th Street, N.W. Washington, D.C. 20001, pursuant to notice at 10:15 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

ZONING COMMISSION MEMBER PRESENT:

KEVIN HILDEBRAND	Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Deputy Secretary, BZA
BEVERLEY BAILEY	Zoning Specialist

This transcript contains the entire minutes of the meeting held on Tuesday, March 1, 2005.

AGENDA ITEM

APPLICATION OF DUD, LLC,
17278 ANC-7C 4

VOTE TO DENY THE APPLICATION.....17

APPLICATION OF NEWCOMB DAY CARE CENTER
17280 ANC-8C.....18

VOTE TO APPROVE THE APPLICATION WITH CONDITIONS...35

APPLICATION OF DAG REAL ESTATE HOLDING COMPANY, LLC
17282 ANC-5A.....36

VOTE TO APPROVE THE APPLICATION WITH CONDITIONS...61

APPLICATION OF RLA REVITALIZATION CORPORATION (DC USA)
17232 ANC-6D.....61

VOTE TO APPROVE THE APPLICATION WITH CONDITIONS.. 98

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

10:15 a.m.

CHAIRPERSON GRIFFIS: A very good morning to everyone present. This is the 1st of March, 2005, public meeting of the Board of Zoning Adjustments for the District of Columbia. My name is Geoff Griffis, Chairperson. Joining me today is Vice Chair Ms. Miller and also Mr. Etherly.

Representing the National Capital Planning Commission is Mr. Mann and representing the Zoning Commission with us on our cases this morning is Mr. Hildebrand. Copies of today's meeting agenda are available for you. They are located on the wall where you entered into the hearing room. Please pick one up and you can see where are decisions are and the chronology of such.

Please be advised that all proceedings before the Board of Zoning Adjustment are recorded. They are being recorded in two fashions these days. First the court reporter sitting to my right is creating a transcript of all our proceedings. Secondly, we are being broadcast live on the Office of Zoning's website.

Attended to all of those, I ask that people turn off their cell phones and beepers at this

time. Of course, during the public meetings there's no opportunity for additional information or public testimony or presentation of evidence. This is an opportunity for the Board to review the record on cases that have previously been heard and to deliberate and decide on those cases.

With that, let me say also a very good morning to Ms. Bailey from the Office of Zoning. On my very far right, Mr. Moy, closer in also from the Office of Zoning. Ms. Bailey, Mr. Moy, good morning to you both. Are there any preliminary matters for the Board's attention in this meeting?

MR. MOY: Not this morning, Mr. Chairman.

CHAIRPERSON GRIFFIS: Excellent. Thank you, Mr. Moy, in which case why don't we call the first case for a decision.

MR. MOY: The first case is Application No. 17178 of Dud LLC, pursuant to 11 DCMR 3103.2, for a variance from the lot width requirements under section 401.3, to allow the construction of two semi-detached single-family dwellings in the R-2 District at premises 556 and 558 48th Place, N.E. (Square 5145-S, Lots 17 and 18).

On February 1, 2005, the Board completed public testimony on the application and scheduled its

decision on March 1, 2005. The Board requested that the applicant submit further arguments towards the requested area variance and the variance for off-street parking requirements. That was filed by the applicant under the applicant's attorney Greg Ellis and is in your case folders identified as Exhibit 26. That concludes the staff's briefing, Mr. Chairman.

CHAIRPERSON GRIFFIS: Excellent. Thank you very much. Board members, I note we've all spent some time on this. Let's just start in as Mr. Moy as outlined. We do have the filings from the Office of Planning. Also the ANC was not available in this case, if it's correctly reflected.

The Office of Planning had discussed the entire test of this. I start with the Office of Planning because actually the final submission and proposed order by the applicant speaks to the Office of Planning directly and is rebutting the arguments of which the Office of Planning did not support the application.

I will speak individually on this in looking at this application. There are times when you look at applications and you read the regulations where you say this makes so much sense to move ahead with approval and see this project come to fruition.

However, the difficulty is going back to the regulations of which we are charged to review and analyze each application on.

When you look at specifically the regulations, it is hard to get beyond the articulation of Section 401, specifically 401.2, in dealing with this situation based on the fact of ownership and timing, based on the fact that improved or unimproved it is very difficult to move beyond that without, again, the very persuasive test of unique practical difficulty and, of course, apparent intent and integrity of the zone plan and not going against the public good.

It seems as though it is in some respect -- how would you characterize? -- an unfortunate situation in terms of the location of this just on the dividing line of the zone boundary. It is not a divided boundary line but rather is close to where the city decided to change the zoning.

A few feet in one direction or the other would have had a larger impact on this. But, going directly to it, it is my position in reviewing this the fact that it is clear in the regulations specifically addressing this situation, and it's not often for us in the regulations.

It's fairly specific and decided on the regulatory intent in 401.2. I have not seen in the submissions from the applicant and, of course, we are required to look only at that which is presented in each instant case of persuasive argument at this time that this meets the test.

There is this second aspect of the parking and really to get to that we need to decide the first I would think. I mean, the parking in terms of its presentation is fairly clear. There is no alley access. There is a paper alley. We have a lot of oral documentation and photographic documentation of that. Certainly very persuasive. However, how do we get to that step if not deciding the first?

Let me open it to others for their comments at this time.

MR. ETHERLY: Mr. Chair, I would agree with your assessment. I think you hit it right on the head when you said it is, indeed, perhaps an unfortunate result but the language of 401.2 is, indeed, very straightforward as it relates to that issue of common ownership.

I would further note that I do appreciate the argument that was submitted by the applicant with regard to a statement of facts concerning, perhaps,

the incongruousness of the result if you do follow the logic of 401.2 out as it relates to this particular instance in that you would, in fact, if you were to combine the lots conceivable have the ability to create perhaps a much larger property that would not be in keeping with the character of the surrounding neighborhood.

I'm sympathetic to that argument. I understand exactly what the applicant means when the applicant submits that argument but it doesn't, nevertheless, resolve itself of the bar, if you would, that is set by 401.2. I'm in agreement with your analysis.

I wish the facts of the case or the circumstances of the case were different such that these two lines were not necessarily in the same ownership and then you wouldn't necessarily have the issue of 401.2 but it is there and the language is fairly clear.

If I could do some artful lawyering and find a way to get around it, I would because I think I heard very persuasively the argument that the applicant submitted in their testimony with respect to what they are trying to do with this undeveloped parcel in terms of further enriching the residential

character of one of the neighborhoods in the District but 401.2 is a tough bar as relates to that issue of common ownership and as we do indeed have a property that is a common ownership here, it's just very difficult to get around the language. Thank you, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you very much.

Ms. Miller.

VICE CHAIR MILLER: I would concur with my colleagues that 401.2 is controlling here the substandard adjacent lots in common ownership. The intent of the reg. is that it be combined to meet the standards of the current reg. but I don't agree that the result is necessarily a property that is out of sink with the rest of the neighborhood because I understood Office of Planning to say that the neighborhood was pretty mixed and that many of the lots have been combined.

There were several 25-foot lots that were combined. I think, you know, it doesn't end there. We then go to the variance test to determine whether or not a variance can be granted in this case. I guess I would like to start the analysis there.

For there to be a variance granted we need to find that the property is unique or subject to some

other exceptional situation and that the strict application of the zoning regs. would create a practical difficulty for the ownership to comply with them and that granting the variance won't cause substantial detriment to the public good or impair the intent, purpose, and integrity of the zone.

So in looking at that analysis, I don't see that this is a unique or exceptional property. We have two lots here and they are both 25 feet wide and they are both -- that means they're not unique, at least with respect to each other.

I don't think they were unique in the neighborhood in that Office of Planning said that most of the neighborhood consisted of these 25-foot lots, many of which had been subdivided together. Even though applicant says these are the only two left, I don't think that quite rises to the level of uniqueness for variance purposes in my view.

With respect to the practical difficulty test, I think this is where it also really falls down. We have heard evidence that a single-family home could be built on the combined lots without zoning relief and I think that is what 401.2 actually intends. We didn't hear any evidence of topographical difficulty or prohibitive cost for that

to happen.

Finally, with respect to the third prong, substantial detriment, I agree certainly it wouldn't be detrimental to the neighborhood to have two homes built on these properties but I think I do agree with Office of Planning's assessment that it would be detrimental to the integrity of the zoning regulations because I think they do intend that these type of properties be combined unless there is some other further compelling reason not to which would show up under the first two prongs.

Finally, the applicant cites Russell v. D.C. Board of Zoning Adjustment in support of his case. In that case the court found that the seller wasn't able to reasonably dispose of the property for permitted use or use of lot itself. In this case the lot can be used. That's where I am on my analysis.

CHAIRPERSON GRIFFIS: Okay. You bring up some interesting points. How do you address the applicant's testimony of the fact that although there may be similar-sized lots this is the last, if not the one, that is undeveloped?

VICE CHAIR MILLER: I don't think that rises to the level of uniqueness because it's the last

one. I mean, there are similar ones which, to me, says that it's not unique. Also, I think you've got this overriding regulation that seems to have the intent that these types of lots be combined.

CHAIRPERSON GRIFFIS: I think that is well said. I agree with the second point and the fact of the matter that if this is the uniqueness, going back to my beginning statements, the regulations set this out for the exact condition. It's almost as if they anticipated how to deal with this so you have to take it, in fact, under 401.2 when looking at this.

You talked about cost and practical difficulty. How do you address the applicant's argument of the fact that this was offered as a combined purpose and it was not something that was done separately by separate owners? Does that rise to uniqueness or practical difficulty?

VICE CHAIR MILLER: I don't think so. First of all, I don't think that the applicant was compelled to purchase this property and I don't think that they are compelling to necessarily hold on to it all together. There's no reason --

CHAIRPERSON GRIFFIS: But that could be said of any application at any time. No one has to do anything.

VICE CHAIR MILLER: That's right. I mean, you know, the regulation was there before he purchased the property. You buy the property or whatever and you have an obligation. As said, the buyer beware. You know the regulations that you are dealing with. If you don't know them, then that is not for us to then turn around and grant a variance because someone wasn't aware.

CHAIRPERSON GRIFFIS: Okay. Others? Anything else on this?

MR. MANN: I have not a point but a question. You said that the parking variance had to be addressed separately. I don't quite understand why one has to be determined before the other to be considered which is what you had indicated earlier.

CHAIRPERSON GRIFFIS: I think if we're looking at a variance of two off-street parking requirements for separate lots its muted by the fact if this doesn't progress successfully forward. If it was the indication of the Board that this was moving towards approval, then clearly we would address the parking because it would be attended to two lots.

MR. MANN: Even if they were building --

CHAIRPERSON GRIFFIS: That's an interesting point. I mean, they are existing lots.

Could you not -- well, it gets to be cumbersome in the fact that we don't have the proposed project to take them individually but I supposed -- I mean, I'm amenable to splitting it if that's the direction you're going.

MR. MANN: It's not necessarily the direction I'm going. I wanted to do what was right and it's probably -- if this application were to be denied, it's probably not much consolation to the applicant anyway. I just wanted to understand why we were proceeding the way we were. I'm willing to accept your theory there.

CHAIRPERSON GRIFFIS: I'm not sure how we should legally deal with that. I mean, it seems that the request for parking relief in my mind was essentially moot based on one possible outcome of the Board's decision. Do others have comments on that or any other comments on the application?

VICE CHAIR MILLER: I'm just wondering if we should take them separately. I agree with you that the parking is depended upon the first application but maybe it's not denied. Maybe it's dismissed which would be different than denied on its merits.

CHAIRPERSON GRIFFIS: Or it could be approved.

VICE CHAIR MILLER: I don't see the facts to approve it because it seems to be tied to two separate lot use.

CHAIRPERSON GRIFFIS: Absolutely. They are two existing lots.

VICE CHAIR MILLER: Well then -- so we are denying them.

CHAIRPERSON GRIFFIS: Yes.

MR. MANN: Does that preclude them? I guess my other consideration or the other thing I would like to take into consideration is if we take some particular action on the parking aspect of this, does that preclude a different sort of application in the future?

CHAIRPERSON GRIFFIS: Right. Does OAG have an opinion?

MS. GLAZER: Mr. Chair, I think it was a separate request for relief but that doesn't mean that the project will go ahead without the other variance relief.

CHAIRPERSON GRIFFIS: Yeah, but it's kind of -- I don't know. Let's not spend a lot of time on this because the mere fact, according to the regulations as situated, you could not build a single-family residence. Therefore, you wouldn't have a

parking requirement. If we are looking at something that is not buildable as a single lot, then there is no requirement so there is no need for relief.

It's almost as if, if I understand which way the Board is going on this, we almost want to remove the parking relief from our decision making somehow so that it would not be a denial of it. I don't think I've heard anything from the Board that we are going to deny that aspect of it but rather not getting beyond the first variance. Does that make sense to everybody?

So, Ms. Glazer, how would we deal with that in a motion?

MS. GLAZER: Mr. Chair, I'm not sure. At the hearing my recollection, I could be wrong, was that there was a request to amend the application. I don't know whether the Board granted that request. One way of addressing it would be to deny the request for an amendment for the parking relief. It's not necessary if the variance for the lot size is denied.

VICE CHAIR MILLER: Okay. At this point then I think I would like to propose that -- I would like to move to deny the Application No. 17278 of Dud, LLC for a variance from the lot width requirements under Section 401.3 and to deny the motion to amend

the application to add a variance from the off-street parking requirements under subsection 2101.1 to allow the construction of two semi-detached single-family dwellings in the R-2 District at premises 556 and 558 48th Place, N.E.

CHAIRPERSON GRIFFIS: Is there a second?

MR. MANN: Second.

CHAIRPERSON GRIFFIS: Thank you, Mr. Mann. Deliberation on the motion further? Comments? We have a motion before us. Let me just reiterate. I think I can speak for the Board in terms of the personal opinions why I need to see something happen and hopefully there is a remedy to deal with it successfully under the current zoning regulations.

That being said, I think we have addressed all the other issues. This is clearly not a denial of the request for parking relief for each of these as we have now stated, but rather removing it entirely from the application looking at the first variance.

Therefore, we have a motion before us that has been seconded. I would ask for all those in favor signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: Opposed? Thank you all very much. Why don't we record the vote.

VICE CHAIR MILLER: Staff would record the vote as five to zero to zero. This is on the motion of Ms. Miller, seconded by Mr. Mann to deny the application and also to deny the amendment to add a variance under 2101.1 Also in support of the motion is Mr. Etherly, Mr. Griffis, and Mr. Hildebrand.

CHAIRPERSON GRIFFIS: Very well. Thank you very much. Mr. Hildebrand, we thank you. Let's move on to the next case of the morning.

MR. MOY: Are you ready, Mr. Chairman?

CHAIRPERSON GRIFFIS: Yes.

VICE CHAIR MILLER: The next case is Application No. 17280 of Newcomb Day Care Center, pursuant to 11 DCMR 3104.1, for a special exception to expand an existing child development center to allow 70 children, and 14 staff, under section 205, in the R-5-A District at premises 541 Newcomb Street, S.E. (Square 5985, Lot 818).

On February 8, 2005, the Board completed the testimony on the application and scheduled its decision on March 1, 2005. The Board also request that the applicant submit a series of items that staff won't articulate unless the Chair desires that. Anyway, the applicant filed and submitted on February 22, 2005, and is identified in the case folders as

Exhibit 34. That will complete the staff's briefing, Mr. Chairman.

CHAIRPERSON GRIFFIS: Good. Thank you very much, Mr. Moy. No, I don't think we need to reiterate all those aspects that were required to be submitted. It's clear on the last submission what we received and what we have not received. Let's open it up to Board members. Any questions, or rather any deliberation? Mr. Etherly.

MR. ETHERLY: Thank you very much, Mr. Chair. I'll offer as we begin to head into deliberation on this particular case that I think perhaps my colleagues will agree that the picture while perhaps not as complete and as outlined as we would have liked, I'll note, however, that I am fairly comfortable with where my deliberation on this particular application lays, Mr. Chair.

As we go through the requirements of Section 205, there were a couple of areas that I, at least, wanted to speak to directly as I felt they perhaps needed some discussion and highlighting but I think all of my concerns have been adequately addressed through the combination of written submissions and testimony.

With respect to 205.3 as it relates to no

objectionable traffic conditions, I think it was fairly clear from the testimony that there were no objectionable traffic conditions as related to the issue of pickup and dropoff.

Although I believe, as was noted in the staff briefing, actually I don't think we did identify a need for additional submissions regarding pickup and dropoff but based on the Office of Planning's assessment of the onsite parking inventory, if you will, ample parking inventory as was described on both side of the street by OP, I didn't feel that there was any concern there or need to get into further details in relation to a pickup and dropoff plan.

I will note, however, under 105.5 that I do continue to feel that there are probably as we speak should we get to the point of a motion of approval and a discussion of conditions that I would perhaps want to entertain or consider a condition that does speak to, as the Office of Planning suggest, time restrictions as relates to outdoor play as we are talking, of course, about a residential area.

Under Section 205.6 as relates to the special treatment in the way of design, screening, buildings, plantings, etc., we did, of course, speak to the desire to see some additional planting around

proposed landscaping. I think that would be one of the areas that I would reference -- that I was referencing when I spoke to the issue of perhaps wanting to have seen a little more in terms of supplemental submittals from the applicant.

That being said, I think, once again, should we get to the point of speaking under a motion to grant, I think we can perhaps look at some language, although I'm not necessarily too overwhelmed by the need to do so but I would be open to looking at some language regarding landscaping.

As you look at the additional submittals at Exhibit 34 as it relates to the front play area, and I'll speak primarily to that in particular, when I gave consideration to that area and you look at the fencing that delineates the area from the sidewalk around the entrance to the property, while it could benefit from some additional screening, part of me was also concerned about perhaps not inadvertently creating any additional security concerns as it relates to screening that might be so high such that you don't have an adequate vantage point from the street looking into the property with regard to safety for children who might be in a play area, etc.

I'm not necessarily wedded to the idea of

requiring any additional screening but I just simply wanted to highlight that particular area. I think we had sufficient testimony with regard to 205.7 and the issue of offsite play area, in particular the tot lot that was referenced on the other side of Malcolm X Avenue.

I felt that the testimony that was offered with regard to how the center's clientele, if you will, would be transported from the center site to the tot lot. I felt that was adequately explained and addressed and didn't feel there was an interest or need for information.

Of course, my colleagues will recall that in the 205.8 Office of Planning did identify an additional site located at the rear of the subject site of 554 Malcolm X Avenue but did not feel that there was an impact of a cumulative enough nature that would raise a concern with regard to the operation of both centers.

It is essentially my sense, Mr. Chair, as I walked through 205 and looking, of course, at the overall requirement for the special exception -- the granting of a special exception that I feel very strongly and comfortable that this application does meet those standards. At the appropriate time I would

be comfortable moving forward, Mr. Chairman. I just wanted to give my colleagues a sense of where I'm at.

Once again, if we do get to the point of talking about this application under a motion of approval, I would definitely be open to talking about specific considerations as relates to the length of time with regard to the order because we did have some discussion regarding the issue of noncompliance under the earlier BZA order. In particular, noncompliance as related to the requirement of the maintenance of two onsite parking spaces at the rear of the property.

We did not get any indication or, I should say, any increased clarity as it related to parking at the rear of the site and what, in fact, is currently available at the site, as well as what happened to remove the parking that was previously required.

While I do, I believe, share the concern of my colleagues regarding that issue of noncompliance, I would be hesitant to perhaps undertake any type of, shall we say, punitive step with regard to consideration of this particular application related to that issue of noncompliance. I believe as we discuss the order further I am more than comfortable with the transcript reflecting my remarks that the issue of compliance, of course, is very

critical. I think we probably can, to an extent, take that into consideration as we look to the issue of the length of time for our order.

That summarizes my assessment of the case, Mr. Chair.

CHAIRPERSON GRIFFIS: Good. Excellent. Very thorough. I appreciate that. I won't be redundant but to say that I do agree with most of your points. Following up on --

MR. ETHERLY: Mr. Chair, I want to also hit one final point which is very critical, and that is the issue of the actual enrollment. I spoke about the parking and I wanted to be sure that I did touch upon the issue of enrollment because we are, as my colleagues are aware, talking about an application that is seeking to increase the number of children that would be hosted on site.

I am comfortable with the number as it has been suggested and that number would be for an enrollment of up to 70 children and the accompanying staff number of 14, if I recall correctly. That would be for the age range as I believe it is identified in the submittals of the applicant, 70 children and that would be six weeks to five years in terms of the ages for the children. I wanted to be sure to highlight

that particular issue as well.

I think the property is adequate to host that particular number and, of course, any additional licensing requirements will be handled by the appropriate D.C. Government agency as relates to fully evaluating the building's capacity to handle that number of children so I won't go any further with regard to that. Thank you, Mr. Chairman. My apologies for the interruption.

CHAIRPERSON GRIFFIS: No, that's an excellent point to put up. I think we need to revisit the age. Let me get clarification because I think what we need to do, as in all these cases, establish clear and measurable aspects and conditions to our orders.

You've indicated that you are talking about an enrollment but you also indicate on site the 70 children is an onsite number in your mind. I believe there was testimony to the fact that it was fairly closely linked in terms of number which is not always the case. As I recall, the application indicates there are 70 onsite.

MR. ETHERLY: At any one time.

CHAIRPERSON GRIFFIS: Right.

MR. ETHERLY: That would be my

understanding, Mr. Chairman.

CHAIRPERSON GRIFFIS: Okay. Good. Others? That is an excellent point you brought up. I think it does raise an awful lot of concern. Our jurisdiction is somewhat limited in terms of how we process an application if it comes to us in noncompliance but it no less diminishes the critical aspect that we hold in terms of following our orders.

You mentioned that they were not following some of the conditions of the previous order but even larger the order had expired. Another critical aspect which doesn't go necessarily directly to the zoning aspect but that is certificate of occupancy which we had requested be submitted.

I am personally concerned that there is no C of O for the building that could have been evidence. Obviously that would be a requirement for this continuing outside of any sort of zoning action. Let me open it up to any others that might have comments on this.

Yes, Mr. Mann.

MR. MANN: I'm going to add only that I'm willing to support Mr. Etherly position on this but, again, to reiterate what you just said, I would like to see the applicant pay more attention to detail,

details like operating in compliance with the order and compliance with the certificate of occupancy.

CHAIRPERSON GRIFFIS: Good. Ms. Miller.

VICE CHAIR MILLER: I just want to add to the conversation that we did receive a letter in opposition to this application from an owner of the property nearby who was concerned about rats and garbage and trash and that the current play area wasn't adequate.

However, this person didn't appear at the hearing and her concerns weren't corroborated at the hearing. I was persuaded by the ANC commissioner who came and testified as to the adequacy of the facilities and the situation with the garbage and trash. We did hear some testimony about whose trash was it in the alley, the owners versus the facility.

In any event, I think we can also get at the trash situation which does seem under control but keep it under control with a condition. Also, I'm not sure that this person was aware of the use of the nearby park that these children were using. I just wanted to get that in the record.

CHAIRPERSON GRIFFIS: Good. Anything else? Let's go then. Is there a motion?

MR. ETHERLY: Mr. if it's appropriate I

would move approval of Application No. 17280 pursuant to 11 DCMR 3104.1 for a special exception to expand an existing child development center to allow 70 children and 14 staff under section 205, in the R-5-A District of premises 541 Newcomb Street, S.E. and would invite a second. That would include conditions to be discussed and agreed upon by the Board subsequent to this motion or as part of this motion.

CHAIRPERSON GRIFFIS: Good. I'll second it. Why don't you continue that with a condition.

MR. ETHERLY: Thank you, Mr. Chair. I would perhaps offer as a starting point the Office of Planning's suggested motion -- suggested conditions at pages 8 to 9 of the report, Exhibit No. 29, the first of which being, "Approval shall be for a period of I will diverge from the Office of Planning and suggest approval shall be for a period of three years."

That would be a nod to the issue of prior noncompliance that has been discussed previously and a desire to perhaps have this applicant come back at a sooner rather than later date to simply confirm that compliance has, indeed, as Mr. Mann suggested, been strengthened and afforded greater attention.

Secondly, "The days and hours of operation shall be Monday through Friday between 7:00 a.m. and

6:00 p.m." I do not recall any testimony to the contrary that would be a problematic condition so I'm comfortable with maintaining that language, Mr. Chair.

CHAIRPERSON GRIFFIS: Good.

MR. ETHERLY: Thirdly, "Enrollment shall be limited to a maximum of 70 children and 14 staff persons." I know, Mr. Chair, that we had some discussion just a moment ago with respect to whether or not that language should be onsite but I'm comfortable with it remaining as it is stated in the Office of Planning's suggestion.

CHAIRPERSON GRIFFIS: Okay. Maintaining that as an enrollment number of 70.

MR. ETHERLY: As opposed to -- I'm flexible either way but we had a discussion about whether or not there should simply be an onsite limitation to no more than 70 at any one time.

CHAIRPERSON GRIFFIS: Right. You know, it's an interesting aspect that we deal with on all of these and the point is that with different sessions and different times or if, in fact, a child took a vacation for four weeks of family travel, could you backfill that and it would not be an enrollment? If you 70 totally enrolled, 70 onsite at one time, that would preclude you from if you strictly held to the

order, which you should.

It would preclude you from having those type of substitutions or having enrollment of 120 but the impact of which would be perhaps less based on how those are scheduled, if there was an early morning session that five children came but didn't spend the entire day.

We dealt with this quite a lot on the Washington International School, I believe it was. They had actually come in for an enrollment number. We actually approved an increased number because we looked to what the impact was to onsite at any one time. But there it is. That's my thinking on this.

VICE CHAIR MILLER: I would recommend that we leave it at enrollment because we didn't really hear testimony about if it was greater than that because if we start getting into onsite at one time, then actually you could have a greater enrollment and it could be greater numbers so I think it's cleaner in this case.

CHAIRPERSON GRIFFIS: Does my memory not serve me? It seems to me that we asked him directly was there a difference between the enrollment and onsite. Are you saying we don't have evidence on that?

VICE CHAIR MILLER: I'm saying if we leave it at enrollment to 708 it couldn't be more than 70 onsite at one time.

CHAIRPERSON GRIFFIS: Right.

VICE CHAIR MILLER: That's all they have. But if we start getting into onsite at one time it's redundant in this case. It would have to be a great enrollment.

CHAIRPERSON GRIFFIS: I don't think it's ever redundant in any case. In practice they may be a similar number but I'm fine with it either way just as long as we all know what we're talking about. We are talking about enrollment of a maximum of 70 children and 14 staff persons. Is that correct?

MR. ETHERLY: That's correct, Mr. Chair.

CHAIRPERSON GRIFFIS: Okay. I think that works out fine.

MR. ETHERLY: Continuing further, "One onsite parking space shall be maintained at the rear of the property." I think that's fairly straightforward. "Evergreen landscaping shall be placed along the front fence play area." We had some discussion about that and, once again, we are hopeful for an additional submission.

I'm flexible either way. I would perhaps

be inclined to probably eliminate that condition. I understand the direction in which the Office of Planning is endeavoring to go there. But as you look at the most recent submittal by the applicant at Exhibit No. 34, and particularly the pictures of the front of the property, while I would always love to do away with chain-link fencing whenever I can, I understand the need, of course, to delineate the front of the play area in such a way as to ensure the safety of the center's clients and not have children running into the street.

Evergreen landscaping there I'm just not certain it would work and be consistent with the character of the residential street scape as you head up the sidewalk so I would be inclined to eliminate that condition, Mr. Chair.

CHAIRPERSON GRIFFIS: Very well. I would agree. To touch upon that, what would that condition actually be looking to mitigate in terms of an adverse condition? I think the screening we all talked about but I tend to agree with it does break the overall block character. So does a chain-link fence which I'm with you on that.

Certainly it wouldn't preclude them from doing any landscaping or even a nice tree that the

kids could climb at some point. I don't think there was a persuasive amount of testimony on the adverse conditions that would actually mitigate.

MR. ETHERLY: Continuing on, "All outdoor activities shall take place under staff supervision." I'm fine with the maintenance of that. Then concluding, "Outdoor play times during the summer should begin no earlier than 9:00 a.m.

CHAIRPERSON GRIFFIS: Good.

MR. ETHERLY: That would conclude the conditions that I would --

CHAIRPERSON GRIFFIS: Okay. You mentioned trash in terms of a proposed element or condition? Or Mr. Mann did you?

MR. MANN: I was just going to suggest one very minor change to the last condition.

CHAIRPERSON GRIFFIS: Okay.

MR. MANN: It says, "Outdoor play times during the summer should begin no earlier than 9:00 a.m." Because summer is kind of nebulous can't we just say, "Outdoor play times should be begin no earlier than 9:00 a.m." and not specify a season?

MR. ETHERLY: I'm comfortable with that. I think the objective here, or the rationale for that condition, would be to ensure that any noise that is

created, and I don't think we heard any significant testimony about adverse impact from noise, but just as a nod towards the activity and rambunctiousness of youngsters, and BZA members for that matter, a limitation of 9:00 a.m. I think is appropriate.

CHAIRPERSON GRIFFIS: Good.

MR. ETHERLY: Mr. Chair, you were speaking to the issue of a condition as it relates to trash piece. I now we had testimony from the applicant regarding their particular practices as related to trash pickup. As you indicated, or perhaps as Mrs. Miller indicated in response to some of the written letters we had received, it wasn't quite clear, or I should say --

VICE CHAIR MILLER: Question. I'm not sure if we said anything about landscaping except that we weren't going to require the evergreen trees. In applicant's submission on Exhibit 34 they do represent that they will at least plant and properly maintain grass if we want to add that. I don't think we have anything on landscaping. It looks pretty weak.

CHAIRPERSON GRIFFIS: I don't think it's bad to incorporate that. It doesn't really say that much.

MR. ETHERLY: I'm comfortable with leaving

the language out. I agree with the direction of my colleague's observation. Clearly there are requirements as it relates to the maintenance of the property, particularly the street and frontage that are enforced by DCRA.

VICE CHAIR MILLER: That's fine with me. I think we have some general language about maintaining the property without debris or whatever that language was.

MR. ETHERLY: Yes.

VICE CHAIR MILLER: Okay.

CHAIRPERSON GRIFFIS: Good. Anything further?

Mr. Etherly, we do have a motion before us. It has been seconded and has been conditioned with 38, or was it 58, conditions as articulated by the Board. Of course, that is in jest. If there is nothing further then, I would ask for all those in favor signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: And opposed. Very well. We will, of course, have an opportunity to relook at the conditions as they come out to make sure they articulate what we had stated.

Mr. Moy.

MR. MOY: The staff would record the vote as five to zero to zero on the motion of Mr Etherly to approve the application, seconded by Mr. Griffis. Also in support of the application Ms. Miller and Mr. Mann. I'm sorry. That should be four zero one because we have a zoning commission members not participating. This approval includes seven conditions. Would the Board care for a summary order with listed conditions or a full order?

CHAIRPERSON GRIFFIS: I think we can go ahead with our rules and regulations and issue a summary order.

MR. MOY: Very good. Thank you.

CHAIRPERSON GRIFFIS: Thank you, Mr. Moy. I believe we are ready to move on.

MR. MOY: The next case for decision is Application No. 17282 of DAG Real Estate Holding Company LLC, pursuant to 11 DCMR 3104.1, for a special exception to enlarge a gasoline service station/mini-mart store under sections 726.1 and 2302, and a special exception to establish a fast-food restaurant in an adjoining structure under subsection 733.1, in the C-2-A District at premises 3101-3103 Rhode Island Avenue, N.E. (Square 4308, Lot 45).

On February 8, 2005, the Board completed

public testimony on the application and scheduled this decision on March 1, 2005. The Board allowed proposed conditions from Mr. Poles, Mr. Blake, and Mr. Jones. The Board received the following from Mr. Poles on February 15, 2005 and that is identified as Exhibit 38 in your case folder.

The response to that following, the applicant file on February 22, 2005, which also included proposed findings of fact and conclusions of law. That is identified in the case folders as Exhibit 39. That completes the staff's briefing, Mr. Chairman.

CHAIRPERSON GRIFFIS: Good. Thank you very much Mr. Moy. I have the personal opinion that I actually want to thank the community as they have defined themselves community activists headed up by Mr. Poles. It's one of the most, I think, delegate and I thought just very civil filings at the end.

They were certainly appreciative of the Board allowing them to participate in the case and submit these proposed conditions. I want to state also that I am very pleased that they have decided to participate in this case.

It obviously brought an awful lot of information, substantive information, to the Board for

its review and that is exactly what we're looking for in every application, to be directed pointedly to the facts that we need to analyze as they relate to the zoning relief requested.

Now, going to the specifics of this, of course, there was great concern about the existing condition of the property and the illegal activity that happens on it and around it in the alley. Then there was concern about the proposed fast food establishment whether that would actually support the continuing illegal behavior around the property or whether it could, in fact, have a higher level of tenant than what is essentially proposed at this point.

I think we did an excellent job and I know we'll hear more of it in terms of how this particular site can deal with all of the surrounding issues or not deal with it. Specifically we need to get into a lot of the aspects of pertinence. They had parking. We did have the updated site plan that was put in that showed directly where the parking was going to be provided and ingress and egress to the service station and also the fast food establishment would be placed and utilized.

I think it's a very strong case. In fact,

even the neighbors headed by Mr. Poles that showed up were not in opposition to the gas station operation but had concerns about how it would operate and how it might mitigate some other factors in this case. I think we should go directly into it in terms of -- well, let me open it up to others for comments initially at this point.

VICE CHAIR MILLER: I just have one general comment. I mean, I thought it was interesting that his neighbors also wanted something better in that space than a fast food establishment like a higher-class eating establishment or whatever. We heard the applicant say that they were certainly open to doing that and that getting relief to be able to put in a fast food would not preclude their getting a higher-class establishment if they could arrange that.

CHAIRPERSON GRIFFIS: Good. And I think also in terms of the conditions that they obviously do not enjoy the illegal activity in the alley and on this site. I think putting some sort of utilized tenants in that structure, I mean, the gas station and the fast food, will hopefully bring, if not immediately, will bring more eyes and ears to the area and more neighborhood traffic perhaps coming to and fro and that will, of course, diminish based on the

amount of citizens out there, diminish a lot of the illegal activity one would hope.

Clearly I think, Ms. Miller, your point is excellent, the fact of if you don't have a building or a place for an upscale tenant, then you're not going to get the upscale tenant. The proposed tenants at this point may well just be the first step in what we'll eventually make it to this site. Of course, that has a lot to do with the market factors.

Okay. Mr. Etherly.

MR. ETHERLY: No, Mr. Chair. I just wanted to note your general comments at the onset of deliberation as relates to the quality of the submittals on both sides but with particular attention to the residents given the time that they so graciously gave of their own schedules at our hearing which was, as I recall, a fairly lengthy day. I just wanted to add to that concern.

Similar to my posture with the prior case, Mr. Chair, I am very comfortable with the vast majority of the requirements as they are laid out under sections 700, 2302, and 733. I'll just highlight for my colleagues' benefit as we get towards the juncture or point of a motion here.

I think the outstanding questions perhaps

continue to require some clarity will be around the issue of any wall type structure along the boundaries of the subject property. In particular, the boundaries as relates to the residential area of the site.

The issue of the refuse dumps, I think there needs to be some discussion and deliberation clarifying the articulation, if you will, of the dumpster. I recall we had some substantial discussion around the use or lack thereof of driveway entrances and, I believe, it was the eastern-most corner of the subject property where the area comes to that little bit of knife point, if you will.

Then finally the issue of any additional conditions, not so much pertaining to design but, of course, from the submittal of the residents at Exhibit No. 38 towards the close of some of the proposed conditions that are highlighted there. There was quite a bit with regard to policing and the maintenance of the safety and security of the subject property that might be somewhat beyond our scope but I think it merits some discussion.

Also with regard to the issue of some of the inventory that might be offered for sale by the applicant. My colleagues will recall, of course,

there was discussion in reference to drug paraphernalia and overall discussion around concerns of illicit activity. Not conducted by the applicant, of course, but an activity that might be attracted by the light or by some of the dark spaces that may be created by lighting at the subject property.

I think that is going to merit some discussion under 733.11 which speaks, of course, to the Board's ability to impose conditions pertaining to any other matter necessary to protect adjacent or nearby property. I'm paraphrasing that particular provision. I'm comfortable moving forward under a motion as we begin to discuss a condition or so just to highlight to my colleagues as to where I am. Thank you, Mr. Chair.

CHAIRPERSON GRIFFIS: Good. Thank you. Why don't you propose the motion and we'll begin our deliberation under that.

MR. ETHERLY: Thank you very much, Mr. Chair. At this time it would be my motion to approve Application 17282 of DAG Real Estate Holding Company, LLC, pursuant to 11 DCMR 3104.1 for a special exception to enlarge a gasoline service station/mini-mart store under sections 726.1 and 2302, and a special exception to establish a fast-food restaurant

in an adjoining structure under subsection 733.1, in the C-2-A District at premises 3101-3103 Rhode Island Avenue, N.E. and would invite a second. That would be with conditions to be deliberated upon and agreed by the Board shortly hereafter.

CHAIRPERSON GRIFFIS: Good. I'll second the motion.

MR. ETHERLY: Thank you very much, Mr. Chair. I'll note, Mr. Chair, that perhaps I don't have the benefit of a clearly articulated list of conditions so I'm open to perhaps starting with the applicant's submittal at Exhibit No. 39.

CHAIRPERSON GRIFFIS: Good. Let me draw your attention. It seems like the one, two, and three conditions of which also this submission is excellent in terms of exactly what we asked for, proposed conditions, and then articulate what that mitigates and how it might mitigate it. One, two, and three go to the security, electronic surround system, and the lighting.

If we read No. 3, "The electronic surveillance system and lighting shall be in operation maintaining good working order from the outset of operations and establish that lighting will be reviewed and repaired as needed." I think that is a

good starting if a condition and then we can get more specific if we believe it is required.

MR. ETHERLY: Mr. Chair, are you accepting one and two as drafted or --

CHAIRPERSON GRIFFIS: I think they can be consolidated into one condition starting with No. 3. No. 1 goes to how many actual televisions there would be, cameras mounted at strategic locations, you know, television monitors, digital and other electronic devices. All of that seems to be part and parcel of what an electronic surveillance system does. I don't have any difficulty adopting it but I don't know if we need to get that specific.

VICE CHAIR MILLER: I would just like to jump in and say since applicant doesn't have a problem being so specific, I think we should accept it because it's more easily enforceable.

CHAIRPERSON GRIFFIS: Okay.

MR. ETHERLY: And I would tend to agree, Mr. Chair. If it were, perhaps, left up to us without the suggestion of this language, I might be inclined to not get into that level of detail as my area of expertise is nowhere near that of security experts. If anyone relied upon me for determination of security needs, we'd be in trouble.

That being said, because of the specificity and I think the solid nature and character of the concerns that were brought forth by some of the adjacent residence, I would actually applaud the applicant for offering these conditions. As Mrs. Miller alluded to, the level of specificity. I'm comfortable with one, two, and three remaining as they are printed in the draft.

CHAIRPERSON GRIFFIS: Good. I think it's an excellent point and I'll note the fact that they are mounting these on the light fixtures and the poles around the site to involve seven as indicated in the drawings just to highlight the fact that we are looking at the last submission drawing as P-1. Let's go to four then, trees, shrubbery, flowers, plants. Mr. Etherly.

MR. ETHERLY: Mr. Chair, I have no objection to this condition as well. I will also note because we have substantial testimony from the surrounding residents as relates to the rear of the property, I'll acknowledge right up front that it's going to be very difficult.

It's difficult, I believe, for any board or city body to craft a condition that is going to deal with what we all recognize as a challenge in any

urban setting, or any rural setting for that matter. That is, the issue of criminal conduct and criminal activity.

That being said, I think the issue as relates to the plantings at the rear of the property is well taken with regard to such plantings being low growing in order to avoid the issue of providing cover for disorderly or criminal activity so I would be in support of maintaining that language as well, Mr. Chair. I'm in support of all these staying as drafted.

CHAIRPERSON GRIFFIS: Good. I think you are absolutely right in terms of the conditions ought to have clear intent but also the flexibility for the time period of which the order would be in effect. Okay, four is in. No. 5 seems to step out a little bit of our jurisdiction in terms of employees being trained for zero tolerance of criminal activities but I'll take your opinion on that.

MR. ETHERLY: I would agree with you, Mr. Chair. I understand and appreciate the spirit of proposed condition No. 5 and would hope that employees of all of our commercial establishments would have that zero tolerance but I would have, and I think the Board would have some considerable difficulty with how

we enforce that zero tolerance test every five weeks to confirm that everyone is up to date.

That's not to make light of, once again, what is a very serious concern for residence in the vicinity of the subject property. I think it would be very difficult from an enforcement or measurability standpoint if condition five were maintained so I would suggest the deletion of that condition, sir.

CHAIRPERSON GRIFFIS: Good.

VICE CHAIR MILLER: I just want to throw out a contrary point of view. I know this isn't a typical zoning condition but, on the other hand, security is such a big issue in this case. Maybe you could take the zero tolerance out but I don't think it's that difficult to enforce some kind of training or call for immediate police assistance.

It seems kind of basic Just wanted to throw that out for consideration. I don't feel strongly about it. I know it's already in their other agreement. I just don't think it's that difficult from an enforcement point of view.

MR. ETHERLY: I mean, Mr. Chair, I definitely am not so strongly opposed to it that I wouldn't accept Mrs. Miller's suggestion. I would also note in one of our prior orders in this case

regarding Application No. 16439 the language of condition seven in the summary order related to this property was somewhat similar in that it noted, "Employees shall be well trained to observe potential criminal conduct on the premises and in the vicinity and to call immediately for police assistance."

I would be comfortable if Mrs. Miller is comfortable simply repeating that language. Once again, this is contained within the Office of Planning's report. Once again, Exhibit 28 towards the rear of that report, the last three pages is the summary order dated April 7, 1999 in Application No. 16439.

The condition we are currently deliberating was condition No. 7, "Employees shall be well trained to observe potential criminal conduct on the premises and in the vicinity and to call for immediate police assistance." I'm comfortable with that language, Mr. Chair.

CHAIRPERSON GRIFFIS: Good. I think that's fine. I think we could maybe change a little bit of the language to say something to the effect that employee training will be offered rather than putting the onus on whether the condition goes to whether the employee is actually well trained or not.

The program would be offered in order to observe criminal conduct on the premises and to take appropriate action to address it. I think that is well said. I would hope that the employees are certainly well trained in terms of security in the event of any sort of difficulty on the premises or in the store so they ought to be able to react with that type of training to anything else that is in the surrounding area.

Okay. Just put that into their course work of good citizen training that we require everyone to take. I'm going for my refresher shortly. Okay. Further conditions?

MR. ETHERLY: As it relates to the proposed condition No. 6, Mr. Chair, and this perhaps might be the place where actually number -- if you look at both No. 6 and No. 7 they reference the issue of trash hauling at No. 6. "On a daily basis the property shall cleaned and maintained," etc.

Then No. 7 goes to the issue of refuse dumpster.

This might perhaps be useful timing in which to have some discussion about precisely what the look of that dumpster and location of that dumpster is understood to be by the Board, Mr. Chair. I would note perhaps also with specificity as relates to the

orientation of that dumpster away from some of the adjacent residences at the rear.

CHAIRPERSON GRIFFIS: Okay. You've made an excellent point that there is a discrepancy of what's on the drawing and what is actually photographed as built in terms of the opening. It seems that the existing condition with the access to it is more appropriate as it faces Rhodes Island Avenue rather than as shown. It certainly has a larger room for access to it, not towards Newton Street but rather towards Rhode Island Avenue.

You bring up a point of the condition in terms of the requirement. The applicant has put in enclosures constructed according to 733.4 which goes to the building code. That is redundant for us to say they have to comply with the regulations but to indicate in that condition that from their own drawing a six-foot high site type brick wall and gate enclosure for the trash and then go into the schedule of the hauling. It would be cleaned daily and trash hauled away on a regular basis I think is appropriate.

MR. ETHERLY: So perhaps what I would suggest would be, one, marrying of these two conditions just for brevity sake condensing them to one with your language changes.

CHAIRPERSON GRIFFIS: Good. Going to 8 then which goes to the brick wall constructed in accordance with 733, of course, according to the regulations north/south portion of the rear lot line perpendicular to Newton Street that is not covered by the east/west rear wall of the building.

That is talking about -- it also is in part the closing of one of the curb cuts -- I believe that was the portion which was there -- and putting up that kind of enclosure wall. I don't know that we need a condition on that in that it's shown on the drawings and that is what is, in fact, the first condition of the order in which we would need approval based on the drawings but I'll leave it up to you for a comment.

MR. ETHERLY: Just to be clear with regard to that comment, Mr. Chair, is it your understanding that a brick wall would extend --

CHAIRPERSON GRIFFIS: Here.

MR. ETHERLY: Okay. I just wanted to make sure because I know we haven't as of yet talked about the issue of the existing driveway apron which is located along the Newton Street side near the intersection of Newton and Rhode Island.

CHAIRPERSON GRIFFIS: Correct.

MR. ETHERLY: But just back on that issue of the brick wall, I'm comfortable with that understanding if I understand your question correctly, Mr. Chair.

CHAIRPERSON GRIFFIS: Okay. Yeah, I think it is a condition based on the fact that it is provided in the drawing. If you look at for clarity the plot that they had presented in their filing, you see that there's an existing curb cut and entrance into the site just adjacent to the public alley. That's being proposed to be closed. I think that's an excellent situation to do that. We'll be required to do that to accommodate the parking 19 through 23 spaces that are in that vicinity.

MR. ETHERLY: So your language for this condition would maintain the brick wall but are you suggesting that it --

CHAIRPERSON GRIFFIS: I'm sorry. Perhaps I wasn't clear. I don't think we need this condition.

MR. ETHERLY: Don't think we need it at all?

CHAIRPERSON GRIFFIS: Because it's on the drawing.

MR. ETHERLY: Okay.

CHAIRPERSON GRIFFIS: So it is a

requirement of our approval that it would be built.

MR. ETHERLY: And I'll just speak very briefly to some of the additional comments or suggestions that were raised in the submittal of Mr. Poles at Exhibit No. 38 because there was, I think, an appropriate reply in the applicant's submittal at Exhibit No. 39 regarding size and specificity of the wall.

I just want to be sure that we have some discussion around that. As my colleagues will recall, I believe it was noted within the submittal of the residents at Exhibit No. 38 that 82 inches in height mounted with a four-foot chain link fence from the gasoline station to Newton. I'm reading at what would be Item No. 6 at Exhibit No. 38 from Mr. Poles on behalf of a number of the residents along Newton Street.

I would agree with you, Mr. Chair. It is indicated on the plans but I would perhaps not necessarily -- I just don't feel a need to go into a level of specificity that is sought by the residents here. I just wanted to highlight that because it was specifically sought by the residents.

CHAIRPERSON GRIFFIS: Good. I agree. And I think the applicant's rebut to that I find

persuasive that would actually create an adverse condition for the adjacent residences making it look very strange but yet very fortress like. Hopefully the criminal activity that they are speaking of is a temporary one as this wall, of course, would not be. Anything else?

MR. ETHERLY: It's indicated by the applicant that condition 9 is a new condition but is one which there is an OP recommendation. I'm just trying to put my hands on my OP report but I would have no objection to that condition.

CHAIRPERSON GRIFFIS: Good. I think it's an excellent one that was actually agreed upon by the applicant and that is to essentially paint and articulate the rear of the building so that it might match the front brick facade. Obviously it's a much more appropriate facade as it is viewed from across the alley to the adjacent residences.

MR. ETHERLY: Mr. Chair, I will note that as we've gone through those conditions I think they have hit upon most of the major issues that were identified as adverse impacts, potential or otherwise, in testimony. I just want to note two final pieces. One, my colleagues would note, of course, that we do have the issue of the amended voluntary agreement

which laudably was reached through extensive discussions between the applicant and the Advisory Neighborhood Commission.

I don't believe there is necessarily any request that is incorporated in anyway into our order. We've had extensive discussion before about how to deal with these types of agreements and I continue to agree that I would encourage them at almost every turn where there is a contested case for issues that properly should be resolved.

I just to highlight that I'm not wedded to -- leaning to incorporate that. I don't think we can, No. 1, but I just wanted to note that. Let me deal finally with an item that is important and that was, in closing, that item No. 12 in Exhibit No. 38, once again from Mr. Poles on behalf of a number of the residents on Newton Street.

I just wanted to highlight it. It's the item that speaks to the issue, once again, of drug paraphernalia, alcohol, and other items or products being prohibited for sale on the subject property. I believe it was appropriately referenced by the applicant in response to that proposed item that there are already laws on the books here in the District of Columbia as relates to the sale of alcoholic beverages

on the premises of gas or service stations in particular.

Then an agreement or an understanding that the applicant will not permit any of his tenants to sell drug paraphernalia and/or some of the other items that are referenced by the residents at the property, nor allow other persons to come on the property to attempt to sell such items. I don't think it's necessary for that condition to be included in the conditions that we have run through.

I simply wanted to highlight it once again because I think the residents took a great deal of time to share concerns about what is a larger issue that confronts perhaps any commercial property, but especially those that find themselves in some of our residential neighborhoods and that is the issue of in addition to the type of activity that we want to attract, commerce, those fast purchases that you want to make while you're on the run, so to speak. In addition to that type of favorable conduct and activity there are, indeed, instances where not so favorable and not so desirable conduct also comes.

I think what we have with the application here is a very well thought out set of conditions which speaks to a number of very clear concerns and I

think an applicant that is committed to helping the community and, in particular, residents in the immediate vicinity of the subject property to deal with some of these issues.

I think my colleagues and I realize that it's a larger problem that is not going to simply be solved by a condition on paper by anyone of us sitting here on the dias but by all of us as a community.

I wanted to give -- I just simply felt it was important to give some voice to the conditions that were expressed by the residents and why some were adopted and why some cannot be. I think we have a well crafted order in front of us that once it's put on paper I think will make this a win/win one would hope for the community and for this subject property. Thank you, Mr. Chair.

CHAIRPERSON GRIFFIS: Good. Thank you very much. Let me take you to the last issue that you just joked about. I agree that it would be good to support that and support the neighbors and not feed any illicit behavior. However, when you get down to it, if we were going to craft a condition, how would be set the level of what is allowable or not allowable?

Is it drug paraphernalia or could be

utilized or not or anything of that nature? Obviously we don't have the ability to assess that, let alone, of course, I tend to agree that it is a supported aspect but certainly not one appropriate for a condition on this.

In terms of the agreement, I also agree that there are numerous aspects that go beyond the zoning issues and it's good that there is dialogue. I wanted to underscore the fact that Mr. Poles and the other residents actually came in stating the fact that this was not a community agreement, that they didn't fine it represented them. That is not uncommon for this Board to hear that an agreement is not 100 percent supported but we also don't lose the substantive fact of what is being said on each side.

Lastly, I would like to propose a final condition on this, or my final condition. That goes to the ingress and egress off Rhode Island Avenue. As you've indicated, we do have two, one from Newton and then from Rhode Island right at that corner. It was testified by the applicant that would be utilized just for the maneuverability of fuel trucks and they were coming and going but was not going to be highlighted as the customer car ingress and egress.

Therefore, we ought to support what were

those and that's Rhode Island Avenue towards the center of the two at the pump stations and then the one further up the page, I'm not sure what direction it is, that would serve as the ingress and egress to the food establishment.

I would like to propose a condition that would indicate that paving the property graphically represented in arrows showing ingress and egress and the signage of appropriate scale would be provided at the main entrance and exits.

MR. ETHERLY: I would agree with that condition, Mr. Chair. I think the thrust of that is to ensure that there is no addition traffic introduced onto Newton Street if at all possible as relates to patrons of the subject property.

If I understand your condition correctly with respect to appropriate painting or other graphical illustration, whether it's the use of arrows or whether it's the use of signage to indicate that the appropriate entrance and exit points will be the two curb cuts that front Rhode Island Avenue, I am in agreement with that and would have no objection.

CHAIRPERSON GRIFFIS: Good. Okay. Anything further, Ms. Miller?

VICE CHAIR MILLER: I just want to address

two conditions that Mr. Poles raised that we didn't address yet which I'm not proposing as conditions. I don't think that we should. I think the dialogue on these conditions was very helpful between applicant and Mr. Poles and his group.

One is we just didn't discuss yet that Mr. Poles had requested a condition limiting the hours of operation for the gas station and the eating establishments. This application wants to have 24-hour operation. I don't think we have sufficient evidence before us that would justify us limiting the hours.

CHAIRPERSON GRIFFIS: Okay.

VICE CHAIR MILLER: And the applicant said that would hurt them greatly economically. Then the other one was the security guard, that we make that a condition of our order. While 706.5 gives us fairly broad authority to impose requirements that we deem necessary to protect adjacent property, or nearby property, I think that goes too far in this case, again, that we didn't hear the evidence that would rise to that level.

CHAIRPERSON GRIFFIS: Although not a bad idea to require an armed guard to protect the adjacent neighbors. I agree with you it's probably a little

bit beyond our authority.

Others? Anything else? Very well. I believe this deliberation is over. We have a motion before us that has been seconded and conditioned. Let me ask all of those in favor signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: Opposed? Mr. Moy.

MR. MOY: Mr. Chairman, the staff would record the vote as four to zero to one to approve the application with specific conditions on the motion of Mr. Etherly, seconded by Mr. Griffis. Also in support of the motion Ms. Miller and Mr. Mann.

CHAIRPERSON GRIFFIS: I don't believe -- go ahead.

MR. MOY: I was just going to ask if you wanted a summary order. There were no parties in opposition.

CHAIRPERSON GRIFFIS: No reason not to issue a summary order and waive our rules and regulations to do so. Okay. Let's move ahead then, Mr. Moy.

MR. MOY: The next and last case for decision is Application No. 17232 of RLA Revitalization Corporation, pursuant to 11 DCMR 3104.1, for a special exception from the roof

structure requirements under section 411, and pursuant to 11 DCMR 3103.2, for a variance from the off-street parking requirements under subsection 2101.1, to permit a multi-use commercial establishment in the C-3-A District at premises 1400-1420 Park Road, N.W., 3100-3220 14th Street, N.W., and 1417-1437 Irving Street, N.W. (Square 2674, Lots 719, 720, 812, 832, 863, 866, 869, 870, 871, and 872).

On February 8, 2005, the Board completed public testimony on the application and scheduled its decision on March 1, 2005. The Board requested from parties proposed findings of fact and conclusions of law. The filings were submitted by the applicant and the party opponent representing Kelsey -- the attorney representing Kelsey Temple Church. That's in your case folders identified as Exhibit 68 and 69 respectively. That completes the staff's briefing, Mr. Chairman.

CHAIRPERSON GRIFFIS: Good. Thank you, Mr. Moy.

Board members, let's get into this very quickly. I want to just jump into the special exception of 411 and dispense with that and move on to what I believe will be a more substantive discussion of issues, the second aspect of the variance from the

off-street parking on this.

The language is very straightforward in terms of it laying out what the requirements are for special exception. It is very clear that there is, one, the requirements of having a single height as well as others, but also in terms of the ability of the Board to, one, grant relief under special exception if that is, in fact, practically difficult in doing, but also to give any sort of design parameters that may, in fact, be required.

It's very clear in terms of the submission of the testimony that, in fact, it was not rebutted the fact that the large distance between the differing systems that were required, the differing tenants and their requirements would if compliance was made to create one large enclosure and, therefore, would actually go against the intent of the regulations, that is to minimize penthouse structures.

I see no reason not to support this special exception in this case unless others need to speak more to it and that would, of course, allow according to the plans that have been submitted multiple roof structures that will provide for, as I say, differing mechanical accesses.

It also would allow any sort of stair

enclosures that would be required in overruns as the circulation throughout this proposed project will be better around the site. They do, if I'm not mistaken, meet the setback requirements from the external but don't meet the single enclosure. We can move on unless others have other things to say on this issue.

VICE CHAIR MILLER: I would only say you said it wasn't rebutted. I would just also clarify that there wasn't any opposition to this relief at all by any parties.

CHAIRPERSON GRIFFIS: I guess that's the legal differentiation there. Good point. Okay. Let me just state at the beginning this application in terms of relief for off-street parking, of course, this Board did have a case for parking relief some time ago. That actually lapsed due to the time and no action on the site itself.

One might look at this and say why did this take so long and why is there so much information in this case? I have to say in reviewing the entire record again in preparation for our deliberation today I was a little disappointed, I guess, in the whole process in this case because of the amount of issues and elements that were brought forth to the Board and on all of the sides, but then, perhaps, weren't fully

disclosed or kind of flushed out or articulated for the Board which lent the Board, as it was presented, to spend time to either require further documentation or investigate with our questions most of which, I think, fell away because they weren't substantive to the zoning relief that was being requested or basically weren't -- well, there it is.

I mean, that is obviously what we're looking for. It is too bad, although maybe it's just part of the process that has to happen, but I think this could have been done very succinctly and directly in terms of the issues. I'm going to leave it at that and open it up.

Of course, we're looking at a reduction of parking, depending on how we get into the detail of this, upwards of 600 spaces. The total requirement would be 1,599. The relief requested is down to 1,000. Of course, what has been initiated in terms of the proposed condition or -- well, the proposed condition on this would be that the availability of attended parking would add upwards of 244 parking spaces if my number recollection is correct.

So let's go into it. We have looked at the variance in terms of the uniqueness of the site and the uniqueness tests that are laid out are

several. There is the zoning history which has been articulated and addressed by both the party in opposition and the applicant.

There is the water table and the level which there is the cost implication of doing below two levels of parking, be it three levels or three and a half additional levels. Did I say the size of the property is also a uniqueness aspect that was articulated by the applicant and also addressed by the parties in opposition.

Let me open it up to others for the initial deliberation on this.

VICE CHAIR MILLER: With respect to the uniqueness question, I mean, I found it very interesting that at the beginning of this case we were wondering what was so unique about it and could you consider the fact that it was an exceptionally large site, unique. I think this is one -- there may be one other one but I think it's quite unique with respect to the planning history.

I think you've made reference to zoning history. We've talked about zoning history and we've seen zoning history referenced in court decisions as being factors for uniqueness but I think planning history might be something new but I think it

certainly does qualify.

This is a piece of property, a site that has undergone years of planning with many agencies in the District of Columbia. As the applicant indicated, the only site in the Columbia Heights area and one of the few sites in the entire District of Columbia that is capable of supporting a major single site retail development.

I think also this gets into practical difficulty somewhat but this piece of property is constrained, at least with respect to the funding by legislation of the D.C. City Council which sets it at a certain amount.

Also not only is the funding set but the type of property that it's going to be. I mean, that it is going to be a big box property with other certain tenants. We were, I think, at one point asking about, "What if you change the parking to rooftop parking or something like that?" The response was, "Then it would have to change the type of site that this is actually going to be. It might not be this big box retail site." I think there are a lot of unique constraints on the property.

CHAIRPERSON GRIFFIS: Excellent. Forgive me, I did misspeak. I was meaning to say planning and

not zoning issues so it's actually an articulation of that because that does directly go to it. What you didn't say, as the applicant proposed, I mean, this was part of the urban renewal plan and part of the 14th Street corridor.

What was this to focus on? There's no -- I think it is decided that the Metro ended up at that in anticipation of one might say the comprehensive plan of the city. Great. That's one aspect of uniqueness. Whether that was actually created we'll get into that.

Mr. Etherly.

MR. ETHERLY: Mr. Chairman, I would like to associate myself with your remarks and those of Mrs. Miller. I think as we get into this variance issue, I think there were two very clear and distinct battle lines, if you will, that were drawn with respect to this application one being precisely what contribute to the uniqueness of this application and, to an extent, what has been, in fact, the practical difficulty that results from that uniqueness. I guess actually, quite honestly, really when you even go to the third prong of the test there was considerable discussion and debate about detrimental impacts if the variance were granted.

Let me simply first begin by, I think, as we got to the stage of looking at the proposed findings of fact and conclusions of law and then looking at the summary orders, I think we really began both on the side of Kelsey Temple and on the applicant, but especially with respect to Kelsey Temple I think we really began to fine tune and focus on what really were the clear issues here.

I think early on we struggled in terms of really honing in on what the critical issues were here. I say all that to note that I think the process, indeed, followed an attack that was, albeit at times, arduous and exhausting but took us on a path that got us to where we needed to go and that is what we are really getting at. I think this is the question that Kelsey Temple was raising, getting at precisely what is the nature of the uniqueness.

As I begin to head down this particular road of analysis, I want to note that I struggled at the outset with understanding that. I think the questions that were raised by Kelsey Temple ultimately helped to crystalize that issue for me. As I said at the outset of my remarks, I agree with Mrs. Miller's analysis and your comments, Mr. Chair, in that we look

at the uniqueness of this particular property.

The case law does indeed allow this Board to take into consideration a number of factors that contribute to that issue of uniqueness. I think when you look at the issue of water table, when you look at the issue of some city planning -- extensive. Not just some, extensive city planning around this particular parcel.

I think all of that plays a very significant role in establishing the uniqueness of this particular property with respect to the questions that were raised by Kelsey Temple, all of which I think were appropriate for the most part. I think the water table was, indeed, a question that was appropriate to explore and to question.

Often times we, indeed, do come into contact with questions around water in this city and, in particular, what water does when you dig far enough to reach it. That might on its face suggest that there is a certain lack of uniqueness here if to one extent we see water everywhere.

But I think that's a little bit of a oversimplification or perhaps maybe just stopping the analysis a little bit short of where it needs to ultimately go. While it may be true that water

frequently rears it head in construction projects here in the city, I think the issue here is, one, looking at the impact of the excavation if it were to go to a certain level.

Two, as was discussed fairly extensively by the applicant, the cost of doing that. Three, looking at the need for whether or not you need to do that in order to satisfy the parking demand. As I alluded to, and as Mrs. Miller referenced, and as you noted, Mr. Chair, the issue of the city's extensive planning history and community planning process at that around this particular partial.

I think all of those factors combine to present what is a very meek parcel that the District is endeavoring to develop and bring to considerable productive use for the community here. I did not ultimately agree with the applicant that perhaps we might be looking at something of a self-made hardship, I'm sorry, with the opposition Kelsey Temple around.

Part of the implication here was if water is down there, if this is what you were able to finance through agreement with the District of Columbia government, that's your problem. That's kind of just the constraints of the project. I understand that argument. I just, however, did not believe that

it rose to the level of being a self-created hardship.

I understand the point that was trying to be made but I think, once again, taking in the confluence of all of the facts at play here as it relates to the uniqueness of this property, I think clearly we had exceptional conditions as related to this property that in my thinking really rounded out that first prong of the variance test and, in fact, led you quite comfortably to that second prong regarding strict application of the zoning regs and whether or not there would be a practical difficulty there.

CHAIRPERSON GRIFFIS: Can I interject just briefly?

MR. ETHERLY: Yes, Mr. Chair. Of course, Mr. Chair. You're the chairman.

CHAIRPERSON GRIFFIS: I think you have well articulated the fact and the applicant has presented a confluence of factors that have created the uniqueness of this. I just wanted to add in that I don't think -- again, this is the Metro site, the Metro tunnels that are also adjacent to that.

Then lastly, very briefly, the self-created hardship, Mr. Etherly, I think is excellent to bring up. I know you are well aware that actually

that would go toward a use variance and not an area variance which, again, supports exactly what you're saying in terms of the nonpersuasiveness in this aspect. Let me let you continue on this.

MR. ETHERLY: No, Mr. Chair. I was simply heading to as you look at the second prong here I think we had very persuasive testimony as relates to the issue of the financial ramifications of strict application of the zoning regs in this particular instance with respect to, one, the project that the District and the applicant tried to undertake here and the cost that would be incurred for obtaining the additional spaces that would be created by going to an additional level.

Once again, I will applaud Kelsey Temple for what I felt was very thorough debate and vigorous analysis and questioning. A number of the parking related materials that we looked at, in particular the parking assessment that was offered by the applicant from, I believe, it was ULI and also the parking assessment that was done.

Clearly there was a lot of discussion around how applicable the ULI parking survey would be in the instance of an urban setting given the fact that a number of those properties that were reviewed

by the ULI study were, in fact, suburban in nature. But I don't necessarily believe that would be dispositive or would otherwise undermine the usefulness of the ULI study as it relates to shopping centers and the parking requirements that attach thereto.

Clearly there is parking that is associated with this property in terms of it just stands to reason that there are going to be patrons who will want to drive to this property. I made light of it early on when we first began in referencing my own sometimes ill-fated trips to certain stores to purchase things and struggling with parking and what have you.

But I think an important component of this particular project is, as we heard referenced in the DDOT report, to an extent the OP report, is the anticipation of considerable pedestrian traffic to this particular destination and the proximity of Metro to the area. I think the ULI study clearly demonstrated to me that the parking need that is sought to be met by the applicant under its current plan is indeed an appropriate plan.

I think the ULI study, I think some of the traffic work that was done by the applicant, some of

the discussion in the DDOT report a little less so, but I think pointed to as we continue to see the renaissance, if you will, of urban living, city living, I think you are also looking at a renaissance, if you will, of urban shopping where we are seeing a reversal of the trips to the suburbs with the mini-van or the stationwagen.

In turn, individuals, families, single residents are looking for opportunities to walk to a shopping destination for those quick trips. I found that to be persuasive and I found the ULI report to be very helpful in that regard.

I think, finally, as relates to the variance test, the third prong regarding, essentially what happens if you do grant the variance? Is there a detriment that will attach to the public good or, of course, impairing the intent, purpose, and integrity of the zone plan.

I think here, again, was one of the very solid battle lines and that is what happens to the nature of this immediate community from the standpoint of parking at a minimum if this project goes forward as proposed. I just, once again, was not necessarily swayed in a decisive fashion that there was a shortfall in terms of the proposed parking as it is

laid out here in the plan such that we are going to see spillover of a significant nature into the surrounding community.

Will there be instances where you might have a patron or two parked on the street? Quite well so you may, but I think the question here from the zoning standpoint is will that happen to an extent such that you are going to have out and out vehicular musical chairs, if you will, in the surrounding neighborhood. I just did not necessarily find myself swayed that is going to be the outcome here.

That's my very broad assessment, Mr. Chair, as relates to the variance test regarding the reduction of parking here by some 600 spaces. I will, of course, at the appropriate time look for some discussion around the applicant's parking plan if it has not already been alluded to.

I think perhaps there still is a little bit of a struggle on my part for -- there's a desire on my part to have had a little more completeness around what that plan would look like in terms of how the garage will be administered. We had some discussion, I think quite obstencibly so, around valet assisted parking, stacking, pricing, and all of that.

It would have been, I think, helpful to

have had a little more detail there but I don't see that as an insurmountable obstacle that can't be dealt with through discussion here. I will definitely find some additional conversation when we get to the appropriate point.

CHAIRPERSON GRIFFIS: Excellent. Let me just briefly continue on your layout there. One other aspect of uniqueness that was presented by the applicant was the fact that this is a unique type of development but one for this city and perhaps for the surrounding area or unique in a wide area in terms of an urban development that is facilitating a much more traditionally known as suburban type usage or tenants.

Let me address one of the things you indicated, that DDOT, of course, had submitted information that you said was not as persuasive as Office of Planning. I do want it understood the importance of DDOT's role in this and specifically with their studies and the public realm study that goes to the pedestrian safety, the width of sidewalks, the street coloring.

The whole point is if we are going to -- if, as proposed, this is going to be a big draw and lots of people are hopefully walking to it and accessing the cars in a safe environment and, frankly,

an enjoyable environment needs to be created. I think DDOT really helped affirm on not only addressing the study but hopefully will also in terms of the implementation of that for the area as it relates directly to the site.

The other interesting point for me in looking at this is that there's not a lot of examples which we can go to for comparison or contrast. One of the difficulties in the very beginning was reconciling this -- I'll round off the numbers -- this 500,000 square foot private development.

Yet, it sat on top of a public municipal parking garage that was being asked to satisfy the parking requirement to it. Yet, part of the test of why it needed a reduction of required parking was two fold actually. My thought is, one, does a municipal public parking actually need a reduction of parking or does it have any requirements at all.

The second is the applicant's case put forth as one of the practical difficulties was the cost of it. Yet, through the evidence and testimony presented they are not bearing any cost so here is this retailer asking for a reduction because it's so costly based on all these aspects of the site but they are not putting any effort towards it.

I'm still not totally persuaded that the developer couldn't participate in the cost of the garage. For goodness sakes if this takes any longer, the cost of it might increase or triple just to do what is proposed.

I've gotten to the point, I think, and I would like to hear everybody else in terms of the admissible and private that they are joined. Obviously physically joined but also in terms of the application there is a connection but I'll leave it open at this point.

Mr. Etherly, you bring up the other which I think is fascinating and it needs to have some substantive deliberation, that is the parking program. We heard ample testimony regarding the fact this was going to be a perfect scenario of retailers finding spots -- I shouldn't be facetious. There was no perfect in there.

This would accommodate the retail parking requirements and would be programmed as such so that it would accommodate that but also accommodate any of the community's concerns. My frustration with this is when we pressed directly comments which was almost -- well, comments like, "We'll work with the communities to satisfy their requirements."

We need substantive and factual pieces in order to measure what that means. I have not seen anything forthcoming in terms of the program. Now, obviously there's a lot that can't be said now until different steps are taken. I would like to be able to ensure the intent that this would proceed successfully.

I mean, we are talking about reducing the requirement of 600 spaces in an area that is developing very quickly as the application evidences. Whether we think that the regulation will require too much or not, I don't know that I could assess. The other point which is an interesting argument without putting my opinion on it, the fact of could you make a practical difficulty that there is no demand for the parking.

Is that one of the practical difficulties? Well, there's no real need for it so, therefore, we shouldn't have to provide it. I'm not sure we want to have that as a thread that carries through on a lot of other applications but I would interested to hear others comment on those pieces.

MR. ETHERLY: I'll note, Mr. Chair, that with respect to the comparison piece that was by virtue of the ULI report, I think, called into

question here, I think, the Office of Planning was very thoughtful in noting at page 7 that when you look at this particular project as is currently proposed, you have a ratio of roughly 2.2 spaces per thousand square feet.

By way of comparison the Office of Planning report notes that Mazza Gallery has a parking ratio of about 2.8 spaces per thousand square feet, Gallery Place 2.3, Best Buy and Container Store atop the Tenley Redline Metro 1.7 spaces per thousand. The shops in Georgetown with no Metro service there, of course, has a ratio of about 1.5 per thousand.

I offer that because I think, once again, the number of parking spaces that's offered here, I think, is going to be consistent with developments of a similar nature here. The opposition, once again rightfully so, did raise the question of not having clarity with regard to the remaining tenants in the subject property. What would those remaining tenants do to the parking requirement.

I felt that as we went through this application and as we got into testimony from the applicant, I think it's fairly clear, you know, albeit not perhaps to the lay person, but it's also perhaps of particular entrances as we discussed this under the

recent announcement of potentially the changing of yet another major retail landmark here in the city, that being the Hecht's nameplate.

But I think clearly as you talk about an anchor Target is going to play a significant role in the determination of parking. As you get into the issue of other tenants in the mall, I think while they still play a significant role in determining what the parking demand is going to be, I think Target is a very clear indicator of what is going to drive a lot of parking here.

The opposition noted a number of additional retail needs, retail activities that are in the immediate vicinity including a Riggs Bank and other developments that might also contribute to the parking need. But I think the interesting aspect of this particular application and the questions that it raises has to do with the fact that we are also talking about an area in the community that is very much in the midst of transition which is still unfolding.

Perhaps the unspoken question, the subtle question here, is how do you manage that transition and how do you look at an application for the BZA in the context of our zoning regulations with the

recognition or with the understanding that there is, in fact, this transition that's underway. Do you strictly scrutinized this project based on the situation as it currently exist or do you perhaps look at it as it is in flux?

I think there is a middle ground here that has to be stricken. There's a middle ground that I think is contemplated by the language of the variance test as it relates to looking at the impact here. All that is to say, Mr. Chair, that as it relates to the issue of the number of parking spaces, from a comparative standpoint I think this project is more than within the safe harbor that is established for developments of a similar nature.

As it relates to how you program that, I would agree, Mr. Chair, I think the subtle point in your comment is the programming is, nevertheless, going to be very important perhaps because this is an area in transition. As that transition continues to unfold, any and everything is going to have a parking impact that needs to be managed.

That being said, I'll definitely note I have no desire necessarily to garb myself in the raiment of a parking authority and try to sort that out but I think there are some general guidelines that

can be laid down that will speak to sort of broad parameters for how you program the space such that everyone will be able to benefit from those sorely needed spaces in the community.

Thank you, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you, Mr. Etherly.

Ms. Miller.

VICE CHAIR MILLER: I just would like to go back to our variance framework and kind of fill in some points that I think are important for us reaching our conclusion on the variance. As I said before, I thought the planning history was a very, very unique element but I don't know we skipped over the basic fact that it's an exceptionally large site in an urban area adjacent to public transit. I think that fact leads into the number of parking spaces that might be appropriate for this site.

I think before we get to that I want to just go into the practical difficulty of that. I'm not sure we really addressed that. Basically I think there were extensive cost figures that were given to us about how prohibitive it would be to build the third and fourth levels of parking.

CHAIRPERSON GRIFFIS: What makes you

believe it was prohibitive? Was there a comparison cost or was this the cost provided?

VICE CHAIR MILLER: The cost that were provided to us was that it would cost $40,000 per space and that the increased cost would be $23.8 million or it was between $35,000 and $40,000. I saw both those numbers. And that the cost of the first two levels of parking is $27,600 per space. I think that is quite a high cost.

CHAIRPERSON GRIFFIS: Based on what? What are you comparing it to? Just based on the fact that the first and second levels are cheaper than the third and forth?

VICE CHAIR MILLER: I think it's a high cost in and of itself. I think it's a big number and I think compared to the first and second levels it's a big number.

CHAIRPERSON GRIFFIS: Okay. But you remember testimony at all comparative of prices of that which is being built across the street or downtown? For example, Mazza Gallery in terms of its ratio of cost for underground parking. Was that taken into consideration or presented?

VICE CHAIR MILLER: Not that I remember. This was sufficient to me, but also constrained by the

fact that this is affected by the Tiff legislation which sets forth a certain amount of money that they had to work with which is a huge practical difficulty plus a unique one.

And in this case we heard testimony from the applicant that said if they couldn't even reduce the size of the square footage of the project, to reduce the number of parking spaces required to meet the regulations because then they wouldn't have the big bucks retail project that the District wanted for that site. I just wanted to get in the record I think there are some really big practical difficulties in this case.

Then we get to no detrimental impact. Well, I didn't find any detrimental impact on the parking. They are reducing it to 1,000 spaces based on this ULI analysis which said that the practical needs of the site is 983 at the 20th highest hour.

Now, we heard that 40 percent of the operational hours of the year they would only be using half the spaces so even though -- I think we can consider the impact on the community in the loss of this parking lot that is there right now. They were providing less spaces than 500 which would be available 40 percent of the time. This 983 number was

for about 19 hours out of the year.

It's during the 10 busiest shopping days of the year so it's a limited amount of time. I think we pressed DDOT on this to what extent were they comfortable with this number and they were very comfortable with this analysis. We didn't hear any evidence to the contrary that this wasn't a reasonable number to rely on.

We also get into the employee parking. There are a lot of employees at Target or whatever and how are they going to accommodate all those employees. We also heard that Target can have employment policies that require them to park elsewhere and there definitely would be enough spaces available for --

CHAIRPERSON GRIFFIS: But not in this particular application.

VICE CHAIR MILLER: Yes, in this application. We heard that the Government --

CHAIRPERSON GRIFFIS: How is Target going to prohibit its employees from going into a public parking garage?

VICE CHAIR MILLER: Because it has private contracts with its employees and it can say what it likes in the employment contract. That's what we heard. We heard that the Government could not

prohibit people from parking there but the stores could.

CHAIRPERSON GRIFFIS: Okay.

VICE CHAIR MILLER: And we also -- I mean, there were two issues. One is are there going to be enough spaces for the retail. We heard there are various ways that they can definitely ensure that. One was their study which came up with a number that was needed when it was busy. The employees could be limited. They have a fee schedule.

Just basically in their structure that this isn't a problem. Then the other is what about the community. I think that is an important -- somewhat important issue because we do deal with adverse impact on the community.

Then there was this whole study by applicant's traffic person. You know, how many cars are really parking in this lot that is being displaced. According to him it was like 45 cars on Sunday at 12:00 was peak. According to Ms. Ruffin we had 75 to 100.

But there's all this discussion that normally on Sunday there would be room in this lot as long as it's open. I guess what we didn't hear, and we maybe didn't ask enough about, was when is this lot

going to be open and how are we going to ensure that it is open when the community needs it.

CHAIRPERSON GRIFFIS: I'm sorry. Let me interject because I don't think we should take the responsibility. I think we asked and it was not answered. I totally agree with you the fact that the programming --

VICE CHAIR MILLER: Okay, maybe so. What I think is here is that it is capable of providing the parking to the community on Sundays and at other times and that can be included in their operations.

CHAIRPERSON GRIFFIS: Good.

VICE CHAIR MILLER: I think we should not also loose sight of the fact we got letters from Council Member Graham and others that the parking lot is a part of this project which will definitely benefit, or which they believe will benefit the citizens of the District of Columbia, that it's vital to a provision of retail services to the residents of Ward 1.

Council Graham said this and that it's extremely important to the economic vitality of the District by retaining tax dollars which are presently being lost to surrounding jurisdictions. At any rate, Office of Planning supports it and the ANC-1A supports

it. I think it meets the variance test.

CHAIRPERSON GRIFFIS: Good. Thank you very much.

Mr. Mann.

MR. MANN: I just have a couple of comments to follow up on something that Mr. Etherly said earlier regarding the neighborhood sort of being in transition. To follow up on that, I would just say that I think the neighborhood is in transition and is probably going to require a lot more parking over the next few years but I don't think that this project should be burdened with providing parking for the entire neighborhood because of the changes that are going to occur.

To answer a question, Mr. Chairman, that you asked earlier, I do think -- I'm satisfied that this kind of public/private partnership fulfills their obligation to -- they have appropriately provided the amount of parking that they were obligated to provide.

Even though the sort of corporate setup might be something different than we would typically see, I don't have any problem with the way that they -- with the answers that they have come up with regarding that.

I do think they have provided sufficient

justification for 1,000 spaces, while at the same time acknowledging that there are times when they might need additional spaces. Furthermore, I'm kind of satisfied that they have come up with a mechanism to respond to those occasional requirements for increasing the amount of parking.

CHAIRPERSON GRIFFIS: Good. Thank you very much, Mr. Mann. Those are excellent points. I think we are ready to proceed but let me just lay it out here because this is a higher level of C-3. The applicant addressed this and I think it's very persuasive that this would not be a text amendment by any means, but rather would be a straightforward variance in this case. Well, there it is. I'll leave it at that and leave it open for a motion if Ms. Miller is ready.

VICE CHAIR MILLER: I just want to make a comment and then I'll move the motion. I agree with you that being near the Metro or the water table wasn't unique enough by itself. I see other factors in this case. Granted, the compliments factors makes the best case of uniqueness but some of these could stand on their own such as the planning history of this such as the Tiff legislation that limits the amount of money for the parking.

CHAIRPERSON GRIFFIS: I don't disagree with you there. I just don't think it would then go so strongly to a reduction of 600 parking spaces based on the planning history or the RFP that was put out, or even the Tiff finance because the city only comes up with $42 million 40 which will go to the parking structure. It falls a little bit short in my mind but I think all together it doesn't.

VICE CHAIR MILLER: In any event, I would move pursuant to 11 DCMR 3104.1 for a special exception from a roof structure requirements under section 411 and pursuant to 11 DCMR section 3103.2 for a variance from the off-street parking requirements under subsection 2101.1 to permit a multi-use commercial establishment on premises 1400/1420 Park Road, N.W., 3100/3220 14th Street, N.W., and 1417/1437 Irving Street, N.W. in the application No. 17232 of RLA Revitalization Corporation.

MR. ETHERLY: Seconded, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you both. Are there conditions attended to this motion?

VICE CHAIR MILLER: Yes, with conditions to be discussed.

CHAIRPERSON GRIFFIS: Let's discuss them.

VICE CHAIR MILLER: I think we can look at

applicant's proposed conditions as our format. No. 1, applicant shall -- hold on.

CHAIRPERSON GRIFFIS: We are looking at -- indeed. Bring it forth and then we can have discussion on it.

VICE CHAIR MILLER: The first condition should address the situation where there is a greater need of parking spaces than 1,000.

CHAIRPERSON GRIFFIS: Good. This goes to the issue of the fact that, of course, in the general regulation the size and dimension would be provided for a 1,000 parking spaces but if there were heavy shopping days or event days the demand was anticipated or became apparent beyond 1,000 that assisted parking, basically attendant parking, would be provided which would allow for about 1,244 spaces. Is that correct?

VICE CHAIR MILLER: Yes.

CHAIRPERSON GRIFFIS: Sounds good to me. Condition No. 2?

VICE CHAIR MILLER: "The applicant shall establish pricing validation mechanisms to ensure that the primary uses of the garage are customers of the retail project."

CHAIRPERSON GRIFFIS: That's right. I've got to say, you know, for what we have at this point

that is an excellently worded condition. I wish that we had more that we could actually get into the specificities of it. But that being said, leave it to the Board to decide. Moving ahead then.

VICE CHAIR MILLER: No. 3 reads, "The applicant shall seek further review from the Board if upon final design and determination of the proposed uses for the subject property the number of parking spaces required for the project exceeds 1,599."

CHAIRPERSON GRIFFIS: Good. Let me address that condition because I was incredibly, I might say, just impressed with the fact that the applicant came forth with a condition of this nature because it was, I think, out of the fact that they were very substantively listening to the Board and the Board's concern, that being the square footage of this project has already been reduced in order to accommodate a parking level which they believe they could build for all the confluence of issues.

I think it would be a tragedy if the intent of what the RFP was as described in this and the intent of the city -- I say that broadly from OP and everybody else involved -- that this would continue to diminish just based on the fact that there are other requirements that it wouldn't reach. I

think this was set forth as a very large development and it should be done well.

It should be done in terms of good urban design. It should be done in terms of servicing -- providing services for the community. I think it should be done as something that is looked at hopefully by those who live there and in the city 10 years from now as a success in all its realms.

Condition No. 3 goes to, I think, this aspect of our regulations that I believe are very difficult in terms of retail. What is the difference between the parking requirement or the actual parking usage, let's say, for 100 square-foot retail store or that of 10,000 square-foot footprints? Do you follow what I'm saying? If you have 10,000 square feet, you probably have a little bit more local neighborhood area you're walking in and out of and not a lot of car traffic.

My point being that I think the applicant is proposing here an excellent flexibility and insurance for what we're looking at because I don't believe our regulations for parking in terms of the retail requirement are adequately specific. Let me get right to the point then.

The aspect of this is that we are looking at if anything changes either in size or in use that would change the overall parking requirement there would be new review. It's almost as if taking it in reverse we are not approving relief to allow 1,000 spaces but we are approving the reduction of 599 from the total somewhat. That doesn't hit all of the issues but I think it somewhat encapsulates most of them. I may have just muddied the waters worse than they were to begin with.

Ms. Miller, question?

VICE CHAIR MILLER: Well, just a comment. My impression of No. 3 is it really reflects what the law would require. At this point the applicant doesn't know exactly what the mixed attendance is going to be for each space.

If for some reason there was a certain kind of tenant that might trigger an increase in the parking requirement above the 1,599, then they would come back to the Board which they would be required to do anyway.

CHAIRPERSON GRIFFIS: Good. Perhaps that is the more succinct way to look at it. We keep talking about one tenant in this structure. Two or three have been named. There are hundreds of

thousands of square feet that would be tenanted and so out of the insurance of that as that would go through that the parking relief is not totally done if those uses change what the total requirement would be. Okay. Very well. That's three. Any other conditions?

VICE CHAIR MILLER: I just want to comment that No. 2 is what needed to be in as a condition, that the garage serve the primary users of the retail project. I think it is also the sentiment of the Board, and we recognize that it's a municipal parking lot and we are not putting any conditions on it serving community but we are hoping that, in fact, it will serve the community at other hours when it has those open spaces because we did hear a lot of testimony about the need for parking in this community.

CHAIRPERSON GRIFFIS: Great. Perhaps one day it will not be needed at all and they will have to fill it with other sort of services and then come to the Board for required parking reduction because they are putting bit community centers in the below grade parking.

All right, I'll stop. It's lunchtime. Anything else then? Very well. I think this is in

evidence of the Board's, might I say, very deliberative work in looking at all the aspects of this. I also want to say it was great to have all the agencies reporting on this.

Obviously there has been an awful lot of work and focus on pulling this together and I certainly hope it continues and moves on, as I said, to produce something that we look back on as a great success in the years to come. It's interesting that we didn't have a lot of community individuals come in to testify on this.

I'm not sure why that is but obviously the record is entirely full. We deliberated on this and we do have a motion that has been conditioned and seconded before us. If there are no further comments from the Board, I'll ask for all those in favor to signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: And opposed. Any abstaining?

MR. MOY: Staff would record the vote as four to zero to one on the motion to approve the application with conditions. This is on the motion of Ms. Miller, seconded by Mr. Etherly. Also in support of the motion Mr. Mann and Mr. Griffis. We have a

Zoning Commission member not participating on the case.

CHAIRPERSON GRIFFIS: Good. Thank you very much, Mr. Moy. Obviously this will be a full order. We certainly hope -- well, I shouldn't say that. Anything else for the Board this morning, Mr. Moy?

MR. MOY: Not this morning.

CHAIRPERSON GRIFFIS: Not this morning. Well done. If there is no other business for the Board at this time, I'll adjourn the morning public meeting on the 1st of March, 2005.

While I have people's attention, we will reconvening the afternoon scheduled -- Mr. Moy, if it's appropriate, I would say we reconvene at 1:30.

MR. MOY: Sounds terrific, sir.

CHAIRPERSON GRIFFIS: We have his blessing.

(Whereupon, at 12:39 p.m. the public meeting was adjourned.)