GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

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TUESDAY
NOVEMBER 18, 2003

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The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 8:00 a.m., Geoffrey Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY GRIFFIS	Chairperson
CURTIS ETHERLY, JR.	Vice Chairperson
RUTHANNE G. MILLER	Board Member
DAVID A. ZAIDAIN	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

ANTHONY J. HOOD Commissioner

COMMISSION STAFF PRESENT:

Beverley Bailey, Office of Zoning
Clifford Moy, Office of Zoning
John Nyarku, Office of Zoning

OTHER AGENCY STAFF PRESENT:

Arthur Jackson, Office of Planning
David McGhettigan, Office of Planning
John Moore, Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:
Lori Monroe, Esq.

C-O-N-T-E-N-T-S

AGENDA ITEM	PAGE
A.M.	
PRELIMINARY MATTERS	4
APPLICATION OF THE NATIONAL CHILD RESEARCH CENTER 16970 ANC -3C	6
MAUREEN DWYER, Esq. Shaw Pittman	6
WITNESSES	
CHUCK ANTHONY	9
OSBORNE GEORGE	23
SUSAN PIGGOT	33
TIFFANY WILLIAMS	39
LEO WILSON, SR.	39
PRELIMINARY MATTERS	175
APPLICATION OF MAURICE C. WALTERS AND MARY JEAN PAJAK 17072 ANC-6C	177
WITNESS	
MAURICE WALTERS	178
APPLICATION OF 5626-28 CONNECTICUT AVENUE ASSOCIATES 17069 ANC-3G	192
LEONARD McCANTS	192
WITNESS	
GARY BORTNICK	195

C-O-N-T-E-N-T-S

AGENDA ITEM	PAGE
P.M.	
PRELIMINARY MATTERS	246
APPEAL OF STANTON PARK NEIGHBORHOOD ASSOCIATION 17043 ANC-6A	247
WITNESSES	
MONTY EDWARDS - APPLICANT	252
LAURA GESALTI GILBERT - DCRA	252
PAUL TUMMONDS - SHAW PITTMAN CAPITOL HILL GROUP	252
BILL CREWS - ANC 6-C	253
FR. RICHARD DOWNING - PARISH	257
DRURY TALLANT - APPLICANT	298
FAYE OGUNNEYE - ZONING ADMINISTRATOR	314
APPEAL OF ADVISORY NEIGHBORHOOD COMMISSION 2E 17034 ANC 2-E	361
WITNESSES	
THOMAS BIRCH - ANC-2E	361
JOHN EPTING - SHAW PITTMAN STRATEGIC GEORGETOWN LLC GEORGETOWN 32ND STREET LLC	361
DAVID HULLEY - ANC 2-E	363
ARMANDO LOURENCO - EXPERT	413

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

8:11 a.m.

CHAIRMAN GRIFFIS: On the record. Good morning, ladies and gentlemen. Let me call to order the 18 November 2003 Special Public Hearing of the Board of Zoning Adjustments of the District of Columbia. I'm Geoff Griffis, Chairperson. Joining me today will be Vice Chair Mr. Etherly and be assured that any portion that he misses, he will be delivered the entire transcript and required to read it. Representing the Zoning Commission with us on this case is Mr. Hood. Representing National Capital Planning Commission this morning and always we do hope is Mr. Zaidain.

I'm going to dispense with any openings and directions. I will assume that everyone is familiar with it. If there are people that are going to giving testimony today that have not previously of course, you will need to be sworn in. You will need to fill out witness cards and I will instruct you on all the other details if that is an occurrence we have this morning.

With that, let's get right into it. I wish everyone a very good morning and hope everyone had a very good and restful sleep. We probably will

get you out of here in time for breakfast. However the rest of us will be staying here for quite some time today. So let's move on.

First of all, we have rebuttal witnesses and closings. That's what we're going to take care of today. We have had delivered to us this morning, not an understatement, a stack of new submissions. We will deal with some of those submissions as it was just handed to us not 15 minutes ago after our rebuttals and closings. In this stack is a motion. We will take up that motion at that time.

Let me address just one letter that came in that I took some note on from a Mr. Bosco regarding my behavior at one of the proceedings in this case. He is saying that I inappropriately rebutted a testimony. Just to clear the record, I don't rebut. I don't present. I ask any question I please in fact in order to get the substance of the case.

In citing Exhibit 103 which was dealing with the emergency access and the dangers that are attended to any sort of addition or continuing problems, we have on all cases referrals to the agencies one of which is the fire department for their review of the application and its implication. There isn't a whole lot of substance in the letter submitted

the marshal in this case. It is assumed by the Board that they have reviewed it for all the attendant issues that would be important to them in order to serve the properties and also the adjacent properties. That being said, we will take into the record of course Exhibit 313, November 16th, which is Mr. Bosco's letter to me and also the fire marshal and also Exhibit No. 103 which I cited is an exhibit in this case.

That being said, let's move on and set up the panel. If you wouldn't mind introducing yourself this morning but also giving me an indication of witnesses you will be calling and the order if you know it at this point.

MS. DWYER: Certainly. Good morning. For the record, Maureen Dwyer with Shaw Pittman representing the Applicant. We will start with the testimony of Chuck Anthony, the architect for the project. He will be followed by Osborne George, the traffic consultant. Then the final witnesses will be Susan Piggot who has with her two of the staff that actually monitor the Transportation Management Plan ("TMP") on a daily basis.

CHAIRMAN GRIFFIS: So the two staff people are also going to be giving testimony.

MS. DWYER: Yes, very brief testimony. Just their personal observations along with Susan's on the current TMP operation.

CHAIRMAN GRIFFIS: Okay. Are you anticipating any additional submissions into the record this morning?

MS. DWYER: I believe we filed all of our materials. There's one additional submission.

CHAIRMAN GRIFFIS: Okay.

MS. DWYER: These are copies of letters that Ms. Piggott has distributed to parents from the start of the school year concerning the school's TMP.

CHAIRMAN GRIFFIS: Okay. For everyone's understanding, the last submission is the basis of what we will be hearing rebuttal testimony on. Is there any party that didn't receive that submission?

(Off microphone.)

CHAIRMAN GRIFFIS: Didn't receive?

(Off microphone.)

CHAIRMAN GRIFFIS: Which is now Exhibit 302 in the record.

PARTICIPANT: Are we talking about the November 12th?

MS. DWYER: Yes.

CHAIRMAN GRIFFIS: Yes. I'm sorry. I

should be very clear. November 12th. It was received in the Office of Zoning on November 13th. It has Exhibits A through E, one of which is the plan that TMP. Everyone has that submission, correct? Okay. So anything else that's coming in today, no one has seen. We'll all see it at the same time. Fabulous. In that case, do we need to call this and maybe do something official?

MS. BAILEY: Mr. Chairman, just for the record, good morning. I just wanted to say that this Application No. 16970 of the National Child Research Center. Perhaps that's sufficient for this morning, Mr. Chairman.

CHAIRMAN GRIFFIS: Sufficient and succinct. Thank you, Ms. Bailey. Also a very good morning to you and also Mr. Moy and Mr. Nyarku who is here. Ms. Monroe is representing Corporation Counsel. Yes, Mr. Nettler.

MR. NETTLER: Good morning, members of the Board, Mr. Griffis. Mr. Nettler for Cleveland Park Neighbors. Are you going to set a time limit on the clock for this?

CHAIRMAN GRIFFIS: Our hearing starts at 9:30 a.m.

MR. NETTLER: Okay.

CHAIRMAN GRIFFIS: We are going to get through this by then. I'm sorry. What's your anticipation for your closing remarks? Time?

MS. DWYER: My closing remarks will probably be about 15 minutes.

CHAIRMAN GRIFFIS: Okay. Let's go.

MS. DWYER: All right. I will introduce the first witness, Chuck Anthony, and ask him to proceed with his rebuttal testimony.

(Witnesses Sworn.)

DIRECT TESTIMONY

MR. ANTHONY: Chuck Anthony, Charles Anthony Architects. I'm going to just address two issues in my rebuttal testimony. First, I have three points to make in regard to this application's satisfaction of the standards for area variance relief from the Zoning Regulation's requirement that each principal structure be located on a single record lot. Second, I have some comments about the tree plan and the preliminary landscape plan that was submitted into the record.

In regards to the practical difficulty standard for variance relief, first, I'd like to note that the current plan was very carefully designed to integrate the carriage house into the existing grade,

to maximize the number of mature trees to be saved on the site and to preserve as much open playground space on the property as possible. It is a respectful neighborly addition to the property.

I also believe that the proposed carriage house is entirely sympathetic to the Cleveland Park Historic District and especially the rhythm, scale and character of the Ordway streetscape. I think there is actually a consensus of opinion amongst the Historic Preservation Review Board ("HPRB"), the Cleveland Park Historical Society's Architectural Review Committee ("ARC") and even some neighbors that breaking the project into multiple buildings or visually separate structures is a preferable solution for this site, certainly better than a large addition to the original historic house, the site's true principal structure. Both the playhouse and our proposal are differential to the main house in scale and design and I would add they are functionally accessory to it as well.

This concept of separate structures minimizes the impact for all, for my client, for the neighbors and for the neighborhood. To that end, I believe this issue of principal structure record lot has been manufactured merely as an impediment to the project without the same regard for impacts on the

neighbors and the neighborhood that we have endeavored to mitigate with this plan.

I would submit that the proposed configuration on balance and considering the alternatives works to the benefit, not the detriment, of the neighbors and the historic district or the public good. I believe these factors evidence the project satisfaction of the third prong of the variance test that granting the variance will not cause substantial detriment to the public good and will not substantially impair the intent, purpose and integrity of the Zoning Regulations or the Zoning map.

My second point. If you attempt to create a separate lot with the plans as submitted for the carriage house, it would not meet the side yard setback requirements from the existing playhouse. If the carriage house was moved to the west to allow for the required side yard setback from the playhouse, the carriage house could be encroaching on the required side yard setback to the Little's property, In fact, it would be over the Little's line.

Let me just show you quickly what that is. If you can see this black and white version of the earlier Ordway elevation. This is the playhouse. This is the carriage house. In order to create a lot,

essentially we need a property line that would be approximately there in order to satisfy both the setback requirements from a proposed structure on this side and the setback requirement from the playhouse. If that were to happen and this building attempted to move over here, you can see that it would probably be all the way over the Little's house.

Just quickly in plan, the same configuration, a lot line there with side yard setbacks here. This area would be displaced and would have to be relocated elsewhere on the site. I'll address that as I go on here. Thanks.

In addition, this separate lot created solely for the carriage house would also require a variance relief from the off-street parking requirements. In the absence of such a variance, the topography and layout of the site are such that a significant loss of specimen trees and significant grade changes would be required in order to carve an entrance ramp and parking spaces into this new lot. It's an idea that both the neighbors and the National Child Research Center ("NCRC") oppose.

My third point. We've looked at the potential of redesigning the project to address the practical difficulties that I've just noted. We've

looked at both reconfiguring the carriage house on a separate lot and an addition to the main house. We arrived at the following additional practical difficulties.

As far as reconfiguring the carriage house, the current placement is sited to have the least impact on adjacent properties and make the best use of topography. Pushing the building farther back into the slope towards the center of the site will result in a greater loss of mature trees. Such a structure if underground would need additional light wells and/or area wells to meet code requirements for life safety and for light and ventilation.

Alternatively, if the revised carriage house was not sunk into the ground, an above grade or partially above grade structure would result in the same loss of trees and reduce playground and open space. The impact would also be more detrimental visually to the adjacent properties. This revised carriage house design would still require variance relief from the off-street parking requirements or face the attendant additional grade changes and loss of trees a parking area would require. Again this is an idea that both the neighbors and NCRC oppose. A revised plan for the carriage house would also greatly

increase project cost in terms of additional time, design, construction, excavation, etc.

An addition to the main house. The significance of the existing building and especially their site and setting within the historic district creates practical difficulties. As I alluded to before, HPRB remarked that a plan that continued the history of NCRC's use of the site with smaller buildings rather than a single large building is the preferred approach. A significantly larger addition than that proposed to the main house or the principal structure is inappropriate in terms of the historic context, the neighborhood context and in terms of the practical and efficient use of the building itself.

In summary, these alternatives create even more practical difficulties than they resolve and they are less desirable from both the NCRC and the neighborhood perspectives. We are here to request variance relief for what I believe on balance is the best solution to this situation. For these reasons as well as my previous testimony and written submissions, I believe that this application has satisfied the standards for granting variance relief from the requirement that each principal structure be located on its own record lot.

The last issue I would like to address is tree plan and the preliminary landscape plan. On June 10th, we submitted an exhibit of a number of trees that showed the trees that will be removed from the site. It's Exhibit No. 191 in the record. There's also an accompanying letter from an arborist, Zimmer and Associates, that's part of that exhibit. That's the exhibit to my left.

CHAIRMAN GRIFFIS: Is there a difference from the submission that we recently got and the past submission?

MR. ANTHONY: When you say "recently," there's a landscape plan and then there's a tree removal plan. The earlier one is this diagram with the Xs through the trees to be removed.

CHAIRMAN GRIFFIS: Right. Exactly.

MR. ANTHONY: The more recent one is the landscape plan which I'll show you.

CHAIRMAN GRIFFIS: Okay.

MS. DWYER: This one on exhibit board is already on the record.

CHAIRMAN GRIFFIS: No, I understand. And it's showing existing condition with the tree removals.

MR. ANTHONY: Yes.

CHAIRMAN GRIFFIS: Okay.

MR. ANTHONY: I'd like to note that there are not trees between the existing NCRC building and the Badami-Neely property that will be removed. I'd also like to point out that of the approximately 21 trees that we have indicated to be removed from the property nine of those were trees that were planted by NCRC recently in 1994 and they are not significant trees. To the extent possible, we'll replant those or replace them in kind.

I'd just like to quote two sentences from the arborist's letter. He states in his first paragraph "In general, there's no danger to any historic or quality specimen trees as a result of the proposed construction." Then he goes on to talk about different areas of the site and specifically the area adjacent to the Little's property. "The three larger trees by the Little's house are volunteer trees and not specimen trees. There are two mulberries and a black cherry. They are not appropriate for this location due to the messy fruit, frequent shedding of dead branches and potential becoming dangerous as they get larger. None of these trees is historic or worth preserving. Their removal could be easily justified regardless of the future plans for the site."

Then last week, we submitted a preliminary landscape plan that shows the general locations and species types that will be planted on the NCRC property adjacent to the Little, Beckner and Badami properties. If you could flip that over for me please. This is a preliminary plan that would be finalized for submission to HPRB as required in their conceptual approval.

Our intent is to select species for a particular situation along the property lines so they can function appropriately for the long term. We would invite the thoughts and suggestions of those immediate neighbors in developing this design. I would also note that an arborist will be consulted during construction to assist in the protection of trees that we've indicated to remain. That concludes my rebuttal statement.

CHAIRMAN GRIFFIS: Excellent. Thank you very much. What we're going to do in terms of process is we're going to have Board questions after each of the testimonies. Then we're going to finish all of the testimonies and then we're going to bring back everybody for cross examination. So first, Mr. Anthony, let me start with what you've just said "preliminary landscape plan." That's going back as

you've indicated to HPRB. Is that correct?

MR. ANTHONY: Yes, it is.

CHAIRMAN GRIFFIS: Is it a public process where you will get comments from the neighbors?

MR. ANTHONY: Yes.

CHAIRMAN GRIFFIS: So it wouldn't be appropriate to have any sort of mark-ups here today. Is that correct?

MR. ANTHONY: Well, I thought that it was appropriate to show you the kinds of things we're thinking about.

CHAIRMAN GRIFFIS: No, I'm perfectly aware of that. What I'm going to try and stop is we are not going to be dealing with this. We're taking this in as a submission of the preliminary noting that it is not final.

MR. ANTHONY: That's correct.

CHAIRMAN GRIFFIS: The Board finds that this is in fact a substantial portion of what we need to deliberate on. We need to see the final. Then we will deal with it at that point, but I don't think this will be the forum of which we're going to have comments and have redesign. However I want people to be able to ask questions that directly relate to what you're proposing here.

In terms of the tree and you've indicated in your testimony now that there isn't any tree that's being removed that's adjacent to the Badami property. However in the testimony of the party represented by Ms. Badami, her indication was that she feared that the construction would take down trees. What are you doing to remedy or to preserve or ameliorate any sort of condition that might happen if that occurred?

MR. ANTHONY: Well, a couple of points on that. One is I think that the exhibit that Ms. Badami referred to or at least what I saw she was pointing to a tree that was not the tree that she thought that she was speaking of. There is a large tree right on the property line between the two properties. It is not our intent to disturb that tree. The earlier parking scheme for that side of the site was withdrawn. As I said, we would have an arborist involved in the project for the protection of trees.

CHAIRMAN GRIFFIS: What does that mean that someone's "involved in the protection of trees"?

MR. ANTHONY: Typically the arborist comes out and stakes the root area or sometimes even the season before may prune roots in a way in anticipation of construction. It's certainly in our interest as well as the neighbors that we preserve these trees.

CHAIRMAN GRIFFIS: So this is done usually as part of construction. Are you creating something here? Is this a new situation?

MR. ANTHONY: No, this is something that's very typical when you have large mature trees.

CHAIRMAN GRIFFIS: What's going to happen if the effect of trees in construction may not be evidenced for years? Has there been any discussion from your end in analyzing this and coordinating all the landscape if a tree was to die in three or four years?

MR. ANTHONY: I think the biggest thing that we've done is attempt to locate the proposed construction away from these large trees that we all want to save. That's the biggest step. It's to avoid the drip line of those trees.

CHAIRMAN GRIFFIS: I see. So you are not digging within the drip line which would damage the roots which would kill the trees.

MR. ANTHONY: That's our general intent.

CHAIRMAN GRIFFIS: I see. Okay. More importantly to basically what we are doing, you've offered testimony. Of course, we are well aware of your original testimony, but I want to clarify that you've actually taken an interesting point in your

testimony today. That is talking about the practical difficulty if you had to do an alternative design.

I think we can understand that, but I guess for clarity as we progress with this, it's clear that the Board is weighing alternative designs or anything else other than what is being proposed to us. So it's appreciative to talk about creating practical difficulties if you had to do something totally different, but the fundamental basis would be what's the practical difficulty that requires you to do what you're proposing. That's covered in the previous testimony so we don't need to get into that. I wanted to make that clarification.

It is interesting what you've given us if I understand correctly is the parties of opposition or certain of have brought up the possibility that this should actually be a subdivision. If I understand you correctly, your subdivision isn't possible because it would in fact create a noncompliant situation. Isn't that based on the footprint of the building that you're proposing now? Or is your testimony the fact that if you subdivide you could not build upon that lot?

MR. ANTHONY: Essentially my testimony is that we could design many alternatives for this.

You're right. That's not what we're here for. I'm specifically looking to the point of another principal structure on a separate lot and the practical difficulties associated with that. If we were to redesign and reconfigure the building and push the building further back into the site, what I said was that it creates more problems for us on many fronts, from neighbors, from trees, from topography, costs, all those kinds of issues.

CHAIRMAN GRIFFIS: Okay. If it was a separate lot and a principal building on that separate lot, could it be larger in mass than what you're proposing? I don't know if you've looked at that.

MR. ANTHONY: I haven't looked at that. I basically was taking the same program and pushing it around.

CHAIRMAN GRIFFIS: Okay. Any other Board questions at this time? Very well. Thank you very much.

MS. DWYER: All right. Our next witness is Osborne George.

(Witnesses sworn.)

DIRECT TESTIMONY

MR. GEORGE: For the record, Osborne George, Transportation Consultant. Mr. Chair, we

provided copies of extracts from three documents to the Applicant, Transportation and Land Development which is prominently referred to by Mr. Peterson in his testimony, copies of extracts from the Traditional Neighborhood Development Street Design Guidelines and extracts from the Uniform Vehicle Code. I really do believe that these documents speak for themselves with respect to a number of the key issues which were raised before the Board. I would like to use some of these documents and perhaps other to address the following key issues.

The first issue I would like to talk about is a data collection. Again I would like to refer to the fact that Mr. Peterson referred prominently to Institute of Transportation Engineers ("ITE") and its recommendations. I would like to refer to one of the documents which ITE recommends very highly to transportation professionals for the use in conducting transportation studies. That document is actually called "The Manual in Transportation Engineering Studies."

On the very first page of the very first chapter, I would just like to read into the record. ITE says that "Motor vehicles continue to be the principal means of transportation in the United

States. Despite the problems of congestion, delay, parking, pollution and safety, motor vehicles are expected to dominate surface transportation for the foreseeable future." Very importantly, it says "Solutions to transportation problems and improvements to transportation facilities and services can reasonably develop after the magnitude, location and extent of the problems or the need for improvements are well understood." Perhaps the most important sentence there says "Such understanding comes from factual information gathered in an unbiased objective manner and analyzed to present a clear and concise picture of the nature of the problem and the impact."

I cited this and I would like to underscore to the Board the methods that we used in our data collection because as in many other fields, the transportation engineering field recognizes that a good database is essential to any analysis that one performs. We've heard the maxim "Garbage in, garbage out." ITE recommends specific procedures for collecting data.

I would like to certify to the Board that we utilize those procedures. We utilize the procedures specified in the ITE manual which included use of trained personnel. I would like to say

specifically to the Board that the people that we used were not involved in the study. In some cases, they were not privy to the purpose of the study. They were simply trained individuals who were taught in the strategies and techniques of data collection.

I would like to say that we followed up our data collection with field surveys by our professional staff including myself. In just about every situation, we did our data collection without any prior notice to NCRC. Instead after the fact after we collected the data, we would typically call them to confirm whether there were any unusual activities or so in order to ensure that our data was truly representative of typical traffic conditions.

The second point I'd like to refer to is the issue of level of service. Mr. Peterson used that as what I would call "the opening solvo" in his presentation, his written as well as his verbal presentation to the Board. He points out that level of service is not an appropriate analysis technique for neighborhood streets.

Interestingly, he points out that there's a point of disagreement. I think we are fully in compliance. Nothing in the documents we submitted to the Board discusses levels of service for Highland

Place which was the focus of our analysis. Indeed we pointed out that the analysis conducted for the area roadway network was simply for the purpose of providing a general background to indicate the environment within which the site is located.

I would like to point out that the definitive source or the definitive reference regarding levels of service is the "Highway Capacity Manual." That manual does provide analysis techniques for analyzing urban intersections. This is what we did. Again we considered that the issue of management of the drop-off and pick-up operations of Highland Place and off Ordway Street were the critical considerations. Hence the reason we focused so extensively on the Applicant's TMP.

MS. DWYER: Mr. George, if I could ask you to move quickly perhaps to your closing points.

MR. GEORGE: Okay. I think we heard a lot from members of the Board regarding what I would term "the rules of the road" as far as vehicles in some situations having to drive on the left-hand side of the road in order to overtake vehicles as part of the passing maneuver. In order to address this issue, we submitted copies of the extracts from the "Uniform Vehicle Code" which talks about operation on on-lane

roadways.

Perhaps more importantly, I would like to come closer to home and refer to Title XVIII of the District of Columbia Municipal Regulations ("DCMR") which deals with vehicles and traffic. I would like to refer to Section 2200 of the DCMR Title XVIII, Sections 2202.7 and 2202.8 which refers to situations when it is quite permissible and in fact recognized as a typical operation where vehicles would utilize the left side of the roadway.

Finally I would like to close by just referring to our supplementary observations. Our initial evaluation on behalf of the school pointed to the fact that there were minor operational constraints during certain periods of the day. We have worked with the Applicant to enhance and upgrade its TMP. We have made observations throughout the most recent weeks and we continue to find that the situation works quite acceptably and quite safety. Thank you.

MS. DWYER: Thank you. Are there questions of Mr. George?

CHAIRMAN GRIFFIS: Board questions? Mr. George, the ITE report that you stated that outlines the Traditional Neighborhood Development ("TND") principles, is this some sort of professional

regulatory document for your analysis? Or how does this play into what you do?

MR. GEORGE: You are referring the TND Principles document.

CHAIRMAN GRIFFIS: Yes.

MR. GEORGE: ITE is not a regulatory body. It is a professional body which does extensive research, analysis and recommends practices and guidelines for the profession.

CHAIRMAN GRIFFIS: Okay. In your personal professional capacity, do you subscribe to the new urbanist mantra? Let's move on from that. Specifically there's one point in your submission on Chapter 13, page 29. It says that "Popular opinion is that narrow streets slow speeds." However the paragraph because it talks about looking at one typical type of roadway based on size the street width range from 20 to 36, they actually say that the speeds may diminish but the accident rate on the narrower streets of 20 feet is substantially higher than that of a wider street. Do you agree with this opinion?

MR. GEORGE: 13, 29.

CHAIRMAN GRIFFIS: Second paragraph under "Pavement Width."

MR. GEORGE: Yes, sir.

CHAIRMAN GRIFFIS: It says "In their analysis, speeds on urban streets that range from 20 to 25 feet found that streets widths had little effect on average speed." Then it goes on to say "The crash rate on major streets 20 feet wide was more than twice that of major streets of 31.4 feet." Aren't they saying that our popular convention or opinion is incorrect?

MR. GEORGE: I think that key word there was "The crash width on a major street."

CHAIRMAN GRIFFIS: I understand "major," but 20 feet wide, I think we can understand the concept of what 20 feet wide is.

MR. GEORGE: Yes, I think the only thing that I could interpret from this is that they are referring to the level of usage on such streets. In other words, with a narrower street if the volumes are very high, you would expect to have a higher crash rate. That is what I interpret this to be saying.

CHAIRMAN GRIFFIS: Okay. That's interesting. I took it to say that people don't slow down and they crash more often because they don't.

MR. GEORGE: I think the key is "major street."

CHAIRMAN GRIFFIS: Okay. I understand

that. So you are saying that based on the width of 20 feet that it gives them the level of volume that would not slow them down. You would see a straightway that's wide enough. There's probably two lanes. There would be no reason to be slowing down.

MR. GEORGE: First of all, I think a street of 20 foot width would probably have no parking. Whereas streets of the greater widths that you cited earlier would more than likely have parking on one or both sides. A 20 foot street is probably a roadway that has no parking. It refers to it as being a major street. I think I would infer from that you are talking about a street servicing relatively higher volumes of traffic. Within the narrow widths, it would expected that the crash or accident rates would likely be higher.

CHAIRMAN GRIFFIS: Okay. And people don't use their common sense when they drive. So what you might do is refer me then the last paragraph of that page and your point of major street versus a local street which is what they are categorizing it here. I'm not going to go too far into that.

If you go to page 35, it shows a diagram of pull-off and what they call accommodating pass-by trips. When the architect comes back for cross, I

will ask him the same question. Was there any analysis of creating a pull-off lane on the NCRC site? It's not directly related to that diagram, but the diagram is making my point.

MR. GEORGE: Yes, but I think the diagram does not make your point. This is very illustrative and what it is trying to do is to define the concept of pass-by trips.

CHAIRMAN GRIFFIS: I understand that, but let's look specifically at this case, Mr. George. One of the major problems with this is drop-off and pick-ups and congestion on the street. Right?

MR. GEORGE: Yes.

CHAIRMAN GRIFFIS: This was actually asked a long time ago, but I'm bringing it back at this point. Was there ever in your analysis in terms of alternatives and how you might alleviate the potential for problems in looking at creating a pull-off lane on the NCRC site?

MR. GEORGE: I believe that concept was talked about very early in the process as design scenarios and site configurations were considered. However, I believe it was discarded because of site constraints which I think perhaps Mr. Anthony would better describe.

CHAIRMAN GRIFFIS: Okay.

MR. GEORGE: I think it was talked within the concept of providing parking within the site before it was learned that the site was not required being in a historic district to provide parking and things like that.

CHAIRMAN GRIFFIS: Right.

MR. GEORGE: It was examined, but not in a serious way because of the other site related constraints.

CHAIRMAN GRIFFIS: Okay. Thank you. Any other questions?

MR. GEORGE: All right.

MS. DWYER: Then I will call Susan Piggott up and with her is Tiffany Williams and Sergeant Wilson, both of whom assist her in the current TMP operation.

DIRECT TESTIMONY

MS. PIGGOTT: Good morning, Mr. Chairman, members of the Board. My name is Susan Piggott. I'm the Director of NCRC. My testimony today will address just three issues, our current TMP, our Department of Health licensing and some of the conditions that we've proposed to the Board.

At the last hearing, the statement was

made that NCRC's TMP began only when we filed our current Zoning application. This is simply not accurate. We've made a number of changes going back to 1998 based on input from our staff, from our parents and from our neighbors. Exhibit O to our Supplemental Prehearing Submission documents these improvements, shows that they go well beyond what the BZA asked us to do and demonstrates our responsiveness as a school.

This spring we met with District Department of Transportation ("DDOT") and the opposing neighbors to discuss further improvements to our TMP. We implemented the changes this fall 2003 even though we were not required to do this rather than wait until the end of the case. The only change that we cannot implement is to add four additional spaces for our carpool line in front of the school. This is up to DDOT and they are waiting for your decision before moving forward.

The changes that we implemented this fall are the following. We extended the drop-off time ten minutes. We included compliance with our TMP in all parent contracts. We implemented a series of escalating sanctions including fines, suspension and ultimate expulsion which we fully intend to stand

behind. We added to two uniform personnel to maintain safety and enforce our TMP. We have required all parents and staff to place NCRC stickers their cars for identification.

The results has been an improvement in two key areas. By adding ten minutes to drop-off time, we have virtually eliminated the double standing during the morning peak. By adding the TMP to our contract, our parents understand the seriousness of our procedures and have responded with a commitment to follow the rules. I have copies of the materials I have send to parents this year. I can assure you that they understand the importance of this and they are complying.

We are extremely serious about enforcement. I have copies of our traffic violation forms as well as a sample letter sent to one of our parents. The Council of our Board of Trustees and I met with this parent and there's a memo describing this meeting. The result has been no further violations. Both Tiffany Williams whom you remember is an NCRC teacher and carpool captain and Sergeant Wilson who trains our traffic guards are here to confirm that our TMP is working well. We are committed to this for the long term.

Moving on to Department of Health, there was testimony that we are in violation of Department of Health licensing due to the number of children in each classroom. I have a letter from the Department of Health giving us a permanent waiver until the new classrooms are constructed. This clearly shows why we need new space.

Last just to turn to some of the conditions. First noise, there was testimony about the noise associated with our pumpkin party last fall and specifically our use of a PA system. The event last year was unusual because we rescheduled it from our usual Saturday to a Sunday since it was the first day that our children were able to go outside since the sniper attacks. This year we returned the event to Saturday where it always had been and we did not use the PA system and would agree to add this to our proposed conditions as a requirement.

Second, enrollment. In our proposed conditions, we have also agreed to provide the Zoning administrator and the Advisory Neighborhood Council ("ANC") information about our enrollment at the beginning of each school year no later than October 15th. We've also agreed that there would be no increase in our enrollment from our current number of

171 until the new building is ready for occupancy.

At the last hearing, the question was raised about whether more of our children could come from the neighborhood. When we admit students, we are balancing several factors when we form our classes: siblings, children with special needs, diversity which includes economic diversity because we do give financial aid to a number of our students and neighborhood children.

Our statistics show that we already consider the ability to walk to school to be an important factor in our admission process. This past year we accepted 66 percent of the neighborhood children who applied. By contrast, we accepted only 27 percent of the children with special needs who applied and only 21 percent of the general applicant pool.

In conclusion, I've watched and participated in nearly every single carpool since the beginning of the year. This is what I've come to understand. The beauty of our carpool line procedure is our ability to manage the unexpected. Our staff understands the reason behind our procedures which is to keep the street passable and safe so that when two vehicles come down Highland Place there is room and

space for those vehicles to pass. We don't just go through the motions of the TMP, putting on our orange vests or grabbing our walkie-talkies as we go out the door.

When something unexpected happens such as sudden rainstorm or a delivery truck that pulls up in front of the school right at carpool time, we are able to quickly adapt to these conditions. We have a number of things that we can and do do. We can bring out more staff. We can quickly reconfigurate so that we pull up only two cars in front of the school instead of four and hold the cars back to leave a space around the delivery truck. Or if the truck is further down Highland instead of letting our cars pull up to the first white line, we can hold them back to the second white line further down Highland allowing a space so there's always passable and safe room for cars to come both ways down Highland Place. I believe that this thoughtful flexibility is what makes our carpool procedure unique and special. It's the reason that it works so well.

Since 1998 BZA order, we have demonstrated over and over that we are good neighbors. We appreciate and value our residential site. We abide diligently by BZA conditions and we are vigilant and

responsive to our neighbors. We very much look forward to return to the positive relationships that we have shared with most of our neighbors in the past. Thank you.

MS. DWYER: Do you want to proceed with Tiffany Williams and Sergeant Wilson? All right.

DIRECT TESTIMONY

MS. WILLIAMS: Good morning, Mr. Chairman and the Board members. My testimony is limited to updating you on the operation of the TMP since the start of the fall semester. As you know from our previous testimony, I have been out there monitoring our TMP for the last six years. As Susan testified, we've put in place new procedures this fall and I would like to provide you with first-hand knowledge of how those new procedures are working.

Based on my personal observations on a daily basis, the TMP does operate safely. The extended time has reduced the number of cars waiting and parents are obeying the rules. In summary, our TMP continues to work well and conditions are even improved this year.

I would also like to add that our TMP is adjusted based on weather or other conditions. For example, several weeks ago one of our neighbors was

having work done to her house. There were two trucks that were parked in the street all day. We adjusted our TMP to accommodate her and we will continue to accommodate our neighbors. Thank you.

CHAIRMAN GRIFFIS: Thank you.

SERGEANT WILSON: Good morning, everyone. My name is Leo C. Wilson, Sr. I'm a retired Metropolitan Police Department ("MPD") Sergeant. I had been there 24 years with MPD. During that time, I was employed on a part-time basis for Georgetown Day School to assist with their traffic and TMP. Since my retirement, I'm now the Director of Security and TMP enforcer for Georgetown Day School. Also I'm a consultant for Washington International School to help set up Fields School, Archbishop Carroll School and several other schools including Potomac School in McLean, Virginia.

I was contacted near the end of the summer by NCRC to assist them with their TMP program. I came and assessed the situation. I took upon myself to recommend three personnel to assist with the traffic for the first 30 days. Once that was completed, we cut it down to just two people. You needed one person at Newark and 33rd Street NW to make sure that parents do one complete circle so they won't be taking

shortcuts in. Everyone has to drive down Newark, come in from Highland Place and go out of 33rd. We have one person in front directly across from a blind spot they have to make sure when cars that are not affiliated with NCRC is coming down Highland from 33rd that there won't be an accident or any problems with cars coming up. Since my personnel has been there, there has not been a problem.

I was invited here for the hearing on the 28th of October to view a video. I watched the video which I was quite surprised. According to the video, there was a serious problem. I took it upon myself from that day up through yesterday to come unannounced to observe the situation.

What was reflected in that video does not exist today. We have virtually no standing traffic on Highland Place whatsoever. The only concern I had was on Ordway. There are parents discharging their children from the street side, the driver's side, of the vehicle and walking up and down the street. Since then, I have talked to these parents. Virtually that does not exist anymore.

What the parents are doing now are taking the kids out of the vehicle from the passenger's side which puts them at the curb. Also they cross over to

the north side of Ordway to use the sidewalk because you virtually have no sidewalk on the south side of Ordway. They walk down until they become parallel with the entrance to the school and safely cross over. When the parents leave, they still cross over and use the sidewalk. We are getting total cooperation from the parents as well as the staff. They have more than ample enough staff members in front. I have counted as many as eight, more than they need.

The unique thing is you have people working in the community like contractors, lawn care and so forth. They have a tendency to part their vehicle on Highland Place on the south side. The south side clearly states no parking anytime. What impressed me is the fact that NCRC were able to put staff out there so it does not interfere with the flow of traffic.

Like I said, what I saw in the video does not exist today. It's safe. The parents are starting to use the sidewalks when they are walking the kids on Highland Place. It does not have that much of a backup of traffic. At the most, you would see the car sitting in the double line maybe two to three minutes tops. It is very safe.

I have a confession. My staff had

virtually nothing to do with this. This was already implemented before we came on board. We're committed to stay with NCRC for the whole duration. Like I said, they took it upon themselves. I commend them.

CHAIRMAN GRIFFIS: Good. Thank you very much. Anything else?

MS. DWYER: That's it for our rebuttal.

CHAIRMAN GRIFFIS: Okay. You raised a couple of points. Let me just get a clarification. You're saying that on the south side of Highland there are other non-NCRC trucks that would be illegally parked. Is that correct?

SERGEANT WILSON: Yes, you have someone to come work on the lawn.

CHAIRMAN GRIFFIS: That's fine. On Ordway Street, you indicated that the parents discharged and then walk on the north side.

SERGEANT WILSON: Yes.

CHAIRMAN GRIFFIS: So there's a sidewalk on the north side and then they get to a place in which they are perpendicular to the school and safely cross.

SERGEANT WILSON: Correct.

CHAIRMAN GRIFFIS: What makes it safe to cross there?

SERGEANT WILSON: It's just a matter of looking. When the cars are not coming, you just cross. Also they have one to two staff members out there in orange vests that also direct them when to cross over.

CHAIRMAN GRIFFIS: So the staff members are there at that point in the street.

SERGEANT WILSON: Yes.

CHAIRMAN GRIFFIS: And you're saying that it's actually safer to cross perpendicular to a street than walking down the street and making your way across diagonally.

SERGEANT WILSON: Definitely.

CHAIRMAN GRIFFIS: I see. Ms. Piggott, you indicated that 66 percent of the accepted students were from the neighborhood. What's the definition of the neighborhood? What's the boundary?

MS. PIGGOTT: Excuse me. I define that as families that could walk to school from three to four blocks distance to the school.

CHAIRMAN GRIFFIS: As these aren't these beautiful rectangular urban streets and blocks that I like, what is three blocks away?

MS. PIGGOTT: Well, it probably differs in terms of which streets and blocks are longer than

others.

CHAIRMAN GRIFFIS: So it goes two blocks from Newark south.

MS. PIGGOTT: Yes.

CHAIRMAN GRIFFIS: A larger problem that's obviously been testified about and there's evidence in the record of the behavior of parents and of course we have new testimony today that all this has been remedied is how do you propose in addition to some of the TMP management elements, for instances notifying parents, to control the behavior of parents driving to and from school when they are off the site, for instances stopping at stop sign?

MS. PIGGOTT: Our TMP goes to what happens right in the vicinity of the school. We advise. I know when Sergeant Wilson was out at the school he stood on the corner one day and just pointed out the stop sign to our parents. Many of the neighbors in the neighborhood just go through that stop sign that's at the end of the street because it's not really truly an intersection. Part of it goes into an alley and part of it is one way coming toward --

CHAIRMAN GRIFFIS: But it truly a stop sign, isn't it?

MS. PIGGOTT: Yes, it is and people should

obey that. We haven't attempted to enforce that sort of city law.

CHAIRMAN GRIFFIS: Okay.

MS. PIGGOTT: Our TMP, we have enforced u-turns and double standing and illegal parking.

CHAIRMAN GRIFFIS: It's certainly something that could be addressed in what you send out, could it not?

MS. PIGGOTT: Sure.

CHAIRMAN GRIFFIS: I can't put my finger on it right now, but in one of the letters to parents outlying what should happen in terms of being courteous to the neighborhood and driving safely and being all that, couldn't you call that out as a specific? "Please stop at all stop signs."

MS. PIGGOTT: Sure.

CHAIRMAN GRIFFIS: "Obeying all traffic signals." I know it sounds ludicrous. It's carpool etiquette which you indicated. It's in your first submission and it's part of Exhibit O. The other piece is that you also send out diagrams of how one is to drive to the school and not. None of the stop signs or intersection signals or whatever you need to do at the intersections are identified during that. Wouldn't that be also part of an important aspect of

as people are looking at this how they would drive and what they would have to do in order to get to and from the school?

MS. PIGGOTT: Certainly. That would be great idea.

CHAIRMAN GRIFFIS: Okay.

MS. PIGGOTT: When Sergeant Wilson was helping a few days at the stop sign, we discussed together the idea of putting that into the training that we do of parents at the very beginning of the year when parents are new and talking about those issues as well as the ones that are in our TMP. It would be just a part of a broader parent education.

CHAIRMAN GRIFFIS: I think that would be very important. Perhaps most drivers today need that education. We could open it up to the community or something. In the conditions that are a part of Exhibit M, are you still holding to that or are you proposing that we will have new proposed conditions submitted?

MS. DWYER: We would have new conditions based on the testimony and the evidence of record.

CHAIRMAN GRIFFIS: Which means I can't go through all these right now. Okay.

MS. DWYER: You could go through them and

we could let you know which ones are going to change.

CHAIRMAN GRIFFIS: That's okay. The other piece of this in discussion is - and clearly we're going to need a very definite aspect, some of what you have indicated in these proposed conditions and let me see if that is maintained today - the issue of enrollment. It is also the issue of onsite students. From the conditions in terms of the original submission, Exhibit M, you are indicating that we are actually as you're proposing looking at two different numbers. One is enrollment and one is the capacity of onsite students.

MS. DWYER: That's right.

CHAIRMAN GRIFFIS: And you're maintaining that the onsite students would be 120.

MS. DWYER: Yes.

CHAIRMAN GRIFFIS: And enrollment would increase as you indicated today and also in the prior submissions up to 171 to 181. Is that correct?

MS. DWYER: Yes, that's correct.

CHAIRMAN GRIFFIS: Okay. Are there any other Board questions? Mr. Zaidain.

MEMBER ZAIDAIN: Yes, I have a quick one for Ms. Piggott regarding the Department of Health letter that was submitted.

MS. PIGGOTT: Yes.

MEMBER ZAIDAIN: In reading through this, I'm a little confused between what this says and what your testimony was. It seems that in the fourth paragraph down your proposed ratios are approved but I believe in your testimony, you said that they were permanently approved based on something else, a conditional permanent approval, which I'm a little confused about. What is this approval based upon and is it temporary or is it permanent?

MS. PIGGOTT: The group size that's mentioned in that fourth paragraph is the group size that we've had for a number of years in the school. While we weren't granted a waiver to do that, it was sort of a de facto waiver because every year Licensing came and looked at our numbers and our group sizes and signed off on that. There was a complaint raised last year about the number of students in the classroom. Licensing came out and investigated and gave us a waiver to maintain the number of children we've always had. It was temporary the way it was written at that point in time to be until this fall.

After that, we talked to them further and we went through our statistics and looked over what we'd done in the past. They agreed to give us a

permanent waiver which is really an extension of what we've always had in order that we can operate until we can reduce the group sizes in those classroom by adding our new classrooms.

MEMBER ZAIDAIN: So you can continue operating until you reduce the sizes.

MS. PIGGOTT: Yes.

MEMBER ZAIDAIN: So when they come out and you have submit your enrollment and statistical figures to them, then they have been granting temporary waivers. Now they've granted a permanent waiver.

MS. PIGGOTT: Yes.

MEMBER ZAIDAIN: Okay.

CHAIRMAN GRIFFIS: Anything else?

MEMBER ZAIDAIN: No.

CHAIRMAN GRIFFIS: Any other questions? Yes, Mr. Hood.

COMMISSIONER HOOD: I just want to ask Sergeant Wilson a question. You mentioned that the video in which the Board was privileged to see that you were surprised at what took place. Is it that the change that does exist today is because of some of the measures that have taken place or was that just a day that it just happened to have happened?

SERGEANT WILSON: Apparently through the changes that they implemented, there were cars –- When I saw the videotape, I was shocked. In fact, when I left here, I had a phone conference with my staff that works out there and asked "What's going on?" because I was seeing all this on the video. They assured me that it doesn't exist. That's why I took it upon myself and check. By them changing the arrival times of spacing it out, you don't have that many cars bunching up.

MEMBER ZAIDAIN: Okay.

SERGEANT WILSON: Therefore, like I said, it's a lot better. The only thing you can't control is people in the neighborhood. It's their way of life walking down the street. You see that a lot. You have a UPS truck sometimes won't stop for the stop sign. If they can see they can get across and no cars are coming, they just keep on going, but they made a great improvement.

COMMISSIONER HOOD: So it existed but due to the mitigation efforts that have been put in place it now has gotten better.

SERGEANT WILSON: A lot better. Like 90 percent improvement.

COMMISSIONER HOOD: And you mentioned

something. I think the Chairman asked this but let me expand on this a little more. On Ordway Street, I think you said the north side is where they walk down the sidewalk. Where is the safe point for a child to cross?

SERGEANT WILSON: The safest place I recommend is directly across where you have steps leading into the school. If they walk straight down, they can get parallel where they can walk across.

COMMISSIONER HOOD: Is there a stop sign or traffic light there?

SERGEANT WILSON: No, there is not. So it's up to the parent or the adult to look both ways. There are constantly big gaps in between traffic going up and down Ordway. It's very safe to cross and the fact that they have their own vested personnel out there. They stand right out and you can see them.

COMMISSIONER HOOD: Okay. Thank you. Ms. Piggott, what percentage of students do you have that come by vehicle? You mentioned that in your rebuttal. Was it 21 percent?

MS. PIGGOTT: I was talking about the numbers of children that we accept.

COMMISSIONER HOOD: That's it.

MS. PIGGOTT: It came up last hearing

about whether we could accept more children from the neighborhood. The point I was making is we have a significant number of children from the neighborhood. We can only accept children for spaces that have. If we have a young child apply for a class that has older children in it, we can't make that fit.

COMMISSIONER HOOD: I'm interested in the ones that you accept not from the neighborhood.

MS. PIGGOTT: Okay and what is your question?

COMMISSIONER HOOD: What percentage was it? You gave us some percentages.

MS. PIGGOTT: We accept 21 percent of our total applicant pool.

CHAIRMAN GRIFFIS: Outside the neighborhood.

MS. PIGGOTT: Yes.

COMMISSIONER HOOD: Okay. Thank you.

MS. PIGGOTT: No, of the total applicant pool including neighbors.

CHAIRMAN GRIFFIS: What is it the percentage of?

MS. PIGGOTT: Twenty-one percent of the total applicant pool, everyone who applies to the school.

CHAIRMAN GRIFFIS: Is?

MS. PIGGOTT: Twenty-one percent.

CHAIRMAN GRIFFIS: I know. The 21 percent is what?

MS. PIGGOTT: We accept approximately 21 percent of everyone who applies to the school.

COMMISSIONER HOOD: Whether they are in the neighborhood or not, it doesn't matter.

MS. PIGGOTT: Yes.

CHAIRMAN GRIFFIS: So if you had 66 percent were from the neighborhood, we would assume that the other percentage is not from the neighborhood.

MS. PIGGOTT: No, what I'm saying is our percentage of the students that we accept from the neighborhood is higher as you can see than we accept of the other categories that we break down.

CHAIRMAN GRIFFIS: I see. So 66 percent is accepted from the neighborhood of the entire pool and you accept only 20 odd percent of the entire applications that come into the school. So there are actually not comparative percentages is what I think Mr. Hood was trying to get to the down of. Okay. You indicated also that you have imposed fines. How much are the fines?

MS. PIGGOTT: There's one fine in the sanction procedure. It's a $250 fine.

CHAIRMAN GRIFFIS: And when is the fine imposed? Is there a warning? Are there several steps before a fine is imposed?

MS. PIGGOTT: There's a letter first. After the letter, there's another letter with a meeting with me. The fine is the third step.

CHAIRMAN GRIFFIS: And your TMP 2002-2003 indicates on the second page arrival times and dismissal times. Arrival of 8:00, 8:35 a.m., 11:30 a.m., 12:40 p.m. Dismissal: 11:30 a.m., 12:30 p.m., 3:00 p.m., 3:30 p.m., 3:00 to 5:00 p.m. Are those still standing?

MS. PIGGOTT: The morning drop-off we have extended from 8:30 a.m. to 8:50 a.m.

CHAIRMAN GRIFFIS: I see. So arrival and dismissal times are fairly close and may in fact occur at the same time.

MS. PIGGOTT: Do you mean the other times of the day?

CHAIRMAN GRIFFIS: Yes, if you have an arrival time at 11:30 a.m., you also have a dismissal time at 11:30 a.m.

MS. PIGGOTT: The 11:30 a.m. arrival time

is ten children or less that are only coming for one special lunch program. It's not a carpool line. Those parents park on Ordway. Some of them walk. They are generally about six or seven cars that make up that arrival.

CHAIRMAN GRIFFIS: Okay. And the carpool lines are the earlier and the later then.

MS. PIGGOTT: And at 11:30 a.m. when the morning children go home.

CHAIRMAN GRIFFIS: I see. Okay.

MS. DWYER: I have one follow-up point for Sergeant Wilson in response to a question from Mr. Hood. I think Sergeant Wilson testified that what he saw in the video was not what he observed at NCRC.

CHAIRMAN GRIFFIS: Right.

MS. DWYER: Then Commissioner Hood asked him if that meant that the situation existed but it had improved. Sergeant Wilson can testify to this but I think his testimony was that he never observed that situation. Therefore his testimony was not -- I can ask him.

CHAIRMAN GRIFFIS: Indeed. Did you ever observe the condition that you saw in the video?

SERGEANT WILSON: No, I never did. That's why I was surprised and I decided to come and observe

it for myself because I wasn't on board at that time when the video was taken.

CHAIRMAN GRIFFIS: Right.

SERGEANT WILSON: But from what I saw in the video, I have yet to this day have seen since I've been observing.

CHAIRMAN GRIFFIS: Seen that type of condition.

SERGEANT WILSON: Right, where people were everywhere parking, everywhere doing u-turns. I only observed one u-turn violation on Ordway and it was not affiliated with NCRC.

CHAIRMAN GRIFFIS: Okay. Good. Thank you.

MS. DWYER: All right. Thank you.

CHAIRMAN GRIFFIS: You both have been here through this proceeding. Is that correct?

SERGEANT WILSON: Yes.

MS. WILLIAMS: Yes, for the most part, I've been at the last three I think.

CHAIRMAN GRIFFIS: Were you sworn at the last hearing?

SERGEANT WILSON: Yes.

MS. WILLIAMS: I was sworn in the first time I came in.

CHAIRMAN GRIFFIS: Mr. Zaidain.

MEMBER ZAIDAIN: Mr. Wilson, how long have you been on the job again?

SERGEANT WILSON: I retired from the MPD August 1994 with 24 years of service.

MEMBER ZAIDAIN: No, I mean with NCRC.

SERGEANT WILSON: NCRC brought me on board near the end of August.

MEMBER ZAIDAIN: The end of August, okay.

CHAIRMAN GRIFFIS: Any other Board questions? If not, any other witnesses?

MS. DWYER: No, that concludes our rebuttal.

CHAIRMAN GRIFFIS: Excellent. Let's move to cross examination then. I was going to ask the architect just about the drive aisle and all that and I think it's fairly clear in my mind, the issues attendant to that. We're going to move beyond that. Do you want to start with this group cross and then go back?

MS. DWYER: Certainly since they're all here.

CHAIRMAN GRIFFIS: Okay. Let's go. Order of cross. Mr. Nettler, do you want to be first?

MR. NETTLER: I think the ANC is first.

CHAIRMAN GRIFFIS: Indeed. Have a seat. Use that mike. That would be perfect.

CROSS EXAMINATION

MS. MacWOOD: For the record, my name is Nancy MacWood. I'm representing the ANC 3-C. Hello everyone. Good morning. Ms. Piggott, I just have a couple of questions for you actually. In regards to the Department of Health waiver, has the Department of Health indicated what will happen regarding the waiver if the special exception is not approved?

MS. PIGGOTT: No.

MS. MacWOOD: The waiver allows you to have how many addition students in how many classrooms?

MS. PIGGOTT: It allows us to have 17 children instead of 16 in two classes and 23 instead of 20 in two other classes.

MS. MacWOOD: So if my arithmetic is correct, one additional child in two classrooms and three additional children in two classrooms.

MS. PIGGOTT: Yes.

MS. MacWOOD: So that's a total of eight. Is that right?

MS. PIGGOTT: Yes.

MS. MacWOOD: Is it possible if the

special exception is not approved that they would require you to reduce the enrollment by eight possibly by attrition or some other method?

MS. PIGGOTT: I don't know.

MS. MacWOOD: You don't know. Okay. Of the 66 percent of neighborhood children that NCRC has accepted, can you tell us what number that is 66 percent of? How many children applied?

MS. PIGGOTT: Yes. This past year 21 children - again I counted the children that could walk within three to four blocks - applied. We accepted 14. Of those 14, three of those families decided to go to another school. So 11 of those children enrolled.

MS. MacWOOD: All right. Thank you. Sergeant Wilson. Have you ever worked for a child development center before?

SERGEANT WILSON: No, mainly private schools.

MS. MacWOOD: The schools that you mentioned, GDS, Field, Washington International School, have these schools significantly reduced the number of car trips as part of their TMP?

SERGEANT WILSON: No, basically they increased them as each year goes by.

MS. MacWOOD: Doesn't the Field School by zoning order use buses and actually children aren't allowed to drive to the school?

SERGEANT WILSON: The seniors are allowed to drive to the school and are allowed to park in the lower lot. Field School does use limousine buses to pick up quite a few of their kids.

MS. MacWOOD: At the Metro stations. Is that correct?

CHAIRMAN GRIFFIS: We're already familiar with their operations.

MS. MacWOOD: GDS I believe is --

CHAIRMAN GRIFFIS: Help me find out the relevance of comparing his experience with other schools and their drop-offs and pick-ups.

MS. MacWOOD: The relevance is one of the issues in this particular case is whether the number of car trips to and from the NCRC is causing a dangerous situation.

CHAIRMAN GRIFFIS: I understand that. Believe me. I've been here, but what you're asking him to say is what? There is better ways of doing this with other schools.

MS. MacWOOD: That in the course, he has been consulting with other schools and I would guess

given the schools that he's mentioned and the familiarities some of us have with those schools' plans that probably what he is recommended is a reduction of car trips at those other schools. I'm just curious why that isn't perhaps what he's recommended for NCRC.

CHAIRMAN GRIFFIS: Okay.

MS. DWYER: But he's testified that there was no reduction in car trips.

CHAIRMAN GRIFFIS: Right.

MS. DWYER: So he's already answered the question.

SERGEANT WILSON: If I can be clear about it, if you ask me to compare the other schools to NCRC, there's not an issue at NCRC compared to the other schools. NCRC is a lot smaller school. The parents. Of all the schools I have dealt with doing TMP, the parents have really adjusted quite well. You explain to them the circumstances. For example, taking kids out on the wrong side of the vehicle, they stopped doing it. Crossing over using the sidewalk is safe for the child. They are compliant.

CHAIRMAN GRIFFIS: Okay.

SERGEANT WILSON: You have some other places. They don't. But it's not an issue at this

point. It's very safe.

CHAIRMAN GRIFFIS: Okay.

MS. MacWOOD: Let me ask you another question then, Sergeant Wilson. How often are you at the NCRC?

SERGEANT WILSON: NCRC, I've been there now going on three or three and a half weeks.

MS. MacWOOD: Are you there every day?

SERGEANT WILSON: Everyday.

MS. MacWOOD: Are you there at every pick-up and drop-off?

SERGEANT WILSON: I get them sometimes half way through the morning drop-off, but I'm there in the afternoon as well as the evening.

MS. MacWOOD: Okay. Sergeant Wilson, are you aware of the TMP that was for NCRC that was approved by the Zoning Order in 1998 that has been in effect at the school since that time?

SERGEANT WILSON: No.

MS. MacWOOD: So you don't have any estimation as to why that plan hasn't been as successful as the plan that you are currently under.

CHAIRMAN GRIFFIS: He said he doesn't know it.

SERGEANT WILSON: No.

MS. MacWOOD: I just have one other question, Sergeant Wilson. You said that you saw the Beckner video at the last hearing. Are you aware that the Beckners testified that some of that video was taped after the new TMP was implemented?

SERGEANT WILSON: I was told from the testimony that there were two or three days I believe that they testified that it was taken at that time. I believe that was in the very beginning when my staff came on board. Since then, there has been any drastic improvement. There is not a safety issue from what I can see at this point.

MS. MacWOOD: All right. Thank you.

CHAIRMAN GRIFFIS: Thank you. Next?

MR. NETTLER: Sergeant Wilson, let me follow up on the last question that you responded to. As you stated, you saw the video that was presented by the Beckners, correct?

SERGEANT WILSON: Yes.

MR. NETTLER: Are you aware that there were six dates during this school term that the NCRC are now in that were shown on the video?

SERGEANT WILSON: I believe so.

MR. NETTLER: And the most recent one is October 21st.

SERGEANT WILSON: Yes.

MR. NETTLER: So on September 12, September 29, October 2, October 8, October 16 and October 21 which are the six dates that were mentioned, were you at the NCRC at the time?

SERGEANT WILSON: No.

MR. NETTLER: So you started with NCRC on what date?

SERGEANT WILSON: I started the first day of school where I put staff up there. I came in.

MR. NETTLER: But you weren't personally there on those dates.

SERGEANT WILSON: Not every day, no. I was there for the first couple days that school started.

MR. NETTLER: Since that time, you've had staff there but you yourself have not been there.

SERGEANT WILSON: I have been going on and off but not every particular drop-off/pick-up time, no.

MR. NETTLER: And when you were there in the beginning which was one or two days.

SERGEANT WILSON: Yes, to set up my staff.

MR. NETTLER: To set up your staff, okay. How many pick-ups on those first and second days were

you there?

SERGEANT WILSON: I was there in the morning. I was there in the afternoon.

MR. NETTLER: You're aware that there are five pick-ups and drop-offs.

SERGEANT WILSON: Yes, at that time we were required to be there mainly for the peak morning hours which we provided three people.

MR. NETTLER: And the staff that you have, have any of them been here during the hearings?

SERGEANT WILSON: No.

MR. NETTLER: Did you ask any of your staff members about those dates that were mentioned in the video?

SERGEANT WILSON: Yes.

MR. NETTLER: Did you complain to those staff members about what you saw in those videos on those six days that were shown?

SERGEANT WILSON: Yes. I have talked to my staff about it. We came up with a plan to improve and one of the things is that the gentleman at Newark and 33rd pointed out the stop sign to everyone whether they are residents or commercial vehicles as well as NCRC.

MR. NETTLER: So is that in the last two

weeks?

SERGEANT WILSON: That has been for the last three weeks.

MR. NETTLER: The last three weeks. So you are aware that the video was showing a various number of dates beginning in January 2002 up to October 2003 which I guess is about almost 18 months. I'm probably wrong. About a 18 month period or so or more. Do you understand that?

SERGEANT WILSON: Repeat that.

MR. NETTLER: The video that you saw represented a depiction of traffic situations from the site beginning in January 2002 up until October 21, 2003.

SERGEANT WILSON: To be honest, I can't really say for the simple fact that it's difficult to identify which cars are which. If there is someone who lives in the neighborhood coming home with their child --

CHAIRMAN GRIFFIS: You understand. His point is that this is small snippets from an 18 month period. Do you understand that?

SERGEANT WILSON: Yes.

MR. NETTLER: You're talking about the last three weeks in comparison with the 18 month

period as having been a demonstration of some compliance with a TMP that's now in effect.

SERGEANT WILSON: Yes.

MR. NETTLER: Okay. Thank you. Are you aware of any ticketing that has gone on the last couple of weeks of any of the school cars that have been parked or that have brought children to the site?

SERGEANT WILSON: The only ticketing I observed was a ticket put on vehicles that were parked illegally.

MR. NETTLER: Do you know whose vehicles those were?

SERGEANT WILSON: There was no indication they were NCRC because NCRC staff have yellow stickers on their rear sun visors. The vehicles I observed didn't have yellow stickers.

MR. NETTLER: And so if a car that was ticketed didn't have a NCRC sticker in it, it's your assumption that it's not a NCRC staff car because you assume that NCRC staff all have their yellow stickers in their car. Is that correct?

SERGEANT WILSON: Correct.

MR. NETTLER: If I was to tell you that two of the cars –- Strike that. Are you aware of the type of vehicles that the personnel at the school

drive?

SERGEANT WILSON: The personnel drive all types of vehicles.

MR. NETTLER: Were you aware of --

CHAIRMAN GRIFFIS: Do you keep a license plate directory or is there any record of that that you're aware of that identifies the cars?

SERGEANT WILSON: From my understanding, NCRC keeps a license plate for all staff.

MS. DWYER: I think Ms. Piggott can answer that question better than Sergeant Wilson.

CHAIRMAN GRIFFIS: I understand, but that's why he's being crossed and I think it's going in the direction if he's aware of that. Does he reference that list in order to assess whether it's a staff car?

SERGEANT WILSON: Yes, we've been told for example if someone in the neighborhood complains about a vehicle. They give my staff the tag. We contact the school. The school has a listing of everyone's tag, the staff as well as the parents.

MR. NETTLER: If you've seen cars that have been ticketed illegally, have you checked them or your staff checks them against that list to see whether they are cars of the staff at NCRC?

SERGEANT WILSON: Have I done it? No.

MR. NETTLER: Ms. Piggott, are you aware of any ticketing that's been done of staff members in the last few weeks for illegal parking on Highland Place?

MS. PIGGOTT: Yes.

MR. NETTLER: Were those staff cars that didn't have school stickers as well?

MS. PIGGOTT: I'm aware of one and it did have a school sticker.

MR. NETTLER: But it was ticketed. What's the consequence of that staff member receiving a ticket under your TMP?

MS. PIGGOTT: That staff member is in a lot of trouble, Mr. Nettler, as you can well imagine.

MR. NETTLER: I'm sure.

CHAIRMAN GRIFFIS: Did you have to pay the ticket?

MS. PIGGOTT: Oh, yes.

MR. NETTLER: You're not aware of any other members of the staff receiving tickets.

MS. PIGGOTT: No.

MR. NETTLER: You're not aware of any parents receiving tickets for illegal parking.

MS. PIGGOTT: No.

MR. NETTLER: But is your testimony that all of our staff members have stickers?

MS. PIGGOTT: Yes.

MR. NETTLER: Does that include the people who you identified when you first testified who come to the premises on a irregular basis to act as an adjunct to your staff?

MS. PIGGOTT: No, it's the staff that we employ.

MR. NETTLER: So the people that come as adjunct and if they park illegal, so the people who you've employed to operate this TMP wouldn't know if they were staff or not, would they?

MS. PIGGOTT: No.

MR. NETTLER: Do you have license plates for those cars as well that come to your site regularly?

MS. PIGGOTT: No, we don't.

MR. NETTLER: With regard to the traffic and issues, you haven't done anything to bring the school into compliance with the previous orders restriction against the number of staff coming to the site, have you?

MS. PIGGOTT: To my knowledge, that's not a condition that was imposed on us in the 1998 BZA

Order.

MR. NETTLER: To your knowledge, there's no condition on the number of staff.

MS. PIGGOTT: No.

MR. NETTLER: You made reference to the event that was scheduled because it couldn't be held on Saturday. Was there a condition in the 1998 Order that authorized you to hold these events on Saturday and Sunday?

MS. PIGGOTT: The condition that went to that said that the normal hours of school operation were from 8:00 a.m. to 5:00 p.m.

MR. NETTLER: Does that say then that you can have events on Saturday or Sunday?

MS. PIGGOTT: No.

MR. NETTLER: So if it was stated in the Order, it's your assumption that it was permissible for you to operate.

MS. PIGGOTT: Yes, we assumed it to be a normal school event since other schools have several adjunct events each year.

MR. NETTLER: Are you aware whether those other schools that have those events have within their order authorization that they have on either night time or weekend events?

MS. PIGGOTT: No.

MR. NETTLER: So you are not familiar with those orders.

MS. PIGGOTT: No.

MR. NETTLER: You're only familiar with your order.

MS. PIGGOTT: Yes.

MR. NETTLER: I believe what you said in your testimony was someone was at the intersections at all times. Is that correct?

MS. PIGGOTT: This year we have not -- Well, what we do is we deploy our staff where we need them. Again that's the beauty of the TMP.

MR. NETTLER: So your previous testimony that someone is at those intersections at all times is incorrect.

MS. PIGGOTT: At that time, we had for example a person at the corner.

MR. NETTLER: Is it correct or not?

MS. PIGGOTT: Yes.

MR. NETTLER: So your statement that someone is at every intersection at all times is a correct statement.

MS. PIGGOTT: I'm not sure what you mean when you say "every intersection."

MR. NETTLER: I'm just referring to your testimony.

MS. DWYER: Which testimony are you referring to? Testimony today that you're cross examining her on or testimony prior?

MR. NETTLER: Yes, today. You said today that someone was at those intersections at all times.

MS. PIGGOTT: No.

MR. NETTLER: What is your testimony today then?

MS. PIGGOTT: My testimony today is that we are following our TMP and that it's a flexible one.

MR. NETTLER: So your testimony then previously was that someone was at the intersections at all times. That's not correct.

MS. PIGGOTT: That was last year.

MR. NETTLER: How many fines have been imposed?

MS. PIGGOTT: No, fines have been imposed.

MR. NETTLER: Everybody has been compliant with the TMP from your perspective.

MS. PIGGOTT: We don't expect for our parents to be perfect. We have sent some first violation letters and I have met with one parent, but we have not even gotten close to the fine stage yet.

We have every intention of doing that if we need to.

MR. NETTLER: Is that after the special exception is approved?

MS. PIGGOTT: No, now. So far everyone has complied after the first letter.

MR. NETTLER: What does it take to get to a fine situation then?

MS. PIGGOTT: As I said previously, there is a first letter that reattaches the TMP and reminds everyone that it is in their contract that they are to abide by the TMP. After that, there is another letter and I meet with the family involved. I've done that one time. I have told them that the next step would be a fine, but everyone has complied to that point.

MR. NETTLER: You saw the video when it was presented by the Beckners, did you not?

MS. PIGGOTT: Yes.

MR. NETTLER: There were six dates that were identified in September and October on that video. Correct?

MS. PIGGOTT: I don't recall the exact dates.

MR. NETTLER: Did you go back and send letters to any of the people who were identified in that video or who you could identify in that video and

send letters to them about their conduct?

MS. PIGGOTT: No. It was --

MR. NETTLER: Okay. Thank you. Ms. Piggott, let me ask you about the letter of June 30th that you referenced from the Department of Health. Mr. Zaidain had asked you a question about this letter, but there's nothing in this letter that says that this waiver is dependent on you obtaining approval of this special exception, is there?

MS. PIGGOTT: No.

MR. NETTLER: And there's nothing in this letter that's contrary to what you said in your original testimony today. There's nothing in this letter saying that the waiver has been granted in anticipation of you building another facility on the premises, does it?

MS. PIGGOTT: No, not in this letter.

MR. NETTLER: I have no other questions.

CHAIRMAN GRIFFIS: Thank you. Next.

MS. DWYER: I have one question of the witness on redirect.

MR. NETTLER: Doesn't that come after all the people have cross examined?

CHAIRMAN GRIFFIS: It probably would be more prudent.

MS. DWYER: All right. I'll wait.

MR. HUNSICKER: For the record, I'm Steve Hunsicker. I live at 3083 Ordway Street. Just a few questions. First, Sergeant Wilson, can you tell me? I believe I understood you have staff that is working with you in connection with NCRC. Is that correct, sir?

SERGEANT WILSON: Correct.

MR. HUNSICKER: Are they onsite for a specific schedule during any given day?

SERGEANT WILSON: Yes, they are onsite for the a.m. peak time.

MR. HUNSICKER: And how do you define the a.m. peak time?

SERGEANT WILSON: 8:15 a.m. to 9:15 a.m.

MR. HUNSICKER: Okay. Is your arrangement with NCRC pursuant to contract?

SERGEANT WILSON: Yes.

MR. HUNSICKER: What is the term of the contract?

SERGEANT WILSON: The term of the contract, we will provide two personnel every morning during school hours from 8:15 a.m. to 9:15 a.m.

CHAIRMAN GRIFFIS: Do you mean "term" as how long does it go for?

MR. HUNSICKER: Correct.

CHAIRMAN GRIFFIS: Well, okay. How long are you hired for?

SERGEANT WILSON: We're hired from year to year from beginning of the school year to the end of the school year. We're also being hired --

CHAIRMAN GRIFFIS: That's what sums an annual contract.

SERGEANT WILSON: Yes.

CHAIRMAN GRIFFIS: Okay. Next question?

MR. HUNSICKER: I believe I understood from your previous question is that you have no staff onsite after -- Was it 9:15 a.m. you said, sir?

SERGEANT WILSON: Yes.

MR. HUNSICKER: Is it correct that you bill by the hour, sir?

SERGEANT WILSON: Yes.

MR. HUNSICKER: How many hours generally speaking have you billed since you've been hired?

CHAIRMAN GRIFFIS: I don't understand the relevance of that.

MR. HUNSICKER: I want to ascertain approximately how many hours Sergeant Wilson has been onsite.

CHAIRMAN GRIFFIS: I understand the

question, but why do I need to know it?

MR. HUNSICKER: It goes to the value I guess of his observation.

CHAIRMAN GRIFFIS: For what point?

MR. HUNSICKER: Whether his observations are based on a --

CHAIRMAN GRIFFIS: So your point is that he can't make observations - I need another cup of coffee - that are not opinionated because he's being paid.

MR. HUNSICKER: No. My point is a simple one. If his observation is based on say one hour, I would argue that it is not as meaningful as it would be if it's based on full-time presence. That's why I'm simply --

CHAIRMAN GRIFFIS: Okay. I understand the point. I think he's given answers and testimony to when he is there onsite and when he isn't. So the Board is aware of that. I now understand your point. Another question?

MR. HUNSICKER: He answered when his staff was on point. I believe his testimony indicates that he has made occasional observations.

CHAIRMAN GRIFFIS: Right. I think he's very clear as far as our understanding of when he is

there and not. Sometimes he comes after the morning session or drop-offs and all that.

MR. HUNSICKER: Right. My question is a simple one, Sergeant Wilson. Approximately how many hours of your time have you billed since this contract has been implemented?

CHAIRMAN GRIFFIS: Let's move on. I understand the question and I understand his answers. Next question.

MR. HUNSICKER: There hasn't been an answer to this question with respect, Chair. It goes to identifying how many hours, the value of his observation.

CHAIRMAN GRIFFIS: How many hours have you billed to date?

SERGEANT WILSON: Billed to date for my time?

CHAIRMAN GRIFFIS: Yes.

MR. HUNSICKER: Correct, sir.

SERGEANT WILSON: Zero.

CHAIRMAN GRIFFIS: Next question.

MR. HUNSICKER: Okay.

CHAIRMAN GRIFFIS: Wait a minute. How could you have billed zero hours?

SERGEANT WILSON: I have not submitted a

bill for my time at all. It's strictly for my staff.

CHAIRMAN GRIFFIS: Now we're getting into the technicalities of it. When you submit a bill, how many hours would there be?

SERGEANT WILSON: Right now, I'm looking at least 60 hours so far depending on when this hearing is over. Depending on how long I'm here determines it.

CHAIRMAN GRIFFIS: See that.

SERGEANT WILSON: So far at least 60 hours.

CHAIRMAN GRIFFIS: We're racking it up.

MR. HUNSICKER: I have many more questions, Sergeant Wilson.

CHAIRMAN GRIFFIS: I can't imagine how much this costs.

MR. HUNSICKER: Ms. Piggott --

CHAIRMAN GRIFFIS: Actually it's a very interesting point because if I understand what you're trying to get to is his billable hours going to tell us how much he's actually there to observe. Right? Now we have to factor out how many hearings he's actually been at. If everything attended to this, do you understand why I didn't want to go into this? It doesn't get us to where you want us to figure out.

Let's move on.

MR. HUNSICKER: Okay. Ms. Piggott, you indicated that TMP as presently implemented is a flexible one such that you may or may not have people at intersections is how I understood your testimony. Is that correct?

MS. PIGGOTT: Yes, somewhat.

MR. HUNSICKER: When we talk about intersections, could you identify the intersections that are at issue?

MS. PIGGOTT: In the morning peak time, one of the traffic guards that Sergeant Wilson hires is at the intersection of 33rd and Newark Streets. That was to help our parents learn that we have a one way pass through.

CHAIRMAN GRIFFIS: Okay. Short answers.

MS. PIGGOTT: There is no other intersection at which we have a person.

MR. HUNSICKER: Okay, but who on a day-to-day basis implements the flexibility? Who makes the decisions that a person at one spot is required for a given time?

CHAIRMAN GRIFFIS: Right. Who directs the flexibility?

MS. PIGGOTT: There's a carpool captain at

each carpool. I'm out there at almost every carpool every day. Ms. Williams is out there for three or four carpools every day and every one has someone in charge.

CHAIRMAN GRIFFIS: Wait a minute. So you have three people making decisions on who's moving where. The troops are moving, but three people are calling those shots.

MS. PIGGOTT: Not at the same time. I'm just saying we're out there.

CHAIRMAN GRIFFIS: I hope not, but who is in charge? How do you actually have it not chaos and people running down the block and up the block and moving over to other intersections? I think that's the point of the question, isn't it?

MS. PIGGOTT: Whoever is out there who is senior in terms of our hierarchy. If I'm out there, then I direct the carpool. If Ms. Williams is out there and I can't be out there, she directs the carpool.

CHAIRMAN GRIFFIS: I see.

MS. PIGGOTT: It's not chaotic at all.

CHAIRMAN GRIFFIS: So there's always only one person at a time that's actually directing the flexibility as you've described it.

MS. PIGGOTT: Yes.

CHAIRMAN GRIFFIS: Okay.

MR. HUNSICKER: Is that correct, Ms. Piggott? One person at a time?

MS. PIGGOTT: Well, we work together so that the person who's at the white line can just let us know what information we need to deal with.

MR. HUNSICKER: When you're saying "out there" I take it you're referring to the front of NCRC on Highland. Is that correct?

MS. PIGGOTT: Yes and also on Ordway.

MR. HUNSICKER: So is it one person on Highland or is it one person on Ordway that is coordinating this flexibility?

MS. PIGGOTT: In terms of the coordination, there is one person who is coordinating, but there are eight personnel generally out on Highland Place either taking children out of cars or working at the white lines.

CHAIRMAN GRIFFIS: Is the same person that directs the flexibility on Highland also simultaneously directing the flexibility on Ordway?

MS. PIGGOTT: No.

CHAIRMAN GRIFFIS: So you have a different person on Ordway that's saying "We have chaos so move

the troops north." Then there's a different person on Highland.

MS. PIGGOTT: But there's no carpool line on Ordway. The people that are on Ordway Street to remind parents about u-turns, illegal parking and to remind parents about walking and where they are supposed to cross the street.

CHAIRMAN GRIFFIS: Right. But the person standing on Highland if I understand – I'm sorry. I'm being a little bit badly humorous - that's directly the flexibility that you talked about on Highland is not also responsible for understanding and making directive calls on Ordway.

MS. PIGGOTT: No.

CHAIRMAN GRIFFIS: So there's a separate person that's there.

MS. PIGGOTT: Or two.

CHAIRMAN GRIFFIS: Indeed. Two.

MR. HUNSICKER: Thank you. I have no further questions.

CHAIRMAN GRIFFIS: Thank you. Next.

MR. BECKNER: Good morning, Mr. Chairman. For the record, Bruce Beckner. 3225 Highland Place. Ms. Piggot, how many staff people not counting the folks supplied by Sergeant Wilson are involved on the

street in implementing this TMP from the school?

MS. PIGGOTT: It depends upon the carpool and it depends on how many people we can get out there and what kind of situation we have. I would say that on Highland Place there are at least six people in orange vests at all times, sometimes eight and sometimes more than that.

MR. BECKNER: Now are these people out for every drop-off or pick-up event during the school day?

MS. PIGGOTT: Yes.

MR. BECKNER: Do these people have other duties besides managing traffic?

MS. PIGGOTT: Yes.

MR. BECKNER: Some of them are teachers. Isn't that correct?

MS. PIGGOTT: Some of them are teachers.

CHAIRMAN GRIFFIS: We're going a bit beyond some of the testimony we've heard today and we've heard all this.

MR. BECKNER: All right. Now the school has had TMPs in place every year since you've been charge of this school. Isn't that correct?

MS. PIGGOTT: Yes.

MR. BECKNER: And you've informed the parents every year of what the plan is for the coming

school year. Isn't that correct?

MS. PIGGOTT: That's correct.

MR. BECKNER: Is the parents compliance this year with the TMP better or worse or the same as compliance in the previous years in which you've run the school?

MS. PIGGOTT: I think that there's been an improvement in compliance with the TMP.

MR. BECKNER: And to what do you attribute that?

MS. PIGGOTT: I think that we have been clearer in our instructions to the parents. We've had more of a practice period in our traffic hours. We've been on the street more and we've put this into our contracts with parents.

MR. BECKNER: Have you stated any policy to the parents regarding the practice of parking their cars and walking their children to school either discouraging or encouraging that?

MS. PIGGOTT: No.

MR. BECKNER: Do you recall whether or not you were present at the morning drop-off on Monday, November 17 of this year?

MS. PIGGOTT: No.

MR. BECKNER: You don't remember?

MS. PIGGOTT: Oh, this Monday.

MR. BECKNER: November 17th, yes.

MS. PIGGOTT: Yes.

CHAIRMAN GRIFFIS: Was that only yesterday?

MS. PIGGOTT: I know.

MR. BECKNER: I'm going to show you a series of photographs that were taken.

CHAIRMAN GRIFFIS: I'm not understanding where this is going in crossing her testimony from today.

MR. BECKNER: Well, Mr. Chairman, the photographs show what appears to be a lawn care truck parked. Ms. Piggott, I believe, referred in her testimony to the flexibility of her plan. I wanted to ask her with regard to this situation what she did to deal with that if anything.

CHAIRMAN GRIFFIS: Okay.

MR. BECKNER: She just testified that the plan was flexible.

CHAIRMAN GRIFFIS: Ask your question.

MR. BECKNER: So, Ms. Piggott, I'm going to hand you this. I'll ask you to disregard the last photograph because it says it was taken at 10:20 a.m. Just look at the first three. Mr. Chairman, there are

copies of this being lodged with the Secretary's office. We just got these today.

CHAIRMAN GRIFFIS: There is what?

MR. BECKNER: There are copies of these photographs being lodged with the Secretary's office.

MS. PIGGOTT: Okay.

MR. BECKNER: Do you recall seeing this situation on the street on this Monday?

MS. PIGGOTT: I recall in the morning carpool, yes, seeing this lawn care truck on the street.

CHAIRMAN GRIFFIS: Let's go right to the heart of the matter.

MR. BECKNER: What did you do to deal with this situation if anything?

MS. PIGGOTT: Mr. Beckner, I think that these pictures are misleading. They are still photographs and so what you see is a lawn care truck and cars parked on the other side of the street. Then you see a car in the middle, but the car is moving down the street. You can't see that in this picture.

CHAIRMAN GRIFFIS: Ms. Piggott, what did you do? What's the flexibility and how was it dealt with in this situation?

MS. PIGGOTT: In the pictures I'm looking

at, there doesn't need to be an flexibility. The cars are moving fine down the middle of the street where they are supposed to be moving.

CHAIRMAN GRIFFIS: You don't recall having to have done anything differently.

MS. PIGGOTT: No, I know what I would have done if there had suddenly been a situation where it looked like they might have been blocked.

CHAIRMAN GRIFFIS: Okay.

MS. PIGGOTT: I would have held the cars back further.

CHAIRMAN GRIFFIS: That's fine.

MR. BECKNER: Look at the third picture which has a Mercedes Benz. I'll show you the larger picture. That car appears to be stopped on the line, doesn't it?

MS. PIGGOTT: Well, it appears to be stopped, but, Mr. Beckner, I don't think you can tell that. From what I remember and I'm out there everyday and see, there are often neighbors that jump out and take pictures of a scene like that and the cars are moving.

CHAIRMAN GRIFFIS: All right. So you can't assess the situation because it's a still photograph.

MS. PIGGOTT: No.

MR. BECKNER: If I may comment.

CHAIRMAN GRIFFIS: I don't know if you can. You're not being crossed. The question is going to Ms. Piggott.

MS. DWYER: Mr. Chairman, I would object. If we're going to have a series of questions of still photographs taken at certain times when the witness has testified to is the general procedures, the fact that there is flexibility and she has also pointed out that these photographs are not reflective of a situation because there's no way of telling whether the car is stopped or the car is moving.

CHAIRMAN GRIFFIS: Understood.

MS. DWYER: So I think the probative value of doing this is nil and it's extending the cross examination way beyond the initial scope of her testimony which is five minutes of direct testimony.

CHAIRMAN GRIFFIS: Okay. I'm not sure we're balancing time to time.

MR. BECKNER: I have a couple of questions for Sergeant Wilson if I may. Sergeant Wilson, let me just make sure. Your staff are routinely stationed at the intersection of 33rd and Newark Streets.

CHAIRMAN GRIFFIS: Let's get right to the

questions because each one of you are asking the same thing.

MR. BECKNER: Is the other person directly in front of NCRC on the street?

SERGEANT WILSON: Just about. It's directly across from the blind spot.

MR. BECKNER: So that person is standing on the other side of the street from NCRC or on the same side.

SERGEANT WILSON: On the same side of NCRC.

MR. BECKNER: What's that person's function? What's he suppose to do?

SERGEANT WILSON: He can see traffic coming in both directions and make that cars coming from either direction can safely get across. He also can identify any parents there or any persons dropping off a child that doesn't have a proper sticker.

CHAIRMAN GRIFFIS: Okay. Next question.

VICE CHAIR ETHERLY: Mr. Chair, if you could pause for a moment. I agreed with the objection that was lodged regarding the question of Ms. Piggott. However I do recall that Sergeant Wilson's testimony did speak to the contingency of contract of vehicles and other such vehicles in the neighborhood. I want

to be careful about how I come back to this, but I would like to hear Sergeant Wilson's comment on that issue because we did open the door, Mr. Chairman with that.

CHAIRMAN GRIFFIS: I understand that but he wasn't crossing. He's clearly able when he started crossing the Sergeant. If he wants to take those out then --

VICE CHAIRMAN ETHERLY: I agreed with that. I'm giving Mr. Beckner guidance to reach out to Sergeant Wilson on that particular question.

CHAIRMAN GRIFFIS: You have to answer the questions at this point. Further on that in terms of direction, let's get right to the heart of the question and what you're trying to poke a hole in terms of the testimony. Get right to it. We don't need a big stage set here.

MR. BECKNER: I think the witness was in the middle of giving an answer. I'll let him finish.

SERGEANT WILSON: I was about to comment about yesterday morning about the still photographs. I witnessed everything that took place. What the resident was doing was cars were coming and when the car got parallel with the contract vehicle, she stepped out, took the picture and step back. There

was no time where there was an interruption with the flow of traffic. The car continued up, dropped off and kept going. There was no interruption in the traffic whatsoever.

MR. BECKNER: So your testimony would be that there was no standing traffic. That it was all moving traffic.

SERGEANT WILSON: There was no standing traffic that was parallel with that contractor vehicle that would impede anyone from going up and down the street.

MR. BECKNER: Okay.

SERGEANT WILSON: So there was nothing for them to do.

CHAIRMAN GRIFFIS: Good.

MS. BAILEY: Mr. Chairman, the documents that are being spoken about. Are we accepting those into the record?

CHAIRMAN GRIFFIS: We haven't yet.

MS. BAILEY: I'm sorry, sir. I didn't hear you.

CHAIRMAN GRIFFIS: We have not yet.

MR. BECKNER: Sergeant Wilson, the people that are employed by you are not Metropolitan Police Department officers. Is that correct?

SERGEANT WILSON: No.

MR. BECKNER: Are you aware of the fact that for instance Murray School does use Metropolitan Police Officers?

CHAIRMAN GRIFFIS: This is what I'm getting to. Bundle all the questions together. Where are you going for him to answer?

MR. BECKNER: I wanted to know whether or not there is any advantage in his view to having Metropolitan Police Officers implemented at the NCRC.

CHAIRMAN GRIFFIS: Excellent question. Is there any advantage?

SERGEANT WILSON: No, all depends on the circumstance of the school and so forth. I'm familiar with Murray School. I set it up. That's what they specifically requested.

CHAIRMAN GRIFFIS: Okay.

MR. BECKNER: Metropolitan Police Officer would have authority to cite people for traffic violations. Would they not?

SERGEANT WILSON: No.

MR. BECKNER: They would not.

SERGEANT WILSON: Not if they're working off duty, no.

MR. BECKNER: Okay. Nothing further, Mr.

Chairman. Thank you.

CHAIRMAN GRIFFIS: Thank you very much. Ms. Badami, have a seat. As we've already talked about the photographs that have come in, I'm going to have them into the record so we don't have any controversy.

MS. DWYER: I would object. There's only one day, November 17th. He has a whole series of photographs. So the only one the witness was questioned about was that one day.

CHAIRMAN GRIFFIS: That's right. November 17th there were three photographs.

MS. DWYER: And all the other photographs should be excluded.

CHAIRMAN GRIFFIS: The last photograph is incorrectly in time or labeled so we'll take the first three that are in that you've seen. We'll take those in. Is that clear, Ms. Bailey?

MS. BAILEY: Yes, sir.

CHAIRMAN GRIFFIS: Excellent. Thank you.

MR. BECKNER: Mr. Chairman.

CHAIRMAN GRIFFIS: Yes.

MR. BECKNER: I have copies of those three photographs I want to show him just to make sure we're in agreement as to what it is I'm showing him.

MS. DWYER: What we were looking at when you were questioning was one page with the three photographs on it.

MR. BECKNER: Here's the three photographs.

MS. DWYER: Right. Can I see the one page with the three photographs?

CHAIRMAN GRIFFIS: Yes, why don't we just submit that one page?

MS. DWYER: Just the one page rather than the three photographs.

MR. BECKNER: The one page, Mr. Chairman, has an additional photograph that the witness wasn't questioned on. I was just trying to make it simple.

CHAIRMAN GRIFFIS: We'll let it slide in, plus we save all that paper.

MS. DWYER: The last photograph is the one that shows no cars on the street. We'll let that in the record.

CHAIRMAN GRIFFIS: Okay. A single page was accepted in and it will become Exhibit No. something. Let's go.

(Discussion off microphone.)

MS. BADAMI: I'm Linda Badami from 3207 Highland Place. First to Ms. Piggott. You said you

had extended the drop-off time in the morning.

MS. PIGGOTT: That's correct.

MS. BADAMI: Have you extended the drop-off time in midday when the congestion is the worst?

MS. PIGGOTT: That's not a formal part of our TMP. We do watch that situation that carpool when the direction is enforced.

CHAIRMAN GRIFFIS: No. Is that correct?

MS. PIGGOTT: No.

MS. BADAMI: Sergeant Wilson, you said that you had three guards. Were you present in the first several weeks of school or was there just the three guards? I don't remember.

SERGEANT WILSON: I had three individuals present for the first three to four weeks of school.

MS. BADAMI: Okay. Are you aware that not all the students enrolled in NCRC were attending during the first few weeks of school?

SERGEANT WILSON: No.

MS. BADAMI: And you said you've been coming the last three weeks unannounced to observe traffic. Have you been in uniform during those times?

SERGEANT WILSON: The way I'm dressed now, yes.

MS. BADAMI: And were you carrying a

clipboard at that time?

SERGEANT WILSON: Yes.

MS. BADAMI: And were you visible to all drivers at that time?

SERGEANT WILSON: In some cases, yes.

CHAIRMAN GRIFFIS: Do you think that would affect the drivers that are going around seeing you in your blue shirt and a clipboard?

SERGEANT WILSON: No.

CHAIRMAN GRIFFIS: So you don't think it would have affected the behavior.

SERGEANT WILSON: It wouldn't have had an effect because you have contractors that come there. They see me standing there. They blow right through the stop sign.

MS. BADAMI: For the guard that's standing at 33rd and Newark, do they have the authority to wave commuters through the stop sign?

SERGEANT WILSON: No.

CHAIRMAN GRIFFIS: Nothing else.

MS. BADAMI: That's all for this panel.

CHAIRMAN GRIFFIS: Right. Have we been through everyone? All right. This is what we're going to do. We're going to have redirect of the

panel while it's here so we don't have to bring them up again. Then at the very end if there's recross on the redirect, we will call those individuals up. Ms. Dwyer, when you're ready.

REDIRECT EXAMINATION

MS. DWYER: I just want to follow up on a couple of questions. This is for Ms. Piggott. Mr. Nettler asked you whether you had viewed the video and you said "yes." Is that correct?

MS. PIGGOTT: Yes, that's correct.

MS. DWYER: And you also have testified that you have been out at the site on a daily basis over the last year and a half monitoring the TMP operation. Is that correct?

MS. PIGGOTT: Yes.

MS. DWYER: In your opinion, does that video in any way accurately reflect the TMP operation over the last year and a half?

MS. PIGGOTT: Not in any way.

MS. DWYER: All right. Thank you.

CHAIRMAN GRIFFIS: Okay. Let's have the architect and the transportation engineer up.

CROSS EXAMINATION

MS. MacWOOD: For the record, Nancy MacWood for the ANC. This will be very quick. I only

have a couple of questions. Mr. Anthony, you testified this morning a bit about the HPRB. Did the HPRB have any awareness of the need for variance relief for this project?

MR. ANTHONY: I'm not sure. I would assume so but I'm not sure.

MS. MacWOOD: You assume that HPRB knew that there would be a need for zoning relief in this case, a variance.

MR. ANTHONY: I'm really not sure what they understood the case to be.

MS. MacWOOD: Let me rephrase the question. Did HPRB address any zoning issues?

MR. ANTHONY: Not that I'm aware of, no.

CHAIRMAN GRIFFIS: And I would hope they wouldn't.

MS. MacWOOD: In fact, were you there when Steve Calcott, the staff member for Historic Preservation Office --

MS. DWYER: Mr. Chair, this has already been testified to. It's in the record as to what the HPRB staff report says about zoning.

CHAIRMAN GRIFFIS: We have the staff report in the record.

MS. MacWOOD: I just want to make it clear

in the record that the HPRB did not consider any of these zoning issues and there was never any consideration of where a lot line would be or anything.

CHAIRMAN GRIFFIS: Well, we won't take up any of the historic issues.

MS. MacWOOD: Good. Mr. George, I just have probably one question for you. The discussion that you had with the Chairman about the 20 foot wide street and the accident rate. In your estimation, what would be the cause of high accident rate on the 20 foot wide street if as you postulated there likely wouldn't be any parking on that street? I'm just asking for your opinion.

CHAIRMAN GRIFFIS: Professional expert opinion?

MS. MacWOOD: Yes.

MR. GEORGE: Could you repeat the question? I want to make sure I get you.

MS. MacWOOD: Okay. What in your expert opinion would be the likely cause of a high accident rate on a 20 foot wide street if there wasn't any parking on that street? You had mentioned that you thought on a 20 foot wide street there likely wouldn't be any parking on the street. What would be the

cause?

MS. DWYER: I think the witness already answered that and said it would be a major road with a high volume of traffic.

CHAIRMAN GRIFFIS: All right.

MS. MacWOOD: Is that your answer? I wasn't aware that it was his response to that question.

MR. GEORGE: That was my response. I think in the middle of the paragraph it referred to our arterial street and the last sentence Mr. Chairman pointed to it referred to a major street. So if you talk about those two characteristics on a 20 foot street, they could correlate to a high accident rate.

MS. MacWOOD: Are you suggesting that it would be an arterial street because a 20 foot street wouldn't be an arterial?

CHAIRMAN GRIFFIS: Okay. Are you going to go too far into it? You're going to just review.

MS. MacWOOD: Yes.

CHAIRMAN GRIFFIS: It's fairly clear. I'm sorry. I pulled an excerpt out of page 29 of Chapter 13 of Residential Neighborhood Streets of the TLD actually. The second edition is where it's actually cited from. I think it's clearer if you go back to

what I was citing, the type of streets that are broken down in terms of the dimension. Let's continue on.

MS. MacWOOD: All right. So just to be absolutely clear and this is my last question, you would say that for a 20 foot wide street that the major cause would be the amount of traffic and it would not be the line of the street whether it's a curved street, whether there's parking. That it would simply be the amount of traffic on the street. Is that right?

MR. GEORGE: I think it relates to the function of the street which is described in the paragraph as an arterial street. It relates to the other characteristics being a major street which is defined in the last sentence. I think those two characteristics.

MS. MacWOOD: All right. Thank you.

MR. NETTLER: Richard Nettler for Cleveland Park Neighbors. Mr. Anthony, in your testimony on the particular difficulty issue, you testified that the lot issue was manufactured as an impediment in this case. Who manufactured that issue?

MR. ANTHONY: Well, that is my opinion and I think the opponents have.

MR. NETTLER: The opponents. So it's not

really in the Zoning Regulations. It's just something that has been manufactured by the opponents in this case.

MR. ANTHONY: I think, yes.

MR. NETTLER: So your testimony is that there is no prohibition against having more than one principal building on a single subdivided lot.

MR. ANTHONY: That's not my testimony.

MR. NETTLER: So how was the lot issue manufactured by those who are opposing this?

MR. ANTHONY: My point is that when you look at this project on balance and you look at the alternatives that it's not a position that promotes the best solution for either the neighbors, for NCRC, the neighborhood, the historic district, any of those.

MR. NETTLER: So in responding to the proposal by NCRC, your expectation I gather from that statement is that for the zoning adjustment and the neighbors should only be concerned about applying some of the Zoning Regulations but not all of the Zoning Regulations.

MR. ANTHONY: That's not my testimony.

MR. NETTLER: Is it your testimony then that --

CHAIRMAN GRIFFIS: Why don't you ask him

what his testimony is rather than giving it to him?

MR. NETTLER: I've been trying to get that and apparently every time I rephrase as to what it is, he says that's not his testimony.

CHAIRMAN GRIFFIS: Okay.

MR. NETTLER: So what is it that's your testimony about the manufacturers? Is it any different than what you just said in terms of --

MS. DWYER: I think what he just testified to was it was his personal opinion.

CHAIRMAN GRIFFIS: Is that correct?

MR. ANTHONY: That's correct. It's my observation of this process and this particular issue.

MR. NETTLER: You didn't identify this issue as one when you self-certified this application, did you?

MR. ANTHONY: No, I didn't.

MR. NETTLER: You're aware of the side yard requirements in a residential zone, are you not?

MR. ANTHONY: Yes.

MR. NETTLER: Are you allowed to locate a building in a side yard of a principal building?

MR. ANTHONY: Out to a locate --

MR. NETTLER: No, in a side yard of a principal building.

MR. ANTHONY: Typically not.

MR. NETTLER: But you are locating another -- Forget the two or more principal buildings on a single subdivided lot. You are locating a building in the side yard of an existing building, are you not?

MEMBER ZAIDAIN: Mr. Nettler, are you referring to an accessory structure or a principal building?

MR. NETTLER: Any structure under the Zoning Regulations.

MEMBER ZAIDAIN: Well, there's a difference.

MR. NETTLER: No, I'm not dealing with the principal building issue. We're just dealing with the side yard issue.

CHAIRMAN GRIFFIS: Just the side yard.

MEMBER ZAIDAIN: Well, he should clarify the question.

CHAIRMAN GRIFFIS: The accessory in a side yard is the question.

MR. NETTLER: The accessory or a principal. The accessory buildings in a side yard. Are you allowed to locate an accessory building in a side yard?

MR. ANTHONY: Yes.

MR. NETTLER: You are. And that's from your understanding of the Zoning Regulations.

MR. ANTHONY: Yes.

MR. NETTLER: With regard to the location of the building that you proposed to be constructed, how far is it from the side yard of the west lot line?

MR. ANTHONY: Are you referring to the carriage house?

MR. NETTLER: Correct.

MR. ANTHONY: It's --

MS. DWYER: Mr. Chair, I would object. His testimony is on the practical difficulties in trying to draw a lot line between the two buildings. This is going back and questioning the plans and his previous testimony.

MR. NETTLER: He's testified that if he was to have to comply with the Zoning Regulations that he would not have to meet the side yard setback requirements.

CHAIRMAN GRIFFIS: Right.

MR. NETTLER: I'm asking him whether he meets the side yard setback requirements with this particular building right now.

CHAIRMAN GRIFFIS: That was my point in going into all of this and looking at the alternatives

and what might happen.

MR. NETTLER: I'm not going into the alternatives. I'm going into this building right now.

CHAIRMAN GRIFFIS: Okay.

MR. NETTLER: Didn't mention the alternative at all. Does it comply with the side yard setback requirements?

MR. ANTHONY: Yes, it does.

MR. NETTLER: So just using this building as you proposed it and the existing building, you're saying that a lot line can't be drawn in a way that would not lead to a violation of the side yard setback requirements.

MR. ANTHONY: If I understand your question correctly, yes.

MR. NETTLER: So that means that you could subdivide this lot without raising a side yard setback issue just with your proposal, wouldn't you?

MR. ANTHONY: No, not with my proposal.

MR. NETTLER: Well, wouldn't both buildings still comply with the side yard setback requirements as you presently propose them?

MR. ANTHONY: Not if you break off a separate line, no.

MR. NETTLER: It depends on where you draw

that lot line, isn't it?

MR. ANTHONY: I don't think there's any line that you could draw based on the design that's currently drafted.

MR. NETTLER: And you haven't done anything that you've presented here in rebuttal that shows you having done a theoretical – not using the theoretical subdivision provisions of the Zoning Regulations - but a theoretical subdivision of this lot to show whether that is the case or not, have you?

MS. DWYER: I would disagree. I think he drew on the drawing where the lot line would go.

MR. NETTLER: A lot line.

CHAIRMAN GRIFFIS: One hypothetical scenario.

MR. ANTHONY: That's correct.

MR. NETTLER: But you haven't looked at all just dealing with what's proposed as a building and the existing building a lot line that would be able to divide up these two lots into two lots that would comply with the Zoning Regulations.

MR. ANTHONY: As I stated, I don't think there is one.

MR. NETTLER: But you've only presented one possibility. Is that correct?

MR. ANTHONY: After having looked at what I thought were the possibilities --

CHAIRMAN GRIFFIS: Yes. Answer.

MR. NETTLER: Let me ask you then. If you drew a lot line down the half of that lot --

CHAIRMAN GRIFFIS: Mr. Nettler, I'm not sure of the relevance for us to go through all the scenarios. It's clear from his answer and I understand that he did not present today a subdivision that he thinks would work according to Zoning. Now you're asking him to go in and investigate the opportunities --

MR. NETTLER: No, I'm just saying. Looking at the lot as it sits in front of us and you can see it on the board up there and knowing the size of the lot that it is and this is an R-1-A district.

CHAIRMAN GRIFFIS: Right.

MR. NETTLER: And the minimum lot width requirements and his testimony that the buildings as they sit there today meet all side yard, rear yard, other requirements, drawing a line down the center of that lot --

CHAIRMAN GRIFFIS: Again he has to look at alternatives.

MR. NETTLER: Excuse me. No, I'm not

looking at alternatives. I'm talking about the building that he's proposing.

CHAIRMAN GRIFFIS: Right.

MR. NETTLER: Drawing a line down half of that lot, where would the zoning violation be?

CHAIRMAN GRIFFIS: If he went to a subdivision.

MR. NETTLER: Correct.

MS. DWYER: I would object. I think what the witness has testified to is that he's looked at all ways to draw the lot and the only way that he could draw the lot was as shown between the two buildings which creates a need for variance relief.

MEMBER ZAIDAIN: And that's based on the design that was submitted. There are no alternative designs.

CHAIRMAN GRIFFIS: The design was something that was fascinating. What are we going to do it?

MR. NETTLER: Excuse me.

CHAIRMAN GRIFFIS: Even if we came up with an alternative one and get him to a point where he --

MR. NETTLER: I'm not talking about an alternative building. I'm talking about the building that he's designed which he says meets all other

requirements. Intuitively if you just look at that lot and divide it in half, you have two lots that would in terms of the size meet the Zoning requirements for a lot size. Then the question remains then is that you have the building that is being proposed. It's still sitting on that lot that's being created which he says meets the side yard requirements and purportedly meets the rear yard requirements. Why doesn't it then meet the Zoning requirements?

MS. DWYER: Mr. Chairman.

MR. NETTLER: Because the practical difficulty.

CHAIRMAN GRIFFIS: So he went into the practical difficulties of alternatives.

MR. NETTLER: I'm not dealing with alternatives. I'm dealing with what's proposed.

MS. DWYER: Mr. Chairman, may I just interject here? If Mr. Nettler feels that there is another way to draw the lot line, that it was incumbent upon him during the course of his direct presentation to show that.

CHAIRMAN GRIFFIS: Right. We've already done that.

MS. DWYER: This witness has testified

that at looking at the site he could not find anyway to draw the lot line that would not create a need for variance relief.

CHAIRMAN GRIFFIS: Right.

MR. NETTLER: And I'm challenging his credibility of that testimony because as you sit here today if it meets the Zoning requirements in terms of side yard and rear yard, drawing a lot line down half of that lot wouldn't create a need for a variance at all. Just drawing a lot line. Just look at it.

MEMBER ZAIDAIN: But you're saying without any sort of expansion or additional building.

MR. NETTLER: No, with the additional building that he's proposing sitting on the lot where he's siting it.

MEMBER ZAIDAIN: So your rebuttal testimony were readily --

MR. NETTLER: I'm not testifying.

MEMBER ZAIDAIN: You're trying to get to the point that --

MR. NETTLER: It's one thing for him to present to you a picture that creates a variance.

MEMBER ZAIDAIN: Let me finish my question.

MR. NETTLER: -- whether there actually is

a need.

MEMBER ZAIDAIN: But you're trying to get to the point saying that you can take the design that has been presented to this Board and draw a line that will subdivide this lot and meet all the Zoning requirements. Is that where you're headed?

MR. NETTLER: That's correct.

MS. DWYER: Then he should have done that in his direct testimony. It's not this witness's job or the purpose of cross examination of this witness to make his case.

CHAIRMAN GRIFFIS: Right. That's where I think we've exhausted, but I think the point is made, Mr. Nettler. Do you want a follow-up question?

MR. NETTLER: Yes, I will follow up. Do you know what the Self-created Hardship Rule refers to under the area variance test?

MR. ANTHONY: Basically, yes.

MR. NETTLER: What is that?

MR. ANTHONY: I think the words are self-evident that you can't create a situation of your own doing that would require the variance.

MR. NETTLER: You don't think that applies here.

MR. ANTHONY: I don't.

MR. NETTLER: Let me ask you about your comment regarding the variance relief for off-street parking. Now it's your position, is it not, that as the lot exists today because it's a lot located in the historic district and because the present building that sits on it is a contributing building that it need not comply with the parking requirements?

MS. DWYER: I would object. It's not this witness's position. It's the Board's position that the Applicant is entitled to the parking waiver.

MR. NETTLER: Is it your position as well?

MR. ANTHONY: Yes.

MR. NETTLER: Now your testimony I gather that is if you subdivide the lot, still the same lot, still the same historic district, that because you've subdivided the lot, you now need to comply with the parking requirement.

MR. ANTHONY: Yes.

MR. NETTLER: And why is that?

MR. ANTHONY: Because it's a separate lot.

MR. NETTLER: In the historic district?

MR. ANTHONY: Without a contributing building upon it.

MR. NETTLER: Without a contributing building. So the fact that there's a contributing

building on the lot, you're testifying, gives you the opportunity to get a waiver for any new construction on the lot.

MS. DWYER: That again is what the Board found.

MR. NETTLER: Is that your position?

MR. ANTHONY: Yes.

MR. NETTLER: Have you seen any prior Zoning decisions that support that?

MR. ANTHONY: Basically I read the paragraph in the Ordinance and I think it's extremely clear.

MR. NETTLER: Extremely clear, but you haven't seen any prior Zoning decisions that have said that.

MR. ANTHONY: Actually I read some of your things but I think the Ordinance is really clear.

MR. NETTLER: You said that you'd have to remove certain trees if you were to subdivide the lot and comply with the Zoning Regulations. Can you point which trees those would be?

MR. ANTHONY: Sure. I was referring that if the building were to expand in this direction, these larger mature trees in this area here.

MR. NETTLER: Okay. And how many mature

trees are those?

MR. ANTHONY: I believe there's 9, 10, 12 or something like that.

MR. NETTLER: And how many mature trees are being taken out for where the building presently is being located?

MR. ANTHONY: Based on the arborist letter and my own opinion, basically there are no mature trees in that area.

MR. NETTLER: Is that because you're distinguishing mature trees that are natural to the site as opposed to mature trees that were planted pursuant to some agreement between the school and the community or some other trees?

MR. ANTHONY: I'm distinguishing between size, caliper and species.

MR. NETTLER: So the answer is yes. And why would you have to move the building forward to comply with the subdivision requirements?

MR. ANTHONY: Because the building as currently configured because it's immediately adjacent to the playhouse would need to be squeezed in some direction in order to comply with the side yard setback requirements for both.

MR. NETTLER: Is that because that would

put a building in the side yard of the building that you want to construct?

MR. ANTHONY: This is in the alternative mode. We looked at a lot line which I drew on the drawing where there would be a setback from the playhouse, then a property line and it required side yard setback from this new lot. That distance would require that the existing design be reconfigured in a way which I was suggesting most likely and I think it's the only alternative would be to expand the building up further into the center part of the lot which is where the most mature trees are and which creates a number of other difficulties for us.

MR. NETTLER: The playhouse would be on which lot then if you were to go forward with that plan?

MR. ANTHONY: The playhouse would be on the lot with the original house.

MR. NETTLER: With the original house, and what about the possibility of drawing the line on the other side of the playhouse so that it's on the same lot as the new construction?

MS. DWYER: I'm trying to understand your question. So you'd be drawing a lot line to create two new principal buildings on a single record lot.

MR. NETTLER: Well, would the playhouse be considered a principal building? Obviously not. Had you thought about drawing a line on the other side of the playhouse then?

MR. ANTHONY: For this exercise, I did not look at a lot line on that side.

MR. NETTLER: Okay. Thank you. You made reference to the trees that were being removed that were planted in 1994. Were you aware that those were planted pursuant to some agreement?

MR. ANTHONY: I am aware that some of them were but not all of them.

MR. NETTLER: Okay. Mr. George, a number of documents were submitted with your testimony that are excerpts from the TND Guidelines and Uniform Vehicle Code and some other documents. You are familiar with the documents that were submitted.

MR. GEORGE: Yes, sir.

MR. NETTLER: I notice that at least the excerpts from the TND doesn't have a date on it. Do you know what the date of that document is?

MR. GEORGE: I would just like to review it to make sure I didn't submit the cover page.

MR. NETTLER: Well, you did submit the cover page.

MR. GEORGE: It says on the cover page 1997.

MR. NETTLER: That's not the most recent book, is it? There's been a supplement to that book, hasn't there been?

MR. GEORGE: There has been an update, yes.

MR. NETTLER: Do you know whether the update contains different information in it than the book that you submitted?

MR. GEORGE: I believe I have a copy of that and I don't believe that it's substantially different.

MR. NETTLER: Was there a reason why you only submitted portions of this and not the update or the other portions of this book related to safety issues, related to speed on these types of streets, related to design speed, related to regulatory issues, other things concerning this type of traffic issues regarding a residential street and neighborhood?

MR. GEORGE: I believe a lot of the Board's inquiry had to do with the delaying the use of road ways in particularly Highland Place. I thought that page 5, Section D2 of that document dealt with that issue very concisely and clearly.

MR. NETTLER: Do you know whether the way in which that's dealt with in the 1999 supplement is the same?

MR. GEORGE: I cannot say as I sit here.

MR. NETTLER: You can't say that.

MR. GEORGE: No.

MR. NETTLER: Are you familiar with the provisions of the TND that deals with neighborhood size and the section D of that document?

MS. DWYER: Is this information that we filed on the record?

MR. NETTLER: No, you didn't.

MS. DWYER: Then I think it's beyond the scope of the direct testimony.

CHAIRMAN GRIFFIS: Indeed.

MS. DWYER: Mr. George's testimony was rebuttal testimony in response to an issue raised in the course of the hearing. This is not the opportunity to go into other areas of manuals or regulations.

CHAIRMAN GRIFFIS: I agree.

MR. NETTLER: He submitted pages from a manual to support his position. I'm asking if he's familiar with other statements within that particular manual.

CHAIRMAN GRIFFIS: But we're not going to go into the substance of the revisions that weren't submitted in from 1999.

MR. NETTLER: No, I'm going to submit those in response to his statement to make it complete so that the Board would have a complete record of that.

MS. DWYER: I would object to that. I don't think there's any basis for the submission of this additional material.

MR. NETTLER: I'm going to ask the Board then to take judicial notice which it certainly has the authority to do of the TND Guidelines 1999 Addition. Does it need for it to be submitted as particular evidence in this rebuttal situation?

CHAIRMAN GRIFFIS: I don't have any difficulty making note of it. I would take in the page 5, Section D of the 1999. As Mr. George says, he's looked at it and there's no substantive difference between the two.

MR. NETTLER: I think it's worthwhile for the Board to see whether that's correct.

CHAIRMAN GRIFFIS: That's the reason for taking note of it.

MR. NETTLER: And whether his being

selective in submitting only portions of it.

CHAIRMAN GRIFFIS: No, I'm not going to go through the entire thing because I don't have the entire package here.

MR. NETTLER: No, we will provide that to you.

CHAIRMAN GRIFFIS: I know.

MS. DWYER: And again I --

CHAIRMAN GRIFFIS: We'll do this. We're going to take the corresponding pages of 5, 6 and 7 of that manual and that's been submitted here. That's all we're reviewing for today. That's all that went to the testimony and that's all we should be able to compare.

MR. NETTLER: Mr. George, you commented upon Mr. Peterson's reliance on the transportation land development ("TLD") text. Do you recall that?

MR. GEORGE: Yes.

MR. NETTLER: You commented as well on the use of the level of service and other aspects of that testimony. Do you recall that?

MR. GEORGE: I do.

MR. NETTLER: Did you in preparation for your rebuttal testimony regarding the TLD treatise have an opportunity to review the TLD treatise?

MR. GEORGE: Yes.

MR. NETTLER: Are you familiar with the provisions of the sections of the TLD treatise that deal with design considerations for residential neighborhoods and streets?

MR. GEORGE: Yes.

MR. NETTLER: And are you familiar that in planning and designing residential neighborhoods that one of those design considerations is in particular with very narrow streets, is a necessity for low speeds, low traffic volumes or essential to the creation and preservation of a high quality neighborhood as one of the design considerations?

MR. GEORGE: Yes, page 13-2.

MR. NETTLER: And you are also familiar with on page 13-3 with the treatise's treatment of the concept of level of service --

CHAIRMAN GRIFFIS: Wait a minute. 13-3. That's outside of what was submitted here. Right?

MR. NETTLER: Yes, that's correct.

CHAIRMAN GRIFFIS: Okay. I'm just trying to be clear.

MR. NETTLER: This was actually part of Mr. Peterson's testimony. 13-3.

CHAIRMAN GRIFFIS: Right.

MS. DWYER: Then I would object.

MR. NETTLER: He's testified in rebuttal.

MS. DWYER: Mr. George has testified as to what he's filed. We don't need to go back to what Mr. Peterson filed.

MR. NETTLER: He just testified that in preparing for his rebuttal testimony and his comments on the statements made by Mr. Peterson that he reviewed this TLD document in preparation for --

MS. DWYER: That's fine, but that does not give you an opportunity to go back and then ask him questions about every section of that document.

CHAIRMAN GRIFFIS: Right.

MS. DWYER: That's way beyond the scope of the examination.

CHAIRMAN GRIFFIS: I tend to agree. Pardon me?

MR. NETTLER: 13-3 is part of their submission as well.

CHAIRMAN GRIFFIS: 13, page 3?

MR. NETTLER: 13-3. Correct.

CHAIRMAN GRIFFIS: Show me where that is. I have page 29. Oh, I see in the residential streets in the next section where the design consideration. Is that what you're talking about?

MR. NETTLER: Talking about street types.

CHAIRMAN GRIFFIS: That's two and then "Street Types" is three.

MR. NETTLER: Correct.

CHAIRMAN GRIFFIS: Okay.

MR. NETTLER: So it's your position that the statement made in this document should not be considered or is something that it does not guide the way in which you look at the impact of traffic generated by this NCRC on the neighborhood.

MR. GEORGE: If you could be specific and point me to the particular section.

MR. NETTLER: The section that states "The service provided by residential streets should be defined by slow speed and low volume characteristics which are compatible with a liveable environment. The level of service concept based on speed, freedom to maneuver within the traffic stream is not appropriate. The design of the street itself is intended to actively discourage the driver from selecting a speed based on the freedom to maneuver within the street system. The LOS measure such as speed, volume to capacity rate and density passengers/cars/miles/lanes simply do not apply." Are you saying you disagree with that statement?

MR. GEORGE: No. I agree with it completely.

MR. NETTLER: Okay. Are you familiar as well from the same document with the discussion regarding factors affecting speed in residential areas?

MS. DWYER: Again I would ask if that is material that we filed in the record.

MR. NETTLER: I'm not submitting it. I'm asking whether he's familiar with the document in preparation for his testimony about the factors for affecting speed in residential areas which is in the same document.

MS. DWYER: Again this is going beyond his testimony on direct.

CHAIRMAN GRIFFIS: Right. It's going beyond the scope of his rebuttal testimony today. What document are you referring to?

MR. NETTLER: The same document.

CHAIRMAN GRIFFIS: Okay, but what section of it? It's not part of the submission here.

MS. DWYER: But it's not a section that we filed. This is not a section that he testified to. It's beyond the scope of cross.

MR. NETTLER: So the sections of that

treatise that deal with factors affecting speed, how you deal with pedestrian, sidewalk locations.

CHAIRMAN GRIFFIS: We'll take it that there are other sections that weren't submitted.

MR. NETTLER: Those were not things that you felt were appropriate for this testimony today. Is that correct?

MS. DWYER: That's not his testimony. His testimony was limited to what he filed today.

CHAIRMAN GRIFFIS: Right and what I understood him to say is that he was filing those exhibits in order to address specific questions or concerns of the Board or your perceived specific concerns of the Board.

MR. GEORGE: That's correct, sir.

MR. NETTLER: And to address Mr. Peterson's testimony about both whether the level of service was appropriate or his comments about the manner in which traffic should be handled or isn't properly handled.

MR. GEORGE: No, I believe what I tried to address was Mr. Peterson's statement both oral and written that we were in disagreement as to whether the concept of level of service was appropriate for a local residential street.

MR. NETTLER: So otherwise, you don't have any disagreement with any portion of his testimony. Is that correct?

MS. DWYER: I would object. That is not what the witness said.

MR. NETTLER: I have no further questions.

CHAIRMAN GRIFFIS: Thank you. Can we take five minutes? Then we have cross from the rest of the parts. Off the record.

(Whereupon, the foregoing matter went off the record at 10:34 a.m. and went back on the record at 10:40 a.m.)

CHAIRMAN GRIFFIS: On the record.

MR. HUNSICKER: I'm Steve Hunsicker. I live at 3083 Ordway Street. I just have a very few questions for Mr. George I believe. Mr. George, you introduced an excerpt from the Uniform Vehicle Code 2000. Do you recall that, sir?

MR. GEORGE: Yes.

MR. HUNSICKER: What was the particular reason for that provision? Did you mean to reference for your rebuttal?

MR. GEORGE: I'm trying to find a copy of it right now. Again I thought a significant part of the Board's inquiry had to do with the operations of

traffic along Highland Place. I think the Uniform Vehicle Code addresses the issue of how unlaned roadways are utilized and I thought that would be enlightening.

MR. HUNSICKER: Among the provisions you submit are 11.305 and 11.306 which I guess address limitations on overtaking on the left. Are those provisions that you had in mind to address the Board's concerns?

MR. GEORGE: I believe so, yes.

MR. HUNSICKER: Those concerns address what we've called the double parking situation and the cars pulling out into oncoming traffic near what has been called "the blind curve on Highland." Is that correct, sir?

MR. GEORGE: Well, it just addressed generally the use of roadways that are not specifically striped with lanes. I think both the Uniform Vehicle Code and the City's traffic regulations address those. That was the purpose for including that section.

MR. HUNSICKER: In addressing the situation of the double parking and the possibility of traffic pulling into oncoming traffic near the blind curve on Highland, did you ask yourself in reference

to 11.305 as to the distance ahead that is clearly visible to permit such overtaking as referenced in 11.305?

MR. GEORGE: I did not specifically address that. I think the Code points out that in the act of overtaking the vehicle must return to the authorized lane which using the right side of the roadway as soon as practical. It further says "In the event that the passing moment involves the use of a land authorized for vehicles approaching from the opposite direction before coming within 200 feet of any approaching vehicle." I agreed with that. It's clearly consistent with the City's own regulations. My testimony and my observations relate to the fact that traffic is so heavily directional that the situation is compromising that requirement or that suggestion is not a frequent occurrence.

MR. HUNSICKER: Were you referring to section 11.305 in that answer right there?

MR. GEORGE: Yes, I think I read a portion of it.

MR. HUNSICKER: Do you see the reference to "free of oncoming traffic for a sufficient distance ahead"? Do you see that, sir?

MR. GEORGE: No. Which line?

MR. HUNSICKER: I'm looking at the fourth line of Section 11.305. Let me try to get to the point. Do you have today an idea of approaching the blind curve on Highland from the east as to the distance that is visible ahead, specifically ahead in to the oncoming lane of traffic?

MR. GEORGE: From what point?

MR. HUNSICKER: Approaching the blind curve from the east?

MR. GEORGE: At what point from the curve?

MR. HUNSICKER: Well, from the perspective of a car that is traveling in a westward direction that has swung out into the oncoming traffic lane in order to avoid the double parking lane. As it approaches the blind curve, do you know the distance ahead that is clearly visible at that point?

MR. GEORGE: I would say, Mr. Hunsicker, saying "approaching" doesn't tell me anything. You could be approaching from five feet away.

MR. HUNSICKER: Let's say ten feet away. Do you know, sir?

MR. GEORGE: No, I don't.

MR. HUNSICKER: Do you know, sir, the amount of distance that it would require a car to both recognize an oncoming vehicle and to break to a stop

if it were say traveling at 15 miles per hour?

MR. GEORGE: Yes.

MR. HUNSICKER: What is that distance?

MR. GEORGE: Fifteen miles per hour, I believe if my memory serves correctly, is approximately 22 feet per second. It takes approximately with driver reaction time 1.5 to 2.0 seconds for reaction to achieve that. So I would say if you multiply that if the 22 feet per second is correct and that's my recollection, it perhaps would be within 40 feet.

MR. HUNSICKER: Now would you agree that the amount of distance required to stop in order to avoid a vehicle in the oncoming lane might be relevant to any concern that the BZA may have concerning the traffic condition and whether or not it's dangerous or not at the blind curve at Highland?

MR. GEORGE: I believe all of the conditions that been described are relevant, the width of the roadway, the fact that the directional split of traffic is very heavily oriented to westbound traffic, that there's very little eastbound traffic. I think you heard testimony today regarding the positioning of staff with appropriate dress for high visibility and so on being in the area of that location. All of

those factors taken into consideration would address the speed and those potential situations you described.

MR. HUNSICKER: Now I believe you made reference to the Traditional Neighborhood Development Street Design Guidelines and you've asserted Section D I believe that is relevant to the Board's concerns. Did you not think that the immediately following chapter on safety would be relevant to the Board's concerns?

CHAIRMAN GRIFFIS: Was that submitted?

MS. DWYER: Again I would object. That was not submitted and it's beyond the scope of cross.

CHAIRMAN GRIFFIS: Let's move off this because I'm sure there's a world of resources that we would love to see. I can't see that production of cross examination questions to elicit all those might see.

MR. HUNSICKER: Okay. You made reference to an estimated reaction a total distance for stopping at 15 miles per hour. Would you accept that the same reference that you used to assert Chapter D shows at figure 11 that at 15 miles per hour --

MS. DWYER: Again I would object. This is beyond the scope of his direct testimony.

MR. HUNSICKER: -- the reaction and braking distance would be 75 feet.

MS. DWYER: I object.

MR. HUNSICKER: And similarly --

CHAIRMAN GRIFFIS: Hold on. You have an objection.

MR. HUNSICKER: I have another follow-up question from the same figure.

CHAIRMAN GRIFFIS: Fabulous.

MS. DWYER: Object.

CHAIRMAN GRIFFIS: Now you have two objections to the two part question and the objection is what?

MS. DWYER: He's asking the witness to testify to something that is not in the record and that is beyond the scope of his direct testimony.

CHAIRMAN GRIFFIS: And what figure are you referring to?

MR. HUNSICKER: It is not beyond the scope of his rebuttal.

CHAIRMAN GRIFFIS: What figure are you referring to?

MR. HUNSICKER: I'm referring to a figure out of the same text that he has referred to although --

CHAIRMAN GRIFFIS: What's the page number so I can look at it?

MR. HUNSICKER: It is page 16. It was not part of the rebuttal submission.

MS. DWYER: That's not filed.

CHAIRMAN GRIFFIS: So let's move on.

MR. HUNSICKER: Mr. George, would you agree with an authoritative text that indicated that the total distance --

CHAIRMAN GRIFFIS: No, and I don't want speculation based on text that I can't see.

MR. HUNSICKER: I'm asking him his opinion.

CHAIRMAN GRIFFIS: I know, but I don't really care about his opinion about a resource that I'm not going to review and look at.

MS. DWYER: And I would submit he already has given his opinion.

CHAIRMAN GRIFFIS: Let's go to cross on the exhibits that are in the record that were submitted today. Let me be very direct. I think it's very clear that what is excerpted here for our review is part of a larger text. The text deals with all sorts of things designed for pedestrians, designed for safety. There are numerous chapters, at least 13 as

we have 13 Chapter submitted to us. So the Board's fully aware that this isn't the whole universe of good traditional neighborhood development and design, not to mention the revision of 1999. That being said, next question.

MR. HUNSICKER: With that, Mr. Chair, I have no further questions.

CHAIRMAN GRIFFIS: Thank you. Next.

MR. BECKNER: No questions, Mr. Chairman. Thank you.

CHAIRMAN GRIFFIS: There's no need to come up for that. Ms. Badami.

MS. BADAMI: Just one for Mr. George. Just to review, Highland Place is shaped like an L. It's two ways and then it becomes one way coming in from 34th Street, right, and Ashley Terrace is a dead end and 33rd Street is a dead end?

MR. GEORGE: Yes, that's true.

MS. BADAMI: Then looking at your traditional neighborhood development on page D-6, connectivity, "DNT streets are interconnected. This principle is central to DNT design. Cul-de-sacs and other dead end streets are not part of a DNT." Does this not make this entire page compromised?

MR. GEORGE: No, I don't think so.

MS. BADAMI: Okay. I have a few to Mr. Anthony. At the beginning of your testimony, you talked about your design and that you had intentionally broke up the facilities because that was more in keeping with the neighborhood and that you did not want to do - this is a direct quote - "not a large addition to the main house." Is that correct?

MR. ANTHONY: Correct.

MS. BADAMI: You're aware that the addition that you're planning to back of the main house, the first floor is 329 square feet and the first floor of my entire house is 328 feet. This is from a submission that you've made.

CHAIRMAN GRIFFIS: So the question is?

MS. DWYER: I would just clarify the question. It's a question as to the dimensions of the building that he has designed.

MS. BADAMI: I'm asking –-

MS. DWYER: I'm just not sure the witness can respond as to the dimensions of your house.

MS. BADAMI: The witness has prepared this document so I'm asking if he recalls the document that he prepared that says that my house which is one of the largest on the blocks, the first floor square footage is actually a square foot less than the

addition that is planned for the back.

CHAIRMAN GRIFFIS: The direct question is isn't the addition a large addition. That's the question, isn't it?

MR. ANTHONY: Relatively speaking, I don't, but I'd like to say that the drawing that you're pointing to there I don't think shows your entire house.

MS. BADAMI: But it does list the square footage.

MR. ANTHONY: Of your house?

MS. BADAMI: Yes, sir.

CHAIRMAN GRIFFIS: Okay. But I don't care. Let's not get into that. That's in the record and I'll review it. Your actual question is based on the testimony today you said in Historic Preservation Review and all that staying to the character that a large addition to the main house wouldn't be appropriate, but haven't you just designed a large addition to the main house?

MR. ANTHONY: I would say that it's not a large addition to the main house.

CHAIRMAN GRIFFIS: Okay.

MS. BADAMI: Do I have one of the largest houses on Highland Place?

CHAIRMAN GRIFFIS: Okay. Your next question is --

MS. BADAMI: All right. Right on. I'm moving on.

CHAIRMAN GRIFFIS: No. Listen to me.

MS. BADAMI: Okay.

CHAIRMAN GRIFFIS: I'm helping you out here.

MS. BADAMI: Thank you.

CHAIRMAN GRIFFIS: What I want to do is make sure you're being direct with your questions though. So you say at the scale of your house and other houses on the block it sets the scale and character of the block, correct?

MS. BADAMI: I would say that.

CHAIRMAN GRIFFIS: And isn't this addition proportionate to a standalone house on the block? Doesn't that put it in the realm of large? Is that your question?

MS. BADAMI: I wouldn't phrase it that way but that works.

CHAIRMAN GRIFFIS: Let's hope not. We all need to be unique. Yes or no?

MR. ANTHONY: No.

CHAIRMAN GRIFFIS: Okay. Now we're going

into splitting hairs over large or small, so I think I understand your point of putting it into context. I'll let you continue with your questions.

MS. BADAMI: Great. Thank you. Thank you for the help. Then you also said that the addition to the accessory building is in keeping with the rhythm of the Ordway houses. I believe to exemplify that part of your submission, photo Ordway Street Existing Condition photos. You are aware of this document.

MR. ANTHONY: Yes, I've seen that.

CHAIRMAN GRIFFIS: Exhibit E of the submissions today.

MR. ANTHONY: I didn't address it in my testimony, but I'm aware of that photograph.

MS. BADAMI: And you're aware in this collage of photos that eight to ten feet of the distance between the accessory building and the edge of NCRC's property line is omitted. Therefore this is actually not existing street conditions.

CHAIRMAN GRIFFIS: And you are talking about the separation of the photograph from the little photograph as labeled.

MS. BADAMI: No, I'm saying that even accounting for that which is indicating that there's not a picture there when you scale the accessory

building --

MR. ANTHONY: The photographs are not scale if that's what you're asking.

MS. BADAMI: So these are not existing conditions.

MR. ANTHONY: It's just a photo montage moving down the street. It's not to scale.

CHAIRMAN GRIFFIS: Right.

MR. ANTHONY: Now the drawings that are in the record of the streetscape of Ordway and Highland are to scale but flattened. I would stand by my testimony.

MS. BADAMI: Okay, but the BZA should not be able to reference this for any sense the rhythm of Ordway.

MR. ANTHONY: They could. I think part of that photograph was also indicating the topography of the streetscape.

CHAIRMAN GRIFFIS: We're not going to be looking at that photograph to scale.

MS. BADAMI: Right on. Okay, thank you.

CHAIRMAN GRIFFIS: Okay.

MS. BADAMI: Then you said in your testimony in cross that if we move the proposed addition of the accessory building back that 9, 10 or

12 mature trees would be pushed back. I'm not seeing them on either the topo map that you've submitted before --

CHAIRMAN GRIFFIS: Does that go to Mr. Nettler's question where he asked him to point out the trees that would be removed? Is that where you're asking?

MS. BADAMI: I wanted to see where the 9, 10 or 12 mature trees that he referenced are because there are some minor trees that have been planted by NCRC as a result of the 1994 condition. But he said 9, 10 or 12 mature trees and I wanted --

CHAIRMAN GRIFFIS: If they did an alternative development, is that correct?

MS. BADAMI: Right. I'm wanting to see where these mature trees are.

CHAIRMAN GRIFFIS: I think we understand because he pointed out the portion south as this lays out. That area would be impacted.

MR. ANTHONY: That's correct.

MS. BADAMI: It would impacted, but I'm trying to point out that he's not correct.

CHAIRMAN GRIFFIS: I know, but we're not going to count trees. He's not correct that there might be trees removed.

MS. BADAMI: That there are 9, 10 or 12 mature trees that are going to be removed.

CHAIRMAN GRIFFIS: Okay. How many are there?

MS. BADAMI: I'm counting three.

CHAIRMAN GRIFFIS: Okay. Yes?

MS. DWYER: My objection is this is very speculative because he pointed to a general area. There is no design of the building so there's no way of knowing. His expert opinion based on the caliber of the trees was that 9 to 10 to 12 mature trees would be removed.

CHAIRMAN GRIFFIS: Excellent point. I think the point of the Board would be that there would be larger area of impact or a different area of impact. That's where I don't think it's productive to count the number of trees. Good point though.

MS. BADAMI: I was just speaking on his speculation.

CHAIRMAN GRIFFIS: He shouldn't have put a number to it.

MS. BADAMI: Then you said perhaps I was confused about the mature tree between our properties. That actually was the one that I was referring to. Are you aware that the drip lines are not the standard

by which our arborist use to know where the roots are of a tree?

MR. ANTHONY: That's certainly one standard to use.

MS. BADAMI: But the drip line is not always the standard. Is that correct?

MR. ANTHONY: I can't testify to what all the arborist's standards are for protecting trees.

MS. BADAMI: And you are aware since that's 100 year old tree that the tree roots are condensed within that area.

MR. ANTHONY: I'm sure they are.

MS. BADAMI: Since you don't have a construction plan, you can't tell me that there are no heavy equipment that's going to run over the roots of my trees.

CHAIRMAN GRIFFIS: That wasn't his testimony.

MS. BADAMI: Okay, but he did speak that the tree wasn't going to be damaged.

MS. DWYER: I think that what the witness testified to was that the use of the arborist would help ensure that any construction activity did not damage the trees. The specifics of that would be determined later.

MS. BADAMI: Okay. Then moving on to more about the trees, you're aware that all the trees that are on my property which I think in my first submission of evidence there are six to eight trees on my property line between my house and the fence which are not listed on your plans that would be affected by the construction.

MR. ANTHONY: I would say that as I testified the trees that are represented there with an X through them are the trees that we anticipate losing in this process.

MS. BADAMI: Okay, but I'm saying that all the trees that would be affected are not listed on this map.

MR. ANTHONY: Let me finish. So then neighboring plant material and the trees that don't have an X through them on that plan, it is our intention to consult with an arborist and to do the best we can to preserve and save those trees or vegetation.

MS. BADAMI: Okay. That doesn't directly respond to what I said but okay. Then even including what you said about the drip drain, the maintenance building cuts into three mature trees on the back of the hill. You are aware of that, right?

MR. ANTHONY: When you say cuts into them what are you referring to?

MS. BADAMI: You testified because the drip edge of the oak tree between our houses was not necessarily going to be affected because of the drip line. I'm asking about the maintenance building where three mature trees' drip lines and root systems are going to be affected.

MR. ANTHONY: As you stated in your earlier question, drip line is not the only measure of impact on tree and also there is considerable existing impervious area both the existing shed and then the concrete, etc. in that area and again it's not just my opinion. There is a letter from the arborist in the record as an evaluation of those trees on that drawing.

MS. BADAMI: But the amount of impervious soil is going to be drastically changed if you build a new maintenance building.

MR. ANTHONY: It's not actually.

MS. DWYER: Was there a question there?

CHAIRMAN GRIFFIS: Are you asking that?

MS. BADAMI: Is it your testimony?

CHAIRMAN GRIFFIS: Correct. Is that correct?

MR. ANTHONY: My testimony is that there is not a great additional amount of impervious area in the maintenance building, but there is existing sideway, shed, etc.

CHAIRMAN GRIFFIS: Next question.

MS. BADAMI: Okay. You talked about the screening plantings that were going to be placed by my property.

CHAIRMAN GRIFFIS: Ask your question.

MS. BADAMI: Your map indicates three pieces of the playground equipment and two permanent benches that are on the site. Since there are 15 pieces of playground equipment, I'm wondering where they are going to be moved to especially the four existing pieces of playground equipment that are going to be displaced by the accessory building.

MS. DWYER: I would object. This is beyond the scope of his direct testimony. He did not testify as to playground equipment or relocation of them.

CHAIRMAN GRIFFIS: Indeed.

MS. BADAMI: No, but he did talk about the screening.

MS. DWYER: He talked about the screening between the adjacent properties which is on your

property line and the Little's property line.

MS. BADAMI: Right, so you can't talk about that.

CHAIRMAN GRIFFIS: Next. Let's move on.

MS. BADAMI: But is that screening going to cover the six pieces of playground equipment between my house and the existing accessory building? They are not listed on here but there are six pieces of equipment there.

MR. ANTHONY: The playground design is really not a part of that exhibit or a part of my testimony or something that I can really state as to what the design is.

MS. BADAMI: But you did have three pieces of playground equipment in this and it's not the accurate amount.

CHAIRMAN GRIFFIS: Next question.

MS. BADAMI: Right on. That's it. Thank you.

CHAIRMAN GRIFFIS: Thank you very much. Is there any other cross? Is there any redirect of these witnesses?

MS. DWYER: I just have two questions of Mr. George.

REDIRECT EXAMINATION

MS. DWYER: There were a lot of questions that were asked by Mr. Hunsicker concerning the blind curve. I wanted to ask Mr. George. Is it true that NCRC cars are not permitted to wait in line at the so-called blind curve?

MR. GEORGE: That's correct.

MS. DWYER: Do you know approximately what the distance is from the front of the school to the white line which is where the cars begin standing?

MR. GEORGE: It's between 150 and 160 feet.

MS. DWYER: All right. Thank you.

CHAIRMAN GRIFFIS: Cross on the redirect testimony? Any questions? Thank you all very much. We have closing left. Is that correct?

MS. DWYER: That is correct.

MR. MOY: Excuse me, Mr. Chairman. Staff would like to remind the Board that we still have the joint motion of the parties in opposition.

CHAIRMAN GRIFFIS: Would you like to remind me of that motion? It's a good reminder. This is what I would like to do. Very well. Last matter in the case then before we get to closing will be the submission of the motion that was provided us. I understand the motion is based on the submission of

the DDOT observation, all of which was given to us this morning. So I haven't had the full amount of time to go through all of the information, but have in fact reviewed and have talked to the Board regarding it.

In terms of the motion, the substance of the motion goes to whether we can have or should have DDOT back for cross based on that submission. It directly states that this is a joint motion of the parties in opposition to require the appearance of DDOT. Looking over the survey and the observation of the DDOT's evaluation, I think it's incredibly clear what it is and perhaps what it isn't. So I don't see the need to continue the hearing and bring DDOT in for cross examination.

We can't require them actually to be here as in terms of subpoenaing them to show up. We can certainly request them. What I would like to do is keep the record open if there are submissions that want to address this information. We can certainly have that and we will go in that regime unless there is any issue with that.

MEMBER ZAIDAIN: I actually have a question. I would see a lot of this issue on the DDOT report. I'm just trying to refresh my memory. We did

not request this. This is just a supplemental report that was given by DDOT.

CHAIRMAN GRIFFIS: Right.

MEMBER ZAIDAIN: Do we have to accept it?

CHAIRMAN GRIFFIS: We don't have to accept it, but if we don't accept the DDOT report then we're basically saying "Why." (1) We have to address that. (2) Is it just because it came in today? If that's so, then we would not accept frankly the inch and a half of paper we received this morning. For that matter, when do we go back to the record of not accepting things?

MEMBER ZAIDAIN: Right.

CHAIRMAN GRIFFIS: The record has maintained open. We never closed it. We never limited it to any submissions which is why we continue to get information. If we had closed it, then it would be a much clearer case of what we would accept or not accept. I don't have any difficulty taking it in.

MEMBER ZAIDAIN: No, I've just never seen an unsolicited supplemental report from DDOT before or at least an evaluation like this. I just didn't know what to make of it. I would agree with your stance in letting the parties in opposition submit rebuttals to

this but I personally will take this for what it is which I'm still trying to figure out because I just got it this morning.

CHAIRMAN GRIFFIS: That's probably what we all should do, shouldn't we?

MEMBER ZAIDAIN: Right.

CHAIRMAN GRIFFIS: Rather than making it something that it isn't. Good. Any other questions from the Board?

COMMISSIONER HOOD: I would agree with your synapses, Mr. Chairman, on accepting it and allowing the parties to be able to comment, but I can tell you, Mr. Zaidain, I have seen an unsolicited report from the DOT. Anything you get anything from them I guess we'd better be thankful. We'll just leave it open.

CHAIRMAN GRIFFIS: Point well taken, Mr. Hood. Good. Anything else? Okay. Any burning comments from the parties in opposition to address this motion? Is it clear? You don't have to take the opportunity. I'm giving you the opportunity though.

MR. BECKNER: Mr. Chairman, as the author of the motion, you say you're going to keep the record open for submissions. Could you indicate for us how long that's going to be?

CHAIRMAN GRIFFIS: All that will go later, but basically you understand that we're denying your motion.

MR. BECKNER: No, I understand that. I'm not going to reargue it here.

CHAIRMAN GRIFFIS: Right. Do you have any question then of that substance or what you've heard us say outside of what you submitted in writing?

MR. BECKNER: No, sir.

CHAIRMAN GRIFFIS: Okay. Thank you.

MR. BECKNER: Thank you.

CHAIRMAN GRIFFIS: In terms of schedule and in terms of submissions, all that will be very clear as we run through all of the pertinence of this and I'll say this again but I'll say it now. If there are questions of schedule once the decision date is set, certainly call into the Office of Zoning and either talk to Mr. Moy or Ms. Bailey and they will be able to clarify what the actual schedule is and the submission date. With that, yes?

MS. DWYER: Just one point I wanted to make in terms of clarifying why this came in. At the September 16th hearing when Ken Laden was testifying, I believe it was Commissioner Hood who asked him whether they were out there monitoring to see if the

TMP was working. Ken Laden said that he was not but that they would be sending people out there. That's why this report came in at this time.

CHAIRMAN GRIFFIS: I see. Good point. Anything else? Mr. Hood.

COMMISSIONER HOOD: No, I had more to do with it than I thought. I didn't know I asked that.

CHAIRMAN GRIFFIS: It's your fault. When you're ready.

MS. DWYER: All right. I'm ready. Good morning, Mr. Chairman and members of the Board. It's still morning. We started this hearing process on February 11, 2003. After nine public hearings and volumes of testimony, we believe we have met the test and that we are entitled to the special exception and variance relief.

What we are proposing is a continuation of a use that has been at this location for over 73 years. During that period of time, there have been no traffic or pedestrian accidents as a result of the school's use, no injuries to students or neighbor's children and no MPD reports of any problems associated with the school's use. Even Lieutenant Rock testified that he had never been called about any activity at the school.

The evidence of record establishes that prior to the public announcement of its plan to construct an addition NCRC had no history of any serious complaints from neighbors regarding traffic and had averaged only three complaints per school year. You'll find that in Exhibit 87 at Tab N. Each time NCRC immediately responded and addressed the situation. It is also significant that in its 73 year history the opposition can site only one noise incident, the use of a PA system which the school has agreed not to use in the future.

Over the last 73 years and continuing today, we had the same activities normally associated with the school use. There are periods during the morning, midday and afternoon when children are dropped off or picked up. There are back to school nights and pumpkin parties and there are parent/teacher meetings that take place. These are the same activities that take place at any other school in a residential district. These are also the same activities that took place when the children of the opposition attended the school.

Even taking at face value the data collected by the neighbors and used by their traffic consultant, what you have are 12 minutes in the

morning, 15 minutes at midday and 12 minutes in the afternoon when cars are waiting to pick up children. These are Exhibits 3A through 3C of Steve Peterson's testimony. This is not an unsafe or untenable situation. If it were, then no school in the District would be permitted to operate. Further, this data was collected over a year and a half ago in the spring of 2002 before many of the improvements were made to the school's TMP.

In the Washington Ethical Society case, the D.C. Court of Appeals stated that "the test is the incremental impact from the additional number of children." NCRC is adding 10 children and there is nothing in the record to support a finding that 10 additional children will create an objectionable impact. As Ken Laden testified, "Ten additional cars or 20 additional trips over the day is not going to have a significant impact."

Much of the opposition testimony focused on existing conditions including area-wide traffic issues which again is not the test. A special exception applicant is not required to alleviate existing traffic conditions in the area. As Lieutenant Rock testified, his general impression of traffic conditions in Cleveland Park is "horrendous"

and he gets complaints daily regarding speeding, sign violations and parking violations. NCRC is not required to address this, but rather that behavior of its own parents, its own staff and its own teachers which it has.

Further as the expert testimony of NCRC's traffic consultant established, once the new classroom building is built traffic on Highland Place will be reduced since children will be able to use an Ordway Street entrance. By adding full day programs at the school, the number of midday trips would also be reduced. Thus, under the incremental impact test, there is no basis in the record to find that the additional of 10 children would have an objectionable impact. Nor was there substantial evidence from the opposition on this issue.

Even though NCRC is not required to improve existing situations, the fact remains that it has. The changes to its TMP over time and in particular this fall have resulted in improvements. The extended drop-off time in the morning and the use of uniform police officers have resulted in a situation that fully addresses any concerns as to the queuing of cars or safety issues and does not require the loss of parking spaces in front of the school or

the creation of a one-way system.

The Office of Planning ("OP")testified that NCRC met all of the requirements of the special exception except for the standard related to traffic and OP deferred to DDOT on that issue. DDOT recommended three approaches to the BZA. Two of the recommended approaches impact the neighbors either through the loss of parking spaces in front of the school or by making Highland Place one way. NCRC believes that the third alternative recommended by the DDOT, improvements to the existing TMP, can work and submits that the evidence establishes that the TMP is working. As DDOT stated in its April 14, 2003 report "The benefit of a regulatory solution is that it could be implemented quickly and if run properly positive results would presumably be felt in a short period of time."

You have heard testimony by NCRC and its staff this morning that the TMP is in place and that it is working. DDOT's concern with the TMP was monitoring to ensure that people were abiding by the new regulation. NCRC is committed to that and has included its TMP in its contracts with its parents and its staff and has a system of oversight and enforcement.

In summary, for the special exception, we believe that we have demonstrated that we meet all the requirements of Section 205. The OP supports that with exception of the traffic issues in which it defers to DDOT. DDOT has recommended three options, one of which is the TMP which NCRC has implemented. We believe we meet the test.

With regard to the area variance, the D.C. Court of Appeals has established a three prong test. The BZA must find that the property is unique by reason of its size, shape, topography or other exceptional condition, that this creates a practical difficulty and that the variance will not impair the intent, purpose and integrity of the zoning plan. We believe that we fully meet the test for the second principal building and the OP agrees with us.

First as the Court has stated in looking at the unique or exceptional qualities of the site, the combination of the factors may be used in determining its uniqueness. In this case, we have several unique factors which combine to create the uniqueness and practical difficulty. The property is the largest site in the neighborhood comprised of 45,000 square feet. It is an unusual through lot with significant grade changes from Highland Place to

Ordway Street. It is the only lot in the neighborhood which has frontage and access on both Highland and Ordway.

The site is also unusual in that it is improved with three existing buildings, two of which have been deemed contributing. The property has significant open space with mature trees. Finally it is located in a historic district and design constraints have been imposed on the new construction. Further as the Court held in both Monaco and National Black Child cases, the BZA is allowed to apply more flexible standard when a public service or non-profit entity is the applicant. As the Court stated in Monaco, "when a public service has inadequate facilities for variance to expand into an adjacent area in common ownership which has long been regarded as part of the same site, then the BZA does not err in considering the needs of the organization as the extraordinary and exceptional situation or condition."

In this case, the evidence clearly establishes the need for NCRC to expand its facilities after 73 years of using the existing buildings. Even the opposition testified to this at the last hearing. As Dickson Carroll stated "Early on I visited the school at the invitation of Ms. Piggott and it was

clear that the school is cramped and does need some remodeling and perhaps some expansion."

As the architect testified this morning, the uniqueness of the site clearly presents practical difficulties in terms of design in the new space. The current plan allows the design that fits into existing grade, maximizes light and air to below grade spaces, retains mature trees on the site, preserves playground open space and meets the HPRB requirements for separate structures in keeping with the history of the site. As the architect testified, to subdivide the site would result at a minimum in a need for variance relief from the side yard and parking requirements. Redesign would also require that the new building lose natural light and air or have to be build below ground into an existing hillside.

In summary, we believe that on the record, we meet the variance test. Not only will the resulting variance not impair the intent, purpose and integrity of the Zone plan, but we submit that it will result in an improved plan for the site by preserving the open space and topography and allowing for a sensitive building addition.

During the course of these hearings, there have been a number of issues that I would term "red

herring" issues put into the record that we believe have no bearing on either the special exception or the variance. Nonetheless we have address each and every one of these issues. For example, there was a suggestion that the variance stemmed from the self-created hardship of the Applicant. First of all, self-created hardship is not applicable to any area variance case. Second, we have established that the property was historically one large lot dating back to at least 1958. That's in Exhibit 191 on the record.

There was an issue raised of unclean hands. We have established that the prior BZA conditions were met. The concern with the prior order and the concern going forward is whether the conditions are clear. We submit that the BZA can impose clear conditions that address the number of students at any one time versus total enrollment, the summer camp program, special events, a prohibition on the use of PA equipment, etc. These are not new issues for the BZA. These are standard issues in most school cases.

An issue has been raised that the space is too big and that the school will be back for an enrollment increase. As the school's enrollment chart indicates, it has a history of steady enrollment.

Further any increase in enrollment would require a new BZA case and a new public hearing process. Thus there are ample protections for the community.

The statement was also made that this preschool is unusually large. On the contrary, we filed in the record the BZA orders for other child development centers which include the Barbara Chambers CDC which has 150 children, the Washington Hebrew Center CDC that has 95 children and the St. Columbus Preschool that has 90 children at any one time and a total enrollment of 124.

An issue was also raised as to whether this is a neighborhood school. While that has some appeal, this is not a requirement in the regulations. In fact, contrary to what Council member Mendelson said, the preschool regulations do not date from 1958. They were significantly revised in 1982 by the Zoning Commission and we filed that information in the record. When they were revised, they eliminated the neighborhood requirement and imposed a new set of standards.

I have here a copy of the Zoning Commission's order which we can file in the record. We did reference it earlier in our submission. It's very interesting to note what the Commission decided

when it choose to eliminate the neighborhood requirement. At that point in time, Lindsey Williams in fact was on the Commission. What the Commission said is "limitation on attendance to children residing in proximity to facilities is contrary to present day needs and demands. The need for daycare services is related to not only where people live but in how they get to and from work and the nature of the programs that are available such as programs run by or for different religious or ethnic groups. Given the requirement for the Board to assess the traffic and parking impacts of proposed centers, the Commission believes that it is unnecessary and inappropriate to limit centers to children residing in the neighborhood." Nevertheless as NCRC testified this morning, it does give a preference to neighborhood children.

An issue has been raised about construction and storm water management measures. We have submitted for the record the pertinent portions of DCMR regulations that govern all of these areas. NCRC will be required as with any applicant to comply with the city's permitting and construction requirements.

There was a concern in the record about

the enforceability of conditions. First, the school is committed to enforcing its TMP through its contract with its parents. Second, the BZA has a zoning compliance officer equipped in this and every case to enforce all BZA conditions. Third, the issue of enforceability is no different here than it would be for every other school. Finally, NCRC has proposed a liaison committee with the neighbors which provides an additional mechanism for communication and enforcement.

Finally there was a question raised as to whether the structure is four stories or three stories and requires additional variance relief. We believe the record establishes that this is an existing three story structure as measured from the front of the building on Highland Place and that it fully complies with the measuring requirements set forth under Section 199.1. I would direct your attention again to the transcript of the June 24th hearing on page 164.

While Mr. Nettler has suggested that the lower level of the house cannot be considered a cellar in one portion and a basement in the other, in fact the Zoning Regulations treat lower levels differently when it comes to the computation of FAR by using the parameter wall method. This is no different. The

lower level is clearly a cellar on Highland Place even though it may be considered a basement at the rear.

As I stated when this case began, schools are integral parts of viable residential communities. All schools involve children arriving and departing from the site. All schools involve the sound of children's voices. All schools involve the occupancy of a building by students. The opposition has not identified a single feature of this school's operation that is atypical for a school.

We have proposed conditions that address any noise and traffic impacts, provide controls on the number of students and basically shows the school's responsiveness to its neighbors. Many of the neighbors in opposition have children who attended the school at a point in time when the school's enrollment was virtually the same as it is today. The school's activities were not objected to then even though they included the same as exists today.

To the extent that there is a concern about NCRC using its property for conferences, we have proposed a condition limiting this to three times a year and a requirement that we provide offsite parking. If the BZA disagrees, then the number can be reduced as the BZA sees fit.

In closing, I want to reiterate the standard set forth by the D.C. Court of Appeals in the Glenbrook Road case. In that case which was a special exception, the Court stated "The Board's function in a special exception case is to determine whether a reasonable accommodation has been made between the school and the neighbors which does not interfere with the legitimate interest of the latter." We believe that we have demonstrated such a reasonable accommodation. The school has agreed to limit enrollment, to improve its TMP, to reduce the size of its plans, to make adjustments to its programs and to include enforceable conditions. What it cannot do is abandon its plan. It needs both the additional space and the ten additional children to meet its program needs for the future.

The core opponents remain firm in their position that they will oppose any expansion of the use, even one child. As you will recall, the Beckners testified that even if the school had an effective TMP they still would not support any enrollment increase, but that is not the legal standard. The evidence overwhelming establishes the new space and the incremental impact of ten additional children will not be objectionable and that we meet the requirements for

the special exception and variance under the Zoning Regulations, under the prior decisions of this Board and under the D.C. Court of Appeals.

In closing, I would also like to remind the Board that we have the support of the D.C. Office of Early Childhood Development which filed a letter in the record pointing out that in Ward 3 alone there are 689 children on waiting lists for early childhood centers. We ask for your support of our application. Thank you.

CHAIRMAN GRIFFIS: Thank you very much. Very well. At least none of you believe it. That concludes our public hearing on this case. With that, we're going to set this for the decision making and I am going to set it for the 6th of January. As our deliberation and public meetings happen the first session of the month, I think December is a little bit too fast as we are asking for a submission here. I want to give adequate time to produce findings of fact and conclusions. That being said January 6th. Ms. Bailey, if you wouldn't mind, let's back from that the submissions and the other dates if you would list those for us.

MS. BAILEY: Mr. Chairman, before I do that I just wanted to remind you December 23rd and

also December 30th, there are no BZA hearings on those dates. Those are around Christmas. I just wanted to remind you of that.

CHAIRMAN GRIFFIS: It's a good reminder actually. But that's not going to affect any of the submission dates. What I'd like to do is as we've done in previous cases which are quite large and extensive especially with this record, let's have final submissions two weeks before. If we can get that before the 23rd and approximately set that for Monday, the 22nd. That way it could be distributed to the Board for their review substantially prior to the 6th of January.

MS. BAILEY: So those are the submissions, Mr. Chairman.

CHAIRMAN GRIFFIS: That would be the findings and conclusions.

MS. BAILEY: Findings. Okay. Then the 15th for the submissions then.

CHAIRMAN GRIFFIS: That would be good.

MS. BAILEY: Okay. Now the record is going to be closed, Mr. Chairman, except for three specific things that I have that the Board requested or the Board anticipates to come in, one of which is the response from the parties concerning the

supplemental report that was filed by DDOT.

CHAIRMAN GRIFFIS: Right.

MS. BAILEY: Are we asking for proposed conditions from Ms. Dwyer?

CHAIRMAN GRIFFIS: Yes, they are going to be amended as they have given indication to today.

MS. BAILEY: Mr. Nettler, were you going to file pages five, six and seven? Those were the three things that I have, Mr. Chairman, other than as you indicated the findings of fact and conclusions of law.

CHAIRMAN GRIFFIS: Indeed. Board members, are you aware of anything else? Okay, so those submissions will come in on the 15th of December and then findings will come in on the 22nd. Is that correct, Ms. Bailey?

MS. BAILEY: Yes, sir.

CHAIRMAN GRIFFIS: Now I'll take questions on the schedule and submissions if there are any clarifications that are needed. Everyone is clear. Fabulous. Then any other procedural questions I can answer regarding this case? Very well. It has been a pleasure to be through this. I say that with great sincerity. Clearly this is a lot of information and believe me, we will be looking at it in its entirety.

So any submissions that come in of course should be on point and succinct or as you want to put it and then we'll look at it.

Of course the December 6th is a public meeting. There is no additional testimony. As Ms. Bailey just indicated the record is closed except for that which we've just set and that is very specific. So you can spread the word and you can also note. If you decide to submit something in addition to what we've just listed, it will not be accepted, meaning it's not in the record and the Board will not see it. Yes, Ms. Badami.

MS. BADAMI: You said January 6th for the decision date. Did you say a time?

CHAIRMAN GRIFFIS: No. Our meetings start at 9:30 a.m. and I'm not sure right now as I look at my schedule which may not be the most current, it's the first in the morning. But again going to that point, our meeting don't have any additional testimony. It is all deliberation. You are obviously all welcome to be here but we will not be hearing from anybody. In fact, you'll hear a lot from us. I would imagine we'll put it –- Well, I don't know where we're going to put it but it's going to be in the morning on the 6th. Any other questions or clarifications or

additional information? Now I've never known this group to be so quiet. Fabulous. I thank you all very much and I appreciate your patience with the Board. Have a great day. Enjoy it before it pours and rains.

As you are leaving, if you wouldn't mean getting out of the hearing room as quickly as possible as we have a morning's 9:30 a.m. We need to finish that by 12:00 noon as we have additional cases that are filling our lunch hour. If I could have everyone's attention just not to talk please because we are proceeding with our hearing. If you have conversation that needs to happen, it can take care outside of the hearing room.

With that, I'd like to call to order the normal public hearing of the morning of 18 November 2003. Dispense with the introductions as people that have been here probably noted the plaques, but of course representing the Zoning Commission is Mr. Hood. Representing National Capital Planning Commission is Mr. Zaidain. We will have our full mayoral appointees out with us shortly.

The order of procedure for special exception and variance is statement of witnesses, the Applicant, Government reports including the OP, the ANC, parties or persons in support, parties or persons

in opposition, closing remarks by the Applicant.

Cross examination of witnesses permitted by the Applicant or parties attendant to a case. Of course the ANC within which the property is located is automatically a party in the case. As you have just probably heard in the last, it will attended to the cases that we are about to hear. The record will be closed at the conclusion of a hearing except for any information that the Board would require. We will be very specific on what is submitted and what is to be submitted.

The Sunshine Act requires this Board to conduct all hearings in the open and before the public. We are able to however according to our rules of procedure and the Sunshine Act enter into executive session during or after a hearing on the case. That would be of course for the purposes of deliberating on a case or reviewing the record.

Let's take up any preliminary matters and let me just ask if people present now have not already done so they can turn off their cell phones and beepers so we don't have a disruption in this rapid fire morning session of which we have 25 minutes left to do. Also in all sincerity I do appreciate the applicants that are here this morning and their

patience with us. Obviously you may have overheard. That was a continuing case from February. We have I think gone through probably close to 60 to 70 hours of public hearing on it. It was good to get that finished, but understand it did in fact eat into your time. We absolutely appreciate your patience. Ms. Bailey, do we have preliminary matters for the Board?

MS. BAILEY: Yes, Mr. Chair. There is a request for a postponement of one of the cases this morning and that is Application No. 17071, Edward B. Rooths.

CHAIRMAN GRIFFIS: Okay.

MS. BAILEY: Are you representing the Applicant, sir?

MR. CRICKMAN: Yes, Ken Crickman of Jackson and Campbell.

MS. BAILEY: Please have a seat.

CHAIRMAN GRIFFIS: Good. Why don't you have a seat and give us two minutes. Did you have additional information to add regarding the request for a continuance? It's my understanding of this submission is that there's a need for additional time to get the rest of the case presented.

MR. CRICKMAN: That's right.

CHAIRMAN GRIFFIS: So essentially you're

not prepared to go forward with it today.

MR. CRICKMAN: That's correct.

CHAIRMAN GRIFFIS: Any questions from the Board? Is there anyone else here attended to this application, Case No. 17071, Bruce Dao? How would you say that last name, D-A-O?

MR. CRICKMAN: Dao.

CHAIRMAN GRIFFIS: Is the ANC representative here today? Not seeing anyone else giving an indication of participating in this case, are there any objections to granting the continuance?

COMMISSIONER HOOD: No objection.

CHAIRMAN GRIFFIS: Okay. Do you have a proposed date for the Board to reschedule this?

MR. CRICKMAN: At least 60 days.

CHAIRMAN GRIFFIS: Right. Indeed. You indicated at least 60 days. Ms. Bailey, do we have a date that seems to work well?

MS. BAILEY: Mr. Chairman, I was just advised that February 10th would be the earliest.

CHAIRMAN GRIFFIS: Okay. February 10th, let's set it for the morning. Is that appropriate for you, Ms. Bailey, from what you're seeing?

MS. BAILEY: Yes.

CHAIRMAN GRIFFIS: Very well. Let's do

it. Any difficulty with the 10th of February?

MR. CRICKMAN: That's fine.

CHAIRMAN GRIFFIS: Thank you very much.

MR. CRICKMAN: Thank you.

CHAIRMAN GRIFFIS: Ms. Bailey, if there's not any other preliminary matters, why don't we call the first case in the morning then?

MS. BAILEY: That is Application No. 17072 of Maurice C. Walters and Mary Jean Pajak, pursuant to 11 DCMR §3104.1, for a special exception to allow a two-story rear addition to a single family semi-detached dwelling under section 223, not meeting the lot occupancy requirements (section 403) and side yard requirements (section 405). The property is located in the R-4 District at premises 623 Constitution Avenue, N.E. also known as Square 867, Lot 825. Please stand so you can take the oath and raise your right hand.

(Witnesses sworn.)

CHAIRMAN GRIFFIS: Allow me two seconds here. No doubt, you brought hundreds of people to testify for this special exception just like the special exception we heard but they were unable to stay. Is that correct?

MR. WALTERS: That's correct.

CHAIRMAN GRIFFIS: Indeed. Okay. For the record of course, that's great humor to start our late morning. Indeed. I'm sorry. Did you introduce yourself for the record?

MR. WALTERS: Maurice Walters.

CHAIRMAN GRIFFIS: Okay. Board members, what I'd like to do is run quickly through this. Clearly we've had sufficient submissions in the record and it looks like the photographs that we have in the record of the model are actually -- The model is present here today for questions. This is a 223 Application. I would suggest that we'll give Mr. Walters opening statement and then have questions from the Board if there is no objection from the Applicant or the Board. With that, why don't we turn it over to you.

DIRECT TESTIMONY

MR. WALTERS: Okay. Is it okay for the opening statement just to quickly walk you through the design?

CHAIRMAN GRIFFIS: Sure. Absolutely.

MR. WALTERS: This is a house that my wife and I live in at 623 Constitution in Capitol Hill in the historic district. You can see an OP map here that it's a unique structure. It sits back about 24

feet from the street line. It was built in about 1880 and has existed pretty much that way since then.

You can see here. These are photographs of Constitution Avenue. Our house is set back here. Immediately to the east is an old C&P phone building that converted to condominiums and then some more of the townhouses that flank it to the west. Some close-up shots of the house. It's a very modest house, two stories in height. Shots of the front and then some details and then some shots of the backyard. You can see the adjacent C&P phone building to the side. This is in the backyard looking to the back. Again that's the C&P phone building and there's a two story garage located at the rear of the structure.

The existing house is 700 square feet, a one bedroom house. We're seeking to extend it to create both a separate living/dining area and a second bedroom within the house. In this plan here, you can see this is the property line at the front and then the 24-foot setback from the property line. The existing house is 13 feet 9 inches wide by 26 feet deep. It currently just has one big room with the kitchen in the back.

Our proposal is to come off the back 18 feet eight inches with an addition and then a two

foot, four inch deep bay window on the back to extend it and create a separate living room and then reconfigure the kitchen and work in a little powder room under the stair. The backyard is currently a little over 50 feet deep. With the extension, the backyard will be about 30 feet deep by 18 feet wide.

The second floor of the front of the house is basically staying intact with a little bit of reconfiguring of the bathroom. Then a second bedroom is added to the back and then over the little side entry on the passage, a spiral stair leading up to a roof on the back of the house that will have a green roofing system on it.

The reasons for the special exception are (1) a nonconforming side yard and (2) the lot occupancy. The lot is 18 feet by 136 feet so it is a semi-detached house. It has a four foot passage along the side as it was built in 1880. We seek to extend that by just bringing the line of the building back so that brings up on one of the needs. Then the fact that it is semi-detached, 40 percent lot occupancy allowable, we're proposing to go to 60 percent and the 60 percent includes the side yard as required of the lot occupancy of the house.

Getting into the elevations of the

building, this is the existing front of the house. The house was renovated in 1961 and there were some things that were done that weren't quite in compliance with what's the proper thinking of historic preservation. The windows were bricked down. The heads were lowered. They were bricked up at the bottom and then six over six windows were put in. The door was actually bricked up and the transom removed.

What we are proposing doing is opening the windows back up to the heads and down a little bit and actually out to the proper opening width and putting in one over one windows which is appropriate for the style of the house and then putting in a glass door with a transom and then a slight decorative treatment at the front door to keep the rain off the front of the door.

On the rear of the house, you can see the bay window on the back which would be made out of fiber cement trim with doors and then the main body out of masonry. The side of the existing house kept intact with the exception of one low window in the powder room to bring light into the powder room.

Then on the west side, this would be the addition with the door into the side. The addition will be in brick with two small windows, clear story

windows in the living area and then brick going up with some brick ties added to continue the pattern, brick ties in a subtle soldier course just to give some character to the side and then another soldier course up above. Then the top parapet wall treated with a fiber panel trim to bring the visual scale of it down and then the bay window off of the back of the house.

Lastly the view from the east. In the area way of the adjacent building, there's an existing masonry wall that occurs over there. It's about seven and a half/eight feet tall. You can see where the existing house presents that wall to that side and then the addition would be built on top of that wall going up to there and then the fence will be replaced and the six foot high fence will continue to exist on top of the building there.

You can see in the model just to get a feel for the scale of the addition. This is the C&P phone building to the east, the neighboring building to the west. This is the extent of the existing house and then the addition back here. So in closing we seek to expand the house to make it a more livable house, more viable property and also to restore the front of the house in keeping with the character of

the neighbor. Thank you.

CHAIRMAN GRIFFIS: Thank you very much and of course we'll give you an opportunity for closing at the end after you've heard from all of the other reports. Let's take Board questions now. Mr. Zaidain.

MEMBER ZAIDAIN: A couple quick ones. I know you're going through a summary here but you didn't mention the accessory structure in the back that was subject of variance.

CHAIRMAN GRIFFIS: Right, in the 1970 variance of which was submitted into the record.

MEMBER ZAIDAIN: Right. How is that accessory structure included in the lot occupancy? I assume it's part of your calculation.

MR. WALTERS: Yes, it is.

MEMBER ZAIDAIN: Also the 24 foot front yard setback I thought was interesting concerning most houses in Capitol Hill are built all the way up to the right of way line if not part of their building is in the right of way line. Is that measured from the edge of curb or from the edge of the right of way?

MR. WALTERS: From the edge of the right of way.

MEMBER ZAIDAIN: So you're one of those

lucky people that has your own front yard.

CHAIRMAN GRIFFIS: Yes, actually I was struck with that too when I read it and had to look back. But the photographs show fairly distinctly that the standard rowhouse is moved substantially out towards the street in a more tradition sense.

MEMBER ZAIDAIN: Actually in Capitol Hill usually the right of way is always to the building and most of those bay windows that you see project out into the right of way.

CHAIRMAN GRIFFIS: That's what I'm saying. This is the only one on the block that does that.

MEMBER ZAIDAIN: That's interesting.

CHAIRMAN GRIFFIS: We're not going to spend time going into the speculation, but it probably was the type of accessory building in a larger development.

MEMBER ZAIDAIN: Right. And one other question. I was just reading here. You are providing separate living and dining areas. This isn't for a separate unit, right? This is just additional facilities in the house.

MR. WALTERS: No, it's just to make it a proper size house.

MEMBER ZAIDAIN: Okay.

CHAIRMAN GRIFFIS: Any other questions of the Board? Excellent. I think the record sufficiently shows and from your testimony today clearly how you meet all the points of the section 223. I would normally read down and have you agree or disagree. I'm not going to do that now as we have great and sufficient information on it. It's fairly clear one in the written testimony how this would not impact the light, air or enjoyment of the adjacent, essentially the adjacent as you said the converted building to condos which actually that's an interesting site section elevation that's showing on that board.

One of the things that I think the Board ought to be aware of also in the submission of the record is that fenestration of windows on that area actually are adjacent to the corridor. Is that correct, Mr. Walters?

MR. WALTERS: That's correct.

CHAIRMAN GRIFFIS: So it's not as if those are units looking out over the property that might impact your privacy or yours might impact their privacy.

MR. WALTERS: That's correct.

CHAIRMAN GRIFFIS: Okay. Good. If there

are no other questions of the Board, let's move on to the OP. Mr. McGhettigan is here with us. How are you this morning, sir?

MR. McGHETTIGAN: Fine. Thank you.

CHAIRMAN GRIFFIS: Good.

MR. McGHETTIGAN: The OP would just like to say on the record for our report lays out how the Applicant meets the test and we recommend approval.

CHAIRMAN GRIFFIS: Thank you very much. I think that's absolutely appropriate. Mr. Walters, do you have any question or cross examination of the OP?

MR. WALTERS: No.

CHAIRMAN GRIFFIS: And you have their memo. Is that correct?

MR. WALTERS: Yes, I do.

CHAIRMAN GRIFFIS: Okay. Any Board questions of the OP?

MR. McGHETTIGAN: I have one.

CHAIRMAN GRIFFIS: Let's not take long. But if you look at your aerial photo, it doesn't look like the garage is showing. Do you know when this photograph was taken or could it have conceivably been taken prior to 1970?

MR. McGHETTIGAN: I think it's just the

shadow.

CHAIRMAN GRIFFIS: Is it the shadow? I couldn't really tell. It's not important, of course, but it was fascinating to me.

MR. McGHETTIGAN: I think it's in the shadow.

CHAIRMAN GRIFFIS: Perfect. Which means it's set back from -- I can figure that out. Any other government reports attendant to this application that I'm not aware? It not, let's move on to the ANC. Is there an ANC representative from 6-C here today? It would have been kind of interesting to see them here today. You took this through. They have recommended approval. Their report was timely filed. I don't have an exhibit number on it. Yes, Mr. McGhettigan, do you have some data on that?

MR. McGHETTIGAN: Yes, I have a letter from fire and emergency medical services department.

CHAIRMAN GRIFFIS: Was that attached to your report?

MR. McGHETTIGAN: No, it was not. I received it after my report.

CHAIRMAN GRIFFIS: Excellent. So you are putting that in today.

MR. McGHETTIGAN: Yes. They have no

objection.

CHAIRMAN GRIFFIS: Okay. Thank you. We'll put that in as an exhibit. Exhibit 26 was the ANC Commission report 6-C. That's all that I have attendant to this application at this time. Is there anyone here either in support or in opposition to Application No. 17072 that would like to give testimony today? Not seeing any indication of requiring testimony opportunities, let's go to any final last comments, Mr. Walters, regarding your application.

MR. WALTERS: No final comments.

CHAIRMAN GRIFFIS: Okay. Last questions? I'm sorry.

MEMBER MILLER: I just want to note for the record Exhibit 22 which is a letter from Capitol Hill Restoration Society also in support of the application.

CHAIRMAN GRIFFIS: Excellent. Thank you very much. I'm sorry that I breezed over that. Very well. Any other clarifications? Clearly, I think that it's strong enough to move approval of Application 17072 for the rear addition under section 223 for the premises of 623 Constitution Avenue N.E. I would ask for a second.

MEMBER ZAIDAIN: I'll second, Mr. Chair.

CHAIRMAN GRIFFIS: Thank you very much, Mr. Zaidain. I know we've been abbreviated in this but I think the record is ample and sufficient. It addresses all of the requirements for the special exception under 223. Last and not least of those requirements is submitting proper elevations, photographs, diagrams. It has been more than sufficient in this case and it was very clear. Now with the model in front of us, I think it's absolutely clear on what the impact of this will be. So I would entertain any other deliberation, comments on the motion. If there are none from the Board, I will ask for all in favor that they signify by saying aye.

(Chorus of ayes.)

CHAIRMAN GRIFFIS: Any opposed. Abstaining.

(No response.)

CHAIRMAN GRIFFIS: If we could record the vote.

MS. BAILEY: The vote is recorded as five, zero, zero to approve the application. Mr. Griffis made the motion. Mr. Zaidain second. Mr. Etherly, Mr. Hood and Ms. Miller are in agreement. This is a summary order, Mr. Chairman.

CHAIRMAN GRIFFIS: I see absolutely no difficulty in a summary order on this one. Yes, thank you.

MS. BAILEY: The graphics that are up, sir, will we be keeping those?

MR. WALTERS: Would you like to keep them?

MS. BAILEY: Yes.

MR. WALTERS: Okay.

MS. BAILEY: Thank you.

CHAIRMAN GRIFFIS: Let's be clear on that. Anything that's present today, we're going to need copies of submitted into the record. If you want to make copies of it and submit it into the record, that would be appropriate to do. If you are leaving actually those color rendered, then of course those won't be returned to you. They become an official part of the record.

MR. WALTERS: They are the same drawings as were submitted but they are just colored. Would you would like color copies?

CHAIRMAN GRIFFIS: Ms. Bailey, do you have any concern if we do not have the color or do you want color submitted into the record?

MS. BAILEY: We don't have to, Mr. Chairman. There's no opposition here.

CHAIRMAN GRIFFIS: Right. I think it would become more of an issue in an opposed case, but it is clear that all these drawings are the exact drawings that were submitted in package that were going in. It just has color on these for better ease of reading them. That being said, I think we have everything we need to complete the record. If there is something that you are aware of that you presented today that isn't in the record, you can submit it in.

MR. WALTERS: I'm sorry. The only thing would be the OP map on the left.

CHAIRMAN GRIFFIS: Map. Right.

MR. WALTERS: That's not in there. I can take that off and leave it.

CHAIRMAN GRIFFIS: Excellent. Why don't we do that.

MR. WALTERS: Okay.

CHAIRMAN GRIFFIS: Good. Is there anything else that attends to this application? Anything else, Ms. Bailey?

MS. BAILEY: No, sir.

CHAIRMAN GRIFFIS: Great. Thank you very much. We appreciate your patience with this this morning and hopefully you will enjoy your day. At least you get out in time for lunch. With that, why

don't we call the next case in the morning.

MS. BAILEY: Application No. 17069 of 5626-28 Connecticut Avenue Associates, pursuant to 11 DCMR § 3104.1 for a special exception to allow an accessory parking lot (last approved by BZA Order No. 16233 dated July 27, 1998) under section 214. The property is located in the R-2 District at premises 3831 McKinley Street, N.W. known as Square 1860, Lots 5, 6, 7, 17 & 18. Gentlemen, would you please stand to take your oath?

(Witnesses sworn.)

DIRECT TESTIMONY

MR. McCANTS: Good morning, Mr. Chairman. My name is Leonard McCants. I'm here representing the Applicant, 5626-28 Connecticut Avenue Associates. We're here requesting a reissuing of a special exception for the property known as 5626-28 Connecticut Avenue. The property as I indicated is located directly at 3831 McKinley Street N.W., Washington, D.C., Square 1860, Lots 5, 6, 7, 17 & 18. The site is zoned R-2 and is located as I indicated on McKinley Street. It is used as a parking lot for the customers of MacGruder's Food Store which fronts on 1526-28 Connecticut Avenue.

Subject property is located on the north

side of McKinley Street and is bordered by 39th Street to the west and to the east right now, it separates the parking lot from MacGruder's Food Store. The site of the application is located within Advisory Neighborhood Commission 3-G.

The most recent special exception for this property was approved by this Board in an order dated July 27, 1998. That order granted the special exception for a period of five years. This Board further conditioned its approval of 16 requirements which are contained in that order and incorporated in our application which is submitted herein. The Applicant has met each of the conditions posed by that order of July 27, 1998 and we are therefore requesting a renewal of that special exception for the accessory parking lot for 56 parking spaces.

With respect to the application, we met the requirements of special exception for 56 parking spaces. We are asking that we continue as an accessory parking lot for MacGruder's Food Store and the relief if granted will be in harmony with the general purpose and intent of the Zoning Regulations and map and will not affect adverse use of neighborhood property in according with the said Zoning Regulations and map.

In terms of the criteria that's required, for its previous approval on Application 16233 established at the subject lot complies with the provisions of 11 DCMR 214 as an accessory parking lot. The Applicant continued to meet the requirements of section 214. The existing accessory passenger automobile parking spaces are on the same lot and are a part of the lot of which the main use is permitted. This is required under section 214.1.

CHAIRMAN GRIFFIS: Without going through all of 214 and you can have testimony to it, but your submission is clearly that all of the provisions of 214 haven't changed since the last order. So the parking lot hasn't moved.

MR. McCANTS: It hasn't moved.

CHAIRMAN GRIFFIS: It's still separated by an alley. It's still used for parking and no cars are parked over the property line, etc.

MR. McCANTS: That's correct.

CHAIRMAN GRIFFIS: Okay. We can move on from there.

MR. McCANTS: Very good. Then I just want to say in summary that we have a witness, Mr. Gary Bortnick, who is a Vice President of the food store. I just simply wanted to ask Mr. Bortnick for the

record. You are associated with the parking lot in what capacity, sir?

MR. BORTNICK: I'm a principal in the business and we use the parking lot for our customers.

MR. McCANTS: All right. To your knowledge, has the parking lot complied with the previous Board order in terms of the special exception and the conditions imposed on that special exception?

MR. BORTNICK: Yes, it has.

MR. McCANTS: Are you asking the Board to reestablish the parking lot or to extent the special exception on this particular lot for an additional five years or so?

MR. BORTNICK: Yes, five years or more.

MR. McCANTS: Five years or more. All right. Are we asking that the conditions that were previously granted be incorporated in this request or are you asking for some change in those requirements?

MR. BORTNICK: We with the ANC were requesting that five changes be made to the previous application.

MR. McCANTS: And what are they? Mr. Chairman, we are referring to page --

CHAIRMAN GRIFFIS: Indeed. Do you concur with all the ANC's proposed changes, deleting numbers

two, seven, 12, 21 and 23?

MR. BORTNICK: Yes, I do.

CHAIRMAN GRIFFIS: In addition, you want to modify condition number three.

MR. BORTNICK: That's correct.

MR. McCANTS: And the modification on number three is what, sir?

MR. BORTNICK: The modification is in lieu of having a parking attendant from the minute that we open until the minute that we close to that he is there during the core hours.

CHAIRMAN GRIFFIS: I see. Defined as 10:00 a.m. to 6:00 p.m.

MR. BORTNICK: Yes, sir.

CHAIRMAN GRIFFIS: Okay.

MR. McCANTS: In terms of the other modification, I think that's self-explanatory in terms of what we are asking for, deletion of certain other items, Mr. Chair. I don't think it is necessary to go through each and every one of them.

CHAIRMAN GRIFFIS: No.

MR. McCANTS: The point is that we're requesting the modification of those in compliance with the ANC recommendations.

CHAIRMAN GRIFFIS: Okay. Questions from

the Board?

MEMBER MILLER: I just wanted to clear. We are only talking about deleting 2(a), not all the paragraphs under 2. Is that correct?

MR. BORTNICK: I believe that's correct.

MR. McCANTS: That's correct.

MEMBER MILLER: Thank you.

CHAIRMAN GRIFFIS: Is that right? I see. So it's 2(a). I thought the entire 2 is coming out.

MR. McCANTS: No, Mr. Chair. We are just requesting 2(a). The others we accept.

CHAIRMAN GRIFFIS: Here's my concern in where we're going next. I think it's all well and good. In fact, it's a great thing. You talked to the ANC and had come to negotiation for the change and the conditions and what goes and not. Now the Board needs to look at it about what is appropriate for the Board to condition. This brings up a specific point. Within 30 days, you're going to repaint pedestrian walkway in the parking lot. That's condition 2(b). Within 30 days, you're going to repair the existing ruts and place small boulders and planters on both sides of the parking lot.

MR. BORTNICK: That's all been done.

CHAIRMAN GRIFFIS: Right. So why are we

conditioning it? That's my point. I understand. There are numerous conditions in all these 18 conditions that happen to go to restating our 23 conditions. Twenty-three conditions that in fact are the regulations. You're required to do it whether we condition it or not, for instances, maintaining or removing snow and ice, maintaining the vegetation and landscaping.

My point is - and I don't necessarily mean unless you don't understand what I'm saying - there is no reason for us to condition these things in an order. It is without saying a requirement for you to continue in this stuff. So I think we may clean up a lot of this. Go ahead. Now you can comment.

MR. BORTNICK: Sir, that's what I was trying to do with the ANC. Last winter during the snow storm, we even testified. I'm not a D.C. resident. I live in Montgomery County.

CHAIRMAN GRIFFIS: We hold that against you a little bit, but not too much.

MR. BORTNICK: I know. I came down with the store manager. We were the only ones that shoveled basically our whole block. I found it as an insult that they have to tell me that I'm supposed to shovel my sidewalk. We actually made a path all the

way up to the post office.

CHAIRMAN GRIFFIS: Right.

MR. BORTNICK: That's what we testified to the ANC that why do you find it necessary after being in business for 35 years and being a good neighbor that you have to give us all these regulations. We can't possibly plant any more hedges.

CHAIRMAN GRIFFIS: Right. For my purposes in terms of regulating, the Board need to craft conditions that we actually control.

MR. BORTNICK: Right.

CHAIRMAN GRIFFIS: So even if you weren't removing your snow off your property, we actually have no control over that. We couldn't go and enforce necessarily that. There are other bodies. That's not a great example to use but it goes to the direction that we need to look. In terms of planting, that's also in condition 2D, plant evergreens near the wall on McKinley Street. That's been done within 30 days of the previous order. Is that correct?

MR. BORTNICK: Yes, sir.

CHAIRMAN GRIFFIS: Those obviously will be maintained.

MR. BORTNICK: Yes, sir.

CHAIRMAN GRIFFIS: Condition No. 6 says

"the parking lot, retaining wall and adjacent landscaping shall be maintained, policed, kept in prime condition." Is that not, Board members, your understanding of the regulations? Ms. Monroe, you can also weigh in on that. The only thing specific with that is if such policing should occur at least three times a day and is it in this condition? Right. The shopping carts would be retrieved. Do you retrieve shopping carts three times a day?

MR. BORTNICK: I would say so. Yes, sir.

CHAIRMAN GRIFFIS: Okay. That would be to your own benefit, wouldn't it?

MR. BORTNICK: I would say we do it a lot more than three times a day.

CHAIRMAN GRIFFIS: How much do shopping carts cost?

MR. BORTNICK: About $120.

CHAIRMAN GRIFFIS: So you don't like those walking away.

MR. BORTNICK: Not really. No, sir.

CHAIRMAN GRIFFIS: Okay. It seems like it's a good condition to put in but a redundant condition that clearly you're going to be attendant to. But as it's already been crafted and all that, what I want to do is take out some of that for we may

need to look at that. Condition 11, again I think it's fairly redundant. It is a requirement. I don't think by taking any condition that we're lessening the burden and responsibility of you, but certainly proper gardening, mulching, trimming trees, I think the Board needs to look at that one. Other comments?

MEMBER MILLER: I know you're going fairly quickly through these. I'm not sure when you were talking about the provision that was required by the regulations anyway. Could you just maybe recite the regulation if we're going to take it out? I'd like to be sure that it is actually going to be covered by the regulation.

CHAIRMAN GRIFFIS: Sure. We'll get to that.

MEMBER MILLER: I think that was number six, "Parking lot retaining wall and adjacent landscaping shall be maintained, policed and kept in prime condition."

CHAIRMAN GRIFFIS: Okay. Let's move on. Anything else from the Applicant to present the case today?

MR. McCANTS: Nothing other than just to point out that we have a letter from the ANC which supports this application with those modifications.

CHAIRMAN GRIFFIS: Right. We'll get to that as we've already touched on it. Let's move on. Any other questions? Let's move to the OP then.

MEMBER MILLER: I just want to ask another question.

CHAIRMAN GRIFFIS: Yes, sure.

MEMBER MILLER: About those conditions, are there any other conditions you want to bring to our attention that you think should not be included? We will be deliberating on the conditions.

MR. McCANTS: He asked for more than five years.

MR. BORTNICK: I would ask for more than five years. I would ask for ten years based on our past history of being there for 35 years and being a good corporate citizen.

CHAIRMAN GRIFFIS: Did you bring that up with the ANC?

MR. BORTNICK: No, sir.

CHAIRMAN GRIFFIS: You didn't talk about timing with the ANC so they essentially assume the adoption of the conditions that are in existence today. Is that your understanding?

MR. BORTNICK: That's correct.

COMMISSIONER HOOD: Mr. Chairman, I just

want to say something. The gentleman made a statement and I forgot your name, sir.

MR. BORTNICK: Oh, Gary Bortnick.

COMMISSIONER HOOD: Mr. Bortnick, you mentioned about shoveling snow. I really just want to make a comment to you. Community groups look at these sometime and while we may not be able to enforce those issues because everybody actually is not a good neighbor. It was not necessarily intended just to your specific business, but a lot of precautionary measures are put in place for their protection while not being enforceable. So it's not necessarily directed at you. I'm pretty sure from reading the ANC letter, but they put those precautionary measures in place because not everybody is a good neighbor.

MR. BORTNICK: I understand.

COMMISSIONER HOOD: I just wanted to clarify that for the record. Thank you.

MR. BORTNICK: And my back can testify to that, because last year I'm the one who did the shoveling. Ms. Miller, did you want me to go through these. There were a number of conditions that I would have approached with the ANC, but I didn't know if that was appropriate or not appropriate. I think a number of these conditions are certainly common sense

and I don't know why they are in my agreement with the ANC.

CHAIRMAN GRIFFIS: Do you have specific ones that you want to identify? Have you done that? We can give you time if you don't. Actually why don't you take a moment to do that as we go to Title 11 Section 2303 for parking lots.

MR. BORTNICK: Okay.

CHAIRMAN GRIFFIS: "Parking lots in any district shall conform to the following provisions:

(a) is always devoted to parking. Access lanes of parking areas shall be paved, maintained with grade concrete or materials, combination of materials, and others as if appropriate by the Department of Transportation, structuring equivalent or better, all-weather impervious surface;

(b) parking lots are designed so that vehicles or any part of vehicles not present over lines;

(c) no other use would be conducted;

(d) vehicular access within 40 feet of an intersection;

(e) lighting used to illuminate wouldn't conflict with anything else surrounding the area;

(f) parking lots shall be kept free of

refuse and debris; shall be landscaped; landscaping shall be maintained in a healthy growing condition, neat and orderly appearance; landscaping with trees and shrubs shall cover a minimum of five percent of the total area, lot or area determined by the Board of Zoning for the parking lot..." And it goes on.

There are other provisions that are attendant to the parking lots but I think that hits most of them. Is that clear?

MEMBER MILLER: Yes, thank you.

CHAIRMAN GRIFFIS: Sure. Okay. Now let's go back to conditions.

MR. BORTNICK: I would say No. 4. The reason with No. 4 is we do have a parking lot attendant, but he's not a policeman. I don't believe he has the authority. He facilitate the parking lot, but he cannot stand out on McKinley Street and stop a car for instances who might be making an illegal turn. I brought that up in the past. No. 6, I think Ms. Miller just brought up or someone brought up about retrieving and it's to our benefit to retrieve those.

CHAIRMAN GRIFFIS: Right.

MR. BORTNICK: No. 8, "no discharges from store operations shall be flushed into the alley of the street." We haven't done that in 35 years so I

don't know why we would start flushing things down the alley now.

CHAIRMAN GRIFFIS: It's also not a Zoning issues, is it? Okay.

MR. BORTNICK: Well, I guess you just asked a question. I skipped over nine and ten because I'm not clear what is a Zoning issue and what is just good common business sense that we have to secure. The Avalon reopened their theater about six months ago and we put signs up "No Avalon parking" because of this and we don't want to have Avalon theater goers to park there.

CHAIRMAN GRIFFIS: Right.

MR. BORTNICK: Although we were approached by the community to allow them to use our parking lot. I said "Folks, you told me I can't use it."

CHAIRMAN GRIFFIS: Right.

MR. BORTNICK: So I'm not sure if nine and ten could come out if it is a Zoning issue.

CHAIRMAN GRIFFIS: What's your understanding of why the community wanted the changed parking lot.

MR. BORTNICK: When the Avalon was there in prior years, that people were not using our parking lot at all hours of the night.

CHAIRMAN GRIFFIS: But why would the community care about that? Did they want them off the streets and parked in your parking lot?

MR. BORTNICK: Noise. The movie theater ends at 11:00 p.m.

CHAIRMAN GRIFFIS: I see. So heavy use. Not your store hour use.

MR. BORTNICK: Right. Non-store use.

MEMBER MILLER: I'm not clear about your position on nine and ten. Are you saying you'd rather not restrict the hours?

MR. BORTNICK: No, I would rather not have it in here. We do it anyway. I don't gain anything by the Avalon parking or anybody. When my store closes, we lock it up.

CHAIRMAN GRIFFIS: Okay. Now there's another thing that we weigh with conditions in terms of although you may not want it and you have a business that this would certainly be the practice, but this runs with the parking lot too.

MR. BORTNICK: Right.

CHAIRMAN GRIFFIS: So conceivably there could be a new user next year and if this ran for five years. We also keep that in mind. Okay. Anything else that jumps out at you that we need to look at?

MR. BORTNICK: The No. 11 about the mulching and screening, we maintain that and always have. Bumpers stops, No. 14. I don't know how somebody would possibly hit an adjoining building. It would have to be an awfully long car.

MEMBER MILLER: I don't understand. Do you have those?

MR. BORTNICK: There are bumper stops. There's walls. They would have to go through some walls. There are bumper stops along the other, but why it's stated in here, there's not really an adjoining building. There's an alley in between the parking lot and the other adjoining buildings. How would a car park and hit a building? It would have to go four feet across the alley.

CHAIRMAN GRIFFIS: Right.

MR. BORTNICK: So that one could come out. The same way with No. 15. No. 19, it's repetitive. We've done the decorative boulder. We've put in trees.

CHAIRMAN GRIFFIS: What was the decorative boulder for?

MR. BORTNICK: When they came up the alley, there were trucks that were missing the turn. So they would make a rut in the alley in the grass

area.

CHAIRMAN GRIFFIS: I see.

MR. BORTNICK: Now if a truck, not necessarily a MacGruder truck, there's also a paint store there.

CHAIRMAN GRIFFIS: As opposed to bollard or some sort of defined –

MR. BORTNICK: It's real big. They are going to know when they hit it. They're not going to move it.

CHAIRMAN GRIFFIS: It's No. 19, decorative boulder condition.

MR. BORTNICK: So 19 would come out.

MEMBER ZAIDAIN: How was it made decorative? I have to ask.

MR. BORTNICK: It was a pretty rock.

MEMBER ZAIDAIN: Was it nice?

MR. BORTNICK: It was a pretty rock and then we planted some bushes around it. If they want to run over the bushes, they're going to find out that there's a four foot boulder.

MEMBER ZAIDAIN: So in a way, it was kind of a trap. They didn't think the boulder was there. They thought they would drive through it. Next thing you know their transmissions on the road.

MR. BORTNICK: Whatever. So when one of those paint trucks hit it, they would know that they had. No. 20, here again like the Chairman just stated if we were not there in a year so that's something they might want to leave in.

CHAIRMAN GRIFFIS: Yes.

MR. BORTNICK: No. 21, don't know why that's in there. We haven't had a problem.

CHAIRMAN GRIFFIS: But 21's the one they`re asking to come out. Isn't that correct? The ANC.

MR. BORTNICK: I thought it was 23.

CHAIRMAN GRIFFIS: Is it 23? In ANC's letter, it says "To be deleted as to user truck seven damage to the –-, 12 additional screen and then it lists 12 again. Is it all in condition 12, outflow of traffic to 39th Street? I read that as a typo because 21 talks about the trucks exiting across the curb of 39th Street. Was that your reading in their letter?

MR. McCANTS: Apparently, I think you're right, Mr. Chairman. That's apparently is a typo.

CHAIRMAN GRIFFIS: And that's supposed to be condition 21 or some other condition?

MR. McCANTS: That is correct. Twenty-one.

CHAIRMAN GRIFFIS: Can you turn on your mike?

MR. BORTNICK: That would make sense.

CHAIRMAN GRIFFIS: Turn on your mike.

MR. McCANTS: You're absolutely correct. That should be 12 and 21.

CHAIRMAN GRIFFIS: So 21 is being proposed to be taken out also.

MR. McCANTS: That is correct.

MR. BORTNICK: Then 22, we spoke of.

CHAIRMAN GRIFFIS: Right.

MR. BORTNICK: Of course, 23 was also a recommendation to come out.

CHAIRMAN GRIFFIS: Right, of which you're concurring.

MR. BORTNICK: Yes.

CHAIRMAN GRIFFIS: Okay. See that. We're down.

MEMBER ZAIDAIN: Actually I have a question.

CHAIRMAN GRIFFIS: Yes, Mr. Zaidain.

MEMBER ZAIDAIN: Going back to condition 9, you started to say something and I thought I knew where you were going, but then I got confused. This condition was put in to limit, is it the hours of

operations or the hours of the operation of when you are using the lot?

MR. BORTNICK: I think we tied it in with what the hours of the store are.

MEMBER ZAIDAIN: Okay, and that was asked to you by the community back when this order was originally adopted.

MR. BORTNICK: Yes, it was.

MEMBER ZAIDAIN: And they came back to you to say "Even though we asked your store to be closed, we wanted to be able to use your lot after 9:00 p.m." Did I understand your statement correctly?

MR. BORTNICK: That's correct. I just want to point out that it's also a liquor store. It's liquor, beer and wine.

MEMBER ZAIDAIN: Right.

MR. BORTNICK: We are governed by the District ABC laws. I believe we can stay open. I know before holidays we currently close at 9:00 p.m. Before a holiday, you're allowed to stay open an additional hour or two.

MEMBER ZAIDAIN: So basically what you're saying is the community asked you to restrict your hours from a tighter restriction than what you'd normally be allowed to be open.

MR. BORTNICK: No, absolutely not. They asked us to just when the store closes that we don't keep the lot open. That's when the store is open.

MEMBER ZAIDAIN: So the hours of your closing at 9:00 p.m. Monday through Saturday was your open policy.

MR. BORTNICK: Right.

MEMBER ZAIDAIN: But they asked you to codify that in this order.

MR. BORTNICK: Right. We probably didn't just pick up on this. We do stay open until 10:00 p.m. right before holidays because you're allowed to by the ABC laws.

MEMBER ZAIDAIN: Okay, but as condition 9 -- I'm sorry. Did we change condition 9 to reflect that?

CHAIRMAN GRIFFIS: No, we didn't make any changes to condition 9, but you raise a very good point of how many jurisdictions are there for hours of operation.

MEMBER ZAIDAIN: That was my question.

CHAIRMAN GRIFFIS: Are you proposing to take that out of a Zoning issue?

MEMBER ZAIDAIN: I was trying to get to what his discussions with the community were because

I found it to be somewhat interesting. If they are telling him that they want his parking lot and his store shut down at 9:00 p.m., did they come back to him later on and say "Hey, why don't you let us use your parking lot at 9:00 p.m.?"

CHAIRMAN GRIFFIS: The way I read condition 9 and not having been there, the pertinent point was obviously the gate not being closed down. The first sentence says "It will be closed when the operation is closed" and then they list the hours of operation almost as if it's the requirement of when that's when the gate closes and opens.

MEMBER ZAIDAIN: That's the way I read it.

CHAIRMAN GRIFFIS: I'm wondering though and now the way it's written and all that, that actually is defining the hours of operation.

MEMBER ZAIDAIN: Right and he's saying. Tell me if I'm wrong about what your understanding.

MR. BORTNICK: Go ahead.

MEMBER ZAIDAIN: I think he says that his understanding is this is a reflection of the law and I guess under ABC rules you can stay open an hour longer around the holidays. That may be the case but if this provision stays what it is, you'd be in violation of the order if you do that.

CHAIRMAN GRIFFIS: That's right.

MR. BORTNICK: So I would like to take this out. I would also like to point out that in the District I don't believe you can make deliveries before 7:00 a.m.

CHAIRMAN GRIFFIS: Right.

MR. BORTNICK: And trash pickups. It says Monday through Saturday and between 9:00 a.m. and 6:00 p.m.

CHAIRMAN GRIFFIS: 9:00 a.m. and 3:00 p.m. on Sunday.

MR. BORTNICK: 9:00 a.m. and 6:00 p.m. on Sunday.

MEMBER ZAIDAIN: Well, I want to keep delivery separate. I'm just talking about your general hours of your operation. Delivery is a whole other animal.

MR. BORTNICK: Well, I was still reading No. 9 about the hours of operation.

MEMBER ZAIDAIN: Okay. Yes, because I think he's started to come in.

CHAIRMAN GRIFFIS: I'm sorry. I did get confused here.

MEMBER ZAIDAIN: Because there's nothing in the order talking about deliveries.

CHAIRMAN GRIFFIS: Okay.

MR. BORTNICK: That was No. 10.

MEMBER MILLER: Can I ask a question?

MEMBER ZAIDAIN: I'm sorry.

MEMBER MILLER: Would the Applicant be okay with the first sentence in No. 9 but not the second sentence?

MR. BORTNICK: Absolutely.

MEMBER MILLER: Because I think that's what we're getting at.

CHAIRMAN GRIFFIS: Right. That's where we're going.

MR. BORTNICK: I think that was a great pickup by the Chairman.

MEMBER ZAIDAIN: Just to make sure, in terms of your conversation with the community, did I depict that correctly in the sense that they limited your business but then they wanted to use your lot after they limited your business?

MR. BORTNICK: No. The second part of your statement is true. They did want to come back and use our parking lot for the Avalon when they reopened which I did find quite interesting.

MEMBER ZAIDAIN: After they told you that they didn't want you --

MR. BORTNICK: After they told us. They basically wanted us when the store was closed they wanted the parking lot closed, but they did not say "You're going to open from 9:00 a.m. on Sunday morning until 6:00 p.m."

MEMBER ZAIDAIN: Okay.

MR. BORTNICK: They basically just did not want the parking lot open all night long.

MEMBER ZAIDAIN: Unless they were going to use it.

MR. BORTNICK: That's correct.

MR. BORTNICK: I don't want to belabor the point. That's what it is. I got what I wanted so thank you.

CHAIRMAN GRIFFIS: I don't want to mischaracterize the community's involvement. At least when we talk about the community, I'm talking about the ANC, the agency that we interact with.

CHAIRMAN GRIFFIS: Right.

MR. McCANTS: The ANC's interest in this was just to ensure that there was no undue noise and other kinds of distracting elements after these various hours that's listed here. That's what their concern was.

CHAIRMAN GRIFFIS: Right. Okay. We're

making a lot bigger issue of importance out of a small piece that we're just trying to figure out without the representation and without having been through the last of what the context was and what the concerns were. Yes, Ms. Miller.

MEMBER MILLER: We don't have anybody here from the community to testify on this. So we'll just have to take this with a grain of salt, but when you're talking about "they" were you meaning that "they," the ANC, wanted the community to be able to use the parking lot when the Avalon was opening or not? Or did you mean some members of the community did and some members don't want it open or what?

MR. McCANTS: The ANC did not and never asked that they use the parking lot after hours. That was never their intent.

MEMBER MILLER: Okay. I have a question on a different condition which is No. 23 which may be going out. The last sentence says "The Applicant shall take and maintain minutes of the quarterly meetings and submit those minutes upon filing for continuance of special exception." I gather that's what this is. I don't recall seeing any minutes in the record. What's the story with that?

MR. BORTNICK: Okay. The story with that

is after 1998 I met with an ANC rep. I'd go down to the store and we'd walk the property and I did make some personal minutes for our file and I believe I did send a copy over to the ANC. Over the course of the last three years, I called and said "Would you all like to have a meeting?" They were supposed to call and they said "There's no reason to meet. There are not problems."

So we haven't had a meeting in a number of years. We have a good working relationship. If there's a problem, they either go in and talk to my store manager or they pick the phone up and they call me or my partner. So there aren't any minutes to show you.

MEMBER MILLER: Okay. Thank you.

CHAIRMAN GRIFFIS: Good. Any other questions of the Board at this time? Let's go to the OP's report.

MR. MOORE: Good afternoon, Mr. Chairman and members of the Board. I'm John Moore, OP. The OP is standing in support of the application. There are a couple of questions that I recommend for the Board.

CHAIRMAN GRIFFIS: Good.

MR. MOORE: Please take a look at the DDOT report.

CHAIRMAN GRIFFIS: Yes.

MR. MOORE: The OP toured the site with DDOT and the manager of MacGruder's. The things reflected in the DDOT report I think you should consider. If you look at the bottom of page three in the OP report, there's a photograph.

MR. McCANTS: Excuse me.

CHAIRMAN GRIFFIS: Yes.

MR. McCANTS: We never got a copy of that report. Do you have an extra copy?

CHAIRMAN GRIFFIS: Do you have the DDOT's report?

MR. McCANTS: No, I don't have this one.

CHAIRMAN GRIFFIS: Is that the one you don't have?

MR. McCANTS: Yes, or OP report.

CHAIRMAN GRIFFIS: You don't have the OP report either.

MR. McCANTS: No.

MR. MOORE: He can have mine.

CHAIRMAN GRIFFIS: Those were submitted timely in the record. It's Exhibit No. 25 and then Exhibit No. 24 is DDOT. They've been in the record.

MR. MOORE: I'll be glad to give you this copy once I've made a couple of points here.

CHAIRMAN GRIFFIS: Okay.

MR. MOORE: Again, Mr. Chair, if you look at the photograph on the bottom of page three, this shows the alley regarding the bumper stoppers.

CHAIRMAN GRIFFIS: Yes.

MR. MOORE: If you look, there are none. We've asked the Applicant at that time if they would consider putting some there because theoretically a car could park there either at the front or back end. The rear of the car if it went all the way up to this curb is in the alley.

CHAIRMAN GRIFFIS: I see.

MR. MOORE: So we wanted the bumpers to be put there to prevent cars from doing that. If you look at the photograph on the top of page eight at the entrance to the site, there's no sign that says "Entrance." We asked them and they agreed to write "Entrance" on the pavement itself. That should be in the DDOT report. Your manager agreed that they would do that.

MR. BORTNICK: Okay.

MR. MOORE: So I would caution in those areas of things that are referenced in the DDOT report that they are stating as conditions although they should be picked up in 2303.

CHAIRMAN GRIFFIS: Good, indeed. If that's going to be difficult relative to that, let's get copies of that stuff out. Does anyone have a nice clean copy? That's excellent comments on that.

MEMBER ZAIDAIN: I had a quick question. As I reading this, I was trying to envision this and I'm looking at the DDOT report which you brought up. To make sure I'm clear, the arrow marking on the driveway off McKinley Street is needed to reinforce that the vehicular exit is prohibited from that driveway. That arrow would not be in the right-of-way. Correct? That would be within the parking lot.

MR. MOORE: Within the parking lot, right.

MEMBER ZAIDAIN: Okay. So essentially if I understand you correctly, there are three issues that you brought up in OP's report and DDOT's. One is the crosswalk markings between the parking lot and the entrance to the store to be repainted.

MR. MOORE: They agreed to do that also.

MEMBER ZAIDAIN: I understand. Then a narrow marking on the driveway off McKinley Street is needed to enforce that vehicular exit from that driveway and then you just mentioned the bumper stoppers.

MR. MOORE: Yes.

MEMBER ZAIDAIN: So there are really these three issues have been brought up aside from the fact that you recommended approval. Did I take words out of your mouth?

MR. MOORE: There was one area that Applicant couldn't control. People come east on McKinley and make a left into the parking lot. One of the neighbors came out and told us that it created havoc there. So DDOT is going to put first a second no left turn sign. There's one of the north side of the block now. They are going to put one of the south side to discourage people from taking a left into the lot from McKinley. We told the neighbor that we'd make sure that was put in there as a condition.

CHAIRMAN GRIFFIS: Okay.

MR. MOORE: So that will be changing in 30 days.

CHAIRMAN GRIFFIS: Good. Mr. Moore, do you have any comments on some of what you've heard today with the Board running through conditions outside of those you've already mentioned? Basically you're saying maintain the bumper stop condition which is in there already. Any of the others?

MR. MOORE: To be appropriate and diplomatic at the same time, I would recommend as you

said that the Applicant adhere strictly to the conditions of 2303 because in many cases, they did meet the test as indicated in the our report, but just marginally.

CHAIRMAN GRIFFIS: I see.

MR. MOORE: So I think they should definitely look at 2303 instead.

CHAIRMAN GRIFFIS: Okay. Thank you.

COMMISSIONER HOOD: Mr. Chairman.

CHAIRMAN GRIFFIS: Yes.

COMMISSIONER HOOD: I wanted to ask Mr. Moore also. Do you have a comment on what the Applicant is asking for? He's obviously negotiated or what was recommended was five years and he just stated that he wouldn't mind having ten. Do you see any problems?

MR. MOORE: We took that under consideration and as I just indicated because the Applicant met the conditions but not greatly met the conditions, we didn't recommend a greater period.

COMMISSIONER HOOD: Okay. And I also just wanted to thank you for your report. I think the pictures really add to the report and give me some insights on actually what's going on. Thank you.

CHAIRMAN GRIFFIS: Indeed. Ms. Miller.

MEMBER MILLER: I just want a clarification. Did you say they met the conditions but marginally?

MR. MOORE: Yes.

MEMBER MILLER: Can you just elaborate a little bit more on that?

CHAIRMAN GRIFFIS: He was just saying it wasn't as good as it could be.

MR. MOORE: Some of the areas mentioned there are ruts which were not all in the alley. Again if you look at the photograph on page three, you see where there's a big scar on the parking lot that's been repaired. The lot should have been done. You have several areas on the lot where they have actually taken care of where there was a divot or something which is meeting the standards but minimally. I guess I would want to take another look at it in shorter timeframe than ten years because that's not going to get any better. But again if they took care of what's under 2303, there would be no problems.

CHAIRMAN GRIFFIS: Understood. Are there any other questions for OP? Does the Applicant have any cross examination of the OP? Any questions?

MR. McCANTS: No questions.

CHAIRMAN GRIFFIS: Okay. Good. Thank

you. That does take care of the DDOT report also. I don't have any other notes of attendant government reports on this application. Let's go to as we've talked to now the extensive of the ANC 34-G report which is Exhibit No. 22. They had listed in the proposed changes to conditions and also enumerated their support of this and this was appropriately and timely filed. Is that correct? We're all set there. Good.

That's all the submissions I have regarding this application. Of course it goes without saying that there was a previous order with the conditions which we've been going to is in the record. Let's go to any closing remarks.

MR. McCANTS: Mr. Chairman, we simply ask the Board to grant the application with the modifications as indicated here for a period of ten years.

CHAIRMAN GRIFFIS: I see. Okay. Two choices, Board. Let me have an indication whether you want to proceed today or we can set this for decision making next week. What we can do is actually have the proposed conditions or keep the record open for proposed conditions from the Applicant. I think we're going to need additional time to deliberate and craft

all these conditions. It would be wise just to set this for a decision on Tuesday, if that's amenable or I'm open if we want to try and fly through this right now.

COMMISSIONER HOOD: The only issue I have, Mr. Chairman, if we would move right now is this time issue.

CHAIRMAN GRIFFIS: Okay.

COMMISSIONER HOOD: I would right now like to see it at five years and remain five years.

CHAIRMAN GRIFFIS: Okay.

COMMISSIONER HOOD: First of all, they brought it up earlier and why I understand they may still be compliance, but I think it needs to be revisited a lot sooner sometimes than later. That's why I would be ready to proceed or if not. Whatever is the Board's pleasure.

CHAIRMAN GRIFFIS: Any other comments or questions?

MEMBER ZAIDAIN: I'm in a similar position, Mr. Hood. I'm in the same position with him on the timing and then as long as we address the issues raised DCOP and DDOT, I would be ready to proceed.

CHAIRMAN GRIFFIS: You want to move today?

Okay. I'm fine. Let's entertain a motion if the Board is so inclined to do it.

MEMBER ZAIDAIN: Can we move under a motion and then have the conditions elaborated after the motion?

CHAIRMAN GRIFFIS: Yes.

MEMBER ZAIDAIN: Okay. Then I'll move to approve Application No. 17069 pursuant to 11 DCMR § 3104.1 for a special exception to allow an accessory parking lot which was last approved by BZA Order No. 16233 in July 1998 under Section 214 at premises 3831 McKinley Street, N.W, with conditions as to be discussed by the Board.

VICE CHAIR ETHERLY: Second it.

CHAIRMAN GRIFFIS: Thank you. Let's run through the conditions and attend to your motion, Mr. Zaidain. First of all, condition one would be for approval of five years. Is that correct?

MEMBER ZAIDAIN: Correct.

CHAIRMAN GRIFFIS: Condition No. 2 would be a parking attendant from MacGruder's shall be present on the lot during all hours of operation. Is that correct? That's current Condition No. 3.

MEMBER ZAIDAIN: Hang on just one second.

MEMBER MILLER: Is it all right if we

clarify that the current Condition No. 2 would now be out for deliberation purposes?

CHAIRMAN GRIFFIS: Exactly.

MEMBER MILLER: What I think what we're doing is working with that order.

CHAIRMAN GRIFFIS: That's correct. Two is to be removed so that Condition No. 2 in your motion, Mr. Zaidain, is actually current Condition No. 3 which is that a parking attendant would be present in the lot during all hours.

COMMISSIONER HOOD: The core hours which is what the ANC had asked for.

CHAIRMAN GRIFFIS: Okay. I'm sorry. The core hours.

COMMISSIONER HOOD: Do we define core hours or can we say just core hours in general? Are the core hours 10:00 a.m. to 6:00 p.m.?

MR. BORTNICK: That's correct.

COMMISSIONER HOOD: Okay.

MEMBER MILLER: Do you want to put that in or do we want to leave that for flexibility?

CHAIRMAN GRIFFIS: No, core hours don't mean anything a year from now. I think we ought to have a time in there.

MEMBER MILLER: Okay. So that was 10:00

a.m. to 6:00 p.m.?

COMMISSIONER HOOD: 10:00 a.m. to 6:00 p.m.

MEMBER ZAIDAIN: Do you want to continue, Mr. Chair?

CHAIRMAN GRIFFIS: Sure. I'll help you out. There were some questions about removal of Condition 4 which seems to now give a job description of what the parking attendant is supposed to do. So it's been proposed for that to be removed.

MEMBER ZAIDAIN: I would agree, Mr. Chair.

CHAIRMAN GRIFFIS: Okay.

MEMBER MILLER: Sorry, but I thought the first sentence might be in. That there would be a parking attendant to monitor the cars but the description following would be out. It gets into monitoring traffic beyond the parking lot almost.

CHAIRMAN GRIFFIS: Okay. If that's the case, then that should be added to Condition No. 2. We don't need two conditions saying that the parking attendant needs to be there and they need to monitor an entry of cars as a second condition. Would you agree?

MEMBER MILLER: Right. Yes.

CHAIRMAN GRIFFIS: So I think we could

just -- I don't know.

COMMISSIONER HOOD: Are we taking the first line of Number 4?

CHAIRMAN GRIFFIS: Yes. The first line No. 4 will go into the condition above it.

COMMISSIONER HOOD: I don't see the significance.

CHAIRMAN GRIFFIS: Me, either.

MEMBER ZAIDAIN: It clarifies what the attendant is doing. It's fine. Let's move on.

CHAIRMAN GRIFFIS: We can go down. Indeed.

MEMBER ZAIDAIN: No. 5.

CHAIRMAN GRIFFIS: No. 5, "Parking on the subject lot shall be exclusive for the patrons of MacGruder's supermarket." I think that can just be maintained. That's the intent.

MEMBER ZAIDAIN: Okay.

CHAIRMAN GRIFFIS: Six was going to be --

MEMBER MILLER: I'm sorry. You're just going a little fast for me. Maintained. Do you mean the whole No. 5 or just up to the supermarket? I just want to be clear what you're doing on No. 5. "Parking on the subject lot shall be exclusive for the patrons of MacGruder's supermarket." We didn't really talk

about what is it except on Sundays. "Only five spaces shall be reserved for employees of MacGruder's."

CHAIRMAN GRIFFIS: Let's just add it's "for the patrons and employees." I don't know why we're going to micro-manage all this stuff. That's three. Condition No. 6 was going to be --

VICE CHAIR ETHERLY: I believe you were suggesting, Mr. Chair, the elimination of the first sentence of current Condition 6.

CHAIRMAN GRIFFIS: That's right. We'll pick up former Condition No. 6 saying "Policing of the lot shall include the retrieval of the shopping carts in the neighborhood streets and removal of debris in alleys and areas immediately adjacent to the lot." There it is.

MR. BORTNICK: Mr. Chairman.

CHAIRMAN GRIFFIS: Actually, I can't have you talk because we're actually under a motion and deliberating. Ms. Miller.

MEMBER MILLER: I'm sorry. I just want to discuss No. 5 in relation to No. 9. We really didn't talk about No. 5, "Parking on the subject lot shall be exclusively for patrons and employees of MacGruder's" which means that they never can let anybody else park there for any other purpose. I don't know if that's

really necessary for any adverse impacts on the community. I guess we've touched a little bit upon Avalon parking and that was never resolved. I'm not sure why we should do that.

CHAIRMAN GRIFFIS: Well, it does find the face of good business practice if they are only allowed to use it when the store is open. Right? I can imagine that the store is not going to allow anyone else to park there unless they are shopping in their store because why would they? I mean if a customer comes, they are going to want to have a place for them to park. Okay. We'll break our own rules.

MR. BORTNICK: I just wanted to say that there's a number of shops. We don't stand alone. I've personally asked people not to leave the lot and go to the paint store or the cleaners or the bank. You don't want to hear what the customers have said. "I've been shopping here for 30 years and you don't tell me that I can't walk to your..." It really is silly.

CHAIRMAN GRIFFIS: Right. Give them a copy of our order. I understand. That's your point.

MEMBER MILLER: That is part of my point. It's part of the community and I guess we haven't heard testimony as to why that's important to limit.

CHAIRMAN GRIFFIS: Here's what I propose. We have 23 of these things to get through. We have a case that's starting at 1:00 p.m. We need to have lunch. We also need to prepare for our afternoon. Mr. Zaidain, I'm going to ask if you wouldn't mind tabling your motion at this time in which case we could pick it up under special public meeting on Tuesday.

MEMBER ZAIDAIN: Yes. That seems good. I'm still in support of the application. I think we need some additional time and possibly some additional information depending on how the Board feels on this application.

CHAIRMAN GRIFFIS: Not information. We've closed the record right now.

MEMBER ZAIDAIN: Okay.

CHAIRMAN GRIFFIS: We need additional time to deliberate.

MEMBER ZAIDAIN: Okay. We should set it for decision making. Maybe I made that motion in a hasty fashion.

COMMISSIONER HOOD: Mr. Chairman, unfortunately I will not be here next Tuesday, but I won't be able to see the addition to the crafting. I'm just trying to see how I can have my involvement

because I'm definitely supportive of the application –

CHAIRMAN GRIFFIS: We will work on getting your involvement.

COMMISSIONER HOOD: –- with the exception of the time. We can craft the additions.

CHAIRMAN GRIFFIS: Exception of the time, do you mean the time period of the order?

COMMISSIONER HOOD: What Applicant proposed.

CHAIRMAN GRIFFIS: Well, the motion before us was for five years.

COMMISSIONER HOOD: Okay.

CHAIRMAN GRIFFIS: We'll make sure that if you're not in attendance, we'll cover that. Not to worry.

COMMISSIONER HOOD: Okay. Good.

CHAIRMAN GRIFFIS: Any questions then? I'm sorry to do this. It is our difficulty because our morning ran so far over.

MS. MONROE: Mr. Chairman.

CHAIRMAN GRIFFIS: Yes, Ms. Monroe.

MS. MONROE: Do you want proposed conditions from the Applicant? I just think it might be a good idea because they are more aware of the

situation.

CHAIRMAN GRIFFIS: Yes. Indeed. We'll leave the record open for proposed conditions that you can provide us. Those need to be in by close of business tomorrow or Thursday we can give you. Otherwise we will not see them. I'm trying to do this as quickly as possible so we're setting it for a special public meeting next Tuesday. The Board receives things out of the Office of Zoning on Wednesdays so if you can get it in tomorrow. If not, if you could give an indication that it will be in the Office of Zoning by 3:00 p.m. which is what we set now for the deadline, please update them on when it's coming in. Then we'll be able to deal with it at that point.

MR. McCANTS: All right. We'll have it in by Thursday.

CHAIRMAN GRIFFIS: Okay.

MEMBER ZAIDAIN: And, Mr. Chair, just to make things clean. This is a procedural issue, but I think in order for us to accept additional information I need to withdraw my motion. So I'm withdrawing it.

CHAIRMAN GRIFFIS: Is that correct?

MEMBER ZAIDAIN: Yes, I'll withdraw it.

CHAIRMAN GRIFFIS: Okay. So withdraw the

motion.

MR. BORTNICK: Do you need us next Tuesday?

CHAIRMAN GRIFFIS: No, it's a public meeting. There won't be any additional testimony.

COMMISSIONER HOOD: Mr. Chairman. Let me just interrupt.

CHAIRMAN GRIFFIS: Yes.

COMMISSIONER HOOD: If they are going to craft some conditions, I think because we think it's a straight through case and we're trying to get through with it, but the ANC would also have to have an opportunity to look at those conditions. Instead of us rushing it, why don't we move it to your decision meeting on December 2nd? When is the next decision meeting?

CHAIRMAN GRIFFIS: The 4th.

COMMISSIONER HOOD: I think that way we would be covered all the way around.

MS. BAILEY: It's December 2nd.

CHAIRMAN GRIFFIS: Okay.

COMMISSIONER HOOD: Not to mention I will be here.

CHAIRMAN GRIFFIS: When does the ANC meet?

MEMBER MILLER: They can have a special

meeting.

CHAIRMAN GRIFFIS: Okay.

COMMISSIONER HOOD: That ANC having served with Ms. Renshaw meet twice a month, don't they?

CHAIRMAN GRIFFIS: Yes.

COMMISSIONER HOOD: They should be applauded.

CHAIRMAN GRIFFIS: So be it. We'll leave the record open for the proposed conditions for the Applicant and the ANC. I guess the Board will make an extra effort on its part based on the scheduling times that we've had this morning to notify the ANC that the record is left open for them to submit in the proposed course. You ought to check in with the Office of Zoning if the ANC doesn't send them to you. Yes.

MR. BORTNICK: Mr. Chairman, I would like to just point out that I have established a very good relationship with the ANC over the past years. I would just assume to go with the five items that they wanted that they agreed to remove. I don't want them thinking that I came down here and pulled an end-around. You and some other folks --

CHAIRMAN GRIFFIS: I'm sure the ANC will know who to blame. I understand your concern. I think we can make that known that the Board has

entertained changing some of the conditions based on the fact of (1) our jurisdiction and there are things in there we can't condition. As the Chairman of this Board, I don't think I can have this Board adopt them and continue on with a condition. (2) We were looking at clarifying some of the other conditions. Ms. Monroe.

MS. MONROE: I was going to say I think you can make it clear to the ANC that some of these conditions were appropriate five years ago, putting in a boulder, but they are no longer appropriate and they did not say anything about that. So we want to make sure that everybody's on the same page and knows what's going on.

MR. BORTNICK: Okay. I just don't want them thinking I turned anything around.

CHAIRMAN GRIFFIS: Yes. We don't have any difficulty making that part of the record. So we'll make sure that the ANC is well aware of where this is coming from and who started this trouble.

MR. BORTNICK: Okay.

CHAIRMAN GRIFFIS: I think they will have no trouble believing that.

MR. BORTNICK: If I knew it would be twelve minutes, I would have brought lunch for

everybody.

CHAIRMAN GRIFFIS: Right. Exactly.

MS. BAILEY: Mr. Chairman. Excuse me.

CHAIRMAN GRIFFIS: Yes.

MS. BAILEY: Just so that I can be clear. We're having a decision on December 2nd at your meeting. Is that correct?

CHAIRMAN GRIFFIS: Yes.

MS. BAILEY: And we're asking for the ANC and the Applicant to respond. When are those responses to be filed?

CHAIRMAN GRIFFIS: Now we can move it out and it can be later, frankly at the last minute whenever that is for you. Could it be the Wednesday before?

MS. BAILEY: The Wednesday before, that's the day before Thanksgiving. That may not be so good. How about the Monday?

CHAIRMAN GRIFFIS: Okay.

MS. BAILEY: The 24th.

MR. McCANTS: When the submissions should be filed.

MS. BAILEY: Submissions.

CHAIRMAN GRIFFIS: Yes, that's next Monday so you bought two days.

MR. McCANTS: Okay.

CHAIRMAN GRIFFIS: All right. Is that clear?

MS. BAILEY: Are we going to hold the ANC to that as well?

CHAIRMAN GRIFFIS: I don't know how we do it.

COMMISSIONER HOOD: I think they meet the 4th. I don't want to sound like an expert on the ANC, but I think they meet the second and fourth Mondays of the month.

CHAIRMAN GRIFFIS: Let's see what we can do. Up until the first, we'll take it from the ANC.

MS. BAILEY: Okay.

CHAIRMAN GRIFFIS: Thank you. We appreciate that. Okay. Is there any other questions, clarifications on that? Very well. Anything else for the morning session, Ms. Bailey?

MS. BAILEY: No, Mr. Chairman.

CHAIRMAN GRIFFIS: Excellent. Then let's adjourn the morning session of 18 November 2003. Thank you very much. Off the record.

(Whereupon, at 12:48 p.m., the above-entitled matter recessed to reconvene at 2:16 p.m. the same day.)

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

2:16 p.m.

CHAIRMAN GRIFFIS: On the record. Very well. As we have come back to a bit of normalcy, let me update what we're going to do today in terms of schedule. We have the special public meeting set for 1:00 p.m. Not boring you with all the details, we are going to move that to the 25th of November which will be at 9:00 p.m. to decide a motion on the appeal which is Case No. 17054. As we have two appeals in the afternoon, I think we need to get right into those and move ahead with it.

The other is also if I'm correct set for a scheduled hearing depending on which way the motion goes on January 27th. So we're not in any way impacting that continuing schedule. So I think that's probably the most appropriate thing to do at that time.

With that, I can call then to order the afternoon session of 18 November 2003. This is of course the Board of Zoning Adjustments of the District of Columbia. My name is Geoff Griffis, Chairperson. Joining me today is Mr. Etherly, Vice Chair, Ms. Miller. Also here as Mayoral appointee representing the Zoning Commission is Mr. Hood and representing the

National Capital Planning Commission is Mr. Zaidain. Copies of today's hearing agenda are available to you. They are located at the door where you entered into the hearing room.

Let me run through a few things which you all may be familiar with but should all be aware of. All cases before the Board Of Zoning Adjustment are of course public, but they are all recorded also. Therefore I ask several things of you. First of all, if everyone would turn off their cell phones and beepers at this time so we don't disrupt the proceeding.

Secondly, when you come forward to speak to the Board, you will need to fill out two witness cards. Witness cards are available at the table where you entered into the hearing room and there are some in front at the witness table. Those two cards go to the recorder who sits to our right. Also when addressing the Board once, the first time you do, you're going to need to provide your name and your address for the record so that the recorder knows who to give credit to all the very important substantive things you will tell us.

The order of procedure today for the appeals of which we have two today. First, we have

statements and then witnesses of the Appellant. Second is the Zoning Administrator as the Government official's case. Third would be the owner or the lessee or the operator involved. Fourth would be the ANC within which the property is located. Fifth would be the intervenor's case and sixth would be rebuttal and closing statements by the Appellant.

It should be absolutely clear this is different than a special exception or variance meaning there are not persons that testimony either in support or in opposition. That will be clear in a few of the specifics of the cases as we go through it. I will make a point of addressing that. Cross examination of course of witnesses is allowable by those that are participating as parties in a case or intervenors. The ANC as I stated within which the property is located is automatically a party and a participant in the case.

The record of all our cases will be closed at the conclusion of the public hearing except for any material that is requested by the Board. That will be very specific material that would be requested and it will be very specific on when that information is to be provided into the Office of Zoning.

Of course, it should go without saying

that after that is received, no other information is accepted into the record. That's important because of course the Board must deliberate solely on the record that is created before us. It is very important to pay attention to submissions and what is required while the record is still opened.

The Sunshine Act requires that this Board conduct all hearings in the open and before the public. We can however enter into executive session according to our own procedures in the Sunshine Act. That would be for purposes of reviewing the record or deliberating on a case. As I've stated as the record is created before us, all our deliberations and the decision on each case has to be based on that record. Therefore we ask that people present today not engage Board members in any conversation which may give the appearance of gaining additional information outside of the record that is created.

I consider any preliminary matters at this time. Preliminary matters are those which relate to whether we should as the Board hear a case today and for any number of reasons if there are motions for continuance or withdrawal or whether proper and adequate notice has been provided or anything else that you might think may stop us from proceeding this

afternoon. If you have a preliminary matter, now would be the time to raise it. You can give an indication to the Board by just coming forward and having a seat. I will say a very good afternoon to Ms. Bailey and Mr. Moy from the Office of Zoning and ask if there are any preliminary matters that they are aware of for the Board at this time.

MS. BAILEY: Mr. Chairman, good afternoon. No, sir, there are not.

CHAIRMAN GRIFFIS: Very well. Yes?

MS. GESALTI GILBERT: Yes, Laura Gesalti Gilbert, representing the Department of Consumer and Regulatory Affairs ("DCRA") and the Zoning Administrator. I would just like to make mention of one item since you stated that the Appellant would put on the Appellant's case first in terms of the order of the proceedings.

In my prehearing statement to the Board that was filed last week, I had made a recommendation to the Board beginning on page 14 and continuing on page 15. The gist of my suggestion was that - I purposely didn't do it in a motion because I thought that then we'd be arguing a motion for hours and I didn't want to do that - essentially there seem to be several legal issues here which really need to be

determined and that there's really no need to get into testimony on a couple of these issues. Once those legal issues have been determined, then of course depending on the outcome or the Board's decision on the legal issues, then the testimony would be appropriate.

CHAIRMAN GRIFFIS: All right.

MS. GESALTI GILBERT: I just wanted to reiterate that point because that would definitely be in the interest of judicial economy and order and time and so on.

CHAIRMAN GRIFFIS: Good. Are there any other preliminary matters that people are aware of in the second case in the afternoon, the Appeal of Advisory Neighborhood Commission 2E, 17034? Any other? Okay. Very well then. I'm going to call the case and then we're going to talk about this within the case hearing.

MS. BAILEY: Mr. Chairman, are we calling the Stanton Park Neighborhood Association case?

CHAIRMAN GRIFFIS: Isn't that first on the schedule?

MS. BAILEY: Yes, sir, but I heard you talk about the second case in the afternoon.

CHAIRMAN GRIFFIS: Right. I just wanted

to see if there are any other preliminary matters that we needed to take up before we call the case.

MS. BAILEY: Okay. That is Appeal 17043 of the Stanton Park Neighborhood Association pursuant to 11 DCMR §§ 3100 and 3101 from the administrative decision of the Zoning Administrator in the issuance of Certificate of Occupancy ("C of O") Permit Nos. C051289 and C051290 to the Capitol Hill Healthcare Group dated March 26, 2003 for Community Residents Facility and Hospital. That's 60 beds and 60 parking spaces respectively. Appellant alleges that the Zoning Administrator erred by issuing the Occupancy Permits where the proposed use is in violation of the parking requirements. The subject premises are located at 700 Constitution Avenue, N.E. It's also located in Square 895 on Lot 76 and it is also located in the R-5-D District. All those persons wishing to testimony today would you please stand to take the oath?

(Witnesses sworn.)

MS. BAILEY: Mr. Chairman, there are two requests for intervenor status in this case.

CHAIRMAN GRIFFIS: Indeed. First, are you including the ANC?

MS. BAILEY: There's a request from ANC 6-

A and also from the St. James Parish, Fr. Richard E. Downing.

CHAIRMAN GRIFFIS: Right. Ms. Monroe, we don't require an application for status in an appeal from the ANC, do we?

MS. MONROE: Ask me that again. What did you say?

MEMBER MILLER: If I can comment on this, Mr. Chairman.

CHAIRMAN GRIFFIS: Of course.

MEMBER MILLER: There are two ANCs involved in this case.

CHAIRMAN GRIFFIS: Right.

MEMBER MILLER: One is located within where the property is located. The other ANC which is requesting party status is across the street from the property.

CHAIRMAN GRIFFIS: So we have a borderline ANC. Okay. Any questions or clarification of the second from the Board?

MEMBER MILLER: There's case law that supports giving great weight to an ANC that's located across the street from an effected property. I don't think there should be a question whether or not they get party status. That's my position.

CHAIRMAN GRIFFIS: Okay. Others?

COMMISSIONER HOOD: I would just concur with my colleague, Mr. Chairman.

CHAIRMAN GRIFFIS: So the belief of the Board is that somehow the two ANCs would represent different views or rather the folks across the street wouldn't be represented in their view in the other ANC.

MEMBER MILLER: I don't think one ANC would represent the interests of another ANC. I think that the communities of both ANCs are affected and both should participate.

COMMISSIONER HOOD: I would also say that while I'm not that versed on the appeal process but in the past when there's an abutting ANC and they've filed to participate in the past, I know the Commission and I believe the Board also has ruled favorably and also given them status.

CHAIRMAN GRIFFIS: I think in terms of the Board's proceedings, you'd probably find more contrary to that, but I understand your point. Okay. Anything else from the Board?

COMMISSIONER HOOD: If you notice, Mr. Chairman, I preface myself by saying the Commission first.

CHAIRMAN GRIFFIS: Indeed. I did notice. Okay.

MEMBER ZAIDAIN: I have a question.

CHAIRMAN GRIFFIS: Yes, Mr. Zaidain.

MEMBER ZAIDAIN: I'm apologize. I'm searching through my file looking for the applications and I do not see them.

CHAIRMAN GRIFFIS: Exhibit No. 22 is the ANC. It also is stated in their letter of Exhibit No. 23.

MEMBER ZAIDAIN: Okay. Well, I guess my general question is this is different from a variance and special exception proceeding where the standards are different. My question would be to Ms. Miller. I understand the case law supports it. It doesn't entitle it. What's the benefit of having both ANCs involved when they are more than likely going to advocate the same exact position?

MEMBER MILLER: I don't think that's obvious. I think that communities can be affected depending on where they are located. Where I'm drawing from is a Court of Appeals decision which I think is fairly controlling. In Georgetown Residence Alliance, they cited Neighbors United For a Safer Community v. D.C. Board of Zoning Adjustment. They

said which I think is pretty straight forward that "This court held that the views of the ANC whose area was directly across the street from the proposed facility were entitled to great weight under Section 1-261. Our rationale was that the BZA's decision affected both ANCs and that therefore the written reports of both ANCs were entitled to great weight."

MEMBER ZAIDAIN: So the case law does support an entitlement.

MEMBER MILLER: It does because of the proximity.

CHAIRMAN GRIFFIS: Was that an appeal?

MEMBER MILLER: Yes. Which one? Both of them?

CHAIRMAN GRIFFIS: The last case you just cited or were they variances?

MEMBER MILLER: I believe it's an appeal. Neighbor Groups appealed to BZA regarding issuance of building permits.

CHAIRMAN GRIFFIS: Okay.

MEMBER ZAIDAIN: Well that sounds like -- I obviously haven't read the case law. You're much more versed in that than I am. If the case law supports their entitlement to being an intervenor in this application, then I would support it and I would

suggest that we would amend our procedures to reflect that as well.

CHAIRMAN GRIFFIS: Is that any and all ANCs as intervenors?

MEMBER MILLER: I think it deals with proximity. If you are directly across the street.

CHAIRMAN GRIFFIS: I understand. And the listed unique concern is parking. Okay. If there are no other comments from the Board, then actually let me have everyone introduce themselves that's in front of us now so we know who to address.

MR. EDWARDS: Mr. Chairman.

CHAIRMAN GRIFFIS: You can sit. Just turn on your microphone if you wouldn't mind.

MR. EDWARDS: I believe there's also a request for party status from St. James Church as a preliminary matter.

CHAIRMAN GRIFFIS: That's correct. Yes. We like to deal with one thing at a time. Yes.

MR. RICE: Cody Rice, ANC 6-A.

CHAIRMAN GRIFFIS: Okay.

MR. EDWARDS: Monty Edwards, Stanton Park Neighborhood Association.

CHAIRMAN GRIFFIS: And Ms. Gilbert.

MS. GESALTI GILBERT: Again Laura Gesalti

Gilbert, DCRA.

MR. TUMMONDS: Paul Tummonds with the law firm of Shaw Pittman on behalf of the property owner, Capitol Hill Group.

CHAIRMAN GRIFFIS: Okay. Ms. Gilbert, do you have comment?

MR. CREWS: Sorry. I'm Bill Crews, ANC 6-C.

CHAIRMAN GRIFFIS: Right. Let's start. Mr. Crews, do you have an opinion on granting intervenor status of the ANC 6-A?

MR. CREWS: I do have an opinion and it would be favorable.

CHAIRMAN GRIFFIS: So you support their participation. Okay. Yes?

MR. EDWARDS: Stanton Park would support their status as intervenor. Excellent. Ms. Gilbert.

MS. GESALTI GILBERT: DCRA has no objection to their intervention in this case.

CHAIRMAN GRIFFIS: Okay. Mr. Tummonds.

MS. GESALTI GILBERT: We're not interested in setting a big precedent for other cases.

CHAIRMAN GRIFFIS: Nor are we. We're going to stick to this case today.

MS. GESALTI GILBERT: This is just for the

specific circumstances of this case.

CHAIRMAN GRIFFIS: We've lost a lot of time so let's just focus on this one.

MS. GESALTI GILBERT: All right.

CHAIRMAN GRIFFIS: Mr. Tummonds.

MR. TUMMONDS: We have no objection to the grant of intervenor status in this case, but I do think that it's important to note the issue that Mr. Zaidain brought up that this is an appeal case. This is not a special exception case. I notice that there's a lot of material in the record that's been submitted by both the Appellant and letters in the record, submissions, from the various groups requesting intervenor status that I think really go to a special exception case. So while I don't have a problem with their requesting intervenor status, it needs to be discussed and maybe we'll discuss this in Ms. Gilbert's motion about really what this case is about and what the decision that the Board will review today is.

CHAIRMAN GRIFFIS: That's correct. I'd say to be direct. I think what I'm hearing you say is what are the relevancy of all the letters that have been submitted. That's as I was being indirect in my opening. That's something that I will address. Okay.

Board members, direction? Is there any opposition to the intervenor?

MEMBER ZAIDAIN: Can we have a second, Mr. Chairman?

CHAIRMAN GRIFFIS: I'm sorry. Yes.

MEMBER ZAIDAIN: You threw a bomb scare in my day and I lose track of all my papers.

CHAIRMAN GRIFFIS: You kind of lose your focus, don't you?

MEMBER ZAIDAIN: What section in the Code? We talked about the difference between intervenor status and party status and how the standard is different. Can somebody point me real quickly to a standard in the Zoning Regs?

MS. MONROE: Mr. Zaidain.

MEMBER ZAIDAIN: Yes.

MS. MONROE: Look at 3199 because there are definitions. The ANC within which the property is located is automatically a party. It lists who's a party in appeals and who's a party in applications.

MEMBER ZAIDAIN: Okay and that points to 3112.15. What is the parish name again?

PARTICIPANT: St. James.

MEMBER ZAIDAIN: St. James. ANC.

CHAIRMAN GRIFFIS: Ms. Miller.

MEMBER MILLER: Sorry. We talked about case law that said if you're located across the street that the ANC was entitled to participate. Now looking at your party status applications, there are residents of the ANC 6-A that are adjacent to the property in question. Is that correct? Can you maybe elaborate on that?

MR. RICE: Yes. The property is located on Square 895 which is bounded by 8th Street N.E. which is also the boundary between ANC 6-C and ANC 6-A. So ANC 6-A is directly across the street from this property.

MEMBER MILLER: And are the residents of 6-C and 6-A affected differently by the property?

MR. RICE: Well, yes. The residents of 6-C live to the west of the property and the 6-A live to the east. There are different land uses in either direction. There are specific parking concerns that are unique to the residents of both ANCs.

CHAIRMAN GRIFFIS: Very well. Any objection? Board members, last comments. Then I'll take it the consensus of the Board is we will grant party status to both 6-A and 6-C. Of course in all of our cases, it would nice if you would combine. We obviously don't allow any sort of repetition of case

presentation, cross examination or anything like that. As much as you coordinate, the better off we will all be and you especially. So let's take up the next four requests for party status in this case. If you wouldn't mind just giving your name and address for the record.

FR. DOWNING: My name is Richard Downing. I live at 222 8th Street N.E., Washington, D.C. We're the only adjoining property owner on the square with the properties in question.

CHAIRMAN GRIFFIS: Right. Indeed. Any questions from the Board? If there are no questions from the Board, let's move on.

MEMBER ZAIDAIN: I have a question. You said a lot of the issues we're going to discussing here with parking. You have noted that you are the only adjacent property, but do you feel like the ANC -- First of all, which ANC are you represented in?

FR. DOWNING: 6-C.

MEMBER ZAIDAIN: 6-C, okay. Do you feel like your concerns will not be represented by the ANC's position?

FR. DOWNING: I have absolute total regard for our ANC and for its ability to represent the people within its boundaries. I think we have a

particular perspective that being the adjacent property owners that deserves to be represented by me.

MEMBER ZAIDAIN: Okay. Did your organization participate in the ANC deliberations and whether or not they should take a position or anything like that?

FR. DOWNING: No. In fact, the truth of the matter is we didn't know that this, whatever it was, an exemption or whatever the change was, had even occurred until we noticed that it was difficult to park.

MEMBER ZAIDAIN: So by that time you noticed --

FR. DOWNING: And that's one of the concerns I have.

MEMBER ZAIDAIN: Okay. In either way, you did not proceed. What I'm getting at is if you were active and participating in developing the ANC's position, then the ANC should be able to reflect what your position is.

FR. DOWNING: I see.

MEMBER ZAIDAIN: That was not the case.

FR. DOWNING: No, sir. I'm sorry. I wish I had that.

MEMBER ZAIDAIN: Okay. I just reiterate

the Chair's statement regarding numerous intervenors and parties coming into this process that need to be specific on what your issues are and reiterating positions is not going to help us in this process. However, I think you've proven your point. I appreciate that. So I have no objections, Mr. Chair.

CHAIRMAN GRIFFIS: Okay. Any other questions from the Board? Let's go down there. Does the ANC have any objection?

MR. CREWS: No.

CHAIRMAN GRIFFIS: 6-C?

MR. RICE: No.

CHAIRMAN GRIFFIS: I'm going to call 6-A as a party in this, but who knows what I'm going to do. I'll probably just run and go on. Any objection?

MR. RICE: No.

CHAIRMAN GRIFFIS: Okay. The Appellant?

MR. EDWARDS: Stanton Park has no objection.

CHAIRMAN GRIFFIS: Very well. DCRA.

MS. GESALTI GILBERT: We have no objection.

CHAIRMAN GRIFFIS: Mr. Tummonds representing the Capitol Hill Group.

MR. TUMMONDS: No objection with my caveat

I mentioned before.

CHAIRMAN GRIFFIS: Okay. Is this for total clarification the case D.C. Capitol Hill Nursing Center, Capitol Hill Hospital? Are they going to be represented today differently? Are you representing them, Mr. Tummonds?

MR. TUMMONDS: I am representing both, yes.

CHAIRMAN GRIFFIS: So the Capitol Hill Group is also part of –

MR. TUMMONDS: Is the property owner.

CHAIRMAN GRIFFIS: Indeed. But it's all one entity. Is that correct? I can't say that. It's one entity before us now.

MR. TUMMONDS: That's correct.

CHAIRMAN GRIFFIS: That's fine because I have to get my program all set here. Then we now have all our participants. So we're ready to go and pick up the speed perhaps a little bit. We go back to Ms. Gilbert. Ms. Gilbert has raised two points of which did not come in as motions but I would like to have everyone –- First of all, do the parties have copies of the DCRA's submission? It is Exhibit No. 91. Does the St. James Parish have that exhibit?

FR. DOWNING: Yes, sir.

CHAIRMAN GRIFFIS: I reference everyone to page 15. I think it would be expeditious to go through these from the Board's point of view. What I'd like to do is I will perhaps abbreviate them and ask the participant in this case speak to these. The first is going to be whether special exception Order 15542 has any continuing force and effect since the District has been up-zoned to allow CBRFs which provide housing for the handicapped as a matter of right in the R-5-D zone. Of course that's the zone in which this is located.

MS. GESALTI GILBERT: Excuse me. I think possibly even before that the question would be if there's any issue as to whether this nursing home is housing for the handicapped. I did not see that being challenged in the appeal.

CHAIRMAN GRIFFIS: Nor did I.

MS. GESALTI GILBERT: Okay.

CHAIRMAN GRIFFIS: Board members, do we need to have people speak to that issue? Is it a consensus of the Board that it is a clear point? Mr. Zaidain?

MEMBER ZAIDAIN: You always catch me when I'm reading through something. The point is is that elderly home is a matter of right in that district.

Am I ahead of you?

CHAIRMAN GRIFFIS: A half step before that. The elderly are covered and has the access handicapped.

MEMBER ZAIDAIN: Yes, I would concur with that.

CHAIRMAN GRIFFIS: Yes, Board members. All in favor of that? Does anyone want to speak to that? Yes?

MR. EDWARDS: Thank you, Mr. Chair. Stanton Park Neighborhood Association does not accept that proposition.

CHAIRMAN GRIFFIS: Okay.

MR. EDWARDS: That proposition was not developed until the prehearing submissions. Our appeal was filed back in May and our appeal went to the issuance of the C of O as being wrongfully issued.

CHAIRMAN GRIFFIS: I understand that.

MR. EDWARDS: The theory as to why they were issued came up in the prehearing submissions by the property owner and DCRA.

CHAIRMAN GRIFFIS: Okay. I can understand your point. However I think we're going more towards not a presentation of a case or opinion, but actually

to a fundamental understanding that we all need to come to a consensus on or not. But that would be whether under the Fair Housing Act part of the reasons why the zoning was changed, part of the reason why DCRA and all that, the point is whether elderly are classified as handicapped.

MS. GESALTI GILBERT: I think not elderly but residents of a nursing home.

CHAIRMAN GRIFFIS: I'm sorry. Members of the nursing home.

MEMBER ZAIDAIN: Let me ask a point of clarification here. Just to put it simply and please don't present your case, just put this in a concise sentence if you can. What is the reason you're claiming why we should revoke the C of O? It's not because of the use of the center. It's because of the parking issue. Correct?

MR. EDWARDS: That's correct.

MEMBER ZAIDAIN: Okay. Well, this has nothing to do with the parking issue.

MR. EDWARDS: Yes, it does have to do with the parking issue.

MEMBER ZAIDAIN: How?

MR. EDWARDS: Because a community-based residential facility ("CBRF") providing housing for

the handicapped supposedly in this case that we found out last week is the Zoning Administrator applied the criteria for a group home whereas this Board has previously treated this exact same facility with no change in operation as a nursing home, skilled nursing, licensed with over 500 employees and has required a much higher level of parking. The second problem we have is very plain words of the Zoning Regulations. I would direct you to --

MEMBER ZAIDAIN: I really do not want to start your case presentation. I don't think the Stanton Park agrees with that issue. They should just include that in their case presentation and we can take it up then.

CHAIRMAN GRIFFIS: And here's the other stuff we could do.

MEMBER ZAIDAIN: I don't mean to cut you off.

CHAIRMAN GRIFFIS: It's up to the Board. These are issues that are going to flush out. It could conceivably have been more handled as a preliminary matter. I thought we were going to get through the first of these steps. It's obviously not clear. Let's start the case. All this obviously will be the substance of the case presentations and

rebuttals if so be it. With that, let's proceed. In which case, everyone can have a seat and be comfortable except of course the Stanton Park Neighborhood Association if they are ready to proceed in presentation of their case.

MR. EDWARDS: We are. Thank you, Mr. Chair.

CHAIRMAN GRIFFIS: Excellent.

MR. EDWARDS: First, let me provide copies of my written testimony.

CHAIRMAN GRIFFIS: Did you say provide coffee? You could win right now then. Maybe they didn't catch that on the record.

MEMBER ZAIDAIN: The fact that he called you "Your Honor" again.

CHAIRMAN GRIFFIS: No, the fact that I give him a win with coffee.

MEMBER ZAIDAIN: Either way.

MR. EDWARDS: I would like to note that as an attachment to my testimony I have an extract from a presentation that was made by the MedLINK Hospital and Nursing Home to the Department of Health on October 2. I have the full text of that submission, 38 pages, one copy of which I'll provide to the Secretary at this time.

CHAIRMAN GRIFFIS: Okay. I'm sorry. What is it?

MR. EDWARDS: These are the last three pages attached to my testimony.

CHAIRMAN GRIFFIS: Last three pages attached to your testimony. Okay.

MR. EDWARDS: They were requested by the State Health Development and Planning Administration ("SHDPA") in considering the certificate of need for this hospital.

CHAIRMAN GRIFFIS: Wasn't that already submitted? Irregardless.

MR. TUMMONDS: I would object to the submission of that. I'm not sure the relevancy of transcript of a certificate of need application before the SHDPA comes out being.

CHAIRMAN GRIFFIS: That's true. Would they be addressing zoning issues?

MR. EDWARDS: Yes, they would. It's not a transcript. It specifies the number of patients. It specifies the number of employees. It specifies that there's been no change in the operation of this facility. Those are the only three extracts I have included.

CHAIRMAN GRIFFIS: So what you're doing is

just fundamentally offering that as evidence of as you just stated use, the employee count and the numbers. Okay. Is that clear? I think we can look to that. We can go to strike submission if it becomes irrelevant. Before we proceed fully, is there any other submissions that you have? Does Stanton Park have any other submissions at this time?

MR. EDWARDS: We do not, Mr. Chair.

CHAIRMAN GRIFFIS: Okay. I'm going to set a little bit of parameters here. We're going to run the clock from zero up and what I'm going to do is provide 30 minutes for the presentation of your case. You obviously don't need to use all of that. Obviously equal time will be given to all participants in the case except to the ANC within which the property is located which is not limited to time.

If you need more time than 30 minutes, of course regulations state that we allow 60 minutes for each side to present their case. I think that this is fairly straightforward in terms of the information that needs to be provided for our own deliberation. Most of it is in the record at this point. I think we're very clear on the issues. What I'd like to do is to try to streamline the oral presentation of the case so that we might have the full record and then

begin our deliberation on it. Is that clear?

MR. EDWARDS: That's clear.

CHAIRMAN GRIFFIS: Is that clear to everybody else?

(Chorus of yes.)

CHAIRMAN GRIFFIS: So what we're going to do is actually I'm going to change what I've said in the beginning. I'm going to put 30 minutes on the clock and we'll run it down. Hopefully the buzzer won't go off. I'll stop it in time if it goes beyond that.

MS. GESALTI GILBERT: And we would like to receive a copy of that submission. We have not seen that.

CHAIRMAN GRIFFIS: You don't have that. Do you have additional copies with you right now?

MR. EDWARDS: It's attached to my statement.

MS. GESALTI GILBERT: Oh, I'm sorry. I did not realize that.

MR. EDWARDS: The extract is attached. The full 38 pages is what I gave to the Secretary.

MS. GESALTI GILBERT: That's what I'm saying. I have not seen the 38 pages.

CHAIRMAN GRIFFIS: You gave the whole 38

pages in?

MR. EDWARDS: Yes.

MS. GESALTI GILBERT: We have not seen the pages.

CHAIRMAN GRIFFIS: And that's what the objection is to. How is the 38 pages going to facilitate in addition to the three pages that you've already submitted? Why don't we just accept the three pages that we have?

MR. EDWARDS: That would be fine. Just in case anyone wanted to verify it, they would have it available.

CHAIRMAN GRIFFIS: All right. We'll hold it off. I'm not going to accept it as an exhibit at this time. If it comes that we need it during the case, we have it somewhere in the office. Okay. Then whenever you're ready.

MR. EDWARDS: Mr. Chairman, my name is Monty Edwards and together with me today is Drury Tallant. Together we serve as co-chair of the Land Use Committee of the Stanton Park Neighborhood Association. Stanton Park is a civic association. It works for the improvement of Stanton Park Neighborhood. It represents the interest of the North Capitol Hill community in the area bounded by East

Capitol 10th Street N.E., H Street N.E. and 2nd Street N.E.

We are appealing the Zoning Administrator's issuance of March 26, 2003 of the two C of O concerning parking requirements at the hospital and nursing facility referred to as MedLINK. Those are in the record as Certificates of Occupancy 51289 and 51290.

It is our position that these certificates should not have been issued by the Board for two reasons. There were outstanding orders of this Board, Order No. 15549 issued in 1991 and a second order issued in 1999 which specifically dealt with the parking requirements and evaluated the needs for parking in terms of number of employees, number of patients. The most recent of those orders of the Board, the 1999 Order, requires the facility to provide more than three times as much off-street parking as the combined parking requirements of the two wrongfully issued C of O.

Further, a second point we raise is not only the Zoning Administrator without authority to disregard the prior Board of Zoning Administration orders, but the Zoning Administrator did not have authority to set the parking requirements for the C of

O for the nursing home, CO51289, because the authority to establish the parking requirement for a community-based residential facility of over 16 persons is specifically delegated and it is exclusive to the BZA and not to the Zoning Administrator under 11 DCMR 2101.1.

Now in pursuing the Zoning Administrator to issue the C of O requiring only 25 parking places for this 117 bed nursing facility, Capitol Hill Group argued that Nebraska Avenue, BZA Appeal 16716(A) which was issued in October 2001 justified this result. But Nebraska Avenue offers no authority for establishing parking requirements under the admitted Zoning Regulations regarding housing for the handicapped. In Nebraska Avenue, the Deputy Zoning Administrator determined the number of parking spaces on March 8, 1999. I should point out that from the time until the formal application was filed there were a number of these determinations that were made by the Zoning Administrator that were there incorporated in the final application that was filed.

The parking space requirement was determined on March 8, 1999. Zoning Commission Order 869 which amended Zoning Regulations to allow housing for the handicapped as a matter of right in the R-4

zone did not become effective until April 30, 1999, almost two months after parking determination on Nebraska Avenue.

Now the factual situation in Nebraska Avenue is also different from the factual situation in this case. The Sunrise Facility which was the subject of Nebraska Avenue was a yet to be constructed facility. It was necessary to employ projections and estimates in establishing the parking requirements. The hospital and nursing home in the subject appeal are existing facilities and the Board has over 12 years of actual experience that it has employed in establishing the parking requirements based on the operations of these facilities. The parking requirements for these facilities were properly established in the 1999 and 1991 orders of this Board and those determinations should continue to guide the Board in establishing the parking requirement needed for an expanding number of employees, the expanded operations, the additional employees, the additional beds.

Now outside of any claim of precedent that may be established by Nebraska Avenue, the Sunrise Facility is materially different from the hospital and nursing facility that comprise MetLINK. Sunrise did

include the term "assisted living" in its name at the time of the Nebraska Avenue case but currently refers to itself as Sunrise Senior Living which is consistent with its anticipated nature. It will likely be primarily an independent living facility when it opens in mid-December of this year. The pricing structure supports this since the basic rental includes apartment rent, meals, apartment cleaning, but if assistance is required, it's provided only on an a la carte basis at additional cost. Just assistance in daily living tasks such as bathing or dressing incur additional daily fees and medication administration incur further daily fees.

Sunrise is not licensed as a nursing facility. It will provide no skilled nursing services. Sunrise offers a very different kind of service. It will have significantly lower staffing levels and will have a substantially lower parking requirement than the Capitol Hill Healthcare Facility.

Stanton Park does not take any position. We were not a party to the Sunrise Senior Living case on Nebraska Avenue and whether or not it should have been classified as a community-based residential facility which provides housing for the handicapped under the Zoning Regulations. However to claim that

nursing home should also be so classified, we do take exception to as being unreasonable.

The Zoning Administrator seeks to achieve this erroneous result under the rationale which says the Sunrise Facility provides housing for persons that are impaired or limited in performing one or more major life activities than a nursing home which provides care for individuals with a greater degree of impairment in performing major life activities should also be classified as a CBRF that provides housing for the handicapped.

To extent that argument would mean that there would no longer be any need for the zoning classification of healthcare facility or even hospital since people that go to hospitals must be handicapped because they go there to have physical impairments corrected. During the period that they are under anesthesia or certain kinds of medicine, they are completely impaired.

The consequence of such a classification for zoning purposes would be to make all such facilities matter of right. According to the Zoning Administrator exempt such facilities from the parking requirement of the Zoning Regulations. If the concept that matter of right means that zoning requirements

for parking can be waived, then the Zoning Administrator may seek to waive other zoning requirements in the interest of matter of right.

The result would be that any facility that you can convince the Zoning Administrator that it serves a population of some degree of physical impairment or limitation would be largely exempt from Zoning Regulations as well as exempt from oversight by this Board.

CHAIRMAN GRIFFIS: But you're not saying that the ZA exempted them from parking requirement, are you?

MR. EDWARDS: I am, Mr. Chair.

CHAIRMAN GRIFFIS: Well, the Zoning Administrator established the parking that would be provided. How is that an exemption from the parking?

MR. EDWARDS: If you will go to the first attachment to my prepared statement which is the table from Title 11.

CHAIRMAN GRIFFIS: No, I understand there's a difference with what was attached to the C of O for the parking and what 2101 might state in the table, but you just stated that the ZA waived the parking requirement.

MR. EDWARDS: Not that they waived. That

they ignored.

CHAIRMAN GRIFFIS: They ignored the regulation for the Board to establish parking.

MR. EDWARDS: Yes.

CHAIRMAN GRIFFIS: But that's different than saying that they waived. Basically when you say that to this Board, I take it as they required no parking. That's not your belief. Is that true?

MR. EDWARDS: That's not my statement. No, Mr. Chair. I apologize.

CHAIRMAN GRIFFIS: That's why I asked. Continue.

MR. EDWARDS: They failed to refer the matter to this BZA to determine the parking and they themselves determined the parking and in so making the determination used a very different standard than this Board has used in the past and should use for this facility.

CHAIRMAN GRIFFIS: Okay.

MEMBER ZAIDAIN: Again just to follow on this question, I'm going to interrupt your testimony. I have something along this same line. You also stated that if they were to waive this requirement which you've clarified to mean substitute, if substituting a different requirement. If we were to

substitute this requirement, what would keep them from substituting other requirements that are special exception regulated for these types of uses. What other zoning requirements would there be?

MR. EDWARDS: I don't know at this point, but it seems to be the argument that because they are matter of right we should not impede their ability to exercise that matter of right. That is the argument that bothers me.

MEMBER ZAIDAIN: I understand that. I guess my question is and this would take a full Zoning Regulation analysis but for those uses that are a matter of right, what subsidiary requirements are special exception? I don't know of a lot of them.

CHAIRMAN GRIFFIS: Right. How do you understand a matter of right use if there's a public review and approval process required?

MR. EDWARDS: That is exactly what we're asking for here, a public review process.

CHAIRMAN GRIFFIS: I understand that.

MR. EDWARDS: Not a Zoning Administrator review.

CHAIRMAN GRIFFIS: I understand what you're asking for, but how do you reconcile that? If it's a matter of right use for our Zoning

classification of use, how is it then that we would require a public hearing and approval process? Doesn't that fly in the face and contradict what a matter of right use is?

MR. EDWARDS: We do not concede that this nursing home should be a community-based residential facility providing housing for the handicapped.

CHAIRMAN GRIFFIS: So you are trying to appeal the distinction of the use.

MR. EDWARDS: I am appealing the distinction of the use. I would go to the plain use of the definition of the Zoning Regulations, Mr. Chairman, page 114 that defines community-based residential facilities.

CHAIRMAN GRIFFIS: Section 199?

MR. EDWARDS: Page 1-14, the definition section. They do not have numbers in the definition section. A copy of that is included as Attachment A to the Statement of Capitol Hill Group if you have that in front of you.

CHAIRMAN GRIFFIS: All right. What's the exhibit number on that?

MR. EDWARDS: Exhibit A.

CHAIRMAN GRIFFIS: What's the record exhibit number? Do you know?

MEMBER ZAIDAIN: Are you referring to the definitions in 199 that "If CBRF can show adult facility..."?

MR. EDWARDS: Yes.

CHAIRMAN GRIFFIS: Do you have that one?

MEMBER ZAIDAIN: We've memorized that in some other appeal cases.

MR. EDWARDS: The seven definitions.

MEMBER ZAIDAIN: Right.

CHAIRMAN GRIFFIS: We're very well aware of that.

MR. EDWARDS: The second paragraph of the preamble to that states that "If an establishment is a community-based residential facility as defined in this section, it shall not be deemed to constitute any other use permitted under the authority of these regulations."

CHAIRMAN GRIFFIS: We have that etched upon our brain from another case.

MR. EDWARDS: "A healthcare facility is a facility under this section that is licensed as a skilled care facility or intermediate nursing care." It qualifies and it is always qualified as a healthcare facility.

CHAIRMAN GRIFFIS: Okay.

MR. EDWARDS: And so qualifying to go to the definition which was added to section 330 of the Zoning Regulations as a part of the Fair Housing Act litigation and it was added to that portion because the purpose of that threatened litigation was to offer equal opportunity for the handicapped to have housing as non-handicapped people.

CHAIRMAN GRIFFIS: That's right.

MR. EDWARDS: And this is the section having to do with boarding houses, rooming houses and it's added there for that purpose. It is not added to preempt the definition of nursing home, convalescent home and hospital that the interpretation argued by Capitol Hill Group would result in. You extend it to nursing homes. You extend it to convalescent homes and then you extend it to hospitals. Pretty soon everything in the city that has any degree of impaired residents is a housing for the handicapped. This BZA, this Board's authority to determine parking on a case by case public review process that takes into account community concerns is obviate and the Zoning Administrator makes those determinations on his own as he did in this case.

MEMBER ZAIDAIN: So it's your argument that this use does not fall under the CBRF. It's more

under the use of a nursing home.

MR. EDWARDS: It does not fall under the CBRF housing for the handicapped. It does call under CBRF for nursing home which is healthcare facility.

MEMBER ZAIDAIN: I was hoping I wasn't going to have to pull out the definition. Now I have to.

CHAIRMAN GRIFFIS: But now of that impairs whether it's a matter of right use or not no matter all the distinctions that you're making. It is still a matter of right use.

MR. EDWARDS: No, Mr. Chairman. In an R-4 zone, a healthcare facility can be provided only by special exception as has been the case in the past. This is R-5, but the requirement for special exception applies to healthcare as it has always for this Capitol Hill facility. That's why it came to this Board in 1991 and 1999, because it was a nursing home.

MEMBER ZAIDAIN: Let me make sure your argument's clear because this is obviously a substantial point you're making. You're saying that the use that's in debate here is classified as a community-based residential facility, healthcare facility so CBRF-D.

MR. EDWARDS: Yes.

MEMBER ZAIDAIN: And you don't think that 330.5 subsection I applies to that definition when it says "CBRF..." You do not think that applies to a CBRF healthcare facility.

MR. EDWARDS: That's correct.

MEMBER ZAIDAIN: Where do you read that? It seems like it's trying to encompass the whole thing.

MR. EDWARDS: It seems like it does and I think that's the very purpose that second paragraph in the definition section of the Zoning Regs goes to.

MEMBER ZAIDAIN: What do you mean "second paragraph"?

CHAIRMAN GRIFFIS: Is that the definitions?

MR. EDWARDS: Page 114 of the definition section.

CHAIRMAN GRIFFIS: 199, Definitions.

MEMBER ZAIDAIN: Right.

MR. EDWARDS: "Community-based residential facilities."

MEMBER ZAIDAIN: Right.

MR. EDWARDS: Second paragraph.

MEMBER ZAIDAIN: Right. So what you're arguing is that if it fits in the definition and so

frightening similar to something that we just had to deal with but if you're arguing that it's a CBRF healthcare facility, then it can be nothing else.

MR. EDWARDS: That's correct. That it cannot be.

MEMBER ZAIDAIN: So how can it not fit into the 330.5(I)? How can it be nothing else?

MR. EDWARDS: Because of the second paragraph under the Definition section. "If an establishment is a CBRF as defined in this section (Healthcare Facility), it shall not be deemed to constitute any other use."

MEMBER ZAIDAIN: Exactly. So then why does it not fit under 330.5? Can I get away from the definition and look at 330.5 subsection I?

CHAIRMAN GRIFFIS: Community-based residential facility.

MEMBER ZAIDAIN: Tell me how it does not fit into that?

CHAIRMAN GRIFFIS: "Under the following uses will be permitted the matter of right in the R-4 district."

MR. EDWARDS: I think that it could and I think that it's the argument of Capitol Hill Group and the Zoning Administrator that it could fit under that,

but the result of fitting it under that is to obviate any classification of nursing home, convalescent home, hospital. Then anybody with any impairment or disability would be covered under this.

MEMBER ZAIDAIN: Right, and I agree with that. At least my initial take is that is why the definition says "if it's this, it can be nothing else."

MR. EDWARDS: That's correct.

MEMBER ZAIDAIN: You're saying it's not really a "could." Either it is or it's not.

MR. EDWARDS: It is or it's not. That's correct.

MEMBER ZAIDAIN: Right. So you're saying that it is.

MR. EDWARDS: That it is. It is a licensed healthcare facility. It is licensed skilled facility or intermediate nursing care.

MEMBER ZAIDAIN: So you're saying that it is a CBRF and it's matter of right.

MR. EDWARDS: No, I'm saying it is a CBRF under healthcare facility.

MEMBER ZAIDAIN: Right.

MR. EDWARDS: Which in an R-4 or an R-5 zone can be operating only as a special exception.

CHAIRMAN GRIFFIS: Do you see that cite?

MEMBER ZAIDAIN: Where do you see that? I think in order to make clear of your point, point us to a section in the Zoning Regulations either under R-4 or R-5 that says a CBRF healthcare facility is only allowed in as a special exception.

MR. EDWARDS: I would have to point you that a CBRF of which encompasses the seven definitions here in the definition section is allowed as a special exception in an R-4 or R-5 zone.

MEMBER ZAIDAIN: Where does it say that in the Zoning Regs?

CHAIRMAN GRIFFIS: Where does it say that?

MS. MONROE: Mr. Chairman, can I point to 359.1? It says "The healthcare facilities for 16 to 300 people shall be permitted as special exceptions in R-5 districts to be approved by the BZA." That of course is not including healthcare facilities for the handicapped. That's the difference.

MEMBER ZAIDAIN: The difference is that and tell me if you think I'm wrong, Ms. Monroe, but does the definition of a healthcare facility as is referenced in 359 the same as a CBRF healthcare facility defined in section 359? Is that the same thing?

MS. MONROE: Yes, it's supposed to be. It's supposed to carry over essentially. All the definitions of CBRF there appear throughout the Regs and this healthcare facility is the "CBRF" that's defined in 199, the special exception type which would not have handicapped. Those that have the handicapped fall under the 330.5(I).

MEMBER ZAIDAIN: Then I guess what we're dealing with if I understand your point is a conflict within the Zoning Regulations of it saying in one section that it's a matter of right and in other section, it's saying that it's a special exception.

MS. MONROE: But the difference is if there are no handicapped individuals in it, then it wouldn't fall under the matter of right. The matter of right is only if the ZA makes that determination that it is housing for the handicapped. He's the one under 335(I) that has to make that determination.

MEMBER ZAIDAIN: Okay. So I think therein lies the debate is the fact that this elderly facility is being deemed as handicapped which is throwing it under the matter of right's CBRF provision. What I understand Stanton Park's position is elderly is not handicapped and therefore putting it under 359. Is that correct?

MR. EDWARDS: The other point is --

MEMBER ZAIDAIN: Is what I just said correct just to make sure on that?

MR. EDWARDS: It's correct and I would add to it that none of the CBRFs housing for the handicapped is licensed by any government agency. Whereas all healthcare facilities by definition are licensed as skilled or intermediate nursing home.

CHAIRMAN GRIFFIS: I'm sorry. Are you saying CBRFs for the handicapped are not licensed?

MR. EDWARDS: They do not require a healthcare license. Whereas a healthcare facility does.

CHAIRMAN GRIFFIS: How do you base that comment?

MR. EDWARDS: Pardon.

CHAIRMAN GRIFFIS: I'm not understanding where your understanding of that is.

MR. EDWARDS: A skilled nursing care has to provide a certain level of nursing care, intermediate nursing care, and received a license from the Health Department.

MEMBER ZAIDAIN: Okay, now which use would that be for, disabled or elderly?

MR. EDWARDS: Neither. Sunrise –

MEMBER ZAIDAIN: So how does that help us? I think what we're going to have to focus on is whether or not elderly is disabled. So help us focus on that.

MR. EDWARDS: All right.

MEMBER ZAIDAIN: And phrase your comparison. You're doing apples and oranges comparison. Delineate what's apples and what's oranges.

MR. EDWARDS: Let's go back to Sunrise Senior Living.

MEMBER ZAIDAIN: Okay.

MR. EDWARDS: They house the elderly. They receive no license for a skilled nursing. They were by this Board considered to be a CBRF housing for the handicapped. Historically Capitol Hill Hospital has always had a license from the Health Department as a nursing home and has historically been treated by this Board as a healthcare facility even to the point of requiring the entire facility to be regulated by this Board.

Whereas a hospital in an R-4 zone is a matter of right because of the integrated nature of it. The entire facility, its operations and the total parking facility, has since 1991 been regulated by

this Board and should continue. There's been no change in operation. I would submit that the purpose of the amendment to the Zoning Regs brought about by the Fair Housing Act litigation was not intended to undo the regulation of nursing homes, convalescent homes and hospitals in the city.

MEMBER ZAIDAIN: Okay.

MS. MONROE: Mr. Chairman, can I just make one point? Mr. Zaidain, about your question of the conflict between 330.5(I) and 359 there, special exception, it says in 330.5(I) that notwithstanding any provision in this title to the contrary, once the ZA makes a determination and whether or not that determination is correct which is what's in question here but once he makes the determination that there are handicapped people there as residents, then notwithstanding any other provision including 359 it kicks it into a matter of right category.

MEMBER ZAIDAIN: Right, so that leads us back to the issue of "is this handicapped."

MS. MONROE: The factual question.

CHAIRMAN GRIFFIS: Yes, if he made the right determination.

MEMBER ZAIDAIN: Yes, if he made the right determination. Okay.

CHAIRMAN GRIFFIS: Yes, Ms. Miller.

MEMBER MILLER: Are you aware of any regulation or case law related to the Fair Housing Act that discusses what handicapped means?

MR. EDWARDS: Not in this jurisdiction other than the Nebraska Avenue case which extended to housing for the elderly. I believe there are some cases in Puerto Rico but I'm not sure what the Zoning Regulations or if they have a separate definition of healthcare facility and housing for handicapped. So no, I don't know.

MEMBER MILLER: Okay.

COMMISSIONER HOOD: Mr. Chairman.

CHAIRMAN GRIFFIS: Yes.

COMMISSIONER HOOD: I wondered if we have access to Zoning Commission Order 869.

CHAIRMAN GRIFFIS: Do you mean do we have it in the record now?

COMMISSIONER HOOD: Yes, it's not in the record. I was wondering if we could get access.

CHAIRMAN GRIFFIS: Absolutely.

COMMISSIONER HOOD: I'll tell you why. Some of us sat on that case and I hate to call on my memory, but I think that was discussed in detail and I think that order would definitely help us go down

the right track.

MEMBER ZAIDAIN: And which part of the regulations did that order implement?

COMMISSIONER HOOD: That was dealing with the whole Fair Housing Act piece. I'm not going to say which way I voted but I can tell you that all that was discussed in detail and I think it would help us if we would get the Zoning Commission Order 869.

MEMBER ZAIDAIN: 869?

CHAIRMAN GRIFFIS: Okay. We will put that into the record.

COMMISSIONER HOOD: I believe that's the correct order. I'm sure because that whole Fair Housing Act was an issue.

MR. EDWARDS: I have one copy of the order here if anyone would like to look at it now.

MS. BAILEY: Mr. Edwards, I can make some copies if you'd like.

MR. EDWARDS: All right.

CHAIRMAN GRIFFIS: We're not going to debate it now. We're going to put it into the record for the Board's review. Okay. Let's continue then.

MR. EDWARDS: Thank you. I would now like to turn to my point that parking requirements for CBRF. In general whether they are with handicapped or

whether they are a healthcare facility should be determined on a facility-specific basis by this Board. Because the CBRFs encompass youth rehab homes, emergency shelters as well as healthcare facilities, there are a total of seven very different classes of facilities. In determining parking requirements, each of the different classes of CBRFs will likely have different criteria which may consist of the number of residents, number of visitors, number of employees.

Thus unlike other portions of the table in Section 2101 which is attached to my testimony, they prescribed parking in terms of ratios, but the parking requirements for CBRFs are to be determined by the BZA on a case-specific basis in order to properly evaluate the nature of the facility, the need to provide off-street parking, the impact of any action on the surrounding community. Requiring a ruling by the BZA on parking does not detract from my facility's matter of right status.

Proceedings before the BZA provide an opportunity to determine the most appropriate criteria, receive comments from the community and evaluate the impact the requested action will have on effected neighbors. That opportunity is not available if the decision is made by the Zoning Administrator.

Even within the specified classes of CBRFs, there can be very different parking requirements. For example, an independent living facility has a different staffing requirement than an assisted living facility and a different staffing requirement than the skilled nursing required at a nursing home. These considerations were taken into account by the two BZA orders pertaining to the Capitol Hill Group.

In 1991, it was the Capitol Hill Hospital. In both orders, the BZA specifically considered the number of beds, the number of employees in establishing the parking requirement. In 1991, with 130 beds and 250 employees, 176 off-street parking spaces were required. In 1999, with an expansion to 162 beds and 340 employees, the parking requirement was increased 276 off-street spaces.

Now with 177 operating beds and 532 employees, the facilities have obtained C of O that are the subject of this proceeding that would reduce the parking requirement to 85 off-street parking spaces. Employees have increased by over 50 percent since 1999.

CHAIRMAN GRIFFIS: First of all, that's all in your written submission. Also we're not going

to be deciding on impact, negative or potential for adverse impact on this. We need to know this is as it is in appeal. It's very factually and legally based. We need to stick to why you think it does push us to the table 2101 to find why the Board decides the parking ratio for this.

MR. EDWARDS: All right. Let me skip over a portion of my testimony and go right to page five.

MEMBER MILLER: Excuse me. I just want to ask one question before you move onto another subject. You basically said that requiring parking determination by the BZA doesn't take away from its matter of right status. Are you aware of any instance where a property has matter of right status and yet the BZA can impose parking or other conditions on it?

MR. EDWARDS: The only other parking that's reserved to the BZA is an ancillary thing under chanceries I believe if I recall. I cannot speak to it other than having seen it in the Regs.

CHAIRMAN GRIFFIS: Chancellories, embassies, that kind of stuff.

MR. EDWARDS: I would point out that every matter of right use has a certain parking requirement.

CHAIRMAN GRIFFIS: That we're aware of. And again this isn't being waived from parking

requirement. It's about who and how and what the parking requirements establish.

MEMBER ZAIDAIN: I think that what Ms. Miller's question is - and this is a good point and to clarify it - where is there a matter of right use where the use is allowed but there is some element of development that has to come to us for review. Correct?

MEMBER MILLER: Yes.

MEMBER ZAIDAIN: Off the top of my head, there are certain things.

MR. EDWARDS: Height.

CHAIRMAN GRIFFIS: If I understand what you're going to be bring up, you can certainly have a matter of right project and decide to do things a variance or special exception.

MEMBER ZAIDAIN: Right. Well, let's just focus on special exception. You can do a variance for anything.

CHAIRMAN GRIFFIS: Okay.

MEMBER ZAIDAIN: But for special exception, yes, you can have a commercial building downtown, but if you have a penthouse that's not complying, you can come in for an 11 special exception. That's the same premise.

CHAIRMAN GRIFFIS: Okay.

MEMBER ZAIDAIN: Is that true?

CHAIRMAN GRIFFIS: Let's have the participants address that as we go through.

MR. EDWARDS: Now can I turn to what will likely happen to this facility in the future as if these C of O are allowed to stand.

CHAIRMAN GRIFFIS: No. Why would that be relevant for this appeal?

MR. EDWARDS: I think it is very relevant because it shows the motivation for attempting to reduce the amount of required parking so that this parking can be made available when approximately three-quarters of the facility is now vacant. It's likely to be rented and if it can be rented with additional parking, it would be highly desirable feature.

CHAIRMAN GRIFFIS: So what you're saying is part of the basis of your case to the appeal is if there was in fact some long term plan on the ZA's part to set this as a precedent so that he could establish or facilitate what's happening on this project.

MR. EDWARDS: Not the Zoning Administrator. I'm saying that the facts of this facility where only the north tower portion on 7th

Street is currently occupied.

CHAIRMAN GRIFFIS: Right.

MR. EDWARDS: All of Constitution Avenue is vacant. All the facility on 8th Street is vacant. The southern portion of 7th Street is vacant.

CHAIRMAN GRIFFIS: I understand all that.

MR. EDWARDS: In today's real estate market, these will not remain vacant forever.

CHAIRMAN GRIFFIS: As you've stated in your written submission.

MR. EDWARDS: With the 176 parking in this underground garage if they can allocated 85 of them to the nursing home and hospital, the balance of some 91 parking spaces could be available when they lease the rest of the facility.

CHAIRMAN GRIFFIS: Totally understood. Now that you've said and also in your written submission, how does that help us determine whether the Zoning Administrator made an error?

MR. EDWARDS: The Zoning Administrator made an error by making a determination that under the Zoning Regulations are reserved to this BZA.

CHAIRMAN GRIFFIS: I understand the statement of the error you're asserting, but how is it important for us to understand the potential use or

future use or reconfiguration of it when what we're trying to figure out is the very straightforward case presentation of the Zoning Administrator erred and he erred because of something?

MR. EDWARDS: And Mr. --

MR. TALLANT: Can I interject for a moment? I would say that this is not the first error on the part of the Zoning Administrator. At the time that MedLINK sold the surface parking lot across 7th Street which provided required parking, they placed themselves in violation of BZA orders. Stanton Park brought that situation to the attention of the Zoning Administrator. The position of the Zoning Administrator at this time - this is going back now some two and a half or three years - said "They're selling the hospital and it doesn't matter that they sold the required parking."

CHAIRMAN GRIFFIS: I understand that. I may not be being very clear, but this is not like a special exception where we hear everything and this is what's going to happen and this is why they did and this is how they are malice and all that that we all hear and we love hearing that and spending hours on it. This is an appeal. What is your burden is to show us that the Zoning Administrator made an error

and we can see that clearly that there's an error because of certain things. Really I'm not convinced yet of the relevancy of you giving me evidence or anecdotal information about the future prospects of development or sale or vacancy or anything of that point unless you can really help me understand. For instances, why would the Zoning Administrator have known that?

MR. EDWARDS: We're not claiming that the Zoning Administrator did know that.

CHAIRMAN GRIFFIS: Good. I'm glad you said that. Then it has no relevancy at this point in my mind to the appeal.

MEMBER ZAIDAIN: And again you're not arguing that if another use goes in this facility - let's say a McDonald's - that the ZA is not going to require them to meet their parking requirements for that use, are you?

MR. EDWARDS: We are saying that there is a section in the Zoning Regulations that says that there's an increased intensity of the use that the applicant has to come in with a revised parking plan. I think it's over 25 percent increase. We know that right now Capitol Hill Group is leasing all six of their operating suites to the Ambulatory Surgical

Group. It's highly likely that persons coming for outpatient surgery are going to be accompanied by a friend or a family member that will expect parking while they're in there. That's already happened. They haven't come to you. They haven't received the licenses but it was testified to before the Health Department on the 31st of October.

CHAIRMAN GRIFFIS: Follow-up question, Mr. Zaidain?

MEMBER ZAIDAIN: No thanks.

CHAIRMAN GRIFFIS: Okay. Let's continue then.

MR. EDWARDS: To resolve the problem, Stanton Park urges this Board to rescind the C of O issued to the nursing facility because the Zoning Administrator had no legal authority to determine the parking requirement for such a facility being a CBRF whether housing for the handicapped or whether a nursing home. Further the Board should require that all the off-street parking spaces associated with the underground parking facility be utilized by the nursing facility and the hospital. This would be consistent with the statement of MedLINK's chief financial officer at the October 31, 2003 Department of Health hearing that he expects all the underground

parking facility spaces would be committed to the new hospital and the nursing home.

As a more comprehensive resolution, the Board should affirm the parking requirement determinations of the prior orders. In the past, the hospital and nursing home operations at this location have been treated as an integrated operation and the hearing on October 31 MedLINK stressed that integration and co-location as a unique attribute shared by only one other healthcare in this city. The integrated regulation for zoning purposes should continue. The entire facility should be regulated as an entity rather than separate C of O for the hospital and the nursing home.

Further the Board should require that the hospital and nursing facility as well as any other operations at this location file an updated application with this Board proposing how to provide the appropriate amount of off-street parking to satisfy the increased intensity of use of this facility. Thank you.

CHAIRMAN GRIFFIS: Thank you very much. In your closing, let me see if I was clear because you mentioned whether this is housing for the handicapped or not as a CBRF, but you're maintaining one position

on that. Isn't that correct? This is CBRF not housing handicapped or disabled.

MR. EDWARDS: The definition of housing for the handicapped treats it as a CBRF but under a separate section of the Zoning.

CHAIRMAN GRIFFIS: Under 359.

MR. EDWARDS: And the parking requirement of all CBRFs is to be determined by the BZA.

CHAIRMAN GRIFFIS: Right. Good.

MR. EDWARDS: If it's over 16.

CHAIRMAN GRIFFIS: Exactly. That's unrefuted. Okay. Follow-up questions? Any questions? Yes, Ms. Miller.

MEMBER MILLER: I just want to get a clarification about where you think this facility falls within the regulations. Did you think it falls within 359.1?

MR. EDWARDS: I do not. I think it falls as a healthcare facility under the definition of CBRF.

CHAIRMAN GRIFFIS: Right, but then you have to go to a section under R-5 to find out what is regulating for how you defined it.

MR. EDWARDS: Yes, that's correct.

CHAIRMAN GRIFFIS: That's what she's asking you. Is it in 359.1? Is it in 330.5? Do you

have the Zoning in front of you?

MR. EDWARDS: I don't have that in front of me.

CHAIRMAN GRIFFIS: We're being unfair by throwing that all around, aren't we? 359.1.

MR. EDWARDS: It should not be under that.

MEMBER ZAIDAIN: No, I wasn't going to say. Co-counsel answered for him last time so I'm glad she asked it again.

CHAIRMAN GRIFFIS: That is true.

MR. EDWARDS: It should not be under 330.5.

MEMBER ZAIDAIN: Where should it fall under? You don't have the Zoning Regs in front of you. I understand.

MR. EDWARDS: It should be treated as a special exception in this zone.

MEMBER ZAIDAIN: From what I understand and if upon further review - I'm sure we won't decide this today and I'm assuming that - if my argument's not yours, please tell me, but it's my understanding that you're pushing for this to be treated under 359.

MR. EDWARDS: That's correct.

MEMBER ZAIDAIN: Okay.

CHAIRMAN GRIFFIS: As a healthcare

facility.

MR. EDWARDS: As a healthcare facility in an R-5 zone.

MEMBER ZAIDAIN: I think what's confusing the Board is when you talk about 359 you're still using the precursor of a CBRF healthcare facility here. In further argument, you might just want to say healthcare facility and not use the CBRF prefix.

MR. EDWARDS: It's necessary because the CBRF of over 16 people is what imposes the parking requirement to be determined by the BZA.

CHAIRMAN GRIFFIS: Right. That part is confusing. There it is. Anyone have follow-up questions from the Board?

CHAIRMAN GRIFFIS: Okay. Let's start with cross examination. Does DCRA have cross examination? Mr. Tummonds? Indeed. Does the ANC 6-C have any cross examination? Father Downing, how would you like me to refer to your party? Can I call it just "the Parish"?

FR. DOWNING: Yes, sir. That would be fine.

CHAIRMAN GRIFFIS: Good, because I like to be very succinct when I run through all these things. Does the Parish have any cross examination?

FR. DOWNING: No, sir.

CHAIRMAN GRIFFIS: 6-A?

MR. RICE: No.

CHAIRMAN GRIFFIS: Man, we're not used to this. We've just been through six hours of cross examination this morning. Very good. In which case what I'd like to do is next we will follow up with DCRA. Let's take ten minutes, stretch our legs and then we'll be back and we'll keep going through this. Thank you. Off the record.

(Whereupon, the foregoing matter went off the record at 3:34 p.m. and went back on the record at 3:54 p.m.)

CHAIRMAN GRIFFIS: On the record. Very well. Let's reconvene.

MS. GESALTI GILBERT: You are ready for me to begin. Laura Gesalti Gilbert appearing on behalf of the Zoning Administrator and the Department of Consumer and Regulatory Affairs. I'd like to make a couple of points at the outset in response to Mr. Edwards's testimony or argument. First, I'd like to just mention a hospital is not a CBRF and secondly, I'd like to mention that there's no suggestion on our part that there has been a change in the operations of the MedLINK or Capitol Hill Nursing Center, only

that's there's been a change in the law.

I'd like to spend maybe 15 or 20 minutes of my time giving the legal arguments and then I'd like to call Ms. Ogunneye who's the chief of the Zoning Review branch to appear on behalf of the Zoning Administrator. First I'd like to address the issue of housing for the handicapped and essentially I'm arguing from pages five through eight of my prehearing statement. Essentially under the laws that exist now, the Zoning Regulations, assuming that a nursing home is a CBRF intended to be operated as housing for persons with handicaps, then the nursing home is a matter of right use in an R-4 district or a higher zone district. As a result of that, the provisions of section 350.4(f) and 359 are superceded.

In reviewing the provisions of the Federal Fair Housing Act and the relevant case law, it is clear that a legitimate nursing home would generally meet the criteria for a CBRF which is intended to be operated as housing for the handicapped. Under the Fair Housing Act, it is unlawful to discriminate in the sale or rental or to otherwise make unavailable or deny a dwelling to any buyer or renter because of the housing of a handicap. That is 42 USC Section 3604(f).

A handicap is defined at 42 USC Section 3602(h) as it is in the District's current Zoning Regulations to include (1) a physical or mental impairment which substantially limits one or more of a person's major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment. To rent as defined in the Fair Housing Act includes to lease or sublease, to let or otherwise grant for consideration the right to occupy premises that are not owned by the occupant. A dwelling means any building, structure or portion thereof which is occupied as or designed or intended for occupancy as a residence by one or more families. Interestingly, a family is defined to include a single individual. Thus a single handicapped person who pays to occupy a portion of a building or nursing home as their dwelling or place of residence is protected under the Federal Fair Housing Act.

There are a number of cases that have confirmed that nursing homes have to be considered housing for the handicapped under the Fair Housing Act. One of these cases, United States v. the Commonwealth of Puerto Rico, was a case in 1991 in which the U.S. District Court overturned a decision by the lower court and Puerto Rico Zoning Agency that had

refused to allow the Isla Verde Nursing Home to operate in a residential district. The home housed 13 elderly handicapped persons. Under the Zoning law, nursing homes could only be granted permits to operate in an R-23 district by applying for a variance.

The court granted a preliminary injunction. They stated that under the Fair Housing Act it was illegal to refuse on the basis of a handicap to make reasonable accommodations in rules, policies, practices or services which such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

The second case is Hovsons v. Township of Brick, 89 F 3rd 1096, a third circuit case from 1996, where they addressed whether the township's refusal to grant a variance to enable Hovsons to build a nursing home in an R-2 district violated the Federal Fair Housing Amendment Act. Essentially they decided that it did. They determined that a nursing home should be classified as a dwelling under the Federal Fair Housing Act and the Third Circuit agreed stating that the Township of Brick's argument that the proposed nursing home is not a dwelling is without merit. For the handicapped elderly person who would reside there, Holiday Village would be their home very often for the

rest of their lives. We therefore hold that the proposed nursing home is a dwelling within the meaning of the Fair Housing Act and they also determined that the residents would meet the definition of handicapped saying that the parties do not dispute that the nursing home patients would be handicapped within the meaning of the Fair Housing Act.

A third case, Lapid-Laurel LLC v. the Zoning Board of Adjustment, another third Circuit case that was decided in 2002 stated that "as an initial matter there are two points on which the parties agree or that are settled beyond dispute. (1) The future residents of the facility that Lapid proposed to build will be handicapped. (2) A nursing home like that one that Lapid proposed qualifies as a dwelling within the meaning of the statute." There are no District of Columbia cases that are specifically on point. However the Hovsons case was cited in the BZA's decision in the Sunrise Assisted Living case, BZA Appeal 16716(a).

We will get into testimony on this matter, but before determining that the Capitol Hill Nursing Center qualified as housing for the handicapped, DCRA did require the Capitol Hill Healthcare Group submit appropriate documentation including proof that it was

properly established and licenses as a nursing facility under the District of Columbia law. The facility application is attached as an exhibit to my pleading. I realized that I left out an affidavit that they filed which I think I referred to in this memo, but the affidavit was actually submitted by the Capitol Hill Care Group and it is the same affidavit that was submitted to us by the Capitol Hill Group indicating the length of resident stay and so on.

CHAIRMAN GRIFFIS: That's an affidavit for Henry Vaughn.

MS. GESALTI GILBERT: Yes.

CHAIRMAN GRIFFIS: Okay.

MS. GESALTI GILBERT: So based upon the submissions by the Capitol Hill Group and the law cited, that provision does not apply, therefore, DCRA determined that the Capitol Hill Nursing Center qualified as a CBRF providing housing for the handicapped. Therefore under the amended Zoning Regulations, the DCRA determined that the use was a matter of right use in an R-5-D district in the District of Columbia.

The next argument I'm not going to spend any particular time on but I just note it beginning on page nine of my memo. Since the nursing center is a

matter of right use under the current Zoning Regulations, the conditions in the BZA special exception order have no continuing force or effect. I think that's pretty much understood by everyone. I have cited some law in support of that, but I think it's pretty clear that once we have a matter of right use that the conditions in a prior special exception order no longer apply. It's in my memo if anyone has any questions or you want me to go into that further, I can.

I next wanted to concentrate on the fact that the Zoning Administrator had the authority to determine the appropriate number of required parking spaces. Let me go back a little bit. Under the Zoning Regulations as they were amended on July 30, 1999 in conformity with a consent agreement entered into by the District of Columbia and the Justice Department, section 330.5 of Title 11 of the Zoning Regulations states that a CBRF provided that notwithstanding any provision in this title to the contrary, the Zoning Administrator has determined that such CBRF that otherwise complies with the zoning requirements of this title that are of general and uniform applicability to all matter of right uses in an R-4 district is intended to be operated as housing

for persons with handicaps. So this use is permitted as a matter of right use in an R-4 or higher district. The Zoning Administrator determined that the Capitol Hill Nursing Center qualified as housing for the handicapped and therefore determined that it was a matter of right use and that the Zoning Administrator was required to treat it as a matter of right use and to comply with zoning requirements of this title that are of general and uniform applicability to all matter of right uses.

On that basis, the Zoning Administrator determined that the provision which was cited by Mr. Monty Edwards pertaining to the parking requirements for CBRF exceeding 16 persons in 11 DCMR 2101.1 where it says that it's a CBRF for 16 or more persons, the parking is as determined by the BZA. It was our interpretation that this provision does not apply. This provision was adopted for the special exception uses.

Generally before this section was adopted, all CBRFs for 16 or more persons were special exception uses. Therefore because they required a special exception, the parking would be as determined by the BZA. However based upon the provisions of section 330.5 that I just cited, that applied. The

Zoning Administrator was required to look at the most appropriate parking for this type of facility and not to discriminate between housing for the handicap and housing for persons who do not have handicaps. For that reason, the Zoning Administrator looked to what he considered to be similar uses being a rooming or boarding house and that's the one that he selected.

I wanted to also mention that this interpretation of the Zoning Administrator was affirmed by the BZA in Appeal No. 16716(a) pertaining to the appeal by the Nebraska Avenue Neighborhood Association of DCRA's decision to issue a building permit to the Sunrise Assisted Living Facility. I draw your attention to page 13 of my prehearing statement. In its conclusion of law, the BZA states "the Board concludes that the Zoning Administrator applied general and uniform zoning requirements applicable to multi-family residences in an R-4 district such as parking requirements in his review of the application for a building permit. Community residential facilities for handicapped persons in the multi-family districts are not subject to a greater level of regulation than those that are applicable to housing for non-handicapped persons." The Board stated further "The Board concludes that the Zoning

Administrator correctly determined the applicable parking and loading requirements and that a ruling from the Zoning Administrator was necessary because the regulations do not set forth specific parking and loading requirements for a community residence facility in R-5-D zone." In the Sunrise case, the BZA held that the Zoning Administrator had the authority to determine the number of required parking spaces for CBRF that qualified as a matter of right use.

That's essentially the gist of my argument. I'd like to just a few questions of Ms. Ogunneye and then if you have any questions I would be happy to answer them.

MS. BAILEY: Excuse me. Ms. Ogunneye, would you please spell your name for the record?

MS. OGUNNEYE: Sure. The first name is Faye, F-A-Y-E. The last name is Ogunneye, O-G-U-N-N-E-Y-E.

DIRECT EXAMINATION

MS. GESALTI GILBERT: I'm sorry. I've been losing papers left and right here. Just give me one more moment. Ms. Ogunneye, could you please state your name for the record? I guess you just did. Could you please state what your position is at DCRA?

MS. OGUNNEYE: Yes, I'm the Chief of

Zoning Review Branch.

MS. GESALTI GILBERT: And can you explain to me what your duties are in that position?

MS. OGUNNEYE: I review C of O as well as building permit applications to ensure that they do comply with the Zoning Regulations.

MS. GESALTI GILBERT: How long have you been employed at DCRA?

MS. OGUNNEYE: Unofficially 18 months. As a full time employee about 12 months.

MS. GESALTI GILBERT: For the record can you state who is the Zoning Administrator?

MS. OGUNNEYE: Denzil Noble is the acting Zoning Administrator.

MS. GESALTI GILBERT: And are you appearing here on his behalf today?

MS. OGUNNEYE: Yes, I am.

MS. GESALTI GILBERT: Now I would like to mark the C of O. I know these are already a matter of the record in this case but I would like to mark the C of O unless they are already in the record. Right?

CHAIRMAN GRIFFIS: They are already in the record.

MS. GESALTI GILBERT: Okay. If then you will just take a look at the two C of O that were

issued that are the subject matter of this appeal. Have you had an opportunity to review these C of O?

MS. OGUNNEYE: Yes, I have.

MS. GESALTI GILBERT: And have you had an opportunity to review DCRA's records and files related to the issuance of these C of O?

MS. OGUNNEYE: Yes, I have.

MS. GESALTI GILBERT: And have you also had an opportunity to discuss the factors which led to the issuance of C of O?

MS. OGUNNEYE: Yes, I have.

MS. GESALTI GILBERT: Have you also had an opportunity to discuss the factors which led to the issuance of these C of O with the Zoning Administrator?

MS. OGUNNEYE: Yes, I have.

MS. GESALTI GILBERT: Can you just try to briefly explain to the Board how it is that DCRA determined to issue new C of O particularly for the nursing home at 700 Constitution Avenue to the Capitol Hill Healthcare Group?

MS. OGUNNEYE: Okay. At the time, the Applicant came for a new C of O, the Zoning Administrator determined that based on the amendments to the Zoning Regulations in 1999 the facility

qualified as a handicapped facility. The Applicant provided an affidavit to that effect as well as a certificate of licensor. The Norson (PH) Home as a handicapped facility is a matter of right facility and based on that we had no choice but to issue a C of O.

MS. GESALTI GILBERT: Now can you address the choice of parking that –- Let me ask you one other question. The prior C of O that existed for this facility, was that subject to the BZA order? Did that indicate that it was subject to the BZA order?

MS. OGUNNEYE: Yes, it did.

MS. GESALTI GILBERT: All right. That was the reason for a new C of O. Was that why they came in for a new C of O?

MS. OGUNNEYE: They came for a new C of O because they had some use changes and the use changes like I mentioned earlier had kicked them into section 330.5 which was a matter of right use. The Zoning Regulations did not stipulate the parking requirements for the facility and the Zoning Administrator determined that based on similar uses for residential facilities and the precedent of Sunrise case that using the rooming house determination would be the more restrictive application.

MS. GESALTI GILBERT: When you say "that

would be the more restrictive application" what were the others? More restrictive than what?

MS. OGUNNEYE: More restrictive than regular multiple family residences requirement and it didn't quite qualify as the assisted living handicapped because that one had to be publicly assisted which this wasn't.

MS. GESALTI GILBERT: Okay. Now I think as I'm reading the Board here when you made a reference to a change of use that's something that we use. That's a term of an ours in DCRA's logo. Is that fair to say that when somebody needs a new C of O we may call it a change in use?

MS. OGUNNEYE: Correct.

MS. GESALTI GILBERT: So the nursing home didn't change.

MS. OGUNNEYE: No, it didn't.

MS. GESALTI GILBERT: All right. Essentially that's it. I have no further question. I will happy to accept any questions or clarifications.

CHAIRMAN GRIFFIS: Questions from the Board? Mr. Zaidain.

MEMBER ZAIDAIN: I have two quick ones for Ms. Gilbert. If I understood your earlier statement

you were talking about the definition of disabled. If I understood you correctly, I thought I heard you say the definition of disabled as outlined in the Zoning Regulations. I was wondering if you could point me to that if I understood you correctly.

MS. GESALTI GILBERT: Right. I think I did say that it's the same as in the Zoning Regulations. I think that the Zoning Regulations incorporates. Let me see if I can pull it out. I think it may incorporate that definition from the Fair Housing Act. It says anybody who is handicapped under the Fair Housing Act in section 330. Yes. It says "For the purposes of..." It's 330.5(I). "For the purposes of this subsection a `handicap'..." I think it was handicap not disabled. It's the term. "...means with respect to a person a physical or mental impairment that substantially limits one or more of such person's major life activities or record of having or being regarded as having such an impairment, but such item does not include current illegal use or addition to a controlled substance." So the principal part of that, apart from the addition part was lifted right out of the Fair Housing Act.

MEMBER ZAIDAIN: Right. Would you agree that 330.5(I) ties back into the definition of CBRF in

its subdefinitions?

MS. GESALTI GILBERT: Yes.

MEMBER ZAIDAIN: I guess one thing that raises my curiosity although this isn't directly before us is why it's not including illegal use or addition of controlled substances, but then the CBRF definition incorporates that under (E). I guess that's not really a big issue for us. Okay.

MS. GESALTI GILBERT: So yes, it's a CBRF and it is a healthcare facility. It meets the definition of a CBRF and it fits under (D) healthcare facility.

MEMBER ZAIDAIN: Right.

MS. GESALTI GILBERT: But contrary to Mr. Monty Edwards, we believe that it does constitute housing for the handicapped.

MEMBER ZAIDAIN: Okay.

MS. GESALTI GILBERT: That a skilled nursing facility or an intermediate nursing care facility in most instances if not every instance will constitute housing for the handicapped.

MEMBER ZAIDAIN: Okay.

MS. GESALTI GILBERT: In this case, we did get the copy of the certification that they were a skilled nursing facility and we did receive their

affidavit and we did review the relevant case law and the subject and we determined they were housing for the handicapped on that basis.

MEMBER ZAIDAIN: Right, so it's on the basis --

MS. GESALTI GILBERT: The affidavit does indicate that the average length of stay for most patients is 11 months. It also mentioned that 48 of the patients have been at the facility for over a year.

MEMBER ZAIDAIN: And that's how the determination was based on was the affidavit and the certification.

MS. GESALTI GILBERT: Right.

MEMBER ZAIDAIN: And that's what we should focus on there.

MS. GESALTI GILBERT: Right.

MEMBER ZAIDAIN: Also I just had a really quick semantical question in regards to your submission. On page two, you talk about BZA Order 16407. You stated your argument about why this doesn't apply, but then you've also talked about that the BZA order expired after its own terms of two years. I was looking through the order and I saw that it said that approval shall be prepared of 10 years.

Is that just a typo?

MS. GESALTI GILBERT: I guess so.

MEMBER ZAIDAIN: Okay. I just wanted to make sure.

MS. GESALTI GILBERT: But I think they had to do something within two years if I'm not mistaken. I haven't read it recently, but I think they have to take some action. They have to apply for a C of O or they had to do something within a two year period under that order.

CHAIRMAN GRIFFIS: You mean they didn't activate the order.

MS. GESALTI GILBERT: I don't have it in front of me. I think so. I think that's it.

CHAIRMAN GRIFFIS: I see. That's why it expired at two years. There was no action on it.

MS. GESALTI GILBERT: They didn't submit new plans for a proposed expansion.

MEMBER ZAIDAIN: I didn't see that in the order.

CHAIRMAN GRIFFIS: Any extending order unless you pull permanence for instance if it's for construction, you have activated the order. It doesn't last forever if you don't effectuate it. That's what you're saying. Correct?

MS. GESALTI GILBERT: It's my understanding that they never did the proposed expansion.

MEMBER ZAIDAIN: So if you get an order and you don't apply for a permit, the order dissolves.

MS. OGUNNEYE: Right. Sometimes it's stipulated in the back of the order.

CHAIRMAN GRIFFIS: Right. Here look at this. The boilerplate stuff that we never read on our orders when they go out.

MEMBER ZAIDAIN: That's probably why I don't know it.

CHAIRMAN GRIFFIS: That's right.

MEMBER ZAIDAIN: Regardless the approval was for ten years.

CHAIRMAN GRIFFIS: Anything else from the Board? Do you have more questions?

MEMBER ZAIDAIN: No, that's okay. I'll look up. Thank you.

MEMBER MILLER: I have a question.

CHAIRMAN GRIFFIS: Yes.

MEMBER MILLER: Ms. Gilbert, DCRA's determination that nursing homes are to be considered handicapped and covered under 330.5 is based on the case law that you cite in your prehearing statement.

MS. GESALTI GILBERT: Yes.

MEMBER MILLER: Is it based on anything else?

MS. GESALTI GILBERT: It's no secret the District was sued by Capitol Hill Healthcare Group. The judge was basically persuaded and was ready to enter a summary judgment against the District. I don't think that's a secret.

MEMBER MILLER: I don't know exactly what you're referring to. Is there some other D.C. case that we can deal with?

MS. GESALTI GILBERT: No, I'm saying that the Capitol Hill Healthcare Group sued the District of Columbia for not having issued the C of O to it relieving it from the conditions of the BZA order and requested a C of O. When DCRA had not acted promptly on that request, they filed suit for a declaratory judgment. The court appeared to be pursued that they did constitute housing for the handicapped. They did not rule because we settled the matter.

MEMBER MILLER: So there isn't a D.C. decision on that case.

MS. GESALTI GILBERT: There is not a D.C. court decision on point. No.

MEMBER MILLER: I haven't read the cases

that you cited yet, but it seems to me that when you're arguing that a nursing home should be considered under the Fair Housing Act, it seems like the point is going to that they not discriminate on the basis of the handicap, not other kind of peripheral things that they shouldn't be required to do other things such as parking. You've read the cases, but that's basically my question. Do they address other things or are they just trying to say that "No, nursing homes shouldn't discriminate against the handicapped on housing"?

MS. GESALTI GILBERT: I think that probably you're correct, but certainly there's an issue here in terms of the provision in the Zoning Regulations. If it would all be a lot neater and clearer if the Zoning Commission had made very clear when they amended the statute what the parking requirements would be or whether those parking requirements applied or whether you'd have to go to the BZA for the parking.

MEMBER MILLER: Basically the BZA cases don't really go into those kind of issues.

MS. GESALTI GILBERT: Right.

MEMBER MILLER: I have a really basic question here. I think you said something. Say the

Zoning Administrator is the one that has the authority now to make this decision. There seem to be statements that says he's required to look to similar uses in determining the appropriate number of parking spaces. I want to know first of all where does it say that in the regulations?

MS. GESALTI GILBERT: I think that what we're relying on is in the –- I think that what I was trying to say that. Well, essentially the practice has been that where there is no specific parking requirement that the Zoning Administrator looks to similar uses, but there's no specific ratio indicated. Then in this case because the housing for the handicapped is to be treated similar to housing that is not for the handicapped, we looked at what the Zoning Administrator considered to be similar uses being an apartment building or a rooming house or a boarding home and determined that it was the similar.

MEMBER MILLER: I understand that.

MS. GESALTI GILBERT: Okay. I'm sorry.

MEMBER MILLER: That's fine. My next question is is there something that precludes the Zoning Administrator from looking right in his record at the previous C of O where there was a BZA order that was based on a whole hearing of the parking needs

in the area?

MS. GESALTI GILBERT: My understanding is that the Zoning Administrator was essentially concerned in making his determination about other uses throughout the city and not making a determination in this facility that would impact other existing nursing homes across the city and require parking in those facilities. That would be out of line with what was being required here. I think that was his principal consideration. Now whether he could have looked at the BZA order for guidance, I don't think there's anything that specifically prohibits that. It's just not in the Zoning Regulations.

MS. OGUNNEYE: If I may just add to that.

MS. GESALTI GILBERT: Sure.

MS. OGUNNEYE: Usually when someone applies for a new C of O, we look at the previous C of O and at that point since the use was a matter of right use, the existing BZA order becomes nullified because it's no longer applicable.

CHAIRMAN GRIFFIS: But where's your first stop to look at how you could classify it for parking?

MS. OGUNNEYE: Once it's a matter of right, we would go to section 2101.

CHAIRMAN GRIFFIS: Okay.

MS. OGUNNEYE: Basically we would pick it out of there. In situations where it is not explicit, then we have to determine what's most similar and apply that.

CHAIRMAN GRIFFIS: So your procedure is to go directly not to the previous decision or ratio or count, but rather your first step and stop is the current regulations.

MS. OGUNNEYE: Correct.

CHAIRMAN GRIFFIS: Okay.

MEMBER MILLER: But you cite in your prehearing statement, New York cases and Rathkoff for the proposition that it's nullified if the law changes. Is there any D.C. law on that?

MS. GESALTI GILBERT: No. In fact, it was interesting. To me it seems that it's almost an obvious situation because the cases that I found were almost the opposite situation, for example, the nonconforming use situation where you have a use that was previously allowed and is now no longer permitted. If the law is changed, you're still allowed to do it.

But in this situation, you have the opposite situation where the law is more lenient. The most significant thing in that material that I cited was that the neighbors have no vested interest in the

continuity of zoning according to the Rathkoff Law of Zoning. That's essentially it.

MS. OGUNNEYE: Just to make an example. If for instance there is a BZA order in an R-4 zone for having an office building which we know is not a matter of right and they do have approval for that if someone else comes along in that property and decides they want to revert it back to residential, then that BZA order dies. If someone else comes along years later and tries to reapply the BZA order, it cannot be done because then it's dead.

MEMBER MILLER: We are in the situation where though the use hasn't changed.

MS. GESALTI GILBERT: Right.

MEMBER MILLER: Nothing has changed except the law and the parking needs as far as DCRA had before it hadn't changed. So what appears to me is that DCRA just didn't look at any of the findings made for that specific location and just started looking at other places around the city.

MS. GESALTI GILBERT: No. I think that what DCRA did was DCRA looked at the regulations. They didn't attempt to base it on the special exception order because the special exception order and the findings that have been made by the BZA in

this special exception order the Zoning Administrator had no further relevance to this situation since it's now matter of right.

Now if BZA decides that it's something that should be determined by the BZA after a hearing, then that's a different situation. But I don't think that the Zoning Administrator would have the basis to go look at all of these different issues.

MEMBER MILLER: I don't want to pursue this too much, but hypothetically if the law changed and they weren't required to follow the BZA order anymore - let's say that was the case - it still seems to me that possibly that the best evidence of the number of parking spaces that might be required would be the findings that were made by the BZA based on an evaluation and public hearing, etc. of the needs of that particular area. It just seems like DCRA disregards that.

MS. GESALTI GILBERT: I can only say that it was not done and instead as Ms. Ogunneye said the Zoning Administrator looked at the regulations and looked at the uses in 2101, the parking.

MEMBER MILLER: Thank you.

CHAIRMAN GRIFFIS: Any other questions?

MEMBER ZAIDAIN: Just as a follow up to

some of that conversation.

CHAIRMAN GRIFFIS: Yes, Mr. Zaidain.

MEMBER ZAIDAIN: In the alternative, isn't it a kind of practice that when a use comes that it is a matter of right but it's not accounted for in the parking schedule, you look for the most restrictive regulation of the closest use in the schedule?

MS. OGUNNEYE: Correct.

MEMBER ZAIDAIN: That happens fairly frequently.

MS. OGUNNEYE: I wouldn't say frequently, but yes, it does happen.

MEMBER ZAIDAIN: Okay.

CHAIRMAN GRIFFIS: Cross examination. We'll start with Stanton.

CROSS EXAMINATION

MR. EDWARDS: Ms. Ogunneye, when you determined the parking for the nursing home portion, what evidence did you have as to the number of employees that were currently employed by the nursing facility at that time?

MS. GESALTI GILBERT: I'm going to ask that the question be rephrased simply because Ms. Ogunneye has already testified that she didn't personally make the decision.

MR. EDWARDS: She did testify that they did review the criteria to determine what was the appropriate level of parking.

CHAIRMAN GRIFFIS: Right, but Ms. Gilbert`s objection is the fact that she didn't specifically do the individual review. She may not be able to tell you the exact number. Are you aware of the number? Can you tell us what the number of employees were?

MS. OGUNNEYE: I'm afraid I can't.

CHAIRMAN GRIFFIS: And you can't because?

MS. OGUNNEYE: Actually the certificate of license here says that they did provide those. They made mention of the skilled and the nursing facility staff members that were there. I'm sorry. Could you repeat the question?

CHAIRMAN GRIFFIS: What was the number of employees that was known to the Zoning Administrator when they made the determination for the parking?

MS. OGUNNEYE: One hundred and seventeen. I'm sorry. That's the number of beds. I'm sorry.

MEMBER ZAIDAIN: Did you guys know about how many employees or did you just focus on the certification and the affidavit?

MS. OGUNNEYE: No, we do know. Sixty-

eight employees.

MR. EDWARDS: I believe you are looking at a portion of their application that has to do with the healthcare professionals. That does not encompass the housekeeping staff --

CHAIRMAN GRIFFIS: You have to ask a question. This is cross examination.

MR. EDWARDS: Is that correct?

MS. OGUNNEYE: I'm sorry. I can't answer that.

MR. EDWARDS: With the page that you have before you now of the application, please read the titles of the entries on the last two lines on the page that you had before you.

MS. OGUNNEYE: Okay. Housekeeping services and others.

MR. EDWARDS: And with the table you were just looking, did it include any housekeeping staff or other in those 42 employees?

CHAIRMAN GRIFFIS: Okay. Just to refresh of course this is all for our benefit. What are we looking at?

MR. EDWARDS: We are looking at the attachment to the prehearing statement of the DCRA.

MR. TUMMONDS: Mr. Chairman, I would

question the relevancy of this question based on the fact that Ms. Ogunneye has testified that the Zoning Administrator's office used the interpretation of the Zoning Regulations of the rooming or boarding house.

CHAIRMAN GRIFFIS: Right.

MR. TUMMONDS: The calculation is based on the beds or units. It doesn't have anything to do the number of employees.

MR. EDWARDS: I'll accept that. Thank you very much.

MR. TALLANT: And we want to challenge that also because one of the things that Ms. Gilbert said was that the Zoning Administrator should look to the closest relevant activity.

CHAIRMAN GRIFFIS: Okay. Either challenge it in cross examination or at another time.

MR. TALLANT: I will. Now?

CHAIRMAN GRIFFIS: That's your cross.

MR. EDWARDS: Can I finish?

MR. TALLANT: I'll let Monty finish first.

MR. EDWARDS: Okay. Both of you testified as to the events that led to the issuance of the C of O. Now I believe you referred to litigation that was on-going. Was that in the bankruptcy court?

MS. GESALTI GILBERT: That's correct.

MR. EDWARDS: Now could you turn to the actual C of O that were issued and confirm that the date they were issued was March 26, 2003?

MS. OGUNNEYE: I'm sorry. Was that for me? Yes.

MR. EDWARDS: Now perhaps this should go to counsel but was there any determination of the validity of any settlement as a result of that litigation by the court?

CHAIRMAN GRIFFIS: How is that relevant to this appeal?

MR. EDWARDS: Did the settlement ever go before the court for approval in that litigation?

CHAIRMAN GRIFFIS: I understood your question, but why is that relevant to this appeal?

MR. EDWARDS: I think my next question will help.

CHAIRMAN GRIFFIS: It's probably best to bundle them together so I understand.

MR. EDWARDS: Isn't it true that on the date or the day following the issuance of the C of O the next thing that happened in the bankruptcy court was a voluntary dismissal of the suit brought by the Capitol Hill Hospital Group against DCRA?

CHAIRMAN GRIFFIS: I still don't

understand. How is that relevant to us getting to the central question of this and most appeals is that the Zoning Administrator made an error?

MR. EDWARDS: The testimony so far has gone to the factors that led to the issuance of the C of O. We have had an oblique reference to some litigation.

CHAIRMAN GRIFFIS: So you're saying that somehow this litigation made the Zoning Administrator make an error.

MR. TALLANT: Ms. Gilbert testified that because of --

CHAIRMAN GRIFFIS: First of all, Ms. Gilbert didn't testify because she's an attorney.

MR. TALLANT: I'm sorry. She stated that as a result of the litigation that DCRA felt compelled to issue the C of O. This was because she believed that a judge was about to issue a ruling against them.

CHAIRMAN GRIFFIS: Excellent. So the question is did the Zoning Administrator issue the C of O because they were being sued.

MS. GESALTI GILBERT: That's not the reason for issuing the C of O. The C of O was issued because as a result of the litigation we looked into all of these issues and I was involved in doing the

research. A couple of attorneys at Corp Counsel were involved in doing the research. We came to the conclusion that, yes, they were right. They had a point. This was housing for the handicapped that should be matter of right in an R-4 or higher zone.

CHAIRMAN GRIFFIS: And that was the basis of the lawsuit.

MS. GESALTI GILBERT: Right. That was the basis of the lawsuit.

CHAIRMAN GRIFFIS: So that's where the facts and evidence came apparent to the Zoning Administrator through you, the counsel, of how they should look at this in terms of issuing the C of O.

MS. GESALTI GILBERT: Through myself and the attorneys at Corp, yes.

CHAIRMAN GRIFFIS: Okay. Go ahead.

MR. EDWARDS: Mr. Chairman, may I submit the complaint that was filed in bankruptcy and let it speak for itself?

CHAIRMAN GRIFFIS: No, not in cross examination, you don't submit evidence.

MR. EDWARDS: All right.

MR. TALLANT: Ms. Gilbert, you stated that the Zoning Administrator did not have the capacity to review the number of employees at MedLINK and make

that a factor in their decision about the appropriate level of parking. Is that correct?

MS. GESALTI GILBERT: I don't think I said that.

MS. OGUNNEYE: I did.

MR. TALLANT: I'm sorry.

MS. OGUNNEYE: In determining the number of parking required for this facility, it's just the number of beds that is applied, not the number of staff.

MR. TALLANT: And for guidance you stated that DCRA looked to the rooming house type of operation at Sunrise Assisted Living. Is that correct?

MS. OGUNNEYE: Correct.

MR. TALLANT: Irregardless of the difference in licensing and degree of healthcare provided at the two facilities.

MS. OGUNNEYE: The affidavit that was supplied to DCRA showed us enough evidence that the facility did qualify as a handicapped facility which was the basis for which we reviewed it under section 330.5.

MR. TALLANT: Then is there any nursing home that would not so qualify?

MS. OGUNNEYE: There's a possibility, yes, if there were in another zone than the R-4.

MR. TALLANT: That has nothing to do with the nature of the operation. If this were R-1, it would be still be the same. I'm talking about the type of operation at MedLINK.

MS. OGUNNEYE: I'm sorry. Could you rephrase that?

MR. TALLANT: Is there any nursing home like MedLINK that would not also be classified as housing for the handicapped?

MS. OGUNNEYE: There's a possibility, yes.

MR. TALLANT: And can you explain that possibility?

MEMBER ZAIDAIN: Are you asking her to name them?

MR. TALLANT: Well, give me example of how that could be.

MS. GESALTI GILBERT: I think that calls for speculation. We argued that as far as we know certainly in my prehearing statement I've suggested that a legitimate nursing home would almost always be considered housing for the handicapped. I think what Ms. Ogunneye as testified is conceivably there's a situation where there could be nursing home that

didn't qualify for some other reason. Maybe it wasn't a legitimate nursing. Maybe their residents only stayed for a week at a time or something else.

MR. TALLANT: The question that I'm trying to get to --

MS. OGUNNEYE: I think you didn't explain that point I was trying to make which was the same sort of facility in an R-2 zone would automatically have to go before the Board because it would not be a matter of right.

MR. TALLANT: Okay.

MS. OGUNNEYE: But the zone in which this particular facility is in.

MR. TALLANT: The question I'm trying to get to is the model that the Zoning Administrator and DCRA looked to for guidance and in this case, they looked to Sunrise Assisted Living which does not provide the level of medical care that MedLINK does.

MS. GESALTI GILBERT: Conceded.

MR. TALLANT: That in fact MedLINK Hospital is far more like a hospital which requires one parking space for each bed and that if the Zoning Administrator were looking for guidance, he should have looked to the previous BZA orders. They should have looked to the requirements for a hospital because

the level of care at MedLINK is far closer to that of a hospital than it is Sunrise Assisted Living.

CHAIRMAN GRIFFIS: Wait a minute. That's a question actually. He meant to end on an upbeat.

MS. GESALTI GILBERT: I think that's an argument rather than question.

CHAIRMAN GRIFFIS: It isn't now. Do you agree?

MS. OGUNNEYE: I'm sorry. What am I agreeing to?

MR. TALLANT: Given the level of medical treatment provided at MedLINK Hospital and Nursing Home should not the Zoning Administrator have looked to the parking requirements for a hospital rather than a rooming house where no medical facilities are provided?

MS. OGUNNEYE: I do not agree. No.

MR. TALLANT: What is your argument for not agreeing? Why is a rooming house --

MS. GESALTI GILBERT: I'm going to object because I really think that Ms. Ogunneye is not equipped to answer this question at this time. She was not personally involved in making the decision.

CHAIRMAN GRIFFIS: Well, it's going to beg the question that why isn't the person that can answer

that question here.

MS. GESALTI GILBERT: Based on his schedule this afternoon.

CHAIRMAN GRIFFIS: That's interesting. So you brought somebody here.

MS. GESALTI GILBERT: We can still get him here. He is on call. If you want to hear from him, we can still get him. Okay. Go ahead.

CHAIRMAN GRIFFIS: The witness that you brought here today certainly has some basis to begin to answer these questions.

MS. GESALTI GILBERT: All right. Go ahead.

CHAIRMAN GRIFFIS: It's a very quick question in terms of why wouldn't you look to something else but more importantly what made you look to rooming house or a procedure leading to rooming house to depict your parking?

MS. OGUNNEYE: We do have two exhibits which are the two C of O and both uses have been separated. They are on different floors. One C of O is for the hospital side and the C of O is for the CBRF. So both entities so to speak were addressed according. The part that was hospital we applied the parking for the hospital. The part that was CBRF we

applied the parking stipulated as CBRF.

MR. TALLANT: And we are not disputing the hospital portion.

CHAIRMAN GRIFFIS: Right, but she's answering the question of why the CBRF wouldn't be analogous to a hospital in the parking calculation. So what you did was you found that the use and the size was more analogous to a rooming house.

MS. OGUNNEYE: Right. The use itself correct.

MEMBER ZAIDAIN: Just out of curiosity which is more restrictive? The hospital is more restrictive.

MS. OGUNNEYE: The hospital is more restrictive but CBRF is no way a hospital.

MEMBER ZAIDAIN: Right. Exactly. But like you testified here, you search for the most appropriate use which in your mind was the boarding house.

MS. OGUNNEYE: Right, which was the most restrictive.

MEMBER ZAIDAIN: And you're asking her why didn't you the hospital for that?

MR. TALLANT: It seems they used the least restrictive comparable model, a nursing facility that

they equated to a rooming house where no medical services are provided.

CHAIRMAN GRIFFIS: Okay. So you answered the question.

MEMBER ZAIDAIN: But I don't know if that question that I directly proposed to her was answered. Can you tell us why you didn't use a hospital for the CBRF?

MS. OGUNNEYE: Because the CBRF part of the application is not a hospital.

MEMBER ZAIDAIN: So you looked to a boarding house in a use sense in your mind and the boarding house was more appropriate in terms of use. I think your testimony was that you could have looked at it as a multi-family use but that was not as restrictive as a boarding house.

MS. OGUNNEYE: Correct.

MEMBER ZAIDAIN: So the difference between a boarding house and a hospital in your mind if I understand you correctly was a boarding house is more closer in use than a hospital was for the CBRF.

MS. OGUNNEYE: No, we wouldn't have looked at the hospital at all in determining the CBRF. We would look at only the uses that best suits the residential use.

MEMBER ZAIDAIN: Okay. Which would exclude a hospital.

MS. OGUNNEYE: Correct.

CHAIRMAN GRIFFIS: And what's your understanding of the activity that happens with the CBRF?

MS. OGUNNEYE: It's a facility for handicapped people that require assistance for getting up, feeding themselves, bathing themselves, clothing themselves and that require assistance from a healthcare provider.

CHAIRMAN GRIFFIS: So how does that happen? People have rooms that they live in and then they have people come in and out.

MS. OGUNNEYE: Correct.

CHAIRMAN GRIFFIS: Okay.

MEMBER MILLER: I just want to follow up on that because that's been festering in my mind as well. This goes back to when you determined that this was a nursing home that falls under 330.5(I). I think you said you looked at the license and the affidavit and the case law discussing nursing homes. I want to know if you looked at the residents of this facility. In what ways were they handicapped or did you just go on those three areas that I just mentioned?

MS. GESALTI GILBERT: I think that we didn't attempt to look at in what ways they were handicapped specifically.

MEMBER MILLER: I'm sorry. I know I addressed this generally. I don't think you can testify though, Ms. Gilbert, as to what you looked at. Can you?

MS. GESALTI GILBERT: Okay.

MEMBER MILLER: So I guess Ms. Ogunneye would have to testify to what they looked at. You could argue as to what you think they needed to look at.

MS. GESALTI GILBERT: Right.

MEMBER MILLER: Let's start with what you did look at. Did you look at impairments they had or anything like that in determining that they were a nursing home that fell under 330.5(I)?

MS. OGUNNEYE: Yes, and that was why we asked for the affidavit to prove that the facility in fact was what is handicapped persons.

MEMBER MILLER: I assume the affidavit is in the record, but maybe you could refresh our memories as to what that affidavit shows about the impairments of the residents.

MS. OGUNNEYE: I'll just read a couple of

excerpts.

MEMBER MILLER: You don't have to read it. If there's nothing in addition to what's in the affidavit, I've just been shown the affidavit. If there's nothing else you want to add to that, that's fine.

MS. OGUNNEYE: No, there is nothing else.

MR. TALLANT: I believe that's all except I would like to ask Ms. Gilbert for clarification. When she was describing section 330.5, it sounded as though your argument was very circular. That a CBRF is a CBRF subject to the regulation by the Zoning Administrator if the Zoning Administrator determines that it is a CBRF. Is that correct?

MS. GESALTI GILBERT: No.

MR. TALLANT: You stated that if it's a CBRF, the Zoning Administrator sets the parking.

MS. GESALTI GILBERT: No, I think what I said is that if it's a CBRF that provides housing for the handicapped then it's a matter of right use.

MR. TALLANT: But the question is who --

MS. GESALTI GILBERT: And the Zoning Administrator determines the parking. So the preliminary determination is does this facility qualify as housing for the handicapped? And having

decided that yes, this nursing home qualifies as housing for the handicapped and is entitled to be to a matter of right use in the zoned district in which it's located, then based upon that determination, the Zoning Administrator determines the parking.

I'd like to just say to the Board. Clearly there is a question here and in terms of the questions that you've raised, Ms. Miller, with respect to the number of employees --

CHAIRMAN GRIFFIS: But this is not speaking to the question.

MS. GESALTI GILBERT: All right. Go ahead.

CHAIRMAN GRIFFIS: Sorry. We were getting this rhythm of rapid fire and rapid answers. Any further questions from cross examination?

MR. TALLANT: I suppose not.

MEMBER ZAIDAIN: I just want to make sure that I understood the exchange here. I think your question was who determines that housing for the handicapped.

MR. TALLANT: Exactly.

MEMBER ZAIDAIN: And your answer is the ZA does.

MS. GESALTI GILBERT: Yes.

MEMBER ZAIDAIN: As underlined in 330.5(I).

CHAIRMAN GRIFFIS: That's correct.

MEMBER ZAIDAIN: Thank you.

MR. TALLANT: So the point of the question was it seems that the whole thing is very behind closed doors. There's no opportunity for the community.

CHAIRMAN GRIFFIS: Okay. And I think you pointed directly to it, but the regulations are very clear on that aspect.

MR. TALLANT: That it should be the BZA.

CHAIRMAN GRIFFIS: No, that the direct issue that Mr. Zaidain has brought up in terms of making the determination whether it's for the handicapped or not is the ZA's. It is not the BZA's.

MR. TALLANT: But if it's a CBRF for over 16 people.

CHAIRMAN GRIFFIS: I understand you're going to parking now, but you have to understand the first point and we also are dealing with the second.

MR. TALLANT: Okay. I'm an architect, not a lawyer.

CHAIRMAN GRIFFIS: So am I. Anything else?

MR. TALLANT: No, sir.

CHAIRMAN GRIFFIS: Okay. Let's take. Mr. Tummonds, yes.

MR. TUMMONDS: We still are in cross examination, right?

CHAIRMAN GRIFFIS: We have to go through anybody. No reason to interrupt. We will get to everybody.

MS. GESALTI GILBERT: May I just say one last thing? I would like to say that I would concede that there is a distinction between a rooming house and a nursing certainly in terms of the number of employees and the impacts on the community. But I don't think that's reflected in the Zoning Regulations or in the parking requirements in the Zoning Regulations.

CHAIRMAN GRIFFIS: Okay. Why don't we save it for closing then?

MS. GESALTI GILBERT: Okay.

CHAIRMAN GRIFFIS: Ms. Gilbert.

MS. GESALTI GILBERT: I'm sorry.

CHAIRMAN GRIFFIS: You're far from done. These people are chomping at the bit to get up here.

MS. GESALTI GILBERT: I'm sorry for stumbling today. I'm really not that well this

afternoon.

CHAIRMAN GRIFFIS: After this cross examination, we will stopping the case. I have a date set for this to continue on because then this Board has the pleasure of starting the next appeal this afternoon. So Mr. Tummonds.

MR. TUMMONDS: Ms. Ogunneye, in your discussion of the factors you used to determine the appropriateness of the parking levels if you were to look at something in this case. Do you think that the fact that say in a hospital where you would have patients that are going to stay for typically of a matter of a couple of days that it would have an impact on the level of parking that would be required in a facility maybe compared to a facility where someone would live for a matter of months or a longer period? In your opinion, would it be more likely that someone was at the hospital they are going to be there for a couple of days? It's a great degree of likelihood you're going to go visit them.

MS. OGUNNEYE: Yes, because it's a short time.

MR. TUMMONDS: So do you think the fact that this facility is a facility for people who stay for a longer period of time that is a more appropriate

determination to say that the parking required for this facility is more similar to a rooming or boarding house than a hospital?

MS. OGUNNEYE: Correct.

MR. TUMMONDS: That's it.

CHAIRMAN GRIFFIS: Good. Let's go to 6-C.

MR. CREWS: Thank you, Mr. Chairman. I have a question for --

MS. OGUNNEYE: Faye. Ogunneye.

MR. CREWS: Ogunneye. Excuse me. Can you point to a provision in the Zoning Regulations that requires you not to look at a hospital? It appeared that you gave testimony that you were only looking at the CBRF listing. Is there a regulation? I apologize to the Board for not having the full comprehension of the Zoning Regulations.

MS. OGUNNEYE: Okay. Section 2101.1 which is the schedule of requirements for parking spaces which is grouped into commercial buildings, institutional and so on. A hospital is under institutional and the CBRF is under residential use.

MR. CREWS: What did you testify in terms of how much latitude the Zoning Administrator had to determine parking requirements for CBRF? Can you point to if there is a limitation on that where that

is?

MS. OGUNNEYE: I'm not sure I understand the question.

MS. GESALTI GILBERT: Could you rephrase the question?

MR. CREWS: Let me ask you again what the basis of determining parking requirements are for CBRFs?

MS. OGUNNEYE: It's a residential use and under the parking table we have the breakdown of different types of residential uses that could apply.

MR. CREWS: So your testimony is that you limited to the residential uses in the table in 2101.

MS. OGUNNEYE: Correct, which is what the facility is.

MR. CREWS: Based on your understanding of the use and as you may have been clear before that you determined that it was closer to a rooming house rather than other uses based on the actual use of the facility.

MS. OGUNNEYE: The rooming or boarding house is the most restrictive use that could be applied under the residential use.

MR. CREWS: Under residential.

MS. OGUNNEYE: Correct.

MR. CREWS: Is there a limit though that you can only look at residential?

MS. OGUNNEYE: That's what it is.

MR. CREWS: That's your interpretation of the Zoning ordinance. I have no further questions.

MR. RICE: Ms. Gilbert, with respect to the Zoning regulations at DS-11 DCMR 2101.1, the parking requirements, would it be fair to say that the plain language of those regulations does not delegate authority for CBRFs with more than 16 persons to the Zoning Administrator?

MS. GESALTI GILBERT: That would be the plain language. However section 330.5 says "notwithstanding any other provision of this title" which is the provision that deals with housing for the handicapped.

MR. RICE: So your basis for saying that despite the language of 2101.1, it's your interpretation of this other section 330.5.

MS. GESALTI GILBERT: Correct.

CHAIRMAN GRIFFIS: Let me help you with that question. It's not her understanding or interpretation. Ms. Gilbert is in a legal term of art notwithstanding.

MS. GESALTI GILBERT: Notwithstanding and

regardless of what any other provisions in this regulations said.

CHAIRMAN GRIFFIS: Which means it overrides anything else that you can find anywhere else.

MS. GESALTI GILBERT: Right.

CHAIRMAN GRIFFIS: Is that correct?

MS. GESALTI GILBERT: That's correct.

CHAIRMAN GRIFFIS: Okay.

MR. RICE: So your interpretation is not withstanding any other provision. All decisions about facilities are delegated to the Zoning Administrator. Is that correct?

MS. GESALTI GILBERT: No, that's not what I said. What I said is that under section 330.5, that a CBRF that provides housing for the handicapped shall be permitted as a matter of right in an R-4 or higher district. As a number of the members of the Board have raised that point that generally where you have a matter of right use, you don't then turn the parking requirement over to the BZA to determine.

MR. RICE: So because the requirement for CBRFs with more than 16 is different than many other cases in the Zoning Regulations you're saying that the BZA should disregard the plain language of 2101.1?

MS. GESALTI GILBERT: No. That's not what I'm saying. I'm turning again to 330.5(I). It says that "CBRF that otherwise comply with zoning requirements of this title that are of general and uniform applicability to all matter of right uses in an R-4 district." In looking at that language, we felt that we should go to the requirements that are of general and uniform applicability to matter of right uses in an R-4 district. That's what we looked at.

MR. RICE: All right. Thank you for clarifying. With respect to the Nebraska Avenue case, that case was mentioned in your statement. Did the appellants in the Nebraska Avenue case specifically challenge the Zoning Administrator's authority to set parking requirements or were they merely disagreeing with the amounts of parking that were required for the development?

MS. GESALTI GILBERT: You know. I'd have to read that decision over. I haven't read that in a while. But I think the decision speaks for itself. I think you can answer that question yourself probably.

MR. RICE: The BZA order on page two related to that case. It says "Under the..."

CHAIRMAN GRIFFIS: You can do that in your

conclusions.

MR. RICE: All right. You're not aware of anything on point with respect to that case as to the challenge to the authority of the Administrator.

MS. GESALTI GILBERT: I would have to reread the decision.

MR. RICE: Okay. Great. Thanks.

CHAIRMAN GRIFFIS: Does the Parish have any cross examination?

FR. DOWNING: We have a song, Mr. Chairman, and a question.

CHAIRMAN GRIFFIS: A song?

FR. DOWNING: "Over the river and through the woods, to Grandmother's house we go." I wonder, Ms. Ogunneye, if you would indulge me in thinking about the elderly people who are residents of the nursing facility at Capitol Hill or MedLINK or whatever its name is. We can't be sure. Do you really think that people would only visit their relations there within two days of their coming or do you think that they might be more inclined to visit them regularly since that's where they live?

MS. OGUNNEYE: I'm afraid I really couldn't answer that because I'm differ from other people. I might. You might not. I really couldn't

answer that.

FR. DOWNING: You were willing to answer the attorney's question about two days. Okay. Thanks.

CHAIRMAN GRIFFIS: Okay. Is that everyone that's going to cross? I think I've gone through the entire list. Am I correct? Excellent. We are at 5:05 p.m. We're going to continue this case. We will come back at the continuation of the case. We are at Mr. Tummonds' presentation of his case and then we'll continue on from that. This will continue next week on the 25th. We do have other cases for that afternoon. However, we will also call this case.

Ms. Bailey, is that acceptable to this schedule as you view it? It's going to be the third case in the afternoon. Our afternoons start at 1:00 p.m. which means I can't tell you exactly when to show up. However I can be fairly assured we're not going to call this immediately at 1:00 p.m. You may want to be close in proximity sometime after that. I would say you'd be fairly secure in showing up at 2:00 p.m. and being timely for the calling of this case. I'm sorry. Mr. Moy. No wonder she was agreeing with me. Anything else we need to do attending to this?

MR. MOY: No, I think we're fine.

CHAIRMAN GRIFFIS: Excellent. Is everyone clear on the date? The Board has not asked for any additional submissions. Of course the record does stay open as the continuation of this case but I don't anticipate additional submissions before Tuesday. Of course there will be perhaps the evidence that we submitted in the case.

COMMISSIONER HOOD: Mr. Chairman, I would just suggest that you make the transcript available to my colleague because I will not be here next week and he can read the record.

CHAIRMAN GRIFFIS: Okay. We will certainly facilitate a full Board hearing on this case. If not, then I'd appreciate everyone being here this afternoon being patient with us and sticking around during the bomb scare. Thank goodness nothing ever happened. So let's move on and call the next case in the afternoon.

You know what? Why don't we take a break. We're going to take a 15 minute break. If the next case could just get settled. My anticipation is that we will go for two and a half hours on the next case and then probably break for dinner and sent everybody home. So we are probably looking at 7:30 p.m. or close to 8:00 p.m. Thank you. Off the record.

(Whereupon, the foregoing matter went off the record at 5:10 p.m. and went back on the record at 5:29 p.m.)

CHAIRMAN GRIFFIS: On the record. Very well. Let's call the next case in the afternoon, Ms. Bailey.

MS. BAILEY: That is Appeal No. 17034 of the Advisory Neighborhood Commission 2-E pursuant to 11 DCMR §§ 3100 and 3101 from the administrative decision of the Zoning Administrator in the issuance of a final and binding ruling letter dated July 12, 2001, to the law firm of Shaw Pittman confirming the ability to develop three lots on the east side of the 1500 block of 32nd Street, N.W. with three row dwellings. Appellant alleges that the Zoning Administrator's decision is flawed and contains factual and legal errors. The R-3 zone property is located in the 1500 block of 32nd Street, N.W. on the east side in Square 1270 on Lots 19, 20 and 21. Please stand to take the oath all those person who will testifying today.

(Witnesses sworn.)

CHAIRMAN GRIFFIS: Okay. We're ready to roll. Who are the players? What do we have? Why don't we come up? First we have Mr. Birch

representing the ANC 2-E, the Appellant. Is that correct?

MR. BIRCH: That's right.

CHAIRMAN GRIFFIS: Very good. Thank you. If you wouldn't mind just turning your mike on and introducing yourself for the record.

MR. BIRCH: My name is Thomas Birch. I live at 1240 29th Street, N.W.

CHAIRMAN GRIFFIS: Excellent. Representing DCRA. There is not a representative from DCRA with us today. See I told you we shouldn't have taken a break. Representing the property owner.

MR. EPTING: John Epting with Shaw Pittman representing the owner of Lots 19 and 20.

CHAIRMAN GRIFFIS: Lots 19 and 20.

MR. EPTING: Which is Strategic Georgetown LLC and Georgetown 32nd Street LLC.

CHAIRMAN GRIFFIS: I see. Is anyone representing the other lot which is 21? Is that correct?

MR. EPTING: That's correct.

CHAIRMAN GRIFFIS: And that's of Miller ownership.

MR. EPTING: That's correct.

CHAIRMAN GRIFFIS: And they are

represented by Mr. Nettler. Is there a representative that owner here? Not now. Okay. In which case, are there any preliminary matters that anyone's brining up in terms of this case? Wow. Then let's go ahead. I'm sorry. Did you introduce yourself?

MR. HALLEY: No, my name is David Halley. I'm here on behalf of ANC 2-E.

CHAIRMAN GRIFFIS: Okay. So you are going to assisting and presenting the case. Is that correct?

MR. HALLEY: Yes, that's correct.

CHAIRMAN GRIFFIS: Excellent. In which case let's get right into it unless there are Board questions that are wanted to be taken up at this time. Why don't we start with the presentation of the case?

MR. BIRCH: Thank you. ANC 2-E was asked by residents of 32nd Street to look into the ruling of the D.C. Zoning Administrator in the letter of July 12, 2001, granting the ability to develop three center lots 19, 20 and 21 on the property located on the east side of the 1500 block as a matter of right. Our appeal to you as was stated on grounds that the Zoning Administrator's decision is fraud and contained errors.

The property proposed for development of

five houses on 32nd Street was part of the Bowie-Sevier house property owned by Herbert and Patrice Miller. In 1998 in a letter to the neighbors, the Millers committed to leaving these three center lots undeveloped and open as green space as long as they owned the Bowie-Sevier property. They still do own that property.

Three years later then in 2003 the letter before us was obtained by the Millers granting a decision from the Zoning Administrator that the center lots could be developed. The property was purchased by two entities, Strategic Georgetown LLC and Georgetown 32nd Street LLC formed in Maryland on September 12, 2002 with the same managers, Darren Phillips and Ryan Hill, the same addresses and same agents. The sale of the property by the Millers included a co-development agreement requiring the developers to submit advanced copies of all designs and plans for review and approval by the Millers.

ANC 2-E has been much involved in this project. We reviewed plans to build five houses on these lots at public meetings on December 3, 2003, February 4, 2003 and April 1, 2003, all in advance of review by the Old Georgetown Board and the Commission of Fine Arts. These were issues having to do with

design and historic preservation issues. Each time ANC 2-E unanimously voted to reject the plans for those houses as being incapable and out of scale with others on the opposite side of 32nd Street and destructive to the ambiance and character of this exceptionally narrow street.

CHAIRMAN GRIFFIS: Let me interrupt right here because you've testified on an interesting point. You said that you actually plans on December 2002. Is that correct?

MR. BIRCH: Yes.

CHAIRMAN GRIFFIS: And there are two questions attendant to this. Why then are you appealing the Zoning Administrator's letter and not the plans?

MR. BIRCH: Why are we not appealing? I'm sorry.

CHAIRMAN GRIFFIS: Why are you appealing a Zoning Administrator's interpretative letter to the Board and not appealing the plans that you reviewed?

MR. BIRCH: First of all, the plans have still not been approved.

CHAIRMAN GRIFFIS: So they haven't been through any sort of administrative review.

MR. BIRCH: No, they haven't. I'm sorry.

I should have said that. They have been reviewed and turned down each time at the Commission of Fine Arts.

CHAIRMAN GRIFFIS: And when you reviewed the plans and they must have been more concept plans.

MR. BIRCH: They were concept. That's right. They were always concept review.

CHAIRMAN GRIFFIS: On December 2, were you aware that there was decision by the Zoning Administrator which would allow the development of these lots?

MR. BIRCH: No.

CHAIRMAN GRIFFIS: And when did you become aware of the decision?

MR. BIRCH: I have to say I don't know exactly when we became aware of that decision.

CHAIRMAN GRIFFIS: Were you aware in `02 that there would be problems in developing these lots?

MR. BIRCH: No.

CHAIRMAN GRIFFIS: So this was all very amenable and friendly and everyone was excited about seeing the development in December of 2002.

MR. BIRCH: No, actually not because what we did know was the agreement, the letter, that the Millers had sent on February 14, 1998 to our Georgetown neighbors telling of their plans for the

property on 32nd Street. This was property where a nursing wing stood when the Bowie-Sevier property was purchased by the Millers. They say that "our plan is to remove the nursing wing on 32nd Street which occupies a substantial portion of the property. We plan to replace it with a single family home at the north end of 32nd Street, two houses on the south end and then an enclosed pool addition to the main. In order to meet current zoning requirements, we are reconfiguring, i.e. subdividing three of the existing lots for these houses. No precedent being set by the subdivision of these existing lots, this will result in a decrease of one lot and a net reduction of about 10,000 square feet of built occupied space on the western portion of the property. We're committed to keeping the remaining three existing lots along 32nd Street as green space, a planted bank open to the street for as long as we own the Bowie-Sevier property." So, no, there was not happiness in the community when these plans were brought before the ANC in December of 2002.

CHAIRMAN GRIFFIS: Because you didn't want development based on the fact that you had a letter from Mr. Miller promising that he would not develop it.

MR. BIRCH: Promising a different scale of development.

MEMBER ZAIDAIN: I guess that it leads to a big issue that I have with this appeal and I want to make sure I'm clear on how we're proceeding here. First of all, you've already stated that there's been no approval of the plans. Are you planning on providing those and are we going to be raising issues with the plans or are we just dealing with the subdivision?

MR. BIRCH: We're just dealing with the subdivision in this appeal.

MR. HALLEY: If I could clarify. Actually these lots were not subdivided. In 1998, some of the lots on 32nd Street were subdivided. Lots 19, 20 and 21 were not subdivided because they had planned not to try to develop them. So they left those alone. With respect to plans that have been set forth with respect to design as Mr. Birch indicated, they have gone through the ANC, the Old Georgetown Board and the Commission of Fine Arts. The developers having been turned down at those levels have appealed the decision of the Commission of Fine Arts to the Mayor's Agent. The Mayor's Agent is awaiting a decision from the BZA before hearing the case on five developed houses.

They would like to develop five houses. If the ANC's appeal here is successful, only three lots would be available for development.

MEMBER ZAIDAIN: When you say "ANC's appeal is successful" what does that mean? That means that we would say that the letter is wrong.

MR. HALLEY: Correct. They would have to go through the process of getting a variance or some other sort authority to develop. That these lots cannot be developed as a matter of right.

MEMBER ZAIDAIN: Okay. I guess this is a gray area for me because as far as my term on the Board, we've never dealt with an appeal that was not tied to a permit. A permit to me is an official action. I'm sorry I'm not entirely clear on what this letter is. I'd like to hear some more testimony on that. Switching to another gear, to my understanding that this is coming in under 3112.2 which is "any person aggrieved by any order..." My question here is based on this letter here, who is aggrieved?

MR. HALLEY: Based upon the Zoning Administrator's.

MEMBER ZAIDAIN: Yes, what does this letter do? What right does this give them?

MR. HALLEY: Before the letter was issued

and even after it, the neighbors in the area had developed a compromise with the Millers that involved the restoration of the Bowie-Sevier estate as well as the destruction of the nursing wing home and the construction of three townhomes. It was a very contentious, long drawn out compromise between the neighbors and the Millers.

MEMBER ZAIDAIN: Was there any Zoning issues that dealt with that?

MR. HALLEY: I don't know if the matter came before the BZA at the time.

MEMBER ZAIDAIN: The anecdotal stuff will probably confuse us as we're getting a little low. It's 6:00 p.m. and so we're almost topped out.

MR. HALLEY: Sure. The reason that it aggrieves the neighbors who had relied upon the Miller's commitment that they would have a certain level of density in the neighborhood and the character of the houses. So when they find out later that the Millers had turned around and sought to develop these lots --

MEMBER ZAIDAIN: Let's stop right there for a second. Does the letter itself give them the ability to do that?

MR. HALLEY: No, the letter itself. They

would still have to go through a design review process.

MEMBER ZAIDAIN: They would still have to get a permit too. Right?

MR. HALLEY: I'm not sure about that, but it does indicate that these can be developed as a matter of right.

CHAIRMAN GRIFFIS: I'm sure about that. If they're going to build houses, they are going to get a permit.

MR. HALLEY: Right. Presumably. I guess what I'm trying to say is I don't think any permit was issued on the basis of this letter. I don't know for certain.

MEMBER ZAIDAIN: Right. I'm still trying to get who is aggrieved here. What the official action and whose interests are at stake? Right now, it seems like things are still in flux. I'm trying to follow your discussion in regards to your discussion with the developers, but in terms of the actions that is before us I'm still need to get a handle. I'm willing to hear anybody else's response on what's the official action.

CHAIRMAN GRIFFIS: I think what he was getting to was this. It's clear that the Board has

the authority in the regulations that we are the body that is the appeal body for any official administrative decision about zoning, even that as stated of the Mayor's if it's an official decision. I don't think the Board refutes the fact that the Zoning Administrator's interpretative letters are an official statement and an official ruling. Thereby it gets you here.

Mr. Zaidain is taking it to the next step essentially saying to be colloquial on a late night "So what?" With this letter, what does it actually do? How could it aggrieve anybody because it is not something that has to be used? It is not attendant to plans that are about to be built. It may not be effectuated. There's nothing that sends itself to be effectuated. I think what Mr. Zaidain is saying that you cannot build based on this letter anything that would aggrieve somebody within the realm of zoning.

MEMBER ZAIDAIN: Right.

CHAIRMAN GRIFFIS: How is it that we can entertain an entire appeal on it? Is it more appropriate perhaps the comment of the time of which permit documents are approved?

MEMBER ZAIDAIN: And that's basically where I was going. In your appeal, it says "The

decision was based on reversible legal and factuary and erroneously granted the ability to develop the lots in question as a matter of right." In my mind, is that true? Can they take this letter and go out and build it?

MR. BIRCH: Yes. Well the letter says --

MEMBER ZAIDAIN: Or is that opinion that they can?

MR. BIRCH: The letter says that it can be developed as a matter of right under zoning. So what this letter signals to the community and various specifically to the neighbors on 32nd Street and Q Street who would be affected by whatever development happens on these five lots is that this is a green light for houses to be built there. Granted it has to go through a process, but you see we're all ready being presented with conceptual design plans for five houses on these lots. So our reasons for coming to you is to seek your assessment, your evaluation and your judgment on what we consider to be a misinterpretation and misapplication of the Zoning Regulations.

MEMBER ZAIDAIN: I understand what you're saying. But my point was with the letter and I'm still trying elicit more of this. Is this an opinion

that based on whatever they saw - and I'm not still clear on DCRA was looking at when they responded to this - it appears that they have the ability to develop the properties? Is this an opinion letter or is this for determination? Do you follow what I'm saying? I just don't understand the legal weight of this letter.

MR. HALLEY: I don't understand the legal weight of it either but I don't feel that I'm in the position to make that judgment.

MEMBER ZAIDAIN: I'm not discussing the merits of your case. There may very well be an issue here. I'm just concerned about two things: (1) the policy and precedent that we set by acting these letters as an appeal and (2) once we get into the merits, how do we deal with it. What can we do? Does it mean that normally it's in a permit and DCRA revokes the permit? Then there's your answer.

MR. HALLEY: If they had a letter like this going in to get the permit, wouldn't the permit be issued by DCRA without question because there's a matter of right?

MEMBER ZAIDAIN: I don't know the answer to that.

MR. HALLEY: I think maybe that is part of

the harm here. They can go in and get their permit.

CHAIRMAN GRIFFIS: That still doesn't preclude you from appealing the permit.

MR. HALLEY: So the position here would be the possibility that this case would have to come back before the BZA after design approval and plans and after the permits have been issued, but before any construction takes place.

MEMBER ZAIDAIN: I'm just trying to figure out if this is a right of appeal for instance. If there's been a determination made and if somebody's been aggrieved. Aggrievement to me - I'm just thinking in my box of what we've seen so far and that's why we're trying to work through this - would be a permit's been issued, trees are now being cut down or the ability for trees to be cut down is there, the bulldozers are ready to tear down an historic house. To me, that's aggrievement. This letter I'm not sure if it's there or not. That's what I'm trying to get an opinion to.

MR. BIRCH: I have to observe that the point that you're raising, sir, is one that troubles us often in these issues where design comes before zoning. We go through the whole process with the ANC and the Old Georgetown Board and the Commission on

Fine Arts and concept and permit and then it turns out that there's a zoning issue. There are those who have raised the question "Shouldn't the zoning issue be settled first so we know what property we're dealing with and what can be built on it" and then start looking at the plans and concepts and drawings.

MEMBER MILLER: I want to make the comment. I think it's a shame that DCRA is not here to answer for themselves. We do have in the record in Exhibit No. 8 a letter from DCRA saying they consider this to be a final and binding decision.

MR. BIRCH: Yes, we received it.

MEMBER MILLER: So it's my opinion then that falls within the regulation that we're talking about.

MEMBER ZAIDAIN: Which exhibit is that?

MR. BIRCH: We could not come before you until we got that letter back.

MEMBER MILLER: Exhibit 8 which DCRA is not here to speak for themselves. This is the only thing that we have with respect to their opinion that it's a final and binding decision. Since we've gotten away from your merits for a minute. I want to ask. I think timing is an issue because sometimes you can come in now and we say "Why are you here now. Why

don't you want until there's a building permit?" Or if you come in later and we say "Why didn't you come in earlier" and "When did you know about all this?" So you're appealing a July 12, 2001 letter. I'm not sure if the Chairman already asked you this, but when did you find out about this July 12, 2001 letter that you are now appealing?

MR. HALLEY: Well, I found out about the letter in April 2003.

MEMBER MILLER: And how did you find out about it?

MR. HALLEY: A neighbor forwarded it to me. I'm sorry. Not somebody in my neighborhood, but somebody in Georgetown but not in that area.

MEMBER MILLER: How did they find out about it?

MR. HALLEY: I don't know and frankly I don't even remember which neighbor it was that forwarded it to me but it wasn't somebody on my block because I forwarded then to the folks on my block.

MEMBER MILLER: So when there were these ANC meetings in December 2002 and following, you all didn't have this letter. You weren't aware of this letter.

MR. HALLEY: I wasn't aware that any

approvals had been given of this nature. No. In fact, there was no construction on the property and nothing being done on the property so there was no reason to believe that anything had been done.

MR. BIRCH: I think a point was made maybe in the case before us that these letters aren't public. So you just discover them.

CHAIRMAN GRIFFIS: That's true and it brings up an interesting point, the importance of these letters. I don't think the Board in any capacity is looking at these letters to diminish their role and their importance. I think you're referring to a Bannum case in which the Zoning Administrator had an interpretative letter. In fact, one of the parties was saying that timeliness goes to that letter. The Board ruled in the fact that timeliness cannot go to those letters. Basically you need to bring an appeal based on an interpretative letter because it is a private correspondence.

More importantly, it may or may not be used. So it's won't effectuate itself. It won't actually facilitate what might then be a physical zoning issue. So the Board did not tie the timeliness of that appeal to the interpretative letter.

We are in a different situation now as

that somehow you have found this. No one is refuting the fact that as an official administrative decision it's appropriate to be appealed. I won't reiterate everything but again it goes back what would be the outcome of appeal or not appeal. It almost comes to the fact that this letter doesn't have to be used, but that's restating.

MR. HALLEY: If I can real quickly just interject. At the Commission of Fine Arts and at the Old Georgetown Board, the developers were putting forward the project as one that they had a matter of right to develop and there were questions from the members of the Commission of Fine Arts and Old Georgetown Board as to whether they had a right to develop these lots.

That was important to them because at the Commission of Fine Arts meeting, they said they did not like to pass on the design for lots that didn't have a right for development. That was about the same time we found this letter. So we were able to at the time to indicate that the matter was going to come before the ANC.

MEMBER MILLER: When was that?

MR. HALLEY: That was in either April of May 2003 whichever meeting the Commission of Fine Arts

heard this.

CHAIRMAN GRIFFIS: Okay. As you stated and restated now, there's an awful lot of people waiting to see what happens here. Mr. Epting, do you have anything to add to this debate to the timeliness and also the relevancy of an appeal of the Zoning Administrator?

MR. EPTING: Possibly.

CHAIRMAN GRIFFIS: You're not required.

MR. EPTING: I would and you'll notice that we didn't file anything to oppose on timeliness (1) because of the subsequent Bannum ruling which I think this appeal is probably timely because of that and (2) because it was an internal letter that we were basing our decisions. But I think the importance to the client though is because of this appeal, we've been not able to proceed so far with the Mayor's Agent although we are trying to get permanent approval. Zoning in terms of Mr. Birch's question when you're entering a historic district and you go to file your permit, they actually require to have historic approval first. I'm in Catch-22. If I can't get the historic approval, I can't get Zoning approval. That's the way they run the permit shop down there. You cannot get Zoning signoff unless you have historic

at least concept approval.

From our standpoint if this case is going to be appealed, we would rather have it appealed now before we go ahead and go through the expense of the permits and all that thing and have a decision made. I'd rather deal with it up front since we know that they don't like the concepts that we're proceeding under.

CHAIRMAN GRIFFIS: Okay. So on both counts you think (1) it is timely and (2) that it is an appropriate appeal element before the Board.

MEMBER ZAIDAIN: I wanted to hear what his opinion was on our discussion regarding the letter and whether or not it's right for appeal or not.

CHAIRMAN GRIFFIS: Do you want to address that, Mr. Epting.

MR. EPTING: I do think it's right because we are trying to act on this letter to do building permits and to get approvals. We would like to proceed to develop --

CHAIRMAN GRIFFIS: When you say "acting on the letter" what does that mean?

MR. EPTING: We have plans that we are trying to get approved through the design process and now at the Mayor's Agent and tried to get processed

through Zoning. If we get those approved, we're going to proceed.

VICE CHAIR ETHERLY: It's almost like the developer is the aggrieved one in the whole situation. But to follow Mr. Zaidain's thinking, does the letter serve –- I mean, the letter doesn't serve as some type of rough shortcut for the process. You would still have to go through the appropriate Zoning and permit approvals. Is it your sense that with this letter in hand that will allow you to expedite that approval process? Is that how you are looking at using the letter?

MR. EPTING: No. We'd still have to meet all the other Zoning requirements. But what the letter allows us to do if it's upheld is to file for lots that don't meet the exact matter of right standards. That's all it does. We still have to meet all the other requirements. But at the same time if I didn't have that letter, I'd need to be filing plans and trying to work with the Zoning Administrator to have to say "This is my theory on this" or it would be rejected and sent to the BZA. So the letter is sort of a first step before you go ahead and do some plans to see if your argument holds water with the Zoning Administrator.

CHAIRMAN GRIFFIS: Right. I think what Mr. Etherly's question directed and I think you've answered it and let's see if I understand it is the point that this is normal process. When you have a question of zoning what you can do, you are often referred and I would imagine the Office of Zoning would refer to the Zoning Administrator to ask their opinion. Is that correct?

MR. EPTING: That's correct.

CHAIRMAN GRIFFIS: Okay. Well there we are. We seem to have some agreement. Mr. Zaidain.

MEMBER ZAIDAIN: Never mind. I thought I had a question.

CHAIRMAN GRIFFIS: See. Now we have total agreement. No, go ahead.

MEMBER ZAIDAIN: I don't have a question.

CHAIRMAN GRIFFIS: Anything else? Yes.

VICE CHAIR ETHERLY: I'm still struggling with Mr. Zaidain's question. I thought it was a very good one and perhaps this will just come out as we go through the discussion if we do move forward. As Mr. Epting was starting to lay out, what happens if they don't have this letter? I'm thinking if the letter is found to be problematic as a final order and we reach some type of decision to "reverse the letter" so to

speak, what is a practical effect of that? But perhaps we'll just sort that out as we continue.

CHAIRMAN GRIFFIS: Maybe. There's not a theory. We hypothesize and the fact that they could go conceivably in my mind this interpretative letter outstanding for a lot of different reasons, but there's nothing precluding the next Zoning Administrator to do an interpretation for exactly this exact property and the situation and perhaps come up with something different. I don't think that it has an precedential value at all.

MEMBER ZAIDAIN: Is that true?

CHAIRMAN GRIFFIS: It may come away with this letter.

MEMBER ZAIDAIN: That was going to be my next question. How binding is the letter? Once you have this, you get this letter. Six months goes by and there's a new ZA. When you go back to the ZA to pull permits, you show him this letter. Is it possible that the ZA is going to have a different interpretation? Do you have any recourse if that's the case?

MR. EPTING: None.

MEMBER ZAIDAIN: I guess you could appeal the denial of your permit based on that letter.

MR. EPTING: Right. You understand this situation from the Zoning Administrator's office. Ten years ago when the Zoning Administrator was the same and you had a letter like this, you could pretty much rely on it. I think now what I said it's basically a guide that we use to determine whether or not to proceed with the project.

MEMBER ZAIDAIN: That's the statement that leads me back to where I started from and how much weight is this letter given? I'm still not sure about that.

MR. EPTING: Right. I discussed that with my client months away. The problem with that is otherwise we are in the position of knowing we're going to be appealed. I trust that if the appeal gets denied –

MEMBER ZAIDAIN: They are going to appeal the permit.

MR. EPTING: –- they are going to appeal the permit. So I'm almost worse off at that point in time from an equity standpoint than having it heard now. I've never been one to say I don't want something dismissed because I love getting things dismissed. In this case if you know it's coming back to you anyway, it seems one judicial way to deal with

this is deal with this now.

MEMBER ZAIDAIN: That's the facts of the situation and it may be correct but as this Board well knows, every decision we make always gets thrown back up to us at some point. I just want to make sure that were following the right path on it.

CHAIRMAN GRIFFIS: That's an excellent point to keep in mind. Yes, Ms. Miller.

MEMBER MILLER: It just seems to me that the issues that are raised by this letter are zoning issues that would be raised later at the building permit stage and that it makes sense to deal with it earlier in the process as Mr. Epting said before. The developer puts in all these resources to get to the building permit and then when we get to the building permit, if it's appealed, you wouldn't revisit the same issues. They either wouldn't exist anymore or they would have already been adjudicated.

CHAIRMAN GRIFFIS: Perhaps. Let's continue.

MR. BIRCH: I would like to ask Mr. Halley to list the issues in the letter to which we take exception?

CHAIRMAN GRIFFIS: Okay.

MR. HALLEY: Should I just proceed and

then you all will make a decision at some point. I don't know if a decision had been made.

MEMBER ZAIDAIN: I was just joking because we raised a bunch of questions and I don't think there's any answer to them.

CHAIRMAN GRIFFIS: I think what we're left with now is we've voiced an awful lot of concerns. I think some of it addresses and we're going to continue with the appeal at this point.

MR. HALLEY: Okay.

CHAIRMAN GRIFFIS: Wasn't that clear with my shrug?

MR. HALLEY: I took it to say so. Essentially I can elaborate on any of the points that you may wish me to. Given that it's this late, I'm going to try to be pretty streamlined. If something is confusing, just stop me.

CHAIRMAN GRIFFIS: Indeed, we will.

MR. HALLEY: The Zoning Administrator's letter which I believe you all have a copy of has basically five points that the ANC has a problem with in the letter. The first has to do with employing the exception provided by section 401.2 for the area. The lots are 1573 square feet so they are too small under R-3. Section 401.3 of the Zoning Regulations requires

a larger lot area size.

There is an exception though in section 401.2. It allows 80 percent of the 401.3 size to be used. It's basically a grandfather clause saying that for property in 1957 when these things were enacted we're not going to make something undevelopable before you could develop. That's just the way that I would read the Zoning Regulations.

Section 401.2 reads as follows: "Except as provided in section 401.3 in the case of an unimproved lot in single ownership on November 1, 1957 that has a lot area or width of lot less than that specified in 401.3 for the district in which it is located and that does not adjoin another unimproved lot in the same ownership a structure may be erected on the lot if both the lot area and the width of lot are at least 80 percent of the lot area and width of lot specified under section 401.3." And 401.3 requires an R-3 row dwelling and lot area of 2,000 square feet and 20 feet wide for the lot.

In the letter that Mr. Johnson wrote, the Zoning Administrator, he said that the lots are unimproved and were in single ownership on November 1, 1957. However on November 1, 1957, the lots were not unimproved. There was a nursing home wing that

straddled the three lots in question. So had he applied that the November 1, 1957 standard to improvement, he would have found that they were not unimproved and therefore the exception of 401.2 would not apply.

CHAIRMAN GRIFFIS: Are you submitting any sort of evidence on the wing portion that was in the lots?

MR. HALLEY: I have plenty here. I doubt that the parties would refute that. In 1998 when the Millers were going before the Commission of Fine Arts and the Mayor's Agent they made statements. I have those.

CHAIRMAN GRIFFIS: Why don't we just have it provided in for the record because our deliberation will be based on the record because it was created here.

MR. HALLEY: Okay. Would you like me to tell me what I have?

CHAIRMAN GRIFFIS: No, just pick one and submit it.

MR. HALLEY: There's no actual statement that this has been constructed and it's done.

CHAIRMAN GRIFFIS: Do you have plat that shows?

E-V-E-N-I-N-G S-E-S-S-I-O-N

(6:00 p.m.)

MR. HALLEY: I have a plat that you don't have a based map for 1957. We have one for 1954 and one for 1960. It's not in 1954 and it is in 1960. We all have the Commission of Fine Arts sign off on the building in 1956 and the C of O that was issued in January 1958.

CHAIRMAN GRIFFIS: Submit whatever you need to show it. Is the C of O going to tell me there's an actual developed portion on all these lots and certain on these lots and does it list all the lots?

MR. HALLEY: Yes, it will.

CHAIRMAN GRIFFIS: Then whatever it is that shows it and if we need more, we'll ask.

MR. HALLEY: It indicates the lots, yes.

CHAIRMAN GRIFFIS: Okay. Go ahead.

MR. HALLEY: Should I just bring this up after?

CHAIRMAN GRIFFIS: Yes. We're just going to create a list.

MR. HALLEY: Okay. So that because the exception doesn't apply in the lots by the terms of the Zoning Administrator's letter, less than the

minimum square footage in section 401.3 they could not be developed as a matter of right. That's the first problem with the Zoning Administrator's decision.

The second is that for the exception of 401.2 to apply the lot must not adjoin another unimproved lot in the same ownership. When the Zoning Administrator's decision was issued, all lots were under the ownership of Herbert and Patrice Miller. The letter stated that it was the Zoning Administrator's understanding that at the time of development one or more of the lots will be owned by or developed by separate companies.

MEMBER ZAIDAIN: Did you submit anything in the record reflecting that or is that just in your statement?

MR. HALLEY: Reflecting that they were --

MEMBER ZAIDAIN: A plat of ownership or anything?

MR. HALLEY: No, I do have that too, if you'd like. I also have the transfer deeds to the current developers.

MEMBER ZAIDAIN: Yes, we'll need those in the record.

MR. HALLEY: Sure. Even in the letter it implies the idea that they're not at that time under

separate ownership. Because that condition of section 401.2 wasn't satisfied again, the lot area exception should not have been applied to the lots in question.

The third point is -- I think there's a typo in the letter. The letter ruling states that the subject properties meet the minimum lot width of 20 percent set forth in section 401.3 of the Zoning Regulations. There's nothing about 20 percent of minimum lot width that I found in the Zoning Regulations. I think he meant to say 20 feet which is what section 401.3 requires a minimum width of lot for a row dwelling in this area.

He then states that the lots measure 20.5 feet along the front property line. However the front property line is the wrong measurement to use. These front property lines are on a skew. They don't go north and south. The Zoning Regulations actually provide for that. They say where the building line is on a skew, the width of the lot should be the distance between the side lot lines perpendicular to the access of the lot taken where either side lot line intersects the building line. That's 11 DCMR Section 199.1. So the real measurement of the lot width, that's under the definition of lot width. The 20.5 foot measurement along the front property line was not

appropriate. They should have done a measurement from the side lot line to the other side lot line at a perpendicular angle.

When you do that, the Office of Surveyor map has a degree of angle that 32nd Street goes at and it's between 20 and 21 degrees. When you use those and you do simple trigonometric calculations, you find that the lot width is somewhere between 19.15 and 19.27 feet. I have the trigonometric calculations if you'd like using the cosine and the adjacent angle on the hypotenuse.

MEMBER ZAIDAIN: I hate to be the one to bring this up I guess but a lot of the things you're saying are just kind of anecdotal assertions in the letter. We need to see what you're talking about. You're saying that the lot is less than 20 feet in width. Can you give us something to substantiate that? And I'm actually curious if Mr. Epting disputes any of these facts. I guess not.

MR. HALLEY: He probably has a chance for cross examination, right?

CHAIRMAN GRIFFIS: And a presentation of his case.

MEMBER ZAIDAIN: I forgot. Sorry. It's running late.

CHAIRMAN GRIFFIS: I thought we were having such a civil time with this appeal and now you want people jumping up and objecting. Making a joke of course. Let's continue.

MR. HALLEY: What I have here is actually the D.C. Office of Surveyor map for lots 19, 20 and 21 on Square 1270. That has the angle of 32nd Street listed as 20 degrees, 16.4 west. So it's between 20 and 21 degrees.

CHAIRMAN GRIFFIS: That would be real helpful. Do you have copies of that?

MR. HALLEY: Yes, I do.

MEMBER ZAIDAIN: Is that what the ZA was responding to?

MR. HALLEY: Well the ZA was actually using a measurement along the front lot line which is here also which is 20.5. But under the Zoning Regulations, that's not the appropriate lot width measurement.

CHAIRMAN GRIFFIS: Right.

MR. HALLEY: So because of this angle that they note here.

MEMBER ZAIDAIN: Okay.

MR. HALLEY: I'll submit it.

CHAIRMAN GRIFFIS: Yes, that we should

have up here now. Are you saying your measurements were done off this? Is that correct?

MR. HALLEY: Well, I took this angle and these measurements here that were on this map.

CHAIRMAN GRIFFIS: Have you noted the building line on that?

MR. HALLEY: Right here.

CHAIRMAN GRIFFIS: Is it noted?

MR. HALLEY: Yes, let me show you one other thing. Sorry for my disorganization. What I did was I took the measurement here of 20.5 feet which exists on this map and the angle here of 21 degrees or 20 degrees which is again on this map. I did it for both and using just math which is math. There's no disputing the laws of mathematics.

CHAIRMAN GRIFFIS: Okay. We won't dispute that.

MR. HALLEY: Right. And I also have the cosine tables just to show you the cosine of 20 or 21. That had to be a calculation.

CHAIRMAN GRIFFIS: Of course this is all on oral record. What we're going to do is have you submit that now. Do you have copies of all that calculation too?

MR. HALLEY: Yes.

CHAIRMAN GRIFFIS: If you can just bring to the far right to the Secretary. Do you have 20 copies of each of those?

MR. HALLEY: No, I don't. I have four copies of those.

CHAIRMAN GRIFFIS: Okay. Can you put your copies and let's give copies of the Board? We'll get copies to all the participants.

VICE CHAIR ETHERLY: While that's being done, Mr. Chair, given the length of our day, I'll just make a little aside. I vote for the quote of the day "Math being math."

CHAIRMAN GRIFFIS: Thank you.

MR. HALLEY: I don't know what they're going to want me to submit. Is it okay if I collect them up here and then bring them over to you after I'm finished speaking?

MS. BAILEY: You said you have four copies. May I have those?

MR. HALLEY: Yes. I have four copies. I'm sorry. I didn't bring 20. I can certainly provide that for you at a later time.

MS. BAILEY: You said you have four copies.

MR. HALLEY: Yes, ma'am.

(Pause.)

MR. HALLEY: Shall I continue or do you want me to hold off for a second?

CHAIRMAN GRIFFIS: No, let's move ahead.

MR. HALLEY: This is just in conclusion of that point. The lot widths are below the minimum width of lot that are required by section 401.3. The Zoning Administrator's ruling was in error.

The fourth point is that the letter ruling applies an exception on top of an exception. The exception of 401.2 for lot area applied but then he also applied a two percent discretionary adjustment from section 401.7 on top of that exception. I'm sorry. Section 407.1. That's my dyslexia again. So that he's applying an exception on top of an exception. It seems that the application of the two percent discretionary adjustment should apply to the standard measurements, not the measurements that have already been accepted.

The fifth concern is that the Zoning Administrator applied the two percent deviation needed for the lots to fall within the minimum lot area without making the requisite finding. That Municipal Regulations actually require that the Zoning Administrator deem the deviations do not impair the

purpose of the otherwise applicable regulations. The letter ruling contains no finding or consideration as to the impairment of the purpose of the otherwise applicable Zoning Regulations.

Then finally the second to the last sentence of the letter states that the lots comply with the standards of section 401.3 of the Zoning Regulations and can be developed as a matter of right. It's an incorrect conclusion. The lots are not in compliance with section 401.3 even by the terms of the letter. They rely on exceptions and discretionary adjustments from other sections, section 401.3 being the standard measurements for lots. I tried to make it quick. I'm sure it was slower than you thought it would be. If anybody has any questions, I'll be happy to them.

CHAIRMAN GRIFFIS: No, that's okay. Your last point if I'm understanding it correctly it's just redundant of your entire appeal.

MR. HALLEY: And it may be a typo but the sentence is if it stands alone would suggest that these lots meet the standard width and lot area requirements of 401.3. They don't. Even by the Zoning Administrator's analysis, they don't.

CHAIRMAN GRIFFIS: I see. Okay.

MEMBER ZAIDAIN: I think that's probably a logical conclusion. I just wish we had DCRA down here to ask that question to.

CHAIRMAN GRIFFIS: Okay. Mr. Etherly.

VICE CHAIR ETHERLY: I just want to be sure I understood what's reflected as the fourth point on page three. I think I follow it.

MR. HALLEY: There's a type there that 401.7 should be 407.1. I apologize.

VICE CHAIR ETHERLY: No problem on that. Perhaps what might be helpful if you could walk just one more time very briefly through that. I think I see as I try to follow the 80 percent and that logic on the top of page two of the July 12th letter. Could you just walk through that one more time so I'm more clear on that?

MR. HALLEY: The 80 percent rule matter or number four and the ANC's. I see what you're saying. The two percent issue.

VICE CHAIR ETHERLY: Yes. Perhaps maybe the best thing to do is essentially what we're talking about is we're talking about that first full paragraph on page two of the July 12th letter. Correct?

MR. HALLEY: Yes, sir.

VICE CHAIR ETHERLY: So applying the 80

percent to 2,000 square feet which is the minimum lot area for R-3, you agree with that step. That was correct.

MR. HALLEY: That would yield a minimum lot area of 1600 square feet. We don't agree that it qualifies for the 80 percent. That's what our first point is about.

VICE CHAIR ETHERLY: Okay. But the argument about the Zoning Administrator giving an exception on top of the exception, I just want to make sure I understand where that's coming in.

MR. HALLEY: Sure.

VICE CHAIR ETHERLY: If you could just highlight where you see the exception being placed on top of the exception.

MR. HALLEY: Well the first exception was moving it from 2,000 square feet down to 1600 square feet. That was based on the exception in section 402.1, the grandfather clause.

VICE CHAIR ETHERLY: Okay.

MR. HALLEY: That 1600 square feet yields a permitted lot size of -- Let's see. Hold on one second. So 1600 square feet is the minimum lot size, but applying the two percent that's still too large. The lot sizes are below 1600 square feet. So they

need to lower the required lot size a little more for these lots to comply. He does that by applying the two percent deviation bringing down the permitted lot size to 1568 from 1600. So it goes from 2,000 to 1600 using 401.2 and then from 1600 to 1568 using 407.1.

CHAIRMAN GRIFFIS: But isn't Mr. Etherly asking us do you disagree that the ZA has the flexibility of two percent on 1600 square feet?

MR. HALLEY: Yes, we believe that the two percent deviation applies only to the 401.3 standard calculations and not to exceptions created under section 401.2.

CHAIRMAN GRIFFIS: Where do you see that?

MR. HALLEY: We couldn't find any case law either way on that actually.

CHAIRMAN GRIFFIS: And nothing in the regulations.

MR. HALLEY: No.

CHAIRMAN GRIFFIS: But somehow in the reading of 407.1 you found that.

MR. HALLEY: Real quickly that's one. I don't know if this is something that would apply here but in section 2000.2 of the Zoning Regulations it does say that it's the intent of this title that nonconformities may not be enlarged upon, expanded or

extended nor may they used for a basis for adding other structures or uses.

CHAIRMAN GRIFFIS: What are you reading from? What section?

MR. HALLEY: Section 2000.2.

CHAIRMAN GRIFFIS: 2000.2 which is nonconforming uses. That wouldn't apply to this.

MEMBER ZAIDAIN: 2000?

CHAIRMAN GRIFFIS: Yes, 2000.2. I understand your logic and we'll take that under consideration.

VICE CHAIR ETHERLY: Yes and you've answered the question for me. I think perhaps from myself and a couple of my colleagues you're being probed some of the rationales underlying your argument. I think it will bear some conversation. I will of course be looking for some response as we go through cross and all that good substance.

CHAIRMAN GRIFFIS: Thank you. One of course is nonconforming structure so we're actually talking about physical structure that you're not allowed to add to unless there are certain things that are in line with that. Okay.

MR. HALLEY: And finally this is a rationale issue. It seems that where the Regs make an

exception for something that's one thing. I think the Zoning Administrator's discretion was basically for the fudge factor in the end that if you have something that's very close and that's before the Zoning Administrator rather than having to go through the whole process of seeking a variance, it give us two percent wiggle room. We thought that it would be most logically applied the standard complying lot width rather than a response that would have to have exceptions made for it.

CHAIRMAN GRIFFIS: Well I don't know if that's following the legislative history of that section because wouldn't you also think that as you looked at Washington D.C. and the age and the peculiarities of many structures would need that type of flexibility in order so that you wouldn't have a special exception or a variance based on the placement of a few inches or a foot. So it's not just the fact that if you have a perfect rectangle in this suburban development but you're just off a hair is what I understood you to say.

MR. HALLEY: Well, by area or width or something like that. You have a slightly too small of a lot. It's like a half foot too small or something like that.

CHAIRMAN GRIFFIS: Okay.

MR. HALLEY: Then the last thing I want to mention when doing the research on this when looking for what is unimproved, this nursing home wing straddling these three lots, it's not defined improved or unimproved in the Zoning Regulations, but the Zoning Regulations definitions actually then refer you to Webster's Unabridged Dictionary which I just wanted to note for the record would apply in this circumstance if there's any doubt that a nursing home wing existing on the lots didn't constitute improvement.

CHAIRMAN GRIFFIS: Okay. Are you aware of what Webster's definition the ZA used in looking at that?

MR. HALLEY: No, I'm not because they didn't indicate.

CHAIRMAN GRIFFIS: Do you know the Webster's definition you're submitting into evidence?

MR. HALLEY: I will if you'd like me to.

CHAIRMAN GRIFFIS: What's the Webster's Dictionary Volume that you're taking it from?

MR. HALLEY: I believe that it's 1983. I got it at the Georgetown Library. I can find out for you. I have the title page, but it doesn't have the

date.

CHAIRMAN GRIFFIS: That's all right. Why don't you submit what you have in? Of course everything you're submitting needs to go to all the other participants too.

MR. HALLEY: I just gave all my copies to her but I can get that to them at a later time if you would like or I could get one copy back.

CHAIRMAN GRIFFIS: You already put in your copies of the definition.

MR. HALLEY: No, I can give the definition to them.

CHAIRMAN GRIFFIS: I see.

MR. HALLEY: I just gave her my copies of the maps and the calculations.

CHAIRMAN GRIFFIS: Okay. I'm sorry. Mr. Zaidain.

MEMBER ZAIDAIN: I just want some clarification on what he just said.

CHAIRMAN GRIFFIS: Actually let me clarify this procedural point.

MEMBER ZAIDAIN: Okay.

CHAIRMAN GRIFFIS: Submissions. All submissions if I ask for anything I am also saying that you have to serve everybody that's involved in

this.

MR. HALLEY: Okay.

CHAIRMAN GRIFFIS: Just be aware of that. Hold copies that you need and then provide them as we will. Okay. Mr. Zaidain.

MEMBER ZAIDAIN: Just refresh my memory because I was going to ask this as you were going along. What is this supposed to demonstrate?

MR. HALLEY: Several things. That's the map in the Office of the Surveyor.

MEMBER ZAIDAIN: Okay. This shows the existing conditions of the lot.

MR. HALLEY: That's what they told me. I asked them what I should use to show the existing conditions of the lots and they said to use that which is the most recent map that shows the square and the folks in the Office of the Surveyor told me to use that.

MEMBER ZAIDAIN: What is this? Unfortunately it reminds me of trigonometry homework.

MR. HALLEY: What that does is it takes the numbers that are on that map and applies them so that we could get the actual lot width.

MEMBER ZAIDAIN: So this is correlated to the plat from the Office of the Surveyor.

MR. HALLEY: That's correct.

MEMBER ZAIDAIN: It's your data source and then you do the calculations.

MR. HALLEY: Yes and they also include the cosine tables in the back in case anybody doesn't believe me.

MEMBER ZAIDAIN: Cosine tables. Good Lord. Thank you.

CHAIRMAN GRIFFIS: Okay. Other questions?

MEMBER MILLER: I just have a general question. Much of the argument is based on your construction of the plain meaning of the regulations. I think it would be fair to say. I've heard you say that in some instances there was no case law. I just want to confirm if that's so. Did you check to see whether there was any legislative history or case law that interpreted the provisions that you're dealing with?

MR. HALLEY: I did check a while back. I'm not saying that somebody else might not have found something, but I did look to see why some of these provisions were enacted or if there is any discussion dependant they're enacted so their purpose and didn't find anything of any help. I would find the dates that they were enacted, but nothing more than that or

nothing that would explain anything.

MEMBER MILLER: Thank you.

CHAIRMAN GRIFFIS: Any other questions? Anything else to present at this time? No witnesses?

MR. HALLEY: No witnesses. I'll just provide copies to everybody here of showing where the nursing home wings existed in 1957.

CHAIRMAN GRIFFIS: Yes.

MEMBER ZAIDAIN: I have a question. Obviously this letter proposed a subdivision plan presented to DCRA. I mean something was submitted to them or shown to them for them to issue this letter.

MR. HALLEY: I don't know if it was subdivision. I think it might have just been development. They probably didn't feel they needed to subdivide at that time.

MEMBER ZAIDAIN: They just looked at the existing lots.

MR. HALLEY: That's correct.

MEMBER ZAIDAIN: And you heard that from DCRA. I just wanted to know what they looked at to base this letter on.

MR. HALLEY: DCRA?

MEMBER ZAIDAIN: Yes.

MR. HALLEY: I don't know.

MEMBER ZAIDAIN: Have you talked to them?

MR. HALLEY: No. All that I know is that the Zoning Administrator reviewed the letter and found that this still --

MEMBER ZAIDAIN: I saw that communication.

MR. HALLEY: Mr. Epting might be able to answer that question since I believe he was the person who was in contact with the Zoning Administrator.

MEMBER ZAIDAIN: That's actually a good point. Are we supposed to subpoena the plans?

CHAIRMAN GRIFFIS: Can we subpoena the plans?

MEMBER ZAIDAIN: Can we subpoena things?

CHAIRMAN GRIFFIS: No, we've been trying to get that but no.

MEMBER ZAIDAIN: Okay, but you had no conversations with DCRA to find out what they looked at and what this letter was based on.

MR. HALLEY: No and Michael Johnson isn't there anymore.

MEMBER ZAIDAIN: Right. thank you.

CHAIRMAN GRIFFIS: Anything else? Good. Cross? No cross? Okay.

MR. HALLEY: You had indicated earlier today about witness cards. Who shall I give my

witness cards to?

CHAIRMAN GRIFFIS: I'm sorry. To the recorder.

MR. HALLEY: Okay.

CHAIRMAN GRIFFIS: Great. In which case we can move on. Let's take five minutes and get ready. Then we'll come back. As we don't have the Zoning Administrator or Government to present here, we will go to Mr. Epting who is representing the owner of two of the lots. Off the record.

(Whereupon, the foregoing matter went off the record at 6:31 p.m. and went back on the record at 6:40 p.m.)

CHAIRMAN GRIFFIS: On the record. Okay. When you're ready.

MR. EPTING: I guess good evening at this point. John Epting with Shaw Pittman. Ashleigh Horne is also with me. We represent as I said Strategic Georgetown LLC and Georgetown 32nd Street LLC, the owners of Lots 19 and 20 in Square 1270 respectively. The property owners are an automatic party to that appeal under the Board's rules.

The appeal challenges the decision of the Zoning Administrator which confirmed that Lots 19, 20 and 21 in Square 1270 could be developed as a matter

of right. Through our Zoning expert, Armando Lourenco we will demonstrate that the Zoning Administrator's ruling is correct, reasonable and must be upheld by the Board. The Board's legal standing in reviewing appeals is clear. The BZA has jurisdiction that hear the appeal and render a decision pursuant to D.C. Code 6-641.07(F). The Board has held that the Appellant has a burden of proof pursuant to 3119.2 "To reverse a Zoning Administrator's decision of approving the issuance of building permit, the Appellant must show by preponderance of evidence that the building permit was issued in error because the proposed building would violate the Zoning Regulations." That's Appeal No. 16604, the Fairview Heights Neighborhood Association case at pages two through three assuming a conclusion must hold for a Zoning Administrator's certification which are the basis for proceeding with building permit. We have submitted copies of the Fairview case and we have also submitted a copy of the statement which we are going to go through tonight.

CHAIRMAN GRIFFIS: Is it up here?

MR. EPTING: It should be being passed to you.

CHAIRMAN GRIFFIS: Okay.

MR. EPTING: Finally I'd like to proceed

with our expert, Armando Lourenco. We've also submitted his rèsumè as a zoning expert. He's been qualified before and I ask that you qualify him as an expert in zoning.

CHAIRMAN GRIFFIS: Okay. Are there any questions from the Board?

MEMBER ZAIDAIN: I have a question in regards to what we're going to receive. Did you submit a plan or whatever DCRA looked at when they responded with the letter?

MR. EPTING: I didn't submit a plan but what we'll go through. I submitted the basically the record of the lots 19, 20 and 21, their dimensions.

MEMBER ZAIDAIN: These?

MR. EPTING: Different ones based upon the Surveyor's Office. There were at one time attachments to it his letter. I don't know why they're not in the file anymore.

MEMBER ZAIDAIN: Can you produce those?

MR. EPTING: We're going to go through those.

MEMBER ZAIDAIN: Great.

MR. EPTING: So I think I have everything that was submitted to him. With that, I would like to go ahead and turn it over to Mr. Lourenco.

CHAIRMAN GRIFFIS: First let me. I was asking the Board if there were any questions of Mr. Lourenco in terms of qualifying him as an expert witness. His rèsumè is front. The pertinent point is July 1998 through July 1999. Of course, he was acting Zoning Administrator in that capacity and prior to that was also part of the BLRA. As Mr. Epting has stated, we have qualified him as an expert witness. Does the ANC have any objection? Not voicing any objections, any objection of the Board? We can take it as a consensus of the Board and hear Mr. Lourenco as an expert witness in D.C. Zoning.

MR. EPTING: Thank you.

MR. LOURENCO: Good evening, Chairman Griffis, members of the Board. My name is Armando Lourenco and I'm a private consultant on building and land use, regulatory matters. Immediately to my working as a private consultant, I served as an Administrator of Building and Land Regulation of the Department of Consumer of Regulatory Affairs. I also served as the Acting Zoning Administrator of the District of Columbia from July 1998 to August 1999. Prior from that, from 1990 to 1994 I was the program manager of the Permit Processing Division of the BLA. In that capacity, I interacted almost daily with the

Zoning Administrator in matters related to the C of O. As a result of my past experience and my background as a regulatory officer in land use matters in the District of Columbia, I'm very familiar with the Zoning Regulations and their implementation.

I was retained by the property owners to review the Zoning Administrator's ruling of July 12, 2001 as well as all the pertinent aspects of the development history of the lots in question to assess the validity of the ruling and the ability of the lots to qualify for application of the ruling. I concluded that the ruling of the Zoning Administrator is valid and that the current lot owners are entitled to develop their respective properties in accordance with it.

The properties in question, Lots 19, 20 and 21 in Square 1270 are located in Georgetown in the 1500 block of 32nd Street. The lots are zoned R-3 and are proposed to be developed with row dwellings. From what can be ascertained from the documents filed with the BZA, the following conclusions can be drawn. These lots were recorded in May 1881. A well check of the Episcopal Home building foundation walls performed in April 1957 confirms that the lots existed in that present configuration before April 1957 and the

garages previously existing on these lots have been removed by them.

The appeal now is the ruling of the Zoning Administrator, Mr. Michael Johnson, who by letter of July 12, 2001 ruled that the lots could be developed as a matter of right to erect row dwellings. The Appellant's arguments are in the five different aspects of the Zoning Administrator's ruling. First, the Appellant claims that the lots were not unimproved on November 1, 1957. Second, the Appellant argues that on the date the ruling was issued the lots were in the same ownership. Third, the Appellant claims that the Zoning Administrator's finding that the lots meet the minimum lot with section 401.3 is incorrect because the width of 20.5 feet was incorrectly measured along the street frontage. Fourth, the Appellant argues that the Zoning Administrator erred in applying the discretionary adjustment of section 407.1 to the exceptional case of a lot covered under section 401.2. Finally the Appellant claims the Zoning Administrator failed to make the finding that the two percent discretionary adjustment granted was "deemed by the Zoning Administrator not to impair the purpose" of the Zoning Regulations. Obviously this is quote from 407.1.

Let's examine these five arguments in light of the text of the Zoning Regulations and the existing records on these lots. First, the argument that the lots were not improved on November 1, 1957 is inconsistent with available records. We know from the records on file that on November 1, 1957 there was on-going construction on the site of the future Episcopal Church Home which included Lots 19, 20 and 21.

In fact, the records show that the basement walls were surveyed in April 1957. This wall check also shows that the garages formally located on the lots had been removed and that the lots were vacant. It was not until December 10, 1957, that is five and a half weeks past the date limit specified in 401.2, that an application for C of O was submitted to the Department of Licenses and inspections were done by BZA. Much can be learned from their application. That is Exhibit C in the owner's submission.

Given the natural aspiration of the building owner to use a building as soon as it is possible to obtain the C of O that sanctions its completion, the date of the taking of the C of O application is a good estimate of the earliest date the owner considered construction completed. Anyone familiar with development will have to agree with me

that it is the way it always happens. We can therefore establish that from well before April 1957 and until December 10, 1957 if not later Lots 19, 20 and 21 were part of a construction site and to the Zoning Regulations, the true litmus test of the existence of a legal established use of a lot is the existence of the C of O that sanctions completion of improvements on the lot.

This principle is well established in the combined provisions of sections 101.5, 3203.1 and 3203.4. Section 101.5 forbids the use of the construction of a building except in compliance with 11 DCMR. Section 3203.1 forbids the use of any construction until a C of O is issued for it. Section 3203.4 forbids the issuance of a C of O to be effective until construction is completed until "to the point of availability of occupancy for use." This has been a consistently accepted standard using the enforcement of the Zoning Regulations and in the vesting of grandfather rights.

In the case of the improvements erected on part on Lots 19, 20 and 21 the C of O No. B9123 which is Exhibit D was not issued until January 14, 1958. One must conclude that Lots 19, 20 and 21 were unimproved in early 1957, were still unimproved on

November 1, 1957 and remained unimproved until January 14, 1958. That is also 11 weeks past the relevant date specified in 401.2. The Appellant's first argument is therefore incorrect.

The Appellant's second argument is also without merit. Arguing that the Zoning Administrator's ruling is invalid because it addressed the condition that was not yet effective negates one of the fundamental roles of the Office of the Zoning Administrator. One cannot deny the ability of the Zoning Administrator to clarify for any member of the public who requests an interpretation how the Zoning Regulations will be applied when certain conditions are met.

This is a normal function of the Zoning Administrator that occurs also daily. How else can the Zoning Administrator discharge his/her duties. What should the Zoning Administrator have done in the present case, respond "I cannot issue a ruling at this time. Go sell your properties and then I'll give you a ruling"? The absurdity of such a position is manifest. The Zoning Administrator's ruling is clearly a conditional one as he writes that "It is my understanding that at the time of development the lots would be owned by separate companies or entities."

Clearly if that condition is not fulfilled, the ruling is not applicable. To that extent the Zoning Administrator's ruling is correct and clearly understood.

The ownership status of the lots at the time the ruling is requested or issues is irrelevant. The regulations do not restrict when rulings may be requested or issued. Until an application to erect a structure on such a lot is submitted, the actual evaluation of the lot in light of section 401.2 does not take place. Therefore until the Zoning Administrator has to review and approve such an application, the test on the separate ownership of the lots is premature. Therefore, we are of the opinion that Appellant's second argument is invalid.

As to the Appellant's third argument, the lot width argument, it is at best irrelevant. Granted the first sentence of the second paragraph of the Zoning Administrator's letter has obviously composition problem. The Appellant speculates that the Zoning Administrator has elapsed and wrote 20 percent instead of 20 feet. An equally plausible possibility is that the Zoning Administrator was the victim of an unwanted word processing mishap that wiped out part of a sentence and the reference to 20

percent was intended but misstated within the incomplete sentence. I note that if you add the words "below that" between "20 percent" and "set forth" that would make the sentence accurate and correct, just two words missing.

More important than speculating on what may have occurred during the editing of the letter is to establish what the lot width requirement is and whether the Zoning Administrator's conclusion is erroneous or correct. Section 401.2 allows certain lots, among those lots 19, 20 and 21, to be narrower by as much as 20 percent and what otherwise would be dictated by section 401.3. To that extent although the Zoning Administrator's sentence is flawed, his conclusion that the subject properties meet the minimum lot width is correct because for lots under the purview of section 401.2 such as Lots 19, 20 and 21 the minimum lot width is 16 feet, not 20 feet. Dwelling on whether the lot width is 20.5 feet as shown on the surveyor's plat or 19.22 feet as measured using the Appellant's proposed methodology - and I calculated that 19.22 feet is okay - but in this case it's relevant for the case at hand.

The Appellant's fourth argument does not stand the simplest scrutiny. The Appellant sustains

that the Zoning Administrator should not apply the discretionary adjustment allowed by section 407.1 to anything other than the areas of widths specified in the table of 401.3. This is arbitrary interpretation that the text of the regulation involves. In effect the minimum area width of this district are regulated by the various sections within section 401. Some lots are subject to the restrictions of 401.1. Others are regulated by the provisions of 401.2. Others, the majority, are regulated by section 401.3. A few lots may benefit from the provisions of 401.4 and other miscellaneous provisions are also contained in 401.5, 401.6 and 401.7.

407.1 states in relevant part "The Zoning Administrator is authorized to permit a deviation not to exceed two percent of the area of requirements of sections 401 and 403 of this chapter." 407.1 does not mention 401.3 or any other subsection of section 401. One has to conclude that the area of requirements of 401.2 are also covered under this minor flexibility authority granted to the ZA because it applies to all areas determinations done under any of the subsections of section 401. Therefore this fourth argument results from the Appellant's flawed reading of 407.1 and as such should be disregarded.

Finally, the claim that the Zoning Administrator failed to make a finding that would be required by section 407.1(b) is not supported by the facts. First, the regulations authorize the Zoning Administrator to permit certain deviations provided the Zoning Administrator deems that those deviations "do not impair the purpose of the otherwise applicable regulations." The Zoning Regulations do not require the Zoning Administrator to state such specific finding in his/her rulings.

The Zoning Administrator is not mandated to grant the deviations considered in 407.1. Since it is a discretionary power, it is inferred that if the Zoning Administrator chooses to exercise that authority and rules to grant the deviation, he/she has to have deemed that in doing so the purpose of the otherwise applicable regulations was not being impaired. Otherwise he/she would have ruled against granting the deviations based on 407.1(b).

Secondly, the tone of the Zoning Administrator's letter already denotes his concern with not impairing the intent of the regulations. As the Zoning Administrator, that is his/her first enforcement duty and there is no reason to doubt his commitment to it. The Zoning Administrator starts by

noting that the subject lots had been recorded since 1881. To paraphrase Mr. Halley, this is not even the case of grandfathering. It's the case of great-grandfathering. This means that the existence of these lots and their size have been in the public domain for well over a century and are not a newly created feature in this square.

Further, the Zoning Administrator acknowledges that the properties are in the zoning district R-3 which the proposed row dwelling structures are a permitted use. Furthermore, the proposed development will have to meet the other requirements of the Zoning Regulations for R-3. Nothing in the Zoning Administrator's letter contemplates any exception from those rules. That is the essence of the purpose of the Zoning Regulations as stated in section 101.1 that is "to prevent a new concentration of population, to prevent overcrowding of land, to regulate the distribution of population, business and industries so as to foster recreational, educational and cultural opportunities and to further economy and public services." Consequently considering the Zoning Administrator's letter as a whole which is evident that he considered the fact of his discretionary decision on the purpose of the

otherwise applicable regulations is all that was required by him by section 407.1(b).

In conclusion, it's my opinion that the Appellant has failed to make a creditable case on any of the five arguments advanced in the appeal. Therefore the appeal should be denied for lack of basis of the text or intent of the regulations and for lack of the substantiation. I thank you for the opportunity to address the Board and I remain at your disposal.

CHAIRMAN GRIFFIS: Thank you very much.

MR. EPTING: I'm just going to ask him one question.

CHAIRMAN GRIFFIS: Sure.

MR. EPTING: Would you look at Exhibit I which is the building plats for Lots 19 and 20? Would a zoning administrator err by accepting the 20.5 width as the recorded record lot? My understanding is that the Surveyor's records are the official records in D.C.

MR. LOURENCO: I know that such a determination has been made in other cases where the lot looks like a parallelogram like these that the width of the lot measured along the line has been accepted by the Zoning Administrator as the width of

the lot as certified by the surveyor in the official plat. That has occurred, yes.

MR. EPTING: But if you're presented this building plat, would you accept that as the width of the lot?

MR. LOURENCO: If I presented on what quality?

MR. EPTING: As the basis for a double permit as meeting the 20 foot width standard.

MR. LOURENCO: I probably would.

MR. EPTING: In addition, you indicated that the lot would also meet the 20 percent standard because the 19.22 complies with that.

MR. LOURENCO: Exactly. In this case, I believe I stated that the width of the lot is really irrelevant because once it's established that the lot qualifies to be considered under section 401.2, the minimum required lot width is 16 not 20. That's a moot point in my opinion.

MR. EPTING: That concludes our testimony.

MEMBER ZAIDAIN: I have a question in regards to the survey plat you're referencing. I'm not entirely familiar about how plats are recorded. Does it have to be surveyor stamped? This notice is a fact so the stamp probably didn't come through, but

is that true? Do you know what I mean? Certified by a professional surveyor.

MR. EPTING: This is the Office of the Surveyor's records.

MEMBER ZAIDAIN: Right.

MR. EPTING: You order this from them based upon their record calculations.

MEMBER ZAIDAIN: But who is the professional surveyor that certifies this?

MR. LOURENCO: The signature there of the D.C. Office of the Surveyor.

MEMBER ZAIDAIN: I understand that. I see that. I'm just using my experience in other jurisdictions that there's a stamp. But in this case in D.C. on those plats it's just the surveyor signing.

MEMBER ZAIDAIN: So he's professionally certifying that this is true. Okay.

CHAIRMAN GRIFFIS: You can do it independently which we often see and we have that request that it has to be certified by an independent surveyor. That's when it would be submitted in.

MEMBER ZAIDAIN: But it is just the fact that it is signed by the surveyor means that it has been professionally certified is correct.

MR. EPTING: Yes, that's correct.

MEMBER ZAIDAIN: Okay. Thank you.

CHAIRMAN GRIFFIS: And if I understand your testimony in terms of the lot width of 20 foot required, you're saying that in fact in this instance based on your review it's actually 16 feet because of the 20 percent reduction which is 401.2 which allows you to diminish the requirements for lot width to 80 percent of those in the table below. Is that correct?

MR. LOURENCO: That's correct.

MR. EPTING: But I would also not like you to accept the definition of skew because this 32nd Street is a straight line. I never understood that to be a skewed lot. These property lines are straight so you can find it either way, either it's 20.5 or it meets the 16.

CHAIRMAN GRIFFIS: Understand.

MR. EPTING: We've laid that out in our statement.

CHAIRMAN GRIFFIS: Right. Mr. Hood.

COMMISSIONER HOOD: Mr. Chairman. Mr. Lourenco, I want to piggyback on what you just commented on to make sure I understand. If you could just walk me through, Mr. Lourenco, the process again about the 80 percent rule which got us down to 1600 square feet which then took us down to the two percent

which the Zoning Administrator has that flexibility which got us down to being able to applying the two percent deviation of 1600 square feet. Just walk me through that process again. I understand about 401.2 but just generically walk me through.

MR. LOURENCO: If you're starting in 407.1.

COMMISSIONER HOOD: Okay, 407.1.

MR. LOURENCO: I agree with the comment made earlier by Chairman Griffis about how this came about. This section gives the Zoning Administrator authority to allow deviations from several things but the one that interests us here is the area of requirements of section 401. It's the only one that we're applying in this case. It's the only one he applied.

COMMISSIONER HOOD: That gets us to the 80 percent.

MR. LOURENCO: So you go to the width requirements of section 401 and if you go to section 401, you have to pick which one you're going to apply, 401.1, 401.2, .3, .4, .5. In the case of these lots, these lots qualify to apply section 401.2.

COMMISSIONER HOOD: So it's established in 407.1.

MR. LOURENCO: The area that yields from the application of 401 to these lots is 1600 square feet which is 80 percent of the volume that they would be allowed.

COMMISSIONER HOOD: All right. Thank you.

CHAIRMAN GRIFFIS: Any other questions from the Board? Cross examination?

MEMBER ZAIDAIN: Actually before we get into this, I have a clarification question, Mr. Epting.

CHAIRMAN GRIFFIS: Yes.

MEMBER ZAIDAIN: I see that you have - and please bear with us here - the letter in question as Exhibit A, the confirmation letter as Exhibit B. Which of the exhibits were the attachments to the letter?

MR. EPTING: The Exhibit E at that time shows the lots in question and the 20.5. I had an earlier building plat for 19 and 20. I put in the latest one which is Exhibit I. I had the 1881 survey which I can submit to you. We have copies of that. What I have to say about this survey. The 1881 records of the surveyors you can't photocopy. This is a plat that we had traced several years ago. It's orthatic in that respect but it's not a photograph.

MEMBER ZAIDAIN: You can't go down and

copy them because of the age.

MR. EPTING: No. It's a sketch. So I'll submit that too. Then I also presented with him the C of O showing the date of improvement. The Zoning Administrator had to make a decision on what day it was improvement. I tried and he agreed with me that the C of O was that day. So the C of O was the other exhibit that he had.

MEMBER ZAIDAIN: That's G.

MR. EPTING: Yes.

MEMBER ZAIDAIN: So we're looking at G, I and E.

MR. EPTING: Actually G is the second C of O. I can't explain that one, but they went back at some point in time and got a revised C of O. The initial C of O is D, January 14, 1958.

MEMBER ZAIDAIN: I hope you understand where I'm coming from. We're being asked to question an alleged decision of the ZA and unfortunately DCRA is not here so I hate to shift the burden onto you and the Appellants, but we need in the record to understand what the information that was used to make this determination.

MR. EPTING: It is these very exhibits. That's all the exhibits I have.

MEMBER ZAIDAIN: Okay. Is there one more thing that you're going to submit?

MR. EPTING: I submit the survey.

MEMBER ZAIDAIN: With the understanding that it's a trace. That's understandable. But it's your assertion that it's something that the ZA looked at.

MR. EPTING: Yes.

CHAIRMAN GRIFFIS: So we have E, I, G, D and 1881 survey.

MR. EPTING: That's correct. Also the application which is C that shows like Mr. Lourenco said that they were applying and D is they got it later.

MEMBER ZAIDAIN: What C again?

MR. EPTING: C is the application.

MEMBER ZAIDAIN: The application for the C of O.

CHAIRMAN GRIFFIS: So C and D.

MR. EPTING: I also had the 1919 Surveyor's office book showing the lots at that time, the 20.5 width dimension which was part of the record lots. Basically everything that I could find I showed him and I've given you copies of all those materials.

MEMBER ZAIDAIN: Okay.

CHAIRMAN GRIFFIS: Okay. Cross examination?

CROSS EXAMINATION

MR. HALLEY: Hi, Mr. Lourenco. Just a couple of quick questions. You've testified about several of the Zoning Regulations. The one requiring separate ownership of lots at the time of development that you were talking about where it was not separate ownership at the time of seeking the Zoning Administrator's decision but rather that the lots needed to be under separate ownership at the time of development, the time the permits issued, do you remember that?

MR. LOURENCO: Yes.

MR. HALLEY: Why do the regulations require separate ownerships of lots at the time of development?

MR. LOURENCO: I cannot speculate and I'm not sure the speculation serves an purpose. It would sound that if I own a lot that is too small or too narrow and I don't own the adjoining lots I really am stuck with the situation as is in regulations want to grandfather my condition.

MR. HALLEY: So in other words if you own both lots, you might have the chance to reconfigure

the lots to make them conform rather than needing to rely on the exception.

MR. LOURENCO: That would be an option that I would have which I don't if I only own my lot. But this is just speculation. I'm not sure exactly why the regulations read the way they do.

MR. HALLEY: Okay. I'm going to have a chance for rebuttal. Is that correct? I'm not going to do rebuttal during cross.

CHAIRMAN GRIFFIS: That's correct. What we have left after this is rebuttal and closings which are all you.

MR. HALLEY: Okay. Can you tell me why you tie the C of O to improvement even though the regulations state that you should do otherwise?

MR. LOURENCO: I don't know of any point where the regulations say that you should do otherwise.

MR. HALLEY: I can show you. It's actually section 199.2(g). It says "Words not defined in the sections to have the meanings given in the Webster's Unabridged Dictionary" and improved is not defined in the section. Was that just ignored? Is that what you are saying?

MR. LOURENCO: No. I know exactly what

section you're talking about. You get to that point when you have no other recourse. Once you have some experience of enforcement of the Zoning Regulations, it becomes very clear that the moment that defines that point at which something is deemed by the authorities that enforce these and other regulations related to safety the point at which it's deemed that a structure exists, was constructed correctly in accordance with the plans, with the approvals by Zoning and so on and so forth, that point is the issuance of the C of O.

MR. HALLEY: Okay. So what about --

MR. LOURENCO: Until that point at best, you may have a structure that is partially constructed, did not reach the point where -- Let me read from here. Section 3203.4 reads "If the erection or alteration of a structure is contemplated" - which is clearly this case - "a C of O for that structure shall not be issued until the erection of alteration is completed to the point of the availability of occupancy for use except as provided" in the section immediately after it which has to do with safety laws. It has been held time and time again that this issuance of the C of O sanctions the existence of the legally established improvement in a lot that can be

used and those rights are granted to the owner of the structure. Until then at best you have a construction site. You have a structure that may be completely legal or in violation of the Zoning Regulations. No one knows until it's established by final inspections that everything was done according to what is required.

The ZA obviously has to rely on some timeline to determine whether there is an improvement on the lot or not. The presence of a grandfather structure is one thing. If it's being built, it's when it's completed. So you get from the record that the home that was being built on that site which included these three lots was not completed on November 1, 1957. Five and a half weeks later it was probably still not completed. If you look at --

MR. HALLEY: Well, real quickly if you can answer. Can you envision a situation which an improvement doesn't require a C of O?

MR. HUNSICKER: A single family dwelling but there is still a final building permit approval that is required to sanction the fact that it was constructed in accordance with the other regulations here. If you look at the sign-offs from the inspectors, fire signed on January 14th. Building

signed on January 14th. Plumbing signed on January 10, 1957. Electrical signed on December 16, 1957 which leads me to believe that there were some building and fire safety issues that weren't resolved until another five and a half weeks later. So you were 11 weeks past the deadline when you could establish that an improvement had been completed and was ready to be used.

CHAIRMAN GRIFFIS: So it's based on convention, understanding what improvement is and also based on the entire process of permit and approval instead of occupancy.

MR. EPTING: It's also whether the Zoning Administrator erred in relying upon a C of O issue subsequent to that. Appellant have to show that he did error in that. Was it reasonable for the ZA to rely upon a C of O as the date when there was "an improvement"?

CHAIRMAN GRIFFIS: Understood.

MR. HALLEY: Actually ZA never relied on that for that purpose. He said it was unimproved in the present day, not in 1957. So he never even went back to that inquiry.

CHAIRMAN GRIFFIS: Without debate, we'll make a note of that. Other questions?

MR. HALLEY: No, I don't have any other questions. Thank you very much.

CHAIRMAN GRIFFIS: Okay. Any follow up questions from the Board? Sounds like we're moving right along.

MR. EPTING: So based upon Mr. Lourenco's testimony, the ZA's ruling was correct. The Appellant have not shown a preponderance of evidence that the ZA erred. We request that you uphold the ZA's decision and dismiss the appeal. I would just like to note that Mr. Lourenco did discuss all five elements of the ANC appeal including the interaction between 407.1 and 401.2, that ZA could rely upon the C of O as the date in which there was an improvement and that came after the 1957 date, that the ZA did not err in stating that the properties were required to be in separate ownership at the time of development, that the ZA didn't err in terms of the lot width and following that the ZA didn't err in terms of the two percent flexibility so there was no harm to the public because he made that implicit in his letter. With that, we conclude our testimony.

CHAIRMAN GRIFFIS: Good. Thank you. Then is ANC ready to present rebuttal and closing this evening?

MR. HALLEY: Yes, they are.

CHAIRMAN GRIFFIS: Okay.

MR. HALLEY: In rebuttal, I would just like to point out a couple of things, one of which I just mentioned which was obviously the ZA was considering what was going on on these lots in 1957. He erroneously applied the unimprovement status from the present day. But that being said with respect to what was improved or not improved and what constitutes improvement with all respect to Mr. Lourenco who by his rèsumè obviously knows zoning, he's not the regulations. I mean the regulations are the law, not Mr. Lourenco's statements here. The law is in section 199(G-2) which is that if something is not set forth in the regulations, we need to look to Webster's Dictionary.

Webster's Dictionary for improved or unimproved talks about anything. It could be the erection of a wall which as Mr. Lourenco said happened in April 1957. It doesn't need an actual regulatory signoff for occupancy to be an improvement to land at least under Webster's Dictionary. So that's the first thing. The lots were cleared improved in 1957.

With respect to his speculation as to why the regulations might require separate ownership of

lots at the time of development, I do want to point out that the lots are currently under separate legal entity ownerships but these legal entities are owned by the same people. So at the very top of the ladder they still are under common ownership. For purposes of whether or not they would have the power to seek a variance and divide these properties and make them comply with zoning requirements to make the lots large enough to actually build upon, they have that within their power as it is.

Finally, with respect to whether or not the ZA actually needs to make a finding as to whether the two percent exception is consistent with the purposes of the Zoning Regulations, to say that just by acting on granting the two percent variance and not making any finding of it constitutes deeming it to be within the purposes of the Zoning Regulations. So it renders that whole provision extraneous. It's a basic function of any statutory interpretation. You try to interpret it so as to not render a provision irrelevant. If that provision weren't necessary, why would the drafters of the regulations have put it in there to begin with. So it's an important and necessary component of any ZA decision granting the two percent exception, just so the exception is

consistent with the purposes of the Zoning Regulations. Given that, I would just like to thank you all for your time and restate that the ANC believes for the reasons set forth in its submissions to the BZA that the ZA erred legally and factually and that the decisions should be overturned or rendered invalid. Thank you.

CHAIRMAN GRIFFIS: Thank you very much. Okay. Yes?

MEMBER MILLER: Mr. Halley, it's late, but I want to make sure I understand one of your points which I don't. Did you say the lots are still owned by the same legal entity? What was that?

MR. HALLEY: The lots are owned by two separate corporations, two LLCs, but the LLCs have as Mr. Birch stated in the beginning the same principles. They were formed on the same date. They have the same entities who are their registered agents. For all intents and purposes, the owners of these two LLCs are the same. So that for purposes of being able to control what happens with these lots, they would be able to redivide them. It's the fiction of the LLC between the owners and the lots. So the impact as the architect stated as much at one of the hearings at OGB or Commission of Fine Acts that the separate structure

is really created just to get around the Zoning requirement.

MEMBER MILLER: Is that in the record showing the ownership?

MR. HALLEY: Yes.

MEMBER MILLER: What you're just saying on the record, is that in this record?

MR. HALLEY: The incorporation documents, I have them. I did not bring them today because I didn't know that it was going to come up.

MEMBER ZAIDAIN: Did the DCRA see those? What did DCRA rely on?

MR. HALLEY: At the time that the decision was rendered, the lots were all under Miller ownership. They were not under the LLCs at that time. The LLCs came about in the fall of 2002.

MR. EPTING: I'd object to this. The BZA has no rule over this ownership. They are owned by different entities, the Strategic Georgetown and Georgetown 32nd Street LLCs. That to me meets the requirements of the regulations to being separate ownership. It's not the BZA's role I see. It's not a zoning issue to pierce into who the ownership entity is because you don't do that in any other case. You make sure that the appropriate property owner is

before you and that's what you have today.

CHAIRMAN GRIFFIS: Yes. I just would uphold that objection, but we might go to the date that they were put into separate ownership if that is relevant to the Board.

MEMBER MILLER: Well, isn't the ownership an issue at least at the time of the letter and that's why we're talking about ownership?

MR. HALLEY: I think it's undisputed that at the time of the letter all three lots were owned by Herbert and Patrice Miller.

CHAIRMAN GRIFFIS: It's the dates not the entities of today's LLCs.

MR. EPTING: But that's the whole discussion we had about 401.2 which is actually written in the present tense. There's a past tense in 1957 in terms of individual ownership and then there's a present tense that does not. The ZA ruling is written that at the time of development so it contemplated later on once you got ready to go that it would be owned by separate entities. That's what we have created.

MEMBER MILLER: So then ownership is an issue with respect to present day ownership. Is that correct?

MR. EPTING: No.

MEMBER MILLER: If the letter goes to a time of development. Oh, because they're not even developing it yet. Is that what you're saying?

MR. EPTING: That's right. The permits are being filed by two separate ownership entities.

MEMBER ZAIDAIN: And the point there, that brings it back to the whole issue with the letter. The letter is giving an opinion saying "When you bring this in for a permit they need to be in separate ownership. We'll work to verify that." Correct?

MR. EPTING: That's correct. And that is the way we have filed under separate ownership.

MEMBER ZAIDAIN: Yes, but your filing is not in front of us. The letter is.

MR. EPTING: That's correct.

MEMBER ZAIDAIN: I mean if you filed it and you got a permit and it was in front of us.

MR. EPTING: But if we would have waited for this appeal after the permit had been issued, there would be one in one entity and one in the other entity which would comply with 401.2.

MEMBER MILLER: Maybe because it's late and we're getting tired, but the if the ZA's decision addressed at the time of development as opposed to at

the time of the improvement in the past, then we would need to know who the owners are going to be at the time of development. Is that correct?

MR. EPTING: That's correct.

MEMBER MILLER: That isn't even now per se, right? It's sometime in the future because we don't have a building permit yet.

MEMBER ZAIDAIN: What do you mean when you say "time of development," when a permit issued?

MR. EPTING: Permits. Yes, permits would have to be issued and two different property owners.

MEMBER MILLER: There's no permit yet so this is in the future, right?

MR. EPTING: But my point is that as long as they are issued in two different property owners you complied with that condition. So it's up to the property owner to file in compliance with that.

CHAIRMAN GRIFFIS: Right, because you wouldn't be in compliance if the ownership changed to a single ownership and now you filed for permit.

MR. EPTING: That's right.

CHAIRMAN GRIFFIS: Right.

MS. HORNE: If I may, Mr. Lourenco actually testified to that. He said that the letter would be conditional and if they were not in separate

ownership at the time of development, then whatever effect it has would not be in effect.

CHAIRMAN GRIFFIS: That's right. It's an excellent point that we skipped over and maybe not fully digested it and Mr. Lourenco's description of it that it is a conditional letter and it's conditioned on what the permit documents will eventually show for full review. Is that correct?

MR. EPTING: That's correct.

CHAIRMAN GRIFFIS: Okay. Which goes to Mr. Zaidain's point about the letter.

MR. EPTING: I understand that. Maybe I should not have conceded that.

CHAIRMAN GRIFFIS: Okay. I was going somewhere else with that though. In terms of Mr. Lourenco's statement today, is that going to be submitted in writing for the record?

MR. LOURENCO: I'll submit it.

CHAIRMAN GRIFFIS: So we will have copies and copies of course for the ANC to look at. Any other questions for the Board or clarifications? Very well. We can conclude this hearing on this appeal.

MR. EPTING: Thanks for hearing it.

CHAIRMAN GRIFFIS: Indeed. I appreciate everyone's patience today and through the scare.

Don't go anywhere because we have some procedural things we need to get to. We need to set this for a decision. We also have asked for a few things in submission. I'm going to set some dates. I want to get this done and decided very quickly. While Ms. Bailey is looking for dates of which we can set the decision, she will also review all those items that we have asked for submission.

(Pause.)

CHAIRMAN GRIFFIS: Okay. Ms. Bailey, why don't we go through your notes because they are obviously better than mine in terms of submissions.

MS. BAILEY: I only have two documents, Mr. Chairman. The ANC is to provide a copy of the documents shown where the nursing home wing existed in 1957.

CHAIRMAN GRIFFIS: Okay.

MS. BAILEY: Then Mr. Lourenco's statement that he read today. Those are the only two things that I had.

CHAIRMAN GRIFFIS: Now the ANC feel sufficient on the submission that you gave us that it shows your point of the improvements on the lot or is there another document you want to submit?

MR. HALLEY: I'm sorry. I guess there's

another document that I would like to be able to submit.

CHAIRMAN GRIFFIS: Okay. When can you get that in? Close of business tomorrow, 3:00 p.m.?

MR. HALLEY: We can certainly try. Can we give ourselves another day just to be sure?

CHAIRMAN GRIFFIS: Here's what I'm trying to do. I'm trying to decide this first thing in a special public meeting on Tuesday.

MR. HALLEY: The reason why I bring up tomorrow is because that is when information is served to the Board and it's by 3:00 p.m. In all seriousness, I just want to see if that's obtainable. If it isn't obtainable, we'll figure it out and I'll deal with the schedule.

MR. EPTING: Mr. Chair, if it helps, we can also submit which we didn't do is we have the April 1957 wall check which would also show where the improvements were.

CHAIRMAN GRIFFIS: Okay. The wall check which is also going to get served on the ANC.

MR. EPTING: Yes.

CHAIRMAN GRIFFIS: Let's go through the whole list and then we'll figure it out. I'm sorry. You had the two pieces. So now we have wall check.

We have the ANC submission and we have Mr. Lourenco's statement of which I'm assuming it's already in. That one's done.

MR. HALLEY: And Ms. Miller had asked for the incorporation documents which I need to provide because I hadn't brought them today.

MR. EPTING: I objected to that submission.

CHAIRMAN GRIFFIS: Indeed. I think we upheld the objection.

MR. HALLEY: I didn't hear that. I'm sorry.

CHAIRMAN GRIFFIS: Yes. What I left over for the Board is when they want any dates attendant to the incorporation but I think we dispensed with that unless I'm mistaken. Any opinions? Do you need an additional submission on the incorporation?

MEMBER ZAIDAIN: No.

MEMBER MILLER: This is the ownership issue that we had discussed.

CHAIRMAN GRIFFIS: Yes.

MEMBER MILLER: Okay. No I don't need anything.

CHAIRMAN GRIFFIS: No, we don't need that in which case wall check and your submission of the

improvements Thursday 3:00 p.m.

MR. HALLEY: Yes.

MEMBER ZAIDAIN: Mr. Chair.

CHAIRMAN GRIFFIS: Yes?

MEMBER ZAIDAIN: I don't know if you covered this or not, but a lot of the issues we're dealing with are "DCRA said this and meant that. DCRA said this and meant that." Are we going to hear from DCRA?

CHAIRMAN GRIFFIS: Nope. We had the opportunity and for goodness sakes they were here. I'm not sure why they didn't present themselves. It will reflect in the deliberation in terms of how we decide this case as they had the opportunity. But, no, I can't see how we change or give additional time or anything in that respect. So Thursday at 3:00 p.m.

MR. HALLEY: Yes and that's 20 copies.

CHAIRMAN GRIFFIS: I don't know. Actually we require 20. Ms. Bailey, how many copies do we need of the submissions? 15?

MS. BAILEY: Fifteen.

MR. HALLEY: Okay.

CHAIRMAN GRIFFIS: There's a reason for that but I won't go into it. So we can all go have dinner. So everyone is okay on the dates? Excellent.

The record is only open to receive that information. Of course that will complete the record and will be closed at 3:00 p.m. on Thursday. So if we don't get that, it will be closed with or without the submissions. We will set this for special public meeting on next Tuesday which is the 25th. Set for another 12 hour day on the 25th.

That is going to be the second decision in the morning at 9:00 a.m. Of course that is our public meeting in which there is no additional testimony. It is the deliberation of the Board. You are certainly welcome to be here to hear the deliberation but we won't be having any sort of interaction or additional testimony provided. So if that's clear, any other questions or clarifications? Questions, yes?

MR. HALLEY: I forgot about this and I apologize. Thank you for reminding me, Ms. Barbara Hartman from the Citizens Association of Georgetown had been here in the audience but had to leave at a little after 5:00 p.m. She asked if the Citizens Association could submit something for the record and if you could leave it open for them to submit something.

CHAIRMAN GRIFFIS: What would they submit?

MR. HALLEY: She said they were going to

submit a letter.

CHAIRMAN GRIFFIS: Okay. In a special exception or variance that would be absolutely appropriate. We would take that in, but in regards to the appeal we have the players and they are defined. That's what we'll look to and deliberate on. In fact, we have several appeals that people write in lots of letters of support or a grievance. They are all irrelevant to the appeal. I'm not sure unless you can help me understand what the Citizens Association would provide. I would have to say that we aren't able to accept a letter of that nature. Okay. Very well. Anything else? In which case, thank you all very much and this would conclude the 18 November 2003 afternoon session. Off the record.

(Whereupon, the above-entitled matter was concluded at 7:35 p.m.)