GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

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TUESDAY, MARCH 4, 2008

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The Regular Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 10:43 a.m., Ruthanne G. Miller, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER	Chairperson
MARC D. LOUD	Vice Chairperson
MARY OATES WALKER	Board Member
SHANE L. DETTMAN	Board Member (NCPC)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLY BAILEY	Sr. Zoning Spec.
JOHN NYARKU	Zoning Specialist

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

This transcript constitutes the minutes from the Public Meeting held on March 4, 2008.

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

10:43 a.m.

CHAIRPERSON MILLER: Good morning, ladies and gentlemen. This meeting will please come to order.

This is the March 4th, Public Meeting of the Board of Zoning Adjustment of the District of Columbia.

My name is Ruthanne Miller, I'm the chair of BZA.

To my right is Mr. Marc Loud, the vice-chair; and to my left is Mary Oates Walker and Shane Dettman, board members. And next to Mr. Dettman is Mr. Cliff Moy of the Office of Zoning, Lori Monroe of the Office of Attorney General and Beverly Bailey from the Office of Zoning.

Copies of today's meeting agenda are available to you and are located to my left in the wall bin near the door.

We do not take any public testimony at our meetings unless the Board

asks someone to come forward.

Please be advised that this proceeding is being recorded by a court reporter and is also webcast live. Accordingly, we must ask you to refrain from any disruptive noises or actions in the hearing room.

Please turn off all beepers and cell phones.

Does the staff have any preliminary matters?

MR. MOY: Good morning, Madam Chair, Members of the Board, staff does have preliminary matters, but I think it would be wise to take them up on a case-by-case basis.

CHAIRPERSON MILLER: Thank you, Mr. Moy. And it's my understanding that we are going to be juggling the schedule a little bit based on certain considerations including the length of certain deliberations.

So, Mr. Moy, I believe that we're going to be starting with, is that No. 3 and

4 on the agenda, of District-Properties, is that correct?

MR. MOY: Yes, ma'am. So with that, the first case for a decision is Application No, 17701 of District-Properties.com, LLC, pursuant to 11 DCMR 3104.1, for a special exception to allow the construction of a new 17-unit apartment building under section 353, in the R-5-A District at premises 2825 Robinson Place, S.E. That's in Square 5875, Lot 862.

As the Board will recall, on February 5th, 2008, the Board convened the application for a decision and after discussion the Board rescheduled its decision to March 4th to allow sufficient time for the District of Columbia Housing Finance Agency to submit comments.

Staff would report to the Board that although the staff has had staff comments with the agency, there's no official response from that agency, although staff was informed

yesterday that a letter may be forthcoming today, number one.

Number two, also as a preliminary matter, staff has received a letter; after the record was closed, I might add, from a Washington Legal Clinic for the Homeless, Inc. for the Board to address. And I think with that, staff will conclude its briefing.

CHAIRPERSON MILLER: Thank you, Mr. Moy. We just received this letter this morning and I have to say that that was part of our delay in getting out here. Whenever we receive something last minute, it does delay us getting out. And, the Board, in considering what to do with this letter, is also considering what to do with respect to the fact that we still haven't gotten a letter in the record from the D.C. Housing and Finance Agency.

So, I think what I would like to propose to the Board is that we do one more postponement, which would allow a letter from

D.C. Housing and Finance Agency to have the opportunity one more time to come into the record, but no later, I'd say, than one month from now. Our next decision meeting is April 1st. And in the meantime, we could also leave open the opportunity for the Washington Legal Clinic for the Homeless to file something to address why we should reopen the record to consider their concerns.

We do have a schedule in the rules that, you know, provides for a hearing on a matter and then filings to come in, and then the record is closed. So, there has to be quite a showing of good cause of some extent in order for us to reopen the record. Originally we were allowing a shorter period of time from a government agency as a courtesy. And since we are allowing that time, we will allow the Washington Legal Clinic to make case why we should reopen the record to hear their concerns. And we'd like to also give then the applicant an opportunity

to respond accordingly why we should or we should not entertain these concerns, whether there would be prejudice to the applicant and what good cause there might be to reopen the record.

So, I believe that's the consensus of the Board, but I want to make sure that is. Okay. Not hearing otherwise, that's what we'll do then, we will continue these to cases, 17701 and 17702 for decision making at the next decision making, April 1st, and leave open the record for the housing agency to make a submittal and Washington Legal Clinic to make a case as to why we should waive our rules to allow them to submit evidence or any documentation regarding this case, and for the applicant to respond.

I would suggest that the Washington Legal Clinic's submission come within approximately two weeks, Ms. Bailey, and the applicant have, you know, 10 days or whatever it is, after that, in time for the

Board to have all the submissions before its decision making meeting. Or, Mr. Moy, do you want to set those dates?

MR. MOY: Yes, Madam Chair.

CHAIRPERSON MILLER: Okay.

MR. MOY: If you want to allow the Washington Legal Clinic for the Homeless to file in two weeks, that would be Tuesday, March the 18th. And certainly for the applicant, for any response, I would just assume a week following that.

CHAIRPERSON MILLER: Okay.

MR. MOY: Which would be March 25th.

CHAIRPERSON MILLER: Okay. And as we don't take any questions at our meetings, if anyone has questions on this case, they can contact the Office of Zoning, an in particular, Mr. Moy.

MR. MOY: Oh, and again, this applies also to the other companion application, as the Chair said, which is 17702

of District-Properties.com.

CHAIRPERSON MILLER: Okay. I think that concludes these two cases.

MR. MOY: Okay. I believe the next application for a decision is the modification motion? Good.

So, the next case is the motion for modification of approved plans and waiver of the six-month time requirement to Application No. 17373-A, pursuant to section 3129 of the Zoning Regulations.

This modification is to the originally approved Application No. 17373 of Douglas Knoll Cooperative, LP, which at that time was pursuant to 11 DCMR 3104.1, for a special exception to allow a child development center. This was 90 children and 20 staff under section 205, and pursuant to 11 DCMR 3103.2, for a variance from the off-street parking requirements under section 2101. This was last approved under BZA Order No. 16902 in the R-5-A District at premises 2017 Savannah

Terrace, S.E., Square 5894, Lot 40.

On January 23rd, 2008, the Board received a request for modification and the waiver pursuant to section 3129 from the Douglas Knoll Cooperative. That letter and document is dated January 22nd, 2008, and is identified as Exhibit 29.

The only other filings in the record is a report in support from the Office of Planning, which was received to the office dated February 26, 2008, identified as Exhibit 31 and a letter in support from an individual ANC commissioner which is dated January 17th, 2008, Exhibit 30. However, staff notes for the Board that only parties are permitted to respond with comments within the 10-day filing period, pursuant to section 3129.4.

So, what's before the Board then is to, number one, act on time limits on Board actions, which is section 3130.1, and depending on that Board determination, action on the waiver of the six-month time

requirement and then the merits for the motion for modification. And that completes the staff's briefing, Madam Chair.

CHAIRPERSON MILLER: Thank you, Mr. Moy.

Well, it seems that this motion may have certainly merit. The Board, in looking at the order that was issued and then this motion for modification. It appears that we don't have jurisdiction over this case anymore, that the order has expired. The date of the final order was November 3rd, 2005, and on that order it says, "Pursuant to 11 DCMR section 3130, this order shall not be valid for more than two years after it becomes effective, unless, within such two-year period, the applicant files plans for the proposed structure with the Department of Consumer and Regulatory Affairs for the purposes of securing a building permit."

We don't have any evidence in the record that those plans were filed and it

appears from the substance of the motion that the plans were not filed. So, at this point, it's too late to even modify the order to extend the period of time to file the plans because the order is already expired.

You know, we had another case like this recently and what happened was that the applicant had to file again for relief, so that looks like that's the case here.

Are there other comments on this?

VICE CHAIRMAN LOUD: Madam Chair, I support your direction on this. I just wanted to add that it does not in any way take away from the substance and the merits of the application and I believe our regulations speak to expedited applications in chapter 31 for the applicant's review and follow-up. So I will be supporting the application; I do think we lack jurisdiction and encourage the applicant to take advantage of the regulations that supported expedited review.

CHAIRPERSON MILLER: Any other

comments? Okay. And then I would move for then denial for motion for modification of approved plans and waiver of the six-month time requirement to Application No. 17373-A, pursuant to section 3129 of the Zoning Regulations on grounds that this Board lacks jurisdiction to grant the relief.

VICE CHAIRMAN LOUD: Second.

CHAIRPERSON MILLER: Further deliberation?

All those in favor, say aye.

Aye.

VICE CHAIRMAN LOUD: Aye.

MEMBER WALKER: Aye.

CHAIRPERSON MILLER: All those opposed? All those abstaining?

And would you call the vote, please?

MR. MOY: Yes, Madam Chair. The staff would record the vote as 4-0-1. This is on the motion of the Chair, Ms. Miller, to deny the request for modification of approved

plans and waiver of the six-month time requirement; seconded by Mr. Loud. Also in support of the motion, Ms. Walker and Mr. Dettman and we have no zoning -- staff's going to amend the vote as 3-0-2 on the motion of the chair, seconded by Mr. Loud. In support of the motion Ms. Walker. We have no Zoning Commission Member participating and Mr. Dettman not voting.

CHAIRPERSON MILLER: Thank you, Mr. Moy. I think that we decided we were going to deliberate on 17675 and 17677 next.

MR. MOY: The next two appeal cases; I'm going to read both appeal cases, which will be deliberated at the same time here by the Board, the first is Appeal No. 17675 of Reed-Cooke Neighborhood Association, pursuant to 11 DCMR 3100 and 3101, from a decision of the Zoning Administrator, to allow off-premises alcohol beverage sales as an accessory use to a Harris Teeter grocery store. The appellant alleges that the use

violates subsection 1401.1(b) of the Zoning Regulations, in the RC/C-2-B District at premises 1641 Kalorama Road, N.W. That's in Square 2572, Lot 36.

On January 29th, 2008, the Board formally concluded the public testimony on both Appeal 17675 17677 of L. Napoleon Cooper. At the January 29th hearing, the Board completed oral argument and testimony to Appeal 17677. Argument and testimony to Appeal 17675 of Reed-Cooke Neighborhood Association was concluded basically at the December 18th, 2007 hearing. At the conclusion of the January 29th hearing, the Board requested additional information from both appeals. And staff can go through those items, if the Board desires.

Very quickly, the submissions into the record. There are six filings that staff would like to note. The first is a filing from the Reed-Cooke Neighborhood Association dated February 8th, 2008. That's identified

as Exhibit 31. That is a courtesy copy of RCNA's comments to the Zoning Commission for the Board, so the Board may want to treat that as a preliminary matter since that's not a requested document. That's Exhibit 31.

Second is a filing again from the; I'm just going to abbreviate and refer to them as the RCNA, dated February 11th, 2008. That's identified as Exhibit 32.

The third filing is from the intervener, the property owner. This is Holland & Knight on behalf of the intervener, a filing dated February 11th, 2008 identified as Exhibit 33.

Fourth, filing from RCNA, which is a response to Holland & Knight's brief, dated February 27th, 2008, identified in your records as Exhibit 34.

The fifth filing, again is from RCNA dated February 25th, 2008, in your case folders identified as Exhibit 35.

And finally, again from the

intervener, Holland & Knight, a response to the appellant's filing. This is dated February 25th, 2008, identified as Exhibit 36.

Staff wants to note that these last four items, there's a mixture of filings with regards to what the Board had requested and the Board may want to give a blanket waiver to accepting them into the record since the substance of the material appears to be addressing the Board's issues. So with that, the Board would act on the merits of this appeal.

The reading for the second appeal is 17677 of L. Napoleon Cooper, pursuant to 11 DCMR 3100 and 3101, from a decision of the Zoning Administrator, to allow off-premises alcohol beverage sales as an accessory use to a Harris Teeter grocery store. Appellant alleges that the use violates subsection 1401.1(b) of the Zoning Regulations, in the RC/C-2-B District at premises 1641 Kalorama Road, N.W. This is also Square 2572, Lot 36.

I'm not going to read the status; it's similar to the reading I gave in the first appeal. I just would like to close by noting filings on this appeal.

The first is from the ANC, Wilson Reynolds, dated February 11th, 2008, identified in your case folders as Exhibit 45. It, I believe, identifies or designates Wilson Reynolds as a representative of the ANC, but it also, with regards to the ANC 1C not acting as intervener in Case No. 17677 and restricting its participation only in Case 17675.

The second filing is from Holland & Knight on behalf of the intervener dated February 11th. This is identified as Exhibit 46 in your case folders.

And finally, filing from the appellant in response to the property owner's brief dated February 19th, 2008, and that's identified as Exhibit 47 in case folders.

So that will conclude the staff's

brief, Madam Chair.

CHAIRPERSON MILLER: Thank you, Mr. Moy. I just want to ask you for a clarification. You made reference to four submissions where you said some of it went beyond what the Board requested; is that right?

MR. MOY: Yes.

CHAIRPERSON MILLER: Which ones were those?

MR. MOY: Okay. On my page 13.

CHAIRPERSON MILLER: Okay. Basically in those, though, there were several arguments and some of them were not what we requested, correct?

MR. MOY: That's correct. That's correct.

CHAIRPERSON MILLER: And some of them were on point?

MR. MOY: That's correct.

CHAIRPERSON MILLER: Okay. But with respect to Exhibit 31, I think that's in

a different category. That's a courtesy copy that Reed-Cooke Neighborhood Association submitted of their comments on the Zoning Commission Case No. 07-33. And the Board is aware that the Zoning Commission is considering a text amendment on this very same issue.

I'm not sure about the other Board Members; I didn't read that, because it wasn't what we asked for clearly and I was focusing on, you know, interpreting the regulations and didn't think that that was germane to that, and we didn't ask for that. So, I'm not sure how others feel, but I would be in favor of not accepting that one into the record.

Do others have comments about that?

VICE CHAIRMAN LOUD: I would agree with you.

CHAIRPERSON MILLER: Okay. So the consensus of the Board is that, you know, we appreciate the courtesy copy, but that's not

being considered by us in this deliberation and not accepted into the record.

Okay. With respect to now proceeding on these two cases, these two cases did not consolidate but in fact each had a hearing, but in certain instances the testimony went to both cases. And I think that we have already dealt with the motions and procedural issues that were different in the two cases, particularly with respect to timeliness and other issues such as standing. And so, I believe that we can now deliberate and have our one deliberation apply to both cases, because both cases really do only involve our interpretation of the provision in the regulations and whether or not the Zoning Commission erred in his March 21st, 2007 letter interpreting the Reed-Cooke Overlay provision that goes to the sale of beer and wine in grocery stores.

Okay. But, I think I just want to back up just a little bit. There are two

issues that were raised, and I don't think that we asked them to be raised, but I think they're worth addressing in this case.

And one is, what did the Board do its previous decision and in particular the order denying reconsideration in Application No. 17395-A with respect to the question of off-premises alcoholic beverages sales. I'm the only Board Member still on this case that was on that case and I think that the words speak for themselves. But just to be clear, since this was argued by both parties in very different ways, basically I want to state for the record that the Board found that the applicant's application was self-certified and they did not seek relief with respect to off-premises alcoholic beverages sale. And therefore, the Board did not address that in any way, except by saying that the applicant didn't seek it and the Board didn't rule on it. So, I would like to put that one to rest.

And I think that the applicant has

been consistent, that they didn't seek relief in that case because they didn't believe that they needed relief.

All right. The second background issue, I just also want to address, is the authority of the Zoning Administrator to issue interpretive opinions. It's been alleged that his letter of March 21st was a ultra vires letter and I think that the applicant did a good job in addressing this. But this is actually the way the system works, and the applicant cited Reorganization No. 55, which was attached to their Exhibit 33, in which is says that the Zoning Division shall be headed by a Zoning Administrator who shall be responsible for administratively interpreting and enforcing the Zoning Regulations and that our regulations allow for appeal of decisions of the Zoning Administrator to the Board, as occurred in this case.

3100.2 says, "The Board, pursuant to the Zoning Act, shall hear and decide

appeals alleged by the appellant in any order, requirement, decision or refusal made by any administrative officer or body, including the mayor and the administration or enforcement of the Zoning Regulations."

And 3112.2 says, "Any person aggrieved by an order, requirement, decision or determination of refusal made by an administrative officer or body, including the Mayor of the District of Columbia in the administration or enforcement of Zoning Regulations may file a timely appeal with the Board."

So, this has come to us in the proper manner. We have here an appeal of a Zoning Administrator, a letter in which he issued an opinion on March 21st, 2007. And in that opinion, he concluded that off-premises alcoholic beverages sales is an allowable accessory use for a retail grocery store and that the restrictions in section 1401.1(b) apply to principal uses only and not to

accessory sales within a grocery store.

So, that brings us to what we're here to decide today, and that is, did the Zoning Administrator err in his interpretation of that provision in application of the Zoning Regulations.

Basically, the appellants argue that the plain meaning of the words dictate that it's very clear that all sales are prohibited, that there's no distinction between principal uses and accessory uses.

And 1401.1(b) says, "The following uses shall be prohibited in the RC Overlay District, (b) off-premises alcoholic beverage."

So, this is a case clearly of statutory construction. This is what we do when there's a question of interpreting the regs, the Zoning Administrator usually makes the first attempt and then it gets appealed to us.

With respect to plain meaning of

words, that is a basic rule of statutory construction, but you don't look at the words alone in a vacuum, but you look at them in the context of the regulatory scheme. And even Reed-Cooke cited a Supreme Court case that's Kmart Corp. v. Cartier, Inc., 46 US 281, 291, 1988, saying courts should look to the particular statutory language at issue, as well as the language and design of the statute as a whole in order to ascertain a statute's plain meaning. And that's from Reed-Cooke Neighborhood Association's reply brief at page 10.

Other provisions that we need to consider in this interpretation are 1400.3. It says the RC Overlay District and the underlying commercial and residential districts shall together constitute the Zoning Regulations for the geographic area identified in 1400.1. Reed-Cooke then says 1400.4, where there are conflicts between this chapter and the underlying Zone District, the more

restrictive regulations shall apply.

This subject property is located in the C-2-B Zone, therefore the underlying Zoning Regulations are set forth in chapter 700. So we need to look at that chapter in conjunction with chapter 1400.

Matter of right uses for that zone are set forth in 721.1. It says, "Any use permitted in the C-1 Districts under 701 shall be permitted in a C-2 as a matter of right." So then we go back to 701. Okay. This is where I have to say that I originally, when I looked at the plain meaning of the words in chapter 1400, I originally shared the view of Reed-Cooke that it looked like, you know, all off-premises alcoholic beverages sales were prohibited. But when I go back to 701.4 and look at the regulatory context, I think differently because 701.4 specifically says, "The following retail establishments shall be permitted in a C-1 District as a matter of right," and then (u) says, "Off-premise

alcoholic beverages sales." So I think that this supports the applicant's view that off-premises alcoholic beverages sales refers to what they call a primary use.

701.5, which is also, you know, under the same provisions of matter of right uses, says, "Other service or retail use similar to that provided for in section 701.1 and 701.4, including assemblage and repair, clearly incidental to the conduct of a permitted service or retail establishment on the premises, shall be permitted in a C-1 District." So, the applicant is saying that the incidental sale of beer and wine is still allowed and that the overlay only prohibits what they call primary, and what I would call retail establishments, selling off-premises alcoholic beverage sales.

And this also came up at the hearing that, I don't think there's not necessarily a conflict between chapter 1400 and 700 because that specific language of off-

premises alcoholic beverages sales is put into chapter 1400 and you can interpret that as prohibiting that, but still allowing incidental uses.

Also, under 701, 701.4(l) provides a matter of right use as a food or grocery store and 701.5, as I just said, is retail use incidental to the permitted retail establishment.

So, I think I might want to pause here because the first question is, you know, does the Board agree that that's the proper way to read the two sections, or to read chapter 1400. If we do, then we go on to find out, you know, for sure whether or not the use is really incidental to the grocery store. But, I think I want to pause here first because you'd have to agree, in order to go further, that chapter 1400 only prohibits, you know, retail establishments or primary uses, not incidental uses with respect to, as in this case, you know, off-premises alcoholic

beverages sales.

VICE CHAIRMAN LOUD: Madam Chair, I definitely reached the same conclusion as you reach overall with respect to your analysis regarding both whether section 1401.1(b) restricts primary uses versus accessory uses. And also, I agree with your conclusion regarding whether or not the off-premises sale of alcoholic beverages are an accessory use to a grocery store. But rather than sort of bifurcate my discussion, I'll defer it back to you and then at the appropriate time I'll just walk through my entire analysis.

MEMBER DETTMAN: Madam Chair, I think I know where you're leaning based on what you said and I think I'm with you. I did approach the language of the regs slightly different than the intervener did, and, I think, a little bit differently than what you had just sort of laid out. And so basically, specifically looking at the language of the

regs, I do have some observations that I could share now, if it's an appropriate time.

CHAIRPERSON MILLER: Definitely.

MEMBER DETTMAN: Specific to the intervener's argument in case about how the overlay and the underlying zoning, the overlay does not replace the underlying zoning that they have to read in conjunction. And, I mean, I think that's right on with how all of the regs are interpreted. And I think the argument about how over time the sale of alcoholic beverages, beer and wine, at grocery stores, over time has become an accessory use or incidental use to a grocery store.

But when I was going through the supplemental filings, and when I refer to the intervener's filing, I'm referring to Exhibit 33, which is titled "Property Owner's Supplemental Brief in Opposition to the Appeals," and specifically on page 13 when the intervener talks about precedence in Overlay Districts where the Zoning Commission

specifically prohibited or otherwise specifically addresses accessory uses, the intervener provides a list of examples that can be found in the regs where it's dealing with prohibited uses and there's language in there that specifically talks about we're going to prohibit this use as an accessory use. I think there's a collection of maybe seven examples, and I'm not going to go through them all, but one of them is 806.4(b), which is in the Langdon Overlay District, and 806.4 says, "The following uses shall be prohibited in the Overlay," and (b) says, "Outdoor material storage or outdoor processing, fabricating, or repair, whether a principal or an accessory use." So it's very explicit that it's inclusive to both the principal and accessory use. And those are very good examples.

But for as many examples as the intervener provides in pointing out that if the Zoning Commission meant accessory use

only, it used that language, you can find, especially in two different locations in the regs, as many examples of language where it pinpoints the primary use, specifically, 602.1. And 602, which are the regs for the Mixed Use CR District, 602.1, "The following uses shall be specifically prohibited in the CR Districts," and 602.1(b) says, "Car wash, as a principal use;" (g) says, "Outdoor advertising or billboard as a principal use."

And so, if we're going to talk about sort of a framework that the regulations set up, there is sort of a framework for lists of the prohibited uses and language that pinpoints an accessory use, a principal use, or just nothing, like we see in the Reed-Cooke Overlay.

Of course the examples that the intervener gives are all examples that are located in Overlay Districts. The examples that I found fall outside of Overlay Districts, which maybe there's a difference

here.

On page 12 of the intervener's document it says, "References to both permitted and prohibited uses throughout the Zoning Regulations are generally presumed to refer to principal uses unless there is specific language to the contrary." They also go to say, "When the Zoning Commission seeks to permit or prohibit a specific accessory use in an Overlay District, it has consistently used clear language indicating its decision to do so." I would agree, based on the examples that I found and the intervener has given, that that is the case. But I think it's fair to say that when a principal or accessory use is not pinpointed, I think it's fair to say that it could be interpreted that when the Zoning Commission is silent on the type of use, it could be read to apply to both, which we find in the Reed-Cooke Overlay.

And so, again, going back to specific to the language of the regs, I think

there are examples that make the intervener's case; I think there are examples that could make the appellant's case, which is why, sort of, my decision; and again, I'll reiterate that I think I'm leaning in the direction that you are, it goes to the spirit and the real intent of the Reed-Cooke Overlay, which is spelled out in the goals of the Overlay, talking about protecting density, encouraging small business development.

We talked about a potential conflict. I think the appellant is saying that there's a conflict between the underlying zoning and the overlay and that the overlay would govern. I agree with you that there isn't a conflict when it comes to the sale of alcoholic beverages. If there's a conflict, it's that grocery stores, being a fairly big, dense use, was not specifically prohibited in the overlay in order to protect small-scale businesses.

And so, I guess I'll just sort of

leave it at that and at the appropriate time when we'll talk about the goals of the overlay, and the spirit of the overlay, and how I got to where I am, I can address it at that time.

CHAIRPERSON MILLER: I guess I would ask you, I mean, would be your opinion that the regulations are really not totally consistent in form, so if you look at, you know, one section somewhere, how they treat accessory uses, or principal uses, and you look at another section that you're going to find a total consistency in the regulations?

MEMBER DETTMAN: I think that's right. I mean, from 1958 until today, there were probably different, not being an attorney, but I'm sure that different lawyers touched these documents and wrote different languages and different standards were applied. And so if you're going to try to find consistency across the board in the regs, I don't think you'll find it. And sort of

looking at the regs as I did, and the intervener did, I think we both probably found examples hat could make both side's case.

And as of late last night, I was sort of saying, well, if it doesn't say one or the other, it could be read to apply to both. But what that did is made me look deeper into sort of what was the purpose and intent of the overlay. And, you know, the sale of beer and wine being pulled out as a separate use; and it's the only sort of use in the regs that it's more of an action instead of an establishment, to me that says that we're looking to control the sale of alcoholic beverages regardless of whatever use it is. I think that if that may have been a goal or an intent of the overlay, if this area was experiencing problems with loitering, public drinking, open containers, whatever, I think that should have been included in the goals up front in the overlay.

So, yes, I'd agree with you that

there lacks consistency in the regs.

CHAIRPERSON MILLER: Well, I think that's why I ended up just looking at basically chapters 700 and 1400, because they were supposed to be read together and then read them together to make the most sense logically out of them and to make them all make sense.

I guess, Mr. Loud, I almost finished my analysis. I was just going to say that we would need to find that then the sale of beer and wine are incidental to food and grocery stores and I would just mention a few reasons why I would find that. The applicant submitted Exhibit 29, and I think, Mr. Loud, you even asked for this, which show the sale of beer and wine at grocery stores in the District. Then they showed it at 64 grocery stores. So it is common that it is sold at grocery stores.

And then D.C. Code 25-332 in 2001 exempted grocery stores from a moratorium on

new Class B liquor licenses where: (1) the sale is incidental to the primary purpose; and (2) the sale constitutes no more than 15 percent of the total volume of gross receipts on an annual basis.

So, this grocery store, to be in compliance with the law, could only sell, as I understand it, no more than 15 percent of the total volume of gross receipts would be beer and wine. So, I think that the counsel recognized that 15 percent was incidental. And then the applicant also talked about incidental and accessory in terms of the area of the building that the sale of the product would take up, and in this case it's five percent, or less than five percent of the floor area. And then they cited cases that talked about 20 percent as being the threshold. And that's what the Zoning Administrator also referenced, so I think the Zoning Administrator was correct.

And let me turn to you, Mr. Loud.

VICE CHAIRMAN LOUD: I think you've covered all of the rationale and bases that led to my conclusions as well, but let me just lift up a few things just so the record is clear as to how I arrived at my conclusion.

First of all, Mr. Scher was qualified as an expert, I do believe, at the hearing and we accepted testimony from him. And one of the things that he said as an expert, which I found persuasive, was the whole argument that you just laid out, that when you take a look at sections 1401.1(b) in the Overlay, that it is addressing itself to the underlying zone; in particular, section 701.4. So that if you read the two together, it's clear that section 1401.1(b), and I think this was the testimony that Mr. Scher was trying to persuade us to accept, is that it is addressing itself to the principal use in the underlying zone and that it is not an accessory use that's being prohibited by that section. I found that persuasive. I wished

that there had been more evidence to contradict Mr. Scher. I wish that Reed-Cooke or Mr. Cooper had come in with some testimony, some evidence that directly went to the issue of what the intent was when the Reed-Cooke Overlay was adopted. I do believe that they may have brought in some witnesses who may have spoken specifically to that issue of whether or not the overlay was intended to prohibit even accessory sales of alcohol. Certainly they attempted to address the issue of intent, but they did not go that far, and it would have been very, very helpful for me had they done that. So I'm suggesting that in future cases the result could be a little bit different. I think in this case though, Reed-Cooke and Mr. Cooper just did not make the case.

Mr. LeGrant also testified regarding the overlay prohibition as being against principal uses and not accessory, and then they both went on to document; I think

you alluded to it, how the sale of alcoholic beverages for off-premises consumption has become an accessory use for grocery stores. And there was Exhibit 29 you mentioned, which showed, I think you said, 64 grocery stores, but specifically about 18 supermarkets in the District that are selling alcoholic beverages for off-premises consumption. And again, you mentioned the five percent gross floor area that's dedicated to the sale of alcoholic beverages for off-premises consumption.

So to me, the appellant did not make the case. The appellee had persuasive evidence, persuasive witnesses, backed it up with exhibits that helped to make the case in this instance that the overlay was not intended to prohibit accessory uses. And those are the reasons why I'm supporting the position that you staked out, Madam Chair.

CHAIRPERSON MILLER: Thank you. I want to comment though that I think that the legislative history was weak in this case with

respect to shedding light on the intent of the overlay, with respect to this question, so I don't think either side could do too much with it. I just don't think it was there. I think that was one of the problems, you know, that raised the question of how to interpret this.

VICE CHAIRMAN LOUD: And there could be a reason for that. I mean, typically when communities do these overlays, there is a reason why they're coming forward to do an overlay and you would tend to find the evidence for that overlay in some of the record that led to the overlay. These overlays are driven by very specific and real concerns that folks in the community are having. So it just suggests to me that had there been some concerns about prohibiting grocery stores, that there would have been enough of a record or enough availability of witnesses. I think some of the folks who came before us were even around during the time that the overlay was instituted. And again,

there was just nothing of substance there, which suggests to your point, suggests that perhaps the intent was really not to prohibit grocery stores that allow off-premises sales as an accessory use.

CHAIRPERSON MILLER: I just mean that the Zoning Commission order really didn't shed much light on it, and often it does. I mean, well, you would hope that it would, but it didn't.

MEMBER DETTMAN: Just to finish up my comments on sort of how I looked at the purposes of the RC Overlay. I mean, one could ask, you know, is this grocery store an appropriate use in the overlay? Does it fulfill the purposes of the overlay? And, you know, personally I think it doesn't. It could be argued that it's too dense of a use. It doesn't encourage small scale business, and in fact it potentially could drive out small scale business. And based on when we looked at the traffic patterns, it potentially could

not protect the residences from damaging traffic patterns. But that's not the issue; it's the sale of beer and wine.

And given the inconsistencies that are known to exist in the regs, the expert testimony, especially given by Mr. Scher, specific to the relationship between the underlying zoning and the overlay, and also given the relatively small proportion or level of alcoholic beverage sales that will occur, if it's less than 15 percent or five percent, or whatever the percentage is, I don't feel that this use, with the accessory alcoholic beverage sales, is detrimental to the area. And with that, I find myself, you know, sort of standing on the side of the intervener in this case.

CHAIRPERSON MILLER: Anything else? Okay. Then I think what we should do, just to keep the records clean, is to vote on each appeal individually. And I would start with moving to deny Appeal No. 17675 of Reed-

Cooke Neighborhood Association, pursuant to 11 DCMR sections 3100 and 3101, from a decision of the Zoning Administrator to allow off-premises alcoholic beverages sales as an accessory use to a Harris Teeter grocery store. Do I have a second?

VICE CHAIRMAN LOUD: Second.

CHAIRPERSON MILLER: Further deliberation? Okay. All those in favor say aye. Aye.

VICE CHAIRMAN LOUD: Aye.

MEMBER DETTMAN: Aye.

CHAIRPERSON MILLER: All those opposed? All those abstaining?

Would you call the vote, please?

MR. MOY: Yes, Madam Chair. Staff would record the vote as 3-0-2. This was on the motion of the chair, Ms. Miller, to deny the appeal of 17675, seconded by Mr. Loud. Also in support of the motion, Mr. Dettman and there's no other Board Member or Zoning Commission Member participating.

CHAIRPERSON MILLER: Thank you. I would now move to deny Appeal No. 17677 of L. Napolean Cooper, pursuant to 11 DCMR sections 3100 and 3101, from a decision of the Zoning Administrator to allow off-premises alcoholic beverages sales as an accessory use for a Harris Teeter grocery store. Do I have a second?

VICE CHAIRMAN LOUD: Second.

CHAIRPERSON MILLER: Further deliberations? All those in favor say aye. Aye.

VICE CHAIRMAN LOUD: Aye.

MEMBER DETTMAN: Aye.

CHAIRPERSON MILLER: All those opposed? All those abstaining?

And would you call the vote, please?

MR. MOY: Yes, Madam Chair. Staff would record the vote as 3-0-2. This is on the motion of the chair, Ms. Miller, to deny the appeal of 17677, seconded by Mr. Loud, the

vice chair. And also in support of the motion, Mr. Dettman. No other Board Member or Zoning Commission Member participated.

CHAIRPERSON MILLER: Thank you.

MR. MOY: The next case for a decision, I believe, is Application No. 17703 of Sidwell Friends School, pursuant to 11 DCMR 3104.1, for a special exception to allow additions to an existing private school under section 206, and a special exception to establish a child development center under. This application was amended to 16 children and six staff for the child development center. This is under section 205 and in the R-1-B and C-2-A Districts at premises 3825 Wisconsin Avenue, N.W., Square 1825, Lot 816.

As the Board will recall, on January 22nd, 2008, the Board completed public testimony, closed the record and scheduled its decision on March the 4th.

The Board requested a number of post-hearing documents. Staff would report

that in your case folders there is a filing from the applicant dated February 29th, 2008, which includes a landscape plan and proposed conditions, and is identified as Exhibit 46.

This is a bit of a preliminary matter in that the applicant bundled or consolidated the Board's requested information to a single filing, which makes it a little bit untimely, so the Board may want to address that.

Second, there's also a filing from ANC 3C, which was received yesterday, March the 3rd, and which is also untimely because the deadline would have been February 26th.

So the Board is to act on the merits of the requested special exception to sections 206 and 205. And that completes the staff's briefing, Madam Chair.

CHAIRPERSON MILLER: Thank you, Mr. Moy. Okay. What is it that might be untimely, the ANC report and parts of the applicant's submission?

MR. MOY: Yes.

CHAIRPERSON MILLER: Okay. I think that they're all germane and don't appear to prejudice any party in the case, so I would suggest that we just waive our rules and take them into the record. Anybody object? Okay.

I think this is a pretty straightforward case for an addition to a private school and for a child development center. The addition to the private school is somewhat of a modification of the previous order in this case in which the uses were approved, but I guess in different structure. That case was Application No. 17149 of Sidwell Friends School dated October 5th, 2004. And then this child development center is something new, and that's for 16 children and six staff.

With respect to the addition in general, they are relocating a new gym that was going to be on the northern boundary of

the campus to be underground, below an existing athletic field at the eastern boundary of the campus. And in the previous order they had proposed a Quaker meetinghouse, and which was going to be newly constructed and now it's going to be in an existing Kenworthy Gym.

This has a lot of support. I think that's because all the neighbors and the ANC and Office of Planning have been working with the school for a long time, since before the 2004 order. But Office of Planning is in support, ANC 3F is in support, ANC 3C is in support, the Hearst School and the Washington Home are also in support.

I think basically this is going to come down to some conditions that we want to consider. But before we go there, we need to just evaluate this in terms of the regulations. So, 206 governs the additions to private schools, so basically 206 reads in words addressing the location of schools, but

it has certainly been interpreted and applied to additions to schools and it's that the private school shall be located so that it's not likely to become objectionable to adjoining and nearby property because of noise, traffic, number of students or otherwise objectionable conditions.

So, we need to look at these two additions in the context of those standards. I just would start by saying that this application does not involve an increase in the number of students, so that's not an issue.

Then we get to noise and traffic, or parking, which is sometimes an issue.

The last order, you know, that this one follows, also involves an underground parking garage that addressed, you know, the parking requirements basically associated with the number of students and with any use of the facilities. So, I don't see that that's a problem in this case.

Does anybody else see any problems with those? And also, we do have proposed conditions which may go to some of those, but I don't see any issues there that need to be mitigated.

We could jump at this point a little bit also to the child development center, which is a new addition to the school. It's not a new structure, but it's a new and separate use that is being sought for the school. It's supported by all these entities provided that it's limited in scope and everyone that I recall agrees that the limitation as to the number of staff and the number of children, 16 and 6, would suffice to prevent any adverse impacts.

I think we heard that most of the children would be coming with faculty, or whatever, or else possibly live right in the area, so there wouldn't be an increase of traffic or problems with parking either.

VICE CHAIRMAN LOUD: As you thumb

through a couple of other things, I think you mentioned, I'm just going to specify the exhibits. Under section 205, the proposed center has to meet code and licensing requirements and we've got Exhibit 21, which is the Department of Health's letter affirming that it meets that requirement. I think with respect to one of the elements of section 205, no adverse impact on adjacent property owners. This is going to be located in the center roughly of the 15-acre campus, so that that element is not implicated at all in our analysis. You mentioned parking and traffic conditions, and/or whether it's unsafe for drop-off.

So I think they've made a section 205 case for the development center.

CHAIRPERSON MILLER: There's also 205.8 that, "The Office of Planning addresses about the Board may approve more than one child/elderly development center, adult day treatment facility in a square within 1,000

feet of another child/elderly development center or adult day treatment facility only when the Board finds that the cumulative effect of these facilities will not have an adverse impact on the neighborhood due to traffic, noise, operations or other similar factors."

They say that there's a child development center at Fannie Mae located 4000 Wisconsin Avenue right across the street from the school, but that the Office of Planning doesn't believe that this center would have an adverse impact on the neighborhood since both facilities are intended to provide services to existing staff members.

And this is rather small too, yes. Okay. Others? Okay.

I think that this is pretty straightforward, so perhaps we can move into proposed conditions.

We have an Exhibit B that was filed, I guess as part of a bundle that Mr.

Moy referenced, by the applicant in the most recent pleading. And it says Sidwell Friends School proposed conditions and I thought that the school was going to be working with the ANC on this, and it's not 100 percent certain to me whose conditions these represent, whether it's just the applicant's or also the ANC's. But I think that we can use this as a starting point and then we can glance back at any other ANC conditions that have been presented before us. I do recall though that we addressed at the hearing somewhat, some of conditions that talked about construction management and we said that those worked within our jurisdiction.

So also, in looking at Exhibit B then, does everybody have Exhibit B to work with? Okay. There wasn't any explanation that went with it, but I think we could figure it out. These proposed conditions not only are to address any potential adverse impacts that might be associated with the relief

requested in this case, but they actually seem to update the conditions that went with the previous order. And I think that is a good idea to have in one place, up-to-date regulations. So, okay.

Number one proposed is, the project shall be constructed in accordance with the plans prepared by Kieran Timberlake Associates, LLP, and Canon (phonetic sp.) Design and marked in the record as Exhibits 11 -- I'm having trouble reading this version, but I think it's 20 or 29, but we'll get the right number.

VICE CHAIRMAN LOUD: Twenty-nine, Madam Chair.

CHAIRPERSON MILLER: Twenty-nine? Okay. Of the record provided that the elevation of the athletic field adjacent to 37th Street shall not exceed its current elevation by more than two feet as shown on the plans -- oh, here we are, in Exhibits 11 and 29.

Okay. And that was an issue at the hearing, so I think that they're responding to this two-feet elevation. So I think it's a good idea to have them reference the plans. Anybody have a problem with that? Okay.

Okay. The next one is two, the maximum enrollment shall be 850 students.

So when I first looked at that, I thought why are we saying that here, and then I looked at the previous order and it has the maximum enrollment as 800 and then increasing to 850 no sooner than one year after issuance of a Certificate of Occupancy for the new parking garage. Therefore, what this does is get rid of all that verbiage, which is somewhat history at this point and just clearly say that the maximum enrollment shall be 850. So I think that that's fine.

Anybody disagree? Okay.

The maximum number of faculty and staff shall be 190 for school purposes and the

applicant may employ an additional six staff members for the child development center pursuant to Condition No. 4. And I think that's a good condition; it clarifies that the six staff members are not included in the count of faculty and staff for the school.

Four, the child development center enrollment shall not exceed 16 children and six staff members. That's clear; that's what they're seeking, that's what the ANC and Office of Planning were comfortable with, finding no adverse impact to that and we're comfortable with that. Okay.

Five, the applicant shall continue to fully implement and comply with the transportation management plan as required by the BZA order in Application No. 17149.

There comments on that one?

There is a reference in 17149 to implementing and complying with the transportation management plan, so I think, same reason, they don't want to have to flip

back to a previous order that this is included as a continuing obligation. So, I don't have a problem with that.

Six, the applicant shall ensure that only vehicles containing a fifth or sixth grader will drop off or pick up students on 37th Street. Again, that's a lifting of a condition from the previous order.

Okay. Eight, use of the new athletic facility will be limited to those activities that are reasonably connected to the school or are consistent with its location in a residential neighborhood. This appears to me to be a new condition, new as in not in the previous order. We talked about this a little bit at the hearing, what does that mean? To me it's kind of a basic with the special exception that's being granted that it's for the location of the school; it's not to have an adverse impact and I don't think it adds very much. I think it may be vague and I just hate to have conditions that could give

rise to disputes within the community, but on the other hand, it's somewhat innocuous. But, I guess the philosophy of this Board has been evolving to really just put in conditions that are clear, enforceable, necessary to mitigate adverse conditions. But, it's an open question, so how do others feel about that?

MEMBER DETTMAN: I would agree with you, Madam Chair, with respect to number eight. You know, it seems to me that that would be very difficult for the Board to enforce. It's a little bit nebulous in sort of trying to determine what these activities and their connection to the school and what that would be. I think that given what we heard at the hearing, number eight is really directed towards these issues with traffic and parking along the residential streets and going into the gymnasium and stuff like that. And I think it was determined at the hearing that the applicant can only do so much in terms of getting people not to park on

residential streets. They can encourage people to use their large parking garage. And that the real solution is to tighten up the RPP, and that would be a DDoT thing. And so, as written, I don't think number eight can be enforced effectively and I actually don't think that it actually can solve any of the parking issues on residential streets.

CHAIRPERSON MILLER: What I remember about this provision, and some dialogue with the ANC was they said, well, they're just concerned that they not use this for a bar mitzvah or wedding. You remember that? And I guess I think that, you know, the school's been around for a long time and it has a history and it's working with its neighbors, and so I don't see that as an imminent threat.

VICE CHAIRMAN LOUD: I think you said it, at least for me; I think it's a pretty innocuous term and we could probably wordsmith it a little bit better and parse it

around a lot differently. But it's done in the context of a school that does do a lot of outreach to the community and it seems to be a part of that spirit of making sure that they, you know, go beyond out of an abundance of caution making sure that they are being responsive to what the community is telling them is important. So it's not a big issue for me that it's in there.

CHAIRPERSON MILLER: I guess I would propose taking it out, but is there a majority? Is that okay? Okay.

All right. So we'll strike eight.

I don't know if I read seven. I'm going to read that. The applicant will direct all uses of the athletic facilities to park in the garage. I don't really have a problem with that. I mean, I think they built their garage in order to alleviate the problem of parking on the street, and seems like good policy. It goes to mitigating that.

Do you have any comments?

MEMBER WALKER: Well, there was some testimony during the hearing, Madam Chair, about making the garage available to people to rent the gymnasium without any charge or fee, so we may want to consider even beefing up this provision.

CHAIRPERSON MILLER: How so?

MEMBER WALKER: By including that they would not only direct them to use the garage, but that there would be no charge associated with the use of the garage.

CHAIRPERSON MILLER: Oh, okay. I don't recall hearing anything about a charge, that there is a charge.

MEMBER WALKER: There isn't.

CHAIRPERSON MILLER: There isn't?

MEMBER WALKER: And they represented that there would not be a charge to use the garage in the future.

CHAIRPERSON MILLER: Oh, okay.

MEMBER WALKER: And so we may want to incorporate that into this language.

CHAIRPERSON MILLER: Oh, okay. So you would say at no charge to the users? Okay.

Okay. We all set with that one? Everyone agree with that? Okay.

Number nine, at the beginning of each school year, but in no event later than October -- I'm sorry, my copy, what does it say, October 5? Yes. In no event later than October 5, the applicant shall provide the Board, the Zoning Administrator and Ddot, documentary evidence to demonstrate its enrollment figures in compliance with the terms and conditions of this order, including the transportation management plan.

Okay. This also comes from the previous order in 2004. And my comments on this are, first of all, I wasn't on this case, none of us were on the case in 2004, but I think that things have evolved since 2004; at least from my experience on the Board, in that I would be opposed to this kind of a condition

because the BZA, Ddot, Office of Zoning, there's no process in which for them to deal with these kind of reports. We deal with reports with a case is brought to our attention in a special exception case or a variance case, or an appeal. There's no process really or need for these entities to be served, so I think that it makes sense to give this information to the ANC and then if they have concerns, then they would bring it to Office of Zoning or DCRA for enforcement action, or whatever. So, I would strike number nine. Do you all agree? Okay.

And then I might beef up number ten to include some of these reports. Let's see. Something like this: The applicant shall provide documentary evidence to demonstrate its enrollment figures in compliance with the terms and conditions of this order, including the transportation management plan in an annual report to ANC 3C and ANC 3F due no later than December 31st and certifying their

compliance with this order. I mean, we can wordsmith this a little bit, but it would get the information to them. See, there are two dates here. The December 31st is what date the ANC had in the previous order and in what was being proposed in this order, so that's why I'm using that date as opposed to October 5th, unless you all think differently. I think that would make sense. It just beefs up what they're going to get in their annual report to include the transportation management plan.

VICE CHAIRMAN LOUD: I agree with that, Madam Chair.

CHAIRPERSON MILLER: Okay.

VICE CHAIRMAN LOUD: And that December 31 date, I think, might be a little bit more pragmatic as well inasmuch as October 5 is right at the beginning of the year and the school management might need a little time to verify the enrollment figures and they're trying to manage the school anyway. So the

additional time would give them the opportunity to pull together really a substantive, good, solid report to give to the ANC.

CHAIRPERSON MILLER: Okay. I agree. Yes.

And that brings us to 11 here. Any significant changes to the site plan will be subject to ANC 3C and ANC 3F review prior to consideration by the Historic Preservation Review Board and/or BZA.

I don't see that in an order, in our BZA order. First of all, we don't have any, I don't think, authority over, you know, what needs to be done for the Historic Preservation Review Board and for our purposes we're going to be done at the end of this order. So, if there's another application or something that involves a modification to the site plan, the ANC would be served anyway. Okay.

So now I think that we should just

take a quick look at if there are any other proposed conditions from the ANCs that need addressing.

Okay. I would note that on February 26th, 2008, the ANC wrote a letter; it's our Exhibit 47, with an attached resolution approving landscape plans for Sidwell pursuant to their application that we're considering. And we have those landscaping plans submitted to us, and they're in our record. And the ANC doesn't seem to be asking us for conditions, I don't think, with respect to the landscaping. And that may be due in part because I believe that the landscaping is located on public space. But, we do have in the record that Sidwell is going to be doing this landscaping plan, and I believe it's going to be submitted to HPRB as well and ANC has supported the application in light of this. And it also says that Sidwell -- well, let me read this. It seems like there's an agreement between ANC 3C and

Sidwell. It says, "Therefore, be it resolved that ANC 3C conditions its approval of the Sidwell landscaping plan for the area on Wisconsin Avenue along the existing partially underground garage on the following: (1) that Sidwell agrees to return to ANC 3C in the fall of 2009 to review the adequacy of the landscaping plan with the intention of augmenting plantings if deemed necessary; and (2) that Sidwell agrees to replace the next planting season any plants or trees that fail."

And, you know, this is somewhat of an outgrowth of the prior order where they did this partially underground garage along Wisconsin Avenue and they attempted to screen it with landscaping. And that hasn't been successful, so many would say it's not very attractive there, and this is to cure that and it's before the HPRB as well. So, I don't believe any action is necessary on our part.

I know we have previous ANC

resolutions. Does anyone see anything in those that we haven't addressed? Okay.

Also, I think ANC 3F and ANC 3C's proposed conditions at that time were the same.

VICE CHAIRMAN LOUD: I think ANC 3C, which was automatically a party, had also requested that the construction management plan be incorporated into the order.

CHAIRPERSON MILLER: Right. Okay. I mean, we might need to address that again, I mean, because I think we discussed it.

VICE CHAIRMAN LOUD: Right.

CHAIRPERSON MILLER: We didn't necessarily rule on it, but that because the Board doesn't have any jurisdiction over construction management -- did you say the order?

VICE CHAIRMAN LOUD: The management plan.

CHAIRPERSON MILLER: Management plan wouldn't be included in our order.

VICE CHAIRMAN LOUD: In our order as a condition.

CHAIRPERSON MILLER: Right. I think if was filed in the record, it will be in the record, but this won't be in our order.

VICE CHAIRMAN LOUD: No, and I wasn't in favor.

CHAIRPERSON MILLER: Yes.

VICE CHAIRMAN LOUD: I just wanted to clarify, I guess, just what you just said, that we did consider the ANC's request for that as part of their great weight consideration, but had made the decision that we made.

CHAIRPERSON MILLER: Right. I think, yes, in order to given great weight we probably need to just double check and address anything that hasn't been addressed.

Okay. Some of these conditions weren't really necessarily relevant to us. I'll read one. "But any significant changes to the site plan as presented to ANC 3F and

the Historic Preservation Review Board" -- oh, we just did that one -- "will be subject to ANC 3F review prior to consideration by the BZA."

Okay. We already talked about that one.

Then one goes to the increase of the elevation of the football field; that's included. The child development center enrollment shall be kept at 16; it is. Then there's one that goes to the construction entrance, which is not within our jurisdiction. One which goes to the landscaping plan on Wisconsin Avenue along the existing partially underground garage include numerous dense evergreen shrubs to shield views of the garage from the street and blackboard shielding views from the street of the interior lighting inside the garage.

My recollection of the testimony at the hearing was that the blackboard shielding views was within our jurisdiction, but the applicant is doing that, and that the

landscaping, as I said, was on public space.

That Sidwell will continue to provide an annual report to ANC 3F due in December, okay, to include enrollment, staff and certification that they are in compliance with the BZA order; that's in.

Oh, that Sidwell hold quarterly meetings open to the neighborhood during construction; that's a construction issue, right? We can all agree with that? So we don't need to get into that.

That Sidwell direct all uses of the athletic facilities to park in the garage; that's in.

Okay. The next one was the use of the athletic facility being reasonably connected to the school and consistent with its location in a residential neighborhood, we discussed.

And then Mr. Loud said about the construction management being incorporated in the BZA order; we said no, and why.

Okay. I think that covers it. Anything else?

Okay. I would then move to approve Application No. 17703 of Sidwell Friends School, pursuant to 11 DCMR section 3104.1, for a special exception to allow additions to an existing private school under section 206, and a special exception to establish a child development center under section 205 in the R-1-B and C-2-A Districts of premises 3825 Wisconsin Avenue, N.W., as conditioned at this meeting. Do I have a second?

VICE CHAIRMAN LOUD: Second, Madam Chair.

CHAIRPERSON MILLER: Further deliberation? All those in favor say aye.

ALL: Aye.

CHAIRPERSON MILLER: All those opposed? All those abstaining?

And would you call the vote, please?

MR. MOY: Yes, Madam Chair. Staff would record the vote as 4-0-0. This is on the motion of the chair, Ms. Miller, to approve Application No. 17703 of Sidwell Friends School, as conditioned, seconded by Mr. Loud, the vice chair. In support of the motion, Ms. Walker and Mr. Dettman.

We also have an absentee ballot from Mr. Anthony Hood, who also participated as a Zoning Commission Member. And his absentee vote is to approve with such conditions as the Board may impose. So that would give a final tally of 5-0-0.

CHAIRPERSON MILLER: Thank you. And I believe this would be a summary order as there's no party in opposition. Okay. Thank you.

MR. MOY: Very good. All right. I believe the next and final case for a decision, Madam Chair, is Application No. 17718 of the Archdiocese of Washington, on behalf of the Shrine of the Most Blessed

Sacrament, pursuant to 11 DCMR 3104.1, for a special exception to construct a new recreational playing field which would serve an existing private school under section 206, in the R-1-B District at premises 3637 Patterson Street, N.W. That's in Square 1863, Lots 824, 825 and 826. The record lots are 6, 6 and 8.

On February 19th, 2008, the Board completed public testimony, closed the record and scheduled its decision on March 4th. The Board requested a number of post-hearing documents from the applicant. Staff will say that the only filing into the record is from the applicant, by Holland & Knight on behalf of the applicant, dated February 27th, 2008. And that filing as identified as Exhibit 35. The Board is to act on the merits of the requested zoning relief to section 206. And that completes the staff's briefing, Madam Chair.

CHAIRPERSON MILLER: Thank you.

This is also a private school case, but a little bit different.

This applicant received authority from the Board to operate a private school of 600 students at Patterson Street, in this residential neighborhood, in 2000. And currently the students play on a parking lot as the school doesn't have, at least, green space that its authorized to have the children play on yet. And so, apparently when a house came up for sale, the applicant purchased the property. It's about two houses down. The razed the home on that property in order to use the land for a recreational playing field.

So, we are looking at this, though, under the same provision, 206, "Use as a private school shall be permitted as a special exception in an R-1 District if approved by the Board of Zoning Adjustment under section 3104 subject to the provisions of this section." And again, it's 206.2, "The private school shall be located so that it is

not likely to become objectionable to adjoining and nearby property because of noise, traffic, number of students or other objectionable conditions."

There is not an increase in student or faculty, so I don't believe there's an increase in traffic. They key issue here is, I believe, noise. The applicant is proposing that this green area, which is pretty much surrounded by residences, or at least by three sides; there's a street and then two houses and then houses in the back, be able to be used for playing field for 90 children. And I think the range that they were proposing is like 10:30 to 6:30, but the after school period is up in the air a little bit. We have also an agreement with one of the neighbors and the applicant. The neighbor that's most affected, I believe, it's the Wellborns, their house is between the school and the playing field. And I think in that agreement that allows for some trial periods

to see if certain things work and if they don't work, such as, you know, after school playing or summer, or weekends, then they won't be continued.

But what we have before us is really to determine whether that area, that green area, can be used by the school for a recreational playing field and, if so, what conditions we might want to impose to mitigate any adverse impacts.

So, I think I'll open this up for discussion. I would just note that this is very unusual for the Board to have come before it an area in which a school is proposing to have 90 children play and none of the homes around the area opposing that. It's probably the largest number we've dealt with recently. Sometimes we limit the number of kids that can play in a green area like that at one time and that wasn't requested by any of the neighbors.

So, I'm just going to open this up because I think that this really the primary

issue in this case.

VICE CHAIRMAN LOUD: Madam Chair, let me just go on record saying that I'll be supporting approval of Application 17718. Reviewing the requirements under section 206 and the testimony that was provided for us by the Wellborns, by MacColl, Gail (phonetic sp.) MacColl, regarding some of their concerns about buffering some of the noise, I think that where we've ended up is that there's general agreement on the hours of operation at the location. So the noise issue, I think, has been resolved. There was some disagreement as to --

CHAIRPERSON MILLER: Why do you think the noise issue is resolved by the hours?

VICE CHAIRMAN LOUD: Well, let me take a look at my notes.

CHAIRPERSON MILLER: Okay.

VICE CHAIRMAN LOUD: My notes reflect that the Wellborns did not support it

unless there were restrictions as to the hours of operation, specifically, and then the types of activities. And a little later in the deliberations, there was testimony that the hours of operation, and I've got to flip through my notes right quick --

CHAIRPERSON MILLER: The first proposed condition that's attached to Exhibit 35, which is the post-hearing submission filed by the applicant, does say the hours of use of the field shall be 10:00 to 6:30 p.m.

VICE CHAIRMAN LOUD: Yes, I think that's --

CHAIRPERSON MILLER: But in no event shall the field be used after sunset, yes.

VICE CHAIRMAN LOUD: Right. So I think that was kind of consistent with what some of the testimony was at the hearing.

Again, I'm searching my notes to actually find it. Yes, here it is, hours of operation 10:00 to 6:30, Monday through

Friday. There was some discussion regarding the primary access to the recreation location and the Office of Planning had some concerns about that, wanting to relocate it from the alley to Patterson Street. And there was testimony from the neighbors that that would not be an acceptable solution, particularly because of the noise impact. So again we're back at noise. And additionally adding that the alley was not an unsafe means of getting from the primary campus of the school to the rec center because it was a very under-utilized alley.

I think there was also testimony that the play field would be buffered by 20-foot wide landscape buffers on both the east and the west side, as well as a seven-foot wood board fence on the west side. There would be no permanent equipment on the field. There was some back and forth discussion about whether there would be four benches or two benches; I think it ended up being four

benches.

Let me see. And I'll sort of open it up and defer to my colleagues as well.

MEMBER DETTMAN: Madam Chair, much like Mr. Loud, I'll be supporting the application, of course with the right conditions.

To me it's an awkward situation to be physically detached from the school grounds and then sort of sandwich this residential property in, but it seems to me that the neighbors are, in general, supporting it, with caution, but they're willing to try, and I think I'm willing to try.

And just as a suggestion, maybe in order to help the Board make sure that we have the right conditions, it might be a worthwhile exercise to go through the copy of the Wellborn's agreement that they have. Much like a construction management plan, the Board doesn't have much jurisdiction over the enforceability of this document, but there may

be things that could be pulled out of this that could be incorporated as conditions. Just in a quick glance, it looks like the proposed conditions have used the Wellborn agreement, but just out of caution and to make sure that, you know, everything that's in the Wellborn's agreement that can be enforced by the Board is incorporated as a condition. And again, that's just a suggestion.

MEMBER WALKER: Madam Chair, I will also be supporting the application. I would be reluctant to do so if it were not for the case that we have an agreement with the neighbors immediately to the left and the right. This is very peculiar, I think, to have a playing field that is proposed for use by so many children in the middle of a residential area. But because the applicant has gone to great lengths to gain the support of the people who are most impacted and to do a comprehensive landscaping plan to address the issue of noise, then I think with the

right conditions we should allow them to give this arrangement a try.

CHAIRPERSON MILLER: Okay. And I would concur. I think that it's somewhat like what the Office of Planning said, you know, when we asked them, you know, do you support this application. It was, well, because the neighbors are okay with this, they were willing to.

I think, you know, in some of these agreements that are part of this record, or, I think it's in the Wellborn's agreement, you know, there are trial periods. Like we'll try this for 90 days and if it doesn't work, then forget it. But, the basic use of the field by 90 students for the school is not subject to that 90-day trial period. And I recognize that the applicant has really gone all out to try to, you know, accommodate the neighbors. Otherwise, I would suggest that we allow this on a trial basis also, that sometimes we term special exceptions to make

sure that they work out all right. And I think this case probably calls out for that as well, because it's so unusual and, you know, all the neighbors think it's going to be okay, and maybe it is. I mean, maybe, you know, 90 students, you know, the noise is kind of muffled or most of the neighbors aren't home, or they're fine with a little of the children's noise. I mean, it just raises a question, I think, in my mind.

We can go forward with the conditions and then kind of see where we are at that, if we want to put a term, which would mean they would have to come back, you know, in a few years and say to the Board it's worked out fine, you know. And then most likely the next board would then decide what to do, whether to put another term on, or just to, you know, give it permanent special exception or not at all if it didn't work out.

So, that being said, we could go through the proposed conditions that are

presented with No. 35 and then we could also be looking at the agreement that was submitted between the applicant and the Wellborns to make sure that there's no contradiction between the two. Okay. You've been looking at that already. And, there isn't anything else we want to add to the conditions.

So, the hours. These are the hours as of now. Number one, the hours of the use of the field shall be 10:00 a.m. to 6:30 p.m., but in no event shall the field be used after sunset. Am I correct that the Wellborn agreement was more restrictive, that if it was a problem with the after school hours, that the applicant would refrain from using it after school? Yes, I think so, in No. 8 of their agreement, hours of use, right?

MEMBER DETTMAN: That's right, Madam Chair. Number eight, for hours of use, states that the Blessed Sacrament will use it between 10:00 and 4:30. And then it goes on to say, "Accordingly, Blessed Sacrament may

use the playground for unstructured adult-supervised play by children in the after school program between 4:30 and 6:30," and then it goes on for a trial period.

But the range of hours from 10:00 to 6:30 is consistent with the proposed condition number one is Exhibit A.

CHAIRPERSON MILLER: Okay. So, I think we could leave it at 10:00 to 6:30. If there's a problem, it's going to be addressed by the agreement. Is everybody all right with that?

MEMBER WALKER: I'm only looking at what appears to be an inconsistency in provision 4 of the agreement with the Wellborns, page 3 of that agreement, that states that the gates will be locked except from 10:00 to 4:30 on school days. And I'm not sure how you reconcile that with No. 8 of that agreement.

MEMBER DETTMAN: Madam Chair, if I might just offer up my sort of reading of No.

4 and No. 8.

To me it means that between the hours of 10:00 and 4:30 there will be no unstructured adult-supervised play by children in an after school program, or available to the public. And so between the hours of 10:00 and 4:30 the gates will be locked and the play area would only be available to the functions of the Blessed Sacrament. From 4:30 to 6:30 it would be made available, gates unlocked, for unstructured play.

CHAIRPERSON MILLER: I think it's not our concern if there are inconsistencies in the agreement. But our concern is, is there any problem with the conditions that we accept in our order, you know, is that going to be in conflict with the agreement. So the fact that the use of the field is between 10:00 and 6:30 p.m., does it matter about the locking?

Five says gates shall be kept locked whenever the field is not in use by the

school or other authorized party. So, I mean, that allows them to lock it in between 10:00 and 6:30. We're not requiring it to be used. Maybe we should say the field may be used between 10:00 a.m. instead of shall be used. Okay. So it would read the field may be used between the hours of 10:00 a.m. and 6:30 p.m., but in no event shall the field be used after sunset.

No more than 90 students shall be permitted to use the field at any given time. You know, again, that sounds like a very high number to me, but there was no testimony at all, that I recall, that we should limit that number. And were we to try to limit it right now, I'd be worried that that might interfere with their programming and therefore I would be in favor of leaving it in and then, you know, when we get to this term question, that just may address the concerns that we have. All right.

Three, the field shall be

developed in accordance with the plans filed on February 27th, 2008, and included in Exhibit, to be filled in, of the record of this case, which plans shall landscape buffers the installation of a fence around the site and the installation of two security floodlights on 10-foot poles. The applicant shall have the flexibility to substitute comparable planting based on availability, planting season and specific requests from the adjacent neighbors.

That looks good to me. And I do also want to comment that the applicant did represent that there are going to be installing security lighting, which I think was great for the abutting neighbors, and also doing this extensive buffering with the landscape. Any problems on that one?

Four, the primary means of access to the field for students in grades one through eight shall be the alley entrance, and the primary means of access to the field for

students in kindergarten shall be Patterson Street.

I have a concern with this one based on my recollection of the testimony at the hearing, and also of how I think this is addressed in the Wellborn agreement. I think there's a question about whether that means of access for the kindergarten students on Patterson Street is going to be the best means of access and whether that should be put in this order, you know, as controlling. Do you have a comment?

VICE CHAIRMAN LOUD: My recollection is that this originated with the Office of Planning and that there was no support for it from the neighbors, and neither the school as well. And there was even some testimony regarding the safety of transporting the young people on Patterson Avenue, given the fact that deliveries or something were made during the day and that they access the alley between the primary school and the

western lot line property. So, I'm not certain why we would have this in here at all, to be honest with you, and certainly not as a mandatory requirement. There may be some language to allow it, but not compel it. I wouldn't even want to say at the discretion of the school, because the neighbors were clear that was one of the things that they really were fairly adamant about, that they didn't think that access through Patterson Street was safe for the kids, or you know, seamless in terms of their day, and peace and quiet, and enjoyment of their homes. So, I would not be for keeping that in, but I'll certainly listen to what others have to say.

MEMBER DETTMAN: Just looking at the documents that we have before us, in No. 4, saying the primary access to the field would be through the alley and the primary means of access for the kindergarten students shall be from Patterson, looking at page 2 of the Wellborn agreement, No. 3, access to the

playground, it agrees that regular access, or I guess primary access, to the playground will be only through the alley on a trial basis; however, kindergarten may use the Patterson Street gate to the playground, I know they had question of safety bringing children down that alley, the north-south running alley was an issue. However, if you look at Exhibit B, overall site plan, I guess it's indicating here that grades one through eight that would be using the alley entrance, it shows in a blue line the route, and the kindergarten children along Patterson Street will not be coming down that north-south running alley, but it looks as if they'll be exiting through the gymnasium and then coming along Patterson Street. And so it's not indicating that there's going to be any pedestrian traffic coming up and down the public alley next to the Wellborn's house.

So, I guess since this kindergarten access via Patterson Street shows

up as a proposed condition and it also shows up in the Wellborn's agreement, and it appears that the alley's not going to be used to get people to Patterson Street, I would be in favor of leaving that in.

CHAIRPERSON MILLER: Well, let me ask you this, I mean, I thought that there is an issue here to determining which is going to best for the kindergarten kids, and why do we need it at all if it is in the Wellborn agreement, and the Wellborn agreement gives them the flexibility that they need?

MEMBER WALKER: Madam Chair, let me just point out that it's in the Wellborn agreement on a trial basis that the kindergarten children may use the Patterson Street gate to the playground. So, because it is on a trial basis, then I don't think we need to impose it as a permanent condition.

CHAIRPERSON MILLER: I agree. I'm just wondering, do we need to have a condition going to the access here, or the primary means

of access if there is already an agreement that covers it and that agreement allows for the flexibility that a Board condition can't allow for?

VICE CHAIRMAN LOUD: If I understand, Madam Chair, you would be for eliminated No. 4 altogether?

CHAIRPERSON MILLER: I think so. I'm throwing that out for consideration.

VICE CHAIRMAN LOUD: All right.

CHAIRPERSON MILLER: I understand that, you know, sometimes the Board wants to have its own conditions if it's concerned about adverse impact. On the other hand, if there's an instrument in place to protect against the adverse impact that allows the flexibility that's desired, maybe don't need to have a condition. Yes, so that's kind of where I am, like, why do we need it?

MEMBER DETTMAN: I won't say that this is a big issue to me, and I could definitely see the elimination of the

kindergarten access route, since it's handled in the Wellborn and it's being used as a trial, and if the trial doesn't work out, they can always use the alley. I could see having something in there that talks about what the primary access would be via the alley.

VICE CHAIRMAN LOUD: Like Mr. Dettman, this is not a huge issue for me, but the agreement speaks to just the parties to the agreement, whereas if we protect the interests of the adjoining property owner through our conditions, it would apply, should there be some subsequent vacation of the property by the current signer to the agreement. So, I would be for keeping something in that encourages or requires, or at least leaves discretion using the alley to get to the rec field, as opposed to making it completely governed by this private agreement between these two parties.

MEMBER WALKER: Madam Chair, let me suggest that we delete the reference to the

means of access for the students in kindergarten. So the provision would just state that the primary means of access to the field shall be the alley entrance.

CHAIRPERSON MILLER: I feel a little weird about that because we're going to be, like, we're doing this in order to protect probably the safety of the kids, I think, and/or not having objectionable conditions to the neighbor. Those, to me, would be the two reasons. So if we cover one through eight, but we don't cover K, it seems kind of weird. But we could just do the access for kindergarten could be either one and leave it at that. Because I think it's up in the air which one is going to work for the kindergarten, right?

MEMBER WALKER: I wasn't suggesting that we make reference to the children in grades one through eight in the language of the provision. I simply said that the primary means of access to the field shall

be the alley entrance, and not make reference to students in any particular grade.

CHAIRPERSON MILLER: So do you think that would still give them the flexibility to have the kindergartens go via Patterson Street?

MEMBER WALKER: Yes, Madam Chair. I think then they would have the flexibility to try it, because the language only says that it needs to be the primary means of access, not the sole means of access.

CHAIRPERSON MILLER: Okay. So, I see what you're seeing. So, it's definitely going to be the primary if you've got one through eight going there.

MEMBER WALKER: Correct.

CHAIRPERSON MILLER: So even if K goes somewhere else -- okay.

MEMBER WALKER: Correct.

MR. MOY: Madam Chair, could you recite that again for the staff?

CHAIRPERSON MILLER: The

condition?

MR. MOY: The one that we were just deliberating on.

CHAIRPERSON MILLER: Yes, well, if I understand it, and Ms. Oates can correct me if I'm wrong, it would be the primary means of access to the field for students shall be the alley entrance. Right? Is that right? Period.

MR. MOY: Staff would just remind you also that would cause a shift, or change, a revision in their overall site plan which shows the circulation, the route circulation. If you look on the map, that would adjust that. It would delete the red line. On Exhibit 35, on the first drawing, it's labeled overall site plan. To be consistent with the language that you just proposed, correct?

MEMBER WALKER: I don't think it's inconsistent because the site plan shows the route for children grades one through eight in blue, and the route for kindergarten children

in red. Just by virtue of the sheer number of children in grades one through eight, that would be the primary entrance through the alley.

CHAIRPERSON MILLER: Do you think it would be clear if we said the primary, but not exclusive, means of access to the field for students shall be the alley entrance? I think it's the Board's intent not to eliminate that entrance that's shown on the site plan with the red arrows. I think what Ms. Oates is saying is that most of the children will be going on the blue path, and that's what she means by primary.

MR. MOY: Okay.

CHAIRPERSON MILLER: But not exclusive.

MR. MOY: Okay. I see now.

CHAIRPERSON MILLER: To give the kindergartens the option of trying out which way is going to work the best.

MR. MOY: Oh, see, I understand

that. We broke up those two sentences, those two concepts, so that works.

CHAIRPERSON MILLER: Okay. Okay.

MEMBER DETTMAN: Madam Chair, if it's even necessary, I understand Mr. Moy's comment, and maybe it's just a matter of labeling on the plan the blue line does signify grades one through eight. The blue line could just be labeled primary access route, and the red line could be secondary/kindergarten route; something.

CHAIRPERSON MILLER: Okay.

MEMBER DETTMAN: If it's necessary.

CHAIRPERSON MILLER: I have a question about that. Can we do that? Can we alter this plan?

MS. GLAZER: Madam Chair?

CHAIRPERSON MILLER: Yes?

MS. GLAZER: I'm sorry to interrupt. I'd like to just caution the Board that we have before us revised site plans

submitted at the Board's request during the hearing, which clearly show entrances and distinguish between kindergarten and the other grades. And typically the Board states in its order that all operations shall be conducted in accordance with the site plans. So that's what we have before us at this point in time, is this site plan. And unless that site plan is revised, or you request the applicant to submit a revised site plan, I think this is what you're addressing.

CHAIRPERSON MILLER: Okay. Here's another way. What if we had, you know, the primary means of access to the field for students one through eight shall be the alley entrance and the primary means of access to the field for students in kindergarten shall be Patterson Street, and then say that the applicant shall have flexibility to change the primary means of access for the kindergarten students? Maybe we have to say depending on what, but I don't know. This is what happens

at the last decision making.

MS. GLAZER: Is this a question addressed to me?

CHAIRPERSON MILLER: Well, I don't know. No, I threw it out, I guess, to the Board. I think we can add a flexibility, personally, but we might need to be more specific.

MS. GLAZER: The only thing I'd want to add is that the Board can impose, as you know, reasonable conditions. And all that means is that there should be a reasonable basis for the conditions. So if you have a reason for saying that there should be flexibility, I think that would be understood and upheld. But if not, I'm not sure that the reason should just be that there's a discrepancy with other documents. I mean, the Board heard a case and heard evidence, and I think has to use its independent judgment at this point in deciding what is reasonable.

CHAIRPERSON MILLER: All right. I think what I recall from the hearing was that Office of Planning concerns about the alley were really not substantiated and that that was the least disruptive to the Wellborns. So, I'm not sure now why the kindergarten children are still being directed that way. That's why I would like to give flexibility to the applicant to change the route from Patterson Street to the alley and I'm just trying to figure out how to make it so that, you know, it's very clear and enforceable. It would be related to the request of the Wellborns that the traffic of the kindergarten children was disruptive to them, given their situation between the school and the playground, that they are the most affected by this. And that's why I want to build that in, if we could.

So, but we want to build it in a way that's pretty clear, you know. They have the flexibility to change, I don't know, upon

consultation with the Wellborns. I don't think that's such a big deal. Do you all have any other feelings about this, or better suggestions for language?

All right. We're going to move on. We'll either come back to this at the end so we don't sit here forever kind of like trying to decide how to wordsmith this. I think that the intent of the Board is clear and why don't we just come back to it later, or after this decision making?

So, we'll bypass this for now. Is that all right? Unless somebody's got another definitive -- okay.

Five, gates shall be locked whenever the field is not in use by the school or other authorized party. I don't have a problem with that. Does anybody? Okay.

No permanent recreational structures such as baseball backstops, soccer goals, or basketball hoops shall be constructed on the field. Any problems?

Okay.

The field shall not be used for major athletic or sporting events, nor shall it be used by organized groups that are not part of the school's educational and religious program.

No amplifiers, generators, compressors or other loud devices shall be used by the school on the field.

The school shall be permitted, but is not required to use the field or make the field available to neighboring families during the hours of 10:00 a.m. and 6:30 p.m. on weekends, holidays or other times when school is not in session subject to any rules and restrictions imposed by the school regarding security and noise levels.

Ten, the school shall be responsible for maintenance of the field including maintenance of the landscaping and removal of trash and debris from the field and the adjacent sidewalk and alley.

I think these are all very good conditions that really go to, you know, mitigating for noise and for security. So I think they're all very good.

Do you want to talk about a term at this point? And, you know, we'll still have to come back to No. 4 either now or agree that we can work out the wording outside of this meeting.

I'd like to hear from others your opinion about a term, to see how this works. I guess, you know, it would be somewhere, I guess, in my view, in the nature of maybe three years or so. I don't know whether that's too long if it isn't working out, or whether I'm trying to balance time for it to work out, work out kinks, to see if it works, you know, versus, you know, any adverse impacts from noise that might occur in the interim. So, I'm just going to throw out three as a possibility. It could be two, but after the first two they'd have to be, you

know, preparing the next application. Or it could be longer if other people feel -- what's the sentiment?

VICE CHAIRMAN LOUD: Just a clarification question. Does the discussion about term mean that if there was a violation of the condition they couldn't come back in immediately and have the violation addressed, or would they have to wait until the end of the term specified? In other words, if we set a term, it doesn't mean that they can't come back in to enforce a violation of a specific condition.

CHAIRPERSON MILLER: No, they wouldn't come to us for that. They would go to DCRA for enforcement or possibly our compliance officer in the Office of Zoning, but they wouldn't come to us.

But what I'm concerned about is, I mean, first of all, I think these are great conditions that have been proposed and I don't believe that the applicant's going to be

violating those. What I'm concerned about are the things that we're allowing, like the 90 kids on the field, you know? They wouldn't be violating that; it just might be creating more noise than the neighbors anticipated. So that's what it's going to.

You know what, and maybe that if 90 is noisy, that the applicant may adjust itself, you know? They may cut down itself, but they wouldn't be required to. Three?

VICE CHAIRMAN LOUD: Three years is a long time, you know, should that become a problem with 90 kids. That's a long time to live through that and not have the opportunity to bring it back and have it addressed. So I do see your point, Madam Chair.

CHAIRPERSON MILLER: Yes, it's a tough call. I mean, I think we have an applicant here who seems to be working very well with the neighbors. You know, we don't seem to have an adversarial relationship. So you know, because of that aspect I would say,

you know, three years, but and also because it takes time to, you know, build a record and make an application again. But I know the flip side is three years is a long time.

MEMBER WALKER: Madam Chair, would the three-year term begin with the date of the order, or begin at the time that the field becomes operational?

CHAIRPERSON MILLER: I think normally it starts with the date of the order. I think that's the easiest most specific, you know, date to start measuring from.

MEMBER WALKER: And is there information in the record about when the field will be up an running?

CHAIRPERSON MILLER: I don't know. I don't really recall, except that it's not like a building; it seems like you'd get the field going pretty quickly.

VICE CHAIRMAN LOUD: I guess I'd be inclined to reduce it a little bit, Madam Chair, maybe a two-year term. I know it's a

bit restrictive, but again, if the scenario that we're trying to guard against is just an unbearable amount of noise, then to have to sit through it for three years, even let's say 24 months, 30 months, before you can begin to address it, just seems to me to be unreasonable. It's not a reasonable period to wait, you know, to enforce your concerns.

CHAIRPERSON MILLER: I guess the only reason I would argue against that would be that no neighbors expressed that concern.

VICE CHAIRMAN LOUD: You proposed it, Madam Chair.

CHAIRPERSON MILLER: Oh. No, no; I proposed three years. I'm just saying --

VICE CHAIRMAN LOUD: Oh, you would argue with the two years?

CHAIRPERSON MILLER: Yes.

VICE CHAIRMAN LOUD: Okay.

CHAIRPERSON MILLER: I mean, I'm a little bit torn also, but there's nothing in the record, there's no neighbor that expressed

that concern. I guess Mrs. Wellborn expressed maybe some discomfort, like some apprehension. And also, I guess it's so hard to turn around. I haven't seen a term for less than three years. That's also part of my concern.

MEMBER WALKER: I'll only point out that there are some trial periods in the agreement with the Wellborns that are relatively short. And for that reason, I would be inclined to agree with Mr. Loud.

CHAIRPERSON MILLER: Well, I'll certainly go along with whatever the majority feels. I don't think there's a right answer here. It's just kind of a judgment call.

VICE CHAIRMAN LOUD: Yes, I think I'd like to stick with two years. To Commissioner Oates point, all of the parties are going to know well before three years if this is presenting a problem because of these trial periods in the private agreements. And if they're not able to resolve those issues through the agreement process, then to me they

ought to be able to bring it back to our organization before a three-year wait period. Some of these trial periods are really, really brief; 60 days, 90 days, etcetera. I don't want to get stuck on that point though, like we did on paragraph 4 which I'm ready to offer some language to resolve.

So, I mean, if you guys feel differently, I'm amenable for the sake of moving the discussion forward going with a different term, but I think, for me, two years is reasonable.

MEMBER DETTMAN: Does it help if I say I think both are good? And I do, and I'll be fine with wherever the Board lands on this. The only reason I think that maybe three years might be appropriate is they will need to go through the permit process, they will need to go through construction. I don't think it will have to take an entire two years to construct, and I can't even guess on how long it will take, but then I wonder does the

school and the neighborhood, the neighbors, have to go through a school year, or a substantial portion of the school year to sort of get what the routine is going to be and the traffic patterns and the pedestrian patterns. So, I'm not wedded to either one, but I'm just wondering if three years would allow this sort of routine to develop and get a good sense of what the noise levels and stuff will be.

CHAIRPERSON MILLER: I think that's actually a good point in that it's really not going to be three years of use. It's probably going to be two years of use anyway, because we're not even talking about the summer necessarily.

VICE CHAIRMAN LOUD: I think for the sake of moving the discussion forward, I'd consent to the three-year period that we're talking about, especially with the clarification regarding actual use. I'm fine with that.

CHAIRPERSON MILLER: Okay. And it

will be from the effective date of the order, which would be, I would think, this week. I don't believe we have parties in opposition; I think that the -- I'm not correct; we do have parties in this case that I believe eventually supported the application provided that there were conditions, which there are.

Okay. I want to go back to No. 4 and then I think that we could be done with this. Let's see if we can resolve that condition.

How about, the primary means of access to the field for students shall be the alley entrance. Kindergarten students shall have flexibility to use either Patterson Street or the alley.

VICE CHAIRMAN LOUD: That's actually the first thing I wrote in my draft notes, so I'm fine with that.

MEMBER DETTMAN: I'm comfortable with that language. I'm just wondering if there needs to be a little extra something

that talks about that Patterson Street access is not disruptive to the neighboring properties, or something like that. So, the alternative will be available so long as it's not disruptive to the neighboring properties.

CHAIRPERSON MILLER: I guess my concern with language like that is, like, well, who decides, you know? The school says it is, it isn't, the one neighbor says it is, one neighbor says it isn't. And, I know, that's what I'm afraid of. Okay.

VICE CHAIRMAN LOUD: Madam Chair, can you just read your condition again?

CHAIRPERSON MILLER: Okay. The primary means of access to the field for students shall be the alley entrance. Kindergarten students shall have flexibility to use either Patterson Street or the alley entrance; or either Patterson Street or the alley. I can leave in the grades one through eight, I guess. The primary means of access to the field for students in grades one

through eight shall be the alley entrance. Kindergarten students shall have flexibility to use either the Patterson Street or alley entrance.

VICE CHAIRMAN LOUD: Madam Chair, I'm prepared to support the language of your condition. I think the interests that we're trying to protect seems to me to be future property owners, because the current west lot line property owner has protected itself very clearly with the language that they use in the agreement, which addresses itself to all of the grades, K through eight are identified in that agreement as being required to use alley entrance. And then there's some follow-up language about on a trial period trying something different. So seems to me we're not going beyond the west lot line owner in our current language; we're trying to protect the scenario where someone else purchases that property and doesn't have these protections. And I think you've gone as far as we can go

without duplicating exactly what's in the agreement to protect that property owner's interest. So I'm willing to support that and suggest we can move on.

CHAIRPERSON MILLER: I just want to note that the Wellborn agreement also applies to future residents at their address.

VICE CHAIRMAN LOUD: Okay.

CHAIRPERSON MILLER: Okay. Then I think that's it with the conditions. I do want to note that the ANC has supported this application and the Office of Planning has supported the application.

Okay. Is there anything else we need to add on this case?

Okay. Then I would move approval of Application No. 17718 of the Archdiocese of Washington, on behalf of the Shrine of the Most Blessed Sacrament, pursuant to 11 DCMR section 3104.1, for a special exception to construct a new recreational playing field to serve an existing private school under section

206 in the R-1-B District at premises 3637 Patterson Street, N.W., as conditioned at this meeting. Do I have a second?

MEMBER DETTMAN: Second.

CHAIRPERSON MILLER: Any further deliberation? All those in favor say aye.

ALL: Aye.

CHAIRPERSON MILLER: All those opposed? All those abstaining?

MR. MOY: Staff would record the vote as 4-0-0 on the motion of the chair, Ms. Miller, to approve the Application No. 17718, as conditioned, for a term period of three years.

CHAIRPERSON MILLER: Three years from the effective date of the order.

MR. MOY: Thank you. Seconded by Mr. Dettman. Also in support of the motion Mr. Loud and Ms. Walker.

We also have an absentee ballot from Gregory Jeffries, who also a participated on the application, and his absentee vote is

to approve the application with such conditions as the Board may impose. And I would also add his comments that he was supportive of an order with a term period of two or three years. So that would give a final resulting vote of 5-0-0.

CHAIRPERSON MILLER: Thank you.

Do we have any other items on our agenda for the Board's meeting this morning?

MR. MOY: Is this a full order or a summary order? Summary?

CHAIRPERSON MILLER: Summary.

MR. MOY: All right. Just for the record, thank you. That concludes the public meeting, Madam Chair, but staff would suggest to the Board that for the afternoon hearing session that has just begun, there is one case, I believe, where there was a motion for a continuance if the Board wanted to open up the afternoon session for a short period to pick that up before your break. That's on the preference of the Board, of course.

CHAIRPERSON MILLER: We're just going to go get our case and come back and call the afternoon.

(Whereupon, the meeting was concluded at 11:11 a.m.)