GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

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TUESDAY
SEPTEMBER 24, 2002

+ + + + +

The hearing came to order at 9:30 a.m. in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, Geoffrey H. Griffis, Chairperson, presiding.

PRESENT:

GEOFFREY GRIFFIS	Chairperson
ANNE MOHNKERN RENSHAW	Vice Chairperson
CURTIS ETHERLY, JR.	Member
DAVID A. ZAIDAIN	Member (NCPC)
CAROL MITTEN	Zoning Commission
Jerrily R. Kress	Zoning Commission
Mary Nagelhout, Esq.	Corporation Counsel (AM)
Corey Buffo, Esq.	Corporation Counsel (PM)
Sheri Pruitt	Secretary to the Board
Beverley Bailey	Zoning Specialist
Clifford Moy	Deputy Secretary to the Board
Jennifer Steingasser	Office of Planning
John Moore	Office of Planning
Venita Ray	Office of Planning

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9:43 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. I would like to call the 24th September, 2002 Public Hearing of the Board of Zoning Adjustment today and welcome you all here. My name is Jeff Griffis. I am the Chairman, and joining me today is Ms. Anne Renshaw, Vice Chairperson, Mr. Curtis Etherly and also Ms. Mitten representing the Zoning Commission, and Mr. Zaidain representing the National Capitol Planning Commission.

Copy of today's agenda are available to you. They're at the table where you entered into the hearing room.

I'm going to go through a few very important things in my opening statement, and don't see the need to give a quiz after that. So, if everyone would pay attention.

Clearly these proceedings are being recorded, and that brings up two important issues.

First of all, anything being said is on the record and will be recorded. Therefore, you have to speak into a microphone and that microphone should be one.

When coming forward to speak to the Board,

you need to fill out two witness cards. Two witness cards are available at the table where you entered into. And there are some at the table in front of us. Those two cards when filled out go to the recorder, who is sitting to my right.

We ask, of course, that people refrain from making any disruptive noises or actions in the hearing room so that we might conduct a very civil and civic proceedings.

The order of procedures today for special exceptions and variances will be, first, we will statements and witnesses by the applicant.

Second, we'll have government reports. That includes Office of Planning and any other reports that are attended to the applications.

Third, we will have the report from the Advisory Neighborhood Commission.

Fourth, would be parties or persons in support.

Fifth, would be parties or persons in opposition.

And sixth, finally we will have closing remarks by the applicant.

Cross examination of witnesses is permitted by the applicant or parties. The ANC within

which the property is located is automatically a party in the case.

The record will be closed at the conclusion of each case except for any materials that the Board specifically requests, and we will make it very clear what is requested, when it should be submitted into the Office of Zoning.

And of course it does not need to be said that after the record is completely closed, no other information will be accepted by the Board.

The Sunshine Act requires that the public hearing on each case be held in the open and before the public. The Board may, consistent with its rules of procedures and the Sunshine Act, enter executive sessions during or after the public hearing on a case for the purposes of reviewing the record and deliberating on the case.

The decision of the Board in these contested cases must be based exclusively on the public record. And so, to avoid any appearance to the contrary, we ask that people present today not engage Board members in conversation.

I would ask at this point that everyone turn off beepers and cellphones and any other transmitting, noisemaking devices so that we don't

disrupt the proceedings.

And I will now consider any preliminary matters. Preliminary matters are those which relate to whether a case will or should be heard today; that is such things as postponements, continuances or withdrawals or where the proper and adequate notice of the case hearing has been given.

If you are not prepared to go forward with a case today or if you believe the Board should not proceed, it is almost the time to raise such a matter. I will first ask staff if they have any preliminary matters for the Board and then I will ask if anyone else has preliminary matters.

MR. BAILEY: Mr. Chairman, good morning.

CHAIRPERSON GRIFFIS: good morning.

MR. BAILEY: And also to the Members of the Board.

Mr. Chairman, there are preliminary matters, but they're case specific. And they're best discussed at that time. But staff has none at this time.

CHAIRPERSON GRIFFIS: Very good. Thank you. And good morning to you, Ms. Bailey.

I also want to welcome Mr. Moy who is with us from Office of Zoning and Ms. Pruitt also with

Office of Zoning. We are represented by Corporation Counsel today and the Office of Planning up here, and I think that gets everybody.

Any preliminary matters from participants that are here today? Not seeing anyone come to the table which would give me the indication that there were preliminary matters, I think we can proceed and call the first case.

MS. BAILEY: The first case is application No. 16914 of Barbara Schriever Allan, pursuant to 11 DCMR 3104.1, for a special exception for the continued operation of a child development center having 23 children and 3 staff (the use was last authorized by BZA Order No. 15713). The application is under section 205, and it is located in the R-1-B District at premises 2828 Hurst Terrace, N.W. (Square 1420, Lot 12).

All those wishing to testify today, please stand to take the oath.

Do you solemnly swear or affirm that the testimony you are about to give in this proceeding will be the truth, the whole truth, and nothing but the truth?

WITNESSES: I do.

MR. BAILEY: Thank you.

Mr. Chairman, as you know, there are two preliminary matters concerning the case, the first of which is there are requests for party status and the second of which is the concern about parking at the site.

And with that, Mr. Chairman, I turn it over to you.

CHAIRPERSON GRIFFIS: Good. Thank you very much.

Let me take first, I believe that we have applications for party status from proponents of this case. If I could have them come forward, just sit at the table very quickly, that would be helpful. If they're present. I should call out those names, perhaps, and I will.

We will have Ms. Gagnon and Mr. Allan. Are they present? Why don't they come up if there was somebody else. Wow. Two to have turned to four. Oh, and a hesitancy. Maybe five. Okay.

Let me first ask if you would just give me your address just as introduction.

And I'm going to instruct you, you need to touch the base of that. The light will come on and that will indicate the mike is on.

And also as another aside for everyone

1 involved today, we're going to keep on mike on at a
2 time, otherwise we will get feedback. Great.
3 MS. GAGNON: My name is Jennifer Gagnon.
4 And I live at 2817 North Glade Street, N.W.
5 CHAIRPERSON GRIFFIS: Okay. Good.
6 MS. McGLONE duPONT: I'm Jamie McGlone
7 duPont. I live at 5159 Fulton Street, N.W.
8 CHAIRPERSON GRIFFIS: And did you put in a
9 request for party status?
10 MS. McGLONE duPONT: I mailed a letter in,
11 yes.
12 CHAIRPERSON GRIFFIS: When did you mail it
13 in?
14 MS. McGLONE duPONT: Months ago.
15 CHAIRPERSON GRIFFIS: Pardon me?
16 MS. McGLONE duPONT: Months ago. Back in
17 -- I believe it was August.
18 CHAIRPERSON GRIFFIS: Faxed it in 2 weeks
19 ago.
20 State your last name again, please?
21 MS. McGLONE duPONT: duPont.
22 MS. MITTEN: Was the letter a request for
23 party status or just to testify in support?
24 MS. McGLONE duPONT: Oh, just to testify.
25 CHAIRPERSON GRIFFIS: Okay. Good.

MS. MITTEN: We're looking for party status at this time.

CHAIRPERSON GRIFFIS: We have listed, and let me just be clear, it's Exhibit 33, which is a letter -- oh. But clearly you just were to testify, is that correct?

MS. McGLONE duPONT: Yes.

CHAIRPERSON GRIFFIS: Okay. And that's not -- let me state, first of all, there is a major difference between party status and coming in and giving testimony. Testimony can be given by anybody on any case; that's about as general as I can be with that.

Party status involves a different level of responsibility. First of all, and I'll be very brief with this, but party status allows a person if -- or the party if granted cross examination responsibilities. They are also asked to provide responses to any motions that may come up. They also have the responsibility to file briefs on issues that will be briefed by all the other parties and can, in fact, provide findings of facts and conclusion of law.

It is a higher standard when we have the proceedings, and what I'm going to ask all parties is to think clearly about this and whether it is actually

required for them to give the important information that they need to conduct all of those responsibilities.

Again, to be clear, anyone can give testimony. We will hear all of the testimony. My one caveat on that, and I will say it again several times, is that we will not need to hear redundant testimony. But that's an aside.

So let us go down, sir, would you give me your name and address, please?

MR. ALLAN: My name is Bill Allan.

CHAIRPERSON GRIFFIS: If you could turn the mike.

MR. ALLAN: Okay. I am Bill Allan. I live at 2828 Hurst Terrace.

CHAIRPERSON GRIFFIS: Okay. Thank you, Mr. Allan.

MR. ALLAN: You're welcome.

MS. DURANT: I am Mary Beth Durant, and I live at 5427 Carolina Place, N.W.

CHAIRPERSON GRIFFIS: And did you --

MS. DURANT: I faxed in --

CHAIRPERSON GRIFFIS: Faxed in a request for party status?

MS. DURANT: Yes, I did.

CHAIRPERSON GRIFFIS: As a proponent?

MS. DURANT: As a proponent.

You need to talk into a mike, if you don't mind.

MS. GRIFFEN: Chairman Griffis, if I could just save us some time, I'm the lawyer for Barbara's Montessori School. All of these people are fine as just parties testifying in support. We don't need any of them to be certified as a party.

CHAIRPERSON GRIFFIS: You mean all individuals.

MS. GRIFFEN: They all have statements they'd like to make, but they don't need to be parties.

CHAIRPERSON GRIFFIS: Okay. And do you speak for all of them?

MS. GRIFFEN: Yes.

CHAIRPERSON GRIFFIS: Okay. Let me a clear resounding that that's all your understanding that is sitting at the table. Is that correct?

ALL: Yes, that is correct.

CHAIRPERSON GRIFFIS: Very good. So we will look for you in testimony time. Great. Thank you all very much.

Let us take up then, we do have the other

requests for party status from the numerous homeowners in the area. I'm not recalling if they named themselves. But Board members questions, concerns. And I am looking at Exhibit 66, and it was submitted by Joseph Rich. And it's fairly clear and fulfills all of -- or answers all the questions that we require in submission of the party status application.

Questions, concerns, Board Members. I'd like to share some conversation on that.

MS. MITTEN: Mr. Chairman, I think this group clearly meets the requirements for party status. They've made an adequate submission and I would support their being granted party status.

CHAIRPERSON GRIFFIS: Thank you, Ms. Mitten.

Are there any objections to granting party status?

VICE CHAIRPERSON RENSHAW: No, I concur with what my colleague has said.

CHAIRPERSON GRIFFIS: Any other comments?

If I can ask the attorney for the applicant, is there any comment?

MS. GRIFFEN: No, we don't have any objections.

CHAIRPERSON GRIFFIS: No objection. Very

well. Then I think we can grant party status.

Are you Mr. Rich?

MR. RICH: Yes, I am.

CHAIRPERSON GRIFFIS: How shall we refer to your party?

MR. RICH: I think that the best name would be the Hurst Terrace Opponents.

CHAIRPERSON GRIFFIS: That's awfully long. Okay.

MR. RICH: Or just opponents, I guess would be fine.

CHAIRPERSON GRIFFIS: HTO was just thought of. But we won't have you an acronym. Okay. Very well. Something will come up, I'm sure.

Good. Thank you very much.

Any other preliminary matters then that we see at this time? Okay.

If I could have you up for a quick moment? We have one other preliminary matter. Thank you very much.

We don't have any side bars here. I don't have the noise machine, so we can't really be official.

If you wouldn't mind stating your name and address, please?

MS. GRIFFEN: My name is Laura Griffen. I live at 4545 Klingle Street, N.W.

CHAIRPERSON GRIFFIS: Okay. In our quick evaluation -- rather not quick, but review of the record that was submitted, the Board has some questions about whether there is adequate parking and what the parking requirement is for this facility, or this address and applicant. Did you have a chance to review that? And let me give you what we're thinking.

As it comes to the current zoning regulations there's the way we will evaluate this application, it looks to us that there may be a requirement for two spaces. That is, one for the dwelling and one for the day care.

MS. GRIFFEN: When I looked at the regulations, I believe it's section 2101, it says that for a child development center for every 4 employees there's a requirement for one off-site parking space.

CHAIRPERSON GRIFFIS: Correct.

MS. GRIFFEN: Barbara Allan's school employees 3 individuals.

CHAIRPERSON GRIFFIS: Uh-huh.

MS. GRIFFEN: So it's our position that there's no requirement for off street parking.

Furthermore, she does have a driveway

which she can provide one spot. But it's our position that the regulations don't require her to provide any off street parking.

CHAIRPERSON GRIFFIS: Okay. I would not agree with your assessment in terms of the requirement for the day care. I think it's basically up to 4. So then the first 4 one is required. But I think we could have that briefed by you.

Okay. What we're going to do is essentially set this small issue aside. However, we're going to have you brief the issue of whether this is actually a variance or not. We are prepared to proceed with the case that is before us. Clearly that we'll make a bench decision if it was applicable today not possible. So we'll have that. We will ask for that and I will set the schedule for that. This will be very quick in that if in fact it's the Board's decision if there is a variance that is required, this will need to be readvertised. That does set it up for a 60 day extension, and then we will come back.

I think what we can do is expedite if it goes to that level, that we would have basically the submissions done all in writing so that we might expedite that and not have an additional public hearing. We will clearly have to access that as we

roll.

Mr. Rich?

MR. RICH: Yes, sir.

CHAIRPERSON GRIFFIS: I'm sorry. Sir, you don't need to get up. I'm going to need you to brief the same issue. Did you follow everything that I just indicated?

MR. RICH: Yes.

CHAIRPERSON GRIFFIS: Good. You are nodding yes for the record. So we continue.

Is there -- do you have questions?

MS. GRIFFEN: Well, just can you state again what your position is? You read the regulations?

CHAIRPERSON GRIFFIS: I don't think we have a position at this point. However, we have some questions about whether two parking spaces are required. One, for the day care and one for the dwelling.

MS. MITTEN: Okay. I think the point that the Chair raised originally is that it's not once you reach the threshold of 4, then one space is required. It's anything up to 4 one space is required.

MS. GRIFFEN: And the fact that she a private driveway that she can accommodate two cars

doesn't meet that standard? Or you just wanted to brief you on that.

CHAIRPERSON GRIFFIS: Well, no, I think that's an important point and it needs to be brought up. The issue will then go can you count how many cars you can pack into the driveway. And the only way we can be -- I mean, you can clearly say logically sure you can fit 5 in. But we are stuck with the regulations. We are stuck with reading the regulations and deciding things based on the regulations.

So if those can count for the legal zoning parking spaces, then so be it. We just need to be shown that. I guess we could go out and measure and take pictures, and all that.

MS. GRIFFEN: Fine.

CHAIRPERSON GRIFFIS: But that's not what we're supposed to do.

MS. GRIFFEN: Okay.

CHAIRPERSON GRIFFIS: Good. Clear?

MS. GRIFFEN: Yes.

CHAIRPERSON GRIFFIS: Everyone clear? Mr. Rich, you're clear also?

MR. RICH: Yes, sir.

CHAIRPERSON GRIFFIS: Good. Thank you very much.

Okay. Then with that, I don't have any other indication of preliminary matters.

I guess an important point, Ms. Griffen, do you know how your estimation of time you will require to present your case this morning?

MS. GRIFFEN: We were told that we were given up to an hour. I think we'll plan to take about 35 to 40 minutes.

CHAIRPERSON GRIFFIS: Good.

MS. GRIFFEN: For the applicant's case in chief.

CHAIRPERSON GRIFFIS: It's not required to take an hour, just to be clear.

MS. GRIFFEN: Right. We had up to an hour.

CHAIRPERSON GRIFFIS: Yes, indeed.

MS. GRIFFEN: We don't plan to take the full hour.

CHAIRPERSON GRIFFIS: So you think about half an hour?

MS. GRIFFEN: I would say closer to 35 to 40 minutes.

CHAIRPERSON GRIFFIS: Okay. We're going to roll with that then.

Mr. Rich, we will a lot the equal amount

of time. Also you are not obligated to fulfill all of that time. However, you will have it.

Good. We are going to keep the time around so that we do have equal time when the other party comes on. If it looks like you're going to need anymore, it is actually being calculated, we will roll with that.

I will state, however, that frankly maybe speaking for myself, but the rest of my Board Members are very intelligent people. And so the clearer and as concise as you can be, it is absolutely important. We do have two others cases that are happening this morning. However, we focus on the case that is in front of us and we get it done. But, I would ask that if we can move things along, and I will assist you in moving along to anything that we:

One, cannot or do not have the jurisdiction to hear about or cannot be actual evidence in this case.

So with that, I think that's it. Hopefully that's it from my end, and I can turn it over to Ms. Griffen to begin presenting your case.

MS. GRIFFEN: Good morning. My name is Laura Griffen, counsel to Barbara's Montessori School.

One point about process before we begin.

I'd like to request that applicants be given the opportunity to present our case in chief and save cross examination for the end after the three of us have had a chance to speak. That way if there's a question better addressed by one of us, we'll be here together as a panel.

CHAIRPERSON GRIFFIS: You just have two witnesses as part of your case, is that correct?

MS. GRIFFEN: People in support you mean?

CHAIRPERSON GRIFFIS: No. Not testimony. These are your witnesses for your case?

MS. GRIFFEN: Exactly.

CHAIRPERSON GRIFFIS: Okay. Yes, I see no problem in that. Let's proceed in all -- Mr. Rich, do you have any objection to that?

MR. RICH: No.

CHAIRPERSON GRIFFIS: Oh, good. Thank you.

MS. GRIFFEN: I'm an attorney but I'm not a zoning lawyer and I'm not a parent of a child who attends her schools. I got involved in this case because as a resident of the area, and an attendee at a recent ANC meeting I saw how difficult it is for small preschools to keep focus on their educational mission in light of a few neighbors who don't want schools in their neighborhood.

Ms. Allan is applying for a renewed special exception for her preschool, Barbara's Montessori School, located at 2828 Hurst Terrace. The original special exception was granted 18 years ago and has been renewed two times since then; in 1987 and 1992. The last time for a term of ten years.

The school is seeking an indefinite term for the special exception and at a minimum, the ten year, the same one as the last one granted in 1992.

Let me start by noting what shouldn't be at issue in this case. What shouldn't be at issue is whether a preschool in a residential neighborhood is important, in appropriate. Child development centers, like schools and churches, are presumed in the D.C. regulations to be compatible with residential neighborhoods of certain conditions are met. Preschools are and should be located in residential neighborhoods where children and their parents are found.

Nothing in D.C. law distinguishes between schools run out of homes and schools run out of other structures such as churches. Preschools are located in residential neighborhoods. To take one example, NCRC, the National Children's Research Center, one of the premier preschools located in Cleveland Park, has

operated since 1928 out of a house in a residential neighborhood, and it's much larger than Barbara's.

Key School, Horace Mann School, Field School. All schools nearby, they are much bigger and they are all located in residential neighborhoods.

Here the BZA decided almost 20 years ago that the use of this property as a preschool was appropriate. Every government or recognized body that has reviewed this case agrees that the school should continued, including ANC-3D and the D.C. Office of Planning.

Traffic is really the only relevant condition that's been raised by the opponents. There have been no complaints about noise, unsafe conditions or anything else. Let me briefly discuss the regulations as they relate to traffic then.

The regulations say the center shall be located and designed to create no objectionable traffic conditions for picking up and dropping of off children. Point one is that the regulations contemplate and picking up and dropping off of children as a normal function of a permitted schools. Cars will stop, kids will be let off. Some cars may line up. That necessarily is going to happen. The question is not whether the school should have drop

1 off and pick up, but whether there's something unusual
2 about this school that creates objectionable
3 conditions.
4 Barbara Allan, the owner of the preschool
5 and Marty Wells, a traffic expert, will make clear
6 hers is a small scale preschool with an efficient
7 reasonable arrival and dismissal plan.
8 There's a very short time frame during the
9 day, 20 minutes in the morning, 15 minutes in the
10 afternoon, when traffic is even a potential issue.
11 That comes to about one percent of the year.
12 Traffic and parking conditions simply
13 aren't objectionable; that's what every reputable
14 authority and expert has concluded. An in depth study
15 by Marty Wells, a respected traffic expert, says so
16 and he will testify here today.
17 Lieutenant Patrick Burke, whose the
18 District of Columbia coordinator says that traffic on
19 Hurst Terrace is a non-issue.
20 The D.C. Office of Planning, who I believe
21 will be testifying today, supports the school and
22 notes all the measures the school has put in place to
23 address traffic concerns.
24 So the Board will have to ask itself are
25 the neighbors raising any legitimate complaints? With

no objectionable traffic conditions how can you grant anything less than the ten year permit you did last time?

Which brings to the issue I think matters the most for us in this case, which is the duration of the special exception. As mentioned, the school's special exception was for ten years. What has changed regarding the use of this school that would justify a shorter term? Absolutely nothing.

The school size has remained constant over the last 23 years; 23 students a day. And has only increased by 3 students since the original exception was granted in 1984. The school is not seeking any increased enrollment, we are not seeking any longer operating hours. It's in session for 3 hours a morning, September through May. The school is not proposing any new structures or uses.

There are many good reasons why the special exceptions should be ten years or longer. First, anything less than a ten year exception will close the school down. Barbara has mentioned at some point she hopes to retire. As her husband will testify, running the school is expensive. No rational person will take on the expense of purchasing the home and business and the demanding job of educating young

children if he or she has no assurance the school will continue to exist in a few years.

Second, Barbara's school should be treated like others that are in residential neighborhoods. The Community Preschool of the Palisades, for example, which is a comparable preschool in the neighborhood, one that Barbara helped get started, recently was granted an indefinite permit at its hearing in 2001. The Field school has been granted an indefinite permit. That's a much bigger operation with much bigger traffic impacts.

There is a good reason for these longer special exceptions, particularly in the case of small preschool without much in the way of resources. Constant BZA battles have not only the school's budget, but the energy and resources devoted to education.

For the BZA there's a general policy issue here. DC needs more good preschools, not fewer. A short term permit would act as a deterrent to educators if operators know a few neighbors can force them to go through a perpetual expensive process, they're not going to open many new schools. And in Barbara's case, we might even lose a good one.

Finally, a long term permit will help

bring peace and stability to the neighborhood. This renewal process has been contentious. A short term permit is only going to exacerbate tensions in the neighborhood giving everyone a reason to continue fighting.

Educators should spend their time educating children, not on renewal campaigns.

The term of the special exception can't rest on who owns the property. The Advisory Neighborhood Commission and the neighbors are asking you for a condition that the special exception only be granted to Barbara Allan personally --

CHAIRPERSON GRIFFIS: I'm going to interrupt you right there, and we can put that to rest. The BZA cannot, does not have the jurisdiction to tie a land use issue to a specific person. In fact, I think I can unequivocal state that in past the BZA has made a mistake. And we're pretty sure this is the first and only one, however we're admitting it.

MS. GRIFFEN: Thank you.

CHAIRPERSON GRIFFIS: So we don't need to talk about that, and I'm not going to actually hear any testimony on that issue.

MS. GRIFFEN: Great. So nothing relevant to the use of the school has changed that would

warrant granting a shorter term permit than the one that was last granted for ten years. So what has changed this time?

Well, one thing that's changed is that there's opposition, whereas there hadn't been at the last three special exception hearings. But the mere existence of opposition without a legitimate foundation shouldn't effect the term of the permit.

The D.C. Court of Appeals noted in the Glenbrook Road case that the school is required to "determine whether a reasonable accommodation has been made between the school and the neighbors which doesn't interfere with the legitimate interests of the latter." In other words, this is an objective standard. The neighbors must have legitimate interests at stake here. Given the testimony and findings that there's no objectionable traffic condition on Hurst Terrace, they don't.

Another thing that's changed is that some of the opponents no longer have a need for Barbara's school. Some of the people you'll hear from today sent their own children to her school. Now that they no longer have a need for a preschool in their backyard, they don't want it around anymore. They suggest moving it to a commercial area, while at the same time they

talk about it was so great to have a preschool they could walk their own children to.

The whim of neighbors, thumbs up or thumbs down on the school depending on whether they still have a need for it, isn't a legitimate interest the BZA should take into account.

Finally, you'll hear some of the neighbors talk about general conditions in their neighborhood changing. You'll hear complaints about increased density and construction in the neighborhood, the additional of some new commercial establishments a few blocks away, increased enrolled in Key Elementary School nearby, the general trend in society toward people driving larger cars.

ANC was also concerned about other sources of traffic in the neighborhood and the possibility that at some time in the future traffic may worsen. And that's why ANC recommended a five year term so they could address future traffic concerns.

But it's our position that the opponents and the ANC have made no findings that any of these extraneous traffic issues relate to Barbara's school in particular. The Key School operates at different times than Barbara's school. The people may park so they dine at a restaurant nearby or cut through Hurst

Terrace in the evening to avoid afternoon rush hour backups. That has nothing to do with her school.

While more traffic may be unwelcome to many neighbors, that's not relevant in determining whether the school itself generates objectionable traffic conditions.

Since the school has capped its daily enrollment and traffic mitigation measures are in place and effective, it is not the school that will generate future problems. In any event, as a general policy matters, the BZA should not place the burden of solving the District's increased population in traffic on schools. Traffic, as Lieutenant Burke testified at the ANC hearing, continues to increase everywhere in the District. That increase in traffic shouldn't be an argument for closing its schools.

The last point about the term of permit. The logical way to solve concerns about traffic is not to shorten the duration of the special exception, it's to deal with it through enforcement and the BZA's power to review exceptions.

First, the BZA should ensure that any conditions imposed on the school are enforced. As the Board knows, there's a new zoning compliance officer, Troy Bellow, whose just been hired for this purpose.

Second, if there are changed conditions, the BZA can always revisit its order.

Both of these mechanisms were adopted by the Board in the Georgetown University Campus Plan when it created a ten year permit. These are the remedies and not a perpetual relicensing process that are the appropriate way to prevent any perceived abuses or worries about changed neighborhood conditions.

In conclusion, the only appropriate term to consider is the same ten year term that was issued the last time or longer. The applicant has 18 years experience running a successful preschool program. She has absolutely no zoning violations, no health code violations, no traffic citations.

The school has complied with the terms of all of its previous BZA orders and has really gone the extra mile to address neighbors' concerns.

The BZA shouldn't place undue burdens on small schools who don't have the time and resources to respond to short term renewals.

Thank you for your time and consideration. I will now turn it over to Barbara Allan, the current head of school. She will discuss the history of the school and her many attempts to meet the legitimate

concerns of her neighbors. And then you'll hear from Marty Wells, a traffic expert, and he will present his findings relating to traffic on Hurst Terrace.

CHAIRPERSON GRIFFIS: Good morning.

MS. ALLAN: Hello. My name is Barbara Allan. I live at 2828 Hurst Terrace, where I own and operate Barbara's Montessori School. I've lived there for 32 years.

CHAIRPERSON GRIFFIS: Take your time. That's fine.

MS. ALLAN: I've raised 4 wonderful children at my residence. I am pleased to be here, but frankly it's a little hard.

I'm an educator and most comfortable in my classroom, and I'd much rather be back there right now with my little ones. It is hard for me to be contentious in a contentious setting with my neighbors. I wasn't really prepared for this. I've had no opposition the last 3 times I've come before the Board for a special exception. And the last people I expected to oppose were some of the parents of the children I have taught.

Educating young children has been my passion in life. I began operating this preschool out of my home in 1977 as a play group preschool. And then

first applied and received a special exception for my child development center in 1984. During that time I've educated hundreds of children, mostly from the Palisades community. This is truly a community preschool. I've educated over ten families on my block alone, and the vast number of children who have attended have lived within 2 miles of my preschool. I always give preference to neighborhood children first.

I have been tremendously gratified by all the letters of support from the community, and hopefully you all have read some of them.

CHAIRPERSON GRIFFIS: All of them.

MS. ALLAN: This renewal process has been very difficult and stress has taken up a lot of time and energy. And I feel very strongly about leaving a legacy to the community. I plan to continue to teach for quite a while, but then hopefully we'll retire and let someone else run my school in the same manner in which I have been doing.

I don't need to tell you about the overwhelming demand for preschools in the city. Each year I receive many more applicants than applications I can possibly accommodate. Parents contact me more than a year in advance to apply for a spot and demand on my school as a critical first step in their

children's education.

The young children that come out of my program to go to the best public and private schools in the city. In fact, many school principals contact me to request that I send kids, children from my program to their school because they know they'll be so well adjusted.

I believe that the success and appeal of my school is due in large because of its small size and location. Parents and caregivers can walk or drive a short distance from the child's home to drop off their little children. The warm, cozy atmosphere of my home provides an ideal atmosphere for 2 to 4 year olds away from home for the first time.

We have built a big addition to our house as a school room and a very big back yard that serves as a playground.

During the first week or two and after some adjustments, at no time are there more than 23 children attending on a given day. A higher number than that are enrolled because nursery school students are not full time. Some children come one day, some come 2 days, some come 3 days, some come 4 days, some come 5 days a week. So that there are never more than 23 children on the premises on a given day.

The number of cars dropping off and picking up is less than 23, because some walk, carpool, have siblings or absent for various reasons.

My school has been in compliance with all conditions in previous BZA orders and my yearly licensing. No zoning violations or traffic citations have ever been issued in connection with my school.

The only concerns have been raised recently by neighbors on the street that have to do with traffic. I took those concerns very seriously and have tried to address them, so let me tell you what I've tried to do.

First, I've talked informally with the majority of my neighbors over the past couple of years and learned about their concerns relating to traffic.

We also met on August 20th at the Palisades Public Library with our ANC Commissioner Eleanor Lewis acting as a facilitator. While I've asked for their impute on how to solve traffic issues and circulate to them my proposed arrival and dismissal plan, they've only been interested in shutting the school down or moving its location.

So I've adopted measures on my own. I met with Lieutenant Pat Burke, whose the District of Columbia traffic coordinator several times over the

past 2 years to seek his input and have implemented his suggestions, including placing no parking cones in front of my curb to allow cars to pull over in front of my property and circulating the arrival and dismissal plan.

As the record indicates, Lieutenant Burke believes that traffic on Hurst Terrace is a non-issue. I have hired at my own expense Marty Wells, who you'll hear from soon.

I have met with the principal at Key Elementary School, which is across the street, because renovations to that school have impacted traffic on Hurst Terrace. I know that a number of my neighbors' concerns relating to traffic have to do with construction at Key School over the past two years. Although none of my neighbors have attended Key School's open house to discuss these concerns, I have always attended those meetings to make sure that the two schools don't create any cumulative traffic impacts.

For example, I make sure that my arrival and dismissal doesn't coincide with Key School arrival and dismissal. Key School has adopted my arrival and dismissal plan -- sorry -- as a model of their own. The principal of Key School and I have agreed to host

quarterly meetings with the neighbors to address any future concerns. I've really gone out of my way to accommodate my neighbors and respect their concerns.

Some of my neighbors have also complaints unrelated to my school, such as increased density in the neighborhood, construction at Key School, increase the commercial establishments on MacArthur Boulevard and the fact that people may be driving larger cars than they did several years ago. I cannot address those larger issues beyond the measures I have already taken related to my school.

With input from all these various groups I've adopted an arrival and dismissal plan which I submitted to the record. Let me review the key features.

Drop off is limited to 20 minutes in the morning and pick up to 15 minutes around lunchtime. Drivers can remain in their cars and my aides shuttle the children in and out of the cars during this time.

In the beginning of the school year, though, parents do park some on the street and walk their little ones in, because this is the very first time their children have ever been to school. But normally after the first couple of weeks everybody always follows the arrival and dismissal plan. But

this rarely happens; the process of getting a child in and out of the car takes about 20 seconds. I believe this is not only the most efficient arrival and dismissal plan, but also the plan.

Drop off and pick up procedures have been sent to all parents. I am happy to make them part of this BZA order.

In terms of enforcement, two infractions will result in expulsion of the child from school.

I have adopted many of these measures voluntarily and believe I have done everything possible to accommodate my neighbors' concerns.

I have run a successful preschool program for over 18 years and hope that you will consider an indefinite or a minimum of a ten year special exception. I do not want to go through this process again in a few years. It has been very stressful and it's distracting me from my educational duties.

I am in constant contact with the other preschool operators in the District, and they are watching me to find out how this process turns out. If my small school, that is not asking for any changes, has an impeccable record and is given than a shorter term than the last one granted for 10 years, I believe this will be a huge deterrent to other schools.

Who will want to open a new school if they have to se how much time and energy and financial resources are consumed by the renewal process. I hope the BZA recognizes that the important function this preschool provides the community ensures that it will be around for many years to come.

As one of my past parents and a resident of Palisades wrote to you all, surely our zoning laws are not meant to exclude, to carve away our most valuable community assets.

Thank you.

CHAIRPERSON GRIFFIS: Thank you very much, Ms. Allan.

Let me make a couple of quick things, and we will have Board questions after everyone goes through.

Ms. Allen, I appreciate you being here and giving your testimony. And I want to be clear, I don't think what is before us is not making any judgments on the facility itself and the functioning of that.

MS. ALLAN: I know. I know.

CHAIRPERSON GRIFFIS: And I know we have quite a bit of information. Nor do I think anyone actually would disagree with you on that fact. But clearly we are tied to Section 205, and there are

certain regulations that we'll go through. I'm sure you're aware of that. But I wanted to say that.

Also in terms of comparison of other projects, we look at each individual application for itself and it must stand on its own merits. And I will say no more at that point, so you can turn to your last witness.

MR. WELLS: Good morning. My name is Marty Wells. I'm President of Wells & Associates, traffic consultant. And I was retained by Barbara's Montessori School to conduct a traffic study.

MS. GRIFFEN: Just one interruption, if I might.

We would like to offer him as an expert witness.

CHAIRPERSON GRIFFIS: Was there a résumé submitted for Mr. Wells?

MR. WELLS: I don't know that there was, but I happen to have a copy.

CHAIRPERSON GRIFFIS: I figured you might. If you wouldn't mind passing that up to staff at this point. I know we're familiar with Mr. Wells. We have had him as an expert witness in previous cases. I would like to review the résumé as it comes down, and I will take questions from the Board.

MS. GRIFFEN: He's been certified as an expert before in front of this Board.

CHAIRPERSON GRIFFIS: Indeed. We like to give people a hard time whenever we can, so at this moment a pause until we get this.

And, Mr. Rich, I'm going to also ask you to make any objections as accepting Mr. Wells as an expert witness. You've just been delivered his résumé, am I correct?

MR. RICH: Yes.

CHAIRPERSON GRIFFIS: We'll give you a minute to review it.

Board Members, comments, objections? Oh well, that's one objection.

MR. ETHERLY: Mr. Chairman, having reviewed Mr. Wells' résumé, I don't have any objection. It might be useful, however, to note that Mr. Wells has had extensive experience in terms of dealing with schools. I might be inclined to ask, Mr. Wells, if you had occasion to deal with a school or a facility of this particular size?

MR. WELLS: Typically, traffic issues are more acute or more associated with larger facilities. We've done some preschool studies in suburban area. This is the first at this small size, and I would

emphasize this is the smallest case. We have had experience in this area.

MR. ETHERLY: Okay.

MR. WELLS: And in this ward for this size school, but I have in different suburban areas.

MR. ETHERLY: Okay. And with regard to those -- the prior experience in other suburban areas, can you recollect whether those were in residentially situated types of context?

MR. WELLS: They're in residential neighborhoods, if you will, not of this type, though.

MR. ETHERLY: Okay.

MR. WELLS: And that's just the very nature of the suburban area versus the urban area we're in.

MR. ETHERLY: Okay. Thank you.

Thank you, Mr. Chair. I would have no objection.

CHAIRPERSON GRIFFIS: Thank you, Mr. Etherly.

MR. RICH: I may have one question.

CHAIRPERSON GRIFFIS: Yes, Mr. Rich. Why don't you come forward.

MR. RICH: Should I turn this on?

CHAIRPERSON GRIFFIS: Absolutely. Have a

seat.

MR. RICH: All right. My question is have you ever done planning for a preschool that is operated out of a residential home?

MR. WELLS: I cannot recollect a case.

CHAIRPERSON GRIFFIS: Thank you, Mr. Rich.

Mr. Wells, would you think that the analysis would be different with the two issues that have come up: One a small size and now one in the residential home. Is your traffic analysis impact, your science different, are there different skills and levels of expertise that would allow you to analyze of that nature or something of a different but comparable use?

MR. WELLS: Absolutely the same techniques apply.

CHAIRPERSON GRIFFIS: Okay. So you feel that you clearly have the capacity to do the assessment on this particular case?

MR. WELLS: Absolutely. Yes.

CHAIRPERSON GRIFFIS: Okay. Any other objection? Mr. Rich, did I take that as an objection or just a question?

MR. RICH: Yes, I think I would object because of the lack of --

CHAIRPERSON GRIFFIS: You're going to have to speak into the microphone.

MR. RICH: Because of the lack of experience.

CHAIRPERSON GRIFFIS: Let me just one thing very clear for everyone. We can hear you fine. You're not on the record if you're not talking into a microphone.

MR. RICH: I understand. Okay. My objection is, as he testified, he has not done a plan for a residential home and I think that he lacks the expertise for drawing a traffic plan for a residential home.

CHAIRPERSON GRIFFIS: Okay. Board Members?

MS. MITTEN: Well, I guess just to -- I don't find Mr. Rich's objection to be compelling because traffic, there's nothing particularly unique about traffic originating from parents dropping off children for a 23 student child development center compared to, you know, a larger facility that has, you know, just similar kinds of issues. So I think that Mr. Wells is more than qualified to testify as an expert in this case.

CHAIRPERSON GRIFFIS: Well said, Ms.

Mitten.

Others?

MR. ZAIDAIN: Mr. Chair?

CHAIRPERSON GRIFFIS: Yes, Mr. Zaidain?

MR. ZAIDAIN: I would agree. I think as Mr. Wells said the science is very much the same in terms of doing the studies. And given his professional certification in the District of Columbia and experience I would accept him as an expert witness.

And I appreciate Mr. Rich's objection, but he'll have the opportunity to cross examine him so if he sees any flaws in his study, he can point them out.

CHAIRPERSON GRIFFIS: Excellent point.

Ms. Renshaw?

VICE CHAIRPERSON RENSHAW: I really have no objections. I always think we should error on the side of more information, not less information. And it's up to us to decide in the end whether or not we are going to take Mr. Rich's -- not Mr. Rich's, Mr. Wells' comments in great weight, as we say in the ANC trade, or whether we will give him lessor weight. But we do appreciate his coming.

I'm going to look for in his testimony references to any meetings or interaction via telephone or fax with Lieutenant Burke. Because

Lieutenant Burke, of course, has given some input. We don't seem to have it in our records, but it has referenced thus far.

CHAIRPERSON GRIFFIS: Good. Thank you, Ms. Renshaw.

And absolutely I think it's important to error on the side of more information, but concise in its quantity.

So, with that said, I can take that as a consensus of the Board that we'll accept Mr. Wells as an expert witness. Not seeing any objection to that, we can move on and welcome you this morning, Mr. Wells.

MR. WELLS: Thank you, Mr. Chairman.

I do have a report that I would like to distribute to the Board. And as that is being distributed, let me say that as part of my work I did interview Barbara Allan, who as you know, is the owner and operator of the school. I did review the school's statement to this Board, the ANC report, Francis Scott Key Elementary correspondence, the opposition's correspondence. I did conduct a field reconnaissance of the area on 3 occasions. I looked at the subject site, Hurst Terrace, the site vicinity and general traffic operating conditions.

I did interview by telephone Lieutenant Patrick Burke, who is the District of Columbia traffic coordinator.

I review the 2002/2003 roster of students. I conducted detailed counts of traffic on Hurst Terrace and the number of pedestrians and vehicles generated by the school on Wednesday, September 18th. That's last week. Bear in mind the school has been in session since September 9th, so this was one of the earliest occasions when I could actually take those counts.

And I did review traffic engineering standards as they pertain to local street designs.

And in an effort to be concise, let me give you my conclusions.

Hurst Terrace carries moderate traffic volumes. I measured a 107 vehicles in a 1 hour period between 8:00 and 9:30 in the morning and 85 vehicles in a 2 hour period centered around noon.

CHAIRPERSON GRIFFIS: Mr. Wells, as a traffic when you say moderate, that's actually a classification of your analysis, not necessarily the opinion that your firm puts on it, is that correct?

MR. WELLS: There's not traffic industry standard for light, moderate or heavy.

CHAIRPERSON GRIFFIS: I see.

MR. WELLS: I would say I would characterize 107 and 85 as not light, but certainly not heavy, not congested. I would characterize it as a moderate volume of traffic, well within the capacity of the street.

CHAIRPERSON GRIFFIS: What would be a comparison of a heavy, an example rather of a heavy?

MR. WELLS: 200, 300 would be a lot.

CHAIRPERSON GRIFFIS: Give me a street.

MR. WELLS: How about Whitehaven Parkway is heavily used. How about Foxhall Road is very heavily used.

CHAIRPERSON GRIFFIS: Okay. Foxhall, I would understand. Okay.

MR. WELLS: MacArthur Boulevard is heavily used.

CHAIRPERSON GRIFFIS: Okay.

MR. WELLS: Garfield is not heavily used, or Fulton Street.

CHAIRPERSON GRIFFIS: Good. Thank you.

MR. WELLS: To put those numbers in perspective, the school generates light traffic volumes. Light I would characterize as the 18 cars I observed in the morning and the 21 cars I observed

around noon.

The school traffic constitutes about 17 percent of all traffic on Hurst Terrace in an hour and a half period, and about 25 percent in the 2 hour period around noon.

These traffic volumes tend to be concentrated in relatively short periods of time. In the morning most of the traffic generated by the school focused on an eight minute period around 9:00. It's actually spread over a 49 minute period, but it was concentrated in an 8 minute period.

And around noon it was spread over a 25 minute period.

Cars driven by parents or guardians dropping off or picking up students stood in front of the school or they parked legally nearby.

By the way, all of the traffic that I observed generated by this school was in the southbound direction on Hurst Terrace. That is to say, the school side of the street, not the opposite side of the street.

I did not observe any of the school related traffic blocking a neighbor's driveway. I did not notice that traffic impeding through traffic on Hurst Terrace.

In my opinion, and in the opinion of Lieutenant Patrick Burke, the school traffic operates safely and efficiently.

Hurst Terrace is 30 feet wide. That is a dimension that can safely and efficiently accommodate the school traffic as well as curb parking on both sides of the street, and two way traffic on the street in what we traffic engineers call a yield flow operation. If two cars confront one another, they can very cautiously pass one another but more typically one of the cars will pull over in the parking area to allow the other to pass. And less than half of the parking capacity on the street is actually used.

The school has published an arrival and dismissal plan for controlling traffic. It's a good plan. I would recommend that parents be reminded on the spot if they violate any provisions of the plan and that Barbara should send them periodic reminders of the provisions of the plan, especially at pick up times and the requirement to drive around the block if three or more cars are standing in front of the school.

I would also emphasize or recommend these further features. That families within the immediate vicinity of the school be encouraged to walk to the

school. In fact, four students in the day I observed in detail, four students walked in the morning, one in the afternoon or one around noon.

I would recommend that the roster be submitted to all of the parents and that the parents be encouraged to voluntarily carpool. There are about 3 carpools now that I observed.

Parents and guardians I would suggest should park only on the west or on the school side of the street, not on the east or opposite side of the street.

I would remind parents and guardians to pull over as close as possible to the curb when dropping off or picking up students.

I would encourage walkers to use the sidewalk on the east side of the street. There is no sidewalk on the west side of the street. And to exercise caution when crossing the street.

I would ask Barbara to ensure that there is always someone available to assist students into and out of their cars during both the morning drop off and noontime pick up periods.

I also would suggest that Barbara evaluate the feasibility of staggered or appointed arrival and dismissal times, as suggested by the ANC.

I do not recommend, as I have in other cases, but I do not recommend in this case hiring an off duty police officer to control traffic during the morning drop off or the midday pick up.

Finally, I would note that my findings are consistent with the DDOT, or the District Department of Transportation's findings. They find in their staff report that "the proposed continuation of the subject's site as a child development center will not have negative impact on parking supply in the immediately community or create dangerous or objectionable traffic conditions.

That concludes my prepared remarks.

CHAIRPERSON GRIFFIS: Thank you very much, Mr. Wells.

A quick question, why wouldn't you recommend an off duty officer?

MR. WELLS: I simply think it's not needed.

CHAIRPERSON GRIFFIS: Okay. Thank you.

Also, Mr. Finney, have you been delivered all the information that was distributed today and you're representing the ANC in this case, is that correct?

MR. FINNEY: I've not received this

report. I'm very interested.

CHAIRPERSON GRIFFIS: Indeed. And I'm interested in you getting it, so let's get another copy. And there was also one other -- oh, I guess it was Mr. Wells' résumé. So let's get the report there. And you can brief that.

I'm going to have in cross examination, Mr. Finney, I'll have Mr. Rich start and then you can ask questions to give you a little additional time and review that.

Ms. Griffen? That's okay. Is that it?

MS. GRIFFEN: That's it.

CHAIRPERSON GRIFFIS: Fabulous.

Board, questions?

MR. ETHERLY: Mr. Chair, if I may?

CHAIRPERSON GRIFFIS: Yes.

MR. ETHERLY: This would be questions to any member of the panel.

CHAIRPERSON GRIFFIS: And just to be clear, actually Mr. Etherly brings up an excellent point. We will then go to cross examination. I will start with Mr. Rich, who will go to cross examination of the entire case in chief so that all the panel will stay at the table for cross examination. Mr. Finney, you can then follow if you have any cross examination

questions. And then the Board, we get the right to ask anytime we want, so we'll follow up.

Mr. Etherly?

MR. ETHERLY: Thank you very much, Mr. Chair.

Just a very quick question of Mr. Wells. In terms of the conduct of your study, are you in any position to characterize the vehicular traffic that you observed traveling on Hurst Terrace? And, of course, we're only talking about the day that you were there, the 18th, but in particular there's quite a bit of time spent in the opponent's briefing materials regarding the nature of the traffic being large, oversized SUV vehicles. I'm taking a look at table 2 from your report which offers a very nice breakdown of the traffic both southbound and northbound; cars, schools, buses, trucks, etcetera. It looks to be the case that a majority of the traffic clearly during the morning peak period is constituted primarily of cars.

Are you in any position to say whether or not those were SUVs or large vehicles, or --

MR. WELLS: I would say the composition of the traffic is pretty much what the composition of the fleet of private cars owned in this country is. Yes, there are SUVs.

MR. ETHERLY: Okay.

MR. WELLS: People own SUVs in the neighborhood. People who attend this are parents who send children to this school, they too own SUVs. They also own compact cars, small cars.

As far as the traffic on the street, Hurst Terrace in general is concerned, we did see mostly cars. But I also saw a Federal Express delivery truck.

MR. ETHERLY: Okay.

MR. WELLS: I also saw school buses. I saw a garbage truck. I saw a contractor's pickup trucks. I saw vans. I saw baby carriages. I saw people walking on the street. There's a lot of life and activity on that street of a varied nature. So it's not all cars, there are the occasionally larger vehicle, and I did observe that.

MR. ETHERLY: Okay.

MR. WELLS: And I was there not just one day, but on three occasions.

MR. ETHERLY: Okay. And with respect to those observations, are you in any position to comment on whether or not there are going to be any special concerns or considerations that might be raised by any particular type of vehicle that may be picking up or dropping off a child at the center?

MR. WELLS: I think Hurst Terrace is wide enough to accommodate the functions that it's being asked to accommodate now. It's 30 feet curb to curb. If one looks to a standard, if one asks the general question how wide does a local residential street need to be to accommodate two way traffic and parking on both sides. If you consult the ASHTO standards, the American Association of State Highway and Transportation Officials guidelines, they suggest 26 feet is wide enough to accommodate that.

CHAIRPERSON GRIFFIS: Parking on both sides and two way traffic?

MR. WELLS: Yes, in a yield flow point of view.

The trade off here clearly wider width would be required to accommodate two full lanes of on street parking and two 11 or 12 foot travel lanes. That is an inappropriate design for a local street, it's simply too wide. It encourages traffic volume, it encourages traffic speeds. The Institute of Transportation Engineers suggests to us that accidents rise expedientially with that kind of streetway. So--

CHAIRPERSON GRIFFIS: Let's get to the heart of what Mr. Etherly's question actually goes to. You have the observation of a time at drop off, is

that correct?

MR. WELLS: Yes. I observed both the morning drop off and the afternoon pick up.

CHAIRPERSON GRIFFIS: Did you observe the opportunity where cars actually had to circle the block?

MR. WELLS: I observed short periods of time when more than one -- more than three cars were parked in front of the school. Some of those --

CHAIRPERSON GRIFFIS: Okay. At that point if an emergency vehicle was coming down, could they pass down the street?

MR. WELLS: Well, I asked Lieutenant Patrick Burke his opinion on that, and he says yes they can pass on that street. They would have access to the local dwellings and it poses no safety hazards.

CHAIRPERSON GRIFFIS: Okay. Okay.

MR. WELLS: And I agree with that.

MR. ETHERLY: And to follow up on the Chairman's question with respect to the issue of queuing, you note on page 13 that you didn't observe any vehicles either blocking or seriously impeding traffic on the street. I just want to be sure that we're clear about that.

It's your testimony that you didn't

observe any vehicles, say for example, queuing or double parked in front of the subject property and thus causing other vehicles to have to perhaps swerve into the opposing lane of traffic to get past?

MR. WELLS: That's correct. I did not see that. What -- I did not see any school vehicle double parked. That is to say, stopped adjacent to a parked car and take up part of the travel way that is designated for through traffic.

I did see vehicles stopped or parked for short periods of time in front of the school at 2828 Hurst Terrace. And I did see for short periods of time people parked down the block in a legal parking space not in the street.

MR. ETHERLY: Okay.

MR. WELLS: Not in the travel way of the street.

MR. ETHERLY: Okay. Thank you, Mr. Wells.

Thank you, Mr. Chair.

CHAIRPERSON GRIFFIS: And you also concur with the fact that the drop offs timing was taking 20 minutes to drop off, 15 minutes to do pick up?

MR. WELLS: Well, I'm very specific about what I saw, if you refer to table 3 in my report.

CHAIRPERSON GRIFFIS: Yes.

MR. WELLS: I show the specific time each car or each party -- I refer to them as parties because some of them walked, others stopped and dropped off children, others parked for a short period of time.

So you can see in the morning, and this was consistent with what I observed in 3 days. The first drop off occurred at 8:23, the last at 9:12. Bear in mind that school starts at 9:00. So you can see the distribution. If my math is right, that's about a 49 minutes period, most of it concentrated in an 8 minute period right around 9:00. And you can see in the afternoon the first car arrived at 11:43 and the last at 12:08. I can't be anymore detailed than that.

CHAIRPERSON GRIFFIS: Yes, that's true. And you're certain that all of the numbers actually were going into the day care, is that correct?

MR. WELLS: We observed --

CHAIRPERSON GRIFFIS: That where you observed them actually going in.

MR. WELLS: Yes. It's not a long block. And one can observe --

CHAIRPERSON GRIFFIS: Right.

MR. WELLS: -- by standing in front of the

school how people get into the school.

CHAIRPERSON GRIFFIS: Okay.

MR. WELLS: They stop in front of the school for the staff to either take the children or they walk them in up the driveway into the back of the home where the school facility is located.

CHAIRPERSON GRIFFIS: Excellent.

Ms. Allan, can you just for our understanding, the Board, give us an understanding of how you arrived at the number of children, 23 children? You indicated today in your oral testimony that you have 23 -- no more than 23 children on the premises.

MS. ALLAN: Yes. Some children come one day a week.

CHAIRPERSON GRIFFIS: Right.

MS. ALLAN: Some come 2 days a week and some 3 days a week, some come 4 and some comes 5.

CHAIRPERSON GRIFFIS: Okay. So for clarity, that's not total enrollment, but that's total--

MS. ALLAN: No, my total enrollment is -- that's the daily enrollment.

CHAIRPERSON GRIFFIS: Right.

MS. ALLAN: Yes, sir. And during the

first two weeks I -- a few children came wrong days, so that's --

CHAIRPERSON GRIFFIS: No, I think we understand that. What we're going to try to do to find what we're looking at in terms of numbers. What is your total enrollment?

MS. ALLAN: I think it's 47.

CHAIRPERSON GRIFFIS: Okay. And number of employees? You've indicated three.

MS. ALLAN: Three every day, not including myself.

CHAIRPERSON GRIFFIS: And that is total employees? So, you may in fact have two on site or one on site?

MS. ALLAN: I have some children -- one employee worked one -- several work just one day a week. I have one in the neighborhood who walks over one day a week.

I have two that have been with me for many, many years. One that works 5 days a week.

CHAIRPERSON GRIFFIS: Right.

MS. ALLAN: And one that works four. And then I have some other ones that fill in.

CHAIRPERSON GRIFFIS: So how many total employees do you have?

MS. ALLAN: You mean every day?

CHAIRPERSON GRIFFIS: No. I mean total employees?

MS. ALLAN: In total?

CHAIRPERSON GRIFFIS: How many are on your payroll?

MS. ALLAN: On my payroll, I think four.

CHAIRPERSON GRIFFIS: And how many volunteers?

MS. ALLAN: Two.

CHAIRPERSON GRIFFIS: So you have a total employment base volunteer and paid of six?

MS. ALLAN: Uh-huh.

CHAIRPERSON GRIFFIS: Okay. But only 3 come every day.

CHAIRPERSON GRIFFIS: Right. And then 3 are on site with 23 children on site.

MS. ALLAN: Uh-huh.

CHAIRPERSON GRIFFIS: Okay.

MR. ZAIDAIN: Mr. Chairman?

CHAIRPERSON GRIFFIS: Yes.

MR. ZAIDAIN: Kind of took my question away from me. But to take you back on what you were discussing in terms of numbers, there's a report -- and I don't know if we should get into this now, maybe

we should save this for government reports. It says that this facility is licensed for 23 children.

When you apply for a license and they say 23 children are licensed, does that mean 23 on site or are we talking 23 children enrollment?

MS. ALLAN: Twenty-three on site.

MR. ZAIDAIN: On site.

MS. ALLAN: That can occupy the room at one time.

MR. ZAIDAIN: Okay.

CHAIRPERSON GRIFFIS: That would make sense.

MS. ALLAN: Yes.

MR. ZAIDAIN: Okay. I just wanted to clear that up. Thank you.

CHAIRPERSON GRIFFIS: Ms. Renshaw?

VICE CHAIRPERSON RENSHAW: Mr. Chairman, to Mr. Wells. You said that you saw cars parks for a short period of time in front of the school. How many vehicles can fit in front of the school?

MR. WELLS: I have observed as many as three.

VICE CHAIRPERSON RENSHAW: Three. And was there any room to spare?

MR. WELLS: No.

VICE CHAIRPERSON RENSHAW: Okay. So three.

I recall in some of the material that someone advanced four as the number of vehicles that could be parked.

MR. WELLS: Those would be very small cars. I did not observe four.

VICE CHAIRPERSON RENSHAW: You did not observe. Okay. All right. So three is the maximum.

And for Ms. Allan, what amount of square footage is devoted to the school?

MS. ALLAN: I think it's 680 square feet. IT's just the one huge room, 30 by 25 or 30 by 30.

VICE CHAIRPERSON RENSHAW: So all of the children are kept in the rear of the home?

MS. ALLAN: Yes. I built -- when I first applied at BZA, I had to bring my plans in before I built the school. And it's, you know, one big room, all according to code.

MR. ZAIDAIN: Mr. Wells, you said three could fit in front of the school for drop off?

MR. WELLS: Yes. I've observed three, yes.

MR. ZAIDAIN: Okay. Was there any impact to the flow of the street when they were dropping off?

MR. WELLS: As much or as little as a normal car parked at the street, at the curb.

MR. ZAIDAIN: At the curb?

MR. WELLS: Uh-huh.

VICE CHAIRPERSON RENSHAW: Were the vehicles there with their motors turned off or do they tend to hover with the motors on?

MR. WELLS: It's a mixed bag. Some parents stop and they'll turn the motor off or some will stop and leave the motor on. It varies.

VICE CHAIRPERSON RENSHAW: All right. Thank you.

CHAIRPERSON GRIFFIS: Okay. Other questions?

Yes, Mr. Etherly.

MR. ETHERLY: Mr. Chairman, I defer to Ms. Mitten.

CHAIRPERSON GRIFFIS: Indeed.

MS. MITTEN: Thank you, Mr. Etherly.

MR. ETHERLY: You're very welcome.

MS. MITTEN: A few questions for Mr. Wells. How do they control the parking spaces in front of the dwelling?

MR. WELLS: The real answer is you can't control them. They're available to the general public.

Barbara does place two cones, orange, you know the orange rubber cones and maybe they're 18 inches high, not in the street but behind the curb. It's a suggestion. Suggestion that those spaces are for the school. And from time-to-time somebody not associated with the school will be parked there during either the morning drop off or afternoon pick up, but generally they're available to the school. But they're a legal curb parking space.

This is zone 3 residential parking. If you have a zone 3 sticker, you can park there for unlimited amounts of time, otherwise up to 2 hours. But generally what I have observed is they're available to the school.

VICE CHAIRPERSON RENSHAW: Given that they're not under the control of the school, doesn't that make the plan somewhat vulnerable to sort of outside forces?

MR. WELLS: The outside force that I would be concerned about is the District of Columbia government who regulates the use of that curb parking. And since you raised the issue, maybe it's a good idea if they would designate that for no parking except during school days.

BUt the long and short of it is it's a

legal curb parking space that anyone can park in.

VICE CHAIRPERSON RENSHAW: Have you ever applied to have that?

MS. ALLAN: No, I haven't.

VICE CHAIRPERSON RENSHAW: All right.

MS. ALLAN: In the past before Key School started their construction, I never needed to use cones or anything. It just was free. And this year it's been -- I've cut back to just the two cones as a suggestion. A couple of days I didn't put them out just to see, and I'd have a person park just before dismissal, and then it just makes it very awkward. And Lieutenant Burke is the one who I consulted with last year, and he's the one who said well just put the cones out for the three hours. And he said, unfortunately, a lot of people won't read the signs, the no parking signs.

CHAIRPERSON GRIFFIS: We won't get into the sociology of parking.

Other questions?

MS. MITTEN: Yes.

How long ago was it that your neighbors made you aware that they had concerns about the traffic and parking?

MS. ALLAN: When Key School started their

construction two years ago.

MS. MITTEN: So prior to that you hadn't heard any complaints from the neighbors about the parking and the traffic?

MS. ALLAN: No. No.

MS. MITTEN: There's been mention made in some of the letters in opposition about large functions at the school where, apparently, you have a lot of --

MS. ALLAN: I do that three times a year. The first day of school I invite all the parents, so that is 40 to 45 children -- families. And they all come to let all the parents get a chance to meet each other.

And then normally Halloween I do invite the whole school because the parents love seeing everybody dressed up in their costumes.

And then the last day of school I have a parent picnic, so the whole school's invited.

And last year, unfortunately, I did not communicate with Key School and they also had a big function, so it was overwhelming, which from now I will definitely communicate so we will not have the functions going on at the same time.

MS. MITTEN: Have you consulted with Mr.

Wells at all about possible ways to manage the parking on days when you would have these large functions.

MS. ALLAN: No, but I'm happy to do that.

MS. MITTEN: Because I think that's, you know, an area of concern that you could possibly address.

MS. ALLAN: Okay.

MS. MITTEN: One of the things in the submission, it says that the record contains a favorable report from Officer Burke. I don't have anything in writing.

MS. ALLAN: I have given that to ANC. Mr. Finney was given that copy. I was given that at the first ANC meeting on July 19th. And I was given it at the meeting, so I didn't have a chance to make copies and I handed it to the ANC Commissioners at that time.

MS. MITTEN: Okay.

MS. ALLAN: So, unfortunately, I don't have -- Mr. Finney, hopefully, may have brought it with him. They have it in their records.

MS. MITTEN: So they have the written report from Lieutenant Burke?

MS. ALLAN: Yes. Yes.

MS. MITTEN: Okay. And he's not going to be testifying today, is that correct?

MS. ALLAN: No.

MS. MITTEN: Okay. And there's also a comment in your submission about the photographs that were taken by the opposition to sort of convey the situation to us. You said those pictures were taken on A typical days. In what way were those days A typical? This is on page 5 of your submission.

MS. ALLAN: December?

MS. GRIFFEN: December 2001.

MS. ALLAN: Oh, you mean the traffic had backed way up?

MS. MITTEN: From the end of -- at the end--

MS. ALLAN: It was in December, I think the pictures were taken.

MS. MITTEN: Okay.

MS. ALLAN: I was out of town at that time. My mother had passed away. And as soon as it was brought to my attention that this had happened, because neighbors did tell me that this had happened as soon as I got back, I immediately sent out an announcement -- a notice to all parents that this is not acceptable, that this had to be changed. And I did change it. And I don't think it ever happened again after that.

MS. MITTEN: So are you saying there was poor execution of your traffic management plan when you were not present?

MS. ALLAN: Well, it was also we were -- Key School, all of Key School traffic was on Hurst Terrace the last two years. Now it's all shifted back over to Eskridge Terrace. And so it was a combination of everybody was parking was Hurst Terrace, so it was a backup. And it was just me trying to figure out how to work all this out.

MS. MITTEN: All right. And would you anticipate that for yourself or for anyone who would operate this facility would also always be a resident of that dwelling?

MS. ALLAN: Oh, yes. Yes.

MS. MITTEN: All right. Thank you.

MR. ETHERLY: Mr. Chair?

CHAIRPERSON GRIFFIS: Yes.

MR. ETHERLY: If I may, just two very brief questions for Ms. Allan.

On the employee and the employee numbers, I just want to be clear.

MS. ALLAN: Yes.

MR. ETHERLY: Two volunteers?

MS. ALLAN: Uh-huh.

MR. ETHERLY: Okay. Three employees that are there every day?

MS. ALLAN: I have one employee that is with me every day.

MR. ETHERLY: Okay.

MS. ALLAN: I have one that comes four days a week. I have then two that come one day a week.

MR. ETHERLY: Okay. And those numbers, of course, are not counting yourself as well?

MS. ALLAN: No, they're not.

MR. ETHERLY: Okay. Okay. So you would be in addition to that.

The second question, there was a little bit of discussion about the driveway. I don't want to get into too much detail about it, but there is a driveway in the front of the property?

MS. ALLAN: Yes.

MR. ETHERLY: What vehicle typically parks in that driveway?

MS. ALLAN: My car.

MR. ETHERLY: That's your personal vehicle?

MS. ALLAN: Which is a zone 3 parking. I do have, you know, zone 3 parking sticker.

MR. ETHERLY: Yes.

MS. ALLAN: So if you wanted one of my employees to park there, I could easily park it, you know, up the street.

MR. ETHERLY: Okay. Okay.

MS. ALLAN: Completely out of the way.

Ad I do have a garage, too.

MR. ETHERLY: Okay.

MS. GRIFFEN: And one walks.

MS. ALLAN: And one of my employees walks.

MR. ETHERLY: Okay. And in terms of the use of the garage itself, the interior of the garage?

MS. ALLAN: I use it, but my 16 year old will be driving soon, so he'll be using that car.

MR. ETHERLY: Oh, you lucky, lucky, lucky. Okay.

MS. ALLAN: My one boy. We lived through three girls, so hopefully I'll survive the boy.

MR. ETHERLY: Okay. Terrific.

Thank you very much, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you, Mr. Etherly.

Ms. Renshaw?

VICE CHAIRPERSON RENSHAW: Yes. Ms. Allan, do you give advance notice to the community regarding your large scale events, the fact that you're going to

have 40 to 45 families coming in?

MS. ALLAN: I have not. Most everyone, you know, have known my school, but I am more than happy to do that. I mean, most people, they do know when my first day of school is and my last day of school and Halloween. But I certainly can do that.

I always do it the last Friday of May and I always start the Monday after Labor Day. So, that's the way I've been doing it for 18 years.

VICE CHAIRPERSON RENSHAW: Well, I'm just asking whether or not you feel it is your responsibility running a business of a residential area to alert the neighbors in close proximity, those on the street, that you are having this large number of people come to your dwelling.

MS. ALLAN: Well, most of my neighbors came to my school, so they know, you know, what I've always done for all the years. But I'm more happy to--

VICE CHAIRPERSON RENSHAW: Well, we're not getting into the turnover on your block. I'm just wondering right now if you do have such a procedure in place.

MS. ALLAN: No.

VICE CHAIRPERSON RENSHAW: And if not, will you?

MS. ALLAN: Yes.

VICE CHAIRPERSON RENSHAW: All right. Mr. Wells or Ms. Allan, we don't seem to have the traffic management plan that has been referenced. Does --

MR. WELLS: I believe the last page of my report includes it as an appendix.

VICE CHAIRPERSON RENSHAW: Since we just got your report --

MR. WELLS: And my apologies.

VICE CHAIRPERSON RENSHAW: -- we're going to have to take a look at this in quieter times.

MR. WELLS: Yes.

CHAIRPERSON GRIFFIS: Okay. Anything else, Ms. Renshaw?

VICE CHAIRPERSON RENSHAW: Not at the moment.

CHAIRPERSON GRIFFIS: Any other Board members? Good.

Let's move on to cross examination. And, Mr. Rich, we'll start with you. If you want to come forward, please?

MR. RICH: Well, I just have a few questions. First of all, Ms. Allan, is Christine Monergan still on the application?

MS. ALLAN: No, she's not.

MR. RICH: And when was she taken off?

CHAIRPERSON GRIFFIS: Actually, we can move on with that because we're not putting any names on an order.

MR. RICH: Okay. Okay.

CHAIRPERSON GRIFFIS: Any other questions?

MR. RICH: Okay. Yes.

With regards to the parking in your driveway, has an employee ever parked in your driveway?

MS. ALLAN: Yes. Tina Montleon, who works for me everyday. She used to park there on a regular basis.

MR. RICH: And when you say "used to," when was that?

MS. ALLAN: Oh, I would say maybe she stopped about 5 years ago.

MR. RICH: Okay. And since then there has no been employees parking in the driveway?

MS. ALLAN: No, there hasn't.

MR. RICH: And, actually, the driveway is the entrance to the school?

CHAIRPERSON GRIFFIS: Is that a question?r Yes.

CHAIRPERSON GRIFFIS: Okay.

MR. RICH: Is it not?

MS. ALLAN: Yes, it is.

MR. RICH: And so you like to keep that open so the students --

MS. ALLAN: And I park my car there, and there's always plenty of parking.

MR. RICH: But isn't it your practice to move your car out during --

MS. ALLAN: No, it is not.

MR. RICH: When the children arrive?

MS. ALLAN: No, I do not move it out.

MR. RICH: Okay. Mr. Wells --

CHAIRPERSON GRIFFIS: Actually, Mr. Rich, if you don't mind me interrupting, I want to follow up on your question.

MR. RICH: Okay.

CHAIRPERSON GRIFFIS: If a car is parked in your driveway, can students still have access into this facility?

MS. ALLAN: Oh, yes. There's lots of room.

CHAIRPERSON GRIFFIS: Okay. Go ahead, Mr. Rich.

MR. RICH: Well, first, let me ask Ms. Allan, is the plan that you have in effect the plan that was described in the ANC recommendation?

MS. ALLAN: Oh, the arrival and dismissal plan? Yes.

MR. RICH: So that you have no objection to those conditions in the --

MS. ALLAN: No, I don't.

MR. RICH: And you say that that recommendations includes limiting the number of cars to the front of your property?

MS. ALLAN: Yes.

MR. RICH: And testimony is that three cars can line up in front of your property without spilling onto other property?

MS. ALLAN: I think so, uh-huh.

MR. WELLS: Okay. How wide is your property line?

MS. ALLAN: I don't know. I don't know. I think it's 50 feet. I think it's 50 feet.

CHAIRPERSON GRIFFIS: Do we have an estate plan on that? Then we know exactly what it is.

MS. GRIFFEN: It's in the written record.

CHAIRPERSON GRIFFIS: Fifty feet.

MR. RICH: Now, in the past you clearly did not have such limitations, is that true?

MS. ALLAN: Not in the past. No, it hadn't been a -- no.

MR. RICH: So until this plan was put into effect, the lines for the drop off and pick up were considerably longer?

MS. ALLAN: I put it into effect last January.

MR. RICH: But prior to that?

MS. ALLAN: No. There was always an arrival and dismissal plan, but there was not a length the way the cars could line up, no.

MR. RICH: And, in fact, the lines were considerably long?

MS. ALLAN: If they were long, then I immediately tried to take care of it. And I have taken care of it.

MR. RICH: So, Mr. Wells, you hadn't observed the school except when it had the traffic plan in effect?

MR. WELLS: I'd only observed the school in September. And so, yes, that would be correct.

MR. RICH: Did you observe any traffic cones on front of the property?

MR. WELLS: I did observe traffic cones in front of the property behind the curb, not in the street.

MR. RICH: And what was the purpose of the

traffic cones?

MR. WELLS: As I mentioned in response to one of Ms. Mitten's questions, it's a suggestion that that space be reserved for the school.

MR. RICH: Is it your understanding that to put those type of traffic control devices in place, D.C. regulations require approval of the Director of Public Works?

MR. WELLS: It's my opinion that the public streets belong to the District of Columbia. They own and control and maintain those streets, and they're the ones that would regulate the use of curb parking or curb space in general.

MR. RICH: And any traffic control device, like the traffic cones?

MR. WELLS: Again, maybe we're splitting hairs here. But these traffic cones are on Barbara Allan's property, not on the public space.

MR. RICH: Aren't they in the street?

MR. WELLS: They are not in the street.

MR. RICH: Okay. And you're not aware that approval has ever been gotten from the Department of Works for those?

MR. WELLS: I believe those cones were placed at the suggestion of Lieutenant Patrick Burke,

the District of Columbia traffic coordinator.

MR. RICH: How long have the cones been in, Ms. Allan?

MS. ALLAN: I began using them last year.

MR. RICH: Just one year?

MS. ALLAN: Maybe a year and a half at the most. When Key School started having their construction and then there started to become a problem.

MR. RICH: Now, one other question for both of you, it has to do with Key School. It's true, isn't it, that Key School is having no drop offs on Hurst Terrace this year?

MS. ALLAN: That's what I was told when I went to the open house.

MR. RICH: And I assume, Mr. Wells, you had saw no traffic from Key School?

MR. WELLS: Oh, I'm sure there's traffic on Hurst Terrace generated by Key School, but not to the point where it made a big impression.

MR. RICH: Were you aware that the entrance on Hurst Terrace is not being used this year?

MR. WELLS: That's correct. I believe the main entrance to the school is now on Eskridge Terrace, which is on the opposite side of the street.

I did note that there is continuing construction work at the school, and that I did observe contractor vehicles using the new parking lot on the Hurst Terrace side of the school. And I did observe some contractors parking on Hurst Terrace.

MR. RICH: And are you aware that the enrollment at the Key School is going to increase about 50 percent once the construction is done?

MR. WELLS: I made no study of Key School itself.

MR. RICH: Okay. Are you aware that after--

MS. GRIFFEN: I would just object that none of this is relevant.

CHAIRPERSON GRIFFIS: Mr. Rich, what I'm going to ask is if you could concisely put a question together with Key School. You are moving a bit beyond the scope of what we're looking at now.

MR. RICH: All right.

CHAIRPERSON GRIFFIS: I understand what you're trying to do in terms of the impact on the street. But it would be pertinent to get to the heart of the matter.

MR. WELLS: Okay. One basic question is once the construction is done, it's true, is it not,

that the drop off will start again on Hurst Terrace, is it not, for both of them?

MS. ALLAN: Only for pre=K and kindergarten will it resume on Hurst Terrace, which it had been for the last 30 years since I've lived there.

CHAIRPERSON GRIFFIS: So it's resuming back to the condition before the construction?

MS. ALLAN: Yes.

CHAIRPERSON GRIFFIS: Okay. Mr. Wells, did you study any of that impact in the future drop offs and pick ups at the Key School?

MR. WELLS: No, sir.

CHAIRPERSON GRIFFIS: Okay. Mr. Rich?

MR. RICH: That's all I have.

CHAIRPERSON GRIFFIS: Thank you very much.

Mr. Finney?

MR. FINNEY: Thank you, Mr. Chairman.

CHAIRPERSON GRIFFIS: And thank you. I'm going to give you this nice warm seat on the very far side of the table, and the microphone is on waiting for you.

MR. FINNEY: I think I should be very brief. I must emphasize, I come here not in opposition to the school.

CHAIRPERSON GRIFFIS: Indeed.

MR. FINNEY: Mr. Wells, you contributed a great deal with this study and I think Ms. Allan for commissioning it.

What you have given us is a glimpse of the current situation.

MR. WELLS: Yes, it terms of the traffic count, certainly they were done on a single day and my observations have been limited to three days.

MR. FINNEY: Now you're a great student of traffic in the Palisades.

MR. WELLS: I thank you for saying that.

CHAIRPERSON GRIFFIS: Let's keep it to this case, right?

MR. FINNEY: Would you say that over the past ten years traffic has increased in the Palisades?

MR. WELLS: In general, I'd say as a general statement that's probably correct.

MR. FINNEY: One other question, how do you account for this moderate traffic in the morning on Hurst Terrace? Do you think there's some traffic coming over from Arizona?

MR. WELLS: Certainly the traffic on Hurst Terrace, there a dozen or so residents on that immediate block. Certainly they do not account for all of the traffic that is generated on that street, nor

1 does Barbara's Montessori School. So it's their
2 neighbors, Key School and others.
3 CHAIRPERSON GRIFFIS: You can't
4 definitively it comes from Arizona, but clearly it
5 comes from off of the street?
6 MR. WELLS: I mean, you can't get there
7 directly from Arizona, you have to use Garfield. And
8 you have to wind your way through the community.
9 CHAIRPERSON GRIFFIS: Okay. Did you study
10 that? Did you study more traffic beyond that --
11 MR. WELLS: No. Except I would
12 acknowledge that there is more traffic on the street
13 than is generated by the immediate neighbors or the
14 school.
15 CHAIRPERSON GRIFFIS: Okay.
16 MR. FINNEY: I'll reserve the rest of my
17 statement, if I may.
18 CHAIRPERSON GRIFFIS: You absolutely
19 should. This is cross examination. Thank you, Mr.
20 Finney.
21 Okay. Follow up questions of the Board.
22 If not, we're going to go straight to the government
23 reports.
24 VICE CHAIRPERSON RENSHAW: Yes. I would
25 like to go back to Ms. Allan, since we're talking cars

here and you mentioned that you have 23 children each day on your premises. I'd just like to ask you how many of those 23 children are neighborhood versus Maryland versus Virginia?

MS. ALLAN: You have that statistic.

VICE CHAIRPERSON RENSHAW: Is it in Mr. --

MS. ALLAN: I think it's 77 percent.

MR. WELLS: If you look at table 1 you'll see a breakdown of the 42 families or 47 students.

CHAIRPERSON GRIFFIS: Mr. Wells, how did you figure this out? Did you just check the license plates of the cars?

MS. ALLAN: No, from my roster.

CHAIRPERSON GRIFFIS: Okay. So it is from your enrollment roster?

MS. ALLAN: Yes. The addresses. Yes.

MR. WELLS: And I'm a student of these matters.

VICE CHAIRPERSON RENSHAW: So you're referencing page 4 of your report, is that correct? Yes.

MR. WELLS: It would be the page after page 4, table 1 of my report.

VICE CHAIRPERSON RENSHAW: Thank you.

CHAIRPERSON GRIFFIS: Okay. Anything

else?

Very well. Let's move on to Office of Planning, and welcome them this morning.

MR. MOORE: Good morning, Mr. Chairman and other Members of the Board. I'm John Moore at the Office of Planning.

The Office of Planning find this application meet the burden of proof under 205 and we support the application.

CHAIRPERSON GRIFFIS: Good. Mr. Moore, let me interrupt just for a quick second. And forgive me.

Mr. Rich, do you have the Office of Planning report?

MR. RICH: Yes, I do.

CHAIRPERSON GRIFFIS: Good. Mr. Finney? I'll assume he does also.

Thank you very much, Mr. Moore.

And I would just say another excellent report. Love the color photographs. It's very helpful in terms of understanding. I think that everyone has this and the Board has, and always does, read thoroughly. You can highlight the site description and history and move right to the meat of it. But I will leave that up to your discretion.

MR. MOORE: We believe that the meat of our report has already been demonstrated by the applicant. I would like to mention that we did meet with Mr. Rich and other members of the opposition group, and we were sensitive to their concerns.

We believe that over the past 18 years that this applicant has a positive history of trying to cooperate with the community with respect to the impact of traffic and transportation on the block as a result of the school as seen by the opposition.

In the OP report there is also folded in a report from the District Division of Transportation that also support the application.

By the way, Mr. Chairman, I delivered the Chairman of the ANC a personal copy. I took it to his home for him in advance of this hearing.

CHAIRPERSON GRIFFIS: Good.

MR. MOORE: And at that session I did tell him that among the ANC conditions there was one that we disagree on. Their time frame is 5 years and we are recommending that it be for 7 years.

With that, OP will stand on the record.

CHAIRPERSON GRIFFIS: Thank you very much, Mr. Moore.

Board Members, questions of Office of

1 Planning, their report?

2 I would indicate, if I'm not mistaken we

3 were delivered a full -- the actual memo which is

4 Exhibit 92 attendant to this case from DDOT. And have

5 other parties received this? I had thought not. Why

6 don't we make copies available to the parties?

7 Any other questions of Office of Planning?

8 VICE CHAIRPERSON RENSHAW: On page 6 the

9 Office of Planning says that the parents have been

10 notified that at no time more than 4 vehicles line up

11 in front of the center at one time. That is really 3

12 vehicles? That should be amended?

13 MR. MOORE: Well, there is a discrepancy.

14 We read in their material in some cases 4 and in

15 other cases 3. But I think that the answer is 3 as

16 testified this morning.

17 VICE CHAIRPERSON RENSHAW: All right. So

18 3 cars.

19 Would you just give a very brief review of

20 your meeting with Mr. Rich and the opposition?

21 MR. MOORE: Yes. We met with Mr. Rich on

22 about 2 weeks ago. You know the date?

23 VICE CHAIRPERSON RENSHAW: I'm asking the

24 question because I didn't get the sense of that from

25 your report.

MR. MOORE: Okay. If you'll give me a second, I'll find the --

CHAIRPERSON GRIFFIS: Ms. Renshaw, you trying to investigate what was actually talked about?

VICE CHAIRPERSON RENSHAW: Yes, I wanted to fill out the report. In other words, it has been stated here that the Office of Planning did meet with Mr. Rich and the opposition, but as I say, I didn't get the sense of that from reading the Office of Planning's report.

CHAIRPERSON GRIFFIS: All right.

VICE CHAIRPERSON RENSHAW: So I was just asking for a brief statement about it.

CHAIRPERSON GRIFFIS: Okay.

MR. MOORE: Ms. Renshaw, I have in my hand some questions left with us by Mr. Rich and his group. And one was how the property owned and occupied by a person seeking parking status will be effected by their request. What legal interest does the person have on the property on the trustee's tenant. And all sorts of answers in here.

I'd be glad to make some copies available to you if you need some.

VICE CHAIRPERSON RENSHAW: I think that that should be attached to the Office of Planning's

report.

CHAIRPERSON GRIFFIS: It sounds like a party status -- was that something that was given out to other parties?

MR. MOORE: They gave it to us when they met with us.

CHAIRPERSON GRIFFIS: I see. So, Mr. Moore, let's just get to the quick here. You're going to give us the date of when that meeting happened and indicating that you went through the issues of the substantive case that Mr. Rich will put on today, is that correct? You went through the traffic issues?

MR. MOORE: Yes.

CHAIRPERSON GRIFFIS: You went through the--

MR. MOORE: Much of it had to do with the traffic and the impact of traffic and the location of these facilities in the residential areas.

CHAIRPERSON GRIFFIS: Okay.

MR. MOORE: To couch it.

CHAIRPERSON GRIFFIS: Okay. And you heard most of their issues as you understand it, correct?

MR. MOORE: Yes.

CHAIRPERSON GRIFFIS: Okay. Ms. Renshaw?

VICE CHAIRPERSON RENSHAW: Well, just to

ask were those comments factored into your decision on this application as far as the term?

MR. MOORE: The comments were taken into consideration, definitely in terms of the term.

VICE CHAIRPERSON RENSHAW: All right. I would just like to request that a simple statement be drafted by the Office of Planning and attached to its report to fill out your report.

CHAIRPERSON GRIFFIS: Excellent. Mr. Moore, if you wouldn't mind. And all we'd ask is that you make a quick statement to revise your memo that indicates the date at which that might have taken place or did take place.

MR. MOORE: I will be glad to.

CHAIRPERSON GRIFFIS: Thanks very much.

Any other questions of the Board?

Does the applicant have any questions of the Office of Planning? Signifying no.

I'm going to keep the order, Mr. Finney and Mr. Rich, do you have any -- Mr. Finney, please come forward. We'll get you both at the table at the same time.

MR. RICH: I just wanted to follow up on the question about our meeting with you, Mr. Moore. We spent over an hour with you, didn't we?

MR. MOORE: That's correct.

MR. RICH: And we presented you photographs?

MR. MOORE: Quite extensive photographs.

MR. RICH: I have some photographs and I want you to say if those are the ones similar to what we showed you.

MR. MOORE: I would say yes.

MR. RICH: And they indicate significant traffic lines up and down Hurst Terrace, do they not?

MR. MOORE: Those photographs and on those dates, yes.

MR. RICH: And did that concern you?

MR. MOORE: Yes, it did.

MR. RICH: Is that concern stated in the report?

MR. MOORE: That concerned me to the extent that I also made ten visits to the site to observe for myself.

MR. RICH: Since the beginning of school?

MR. MOORE: Since we met with you.

MR. RICH: All right.

MR. MOORE: And what I observed in the field did not support the photographs. I'm not saying that as you said at our meeting that the past has been

some serious problems with respect to traffic. And as I said to you in our meeting, I believe that much of the traffic situation was associated with the reconstruction project at the school down the block, Key School. And especially with three huge bins that's parked in front of the school. I guess construction bins. That sort of bring the traffic into one lane when they get to that point in the block.

CHAIRPERSON GRIFFIS: Okay. So basically the answer is you took into consideration the photographs --

MR. MOORE: Yes, we did.

CHAIRPERSON GRIFFIS: -- and the information?

MR. ZAIDAIN: And did you attend observations during the four hours?

MR. MOORE: Yes, we did.

CHAIRPERSON GRIFFIS: After the meeting with Mr. Rich?

MR. ZAIDAIN: Yes, after the meeting with him.

MR. MOORE: Since the school opened.

CHAIRPERSON GRIFFIS: Okay. Mr. Rich?

MR. WELLS: Now you were aware that there

was no drop off at Key School this year on Hurst Terrace?

MR. MOORE: Yes, I am. I also met with the principal of Key School.

MR. RICH: Okay. Are you aware that there will be drop off next year?

MR. MOORE: I'm aware that Key School currently 14 instructors and administrative staff and 12 support staff, and that the parking lot being built on the grounds will accommodate 26 vehicles, which should alleviate the traffic on Hurst Terrace and in the community in general in front of the school.

MR. RICH: But the parking lot's for teachers?

MR. MOORE: It's for employees of the school.

MR. RICH: Yes. But I'm talking about the drop off of children on Hurst Terrace next year.

MR. MOORE: I'm not aware that there will be any.

MR. WELLS: Okay. If you were aware that that was going to occur, wouldn't you expect that the traffic on Hurst Terrace will increase next year?

MR. MOORE: All of OP's traffic information was based on the DDOT report and

conversation with Ken Laden.

CHAIRPERSON GRIFFIS: Okay. Thank you, Mr. Moore.

Mr. Rich, anything further?

Mr. Finney?

MR. FINNEY: Mr. Moore, first of all, let me compliment you on the diligent way that you pursued this case with on-site inspections and consultations.

I'm troubled by one aspect. Our ANC submitted a report that was received here from the Zoning Office on September 9th. Your report to the Zoning BZA, which is dated I think the 24th, contains no mention of the conditions offered by ANC. How do you explain that?

MR. MOORE: Mr. Finney, as I explained to you on Friday morning, the report, as you said, was forwarded to this office in advance of my picking up a copy. And before I came to visit you on Friday I told you that I stopped and picked up a copy. I further committed to you that the Office of Planning would amend this report this morning in writing to reflect the conditions in your report and those that we agree to.

And as I just mentioned, the only one is the one that has to do with the five year approval and

our difference of seven.

MR. FINNEY: So then all the others you have adopted all the ANC conditions? You have adopted, and so informed the BZA?

MR. MOORE: We are on the record informing the BZA of that today. As I told you yesterday when I talked to you, that it had been advised that we will not amend the report, but we'll put on the record this morning that we support the conditions in the ANC report with the exception of the one.

MR. FINNEY: I appreciate that.

Now let us discuss why you said seven years for the special exception rather than the five that was recommended by ANC.

CHAIRPERSON GRIFFIS: Limited discussion, Mr. Moore.

MR. MOORE: As mentioned, we met with Mr. Rich and we are sensitive to the current concerns raised by the community. And at that time, as you know, there was another person's name on the application.

We believe that Ms. Allan was to retire within the next 3, 4, 5 years, that a new owner should be given an opportunity to establish a track record and that the community should be given an opportunity

to critique that track record. So we reduced it --

CHAIRPERSON GRIFFIS: So your concern is that a change of ownership may change the operation of the facility itself which would then put to jeopardy the conditions of the order?

MR. MOORE: That potential would be there.

CHAIRPERSON GRIFFIS: Okay.

MR. FINNEY: Thank you.

CHAIRPERSON GRIFFIS: Anything else?

MR. FINNEY: No.

MS. GRIFFEN: I just had one clarifying question regarding accepting all of the ANC conditions. There was one condition that the ANC imposed that was a personal condition restricting ownership to Barbara Allan.

CHAIRPERSON GRIFFIS: Yes.

MS. GRIFFEN: I think as we clarified, that is not a condition that's being accepted.

CHAIRPERSON GRIFFIS: That's true. But OP can do what they wish. They can adopt any condition they want. They make the recommendation to us, we'll take it into consideration.

MR. MOORE: Let me clarify, that no we do not support that. I didn't mention it because the Chair said that wasn't an issue, he discussed this

morning.

CHAIRPERSON GRIFFIS: I said more than that. I said I don't want to hear anything more about it. Okay.

Any follow up questions of the Board of Office of Planning? Good.

Thank you very much, Mr. Moore. We appreciate that.

Let us move on to the other government report. We have mentioned the traffic report, the DDOT, I should say. The parties should have an opportunity to read this and review it.

Board Members, any comments?

MS. MITTEN: The only comment that I would make is that in response to Mr. Rich's question to Mr. Moore, this elaborates more fully on the issue of the pick up and drop off and Hurst Terrace for Key Elementary. It was not unknown to Mr. Laden when he prepared his report.

CHAIRPERSON GRIFFIS: Okay. Ms. Renshaw?

VICE CHAIRPERSON RENSHAW: I was just scanning this report which we've received today for mention of the cones. And I don't seem to see it, perhaps the Department of Transportation would give some clarification on the use of those cones.

Intermission.

CHAIRPERSON GRIFFIS: Sorry, Ms. Renshaw.

VICE CHAIRPERSON RENSHAW: Back on tape. Okay.

So I would request that DDOT be queried as to the use of those cones.

CHAIRPERSON GRIFFIS: Indeed.

MS. BAILEY: Mr. Chairman, just to be technically correct, the DDOT report does need to be waived into the record.

CHAIRPERSON GRIFFIS: Yes. I appreciate that. And I don't see any objection to waiving in the report. Do any of the parties have any objection to waiving in the report? You still don't have a copy. Oh, they probably mistakenly gave me all the copies.

Okay. What I'm going to do at this point because the DDOT report did come out late, we have waived it into the record. I will keep the record open for the parties to have written submission addressing that report.

I'm not sure how we query the DDOT.

Ms. Renshaw, do you have a quick observation on what you want to do with that?

VICE CHAIRPERSON RENSHAW: Well, I think we send a fax to Ken Laden and ask him a question

about the use of these cones and for him to respond by a date certain.

CHAIRPERSON GRIFFIS: Very well. I think what we ought to do is have Office of Planning look to DDOT for response in that. And, in fact, they can because they are resubmitting a short written revising their report. Is there any difficulty in doing that, Mr. Moore? Do you foresee any difficulty?

MR. MOORE: None whatsoever.

CHAIRPERSON GRIFFIS: Okay.

VICE CHAIRPERSON RENSHAW: And so DDOT's report would be attached to the Office of Planning's supplemental report?

MR. MOORE: That amended part?

VICE CHAIRPERSON RENSHAW: Yes.

MR. MOORE: Ms. Allan can correct me, Mr. Chairman, when I noticed the cones in the photograph I mentioned to her that I thought they would be illegal and also she told me how she put them there. And I told her that only DDOT could issue that. And I don't think they're out there no more.

CHAIRPERSON GRIFFIS: Pardon me?

MR. MOORE: I thought they were removed.

CHAIRPERSON GRIFFIS: She still uses two she has indicated.

I think the Board is fairly clear of the cones and their official capacity and not. So I think we have enough information for us to deliberate the case on the issues that are before us. But a revising if DDOT had any opinion or observation of those cones and their use might be appreciated further.

Anything else?

MS. MITTEN: Mr. Chairman, while we're asking the Office of Planning to ask DDOT a question or two, I would ask that the Office of Planning ask Mr. Laden whether or not DDOT would entertain an application -- favorably entertain an application to limit the use of the parking spaces in front of this property for the use by the school during school hours.

MR. MOORE: Parking restriction?

MS. MITTEN: Yes.

MR. MOORE: Okay.

MS. MITTEN: Thank you.

CHAIRPERSON GRIFFIS: Good. Anything else?

Very well. We do have also the Department of Health Exhibit 20C which was recommending approval. That is in compliance with our Section 205, in which case the center should be capable of meeting all applicable codes and licenses. We are also required to

refer for recommendations to the Department of Health.

I do not see any other government reports at this time, so we can move on to the ANC report, which I would have everyone note is Exhibit 70. Mr. Finney, are you prepared to present your report at this time? Good.

MR. FINNEY: Good morning.

CHAIRPERSON GRIFFIS: Good morning.

MR. FINNEY: I come here in support of the ANC letter to you recommending a five year extension of the special exemption for the school under certain conditions.

I wish that my colleague, Commission Lewis were here, she could not be, to testify because it was she who brought together the school, Ms. Allan and the neighbors to try to work out some kind of understanding. And our letter to you follows her conclusions as to what should be done.

CHAIRPERSON GRIFFIS: Very well.

MR. FINNEY: There are the major point, I guess, in contention is the length of the special exemption. The Commission recommended five years, and I think for two reasons.

One, our neighborhood is changing quite rapidly; demographically, affluence, traffic. We're

getting over the past ten years, I think Mr. Wells admitted, a great deal more traffic. And some of that is slopping over onto the side streets, such as Hurst Terrace. One reason it may be slopping over onto Hurst Terrace is because of our efforts to control the speed of the traffic in our neighborhood. Because we now have photo-radar cars patrolling Arizona Avenue.

CHAIRPERSON GRIFFIS: Okay.

MR. FINNEY: Handing out thousands of tickets a month. And I suspect some of this moderate traffic that is now showing up on Hurst Terrace may be an effort by some smart drivers now to avoid the photo cameras. So we are get that kind of slopover.

And the Commission felt that one should not grant an indefinite permit to a school to operate in view of these changing conditions.

CHAIRPERSON GRIFFIS: Okay. Are there other issues?

MR. FINNEY: The other factor that came into our thinking was the one that Mr. Moore alluded to on the seven year. We were told that Ms. Allan intended to sell the school.

CHAIRPERSON GRIFFIS: Right.

MR. FINNEY: It seemed at first to us that the sale might be imminent, in other words 1 or 2

years. As it went along, it seemed it might be later than that.

CHAIRPERSON GRIFFIS: Okay.

MR. FINNEY: But we wanted a chance, an opportunity to review the operation of the school, particularly on these many details and conditions of traffic management under the new management.

We all have great respect for Ms. Allan.

CHAIRPERSON GRIFFIS: Good.

MR. FINNEY: And that is why we just have extended the permit in the past. And we thought it just advisable in a changing neighborhood, in a changing ownership for the community to have a chance to review the ownership after a certain period of time.

CHAIRPERSON GRIFFIS: Understood.

MR. FINNEY: Those are our two points I think, sir.

CHAIRPERSON GRIFFIS: Thank you very much.

Anything else?

MR. FINNEY: No.

CHAIRPERSON GRIFFIS: Very well.

MR. FINNEY: I will make one point that in all the letters I've received in support of the school I've been struck, impressed with the great social

function that these kind of schools are performing in our society now. And I think we need more of them. But I'm not sure we need more in residential neighborhoods.

CHAIRPERSON GRIFFIS: I see.

MR. FINNEY: Thank you.

CHAIRPERSON GRIFFIS: Thank you.

Questions of the Board to the ANC?

Cross examination of the ANC by the applicant? Mr. Rich? No one seeking the opportunity for cross examination.

Thank you very much, Mr. Finney.

MR. FINNEY: Thank you.

CHAIRPERSON GRIFFIS: Okay. Let me have everyone, now would be the opportunity for persons to give testimony in support of the application. I'm going to have everyone come up at this time.

We've got four chairs. How many others, if I see, raise their hands. We have six people that are going to give testimony.

Our general procedure is that testimony is allowed for four members, 3 minutes each. Clearly I want to hear from everyone and I want to hear everything you have to say. However, we also have a lot to do today. So there's no point in being

redundant. We also have written submission from, I think, most of you if not all of you. So if you want to highlight your letters that were submitted or anything, that would be appropriate.

In which case, I will as the clock goes -- and I'm not going to be flexible with this. I think you can get through what you need to do.

So why don't we start on my right. And, again, you can introduce yourself for the record and continue.

My name is Jennifer Gagnon. I live at 2817 North Glade Street, N.W. Our home is within 200 feet of Barbara Allan's early childhood development center, and I can attest to obtaining the signatures on this petition in support.

In obtaining these signatures I was amazed with how misinformed some of my neighbors were because of what other opposing neighbors had told them. I am here to tell you that I am in favor of the indefinite renewal of the school's special permit.

We have lived in the Palisades are for the past 4 years. We have two young boys and can attest to the need for quality early childhood programs in the area. Barbara's preschool provides this.

Her school is a small school with an

excellent student/teacher ratio.

After starting at his new school this year my 3 year old summed it up when he said "I missed my little school."

By operating this preschool out of her home rather than in a school building, Barbara provides a place that nurtures their developmental needs and at the same time provides a sense of security.

Barbara Allan's early childhood development center promotes a sense of community in our neighborhood. Barbara gives priority to families within the neighborhood. It's always nice to feel as though you are a part of the community and through Barbara's school we now do.

The people in the community whom we have met have only positive things to say about the school.

Currently there are 3 preschools in the Kent Palisades neighborhood. The two established ones have long wait lists. There's a growing number of families with young children in the neighborhood. Barbara's preschool is an attraction for these families. We hope to be able to send all our children to her school in future years.

The Kent Palisades neighborhood, like

other neighborhoods in recent years, has been benefitted greatly from appreciation in property values. The strength of Key School has contributed to this growth. Likewise, the strength of a quality preschool such as Barbara's Montessori School has also contributed.

I walked my son most days to Barbara's preschool last year. In order to do so, I walk up Arizona Avenue, a street with no sidewalk along Garfield, another street with no sidewalk, and then down Hurst Terrace, which has a sidewalk. Never once was I concerned with the amount of traffic on Hurst Terrace during the drop off and pick up times.

Please renew Barbara Allan's special permit application 16915 for an indefinite time so that the Palisades' community's needs continue to be met for future generations.

Thank you.

CHAIRPERSON GRIFFIS: Thank you very much.

Yes?

MS. MENDITTO: My name is Lauri Menditto. I live at 5416 MacArthur Boulevard. I'm a four year resident of the Palisades, and last year as well as this year I have both a child at Barbara's school and at Key Elementary School.

I'm here today to testify that the traffic issues on Hurst Terrace are a direct result of the expansion project at Key School and have nothing to do with Barbara's school.

Last year the Eskridge Terrace entrance of Key School, formally the main entrance of Key School, closed down due to the construction and the Hurst Terrace entrance became the only entrance to the school. This resulted in a challenging drop off/pick up situation at Key due to the fact that all 200 plus students had to filter through one door.

Hurst Terrace itself was often glutted with double parked cars, and I can well understand the frustration of the neighbors. But at no time last year, this year or four years ago when daughter was at Barbara's Montessori School did this have anything to do with Barbara's Montessori School.

Ms. Allan's drop off/pick up procedure has always been quick and orderly to a fault. Parents are not allowed to get out of their cars and the line is not supposed to be more than 3 deep. The time frame is limited to no more than 20 minutes in the morning and 15 in the afternoon. And the impact on the traffic flow of Hurst Terrace is nonexistent.

Last week at Key School's back to school

night the PTA handed out this flyer indicating three entrances to the school, and due to the renovation on the old building, the Hurst Terrace entrance is not among them. Consequently, this year there are no traffic issues on Hurst Terrace. Key School is not causing them, so it's not there. Next year when the renovation on the old building is complete, there will be four entrances to the school and a teacher parking lot which will even out the traffic issues.

I take my children to both schools. The traffic problems belong to Key School and will soon be over. To penalize Barbara's Montessori School over this issue would be unjust and shortsighted.

Thank you.

CHAIRPERSON GRIFFIS: Thank you very much. And you have copies of that to hand out?

MS. MENDITTO: Yes.

CHAIRPERSON GRIFFIS: Good. We'll have that submitted into the record and we can also give -- hold two of those, please, for the parties that are here today.

Thank you very much.

Yes?

MS. McGLONE duPONT: Hello. My name is Jamie McGlone duPont. I live at 5159 Fulton Street.

I've lived in the neighborhood for 17 years. Both of my daughters, who are now 19 and 16, attended Barbara's and I currently now work at Barbara's on Friday morning.

And my house is within 200 feet of Barbara's. I walk to work.

A lot of these issues have already been gone over, but I would just like to attest to the fact that I have lived here since 1985 and I'm familiar with the traffic situation. My children went to both schools. And it was the only time that the traffic was really noticeable was when the construction started. It even came over to Fulton Street, which is where I lived. Cars were double parked, even on my street. It was noticeable, even my neighbors complained. But we knew it was due to the construction. In contrast this year, we don't have any of that. Obviously, it's because the entrance is closed on Hurst and the other ones are open. But in retrospect when it opens up again, the concern about the pre-K and K, all the other grades will still be using the other new entrances, so I know that there will not be a problem.

There has been neighborly concern about property value, and that is not in peril. Recent recorded sales in our neighborhood have been over the

asking price. There are many families looking to buy a home, and schooling is a priority with the renovated Key School, which is now a model for the other districts. It's a great asset. And added to that the established home-based preschool; we have a rarity. Not many of those around.

My other full time job, by coincidence, just happens to be next door to the preschool at the Palisades Church. And I go there at 9:00 in the morning and I see the traffic there. Barbara has 23 students each day, the Palisades Preschool has 42. There is no parking, there is no -- I'm sorry, there's no parking lot at the church and there are no teachers that will escort the children into the school at the Palisades. So I see all these parents parking, walking their children in and then getting out and leaving. And it's not a problem. So I really don't understand why the Palisades preschool would have an indefinite permit and Barbara's would have to be limited to a time frame. Because they're very similar and there are no problems.

CHAIRPERSON GRIFFIS: I'm sorry. Go ahead.

MS. McGLONE duPONT: I'm trying to adlib this and cut everything out.

CHAIRPERSON GRIFFIS: Go ahead.

MS. McGLONE duPONT: But the other thing is, I'm trying to speak as a neighbor, as a friend and a neighbor. I went around and did the petition with the houses within 200 feet of Barbara's. Not only were my neighbors supportive, but they all agreed on the importance of having a preschool. They range from the retired and grandparents to single and divorced and families.

One of them who didn't even know Barbara, didn't even know she had the school, was so interested that he attended the ANC meeting because he felt it was important to support the school and the neighborhood. And, frankly, he really couldn't understand why this had become such an issue.

And this is unique in our neighborhood. We are very friendly. We like to welcome everybody in and we have a community. And someone who would be willing to take over Barbara's school, if that would happen, would have to be an exceptional person. And that's the neighbor we would like to have.

Having a continuance of only five years, which the ANC had asked for, would just mean another confrontation coming down the line and I can't imagine anyone wanting to move into a situation.

So, as you know, there's been an

overwhelming support to Barbara's school. People who have sent them there, it's a nurturing, warm, home-based environment. Neighbors being neat to neighbors, friendships are formed, bonds are built and a community grows. And that's what makes it such a special place.

And a school of this nature should be encouraged and it should not be limited with incentives such as a longer renewal should be given to her.

CHAIRPERSON GRIFFIS: Thank you very much.

MS. McGLONE duPONT: I'm obviously in support.

CHAIRPERSON GRIFFIS: And the Board is aware, also, that you do have a written submission. And we have read that. So we can move on. Thank you.

MS. McGLONE duPONT: Thank you.

MS. McDONNELL: My name is Jane McDonnell, I live at 2860 Arizona Terrace. I will make this very brief because I know you've heard most of this.

But I am very disappointed that residents have been complaining about school traffic in the neighborhood, particularly because these people knew that they were moving into a school zone when they moved there. The Key School is right there. So it

baffles me as to why these people would complain about this.

But I walk my son to Barbara's two days a week, and I have to cross over Arizona which again has no sidewalk. So that's the worst part of my trip. But Hurst Terrace I'm never concerned about the traffic.

Something that Mr. Finney brought up is, unfortunately, you cannot take Hurst Terrace and avoid the speed traps but you can take Hurst Terrace to avoid the backup that comes on Arizona Avenue when people try to go over Chain Bridge. There's a huge amount of traffic on Arizona and a lot of people do cut through Hurst Terrace. So that is something that he might be addressing. However, it has absolutely nothing to do with Barbara's school. And traffic is increasing everywhere, it's not just in this area and none of it has to do with Barbara's school.

I hope that -- you know, I accept this application. I hope that you all do, too.

Thank you.

CHAIRPERSON GRIFFIS: Thank you very much.

Before you go, is there cross examination of the persons giving testimony at this point by any of the parties or the applicant? Mr. Rich? Ms. Griffen? Mr. Finney?

Ah, you're lucky. Thank you very much.

I believe it was indicated we have two other testimonies in support.

MR. ALLAN: Hi. I'm Bill Allan. I'm Barbara's husband, and I'm very fortunate to have spent all my days with this young lady.

Barbara's a wonderful teacher. She's an educator. A wonderful mother. And a wonderful person in the community.

Barbara has participated not only in her school for the last 25 years, she has also been very involved in the community teaching Sunday School every Sunday, involved in the Citizen Association and Recreation Center and our Key School over a period of time when our children were young. She also served on the board of directors for 6 years in the Bright Beginnings, which is a preschool and daycare center for the children of homeless parents in the District. She's still very involved in that.

I've been a teacher for 30 years in the city of Alexandria, and Barbara and I are a team, not only as a husband and wife with our children and so forth, but we're very involved in the community. And our big passion is children, our youth for today.

And the other thing -- I'm going very

quickly because I know only have a couple of minutes. The school finances is a huge responsibility to the school. You all know your responsibility with your homes, but the school has a mortgage. It has taxes to pay. The liability insurance, which goes up as we speak. The property insurance, the utilities, the payroll, the supplies, the repairs that are interior as well as exterior.

The education trend which I'm very involved in Alexandria City Public Schools, the local association as well as the National Education Association; their trend is to have schools in the community, right in the residence area. It's been in the past and they are now building schools, and they are building schools first and putting communities completely around it with townhouses, single family homes and so forth. So you have that close knit community, that's what we're trying to develop here.

The impact of students in the past as well as the future. Like I said, Barbara and I have a combination of 55 years of experience of teaching school. And we don't go anywhere without one of Barbara's students coming up to us and commenting how the positive experience that they've had in her school. And not only do we have the impact when

they're 2 and 3, but when they're in high school, but as they grow up they have that positive experience and they're starting their education procedure. And that's how they're going to parent. That's how they're going to act. That's how they're going to get involved in their community and pursue education for their neighborhoods.

And I would like to leave you on this last note. The gift of giving of yourself to others and give to your community is a gift of life. Give more, take less. Go out and give and volunteer in our schools. Our future are our schools.

Thank you very much.

CHAIRPERSON GRIFFIS: Thank you very much, Mr. Allan.

MS. DURANT: My name is Mary Beth Durant, and I live 5427 Carolina Place, N.W. My family have lived in the Palisades for 17 years, and I've been a D.C. resident for nearly 30 years.

Both of my children, now 24 and 21, attended Barbara's Montessori School. Twenty-two years ago I choose to drive them from Georgetown where we lived because it was the only preschool I could find that had an option for fewer than 5 mornings a week. Also, the nearby preschools were in church

basements with tiny outdoor play areas, if any. And when I saw Barbara's school in her home in a lovely residential area with a huge outdoor play area, I knew it was the perfect place for my children.

In large part because of our wonderful experience at Barbara's school, we decided to buy a house in Palisades rather than move to Maryland or the Virginia suburbs, which is what most of our city friends with young children were doing. I was so impressed with the warm, caring and enthusiastic environment at Barbara's Montessori School that after my youngest son began pre-K, I began working with Barbara and more than 16 years later, I still enjoy working with her and our wonderful students. I'm the one who works there four mornings a week.

One of my duties as a teacher at Barbara's school is to greet the children and take them out of their cars as they pull up to the foot of the driveway and help with the noon dismissal by putting them back in their carseats. So I can attest this is a very efficient process. You know, it's complicated having to get them in and out of carseats, but we do it very quickly and, at most, this is a process that takes 10 to 15 minutes. And now that we have asked parents to drive around the block if there is a backup, it's

1 become even less of an impact on the neighborhood.

2 I can attest that before Key School's

3 construction began there had never been traffic

4 problems. We had never heard complaints from any

5 neighbors. The construction project did put a strain

6 on parking and traffic, but we all realized it was a

7 temporary situation and at the end we would end up

8 with a wonderful school facility.

9 Barbara did, as soon as she heard any

10 complaints, she addressed them completely. She put a

11 new process in plan, talked to every neighbor, every

12 parent and we talked to parents as they arrive and in

13 the morning and in the noon.

14 This year Key School again, as you've

15 heard, has completed their construction with all of

16 the entrance on Eskridge Terrace, there's really no

17 traffic impact at all on Hurst Terrace.

18 Finally, I want to speak to the importance

19 of at least a ten year or an indefinite permit.

20 Barbara is a very good friend and a colleague, and so

21 I have seen firsthand how difficult this has been,

22 this whole process.

23 CHAIRPERSON GRIFFIS: You need to sum up.

24 MS. DURANT: I will sum up. Yes, I don't

25 think you can ask someone to come in and go through

this process again, either Barbara or someone else. It's too divisive. It is just financially it's a strain, emotionally it's a strain and I think that everyone has agreed this is a fabulous resource for the community and it needs to be there. If it doesn't get longer than a five year permit, it probably will close and it will be a tremendous loss for our neighborhood.

CHAIRPERSON GRIFFIS: Okay. Thank you very much.

Any cross examination of the last two witnesses at this time? Ms. Griffen? Mr. Rich? Mr. Finney? Not seeing any indication, thank you.

We're going to take a ten minute recess. And I appreciate everyone patience for the other cases that are scheduled this morning, and we will get to them. However, not in the morning as it's 2 of 12:00.

We'll see you back here in ten minutes.

(Whereupon, at 11:56 a.m. off the record until 12:10 a.m.)

CHAIRPERSON GRIFFIS: Okay. We're ready to reconvene. If everyone could take their seats and we are ready to hear from the parties.

Mr. Rich, I'll turn it over to you. Please proceed.

MR. RICH: Okay. Thank you. I'm going to summarize the arguments we made in our brief. Ursula Daniel and Christine Allison are going to present some evidence of analysis they did of child development centers in Ward 3. And then we have other residents of Hurst Terrace that will be speaking in opposition.

CHAIRPERSON GRIFFIS: Okay. Let me just caution in terms of comparison of other day care centers, we're going to need that comparison to be very specific of how it relates directly to the issues that we're dealing with today. Because, first of all, we don't rely on precedents at the BZA. So even though something may have happened in what might think a similar situation does not mean necessarily that it is occurring in this instant application.

MR. RICH: Okay. My name is Joe Rich. I live at 2847 Hurst Terrace, which is at the corner. I have a map here. At the corner of Garfield and Hurst, the block on which the school is located.

As I said, I've submitted a brief in opposition and want to try to summarize that.

CHAIRPERSON GRIFFIS: Good. And let me say for the record, Mr. Rich, all the Board members have received this and have read it thoroughly.

Did the applicant's representative also

receive this?

MS. GRIFFEN: Yes.

CHAIRPERSON GRIFFIS: Very well.

MR. RICH: The opponents are primarily Hurst Terrace and Garfield Street residents and include everyone on Hurst Terrace except the two adjoining neighbors who have chosen to remain neutral. On the map you can see that's colored in in green.

Other neighbors who live on North Glade and Fulton, some of who testified earlier, did not feel the impact of this school. The impact of the school, the traffic and parking congestion that it causes falls on Hurst Terrace and the Hurst Terrace/Garfield intersection.

At the outset I want to make it clear that the opponents are not trying to shutdown the school. We actually agree with supports and many of those that the school is offering a quality educational experience. Our concern is it's a school that is too big for a block like Hurst Terrace. And our concern especially now is that the effort seems to be trying to transform it into a permanent fixture on our block.

We supported the school for many years, many of us. Others moved down the block were not aware of this school when they moved down the block

and might have had second thoughts had they known it. But we supported it because we thought it would come to an end when Barbara Allan retired. Now that it looks like it's going to continue on, we felt we had to step forward in opposition because of the objectionable circumstances and conditions it causes.

Conditions in the neighborhood have changed and Ms. Allan cannot meet the burden of demonstrating that her school meets by the requirements set by the D.C. Zoning regulations. Title 11, Section 314.1 permits special exceptions for child development centers like this only if the applicant can show that the center will not "tend to effect adversely the use of neighboring property." The evidence in this case clearly demonstrates that the school at a minimum tends to have an adverse impact on neighboring property.

Especially evident is that Ms. Allan cannot meet the requirement of Section 205.3 which states the center shall be located and designed to create no -- and I repeat no objectionable traffic condition. A school of this size on a block as small as Hurst Terrace inevitably causes objectionable traffic conditions.

Finally, the parking congestion from

visiting parents, which has been discussed, indicates that Ms. Allan does not meet the requirement of Section 205.4 which requires her to provide sufficient parking for employees, but also visitors to the school. And visitors include the many, many parents who attend the school. There is not that sufficient parking. As the evidence shows, the parking spills all over the neighborhood when those parents attend.

The ANC views are entitled to great weight before the BZA. ANC-3E spent two nights hearing evidence about this school and it included its September 5th letter that there was objectionable traffic. And I'll quote from their letter. "Since the last zoning exception was approved ten years ago for a child development center there has been great increased traffic to the vicinity caused by the enlargement of Key School across the street and greater density of residential and commercial uses in the neighborhood, as well as an increase in the number of students at the center who are driven rather than walk to school."

This school started out as a school that was supposed to only have approximately 5 students who didn't walk to school. It's now the opposite. Almost everybody's driven.

In fact, Ms. Allen testified before the BZA that the majority of the children within walking distance of the site live within walking distance of the site. Now only a handful do, and as the evidence has shown, many are from Virginia and Maryland, far away from our neighborhood.

Moreover, Hurst Terrace is no longer a likely traverse street, which the BZA had noted in an early special exception orders. Increased traffic from the school, to start with, but also from the expanded Key School and the increased density in traffic that we're feeling has changed that.

The adverse impact on the neighbors on Hurst Terrace is obvious. Photographs that we submitted in our brief as well as letters in opposition from present and past Hurst Terrace residents, and testimony to be given by some of the opponents today, demonstrate this.

These photographs, and I have them here, I'd like to hand to you so you could look at them.

CHAIRPERSON GRIFFIS: You know these need to be entered into the evidence also.

MR. RICH: And can I have them entered into evidence right now?

CHAIRPERSON GRIFFIS: Right. And these

are the same photographs that you showed to the Office of Planning in your cross examination, is that correct?

MR. RICH: That's correct.

CHAIRPERSON GRIFFIS: Okay. So you'll note that you won't get these back.

MR. RICH: Right.

CHAIRPERSON GRIFFIS: Okay. I don't know how they're going to fit into the folder, but we'll make that do.

MR. RICH: Now these pictures, as you can see, were taken in December of last year. And up until Ms. Allan started changing her traffic plan, that traffic condition was typical if not everyday, it was typical. And I think people on the street can testify to that. In other words, there were long traffic lines that tended to block the street, that stretched up and down Hurst Terrace to Garfield Street blocking driveways, parked cars of residents and even blocking cars from being able to pass on the street because parents would get out of their vehicles to talk with other cars in the line. And one of the pictures demonstrates that.

Parking congestion spreads up and down the block and onto Garfield Street. Many of the cars

parked illegally. Residents are unable to park in front of their homes or even reach their homes. But this traffic congestion is especially bad on those days when all the parents attend the school, and we have some pictures of that to demonstrate that fact. These were taken, actually, just on September 9th.

The traffic congestion also has posed a safety issue. Rescue vehicles were impeded by this traffic from reaching one resident who was in need of emergency care last February. The daughters of a 95 year old neighbor who lives right across from the school have expressed in their letters a concern that any emergencies that their mother may undergo would have the same problem.

The traffic and parking congestion at the school is directly related to its size. The school is an incorporated and profitable, and a major business, akin to a mini private school. It is simply too big for a quiet residential street like Hurst Terrace.

The existing special exception limits student enrollment to 23, but as was discussed earlier, 47 children enrolled this year. A school this size is unique for a residential home in Ward 3. The evidence that we'll present in a few minutes will show that there are 32 centers in Ward 3, only 4 are

located in residential homes. Ms. Allan's is one of these four. Her student cap is 23, the other three have a cap of only 4 or 5 children.

By comparison, St. Patrick's School is seeking a special exception before you to place 60 students in a facility used for institutional use on MacArthur Boulevard, a major thoroughfare. That's bigger than this school, but not all that bigger but in a much different setting.

CHAIRPERSON GRIFFIS: Of course, you don't know how that's going to turn out either yet?

MR. RICH: No, that's true.

CHAIRPERSON GRIFFIS: Okay.

MR. RICH: I also would add that the discussion of the Palisades Community School, which is one of the child development centers in Ward 3, is in a nonresidential setting. It's in a church in our community that has a facility that is appropriate for a school this size. I don't believe a residential home such as this home is appropriate for a school this size. Indeed, I think the Palisades Community School's enrollment is approximately 40, the same as this school.

The argument that a new traffic plan recently devised by Ms. Allan and now by Mr. Wells,

which we just saw for the first time today, that this will alleviate the adverse impacts on the street is dubious in our judgment and at best, remains to be seem in the future. A school of this size in a block this small inevitably will cause traffic and parking congestion.

In the first few weeks of school this year while the traffic lines have been reduced, new parking and traffic issues have cropped up. Parking remains a problem, as the photos I just gave you show. Moreover, the limitation on traffic lines under the plans means that parents start parking on the street idling or circling the block, thus adding to traffic congestion in the immediate area.

In sum, we would submit that the evidence demonstrates Ms. Allan cannot meet the burden she must meet for receiving a special exception. While we believe this would justify a denial of the application, as I said, we do not wish to shut the school down. Rather we would recommend that the BZA adopt all the conditions recommended by the ANC except that any extension of the special exception be limited to 2 o or 3 years, not five. This is the period of the first special exception, which was 3 years, and we think it's appropriate now that conditions have

1 changed so that it go back to that original 3 year
2 period.
3 Such a limitation would be designed to
4 permit Ms. Allan and any future operator to relocate
5 the school to a suitable location which could serve
6 both the present enrollment and the long waiting list
7 that has been alluded to.
8 I would add one point here. Neighbors had
9 made many efforts last winter to meet with Ms. Allan
10 to discuss our concerns with the school being a
11 permanent fixture and going on indefinitely. We
12 weren't able to have that meeting because she would
13 not meet with us. It wasn't until Eleanor Lewis at the
14 ANC meeting really encouraged us all to sit down and
15 discuss it that we were able to do it on August 20th.
16 And at that meeting we discussed our interest in
17 trying to have the school relocated or at least
18 reduced in size, and we were unable to reach
19 agreement.
20 As I said, alternatively to relocating the
21 school, the granting of the special exception could
22 include a condition that phased in a reduction of its
23 size to a more appropriate number for a residential
24 home. The other residential homes in Ward 3 have only
25 4 or 5 kids. In the past, this school was run for

about 8 to 10 kids. We think that that would be appropriate size for a school in a residential home on a street like Hurst Terrace.

In any event, limiting the special exception to 2 or 3 years is necessary for the reasons stated in the ANC letter. The letter states the conditions are needed "in order to give it time to deal with the changes in neighborhood conditions." We think specifically 2 or 3 years is a time you would need to review it in view of the expansion of Key School, whose enrollment has increased about 50 percent, and the likely impact that that will have on the block once it opens at that capacity. I think a review is needed immediately to review the workability of the new traffic plan that we've discussed and which has caused new problems. I think it would necessary, as Mr. Finney said, to review if there is a new operator, a new owner to review that new owner's operation; somebody who maybe has never had experience running a school of this size. And I think anytime that happens, a review of the special exception is needed.

Indeed, I think we believe this should be a special exception. It should not be treated as a permanent fixture which is becoming in our

neighborhood. We feel that our original support and nonobjection to the past special exceptions are being used against those now. We did those out of, I think, support for Ms. Allan and understanding of her needs. But the school for many years has been very large and has impacted us badly. We have tolerated it without complaint until now. And we're complaining now because it seems to be headed toward a permanent fixture. And we never believed that a special exception was designed to impose a permanent fixture, a permanent school of 47 kids on a block like Hurst Terrace.

Thank you.

CHAIRPERSON GRIFFIS: Thank you, Mr. Rich.

May we move on.

MS. ALLISON: My name is Christine Allison, and I live 2840 Hurst Terrace. I'm a new resident, I moved in 3 years ago. I'm a mother of a St. Patrick's child.

Particularly as a newcomer to this block, not knowing the existence of Barbara's when I first moved into the block, I have been very curious to know to what extent Barbara's school represents a typical facility on a residential street like Hurst Terrace. We thus undertook a little bit of research in terms of

1 understanding what other child care facilities, child
2 development centers in Ward 3 looked like. We're now
3 very briefly going to present evidence that shows that
4 Barbara's Montessori School is quite unique in that
5 other schools of its size operate out of more
6 appropriate facilities with both parking and traffic
7 arrangements that make the impact on the neighbors
8 very limited. And the schools that are run out of
9 private homes as Barbara's is, are considerably
10 smaller, as Mr. Rich has spoken.
11 Very briefly, we requested from the
12 Department of Health the list of all child care
13 facilities in the District of Columbia and then we
14 then looked at the ones that are in Ward 3.
15 There were 32 child care facilities in
16 Ward 3. We've not visited all of them, but we visited
17 some and various members of the community have private
18 previous experience with many of them. All but 4 of
19 the facilities are operated from nonresidential
20 places. Fourteen are in churches, 9 are in schools or
21 related business, and 5 are in dedicated facilities.
22 So there are just 4 running out of residential homes
23 in R-1 communities like ours.
24 CHAIRPERSON GRIFFIS: They're all in R-1?
25 MS. ALLISON: They're all in R-1.

CHAIRPERSON GRIFFIS: Okay.

MS. ALLISON: The four, yes.

MS. DANIEL: My name is Ursula Daniel. I live at 2839 Hurst Terrace. And before I just show you the evidence that we I would like to represent, I just want to quickly note that I operate my profession from my home. My office overlooks Hurst Terrace so I have a daily first row view of the traffic there. And even though the traffic regulations that Ms. Allan has instituted have certainly made some change, but I have seen for many, many years actually now, these lines of traffics that go right up to the intersection with Garfield Street.

CHAIRPERSON GRIFFIS: You have a letter submitted in the record, is that correct?

MS. DANIEL: Yes, I have.

CHAIRPERSON GRIFFIS: Okay.

MS. DANIEL: Yes. So this is my personal and on a daily yearly basis.

What we would like to just briefly present to you is the -- what Mr. Rich has noted, mainly before --

CHAIRPERSON GRIFFIS: Okay. What I'm going to need you to do is be in proximity to a microphone, otherwise you're not getting picked up.

MS. DANIEL: Yes, that's right.

CHAIRPERSON GRIFFIS: So, if you could keep that on the easel actually, it's easier if you do not hold it. The Board Members can see it and also the applicant and the parties can see it.

MS. DANIEL: The four facilities that we're talking about, the small ones, they're the ones that are run from residential homes, are 4521 43rd Place on the top, 5420 30th Place to the left, 5310 MacArthur Boulevard.

Now, the top one on 43rd place has 4 children. The 30th Place one has 5 children. MacArthur Boulevard has 5 children. And here is the Hurst Terrace facility of Barbara's that has 23 children. Just to give the impression of the difference.

CHAIRPERSON GRIFFIS: Good.

MS. DANIEL: Shall I hand them to you?

CHAIRPERSON GRIFFIS: No. You can leave that there. We can see it, unless you need to point to it. And we can give you a pointer if you need.

MS. DANIEL: No, that's fine.

CHAIRPERSON GRIFFIS: Okay.

MS. DANIEL: In contrast the facilities that are more in numerically in keeping with Barbara's

1 school are the child development facility by American
2 University that has 30 students, August Montessori on
3 Everrett Street that has 30, Chevy Chase Community Day
4 Care Center that has 25, Chevy Chase Plaza Child
5 Development Center 31, Kinder House on Connecticut
6 Avenue has 25. UDC has 30 and Cherry Marlane is with
7 the Lutheran Church on Connecticut Avenue has 33
8 children.
9 So the point being that all the school
10 facilities that are comparable to Barbara's day care
11 center are in much larger and to our mind much more
12 appropriate facilities.
13 CHAIRPERSON GRIFFIS: The numbers that you
14 just indicated in terms of capacity, is that total
15 enrollment and do you know whether these --
16 MS. DANIEL: These are the numbers that we
17 got from --
18 CHAIRPERSON GRIFFIS: The Department of
19 Health?
20 MS. DANIEL: -- the child care facilities
21 from the Health Department Child Care --
22 CHAIRPERSON GRIFFIS: Okay. And is that
23 submitted into the record?
24 MR. RICH: We can submit it right now.
25 CHAIRPERSON GRIFFIS: Yes. Let me be

absolutely clear. Anything that is talked about, referred to at this point will be submitted into the record.

MR. RICH: For the record, this document has a summary sheet that indicates a summary of the 32 different facilities and then attached to it is the actual Health Department list of all child development centers in the city from which we drew the 32.

CHAIRPERSON GRIFFIS: Okay. I think the point is taken.

Anything further? Mr. Rich, calling any other witnesses?

MR. RICH: No. As I said, there are 3 or 4 people who want to speak in opposition that have come up --

CHAIRPERSON GRIFFIS: In testimony, correct?

MR. RICH: That come after us.

CHAIRPERSON GRIFFIS: That's fine. We just need -- that's the conclusion of your case then?

MR. RICH: Yes.

CHAIRPERSON GRIFFIS: Very well.

Mr. Finney, any cross examination?

MR. FINNEY: No, sir. Thank you.

CHAIRPERSON GRIFFIS: Does the applicant's

representative have any cross examination?

MS. GRIFFEN: I guess a question for the two of you that prepared and took these pictures. Are you aware of anything in the law or regulations that distinguishes between a home-based school and a school that's based in another structure, such as a church:? Is there any distinction that's relevant in the law?

MS. DANIEL: Not that I know of.

MS. GRIFFEN: Right. I notice NCRC, which is the one example I'm familiar with, didn't show up. I presume that that's because it's not in Ward 3. Why did you restrict your study just to Ward 3? Was that relevant?

MS. ALLISON: We just had to draw the boundaries somewhere. We did actually initially look at parts of Ward 2 as well, because the 20007 zip code is very near us. But we thought it appropriate just to keep the analysis to Ward 3.

MS. GRIFFEN: Okay. I would just note that if you're going to make a comment saying that there's no precedent for this, there's certainly a precedent I'm aware of, a much larger school in a residential home.

CHAIRPERSON GRIFFIS: And you can add that in your conclusion.

MS. GRIFFEN: Okay.

MS. DANIEL: Excuse me. May I just briefly, the NCRC was actually not included on the list--

CHAIRPERSON GRIFFIS: Actually, we only just take questions in cross examination.

MS. DANIEL: Okay.

MS. GRIFFEN: I guess a question for Mr. Rich, you suggest Barbara should locate to a different location. Given the zoning battles over new schools in the Palisades, St. Patrick's Field School, do you really think that the prospect of finding a new location at this point would be easy for her?

MR. RICH: Well, I'm not a real estate agent, I don't -- I think that initially Barbara had the opportunity to use the Palisades Community Church. Subsequently that church became one of the child development centers in a church facility, what we think is appropriate for Barbara's school.

I think that a good search of other facilities in the neighborhood, rec centers, other churches may turn up a suitable location that's not on a block like ours.

MS. GRIFFEN: And do you acknowledge that the D.C. law finds that schools are compatible with

residential districts or do you find that objectionable?

MR. RICH: I'm sorry, what was the question?

MS. GRIFFEN: Are you aware that the D.C. regulations have specifically stated that schools are compatible with residential districts?

MR. RICH: I assume that's correct. I mean, I think --

MS. GRIFFEN: But you object on principle to having schools in residential neighborhoods?

MR. RICH: No. I object on the principle of section 205; that this school cannot be shown to have no objectionable traffic conditions. And it's because it's on a small residential block in a residential home in which the owner lives.

MS. GRIFFEN: Okay. Just one final question, I guess for your, Mr. Rich. On your statement that everyone is driving from far away and you've noticed the Virginia and Maryland tags of some of these cars. Do you think it's a possibility given that, for example, there's only one child from Virginia who attends this school that the Virginia and Maryland tags might belong to caregivers of parents nearby who live in the neighborhood who are maybe just

dropping off the children in the caregiver cars? Do you acknowledge that that night explain why there are Virginia and Maryland tags?

MR. RICH: I have no idea how to explain it. I would assume when I see a car from Maryland dropping of a child, that that's where that car is coming from.

MS. GRIFFEN: I would just ask the Board to look at the roster of students and --

CHAIRPERSON GRIFFIS: You can submit that.

MS. GRIFFEN: -- the breakdown, it's in Mr. Wells' report.

CHAIRPERSON GRIFFIS: That's fine. Okay.

MS. GRIFFEN: That's it. Thanks.

CHAIRPERSON GRIFFIS: Thanks very much.

Mr. Rich, any redirect of your witnesses?

MR. RICH: No. I do think that the NCRC is 132, is it not?

MS. DANIEL: The NCRC was not listed on the list of the facilities that we got from the Health Department.

MR. RICH: Oh, it's not.

MS. DANIEL: That's why we don't have it on here.

MR. RICH: I mean, I do know that the NCRC

while in a residential neighborhood, has been there for 75 years in a large mansion that was dedicated to school use only. We see that as a lot of different than a 47 student school in a residential home that is much smaller.

CHAIRPERSON GRIFFIS: Okay.

Ms. Griffen, do you have cross examination of the new testimony you just heard?

MS. GRIFFEN: No.

CHAIRPERSON GRIFFIS: Thank you. Okay.

Thank you all very much.

MS. MITTEN: Mr. Chairman?

CHAIRPERSON GRIFFIS: Yes. I'm sorry. Don't go anywhere.

MS. MITTEN: Could the Board maybe ask a question or two.

CHAIRPERSON GRIFFIS: The Board has questions. Usually I move this on too quickly.

MS. MITTEN: Mr. Rich, you had mentioned that since school started and setting aside the first day of school, which we know is sort of a special event day --

MR. RICH: Right.

MS. MITTEN: You said new traffic and parking issues have cropped up. Could you be more

specific?

MR. RICH: Yes, and I think some of the opponents can speak to it as well. But what I meant by that is in that in the past you had traffic lines of the kind that the first set of pictures shown that were very objectionable and impeded us badly. The lines have been reduced. There's efforts to keep the lines to two or three cars. But that means all the cars that are coming by are having to park on the block, take their kids into school, idle. In other words, you have that same traffic congestion coming into the area. While it isn't lining up like it did in the past, it is either parking on our block or circling the neighborhood, which has an impact on the rest of the neighborhood.

MS. MITTEN: Okay. So if the parents are parking and walking the children, that's not what is proposed. They're in violation of the --

MR. RICH: My understanding is that parents are supposed to stay in their cars. But I'll let the other opponents who have actually observed what's been happening since school opened speak to that.

MS. MITTEN: All right.

MS. ALLISON: If I may, I could just speak

to a particular incident that happened last Friday. It was just before 9:00 in the morning and a mother parked right at the end of my driveway for my house. And I asked her if she was intent on parking there for anytime. And she said yes, she was going to walk her child into Barbara's school and would be gone 10 or 15 minutes.

I said to her that I actually would be needing to get out very soon. And she said something like "Well, that's tough." After a little exchange, she did finally move her car. But it really was a very unpleasant experience for me to have to ask her to move her car, and I really do not look forward to having to do that every Friday morning when I happen to be at the house later than I normally leave for the office.

MS. MITTEN: I understand. Thank you.

And then the issue about cars circling. I mean, when I look at Mr. Wells' sort of like almost minute-by-minute depiction of what's going on there, and given the volume of traffic that's going; how is it possible that the neighbors are able to discern that X, Y, Z car is somehow adding, you know, some onerous traffic to this already, you know, significant amount of traffic that's going through?

MR. RICH: Well, I think that that's a point well taken, but I do think that the change in the condition in the neighborhood has been to increase traffic. I think that's accepted over the last 10 years. And given that condition, a school that is enrolling 47 kids, the impact of traffic from that school becomes all the greater because of this additional traffic.

Now, in other words, my wants have been less objectionable when there wasn't as much traffic in the neighborhood now has become very objectionable.

MS. MITTEN: All right. Thank you.

CHAIRPERSON GRIFFIS: Further questions from the Board?

MR. ETHERLY: Mr. Chairman?

CHAIRPERSON GRIFFIS: Yes.

MR. ETHERLY: Two very quick questions. Hopefully, they're be quick. They're a little nuance. I want to follow up on Ms. Mitten's, the exchange that you had with Ms. Mitten, Mr. Rich.

First of all, let me be sure I'm clear on your argument. Is it your argument and the argument of the opponents that you're not opposing the granting of the special exception, but if it is to be granted, you want to see certain conditions attached or are you

arguing we oppose the granting of the application here, but in the alternative if it is granted, we want to see certain conditions attached?

MR. RICH: I think it's more the latter.

MR. ETHERLY: Okay.

MR. RICH: We're not trying to shutdown the school. We think there would be grounds for denying the application, but we're not seeking that. We're seeking rather a short term special exception which would permit a chance to relocate the school. If that were not to be the case, we would ask for a condition that would limit the size to a much smaller size than it is now.

In any event, I think review of this special exception is needed in the near future, given the changing conditions in the neighborhood and the likelihood that there may be a new operator shortly.

MR. ETHERLY: Okay. Now, coming back to Section 205.3, which once again speaks to the fact that the center shall be located and designed to create no objectionable traffic conditions; that seems to be quite a bit of what you're argument is hinging on. And I agree with you, that's a very important consideration here.

What I'm interested in kind of exploring a

little bit is you keep referencing this issue "the changing" or "the changed nature of the traffic conditions as it now exits on Hurst Terrace." What I'm grappling with is whether or not it is an acceptable outcome for the applicant to essentially be penalized in this consideration of this application because of what sounds like conditions that are outside of her control or outside of the control of the center itself.

Can you help me work through that?

MR. RICH: Yes, I think --

MR. ETHERLY: And let me interrupt you for a quick second.

MR. RICH: Okay.

MR. ETHERLY: Because what I'm struggling with is should the question or should the inquiry here be are there any objectionable traffic conditions that are created by the center. And it sounds like very subtly what you're saying here is we're not necessarily concerned so much about the center. It's just that because of the nature of the traffic condition has changed in the community, the center's just now all of a sudden adding a weight that we can no longer bear.

MR. RICH: Now that's not quite right.

MR. ETHERLY: Okay. Help me work through that.

MR. RICH: I would say that, first of all, the nature of the school has changed has considerably. As early special exceptions indicate, the original conception here was, as Ms. Allan testified, majority of the children live within walking distance of the site. That's no longer the case. Virtually everybody's driven and it's been that way for many years.

MR. ETHERLY: Okay.

MR. RICH: And there's been a direct traffic problem, objectionable traffic condition caused by that as those pictures show. The traffic was lining up down the street. That was not related to Key School. That was not related to increased traffic. That was a direct result of the school.

MR. ETHERLY: Okay. Let me pause you there for a moment. Okay. I understand that point.

In terms of the pictures that we've seen and have reviewed, those pictures were taken by whom?

MR. RICH: The pictures were taken by one of the neighbors.

MR. ETHERLY: Okay. By one of the neighbors. Is that individual or persons present with us today.

MR. RICH: Well, the pictures -- are you talking about the pictures that I handed to you?

MR. ETHERLY: Yes.

MR. RICH: These pictures are of the other school.

MR. ETHERLY: The pictures that illustrate some of the alleged congestion around the school?

MR. RICH: Yes. There's two people that --

MR. ETHERLY: Okay. I saw an individual indicate her presence, so we'll probably hear something from that effect a little later on.

MR. RICH: Right. Right.

MR. ETHERLY: I will be interested in hearing that it was observed that that congestion directly correlates to the operation of the center. I think Ms. Mitten was kind of exploring that a little bit, and you have perhaps heard a little bit of that exchange in terms of some of the cross from counsel for the applicant.

MR. RICH: Yes. I think to go on from what I'm saying is, that I think first it's what I just said. The school itself has changed. It's no longer a neighborhood school. There's a lot more cars coming there. That has created an increased traffic, objectionable traffic condition.

But in addition, over the last 10 years, as the ANC letter indicates, there's been testimony, the whole area is getting more traffic congestion, more parking congestion. This means that the impact of the school has worsened because of that additional traffic. Yes, there's no controls over that, but it makes the presence of the school more objectionable than it would be if you didn't have that traffic. And for that reason, we think it adds to the objectionable condition that the regulation goes to.

MR. ETHERLY: Okay. This might sound like left field, Mr. Chairman, and probably even you, Mr. Rich, but I'll kind of bring it back a little bit. Are there any retail establishments anywhere in the vicinity of Hurst Terrace; convenience store, 7-11, anything along those lines?

MR. RICH: This is a rough map of Hurst Terrace here. You come down to Dana and then down to MacArthur, there's a lot of commercial establishments here.

MR. ETHERLY: Okay. Gotcha.

MR. RICH: There's new restaurants here. This is having impact on parking into this neighborhood.

MR. ETHERLY: Okay. Okay. I gotcha. I

1 won't do a follow up thing, because that answers the
2 question.
3 A final question, Mr. Chair. Pardon?
4 No, I don't think it'll be necessary.
5 The inquiry here was are any of those
6 establishments new in terms of any retail
7 establishments along as you get back towards MacArthur
8 Boulevard?
9 MR. RICH: There's been increased
10 commercial development over the last several years,
11 which I think was recognized in the ANC letter.
12 MR. ETHERLY: Okay.
13 MR. RICH: The density of the neighborhood
14 as a whole has increased.
15 MR. ETHERLY: Okay.
16 MR. RICH: It's a different type of
17 neighborhood.
18 MR. ETHERLY: Okay. And I understand the
19 argument. I mean, it's an interesting one, so I
20 understand where you're coming from. Thank you for
21 the clarification.
22 So final question is you heard testimony
23 from the traffic expert for the applicant.
24 MR. RICH: Right.
25 MR. ETHERLY: You heard some conversation

about table 2 in the applicant's traffic study which offered in terms morning peak period traffic and mid-day peak period traffic according to the traffic expert. You have in the morning peak period 27.3 percent of the total of the traffic on Hurst Terrace being attributable to the center. And then in the mid-day peak period, 33.9 percent. Those percentages, I guess it's arguable and perhaps I'm just looking for some response from you. So it's your contention that 27.3 percent is a significant impact that this Board needs to be concerned about when looking into --

MR. RICH: Well, I think that when you say "traffic," I mean what we think has been objectionable is the lines that have been created by the school that have in the past lined up all the way to Garfield Street. We think that's a very objectionable traffic condition. We're not talking about these cars passing through.

MR. ETHERLY: Okay.

MR. RICH: What we see happening now is a new traffic plan that is designed to reduce those lines.

MR. ETHERLY: Uh-huh.

MR. RICH: We see other results from that that may impact on our parking and may impact on

traffic, other traffic in the neighborhood. We think that's a good reason for a special exception of limited duration so that the workability of this plan can be reexamined.

MR. ETHERLY: Okay.

MR. RICH: This neighborhood is changing. Traffic keeps increasing.

MR. ETHERLY: You heard from Mr. Wells, however, that for the 3 days that he observed traffic on Hurst Terrace he didn't see congestion. He didn't backup. Yet we have some arguably compelling pictures from your perspective which illustrates what could be conceived as some very substantial backup. You know, I'm trying to reconcile.

MR. RICH: Right. I think that the pictures that we gave you of the backup were what we were experiencing for much of the last ten years until a new traffic plan was adopted.

MR. ETHERLY: Okay.

MR. RICH: The new traffic plan has helped reduce those lines. But as I've said, it remains to be seem whether there are still the same number of cars having to come to the school. They've got to go somewhere. You have a situation like Ms. Allison testified where somebody parks, walks her in rather

than getting in line, now are parking and idling. That causes parking congestion, if you will. That's our point.

MR. ETHERLY: All right. Thank you very much, Mr. Rich.

Thank you, Mr. Chairman.

CHAIRPERSON GRIFFIS: Any other questions from the Board?

VICE CHAIRPERSON RENSHAW: Mr. Rich, when you met with Ms. Lewis of the ANC who had I understand brought the parties together, yourself and Ms. Allan, how did you -- would you please give us a review of that meeting and whether or not Ms. Allan was conducive to your suggestions for changes in the traffic patterns.

MR. RICH: I think that Ms. Allan brought to the meeting the traffic plan that's really being discussed here, and Ms. Lewis in particular, discussed. Some of the neighbors asked questions about the traffic plan. It really became the traffic plan that the ANC eventually recommended and similar, if not the same, as the traffic plan that has been testified to today.

The neighbors' concerns, as I expressed in my statement, has been with this school becoming a

permanent fixture. And we had always understood from past special exceptions and from our understanding that this was just going to be a school that Barbara Allan ran, that this school would eventually come to an end. And so we raised what to us a very important issue. When she retired, could the school end or be relocated.

You know, we said we're not trying to shut down. But we think a school this size is too big. We think over the years that you're going to finish up is a good time to look for another location that would serve the large student body that it has now, as well as a waiting list. There's great demands for schools like this. And we think a more appropriate facility that can hold those kids is what needed. And Ms. Allan really was not interested in pursuing that.

And so that's really how the meeting ended.

VICE CHAIRPERSON RENSHAW: All right. Thank you.

CHAIRPERSON GRIFFIS: Anything else?

In the retail on MacArthur, are there are new establishments, is there expanded square footage of retail or commercial space in the area, to your knowledge?

MR. RICH: I would -- I can't tell you for certain, but I'm quite sure. You know, there's been a lot of expansion.

CHAIRPERSON GRIFFIS: You speculate that it has increased?

MR. RICH: Yes. I mean, I think --

CHAIRPERSON GRIFFIS: Okay. Thank you.

MR. RICH: -- anybody who lives there would agree with that.

CHAIRPERSON GRIFFIS: Very well.

If there's any trouble, any cross examination of any new testimony that you just heard?

MS. GRIFFEN: It may seem like a minor point, but the testimony that your driveway was blocked in, I don't know; Ms. Allan claims that you don't have a driveway. Is that --

MS. ALLISON: Partly. Partly. There is no--

CHAIRPERSON GRIFFIS: Can you turn on your mike?

MS. ALLISON: There is no sidewalk on my side of the street, so my pathway, foot path to get from the front door to the street requires that one walks down the path and gets onto the street.

MS. GRIFFEN: I just wanted to clarify.

MS. ALLISON: It was completely blocked.

MS. GRIFFEN: It was actually blocking in your car, though?

MS. ALLISON: No. Because my car was really on the street.

MS. GRIFFEN: Thanks.

MS. ALLISON: But no pedestrian could traverse from my house to the street.

CHAIRPERSON GRIFFIS: Okay. Good.

Anything else from the Board? Very well.

Thank you all very much.

I'm going to ask if I can have a show of hands of the people that are going to testify now in opposition. All right. It looks like we can fit you all at the table. Why don't you all come up at this point?

Okay. I don't need to go through the ground rules. Yes, witness cards go to right. You have 3 minutes each. The timer will go. I'm going to ask that you observe that very strictly.

And if you want to indicate, actually, if you submitted a written letter to the record when you introduce yourself and your address, that would be important. We have read all of them, but we can certainly mark them and follow along while you

proceed.

So, I'll start on my right.

Good afternoon, ma'am. And I need you to turn your microphone on before you say anything.

MS. KAUFMAN: Good afternoon. My name is Lynn Kaufman. And I have submitted a letter for the record.

CHAIRPERSON GRIFFIS: Thank you.

MS. KAUFMAN: My remarks this evening are changed somewhat, because I would like to try to respond to some of the commentary and earlier testimony. So I'm going to try to fish through here and keep it coherent.

CHAIRPERSON GRIFFIS: Can you just state your address, please?

MS. KAUFMAN: Yes. I live at 2836 Hurst Terrace. I speak in opposition to the renewal of the special exception because conditions in both the neighborhood and the child development center have changed dramatically over the years.

I would like to address one issue in previous testimony that indicated that the neighbors had not expressed any discontent to the problems that they were experiencing. And I think it needs to be clarified here, even though it's not a legal point,

that the original special exception was sought by Ms. Allan a number of years ago and which she came around to each of the neighbors and asked us to please support her because she needed to support herself. She had recently become a single parent. So it was based on a friendship relationship. And over the years, as had been previously stated, none of us felt that this was going to go on and we absorbed things that we not have absorbed under other circumstances. In fact, we may not have even supported the special exception to begin with.

Barbara's school began as a small neighborhood play group, which in fact 6 little play schoolers including my own walked 3 mornings a week. They arrived in strollers or holding hands with their parents. There were no employees because parents provided assistance and emergency backup. The 6 children and their walking parents created no vehicular traffic on Hurst Terrace.

I live two houses away from the child development center. So the lines of cars have consistently winded in front of my house blocking my driveway and causing unsafe conditions for both the vehicles that are lined up for the child development center as well as though trying to pass through.

The issue of Lieutenant Burke, I would also like to respond to, because I think it needs to be brought out in the record that I'm not sure if Lieutenant Burke was speaking in an official capacity, but he has a child at the school child development center, or did have one. So he had a personal interest here, which I think is important to bring out.

CHAIRPERSON GRIFFIS: You need to sum up.

MS. KAUFMAN: Pardon me?

CHAIRPERSON GRIFFIS: You're going to need to sum up.

MS. KAUFMAN: Oh, okay. Is that my --

CHAIRPERSON GRIFFIS: It is, but give you a last minute.

MS. KAUFMAN: Okay. I just want to say that two experiences I had. One in which my husband needed emergency care and the vehicles did have trouble getting up the street when I called 911. And on the day I brought him home from the hospital there was -- this was not a Barbara school issue, but it was a Key School issue. A Key School parent had parked in front of my driveway so I couldn't even escort my husband out of the car into the house upon his release.

So these are just personal experiences

that I wanted to share with you.

Thank you.

CHAIRPERSON GRIFFIS: Okay. Thank you very much.

MS. LEONARD: My name is Mary Leonard, and I have resided at 5030 Garfield Street, N.W. for 25 years. My home is at the intersection of Garfield Street and Hurst Terrace, 4 houses from Barbara's Montessori School. I have submitted a letter for the record to the BZA.

Simply stated, the school's a substantial commercial business that generates traffic and parking problems incompatible with the residential character of an R-1-B zoned area.

For the past 8 years I've maintained a home office for my small foundation management business. This means that I'm home during the hours when the school is operating, as are a growing number of other home-based business owners in the neighborhood.

Our narrow curving streets have been clogged by the cars lined up to drop off and pick up children. And I've been personally inconvenienced by having my car blocked in my these cars dozens of times.

My guests and my clients have complained that they have difficulty getting to and parking near my home, and contractors who have done work on my home share these frustrations.

I certainly do appreciate the efforts that Barbara Allan has recently made to develop a traffic plan and hire a traffic consultant. Other efforts to control past traffic problems have periodically been made, but without consistent success.

Clearly, even the best planning doesn't stop parents or caregivers from excusing themselves from the rules "just this once," or "just for a minute" when in a rush. We've all done it, it's just human nature. Based on the past experiences, I do not believe that our small street can accommodate the comings and goings of 23 children and their families without the adverse impact R-1 zoning seeks to avoid.

Thank you for your attention and your understanding.

CHAIRPERSON GRIFFIS: Thank you very much, Ms. Leonard. And we do note that you do have one submitted letter in the record. It is Exhibit 55.

MS. RICH: My name is Sherry Rich, and I live at 2847 Hurst Terrace, and I submitted a letter.

For many years I was friends with Barbara

Allan. And because of that friendship I never complained, even though the lines from the parents did inconvenience me. I always assumed that when Barbara retired in a couple of years we would lose the traffic lines. So I was very surprised to learn she wanted to sell a teacher friend of hers and have an extension of her variance.

The pictures that you have dated 12/02 were very typical of the lines for the past 10 years. I believe after she learned of our dissatisfaction and that we were going to oppose, she did have the parents changing traffic plans. But they've created new problems.

I also want to say that the traffic lines were there long before Key School construction.

And I just have more -- more important, I want to read just a couple of lines from her former neighbor across the street who writes: "Daily our family was subject to the long carpool lines and vehicles blocking our driveway. The fumes from these vehicles could be smelled in our house. We often spoke with the drivers and asked that they turn off their engines during the 15 minute wait in the carpool. This request was never complied with and was often met with aggressive hostile responses from the

drivers."

Another next door neighbor, Carol Hilton, she was a next door neighbor to the Allans for 13 years, both of these have submitted letters. "Once the first variance was granted in 1984 cars become more of an issue. For much of the time that I was her neighbor I experienced that my driveway was blocked by parents delivering their children to her school and that traffic increased dramatically at the drop off and pickup points of the day. As the school expanded and brought children from further away in D.C., Virginia and Maryland, there were fewer walkers."

And I just want to conclude by saying it may not seem quite 15 minutes in the morning and 15 minutes in the afternoon should trouble us. The problem is we have to plan with our clients when they can come, repair people; our lives. We sometimes have not been able to get up and down the block. And that's why we were sorry to hear that wanted to take on a life beyond Barbara. We just don't know what a new owner would be like.

Thank you.

CHAIRPERSON GRIFFIS: Thank you very much.

Yes, sir.

MR. KAUFMAN: My name is Nicholas Kaufman.

I live at 2836 Hurst Terrace.

I've heard some interesting testimony this morning, as well as you, from the people who have commented. And I think some seminal queries have been raised here. Why has this become such an issue is one of them. When does the exception become the rule? You know or the variance become tantamount to a matter of right?

I believe what we have here is a case of community and zonal thermal dynamics. The obvious inference from Chairman Finney's last comment is that the buffering capacity of R-1 zoning in this block in the Ward as well, maybe the rest of the city, is just about used up especially when it comes to expanding nonresidential and commercial considerations in R-1 zones.

I consider myself a friend of Barbara and Bill, and have been for 25 years. In fact, I have no doubt that the stalwart citizens and parents who are proponents for this applications are well intentioned. Indeed, 25 years ago I was one of those parents whose child benefitted from attending Barbara's school. It was much smaller then, 6 to 8 children. And all lived in the immediate neighborhood and all walked to school. The problem is that these parents now, they

1 don't live on the street that they wish to utilize
2 under this special exception.
3 I personally feel that the original
4 residents and signatories not opposing the initial
5 exceptions had they realized this exception would
6 result in perpetual life, would have opposed it from
7 the outset. The reason they didn't do so was because
8 of personal friendship for the applicant.
9 I don't think as stated and as submitted
10 the renewal of this referenced special exception it
11 does -- I believe it sets an unprecedented degree of
12 variance to our R-1 zoning if this information that
13 has been brought into evidence today is accurate about
14 the number of children in these homes versus those
15 that are in an institutional setting. It doesn't
16 comport with the current local and ward wide concerns
17 and objections over institutional encroachments on
18 residentially zoned R-1 neighbors, and therefore I
19 would ask this Board to look into the longer range
20 impact of their own decision in this matter.
21 Thank you.
22 CHAIRPERSON GRIFFIS: Thank you very much,
23 Mr. Kaufman.
24 Any questions from the Board?
25 MR. ETHERLY: Yes, Mr. Chairman, just very

briefly. One to Ms. Kaufman and then I want to come back to Ms. Rich, if I could.

Ms. Kaufman, thank you very much for your testimony. You highlighted an incident which, of course, is probably not the most enjoyable of one where you have a loved one who has to receive some emergency treatment. You referenced the situation involving the ambulance. I just want to kind of explore that just very briefly.

On that particular day, as you recollect to the best of your ability, what was the traffic situation like on the street that day? Was it a double parked vehicle that created the difficulty for the emergency response unit or --

If you could use your mike. Thank you.

MS. KAUFMAN: As I recall that day, which I am -- I have to go back and picture it in my mind. But as I recall it was a combination of the cars parked on both sides. And even though the traffic expert indicated that theoretically there's enough space for two way traffic. It's very, very tight. And as I recall, there were two emergency vehicles that came up. And there had to be someone holding back the traffic that was coming and going in order for the emergency vehicles to get through because only one

emergency vehicle could fit through.

MR. ETHERLY: Okay. Okay. Do you recall what time of day that particular incident?

MS. KAUFMAN: It was the beginning of the school day. I mean, it was in the morning.

MR. ETHERLY: Okay. Thank you. Thank you.

Ms. Rich, if I recall correctly, you heard the engage between myself and counsel for the opposition regarding the photographs and you referenced the December 1st photographs. I believe you might have indicated from the rear of the room that you took the pictures?

MS. RICH: Yes, I did.

MR. ETHERLY: Okay. Let me just be sure I'm clear. So it's your testimony that you, of course, personally observed that the traffic condition that you photographed on that particular day?

MS. RICH: Yes.

MR. ETHERLY: Yes. Okay. Secondly, that those vehicles were directly related to the center's operations? To the best of your knowledge, let's just put it like that. I'm not trying to put you on the spot, but I'm trying to develop some comfort --

MS. RICH: It's easy. I can easily answer

that.

MR. ETHERLY: Okay.

MS. RICH: The one with the line is a line that's idling in the street and they're picking up children.

MR. ETHERLY: Okay.

MS. RICH: They're not trying to get through the street. They're just parked.

MR. ETHERLY: Okay.

MS. RICH: Okay. And the parked cars on the first day of school, there were some of us who observed -- I mean, we're outside and other people had taken some pictures. But there were parents getting out of all these cars with children.

MR. ETHERLY: Okay.

MS. RICH: And I assumed going to Barbara's because of their age.

I also could go back, because I witnessed the emergency vehicles on the day Mrs. Kaufman's talking. I was out there and I might better be able to speak of it because it was her husband that they were -- and there were three emergency vehicles. One had already arrived -- if you don't remember -- and it was fixed. Okay. And then two fire trucks came from opposite directions.

MR. ETHERLY: Okay.

MS. RICH: But I saw and heard the firemen get out of truck and ask parents who were lined up at Barbara's line for the 9:00 school that they would have to move the car so the truck could back up and get out of the street.

MR. ETHERLY: Okay. Okay. That's helpful information.

One final question just for, you know, any of the four of you to respond to. And, you know, once again, I appreciate my colleagues patience with me because I'm probably beating a little bit of a dead horse here. But my difficulty here is we have one picture which is presented by the applicant's traffic expert, three days of observations which is setting a very different tone from what we're hearing from neighbors, adjacent property owners as to the nature of the traffic situation on Hurst Terrace. So I'm trying to reconcile those two competing pictures.

Is it just the case in your opinion that Mr. Wells just happened to come on the three days where we just had the lightest traffic of the year and otherwise it's just absolute bedlam over there or --

MS. RICH: No. I would answer that neither is correct. Until last spring I would say

that it's typical. And had he come six months ago, that's what he would have seen.

Starting last spring the parents were instructed to drive around the block or idle back by our houses instead of getting up and -- there were just different traffic plans.

I also think that right now the parents are -- everybody's being very careful and because knowing that this is being studied and that there is the special exception deadline, I believe, coming up.

So I think I'm worried, you know, that it's not going to last.

CHAIRPERSON GRIFFIS: Indeed. That's understood.

MS. RICH: The worry.

MS. KAUFMAN: There's one other personal observation that I had that I saw in regard to a police officer driving down our street on the first day of school. And I just happened to see him and he drove between parked cars on both sides. He drove straight through, but it required the person coming from the opposite direction to dip into the driveway area of the home across the street.

So I don't know if this was Officer Burke or who was in the car but he obviously was -- he

didn't think it was a problem because he drove straight through. But the other person coming up the street was the one that had to kind of dip him to allow him to go through.

MS. LEONARD: If I could add, I mentioned in my testimony that over the years there have been a number of sporadic efforts to control the traffic problems when neighbors complained that their driveways were blocked, etcetera. They work for a while.

CHAIRPERSON GRIFFIS: Good. Thank you all very much.

Any cross examination of the testimony we've heard?

MS. GRIFFEN: I think just quickly for the record, some of you have answered this question, but just a yes or no from everyone on the panel, did you send your child to Barbara's Montessori School?

MS. KAUFMAN: No. I sent my child before Barbara established it as the Barbara's Montessori School.

MS. GRIFFEN: But your child was educated by Barbara in her home?

MS. KAUFMAN: Yes, I said that.

MS. GRIFFEN: And, Ms. Leonard, did you

send your child to her school?

MS. LEONARD: Yes, my daughter was one of the walkers in the neighborhood.

MS. GRIFFEN: Right. We have many walkers today.

MS. LEONARD: Five, I believe.

MS. GRIFFEN: And did Barbara offer your babysitter's daughter a scholarship to her school?

MS. LEONARD: Yes, she certainly did and she was very generous, and they both got excellent educations there.

MS. GRIFFEN: And did you send your child to her school?

MS. RICH: My child went to -- before she had Barbara's Montessori School.

MS. GRIFFEN: You sent your child to Barbara's home to be educated?

MS. RICH: I felt it was like a play group then before had a variance.

MS. GRIFFEN: Okay. And you did as well, sir?

MR. KAUFMAN: Yes, I'd do it again.

MS. GRIFFEN: Okay. Just wanted to clarify here.

I don't want to make a big deal about this

ambulance story. I would just note that Barbara --

CHAIRPERSON GRIFFIS: Actually, you can do that in closing.

MS. GRIFFEN: She has a very different version, though, and I would just like to put her one to clarify. I don't think any of them have said that the ambulance didn't make it through the street.

CHAIRPERSON GRIFFIS: Right.

MS. GRIFFEN: And so if you're interested in pursuing this, I would just say that she has a very different version of what happened that day.

CHAIRPERSON GRIFFIS: You have an opportunity after we get through cross examination. First of all we do rebuttal and then closing.

MS. GRIFFEN: Okay. I think that's it. Thanks.

CHAIRPERSON GRIFFIS: Good.

Mr. Rich? Mr. Finney? Very well.

Thank you all very much.

Okay. Ms. Griffen, if you want to prepare any rebuttal testimony they have, we can proceed with that and then we can go directly into closing.

MS. ALLAN: You want me to talk?

CHAIRPERSON GRIFFIS: I don't know. Actually, I'd defer to your representative.

MS. ALLAN: Okay.

MS. GRIFFEN: She's just going to make just one point on rebuttal and then we'll wrap up with closing.

CHAIRPERSON GRIFFIS: Okay.

MS. ALLAN: The morning of the incident with the ambulance, I came out for arrival and saw the ambulance parked in front of my neighbor's home. As soon as I got a few of the children in school and there were no other cars, I ran up to find out what was going on.

And at the end of my arrival, and luckily I had my cones out in front of my house, because then when the two fire trucks came up, that's where they parked.

That's all.

CHAIRPERSON GRIFFIS: Any cross examination of the new testimony you've just heard? Mr. Rich is indicating no. Mr. Finney? No. Very well.

Go to closing.

MS. GRIFFEN: Just a few closing comments.

CHAIRPERSON GRIFFIS: Sure.

MS. GRIFFEN: I know that we're going on here. It's important for Barbara that we get this

right.

CHAIRPERSON GRIFFIS: That's what we do here.

MS. GRIFFEN: I really think this should be an easy case for the BZA to approve. As the experts and the government have presented in their reports, they have found no objectionable traffic condition. That's obviously your role to determine whether you agree with that.

I would urge you to note there's been no evidence that traffic is impeded on the block.

Regarding parking problems on the street, I would just call your attention to the expert's report, table 5, when he outlines percent of spaces occupied during the morning and noontime hours; at all times less than 50 percent of the parking spaces on the street are occupied. I wish I lived on a street that had that many open parking places.

I don't think the neighbors have shown that there have been any new traffic problems that have come up since the traffic plan was devised by Barbara with input from the police department and others.

I think that she recognizes that there may have been problems. She's done everything she can to

address them. And I think that's all that can be expected of her. She needs to address the legitimate concerns of her neighbors. She can't tackle some of these larger issues regarding traffic in the neighborhood generally. And I think that seems to be the only reason that the opposition and the ANC think that you should give a short term, so they can review those external traffic conditions. But I would just encourage you impose reasonable conditions on traffic control for her school that you think will work. And that's what she can be expected to do to address the traffic conditions that are specifically related to her school.

I would note, just so you don't get the false impression that every neighbor on the street has opposed this, on the map that Mr. Rich brought up you'll see that the immediate adjacent neighbors to Barbara don't oppose this school and they're the ones that would presumably would suffer from the greatest traffic impacts.

The opposition keeps saying that the nature of the school has changed. You know, all of their kids walked. No one walks today. In the past there were parents of kids who walked. Today you heard from a number of people who currently walked to

the school. You're always going to have people driving to the school; there were when the school first started, there are now. And again the question is whether that creates an undue hardship on the neighbors. But I think as we've shown today it doesn't.

One final point on the duration issue. While we think it's so key that this permit be granted for ten years at least. The opposition seems to have admitted that it's okay as long as Barbara's running the school. As you know, it's not relevant who the operator is, but the question is whether the conditions on the use of the property are appropriate. You've already decided 20 years ago almost that the use of this property as a preschool was appropriate. Now you need to condition the use of that property and you should do that through your power to enforce traffic conditions, and you can always revisit this if conditions change in the future that are related to her school. But you've just got to understand that a short term permit, which is what the opposition is asking, is tantamount to getting in a backway condition that's illegal. In other words, they're trying by short term permit to make sure that the school ends with Barbara. And that's the same thing

as putting a personal condition on the school.

A short term permit is just not a viable option for a small school operating under these conditions. Denying a special exception to this tiny school are placing unreasonable restrictions on the duration of the term which subvert the District's longstanding policy in favor of preschools and allowing them to operate in residential areas. Her school is not only not objectionable, but desirable in this community and in the city where there's a real shortage of quality preschools.

Thanks.

CHAIRPERSON GRIFFIS: Thank you very much.

Thank you very much. That does conclude the hearing of the case today.

I'm going to run through my list of what I anticipate being submitted. I'm going to ask if staff concurs with that and Board Members concur, and then we're going to set the schedule and very quickly get through this.

First of all, I have a note that Mr. Wells is going to submit an addition to the traffic plan that incorporates events and how that will be facilitated.

We also asked for Lieutenant Burke's

report.

I would ask that the parties submit proposed conditions. And all the parties were also going to brief the issue of the parking requirements attendant to this application.

And what have I missed?

VICE CHAIRPERSON RENSHAW: Office of Planning supplemental report.

CHAIRPERSON GRIFFIS: Okay.

VICE CHAIRPERSON RENSHAW: And the DDOT is to give a reading on the cone issue.

CHAIRPERSON GRIFFIS: Right.

MR. ZAIDAIN: And, Mr. Chair, do we want a brief from Corporation Counsel on the parking issue?

CHAIRPERSON GRIFFIS: No, I think the Board can ask Corporation Counsel's opinion if needed once we receive the briefs.

MR. ZAIDAIN: Fair enough.

CHAIRPERSON GRIFFIS: Ms. Mitten?

MS. MITTEN: Mr. Chairman, the second item that we had asked from DDOT was how they would view an application to reserve the parking spaces in front of the subject property for use by the school during school hours.

CHAIRPERSON GRIFFIS: Good.

Does the staff have anything that we missed? Ms. Bailey?

MS. BAILEY: No, Mr. Chairman.

CHAIRPERSON GRIFFIS: Thank you very much.

Is that clear what's to be submitted? All the parties indicating that they understand that.

Okay. Let's set schedule.

MS. PRUITT: Mr. Chairman, based on the information that needs to come in, it appears that the best time for the Board to make a decision, particularly about the parking, would be at the December 5th meeting. Oh, I'm sorry. You're not going to have a meeting on that date because of election day, correct?

CHAIRPERSON GRIFFIS: November you are talking about, correct?

MS. PRUITT: November. So that would be November 12th, we could do it as a special public meeting the first thing in the morning. If that's the case, you could have briefs submitted October 15th and then responses could be on the 29th.

Actually, all information should be submitted on the 15th with responses to those by parties on the 29th.

Also, do you understand you have to serve

everything on all the other parties? So if you're requested to submit information, you then need to give a copy of that to the ANC and the opposite party and they have to give you that, too.

MS. GRIFFEN: Okay. And then do I have a hearing again?

CHAIRPERSON GRIFFIS: If you have questions -- actually, any parties that have questions on this, if we need to give clarification make sure everyone gets out of here momentarily with a full understanding of the schedule and what's to be submitted.

MS. GRIFFEN: So we need to submit our report -- our brief on the parking conditions by October 15?

MS. PRUITT: Correct.

MS. GRIFFEN: And then there's a hearing on that issue?

MS. PRUITT: No. The Board will take in that information. The parties will have a chance to respond to your briefing, as you will with them, by the 29th. And November 12th at a special public meeting the Board then will make a determination whether or not on the parking issue based on your briefs. And if there is a further hearing needed, then

that will be discussed and set. If not, then we can set it for decision for the overall case.

MS. GRIFFEN: So we don't need to show up on November 12th?

MS. PRUITT: It's just a matter of information.

MS. GRIFFEN: And just so you know, Barbara's permit expires in October, but I presume the fact it won't be decided until December is fine?

MS. PRUITT: Because it's in our jurisdiction, so it's not like --

CHAIRPERSON GRIFFIS: Once the application is filed, then its in our jurisdiction.

MS. GRIFFEN: Okay.

CHAIRPERSON GRIFFIS: Mr. Rich?

MR. RICH: I just wanted to be sure. The only other issue you wanted us to address --

CHAIRPERSON GRIFFIS: I can't hear a thing you're saying unless you're on a mike.

MR. RICH: I'm sorry.

The only other issue you wanted us to address was the conditions we thought that should be imposed?

CHAIRPERSON GRIFFIS: Exactly. I'm opening the record to receive any proposed conditions. And you

1 don't need to be redundant if they're in. Clearly we
2 have it.
3 MR. RICH: Right. So the two issues are
4 the parking and that --
5 CHAIRPERSON GRIFFIS: Correct. Anything
6 else?
7 Okay. For clarification for the Board,
8 Ms. Pruitt, we've set this for November 12th decision
9 making. We could conceivably decide this entire case
10 on that date, is that correct? Or are you indicating
11 that you just wanted to have the parking decided?
12 MS. PRUITT: No. You could actually if
13 you decide that there is no requirement for you to re-
14 advertise on parking .
15 CHAIRPERSON GRIFFIS: That's exactly
16 right. In which case, we're going to go for the whole
17 package. In which case we're going to request that the
18 parties submit findings of facts and conclusions of
19 law in this case so that we can be totally prepared
20 for the 12th. So let us reiterate only that
21 information on when that's to be submitted and when
22 the Board would get that.
23 MS. PRUITT: Okay. That would be due
24 October 29th but from everybody.
25 MS. GRIFFEN: So October 15th you require

our briefing on parking. All other information that you requested --

CHAIRPERSON GRIFFIS: Right.

MS. GRIFFEN: -- is due October 29th.

CHAIRPERSON GRIFFIS: There are two points for the two different dates because some of the stuff has to be circulated and given an opportunity for response from parties. And so we will have submissions and responses. Is that clear?

Is that clear to everyone else? Mr. Rich? Mr. Finney? Are you sure, Mr. Finney? We can take other questions related to this.

Okay. And let me also indicate clearly staff is available after a public hearing if there are further questions by any of the parties for clarification of what we've just gone through, but we've got it on the record.

In that then, I bid you all a great afternoon. We will possibly see potentially November.

And let us call the next case of the morning. Actually -- well, yes, let me have the next case of the morning start setting up.

While the second case is being set up, I'm going to ask if people could just have a little decorum here. Because what I need to do is have the

representative from the third case of the morning come up to the table, please, and that is application 16917, the application of Pilgrim A.M.E. Church.

Good afternoon, sir. Wish I was saying good morning.

MR. STILLWELL: Good morning, Mr. Chairman.

CHAIRPERSON GRIFFIS: Have a seat. Just give me your name, please?

MR. STILLWELL: For the record, my name is Garland Stillwell.

CHAIRPERSON GRIFFIS: Yes.

MR. STILLWELL: The law firm of Reynolds and Block. We will represent the applicant Pilgrim A.M.E. Church.

CHAIRPERSON GRIFFIS: Good. And I understand that staff has indicated to you clearly our schedule has gone a bit further, which was beyond our control.

MR. STILLWELL: Yes.

CHAIRPERSON GRIFFIS: And I'm asking whether you will be not in opposition of rescheduling this case to a time, I believe, in October?

MR. STILLWELL: We understand the severe time constraints of the Board this morning. We are

prepared to offer in light of that to stand on the record in this case, if that would help expedite this case.

We do have some critical time constraints at the site in regards to maintaining the security because it is vacant. We worked extensively with Mr. McGittigan and the ANC. We could simply say on the record today without presenting any detailed testimony at all, we stand on the record, the report by the Office of Planning and to our knowledge there is no opposition here today on this case.

CHAIRPERSON GRIFFIS: Okay. That is not my understanding.

What was the date that we set? October 1st, is that correct?

MS. BAILEY: Yes, that would be next week.

CHAIRPERSON GRIFFIS: Okay. So we have just until next week.

Secondly, there is opposition in this case. If I'm not mistaken, there's actually an application for party status, isn't that -- am I --

MS. PRUITT: That's correct, sir.

MR. STILLWELL: If you're referring to record item number --

CHAIRPERSON GRIFFIS: Exhibit 26.

MR. STILLWELL: -- 26. That relates to the adjacent property on which the client, which our applicant has met with and we're looking into that situation. But I don't believe they have a representative here today.

CHAIRPERSON GRIFFIS: Yes. Okay. Well, in that you're looking into it, wouldn't you like another week to look into that situation and remedy it fully?

MR. STILLWELL: If I understand the Chairman correctly, we would be talking -- when we say October, we would be talking about October 1st?

CHAIRPERSON GRIFFIS: That's correct.

MR. STILLWELL: We'd take October 1st, Mr. Chairman.

CHAIRPERSON GRIFFIS: Good. I thank you very much. And I do appreciate your patience this morning. I'm sorry we've had to keep you all the way into the afternoon. But we will see you October 1st.

What is the schedule on the 1st?

MS. PRUITT: You see, Mr. Chairman, we're in a unique position that we have no cases to be decided for October 1st.

CHAIRPERSON GRIFFIS: Oh, we're going to take the day off then.

1 MS. PRUITT: So we'll --

2 CHAIRPERSON GRIFFIS: No, we're not.

3 We'll hear you guys.

4 MS. PRUITT: So we can hear them at 11:00

5 just in case there's something that does come up

6 before that we need to deal with.

7 CHAIRPERSON GRIFFIS: Okay. And the first

8 of the month is our public meeting, which we do our

9 decision making.

10 MR. STILLWELL: Understand.

11 CHAIRPERSON GRIFFIS: It would be very

12 safe for us to set you at 11:00 and that way you don't

13 idly sit by for a couple of hours.

14 So 11:00, October 1st.

15 MR. STILLWELL: We understand. Just for a

16 point of understand for our client, we would be asking

17 for a vote on the application at that point, would

18 that be appropriate?

19 CHAIRPERSON GRIFFIS: Depending. Why

20 don't we hear the case first.

21 MR. STILLWELL: Just thought --

22 CHAIRPERSON GRIFFIS: It would be

23 extremely appropriate for you to ask at the end of the

24 case for a bench decision, which conceivably if the

25 entire case is there, we have done that in the past.

MR. STILLWELL: Thank you, Mr. Chairman.

CHAIRPERSON GRIFFIS: Good. Thank you very much.

Okay. Let us move back to application 16916. Did we call the case? We call the case.

MS. BAILEY: Application 16916 of Friends Committee on National Legislation, pursuant to 11 DCMR 3103.2, for a variance to allow the enlargement of nonconforming non-profit office space under subsection 2002.5, in the CAP/R-4 District at premises 245 2nd Street, N.E. (Quire 757, Lot 844).

Please stand to take the oath.

Do you affirm that the testimony you are about to give in this proceeding will be the truth, the whole truth, and nothing but the truth?

WITNESSES: I affirm.

CHAIRPERSON GRIFFIS: Yes, sir.

MR. TUMMONDS: Good morning, or I had it written down for this morning. We're now good afternoon.

One preliminary matter, we will be submitting into the record the résumé of our architect. We'd like to have him be admitted as an expert witness.

CHAIRPERSON GRIFFIS: Is that the only one

you're proffering as an expert witness?

MR. TUMMONDS: That's correct.

CHAIRPERSON GRIFFIS: Okay. Thank you.

Okay. Board Members, take a moment.

Any objection?

MS. MITTEN: No objection, Mr. Chairman.

CHAIRPERSON GRIFFIS: Very well. And that indicates the census of the Board.

MR. TUMMONDS: Okay. For the record my name is Paul Tummonds on behalf of law firm of Shaw Pittman.

In light of the fact that this application has no opposition, we have unanimous support from various government agencies, the two adjacent most readily impact residential neighbors, we are prepared to give a very abbreviated short presentation. We don't expect our presentation to take more than ten minutes.

As I said, we are here today on behalf of the Friends Committee, a National Legislation Education Fund. We have representative Joe Volk here to answer any questions that you may have regarding operations on the site. We also have Harry Gordon and Ginny Baker representatives of the applicant and Ashley Horn is also here with us today. She's part of

1 our Shaw Pitmann team. And we're off and running.
2 The case we're presenting a minor use
3 variance for the Friends Committee building, which is
4 located at 2nd and C Street, Northeast. This site was
5 initially approved for nonprofit office by the BZA in
6 1958. Since that time the Friends Committee has
7 continually used that site for nonprofit office space.
8 As discussed in greater detail in our
9 prehearing statement and also in Exhibit I, the letter
10 from the Zoning Administrator, the proposed additions
11 and modifications to the building fully satisfy all of
12 the matter of right zoning development perimeters in
13 the CAP/R-5-B district. The requested variance relief
14 is necessary because we are adding some additional
15 gross square footage to this building. Of this
16 additional gross square footage, 73 percent is related
17 to upgrades of the building related to ADA and various
18 building code requirements.
19 In addition, the Friends Committee
20 undertook an internal assessment regarding the
21 longevity of this building. That internal assessment
22 found that this building will only be habitable for
23 another five years.
24 The architects will go into a little great
25 detail about the modifications and additions to this

building. As I mentioned previously, the proposed upgrades to the building have received conceptual design approval from the Historic Preservation Review Board, the Capitol Hill Restoration Society. In addition, we made a presentation to the ANC-6A development committee meeting and received their support. In the record there are record there are letters of support from the two adjacent residential property owners on C Street. I see that one of those residential neighbors is still here, unfortunately the other one had to leave. She said she may be back.

CHAIRPERSON GRIFFIS: I hope she brings lunch.

MR. TUMMONDS: Yes, me too.

Finally, the Office of Planning and the Architects of the Capital has submitted reports in the record in support of this application.

With that, as I mentioned previously, representatives of the Friends Committee are here to answer any questions you may have regarding operations on this site.

And I will now ask Harry Gordon, representative of the architect, to quickly go through the proposed additions and renovations to the building.

Mr. Gordon.

MR. GORDON: Thank you. My name is Harry Gordon with the architectural firm Burthill, Kosas, Riddleman Associates, and I'd like to briefly describe the proposed renovations for this project.

The board on your left is a site plan and first floor plan and orients you. C Street is at the top of that board and 2nd Street is on the lefthand side.

The board on your right shows a photograph of the existing corner and our rendering showing the proposed changes to the building.

Basically the purpose for our changes is twofold. One is to make the building sound and more efficient. And two is to cause it to comply with building code, ADA and other requirements that the building currently does not achieve.

As counsel said, the building has been continuously in use since 1958 by the Friends Committee on National Legislation. And no substantial changes have been made to the building in that period of time. So regulations having to do with egress and life safety, Americans With Disabilities Act and so forth, the building does not comply with those.

We intend as part of our renovation to

restore the historic facades, to partially demolish the nonhistoric elements that were built approximately 40 years ago and to add a gross floor area of 1,509 square feet. The principle purposes for that additional proposed square feet would be: To add an egress stair to comply with egress stair; to provide an elevator which will allow the building to comply with the Americans With Disabilities Act accessible toilet rooms, again for compliance with the ADA; reading ventilation shafts to permit fresh air to be brought through the building to achieve healthy building conditions.

Although it's not a space requirement, we're also adding a fire protection system which will provide increased safety not only for this building, but also for neighboring buildings.

As counsel said, the upgrades building satisfies all of the requirements of CAP/R-5-B. And we became aware of a couple of questions that the Board had that I would like specifically address. One is I'd like you to note the elevator location, which is at the center of the building. In this adjacent plan here, if my colleague will please put it up, you'll see that the override for that elevator occurs in the middle of the structure adjacent to the party wall. So

it as far from any of the exterior walls of the building that it is possible to put it.

The other question that we're aware of that was raised has to do with the garden, which is proposed at the south end of the site.

CHAIRPERSON GRIFFIS: Let's not move off the elevator override first. In terms of, you're looking at -- you've just point to the west elevation. However, I don't think it's clear to the Board. If you look at the elevator location, that's actually on a property line, correct?

MR. GORDON: It is.

CHAIRPERSON GRIFFIS: Okay. So when that override rises on that wall, it's directly on it. Is that correct.

MR. GORDON: It is.

CHAIRPERSON GRIFFIS: So it isn't set back from the edge of the property?

MR. GORDON: Set back from the three exterior freestanding edges, I believe what my testimony was.

CHAIRPERSON GRIFFIS: Indeed. Okay. Follow up questions on that?

MS. MITTEN: Well, Mr. Griffis, you can probably correct me on this, but I thought the setback

requirement was equal distance to the height from each exterior wall not just unattached exterior walls. When he rubs his eyes like that, it means he's not happy with me.

CHAIRPERSON GRIFFIS: I'm not the expert to answer that question.

MS. MITTEN: Well, you have the ordinance in front of you.

CHAIRPERSON GRIFFIS: That is true. We can get an opinion from Corporation Counsel, as they are here. 411.

MS. MITTEN: Mr. Chairman, the relevant section is 400.7(b) housing for mechanical equipment, stairway or elevator penthouse. One of the conditions is that it shall be setback from all exterior walls, a distance at least equal to its height above the roof upon which it is located. 400.7(b).

CHAIRPERSON GRIFFIS: And what's your definition of an exterior wall?

MS. MITTEN: I'd be surprised if we had one, but --

CHAIRPERSON GRIFFIS: I would, too. Wall, lot line.

MS. MITTEN: I mean, we would have to go to the dictionary, and I would suggest that the

definition -- I mean, we could look it up but it's going to say something about being on the outside. So then it becomes a question of whether or not a party wall is an outside wall.

MR. TUMMONDS: I think looking at the definition of wall lot line, page 1.24.

CHAIRPERSON GRIFFIS: Right.

MR. TUMMONDS: Wall line in enclosing wall construction immediately adjacent to a side lot line but not a party wall.

MS. MITTEN: But the term that's used in 400.7 is not lot line wall, it's exterior wall.

CHAIRPERSON GRIFFIS: Right. And it's not party.

MR. TUMMONDS: Well, I think on behalf of the applicant, we have two things, we relied on the interpretation of the Zoning Administrator stating that this application fully satisfied all of the relevant requirements. Because we are already here for a use variance, I believe that if you believe as a Board that it is necessary to also grant relief from Section 400.7(b), I believe that this case, because it is also -- you know, in fact we're here for a use variance, an area variance has a lesser standard of relief. I think those people who had any questions

regarding notice, they would be here, they would be able to present that.

We could then also, if you feel it's necessary --

CHAIRPERSON GRIFFIS: However, we can deal with it today. Just how we deal with it is the point.

Okay. There's another issue, unless there's other things you want to add to that.

MS. MITTEN: Well, Mr. Gordon was on a roll and we just sort of interrupted him, so maybe we'll just let him proceed. Because I think he was going to address the second issue.

CHAIRPERSON GRIFFIS: Indeed. Very well.

MR. GORDON: I was indeed. I'll try to make sure that I state it as clearly as I can, and we'll see if I understood it properly.

I think the second question had to do with the garden which is proposed on the south end of the site.

MS. MITTEN: Actually, no it didn't.

CHAIRPERSON GRIFFIS: It's on the other side.

MS. MITTEN: The question had to do with the notch in the wall on the east side. There's a notch where the end -- the existing party wall ends

and on the east side. What's that notch? Because the property line is not irregular.

CHAIRPERSON GRIFFIS: You need to describe why you didn't create open space there or nonconforming court.

MR. GORDON: Well, isn't that adjacent to the dog leg? I believe that the adjacent property has a dog leg at that location.

CHAIRPERSON GRIFFIS: Okay. I think then the important thing would be can you point to the property line on that plan? Does it fall -- do you know where the property line is?

MR. GORDON: To the best of my belief, it's in the center of that wall.

CHAIRPERSON GRIFFIS: Center of the front wall, which means that a lot line wall, that's a common wall, party wall. So half of that wall is on one property, half of it is on the other?

MR. GORDON: That would be right.

CHAIRPERSON GRIFFIS: Okay. So if you follow the property line down to your new wall, where is it?

MR. GORDON: I believe it's our intention that the eastern most face of that wall is at the property line.

CHAIRPERSON GRIFFIS: Meaning on the property line.

MR. GORDON: Meaning on the property line.

CHAIRPERSON GRIFFIS: Okay.

MS. MITTEN: That's fine.

CHAIRPERSON GRIFFIS: Indeed. That would satisfy it. Very well.

Any other issues you've become aware of while we've been sitting around all day.

MR. GORDON: No, but I'd be happy to respond if any have arisen.

CHAIRPERSON GRIFFIS: Yes. Good. Thank you. Okay.

We're going to take a minute and just continue with this, and we will get some information on the penthouse setbacks. But I would ask that you continue presenting your case.

I think we're very clear on the plans. I'm not sure how much more we have to go through those. I think it's very adequately presented in terms of what the requirements were in terms of the expanding space.

A quick clarification, of course we will need. It is in the written submission, however, that there's an expansion of use going into this space, but

there's actually no expansion of the program that's happening within the building. And I think we could just hear a little bit about that. But I'll let you continue.

MR. VOLK: Mr. Chairman, that's exactly right as you stated it that there is no plan or even capacity of this small nonprofit organization to expand our program, but we would anticipate it continuing as is for the foreseeable future.

And my name for the record, Joe Volk, Executive Secretary of the organization.

CHAIRPERSON GRIFFIS: Good. Thank you.

MR. TUMMONDS: Mr. Chairman, based on our earlier discussion, the one issue which we probably have not addressed in the record which was not addressed in our prehearing statement would be if you want, we could have our architect quickly go through the variance relief standard for the rooftop, the penthouse enclosure for the elevator mechanical space just so that we have it on the record so that we can fully show that we've fully satisfied the variance standards for that relief if it is deemed that we need to have that relief.

CHAIRPERSON GRIFFIS: We won't deny you without letting you present a case.

Any further on the case in front of us?

MR. TUMMONDS: That concludes our presentation.

CHAIRPERSON GRIFFIS: Great. You want to avail yourself to questions, starting with Ms. Mitten.

MS. MITTEN: I just have one question, because this case is very similar to another case that we had recently with one important difference, which is the fact of the nature of the organization. So we do have some information in the record about the fact that, you know, the mission of the organization. If you could just perhaps speak for a minute or two about why you need to expand in this location rather than relocate to someplace else. Or why it's so important that you be allowed to have what would be about a 27 percent increase in gross floor area that's directly related to adding space as opposed to dealing with, you know, health safety requirements.

MR. VOLK: The Friends Committee on National Legislation is a Quaker organization and does education about national legislation and national policy. We work in the public interest, that is we're not educating or proselytizing about our own religious society of Friends, but rather working in the public interest on policy issues of concern to Friends.

Being on that corner across from the Hart Senate Office Building provides us access to talk with people who are informed about public policy and who make public policy. And having been there for the past 40 years, we, our operation, our community would be disrupted if we had to move to Rosslyn or Sandy Springs, someplace like that.

I don't know if I've spoken to the question that you're asking.

MS. MITTEN: Well, presumably you wouldn't have the same kind of access if you were in another location?

MR. VOLK: We certainly would not. Colleague organizations which have a similar mission, directors talk to me about this and say that they are not able to have policymakers come and talk with them and their constituents because they won't travel across town to do it.

And also, they make decisions every day, will they take the time and the money for the taxi ride or the Metro ride to the Hill.

MR. TUMMONDS: Mr. Volk, perhaps you could discuss briefly the importance of having your national headquarters building be fully ADA compliant with your group's views on openness to all people?

MR. VOLK: One of the advocacy and education work that the FC National Legislation Fund did was to help our members, member congregations but also the general public, understand the problems that people with physical handicaps have in access to public facilities and private facilities. And we worked very hard to help people under why the Americans With Disabilities Act made sense. And having done that, we feel that to have integrity with our own value and work, we need to make our building compliant with ADA.

MS. MITTEN: Thank you.

CHAIRPERSON GRIFFIS: Other questions?

Okay. Any other questions for the applicant and the Board Members?

In which case, I'd like to proceed to the government reports. And let's start with the Office of Planning, which would be -- yes. Good afternoon.

MS. RAY: Good afternoon. My name is Venita Ray, I'm with the Office of Planning. And I think you have our report in front of you.

CHAIRPERSON GRIFFIS: Uh-huh. Are you prepared to stand on the record on your report?

MS. RAY: Yes. I was looking through.

CHAIRPERSON GRIFFIS: Thank you very much.

A good report as usual.

Any questions of the Board Members regarding the --

MS. RAY: And you should also have our color photos.

CHAIRPERSON GRIFFIS: Oh, indeed.

MS. RAY: I couldn't download my file and then I was out of town, so sorry for the -- Exhibit 34. And I've also given the applicant a copy.

CHAIRPERSON GRIFFIS: Okay. Good.

Any questions from the Board? Any questions of the applicant?

MR. ZAIDAIN: No questions.

CHAIRPERSON GRIFFIS: Very well.

We do have Exhibit 27, which is the letter from the Architect of the Capital that indicates that there would not be any adverse effects to the Capitol complex to the master plan.

HPRB, I don't have indication that actually had a submission of the memo from HPRB, is that correct?

MR. TUMMONDS: That's right. We had not submit the HPRB. But I can submit for the record --

CHAIRPERSON GRIFFIS: Are you submitting the memo, is that what you're doing?

MR. TUMMONDS: Yes. What I submitted to staff is the HPRB staff report recommending approval for the -- conceptual design approval for the proposed amendments to the facade, the lots subdivision application and I believe the demolition, minor demolition to some aspects.

CHAIRPERSON GRIFFIS: Okay. We also have ANC 6A 04 that was not filed. Does anyone have record of that being submitted late? Very well.

Is anyone here attendant to this case this afternoon that would like to give testimony either in support or in opposition. We are looking at our second case of the morning, application 16916, the application of Friends Committee on --

MR. TUMMONDS: I believe we do have the immediately adjacent neighbor, in fact the neighbor whose property abuts the building where the elevator override will occur. She has been here. Ms. Morris has submitted her letter in support. But I think she'd like to testify as well.

MS. MORRIS: I've been very interested in what we've heard this morning. I live in the city and I enjoy hearing how carefully you're trying to run the place. And a little more than that --

CHAIRPERSON GRIFFIS: I appreciate that.

MS. MORRIS: -- because a war is so imminent, it seems that I think when you go into these things in detail to try to keep -- to put down the fires of neighborhood quarrels it's a wonderful process. And it's very good of you. It takes time.

I like living next door to the Quakers. And they are quiet and efficient, the place is run. And can testify by the manager of all their buildings and things, that they run now.

I've studied all these pictures that they have and they meet my approval, which is something a little more than if I were just a neighbor. I'm an ex-school teacher, of course. But the reason I'm qualified is that I myself worked hard for historic preservation on my own building. Everything is absolutely -- absolutely right. The Department of Interior certification that I did my building right, which was built in 1860, just about the time they were into the Civil War and deciding whether they had to build the buildings cheaper. But they built a good one for me.

So I thank you for apparently approving what the FC&L, Friends Committee on National Legislation is doing their building. It's going to make my building safer, stronger and possibly more

beautiful on the outside. So it should appeal to everybody.

Thank you.

CHAIRPERSON GRIFFIS: Good. Thank you very much, Ms. Morris.

Any questions from Board Members?

MS. MITTEN: Well, I just wanted to say hello to Mrs. Morris. Mrs. Morris. I rented from an apartment from you 205 C Street 18 years ago. So, I can attest to the quality of your renovation.

MS. MORRIS: Carol Mitten, were you in apartment 3?

MS. MITTEN: I was on the second floor. The efficacy.

MS. MORRIS: That's the one. She changed my building. She had a sofa that had to go in --

CHAIRPERSON GRIFFIS: All right. I don't think we're going to go too far into that.

MS. MORRIS: We had to enlarge and rebuild the stairway because we such a tiny spot in the old building to turn around in.

CHAIRPERSON GRIFFIS: Indeed. And we'll take that as a disclosure by Ms. Mitten. Any objections to her continuing on the case? Very well.

Anybody else here today intending to give

testimony? That being said, prior to closing remarks, I'd like to remedy this roof structure issue.

I think we have two expeditious ways to proceed with this. The first, clearly we could have a variance case presented to us by the applicant for a variance from the setback. We can also indicate that that is not needed at this point. And I would open up discussions briefly to the Board at this point.

MR. ZAIDAIN: Mr. Chair?

CHAIRPERSON GRIFFIS: Yes.

MR. ZAIDAIN: Given the situation, I think we have to use the information that we have in front of us. And it's my understanding that when there's not a clear definition, we have to defer to the dictionary.

CHAIRPERSON GRIFFIS: Correct.

MR. ZAIDAIN: Am I correct?

Well, unfortunately the dictionary also has to definitions of exterior. But looking -- and that's the issue here here is whether or not the exterior wall -- if the adjoining wall is an exterior wall which would be suspectable to the conditions of the setback for the elevator overrun. And looking at the definition of exterior, I would not feel comfortable with designating that as an exterior wall.

If you look at the definition it references structures with an outer surface. You see suitable for use, again, on outside surfaces. It seems to provide a definition of structures that are visible to outside components, suspectable to outside conditions. Obviously, this is an interior wall that adjoins the neighboring property.

So with the information I have in front of me, I would not be willing to designate it as an exterior wall and I would stand by the Zoning Administrator.

CORPORATION COUNSEL: Mr. Chair? Mr. Chair?

CHAIRPERSON GRIFFIS: Yes.

CORPORATION COUNSEL: Could I just suggest a third alternative, which is to look at 411.11.

CHAIRPERSON GRIFFIS: Uh-huh.

CORPORATION COUNSEL: Which says that even if you decide that 400.7(b) applies, that provision allows the Board to approve the location, design and all other aspects of such structure even if they don't meet the normal setback requirements. And it gives the criteria that you should apply there.

CHAIRPERSON GRIFFIS: How is that a third alternative? Isn't that really --

CORPORATION COUNSEL: Well, if you decide that this might be an exterior wall, you can grant an exemption in effect under 411.11 or, you know, if you don't want to decide whether or not this is an exterior wall. Or if you decide it is an exterior wall, rather than a variance you can give an exception under 411.11.

CHAIRPERSON GRIFFIS: I see. Is that clear to Board Members? Others?

MR. ZAIDAIN: Well, it's 411.11. Is that a special exception process?

CORPORATION COUNSEL: I think it's a little similar than that even.

MR. ZAIDAIN: It's just an approval?

Well, I stand behind my first statement about the exterior wall, so I guess that leaves me out of the debate.

CHAIRPERSON GRIFFIS: Okay.

MS. MITTEN: Mr. Chairman, since I'm the one that raised it, I don't want to bog things down. It's just that it didn't strike me -- it struck me that that was an exterior wall. But if we can move along quickly under 411.11, let's do that.

CHAIRPERSON GRIFFIS: And I don't have a problem bogging it down if we are in a substantive

piece. I just want to make sure that we're absolutely looking at all the information and deciding the case correctly. In which case, we could roll that in if it's the consensus of the Board to go under 411.11 in this case. If Corporation Counsel, disagrees, they can indicate so and put that into the motion, whichever way we move on this case.

Is that everyone's consensus to move that way? Very well. Then we can go to closing remarks by the applicant.

MR. TUMMONDS: Okay. Then based on the evidence that we submitted in the record, and we believe the applicant's satisfaction of the variance standards in support for this application, we would request that the Board approve this application today by a bench decision.

Thank you.

CHAIRPERSON GRIFFIS: Thank you very much.

I think the Board's prepared to move ahead with this today in a bench decision. I wanted to briefly -- let me first indicate that I would move approval of application 16916 to the Friends Committee National Legislation to allow the enlargement of the existing nonprofit office space under subsection 2002.5 for premises 245 2nd Street, N.E. and also to

grant under 411.11 a -- I don't know what the hell we call it -- I guess it's an exception from the setback as might be required

MS. MITTEN: Second.

CHAIRPERSON GRIFFIS: I love ties for seconds. Very well.

First of all, I thought it was an impressive case that was presented. One of the most stunning things was to read the actual order from 1958, which was enlightening. And as a quick aside, they obviously allowed Board members site visits, which I wish we could do. However, it shows that there's a clear history of the use has now proffered and is now proffered in this building. Clearly, it's seemingly simple, but it's complex in the application itself because we have an extension of a matter of right addition and, therefore, the use has to fulfill that. But we don't have actually expanding use. I thought that was pertinent and critical to the formulation and the strength of this case.

Laid out before us was three, let's say issues that spoke out to the exceptional situation and condition. I was strongly swayed by one of the three and not so persuaded, but not disregard the second of the two. And I spoke to the first, and that is the

occupancy of the subject property for over 40 years. It's about time the additions and upgrades are happening. It's good to see that it's happening.

The second in terms of proximity to Capitol, I think a lot of the importance of that was brought to light today in terms of the functioning, and that really ties to the third, which independently I'm not sure stand on its own that this is a unique and therefore should be granted just based on the fact that it promotes -- it's an entity that promotes public welfare. But all wrapped together the three seemed to be very strong.

I can go on, but I thought those were the points I wanted to highlighted in this. Anyone else is free to speak to the motion at this time.

Very well. Then I can ask for all those in favor by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: And opposed?

Mr. Tummonds, do you ask for a summary order on this?

MR. TUMMONDS: Yes, please.

MS. MITTEN: Mr. Chairman, can I just ask one question about that? We have another case, as I mentioned, that was very similar to this and we denied

the request for a use variance beyond providing for life safety because of the critical issue about the nature of the organization in this case. So will a summary order represent that we are relying in part in granting this on the Monaco and National Black Child Development cases as interpreting -- further interpreting the ordinance? Because I want to be sure that that's captured.

CHAIRPERSON GRIFFIS: Right.

MS. MITTEN: I'm thinking for the Board's benefit of the case on N Street.

CHAIRPERSON GRIFFIS: Right. Yes. And we've actually had it go both ways, because I'm recalling another one.

I don't think that's a problem in terms of summary order. I can be corrected by staff, corp counsel on that, and I think it's important to do. There are some excellent citations for the cases also that I thought about substantiated the presentation of the issues to us.

So we'll make note of that and add that in the summary order.

Very well. Anything else in this case?

Oh, then with a bit of pleasure I can adjourn the morning session this 24th of September

2002. And I will be calling the afternoon session in a matter of 25 minutes.

(Whereupon, at 2:12 a.m. the Public Hearing was adjourned, to reconvene this same day at 3:25 a.m.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-0-N

3:10 p.m.

CHAIRPERSON GRIFFIS: And good afternoon, ladies and gentlemen. I will call to order the 24th September, 2002 afternoon session of the Board of Zoning Adjustments.

I'm going to try to abbreviate. We all have name tags and I think you were part of this morning. But I am Jeff Griffis. With me today is the Ms. Anne Renshaw, Vice Chairperson, Mr. Curtis Etherly and also representing the Zoning Commission is Ms. Mitten, and Mr. Zaidain representing the National Capitol Planning Commission.

Let me outline a few important things. Clearly, the agenda since this is the only case in the afternoon, but they are located at the door.

The important things to remember, the hearings are being recorded so we will need to have everyone speak into a microphone. The microphone should be one.

Also, when coming forward to give testimony to the Board, you need to fill out two witnesses card. And we still have plenty copies of those and you can present the two witness cards to the recorder whose sitting to my right.

I would ask that everyone turn off cellphones and beepers so we don't disrupt any of the proceedings that are happening in this afternoon's case.

And I don't anticipate any disruptive noises or actions in the hearing room. Clearly we won't tolerate those. And I'm certain it won't happen.

Let me say, I will go through the procedure for this case, which is an appeal, which is a little different. Not a normal special exception and variances. But first we will clearly have the appellant's case. Second we have administrative officer's case. Third, we would have case of the owner. Fourth we will hear from ANC in which the property is located. And then finally we'll have rebuttal and closing statement by the appellant.

Let me state for clarity, of course, that any information the Board will request, we will make it very clear on which and why it should be submitted. We will also indicate when the record will be closed. After the record is closed, we will have no other information submitted to the Office of Zoning.

The Sunshine Act requires that public hearing on each case be held in the open before the public. The Board may, consistent with its procedures

and the Sunshine Act, enter into executive session either to discuss the case or deliberate on this case. And in order to have any appearance to the contrary of keeping this based exclusively on the record, we ask that people present today not engage Board members in conversation.

As I indicated, the Board is prepared to hear the entire case. Clearly we can't assess exactly how long it's going to take, but we are committed to keeping our schedule. And so we will reassess when we get close to the 6:00 hour how much more is left and how far we need to go.

I will also try and take a quick break, which I think will only facilitate our proceedings as the Board Members can stretch their legs and stay attentive to all the information that's coming to us. You were all here for most of our morning, or part of the afternoon which was our morning. And so you know that we've started early and heard quite a lot of information already. So I do want to make sure that we're bright and attentive.

With that, if there are not any other things, let me turn to staff to see if they have any preliminary matters for us in the afternoon case and if not, I can ask if they have preliminary matters,

and then we can call the case.

MS. BAILEY: Mr. Chairman, no specific preliminary matters other than the ones associated with the case. This is the only one for the afternoon. So would you like for me to call the case at this time?

CHAIRPERSON GRIFFIS: I think that would be appropriate, yes.

MS. BAILEY: Okay. This is appeal number 16849 of Robert Lehrman, pursuant to 11 DCMR 3100 and 3101, from the decision of Michael D. Johnson, Zoning Administrator, effecting the issuance of building permits (Nos B439404 and B435446) allegedly causing the illegal removal of trees protected under the Tree and Slope Protection Overlay District (section 1511), the property is located in the TSP/R-1-A District at premises 2221 30th Street, N.W. (Square 2198, Lot 6).

Mr. Chairman, this is an appeal proceeding, so there is no swearing in.

CHAIRPERSON GRIFFIS: Very good. Thank you very much.

Are there any preliminary matters to be brought up at this time?

MR. QUIN: Yes, Mr. Chairman. My name is Wayne Quin with Dennis Hughes of Holland & Knight. We

represent the property owners in this particular case. And we have filed a motion to dismiss on jurisdiction grounds, which I assume you'll hear first, which is the normal way -- in fact, it's required for the Board in order to proceed -- to have the power to proceed you would have to decide the motion first.

CHAIRPERSON GRIFFIS: Thank you.

MR. QUIN: Then we can present case law on that.

CHAIRPERSON GRIFFIS: Any additional preliminary matters that we may not be aware of

MR. QUIN: No.

CHAIRPERSON GRIFFIS: Okay. Anybody else bring up any preliminary matters?

We do have two motions before us. One is the motion to stay and one is to the motion to dismiss.

First of all, I appreciate all the submissions that were done on these and the responses to it. I think we have -- this is the way I'm going to proceed with this.

Board Members, I would like to have deliberation on each of these motions. I would like to start with the motion to stay and then move to the motion to dismiss.

I do not anticipate at this time hearing any oral argument on this because I think the written submission are sufficient for our deliberation, but that can be assessed from the Board and myself, depending on if that changed.

Mr. Quin, did you have a comment?

MR. QUIN: Yes, I do, Mr. Chairman. I don't see how you can reach a motion to stay unless you determine agreement and timeliness. Because if the Board does not have jurisdiction, which I believe you do not by virtue of what the court calls jurisdictional questions, then I do not think you can proceed even with a request for stay.

CHAIRPERSON GRIFFIS: So you would like to see the motion dismissed first?

MR. QUIN: Absolutely.

CHAIRPERSON GRIFFIS: I don't see any problem with that if Board members don't see any problem with that. Of course, I thought we'd get the easy one first and then move on to the next.

Any objections?

MR. LEHRMAN: I don't have any problems with that.

CHAIRPERSON GRIFFIS: Okay. Then I don't see any objection to that, then why don't we move that

schedule up and take up the owner's motion to dismiss.

And let me first summarize to refresh. I know Board Members, each individual has spent quite a bit of time reading and reviewing and analyzing this information. And I think it can be distilled down to three areas that speak to this motion of dismissal.

And that is, one, standing; two would be timeliness, and; three, would be the issue of the appeal being mute.

I would open up the floor to the Board for beginning of deliberation on this motion.

MR. QUIN: Mr. Chairman, may I be heard on these before you -- I'm prepared to address these because I think there are precedents that this Board has had, there are court decisions which we've referenced. And I was prepared to make the arguments on those four points that you've analyzed and then proceed. And then if you needed to have response to it and whatever evidence that you needed to address those.

CHAIRPERSON GRIFFIS: Well, first let me get a quick assessment of how long you need to present that additional information.

MR. QUIN: I would say ten minutes.

CHAIRPERSON GRIFFIS: Okay. Secondly, is

it additional information not in the written submission?

MR. QUIN: It's not additional information, but is, in point of fact, a number of legal precedents which I think I need to describe to the Board, including one of the Board's own orders that deals with timeliness and one that deals with the aggrievement.

CHAIRPERSON GRIFFIS: I'll hear from others. I'm hesitant because, frankly, I'm satisfied with the completeness of the written submission and I'm also confident in the Board's understanding of all the information that was submitted. But if others have differing opinions.

MS. MITTEN: Mr. Chairman, I think that the written submission have been very thorough on the owner's motion to dismiss and then we have response to that, and then we have response to that response. And I guess I would be surprised if there was anything left unsaid at this point.

So I think we're more adequately informed about the positions of each of the parties in order for us to proceed.

CHAIRPERSON GRIFFIS: Okay.

VICE CHAIRPERSON RENSHAW: And I concur,

1 Mr. Chairman.

2 MR. QUIN: Mr. Chairman?

3 CHAIRPERSON GRIFFIS: Yes.

4 MR. QUIN: I don't want to interrupt your
5 thinking or anything. When you wipe eyes, as Ms.
6 Mitten said early, I have to worry about what's going
7 on.

8 CHAIRPERSON GRIFFIS: She may not be
9 correct in disclosing that information.

10 MR. QUIN: But at any rate, there are
11 several precedents that were referenced but not
12 described. And I think it's very important on those. I
13 think there are about three, and that would take very
14 little time. But I think it's absolutely essentially
15 that you hear those few points because they are -- one
16 is a court case, one is precedent that deals with
17 timeliness that's almost identical to our case that we
18 have today in which the Board dismissed on the basis
19 of timeliness. And I think I would like to submit that
20 to the Board. I can give you copies of both in a
21 matter of minutes.

22 CHAIRPERSON GRIFFIS: Okay. Yes, sir.

23 MR. LEHRMAN: I would like to point out
24 that if I was not provided with this information, that
25 it would be prejudicial to my ability to rebut it, as

I was not given that information. And in that regard, I think it is inappropriate for this detail to be elaborated?

CHAIRPERSON GRIFFIS: Okay.

MS. SMITH: The Government has no objection to the owner's counsel proceeding with his supporting argument regarding his motion to dismiss.

CHAIRPERSON GRIFFIS: Okay. It seems to me that we often, and probably good reason, error on the side of hearing more evidence than stopping it from coming in. So I'm prepared to take a short few minutes to take a quick embellishment.

Now, in terms of the new evidence that's coming in. First of all, as indicated, Mr. Quin is actually saying he illuminating more of the actual references to the court cases that are within the document itself. So I don't believe that it would be prejudicial and I think, in fact, it may just illuminate some of the other pieces to it.

So, with that without any further delay, if I can have the Board support on that we'll hear Mr. Quin and then we can hear -- well, then we'll go from there.

MR. QUIN: Thank you.

You correctly listed the four points, I

1 think, although you grouped -- I think you grouped two
2 togethers namely the timeliness and the Latches in
3 your summary. Because we've made them separate.
4 But the two major points that I wanted to
5 make are dealing with the issue of aggrievement in the
6 tests that were set out. And I don't want to restate
7 that. But it's you know it's very similar to the tests
8 for party status where you have to show that there's
9 something different, you're injured in a way that's
10 different from the general public. That has been
11 spelled out in our briefs. I don't think I need to go
12 into detail in that.
13 The points that I wanted to hit, very
14 specifically, is the one that deals with timeliness.
15 And on the timeliness issue, if you look at two cases,
16 the Waste Management case, which we referenced in our
17 brief and two, a Board of Zoning Adjustment case which
18 I will hand out to everyone on the issue of
19 timeliness. There's one aspect of it that I think,
20 while it was covered briefly in our brief, needs some
21 elaboration.
22 And that point is, first, aside from the
23 fact that the court said if the appeal was not timely
24 filed, the Board is without power to consider it, they
25 talk about the issue of what happens when there's an

1 initial decision. Like in this case there was an
2 initial decision by the Zoning Administrator on
3 October 10. And the appellant instead of taking an
4 appeal at that point, continued to see if he could get
5 that opinion reversed. And that particular situation
6 is addressed in two authorities which I would like to
7 submit to the Board and which they are now being
8 handed out.
9 The first is on page 10 on the Waste
10 Management court case, which says that the fact that
11 the Waste Management chose to concentrate on avenues
12 that reasonably may have been more promising -- may
13 have appeared more promising than an appeal does not
14 excuse an appeal -- a delay in noting an appeal.
15 CHAIRPERSON GRIFFIS: I'm sorry. Did you
16 cite page 10?
17 MR. QUIN: Page 10 of the Waste Management
18 decision. I'm not sure what version you have, but I
19 can find it.
20 CHAIRPERSON GRIFFIS: I have 6 pages in
21 mine. Is it a highlighted case?
22 MR. ETHERLY: Mr. Quin, you're referencing
23 page 10 of the court report version?
24 MR. QUIN: Court versions, right, yes.
25 MR. ETHERLY: Okay. Which should be if

I'm correct page 5.

CHAIRPERSON GRIFFIS: Okay. Page 5 highlighted at the top? Very well.

MR. QUIN: Right. Okay.

So the point there is when there is a decision by the Zoning Administrator, that's immediately appealable. And we put in our brief the statutory authority and the fact that the appeal must be taken directly from the Zoning Administrator's. So that's all in our brief.

The second point of that, though, is the BZA case which has been handed to you and where the Board said essentially the same thing. And that's at page -- on the BZA appeal number 1454. And what is very significant, if you look at page 10 -- I'm sorry, page 2 paragraph 10 of the BZA order in 1454 it talks about the initial decision that was made after there had been a Zoning Administrator meeting and determination orally. And that was put in writing by letter dated November 22, 1982.

The appellant was not satisfied with that explanation received. The appellant chose -- their finding 13 -- the appellant chose not to file an appeal before the Board of Zoning Adjustment at that time. The appellant attempted to resolve the problem

through letters to and meetings with staff, members of the city council, other D.C. departments and the mayor.

Then skip down to 16. By letter dated August 11, 1983, substantially later, Mr. Lee confirmed the zoning calculations and issued another letter.

Now what happened is the appeal was filed two days after Mr. Lee's confirmation. So if you go to the next page, and this is the conclusions of law of the Board on finding of fact number 20. The Board finds that the August 11, 1983 letter from Mr. Lee is not a ruling of its own, but is merely reaffirmation of the decisions made by employees of the Office of Building and Zoning Regulations. And that's what we have here.

Further, under the conclusions of law, the Board said under the current rules, therefore, persons faced with potential filing appeals should act promptly to reserve their rights. If subsequent actions can resolve the matter before the Board acts on the appeal, the appellant always has the right to withdraw the appeal.

And then finally, on page 5 the Board talks about appellant's attempt to resolve the issues

through other means was his own choice. The Zoning Act and zoning regulations clearly state where an appeal regarding administration or enforcement of the zoning regulations is to be taken, the appellant choice of pursuing other possible remedies now forecloses his right to appeal to the Board. And the Board in that case dismissed the appeal on the basis of lack of timeliness. OF course, now we have an intervening action by the Zoning Commission which is not yet effective, is my understanding, has not been published. But the two month 60 day requirement has been approved by the Zoning Commission and it's stated in the Waste Management case, which I think is how the Zoning Commission wound up with 60 days.

The point here on the timeliness issue is that on October 10th the Zoning Administrator ruled in writing, which the appellant knew about, and the appeal was not taken until January the 17th. In the interim, what was done was to try to reverse the decision of the then Zoning Administrator.

So these are jurisdictional issues. All four points are jurisdictional issues. And we believe that the Board should dismiss this case, anyone of those is sufficient to dismiss it. You should not reach the merits of this case, if there are any

merits. We don't think there are any. But the point here is legally we believe that you're required to make a judgment and decide these four jurisdictional points before you get into any further discussion.

You may need if you want evidence on those points, you can certainly take evidence that satisfies your inquiry that you deem necessary to answer those four points.

And I did have a lot more to say, but in light of what you said you understand the issues to the case, I will not dwell on those anymore. I think the Latches case is one. You know that Latches is different from the timeliness in the sense that it deals with the whole chain of events.

And muteness, I don't see that there's anything that the Board could possibly do in this situation. We're dealing with, as the facts show in the record, a tree that was taken down because it was deemed to be unsafe. And second, the other tree that has been discussed is sliding and we can, if necessary, show pictures of it. And there's no basis for the Board action. The Board has no authority to revoke a building permit. It must deal with zoning.

CHAIRPERSON GRIFFIS: Okay.

MR. QUIN: Thank you.

CHAIRPERSON GRIFFIS: Thank you very much.

Government have any response?

MS. SMITH: The Government concurs with the position of the owner in this case. We feel that the appeal was untimely. Basically we're looking at period of over 90 days. I believe that the Board should be looking at the appeal date as the date of October the 10th of 2001, which is the date the Zoning Administrator prepared the appeal. And even given the 90 days period and 3 days for mailing, this appeal falls out of that time range.

CHAIRPERSON GRIFFIS: Okay. Thank you.

Yes?

MR. LEHRMAN: May I reply?

CHAIRPERSON GRIFFIS: Absolutely.

MR. LEHRMAN: All right.

CHAIRPERSON GRIFFIS: Actually, I don't know if you've stated your name.

MR. LEHRMAN: Yes, I'll do that. My name is Robert Lehrman, and I live at 2900 Benton Place, N.W., in Washington, D.C.

As a matter of both fact, I believe law equity and public policy, I believe that distinguished counsel is incorrect in his assessment.

On October 10th we have here, I might add,

is a tail of the dog that they're trying to describe as being higher dog. The tail of the dog is on October 10th Michael Johnson's determination did not address the fatal damage to the second larger tree that is photographed there. When I pointed out this out to him, he told me that because he was leaving, not because he didn't believe the appeal had merits, but because he was leaving he did not have time to revisit this material. And he personally directed me to take it up with his successor.

During that time I was in constant dialogue with the BLRA who both advised me that they were reconsidering the case based upon insufficient evidence --

CHAIRPERSON GRIFFIS: Let me interrupt you quickly for clarity.

MR. LEHRMAN: Yes.

CHAIRPERSON GRIFFIS: That interchange, I think it's in the record, was by telephone, is that correct?

MR. LEHRMAN: By telephone and then subsequently confirmed in writing from Mr. Love, who in actual writing said that I had the right to appeal.

CHAIRPERSON GRIFFIS: I understand that.

MR. LEHRMAN: Right.

CHAIRPERSON GRIFFIS: In his letter.

MR. LEHRMAN: Yes, how.

CHAIRPERSON GRIFFIS: However -- okay. Go ahead.

MR. LEHRMAN: Therefore, there was no full determination and using Mr. Quin's exact case here, his language is "if subsequent actions can resolve the matter before the Board acts on the appeal, the appellant always has the right to withdraw the appeal."

I point out to you that no subsequent action could be used to assess this because the Zoning Administration had not ruled or even spoken to the issue of the second large growth tree that has been fatally damaged. And we will present evidence to that fact. So it was impossible for me to reply to something that did not exist in the record.

In addition, as I pointed out, it is our supposition, and we will show to you, that the subsequent refusal was based upon false information that was provided to the Zoning Administrator. And I think that the principle of estoppel suggests that misrepresentation of the existence of protective fencing, which I'll point out to you does not exist in any of these pictures which happened over an entire 6

week period, and that there were these mysterious silver fish, which we will show you as a matter of absolute science could not have done that, led the District astray .

What's more, the issue of estoppel, since 3 different members of the DCRA, both Michael Love, Greg Johnson and David Clark told me that they were continuing to work on this case and that they issued two stop work orders during that period which shows that they were actively involved in the case, suggests that this is in fact the tail of the dog and not a separate reconsideration of a different issue.

And lastly, in addition as a matter of public policy there are compelling reasons to hear this case and it is differentiated from the Waste case that the esteemed counsel pointed out.

The first is the time involved in terms of the delay is a matter of 37 days, not 3 years. So this case can be meaningfully distinguished from the Waste case.

And if this interpretation was applied it in fact would discourage individuals to use available administrative processes and regulations to see redress for their wrongdoings and might, in the process, trigger a flood of unnecessary premature

appeals to the BZA and other agencies before the facts were ascertained.

Lastly, on terms of Latches, as I've said, this interpretation of the case allows Mr. Estrin to benefit from the hocus pocus misrepresentations from a purported tree expert that misrepresented to the government what was going on.

So it is my submission that this case does have standing to be heard.

CHAIRPERSON GRIFFIS: Okay. Thank you.

MR. QUIN: Mr. Griffis?

CHAIRPERSON GRIFFIS: Yes.

MR. QUIN: My motion, I think I have a right to respond his response, his reply. That's normally the way it's done.

At any rate, I just want to point out three things. One, the agreement issue, there has never been any allegation on agreement, how he's injured different and apart from the public in general.

Secondly, fatal damage, that's almost laughable. The tree is alive and well and doing quite well now.

CHAIRPERSON GRIFFIS: Okay. Well, I think I understand the issue that he bring the second tree

1 would have been -- without getting into much more
2 substantive pieces of the case. And unless Board
3 Members have queries on that issue, I think it's clear
4 where each of the --
5 MR. QUIN: The last point --
6 CHAIRPERSON GRIFFIS: Yes.
7 MR. QUIN: -- that he had counsel during
8 all of that part.
9 CHAIRPERSON GRIFFIS: Right.
10 MR. QUIN: He does not have counsel now,
11 but he did have counsel at the time and before, and
12 the letter that went into Mr. Johnson was detailed to
13 deal with both trees. And if you read Mr. Johnson's
14 letter, he says not only does he deal with the one
15 tree on the safety but he says "Further based upon my
16 review, site inspection and understanding the issues
17 raised, I conclude that there is no violation of the
18 zoning regulations and no further enforcement action
19 is required."
20 MR. LEHRMAN: Can you show me where he
21 refers to both trees? Forgive me, I don't see that.
22 CHAIRPERSON GRIFFIS: Yes, a quick
23 reference. You're referring to Mr. Johnson's October
24 10 letter, correct?
25 MR. QUIN: Yes, sir.

CHAIRPERSON GRIFFIS: Okay. One of us should get that in front of him.

MR. QUIN: And you should also look at Mr. Lehrman's letter to Mr. Johnson which talked about both trees.

CHAIRPERSON GRIFFIS: Absolutely.

MR. ETHERLY: I see no reference to the second tree, sir.

CHAIRPERSON GRIFFIS: Mr. Quin, could you point our attention to the area you were just trying to cite.

MR. QUIN: Yes. If you look at the actual letter that Mr. Lehrman submitted, and I'm having a hard time finding that letter right now. But it references a whole argument on the second tree. In Mr. Johnson's letter going back in response, a copy went to Mr. Estrin and a copy to Mr. Lehrman, it says "I have reviewed correspondence submitted on behalf of Mr. Robert Lehrman, a nearby neighbor and correspondence from Ann Jordan and all the certification from Lee Tree Service."

In the last paragraph, though, he says "Although there may be some question as to whether the tree and slope protection overlay zone is even applicable outside the zone of construction."

CHAIRPERSON GRIFFIS: Right.

MR. QUIN: He then goes into say "there was an unsafe condition for the first tree." And then he says, "Further, based upon my review, site inspection and understanding of the issues raised I conclude that there is no violation of the zoning regulations and no further enforcement action is required regarding matter." He is obviously responding to Mr. Lehrman's full letter that was written by Andrea Furster on his behalf, which dealt with a multiple of issues including both trees.

CHAIRPERSON GRIFFIS: Okay. There are questions from the Board, but first I want to make sure we can reference that letter by Mr. Lehrman, which you indicate was authored by Mr. Furster. What was the date on that?

MR. QUIN: It was dated the July 26th, 2001. And it's in the record as part of -- I believe I stated it, but I know it's in the record.

MR. LEHRMAN: I have no problem with considering it in the record. I would point out, Mr. Chairman.

CHAIRPERSON GRIFFIS: Yes.

MR. LEHRMAN: That in addition to the fact that this does not reference the tree, that it's still

standing but it's fatally destroyed, it specifically addresses only the tree that was in the unsafe condition. And once more, I can tell you that I spoke directly with Mr. Love and he told me that he did not consider the other tree and that he would not consider the other tree because he was leaving the job.

MR. QUIN: Mr. Chairman, I just would invite your attention --

MR. LEHRMAN: I'm sorry, not Mr. Love. Mr. Johnson.

CHAIRPERSON GRIFFIS: Correct. Okay.

MR. LEHRMAN: I'm sorry.

MR. QUIN: May I invite your attention to Exhibit 5 to our motion to dismiss which argues on the first page the tree was subsequently felled by construction workers. That's his first allegation. And secondly --

CHAIRPERSON GRIFFIS: Hold it. Don't go too fast.

MR. QUIN: Sorry.

CHAIRPERSON GRIFFIS: I have Exhibit 18 which is one of your motions and I need to find Exhibit 5 now.

MR. QUIN: I'm sorry. This is an attachment to the motion.

CHAIRPERSON GRIFFIS: Oh, good. That's going to make a heck of a lot more sense to me now.

MR. QUIN: Okay. Sorry.

CHAIRPERSON GRIFFIS: Hold on just a second then. Our copies didn't come with the nice tabs that you notice you have. Oh, here we are.

MR. QUIN: They should have.

CHAIRPERSON GRIFFIS: It takes me a minute more to get to that.

MR. QUIN: I'm sorry. They should have.

CHAIRPERSON GRIFFIS: Yes, well, they've probably been -- anyway, I don't have them. So there it is. Got it now. July 26th.

MR. QUIN: Okay. July 26th first page.

CHAIRPERSON GRIFFIS: Right.

MR. QUIN: Without getting into all the details that would take your time, in the second paragraph there are two separate issues raised. The tree was subsequently felled by construction workers. That's dealing with the first tree. The second sentence or next sentence says "An additional mature tulip poplar with a ten foot circumference now shows a fresh gash measuring 6 to 8 inches which damages appear to have been inflicted as a result of on-site construction activities.

So that particular issue in this further discussion was before Mr. Johnson when he ruled on October 10. He not only reviewed the correspondence from Mr. Lehrman, which he references, but he had a site visit to see the whole site. And then he rules on page two that says "Further, based upon my review --" this is after he's dealt with the unsafe condition, "site inspection and understanding of the issues raised I conclude that there is no violation of the zoning regulations." At that point if Mr. Lehrman was dissatisfied, he had a remedy and he had counsel. He could have filed immediately with the Board of Zoning Adjustment. But he did not do so.

CHAIRPERSON GRIFFIS: Okay.

MS. SMITH: May I be heard?

CHAIRPERSON GRIFFIS: Yes.

MS. SMITH: Pamela Smith for the District of Columbia.

Regarding the letter dated October 10, 2001, the intent of the Zoning Administrator was to address both the first tree and the second tree. And it's our understanding that we are here on an appeal for both matters. And I can proffer that there will be testimony presented as to the process that the Zoning Administrator took to make a determination that there

was no violation in this case.

CHAIRPERSON GRIFFIS: Very well.

Mr. Lehrman?

MR. LEHRMAN: I can only reiterate that in this instance both the interpretation that Mr. Quin would like you to have references two separate documents months in difference in terms of time. That Mr. Johnson told me specifically that he did not consider the second tree and that he was not going to consider the second tree.

And third, even were it the case that he did, there was no information provided in the decision that would enable me to respond to that because he did not give the reasons for why the second tree, which we can see here, was very poorly treated.

So I had no way to rebut that until I got something in writing. And I asked him for something in the writing.

CHAIRPERSON GRIFFIS: Did you question the conclusiveness of his last sentence that there is no violation of the zoning regulations --

MR. LEHRMAN: Yes, I did.

CHAIRPERSON GRIFFIS: -- and no enforcement action?

MR. LEHRMAN: I specifically did. And he

said I did not consider the second tree. And this is a quote, "And I will be frank with you. I will not do it because I am leaving this job in two weeks. If you want to bring that up, bring it up with my successor."

MR. QUIN: Mr. Chairman, could I just note an objection for the record. I know that you have very great latitude in what you accept as representations of third party discussions and hearsay rule.

CHAIRPERSON GRIFFIS: How do you know I have latitude with that?

MR. QUIN: Well, I know you do.

CHAIRPERSON GRIFFIS: Okay.

MR. QUIN: But I just want to point that out, that this is not documented.

CHAIRPERSON GRIFFIS: Yes, indeed. And I was about to bring it up, and it's an excellent point. It is in the written submission. We do have it in evidence. I think the Board is kind of well aware, and that's why I asked you was it a phone conversation. If we could call Mr. Johnson, he could speak to that issue, that would be a lot more appropriate. But my direction would be let's not bring -- keep bringing it up and let's not rest an awful lot of importance on that.

MR. QUIN: Thank you, Mr. Chairman.

CHAIRPERSON GRIFFIS: What I understand you're saying is that, first of all, it's two points. And really you're looking at what starts the fair notice. When was it for you that actually started the clock to set the appeal. You looked as if you were pursuing all the right means. And what I'm trying to establish for our deliberation is how you interpreted this letter from Mr. Johnson.

Clearly Mr. Quin is saying this is a very strong statement, it was the ruling from the Zoning Administrator, that's when you should have taken first action to file the appeal and then continue your actions to see if you could have remedied it within the time period that you were hoping for. And that's where I am.

If Board Members have other questions, I will then turn it back over to Mr. Lehrman for response.

Okay. Is there any additional information you can give us in terms of highlighting this letter?

MR. LEHRMAN: Well, I can't give you additional information regarding highlighting letter, except to point out to you that the reading of this letter that Mr. Quin is suggesting ignores the fact that this paragraph refers back to his statement on

the first page, which was the way I understood this letter. And that the statement ont he first page refers specifically and only to the tree that was cut down. It's an all encompassing statement that could be interpreted to say anything you want. But the only thing that we have to see is that it refers to a tree that was cut down and was in an unsafe condition.

Even if that were true, what Mr. Quin says, I believe that the fact that there were two stop work orders that were issued, a letter in writing from the District of Columbia telling me that the case was ongoing and being considered, that the additional 37 day delay was not what would be considered unreasonable.

CHAIRPERSON GRIFFIS: And what did you take in the second sentence or in the first paragraph where Mr. Johnson says "Complaints that have been received assert, among other things"? What were the other things he was talking about?

MR. LEHRMAN: I can't begin to tell you what he was talking about in "other things."

CHAIRPERSON GRIFFIS: Okay. Mr. Quin, in the same letter, last sentence where Mr. Johnson concludes that there are no violations of the zoning regulations, is it your understanding that Mr. Johnson

actually did a full zoning analysis and walk of this project; the whole property, the structure itself, the tree and slope overlay? It was an extensive zoning review?

MR. QUIN: Absolutely. In fact, we have Mr. -- we can produce the owner of the property who met Mr. Johnson on the site to review the conditions of all the trees.

CHAIRPERSON GRIFFIS: Is that the government's position also? And I'm not talking just trees.

MR. QUIN: I understand.

CHAIRPERSON GRIFFIS: Okay.

MR. QUIN: And, you know, we filed a letter that you have in the record as well that was the initial letter to Mr. Johnson that dealt actually with the building code first, the stop work order, and then extensively dealt with the jurisdictional question of whether the tree slope overlay even was applicable, and then it dealt with the safety issue. And Mr. Estrin had actually filed with Mr. Johnson a copy of the affidavit or the letter from the tree expert. So every issue including the damage to the second tree, which is thriving, was before the Zoning Administrator.

1 CHAIRPERSON GRIFFIS: Okay.
2 MS. SMITH: And you'd asked for the
3 government's response?
4 CHAIRPERSON GRIFFIS: Yes.
5 MS. SMITH: We do look at the October 10,
6 2001 letter for final decision regarding the concerns
7 with the first tree that was cut down and the second
8 tree --
9 CHAIRPERSON GRIFFIS: My question, though,
10 was it is your interpretation Mr. Johnson did a full
11 zoning review above and beyond even the tree and slope
12 overlay? Did he review all the zoning regulations for
13 the construction of the project? Is that your
14 interpretation of that sentence?
15 MS. SMITH: Yes. Basically my
16 understanding is that he went through the process
17 necessary to entertain the appellant's concerns. And
18 that's initially why the stop order was put in place,
19 to do a full investigation to determine if in fact
20 there was a concern and something, some action that
21 the government needed to take at that time.
22 CHAIRPERSON GRIFFIS: Okay. But I'm
23 taking you to mean that it's not as broad as I'm
24 stating it for you to answer. You're stating that Mr.
25 Johnson said there's no zoning violations in relation

to the issues brought up by Mr. Lehrman.

MS. SMITH: At this time those were the issues that I actually focused on. But I would feel more comfortable in having the Zoning Administrator to describe to you the process that they go through when they're addressing a person's complaint.

CHAIRPERSON GRIFFIS: Well, we know the process. But we'd love to hear it.

I will get to you. I think Mr. Quin had a follow up.

MS. SMITH: But I did have one other item that I wanted to bring to your attention.

CHAIRPERSON GRIFFIS: Okay.

MS. SMITH: You'll notice that in your Exhibit 1 in the actual appeal that was typed up, under the area where he's actually to state the manner in which the appellant is aggrieved by the administrative decision, he refers to both trees. It has appellant is a nearby landowner whose enjoyment of his property was adversely effected by the fatal damage to a nearby old growth trees and removal of one of them in violation of the zoning regulation and building permit requirements.

I don't believe that it would appear that even at the time this appeal was filed that the

appellant was appealing both the decision regarding the tree that was cut down and the tree that was alleged to be damaged.

CHAIRPERSON GRIFFIS: Would you state that again?

MS. SMITH: I said it would appear that at the time the appellant filed his appeal --

CHAIRPERSON GRIFFIS: Yes.

MS. SMITH: -- in January, that he was appealing the decision regarding the tree that was cut down and the tree that was alleged to be damaged.

MR. ETHERLY: But if I understand you correctly, Ms. Smith, that does not cut in favor of Mr. Lehrman's argument then that what he's doing is he's responding to the second letter.

MS. SMITH: No. I believe that this is a response to the -- in fact, in the top portion of the appeal it questions what decision you're appealing. And the decision date is typed in here as October 20, 2001. So there was not a reference in his appeal to him appealing the December date, although he does reference it in the body of this. He notes that the date of the decision he's appealing is October 10, 2001.

CHAIRPERSON GRIFFIS: Okay.

MR. QUIN: Just clarification. Just clarification.

One, you've asked the question, I may have misunderstood your question on zoning.

CHAIRPERSON GRIFFIS: Right.

MR. QUIN: There are two parts of this whole case, only one part is before you. The building code issue when someone goes in for a building permit, it's obviously processed through the -- and you can see on the forms that are part of the record --

CHAIRPERSON GRIFFIS: That we understand.

MR. QUIN: Okay. Then the only issues that were subsequent are the issues raised about tree slope overlay.

CHAIRPERSON GRIFFIS: Correct.

MR. QUIN: And whether the two trees that have been cited by Mr. Lehrman were someone violative of the regulations.

CHAIRPERSON GRIFFIS: Correct.

MR. QUIN: Those were the two issues that were addressed by the Zoning Administrator.

CHAIRPERSON GRIFFIS: Right.

MR. QUIN: And the -- well, I guess that answers.

CHAIRPERSON GRIFFIS: Okay. And I

appreciate that. I did ask a very broad question and I was going far beyond what we will look to the appeal. And I wanted to get an understanding of everyone's interpretation of that sentence, and that's the only reason why I posed the question the way I did.

Mr. Lehrman?

MR. LEHRMAN: Thank you, sir.

You asked me what, among other things, would possibly refer to and I said at the time I wasn't aware. But I know two very important other things that were referred to.

If you'll refer into your additional information to the page that says at the end "Photographs, location of 31 inch tulip popular tree." I point this out to you. You will see that there is a small remnant of a foundation that is what was pulled down to build the new house. Among the other things that were referred to was the fact that Mr. Estrin pulled this house down without appropriate permit to do so. In the process of pulling the house down by the Lee Tree Service letter's own statement, the shifting of the foundation which was created -- a foundation shifts when it's pulled down. The tree was right there. The foundation shift when the house was

pulled down, illegally pulled down and --

CHAIRPERSON GRIFFIS: What is this getting us to?

MR. LEHRMAN: It's getting to the other things that I spoke to Mr. Johnson about.

CHAIRPERSON GRIFFIS: I see. Okay. Good.

MR. LEHRMAN: So the point is --

CHAIRPERSON GRIFFIS: So the other thing is the demolition of that what was essentially the retaining wall is probably the basement wall in the rear of the property?

MR. LEHRMAN: That's correct.

CHAIRPERSON GRIFFIS: And so he's also then, his conclusion that there was no violation.

MR. LEHRMAN: But that's inconsistent with the fact that they had a stop work order and that he acknowledged that there was a violation and that they had to get a new building permit.

CHAIRPERSON GRIFFIS: So you're asserting that the stop work orders that were after this October 10th letter were actually an admittance that this October 10th letter was not correct and they were rethinking it?

MR. LEHRMAN: That is true of the second stop work order. Of the first stop work order, it was

in relation to the building permit, and that is what the other things were. That we have a pattern of behavior here where people are doing things without approval.

CHAIRPERSON GRIFFIS: Okay.

MR. LEHRMAN: Pulling houses down and then coming after the fact and justifying that what they in fact are doing was no harm.

CHAIRPERSON GRIFFIS: Even with the October 10th, you didn't know a stop work order was coming or not coming?

MR. LEHRMAN: That's correct, I did not.

CHAIRPERSON GRIFFIS: It would seem that there must have been something in your thought process and which way to proceed next, an appeal would have been one of them.

MR. LEHRMAN: The reason that I did not move to an appeal at that time was I had no ruling from the District of Columbia that could allow me to address the second issue of the damaged tree.

CHAIRPERSON GRIFFIS: Okay.

MR. LEHRMAN: And I was told by the District of Columbia that pursuing that remedy was an appropriate way to handle it, which is why I believe the principle of estoppel would apply here. I was told

both in writing for the record and orally.

MR. QUIN: Mr. Chairman, I have a procedural point that I'd like to raise.

Two of us are at the table as counsel.

CHAIRPERSON GRIFFIS: Yes.

MR. QUIN: And therefore our submissions, our factual representations have to be established otherwise. We have no authority as counsel to give testimony.

CHAIRPERSON GRIFFIS: Correct.

MR. QUIN: Mr. Lehrman, on the other hand, is not counsel but is giving what he perceives to be facts. I need at some point the right to cross examine all of this and to rebut it. Because his statements are basically factual as opposed to legal.

CHAIRPERSON GRIFFIS: That's true.

MR. QUIN: And I just want to make sure that you all understand that there's a distinction there. That you're listening to statements that are going to -- in fact, he has not been sworn. And I think that there is a whole litany of rights that other parties have to challenge the statements.

CHAIRPERSON GRIFFIS: I think the Board understands your point. There's two quick clarifications. One, I think all Board Members here

with us today are intelligent enough to filter the information and are understanding at what we're hearing at this point.

The second is the quickest way to get into that is to start the case, and that will give you ample time to present testimony and also cross examine any testimony.

MR. QUIN: Right.

CHAIRPERSON GRIFFIS: So, with that --

MR. QUIN: I'm sorry. May I? I hesitate to keep interrupting. But I would like to note for the record respectfully an objection to your proceeding with any further testimony in view of the motions that we filed that go to aggrievement when the record shows that there's not one single argument or allegation, or piece of evidence that shows that Mr. Lehrman is injured in anyway different from the general public. In character of kind, that's one.

And then the other three I won't reargue.

CHAIRPERSON GRIFFIS: Right.

MR. QUIN: But those are legitimate jurisdictional questions, I believe, and the Board should dismiss this case. If it needs to take testimony on those four issues, that's fine.

CHAIRPERSON GRIFFIS: I understand. I

1 understand. I don't agree that we've waded deeply into
2 testimony. I think giving Mr. Lehrman an opportunity
3 to respond to your oral testimony today is
4 appropriate.
5 MR. QUIN: My oral argument.
6 CHAIRPERSON GRIFFIS: Rather oral
7 argument. Thank you.
8 So, I will be attentive to that, Mr.
9 Lehrman, and I ask you to do the same.
10 Ms. Mitten, you had a question?
11 MS. MITTEN: I just wanted to ask the
12 government given that the window of time, if we're
13 looking at October 10th date as the date that was the
14 trigger date, the final decision date, so there was a
15 60 day window after October 10th. And in that period
16 of time -- I can't find the letter, but there's
17 reference made to a letter November 5, 2001, Andrea
18 Furster on behalf of Mr. Lehrman received a letter
19 saying -- this was "they," meaning DCRA was
20 reevaluating the matter. And that letter was from Greg
21 Love. And then there was a stop work order issued
22 November 21, 2001. So it's in the 60 day window of
23 time when Mr. Lehrman would have clearly timely filed
24 an appeal of the October 10th decision by Mr. Johnson.
25 There were two actions taken by DCRA, and

1 those actions would appear to give credence to Mr.
2 Lehrman's position that it was not a closed matter.
3 How does that coincide or correspond with your
4 argument that the definitive date was October 10th?
5 MS. SMITH: I don't have the December 5th-
6 -
7 MS. MITTEN: Can you turn on your
8 microphone, please.
9 MS. SMITH: Thank you.
10 I don't have the December 5th letter in
11 front of me.
12 MS. MITTEN: November.
13 MS. SMITH: Oh, November?
14 MS. MITTEN: I don't have it either. Just
15 a second.
16 MS. SMITH: The government's position
17 based on the October 10, 2001 letter is that that was
18 a final determination that could be appealed from. It
19 was a determination on both of Mr. Lehrman's
20 complaints.
21 The continued efforts of the government to
22 work with Mr. Lehrman and respond when he called was
23 basically just a matter, I believe, of just following
24 up with a citizen who had a concern. But I don't
25 believe that that changes the fact that there was a

very definite letter and day when a decision was made regarding this particular issue.

And I believe on the December 10th letter on page 2 the first paragraph after number one you'll see the reference that he makes that the Zoning Administrator properly applied the zoning regulations. In his opinion that the removal of the tree did not violate TSP overlay restrictions. And it clearly goes on.

But I believe that this was just an effort to work with a citizen. And, in fact, this Board is established to hear the appeals of the decisions of the Zoning Administrator, and in this case this letter as distinguished being written by the Zoning Administrator was actually written by a government employee who was working in a different capacity. And I believe that that distinguishes any subsequent correspondence.

You'll note that on the November --

VICE CHAIRPERSON RENSHAW: Would you explain that again over here?

MS. SMITH: I'm sorry.

VICE CHAIRPERSON RENSHAW: Yes. Would you explain that statement again? That's a little convoluted.

MS. SMITH: Okay. I'll try to be clearer.

The government looks at the October 10, 2001 letter as the statement or the final ruling of the Zoning Administrator. The subsequent letters noted dated November 5th, 2001 and December 10, 20001 are from one J. Gregory Love, who is also an Administrator but not the Zoning Administrator.

We've taken the position that the Zoning Administrator's decision is that which would be appealed to this particular Board and not that of Mr. Love's.

VICE CHAIRPERSON RENSHAW: If I may, Ms. Mitten, we also note that Mr. Love on December 10th was using the stationary of the Office of the Zoning Administrator. So that colors it a bit.

MS. SMITH: Right. But at that time he was -- he's not the Zoning Administrator.

MS. MITTEN: Was he the acting Zoning Administrator at that time?

MS. SMITH: I don't believe that he responded in his capacity --

MS. MITTEN: I'm asking was he the acting Zoning Administrator at that time?

MS. SMITH: To be honest, I'm not sure. I believe that the signature page does not identify him

as the acting Zoning Administrator. If you'd give me a minute, let me check. And I can find this out very quickly.

MS. MITTEN: Okay. And then I had another follow up after you check on that.

MR. QUIN: And I had one other point that goes just to Mitten's specific question. And that is, if you think of it logically, there could never be a time when an appeal is ripe because an appellant, like Mr. Lehrman, can continue to request evaluation, reevaluation, reconsideration and that could go on for literally years.

MS. MITTEN: I understand that.

MR. QUIN: So there has to be a determination. And in this case there was a determination and each subsequent letter, each subsequent letter confirmed the Zoning Administrator's decision. No ambiguity.

MS. MITTEN: I understand that part.

MR. QUIN: And the right with counsel to appeal was there.

MS. MITTEN: Thank you.

MS. SMITH: Yes. I do have a response to your question. He was not the acting Zoning Administrator. After Michael Johnson, the person who

1 followed was Toya Bello.

2 MS. MITTEN: All right. So on December

3 10, 2001 the acting Zoning Administrator was Toya

4 Bello?

5 MS. SMITH: Correct.

6 MS. MITTEN: All right. Now, back to the

7 question that I asked originally.

8 MR. QUIN: No. No. You said October 10th.

9 MS. MITTEN: Oh, i'm sorry, December 10th.

10 If I misspoke, I did not mean to.

11 MR. QUIN: I want to make sure, though, we

12 keep the record straight.

13 MS. MITTEN: December 10th. Okay. Acting

14 Zoning Administrator on December 10th was Toya Bello.

15 The actual Zoning Administrator on October 10th was

16 Michael Johnson.

17 CHAIRPERSON GRIFFIS: Exactly.

18 MS. MITTEN: Okay. It was a two part

19 question. One was about the letter, the November 5th

20 letter. And I understand Mr. Quin's point about -- and

21 your point, too, about trying to respond to citizen's

22 concerns on an ongoing basis even after a decision was

23 made.

24 MS. SMITH: Yes.

25 MS. MITTEN: What about the stop work

order? That's a little bit more than is typically done to placate a citizen and their concerns.

MS. SMITH: Actually, I was informed that that is policy. Basically because of the nature of the complaint that was made a stop order was put in place to investigate the concerns of the citizen.

MS. MITTEN: Even after the final decision was made?

MS. SMITH: Let me indicate that the -- to make a distinction, there were two stop work orders. With the first --

MS. MITTEN: We just want to focus on the second one, okay?

MS. SMITH: Okay. But just so I can -- it'll help me, I think, if I could be clear.

MS. MITTEN: Okay. If you need more time to compose your answer, that's fine.

MS. SMITH: With the first stop work order it pertained to the owner exceeding the scope of the building permit.

MS. MITTEN: Right.

MS. SMITH: And that particular issue was addressed and a subsequent building permit was issued.

With the second stop work order that pertained -- that was in direct response to Mr.

Lehrman's concerns about the tree slope overlay prohibitions being violated. And so that's why you ended up the second stop work order.

MS. MITTEN: Well, I have to tell you that I think it's fairly common knowledge that it is not the practice of DCRA to give sort of a knee jerk response to citizens' concerns, even very, very serious concerns to just issue a stop work order while they figure it out. Particularly after there had been this long investigation and this final letter written.

So I would say isn't it fair for someone to presume that if you go to the extreme, because it is extreme; it costs people money when you issue a stop work order, that there is serious reconsideration being given to the order or to the decision by the Zoning Administrator on October 10th? Isn't that a logical thing for Mr. Lehrman to believe at that point?

MS. SMITH: I would think that it would just -- you know, I would just be guessing if I were to try and determine what Mr. Lehrman's response was to the -- to that second stop work order.

MS. MITTEN: All right. Thank you.

MR. ETHERLY: Mr. Chair, if I could follow up real quickly with this, because this pertains to

where Ms. Mitten is going.

Not to put words in Ms. Mitten's mouth, but I think the gist of it is is if this thing was a done deal with the October determination, why all this subsequent activity?

I understood where counsel was going, Mr. Quin, with your response that it perhaps doesn't make sense that after you have a final determination that you just all of a sudden cut off all interaction with the public. The District still has to conduct business, so of course the District is still going to work with Mr. Lehrman to address whatever concerns he may continue to have. So I kind of understand that. But I think Ms. Mitten raises a very excellent point, which is curious why all this activity after October 10th.

My question kind of comes at it from a different angle. Let's say Waste Management is good precedent, solid law. My question to you, Mr. Quin, is does all this subsequent activity create perhaps that reference to exceptional circumstances which could be viewed as impairing Mr. Lehrman's ability to file his appeal?

MR. QUIN: No, I --

MR. ETHERLY: And if not, why not?

1 MR. QUIN: Okay. I think I can deal with
2 that in two cases, which is why I submitted both the
3 Waste Management case which talks about actions
4 subsequent to a ruling.
5 There were two things that Mr. Lehrman
6 could do. Mr. Lehrman could have filed an appeal
7 promptly from October 10th. There is no debate on
8 that. Even Mr. Lehrman would say yes he had the right
9 to take an appeal from that decision.
10 CHAIRPERSON GRIFFIS: We'll hear if he
11 wants to answer to that. But go ahead.
12 MR. QUIN: Well, I can ask him that
13 question. But clearly he had the right whether he took
14 it or not.
15 He actually had counsel experienced in
16 zoning matters. He knew that he could take an appeal,
17 but he didn't. And that's the very type of action
18 that in Waste Management the court says wait a minute
19 here. Just because you choose to do other ways of
20 challenging and trying to obtain your relief a
21 different way by appeals or by reevaluations, that
22 does not remove your obligation to seek an appeal.
23 And that's precisely what the BZA did in the order
24 that I gave you. And that's why I brought it to you is
25 to say what happened in that case was there was a

ruling and then a number of months later there was a request that went into almost the same people, the acting administrator of BLRA and they issued another order that said that confirmed the prior order, which is the same thing here. And then there was an appeal. And the BZA held, and I think rightfully so, that didn't make any difference. The fact that there was a subsequent reevaluation or statement of reevaluation didn't change the obligation of the appellant to proceed in a timely fashion. Because otherwise the property owner who was effected is in jeopardy all that period of time. He's proceeding on without a board like this making at timely determination.

MR. ETHERLY: Okay. So let me make sure I'm clear. With the exchange that you just heard between counsel for the government and my colleague Ms. Mitten. And if I may for a minute I'm just going to work up this hypothetical, Mr. Lehrman, so my apologies for it.

Let me put myself in the shoes of Mr. Lehrman. I'm on November 21st, I've gotten the October letter in my hand.

MR. QUIN: With counsel.

MR. ETHERLY: On November 21st with counsel. A November 21st the stop work order is

issued. I'm left kind of scratching my head saying "Well, whoa, maybe this isn't a done deal. Maybe I still have an opportunity to get a bite of the apple here because there hasn't been a final determination."

MR. QUIN: Oh, but there was not --

MR. ETHERLY: Let me finish, Mr. Quin, because what I think you're saying is okay, fine, you might begin to think that Waste Management -- the door that's left open in Waste Management you're saying well Mr. Lehrman might be able to walk through it, but wait a minute. The BZA order says you still have to promptly file your appeal and preserve that right and still pursue all your other remedies?

MR. QUIN: Right. And as the Board says, let's say -- and this is just something I would argue with Mr. Lehrman about. If Mr. Lehrman had gotten a reversal -- let's assume that Mr. Love had said I don't agree with what Mr. Johnson said, and Mr. Bello I don't agree with what Mr. Johnson, and I hereby say that Mr. Estrin is in violation of the zoning regulations? He would have achieved his goal. Then the burden would have been on Mr. Estrin to challenge that rule.

So you see, he was seeking, I believe. He may have gone to the mayor, he may have gone to the

council members, he may have gone to somebody else to try to change that ruling. But each of those rulings refers back to the basic determination, and on that day he had an obligation to challenge it in all fairness and under the rules, I believe. And I think that the court decision says that, and the BZA decision says that. And there were two stop work orders and two letters. I don't know whether you have that correspondence. But there were two and I can furnish those if you don't have those in the record. I think you do, though.

Right. In fact, there are three different letters that talks about the dates that Mr. Johnson -- I think we're getting into -- I can keep getting into more and more --

MR. ETHERLY: No, no. I understand. I understand the argument, and that's a very helpful response.

I'll rely on the chair to help ensure that I'm not going too far afield here. But did counsel for the owner have an opportunity to take a look or explore this issue of what the court contemplated or might have in mind when it talks about anything that might impair, substantially impair the ability of an aggrieved party --

CHAIRPERSON GRIFFIS: In which case are you talking about? In the Waste Management?

MR. ETHERLY: In the Waste Management case. Because what I was trying to get at is let's say that October 10th was the date, boom, that's your decision, that's when you start running the clock. But you have these subsequent actions that Ms. Mitten references all in this back and forth between Mr. Lehrman and government. Does that create that substantial impairment of Mr. Lehrman's ability to file the appeal? But what you're saying is wait a minute, BZA 14054 says that you have to promptly file that appeal just to preserve the right, and then you can continue to do whatever you want in terms of an exchange with the government or other entities to explore resolution?

MR. QUIN: I think that's what it says in Waste Management. It says efforts to resolve dispute through negotiations did not excuse the delay in filing appeal.

And I think there are two parties to this. This is not just Mr. Lehrman who, aside from not being aggrieved in my opinion, is proceeding with an appeal, but it's effecting the property owner. The property owner is proceeding but he doesn't know where he is.

He got a ruling that was favorable to him, and that ruling should have been challenged by Mr. Lehrman. There's no reason in the world that Mr. Lehrman could not have filed a BZA appeal.

What would you have done? I would just ask you, what would you have done as a prudent businessman --

CHAIRPERSON GRIFFIS: We'll take that rhetorical.

MR. QUIN: Thank you. All right.

CHAIRPERSON GRIFFIS: Yes, Mr. Lehrman?

MR. LEHRMAN: I would like to reiterate what has come forward by pointing out that on the DCRA stationary. They have in writing that the DCRA is in the process of reevaluating the Zoning Administrator's determination, that's November 5th. And they subsequently on the November 21st put a stop work order.

I view that as a clear and compelling differentiation from the circumstances of the Waste Management.

I would also ask this Board to consider the one page letter that was issued back in October versus the fully elaborated letter that came out on December 10th which then gave me the kind of

information and response that I had been begging the District to provide me for the last two months in active conversations and letters. And I think that by looking at all of those circumstances, it's very clear that there are distinguishing and important differences here.

As to the issue of aggrievement, I would want to point out that I live on this street. That the great character of the neighborhood is based upon the high tree canopy. That I can see both of these trees from my house and from my yard. And that as these trees get cut down the neighborhood changes in character and quality, and that I am significantly aggrieved in a way that is different financially from people that are the general public. Although I will say that from heart this case is brought not from the financial point of view, but from the desire that people abide by the regulations of the District of Columbia and according to the laws that say that if you file building permits, you should tell people what you're doing. And if you cut down trees in advance, you should do it with the appropriate regulations in mind.

CHAIRPERSON GRIFFIS: Thank you. I'll take that as your last.

Ms. Renshaw?

VICE CHAIRPERSON RENSHAW: Just a small point to our representative from the city. You spoke just a little while ago about that's policy. It was a comment about city activity or activity with the city after a determination. In other words, here the Zoning Administrator back in October made, you said, a determination that was the definitive determination and yet there was activity with the city, from the city, after that date.

So I would like to know if this policy that you say "that's policy" is written down or is it the way it's always been?

MS. SMITH: If you can give me just a moment, I can check that.

VICE CHAIRPERSON RENSHAW: Okay. Thank you.

MS. SMITH: If I could have the Board's indulgence just a little bit longer. I'm checking to see if there is something that has been reduced to writing on that policy.

CHAIRPERSON GRIFFIS: We're just going to take five minutes, unless they're coming forward with it now.

Is there a couple of more minutes needed

by the government for this?

MS. SMITH: I'm sorry.

CHAIRPERSON GRIFFIS: It's no problem, actually. We were going to take five minutes if you needed additional time.

MS. SMITH: That would probably be helpful.

CHAIRPERSON GRIFFIS: Excellent. We'll be back in five.

(Whereupon, off the record at 4:24 p.m. until 4:34 p.m.)

CHAIRPERSON GRIFFIS: Okay. Do we have information?

MS. SMITH: Yes. Regarding the issue --

CHAIRPERSON GRIFFIS: Your mike's off.

MS. SMITH: Sorry. I'm not quite use to the mike setting.

Regarding the issue of the policy, the policy in this particular case was not reduced to writing, but the policy in this case or the decision was to issue a stop work order because of the uniqueness of this situation. It was basically an attempt to keep the status quo to make sure that nothing happened in the interim that we could investigate and check the further complaint of the

appellant.

CHAIRPERSON GRIFFIS: Follow up, Ms. Renshaw?

VICE CHAIRPERSON RENSHAW: No follow up at this time. Thank you.

CHAIRPERSON GRIFFIS: Any other questions at this point?

MR. QUIN: Mr. Chairman, just one quick point.

CHAIRPERSON GRIFFIS: This will be the last word, Mr. Quin.

MR. QUIN: No,I never get the last word. I don't want the last word.

CHAIRPERSON GRIFFIS: No, you're the last word. It won't be the last word.

MR. QUIN: I want the one that dismisses the word that we were looking for.

CHAIRPERSON GRIFFIS: Indeed.

MR. QUIN: And that is, I made at the beginning, the difference between zoning issues and building code issues. And I think the stop work order issue was clearly in the building code area. And I just wanted to make sure that that was before you.

CHAIRPERSON GRIFFIS: Okay. Thank you.

I'm going to ask if you would turn off

your mikes, have a seat. We're going to have the Board deliberate on these motions now. I think we've heard sufficient information today and direction, and I want to open it up to the Board to talk about the first motion we have before us, and that is the motion to dismiss with the issues that we have now gone through.

MR. ETHERLY: Mr. Chair, just as a suggestion. We are taking the motions in order --

CHAIRPERSON GRIFFIS: An excellent suggestion. We'll take them one at a time.

MR. ETHERLY: And we probably want to deal with the aggrievement issue first.

CHAIRPERSON GRIFFIS: Indeed. That would be fine.

MR. ETHERLY: Thank you, Mr. Chair.

CHAIRPERSON GRIFFIS: Start it off, Mr. Etherly.

MR. ETHERLY: Thank you very much, Mr. Chair. I was just making a suggestion, but I have no hesitancy just to dive right in.

I'm not overwhelmingly swayed with respect to the aggrievement issue, Mr. Chairman. Some of my colleagues will, perhaps, be a little more prepared to speak in detail there. But I don't think that the standard for aggrievement could conceivably set

forward were we to accept counsel for the owner's argument. I just see that standard as being somewhat too high, too aggressive such that it frustrates the objective of the overlay here. I believe my colleague, Mr. Zaidain, might have a more articulate way of putting it, Mr. Chairman, but that's just the very rough cut. I see that as being somewhat a little strenuous in this regard.

CHAIRPERSON GRIFFIS: Okay. But for clarity then you're stating that Mr. Lehrman does have standing and is aggrieved?

MR. ETHERLY: Yes, that is correct, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you.

MR. ZAIDAIN: Mr. Chair, I don't think I could be as articulate as Mr. Etherly. But I would like to align myself with his position in terms of the aggrievement. I think if you look at the intent of zoning regulations, such as the tree and slope overlay, their intent is to protect something a little bit broader as opposed to set backs and things, something a little bit more tangible. This is something that's there to protect characters of neighborhoods and broader issues. And if somebody in direct proximity is directly effected by somebody who

violates that type of zoning regulations because it's there to protect the character and possibly even property values and things such as that. So I do not agree with Mr. Quin's argument in terms of the aggrievement.

I think if Mr. Lehrman does not have standing, who would in this type of situation.

CHAIRPERSON GRIFFIS: Okay. And so your point is in the tree and slope overlay it is an area designation?

MR. ZAIDAIN: Right.

CHAIRPERSON GRIFFIS: Not necessarily a specific site designation. However, the proximity of Mr. Lehrman's property, and there was some discrepancy or there was some argument about that distance, you would say that the short distance actually puts him in close proximity to be specifically aggrieved by any damage or any violation of the tree and slope overlay. Is that correct?

MR. ZAIDAIN: I would agree. I think --

CHAIRPERSON GRIFFIS: And that's based, in fact, what Mr. Lehrman has restated today.

MR. ZAIDAIN: Right.

CHAIRPERSON GRIFFIS: But based on the character and quality of that tree and slope overlay.

MR. ZAIDAIN: Right.

CHAIRPERSON GRIFFIS: And what kind of environment, but also perhaps even some --

MR. ZAIDAIN: But I think that if we found that he was not aggrieved, I think that would be something contrary to the intent of what the tree and slope overlay is there to protect.

CHAIRPERSON GRIFFIS: Okay. Others on standing?

MS. MITTEN: I'm sorry. Ms. Renshaw, did you want to go ahead.

VICE CHAIRPERSON RENSHAW: Thank you, Ms. Mitten.

Just to say that I want to thank all the parties for their in depth discussion of these particular matters before we even launch into any part of the case.

But I do feel that Mr. Lehrman is an aggrieved party. And I concur with Mr. Etherly and Mr. Zaidain in the particular nature of the tree and slope overlay, the proximity of the appellant to the owner's property. The intent of the tree and slope overlay is very definite and I feel that Mr. Lehrman as an aggrieved party has a right to speak up on that intent.

CHAIRPERSON GRIFFIS: Okay. Ms. Mitten, did you want to speak in opposition to that?

MS. MITTEN: No. I just wanted to add the fact that there is one Court of Appeals case that deals with the issue of aggrievement in BZA case and proximity is one of the basis on which aggrievement was found in that case. And so I think it's appropriate given how close Mr. Lehrman's property is to the subject property in this case, that that is an important ingredient here and it is present.

CHAIRPERSON GRIFFIS: Okay. Others?

Is there a motion to dispense with this portion of the motion to dismiss, or would you like to combine them all?

MR. ETHERLY: It might be cleaner, Mr. Chairman, because I would anticipate we're probably going to have substantially more in depth discussion on the second motion. I might suggest that we deal with these independently. So if I could endeavor, I wouldn't make a motion that the owner's motion to dismiss the appeal under Section 3112.2 of the zoning regs on the grounds that the appellant is not an aggrieved person, that that motion be denied.

MS. MITTEN: Second.

CHAIRPERSON GRIFFIS: Very well. Any

further discussion needed on that motion?

As to all those in favor, signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: And opposed?

MR. QUIN: Mr. Chairman, just for the record, I'd like to note an objection to the ruling on the basis that it is contrary to the requirements of GOTO in terms of aggrievement that require that an appellant show an injury different in character and kind from the general public.

Thank you.

MR. ETHERLY: I don't know, Mr. Chair, if you want to --

MS. KRESS: Did you record the vote? Staff, did you record the vote, please?

MS. BAILEY: The motion was made by Mr. Etherly, seconded by Mrs. Renshaw -- I'm sorry. Seconded by Ms. Mitten. Mr. Griffis, Mr. Zaidain and Mrs. Renshaw is in agreement. Mr. Lehrman does have standing and is aggrieved.

CHAIRPERSON GRIFFIS: Very well.

MR. ETHERLY: Mr. Chair, if I may, you know once again just to start right in. I think the owner's motion with regard to dismissal on the grounds

of timeliness is, in my opinion, is a compelling argument and I would be prepared to support dismissal on those grounds. Let me walk through my reasoning as slowly and as carefully as I can. And then, of course, discussion can follow. If I may, Mr. Chair, with your leave?

CHAIRPERSON GRIFFIS: Go ahead.

MR. ETHERLY: Let me begin with Waste Management. I believe Waste Management very clearly lays out for our consideration a clear and very bright line time frame of two months with regards to filing an appeal and preserving your rights.

As I said, we had extensive discussion prior to this motion on this particular matter. Here's where's my thinking is.

You being with Waste Management. Two months unless the ability, unless there are exceptional circumstances which substantially impair the ability of an aggrieved party to appeal. I'm paraphrasing language from the court's decision.

We've had extensive back and forth on the issue of subsequent communications; the October 10th communication, the December 10th communication, stop work orders. For a moment I was inclined to look at that subsequent interaction following the October 10th

letter as being sufficient grounds for finding the existence of exceptional circumstances. As Ms. Mitten was heading in the direction of her questions it seemed to raise a very reasonable question as to if indeed the October 10th communication was a final determination.

Why did we have all this back and forth? However, I was swayed by two particular considerations. One was the fact that it simply stands to reason that you can have a final order but you still not necessarily want to prevent a government from continuing to conduct the work of the people. And so once you have a final determination, that should not dictate that the government in any case should then cease all contact and communication with persons who have concerns or issues that they want to bring to the government's attention.

And I believe it's a very reasonable interpretation to see that in this particular instance you had a final decision issued on October 10th in the letter from Michael Johnson, but it was entirely understandable for the agency to continue working with Mr. Lehrman to resolve any continuing concerns that he might have.

Secondly, the issue was raised concerning

the stop work order, the second of two, but the stop work order which was issued on November 21st. Once again, it raises a question of if indeed October the 10th communication was a final determination, why in the heck are we now seeing a stop work order on November 21st?

Well, I'll just direct the attention of my colleagues to Exhibit 2, which is a December 10th letter, once again one which has been referenced previously to Mr. Lehrman under the signature of Mr. Love in his capacity as administrator of the building and Land Registration Administration. And in particular I'll direct my colleague's attention to the language on top of page 4, which is the final page of that communication which notes that the second stop work order was issued solely to address your concern that construction activity continued to woefully cause fatal damage to protected trees.

This language, in my mind, suggests that we weren't looking at the second -- that you should not view the second stop work order as a reopening, so to speak, of the concerns that were raised or the concerns that were dealt with and disposed of in the October 10th communication, but was an effort to address some additional concerns that continued to be

raised by Mr. Lehrman in terms of his subsequent communications with the Department. So that's why I'm not swayed necessarily by the issuance of the second stop work order on November 21st.

The argument of the owner's counsel with respect to -- if I can put my hands on the order that was issued on 14054 appeal I believe is very instructive and is a useful document to look at in conjunction with the Waste Management case. If you are an aggrieved party which desires to appeal a final order, the rule that I'm laying out here is a very clear, very bright line, very simple one. If you want to protect, preserve your right to appeal, you do it promptly. We said it very clearly in that language in 14054; that is further upheld, of course, in the Waste Management case.

You file that appeal promptly and then you can continue to move forward with any negotiation efforts or other efforts to resolve your concerns, but you protect that right to appeal and you do it promptly. That was the reason for kind of one of the latter exchanges that I had with owner's counsel with regard to if you have all of these subsequent actions taking place after the October 10th communication, isn't it appropriate to view that as being the

exceptional circumstances that allow you to get through the door that Waste Management leaves open?

The reason why I don't see that as Waste Management and the language in that order that I just read, once again, clearly lays out that you file promptly, that you do it promptly. So in terms of my perspective it is my contention that Mr. Lehrman in this case should have filed promptly after receiving that October 10th communication. He could have then, of course, still proceeded with all due efforts to work out some type of resolution in the alternative with the agency and other interested parties, but he would have preserved his right as an aggrieved party to appeal the decision of the October 10th letter.

That's a very long outlay, Mr. Chairman, but it's for those reasons that I'm inclined to accept the argument for dismissal on the grounds of lack of timeliness in filing the appeal in this matter, Mr. Chairman.

Thank you.

CHAIRPERSON GRIFFIS: Thank you, Mr. Etherly.

MS. MITTEN: Mr. Chairman?

CHAIRPERSON GRIFFIS: Ms. Mitten?

MS. MITTEN: I appreciate everything that

1 Mr. Etherly just said, and it was very well said and
2 I'm glad you took the time to lay all that out. I just
3 wanted to give a little bit different perspective to
4 so me of the issues for the Board to consider.
5 WE had a case like this in terms of the
6 timeliness issue not long ago, the Grinstead appeal.
7 And one of the things that was important to the Board
8 in deciding timeliness in that case was when it was
9 reasonable for an appellant to believe that a decision
10 was final and that's in essence what we have now.
11 There's no question that the October 10th letter was
12 an appealable event, but was it the final decision?
13 While I don't disagree that correspondence
14 from the agency shouldn't really rise to the level of
15 importance that somebody might say, "Well, things are
16 happening and therefore I don't have a final
17 decision." But the stop work order I think is
18 slightly more significant than Mr. Etherly suggests
19 for this reason. When the stop work order was issued
20 what Mr. Lehrman knew is that he had a letter in his
21 possession that said we are reevaluating your
22 concerns. Then there's a stop work order issued and
23 it's not until he receives the December 10th letter
24 from Gregory Love that he knows why the stop work
25 order was issued, which is this ongoing concern. He

doesn't know that it's not in response to his initial concerns about which he complained to Michael Johnson.

The other issue related to -- so I think the stop work order is significant because I think it's a very significant even. And I think it was such a significant event that it would give the average person cause to believe that, in fact, the decision was not final. Because if someone issues a stop work order on a decision that was made the agency; you don't issue a stop work order because you're supporting a position you took. It's because you're reconsidering a position you took.

The issue of pursuing other remedies that comes up in the Waste Management case and comes up in the California Street appeal before the BZA; in each of those cases the relief that the concerned parties were seeking in those cases was outside DCRA. It was not inside DCRA.

Here we have a property owner who is dealing with the same group of people. And so, you know, it's not like it's a separate decision making body. He's not writing letters to the city council or he's not calling the mayor. He may be doing that, but that's not the other activity that's going on. The other activity that's going on is in the very same

agency in the very same office.

So, I think it's slightly different in terms of what one would be led to believe about the finality of the order, given that all of the efforts that we're aware of were concentrated in the same place.

And so I think that there is, particularly in light of the Grinstead decision by this Board, that I think we have in the past decided that there's a finality of decision making that is important; not just a decision, but the final decision. And I think the stop work order was a significant enough event that that was called into question.

Thank you.

MR. ZAIDAIN: Just to kind of engage Ms. Mitten's points there for a second, because I'm still struggling with these issues here.

So it's your position that the second stop work order cast the finality of the decision in doubt?

MS. MITTEN: Yes.

MR. ZAIDAIN: And just to provide some clarification to me. To me a final decision by an agency is defined as the agency making a determination and there is no further pending action or they're not continuing to review.

In my mind the October 10th letter was a decision with no decision -- there was no continued review by that agency at that time until there was a letter for reconsideration submitted to them by Mr. Lehrman, and then the stop work order came in.

I guess what I'm struggling with is that was kind of brought about by his requesting are you sure that this is the final decision as opposed to DCRA doing it on their own saying we're going to continue to evaluate this. That's just kind of where I'm struggling with.

You know, you can keep filing reconsiderations, how do you know what is final?

CHAIRPERSON GRIFFIS: That's an excellent point.

MR. ZAIDAIN: I know that's obviously what we're wrestling with here, but I think the second stop work order is definitely compelling. But that was brought about by Mr. Lehrman supplying the letter saying are you sure that this is final.

MS. MITTEN: Right.

MR. ZAIDAIN: In fact, do you see what I'm saying.

CHAIRPERSON GRIFFIS: If I could follow up on that. The logical conclusion to what you're saying,

Mr. Zaidain, is that we would only know when the decision was final after the time had lapsed and the appeal was lost. If you follow me? How are you ever going to know until you see the entire picture which may, in fact, lend people to always miss an appeal possibility as opposed to what your saying is you take the decision when it comes out and you put in your appeal for assurance.

MR. ZAIDAIN: Right.

CHAIRPERSON GRIFFIS: And you can continue in your actions in order to overturn perhaps that decision and not need the remedy of appeal, but still you have the insurance of an appeal.

MS. MITTEN: Mr. Griffis, can I just respond to what Mr. Zaidain said and then what you followed up on?

CHAIRPERSON GRIFFIS: Yes.

MS. MITTEN: I don't disagree with most of what you said, and it was Mr. Quin's argument, which is if there's these letters going back and forth like, you know, look, Mr. Lehrman's writing, I still think there's a problem. And they write back, you know, we hear you, we're taking it under advisement and so forth. If it's just letters flying back and forth, that's one thing. But when an agency does something

which it's highly unusual, but it's a significant thing, which is they issue a stop work order; that is to me that says look we're not standing by this decision. If they stood by the decision, why would they issue a stop work order? That says to me we're taking a serious look at this and we have doubts.

If they had no doubts, they would have never issued the stop work order.

MR. ZAIDAIN: I can understand that. But is the real decision point that we're looking at here in October or at that point?

MS. MITTEN: Well, you need to look at it two ways, I think. Was the October 10th decision letter, was that appealable? Yes, no question. Was there anything that happened in the window of time between October 10th and the 60 days following, which would have been the normal time to file an appeal, was there anything that would cause Mr. Lehrman to doubt that in fact the October 10th letter was the final decision? And what I'm suggesting is that, yes, the stop work order was a significant event that gave him reason to believe that that was not the final decision.

MR. ZAIDAIN: But that was only after he submitted his letter for reconsideration, if I

1 understand it.

2 MS. MITTEN: That's true. But I don't

3 know--

4 MR. ZAIDAIN: I mean, I think if that

5 would have came about without his saying, you know,

6 his letter in essence saying are you sure that this is

7 final, then I could see that. But --

8 MS. MITTEN: Well, I don't think it's the

9 practice of DCRA to sort of without prodding keep

10 reexamining their own decisions. They're just on to

11 the next thing.

12 MR. ZAIDAIN: Well, taking it -- well --

13 so you're saying a final decision from DCRA cannot be

14 achieved until they're prodded by somebody?

15 MS. MITTEN: No. I'm saying that under --

16 if all that had happened was Mr. Johnson issues his

17 letter on October 10th.

18 MR. ZAIDAIN: Uh-huh.

19 MS. MITTEN: Mr. Lehrman's writes a letter

20 -- he makes phone calls, writes letters. He gets a

21 letter back from whomever, Greg Love or somebody else

22 and they say, you know, we're looking at your concerns

23 and thank you for writing again. And then meanwhile,

24 you know, other letters that was exchanged. If that

25 was all that happened, then I would say he doesn't --

he did not file a timely appeal because he wasn't given any real reason to think that the agency was questioning its decision.

But I think that the stop work order --

MR. ZAIDAIN: Yes, because that brought the order.

MS. MITTEN: -- is what gave him reason to believe that they were questioning their decision. Prompted by him or not. It's not something they do lightly.

MR. ZAIDAIN: Oh,I understand.

CHAIRPERSON GRIFFIS: But, Ms. Mitten, it also goes to the fact that you're looking at success-- if you're appealing or looking to appeal in contrast of an order, a decision, you're looking to ensure two tracks of success, right? One would be an appeal to this body and the other would be to have the agency itself overturn itself.

MR. ZAIDAIN: Right.

CHAIRPERSON GRIFFIS: And I think what Mr. Zaidain is saying is the minute you have a decision that is when you should absolutely preserve your right, even if you get an inkling and you get phone calls back, and you get some good conversation, you get a letter that says we'll think about it and you

get the stop work order that there are two tracks and one should have been taken.

MS. MITTEN: Well, what you're suggesting -- I don't disagree with you.

CHAIRPERSON GRIFFIS: The last piece is and so that actually the starting point for the timing for filing the appeal could not have the verbiage of a final decision, but some sort of -- well, I would say it needs to tie more to the decision that comes out of the agency. Because how we define and how anyone can define of interest in the community when it was actually final I think gives us the problems that we have in this case and in others.

MS. MITTEN: Everything would have been easy for us and there wouldn't even be -- Mr. Quin would have had a lot easier time, he wouldn't have been able to file a motion to dismiss on the basis of timeliness if Mr. Lehrman had filed in 60 days of October 10th. There's no question. But given that he didn't and given that there's been arguments on both sides, we have to look at, okay, is there any reason to say that the decision was not final or was perceived not to be final on October 10th. And I'm suggesting, yes, there is that reason. And I'm also reminding the Board that in the Grinstead case we did

acknowledge that there was an appealable event and yet there were subsequent actions by DCRA that led the appellant and ultimately us to believe that an appeal filed after the date of the initial decision was timely because they were led to believe that that decision was not yet final. That's the only point I'm trying to make. Life would be a lot easier if Mr. Lehrman had appealed the October 10th letter. No question.

MR. ZAIDAIN: Or if DCRA would have attach here this is the final decision down at the bottom of this letter.

CHAIRPERSON GRIFFIS: Well, it's an interesting point, Mr. Zaidain, because I think there is a finality in any letter issued by the agency, specifically the Zoning Administrator.

MR. ZAIDAIN: Well, yes. For whatever it's worth. I mean --

CHAIRPERSON GRIFFIS: Right. Exactly.

MR. ZAIDAIN: I guarantee from the agency's perspective this was a final determination.

CHAIRPERSON GRIFFIS: It's interesting words. Okay.

Ms. Renshaw?

VICE CHAIRPERSON RENSHAW: Yes. Mr.

Chairman, my colleagues, I am sitting here awash in paper and, of course, awash in all of the arguments presented by my colleagues and I might say, so very well presented. But I feel very strongly that this case should proceed.

I am not convinced that October 10th can be seen as the final decision date. It was the final decision date as of that date, but there was then sufficient activity after that to lead to the appellant to thing that something more was coming. And, indeed, we have this interaction with Mr. Lehrman and Mr. Love, the statement in Mr. Lehrman's chronology that November 5th DCRA is going to reevaluate. Then Mr. Love writing to Mr. Lehrman on December the 10th regarding the BZA appeal. Then there is the decisions of the DCRA that it's policy but it's not written down so anyone can see that that is going to be end all and end all. So the whole thing is like a dish of Jell-O that you'd like to get your hands around but you can't because it squeaks off in other directions.

And I feel that this is a very important case that could proceed so that we can get a determination on the importance of the tree and slope overlay. And would advise my colleagues to vote in

1 favor of the case proceeding and not being dismissed.
2 MR. ETHERLY: Mr. Chair, if I may just a
3 couple of additional points in response to some of the
4 points that have been made, and I think it's a very
5 good place to start with where Ms. Renshaw left off,
6 which is that this is indeed a dish of Jell-O. But
7 that is the value of carving out clear rules of
8 process that are bright and concrete enough that
9 everyone understands what the playing field is
10 comprised of here.
11 And I think that's the effort behind
12 Grinstead to an extent, but I'll deal with that in a
13 moment. But that's the effort behind Grinstead and
14 also behind Waste Management to eliminate all of this
15 uncertainty.
16 What concerns me about my colleague, Ms.
17 Mitten's interpretation here, is that where you run
18 the risk if you accept her interpretation of creating
19 a definition of finality or a definition of a final
20 order that's very fungible and subsequent to what
21 happens at later dates. And I think one of your
22 questions to Mr. Zaidain kind of began to explore
23 that, which is well perhaps under that interpretation
24 you never ever get to final. Because conceivably
25 you're going to have subsequent communication efforts

or subsequent things that then either this body or a full fledged court of law is going to have to look at to figure out, well there was something final issued but we had a phone call between the acting ZA and counsel. Does that eliminate the finality?

Well, we had a Fed Ex that went from counsel to the ZA's cat at home; that upsets the finality. And I don't say that, you know, in jest to make light of Ms. Mitten's argument, but I'm trying to highlight what I think is a slippery slope here.

CHAIRPERSON GRIFFIS: Yes.

MR. ETHERLY: The important piece, and I agree with my colleague Ms. Renshaw, that there's some important underlying issues here regarding the overlay that would be great to get at. But I don't think we want to miss an equally important issue, if not an even more so important issue, which is establishing what should be a very clear and bright line indicator for all parties here. That you have a responsibility to protect your rights, and the way to do that -- we're not eliminating any avenues here. You can do a zillion different things. But the way in which you do that is when you believe you have a final order in hand -- when you have a final order in hand -- let me correct myself. When you have a final order in hand,

file your motion to appeal, protect that right and then continue doing everything.

So my concern with Ms. Mitten's interpretation is that to accept it would create a very subjective determination as to what constitutes a final order. And I think it's my interpretation and the interpretation of the Waste Management opinion that helps us eliminate that; otherwise you just run the risk of trying to figure out what is final ever.

With that in mind, Mr. Chairman, I don't want to close off discussion here, but we have an opportunity I think to still entertain conversation after a motion. I would be inclined to move forward with making a motion that the owner's motion to dismiss the appeal on the grounds of untimeliness under section 3112.2, I would make a motion -- I've just drawn a little bit of a blank here. I would make a motion to uphold the motion to dismiss for lack of timeliness under Section 3112.2 and would invite a second, Mr. Chairman.

Thank you.

MR. ZAIDAIN: Before we get to that, can we discuss something a little more --

CHAIRPERSON GRIFFIS: I would second the motion, and for discussion, Mr. Zaidain.

MR. ZAIDAIN: Okay.

CHAIRPERSON GRIFFIS: Do you want to do that?

MR. ZAIDAIN: I'm not going to second the motion, no.

CHAIRPERSON GRIFFIS: I see. I'll second it then.

MR. ZAIDAIN: Okay. Looking at the two letters, because obviously those are the two decision points we're looking at. We've got the October 10th and the December 10th letter. I'm trying to find some notch in between these two that would help me understand what would be a better determination of what is final or not. And looking at the December 10th letter, there is a paragraph advising Mr. Lehrman that his available remedy is to file an appeal before the Board of Zoning Adjustment. This was the December 10th letter. Whereas in the October 10th letter did not say that.

And looking at the Grinstead decision it says based on the Board -- and this is point 21 -- the Board finds that Mr. Grinstead was not aware until receipt of DCRA's letter that DCRA made a final determination with respect to the issues he had raised involving the permit and that any further

administrative recourse would be to the BZA. So the relief was discussed.

And so I guess what I want to bring up to the members here, is the fact that a relief was discussed in the December letter as opposed to the October letter, that that is a better indication of finality?

CHAIRPERSON GRIFFIS: Well, I think there is a point that would be argued that Mr. Lehrman did not necessarily need a December 10th letter indicating that he could appeal or had appeal possibilities. One, he was represented by counsel. And two --

MR. ZAIDAIN: Well, represented by counsel when? In October or December is your point?

CHAIRPERSON GRIFFIS: Throughout.

MR. ZAIDAIN: Throughout? October 10th.

CHAIRPERSON GRIFFIS: I forget the exact date. I think it was --

MR. ZAIDAIN: Oh, no, that's fine.

CHAIRPERSON GRIFFIS: But it was well before that.

MR. ZAIDAIN: I'm to the point of splitting hairs now, so --

CHAIRPERSON GRIFFIS: Not necessarily. You're exploring your deliberation.

Continue on your thought.

MR. ZAIDAIN: Well, splitting hairs is my analogy of exploring. So, no, I just wanted to get a discussion from the Board Members.

MR. ETHERLY: And I think Mr. Zaidain raised an interesting point. I'm not too moved about it as maker of the motion because that sentence that Mr. Zaidain references in the December 10th letter continues to state that if you believe the Zoning Administrator's decision is in error, and I believe that's a very clear reference back to the October 10th communication.

I mean, once again from the standpoint of trying to fashion a workable rule out of our deliberations and eventually out of whatever decision comes out of this motion, clarity is the watch word here. And if we're going to use Mr. Zaidain's phrase "split hairs" to the point that we simply have to ensure that the right combination of words is used in a communication to an interested party from the District of Columbia government, I think we're missing the forest for the trees here.

MR. ZAIDAIN: Right. I agree. I agree.

CHAIRPERSON GRIFFIS: Interesting analogy.

MR. QUIN: Mr. Chairman, there's one big

point that you all haven't discussed, and I'm not going to argue it. I just want to put it before you, because I think it's effectiveness.

CHAIRPERSON GRIFFIS: Right. I understand, Mr. Quin, but actually we have a motion in fact now and we're deliberating on our motion, so I can't entertain --

MR. QUIN: Well, it relates to --

VICE CHAIRPERSON RENSHAW: Mr. Quin, you're out of order.

CHAIRPERSON GRIFFIS: Let's proceed.

MS. MITTEN: Mr. Chairman?

CHAIRPERSON GRIFFIS: Yes.

MS. MITTEN: I don't want to belabor this anymore, and I'm very appreciative of the thorough nature of the discussion that we're having, because this is clearly a complicated issue. I just want to give one final thought to the other Board Members, which is I think that the agency has the responsibility as well for conveying a finality to their decision making. And I would just ask you to think about when the stop work order was issued, did Mr. Estrin, the property owner, did he think it was over? Did he think the decision was final or did he think oh here we go again? Because DCRA was again,

you know, rethinking the "final decision" that had been made with the October 10th letter. And if you--

CHAIRPERSON GRIFFIS: Well, if you put it to the owner, then I think action would mean that he would have stopped building.

MS. MITTEN: No.

CHAIRPERSON GRIFFIS: If he thought he was in this all over again, why wouldn't he have stopped construction?

MS. MITTEN: What I'm asking is at the time that the stop work order was issued, the second one.

CHAIRPERSON GRIFFIS: Right.

MS. MITTEN: Would it have been reasonable to think that he was like, oh yes, they're just standing behind Michael Johnson's decision? Is that the conclusion that one would logically draw from a stop work order being issued? Or, would one logically draw the conclusion that decision is under serious reconsideration? And that's the only additional point that I'd like to make.

Thank you.

CHAIRPERSON GRIFFIS: Yes.

VICE CHAIRPERSON RENSHAW: Mr. Chairman, just one last point I would like to make about the

October 10th letter. Were I to have received this and read the last paragraph where the Zoning Administrator tells me that he has concluded there is no violation of the zoning regulations and no further enforcement action is required regarding this matter, period. If I had read that without the very last sentence which says "Should you have additional questions, please call," and gives a phone number.

So that tells me that he had this decision, he made a conclusion, but that boy if I had questions about that, I can keep this going.

CHAIRPERSON GRIFFIS: October 10th

VICE CHAIRPERSON RENSHAW: And so I just want to point out that the door was left open. If he had ended the letter without the last sentence, it would have said to me well that's a firmer judgment.

CHAIRPERSON GRIFFIS: I appreciate that observation, Ms. Renshaw. And I think Mr. Zaidain was actually trying to touch on that. Is the quote at the end of the letters that make it final is it you can now take this to an appeal. I don't think it's the responsibility of the agency or the person in charge to give the path of what should next course be. But I do appreciate your fact. That may just be a friendly send off.

MR. ZAIDAIN: Well, I mean, there's a similar sentence in the December letter.

VICE CHAIRPERSON RENSHAW: Yes, but it invites a reaction and a continuance.

CHAIRPERSON GRIFFIS: I'm not sure it invites -- I understand what you're saying. I'm not convinced that that invites continual request for reconsideration ==

VICE CHAIRPERSON RENSHAW: Well, if he did not want it, it should not have been in the letter.

CHAIRPERSON GRIFFIS: -- of the Zoning Administrator's order.

Okay. Others speak to the motion? Mr. Zaidain, did you want to say something further?

MR. ZAIDAIN: No. I was just going to say I appreciate Ms. Renshaw's comment, but I don't think I'm in agreement. I think it's just, I guess, just manners.

CHAIRPERSON GRIFFIS: Right. Because if you clearly make the assertion that the interpretation at the end of December 10th letter was keep it coming. I mean, here he is applauding the effort and the vigilance of assuring adequate, is that some sort of code word to say we have really made a mistake but we won't admit it.

At any rate, clearly we can't get into that because we have no understanding vehicle to interpret all this.

I think Mr. Etherly has been quite persuasive in the fact of looking at the dates and the time and ensuring one's right to appeal even though one might pursue further actions, of course, even with the same agency. But once a decision is made, one should take that as final. It also goes to setting the standard, which I think has been all over the place, as we are seeing today, but also in other cases as the Zoning Commission it's been alluded to may try and remedy also.

I think there has to be a point where everyone involves says this was the beginning and this sets the clock.

And so, with that, I will ask for people's last comments on the motion before I call the vote.

MR. ZAIDAIN: Just to reiterate the motion is to grant the dismissal based on --

CHAIRPERSON GRIFFIS: It is to uphold the dismissal based on the fact that it was untimely.

Is everybody clear? Very well. Then I would ask for all those in favor of the motion signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: And opposed.

VICE CHAIRPERSON RENSHAW: Opposed.

MS. MITTEN: No.

CHAIRPERSON GRIFFIS: Can we record the vote.

MS. KRESS: Staff, please record the vote.

MS. BAILEY: Ms. Mitten is opposed and who is the other person who is opposed?

VICE CHAIRPERSON RENSHAW: I'm opposing.

MS. BAILEY: The motion passes three to zero. Mr. Lehrman, the appellant did not file the appeal in a timely manner.

MR. QUIN: Mr. Chairman?

CHAIRPERSON GRIFFIS: Yes, Mr. Quin?

MR. QUIN: I wanted to apologize for appearing to try to interrupt your procedure. I was not trying to do that. I just wanted to call your attention to the reorganization order that points out that appeals can only be taken from the Zoning Administrator, and that was in my brief. And there was no discussion of it previously, and I just wanted to make sure that you were aware that it was there.

CHAIRPERSON GRIFFIS: Understood.

MS. MITTEN: Oh, well, now I want to vote

again.

MR. ZAIDAIN: So let's make it unanimous at this point.

CHAIRPERSON GRIFFIS: Is there a motion?

In which case this matter has been dismissed before this Board.

I will make a brief statement, and I think, Mr. Lehrman, we do applaud your efforts and all that was involved in this. This Board takes this very seriously and I think also is very serious about the regulations that are before us and how we need to act in accordance to those.

And, again, I thank everyone for their patience today in spending most of the day with us.

And if there's nothing further, I do believe that I can call to a conclusion the afternoon session of the 24th of September, 2002. Thank you.

(Whereupon, the above-entitled matter was concluded.)