

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

JANUARY 9, 2007

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

ZONING COMMISSION MEMBER PRESENT:

JOHN PARSONS Commissioner (NPS)

OFFICE OF ZONING STAFF PRESENT:

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

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

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

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

9:45 a.m.

CHAIRPERSON GRIFFIS: Good

morning, ladies and gentlemen. Let me call to order our public meeting of the Board of Zoning Adjustments, District of Columbia. This is the 9th of January, 2007. My name is Geoff Griffis, Chairperson.

Joining me today is the Vice Chair Ms. Miller and also Mr. Etherly, our esteemed member of the Board. Representing the National Capital Planning Commission, Mr. Mann, and representing the Zoning Commission with us on our first case for deliberation and decision is Mr. Parsons.

Copies of the agenda are available for you. They are located close to the door where you entered into. There are several things. Of course, I'm going to ask everyone to please turn off their cell phones and other noise-making devices so that we don't have a disruption of the transmission.

1 Of course, all actions of the
2 Board are held in the open and before the
3 public and are being broadcast in several
4 ways, the most important, of course, the court
5 reporter who is setting up the official
6 transcript for this. We are also being
7 broadcast live on the Office of Zoning's
8 website, however. Attended to that is why I
9 would ask that you turn off all of your cell
10 phones.

11 This is, of course, a public
12 meeting meaning we are going to call for
13 decision and deliberation cases that have
14 already been through a public hearing. There
15 is no opportunity at this point for additional
16 testimony to be provided. The records have
17 been closed on all this and they are full and,
18 therefore, ready for our decision making
19 process.

20 With that let me say a very good
21 morning to Mr. Moy with the Office of Zoning.
22 Also Ms. Bailey, Office of Zoning, at my very

1 far left, Mr. Bushman with the Office of
2 Zoning, and Ms. Monroe with the Office of the
3 Attorney General is with us this morning.

4 Let us move ahead. Mr. Moy.

5 MR. MOY: Good morning, Mr.
6 Chairman, members of the Board. The first
7 case for decision, I believe, is Application
8 No. 17309 of Dorchester Associates, LLC,
9 pursuant to 11 DCMR 3104.1 for a special
10 exception under Section 2516 to allow thirteen
11 detached single-family dwellings on a single
12 subdivided lot, including approval of two 16-
13 foot wide roadways instead of the required 25-
14 foot wide roadways pursuant to Subsection
15 2516(d) in the CB/UT R-1A District in the 2800
16 block of Chain Bridge Road, N.W. That's in
17 Square 1425, Lot 827, Parcels 12/63, 12/293
18 and 12/294.

19 On October 31, 2006, the Board
20 completed public testimony, closed the record,
21 and scheduled its decision on January 9, 2007.
22 The Board requested draft, or rather proposed

1 findings of fact and conclusions of law from
2 the applicant and all parties.

3 Mr. Chairman, these documents have
4 been filed in the record from both the
5 applicant and the party in opposition and they
6 are identified in your case folders as Exhibit
7 173 and 174 respectively. The Board is
8 stacked on the merits of the special exception
9 pursuant to Subsection 2516 as well as action
10 on the approval of the two 16-foot wide
11 roadways pursuant to Subsection 2516(d).

12 That concludes the staff's
13 briefing, Mr. Chairman.

14 CHAIRPERSON GRIFFIS: Excellent.
15 Thank you very much, Mr. Moy. I'm sorry.
16 What did you just end with, 2516.6(d) did you
17 say?

18 MR. MOY: Yes, that is identified
19 in the CB --

20 CHAIRPERSON GRIFFIS: Oh, I
21 understand. This is modifying 2516.6(b).
22 Excellent. Excellent. Good clarification.

1 Very well. Thank you very much. As Mr. Moy
2 indicated, there was a substantial amount of
3 exhibits in this application. I know the
4 Board has spent a great deal of time reviewing
5 all of the facts and is focusing on, one, the
6 overlay but also the requirements under 2516.

7 Of course, 2516 covers, one might
8 say, everything and in great specificity and
9 also in generality as we look at 2516.9, for
10 instance, "The proposed development shall
11 comply with the substantive provisions of this
12 title and shall not likely to have an adverse
13 affect on the present character and future
14 development of the neighborhood."

15 The Board is well aware of other
16 applications for elements that go into that
17 and I know we will hear all of those. It also
18 focuses on 2516.10 in referring it to other
19 agencies for recommendations, or rather
20 reports and review for our information and
21 also for the basis of our decision. We have
22 a substantial amount of documentation on that.

1 Of course, just to give you a
2 little further background, this changed
3 several times in the iteration of the hearings
4 and so we have numerous reports from each of
5 the agencies. I know I have and I am aware of
6 other Board members that have organized this
7 file so that each of the revisions to reports
8 are tied directly to that which was the most
9 recent submissions of the plans.

10 I am going to open it up for any
11 comments initially to frame our deliberation
12 and we'll get into further detail as required.
13 We'll start with you, Mr. Parsons, if you
14 would like to begin.

15 MR. PARSONS: Thank you, Mr.
16 Chairman. The incredible detail we've gone
17 into on this case I think has helped us all
18 coming towards resolution. The applicant has
19 not only expended an enormous amount of time
20 and effort on this but has set for us a
21 commitment in his detail of how he is going to
22 build this project that is unprecedented.

1 However, the integrity of this
2 historic country lane should not be encroached
3 on, especially in the context of the park
4 across the street. I think it is a unique
5 situation in this city to have an historic
6 country lane of this type remaining as it does
7 here.

8 Of course, our foremost
9 consideration is the Chain Bridge University
10 Terrace tree and slope overlay. It's intent,
11 of course, is to preserve the natural
12 topography and trees to the maximum extent
13 feasible.

14 I think our most effective witness
15 in this area was Mr. Eutsler and I want to
16 quote him, "The extent of construction that is
17 proposed will most assuredly not allow for the
18 preservation of the most sensitive trees
19 called for in the applicable regulations."

20 Of course, this piece of property
21 is further complicated by this rare stand of
22 beech trees that lay along this very narrow

1 entrance road so we must proceed with a great
2 deal of caution.

3 In my judgement, to permit this
4 level of exception to the overlay would
5 undermine its purpose and enforcement in the
6 future. My experience while the applicant has
7 gone to extreme efforts, as I mentioned
8 earlier, to show how he will protect these
9 trees, most of the techniques he has brought
10 to us are experimental, untested, or contested
11 techniques such as the unexcavated peer-
12 supported platforms, bridging and the
13 driveways over the roots of trees.

14 We all know from experience once
15 you get into the field to build a project of
16 this type the circumstances change and these
17 trees will be further at risk. The review of
18 the plan called All Trees, which has been
19 before us a number of times, shows that the
20 trees are on the steep topography between two
21 plateaus in this project.

22 While the plateaus are buildable,

1 I think we all would agree with that, to
2 encroach on these steep topographic areas
3 separating them is what is causing the problem
4 in my judgement. In order to avoid these
5 trees, it seems to me the density of the
6 houses needs to be reduced.

7 If the applicant wants to build
8 houses of this size, which I think we have
9 been persuaded are out of character with the
10 houses in the community, that the number of
11 houses has to be reduced significantly to
12 allow construction on the plateaus.

13 I also feel very strongly about
14 the billboard effect, as it's been called, on
15 Chain Bridge Road and the park across the
16 street. I think the houses would absolutely
17 overwhelm the feeling of this place and they
18 should be eliminated as well. Many of them
19 are on steeper slopes in any event.

20 I think the entrance to the
21 project should be at the northern. That the
22 entrance on Beech Drive -- along the Beech LA

1 entryway must be avoided on a safety basis and
2 also on a basis of the care and health of the
3 trees in the future. The boring techniques
4 described in the sewers as to whether they
5 could be separated vertically and horizontally
6 simply didn't come to any resolution other
7 than it's an untested system.

8 The extra effort that the
9 applicant has used to deal with, control and
10 treat storm water is admirable but it is very
11 dependent on a high level of maintenance which
12 cannot be guaranteed or enforced. The
13 fragility of the downstream circumstance on
14 its route to the Potomac River as it passes
15 through neighbor's backyards and in turn into
16 the park below, simply, I don't think, is
17 worth the risk.

18 The impervious nature of this
19 place as a result of the paving and the moves
20 of these enormous structures, in my judgement,
21 simply are not worth the risk to the
22 downstream residents and park below. Although

1 I have some ideas on how to redesign this,
2 that is not our purpose but I would urge that
3 we disapprove this project.

4 CHAIRPERSON GRIFFIS: Excellent.
5 Thank you very much. I think that frames
6 several of the elements that we should proceed
7 with. Let me ask for a quick clarification.
8 Your statement on the entrance, my
9 understanding is you would move it north.
10 That would be more towards one of the current
11 entrances?

12 MR. PARSONS: That's what I meant
13 to say. The other proposed entrance, I think,
14 should be the only entrance to the project to
15 avoid the Beech trees.

16 CHAIRPERSON GRIFFIS: Excellent.
17 Very well. Others? Ms. Miller.

18 MS. MILLER: I would echo what Mr.
19 Parsons has said but I just want to add the
20 legal context here, I think, is different and
21 significant from the normal cases that we see,
22 I think primarily the interplay between 2516

1 and the overlay -- I'm sorry, 1565, the Chain
2 Bridge overlay in that 2516 specifically does
3 say that the development must be -- we must
4 consider the overall purpose and intent of the
5 zoning regulations.

6 When we look to the overlay,
7 specifically 1565.2(a), the purpose of the
8 CB/UT overlay is to observe the natural
9 topography and mature trees to the maximum
10 extent feasible in the residential
11 neighborhood.

12 Based on the evidence that I
13 heard, this was not being done to the maximum
14 extent feasible, even though I think it was
15 commendable that the applicant came back with
16 an attractive landscaping plan that was much
17 improved from the initial plan that they
18 presented.

19 In the context of the overlay it
20 wasn't sufficient in my view because I think,
21 as the opposition has said, they were
22 basically destroying trees and destroying the

1 terrain and then replacing with landscaping
2 and that is not in the intent of this overlay.

3 I think I was definitely persuaded
4 by the agency, the Urban Forestry, who had
5 expertise on the trees in this case and he was
6 quite adamantly opposed to the plan as
7 presented. He had said that the plan as
8 proposed would seriously undermine the
9 regulatory authority of the tree and slope
10 district of the Chain Bridge Road and
11 University Terrace.

12 I think he said that in his
13 written comments and at the hearing. He said
14 it would be reckless if the Board were to
15 proceed in approving the development as it is.
16 I think all parties seem to agree that
17 residential development was appropriate in
18 that area. It's just that the extent of the
19 development in this case was too much and that
20 it would cause damage to the preservation of
21 the trees as one factor.

22 I think I'm going to pause here

1 for now and let somebody else comment if they
2 would like.

3 CHAIRPERSON GRIFFIS: Very well.
4 Others? I would take a little bit of issue,
5 although I understand your citing of the Chain
6 Bridge Overlay, 1565.2, I believe, you
7 indicated which outlines the general purposes
8 of the overlay district. Doesn't it then go
9 to specifics on how that is to be measured in
10 terms of compliance with the purpose and also
11 does not 2516 get further into specifics.

12 My point being often times we look
13 at or are asked to look at the general
14 directions and whether their applicants or the
15 decisions or proposed plans comply with
16 generalities.

17 I would be hesitant to say clearly
18 this doesn't meet the purpose and, therefore,
19 that is the basis of denying an application,
20 but rather, and I am agreeing with you that
21 you are going further into the details of how
22 that general parameter of compliance with the

1 overlay is measured and is either made or not
2 made.

3 MS. MILLER: I understand what
4 you're saying because normally we don't find
5 a regulation is violated if only the purpose
6 is violated. We go to the specific
7 requirements that follow the intent and the
8 purpose. That's why I think that this case --
9 I'm not saying that I certainly don't find
10 that the specifics were violated.

11 I think we can discuss that if we
12 want to with respect to how you consider a
13 lot, you know, whether they violated with
14 respect to how many trees are on a lot.
15 There's interplay here because 2516 refers to
16 the intent and the purpose of the regulations
17 of this title and that is why I find they
18 violated the purpose and the intent of the
19 overlay under 2516.

20 MR. PARSONS: Okay. I understand.

21 MS. MILLER: Not that they
22 violated Chapter 1565.

1 CHAIRPERSON GRIFFIS: Mr. Parsons,
2 Ms. Miller, does the Office of Planning's
3 report also in some respects substantiate your
4 positions if I look at hearing both of your
5 causes and deliberation in terms of the
6 natural topography.

7 Mr. Parsons also talked about the
8 character. They are indicating that there was
9 -- they were recommending just one lot to be
10 removed but in the larger picture of the
11 density or the layout, is Office of Planning
12 in that aspect in accordance with your
13 positions?

14 MR. PARSONS: If the applicant
15 wants to retain these size buildings, and I
16 said I wouldn't get into design but I've done
17 it, I mean on my own, I can't imagine more
18 than seven houses on this project. That is
19 what I mean as I said earlier is to build on
20 the plateaus and not encroach on the area
21 where the sensitive trees are. As well as
22 hopefully eliminating the houses along the

1 road.

2 CHAIRPERSON GRIFFIS: Excellent.
3 Yes?

4 MS. MILLER: Just picking up on
5 your question, I mean, I think we also need to
6 look at 3104.1 as a special exception and it
7 says that, "Where it is authorized to grant
8 special exceptions, wherein the judgment of
9 the Board the special exceptions will be in
10 harmony with the general purpose and intent of
11 the zoning regulations and zoning maps and
12 will not tend to affect adversely the use of
13 neighboring property in accordance with the
14 zoning regulations and zoning map."

15 The Office of Planning, I mean,
16 the submitted several reports. I have in my
17 notes, at least, in their first report, which
18 is Exhibit 54, that they said, "The intent of
19 the CB/UT overlay may not be realized on all
20 the lots as the lot occupancy and impervious
21 surfaces are maximized and not minimized as
22 recommended by the overlay." They stated that

1 on page 9 of that report. I don't think they
2 changed their position.

3 CHAIRPERSON GRIFFIS: Right.
4 Okay. Is there address to the DDOT report?
5 DDOT had found that there was not. They were
6 first concerned about the narrowing of the
7 proposed driveways of less than 20 feet but
8 they were accepting of the proposal to
9 accommodate that based on site lines and also
10 the talks of potentially installing concave
11 mirrors.

12 MS. MILLER: Right. They accepted
13 that for the purpose also of preserving more
14 trees.

15 CHAIRPERSON GRIFFIS: Okay. There
16 is nothing substantial on that. Let's move
17 then to Department of Health which was
18 providing analysis and report to the storm
19 water management plan. Is there detail or any
20 requirement to address that in the findings or
21 any of the deliberation and findings of Board
22 members? Mr. Parsons talked on it a little

1 bit.

2 I believe what you were getting
3 into is the amount of intensity in laying it
4 in for that amount of housing and also in
5 terms of the location of those houses. Is
6 there additional comments on that?

7 MR. PARSONS: Regarding the storm
8 water?

9 CHAIRPERSON GRIFFIS: Right.

10 MR. PARSONS: Well, I think I
11 mentioned earlier the techniques that are
12 being used or proposed here are so highly
13 dependent on maintenance that if this project
14 had the luxury of a storm sewer on Chain
15 Bridge Road or connecting into a storm water
16 system, I wouldn't be as cautious as I am.
17 That is, we know what it's discharging into or
18 what is happening downstream. It is private
19 property and park land beyond and that's the
20 concern.

21 Without a high level of
22 maintenance, which one could presume with

1 homeowners of this caliber, if you will,
2 economic caliber, that it would be done. But
3 if it isn't, the impervious surface here is
4 such that I see, I'll use the word, potential
5 catastrophic problems downstream. That is the
6 concern.

7 CHAIRPERSON GRIFFIS: Okay. Very
8 well. Others? Any other comments or
9 elements? Specifics?

10 MS. MILLER: Just on that point,
11 DOH did have a report attached to Exhibit 54
12 of Office of Planning's original report. I
13 believe in that report they did not express a
14 concern but that was written also before --
15 they didn't listen to any of the testimony
16 that we heard.

17 That was written earlier on. They
18 made the point the detailed plans would be
19 reviewed prior to issuance of the building
20 permit. In any event, unlike the testimony of
21 Mr. Eutsler from Urban Forestry DOH didn't
22 have the benefit of reviewing all the

1 testimony in this case.

2 MR. PARSONS: I think that is a
3 very good point and it is true of the Office
4 of Planning's report as well. It was at the
5 beginning of a process and we watched the
6 evolution of it.

7 CHAIRPERSON GRIFFIS: Good.
8 Others?

9 MR. PARSONS: Mr. Chairman, I
10 should say for the record that I read in its
11 entirety the transcript of the last hearing
12 where I had to leave early. I just want to
13 make sure.

14 CHAIRPERSON GRIFFIS: Oh, good.
15 Yeah. Excellent point. Appreciate you
16 bringing that up. Okay. Is there any others?
17 Any other topical elements that need to be
18 addressed in this preliminary deliberation?
19 Is there action proposed by the Board?

20 MR. PARSONS: Mr. Chairman, I
21 would move that we disapprove this
22 application.

1 CHAIRPERSON GRIFFIS: Is there a
2 second?

3 MR. ETHERLY: Second, Mr. Chair.

4 CHAIRPERSON GRIFFIS: Excellent.
5 We have a motion before us that has been
6 seconded. Let me hear further deliberation
7 then on the motion. Ms. Miller?

8 MS. MILLER: I was just going to
9 say there are aspects of this proposal that
10 were certainly attractive and I do think it
11 has potential but the major factor here I
12 think is that it was just too much for this
13 location under this overlay.

14 CHAIRPERSON GRIFFIS: Others?

15 MR. ETHERLY: Thank you very much,
16 Mr. Chair. As seconder of the motion I will
17 associate myself with both the comments and
18 remarks of my colleagues and Mr. Parsons and
19 Mrs. Miller. I felt coming into this case
20 where we were essentially was dealing with the
21 a patient that still needed fairly major
22 surgery.

1 I think both Mr. Parsons and Mrs.
2 Mitten -- Mrs. Miller, I'm sorry, hit it right
3 on the head in terms of addressing what I
4 think are substantial concerns with regard to
5 the preservation of the tree system as we
6 currently see it on this property.

7 Mr. Parsons was right on target in
8 highlighting I think what was fairly damning
9 testimony from Mr. Eutsler with regard to the
10 measures that were proposed for the mitigation
11 of impacts on the trees here.

12 I want to highlight, as Mr.
13 Parsons did, the extraordinary amount of work
14 and effort that was placed on this application
15 with regard to trying to address some of the
16 concerns but I think there was a fairly high
17 bar set by the testimony offered by Mr.
18 Eutsler in a very credible way.

19 Clearly there was a lot of back
20 and forth about Mr. Eutsler's understanding
21 of the technologies and techniques that were
22 proposed for the property, dueling experts at

1 alternate times with regard to those measures.

2 I think at the end of the day it
3 was very important to take a step back from
4 what was fairly strong language and prose used
5 by Mr. Eutsler and try to really look
6 objectively at what the impacts were going to
7 be and whether or not in realistic fashion
8 those impacts were going to be mitigated by
9 the measures that were proposed. In doing
10 that I simply did not find the applicant to
11 satisfy the burden under the zoning
12 regulations.

13 I think further as we discuss a
14 little bit regarding storm water management,
15 I think there continue to be significant
16 concerns that remained unaddressed after our
17 final hearing on this application. We had
18 substantial discussion, I believe, on the part
19 of adjacent property owners, the party in
20 opposition, and other persons in opposition
21 regarding currently existing flooding on the
22 property and concerns that the proposed

1 application would augment flooding as it
2 currently occurs on the property.

3 I can't say there was a tremendous
4 amount of comfort, if you will, created by the
5 proposed storm water management plan. Again,
6 dueling experts that offered at times
7 contrasting visions of what would happen on
8 the property. I understand again, as Mr.
9 Parsons indicated, that substantial lifts, I
10 think, were undertaken by the applicant to
11 address these issues.

12 I think at the end of the day
13 considering the topography of the subject
14 property, considering the volume of
15 development on the property, I think the bar
16 simply would be too high for the application
17 as it is currently proposed to satisfactorily
18 address both storm water management concerns
19 on the site and, as has already been
20 discussed, the preservation of existing trees
21 on the site. Thank you Mr. Chair.

22 CHAIRPERSON GRIFFIS: Excellent.

1 Thank you very much. Others?

2 MR. MANN: The only thing I have
3 to add -- well, first, I agree with everything
4 that I have heard so far. I don't have any
5 issues with anything that any of the other
6 members have raised. The only additional
7 information I would add is I also thought it
8 was useful that Mr. Eutsler provided
9 information that helped put out evaluation of
10 the tree and slope overlay into a longer-term
11 perspective.

12 I think the applicant was clearly
13 trying to address the immediate ramifications
14 of what their project was going to do the
15 trees but I thought Urban Forestry
16 Administration allowed us to take a longer and
17 larger perspective to understand what the
18 objectives of tree preservation really are.

19 CHAIRPERSON GRIFFIS: Excellent.
20 Thank you. Others? I think it is very well
21 framed. I think looking at the criteria for
22 2516 in itself lays out fairly stringent

1 requirements that need to be met or at least
2 assessed by the Board. What I'm hearing is
3 that the majority have a feeling it has not
4 been met in numerous ways.

5 I would also tend to agree with
6 the comments being made that the overlay, the
7 tree and slope overlay, add an additional
8 burden, lets say, in terms of how one looks at
9 the siting and the proposed development and,
10 therefore, create specifics in terms of
11 adverse affect on the character or the
12 potential for future development.

13 We looked at ingress and egress.
14 We looked at the physical trees, the location,
15 the impervious area, although -- well, the
16 storm water management plan. What is
17 interesting in this case is that I found it
18 much more important and integral to the
19 presentation and the success or failure of
20 this proposal was the construction means and
21 methods which we don't often get into because
22 we don't find that it raises a zoning issue.

1 However, with the confluence of
2 the requirements of the tree and slope overlay
3 and 2516 and overall the special exception
4 criteria, I think means and methods were an
5 important aspect to how you were going to
6 implement this.

7 Mr. Mann's comments and
8 recollection of the testimony is critical to
9 this because we are looking at not just that
10 they can be done or the impact of what it
11 would be the first day, but rather we are
12 looking at what is the impact down a certain
13 period of time. I think that fascinatingly
14 goes to how the overlay folds into 2516 and
15 addresses the character of the neighborhood.

16 I don't agree necessarily with
17 what Mr. Parsons would redesign in terms of
18 moving things off the street or not, but I
19 think he said it well that is not our purview
20 here to redesign this. There are issues, I
21 believe, of great concern in reviewing this
22 site plan that touch on numerous elements and

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1 issues.

2 One of it is the siting of each of
3 the lots and the number of the lots and how
4 each of that has, as you all have articulated
5 well, I believe, not only the potential but
6 perhaps we have seen evidence and strong
7 testimony that it would, in fact, have an
8 adverse impact and affect.

9 With that then I will let it go to
10 anyone else who has last comments, closings.
11 Very well, if we have no other comments, we do
12 have a motion before us and it has been
13 seconded. I would ask for all those in favor
14 signify by saying aye.

15 ALL: Aye.

16 CHAIRPERSON GRIFFIS: And opposed?
17 Abstaining? Very well. Why don't we record
18 the vote.

19 MR. MOY: Yes, sir. The staff
20 would record the vote as five to zero to zero.
21 This is on the motion of John Parsons to
22 disapprove or deny the application. Seconded

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

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

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

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

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

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

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

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

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

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

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

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

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

4 CHAIRPERSON GRIFFIS: Right.

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

12 CHAIRPERSON GRIFFIS: Right.

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

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

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

6 Ms. Miller.

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

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

15 MS. MILLER: I did.

16 CHAIRPERSON GRIFFIS: Others?

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

21 CHAIRPERSON GRIFFIS: Perfect.

22 Mr. Etherly, any concerns?

1 MR. ETHERLY: No objections.

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

9 MR. MOY: Yes.

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

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

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

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

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

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

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

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

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

21 Ms. Miller.

22 MS. MILLER: Okay. The appellant

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

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

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

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

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

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

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

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

1 here.

2 CHAIRPERSON GRIFFIS: Did you say
3 translated?

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

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

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

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

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

8 CHAIRPERSON GRIFFIS: Why don't --

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

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

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

16 CHAIRPERSON GRIFFIS: Yes.

17 MS. MILLER: Okay.

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

1 I saw.

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

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

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

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

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

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

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

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

4 CHAIRPERSON GRIFFIS: Right.

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

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

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

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

4 CHAIRPERSON GRIFFIS: Excellent.

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

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

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

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

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

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

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

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

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

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

22 I think what we ended up doing was

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

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

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

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

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

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

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

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

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

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

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

22 CHAIRPERSON GRIFFIS: Right.

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

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

11 Okay. What else?

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

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

1 assuming they were in effect.

2 CHAIRPERSON GRIFFIS: Agreed.

3 Other elements?

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

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

22 I don't agree with either of

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

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

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

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

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

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

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

20 MR. MOY: Yes, sir.

21 CHAIRPERSON GRIFFIS: -- absentee
22 ballots?

1 MR. MOY: I was going to bring
2 that to your attention.

3 CHAIRPERSON GRIFFIS: Excellent.

4 MR. MOY: Carol Mitten, who, of
5 course, has also participated on the case, has
6 filed an absentee ballot with rather
7 substantial comments. I don't know whether or
8 not you would like the staff to read her
9 comments.

10 CHAIRPERSON GRIFFIS: Two things.
11 I would like you not to indicate what her
12 actual vote is, if possible, and then to read
13 any of her comments on her ballot. I think
14 that would be instructive for our own
15 deliberation at this time.

16 MR. MOY: Yes, I can. "The ZA,
17 Zoning Administrator, determined three areas
18 of noncompliance with the zoning ordinance,
19 two related to the issues raised by the
20 appellant in Section 401.1, the area and lot
21 width requirements, and the third related to
22 required parking.

1 As to Section 401.1 the Section
2 does not speak to the use of the property. It
3 appears that the ZA infers that the
4 enlargement permitted by Section 401.1
5 anticipates no change in use. I appreciate
6 that the ZA was sensitive to the Zoning
7 Commission's concern regarding lot area and
8 lot width requirements as they applied to
9 public schools as expressed in the emergency
10 rulemaking.

11 However, the specialized condition
12 addressed in 401.1 was not discussed by the
13 Zoning Commission in approving either the
14 emergency or the subsequent permanent
15 rulemaking. To the extent that 401.1 is
16 ultimately inconsistent with the Commission's
17 intent but remains meaningful on its own
18 terms, then it is the flaw of the Commission
19 interacting the rulemaking, not an area of
20 interpretation for the ZA.

21 The third issue, the parking
22 issue, is the basis for my vote. The BZA

1 heard testimony as to the existing number of
2 parking spaces. The ZA testified that he
3 determined that six compliant parking spaces
4 could have been configured on the property for
5 purposes of establishing the existing number
6 of parking spaces.

7 It is appropriate to adopt this
8 number in the absence of facts to the
9 contrary, specifically an indication on the
10 prior C of O as to the number of existing
11 parking spaces. No such indication on the C
12 of O exist. The ZA consistent with his goal
13 of compliance first would appropriately
14 interpret the existing condition to achieve
15 the greatest degree of compliance for the
16 existing use, i.e., private club.

17 Further, we have testimony from
18 the neighbor, Mr. Foley, that the former user
19 did seek to maximize the amount of parking on
20 the lot using stacking. This reinforces Mr.
21 Crews' conclusion that the maximum number of
22 legal spaces should be assumed in the absence

1 of facts to the contrary.

2 Therefore, because the applicant
3 provided only three parking spaces thereby
4 reducing the number of existing parking
5 spaces, which is not permitted under Section
6 2100.5, whatever disagreements there may be as
7 to the interpretation of 2100.5 as it relates
8 to additions greater than 25 percent, there
9 has been no disagreement in my experience on
10 the BZA that the number of legal parking
11 spaces may be reduced from the existing
12 number."

13 CHAIRPERSON GRIFFIS: Excellent.
14 Thank you very much. I think that is well
15 stated. I noted that Mr. Crews actually
16 stated in his testimony, and I wrote the quote
17 in my own notes, that the property "never had
18 six or five spaces on the site but could." I
19 think that is what Ms. Mitten was actually
20 inferring also. There are two elements to
21 that to address that I see.

22 First, there was a permitted

1 construction of that fence which precludes
2 five or six as I see all the layouts and the
3 iterations. I don't disagree that Mr. Crews,
4 the Zoning Administrator, should have looked
5 at how many could have been provided or should
6 have been provided according to the
7 regulations.

8 The stackable, I'm not sure why we
9 are even talking about because unless there
10 was some sort of relief provided by this Board
11 for that, they never would have been able to
12 be counted as complying with the regulations.
13 Again, I go back to trying to establish
14 whether it was striped or wasn't. I find that
15 three seems to be the number -- not seems to
16 be.

17 Three is the logical number based
18 on the size of the surface area, the existence
19 of the egress stairs, the AC units, and the
20 gate most importantly which creates a drive
21 isle. When you have the dimensions that we
22 have, I don't see how you fit nine by 19

1 spaces in anymore than three.

2 Yes.

3 MS. MILLER: I also want to
4 comment that figure of five or six spaces,
5 whatever that was, that was determined after
6 Mr. Crews made his decision on the AppleTree
7 case. If you recall in his letter saying that
8 they needed parking, he said they needed 10
9 spaces in accordance, I think, with the 206.1
10 or whatever, you know, 10 spaces per use as a
11 public school.

12 He didn't say six and that was
13 part of our concern that the day before the
14 hearing when he looked at the property and
15 took pictures and we said, "How could your
16 decision have been based on that number since
17 you made your decision well earlier and you've
18 just taken these pictures."

19 CHAIRPERSON GRIFFIS: Right. I
20 think that is well said. I think it is a
21 difficult burden for the Zoning Administrator
22 to look at existing buildings and trying to

1 assess when it isn't clear on previous ruling,
2 previous permittings, or previous rulings,
3 previous permittings, or previous certificate
4 of occupancy so I agree.

5 MR. MANN: I also agree that three
6 is the correct number. I think that you laid
7 out the physical reasons why that is the
8 appropriate number. I also sort of disagree
9 with some of the comments we just heard on the
10 absentee ballot that implies we should be
11 working towards the maximum number.

12 I don't think that is the
13 direction that we should be heading. I think
14 that is why three in this case is more
15 supportable, particularly given the physical
16 evidence that you have outlined.

17 CHAIRPERSON GRIFFIS: Others?

18 MS. MILLER: I just want to
19 address the ANC report to give them their
20 great weight. I think where the ANC was going
21 was that the use of a charter school should be
22 considered a nonconforming use. I don't

1 believe it is a nonconforming use because use
2 of a public school is allowed in this
3 residential zone and, therefore, the arguments
4 that they made with respect to that failed.

5 It's sort of a nonconforming use
6 as a public school because it didn't meet the
7 lot and width requirements. The ANC has made
8 several arguments based on the fact that they
9 characterize the use in this case as
10 nonconforming because AppleTree didn't meet
11 the requirements set forth in 401.3.

12 CHAIRPERSON GRIFFIS: Right.
13 401.3 doesn't go to use.

14 MS. MILLER: It goes to area,
15 right.

16 CHAIRPERSON GRIFFIS: It goes to
17 the area of the lot and the width in that the
18 use is designated in order to establish what
19 is required for the lot width and the lot
20 area. A public school is a matter of right
21 use. It's an allowable use within the
22 residential zoned district so it's not as if

1 it's a -- the nonconformity of use is not
2 established based upon an area of compliance
3 or noncompliance.

4 If the building is five feet
5 higher than is allowed in the zoned district,
6 it doesn't make the use that fills it
7 conforming or not conforming. That use can be
8 conforming and the structure can be
9 nonconforming. Actually, it's incredible
10 articulated in our regulations as we look at
11 nonconforming structures with conforming uses
12 and nonconforming uses of conforming
13 structures and vice versa.

14 Okay. What else? Anything else?
15 Is there action proposed by the Board?

16 MS. MILLER: I just want to
17 clarify something. It doesn't take away from
18 what we were saying but they tied this
19 nonconforming use into 401.1 which talks about
20 meeting the requirements of Chapter 20.
21 Anyway --

22 CHAIRPERSON GRIFFIS: Correct.

1 MS. MILLER: Okay.

2 CHAIRPERSON GRIFFIS: I'm glad you
3 braised it and I think we have put it to rest.

4 MS. MILLER: Good.

5 CHAIRPERSON GRIFFIS: Anything
6 else then? Is there a motion?

7 MS. MILLER: I would move to grant
8 the appeal of AppleTree on grounds that it is
9 exempt from 206.1 pursuant to 401.1 and that
10 it is exempt from the additional parking
11 pursuant to 2100.5 and only three spaces are
12 required.

13 MR. MANN: Second.

14 CHAIRPERSON GRIFFIS: Excellent.
15 I'm prepared to support the motion. However,
16 I would have framed the motion a little bit
17 differently and found that it was -- the last
18 piece of it, it was in conformity with the
19 rest of the provisions of the regulations.
20 However, I don't think that is a critical
21 aspect that will be detrimental in terms of
22 the motion moving forward.

1 Speaking briefly to the motion, to
2 reiterate, I think all of this has been well
3 said and I look further in trying to figure
4 out the more current intent and the previous
5 intent of the zoning regulations is how we
6 look at this.

7 I also am looking at kind of
8 proposing the worse case scenarios because
9 that's what we have to do is kind of enlarge
10 what the impact is in many ways just to inform
11 ourselves and then we get to the specifics.
12 You look at it and you say, one, I wonder why
13 we deal with private schools and public
14 schools differently in our regulations but
15 that's a bigger discussion.

16 As we look at public schools we
17 also realize the fact that there are many,
18 many regulatory areas or agencies and elements
19 that go into opening a school and placing a
20 school. I think, one, our own building codes
21 will indicate how many students and teachers
22 will go into structures. That will be a

1 limiting factor.

2 We also have the health
3 requirements in terms of the age of students
4 and the like. Why do I say that? I have
5 great assurance that our zoning regulations
6 play only a small part in making sure that the
7 health and safety is ensured as we go forward.

8 However, the specifics of this, I
9 think, it has already been delivered and
10 directly stated that this, in fact, under
11 206.1 and 401.1 with the new text creations
12 was exempt from that lot or width area
13 requirements.

14 This is a matter of right use and
15 that it did comply with the other provisions
16 within the title. Others? Anything else?
17 Very well. We do have a motion before us. It
18 has been seconded. I would ask for all in
19 favor to signify by saying aye.

20 ALL: Aye.

21 CHAIRPERSON GRIFFIS: Opposed?

22 MR. MOY: Staff would record the

1 vote as four to zero to zero. This is on the
2 motion of Ms. Miller, the Vice Chair, to grant
3 the appeal. Seconded by Mr. Mann. Also in
4 support of the motion the Chair, Mr. Griffis,
5 and Mr. Etherly. As I said earlier, we do
6 have an absentee ballot from Carol Mitten and
7 her absentee vote is to deny the appeal. That
8 would give the resulting vote of four to one
9 to zero.

10 CHAIRPERSON GRIFFIS: Excellent.
11 Thank you very much, Mr. Moy. I believe it is
12 clear on the elements of what Ms. Mitten was
13 denying the appeal on. I appreciate you
14 reading that into the record for our own
15 information and deliberation. Very well. Is
16 there anything else on that case?

17 MR. MOY: That completes that
18 particular case, sir.

19 CHAIRPERSON GRIFFIS: Good. It's
20 my understanding that we have one more small
21 matter before us in our meeting. Is that
22 correct?

1 MR. MOY: Yes, sir.

2 CHAIRPERSON GRIFFIS: Excellent.
3 Why don't we move ahead to that then.

4 MR. MOY: Okay. The third and
5 final action for the Board this morning is the
6 motion for reconsideration to clarify the
7 order in Application No. 17383 of the Lab
8 School of Washington pursuant to 11 DCMR 3126.

9 The original application was
10 pursuant to 11 DCMR 3104.1 for a special
11 exception under Section 206 to allow an
12 increase in student enrollment from 310 to
13 330, an increase in faculty and staff from 95
14 to 182, a special exception under Section 206
15 to permit the use of nearby property at 4749
16 Whitehaven Parkway, N.W. Square 1374, Lot 840,
17 administrative offices for the School and a
18 special exception under Section 2116 to locate
19 accessory parking spaces elsewhere than on the
20 lot served at an existing private school
21 located at premises 4759 Reservoir Road, N.W.,
22 Square 1372, Lot 25, in the R-1-B zone.

1 On December 22, 2006, the
2 applicant represented by Pillsbury Winthrop
3 Shaw Pittman filed a motion for
4 reconsideration to clarify the Board's order
5 17383 pursuant to Section 3126 under the
6 zoning regulations. That filing is identified
7 in your case folders as Exhibit 86.

8 Also attached to that Exhibit is
9 their Exhibit or Tab A which recommends
10 suggested language change for the Board's
11 approval. Finally, we also have the -- the
12 office has also received a response which was
13 timely filed from ANC-3D dated January 4,
14 2007, and that is identified as Exhibit 87 in
15 your case folder.

16 Staff will just conclude here and
17 say that the Board should act on the merits on
18 the motion for reconsideration.

19 CHAIRPERSON GRIFFIS: Excellent.
20 Thank you very much. I think this one meets
21 its interest for us to consider it as a motion
22 for reconsideration and I would move ahead

1 with that as it is exactly a clarification of
2 frankly the writing of the order. I think it
3 is appropriate to move ahead with that unless
4 there is any objection from Board members or
5 comments. Not noting any, let's move straight
6 ahead.

7 In looking at Exhibit A I think
8 there are several things that we need to
9 address. I don't disagree that clarification
10 of condition No. 7 is required and I tend to
11 agree with the proposed language for that as
12 written in Exhibit A. The first strike of
13 that though, I think, we would remove the last
14 sentence which says, "Unless otherwise
15 determined by the Board," because I don't
16 think that has much meaning to that.

17 Let me just step back a little bit
18 because in looking at this application we had
19 a special exception for specific elements and
20 not a full special exception for the
21 continuance of the school, but rather of the
22 increased enrollment, staff, and also the

1 parking and how that was to be dealt with.

2 The timing went directly to the
3 provision as it was characterized somewhat in
4 different language but characterized as a
5 temporary provision meaning they were looking
6 for a permanent provision of parking and the
7 applicant, the school, had confidence that
8 they were going to reach that within this term
9 period.

10 What we had indicated was the fact
11 that once that was done it would come back for
12 review as a permanent condition. I have to be
13 honest and say that I never assumed that there
14 would be an event in which the school would
15 look to reduce its enrollment so I always had
16 great confidence in the fact that although one
17 could view this as all they needed to do if
18 they don't find the parking is revert back to
19 the previous order.

20 I don't think that is a realistic
21 scenario and so I find the provision as
22 written in terms of the five-year term and

1 proposed edits of condition 7 suffice to the
2 intent of the Board and the directness of
3 that.

4 We have a couple of other elements
5 in areas I think we need to look at. One is
6 the footnote No. 3 on that and also the
7 titling as we were going into it indicating
8 there would be an increase in enrollment,
9 faculty, staff limits and I agree with those
10 edits.

11 Addressing footnote 3 it would be
12 best proposed that, again, the conditions set
13 forth in this order were to qualify any of
14 similar conditions and elements in previous
15 order. Now, what does that mean? It doesn't
16 mean this superseded everything that was done
17 previously but rather only those elements that
18 went to the faculty and staff limits.

19 I think we can either remove
20 footnote 3 or change it to bring more
21 clarification. I think it probably is more
22 efficient and effective to remove condition

1 No. 3. There are other elements or edits of
2 the exhibit which I think we can add in, too.

3 Lastly, the ANC had indicated
4 their support. However, also had provision of
5 edits that indicated the inclusion of the word
6 "only" as part of the final paragraph in
7 Exhibit A. I'll hear comments on that.

8 MS. MILLER: First of all, I would
9 like to commend the parties for getting
10 together and bringing these to our attention.
11 This is a good use of a motion for
12 reconsideration. I'm sorry some of the
13 language wasn't clear.

14 I would say that we should delete
15 the footnote. I think it's probably cleaner
16 if we do and I think the parties would assume
17 that the most recent applies. I think
18 sometime down the road in the future in some
19 of these school cases it is a good goal
20 perhaps to get all the conditions in one
21 document so the community and the school don't
22 have to search through documents but this

1 isn't the case I don't think so I would agree
2 we just should delete footnote 3. I think
3 that was a very good point that the ANC made
4 and brought to our attention.

5 I would agree with you that we
6 should accept in substance the changes
7 recommended to the conditions with the
8 exception I think we ought to take out,
9 "Unless otherwise determined by the Board,"
10 because I think the only context in which it
11 would be determined by the Board would be if
12 they came back to us. I don't think we want
13 to get into these speculative kind of
14 situations.

15 With respect to the word "only"
16 after administrative use, I would say not. I
17 don't think that is a provision that needs
18 clarification. I think it is pretty clear on
19 its face so I wouldn't change it.

20 CHAIRPERSON GRIFFIS: Well said.

21 Others?

22 MR. MANN: Well, I think I agree

1 and it seems like the testimony that we heard
2 implicitly implied that it was going to be the
3 only purpose for that building. It might be
4 a little redundant to have it in there but is
5 there any reason not to?

6 CHAIRPERSON GRIFFIS: Is there any
7 reason not to.

8 MR. MANN: Is there any reason not
9 to include the word "only." Otherwise I'm in
10 support of including it at the ANC's request.
11 I understand that I think we heard plenty of
12 testimony that the building is only going to
13 be used for administrative purposes but I
14 don't think it's necessary but I have no
15 objection to including it at the ANC's
16 request.

17 CHAIRPERSON GRIFFIS: Okay.

18 MS. MILLER: I guess, you know,
19 it's not going to do any harm either way
20 except I think as precedent I don't think we
21 want the parties to come back and tell us how
22 to keep improving language or change language

1 unless it, in fact, has a real consequence.
2 I think No. 7 and some of the other changes
3 did need clarification so that is my only
4 point. I don't want to belabor one word
5 necessarily. I just don't think it's
6 necessary.

7 MR. MANN: Okay. Now that I
8 understand your reasoning, I still support
9 including the word "only" but I think that's
10 a very good reason to not include it.

11 CHAIRPERSON GRIFFIS: Good. I
12 would tend not to support including it two-
13 fold. One, it seems to be a restatement of
14 the same. If today is any indication of our
15 own deliberations, oftentimes the more words
16 there are, the more trouble we get into. I
17 didn't find any difficulty with the writing of
18 it in the beginning or as it was issued as
19 opposed to what Ms. Miller said, the other
20 elements that are under reconsideration.

21 Okay. Other elements?

22 MS. MILLER: We'll change the

1 exhibit number to reflect the correct exhibit.

2 CHAIRPERSON GRIFFIS: Yes. Have
3 we covered everything? Very well. Then I
4 would move under this reconsideration that we
5 adopt the language as deliberated and
6 discussed here today and I won't go through
7 all those iterations but it obviously dealt
8 with the footnote Condition 7, the heading of
9 the condition and also the exhibit number. I
10 would ask for a second.

11 MR. ETHERLY: Second, Mr. Chair.

12 CHAIRPERSON GRIFFIS: Thank you
13 very much, Mr. Etherly.

14 Is there further comments,
15 discussions?

16 MR. ETHERLY: Just very briefly,
17 Mr. Chair. Just for the sake of process, are
18 we acting separately on the motion for
19 reconsideration or we just did that by --

20 CHAIRPERSON GRIFFIS: It was by
21 consensus.

22 MR. ETHERLY: -- general consensus

1 so to speak.

2 CHAIRPERSON GRIFFIS: I appreciate
3 you bringing that up.

4 MR. ETHERLY: No problem. No
5 problem. No further comments.

6 CHAIRPERSON GRIFFIS: Excellent.

7 MS. MILLER: Not to belabor this
8 but, Mr. Etherly, do you have an opinion on
9 the "only" addition to that language? I think
10 we have consensus but I don't know if it's
11 clear where we stand.

12 MR. ETHERLY: I'm fine with that.

13 MS. MILLER: With or without?

14 MR. ETHERLY: Without.

15 MS. MILLER: Okay.

16 CHAIRPERSON GRIFFIS: Excellent.
17 Way to put him in the hot seat. Okay.
18 Anything else? We have a motion before us
19 that has been seconded. I would ask for all
20 in favor to signify by saying aye.

21 ALL: Aye.

22 CHAIRPERSON GRIFFIS: And opposed?

1 Abstaining?

2 Mr. Moy.

3 MR. MOY: Yes, sir. The staff
4 records the vote as four to zero to zero on
5 the motion of the Chair to adopt the language
6 as suggested with the changes as discussed.
7 Seconded by Mr. Etherly. Also in support of
8 the motion Ms. Miller and Mr. Mann. We also
9 have an absentee ballot, Mr. Chairman, from
10 Carol Mitten who also participated on the Lab
11 School. She has comments supporting her vote
12 if the Board care for the staff to read.

13 "For the ANC proposal I agree with
14 adding the word "only" for the applicant's
15 amended language. I do not agree with the
16 proposed language that allows the enrollment
17 to revert to 310 and the faculty reverting to
18 95 in the event that a permanent parking
19 solution is not found. The record of the case
20 is clear that the parking problem is
21 substantial and not attributed to a marginal
22 increase in enrollment.

1 If the TNP is not effective, the
2 school needs to return to the BZA with one
3 that is effective. Without further action by
4 the BZA there is no guarantee that lower
5 enrollment and staffing will de facto result
6 in acceptable traffic and parking conditions."

7 So part A, her vote would be to
8 grant the motion for reconsideration. Part B,
9 do not support the amended language as
10 proposed. So then --

11 MS. MILLER: I'm not clear. Isn't
12 she opposed to the motion for reconsideration
13 or she's only opposed to part of it?

14 MR. MOY: She's okay with
15 deliberating on the motion for reconsideration
16 but she doesn't support the amended language
17 as proposed by the applicant. Unless you
18 correct me, I'm reading that her vote would be
19 to not support the motion which would give a
20 final vote of four to one to zero.

21 MS. MILLER: Thank you.

22 CHAIRPERSON GRIFFIS: Well done,

1 Mr. Moy. Thank you very much.

2 MR. MOY: I try.

3 CHAIRPERSON GRIFFIS: Very well.

4 Is there any other business for the Board in
5 its public meeting this morning?

6 MR. MOY: There is a small matter
7 that typically in the regulations the first
8 meeting in January --

9 CHAIRPERSON GRIFFIS: Excellent.
10 Thank you very much. I think what we'll do is
11 take that up at the end of the day as we are
12 a little bit behind schedule based on the
13 decision making so we can take that up later.

14 MR. MOY: Very well.

15 CHAIRPERSON GRIFFIS: We'll just
16 call into session at another meeting and
17 whoever is left in the audience can
18 participate. With that being said, let's move
19 ahead to the business of the day. We will
20 adjourn our morning meeting. I'm just going
21 to take three minutes and then come back and
22 I will call to order our hearing. At that

1 time the applicant obviously can get set up
2 and ready to roll.

3 (Whereupon, at 11:17 a.m. the
4 meeting was adjourned.)

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