

GOVERNMENT OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

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TUESDAY, MAY 10, 2005

The Special Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

ZONING COMMISSION MEMBER PRESENT:

ANTHONY HOOD	Commissioner
DAVID A. ZAIDAIN	Commissioner (NCPC)
KEVIN HILDEBRAND	Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Deputy Secretary
BEVERLEY BAILEY	Zoning Specialist
JOHN NYARKU	Zoning Specialist

OFFICE OF PLANNING STAFF PRESENT:

KAREN THOMAS

D.C. OFFICE OF THE ATTORNEY GENERAL:

LORI MONROE, ESQ.

This transcript constitutes the minutes from the Special Public Meeting held on May 10, 2005.

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AGENDA ITEM

PAGE

OPENING REMARKS:

Curtis Etherly	3
Geoffrey Griffis	4

NATIONAL CHILD RESEARCH CENTER

<u>APPLICATION NO. 16970 -</u>	4
--	---

<u>VOTE ON MOTION TO STAY</u>	42
---	----

APPEAL OF EASTERN TRANS WASTE OF MARYLAND, INC.

<u>NO. 17288 - ANC-6D:</u>	44
MOTION TO GRANT APPEAL	49
VOTE TO GRANT APPEAL	52

ADJOURN

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

9:43 a.m.

1 BOARD MEMBER ETHERLY: Thank you, Mr.
2 Hood. Good morning, ladies and gentlemen, let's,
3 please, call the Meeting to order. My name is Curtis
4 Etherly and this is a Special Public Meeting of the
5 Board of Zoning Adjustment. Today's date is May 10,
6 2005. Joining me today are Mr. David Zaidain
7 representing the National Capital Planning Commission
8 and Mr. Anthony Hood representing the Zoning
9 Commission.
10
11

12 Copies of today's Special Meeting agenda
13 are available to you and are located to my left near
14 the wall bin at the door. We will not be receiving
15 public testimony at this Special Meeting, unless the
16 Board asks someone to come forward, but I do not
17 anticipate that being the case.

18 Please, be advised that this proceeding is
19 being recorded in two ways. One by a Court Reporter
20 seated to my right and also by virtue of a webcast
21 live. Accordingly, we would ask the audience to,
22 please, refrain from any disruptive noises or actions
23 in the hearing room during our deliberations and
24 proceedings.

25 At this time, I also would like to ask if

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1 everyone could, please, turn off their cell phones and
2 beepers, so also as to not disrupt our proceedings.
3 At this particular time, let me turn and offer a very
4 good morning to our staff. We will be assisted by
5 Mrs. Bailey at the far end of the dias, Mrs. Monroe
6 representing the Office of the Attorney General and
7 Mr. Clifford Moy.

8 With that good morning, let me turn to
9 you, Mr. Moy, and ask if there are any preliminary
10 matters and if not, we can proceed with calling the
11 case.

12 MR. MOY: No, sir and I can proceed with
13 calling the case.

14 Good morning, Mr. Chairman and members of
15 the Board. The case this morning is a motion for stay
16 of the effectiveness of BZA order to an Application
17 No. 16970 of the National Child Research Center.

18 This application was presented to 11 DCMR
19 205 and 3104.1 for a special exception to increase the
20 enrollment of an existing child development center
21 from 120 to 185 children ages two and a half to five
22 years; to increase staff on 28 to 44; and to authorize
23 the construction of an addition to an existing
24 building and the construction of an accessory building
25 in an R-1-B district at premises 3209 Highland Place,

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1 N.W., and that's in Square 2072, Lot 30.

2 The Board is to act on the merits of a
3 motion for the stay, which was timely filed by the
4 applicant on April 11th, 2005, and that's identified
5 in your case folder as Exhibit 385.

6 The staff also notes that there was a
7 subsequent motion in opposition for the stay filed by
8 the parties in opposition, represented by Richard
9 Nettler, and that is identified in your case folder as
10 Exhibit 386, and that's dated April 18th, 2005.

11 Now, at that point, Mr. Chair, I'd like to
12 conclude staff's briefing.

13 MR. ETHERLY: thank you very much, Mr.
14 Moy.

15 Let me also note that I neglected to
16 highlight that we will also be assisted by Mr. Nyarku,
17 whom you will see exiting in and out of the board room
18 at various times.

19 Once again, thank you very much, Mr. Moy.

20 Let me first simply confirm that my
21 colleagues are, indeed, in receipt of Exhibits No. 385
22 and 386 as Mr. Moy laid out, respectively, the
23 application for stay offered by the applicant and then
24 the opposition for motion to stay, also offered by the
25 party in opposition.

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1 If I could, I think an appropriate place
2 for us to start will be to talk a little bit about the
3 particular test that we are working under with respect
4 to the question of the motion of stay, and then
5 clarify as I see it the Board's thinking with respect
6 to how we're going to parse out this discussion.

7 It's a fairly complicated case. Many of
8 you here in the room, of course, are very familiar
9 with the months of proceedings that we have on this
10 particular issue, but once again, for clarity's sake,
11 I want to be sure to kind of walk through where we're
12 starting at.

13 First, of course, as my colleagues are
14 aware, to prevail on a motion for stay, the party
15 seeking the stay must first demonstrate that:

16 One, it is likely to prevail on the
17 merits.

18 Two, irreparable injury will result if the
19 stay is denied.

20 Three, the opposing parties will not be
21 harmed by a stay.

22 And, four, the public interest favors the
23 granting of a stay.

24 Four fairly specific and discrete
25 questions.

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1 With regard to jumping right into this,
2 I'd perhaps like to note for my colleagues that, of
3 course, our order, which is the subject of this motion
4 for stay, was a fairly far reaching one in that it
5 addressed a number of different issues, and I think
6 it's important to clarify for my colleagues and for
7 the audience what issues are being addressed by this
8 motion for stay as we see it and what issues are not
9 on the table.

10 I would say fairly clearly that it would
11 not be my position that this motion for stay should
12 address, one, the issue of additional construction on
13 the NCRC site, and, two, the issue of the additional
14 request for ten students under the earlier
15 application.

16 Would that be consistent with my
17 colleagues' understanding of proceeding forward? Mr.
18 Hood.

19 MR. HOOD: Mr. Chairman, that is very
20 consistent. That has already been hashed out, and I
21 am not here today to take any of that up at this time.

22 MR. ETHERLY: Thank you, Mr. Hood.

23 Mr. Zaidain.

24 MR. ZAIDAIN: Yeah, that's my
25 understanding as well. To me the enrollment issue is

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1 kind of all encompassing among the ten additional
2 students, and then the clarification of the cap, which
3 is the real crux of the matter, but I agree with your
4 parsing of the issues and the two between the
5 enrollment and the new construction.

6 MR. ETHERLY: Excellent. Thank you very
7 much, Mr. Zaidain.

8 It would further then be my suggestion
9 that that does not need to take the form of any type
10 of affirmative or other motion to dispose of that
11 unless the Office of Attorney General would like to
12 offer some comment on that.

13 MS. MONROE: I just can't hear you.

14 MR. ETHERLY: I would perhaps suggest that
15 that does not require any type of dispositive motion
16 on our part in terms of the issue of the building or
17 additional students in terms of that art of this
18 motion.

19 Essentially what I'm saying, I'm perhaps
20 being a little too politic about it. Essentially what
21 I'm saying is we're only dealing with the issue of
22 what is effectively the enrollment cap of 120
23 students.

24 MS. MONROE: Okay. The request for a stay
25 was for the whole order. If you are only dealing with

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1 the enrollment, then that's all you're dealing with.
2 Okay?

3 MR. ETHERLY: That is correct.

4 MS. MONROE: Let's be clear on that.

5 MR. ETHERLY: That is correct.

6 MS. MONROE: Nothing else is being stayed
7 or not stayed.

8 MR. ETHERLY: That is correct.

9 MS. MONROE: Then that's it. I don't
10 think you need to take a separate vote on what you're
11 dealing with as long as it's clear.

12 MR. ETHERLY: Okay, excellent. Okay.
13 thank you very much, Ms. Monroe.

14 Let's then proceed, if we could, to the
15 first prong of the analysis here, the test which it is
16 likely to prevail on the merits, and that question
17 was, again, for the benefit of our audience, is: is
18 NCRC likely to prevail on the merits in terms of
19 seeking this stay?

20 I think this is perhaps of the four prongs
21 one of the -- well, I wouldn't say there is a one
22 million dollar question among them that stands above
23 all of them. I think each of them are, in part,
24 million dollar questions here. So let me not try to
25 characterize it and just simply say that I think this

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1 is a very difficult prong, but I think it's one that
2 does not necessarily fall in the direction of NCRC's
3 favor, as I see it, but I want to invite some
4 discussion here.

5 Clearly, the issue here relates to this
6 Board's ability, this Board's authority to establish
7 an enrollment cap of 120 students in the context of
8 the prior case before this Board, and then of course,
9 the earlier special exception case where the original
10 number of 120 was discussed in some measure.

11 I think it's safe to say that in looking
12 at the applicant's motion, essentially four arguments
13 are being proffered. First, in part, the BZA has no
14 authority to unilaterally amend downwardly a C of O or
15 to impose remedial measures.

16 Secondly, on evidentiary basis that would
17 justify a reduction in enrollment to 120 exists.

18 Thirdly, imposing a cap of 120 is not
19 appropriate regulation of the school's land, but,
20 quote, in the realm of managing details of its
21 operations.

22 And, fourth, the order is completely at
23 odds with the orally expressed views of the Board
24 members at the hearing.

25 Let me open it up for discussion and kind

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1 of get us rolling right on that particular prong.
2 I'll turn to either one of my colleagues for any
3 comment or discussion on that particular point. Let
4 me turn to Mr. Zaidain.

5 MR. ZAIDAIN: I was not swayed by the
6 argument regarding the Certificate of Occupancy. What
7 we did in my mind did not involve the clarification or
8 revocation of a Certificate of Occupancy. It was all
9 about clarifying the previous orders because we denied
10 the enrollment expansion.

11 And my point was, in one of the decision
12 meetings, was that we should make sure that it's clear
13 what the enrollment is because we're denying the
14 expansion. I think it would have been a disservice to
15 leave that in a gray area.

16 And my position at the time was that 120
17 was the clear enrollment, and there was basically no
18 argument from the rest of the Board or otherwise. So
19 that's where I was coming from, and I thought that the
20 order reflected that.

21 So that's still my position as it stands,
22 and I'd be willing to hear from the rest of the Board
23 members otherwise.

24 MR. ETHERLY: Thank you.

25 Mr. Hood.

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1 MR. HOOD: Mr. Chairman, I would agree
2 with Mr. Zaidain. I recall and I'm sure that the
3 record will reflect that when he mentioned to make
4 sure it's understand that it's 120, I questioned it to
5 make sure that what I was understanding to him to be
6 deemed correct.

7 So I think that the record is clear. As
8 far as granting more than 120, I think that's what
9 that whole case was about for, I guess, two years or
10 so. So I'm in agreeance with my colleague, Board
11 Member Zaidain.

12 MR. ETHERLY: So if I understand the
13 comments of my two colleagues, one, the issue of the
14 Certificate of Occupancy as it relates to the argument
15 that was, in part, offered by the applicant here; one,
16 the C of O essentially is not an issue here.

17 And I would tend to agree with you. I
18 think the inquiry around a C of O versus the analysis
19 that's offered under Section 205 are essentially two
20 different inquiries, one not having much to do with
21 the other. So I would agree with my colleagues as it
22 relates to the argument around the C of O.

23 Further, as it relates to the issue of 120
24 students, I think this is a very critical question,
25 but I tend to agree with my colleagues as it relates

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1 to the earlier order. I just don't find the argument
2 compelling that in the earlier order the Board was
3 discussing on-site numbers at any one time versus the
4 issue of what the actual enrollment cap will be.

5 As my colleagues will recall, that is one
6 of the arguments that's proffered by the applicant
7 here, that, in fact, in the earlier proceeding the
8 number of 120 was simply an on-site number meant to
9 reflect 120 students on site at any given time, but
10 not necessarily an enrollment number.

11 I think as Mr. Hood noted in his comments,
12 to accept that argument would essentially mean that
13 then there would be no logical cap arguably speaking
14 under the earlier order in the absence of any other
15 number being highlighted. I find that particular
16 position simply to be unworkable and untenable.

17 Any further discussions on the issue of
18 prevailing on the merits?

19 MR. HOOD: I have none, Mr. Chair, and we
20 can move on.

21 MR. ETHERLY: Thank you very much, Mr.
22 Hood.

23 And I want to highlight here that this is
24 a four-part test, which is taken in its entirety.
25 However, I think it's critical that this Board walk

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1 through each and every prong of this particular test
2 rather than, shall we say, essentially stop the
3 analysis midstream. One could argue that if you don't
4 prevail necessarily on one of the merits, you really
5 don't have to proceed any further, but I don't think
6 that is the case here. I think it's important for
7 this Board to continue to move forward and talk
8 through prongs two, three and four.

9 It would be my suggestion that as we talk
10 through this motion, we would then take the ultimate
11 question of the motion and the issue of granting or
12 denying the motion in total at the end of our
13 discussion.

14 So I'm not suggesting that we essentially
15 act in part, more in part, what have you. I want to
16 kind of walk through the full test, take it in its
17 totality, and then come back and deal with the motion
18 at the close.

19 Let's then move to prong number two of the
20 test, which speaks to the issue of irreparable injury
21 will result if the stay is denied.

22 Once again, summarizing a number of the
23 arguments that were offered by the applicant here, I
24 think essentially what we're looking at is a
25 discussion that focuses on the fact that NCRC arguably

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1 would not be able to responsibly or lawfully eliminate
2 50 preschoolers from its roster, therefore placing the
3 school in an untenable position of having to violate
4 a BZA order in order to maintain its compliance with
5 other obligations to its students. And that has been
6 identified as the chief irreparable harm here.

7 It is further noted that under the
8 applicant's motion, NCRC's only alternative to
9 violating the order would be to reduce enrollment by
10 50 preschoolers, which would account for nearly one-
11 third of its total enrollment.

12 A reduction in enrollment consequently
13 would harm young children, their families who would be
14 denied the preschool opportunity when no alternative
15 is likely available.

16 Let me open up that particular prong for
17 discussion. Mr. Hood.

18 MR. HOOD: Chairman, for me on the surface
19 of this, this is a very -- you know, when you sit and
20 read the submittals, nobody is in the business of
21 harming kids, especially preschoolers. You know,
22 while we're not supposed to let it get to us to a
23 point, I mean, we're all human up here and it gets to
24 us.

25 I mean, when I read that having to throw

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1 50 kids out of school and all of that, you know, that
2 plays on you. But we have a job to do, and I think
3 that a lot of that was hashed out during the hearing.

4 So, you know, that was one that kind of --
5 the other prongs I didn't have a problem with. This
6 one here I would also like to maybe just open up and
7 have some discussion, but I can tell you that the way
8 it's written, you know, I'm sure that it's written to
9 get to me, and I want them to know that they did.

10 So I'll leave it at that.

11 MR. ETHERLY: Okay. Thank you very much,
12 Mr. Hood.

13 Mr. Zaidain.

14 MR. ZAIDAIN: Well, I agree with Mr. Hood.
15 You know, none of us are here in a position to want to
16 shut down schools or throw kids out of schools or
17 whatever. We're having to deal with a complex zoning
18 matter.

19 This is clearly going to be the most
20 difficult prong of the test in our discussions.
21 That's for sure.

22 Basically this came down -- and this is
23 where I'd like to hear some discussion from both of
24 you on this -- I think this came down to a matter of
25 timing for me. One of the points that I made in the

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1 previous decision meeting was that this is going to be
2 coming back up for special exception in '07, which
3 given the nature of the case and how it proceeded the
4 first time, they are going to have to be filing pretty
5 quick to make that '07 date for a new order.

6 So in terms of providing some relief from
7 this order, I think that process may do that and
8 alleviate some of the harm because a filing could come
9 very quickly, provide some relief from an enforcement
10 action, and then this project can work through that
11 process.

12 Now, on the flip side of whether or not
13 there's going to have to be an elimination of 50 kids,
14 you know, it's hard to know whether or not that is a
15 fact. You know, I don't know if we're in a position
16 to go into a hearing on that and take testimony and
17 get evidence on exactly what the contractual
18 arrangements are for NCRC. I mean, it's a difficult
19 question.

20 I think what I want to throw to the other
21 Board members is the issue of timing. I mean, can we
22 use the fact that this is coming back in a relatively
23 short order as something to hang our hat on for
24 alleviating the harm here?

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

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1 Zaidain. I think that's a very excellent observation
2 with respect to the fact that there is the issue of
3 the upcoming special exception out there. I would
4 offer that I think part of the argument of the
5 applicant here is perhaps very, very applicable with
6 respect to one existing enrollment, but in particular,
7 perhaps to use some phrasing here, I'll say the class
8 that would be the 2005-2006 class for missions
9 purposes, and then probably the 2006-2007 class, once
10 again, that pool of children who would be considered
11 for admission or admitted to NCRC.

12 So I think part of the discussion here is
13 essentially: one, is there harm that's caused to
14 existing enrollment that would have to be impacted to
15 get the school to a 120 enrollment cap number?

16 And perhaps secondarily and thirdly, what
17 are the ramifications for the school having to
18 readjust itself in terms of its admission decisions
19 for those two upcoming admissions classes?

20 I think the point that was raised by Mr.
21 Hood is a very, very important one, and I think it's
22 one that is worth stating again. And that is this
23 issue of is the Board's order, in effect, closing the
24 school down.

25 I think that's rhetoric. I understand the

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1 concern. I do, but I don't see that as a possibility
2 here. I think the opposition brief hit it somewhat on
3 the head when it spoke to, one, what is typically, of
4 course, a practice here in this kind of situation.
5 That is, one, the issue of fines. Clearly, I think
6 part of the discussion here is what would be the
7 impact of fines on NCRC and its financial viability,
8 and I think that is worth discussing because that's
9 part of the irreparable harm discussion.

10 But I don't think this is a case that
11 needs to be characterized in terms of is the BZA
12 shutting this school down, and I can't simply say that
13 strongly enough.

14 Further, I think Mr. Hood's comment with
15 respect to the seriousness with which all of us here
16 on this Board approach the business of what we are
17 trying to decide and deliberate on today. The rock
18 and the hard place here, there has to be a starting
19 place, folks, and I think the Board took the correct,
20 very strong, and very aggressive stance of setting
21 that starting point at 120 students.

22 As I said earlier, I think in the absence
23 of taking that stance and clarifying the original 1998
24 order, I think we ran the risk here of not having an
25 identifiable enrollment cap that could be looked to by

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1 NCRC, by other interested members of the community in
2 terms of what the enrollment cap would be for this
3 institution.

4 That's the rock. That's the rock up
5 against which my colleagues and I are standing. Now,
6 as Mr. Hood noted, the hard place is, well, what kind
7 of impact does that have on the institution today.

8 I do not think that it cannot be
9 overlooked that NCRC ran the risk of coming under a
10 circumstance like this of having to be confronted with
11 a very definitive statement from this Board regarding
12 what its enrollment cap was. I think that was a very
13 logical circumstance to anticipate at some point.

14 That is to suggest in part that, yeah,
15 there's a little bit of a self-created hardship here.
16 Once again, there has to be a starting point for this
17 institution's enrollment, whether it's 120, whether
18 it's 170, whether it's 150 or whether it's 180.

19 And I think the Board took the appropriate
20 and correct stance of starting with 120 by looking at
21 the earlier order.

22 Further, as it relates to Mr. Zaidain's
23 comment, I agree with you that this is a very
24 difficult prong because there is perhaps no more
25 important life blood of the city than having strong,

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1 viable educational institutions that its residents and
2 other persons can rely on for the education of their
3 children.

4 That being said, let's just move a little
5 further as relates to this issue of harm, and I think
6 Mr. Zaidain and Mr. Hood both said it very, very
7 strongly and very clearly that this is not a scenario
8 where we are talking about shutting this institution
9 down.

10 Mr. Hood.

11 MR. HOOD: I just have one comment. Mr.
12 Zaidain alluded to something and maybe if you can walk
13 me through that timing issue, maybe I can be a little
14 more clear on it.

15 You stated you thought that as far as harm
16 was concerned because I think in a year or two or so
17 they will have to come back for a special exception.
18 Walk me through that.

19 MR. ZAIDAIN: Well, it's my understanding
20 that the special exception from the previous order
21 expires in 2007, and if I'm incorrect, please correct
22 me at the other end of the dais down there. That is
23 the expiration of the order, and that is when they
24 will need a new order to be out. That's my
25 understanding.

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1 So there's going to have to be a filing
2 for a new special exception in relatively short order.
3 I mean, we're already five months deep into 2005 and
4 time moves pretty quick. I mean, it took two years to
5 go through this case already.

6 So at some point there's going to have to
7 be a filing and in pretty short order, and it is in my
8 view that that is going to -- I don't know. I don't
9 know if I want to state prevent enforcement action,
10 but it's going to allow the dialogue to be reopened
11 and the process to start all over again, and all of
12 this to be corrected or, you know, clarified through
13 a new order from a different proceeding.

14 MR. HOOD: So where we are headed today,
15 if my colleagues can help me, you think this will be
16 minimal impact or harm? I mean, from what you're
17 saying with all of that that's going to have to take
18 place, are we looking at very minimal harm?

19 MR. ZAIDAIN: I would say that if the
20 special exception was not going to expire for another
21 ten, 15 years and they were going to have to deal with
22 this in that length, yeah, I think the situation would
23 be much different. I think we would be in a much more
24 dire situation. But that's not the case.

25 MR. HOOD: I don't mean to question you,

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1 but thank you.

2 MR. ETHERLY: No, I think it was an
3 excellent question. I would take, in terms of my own
4 interpretation of Mr. Zaidain's observation, I would
5 take it as one aspect that could conceivably be looked
6 at as mitigating in part some of the alleged harm
7 that's being proffered by the applicant here with
8 respect to having to downsize by virtue of 50
9 students.

10 I think one of the interesting things that
11 was laid out by the opposition filing in this
12 particular issue relates to the question of
13 alternative measures, if any, could be undertaken by
14 the applicant to mitigate or ameliorate the need to
15 downsize by 50 students, and I think it was a very
16 appropriate question to ask that from my thinking and
17 my reading did not necessarily find an answer in the
18 application brief.

19 Now, it could be the case that that
20 omission simply means that it would not be an option
21 for the institution to house those students at another
22 location, at a satellite location, or make alternative
23 arrangements. That could be one interpretation or it
24 could be interpreted that, well, they didn't say that
25 they couldn't do it. So there could conceivably be a

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1 possibility that some type of measure along those
2 lines could be undertaken to mitigate some of the
3 impact.

4 But I think, once again, I don't see this
5 order resulting in the nuclear scenario to perhaps,
6 not coin a phrase but use a phrase that we've heard
7 entirely too frequently over the last few months here
8 in the District, but I don't necessarily see that
9 option coming to pass, that 50 students are going to
10 be turned out on their book bags, if you will, in
11 order to come into compliance with this particular
12 order.

13 But I do think to kind of move this into
14 another aspect of the inquiry, I think there is some
15 strength and some merit in the argument, as Mr. Hood
16 alluded to, that essentially there's another piece of
17 this, and I think it's part of NCR's argument and I
18 want to kind of interpret it off of my interpretation
19 of it.

20 One here, as I said earlier, is I think
21 very strongly that NCRC had to confront and
22 contemplate and deal with the possibility that an
23 enrollment cap would be set or would be offered by
24 this Board in terms of its thinking consistent with
25 the 1998 order. That's one piece of it.

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1 There is another piece of it, of course,
2 which involves those many parents and families who
3 made a decision based on the longstanding and strong
4 and well deserved reputation of NCRC as an educational
5 institution of excellence.

6 And I think part of NCRC's argument here
7 with respect to irreparable harm is how are those
8 families being impacted. Individuals who in large
9 part have nothing to do with the administration and
10 management of the institution, but simply made a
11 decision as all families do around what's going to be
12 the best educational outcome for their child or their
13 children.

14 And I think as Mr. Hood spoke at the
15 outset of our discussion about this particular prong,
16 irreparable injury or irreparable harm, I think there
17 is definitely some merit. There definitely is some
18 ground there over which this Board needs to pause.

19 Does that pause in my thinking necessarily
20 argue or compel a certain outcome with respect to this
21 particular prong? I don't necessarily see it. Mr.
22 Hood said a very important statement, and that is that
23 might there be some parents -- well, he didn't say it
24 explicitly, but I think the implication of his
25 statement is, yeah, might there be some parents who

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1 might have to make another decision or who might have
2 to make alternative arrangements that could very well
3 be a course of action that might have to be
4 undertaken.

5 But the argument that's offered by the
6 applicant here as it relates to 50 students having to
7 be summarily dismissed into the wind and the rain and
8 the cold elements -- and I'm paraphrasing here, but
9 not using language that was employed by the applicant
10 --

11 MR. HOOD: Mr. Chairman.

12 MR. ETHERLY: -- and I don't mean to be
13 flip, but --

14 MR. HOOD: I just wanted to interrupt. I
15 don't think I said that.

16 MR. ETHERLY: No, no, no. I'm not saying
17 you said that.

18 MR. HOOD: I wanted to make sure. I
19 wanted to make sure what I said is clear.

20 MR. ETHERLY: Absolutely.

21 MR. HOOD: I was thinking, "Did I say
22 that?" Either that or you phrase it so well that I
23 didn't even recognize it myself.

24 MR. ETHERLY: That's probably how it went.

25 But in all seriousness, I'm simply taking

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1 I think what was a very important point by you and
2 kind of moving it further here because a lot of what
3 we're dealing with is, if you would, whatever the
4 appropriate expression might be, the 800 pound gorilla
5 in the room or the elephant in the room in the corner,
6 and that is what will NCRC have to do with those young
7 people who are presently set to come as new students
8 into that institution in the upcoming school year or
9 currently existing students in the class.

10 And that's a very important question. I
11 think what I hear the colleagues saying the argument
12 that is proffered by the applicant that 50 students
13 will have to be displaced is not one that you find
14 compelling in its entirety. Okay?

15 Am I misstating that?

16 So that's where I was trying to go, Mr.
17 Hood, in terms of trying to move that further, but as
18 Mr. Zaidain said, and this is not to beat a dead horse
19 because I don't think this horse is dead; I think it's
20 a very important question here, and I want to be sure
21 that the listening public and that our audience
22 understands that this Board grapples with that
23 question and understands the seriousness of it, but
24 also has to take into account the full realm of
25 possibilities here as it relates to what happens to

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1 NCRC if the Board's original order is allowed to stand
2 and the stay is denied.

3 Does NCRC have to summarily dismiss 50
4 students? Are there other alternatives or other
5 measures that could be taken into consideration by
6 NCRC to mitigate any impacts there?

7 And that's a very important question.
8 Once again, I think as it was noted here, I don't
9 think it was necessarily this Board's role to
10 contemplate what the enforcement action of DCRA would
11 be with regard to this particular application, but I
12 think it was very important to be reminded in the
13 opposition brief here that it is not without precedent
14 for fines to be levied and issued in a situation of
15 this particular type.

16 Mr. Zaidain's point is important here
17 because it does highlight the fact that there is a
18 special exception process which will be coming down
19 the pike in late 2006 or 2007 when the earlier 1998
20 order expires, which will, I am more than certain
21 perhaps, give this Board or another body an
22 opportunity to address some of these issues and look
23 at the context of the current enrollment situation at
24 NCRC.

25 I would further note without necessarily

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1 hanging my analytical hat on this particular peg that
2 I think we all know that this may very well not be the
3 last stop on the legal train for this particular case
4 either before this body or, perhaps more importantly,
5 in other judicial forums.

6 I'm not suggesting that that be used as
7 shall we say a decision point on this particular
8 issue or on the overall question of the motion, but
9 just from a practical standpoint, there will, of
10 course, be other options that will be pursued I am
11 certain by both parties with regard to however this
12 Board comes out.

13 Further questions or comments on
14 irreparable injury? Mr. Zaidain.

15 MR. ZAIDAIN: Actually I wanted to
16 clarify, and I think you've stated the issue really
17 well, and I'm in concurrence with generally everything
18 you've said. There is a point somewhat off the issue,
19 but still relevant to what we're dealing with that I
20 feel like needs to be clarified, and that is in the
21 applicant's motion on page 4 and 5 there's discussion
22 about some dialogue we had and a vote that we took on
23 the compliance issue during the hearing, and I think
24 it's important that that be clarified briefly because
25 I think what the applicant is trying to do is trying

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1 to say that we've ruled on this cap during the
2 proceedings, and I just want to clarify my point
3 during that because I'm quoted, as is Mr. Etherly, and
4 so that led me to make sure that I understood what we
5 were doing at the time.

6 And what was going on at the time was that
7 was whether or not we were going to conduct hearings
8 and whether or not NCRC was in compliance and whether
9 or not the application was going to move forward.

10 And where I was at that time and still am
11 is that this Board has consistently, at least my time
12 on the board, has had a policy not to get into during
13 applications on whether or not an operation is in
14 compliance as we dealt with applications as new
15 applications, and that's where I was coming from at
16 that point.

17 At that time I could see us hearing tons
18 and tons of testimony on whether or not -- on the
19 exact number of students, history of student
20 enrollment and things like that, and at that time I
21 didn't think that was appropriate because we had to
22 get into what the impacts of all of that were from a
23 traffic standpoint, from a land use standpoint, et
24 cetera.

25 Now, clearly, the situation was different

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1 once we got to the decision meeting and decided to
2 deny the expansion, and then at that time at least my
3 position was that we needed to provide some clarity on
4 what the previous order said, and that's what we did.

5 So I just want to make sure that those two
6 motions and those two issues were distinct so not to
7 have any confusion.

8 MR. ETHERLY: I think that's a very
9 excellent clarification, Mr. Zaidain. I, too, raised
10 an eyebrow when I saw that particular reference, and
11 I think the context that you offered for that
12 particular reference on pages 4 and 5 of the
13 applicant's motion brief, I think, is an important
14 clarification to make.

15 I would note further that as you continue
16 through the applicant's brief under that first prong,
17 there also is some discussion thrown towards the issue
18 of Georgetown University and perhaps any applicability
19 of some of this Board's jurisprudence as it relates to
20 Georgetown University. I would further note that I did
21 not find that to be dispositive in any compelling way
22 or, for that matter, necessarily applicable in this
23 particular setting.

24 I understand, I think, the spirit in which
25 the applicant was trying to move with regard to

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1 discussion in that case about this Board's ability to
2 establish enrollment caps, but I think clearly there
3 we're talking a different case, a different set of
4 factors, a different institution altogether.

5 So I didn't find that Georgetown
6 observation to be a compelling one.

7 Mr. Hood, any final comments on the issue
8 of irreparable harm?

9 MR. HOOD: I think we have addressed that,
10 Mr. Chairman. I don't have anything to add.

11 MR. ETHERLY: Okay. Let's then proceed to
12 the third program of the test, which deals with the
13 opposing parties would not be harmed by a stay or
14 essentially what might be termed a balance of
15 equities.

16 And here the question relates to those
17 opposing parties with regard to the NCRC application
18 and operation. Would there be any harm afforded to
19 that party by virtue of offering a stay?

20 Mr. Hood.

21 MR. HOOD: Mr. Chairman, I don't want to
22 seem like I'm on a seesaw, a light switch, but this
23 took the complete opposite of how I felt on the second
24 prong. I think the record is clear. We've had
25 numerous hearings on impacts, harm. The opposition

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1 stated their case clearly. I think the Department of
2 Transportation, without rehashing everything, I think
3 the Department of Transportation cited unsafe
4 conditions, and I think that case was well made.

5 And if this was to continue in this case,
6 I think that we're not doing our decision any justice
7 because the adverse impacts on the dangerous and
8 unsafe conditions will still exist. So this is a
9 complete flip to how I felt with prong two, and that's
10 just my position on three.

11 MR. ETHERLY: Thank you very much, Mr.
12 Hood.

13 Mr. Zaidain.

14 MR. ZAIDAIN: I basically took the same
15 position on this program and the next, which is the
16 public interest. I just felt at least from a pure
17 legal standpoint it would be hard for us to conclude
18 now that our decision is adverse to the public
19 interest or will create harm to the opposing party.
20 when we concluded that there were adverse impacts from
21 the current enrollment and the transportation impacts
22 associated with that.

23 I think that would be a relatively high
24 wall to climb now for us to say, well, let's step back
25 and say that maybe those impacts are not as severe.

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1 I think in looking at our conclusions and
2 our findings of fact in the order, I think that really
3 we would be hard pressed to turn against that.

4 MR. ETHERLY: Thank you very much, Mr.
5 Zaidain.

6 I would agree with the remarks that have
7 been offered by both of my colleagues here. I think
8 this particular prong necessarily calls into question
9 a fairly large chunk of the heart of the earlier
10 proceeding as it relates to the issue of adverse
11 impacts on the surrounding community and neighborhood.

12 And I think it was very, very adequately
13 and fully parsed out by this Board in its earlier
14 decision around those adverse impacts as it related to
15 traffic, in particular, both vehicular and to an
16 extent some of the pedestrian related concerns, but
17 especially vehicular concerns.

18 And I think that is necessarily also part
19 of that 120 number that this Board identified as its
20 enrollment cap flowing from the earlier 1998 decision.
21 There are, indeed, adverse impacts by virtue of the
22 fact that NCRC is above its 120 student enrollment
23 cap, and I think those adverse impacts were fully
24 discussed at the earlier proceeding.

25 And I agree with you, Mr. Hood. I think

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1 you said something that was very important, and I'll
2 be distinct. I'll be short this time in terms of
3 characterizing your statements in that that would be
4 to undo what this Board did previously. So I would be
5 in agreement there.

6 The fourth prong as relates to the issue
7 of public interest, let me start our conversation off
8 briefly here in striking a tone that Mr. Hood struck
9 earlier, in that I think when you look at this
10 particular issue, as you parse through talking about
11 adverse impacts, as you parse through talking about
12 what an enrollment number is, I think perhaps the
13 toughest components of this particular case do deal
14 with the issue of, one, what is the irreparable harm
15 here as we talk about the students and the families
16 that could be impacted by this Board's action, but
17 also as we talk about the issue of public interest.

18 As I alluded to earlier, there's perhaps
19 no bigger part of our public interest than talking
20 about the viability of our educational institutions.
21 But I think what is also just as important, and it's
22 imperative on this Board and each individual member to
23 take this into consideration because we took an oath
24 to do that in front of the Mayor, in front of the
25 citizens of the District of Columbia, and that is

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1 insuring that this Board's orders and decisions stand
2 with the weight and the stability, if you will, of the
3 paper that they're written on.

4 I think that is a very strong undercurrent
5 to this Board's deliberation of the motion to stay.
6 When this Board offers an opinion and speaks with a
7 voice, and I think it spoke with a very strong voice
8 in its earlier proceeding, this Board should be very
9 circumspect and very careful on both sides of the
10 fence, but should be very circumspect with regard to
11 the potential of undoing that voice or otherwise
12 retracting that voice and offering a different song,
13 if you will.

14 And I think that's part of the public
15 interest here. Clearly, part of the discussion, part
16 of the argument that's been offered by the applicant
17 and rightfully so is the public interest in assuring
18 the educational decisions of parents and members of
19 the community are allowed to stand, but that is by no
20 stretch of the imagination the only piece that has to
21 be considered with regard to the public interest here.

22 And I think, once again, it was very
23 important and NCRC should at some point have
24 contemplated this, that 120 number in 1998 at some
25 point was going to be called back into very stark

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1 relief, and a question was going to be asked relative
2 to where we are with that 120 number.

3 And I think there are consequences by
4 virtue of the fact that we are now some 50 students
5 over that number, and that was a very logical and
6 large component of the earlier case.

7 Let me turn to Mr. Hood or Mr. Zaidain for
8 any comments on the issue of public interest.

9 MR. HOOD: Mr. Chairman, I don't know how
10 much more I can expand. I think you said it
11 eloquently. It was dealt with in '98, and at some
12 point in time it was going to be called to task, and
13 we're at that point. So, again, I would basically
14 just echo my comments that I said with prong three and
15 say the same with prong four and also agree with your
16 comments.

17 MR. ETHERLY: Thank you.

18 Mr. Zaidain.

19 MR. ZAIDAIN: Like Mr. Hood, I don't have
20 a huge amount to add to that, other than to say that
21 like some of the things we've said already, nobody is
22 here to shut down schools, and this is an incredibly,
23 incredibly difficult case, and I wish I was back at
24 the BZA on much easier circumstances.

25 But you know, the big point here was that

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1 we agreed with the opposing party when it came to
2 adverse impacts, and my point in the decision meeting
3 was, okay, so where does that leave everybody from an
4 enrollment standpoint.

5 And the way I read the order is that 120
6 was the cap, and that's what I stated in the decision
7 meeting, and as I said, there wasn't any argument from
8 other Board members, which led to the order being
9 written the way it's written.

10 And, you know, that's the short and skinny
11 of the whole thing. And as I said earlier, I hope
12 that this can come back in the next year or so for
13 another special exception, hopefully under better
14 circumstances, and things, you know, can proceed in
15 much better manner.

16 MR. ETHERLY: Thank you very much, Mr.
17 Zaidain and Mr. Hood, for your comments on that fourth
18 prong.

19 I'd also note that it is spoken to in the
20 applicant's motion regarding the public interest as it
21 relates to preschool slots here in the District of
22 Columbia, and I simply want to note that I think none
23 of the comments of my colleagues endeavor to dispute
24 the importance of availability of slots throughout the
25 District for preschool placement.

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1 I think what is at issue here and what has
2 always been at issue here is whether or not this is
3 the appropriate location for as many slots as they now
4 have. I think that was a question and it's a question
5 that continues to arise in front of us.

6 But I simply think it's very important
7 that this Board continue to note that this decision is
8 not a referendum on preschool slots and the importance
9 in the District. It's not a referendum on the
10 wonderful work that NCRC has done throughout its
11 history since the early part of the 20th Century, but
12 it is an important step for it in terms of the Board's
13 conduct of its duty and responsibilities in addressing
14 questions of zoning import.

15 With that being said to my colleagues,
16 we've walked through four prongs, once again, the
17 likelihood of prevailing on the merits. Irreparable
18 injury will result if the stay is denied. The
19 opposing parties will not be harmed by a stay, and the
20 public interest favors the granting of a stay.

21 Let me offer for any closing remarks or
22 any comments on any of those prongs from my
23 colleagues.

24 MR. HOOD: No more, Mr. Chairman, than
25 saying when you have these cases, they're difficult.

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1 You know we are human, too. Nobody is going to like
2 the outcome. They never do, but I can tell you that
3 we try to make the best decision possible.

4 Like you said, we've taken an oath, and
5 the oath is to protect the residents and the people
6 who do business and work and play and recreate here in
7 the District of Columbia, and sometimes it's a hard
8 task.

9 When you sit where we sit sometimes, you
10 have to vote against senior citizens home because it's
11 not the right balance. One of these days, I'm going
12 to need to be in a senior citizen home if I'm still
13 here.

14 So my point is a lot of times it's not
15 easy. It's really not easy, but sometimes you have to
16 make the tough decision. I'm not really sure where
17 this is going. Maybe I'm speaking presumptively, but
18 sometimes you have to make the tough decisions.

19 But let me ask a procedural question if I
20 could.

21 MR. ETHERLY: Sure.

22 MR. HOOD: Are we going to vote on the
23 motions individually or how are we going to do this?

24 MR. ETHERLY: No, it would be my
25 suggestion that as we discussed at the outset, the

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1 issue of new construction and the original request for
2 ten additional students are not part of our discussion
3 and are not subject to this motion.

4 It was, of course, noted, I believe, in
5 the opposition motion that a stay should also apply to
6 the issue of construction and we clarified that that
7 is not the case here. So essentially what we re
8 talking about is the issue of that 120 enrollment cap
9 and whether or not the impact of the order in question
10 would be stayed with regard to just that particular
11 issue.

12 So I think we are at the appropriate point
13 to offer a motion, and I would look either to my
14 colleagues or --

15 MR. ZAIDAIN: I just wanted some
16 clarification of what you just said. The new
17 construction portion which we approved is not subject
18 --

19 MR. ETHERLY: Is not at issue here.

20 MR. ZAIDAIN: Okay, okay.

21 MR. ETHERLY: Not subject to any action on
22 this Board.

23 MR. ZAIDAIN: Okay.

24 MR. ETHERLY: Everyone clear with that?

25 Okay. If there are not any further -- Mr.

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1 Hood?

2 MR. HOOD: I was just going to make the
3 motion that we deny the motion to stay for the reasons
4 that we've said in the four prongs that we have
5 already dialogued on.

6 MR. ETHERLY: Thank you very much, Mr.
7 Hood.

8 Is there a second?

9 MR. HOOD: I don't know if I need to add
10 any more to that because I think we just did 30
11 minutes of it.

12 MR. ETHERLY: Okay, okay. Is there a
13 second?

14 MR. ZAIDAIN: I'll second.

15 MR. ETHERLY: Thank you very much, Mr.
16 Zaidain.

17 We have a motion that is before us. It
18 has been properly seconded. Any further discussion?

19 MR. HOOD: No.

20 MR. ETHERLY: Any further discussion?

21 At this time I'd ask for all those in
22 favor please signify by saying aye.

23 (Chorus of ayes.)

24 MR. ETHERLY: Any opposed?

25 (No response.)

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1 MR. ETHERLY: Abstentions?

2 (No response.)

3 MR. ETHERLY: Mr. Moy, could you record
4 the vote, please?

5 MR. MOY: Yes, sir. Staff would record
6 the motion by Mr. Hood to deny the motion for a stay
7 seconded by Mr. Zaidain, and the result is three to
8 zero to two in favor of the motion. Of course, Mr.
9 Etherly, we have two, Mr. Griffis and Ms. Miller who
10 recused from the application, from the motion.

11 MR. ETHERLY: Thank you very much, Mr.
12 Moy.

13 Mr. Moy is there any further business
14 before us for this special public meeting?

15 MR. MOY: Yes, we have one other case for
16 decision making. Staff would suggest we take a minute
17 recess.

18 MR. ETHERLY: Okay. We're going to recess
19 at this time, and we'll adjourn in approximately about
20 ten minutes.

21 Thank you.

22 (Whereupon, at 9:44 a.m. a recess until
23 10:45 a.m.)

24 CHAIRPERSON GRIFFIS: Very well, let's
25 resume with our Special Public Meeting this morning

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1 and a very good morning to you. I am Geoff Griffis,
2 of course, the Vice Chair is now with us, Ms. Miller,
3 representing the National Capital Planning Commission
4 is Mr. Mann and representing the Zoning Commission
5 with us is Mr. Hildebrand and a very good morning to
6 you, Mr. Etherly.

7 Mr. Moy, would you mind calling the next
8 case for decision this morning?

9 MR. MOY: Yes, sir, that case is the
10 Appeal of Application No. 17288 of Eastern Trans Waste
11 of Maryland, Inc., pursuant to 11 DCMR 3100 and 3101,
12 from the administrative decision of the Zoning
13 Administrator of the Department of Consumer and
14 Regulatory Affairs.

15 The appellant alleges that the Zoning
16 Administrator erred by denying the issuance of a
17 building permit and instead requiring variance relief
18 from the Board of Zoning Adjustment to make internal
19 repairs and improvements to an existing solid waste
20 transfer facility in the CG (Capitol Gateway)/CR
21 District at premises 1315 1st Street, S.E., that's in
22 Square 703, Lot 54.

23 The Board completed it's public testimony
24 on the appeal and scheduled its decision on May 10,
25 2005. The Board requested proposed findings of fact

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1 and conclusions of law. These filings were received
2 from both the appellant and the appellee, DCRA, and
3 they are in your case folders identified as Exhibit 22
4 and Exhibit 23, respectively.

5 The staff also notes for the Board that
6 the appellant has also filed copies of the original
7 building construction plans and that is identified in
8 your case folders as Exhibit 24. And with that, I
9 think the staff will conclude its briefing, Mr.
10 Chairman.

11 CHAIRPERSON GRIFFIS: Excellent. Thank
12 you very much, Mr. Moy. I appreciate you highlighting
13 the last submission and I don't think there's any
14 reason to discuss much, unless there's any opposition
15 to accept that into the record. It was not directly
16 requested, as far as my notes indicate, but obviously
17 it was part of the discussion of the Board in looking
18 at that and surmising whether this was an expansion
19 looking at the scope of work, so I think it's
20 critically important to put into the record, unless
21 there's any opposition?

22 Not noting any, let's move ahead then and
23 open this up for discussion on the appeal as Mr. Moy
24 has laid it out. I think the framing of the questions
25 is straightforward enough and I want to get to people

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1 speaking to it. Obviously, we have the existing Zone
2 District, the previous Zone District, the change of
3 use and whether it was, in fact, changed to
4 conforming, nonconforming, that issue was arising,
5 whether this was enlargement and then the structural
6 modifications, those are all elements of the appeal
7 that we have heard and I will open it up for
8 discussion. Ms. Miller?

9 VICE CHAIR MILLER: Yes, Mr. Chairman. I
10 think that this case is one that clearly rests on the
11 principles of statutory construction, in essence, the
12 zoning. The appeal is that the Zoning Administrator
13 erred by denying the issuance of the building permit
14 and instead referring the matter to the BZA saying
15 that it required variance relief from the Board in
16 order for the applicant to make internal repairs and
17 improvements to their existing solid waste transfer
18 facility.

19 And in this case, we have a facility that
20 had a lawful use and then when the Zoning Commission
21 enacted the Capital Gateway Overlay Commercial
22 Residential district, the use was no longer
23 necessarily lawful as a matter-of-right and it either
24 falls within one of two provisions. The Zoning
25 Administrator says that it falls under 2002.4 as a

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1 nonconforming use and 199.1 of our regulations defines
2 nonconforming use as "Any use of land or of a
3 structure and land in combination lawfully in
4 existence at the time that this title or any amendment
5 to title became effect that does not conform to the
6 use provisions for the District in which the use is
7 located."

8 And that does cover the situation here.
9 However, the applicant states that the prevailing
10 regulation is in the overlay itself, which is 1605.1,
11 which states that a use is conforming under these
12 circumstances, it says, "A commercial or industrial
13 use that is first permitted in the CM or M Zone
14 Districts and is in existence with a valid Certificate
15 of Occupancy as of the date of the provisions of this
16 chapter first became effective shall be deemed a
17 conforming use, but shall not be entitled to expand."

18 So I think the issue when it came down to
19 it at the hearing was which provision prevails,
20 because it certainly falls within the letter of each
21 provision, but the two provisions, we need to decide
22 which one prevails. And so in order to do that, we
23 can look at there are certain principles of statutory
24 construction that the Court of Appeals as set forth.
25 One is that a statute may not be interpreted as to

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1 render it meaningless.

2 And my assessment is that the provision in
3 the overlay would be rendered meaningless if this use
4 was interpreted as nonconforming, because it
5 specifically says that it would be considered
6 conforming. And I would also say that there is no
7 dispute about the facts here. Really, it came down to
8 which regulation applies? And then there is also the
9 statutory principle that you consider the entire
10 enactment against the backdrop of its policies and
11 objectives.

12 And the applicant cited the explanatory
13 provisions that went along with the enactment of this
14 regulation and that specifically addressed existing
15 industrial uses and why they should not be allowed to
16 expand, even though they will be considered
17 conforming. And so the Zoning Commission has stated
18 in its explanatory language as well as in its
19 regulations that this use is considered conforming if
20 it existed prior to the enactment of the regulation.

21 And finally, another principle of
22 statutory construction is that a specific later
23 statute rather than an earlier one applies to a given
24 transaction described by both acts. That's a U.S.
25 Appeals' decision and the overlay regulation is later.

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1 But finally, really, you're not supposed to read the
2 regulation so it has no meaning. And 1605.1 would
3 have no meaning if we applied this situation under
4 2002.4.

5 The overlay applied to specific areas,
6 2002.4 would not be rendered meaningless if we read
7 the specific situation under 1605.1, because it would
8 apply to other uses other than in this overlay. So at
9 the hearing we discussed all sorts of things, such as,
10 you know, the types of improvements, etcetera, but it
11 really came down to which regulation applied, because
12 it's only 2002.4 that we get into the nature of the
13 repairs, whether they are alterations or major
14 repairs.

15 In 1605.1, we would get into whether or
16 not this was an expansion. However, at the hearing,
17 DCRA did not challenge that this was not an expansion.
18 So I would support granting the appeal on the grounds
19 that the Zoning Administrator erred in applying the
20 wrong regulation.

21 CHAIRPERSON GRIFFIS: Excellent and well
22 said and complete. Let me see if I fully understand
23 in my summary of your position and I'll take that.
24 Actually, we should bring that up as a motion, Ms.
25 Miller, if you are appropriate to grant the appeal.

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1 Is that correct?

2 VICE CHAIR MILLER: Yes.

3 CHAIRPERSON GRIFFIS: Is there a second to
4 the motion?

5 BOARD MEMBER MANN: Second.

6 CHAIRPERSON GRIFFIS: Good. Let me just
7 summarize what I understand are the argument there in
8 support of the motion to uphold the appeal and that is
9 we have two sections. Of course, the overlay was
10 enacted after that of the underlying Zone District and
11 what you're saying is based on statutory construction
12 timing, but also in the direct letter of the reading
13 of the overlay, that it is, in fact, more controlling
14 or the controlling aspect involved in this and not the
15 underlying zone under 2002.4.

16 And that would make this a conforming use
17 within, but could not be expanded and therefore, was
18 not looking at an existing nonconforming use. Is that
19 correct?

20 VICE CHAIR MILLER: That is correct.

21 CHAIRPERSON GRIFFIS: Okay. Others,
22 questions?

23 BOARD MEMBER MANN: The only thing that I
24 was going to add to what Ms. Miller said was that not
25 only is it not an expansion, it's neither an expansion

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1 physically of its size nor of its intensity of use.

2 CHAIRPERSON GRIFFIS: Excellent point.

3 And it goes actually to expand some of the discussion
4 on this in terms of the submission, also in terms of
5 the evidence in the hearing. It goes to the, what do
6 I want to say, the landowner, the user's case
7 presentation they were saying. And, in fact, I think
8 slightly persuasively argued that even if it was under
9 2002.4, that this was in no way an enlargement to
10 their facility, but rather was normal and ordinary
11 repairs.

12 I think there was substantial evidence in
13 the record regarding the damage that was done in
14 previous years and that was trying to remedy that.
15 I'm talking about the structure in terms of the roof
16 and also the siding. In terms of updating the weight
17 scale and adding a scale in for normal functioning, I
18 don't think there was any evidence that was shown and
19 there wasn't persuasive arguments against that were
20 showing that this was an expansion of it.

21 In fact, there was very persuasive on our
22 questions from the Board's questions of the user of
23 what type of impact that would be and noting that,
24 essentially, the loading floor, let's call it, that's
25 not the correct terminology, but where the waste is

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1 set and separated was not expanding, and that
2 regulates the capacity, therefore, and the amount and
3 that would be -- if that was to increase, obviously,
4 would probably more persuasively go to an increase or
5 enlargement to the use. Yes, Ms. Miller?

6 VICE CHAIR MILLER: I just also want to
7 add that my understanding is that at the hearing, the
8 Zoning Administrator stated that he wasn't challenging
9 whether or not this was an expansion any more. He
10 just was saying --

11 CHAIRPERSON GRIFFIS: Understood.

12 VICE CHAIR MILLER: Because that falls
13 under 1605.1 and he was saying that it fell under
14 2004.2. -- 2002.4.

15 CHAIRPERSON GRIFFIS: Understood. Good.
16 Okay. Others? Anything else? Very well. We've got
17 a motion before us. It has been seconded. I would
18 ask for all those in favor to signify by saying aye.

19 ALL: Aye.

20 CHAIRPERSON GRIFFIS: Aye. Opposed?
21 Abstaining? Mr. Moy, if you wouldn't mind recording
22 the vote?

23 MR. MOY: Yes, sir, the motion was made by
24 Ms. Miller to grant the appeal, seconded by Mr. Mann,
25 also in favor of the motion Mr. Griffis, Mr. Etherly

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1 and Mr. Hildebrand and that was 5-0-0.

2 CHAIRPERSON GRIFFIS: Thank you all very
3 much. If there's no other business in the Special
4 Public Meeting, let's adjourn the Public Meeting of
5 the 10th of May 2005.

6 (Whereupon, the Special Public Meeting was
7 concluded at 10:57 a.m.)

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