

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

+ + + + +

TUESDAY

JANUARY 13, 2004

+ + + + +

The Special Public Meeting 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
CURTIS ETHERLY, JR.	Vice Chairperson
RUTHANNE MILLER	Board Member
DAVID ZAIDAIN	Board Member (NCPC)

ZONING COMMISSION MEMBERS PRESENT:

PETER G. MAY	Commissioner
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OFFICE OF ZONING STAFF PRESENT:

Clifford Moy,	ACTING SECRETARY
Beverley Bailey,	Office of Zoning

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

Time: 9:59 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. We appreciate everyone's patience this morning. We have quite a bit to get through this morning. We have two sessions, a public meeting, of course, and the public hearing, and we will move expeditiously through that.

Let me formally call to order the 13 January 2004 Special Public Meeting of the Board of Zoning Adjustment of the District of Columbia. My name is Geoff Griffis.

Joining me today is Mr. Etherly, also Ms. Miller. Mr. Zaidain is representing the National Capital Planning Commission, and representing the Zoning Commission we will have members attendant to each of the decision makings, and then I will introduce the Zoning Commission member for our public hearing this morning when I call that to order.

Please be aware that there are copies of our agenda for the entire morning's session and the afternoon located at the door where you entered into the hearing room. You can take a look at that and see how we progress through.

Also, several new items that I want to

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1 call everyone's attention to: Of course, all public  
2 meetings and public hearings are recorded. They are  
3 recorded in two fashions now, one with the court  
4 reporter who is sitting to my right on the floor.  
5 Secondly, we are also being live-cast on the Web.

6 So just be aware of that, and I would ask,  
7 accordingly, that people turn off cellphones or  
8 beepers so that we don't disrupt the proceedings, and  
9 also pay close attention that, when coming forward to  
10 speak to the Board, you will, of course, need to speak  
11 into a microphone. That microphone should be off. We  
12 also ask, after you have finished speaking, that you  
13 would turn off that microphone.

14 Let me go to staff and see if they have  
15 any preliminary matters for us in the Public Meeting  
16 session and, if not, why don't we call the first case.

17 MR. MOY: Good morning, Mr. Chairman,  
18 members of the Board. I will just move ahead to the  
19 first case of the morning.

20 That is Application No. 17081 of St.  
21 Patrick's Episcopal Day School, pursuant to 11 DCMR  
22 3104.1 for a special exception to permit an existing  
23 child development center and private school under  
24 Sections 205 and 206, having 93 faculty and staff in  
25 the R-1-B District at premises 4700 Whitehaven

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1 Parkway, N.W. (Square 1372, Lot 817, and Square 1374,  
2 Lot 5).

3 On December 2, 2003 the Board completed  
4 testimony on the case application and scheduled its  
5 decision on January 13, 2004 for a Special Public  
6 Meeting. The Board requested the following post-  
7 hearing documents: First, that the applicant provide  
8 copies of the case citations that reference FTE caps  
9 on faculty and staff, and that they did do and it was  
10 submitted in your case folders under Exhibit 37.

11 Also in your case folders is a copy of a  
12 letter which the Board requested from a Douglas  
13 Oberon. That is a letter dated November 26, 2003. It  
14 was submitted by a Michael Levendski, and that is in  
15 your case folder. It is under Exhibit 37.

16 Finally, the applicant has also submitted  
17 proposed findings of fact and conclusions of law,  
18 which is identified as Exhibit 37 in your case  
19 folders.

20 That completes my briefing, Mr. Chairman.

21 CHAIRPERSON GRIFFIS: Thank you, Mr. Moy.  
22 Board members, let's get into this directly. Let me  
23 just summarize a couple of things.

24 First of all, the application did come in.  
25 It is the modification of the specific aspects in the

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1 application and, therefore, we would look to the past  
2 orders to continue as they are pertinent, aside from  
3 any modifications that may be approved today and, if  
4 not, of course, the older order would then be reverted  
5 to.

6 Running down, of course, this is under two  
7 sections because of the child development center and  
8 also because of the private school, and I think that  
9 we can speak expeditiously to all of the requirements  
10 within that.

11 Let me summarize, however, of course, one  
12 of the requirements is the licensing. Department of  
13 Health did come in and give an indication of when the  
14 license would expire and did not anticipate that there  
15 would be difficulty in compliance with that.

16 The Office of Planning also recommended  
17 approval with certain conditions, and I know the Board  
18 has noted all of those.

19 Department of Transportation also  
20 indicated in their report that there was no negative  
21 impact based on this modification and did recommend  
22 approval.

23 The ANC-3D also participated and put in  
24 quite a bit of information on this and was  
25 recommending approval with conditions, and I know the

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1 Board has looked at those conditions.

2 I think we ought to go directly into the  
3 deliberation on this, and I would open it up to Board  
4 members for their comments.

5 BOARD MEMBER MILLER: I just want to  
6 comment on one thing, one nuance, in that at the  
7 hearing OP noted that they supported the application  
8 with a condition, but they didn't necessarily  
9 recommend the condition. So if you see in OP's  
10 summary and recommendation, they don't put any of the  
11 conditions as their particular recommendation.

12 CHAIRPERSON GRIFFIS: That is noted as a  
13 nuance. For total clarity, of course, in reviewing  
14 the community comments, Office of Planning did note in  
15 their report that they supported the ANC's conditions.

16 Let's get into the specifics of it,  
17 because all the conditions and recommendations are not  
18 that far afield. I think they are all very -- They  
19 are closely aligned, and the Board may have a little  
20 bit of brief editing to do on them.

21 Well, continue, if you would.

22 BOARD MEMBER MILLER: Well, we are  
23 probably skipping ahead to conditions, and the main  
24 issue that we are going to be dealing with is amending  
25 the previous order to increase the cap for faculty and

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1 staff and whether that be in the form of FTEs versus  
2 real persons. But while we are on the conditions --  
3 Well, what do you want to do first?

4 CHAIRPERSON GRIFFIS: I think it would be  
5 advantageous just to run down the requirements. Of  
6 course, Section 205 and also 206 is very clear in the  
7 findings submission and also in the preliminary  
8 hearing that they have met most of their criteria.

9 What is interesting to me is, when we are  
10 looking at increasing the staff numbers, of course, we  
11 have to go to the parking requirements. 205 and 206  
12 are distinct, although similar, in how they address  
13 the parking requirements.

14 One in the child development center  
15 indicates that there should be -- is it "ample" that  
16 they use or -- "Sufficient," I think, is what it is.  
17 I can't see that right now. It's difficult.  
18 Sufficient, indeed, 205.4.

19 It reads directly: "The Center shall  
20 provide sufficient off-street parking spaces to meet  
21 the reasonable needs of teachers, employees and  
22 visitors."

23 What we have in 206 goes beyond that. It  
24 does indicate "ample," but it gives us a threshold.  
25 It can be no less than that in Chapter 21, which is

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1 the parking requirements that are laid out.

2 Of course, I think it is fairly clear from  
3 the Board's perspective that, in order to deliberate  
4 and measure impact and parking availability, we need  
5 to look at how many total people are coming and going  
6 and perhaps their schedule.

7 There has been evidence that the school  
8 has an FTE number, full time equivalent, and also a  
9 person count of 105. I think factoring in the aspect  
10 of, if you went with the full time equivalents of 93  
11 and did the exact parking calculations, you would come  
12 out to 62 parking spaces would be required, of which  
13 that is being provided at this point.

14 If you go to 105, then that goes up to 70,  
15 basically. It goes to 35 -- Well, I won't do the  
16 math. Looking at it, and the reason why I bring this  
17 up, in terms of satisfying 205 I think the evidence is  
18 very clear that the provision of -- and the applicant,  
19 the school, is providing 127 total parking spaces, and  
20 when I say 62, it is on site.

21 I think, in terms of the requirements for  
22 205 for the parking at the child development center,  
23 that sufficient parking has been evidenced as being  
24 provided. Then as we go to 206, I do believe that,  
25 based on the evidence, that it does satisfy the

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1 requirements of Chapter 21, but also is sufficient for  
2 the total employees and faculty. So I see no  
3 difficulty in them satisfying both of those sections,  
4 205 and 206.

5 I think it should be also mentioned just  
6 in terms of, well, how do we get to this level of  
7 request for increased staff and faculty. I won't  
8 spend a lot of time on it, but I think it is pertinent  
9 to speak to the fact of the changing programs is  
10 integral to St. Patrick's, one, in terms of, as it was  
11 evidenced in the submissions, the amount of detailed -  
12 - or the amount of specificity in the teaching staff  
13 from language to music and all the other kind of what  
14 I used to think about as -- well -- and that changing  
15 aspect changes the possibility of functioning of the  
16 school. Therefore, it is appropriate to be discussing  
17 something of this nature.

18 Let me touch upon the ANC and their  
19 submission. I think that it is, in my mind,  
20 deliberating and looking at the evidence and facts in  
21 the case, that I concur with most of what the ANC has  
22 indicated.

23 I have one area of pause, and that is in  
24 the ANC's requesting that we condition the applicant  
25 to preclude them from making any further requests in

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1 the future. We have run across this before and had  
2 some substantive discussion on this.

3 It is my clear position, and I'd like to  
4 hear from everybody else, that we don't have the  
5 jurisdiction to do that. Obviously, the way our Board  
6 is set up and the jurisdiction that is given to us is  
7 to hear each case, and each case on the facts that are  
8 presented.

9 For us to say that we could preclude or  
10 have the jurisdiction to preclude any application in  
11 the future when we know nothing about it, I think,  
12 goes well beyond what we can do.

13 I don't disagree with the intent of the  
14 condition by the ANC, and I think the message is heard  
15 by this Board and should be heard by the school and  
16 the community. The way I took it is twofold, but one  
17 is that continued communication of changes and  
18 possibilities and plans need to be made so that people  
19 can understand and can be aligned, whether in support  
20 or in opposition. But I think that is a critical  
21 piece.

22 I think the other message from the ANC, as  
23 I understood it, is the fact that they may not be able  
24 to support anything further than what they have seen  
25 in this application. But as I say, that is for future

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1 good work in the community.

2 I think that is all I really need to  
3 address at this point, outside the other pieces,  
4 unless folks have questions or want to add.

5 BOARD MEMBER MILLER: If my memory serves  
6 me correctly, I think the applicant came in with a  
7 request for 93 FTEs, which were equivalent to 103  
8 persons, and at the hearing we threw out the number of  
9 105 in order to give a little leeway in the event that  
10 more part-time employees might need to be hired.

11 I think that the number that they came in  
12 with reflected the existing number, and that the ANC  
13 indicated that that number was not having an adverse  
14 impact on the community.

15 CHAIRPERSON GRIFFIS: Good. Anything  
16 further? Okay, not hearing from anybody else, I think  
17 it is appropriate then to take some action, and move  
18 approval of Application 17081 of St. Patrick's  
19 Episcopal Day School. This is, of course, pursuant to  
20 the special exception, which would permit an existing  
21 child development center and private school under the  
22 Sections 205 and 206 having 105 faculty and staff at  
23 premises 4700 Whitehaven Parkway.

24 I would add to my motion three conditions.

25 The condition one is redundant in that the relief

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1 sought and in the motion, but it is the maximum number  
2 of faculty and staff, shall be a total person count of  
3 faculty and staff employed by the school, not to  
4 exceed 105.

5 Second, I think it is very appropriate  
6 that -- and a lot of the concerns that we have with  
7 applications, specifically private schools and child  
8 development centers -- is we may be able to condition  
9 things that alleviate or remove any sort of  
10 detrimental impact by the community's concern about  
11 whether and how we would enforce that and continue the  
12 enforcement.

13 I think that there have been a substantial  
14 amount of new created positions and oversight, which I  
15 won't go into all the specifics, that are enabling  
16 this Board to at least monitor the compliance with the  
17 conditions. Therefore, condition number two, I would  
18 have the school to be required to file an annual  
19 report with this Board and ANC-3-D, and that would be  
20 for the indication of the total number of faculty and  
21 staff.

22 The specificity of that, I think, can be  
23 left to the school, but I think it is very clear that,  
24 obviously, we would have a breakdown in how it does  
25 come under the 105.

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1           The third condition actually has been  
2 offered by the applicant. I don't feel that strongly  
3 about it. We could take some discussion on it. That  
4 is that the school would schedule quarterly meetings  
5 and invite and encourage participation of their board  
6 and the ANC and the community, and that would be for  
7 the purposes of discussing any issues that had arisen.

8           I think that is an excellent posture to  
9 take, and probably should be followed through. I just  
10 have some brief hesitation about actually conditioning  
11 it within our order.

12           Is there a second?

13           BOARD MEMBER ZAIDAIN: I'd like to be a  
14 little bit more clear on what exactly -- Are you kind  
15 of adding -- or supporting and deleting some  
16 conditions? Can you kind of reiterate what the  
17 affirmative conditions were? It was removal of the  
18 FTE --

19           CHAIRPERSON GRIFFIS: The motion is to  
20 approve with three conditions is what I am putting out  
21 for Board deliberation.

22           VICE CHAIRPERSON ETHERLY: Second it, Mr.  
23 Chair.

24           CHAIRPERSON GRIFFIS: Thank you.  
25 Discussion?

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1 BOARD MEMBER MILLER: Mr. Chairman, the  
2 way I understand it, I would support your motion, but  
3 I don't know whether to say this would be a friendly  
4 amendment, but I think that our amendment to the order  
5 or our new order would be to increase the staff and  
6 faculty up to 105. That would be the cap. So I don't  
7 understand why we would repeat that as a condition.

8 CHAIRPERSON GRIFFIS: Okay.

9 BOARD MEMBER MILLER: I would take that  
10 condition out.

11 CHAIRPERSON GRIFFIS: And you would  
12 maintain two and three?

13 BOARD MEMBER MILLER: The yearly reports  
14 and the quarterly meetings?

15 CHAIRPERSON GRIFFIS: Yes.

16 BOARD MEMBER MILLER: Yes, that would be  
17 fine with me.

18 CHAIRPERSON GRIFFIS: I have no problem  
19 with that. Mr. Etherly, do you have any problem?  
20 Okay. Anything?

21 VICE CHAIRPERSON ETHERLY: I agree.

22 BOARD MEMBER MILLER: I would also like to  
23 make one more comment on the FTE question.

24 I think it was proposed to us that the  
25 applicant suggested that by having the cap in the form

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1 of FTEs that that would not discourage or would  
2 encourage part-time employment, and at the same time,  
3 when we discussed at the hearing, well, if there was a  
4 cap in a number of persons, that would still allow the  
5 applicant to have as many part-time positions as would  
6 fall within that number.

7 So our decision with respect to putting  
8 the cap in persons with respect to FTEs goes to the  
9 issue of being able to monitor simply the number of  
10 people that are allowed at the school and not to  
11 discourage in any way part-time positions.

12 CHAIRPERSON GRIFFIS: That is very well  
13 said. I think the other difficulty that we have in  
14 looking at FTEs is that our parking doesn't calculate  
15 out to that. It counts to total faculty and  
16 employees.

17 The other aspect to it is we asked  
18 specifically in this case, and we have asked in  
19 others, and I think it is the Board's understanding  
20 that schools can't be run by all part-time employees.

21 There is a base level of function of which is full  
22 time. Therefore, the flexibility comes above that,  
23 which is a smaller number for their part-time  
24 employees and faculty. Mr. Zaidain?

25 BOARD MEMBER ZAIDAIN: Well, I was just

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1 going to add to what Ms. Miller said. I think we have  
2 been struggling with how to -- what to make of the FTE  
3 issue. Since I have been on the Board, I am still not  
4 convinced on what exactly -- what benefit an FTE does  
5 to us.

6 I appreciate an institution's dilemma in  
7 trying to give flexibility from this Board when an  
8 application is before us in managing their staff, but  
9 we have to assess the impacts of an application. That  
10 includes people coming to and from the site, parking  
11 requirements, etcetera, capacity of buildings and  
12 whatever, and I don't see how an FTE plays into that.

13 So I support the motion. I think we are  
14 doing the right thing here, and I think we are going  
15 to continue to wrestle with this as these type of  
16 applications come in.

17 CHAIRPERSON GRIFFIS: Good. Thank you.  
18 Well said. My last statement is, of course, I think  
19 when we do look at FTEs, Mr. Zaidain, and I think you  
20 are absolutely correct, that there may be a question  
21 of the value of that figure for this Board. Of  
22 course, that's not a referendum comment by the Board  
23 on other types of uses and their applicability.

24 In fact, the last findings cited quite a  
25 bit of the universities, and I don't think we are

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1 addressing that in any means.

2 That being said, anything else? Any other  
3 comments, deliberations? Are we all clear on the  
4 motion? It has been amended. Then I would ask for  
5 all those in favor, signify by saying Aye. Opposed?  
6 Abstaining?

7 MR. MOY: Staff would record the vote as  
8 four-zero-one, motion by the Chairman, second by Mr.  
9 Etherly. Also supporting the motion, Ms. Miller and  
10 Mr. Zaidain. We have one Zoning Commission member not  
11 participating on the case, and approval of the motion  
12 includes two conditions.

13 One is the requirement to file an annual  
14 report to the BZA and ANC-3-D, which includes  
15 reporting on the total number of faculty and staff;  
16 and second, school scheduling of quarterly meetings.

17 The next case is Application No. 17088 of  
18 Willie D. Cook, Sr., pursuant to 11 DCMR 3103.2, for a  
19 variance from the off-street parking space  
20 requirements under subsection 2101.1, to allow a  
21 public hall and summer garden in the C-2-A District at  
22 premises 1101 Kenyon Street, N.W. in Square 2844, Lot  
23 819.

24 On December 9, 2003, the Board completed  
25 testimony on the case application and scheduled its

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1 decision on January 13, 2004, for a Special Public  
2 Meeting.

3 The Board requested the following post-  
4 hearing documents: One is that the applicant confirm  
5 the calculation on the number of square footage in the  
6 assembly hall in the building, and that is in your  
7 case folders as Exhibit -- under Exhibit 26.

8 The Board has also received this morning -  
9 - This is noting a preliminary matter on the issue of  
10 timeliness -- a letter from ANC-1A06 from Jenna Moyer,  
11 and that is also in your case folders.

12 That completes my briefing, Mr. Chairman.

13 CHAIRPERSON GRIFFIS: Good. Thank you,  
14 Mr. Moy. Let's bring up the ANC submission. Of  
15 course, it is on ANC letterhead, but reading this it  
16 is clearly not timely, but it also is from -- It is a  
17 personal support letter from a single member of the  
18 Commission that actually lives on the block.

19 Is the applicant here regarding 17088?  
20 Not seeing an indication that they are here. I was  
21 going to give them -- allow an opportunity to object,  
22 but I don't see any difficulty, and I would like to  
23 waive our rules and accept this into the record unless  
24 there is any objection. Yes, Mr. Zaidain?

25 BOARD MEMBER ZAIDAIN: Mr. Chair, before

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1 we get into that, I need to disclose that I was not  
2 here on the December 9th hearing, but I have read the  
3 record. I read it last night, and looking forward to  
4 participating in the decision making.

5 CHAIRPERSON GRIFFIS: Excellent. It's  
6 good to have you. Any difficulty and any concern  
7 about accepting the personal letter from the ANC  
8 member? That being said, then let's move on.

9 I think it is fairly clear, the Board will  
10 recall the hearing on this. This is a -- Well,  
11 essentially a bar establishment that has been in  
12 existence for quite sometime, numerous decades.

13 The difficulty that they have run into  
14 currently, which brings this instant application, is  
15 the fact that several years ago the change of  
16 operation. Specifically, that was that they started  
17 to charge admission, which put them into a different  
18 category under the zoning regulations, in the use  
19 category. That goes to public hall.

20 Of course, public hall has an incredible  
21 parking requirement attendant to it. We had put this  
22 off and asked for the specific calculations of the  
23 square footage so that we might know exactly what kind  
24 of parking relief we were looking at.

25 It is my brief calculation, the submission

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1 we received was only an estimate, an approximated  
2 square footage in the building, and the approximate  
3 square footage is about 1,022 square feet. Of course,  
4 my calculations show for our zoning regulations that  
5 15 spaces would be required.

6 What I'd like to do is just open up  
7 discussion on this, any questions, clarifications that  
8 we have or straight deliberation. Of course, the only  
9 thing we have from the ANC was the letter that came  
10 in.

11 The Office of Planning was not in support  
12 of this application. So let me hear from other Board  
13 members, if they have further discussion.

14 BOARD MEMBER ZAIDAIN: Let me just make  
15 sure I'm clear on the statement you just made, that we  
16 are now -- As I was reading the record, it seemed like  
17 that the operative requirement was 30 spaces, but  
18 there were some questions about that, and in what I  
19 think are additional submittals -- they were part of  
20 the whole entire record that I received -- using this  
21 plan is what we are now working under? I just want to  
22 make sure I'm clear.

23 CHAIRPERSON GRIFFIS: I am open, and  
24 during the hearing we couldn't figure out exactly what  
25 the parking requirement was, which is why we asked for

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1 this clarification. So, yes, that's what I have been  
2 essentially looking at, as that is the only  
3 information we have.

4 I know you weren't here, but I know other  
5 Board members may recall that we had a -- we were  
6 trying to estimate the actual square footage, and it  
7 just wasn't appropriate for us to be doing those kind  
8 of calculations. So, yes, unless others have  
9 something that I'm missing.

10 BOARD MEMBER MILLER: My recollection is  
11 that OP originally thought that this calls for 30  
12 parking spaces, but it said at the hearing that the  
13 calculations might be wrong and that the variance  
14 might be for only 12 parking spaces. But I don't know  
15 that that's ever been determined.

16 They said they might not have a problem  
17 with that number, because they didn't know of any  
18 adverse impact on the community. That's my  
19 recollection from the transcript.

20 CHAIRPERSON GRIFFIS: Okay. Do we need  
21 clarity then on the exact parking count before we can  
22 continue?

23 COMMISSIONER MAY: No. It's 12 or 15. I  
24 think it's still in the same ballpark. You know, the  
25 bare fact of it is that they can't legally provide any

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1 parking or, you know, maybe one space. They say that  
2 there are two, but they are at least partially in  
3 public space. So we're talking about essentially  
4 removing this parking requirement entirely for this  
5 property for them to operate a public hall.

6 I'm not sure at what point OP may have  
7 said that somehow this is -- at 12 spaces, that it's  
8 not that bad. Do you actually have that section of  
9 the transcript? I don't recall that in particular. I  
10 don't dispute it, but I just don't recall it.

11 BOARD MEMBER MILLER: I don't have it.  
12 But the variance test is probably still the same.

13 COMMISSIONER MAY: Yes, regardless.

14 CHAIRPERSON GRIFFIS: Okay. I think it is  
15 appropriate then to get into the variance test. Let  
16 me just preface the fact that the parking calculations  
17 which we required, as I stated, is much different for  
18 the public hall in this commercial zone C-2-A. The  
19 established restaurant/bar would not have a parking  
20 requirement in that it is below 3,000 square feet.  
21 With a public hall, of course, we've done the  
22 calculations, and it is upwards of 15.

23 So let's hear some direct deliberation on  
24 the uniqueness of this site, what the actual practical  
25 difficulty is, and whether there is any detriment to

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1 the public good. Anybody want to start?

2 COMMISSIONER MAY: Well, I mean, I guess  
3 you can make some argument that the site is unique in  
4 the sense that it is small, and there is not enough  
5 room for parking. But I don't know that that's -- I  
6 mean, essentially we are talking about a change in use  
7 here.

8 The current licensed use doesn't require a  
9 variance, and it seems like the property is perfectly  
10 appropriate for that use. So, you know, even on that  
11 count, I think kind of the uniqueness of it falls  
12 apart.

13 I really don't see a lot of justification  
14 or a lot of need, any rationale for why it is  
15 essential that this space be operated as a public  
16 hall, and that there is some impediment to doing that  
17 or some hardship on the owner for doing it. We don't  
18 have good financial data that shows that it can work  
19 financially as a public hall, whereas it can't work  
20 financially as a restaurant.

21 CHAIRPERSON GRIFFIS: Okay. You bring up  
22 excellent points, and let me address the first one.  
23 You have said it's a use change, and I think we will  
24 have probably some further discussion on the fact of  
25 how parking, when we look at parking variance, and I

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1 know we have all been involved even in the off-site  
2 parking, that it is a hybrid of use, because it is  
3 attendant to the use, but it's an area.

4 So just for clarity, of course, I know  
5 that you fully understand that we are looking at a  
6 parking variance but not a use variance.

7 The other aspect: I see some uniqueness  
8 here in terms of several things. One, there is an  
9 existing building. There is an established business  
10 there, and it is the lot occupancy does not for the  
11 provision of parking.

12 The next piece, though, when you go to,  
13 well, what is the actual practical difficulty or some  
14 sort of hardship, if we are talking about this hybrid,  
15 that's where I think the test begins to fall apart, if  
16 not fail; because as you have stated, and I think very  
17 well, the fact of the restaurant and bar can continue  
18 and can function.

19 It is when you try to increase that  
20 intensity of use, which our regulations look at that  
21 as an intensity of use change, that's where I find  
22 that there is not sufficient evidence in the case to  
23 bring that over the threshold. Others?

24 COMMISSIONER MOY: Well, I agree with  
25 everything that I've heard in terms of the struggle

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1 that we are going to go through, and seeing if this  
2 makes the test. I mean, it is clearly a challenge.

3 I think one of the things that -- as I was  
4 reading the transcript and realizing the  
5 circumstances, as I understood it, it was the minute  
6 that this became not a restaurant anymore or became a  
7 different type of use, it kicked it into this greater  
8 requirement of a public assembly hall.

9 I mean, it is clear that this is not a  
10 public assembly hall, as one would think of it. But  
11 under the zoning regulations, it is. So,  
12 unfortunately, the use is kind of caught in between --  
13 It's got an image problem. Let's say that. But  
14 unfortunately, the regulations are what they are, and  
15 the use for which this building is being utilized for  
16 kicks into that zoning requirement. That means that  
17 they have to provide that parking.

18 It's clear that this site can function  
19 under -- legally under another use where they have  
20 satisfied the zoning requirements. So I think that is  
21 a detriment to the zoning test which it has to make.

22 It's a tough application for the  
23 applicant. Let's put it that way.

24 BOARD MEMBER MILLER: I would concur with  
25 what my Board members have said, and basically zero in

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1 on the second prong of the test, the same test where I  
2 think the applicant does fail.

3 In this case, the applicant was operating  
4 as a bar/restaurant/public hall for many years, but it  
5 was never authorized, really, to operate as a public  
6 hall, meaning that it could charge for entertainment  
7 and to have entertainment.

8 I find that this case is extremely similar  
9 to a Court of Appeals decision that is control --  
10 guiding, if not controlling in our jurisdiction, which  
11 is the Palmer case. In that case there was a  
12 restaurant/record shop that was operating in  
13 Georgetown, and they actually have some entertainment,  
14 and they wanted to expand and charge admissions. But  
15 by doing so, they, too, fell in the category of a  
16 public hall and needed to seek a variance from the  
17 parking requirement.

18 The Court of Appeals said that they did  
19 not meet the variance test, because they could still  
20 earn a reasonable income from the business that they  
21 were operating, even though by expanding they could  
22 have yielded a greater return.

23 So this seems so similar to that, that I  
24 would have to agree that the applicant would have to  
25 fail, based on that test in this case.

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1 CHAIRPERSON GRIFFIS: Okay. One other  
2 aspect that did come up in terms of the provision of  
3 off-site parking was the utilization of other  
4 available parking. On-street, of course, was  
5 calculated, which don't go into the required  
6 regulation parking.

7 Then there was a facility that is adjacent  
8 across the street, and that is an elementary school.  
9 However, in the public hearing the testimony by the  
10 applicant was that they have no formal agreement and  
11 had, in fact, never even spoken to the school to see  
12 if they were allowed to use -- As he was saying, it's  
13 past practice just to park there, but there was never  
14 any discussion or communication with the school to see  
15 if that might be formalized or was actually even  
16 appropriate.

17 So it is difficult to factor that in, in  
18 terms of looking at this application. Yes?

19 BOARD MEMBER MILLER: On that point also,  
20 there was testimony in the record that this was a  
21 changing neighborhood with increasing density and  
22 construction of condominiums, and it wasn't really  
23 established that they would be able to continue to  
24 have sufficient parking on the street.

25 CHAIRPERSON GRIFFIS: Okay. Anything

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1 else?

2 COMMISSIONER MAY: No. Motion?

3 CHAIRPERSON GRIFFIS: Sure.

4 COMMISSIONER MAY: I would make a motion  
5 that we deny the request for a variance from off-  
6 street parking space requirements under Subsection  
7 2101.1 to allow a public hall and summer garden at  
8 premises 1101 Kenyon Street, N.W.

9 BOARD MEMBER ZAIDAIN: Second.

10 CHAIRPERSON GRIFFIS: Thank you. A motion  
11 is before us, seconded. Is there further  
12 deliberation, discussion, comments? Therefore, I  
13 would ask for all those in favor of the motion,  
14 signify by saying Aye. Opposed? Abstaining?

15 Let me also take this moment before we  
16 record the vote to welcome Mr. May representing the  
17 Zoning Commission. I don't think I introduced you as  
18 you came out under this case.

19 COMMISSIONER MAY: Thanks.

20 CHAIRPERSON GRIFFIS: Mr. Moy?

21 MR. MOY: Yes, sir. The staff would  
22 record the vote as zero-four-one on the motion to deny  
23 the application, motion of Mr. May, seconded by Mr.  
24 Zaidain. In favor of the motion to deny, the  
25 Chairman, Ms. Miller. That's it. And a Board member

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1 not participating on the case.

2 The staff would also note for the Board  
3 that there are two remaining items for the Special  
4 Public Meeting. That is the Board's annual Board  
5 elections and minutes of November and December  
6 meetings and hearings.

7 CHAIRPERSON GRIFFIS: I suggest we go  
8 straight to the minutes. Board members, what is being  
9 passed out is the change to the first page of Tuesday,  
10 November 4, 2003. I am going to go through these  
11 fairly quickly.

12 Are there any changes, omissions, edits  
13 regarding November 4? Yes, Ms. Miller?

14 BOARD MEMBER MILLER: I'm sorry. I was  
15 not participating on the NCRC case. So I won't be  
16 voting with respect to that -- those minutes.

17 CHAIRPERSON GRIFFIS: Mr. Zaidain, name  
18 spelling?

19 BOARD MEMBER ZAIDAIN: On the revised  
20 sheet that I just received, it looks perfect. Thank  
21 you, Ms. Bailey. I appreciate that.

22 CHAIRPERSON GRIFFIS: Okay. Then I would  
23 move approval of November 4, 2003, bench minutes.

24 BOARD MEMBER ZAIDAIN: Second.

25 CHAIRPERSON GRIFFIS: Thank you. All in

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1 favor? Opposed?

2 Let's go to November 11th, which was not  
3 in session. November 18, 2003, Special Public  
4 Hearing: We did have the NCRC again. Regular Public  
5 Meeting, we had Maurice Walters, Connecticut Avenue  
6 Associates. Any additions, corrections, omissions?

7 BOARD MEMBER MILLER: I just want to  
8 clarify again that I did not participate in the NCRC  
9 proceedings. So to the extent it is reflected as  
10 Board members present on the first page, that should  
11 delete my name.

12 CHAIRPERSON GRIFFIS: No, because you were  
13 present for the day, and that's the entire day.

14 BOARD MEMBER MILLER: Oh, for the day?  
15 Okay.

16 CHAIRPERSON GRIFFIS: So we will note you  
17 didn't participate in NCRC, as it will probably be on  
18 every single minute coming up.

19 BOARD MEMBER MILLER: It is noted. Okay.

20 CHAIRPERSON GRIFFIS: So we won't need to  
21 make that note.

22 BOARD MEMBER MILLER: Okay, thank you.

23 CHAIRPERSON GRIFFIS: And the critical  
24 piece, of course, under the application, if you looked  
25 at the NCRC, would be the participating members in

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1 that, of which you are noted as being recused from the  
2 hearing in that case.

3 Then any other comments, corrections? If  
4 not, then I would move approval of November 18, 2003.

5 BOARD MEMBER ZAIDAIN: Second.

6 CHAIRPERSON GRIFFIS: All in favor, Aye?  
7 Opposed?

8 Let's go to November 25, 2003. It begins  
9 with the application of PSD Trust, Deborah Gellen, the  
10 Jubilee Housing application. Questions, comments?  
11 Move approval of the 25th of November 2003.

12 BOARD MEMBER ZAIDAIN: Second.

13 CHAIRPERSON GRIFFIS: Thank you. All in  
14 favor? Opposed? Abstaining?

15 Let's move to the December 2, 2003.  
16 Questions, comments, deletions?

17 BOARD MEMBER MILLER: It is with respect  
18 to the St. Patrick's day school. I just find it  
19 confusing. On the second page, third paragraph, it  
20 says "Using FTE 92 persons are employed at the site."

21 Actually -- and then the applicant indicated the  
22 school employs 105 full bodies.

23 I mean, actually, the school employs 103.

24 So that part -- That needs to be corrected. We gave  
25 them permission to go up to 105, but actually they

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1 currently employ 103.

2 I think it's confusing saying "using FTEs  
3 93 persons are employed at the site." There may be 93  
4 FTEs employed at the site. I don't know. This is a  
5 little confusing to me. Do you know what I'm saying?

6 CHAIRPERSON GRIFFIS: I do understand.

7 BOARD MEMBER MILLER: Go back to our  
8 decision to get it clear.

9 CHAIRPERSON GRIFFIS: That's fine. We  
10 will revisit the 105. I don't find any confusion on  
11 "Using FTEs 92 persons are employed at the site."  
12 That's exactly what it should say, because that is  
13 what was being proposed.

14 Using an FTE count, 93 are the persons  
15 employed, because three -- one-third employees makes  
16 one employee, and that's what they were proposing.

17 BOARD MEMBER MILLER: Can we just make it  
18 consistent?

19 CHAIRPERSON GRIFFIS: It is. Anything  
20 else? We'll revisit the 105 and make sure that that  
21 is reflected correctly, and we can look at that  
22 paragraph. Other comments? Then I would move  
23 approval with the notes of December 2, 2003.

24 VICE CHAIRPERSON ETHERLY: Second it.

25 CHAIRPERSON GRIFFIS: Thank you. All

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1 those in favor, Aye? Opposed?

2 Let's go to December 9. Mr. May was the  
3 Zoning Commissioner participating in that. Any  
4 comments, corrections, deletions?

5 COMMISSIONER MAY: Yes. I want to note  
6 one issue on the case 17087.

7 CHAIRPERSON GRIFFIS: Yes?

8 COMMISSIONER MAY: It's on page 3. "After  
9 hearing the facts of the case, Commissioner May  
10 expressed concern of whether the application met the  
11 practical difficulty test." It was also the  
12 uniqueness test.

13 CHAIRPERSON GRIFFIS: Okay. So we will  
14 add uniqueness. Okay. Very well. Other corrections?  
15 Additions? Edits? Then I move approval of December  
16 9, 2003. Is there a second?

17 COMMISSIONER MAY: Second.

18 CHAIRPERSON GRIFFIS: Discussion?

19 BOARD MEMBER MILLER; I just would want,  
20 if we could double check again this whole issue of  
21 FTEs and number of persons with respect to the  
22 Washington International School. I think at one point  
23 it was to allow a maximum of 92 faculty and staff and  
24 it might be referring to 92. I don't know. I could  
25 be wrong again. These numbers, with the full time --

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1 with the full bodies and the FTEs, I just want to make  
2 sure we have it right. I can't tell that it's right.

3 It may very well be. Could we just have a double  
4 check on that?

5 In some of these applications, they have  
6 asked for -- next to last page.

7 CHAIRPERSON GRIFFIS: So what is your  
8 concern, in what is advertised?

9 BOARD MEMBER MILLER: I just want to make  
10 sure that the use of the numbers with respect of full  
11 time equivalents and exact number of persons on site  
12 is accurate.

13 CHAIRPERSON GRIFFIS: Okay. But to be  
14 clear, these are just the minutes of the process of  
15 the discussion that was happening. Clearly, that was  
16 a substantive discussion. I mean, the controlling  
17 definition of that comes in the order and any  
18 decision.

19 BOARD MEMBER MILLER: Okay.

20 CHAIRPERSON GRIFFIS: Because this is just  
21 -- What you are indicating in the first paragraph, if  
22 I'm understanding you correctly, is actually as it was  
23 advertised.

24 BOARD MEMBER MILLER: Okay. I don't have  
25 a problem with that then. Yes.

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1 CHAIRPERSON GRIFFIS: Okay. Then where  
2 are we? We are on December 9. It has been moved and  
3 seconded. All in favor, signify by saying Aye.  
4 Opposed?

5 Let's go the 16th. Corrections,  
6 additions, deletions?

7 COMMISSIONER MAY: On the 16th, I  
8 participated only in one case.

9 CHAIRPERSON GRIFFIS: Okay.

10 COMMISSIONER MAY: The 17084.

11 CHAIRPERSON GRIFFIS: Any corrections on  
12 that?

13 COMMISSIONER MAY: No.

14 CHAIRPERSON GRIFFIS: Additions?  
15 Clarifications?

16 BOARD MEMBER MILLER: On 17066, this was  
17 the appeal case where I think we determined that the  
18 appellee was entitled to expand their house as a  
19 matter of law, and I don't recall the paragraphs that  
20 are on the last page talking about the administrator  
21 mistakenly signed off on the issuance of a building  
22 permit or the building -- or the Board acknowledged  
23 that the BZA application needed to be amended.

24 MS. BAILEY: There clearly was discussion  
25 about that, Mrs. Miller.

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1 BOARD MEMBER MILLER: Okay. That's fine.  
2 I mean, I'm just noting for the record, I don't  
3 remember it, but I trust that that is true. And then  
4 I think there also maybe needs to be some  
5 clarification about the motion for summary judgment.

6 What we were voting on -- I think we were  
7 voting to not render a decision on the motion for  
8 summary judgment as opposed to voting on the merits of  
9 this motion for summary judgment.

10 CHAIRPERSON GRIFFIS: Okay. Let's hold  
11 off on the December 16 then, and we will revisit the  
12 application 17059 for further clarification, as it  
13 would be not prudent to rely on everybody's memories  
14 for exact actual information at this point, and we  
15 should just get it exact.

16 I don't have any other indication of  
17 meeting minutes that we need to deal with at this  
18 point, unless staff has any indication of such.

19 MS. BAILEY: No, Mr. Chairman.

20 CHAIRPERSON GRIFFIS: Okay, good. Thank  
21 you very much for the completeness of all those, two  
22 full months.

23 Okay, next then.

24 MR. MOY: The last item for the Special  
25 Public Meeting, Mr. Chairman, is the Board's annual

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1 elections.

2 CHAIRPERSON GRIFFIS: Good. Very well  
3 then. I think it is appropriate to, first of all, lay  
4 out very succinctly and, hopefully, expeditiously, the  
5 fact that we have two positions of elected -- two  
6 elected positions on this Board, one of Chairman and  
7 one of Vice Chairperson, and we do, and are required,  
8 in January to hold public elections on that.

9 The voting, of course, comes from the  
10 Board itself. There are five votes that are cast in  
11 this. Let me open it up to the Board and ask if there  
12 are any nominations for the Chairman at this time.

13 VICE CHAIRPERSON ETHERLY: Mr. Chair, I  
14 would like to nominate your continued service in the  
15 position of Chairman of the Board of Zoning  
16 Adjustment, and would invite a second.

17 BOARD MEMBER MILLER: Second.

18 CHAIRPERSON GRIFFIS: Very well, and I  
19 appreciate the confidence that that indicates, and I  
20 am very happy and, in fact, enthused to continue  
21 service as the Chairperson of this Board. I think  
22 this is a very productive and excellent Board that I  
23 am proud to be a part of, and I am honored to have the  
24 confidence of all of you to continue in that realm and  
25 in that position.

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1 Any other discussion on the motion that is  
2 before us, or the nomination?

3 BOARD MEMBER ZAIDAIN: Just that I'd like  
4 to say that I would be happy to vote in favor of the  
5 motion, and commend you for helping us navigate  
6 through some pretty difficult waters over the last  
7 year, and it's a tough job we have to do up here, but  
8 you help us get through it, and to keep on that track  
9 and keep introducing some good jokes. They are  
10 getting better as time goes on. Not quite there yet,  
11 but they are getting there.

12 CHAIRPERSON GRIFFIS: Thank you.

13 BOARD MEMBER MILLER: I would also like to  
14 make a few comments for the record, that I have been  
15 incredibly impressed with how hard working our Chair  
16 is and how dedicated he is to the BZA. When he says  
17 that he reads every page, he actually does.

18 I also appreciate his sense of humor,  
19 which gets everyone through these long days and  
20 nights.

21 CHAIRPERSON GRIFFIS: Thank you very much.

22 I appreciate those comments. Then although -- Well,  
23 let me give an opportunity for anybody else, not to  
24 cut them off on that good stuff. But it may be  
25 somewhat self-serving, but I would call the vote then

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1 on the nomination, and ask for all those in favor,  
2 signify by saying Aye. And opposed? Very well.

3 Next we move on to the Vice Chair  
4 position, and I think it goes without saying that this  
5 is a very productive Board. Although we don't always  
6 agree, we certainly work hard, and very hard, to work  
7 together. In that, I think that we do not necessarily  
8 look to different positions or one power over the  
9 other, but rather a very equitable situation. We all  
10 have one vote, and we all use that wisely, and it is,  
11 I think, an encouragement to look to everyone's  
12 participation and the changing roles that we do have.

13 I know that there is quite a lot of burden  
14 put on everybody on this Board. We are essentially  
15 volunteers. We do have things outside, like families  
16 and jobs, that take up an extensive amount of other  
17 obligations for us, and time obligations.

18 I would open up just for a brief  
19 discussion, and then I think we can get directly to  
20 nominations for the Vice Chair at this point.

21 COMMISSIONER MAY: I just want to follow  
22 on the comment you made about how hard the BZA works,  
23 and as somebody who sits here at most one-fifth of the  
24 time, I have to say that serving on the BZA is a  
25 marathon of work, and I think that all of us in the

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1 Zoning Commission and all of the citizens of the  
2 District of Columbia should appreciate, or do  
3 appreciate, I think, the service involved here, the  
4 amount of work and preparation.

5 I mean, sitting here for eight hours on  
6 every Tuesday -- I mean every Tuesday -- and then the  
7 preparation that goes in before that is just a  
8 Herculean effort. On the Zoning Commission our work  
9 sort of ebbs and flows and, as I said, we are here  
10 one-fifth of the time, and often in smaller doses.

11 So I think I would commend the entire BZA  
12 on its exceptional dedication and hard work.

13 CHAIRPERSON GRIFFIS: Thank you. Any  
14 other general comments at this time? If not, then I  
15 would like to make a nomination for the Vice Chair  
16 position, and I would like to nominate Ms. Miller.

17 I look at this as not any sort of new  
18 beginning or any sort of indication of the Board, but  
19 rather a strong feeling of the continuation of great  
20 work that the Board is doing together, and I think  
21 that we are not, as I said, such a regulated  
22 hierarchical or vested in notions of tradition, but  
23 are flexible, are open, and most importantly, are  
24 incredibly intelligent when we all come together, and  
25 I think that we have been very productive, and I look

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1 for that great continued production.

2 I think Mr. Etherly has been one of the  
3 most important members on this Board in his  
4 participation, and that by no means changes, and I  
5 think we will look to that continuing and, as I say,  
6 we all have one vote, and we all use it wisely, and we  
7 will all continue to do that.

8 I think Mr. Etherly has done a fantastic  
9 job as a member of this Board, and that is not going  
10 to change.

11 Ms. Miller brings on, I think, also a new  
12 perspective which has been valuable to the Board. It  
13 is clear that Ms. Miller puts the time required into  
14 the preparation, as we all do, of these applications,  
15 but brings a different avenue of review. Whether I  
16 would agree with that all the time or any of the time  
17 isn't actually the point of matter, but rather I do  
18 believe that it is important, and I think she will be  
19 an excellent Vice Chair in all that comes with that  
20 role.

21 VICE CHAIRMAN ETHERLY: Mr. Chair, it  
22 would be my pleasure to second that nomination. I  
23 have been very pleased to serve in the capacity of  
24 Vice Chair for these few months. I agree with you  
25 wholeheartedly that it is very important that we

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1 continue to cycle through our membership among the  
2 Mayoral appointments and ensure that everyone is hands  
3 on with an opportunity to participate in the  
4 establishment and setting of the direction of this  
5 body, and I believe that Ms. Miller is going to be  
6 very well positioned to continue serving in the  
7 tradition that I have struggled so mightily to  
8 continue in the role of Vice Chair, of course,  
9 following in the footsteps of our former colleague,  
10 Mrs. Renshaw.

11 With that, I look forward to continuing  
12 the wonderful work of this Board as we move forward in  
13 another year in carrying the business of the District  
14 of Columbia ahead. Thank you.

15 CHAIRPERSON GRIFFIS: Thank you very much.

16 BOARD MEMBER ZAIDAIN: I would like to  
17 agree with Mr. Etherly. I think Ms. Miller is well  
18 positioned, as she is the closest member to me, and I  
19 am within striking distance of her.

20 I definitely appreciate the added element  
21 that Ms. Miller has added to this Board, and really --  
22 She has really proven herself and works very hard and  
23 prepares to a level that is almost mind boggling  
24 sometimes. So I would be happy to support her  
25 nomination for Vice Chair.

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1 CHAIRPERSON GRIFFIS: Any other comments?

2 BOARD MEMBER MILLER: Well, I would like  
3 to thank my colleagues for their nomination and kind  
4 words, and have to say that, since coming on the  
5 Board, I have been extraordinarily impressed with the  
6 dedication and work of my fellow Board members.

7 I really had no idea about the volume of  
8 work that is entailed on this Board. I don't think  
9 that one can know that before one comes on, and the  
10 caring that actually goes into the decision making.

11 I want to thank Mr. Etherly for his  
12 service as Vice Chair over the past few months. In my  
13 mind, he did an exceptional job in chairing the  
14 hearings in which the Chair was recused, and I don't  
15 think I will ever match his smooth and articulate  
16 manner.

17 I recall at my confirmation hearing that  
18 Chairman Cropp asked if I had the time to do this job,  
19 and I felt, well, yeah, I have the time. I probably  
20 have more time than the fellow Board members, which is  
21 true, but I really did not realize how much time that  
22 is. I think that is a factor in my taking on the role  
23 as Vice Chair, that I do have more time in my personal  
24 life, and I am happy to devote it here.

25 The other thing I would like to say is

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1 that I just want to thank the Chair and my fellow  
2 Board members as well as the Office of Zoning staff  
3 and the land use attorneys in OCC for their support  
4 and friendship and for providing me the inspiration to  
5 work hard at this job.

6 CHAIRPERSON GRIFFIS: Thank you very much.

7 That is very well said. I think most of us have made  
8 the mistake in answering Chairman Cropp's question in  
9 the way that you did. You know, I hesitated from  
10 thanking Mr. Etherly, because it actually goes more  
11 toward a closing, and I don't see any closing on this  
12 at all but, obviously, a continuation of the great  
13 work that we are doing.

14 So with that, are there any other  
15 comments? Okay. All this talk of work. We need to  
16 get to it. So let me ask for all those in favor of  
17 the motion to signify by saying Aye. Opposed? Very  
18 well.

19 Mr. Moy, is there anything else for us to  
20 attend to at this Special Public Meeting of the 13th  
21 of January?

22 MR. MOY: I. I think that completes the  
23 Special Public Meeting this morning, Mr. Chairman.

24 CHAIRPERSON GRIFFIS: Okay. Thank you  
25 very much. Then I would like to close that meeting

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1 and open the morning session of 13 January 2004.

2 (Whereupon, the foregoing matter went off  
3 the record at 11:00 a.m.)

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