

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

SPECIAL PUBLIC MEETING

+ + + + +

TUESDAY

JULY 27, 2004

+ + + + +

The Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:33 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS, Chairperson  
CURTIS ETHERLY, JR., Board Member  
DAVID ZAIDAN, Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

ANTHONY HOOD, Zoning Commissioner

COMMISSION STAFF PRESENT:

Beverley Bailey, Office of Zoning  
John Nyarku, Office of Zoning

D.C. OFFICE OF CORPORATION COUNSEL:

Lori Monroe, Esq.

(This transcript constitutes the minutes from the special public meeting held on Tuesday, July 27, 2004)

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C-O-N-T-E-N-T-S

<u>AGENDA ITEM</u>	<u>PAGE</u>
--------------------	-------------

<u>APPLICATION NO. 16970 OF THE NATIONAL CHILD RESEARCH CENTER - MOTION TO DISQUALIFY CHAIRMAN AND VACATE VOTES (MARCH 9, 2004 AND APRIL 13, 2004)</u>	. . . . . 5
--	-------------

VOTES

MOTION TO DISQUALIFY THE CHAIRMAN . . . . .	44
---	----

MOTION TO VACATE PREVIOUS VOTES . . . . .	61
---	----

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

(9:33 a.m.)

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. Let me call to order the Special Public Meeting of the 27th of July 2004 of the Board of Zoning Adjustment of the District of Columbia. My name is Geoff Griffis, Chairperson. Joining me today for this Special Public Meeting is Mr. Etherly. Representing the National Capital Planning Commission with us on this case and the business before us is Mr. Zaidan, and representing the Zoning Commission is Mr. Hood. Good morning to you all.

Let me just first lay out a couple of things that are important. Of course, people are here for our regular hearing, which was to start at 9:30. We will get to it very quickly. This is some business that is before the Board, and all business before the Board, of course, happens in the open and before the public. So we had scheduled this public meeting to dispense with that.

Copies of today's hearing agenda are available for you and they will give you an idea of what else we are going to accomplish with the rest of our day today.

I am going to be very concise in this

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1 because my opening for the public hearing will repeat  
2 an awful lot of this, but there are several important  
3 things to understand with the parameters of a public  
4 meeting.

5 First of all, public meetings are called  
6 for this Board to deliberate on cases that have  
7 already been heard or to take up business of cases  
8 that have already been heard. This is not an  
9 opportunity for any sort of participation by, frankly,  
10 anybody except Board members. So we would ask that  
11 everyone be patient with us and listen intently, and  
12 hopefully we will make some sense with what we are  
13 saying this morning.

14 Also, please be aware that we are being  
15 broadcast live on the Office of Zoning website and, of  
16 course, everything that's conducted before this Board  
17 is being recorded by the court reporter who is sitting  
18 to my right. So to that, I would ask that people turn  
19 off cell phones and beepers or any sort of satellite  
20 transmitting devices that may make some noise and we  
21 can proceed without any further interruptions.

22 Let me say a very good morning to Ms.  
23 Bailey, who is with us from the Office of Zoning. She  
24 is going to keep us on track, not only this morning  
25 but the rest of the morning, the afternoon, and

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1 probably into the evening. Ms. Bailey, a very good  
2 morning to you.

3 Do we have any business before us this  
4 morning?

5 MS. BAILEY: Yes, Mr. Chairman, we do, for  
6 the Special Public Meeting, and should I call that  
7 case now?

8 CHAIRPERSON GRIFFIS: If you would,  
9 please.

10 MS. BAILEY: And good morning to you as  
11 well as the other members of the Board.

12 APPLICATION NO. 16970 OF THE NATIONAL  
13 CHILD RESEARCH CENTER -  
14 MOTION TO DISQUALIFY CHAIRMAN  
15 AND TO VACATE VOTES  
16 (MARCH 9, 2004 AND APRIL 13, 2004)

17 MS. BAILEY: This is Application Number  
18 16970 of the National Child Research Center. This is  
19 a motion to disqualify Chairman Griffis and to vacate  
20 votes on March 9, 2004, and April 13, 2004, pursuant  
21 to 11 DCMR 3104.1, for a special exception approval to  
22 continue an existing child development center, last  
23 approved by BZA Order Number 16307, with morning and  
24 afternoon programs for 120 children at any one time,  
25 ages two and a-half to five years and 38 full-time

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1 equivalent staff on all floors of the existing and  
2 proposed buildings on the site and for new  
3 construction of an addition and new building pursuant  
4 to section 205; and for relief from 2100.6, which  
5 requires the provision of parking spaces for the  
6 proposed additional principal structure on the  
7 National Child Research Center property. It is  
8 located in the R-1-B District at premises 3209  
9 Highland Place, Northwest, also known as Square 207,  
10 Lot 30 (855 and 856).

11 There is a motion before the Board for  
12 consideration at this time as indicated, Mr. Chairman.

13 CHAIRPERSON GRIFFIS: Indeed. Thank you  
14 very much, Ms. Bailey.

15 Board members, what I would like to do is  
16 just read, actually, opening remarks regarding this  
17 case and then we will proceed with processing the  
18 motion that is before us.

19 Let me lay out a little bit of the  
20 history. First of all, on June 16th, 2004, the Board  
21 of Zoning Adjustment of course received a motion to  
22 disqualify me, as Ms. Bailey has adequately said, for  
23 Case Number 16970 -- that is the application of the  
24 National Child Research Center -- and to vacate the  
25 votes that were taken in March on the 9th, 2004, and

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1 on April 13, 2004. The original vote on the NCRC  
2 case, as we are well aware, was taken on January 6,  
3 2004.

4 On March 9, 2004, the Board voted  
5 unanimously to reconsider the original denial of the  
6 construction requested by the applicant. On April 13,  
7 2004, this Board voted 3-1-1 to grant the preschool  
8 the partial relief.

9 I know we spent a lot of time on this and  
10 we have read it numerous times, but in essence, the  
11 motion before us now alleges that I have a personal  
12 bias towards an NCRC trustee that taints the last two  
13 decisions in this case, both of which were unfavorable  
14 to the opposition parties or that party that has  
15 brought this motion before us. They do not move to  
16 vacate the January vote as it was favorable to them.

17 I can state for my Board and for the  
18 entire public without equivocation or hesitation that  
19 my personal life and my personal relationships in no  
20 way influence my thinking or votes on the NCRC  
21 application. I voted as I did based only on facts  
22 adduced on the record of this proceeding and on my  
23 application of those facts to the zoning regulations  
24 as I interpreted them. I was not influenced by  
25 anything outside the four corners of the hearing room.

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1           No one could reasonably question whether  
2 my deliberation and conclusions were based extensively  
3 and exclusively on the facts in the record. My  
4 deliberations and conclusions were exhaustive in  
5 reference and not based on emotions, gut feelings, or  
6 outside pressure.

7           As a mayoral appointee and Chairman, what  
8 is of greatest concern to me is preserving the  
9 integrity and functioning of this Board as well as  
10 ensuring the public that every party will receive an  
11 objective, unbiased, thoughtful, and fair  
12 consideration of his or her case.

13           No one has complained about how I have  
14 managed this case. All parties were given equal and  
15 ample time to present their cases and cross-examine  
16 witnesses. In the mind of an average citizen, my  
17 conduct did not appear different in this case than in  
18 any other case that I have presided over.

19           Nevertheless, several individuals in  
20 opposition to this application who have consistently  
21 maneuvered to remove members and impede or, worse,  
22 prohibit the processing of this application. Vice  
23 Chairperson Miller, the D.C. Attorney General, the  
24 applicant's attorney have all been victims of false  
25 accusations, fabricated controversies by the same

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1 people now bringing this motion against me.

2 As the motion before us illustrates, I am  
3 now the target of the party in opposition. Their  
4 current maneuver, which has included hiring a private  
5 investigator to videotape and document my private  
6 life, is not the proper way to decide the outcome of  
7 an application or to overturn a decision by this  
8 Board. If a party in a case believes that a decision  
9 has been rendered in error, personal attacks will not  
10 remedy that matter. Our deliberations and decisions  
11 are public record. If there is not faith in our  
12 reasoning, then offer it for review to the Court of  
13 Appeals and have the substance and the fruit of our  
14 labor legally challenged. A hollow personal attack on  
15 my impartiality is not the proper, honest, or  
16 appropriate means to appeal a decision of this Board.

17 The malicious actions taken by Steve  
18 Hunsicker, Sallie and Bruce Beckner, Henry Little, and  
19 Linda Badami, collectively referred to as the  
20 opposition party, seriously threat the authority and  
21 proper functioning of the Board of Zoning Adjustment  
22 in this and in all future cases.

23 It's kind of creepy to think that someone  
24 has been outside of my house 24 hours at a time for  
25 who knows how long and who knows if they are still

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1 there, following me around, photographing and  
2 videotaping who talks to me and who I talk to. I have  
3 nothing to hide, but who wouldn't be unnerved by  
4 something like this? I sometimes wonder if they are  
5 photographing my daughter.

6 And what is happening with the videotapes  
7 and the photographs? Who gets them and what are they  
8 going to do with them? How can I not worry about  
9 that?

10 The photographs of me distributed across  
11 this city evidenced that wonderful period in a new  
12 romance, and if my personal life is to be explored, it  
13 should be noted that I am not married. These pictures  
14 were taken in June, two months after the final vote on  
15 this application. No further action or proceedings in  
16 this case occurred since.

17 There is a sworn affidavit in the record  
18 submitted by an Anna Evans. It's interesting -- she  
19 has children in the same school as my daughter and  
20 opposes the application, something now that I think  
21 maybe I should have brought to the attention of the  
22 Board. The affidavit states that I engaged in an  
23 animated conversation at my daughter's school on 23  
24 January 2004. I do not dispute that I was animated.  
25 As I recall that day, I had just left my daughter's

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1 first grade Martin Luther King assembly where all of  
2 the classmates and parents had watched a two-hour  
3 performance. In leaving the school with all the other  
4 parents, I can't imagine I wouldn't have been anything  
5 else than animated.

6 Bruce and Sallie Beckner and Steve  
7 Hunsicker and Linda Badami have shown the type of  
8 people that they are, but it is not my place to judge  
9 them. I can certainly let others do that.

10 What is clear is that they have lots of  
11 time and money and resources to try and get what they  
12 want, but our charge here is not to give privileged  
13 individuals what they demand; our charge is to  
14 impartially hear the presentations of applications  
15 both for and against, weigh the facts, deliberate, and  
16 decide. We do not base our decisions on popularity  
17 contests. We don't sit in the back room and count how  
18 many letters are for and how many letters are against  
19 and then figure that's our decision.

20 What I fear is that this malicious type of  
21 maneuver may be used by others to frustrate and  
22 manipulate the process. Mr. Hunsicker, with his 600-  
23 attorney firm, is trying to force this Board to work  
24 outside of our established process by creating a  
25 threatening and fear-filled environment where they

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1 control and they manipulate the facts to influence an  
2 outcome without regard to regulations or civility.

3 We, this Board and all future boards,  
4 cannot and should not be bullied into action. We must  
5 rely on the strength of our process, deliberations,  
6 and decisions.

7 Much is asked of mayoral appointees to  
8 boards and commissions. We sacrifice our time and our  
9 energy, and believe me, we do so with enthusiasm and  
10 pleasure. We render decisions that cannot always  
11 please everyone, but we do so objectively, fairly, and  
12 before the public.

13 We Board members do not live socially  
14 sterile lives. We mix with members of our community  
15 in various aspects, both socially, professionally,  
16 politically. Relationships develop at different times  
17 in various contexts. I have not hesitated to disclose  
18 when a relationship that I am aware of or involved in  
19 with a case that's in front of us might create the  
20 appearance to a reasonable person that there would be  
21 a bias.

22 The false perception is being created that  
23 I alone hear and decide on cases before this Board.  
24 This is not the case. There are five independent  
25 members on this Board in most cases, four on this one.

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1 One represents the National Planning Commission, one  
2 represents the Zoning Commission, and there are three  
3 mayoral appointees. We are five members that  
4 volunteer 10 to 20 hours a week to prepare for cases,  
5 and we hear applications every Tuesday for 8 to 12  
6 hours. We hold full-time jobs outside of our  
7 volunteer service here on the Board, and we are but a  
8 small element of the larger zoning relief process.

9 There is the Office of Zoning with its  
10 director and full-time staff. I daresay they are  
11 probably the most critical and essential. The Office  
12 of Attorney General, which offers a bank of attorneys  
13 for legal advice. That I have been accused of  
14 controlling this Board, the Office of Zoning, and the  
15 entire Land Use Division of the Attorney General is  
16 flattering but clearly a delusion on the part of Mr.  
17 Hunsicker, the Beckners, and Ms. Badami.  
18 Sensationalism, connecting information and facts and  
19 events in a vacuum is the vehicle here to support the  
20 accusation that I and I alone control the entire  
21 zoning and approval process. Again, I am flattered,  
22 but I assure you it's not true. Our decisions are  
23 votes publicly voiced and recorded.

24 This Board should not be reduced to this  
25 level where it is forced to react or, worse, to

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1 potentially be rendered unable to function because a  
2 few unsatisfied people forced the removal of Board  
3 members. All contentious cases before this Board  
4 invoke great personal passion and dedication, but most  
5 participants conduct themselves with civility,  
6 maturity, and respect for our process, and they are  
7 met with the same from this Board.

8 This case has created thousands of pages  
9 in transcripts, hundreds of submissions of evidence,  
10 hundreds of letters. I and all the Board members  
11 read, re-read, reviewed, and deliberated on the  
12 evidence. There were no back-room deals. I have  
13 nothing professionally, monetarily or personal to gain  
14 from the success or failure of this case or for the  
15 400 others, quite frankly, that we're going to hear  
16 this year.

17 There is a difference between being  
18 prejudiced and being invested in a case. We all  
19 invest our time, our attention, and we all conduct our  
20 own analysis of cases. We agree and we disagree and  
21 we call a vote, all in public. I think all applicants  
22 before us expect that and would accept nothing less.

23 What is of utmost importance to me is to  
24 protect the authority, the integrity, and the  
25 functioning of this Board, as well as preserving the

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1 public's confidence that every party will receive  
2 objective, unbiased, thoughtful and fair  
3 consideration.

4 Although I do not believe that there is  
5 any reason or legal basis for my votes to be vacated,  
6 the fact that a circus has been created outside the  
7 authoritative process of this Board by manipulating  
8 facts, dates, and drawing conclusions without any  
9 context, I believe that it is in the best interest of  
10 this Board for it to decide if my votes should be  
11 vacated, and to do this without my involvement.

12 I will, therefore, recuse myself from any  
13 further processing of this case. I stand behind this  
14 Board and have full faith that it will continue to  
15 conduct business in a professional, judicial, and fair  
16 way, as it has done and will continue to do.

17 This is a low point, but this is not the  
18 Board's doing. This Board must maintain its authority  
19 even when those who do not respect it try to take it  
20 away.

21 So it is, Mr. Etherly, because of how I  
22 feel about the invasive tactics of this motion and  
23 because of the pictures of me taken in June have  
24 resulted in creating an appearance of impartiality, I  
25 do recuse myself prospectively and ask that you

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1 preside over the motion to disqualify me and vacate my  
2 votes.

3 Thank you very much.

4 MEMBER ETHERLY: Thank you very much, Mr.  
5 Chairman. For my colleagues, let us proceed forward.

6 As we undertake what is most certainly an  
7 extraordinary deliberation, I think it's very  
8 important, perhaps, to offer some guiding words as we  
9 move forward. We're going to move forward  
10 expeditiously, we're going to move forward in a very  
11 focused way, and it is my hope that regardless of the  
12 outcome of our deliberation, that this Board speaks  
13 with one voice, that it's unequivocal, unquestioned,  
14 and most certainly very decisive.

15 I am perhaps guided in our movement  
16 forward by the words of Ralph Waldo Emerson who wrote  
17 that it is very easy in the world to live by the  
18 opinion of the world.

19 "It is very easy in solitude to be  
20 self-centered. But the finished man is he who in the  
21 midst of the crowd keeps with perfect sweetness the  
22 independence of solitude. I knew a man of simple  
23 habits and earnest character who never put out his  
24 hands nor opened his lips to court the public, and  
25 having survived several rotten reputations of younger

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1 men, honor came at last and sat down with him upon his  
2 private bench from which he had never steered." The  
3 words of Ralph Waldo Emerson.

4 My colleagues, we have two critical  
5 questions before us. Let me begin by noting that I  
6 believe it was entirely appropriate for the Chairman  
7 to voluntarily recuse himself. As we are all  
8 familiar, recusal is critical to preserve the  
9 integrity of the judicial process, not only against  
10 actual impropriety, but also the appearance of  
11 impropriety, and I believe that it is in that vein, in  
12 that spirit that the Chairman undertook the  
13 extraordinary action of recusing himself prospectively  
14 from not only our deliberations today but any further  
15 action on this case should such action be necessary.

16 We are left, however, with a very  
17 critical, perhaps unprecedented question of  
18 retroactive action, and that is, first, the  
19 disqualification of the Chair, and secondly the  
20 vacating of the Chair's votes on March 9th and April  
21 13th.

22 I would like to as we proceed lay out the  
23 standard of law with regard to the inquiry first with  
24 respect to disqualification. So with leave of my  
25 colleagues, if there aren't any further comments, I

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1 would like to walk us through what our standard will  
2 be for the question of disqualification, and it's a  
3 very clear standard that has been adopted by D.C.  
4 Superior Court.

5 First, the facts alleged must be material  
6 and stated with particularity.

7 Secondly, the facts must be such that if  
8 true, they would convince a reasonable man or woman  
9 that bias may exist.

10 Third, the facts must show the bias is  
11 personal as opposed to judicial in nature.

12 My colleagues, I would open up for  
13 discussion with regard to the question of  
14 disqualification. My ultimate objective here is to  
15 suggest that we deal with both motions separately, one  
16 then the other. So if my colleagues are in agreement  
17 with that, and with that, I would like to open it up  
18 for any comment with regard to the standard that has  
19 been laid out on the issue of disqualification.

20 Once again, we are all in receipt of  
21 briefing that has been submitted by both parties.  
22 Once again, this is a deliberative posture that the  
23 Board is in, so there will be no public comment or  
24 testimony taken pursuant to any of the briefing  
25 materials or other general public comments.

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1                   With that, I will open the floor up to my  
2 colleagues.

3                   Mr. Hood.

4                   COMMISSIONER HOOD: Mr. Chairman, I wanted  
5 to actually say something on the statement made by the  
6 Chairperson before he left, and now that we've gotten  
7 into an organized format in which we're proceeding --  
8 maybe this may be inappropriate, but I feel this on my  
9 heart to say.

10                  As the Chairperson said and my colleagues  
11 know, and I've said this before, even before this  
12 incident event even came up, we spend a lot of time  
13 down here. We try to make the best decisions for the  
14 best interests of the District of Columbia as a whole,  
15 and someone who has been in that position myself,  
16 having to recuse myself of some things that people  
17 went back into 1997 and 1996 of things that I've done  
18 in trying to make this a better city in my  
19 neighborhood and make a better quality of life,  
20 increase the quality of life in my neighborhood, I was  
21 appalled. As the Chairman said, this is a real low  
22 point because this is even lower than that.

23                  In 1996 -- I was not even considered to  
24 come on the D.C. Zoning Commission until 1998. I was  
25 doing things in my neighborhood, as everyone else that

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1 comes down here does, to increase the quality of life.  
2 I will tell you that I have mixed emotions on this  
3 whole issue, and I will tell you that after we made  
4 the decision -- and I haven't forgot that. That  
5 resonated with me, that one of the opposition, when I  
6 walked to the rest room, would grit on me, as we  
7 called it when I was growing up, would actually stare  
8 me up and down, turn around and look at me and grit on  
9 me. The neighborhood I come from, we don't tolerate  
10 that.

11 That's for a preliminary bout, and I just  
12 wanted to put that on the record, and I'm not being  
13 compassionate, emotional; I'm just telling you what we  
14 have to do with. And I want that person who is in  
15 here -- and they're sitting in here and I want them to  
16 understand: I haven't forgotten you for that, and I  
17 won't. But I have a bigger job and a biggest task for  
18 the best interests of the city, so I disregard it.

19 To hire a private investigator because  
20 certain things don't go our way sometimes -- and  
21 again, I'm not talking about this, I'm talking in  
22 general -- I take exception to it because other  
23 citizens of the city, for example, and I always go  
24 back to my neighborhood -- you come down here and talk  
25 about the trash that we have to smell. Yesterday it

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1 was -- I don't even think it was 90 degrees and my  
2 neighborhood smelled like a dump, and we have to sit  
3 there and tolerate that, we have to deal with the  
4 decisions that are made. And yes, we try to deal with  
5 them accordingly, but sometimes when the board is down  
6 here, ABC Board, Zoning Commission, BZA, the court, we  
7 have to live with it.

8 I know that's not the direction you were  
9 going with, Mr. Chairman, but I wanted to get that out  
10 of my system because I really believe that when I was  
11 gritted on, I took exception to that, because I call  
12 myself -- and if anyone knows me, I have always -- I  
13 come from a neighborhood, too, and I have always tried  
14 to make the best decision for the best interest of the  
15 District of Columbia. No more, no less. And trying  
16 to make that balance up here sometimes is difficult,  
17 and we've got a lot of kids in this city who are  
18 dying, and I think if you have that kind of pull that  
19 you can get Channel 4, 5, 9, the Washington Post --  
20 let's direct some of that towards that instead of  
21 looking at Mr. Griffis' love life. Let's try to help  
22 some of those people who are losing their lives.

23 I know I digress, Mr. Chairman, but you  
24 can go back to where you were.

25 MEMBER ETHERLY: Thank you. I thank you

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1 for your remarks, Mr. Hood. They are, indeed, well  
2 taken. There is an extraordinary level of passion,  
3 I'm certain, among my colleagues and myself with  
4 regard to this important matter.

5 I think it's very clear and very important  
6 to state that it is indeed entirely appropriate to  
7 question the conduct of our judiciary, be that in the  
8 setting of the strict confines of the courtroom of law  
9 or be that in a quasi-judicial setting that we find  
10 ourselves in today, and I believe that this Board is  
11 united in understanding and acknowledging that it is  
12 entirely appropriate.

13 The protection and the guidance that is  
14 offered by the rule of law with regard to that  
15 inquiry, however, is very critical, and I believe in  
16 the context of Mr. Hood's comments, he said what is  
17 most important -- that despite that passion, despite  
18 the discomfort that may exist, there is, indeed, a  
19 higher duty here, and once again, that duty is shaped  
20 by the need to ensure that our processes here, as  
21 would be the processes in any judicial or legal forum,  
22 are conducted without impropriety in actuality or  
23 without impropriety in terms of appearance.

24 So your comments are well taken, Mr. Hood,  
25 and I think they do lead us, despite perhaps what you

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1 may suggest, I think they do lead us in the  
2 appropriate direction here.

3 Once again, the test has been set out  
4 under -- Superior Court law has been very well  
5 articulated I think in both our briefing materials and  
6 once again in terms of our own preparation for the  
7 case.

8 First, the facts alleged must be material  
9 and stated with particularity.

10 Once again, we have the motion in front of  
11 us which alleges in pertinent part that, first,  
12 incontrovertible evidence, quote, that the Chairman  
13 does have today and has had for many months a close,  
14 personal relationship with a trustee of NCRC who has  
15 been deeply involved in the school's effort to seek  
16 favorable action from the BZA with respect to the  
17 school's application to expand.

18 I would offer that that is perhaps the  
19 central pillar, if you will, of the motion for  
20 disqualification, that relationship. I think it's  
21 further important to note that with regard to the  
22 standard that we are reviewing this motion under, the  
23 facts must be such that, if true, they would convince  
24 a reasonable man that a bias exists.

25 What I would offer as the next step here

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1 for my colleagues is looking at the motion and  
2 accepting for the moment just for the sake of  
3 deliberation and discussion that all of the  
4 allegations alleged herein were true, would those  
5 allegations convince a reasonable person that a bias  
6 exists. And, of course, the facts must show that the  
7 bias is personal as opposed to judicial in nature.

8 Mr. Zaidan.

9 MEMBER ZAIDAN: I think you have laid out  
10 the first two tests, and that's where I would like to  
11 kind of chime in, and also, you know, not to get into  
12 more of the dialogue, I think, although I am not the  
13 current sitting NCPC member, I think my tenure may be  
14 being defined on this Board by this case, as I'm sure  
15 we'll be having to deal with it again once the order  
16 comes out.

17 As we sat through the hours and hours of  
18 testimony, you know, this case was defined by strong  
19 passions and opinions, and because of that, it was  
20 kind of tough to sit through. I mean, it was tough to  
21 deliberate on because we had to sift through a lot of  
22 these strong opinions and strong allegations and at  
23 times childish allegations, you know, that were flying  
24 around from both sides to really look at the facts,  
25 and I think we have to do the same thing here.

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1           We can only look at this in a strictly  
2 factual manner and cannot try to interpret some of  
3 these accusations, you know, as somebody who is  
4 anticipating something to happen. I don't know what  
5 that exactly means, I don't know how to quantify that  
6 or how to deliberate on that factual or what an  
7 animated conversation may imply or, in fact, what an  
8 animated conversation may look like. I may have my  
9 own opinions of what an animated conversation is, but  
10 they may differ from people to people.

11           So I think Mr. Etherly has laid this out  
12 correctly. We have to be somewhat cold in looking at  
13 this and look at the facts and look at what we  
14 experienced being sitting Board members as we went  
15 through this very long and tedious hearing.

16           Although I am not a political appointee,  
17 which is a rare trait to have on these types of boards  
18 -- you go anywhere around the country, and these  
19 boards are usually made up of political appointees.  
20 All five of them normally would be political  
21 appointees, which means the stakes in these types of  
22 issues would be even higher in other cities where you  
23 could, you know, potentially have the whole entire  
24 board recused in some instances. Political appointees  
25 by their very nature and basically by necessity are

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1 civic-minded people who are active in their  
2 communities, and you want them to be that way. I  
3 don't see how you would want -- I don't see how  
4 somebody who is civic minded and is active politically  
5 or active in the community could be ones who do not  
6 have relationships and do not see people and do not  
7 run into people. So in that nature, it is not  
8 uncommon that members have dealings with or  
9 associations with people who come before the body in  
10 which they serve. Therefore, observations of  
11 encounters or random conversations among participants  
12 do not disqualify them or do not present a factual  
13 basis for disqualifying them, animated or not.

14           Again, I don't know what "animated" means.  
15 You know, as the Chair stated, he had just seen his  
16 daughter in a play and he could have been jumping for  
17 joy. So I don't think that that establishes a factual  
18 base on which a bias is proven.

19           Now, evidence has been submitted, and  
20 this is the one particular, that there has been a  
21 relationship beyond this type of chance encounter or  
22 random association that people who are active in their  
23 community usually have, but the facts are that that  
24 encounter or that relationship, that one particular  
25 occurred after the hearing was closed in June. That

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1 is the facts and that is the evidence that we have to  
2 use in order to deliberate, and the Chairman has  
3 rightfully recused himself prospectively as I'm sure  
4 we and this Board will have to deal with this case  
5 again at some point. So he has rightfully recused  
6 himself from this deliberation as well as dealing with  
7 this case moving forward.

8 Now, in terms of another -- I think  
9 looking at the second test, which is that the bias  
10 exists, there were a lot of accusations or part of the  
11 particulars that were submitted to us were that the  
12 Chairman was an advocate for the case or for NCRC's  
13 cause or was biased to leading the hearing. I take  
14 great exception to that because I think that the  
15 Chairman did not act in a biased way. I think he gave  
16 great leeway to everybody in their testimony, in their  
17 cross-examination, in their presentations to the  
18 Board, so much so that we were here until eleven  
19 o'clock at night.

20 You hear a lot of these complaints to City  
21 Council and to the papers about, you know, how long  
22 it's taking to get through the BZA. Well, the reason  
23 is because we really defer to allowing people to come  
24 and speak their minds to us, to present their  
25 observations and their testimony, and I think it's

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1 critical that we do that, and I certainly hope that,  
2 you know, the call for expediency does not limit that  
3 in the future years of this Board, and I certainly do  
4 not think that the Chairman acted in any way that was  
5 indifferent to other cases that have been before us.

6 Furthermore, Chairman Griffis, like most  
7 intelligent, you know, civic-minded, active people is  
8 an opinionated person, and he's not an advocate for  
9 applications, he's an advocate for his position, which  
10 when you are opposite his position, which I am  
11 sometimes, can cause you great heartburn.

12 So I think that if it came across to  
13 anyone that he was advocating for an application, I  
14 think that was a misinterpretation. If you look at  
15 any of the cases that he has sat on, particularly ones  
16 where the stakes are so high, you will see these Board  
17 members, especially Mr. Griffis will advocate for what  
18 he thinks is the right way to go, and I think that  
19 that is the way that he has acted in this case and all  
20 the other cases before it.

21 I hope that addresses the two tests that  
22 you have -- at least my position on the two tests that  
23 you have laid out, and I will leave it to you guys to  
24 talk further.

25 MEMBER ETHERLY: Thank you very much, Mr.

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1 Zaidan. I think that helps to focus our inquiry here.

2 I am going to echo your comments, but let  
3 me take a little more of a scalpel as we move through  
4 the first aspect of this test here, which once again  
5 is the facts alleged must be material and stated with  
6 particularity. Let me deal with the material aspect  
7 first with regard to my perspective on the motion and  
8 the supporting documentation that has been offered.

9 First in the motion that was offered at  
10 the outset to disqualify the Chairman, once again, the  
11 critical sentence was, "Chairman Griffis does have  
12 today and has had for many months a close personal  
13 relationship with the trustee of NCRC."

14 I think the issue of recusal and the  
15 Chairman's decision to recuse himself prospectively  
16 deals with the very important question, the very  
17 important issue that was raised with regard to the  
18 existence of a relationship today. I think that has  
19 been put to rest. I think what is left is what, in my  
20 mind, is a rather ambiguous and amorphous phrasing of  
21 "has had a relationship for many months."

22 Once again, the critical issue here is  
23 with regard to the March 9th and the April 13th votes.  
24 I think in order for the first aspect of this motion  
25 to satisfy that first part of the first prong of the

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1 test for disqualification, a relationship for many  
2 months does not pass muster in my estimation.

3 The evidence that has been offered once  
4 again I think speaks somewhat to the existence of a  
5 relationship at present but does not rise to the level  
6 of supporting the jump, if you will, to the conclusion  
7 that a relationship existed at the critical times of  
8 March 9th or April 13th or, for that matter, at the  
9 outset.

10 An important unspoken but subtle aspect of  
11 this question is, should, of course, the Chairman, if  
12 there was a relationship that existed, have disclosed  
13 such a relationship and disqualified him at the  
14 outset? While that is not the precise question before  
15 us, that's part of this calculus, in my thinking.

16 Once again, I think the evidence that has  
17 been offered with regard to supporting the allegation  
18 that the Chairman has had this relationship for many  
19 months and as such that relationship in turn would  
20 impact or affect his ability to rule impartially on  
21 this case, I do not believe that the evidence as it  
22 has been proffered rises to satisfy that first aspect  
23 of the first prong of the test -- i.e., one, material  
24 and stated with particularity.

25 Let me actually reverse there. The

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1 allegation, of course, is material. It's  
2 "particularity" that I'm concerned about here, and I  
3 think it's "particularity" -- that is the ground upon  
4 which the first prong of the test is not met.

5 With regard to the additional information  
6 that has been offered both in the supplemental  
7 documentation and the motion as originally offered,  
8 let me move forward to a couple of other allegations  
9 that have been contained here.

10 In addition to the broad allegation that  
11 a relationship has existed for many months, there is  
12 also an allegation with regard to the Chairman's  
13 actions with regard to the prosecution of this case,  
14 if you will -- as Mr. Zaidan noted, the Chairman  
15 advocating on behalf of the applicant.

16 While I look for the relevant quote in the  
17 supplemental documentation, I am very comfortable in  
18 the belief as I review the document that much of what  
19 was pointed to on behalf of the Chairman from an  
20 action standpoint falls squarely within the confines  
21 of what the Chairman is statutorily and by regulation  
22 required to do in his role as chairman.

23 Some of the allegations, and I'm  
24 paraphrasing once again as I look to find the precise  
25 language, speak to the Chairman once again advocating

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1 very passionately, speaks to the Chairman setting  
2 agendas, determining order of questions, demonstrating  
3 willingness or an untoward desire, perhaps, to prolong  
4 discussion. Once again, I would remind my colleagues  
5 that it is very clear within our regulations and  
6 within our rules what the Chairman's role is in  
7 shaping and guiding our discussion.

8 I think Mr. Zaidan offered a very  
9 important statement with regard to the expectation on  
10 the part of any Board member to argue passionately for  
11 a position that he or she thinks is the appropriate  
12 position, and it is through the deliberative process  
13 that we arrive at a conclusion or some consensus,  
14 whether it's by majority or whether it's by unanimous  
15 decision, regarding any particular case or outcome.

16 So I think with respect to the first  
17 aspect of the test, once again, that the facts must be  
18 material and allege with particularity, I think that  
19 the motion as offered falls on that face.

20 Mr. Hood, anything to offer with regard to  
21 that particular aspect of the inquiry?

22 COMMISSIONER HOOD: Mr. Chairman, I  
23 probably would not articulate it as eloquently as you  
24 have done, but I will say that I find -- I accept the  
25 evidence and have read both submittals, all the

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1       submittals that have been submitted, but I just find  
2       the timing and the relationship are irrelevant to the  
3       proceedings. I think that the Board -- we deliberated  
4       like we usually do. No one, chairman or no chairman,  
5       dictates my vote, and I think -- and the first time we  
6       dealt with this issue, I remember specifically saying  
7       that we were doing this for four and a-half hours, to  
8       the point where we were exhausted.

9                If I can digress back to a prior case  
10       which Mr. Griffis and I disagreed on wholeheartedly  
11       somewhat like what we did on this one, he has been  
12       consistent in his voting, and I just think that, like  
13       I said, the timing of the relationship and all that,  
14       I accept that, but I think it's irrelevant to the  
15       proceedings in this case.

16               MEMBER ETHERLY: I would agree with you,  
17       Mr. Hood. I think what is important to note both for  
18       the benefit of my colleagues and for our listening  
19       audience is the allegations that we have in front of  
20       us, in my mind, consist of photographic evidence and  
21       simply assertions. The photographic evidence, in my  
22       mind, does not speak to the existence of a  
23       relationship on the critical dates of March 9th or  
24       April 13th or, for that matter, speak to or ratify or  
25       validate the claim that a relationship did indeed

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1 exist at the start of this proceeding, at the outset  
2 of the NCRC application. Fortunately, once again, we  
3 have a very clear rule of law to follow here.

4 The second prong says that, well, okay,  
5 that's fine and well, but if the facts are true, if  
6 you presume that they are true for the sake of  
7 discussion, would they convince a reasonable man or a  
8 reasonable person that bias exists. I think it is  
9 here, as Mr. Hood's comments have begun to lead us in  
10 the direction of, I think it is here also that the  
11 allegations as contained in the supplemental material,  
12 in the original briefing, simply fail to pass muster.

13 MEMBER ZAIDAN: Mr. Etherly?

14 MEMBER ETHERLY: Yes?

15 MEMBER ZAIDAN: Before you get off these  
16 two points, I think in regards to the Chairman's role  
17 in setting agendas and shaping discussions, I think it  
18 was the motion in opposition to the motion to  
19 disqualify summed it up best, and that is that that is  
20 his job, that's the Chair's job to do that. The Chair  
21 does set agendas, does identify issues to be addressed  
22 in coordination with the Board, does frame  
23 discussions, and you clearly want a chairperson to do  
24 that.

25 Secondly, just to touch again on this

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1 whole advocacy argument, it troubles me because the  
2 more I reflect back on -- and I have been trying not  
3 to do this in the last couple of months, but the more  
4 I reflect back on the original deliberation back in  
5 January, it was a very almost heated exchange between  
6 all of us, and I certainly hope that my advocacy for  
7 my position, which was in opposition to the  
8 application, does not reflect a bias in favor of the  
9 opposition because that's surely not the case. I felt  
10 that the opposition had made their case in the January  
11 deliberation.

12 I think that those two issues can be put  
13 to rest in the motion.

14 MEMBER ETHERLY: That's an excellent  
15 point, Mr. Zaidan, and I think it probably should not  
16 go unstated, of course, that with regard to the second  
17 vote at issue here, I was indeed the lone dissenting  
18 member with regard to that application. It is perhaps  
19 ironic that I now find myself in the position of  
20 chairing this particular aspect of the proceeding.  
21 But your point is well taken.

22 With respect to --

23 COMMISSIONER HOOD: A clarification, Mr.  
24 Chairman.

25 MEMBER ETHERLY: Yes.

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1 COMMISSIONER HOOD: Mr. Zaidan, you were  
2 speaking to the January -- the first vote.

3 MEMBER ZAIDAN: Yes, I was speaking to the  
4 January vote. Exactly.

5 COMMISSIONER HOOD: Because there were two  
6 or three -- I'm getting confused now. How many votes?  
7 Two votes taken.

8 MEMBER ZAIDAN: Yes.

9 COMMISSIONER HOOD: All right. And you  
10 were speaking to the second vote.

11 MEMBER ETHERLY: To what would actually be  
12 the final vote.

13 COMMISSIONER HOOD: The final vote.

14 MEMBER ETHERLY: The April vote. Yes,  
15 that is correct.

16 COMMISSIONER HOOD: All right.

17 MEMBER ETHERLY: But I think both points  
18 are of note but perhaps not critical to the discussion  
19 at hand.

20 Once again, the second prong of the test  
21 requires that the facts must be such that, if true,  
22 they would convince a reasonable man that bias exists.  
23 So I want to encourage some discussion with regard to  
24 that particular aspect of the test here, and that is  
25 that if you look at the facts as they exist in the

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1 motions, both the original motion and the supplemental  
2 motion, and you were to accept that these facts were  
3 true, would you find that there was the existence of  
4 bias?

5 I would be more than happy to start off  
6 that particular dialogue by once again reiterating  
7 portions of my statement with regard to the first  
8 prong of the test. I simply do not see the case, the  
9 argument in the pleadings that have been argued.

10 I want to be very clear about that  
11 particular aspect of the point here. While there is  
12 no, shall we say minimal threshold that is set forward  
13 regarding the issue of an evidentiary hearing, while  
14 there is I think no vehicle, for that matter,  
15 regarding the establishment of an evidentiary hearing  
16 process, I don't view this inquiry as simply creating  
17 a threshold or minimal level of allegation that you  
18 must satisfy in order to get to evidentiary hearing.  
19 I think what is incumbent, what is part and parcel of  
20 this inquiry, is you shoot all your bullets the first  
21 shot. You don't seek to establish a minimal level of  
22 proof and then hope to get to an evidentiary hearing  
23 where you can conduct further fishing. I simply don't  
24 subscribe to that theory.

25 I want to be very clear that the movants

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1 of the motion did not suggest that. There was no  
2 statement to that effect. However, I think it is very  
3 important to be sensitive to what the practical effect  
4 of the motion would suggest because there is an aspect  
5 of the motion which speaks to if, indeed, the Board is  
6 not swayed or convinced by the facts as they alleged  
7 in the pleadings, let us go to an evidentiary hearing.  
8 I simply do not believe that that is the rule which we  
9 follow with regard to the administration of the  
10 three-part test.

11 But importantly, that second prong I think  
12 also encapsulates a little bit of Superior Court Rule  
13 63-1, which once again speaks to the legal sufficiency  
14 of what would otherwise be viewed as an affidavit in  
15 this kind of situation -- once again, that if you  
16 accept the alleged facts as true, and if the statutory  
17 standards are met, the judge must recuse himself even  
18 if he knows the allegations are false. But if you  
19 accept, and it's my argument here for my colleagues  
20 that if you accept the facts as they alleged in these  
21 two documents as being true, is there the existence of  
22 bias, and I simply do not see that case here.

23 Once again, as Mr. Zaidan has spoken to  
24 and as I have referenced, there is the allegation that  
25 a relationship has existed for many months. The

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1 support for that allegation comes through the  
2 submission of letters for the record that have been  
3 submitted by Ms. Bloch. The allegations regarding Mr.  
4 Griffis' conduct of the case with regard to perhaps  
5 demonstrating a favoritism, if you will, as the motion  
6 would allege. If you presume all of these allegations  
7 to be true, do you find bias? And in this particular  
8 instance, based on the conduct that Mr. Zaidan has  
9 alluded to, as we have gone through the prosecution of  
10 this case, I simply do not see that.

11 Mr. Zaidan or Mr. Hood, anything further?

12 MEMBER ZAIDAN: I think my statements that  
13 have -- I think my statements to this point reflect  
14 the fact that I agree with you.

15 There is one other thing that I would like  
16 to address because if it wasn't directly referenced in  
17 the motions, I think it was kind of intimated, and  
18 that is the cause or the alleged role of the Chairman  
19 in our -- I believe our March or April -- I'm sorry --  
20 our March decision to reconsider and then the  
21 subsequent reconsideration. The Chairman had no role  
22 in us doing that, period. That was a decision of this  
23 Board and we acted and we even discussed this when we  
24 were deliberating on whether or not to reconsider, we  
25 discussed why we were doing that, and that was because

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1 of advice we received from staff to this Board, which  
2 is absolutely appropriate.

3 We received advice to move into that  
4 reconsideration. We accepted that advice and we have  
5 the authority to either accept advice that we get from  
6 staff or reject it, and we decided to accept it as  
7 they had a compelling reason, and that is why we moved  
8 forward with that reconsideration.

9 I just wanted to make sure that that was  
10 clear on the record because I do believe that that was  
11 part of some of the accusations in these documents,  
12 and I think it's important that we clarify that  
13 because that reconsideration I think caused us all,  
14 everyone from the Board to the parties in the case, a  
15 little bit of confusion and a little bit of heartburn,  
16 so to speak, because there were some definite  
17 technical nuances that we had to address and we had to  
18 be clear to make sure that we were making the right  
19 decision.

20 I just want to say that the Chairman did  
21 not play a role in us doing that in terms of  
22 influencing the Board to do that.

23 COMMISSIONER HOOD: You are right, Mr.  
24 Zaidan. And let me just piggyback, because the  
25 Chairman was in the minority on the first vote as far

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1 as the reconsideration, he couldn't even bring it back  
2 up, and that was mentioned to him. So you are right,  
3 he had no role in that; that was the Board because of  
4 the advice that we had gotten.

5 MEMBER ZAIDAN: Right. And actually, I  
6 think, just to maybe try to inject a little bit of  
7 humor in this, I think the assumption that Mr. Griffis  
8 could have that much influence on the three of us to  
9 do that I think is a huge leap. I think that we are  
10 all pretty, you know, ideological people who stick to,  
11 you know, what we believe, and I think that if Mr.  
12 Griffis would have brought a motion on his own accord  
13 to reconsider at a later time, that would have not  
14 flown, not that he -- he did not do that obviously and  
15 that was not his position to do so. I am giving  
16 hypotheticals here.

17 I just think that trying to assume that he  
18 has that much influence over the three of us I think  
19 is a stretch.

20 COMMISSIONER HOOD: Board Member Zaidan,  
21 it is ironic you would mention that because when I  
22 read it, I was actually -- I felt like I was being  
23 slapped in the face. I took exception to it because  
24 I stand alone and I have a vote just like the Chairman  
25 has a vote, and our regulations specifically say, like

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1 you mentioned earlier, what the roles and  
2 responsibilities are of the Chairman of this Board and  
3 the Zoning Commission. But at the end of the day, we  
4 all have one vote.

5 MEMBER ETHERLY: I know. I agree with  
6 both of those comments. I think what is important  
7 with regard to this second aspect of the test that  
8 we're reviewing here is once again taking all the  
9 facts that are alleged as being true, would you still  
10 find the existence of bias, and I think the comments  
11 that have been offered with regard to the proceedings  
12 on reconsideration and, of course, the ultimate vote  
13 I think are indeed very supportive of finding an  
14 absence of bias in this particular regard.

15 As my colleagues, of course, will recall,  
16 I spoke very passionately during the reconsideration  
17 about the rationale for that reconsideration as it  
18 related to support on the record for the decision that  
19 we have reached and concerns that had been expressed  
20 on the part of the then-Office of Corporation Counsel  
21 that our deliberation needed to be more involved, our  
22 deliberation needed to be more detailed on the  
23 particular question of the approval of the building,  
24 and that was the rationale for the reconsideration,  
25 and I think that's very important to note here.

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1 I think what is also important to note is  
2 that the case law is not silent on the issue of the  
3 obligation that a member of the judiciary has in not  
4 recusing him- or herself when the situation does not  
5 require it. There is case law which speaks to the  
6 fact that mere rumors and gossip do not rise to the  
7 level that would invoke the need for recusal or  
8 disqualification. Once again, I simply believe that  
9 the record as it has been proffered in the motions and  
10 the supplemental statement simply do not rise to the  
11 appropriate level.

12 With regard to the third and final prong,  
13 once again, the facts must show the bias is personal  
14 as opposed to judicial in nature. I don't think there  
15 is any disagreement here that allegation itself speaks  
16 to a personal aspect as opposed to a judicial aspect.

17 With that in mind, for the benefit of my  
18 colleagues, I think we have moved through a fairly  
19 exhaustive discussion of the first motion, which would  
20 be a motion of disqualification. If there is not any  
21 further discussion, looking to Mr. Zaidan and then to  
22 Mr. Hood, if there is not any further discussion, then  
23 it would be my motion to deny the motion for  
24 disqualification of the Chairman, and I would invite  
25 a second.

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1 COMMISSIONER HOOD: I will second it.

2 MEMBER ETHERLY: What I am going to do at  
3 this point is once again -- the motion is on the  
4 floor. Any further discussion, Mr. Zaidan, Mr. Hood?

5 (No response.)

6 MEMBER ETHERLY: Hearing no discussion,  
7 all those in favor, please signify by saying aye.

8 (Chorus of ayes.)

9 MEMBER ETHERLY: Opposed? Abstentions?

10 (No response.)

11 MEMBER ETHERLY: It is then by consensus  
12 of the Board that the Chairman is not to be  
13 disqualified from the proceedings of March 9th and  
14 April 13, 2004.

15 Ms. Bailey, would you record that vote for  
16 us, please?

17 MS. BAILEY: Sure, Mr. Chairman. The vote  
18 is recorded as 3-0-2 not to disqualify Mr. Griffis'  
19 vote as it pertains to decisions made on this case on  
20 March 9th and April 13th, 2004. Mr. Etherly made the  
21 motion. Mr. Hood second. Mr. Zaidan is in agreement.  
22 Mr. Griffis is recused and Ms. Miller is also recused.

23 MEMBER ETHERLY: Thank you very much, Ms.  
24 Bailey.

25 I appreciate the engagement and passion of

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1 my colleagues with regard to that particular aspect of  
2 the motion.

3 We still do, however, have a second  
4 component of the motion with regard to the vacating of  
5 the votes taken on March 9th and April 13th. That  
6 would be in relevant part the March 9th vote, which  
7 was the vote of reconsideration, and the April 13th  
8 vote, which was the ultimate disposition of the  
9 question of approval of the new buildings on the NCRC  
10 campus.

11 If I could, I'm going to follow the  
12 structure that we utilized with regard to the first  
13 vote, and that is to once again lay out my  
14 understanding of what the relevant legal test is with  
15 regard to this particular question, and the relevant  
16 standard here is set forth in the Liljeberg case,  
17 Supreme Court jurisprudence, and it states in relevant  
18 part that the decision of a vote can be vacated, but  
19 the determination is based on three factors. The  
20 first is the risk of injustice to the parties in the  
21 particular case. The second is the risk that the  
22 denial of relief will produce injustice in other  
23 cases. And thirdly, the risk of undermining the  
24 public's confidence in the judicial process.

25 Once, again, the risk of injustice to the

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1 parties in the particular case, the risk that the  
2 denial of relief will produce injustice in other  
3 cases, and the risk of undermining the public's  
4 confidence in the judicial process.

5 With regard to that test, let me start us  
6 out on the discussion there. I think the relevant  
7 inquiry is the third prong: the risk of undermining  
8 the public's confidence in the judicial process. I  
9 think that is where the game is here. I think that is  
10 the important and perhaps most critical inquiry, not  
11 only for the benefit of this case but for the benefit  
12 of the Board as it continues to move forward in the  
13 conduct of the District of Columbia's business.

14 The risk of injustice to the parties in  
15 the particular case if the votes are not vacated. Let  
16 me open the floor up to any comments or any remarks  
17 with regard to that particular prong of the Liljeberg  
18 test.

19 MEMBER ZAIDAN: Can you repeat that?

20 MEMBER ETHERLY: The risk of injustice to  
21 the parties in the particular case. So if the votes  
22 of March 9th and April 13th were not vacated, would  
23 there be an injustice to the parties in this  
24 particular case?

25 MEMBER ZAIDAN: Well, through our

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1 deliberations, I think we have established the fact  
2 that we do not feel that there was a bias that existed  
3 during the course of the public hearings, so I think  
4 that stands on its own in terms of, you know, the  
5 April and March votes. Again, there was no  
6 substantiation of any type of bias or relationship  
7 through the outset of those votes, so I don't see how  
8 that test would pass, so to speak.

9 MEMBER ETHERLY: Okay.

10 Mr. Hood?

11 COMMISSIONER HOOD: I would agree with Mr.  
12 Zaidan. The record was clear, it was sufficient. We  
13 deliberated and dealt with on the merits everything  
14 that was in the record. So I don't see anybody having  
15 -- there being a risk of being injustice through the  
16 process.

17 MEMBER ETHERLY: I would agree with both  
18 Mr. Zaidan and Mr. Hood in that respect. Once again,  
19 I think the conduct of the case, as we discussed  
20 within the disposition of the first motion, was very  
21 clear, was very fair, was very impartial. There was  
22 passion and disagreement on all sides. I think in  
23 essence if you were to sum up this case, some people  
24 won, some people lost.

25 COMMISSIONER HOOD: Mr. Chairman?

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1 MEMBER ETHERLY: Yes.

2 COMMISSIONER HOOD: Isn't that typical in  
3 most cases?

4 MEMBER ETHERLY: Quite honestly, but  
5 perhaps I was being a little too flip with that  
6 statement. What I want to be clear to note is that I  
7 think there was a little bit that was won and lost by  
8 both parties here. Clearly the outcome is not the one  
9 that inures to the complete application, the complete  
10 benefit of NCRC, but at the same time, clearly there  
11 were some aspects of the case that I think gave this  
12 Board pause with regard to the issue of an enrollment  
13 increase, and the Board acted appropriately in that  
14 respect. I simply do not see the issue of an  
15 injustice, a risk of injustice to the parties in this  
16 case if the votes were not vacated.

17 With regard to the risk that the denial of  
18 relief will produce injustice in other cases, I would  
19 take a similar position. I do not think that there is  
20 anything that has happened in this case that would  
21 establish a concern that perhaps would lead to  
22 injustice in other cases. In fact, I think perhaps  
23 all of our actions to date, including the recusal of  
24 the Chairman prospectively, indeed reaffirm the  
25 commitment of this body, the commitment of this Board

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1 and its members to ensuring that the process is held  
2 beyond any type of question or any type of suggestion  
3 of impropriety.

4 So I would also assert that the risk of  
5 denial of relief in this regard would not produce  
6 injustice in other cases and once again look to my  
7 colleagues for any comments on that particular aspect.

8 COMMISSIONER HOOD: I would just simply  
9 just agree with you, Mr. Chairman.

10 MEMBER ETHERLY: Thank you very much, Mr.  
11 Hood.

12 It is the third prong that I think is most  
13 critical -- once again, the risk of undermining the  
14 public's confidence in the judicial process.

15 Clearly much of the motions practice that  
16 has been presented before us, much of the discourse  
17 that has taken place publicly within the confines of  
18 the media and other places I think clearly speaks to  
19 a concern that there is an undermining of the public's  
20 confidence in the judicial process.

21 It is here, perhaps, that I take a more  
22 nuanced approach but nevertheless finding in my own  
23 opinion that there is not an undermining of the  
24 public's confidence here but, in fact, a reaffirmation  
25 of this body's commitment to a fair, open, and

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1 impartial process.

2 As I said at the outset, and once again  
3 I'm speaking just as one member here, as I said at the  
4 outset, it is entirely appropriate to question our  
5 judges, to question our administrative law judges, to  
6 question anyone in a position of decisionmaking  
7 authority. That is not before this Board here, and I  
8 think if it were we would be in unanimous agreement.  
9 But I think it is very important and it has been said  
10 in numerous law journal articles and by other  
11 commentators that that questioning, that criticism,  
12 should be based on fact, it should be based on an  
13 understanding of the proper and limited role of the  
14 institution, of the courts, or in this case of this  
15 institution. I think personal attacks on the  
16 integrity and motives of judges, as has been written,  
17 undermine authority and independence of the body  
18 because in the end, the legitimacy of this Board is  
19 dependent on the perception that we engage in  
20 principled decisionmaking.

21 What is so critical here is that I do not,  
22 speaking as an individual, I do not want to set the  
23 precedent that personal attacks on integrity are to be  
24 awarded, and perhaps I step out on a limb somewhat  
25 presumptuously by saying that I hope that statement is

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1 heard unequivocally and is perhaps accorded an  
2 additional level of weight because I would remind our  
3 audience as well as my colleagues that I voted in  
4 dissent on the issue of the building. It would do me  
5 from the standpoint of my position no harm if there  
6 were to be a re-vote and that vote were to fail for a  
7 lack of majority. The outcome would be the outcome  
8 that I supported because I also did not support on  
9 traffic grounds the issue of the enrollment increase  
10 that was sought by the applicant.

11           However, once again, I think very  
12 importantly here, the inquiry with regard to public  
13 confidence in the judiciary or any body is a two-way  
14 street. We have the protections of recusal, we have  
15 the protections of disqualification, and we are  
16 engaged in that inquiry as we speak. That's one  
17 protection.

18           The other protection is ensuring that our  
19 individuals who serve, be it in a judicial capacity or  
20 be it in a quasi-judicial setting as the Board of  
21 Zoning Adjustment finds itself in, those individuals  
22 should continue to be accorded the ability to act  
23 independently and to act in a way that is free from  
24 and insulated from where appropriate personal attacks  
25 on integrity.

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1           Once again, it is appropriate to question  
2 our judges in any forum, in any setting. That is not  
3 the issue here. But the questioning and the criticism  
4 should come with support. It should come with a basis  
5 in fact and understanding of the roles.

6           I think the motions as they have been  
7 offered, as we have talked about before with regard to  
8 some of the conduct that was alleged by the Chairman,  
9 with regard to how he conducted cases, that, to me,  
10 evidences a lack of understanding of what the role of  
11 the Chairman is.

12           There is a necessary leadership aspect to  
13 the chairmanship of the Board of Zoning Adjustment,  
14 and all of the Chair's conduct in this regard was very  
15 consistent with that expectation, with that  
16 responsibility, I might add. However, I think the  
17 confidence of the public in the judicial process --  
18 once again, as a two-way street, we have to ensure  
19 that these types of personal attacks are not rewarded.  
20 I think that's a very important aspect of the  
21 Liljeberg discussion, perhaps one that found more  
22 credence in the dissenting opinion of the Liljeberg  
23 case as opposed to the majority opinion. So I want to  
24 be very clear about that. I'm not speaking from that  
25 standpoint to offer Liljeberg in support of that, but

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1 I think that in my assessment of the third prong, the  
2 risk of undermining the public's confidence, I think  
3 that inquiry is something of a two-way street.

4 When you look at Liljeberg and you look at  
5 the line of cases that relate to judicial misconduct,  
6 when you look at the canons of conduct set forth for  
7 U.S. judges, federal judges, I think it's a very  
8 important aspect that is perhaps very quiet, very  
9 nuanced that it's a two-way street, and part of that  
10 street is ensuring that our judges and the arbiters of  
11 the great questions of the day that confront us are  
12 free from personal attack or, in the event of personal  
13 attack, still have the strength, the personal  
14 fortitude, and the integrity to withstand those  
15 attacks and issue a decision as they see fit.

16 I would open up the floor on that  
17 particular aspect to either of my colleagues, Mr.  
18 Zaidan or Mr. Hood.

19 COMMISSIONER HOOD: Mr. Chairman, I don't  
20 know how much more -- I mean Vice Chairman -- I don't  
21 know how much more I can add to that, but there is a  
22 process, and the process -- when people disagree with  
23 decisions that this Board makes, they take it on to  
24 the other level, there are checks and balances, and  
25 that's due process.

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1 I will tell you that, as you stated, Mr.  
2 Chairman, the personal attacks are, as far as I'm  
3 concerned, not in the process, and I don't have all  
4 the legal case law and the legal jargon and everything  
5 behind that, but I do think that Board members make  
6 their decisions within the realm of the merits of the  
7 case and move to that point. But as far as because  
8 someone didn't like a decision that someone makes and  
9 to go and make a personal attack on them, I have a  
10 problem with it.

11 I will tell you that, again, we do our  
12 jobs the best we can down here. We have full-time  
13 jobs. I don't know, I may be getting off a little,  
14 Mr. Chairman, but I believe there needs to be some  
15 protection for Board members when they make those  
16 types of decisions.

17 And fortunately, like I said, there is  
18 another avenue, there is an appellant court, and that  
19 is the process, the checks and balances, to make sure  
20 that the decision that came from this Board can be  
21 checked on if someone disagreed with it. But the  
22 personal attacks should be disallowed, and I actually  
23 think that they should be discontinued because this is  
24 not the first one, and hopefully this will be the last  
25 one.

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1                   MEMBER ETHERLY: Thank you very much, Mr.  
2 Hood.

3                   Perhaps before we move forward with a vote  
4 on this final aspect of the motions before us that  
5 will conclude our deliberation today, I would like to,  
6 with leave of my colleagues, offer I think what is an  
7 excellent assessment in summary of the problem, the  
8 concern, the slippery slope that confronts us as we  
9 deal with these motions.

10                  I am going to read in part to you part of  
11 an article that was offered by Judge Paul Friedman,  
12 who has been a frequent commentator on issues  
13 surrounding civility, civility in our judicial -- our  
14 legal systems. Clearly for the benefit of those in  
15 the audience civility has been a very important and  
16 critical point of discourse over the last couple of  
17 years, dating back to, of course, the decision in Bush  
18 v. Gore as well as in recent decisions that involved  
19 the question of recusal of Supreme Court Justice  
20 Antonin Scalia and the case involving the vice  
21 president.

22                  There is a wealth of commentary on this  
23 issue, but I think it's Judge Friedman's comments  
24 which perhaps summarize very expertly what I am  
25 attempting to get at with respect to this particular

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1 last prong.

2 Judge Friedman writes in part, and you've  
3 heard me paraphrase before, that "Judges do make  
4 mistakes and fair criticism of judicial decisions  
5 certainly is appropriate. But criticism should be  
6 based on fact and on an understanding of the proper  
7 and limited role of the institution of the courts.

8 "Personal attacks on the integrity and  
9 motives of judges undermine the constitutional  
10 authority and independence of the courts because, in  
11 the end, the courts depend for their legitimacy on the  
12 perception that they engage in principled  
13 decisionmaking and on their reputation for  
14 impartiality and non-partisanship. The attempts to  
15 intimidate judges in the hope of achieving outcomes  
16 for clients or causes or of undermining the legitimacy  
17 of courts and their decisions run counter to the  
18 delicate balance that the founders of our system  
19 intended."

20 As Professor Stephen Bright has written,  
21 quote: "Distorted attacks for political gain endanger  
22 judicial independence and public confidence in the  
23 courts and ultimately undermine the rule of law."

24 Judge Friedman continues to write: "In my  
25 view, it is the basic responsibility of the bar and

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1 individual lawyers to ensure that the courts are not  
2 intimidated or subjected to political pressure by  
3 defending the independence of the judiciary and of  
4 individual judges when those judges are wrongly  
5 attacked or when their motives, character, or  
6 integrity are impugned. It is the obligation of the  
7 bar, lawyers, and judges to ensure that our courtrooms  
8 and legal proceedings are civil and civilized  
9 engagements. The public must be given no reason to  
10 doubt either by judges or by those who disagree with  
11 their decisions that the system is anything less than  
12 rational, civil, and independent. We all have an  
13 investment in an independent judicial system, and  
14 without such an understanding, the rule of law itself  
15 is at risk."

16 Former Chief Judge Mikva of the D.C.  
17 Circuit also said that judges must follow their oaths  
18 and do their duty. He listed editorials, letters,  
19 telegrams, picketers, threats, petitions, panelists,  
20 and talk shows.

21 "In this country, we do not administer  
22 justice by plebiscite. We judges need the lawyers and  
23 the leaders of the bar to help us in this important  
24 endeavor so that everyone's day in court is a fair  
25 one." Judge Paul Friedman.

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1           For my colleagues, then, if there is no  
2 further discussion, I would also move to deny the  
3 motion to vacate the votes on March 9th, 2004, and  
4 April 13th, 2004, and invite a second.

5           COMMISSIONER HOOD: Second.

6           MEMBER ZAIDAN: Second.

7           MEMBER ETHERLY: Thank you very much --  
8 Mr. Zaidan?

9           COMMISSIONER HOOD: Mr. Zaidan.

10          MEMBER ETHERLY: Thank you very much, Mr.  
11 Zaidan, for the second.

12          I think we have had adequate discussion.  
13 Once again, any further discussion on that question?  
14 Any further discussion?

15          COMMISSIONER HOOD: I just have one  
16 question. Also what was submitted -- I don't know if  
17 this is the appropriate venue to do this, but there is  
18 an issue about the enrollment of 120 which was --  
19 actually I voted to deny any expansion of the  
20 enrollment, and I wanted to make sure it was clear,  
21 and I think Board Member Zaidan, on page -- I don't  
22 know what page it is, but in the supplement to the  
23 motion to disqualify Chairman Griffis and to vacate  
24 votes taken May 9th, I think it's the third -- page 3.  
25 It mentions something I think that you asked be

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1 incorporated in the order, and I just wanted to make  
2 sure that that was where we were before we close out  
3 on this.

4 MEMBER ZAIDAN: In regards to the  
5 expansion of the enrollment?

6 COMMISSIONER HOOD: Yes. I want to make  
7 sure we had an understanding.

8 MEMBER ZAIDAN: Yes. That was my position  
9 in the deliberation and that's my position now.

10 COMMISSIONER HOOD: A hundred and twenty,  
11 right?

12 MEMBER ZAIDAN: Yes. That's my reading of  
13 the two previous orders.

14 COMMISSIONER HOOD: I just want to make  
15 sure. Okay.

16 MEMBER ZAIDAN: And just --

17 MEMBER ETHERLY: Yes.

18 MEMBER ZAIDAN: And just to kind of I  
19 guess maybe -- you know, we have laid out a lot of  
20 philosophical references and good philosophical  
21 discussion here, but I think, like a lot of the things  
22 that come before us, this issue comes down to the fact  
23 that this city is doing pretty well right now. D.C.  
24 is definitely in a renaissance, and unfortunately this  
25 Board has to deal with some of the negative aspects of

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1 that. Because there is activity and because there are  
2 people wanting to move back to the city and put  
3 additions onto their houses and enroll their kids in  
4 schools, et cetera, we have to deal with the negative  
5 aspects of that, and that is how to balance the  
6 impacts of this positive energy with the needs of the  
7 neighbors and of the city as a whole. It's my  
8 recollection that this is coming back in 2006. The  
9 special exception expires completely, and I certainly  
10 hope that at some point, this extremely bad blood can  
11 be taken care of because it's not going to get anybody  
12 anywhere in the next go-around of this application  
13 because I don't envision and I certainly don't  
14 anticipate anybody moving off of that street and I  
15 certainly would not encourage that.

16 I just hope at some point everybody can  
17 step back and look at what the issues are and try to  
18 take into account how best everybody can coexist  
19 because this is a product of a good thing that we're  
20 experiencing in this city and I hope that it can be  
21 managed the next go-around.

22 MEMBER ETHERLY: Thank you very much, Mr.  
23 Zaidan.

24 If there is no further discussion on the  
25 motion, I would like to ask for the vote. All those

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1 in favor, please signify by saying aye.

2 (Chorus of ayes.)

3 MEMBER ETHERLY: Opposed? Abstentions.

4 (No response.)

5 MEMBER ETHERLY: Hearing none, Ms. Bailey,  
6 if you could read the vote, please.

7 MS. BAILEY: Thank you. The Board has  
8 voted not to vacate Mr. Griffis' vote as it pertains  
9 to the March 9th and April 13th decisions on this  
10 case. The vote is 3-0-2. Mr. Etherly made the  
11 motion, Mr. Zaidan second, Mr. Hood is in agreement,  
12 Mr. Griffis is recused, and also Mrs. Miller.

13 MEMBER ETHERLY: Thank you very much, Ms.  
14 Bailey.

15 I would like to thank my colleagues for  
16 what has been a very difficult discussion but a very  
17 important one. I would like to thank the members of  
18 the public for your engagement. I think it is safe  
19 for me to say that the Board has spoken very clearly,  
20 very cogently, and unequivocally with regard to its  
21 distaste for the tactics that have been engaged. Once  
22 again, that is in complete acknowledgement of the  
23 appropriateness of questioning the judiciary that acts  
24 as the arbiters of the great questions of our day.  
25 But when those tactics move to the level that I think

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1 we have seen here -- and once again, this is from  
2 someone who spoke as a supporter of the opposition  
3 because I thought the position was right in terms of  
4 the outcome of the case although I didn't prevail --  
5 but I stand united with my colleagues here in wanting  
6 to be sure that we reaffirm to you that there is  
7 perhaps no louder, no more unequivocal action that  
8 this vote has taken since I have been a member of the  
9 Board than what it has done today to support the  
10 Chairman and ensure that subsequent servants of the  
11 District of Columbia are not subjected to tactics such  
12 as these and that these tactics are not rewarded.

13 Thank you very much for your  
14 participation. We are going to take a brief recess  
15 and we will return shortly to begin our public  
16 hearing.

17 Thank you. We stand adjourned.

18 (Whereupon, at 10:52 a.m., the special  
19 public meeting adjourned.)  
20  
21  
22  
23  
24  
25

**NEAL R. GROSS**

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