

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

SPECIAL PUBLIC MEETING

+ + + + +

FRIDAY  
AUGUST 17, 2007

+ + + + +

The Special Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 10:00 a.m., Ruthanne G. Miller, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER Chair  
CURTIS ETHERLY, JR. Vice Chair  
JOHN A. MANN, II Board Member (NCPC)

OFFICE OF ZONING ADJUSTMENT STAFF PRESENT:

CLIFFORD MOY Secretary

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

ALAN BERGSTEIN, ESQ.  
SHERRY GLAZER, ESQ.

The transcript constitutes the minutes from the Special Public Meeting held on August 17, 2007.

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P R O C E E D I N G S

10:22 A.M.

CHAIRPERSON MILLER: This meeting will please come to order.

Good morning, ladies and gentlemen. This is the August 17th Special Public Meeting of the Board of Zoning Adjustment of the District of Columbia. My name is Ruthanne Miller. I'm the Chair of the BZA. Joining me today to my right is the Vice Chair, Mr. Curtis Etherly and to my left is Mr. John Mann representing NCPC. Mr. Clifford Moy is also here from the Office of Zoning and Alan Bergstein from the Office of Attorney General.

Copies of today's meeting agenda are available to you and are located to my left in the wall bin near the door. We will not take any public testimony at our meeting unless the Board asks someone to come forward.

Please be advised that this proceeding is being recorded by a court reporter and is also webcast live.

1           Accordingly, we must ask you to refrain from  
2           any disruptive noises or actions in the  
3           hearing room. Please turn off all beepers and  
4           cell phones.

5                       I just want to make a few  
6           preliminary statements. This Board has come  
7           out of recess which is very unusual for a  
8           meeting and I just want to let the public know  
9           the reason for that and that is because Mr.  
10          John Mann who is representing NCPC will be  
11          rotating off the Board, unfortunately. And  
12          today is his last day to participate in the  
13          deliberations and he is an integral Member of  
14          the Board on two cases that are ripe for  
15          decisionmaking. So I want to take a moment to  
16          thank him for his service on the Board. He  
17          has been an incredible asset with his  
18          knowledge and astuteness and dedication.  
19          Anyway, I just want to wish him luck. And  
20          that's the way it works on the Board of Zoning  
21          Adjustment, people come and go. And NCPC, in  
22          particular, rotates its representative.

23                       Second, I want to just address a

1 little bit the question of the notice of this  
2 meeting. It was properly noticed, publicly  
3 noticed, August 9th, but it was noticed for  
4 yesterday when we were planning to have this  
5 meeting and the agenda was posted at that  
6 time.

7 I had a death in the family and  
8 the funeral was yesterday, so for that reason  
9 we postponed the decision meeting to today, so  
10 I'm not sure that we even need to waive our  
11 rules in that 3105.7 goes to posting the  
12 agenda at least seven days in advance of the  
13 meeting and the agenda was posted even further  
14 in advance of the meeting. But in the event  
15 that we do need to waive it, I would say that  
16 a funeral is of good cause and there's been no  
17 prejudice to the parties which is the standard  
18 for waiver. I see that my Board Members are  
19 concurring.

20 I think that covers the  
21 preliminary matters.

22 Mr. Moy, do you want to call the  
23 first case?

1                   MR. MOY: Yes, good morning, Madam  
2 Chair person and other Members of the Board.  
3 I believe the first of two cases the Board  
4 will be making a decision on is the Georgetown  
5 College case. This is the second remand from  
6 the District of Columbia Court of Appeals  
7 which goes to Application No. 16566-H, as in  
8 hotel, of the President and Directors of  
9 Georgetown College. The Board will recall  
10 this application was pursuant to 11 DCMR  
11 3104.1, for a special exception for the review  
12 and approval of the University Campus Plan,  
13 years 2000 to 2010 under Section 210 in the R-  
14 3 and C-1 Districts at premises bounded by  
15 Glover Archbold Parkway to the west, the  
16 National Park Service property along the  
17 Chesapeake and Ohio Canal and Canal Road to  
18 the south, 35th Street, N Street to 36th  
19 Street, and 36th Street to P Street to the  
20 east and Reservoir Road to the north. I'm not  
21 going to read all the squares and lots.  
22 That's in our record file.

23                   Staff will say that on June 7,

1 2007, the District of Columbia Court of  
2 Appeals issued its decision on the Board's  
3 April 5, 2005 decision which is reflected in  
4 the BZA order number 15566-F, F as in foxtrot.  
5 This was issued on June 7, 2005. An order  
6 certifying the Applicant's campus plan, as  
7 revised to reflect the conditions of the  
8 approval in order number 16566-F was issued  
9 February 3, 2006. And that was order number  
10 16566-G, g as in golf.

11 Essentially, the Board is to act  
12 on the second remand and to provide "an  
13 explanation as to why several uncontested  
14 provisions included in the original campus  
15 plan were not included in the revised campus  
16 plan." And a copy of the Court's decision is  
17 in your case folder, record folder, and that's  
18 case number 05-AA-688. That will complete the  
19 staff's briefing.

20 CHAIRPERSON MILLER: Thank you,  
21 Mr. Moy. I'd just like to say to my Board  
22 that this unusual for us in that we have  
23 before us an order that we're being asked to

1 adopt that reflects our deliberations a while  
2 back. Normally, I don't believe there's much  
3 deliberations due on the record at this point  
4 because this order reflects the previous  
5 deliberations and our view of it. Basically,  
6 the Court did ask us for an explanation of why  
7 five uncontested provisions included in the  
8 campus plan originally approved by the Board  
9 in the original campus plan order were not  
10 included in the revised campus plan approved  
11 by the 2005 order. And the order that went to  
12 the Court did not include an explanation of  
13 conditions that we had chosen not to accept,  
14 which had been accepted previously and which  
15 were uncontested.

16 This order addresses why those  
17 conditions were included by the Board and in  
18 essence, I think that the rationale which goes  
19 through it is that we were very mindful of  
20 what the Court said in Georgetown 1, that we  
21 should adopt only conditions necessary to  
22 mitigate and identify potential adverse  
23 impacts related to the university use of

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1 property in a residence district and not to  
2 intrude to an impermissible degree into the  
3 management prerogatives of the university.

4 And I also just want to comment  
5 that I came on the Board when this case was  
6 originally being considered and the Court's  
7 order in Georgetown in this case had a great  
8 impact on me and I think it had a great impact  
9 on the Board in general when we considered  
10 conditions not even just related to schools,  
11 but related to all sorts of cases. So this  
12 was an opportunity, actually, for us to fully  
13 explain to the Court how we applied it in this  
14 case and how we understood their order.

15 So I would like to ask or at least  
16 have everyone confirm that we, in fact, did  
17 read the transcript and that this does reflect  
18 our deliberations.

19 MEMBER MANN: Madam Chair, yes, I  
20 did review the transcript and I believe that  
21 this new order does accurately reflect what it  
22 is that we discussed in our deliberations  
23 which we -- when we discussed those conditions

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1 we very thoroughly gave explanations as to why  
2 we adopted or didn't adopt certain conditions.

3 CHAIRPERSON MILLER: Thank you.

4 VICE CHAIRPERSON ETHLERLY: I'd  
5 also like to echo the comments of my  
6 colleague, Mr. Mann, in the same respect.

7 Thank you, Madam Chair.

8 CHAIRPERSON MILLER: Thank you.

9 If there are no further comments then, then I  
10 would move that we adopt this order on second  
11 remand.

12 MEMBER MANN: Second.

13 CHAIRPERSON MILLER: All those in  
14 favor say aye. Aye.

15 (Chorus of ayes.)

16 All those opposed? All those  
17 abstaining?

18 Would you call the vote, please?

19 MR. MOY: Yes. The staff would  
20 record the vote as three to zero to two. This  
21 is on the motion of Ms. Miller, the Chair, to  
22 adopt the draft order. Who seconded it? Mr.  
23 Mann. I'm sorry, thank you. Mr. Mann

1 seconded it; in support of the motion, Mr.  
2 Etherly. We have a Zoning Commission Member  
3 not participating on this case and another  
4 Board Member not participating also. So at  
5 any rate the final vote is three to zero to  
6 two.

7 CHAIRPERSON MILLER: I just want  
8 to make one correction, if I could. I  
9 wouldn't say that it's a draft order. I would  
10 say that this is the order and that it will be  
11 issued today.

12 Thank you.

13 MR. MOY: The next action of the  
14 Board is a motion for reconsideration to  
15 appeal No. 17532 of Apple Tree Institute for  
16 Education Innovation, Incorporated pursuant to  
17 Section 3126 of the Zoning regulations. The  
18 motion is to the original appeal which was  
19 pursuant to 11 DCMR 3100 and 3101 from the  
20 administrative decision of the Zoning  
21 Administrator, Department of Consumer and  
22 Regulatory Affairs, to require BZA special  
23 exception approval for a proposed addition to

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1 an existing building to accommodate a public  
2 charter school use. The appellant alleged  
3 that the Zoning Administrator erroneously  
4 relied on the Zoning Commission's February 13,  
5 2006 emergency rulemaking to require  
6 additional on-site parking spaces.

7 The subject property is located in  
8 the R-4 District at premises 138 12th Street,  
9 N.E., that's in Square 998, Lot 820. On  
10 August 2, 2007, ANC 6A filed a timely motion  
11 for reconsideration. This is in your case  
12 folders identified as Exhibit 45. On August  
13 6, 2007, the Appellant filed an opposition to  
14 the request for reconsideration. That is  
15 identified in your case folders as Exhibit 48.  
16 Both filings were timely filed pursuant to  
17 Sections 3126.2 and 3126.5.

18 The Board is to act on the merits  
19 of the request for reconsideration pursuant to  
20 the requirements under Section 3126 and that  
21 completes the status briefing, Madam Chair.

22 CHAIRPERSON MILLER: As a  
23 preliminary matter, I just want to address the

1 two filings that came in. After the record  
2 was closed and before the motion for  
3 reconsideration came in, Exhibits 43 and 44.  
4 One is -- Exhibit 43 is a letter to  
5 Chairperson Mitten, and requesting I believe  
6 this may be the sua sponte letter, that they  
7 sua sponte this case. And the second is a  
8 letter from Council Member Tommy Wells  
9 addressing what the Council Member believes is  
10 the intent of the Zoning Commission and asking  
11 for us to consider that.

12 In any event, they're not attached  
13 to any motion. So I just want to say that  
14 I've read them. I believe the other Board  
15 Members have read them and to the extent that  
16 they bear upon an issue that we'll be  
17 addressing the motion for reconsideration they  
18 have been read.

19 Now the next thing I want to do is  
20 just set the context here. This is a motion  
21 for reconsideration, what the standard is.  
22 It's set forth in 3126.4 and 3126.6. A motion  
23 for reconsideration shall state specifically

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1 all respects in which the final decision is  
2 claimed to erroneous and the relief sought and  
3 3126.6 goes to rehearing. No request for  
4 rehearing shall be considered by the Board  
5 unless new evidence is submitted that could  
6 not reasonably have been presented at the  
7 original hearing.

8 The ANC has put forth five grounds  
9 for reconsideration and I think we should  
10 start with the first ground because that  
11 addresses the question of recusal including  
12 the Vice Chair's recusal in this case and so  
13 we need to address that first because were he  
14 to recuse himself, we wouldn't even have a  
15 quorum to continue this deliberation.

16 I am going to turn this over to  
17 Mr. Etherly shortly, but I just wanted to also  
18 set forth the standards for recusal. 6A said  
19 that where reasonable people would judge them  
20 to have such a conflict. In general, we  
21 actually address this a little bit more fully  
22 in another case and that was the NCRC case.  
23 I think I just want to read a little bit so

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1 that the public has an understanding of what  
2 we're looking at and we said in that case  
3 "here is no controlling statute or Board  
4 regulation governing the disqualification of  
5 Board Members. In order to insulate the  
6 administrative process and its decision makers  
7 from prejudice and bias, it has generally been  
8 recognized that the same rules requiring the  
9 recusal of judicial officers are applicable to  
10 administrative officers who act in an  
11 adjudicative or quasi-judicial capacity. In  
12 the absence of a statute providing otherwise,  
13 a Judge must recuse himself when his alleged  
14 bias arises from a source outside the four  
15 corners of the courtroom and results in  
16 opinion on the merits on some basis, other  
17 than what a Judge learned from his  
18 participation in the case. A legally  
19 sufficient claim of personal bias requires  
20 that the facts alleged must be material and  
21 stated with particularity; that the facts must  
22 be such that if true would convince a  
23 reasonable person that a bias exists and the

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1 facts must show that a bias is personal as  
2 opposed to judicial in nature."

3 I also want to address one more  
4 standard and that is for vacating an order.  
5 Usually, those standards for recusal are often  
6 used before the vote is taken, before the case  
7 is deliberated and when you get to a point  
8 where there's already been an order and you're  
9 asking that a vote be vacated, you also have  
10 to -- there's a higher standard you need to  
11 show.

12 There are three factors: the risk  
13 of injustice to the parties in the case, risk  
14 of the denial of the relief will produce  
15 injustice in other cases, and risk of  
16 undermining the public's confidence in the  
17 judicial process. And that is based on a  
18 Supreme Court case, Lilliberg v. Health  
19 Services Acquisition Corp.

20 Okay, so I think at this point I  
21 would like to turn to Mr. Etherly because  
22 there has been allegation that because of his  
23 participation or being a Board Member on a

1 child- related board, or a school-related  
2 board, that he should be recused.

3 VICE CHAIRPERSON ETHLERLY: Thank  
4 you very much, Madam Chair. This will  
5 definitely, I think, be a very necessary,  
6 complicated, and I think long conversation  
7 because I think allegations of this type are  
8 very, very important. They are very critical  
9 whenever there is any concern or any question  
10 raised about the impartiality of this Board's  
11 decisions and the participation of its members  
12 in such decisions. So I'm going to take a  
13 very, what I think will be, hopefully a  
14 deliberate and slow walk through a discussion,  
15 both in terms of the facts as well as in terms  
16 of the relevant case law and perhaps codified  
17 practice as it relates to judicial conduct.

18 As the Chair indicated, there is  
19 no direct statute on point that speaks to  
20 issues of disqualification for Board Members.  
21 Rather, the Courts have looked to the Judicial  
22 Code of Conduct for general guidance, and in  
23 particular, has looked at the issue of

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1 personal bias, as you indicated, Madam Chair,  
2 requiring one, the facts alleged must be  
3 material and stated with particularity. Two,  
4 the facts must be such that if true will  
5 convince a reasonable person that a bias  
6 exists and the facts must show that the bias  
7 is personal as opposed to judicial in nature.

8 As I have taken a look at both  
9 case law and some of the codified rules of  
10 conduct as they apply to Judges here in the  
11 District of Columbia, I think it will be  
12 helpful and instructive to supplement my  
13 discussion with respect to those issues with  
14 some of the jurisprudence and some of the  
15 discussion under some of our federal code  
16 requirements as they relate to Federal Judges.  
17 So I'm going to speak a little bit to some of  
18 the case law and some of the practices under  
19 Section 144 of the U.S. Code, which deals with  
20 the issue of personal bias. I may also speak  
21 a little bit to Section 455, and then I'm  
22 going to reference some general case law.

23 But again, I want to just set the

1 stage for what I think needs to be a very  
2 detailed discussion. At the end of the day,  
3 I'm going to offer what I believe is my  
4 perspective on the substantial requirements of  
5 what the law requires or would require in this  
6 particular case. But I just wanted to kind of  
7 set a little bit of the stage for how I'm  
8 going to try to walk through this.

9 I want to first and foremost thank  
10 the ANC for bringing this matter forward.  
11 Oftentimes, there are concerns raised about  
12 the impartiality and conflicts of interest as  
13 they relate to Board Members. Not only on  
14 this Board, but in other contexts throughout  
15 the District of Columbia Government. And at  
16 times, these discussions can, shall we say,  
17 get very vitriolic and rather energetic and  
18 heightened. I don't view that as this type of  
19 discussion. I view it as a very important  
20 question that needs to be discussed and vetted  
21 thoroughly. So that is indeed the intent and  
22 spirit with which I approach the concerns that  
23 the ANC has raised.

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1           Perhaps as a starting point, let  
2 me deal with a little bit of the factual  
3 discussion. Again, I'm going to just simply  
4 recognize for the record that this is going to  
5 be an unusual discussion, because to an extent  
6 I'm going to speak a lot on this issue, and  
7 the issue is at its heart about me. But I  
8 want to kind of set the stage and talk a  
9 little bit about what I understand to be the  
10 factual context here and then try to put that  
11 into the framework of the relevant legal tests  
12 here.

13           What the ANC expresses a concern  
14 about, and I'm going to reach and put my hands  
15 on the ANC's submittal so I am clear to  
16 reference specifically what the grounds are is  
17 that in this instance, two Members of the BZA  
18 failed to declare conflicts of interests, one  
19 being former Chair Mr. Griffis, whom I will  
20 not speak to in this regard. And then of  
21 course, the second person being myself.

22           The concern expressed by the ANC  
23 has to do with my affiliation with the

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1 organization that does advocacy work on behalf  
2 of children and children-related policies here  
3 in the District of Columbia, that being D.C.  
4 Action for Children. It became apparent to  
5 the ANC during its work on this case that D.C.  
6 Action for Children had in some respects  
7 submitted communications in some form  
8 expressing an opinion to the Zoning Commission  
9 regarding proposed rules concerning the  
10 location of charter schools in residential  
11 neighborhoods.

12 As the ANC correctly and properly  
13 noted, I am a member of the Board of Directors  
14 of said organization. At this particular  
15 juncture, what I have been able to ascertain  
16 is the following. As part of the Zoning  
17 Commission's look at the issue of charter  
18 schools, there was quite a bit of advocacy on  
19 the behalf of a wide-range of participants in  
20 the community, both ANCs as well as other non-  
21 profit organizations, groups that have an  
22 interest and the desire to forward the  
23 interest of charter schools here in the city.

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1                   During the course of that  
2                   advocacy, it is my understanding that shall we  
3                   say a general call was put out to  
4                   organizations who were considered to perhaps  
5                   be in some way aligned or perhaps interested  
6                   in the outcome of this issue. Such a call  
7                   went out to D.C. Action for Children. As I  
8                   understand it, that outreach was made to the  
9                   Director of Policy, who was indicated in the  
10                  submittal of the ANC as Suzie Cambria, who is  
11                  indeed the Director of Policy and now is  
12                  currently the interim executive director of  
13                  D.C. Action for Children.

14                  Ms. Cambria, in response to that  
15                  request for support in forwarding shall we say  
16                  a pro charter school outcome relative to the  
17                  Zoning Commission, as far as I can ascertain,  
18                  sent at least one email to other advocates, to  
19                  members of the D.C. Action network, if you  
20                  will, what some people oftentimes refer to as  
21                  an email tree. To the best of my knowledge,  
22                  and in discussions with Ms. Cambria, here is  
23                  what I have ascertained as it relates to

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1       whether or not that type of activity would  
2       typically come to the Board of Directors.  
3       That type of activity would not, as a matter  
4       of course, come to the Board of Directors.

5                Again, I'm only speaking from the  
6       standpoint of the factual, my factual  
7       understanding of the case, and I'm not  
8       speaking to how we view those facts yet in  
9       terms of the relevant legal tests.    But from  
10      the standpoint of discussion of the facts, at  
11      no time did the Board of Directors of D.C.  
12      Action for Children discuss the organization's  
13      position with regard to this issue, with  
14      regard to any of the matters before the Zoning  
15      Commission, and at no time was any discussion  
16      ever agendized.  It is not unusual.  It is  
17      rather standard fare, standard for the course,  
18      that the executive director or even the policy  
19      director would have the ability to  
20      unilaterally make a determination that a  
21      position on behalf of the organization would  
22      be appropriate in a given matter without  
23      having to come to the Board of Directors.

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1           So from a factual standpoint,  
2           again not reading, not interpreting the  
3           implication of those facts, from a factual  
4           standpoint, there was never any discussion at  
5           the Board level of D.C. Action for Children  
6           regarding the facts or the circumstances  
7           surrounding the Zoning Commission's look at  
8           this issue. And as a corollary, of course,  
9           there was never any discussion at the Board of  
10          Director's level with respect to the  
11          particular case pending before the Board of  
12          Zoning Adjustment.

13                 As the ANC also correctly noted, I  
14          did disclose on the record a long-standing  
15          affiliation with a charter school, that being  
16          Washington Math, Science and Technology Public  
17          Charter High School. At past times, I have  
18          served as chair of that board. To the best of  
19          my recollection, my term as chair had ended by  
20          the time this case came before us, but I felt  
21          that that was a very, very clear instance that  
22          needed to be put on the record with regard to  
23          any concerns about bias, any concerns about an

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1 inability to be impartial on the record  
2 because of an obvious affiliation with a  
3 charter school that ostensibly could, at some  
4 point in the future, conceivably be affected  
5 by whether it be the outcome of the Zoning  
6 Commission's action or be it the outcome of  
7 any of our work.

8 So as the ANC indicated, I did  
9 disclose that on the record. I also I think  
10 in the context of that disclosure indicated  
11 that Apple Tree Institute in the past had also  
12 been affiliated with the charter school.

13 So from a factual standpoint,  
14 there I think that sets forth the details  
15 around D.D. Action for Children. Again, in my  
16 investigation of the factual circumstances  
17 surrounding D.C. Action's input here, at no  
18 time have I found that D.C. Action for  
19 Children submitted anything on the record to  
20 the Board of Zoning adjustment pursuant to its  
21 action in front of Apple Tree, nor would the  
22 BZA have reason to look to or reach out on its  
23 own merit, on its own motion, for the Zoning

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1 Commission's record in its deliberations. I  
2 raise that issue from the standpoint of  
3 beginning to get into some of the context,  
4 some of the legal tests and context here, and  
5 that is well, should I have known that the  
6 organization would likely take a position on  
7 this. I'm going to put that into the context  
8 of some of the judicial code as it relates to  
9 the Code of Judicial Conduct here in the  
10 District of Columbia under the Court of  
11 Appeals.

12 From a factual standpoint, I have  
13 further been able to ascertain that D.C.  
14 Action for Children has not maintained records  
15 of conceivably any other correspondence that  
16 may have been submitted to the Zoning  
17 Commission, so I can't say definitively  
18 whether or not there was other advocacy that  
19 may have taken place on the part of the  
20 organization. Again, I'm only speaking to the  
21 factual record here.

22 As the ANC indicated, there was at  
23 least one email that was sent encouraging

1 other advocates to advocate before the Zoning  
2 Commission, expressing an opinion that no rule  
3 change be implemented that would conceivably  
4 restrict the ability of charter schools to  
5 locate. But I have not been able to determine  
6 whether or not the organization sent an  
7 official letter or any other type of  
8 communication that may have gone to the Zoning  
9 Commission.

10 Again, as a Board Member and in  
11 the context of all of my recollections and my  
12 participation in Board meetings, at no time  
13 was this issue agendized for discussion at the  
14 Board level. So it is my understanding that  
15 the Board would not have had reason to know  
16 that the organization was advocating in this  
17 regard.

18 That's a little bit of the factual  
19 underpinning here, based on my own research  
20 after the ANC's motion was brought forward.  
21 Again, there would have been no reason for me  
22 to know that our Director of Policy would have  
23 acted in this regard, but it is not an unusual

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1 step. The Director of Policy and of the  
2 Executive Director have the ability to take  
3 this step without moving, without bringing it  
4 forward to the Board.

5 I'm going to pause there from a  
6 factual standpoint. Again, I think this needs  
7 to be a very short, I mean a very long and  
8 deliberate walk, so I want to be sure that my  
9 colleagues are clear on what I understand the  
10 facts of the participation of D.C. Action in  
11 this issue may be, and I perhaps will pause  
12 there for any factual questions before perhaps  
13 connecting up the legal context here.

14 CHAIRPERSON MILLER: As I  
15 understand what you said, you weren't aware of  
16 the email or by actions by that organization  
17 with respect to the rulemaking proceedings?

18 VICE CHAIRPERSON ETHLERLY: That  
19 is correct.

20 CHAIRPERSON MILLER: Okay. So you  
21 couldn't have disclosed it if you weren't  
22 aware of it?

23 VICE CHAIRPERSON ETHLERLY: That

1 is correct.

2 CHAIRPERSON MILLER: Also, the  
3 communication, at least this one as I  
4 understand it, doesn't go to the issue that we  
5 were considering because as I understand it,  
6 the Zoning Commission didn't even recognize or  
7 see this issue. One of the questions that we  
8 are dealing with is the fact that there may  
9 have been a "oversight" on the part of the  
10 Zoning Commission with respect to 401. So  
11 therefore, that issue wasn't before even the  
12 public to be addressing, correct?

13 VICE CHAIRPERSON ETHLERLY: I  
14 would agree with that interpretation.

15 CHAIRPERSON MILLER: Okay.

16 VICE CHAIRPERSON ETHLERLY: And  
17 again, I think it is important to note here  
18 the nuance of the ANC's concern is not  
19 necessarily so much that there was  
20 participation on the part of D.C. Action for  
21 Children, but rather the organization of which  
22 I was a member, a Board Director and continue  
23 to be a member, has in fact taken a position

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1 on an issue which at least from the standpoint  
2 of the relationship would perhaps raise a  
3 concern about my ability to be impartial. So  
4 I want to be very clear in terms of how I am  
5 approaching the ANC's concern here.

6 I am not reading it narrowly. I'm  
7 rather reading it very broadly. I think that  
8 is the appropriate way to read it. Again, as  
9 I have looked at the case law and the relevant  
10 code of conduct jurisprudence, there is  
11 oftentimes a very broad approach to these  
12 issues because of the issue of judicial  
13 impartiality. It is so essential and so  
14 critical and it is absolutely important that  
15 the public's trust in the actions of a Judge,  
16 be it a Judge on a traditional Court or a  
17 quasi-judicial entity, as I believe we sit, it  
18 is absolutely essential that their  
19 participation and their decisions rise above  
20 any appearance of impropriety and bias.

21 So as you indicated, Madam Chair,  
22 in the outset of your remarks, we aren't  
23 governed by a specific statute, but rather as

1 the NCRC case indicates, in order to -- and  
2 I'm reading directly from the Court of Appeals  
3 decision, which is quoted in that case, and  
4 that's Morrison v. D.C. Board of Zoning  
5 Adjustment. "n order to insulate the  
6 administrative process and its decision makers  
7 from prejudice and bias, it is generally been  
8 recognized that the same rules requiring the  
9 recusal of judicial officers are applicable to  
10 administrative officers, who act in an  
11 adjudicative or quasi-judicial capacity.  
12 In the absence of a stature providing  
13 otherwise a Judge must recuse himself when his  
14 alleged bias arises from a source outside of  
15 the four corners of the court room."

16 So essentially, I am reading the  
17 ANC's concern here in this particular account  
18 to be that by virtue of my affiliation as a  
19 board member of D.C. Action for Children,  
20 there would in fact or there would be some  
21 personal bias or concern that my decision  
22 might have been impacted by a source outside  
23 of the four corners of the court room.

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1           As that discussion continues to  
2           note, "a legally sufficient claim of personal  
3           bias requires that one, the facts alleged must  
4           be material and stated with particularity.  
5           Two, the facts must be such that if true would  
6           convince a reasonable person that a bias  
7           exists. Three, the facts must show that the  
8           bias is personal as opposed to judicial in  
9           nature."

10           So what I would like to suggest,  
11           Madam Chair, and with leave of my other  
12           colleague, Mr. Mann, would be to walk first  
13           through that particular conversation and then  
14           perhaps look to some other guiding principles  
15           as they relate both to the Code of Judicial  
16           Conduct set forth by the District of Columbia  
17           Courts. Then I think there is some  
18           instructive discussion again that appears  
19           under Section 144 and Section 455 of the U.S.  
20           Code as it relates to the conduct of Federal  
21           Judges.

22           With respect to the facts alleged  
23           "must be material and stated with

1 particularity," there are some concerns that  
2 I have here. First and foremost, there is no  
3 doubt that the facts that are alleged here are  
4 indeed material. I do not question that in  
5 the least. An organization of which I am a  
6 Board Member, took a position albeit not in  
7 this particular case, but on the broader issue  
8 of charter schools and their ability to exist  
9 and operate here in the District of Columbia.  
10 I do indeed agree that that would indeed be a  
11 material part of our conversation here and one  
12 which is ripe for discussion. So I have no  
13 issue with that.

14 It is a concern perhaps that I  
15 have with the particularity. And by  
16 particularity, I mean this: as I have looked  
17 at the discussions of bias and personal  
18 prejudice under Section 144, which is perhaps  
19 somewhat instructive in terms of how Courts,  
20 Supreme Court, and otherwise have looked at  
21 the issue of bias, there has been great  
22 attention paid to the issue of particularity  
23 here. And my concern with the particularity

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1 here is that I believe the argument stops  
2 simply at Mr. Etherly is a Member of the Board  
3 of Directors of an organization which appeared  
4 to take a position on a related issue, but one  
5 which does have some impact on part of the  
6 issue that Mr. Etherly was adjudicating as a  
7 Member of the Board of Zoning Adjustment.

8           There are a couple of assumptions  
9 that I think are left out of the ANC's  
10 submittal that I think would be very important  
11 here. But I am going to encourage my  
12 colleagues not to necessarily, not to  
13 necessarily deny this particular count on that  
14 issue. I think it is an important issue, but  
15 I'm not suggesting here that because of the  
16 lack of particularity that we cease our  
17 inquiry.

18           I would perhaps like to have seen  
19 more of an indication that there was some  
20 personal involvement or some direct  
21 involvement in the fashioning of the  
22 organization's position by myself as a Board  
23 Member or by the Board as a whole, but to an

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1 extent I recognize that the ANC perhaps would  
2 be very challenged in terms of its ability to  
3 fathom that out. The ANC and its members of  
4 course, not being privy to D.C. Action for  
5 Children board meetings or minutes would  
6 perhaps have no way of knowing that the Board  
7 had never discussed this issue or agendized it  
8 in any way.

9 So with that regard, I'm not again  
10 necessarily ready to hang the hammer on the  
11 particularity account. But I do have some  
12 concerns again with respect to that particular  
13 aspect. As I looked at some of the case law  
14 that deals with the issue of either personal  
15 bias or extra-judicial sources influencing a  
16 Judge's ability to rule impartially on a case,  
17 some of the case law that I have found on this  
18 particular issue speaks to the the following  
19 with respect to the issue of looking at  
20 particularity.

21 Quite a few of the case law, quite  
22 a few of the jurisprudence speaks to the issue  
23 of subjective conclusions and/or opinions that

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1 bias or the appearance of impropriety may  
2 exist are insufficient to requirement a  
3 Judge's disqualification. That's a quote  
4 taken from the Bumpus v. Uniroyal Tire Company  
5 decision, which was an Eastern District of  
6 Pennsylvania decision from 1974. Not binding  
7 on us in terms of our jurisdiction, but again  
8 constructive as secondary authority.

9 Many of the Courts, as I have  
10 found them, deal with when looking at concerns  
11 or allegations around bias, attempt to strip  
12 the allegation of conjecture, opinion, and  
13 speculation that facts alleged by the movant,  
14 which must be accepted as true. So in looking  
15 at the ANC's concern here, what I would  
16 suggest or what I think the case law suggests  
17 is to an extent, you must presume that their  
18 concerns are true. But in doing that, you  
19 must strip the conjecture. You must strip the  
20 presumptions, and you must strip the  
21 subjective conclusions out of the mix.

22 Let me say here that the work ANC  
23 6A, in my opinion, and this is not necessary

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1 for our discussion here, but I will say it.  
2 The work of ANC 6A has always been solid,  
3 solid work as is the work of many of our ANCs  
4 across the city. They have always been very  
5 diligent in their work and their attention to  
6 detail, especially as it relates to planning  
7 and zoning issues here.

8 I don't necessarily think that the  
9 motion here is any different in terms of that  
10 tradition, but again there is a little bit of  
11 a concern on my part that there are a couple  
12 of unspoken suppositions which move from Mr.  
13 Etherly was a Member of Board of Directors of  
14 this organization, and the organization in  
15 turn submitted something on the record to the  
16 Zoning Commission, which involved an entirely  
17 different matter. Therefore, Mr. Etherly must  
18 be biased.

19 It is a fairly long walk to get  
20 from point A to point Z, but again I want to  
21 be very, very clear here that I don't want to  
22 encourage my colleagues to simply rest their  
23 deliberations and their thinking on that

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1 particular point. But I simply want to raise  
2 it as part of the discussion of the relevant  
3 tests.

4 With respect to the on-going  
5 discussion of the NCRC decision, secondly,  
6 "the facts must be such that if true, would  
7 convince a reasonable person that a bias  
8 exists." Now there is quite a bit of  
9 discussion that gets into how you approach the  
10 issue of reasonableness. I'm not going to  
11 bore anyone with the benefits of all of my  
12 wonderful legal research at 2 a.m. in the  
13 morning on the question of reasonableness, but  
14 I will simply say this that I think the case  
15 law requires that you simply take a reasonable  
16 person's position and say based on what we  
17 know, which is Mr. Etherly is a Member of the  
18 Board of Directors for this organization and  
19 this organization took a position on a matter  
20 that is in some respects broadly related to  
21 the issue of charter schools and their ability  
22 to locate in the District of Columbia.

23 Would a reasonable person expect

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1 or be convinced that a bias exists?

2 You know, again I'm walking  
3 through the test and trying to kind of build  
4 up the case before I kind of take shall we say  
5 positions. And to an extent, I want to be  
6 very careful in how I express my positions  
7 because I recognize again, I'm participating  
8 in the discussion and I'm the subject of that  
9 discussion. But I think in terms of my look  
10 at the case law, an important inquiry here is  
11 would a reasonable person believe or think  
12 that bias would exist by virtue of D.C. Action  
13 of Children's participation by expressing an  
14 opinion that did not come before the Board.

15 I would say it is arguable. I  
16 would say it is arguable. As some of the case  
17 law looks, the case law doesn't presume a  
18 reasonable person to necessarily be a civic  
19 expert, someone who is deeply steeped in  
20 community affairs. So I am not looking at it  
21 from the standpoint of would a reasonable ANC  
22 Commissioner think that. The ANC Commissioner  
23 is oftentimes privy to much more information

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1 than perhaps a member of the general public.

2 Some of the case law that I found  
3 doesn't suggest that a reasonable person has  
4 to know every conceivable fact. So I am more  
5 than comfortable simply saying that that is an  
6 arguable point. It is one that perhaps I  
7 would encourage some discussion from my  
8 colleagues as we move through the discussion  
9 of this case. Again, the case law, as  
10 recorded in the NCR case, NCRC case, the facts  
11 must be such that if true, would convince a  
12 reasonable person that a bias exists.

13 I think in this regard, however,  
14 the word facts refer to the facts that are  
15 alleged in the allegation of bias. And again,  
16 as I indicated in the discussion on the first  
17 prong, I'm a little concerned that other than  
18 the fact that I am a Member of the Board of  
19 Directors, there is not a whole lot of meat on  
20 the bone here. But I am asking my colleagues  
21 to hold that somewhat in abeyance, because  
22 ultimately I think the goals of ensuring  
23 judicial impartiality and assuring that there

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1 is no impropriety in any judicial decisions,  
2 quasi-judicial or otherwise, I think there is  
3 some larger, larger goals here that I want to  
4 get to before perhaps passing my  
5 -- offering my own judgment on the test.

6 And then finally the third prong  
7 of the test is the facts must show that the  
8 bias is personal as opposed to judicial in  
9 nature. In this regard, I've struggled with  
10 trying to figure out exactly oftentimes how  
11 that is interpreted. With respect to D.C.  
12 Action's position on the broad issue before  
13 the Zoning Commission, I think the Chair is  
14 absolutely correct in what she indicated that  
15 those are in fact two very different  
16 proceedings. In terms of the ultimate,  
17 overall question that the Zoning Commission  
18 and we were dealing with from a matter of law,  
19 I felt those questions to be very different.

20 But with respect to did D.C.  
21 Action for Children's communication in any way  
22 for -- what's the word I'm looking for,  
23 indicate or suggest that I would perhaps be

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1 predisposed to a particular outcome in the  
2 case before us. Again, I think it is  
3 arguable. I would submit that I don't believe  
4 it did, especially since I had no knowledge  
5 and should not have had any knowledge of the  
6 action of one of our employees in this regard.  
7 I don't think that there's enough there to  
8 suggest that the bias is personal as opposed  
9 to judicial in nature.

10 That is kind of the first part of  
11 the test, and again, the Chair walked through  
12 that. I'm taking a little bit of a longer  
13 walk through it, but I'm suggesting that we  
14 take our inquiry a little further. And as is  
15 indicated in the Morrison case, generally it  
16 has been recognized that the same rules  
17 require recusal of judicial officers are  
18 applicable to administrative officers who act  
19 in an adjudicative or quasi-judicial capacity.  
20 So I took a look at the Code of Judicial  
21 conduct for the District of Columbia Courts,  
22 readily available online if you go to the D.C.  
23 Superior Court Website.

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1           I believe that there are two  
2           canons in that code that are on point with  
3           respect to this issue. One, which is general  
4           and one which speaks more to the issue of  
5           Judges as members of Boards of Directors in  
6           civic and charitable organizations. None of  
7           them necessarily offer, and I will be sure to  
8           highlight this, none of them offer I think a  
9           dispositive resolution to the ANC's concerns,  
10          but I think they specifically speak to the  
11          types of issues that are raised by the ANC.

12                 Canon 2 reads "a Judge should  
13                 avoid impropriety and the appearance of  
14                 impropriety in all of the Judge's activities."  
15                 Clause A reads that "a Judge shall respect and  
16                 comply with the law and shall act at all times  
17                 in a manner that promotes public confidence in  
18                 the integrity and impartiality of the  
19                 judiciary."

20                 Now as I have looked at the case  
21                 law under the appearance of impropriety  
22                 standard, and there is quite a bit of it,  
23                 there's quite a bit of discussion under it.

1 The American Bar Association recently dealt  
2 with proposed changes to that standard, which  
3 prompted quite a bit of discussion, all of  
4 which is readily and easily available online,  
5 especially if you are up at 2 a.m. in the  
6 morning taking a look at it.

7 The issue of the appearance of  
8 impropriety is very critical, however, because  
9 it does not require that there be an actual  
10 impropriety. It simply says the appearance.  
11 Moreover, the case law that I have found  
12 supports that it doesn't matter that the Judge  
13 or the quasi-judicial official knew of the  
14 impropriety. And that's very important. I  
15 want to be sure to state that on the record  
16 here that as I have looked at this issue, this  
17 is such an important consideration for the  
18 judiciary that simply the appearance of  
19 impropriety is strongly, strongly, strongly  
20 repudiated here.

21 That's Canon 2. I'm going to  
22 highlight the two canons and then I will come  
23 back for further discussion. The other canon

1 which I believe is on point here is Canon 4C3,  
2 which reads that "a Judge may serve as an  
3 officer, Director Trustee, or non-legal  
4 advisor of an organization or governmental  
5 agency devoted to the improvement of the law,  
6 the legal system, or the administration of  
7 justice or of an educational, religious,  
8 charitable, fraternal, or civic organization  
9 not conducted for profit subject to the  
10 following limitations and the other  
11 requirements of this code."

12 In relevant continuation, 4C3A  
13 reads "a Judge shall not serve as an officer,  
14 director, trustee, or non-legal advisor if it  
15 is likely that that organization (1) will be  
16 engaged in proceedings that would ordinarily  
17 come before the Judge, or (2) would be engaged  
18 frequently in adversary proceedings in the  
19 Court of which the Judge is a member or in any  
20 Court subject to the appellate jurisdiction of  
21 the Court of which the Judge is a member."

22 Broadly speaking, I'm going to  
23 deal with Canon 4C3 first and then move back

1 to Canon 2, because I think Canon 2 is the  
2 much broader, more aspirational discussion.  
3 But broadly speaking, Canon 4C3 in my research  
4 has been read to mean that Judges can in fact  
5 participate in extra-judicial activities of a  
6 civic nature. They simply have to be  
7 monitored very, very, very closely and  
8 oftentimes that monitoring has to be updated  
9 on a regular basis because of the changing  
10 nature of some organizations and their  
11 relationship to the law may make it necessary  
12 for a Judge to regularly reexamine their  
13 activities. I'm reading directly from the  
14 commentary to rule 4C3.

15 With respect to D.C. Action for  
16 Children, as I look at 4C3, I most certainly  
17 do not believe that D.C. Action for Children  
18 would be engaged in proceedings that would  
19 ordinarily come before me and my capacity as  
20 a Member of the Board of Zoning Adjustment.  
21 I simply have never seen it in my experience.  
22 I have never seen it come before the Board,  
23 the issue of land use issues as they relate to

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1 impacts on children and the District of  
2 Columbia. So from the standpoint of my  
3 thinking whether it would be likely for D.C.  
4 Action to appear before us, I found it to be  
5 very unlikely.

6 Secondly, I would submit to my  
7 colleagues that I find it very unlikely that  
8 D.C. Action would frequently be engaged in  
9 adversary proceedings of any nature before  
10 this body or before the Zoning Commission. It  
11 is very unusual for the organization to  
12 participate, again, in a land use or zoning  
13 matter. But just because I don't have  
14 knowledge of it ever happening during my  
15 tenure as a Board Member or during the  
16 organization's history, again I don't think is  
17 dispositive of the question that is presented  
18 by the ANC. But I am simply offering my  
19 interpretation as it relates to the  
20 application of 4C3.

21 With respect to Canon 2, again a  
22 Judge shall avoid the impropriety and the  
23 appearance of impropriety in all of the

1 Judge's activities. I think this is the area  
2 that merits quite a bit of discussion in  
3 addition to those elements that were  
4 identified in the NCRC decision and the  
5 Morrison v. Board of Zoning Adjustment  
6 decision. Again, that is the issue of the  
7 appearance of impropriety. As the chair  
8 indicated in quoting from Lilliberg v. Health  
9 Services, which is one of the key seminal  
10 Supreme Court Cases, U.S. Supreme Court cases  
11 on this issue, "Courts have repeatedly held  
12 that positive proof of the partiality of a  
13 Judge is not a requirement, only the  
14 appearance of impartiality. Further, what  
15 matters is not the reality of bias or  
16 prejudice, but its appearance."

17 So what I think we have at the end  
18 of the day, Madam Chair, and my colleague, Mr.  
19 Mann, is the test that's laid forth under our  
20 NCRC discussion and in Morrison directly, the  
21 three- prong test, facts must be alleged, must  
22 be material and stated with particularity, the  
23 facts must be such that if true would convince

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1 a reasonable person that a bias exists, and  
2 the facts must show that the bias is personal  
3 as opposed to judicial in nature. We have  
4 that and I think we have Canon 2, which speaks  
5 broadly to the concern about the appearance of  
6 impropriety.

7 I need to pause there for a  
8 moment, Madam Chair, because I have thrown a  
9 lot at my colleagues in terms of the  
10 discussion, but again I wanted to walk very  
11 slowly through what I think are some of the  
12 relevant code issues and legal test issues in  
13 this matter and perhaps open it up for further  
14 questions as we kind of parse through the  
15 facts here.

16 At the end of the day, I'll now  
17 offer my opinion on what I think the outcome  
18 should be. I think as I have looked at all of  
19 this jurisprudence, and as I have looked at  
20 the ANC's concerns that were expressed in  
21 their motion, as I look at the facts of the  
22 case here, I would hope that it is very clear  
23 to all parties involved that at the outset of

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1 that case, the Apple Tree case, I want it to  
2 be very certain that it was absolutely  
3 understood that I had a longstanding  
4 affiliation with a charter school and with the  
5 charter school movement here in the District  
6 of Columbia. I wanted to put that up front,  
7 first, and foremost. I wanted to indicate, as  
8 I did, the past affiliation between my charter  
9 school and Apple Tree, which had long since  
10 ended well before the case came before this  
11 Board. But I want it to be very clear that  
12 the general public, as well as the parties,  
13 had an opportunity to express any concerns  
14 with regard to those affiliations.

15 Quite frankly, I felt that that  
16 would have been a very obvious opportunity to  
17 get at any concerns about recusal or personal  
18 bias. Not because I felt I couldn't be  
19 impartial, but because I felt simply it was  
20 just entirely too obvious. You are the Chair,  
21 or your have chaired the Board of Directors  
22 for a charter school. You have nurtured that  
23 charter school. In many respects, that

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1 charter school was my alma mater, because it  
2 predecessor was the Math Science Program at  
3 Ballou Senior High School. Is it an  
4 institution that I am tremendously passionate  
5 about, and I want to be clear about that  
6 affiliation at the outset.

7 But there were no concerns raised  
8 about my continued participation. But again,  
9 that is not the question here. The question  
10 put forth by the ANC is well, if we had known  
11 however that an organization of which you were  
12 part of the Board of Directors expressed an  
13 opinion before the Zoning Commission on this  
14 broader issue of charter schools, we might  
15 have perhaps taken a different position.

16 Again, that is where I think the  
17 appearance of partiality or the appearance of  
18 impropriety is perhaps most significant for  
19 our discussions here. I'm going to pause  
20 there, Madam Chair.

21 Again, I have thrown quite a bit  
22 at my colleagues, but I think that is a fairly  
23 exhaustive discussion in highlight fashion for

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1 the most part, of some of the key factors  
2 dealing with the issues of judicial bias,  
3 dealing with the issue of appearance of  
4 impropriety, and I think we're at a point  
5 where we can begin looking at the facts and  
6 applying them to this test and perhaps seeing  
7 where we are at the end of the day.

8 CHAIRPERSON MILLER: I just want  
9 to ask you one question before I start to do  
10 that. Did you find that there  
11 is a different test for appearance of  
12 impropriety versus the test I read for recusal  
13 on the basis of alleged bias? Or are they the  
14 same standards, material and stated with  
15 particularity, if true, would convince a  
16 reasonable person that a bias exists. And  
17 three, facts must show that the bias is  
18 personal as opposed to judicial in nature.

19 VICE CHAIRPERSON ETHLERLY: I  
20 would suggest in looking at the appearance of  
21 impropriety standard, that there is a somewhat  
22 broader reading that some have referred to as  
23 a totality of circumstances inquiry. Others

1 have looked at, you know, is there  
2 circumstantial appearance of impropriety. I  
3 would say to the best of my knowledge in  
4 looking at the jurisprudence, that it is a  
5 somewhat broader read, that it is a somewhat  
6 broader read. I think that is by design  
7 because of the critical nature of this  
8 particular rule and the absolute dedication to  
9 assuring that our judicial decisions are above  
10 question, are above partiality and are beyond  
11 taint, beyond taint according to the  
12 reasonable person's perspective.

13 So as I have looked at the  
14 jurisprudence, I would say that it is perhaps  
15 a different and somewhat broader inquiry as  
16 opposed to the three standards that were noted  
17 in the Morrison case. So I am suggesting in  
18 terms of the prism that we look through in  
19 looking at the ANC's allegation on this count,  
20 that we look at the Morrison standard. I  
21 think the two codes of judicial conduct in  
22 Canon 2 and Canon 4 are broadly applicable,  
23 because as Morrison indicated the rules

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1 requiring the recusal of judicial officers are  
2 applicable to us, so I think Canon 2 and Canon  
3 4 need to be looked at. Canon 2 gets us to  
4 that broader jurisprudence around the  
5 impropriety standard and how it has been dealt  
6 with. Again, it is not a crystal clear  
7 standard. It is a very difficult one to look  
8 at.

9 CHAIRPERSON MILLER: Okay, and  
10 actually I have also, I've referenced in my  
11 notes D.C. Canon 3E1, which talks in relevant  
12 part about a Judge disqualifying himself or  
13 herself in a proceeding which a Judge's  
14 impartiality must reasonably questioned. So  
15 I think perhaps we're looking at maybe broader  
16 facts, but the standards really I think go to  
17 reasonableness and for a bias.

18 What I see in this case is that  
19 the ANC come across something which I think  
20 does raise a red flag, and I think that's  
21 really though just the beginning, and if they  
22 were aware of that earlier they would have  
23 raised it at the hearing and you would have

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1 responded at the hearing.

2           What has happened now is that they  
3 found it later and they raised it and you have  
4 responded to it, so I think at this point  
5 we're now at the juncture of evaluating the  
6 bigger picture. I don't think it is enough to  
7 say that this email then shows that you are  
8 likely to be biased in this case, personally,  
9 that that is enough. Particularly when I have  
10 heard you say that you weren't even aware of  
11 the email, that the issues that Board and the  
12 organization deals with are very broad  
13 relating to children, and that this particular  
14 issue that was before the Board is not really  
15 a subject of this email.

16           We don't even know if the  
17 organization took any position on it. There's  
18 no evidence on the record of that. There is  
19 no evidence of bias in this case that's been  
20 even alleged. We had a whole hearing. We had  
21 a whole deliberation and there isn't any  
22 pointing in the record to instances of what  
23 you may have said or questions you may have

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1 asked during the hearing or anything that  
2 shows a bias.

3 So in my view, what the ANC has  
4 presented is enough to raise a flag, but it is  
5 not enough to be grounds for recusal, Just  
6 looking at recusal. I will turn to Mr. Mann  
7 in a minute. We're doing these little  
8 speeches here. But also, we're not even  
9 talking about just recusal now. We're talking  
10 about vacating your vote and there hasn't been  
11 any showing that there was a risk of injustice  
12 to the parties in this case, and that denial  
13 of the relief produced injustice in other  
14 cases or that it will undermine the public's  
15 confidence in the judicial process.

16 I think the process is working as  
17 it is intended. I think had ANC found this  
18 email and you had responded otherwise or the  
19 facts had lead to other conclusions, then at  
20 this point I might have supported recusal, but  
21 based on the facts that you have put in the  
22 record, I don't see that grounds exist.

23 VICE CHAIRPERSON ETHLERLY: I will

1 perhaps before Mr. Mann jumps in. One, there  
2 is a clarification at OAG, Ms. Glaser offered,  
3 that I want to make sure that I emphasize. I  
4 think I have touched upon it earlier, but that  
5 is the issue that as we look at kind of this  
6 broader standard, it is a fairly discretionary  
7 look, but it is one which I am advocating that  
8 we absolutely take into consideration here.

9           Again, as Morrison indicates,  
10 Morrison sets forth the three-prong test that  
11 we have been talking about here: the facts  
12 with particularity; the facts must be  
13 substantive, true, which would convince a  
14 reasonable person that a bias exists. The  
15 facts must show the bias is personal.

16           Morrison also speaks broadly to  
17 the code of the judicial conduct as also being  
18 applicable to quasi-judicial officers and then  
19 that's essentially kind of where Morrison  
20 stops. But I've gone much further in terms of  
21 looking at some of the 455 jurisprudence under  
22 the U.S. Code, some of the 144 stuff, because  
23 I think it all grapples with this appearance

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1 question and it all grapples with the bias  
2 question. And much of the language tracks  
3 what you see in the judicial code. Much of  
4 the language tracks some of the jurisprudence.  
5 One of the -- it's somewhat of a commentary on  
6 the appearance of impropriety standard, but  
7 I'll provide some of the comment to you to  
8 help perhaps further elucidate an answer to  
9 the question which you ask which is is there  
10 a difference in terms of the test. And I'm  
11 going to read some of this commentary into the  
12 record because it speaks a little bit to how  
13 you look at the appearance of impropriety --  
14 or how it has been looked at across varying  
15 jurisdictions. So it may be helpful to  
16 further elucidate, perhaps how my colleagues  
17 may want to deal with this particular  
18 question.

19 And it reads, and I'm reading from  
20 -- just so others might be able to find the  
21 article if they want to pull it, it's from the  
22 July/August 2005 issue of Judicature.  
23 Judicature is spelled J-U-D-I-C-A-T-U-R-E. I

1 apologize for not recalling the name of the  
2 society or the organization to which the  
3 magazine belongs. I want to say I believe  
4 it's the American Judicature Society and as I  
5 ascertained from some of my research it  
6 appears as though it was a society, it is a  
7 society that was very much engaged in  
8 expressing an opinion about proposed changes  
9 to the appearance of impropriety standard.  
10 But it's an article that appears in the  
11 July/August 2005 issue by Cynthia Gray titled  
12 "Avoiding the Appearance of Impropriety, With  
13 Great Power Comes Great Responsibility." And  
14 it's a commentary on how Judges must  
15 demonstrate their commitment to maintaining  
16 public confidence in the integrity and  
17 impartiality of their decisions by considering  
18 how the public might reasonably view their  
19 conduct. In its discussion of the appearance  
20 of impropriety standard it reads as follows:  
21 "In a literal approach to the appearance of  
22 impropriety standard, judicial discipline  
23 cases often start with the improprieties to

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1 find in the code and then proceed if an actual  
2 violation is not proven to consider whether  
3 the Judge created the appearance of a  
4 violation. In other words, an appearance of  
5 impropriety is found if notwithstanding the  
6 absence of proof of any actual or intended  
7 impropriety the Judge's conduct 'inescapably  
8 created a circumstantial appearance of  
9 impropriety.' Similar pronouncements of the  
10 rule provide that an appearance of impropriety  
11 is established if a reasonable person would be  
12 justified in suspecting that the Judge  
13 violated the code in having an 'undispelled  
14 suspicion of actual impropriety or believing  
15 that an impropriety is afoot.'"

16 The article continues to read that  
17 "a crucial element of the appearance of  
18 impropriety standard is the consideration of  
19 whether the conduct was readily avoidable. In  
20 other words, whether there were reasonable  
21 precautions the Judge could have taken to  
22 avoid creating the appearance of impropriety.  
23 Cases have described the reasonable person as

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1 'a reasonably intelligent and informed member  
2 of the public, an objective observer and the  
3 average person encountered in society. Other  
4 formulations emphasize what a reasonable  
5 person is not, not the Judge himself or  
6 herself, not a well-trained lawyer, not a  
7 highly sophisticated observer of public  
8 affairs and not a cynic skeptical of the  
9 government and the Courts. Perhaps the most  
10 evocative variation characterizes the  
11 reasonable person as neither excessively  
12 indulgent nor excessively jaundiced."

13 That's just a little bit of the  
14 discussion from that article on the appearance  
15 of impropriety standards, so again, in answer  
16 your question, Madam Chair, about whether or  
17 not there are kind of differences in the test.

18 As I looked at the judicial code  
19 with respect to some of the factors that have  
20 been identified as grounds for  
21 disqualification, and I'm reading from what is  
22 Canon 3E on disqualification and I apologize  
23 if I have my cite incorrect, but I believe

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1 it's Canon 3E, "a Judge shall disqualify  
2 himself or herself in a proceeding in which  
3 the Judge's impartiality might reasonably be  
4 questioned including, but not limited to  
5 instances where (a) the Judge has a personal  
6 bias or prejudice concerning a party or a  
7 party's lawyer or personal knowledge of  
8 disputed evidentiary facts concerning the  
9 proceeding; (b) the Judge served as a lawyer  
10 in the matter in controversy or lawyer with  
11 whom the Judge previously practiced law,  
12 served during such association as a lawyer  
13 concerning the matter, or the Judge has been  
14 a material witness concerning; (c) the Judge  
15 knows that he or she individually or as a  
16 fiduciary or the Judge's spouse, parent, or  
17 child were ever residing or any other member  
18 of the Judge's family residing in the Judge's  
19 household has an economic interest in the  
20 subject matter in controversy, or in a party  
21 to the proceeding or has any other more than  
22 de minimis interest that could be  
23 substantially affected by the proceeding, the

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1 Judge or the Judge's spouse or person within  
2 the third degree of relationship to either of  
3 them or spouse of such a person as party to  
4 the proceeding is acting as a lawyer, is known  
5 by the Judge to have more than a de minimis  
6 interest that could be substantially affected  
7 by the proceeding, or is to the Judge's  
8 knowledge likely to be a material witness in  
9 the proceeding."

10 Those are some of the specific  
11 grounds under disqualification. I think  
12 again, it's not dispositive on the question.  
13 I think most squarely we're probably in the  
14 orbit of talking about Section A which speaks  
15 to the Judge, has a personal bias or prejudice  
16 concerning a party or party's lawyer. And I  
17 think the concern again is the ANC's  
18 consideration of my role as a Board Member of  
19 D.C. Action for Children setting forth  
20 potentially a ground for a personal bias with  
21 regard to a particular outcome.

22 So again, I'm going to pause there  
23 and invite further deliberation and

1 discussion.

2 CHAIRPERSON MILLER: I just want  
3 to make a general point because I think we've  
4 gone really far in covering all aspects of  
5 disqualification, grounds for recusal and the  
6 allegation talks about conflicts of interest  
7 and I don't think that that's evident there at  
8 all, that there was a conflict of interest  
9 with your being on this D.C. Action for  
10 Children and participating on this case.  
11 That's not what's meant by a conflict of  
12 interest. That often goes to financial  
13 matters and things like that. But I think  
14 what the ANC does mean is that probably a  
15 personal bias, so I think that the standards  
16 are that I stated from the NCRC case for  
17 Morrison are the ones that do apply.

18 Mr. Mann, did you want to address  
19 any of the standards, what you think with  
20 respect to what Mr. Etherly has said?

21 MEMBER MANN: Well, if the Chair  
22 would like to hear my opinion, I'm certainly  
23 going to express an opinion on this whole

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1 subject. I don't have any particular  
2 questions regarding this. I thought that it  
3 was very helpful for Mr. Etherly to lay out  
4 just the plain facts of the case and quite  
5 frankly I thought what the facts of the case  
6 have been laid just on its face I was  
7 convinced that there was no bias or conflict.  
8 I simply did not have any problem knowing the  
9 full range of facts.

10 It was particularly helpful then  
11 to put it into the context of this legal  
12 framework and these legal tests to see what  
13 the Courts have said about this and what other  
14 judicial bodies would have to say about the  
15 way that you would evaluate this. And putting  
16 it into that context though I'm further  
17 persuaded that there is no conflict and no  
18 bias and I certainly don't object to Mr.  
19 Etherly's continued participation in this  
20 case.

21 CHAIRPERSON MILLER: Thank you. I  
22 think we spent a lot of time on this issue and  
23 I don't know if you want to add any more, Mr.

1 Etherly, but I'm certainly -- I think I've  
2 already said it, probably, that I don't  
3 believe that the tests have been met for  
4 either that you should have recused yourself,  
5 that you didn't even know about the action and  
6 I don't want to repeat myself, and that also  
7 to vacate your order that those tests have not  
8 been met either. But I understand why the ANC  
9 brought this up and I think it is enough to  
10 raise a flat, but not enough to vacate your  
11 vote.

12 VICE CHAIRPERSON ETHLERLY: Thank  
13 you, Madam Chair. I'd be more than  
14 comfortable offering some opinion now on  
15 everything that I've laid out and I appreciate  
16 the time of both my colleagues and of the ANC  
17 in bringing this matter forward. And again,  
18 as I said at the outset of my remarks and I  
19 believe I would be fairly sure my colleagues  
20 would share my opinion in that I think this  
21 has been time very well spent and I wanted to  
22 err, I came into this room prepared to err on  
23 the side of spending just as much time as we

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1 have, if not even more, being very clear in  
2 our understanding of what some of the relevant  
3 jurisprudence and case law says on this issue,  
4 but really speaking to what I think ultimately  
5 at the end of the day is a concern on the part  
6 of the ANC that there may be some appearance  
7 of impropriety or some broad personal bias  
8 here. I simply do not believe that to be the  
9 case, not only in terms of the context of the  
10 relevant legal test here, but simply the  
11 understanding of what D.C. Action did, which  
12 I had absolutely no knowledge of. If I had I  
13 would have absolutely disclosed it, but I have  
14 no knowledge of their participation in any way  
15 in the Zoning Commission's activities or the  
16 expression of an opinion on what the Zoning  
17 Commission was doing.

18 I am very confident that I should  
19 not have had any reason to know. If it had  
20 been discussed at a board meeting, if it had  
21 been agendaized for discussion by the board,  
22 and I had not attended, I wouldn't see that as  
23 excusing me from being responsible for knowing

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1 as a Board Member what the organization was  
2 doing. But I simply have found no evidence to  
3 suggest that the discussion ever came before  
4 the Board in any meeting that I would have  
5 been or should have been or was, in fact, a  
6 participate in.

7 With respect to the appearance  
8 aspect of it, that is what troubled me the  
9 most here because I think the case law is  
10 fairly clear that at the end of the day it is  
11 a step that the Judge, him or herself, must  
12 ultimately take and review on a consistent  
13 basis. And so here my biggest and most  
14 greatest concern was though I believe there  
15 clearly to be no facts which would indicate a  
16 bias or an appearance or an actual  
17 impropriety, the standard still says there  
18 should be no appearance of it. And it's there  
19 where I grapple with the whole reasonable  
20 person aspect of it. And it is indeed highly  
21 arguable that a reasonable person knowing what  
22 we know may very well think oh, well, there's  
23 an appearance there. There's an organization

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1 he's part of the board of and they express  
2 something.

3 And I absolutely have struggled with  
4 that.

5 On the law and on the face of it,  
6 I think the outcome is arguable, but fairly  
7 clear that there was no impropriety here, but  
8 I think again the issue of appearance is the  
9 one that is most arguable. As I look at the  
10 language from Morrison which is probably, not  
11 probably, which is most directed to us as  
12 quasi-judicial members, it reads that a Judge  
13 must recuse himself when his alleged bias  
14 arises from a source outside the four corners  
15 of the courtroom and results in an opinion on  
16 the merits on some basis other than what a  
17 Judge has learned from his participation in  
18 the case. That inquiry is meant to, of  
19 course, be applied prospectively, but all we  
20 can do here is look retrospectively.

21 Retrospectively, I can absolutely  
22 say without a shadow of a doubt that my  
23 decision in the case rested squarely on what

1 took place in the four corners of this room  
2 and in the context of our proceedings. One,  
3 because I had no knowledge of D.C. Action for  
4 Children's expression of an opinion on the  
5 case and had no reason to have any knowledge  
6 of that. Two, obviously, but I will state it  
7 anyway, had no outside discussions with  
8 anybody involved in the case or any exposure  
9 to information or argument that appeared  
10 outside of the context of the case.

11 But I will say just as we move  
12 forward, the issue of the appearance is one  
13 that I simply take very, very seriously.  
14 Quite honestly, Madam Chair, I'm struggling  
15 with it.

16 CHAIRPERSON MILLER: Well, let me  
17 see if I can help you on that then. Because  
18 the way I read the law -- you're struggling  
19 with this question of appearance, but we're  
20 not considering just this email or action of  
21 the organization on its own. We look at that  
22 action plus what you have just said on the  
23 record and then that's the whole picture.

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1 Then we can look at the standard, what a  
2 reasonable person then be convinced that a  
3 bias exists.

4 I believe Mr. Mann is of the same  
5 view that I am that no, not based on this  
6 whole picture would we think that a bias  
7 exists or that a reasonable person would think  
8 a bias exists. I'm not sure the ANC would  
9 either. I think the ANC only had half the  
10 picture.

11 VICE CHAIRPERSON ETHLERLY: And  
12 Madam Chair, I would tend to agree with you on  
13 that interpretation and that is ultimately the  
14 direction that I was moving towards. But I  
15 most certainly want to be honest that I think,  
16 and I think we're all being here. I'm not  
17 implying any lack of honestly. But at the end  
18 of the day, all of what we have talked about  
19 recognizes the difficulty in parsing this  
20 stuff out.

21 One of the articles that I looked  
22 at talked about the nature of public service  
23 and the fact that oftentimes as public

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1 servants, many of us are brought to boards and  
2 commissions because of either outside  
3 affiliations or because of our broader  
4 knowledge and expertise with regard to a wide  
5 range of issues. And at the same time, it is  
6 exactly that broader knowledge and experience  
7 and network of relationships that sometimes  
8 may give rise to the appearance of impropriety  
9 or conflicts of interest.

10 I want it to be sure that I  
11 acknowledge that and that I spoke to that.  
12 Again, I think very clearly that I am firmly  
13 in agreement with you with regard as the  
14 Supreme Court indicated in a 455 discussion is  
15 whether a reasonable person, knowing all the  
16 facts and circumstances, would question a  
17 Judge's impartiality. I am convinced that  
18 with the discussion of the facts and the  
19 circumstances that we've had on the record  
20 here surrounding this communication,  
21 surrounding my understanding of it, my lack of  
22 knowledge of it, and the fact that I would not  
23 have any reason to be aware of it, I think I

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1 am hopeful that the facts would support a  
2 finding that there is really no question of my  
3 impartiality in this case.

4 CHAIRPERSON MILLER: Let me just  
5 take this one step further. Even if knowing  
6 what you know now and you weren't even aware  
7 of that email or action before, say you did  
8 know that and then you decided well, out of  
9 utmost caution so as not to create any  
10 appearance of impartiality, you would recuse  
11 yourself.

12 That is a different question that  
13 what is before us now, because the Court has  
14 said that once there has been an order and a  
15 hearing in which you have participated in, if  
16 you were to now decide to vacate your vote,  
17 the standard is different. The standard is a  
18 risk of injustice to the parties in the case,  
19 risk the denial of the relief of produced  
20 injustice in other cases and risk of  
21 undermining the public's confidence in the  
22 judicial process.

23 Now, the ANC has not addressed

1 that, but I would say that in situations like  
2 ours, where there are five Board Members and  
3 taking one out affects how the vote is,  
4 etcetera, actually doing something like that  
5 often creates an injustice to the other party  
6 because it may change the outcome of a case.  
7 To do that in which there has been no bias  
8 found at all I think does create an injustice  
9 to the other parties and I think it can also  
10 risk undermining the public's confidence in  
11 the judicial process because I don't believe  
12 that the ANC is doing that in this case, but  
13 it might encourage other parties to try to  
14 knock off Board Members later whose votes they  
15 didn't like based on something that they might  
16 dig up after the fact.

17 I think that's a very bad way to  
18 go. So I don't see any grounds for this  
19 recusal. Again, I just want to say or  
20 disqualification that I also think it was the  
21 right thing for the ANC to bring this out and  
22 that you have a chance to address it and  
23 there's probably nothing more important to

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1 this Board than its integrity and if any of  
2 the Board Members also felt that there was  
3 something wrong here, that you were biased,  
4 the Board Members themselves would be seeking  
5 that. I don't have anything  
6 further to say. I'm ready to go onto the next  
7 issue unless either of you have further  
8 comments.

9 VICE CHAIRPERSON ETHLERLY:  
10 Nothing further, Madam Chair.

11 I would as a procedural matter  
12 perhaps just inquire as to how you want to  
13 approach this. I would perhaps suggest  
14 dealing with the motions seriatim as we've  
15 started. I think as you've mentioned at the  
16 outset, because obviously we have to get  
17 through this first question before proceeding  
18 to the other ones. So if it is appropriate to  
19 act on the motion?

20 CHAIRPERSON MILLER: I don't think  
21 so. I don't think so because there is one  
22 motion before us for reconsideration, and that  
23 if we find there are grounds for

1 reconsideration as we go through this, then we  
2 will vote at the end and see where we are.

3 I think we have thoroughly  
4 exhausted the discussion on you. I would like  
5 to go to the discussion on Mr. Griffis next  
6 because he also was alleged to have had a  
7 conflict of interest in this case and the ANC  
8 says that then Chair Chairman Griffis failed  
9 to disclose that he was a member of two  
10 charter schools if I have that correct? Let's  
11 see.

12 VICE CHAIRPERSON ETHLERLY: Yes.

13 CHAIRPERSON MILLER: And that they  
14 would have asked for his disqualification had  
15 they known and that somehow his membership in  
16 those charter schools tainted our  
17 deliberations. Okay, unfortunately we do not  
18 have Mr. Griffis to give the other side of his  
19 story because he is no longer a Member of the  
20 Board.

21 So what we have are the standards  
22 and the evidence or allegation presented by  
23 the ANC with respect to Mr. Griffis.

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1 I would say that you know, again  
2 we're talking about vacating somebody's vote  
3 and I don't believe that the standards are met  
4 at all, just as yours. But also with respect  
5 to him in particular we don't know why he  
6 didn't do it, again that's a red flag but I  
7 don't think that the ANC has gone far enough  
8 to then show any bias on his part in the  
9 proceedings.

10 We have a full record again of  
11 deliberation and how he conducted the hearing.  
12 Often, I've read these cases dealing with bias  
13 and they talk about how the Judge was biased  
14 and he did certain things and he wouldn't  
15 allow in certain evidence, etcetera, and  
16 certainly the Chairs in that position of  
17 directing the proceedings and there is no  
18 evidence here that he did anything that shows  
19 any bias or that he had any information  
20 outside the four corners of the court room.

21 Any other comments?

22 VICE CHAIRPERSON ETHLERLY: No, I  
23 would tend to agree, Madam Chair.

1           I think ultimately on these  
2 questions it is -- there are two concerns to  
3 be balanced, and I believe that they are both  
4 equally critically. One of course again is  
5 the issue of assuring that the Board's  
6 decisions are absolutely above question and  
7 reproach. But I think also the case law that  
8 I have looked at has really looked at the  
9 issue with regard to as one Circuit put it,  
10 the Tenth Circuit, that a Judge not recuse  
11 himself simply on unsupported, irrational, or  
12 highly tenuous speculation.

13           I'm not using any of those  
14 qualifiers to refer to the ANC's concerns in  
15 this regard, but I think what's a critical  
16 part of this inquiry is that there must  
17 absolutely be solid, credible facts that would  
18 speak to a concern about bias and ultimately  
19 at the end of the day what we're left with  
20 here is the concern about a board membership  
21 and the allegation that just by virtue of that  
22 board membership, one is biased.

23           The ANC is absolutely correct in

1 that I made the disclosure, but that was a  
2 determination for me to make personally based  
3 on my own understanding and my relationship  
4 with the particular charter school institution  
5 in question and how much I had been involved.  
6 It may have indeed and I am absolutely not  
7 going to speculate what was in Mr. Griffis'  
8 head or what should have been or could be in  
9 his head with regard to his own disclosure.  
10 But I think again, the case law is very clear  
11 that the flip side of the coin is just as  
12 important and that is that you don't knock off  
13 judicial officers or quasi-judicial officers  
14 simply based on speculation or the conjecture  
15 or presumption without clear particularity and  
16 detail and that is simply what we are lacking  
17 here.

18 I just simply can't find anything  
19 that would suggest that ultimately the bright  
20 line of rule is by simple virtue of the fact  
21 that you are on the Board of a civic or  
22 charitable organization, you are inclined or  
23 will tend to act or decide in a certain way.

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1                   So I would tend to agree with you  
2                   on your assessment, Madam Chair.

3                   CHAIRPERSON MILLER: I probably  
4                   should not rush through these. I think we  
5                   could just go through the standards perhaps  
6                   and then move on.

7                   The first is that the facts must  
8                   be material and stated with particularity. In  
9                   my opinion, the fact that he is on two charter  
10                  schools is perhaps material. We were  
11                  considering an issue that affected some  
12                  charter schools, but there is no connection  
13                  then to how those charter schools, being on  
14                  the Board of those, led to bias in his or  
15                  would necessarily lead to a bias.

16                  Just as you said, you can be in  
17                  charter schools and disclosed it and nobody  
18                  raised a concern about that per se because it  
19                  doesn't lead directly to a bias or a conflict  
20                  of interest with the issue that we were  
21                  discussing. I don't believe that the facts --  
22                  it's true, okay, if I take that as true that  
23                  he was on these charter school boards, that

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1 that convinces me that there would be a bias,  
2 just as I am not convinced that you had a bias  
3 just because you were on charter school board.

4 Not being convinced as a bias, you  
5 can't even get to the next step that it is  
6 personal as opposed to judicial. And again,  
7 I would say that going to the U.S. Supreme  
8 Court case when you're talking about vacating  
9 an order, there has been no showing or  
10 addressing of a question about risk of  
11 injustice to parties or the denial of relief  
12 or produced injustice in other cases or  
13 undermine the public's confidence in the  
14 judicial process. In fact, probably the  
15 opposite effect would be true because -- I  
16 mean, it's exactly the point that the ANC was  
17 making. If you take off Mr. Griffis and Mr.  
18 Etherly from deliberations, then we didn't  
19 have a quorum and the order doesn't have  
20 effect. So that's a pretty drastic result for  
21 very little evidence if any that shows bias.  
22 And I don't see any evidence of bias.

23 VICE CHAIRPERSON ETHLERLY: I

1 would continue to agree, Madam Chair.

2 Under some of the jurisprudence  
3 that I have looked at, as I talk to the issue  
4 of what precisely, what type of interest  
5 precisely would be supporting the nature of  
6 bias and in the Bumpus v. Uniroyal Tire case  
7 that I mentioned, actually, strike that, in  
8 the United States versus Morrison case, it's  
9 a Second Circuit case, but in discussing the  
10 interest that was at issue in that case, the  
11 Court ruled that where an interest is not  
12 direct but is remote, contingent, or  
13 speculative, it is not the kind of interest  
14 which brings into question the Judge's  
15 impartiality.

16 I think here the argument again  
17 stripped down to its barest essentials is  
18 simply by virtue of the fact that one is a  
19 member of a charter school board, he or she  
20 would be inclined to rule or order in a  
21 certain way because that charter school at  
22 some point may be the beneficiary of the  
23 activity that is at issue before the Judge.

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1           I think that is precisely the type  
2 of contingent or remote or speculative  
3 interest that is not at issue or is not ripe  
4 for the discussion of a Judge's impartiality.  
5 But rather it needs to be direct, and by that  
6 I think an appropriate material fact would  
7 have been if either my charter school or the  
8 charter school that Mr. Griffis -- the two  
9 schools that Mr. Griffis allegedly were  
10 affiliated with, and I'm only using allegedly  
11 because we don't have him here to confirm or  
12 deny.

13           But if those schools were in fact  
14 pending some type of activity that would have  
15 been impacted by very tenuously the Zoning  
16 Commission's action or by our decision, that  
17 I think would move us in the direction of  
18 getting to material facts that have some  
19 particularity to them. But I think at the end  
20 of the day, the presumption or the argument  
21 here is that just by virtue of the fact that  
22 you were on a charter school board, the broad  
23 brush of bias and partiality therefore applies

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1 and attaches to you.

2 I simply think that is not the  
3 outcome that is contemplated under the  
4 jurisprudence as it relates to bias. It has  
5 to be direct and not remote, contingent, or  
6 speculative. I think to find bias in this  
7 instance requires us to infer some facts that  
8 are simply not offered in the record.

9 CHAIRPERSON MILLER: I agree. I  
10 mean, I think if they had said something like  
11 well, these schools are on non-conforming lots  
12 and they want to make an addition or something  
13 or even if they were on something, not just  
14 the fact that they are charter schools. It's  
15 just too unconnected.

16 Do you have any comments?

17 MEMBER MANN: I have no additional  
18 comments. I agree with the position of the  
19 Chair and Mr. Etherly.

20 CHAIRPERSON MILLER: Okay, then I  
21 suggest we move to the second grounds. At  
22 least, I have identified this as the second  
23 one. If we could look at the issue where they

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1 say that the BZA failed to consider the clear  
2 intent of Zoning Commission Order 0606. The  
3 BZA failed to reconcile statutes that failed  
4 to be in conflict, rendering a more recently  
5 adopted regulation meaningless.

6 I think this is perhaps the meat  
7 of the appeal in this whole case. I would say  
8 that that's not true, that we did not consider  
9 this and I'm going to read from our order  
10 specifically where we did. We stated at one  
11 point, accordingly, the only issues before the  
12 Board with respect to the lot requirements are  
13 whether the subject property is exempt from  
14 the public school lot requirements set forth  
15 in 401.3 and whether the property complies  
16 with all other provisions of the Zoning  
17 regulations.

18 The new public school regulations,  
19 while amending several regulations in Chapter  
20 4, including 401.3, in particular leave 401.1  
21 intact. The Zoning Administrator and the  
22 parties in opposition ask this Board to treat  
23 the admission to amend this regulation as an

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1 oversight on the part of the Zoning Commission  
2 and to read the inapplicability of 401.1 to  
3 buildings used for public schools as  
4 consistent with the Zoning Commission's intent  
5 with respect to the new public school  
6 regulations.

7 The Board notes that the Zoning  
8 Commission specifically reviewed the  
9 regulations in Chapter 4 when adopting the new  
10 regulations, and that 401.1 was a part of the  
11 regulatory scheme that it was reviewing.  
12 Further, there is evidence in the record that  
13 this specific issue was brought to the  
14 attention of the Office of Planning prior to  
15 final action.

16 Accordingly, the Board finds that  
17 it is beyond its purview to assume that the  
18 admission to amend 401.1 was an oversight on  
19 the part of the Zoning Commission. As stated  
20 by the Chair of the Zoning Commission in  
21 participating in this decision to the extent  
22 that 401.1 is ultimately inconsistent with the  
23 Commission's intent, but remains meaningful on

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1 its terms, then it is the flaw of the  
2 Commission interacting and enacting the  
3 rulemaking, not an area of interpretation for  
4 the Zoning Administrator.

5 The Board further recognizes that  
6 any such flaws of rulemaking are not for the  
7 Board to fix in an appeal case, but rather  
8 within the authority of the Zoning Commission  
9 to correct in a rulemaking proceeding.

10 Now I can see the frustration on  
11 the part of the ANC in that it is certainly,  
12 there is certainly evidence that the Zoning  
13 Commission didn't intend the result that  
14 happened. But what we said was we looked at  
15 those regulations and we said you know, we  
16 can't fix it and the Zoning Administrator  
17 can't read in a fix either that that is the  
18 authority of the Zoning Commission to fix.

19 I was looking at their filing and  
20 I thought, you know, they said that there is  
21 new evidence and this new evidence was showing  
22 that the Zoning Commissioner's intent, that  
23 401, not .1, did not defeat the newer

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1 regulation. But it takes more than intent to  
2 give authority to the Zoning Administrator or  
3 the Board to read a regulation that is clear  
4 on its face.

5 It is not enough for the Zoning  
6 Commission to say look, this is what we  
7 intended. They have to translate their intent  
8 into a regulation through the legislative  
9 process. That means that there is an  
10 opportunity for a notice and comment, and  
11 that's how regulations are enacted. They  
12 cannot just be interpreted the way we think  
13 that the Zoning Commission really wanted them  
14 to be, but didn't make them that way.

15 When you are talking about  
16 legislative intent, I was looking at the rules  
17 of statutory construction, and basically where  
18 the rules of the statute are clear, the  
19 judicial inquiry is complete. That's what the  
20 Court says. With limited exceptions,  
21 unambiguous statutory language trumps all  
22 other considerations.

23 We didn't find any ambiguity in

1 401.1. All we found was that the Zoning  
2 Commission perhaps wished that it had made  
3 changes to it but didn't and it is now in the  
4 process of doing that through the regulatory  
5 process. So it is not for this Board to jump  
6 in and say oh, you don't have to do that,  
7 we'll just read it this way. We'll reconcile  
8 the two regulations the way we think you  
9 wanted them to be. We have to look at each  
10 regulation and if they are not ambiguous, we  
11 have to read them based on the clear meaning  
12 of the words.

13 So number one, I would say yes, we  
14 did look at the intent of both and the intent  
15 of the Commission and just reiterate that you  
16 know, we're bound by our authority and we  
17 interpret the law. We don't make the law and  
18 the Zoning Commission, as the chair who was  
19 sitting here said, it is up to them to fix  
20 something if there is a flaw and their failure  
21 to enact maybe what they wished they had  
22 enacted with respect to the public school  
23 regulations.

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1 Any comments?

2 MEMBER MANN: I agree entirely  
3 with what you just said and the analysis of  
4 that. I also agree that this is beyond the  
5 first issue that we discussed this morning,  
6 perhaps the most important aspect of this  
7 case.

8 When this appeal was first filed  
9 and without even reviewing the record, it did  
10 give me cause to think oh gosh, I wonder if  
11 that's, you know, did we do the right thing.

12 As I read through all the filings,  
13 as I read through the decision that we made,  
14 I come to the conclusion that we absolutely  
15 went through the correct thought process and  
16 the correct analysis and came to the right  
17 conclusion for all the reasons that you just  
18 reiterated, so I won't go back other those.  
19 But it is not our place to try to figure out  
20 what somebody meant to say or might have meant  
21 to say or to get into their head. We know  
22 what they did say and we know what the law  
23 does say and we have to apply that law. We

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1 can't just go in and arbitrarily decide that  
2 we think something should have been when it is  
3 not written that way.

4 CHAIRPERSON MILLER: Yes, I  
5 actually did struggle with this one until I  
6 realized, until I went back and looked at the  
7 cases and statutory construction and etcetera,  
8 you use intent or you look to intent only when  
9 you have an ambiguous regulation or statute.  
10 You can't figure out what it means and then  
11 you look at the whole intent to try to help  
12 you figure it out.

13 In this case, we knew what each  
14 regulation meant and so did the Chair of the  
15 Zoning Commission who sat here and said oh,  
16 okay, we need to take more legislative action.

17 Okay, so I think we concur on that  
18 and we will move onto the next issue I have  
19 identified is that an objection that there  
20 were findings of fact that weren't presented  
21 before at the hearing.

22 Findings of fact actually are  
23 addressed in 3121 of our regulations, and

1 3121.2 says that there should be submitted  
2 within such time as the presiding officer may  
3 direct, which in any event shall not be less  
4 than seven days after the transcript is  
5 delivered to the Office of Zoning.

6 So findings of facts are not ever  
7 presented at the hearing, but I think that the  
8 ANC objected to the fact that in the finding,  
9 in these findings of fact was a fact that  
10 wasn't addressed at the hearing per se. They  
11 ask -- they said that we should have a re-  
12 hearing so they could have the opportunity to  
13 dispute it and the facts that proceeded from  
14 it in our finding of facts.

15 Okay, basically the findings of  
16 fact dealt with the parking regulations that  
17 were in effect I believe in 1973. It was a  
18 public record what this was and the appellants  
19 submitted in their proposed finding of fact,  
20 as we had been discussing at the hearing, what  
21 were the prior uses, what were the regs that  
22 were applied, and they later put this fact in.  
23 I don't see any grounds for a re-hearing on

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1 this. I think in a motion for a  
2 reconsideration, if the appellant wanted to  
3 dispute this fact that this was in fact not  
4 so, this was the opportunity to do it in their  
5 motion for reconsideration that there was an  
6 error and then bring it to our attention and  
7 then we could decide whether we needed a  
8 hearing.

9 I think it is unlikely, and this  
10 is a matter of public record fact that we are  
11 talking about. So I don't see any reason for  
12 a re-hearing on this issue.

13 MEMBER MANN: I agree.

14 VICE CHAIRPERSON ETHLERLY: I also  
15 agree, Madam Chair.

16 CHAIRPERSON MILLER: Okay, the  
17 next issue I have identified is that the  
18 subsequent Zoning Commission case has rendered  
19 this decision moot. They are referring to the  
20 proposed action that is being taken by the  
21 Zoning Commission to actually, I guess, amend  
22 or clarify or whatever the problem that arose  
23 in this case, that was spotted in this case

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1 with respect to the regulation. In any event,  
2 the regulation isn't in effect yet and it is  
3 not law.

4 Our regs say that no regulation is  
5 in effect until published in the D.C.Register.  
6 That's 11 DCMR 3028.9. Therefore, the current  
7 regulation is still in effect and therefore  
8 the case is not moot.

9 Let's see. Finally, I think that  
10 they alleged that there is a new fact that  
11 Apple Tree is not a public charter school.

12 Do you want to address that?

13 MEMBER MANN: Well, I am sure that  
14 you will have perhaps a different framework to  
15 put this in, but it just seems to me that that  
16 is not much different than many cases that we  
17 see under a lot of different circumstances  
18 where there is a lot of parallel processes,  
19 regulatory and review processes that  
20 applicants have to go through. Typically, we  
21 would see, for example, historic preservation  
22 review that may or may not precede before a  
23 hearing before the Board of Zoning Adjustment.

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1           But I mean there is a lot of  
2 different regulatory processes that applicants  
3 have to go through and there is no definitive  
4 information given regarding which one they  
5 have to go through first. So if you are, I  
6 don't know, a restaurant for example, you  
7 might require a liquor license. Where are you  
8 going to get the liquor license before or  
9 after you have gone to BZA and before you've  
10 gotten various approvals.

11           So I don't see this as much  
12 different than any other case where people  
13 have to seek special or seek several different  
14 permits or levels of review.

15           CHAIRPERSON MILLER: Yes, I think  
16 in fact the Chairman of the Zoning Commission  
17 also made that comment in their proceedings.  
18 Also, I looked at our regs to the extent that  
19 I could see what else is germane to this  
20 question and I believe it was 3202 which  
21 talked to proposed uses and compliance with  
22 this title in order to get a building permit.  
23 Because the ANC here were saying that they

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1       couldn't get a building permit unless they had  
2       authorization by PCSB for a charter school.

3               I don't believe that is really  
4       true. I think you have to be the owner to get  
5       a permit and then you present your proposed  
6       uses and show your compliance with the title.  
7       So I think you are right. You don't have to  
8       show that you are a charter school, per se,  
9       even though you may be seeking use as a  
10      school. So I don't see any grounds for that  
11      allegation.

12             So any other comments? I think we  
13      have gone through them.

14             (Pause.)

15             At this point, I'm going to make a  
16      motion to deny the motion for reconsideration  
17      to Appeal Number 17532 of Apple Tree Institute  
18      for Education Innovations, Inc., pursuant to  
19      Section 3126, the regulations.

20             MEMBER MANN: Second.

21             CHAIRPERSON MILLER: Is there  
22      further discussion?

23             VICE CHAIRPERSON ETHLERLY: Madam

1 Chair, just as we move towards dealing with  
2 the motions, again I want to kind of emphasize  
3 two points. One which is and this is not, I  
4 can't think of what the informal phrasing is  
5 for it. This is not a -- you hear the  
6 expression crocodile tears, which are meant to  
7 suggest that tears are not honest. And so I  
8 don't want this to be viewed as a crocodile  
9 compliment. I said it earlier and I will say  
10 it again that I want to thank the ANC for the  
11 excellent work they have done and continue to  
12 do on planning and zoning issues.

13 And I mean that in all  
14 seriousness. It would be very easy and I  
15 recognize, of course, that there is quite the  
16 level of public scrutiny with regard to this  
17 particular case, and scrutiny that will extend  
18 to members of the media, members of the press,  
19 and I think it is very important that as  
20 especially with respect to my participation in  
21 this case, and I say and I say repeatedly that  
22 I thank ANC for its work and for the questions  
23 that they have raised here.

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1                   Clearly, my position on the  
2                   outcome of all of these counts are contrary to  
3                   what the ANC believes the record and the facts  
4                   and the law to dictate. But I believe on all  
5                   of these counts as it relates to the concerns  
6                   that have been raised by the ANC, I think we  
7                   have dealt with them in extraordinary detail  
8                   and rightfully so. So I want to again make  
9                   that compliment.

10                   Secondly, I'm going to simply  
11                   close on the issue of recusal again, because  
12                   I think it again is so important that at the  
13                   end of the day there was perhaps one bit of  
14                   language that I found which I think very  
15                   adequately sums up how I have tried to  
16                   approach this question and resolve it as it  
17                   relates to my participation both in the past  
18                   with respect to this case as well as going  
19                   forward. I would like to just share that in  
20                   the record as we kind of close and then I want  
21                   to be done.

22                   It comes from a slip opinion in a  
23                   case out of Pennsylvania. Again, it speaks

1 ultimately to how one from Federal Judge  
2 standpoint, but the principles are all very,  
3 very transferable and applicable here. It  
4 wraps up a discussion of 144 and 455. Again,  
5 Section 144 of 28 USC deals with personal  
6 bias. Section 451 of 28 USC deals with the  
7 appearance of impropriety. And it reads as  
8 follows: it says "one additional point needs  
9 to be made in the interest of wise judicial  
10 administration.

11 Both sections describe a process  
12 designed to ensure not only the fact, but also  
13 the appearance of impartiality in our Courts.  
14 Section 144, in particular, is quite powerful  
15 requiring recusal on the basis of bare  
16 allegations and unadjudicated facts. When  
17 used in good faith, these provisions serve to  
18 strengthen the public's confidence in the  
19 administration of justice.

20 When misused or used for improper  
21 purpose, they can cause great harm."

22 Let me pause here in the reading  
23 in that and say that I am not in any respects

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1 suggesting that they were misused or used for  
2 improper purposes here. It continues to read  
3 that "in the final analysis, it is the  
4 willingness of the Judge so accused to make  
5 time in the judicial calendar to work through  
6 the allegations, dispassionately about the  
7 facts and fairly as to the law that best  
8 protects the system of justice from the  
9 corrosive effects of Judge shopping by  
10 litigants."

11 Again, I am not suggesting that  
12 that is what we have here. "Although at times  
13 it may seem appealing or even wise to yield to  
14 another Court on the premise that the  
15 allegations of impartiality are a distraction  
16 to the main event, to do so while a short-term  
17 expedient will reward the culprit, punish the  
18 other parties to the litigation, and encourage  
19 the tactic of Judge shopping. It is thus  
20 'vital to the integrity of the system of  
21 justice that a Judge not recuse himself on  
22 unsupported, irrational, or highly tenuous  
23 speculation.'" Those quotes from this

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1 opinion are coming from a 10 Circuit Case,  
2 Hinman v. Rogers.

3 I offer that final word on the  
4 issue of recusal again, not to put the ANC's  
5 considerations in the context of any of those  
6 questionable motives. There is no belief on  
7 my part that the ANC is motivated by anything  
8 other than the concern for making sure this  
9 Board's decision in this particular instance,  
10 as it should be in all instances, rises above  
11 reproach and question.

12 But I think what those final words  
13 in that particular case highlight is that  
14 there are two sides to this coin, both in  
15 terms of the commitment to ensuring that  
16 decisions are without partiality and without  
17 bias and favor, but also in ensuring that when  
18 we raise these critical and very important  
19 questions, that we delve into them with the  
20 utmost of care and concern and attention to  
21 detail. That is the motivation, that is the  
22 approach, and that is the framework that I  
23 would try to apply and suggest to my

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1 colleagues as we've looked at the question of  
2 recusal.

3 So I simply wanted to offer that  
4 final closing snapshot with regard to my  
5 perspective on how we have tried to approach  
6 these issues. Clearly, we are coming to a  
7 different outcome, not only on that count but  
8 all of the accounts that are raised by the  
9 ANC. But I think it is important to have that  
10 added perspective because the issue of  
11 impartiality is so absolutely critical to what  
12 this Board and any Board or Commission in this  
13 city does moving forward.

14 Thank you, Madam Chair.

15 CHAIRPERSON MILLER: Thank you. I  
16 guess I just want to make a philosophical  
17 comment as well. I would like to say that I  
18 recognize the hard work that the ANC has done  
19 and their great concern with this issue and  
20 their obvious frustration with the process.  
21 What I want to clarify is that we don't make  
22 decisions on the basis of what we would like  
23 the outcome to be. We, as a Board, are

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1 obliged to apply the law as we understand it  
2 and in the long run, I think it is adherence  
3 to the law is what is in the public interest.

4 I will just say that for the most  
5 part, for the ANC's benefit, because I want  
6 them to realize that that's what we're doing.  
7 We're interpretating the regulations the way  
8 we truly believe we are required to do under  
9 the legal standards.

10 Okay, are we ready for a vote? Do  
11 we have anymore comments? Okay, all those in  
12 favor say aye.

13 (Chorus of ayes.)

14 All those opposed? All those  
15 abstaining?

16 Mr. Moy?

17 MR. MOY: Yes, ma'am. The staff  
18 would record the vote as 3-0-2. This is on  
19 the motion of the Chair, Ms. Miller, to deny  
20 the motion to appeal Number 17532 of Apple  
21 Tree. Seconding the motion, Mr. Mann and in  
22 support of the motion Mr. Etherly. We have  
23 Carol Mitten not present, not voting and

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1 another Board Member not participating.

2 CHAIRPERSON MILLER: Okay, thank  
3 you. Anything else on the agenda for this  
4 public meeting?

5 VICE CHAIRPERSON ETHLERLY: Madam  
6 Chair, if I may, I want to come back to one of  
7 the comments that you made at the outset and  
8 that is the impending departure of our  
9 esteemed colleague Mr. Mann. I want to say  
10 not only as Vice-Chair, not only as a  
11 colleague on this Board, but I hope after what  
12 has been a dynamic and oftentimes challenging  
13 experience on a daily basis here, as we all  
14 grapple with the issues, I hope I speak as a  
15 friend when I say to Mr. Mann that he will be  
16 sorely, sorely missed, that his loss is indeed  
17 a loss for this body.

18 It is indeed, as the Chair  
19 indicated, a rotation and it is one that  
20 happens on a regular basis. But there are  
21 times when you have the opportunity to work  
22 with someone whom you have come to enjoy and  
23 respect and appreciate, personally and

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1 professionally, and Mr. Mann and I haven't  
2 seen eye-to-eye all the time. More times than  
3 not, we find ourselves in the same posture on  
4 the same outcome. But his perspective, his  
5 ability to look at our cases and to argue his  
6 positions passionately, as well as  
7 dispassionately, has been greatly, greatly  
8 appreciated.

9 I am happy to say that he  
10 continues to be a Ward 6 resident and one who  
11 fortunately doesn't live too far from me, so  
12 I hope to from time-to-time find him out and  
13 about enjoying all there is to enjoy about  
14 Ward 6, especially in our Southeast/Southwest  
15 waterfront area. I also understand he will  
16 not be going too far from what he is currently  
17 doing and will continue to bring his expertise  
18 to bear on behalf of the residents of the  
19 District of Columbia and his continued service  
20 with the Federal Government.

21 So with all of that, that's a  
22 beautiful long-winded way of saying Mr. Mann,  
23 I'm going to miss you. I am going to miss

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1 your presence on Tuesdays, your perspective,  
2 your laughter, your cheesy jokes from time to  
3 time. But you most certainly sorely, sorely  
4 be missed. But we are going to continue to  
5 look out for you and we look forward to  
6 working with you in the future in all of your  
7 endeavors, which continue to inure to the  
8 benefit of the residents of the District of  
9 Columbia. So Mr. Mann, you got to speak.

10 MEMBER MANN: Thank you for your  
11 comments, Mr. Etherly, and thank you for your  
12 comments earlier Madam Chair. It has been  
13 really a pleasure and an honor to serve on the  
14 Board and it certainly has been a tremendous  
15 learning experience. It has been terrific to  
16 work with both my fellow Board members, the  
17 Zoning Commission Members and the staff of  
18 Office of Planning, Office of Zoning, and I  
19 certainly look forward to crossing paths with  
20 you in the future. Thanks.

21 CHAIRPERSON MILLER: Okay, well I  
22 think we can continue our good-byes property  
23 in executive session.

1 (Laughter.)

2 CHAIRPERSON MILLER: But thanks  
3 again. Yes, you will definitely be sorely  
4 missed but I know that you will do great  
5 things where you put your energies. So okay,  
6 I am going to adjourn this meeting.

7 (Whereupon, at 12:16 p.m., the  
8 meeting was concluded.)

9  
10  
11  
12