GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

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TUESDAY

JULY 24, 2004

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

ZONING COMMISSION MEMBER PRESENT:

ANTHONY HOOD	Zoning Commissioner

OFFICE OF ZONING STAFF PRESENT:

Beverley Bailey	Zoning Specialist
John Nyarku	Zoning Specialist

D.C. OFFICE OF CORPORATION COUNSEL:

Lori Monroe, Esq.

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

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(9:33 a.m.)

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

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

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

I am going to be very concise in this

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

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

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

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

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

Do we have any business before us this morning?

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

CHAIRPERSON GRIFFIS: If you would, please.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

people now bringing this motion against me.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you very much.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Hood.

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

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

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

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

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

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

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

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

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

MEMBER ETHERLY: Thank you. I thank you

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

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

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

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

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

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

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

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

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

What I would offer as the next step here

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

Mr. Zaidan.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MEMBER ETHERLY: Thank you very much, Mr.

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

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

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

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

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

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

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

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

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

Let me actually reverse there. The

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MEMBER ZAIDAN: Mr. Etherly?

MEMBER ETHERLY: Yes?

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

Secondly, just to touch again on this

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

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

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

With respect to --

COMMISSIONER HOOD: A clarification, Mr. Chairman.

MEMBER ETHERLY: Yes.

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

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

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

MEMBER ZAIDAN: Yes.

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

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

COMMISSIONER HOOD: The final vote.

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

COMMISSIONER HOOD: All right.

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

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

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

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

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

I want to be very clear that the movants

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

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

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

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

Mr. Zaidan or Mr. Hood, anything further?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSIONER HOOD: I will second it.

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

(No response.)

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

(Chorus of ayes.)

MEMBER ETHERLY: Opposed? Abstentions?

(No response.)

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

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

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

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

I appreciate the engagement and passion of my colleagues with regard to that particular aspect of the motion.

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

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

Once, again, the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

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

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

MEMBER ZAIDAN: Can you repeat that?

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

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

MEMBER ETHERLY: Okay.

Mr. Hood?

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

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

COMMISSIONER HOOD: Mr. Chairman?

MEMBER ETHERLY: Yes.

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

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

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

commitment of this body, the commitment of this Board and its members to ensuring that the process is held beyond any type of question or any type of suggestion of impropriety.

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

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

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

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

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

It is here, perhaps, that I take a more nuanced approach but nevertheless finding in my own opinion that there is not an undermining of the public's confidence here but, in fact, a reaffirmation

of this body's commitment to a fair, open, and impartial process.

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

What is so critical here is that I do not, speaking as an individual, I do not want to set the precedent that personal attacks on integrity are to be awarded, and perhaps I step out on a limb somewhat

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

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

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

on integrity.

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

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

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

standpoint to offer Liljeberg in support of that, but I think that in my assessment of the third prong, the risk of undermining the public's confidence, I think that inquiry is something of a two-way street.

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

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

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

that's due process.

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

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

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

one.

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

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

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

There is a wealth of commentary on this issue, but I think it's Judge Friedman's comments which perhaps summarize very expertly what I am

attempting to get at with respect to this particular last prong.

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

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

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

Judge Friedman continues to write: "In my

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

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

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

one." Judge Paul Friedman.

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

COMMISSIONER HOOD: Second.

MEMBER ZAIDAN: Second.

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

COMMISSIONER HOOD: Mr. Zaidan.

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

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

COMMISSIONER HOOD: I just have one question. Also what was submitted -- I don't know if this is the appropriate venue to do this, but there is an issue about the enrollment of 120 which was -- actually I voted to deny any expansion of the enrollment, and I wanted to make sure it was clear, and I think Board Member Zaidan, on page -- I don't know what page it is, but in the supplement to the motion to disqualify Chairman Griffis and to vacate votes taken May 9th, I think it's the third -- page 3.

It mentions something I think that you asked be incorporated in the order, and I just wanted to make sure that that was where we were before we close out on this.

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

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

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

COMMISSIONER HOOD: A hundred and twenty, right?

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

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

MEMBER ZAIDAN: And just --

MEMBER ETHERLY: Yes.

MEMBER ZAIDAN: And just to kind of I guess maybe -- you know, we have laid out a lot of philosophical references and good philosophical discussion here, but I think, like a lot of the things that come before us, this issue comes down to the fact that this city is doing pretty well right now. D.C. is definitely in a renaissance, and unfortunately this

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

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

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

If there is no further discussion on the

motion, I would like to ask for the vote. All those in favor, please signify by saying aye.

(Chorus of ayes.)

MEMBER ETHERLY: Opposed? Abstentions.

(No response.)

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

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

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

I would like to thank my colleagues for what has been a very difficult discussion but a very important one. I would like to thank the members of the public for your engagement. I think it is safe for me to say that the Board has spoken very clearly, very cogently, and unequivocally with regard to its distaste for the tactics that have been engaged. Once again, that is in complete acknowledgement of the appropriateness of questioning the judiciary that acts as the arbiters of the great questions of our day.

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

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

Thank you. We stand adjourned.

(Whereupon, at 10:52 a.m., the special public meeting adjourned.)