

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

SPECIAL PUBLIC MEETING

+ + + + +

TUESDAY,

OCTOBER 18, 2005

+ + + + +

The special public meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 10:15 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

OFFICE OF ZONING STAFF PRESENT:

|                |                   |
|----------------|-------------------|
| CLIFFORD MOY   | Secretary         |
| BEVERLY BAILEY | Zoning Specialist |

D.C. OFFICE OF THE ATTORNEY GENERAL STAFF PRESENT:

LORI MONROE, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

TRAVIS PARKER  
JOHN MOORE  
JOEL LAWSON

This transcript constitutes the minutes from the special meeting held on October 18, 2005.

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## AGENDA ITEM

## PAGE

CALL TO ORDER:

Geoffrey Griffis. . . . .3

PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE:

APPLICATION NO. 16566F. . . . .3

VOTE ON MOTION TO APPROVE AND CERTIFY . . . . .8

TWO PROPERTIES LIMITED

APPLICATION NO. 17367 . . . . .9

VOTE ON MOTION TO APPROVE . . . . .26

E. L. HAYNES PUBLIC CHARTER SCHOOL

APPLICATION NO. 17376 . . . . .27

VOTE ON MOTION TO APPROVE . . . . .43

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

(10:17 a.m.)

CHAIRPERSON GRIFFIS: Good morning. Let me call to order our 18 October 2005 special public meeting. We have several things on the agenda this morning. In this public meeting, three petitions are before us.

Why don't we move to say a very good morning, Ms. Bailey and also Mr. Moy. Mr. Moy, if you wouldn't mind calling the first case for decision this morning?

SECRETARY MOY: Yes, sir. Good morning, Mr. Chairman, members of the Board. The first case for decision is the certification of the revised campus plan docketed by the Board of Zoning Adjustment to application number 16566F, as in Foxtrot, of the president and directors of Georgetown College pursuant to 11 DCMR 3104.14, a special exception for the review and approval of the university campus plan, years 2000 to 2010, under section 210 in the R-3 and 2-1 districts at premised owned by Grover Archibald Parkway to the west, National Park Service property along the Chesapeake and Ohio Canal and Canal Road to the south, 35th Street, N Street to 36th Street, and 36th Street to P Street to the east and Reservoir Road

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1 to the north. I'm going to map-cite these squares and  
2 lot numbers -- that is in the case folders -- for a  
3 time this morning, Mr. Chairman.

4 I'll, finally, add that the Board convened  
5 this special public meeting to certify the revised  
6 university campus plan. On September 27th, 2005 after  
7 deliberation, the Board requested that the applicant  
8 provide a more complete campus plan by including its  
9 off-campus Student Affairs Program and the Alliance  
10 for Local Living Program, which would respond to  
11 conditions 3 and 7 of the corrective order on remand.  
12 The applicant filed on October 4th, 2005. And it's  
13 enclosed in your case folders under exhibit 301.

14 That completes the staff's briefing, Mr.  
15 Chairman.

16 CHAIRPERSON GRIFFIS: Thank you very much,  
17 Mr. Moy.

18 It is a long history on this one. I think  
19 we can be very succinct and direct, frankly, and make  
20 up some time. However, for clarity, Mr. Moy, I  
21 appreciate the history that you've laid out.

22 Obviously we have looked at this, reviewed  
23 it. The last really issue for the Board was to make  
24 sure that all of those aspects that it had reviewed  
25 and approved in the master plan, campus plan I should

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1 say, were actually put together in one of the  
2 bindings, essentially, of the campus plan.

3 We sent this back out for additional  
4 comment if required. We have had none. We do have  
5 this submission from the university that I think is  
6 excellent.

7 Looking through again this week, looking  
8 for those aspects that we were specifically looking  
9 at, and then rereading some of those that we haven't  
10 dealt with in a long time, it is, again, I should say,  
11 an impressive document.

12 The code of conduct goes into so many  
13 specificities it's, frankly, impressive, but I don't  
14 want to belabor the point. I think our limited aspect  
15 for today's deliberations has been put before us. And  
16 I'll open it up for any other specific comments or  
17 deliberation on this.

18 VICE CHAIRPERSON MILLER: Mr. Chairman, I  
19 would just like to note that I think the latest  
20 submission does detail the programs, policies, and the  
21 procedures based upon a variety of determinants.

22 Specifically, there is a reference to  
23 addressing the impacts in the neighborhoods that are  
24 necessary. And I think it demonstrates the  
25 university's commitment to addressing the problems in

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1 the surrounding neighborhoods.

2 And so I'm prepared to go ahead.

3 CHAIRPERSON GRIFFIS: Excellent. Is  
4 there a second?

5 MEMBER ETHERLY: Second, Mr. Chair.

6 CHAIRPERSON GRIFFIS: Excellent. Very  
7 well. Is there additional deliberation or others?  
8 Mr. Etherly? Mr. Mann? Other comments?

9 (No response.)

10 CHAIRPERSON GRIFFIS: If there are no  
11 further comments, we do have a motion before us to  
12 certify, approve and certify, the revised campus plan.  
13 It has been seconded.

14 I would ask that all of those in favor of  
15 the motion signify by saying "Aye."

16 (Whereupon, there was a chorus of "Ayes.")

17 CHAIRPERSON GRIFFIS: And opposed?

18 (No response.)

19 CHAIRPERSON GRIFFIS: Outstanding. Very  
20 well. Mr. Moy, if you wouldn't mind recording the  
21 vote?

22 SECRETARY MOY: Yes. The staff would  
23 record the vote as 4 to 0 to 1 on the motion of the  
24 vice chair, Ms. Miller, to certify the revised campus  
25 plan, seconded by Mr. Etherly, also in support of the

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1 motion Mr. Mann and Mr. Griffis, the chair. And we  
2 have no Zoning Commission member participating on this  
3 case.

4 CHAIRPERSON GRIFFIS: Excellent. Thank  
5 you very much, Mr. Moy.

6 Why don't we move on, then, call the next  
7 case for the BZA for this morning.

8 SECRETARY MOY: The next case is  
9 application number 17367 for Two Properties Limited,  
10 pursuant to 11 DCMR 3103.2 for a variance from the use  
11 provisions to renovate and convert a vacant building  
12 formerly used as a private school into a four-unit  
13 condominium apartment building under subsection 320.3  
14 and variances to allow an elevator to be installed  
15 within an existing nonconforming closed court and to  
16 allow a parking pad to be constructed at the rear of  
17 a nonconforming structure under 403 and subsection  
18 2001.3 in the R-3 district at premises 2129 F Street,  
19 Northwest, parking square 25-32, lot 13.

20 On September 27th, 2005, the Board  
21 completed public testimony on the application. The  
22 Board scheduled its decision on October 18th, 2005.  
23 At a special public meeting, the Board requested the  
24 following post-hearing documents: one, a supplemental  
25 report from the Office of Planning.

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1 And that was filed. And it's identified  
2 in your case folders as exhibit 26 and a response from  
3 the applicant, which has also been filed and is in  
4 your case file, identified as exhibit 27.

5 The Board is back on the merits of the  
6 application. And staff concludes its briefing, Mr.  
7 Chairman.

8 CHAIRPERSON GRIFFIS: Excellent. Thank  
9 you very much, Mr. Moy.

10 Let's open it right up, Board members. We  
11 had received at the end, as Mr. Moy has indicated,  
12 additional information and also had requested further  
13 information. We do have the submissions, supplemental  
14 reports, and response to the Office of Planning  
15 supplemental report, exhibit number 27.

16 Let me invite people to speak to the  
17 application.

18 VICE CHAIRPERSON MILLER: Mr. Chairman,  
19 this case involves both a use variance and area  
20 variances. And the test of the use variance and the  
21 area variance are the same, especially two of the  
22 elements, the issue of uniqueness and the issue of  
23 substantial detriment. So I think I'd like to address  
24 the use variance first. And those two elements will  
25 go to both, though.

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1           There is an issue of whether or not this  
2           is a unique or exceptional circumstance. We have  
3           evidence in this case that to me establishes that it  
4           is a six-story building that has been used as a school  
5           and they are seeking to use it to get it back to a  
6           residential use. And the issue is whether or not this  
7           would be feasible to be put back into a single family  
8           residence, which is the matter of why we are here.

9           Even the Office of Planning, which opposes  
10          the use variance, found that as a six-story building,  
11          it was unusual. And, in fact, they even said unheard  
12          of for a single family residence.

13          There was evidence in the record that  
14          compared it to other buildings in the neighborhood,  
15          but it seems to me that the Office of Planning had  
16          just conceded that this was, in fact, unusual.

17          And also the applicant, who was -- I think  
18          we qualified him as an expert in real estate, as a  
19          relator in residential real estate, said that he had  
20          never seen a six-level single family residence before.

21          So then we get to the question of undue  
22          hardship, which is the standard, which is the second  
23          test for a use variance. The applicant in this case  
24          submitted evidence that he could not sell.

25          They put it on the market, and it wouldn't

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1 sell for a matter of right use or for any of the uses  
2 allowed as a special exception, including schools.  
3 And it was on the market for three and a half months.

4 And I think we have to determine whether  
5 three and a half months is a sufficient amount of time  
6 to establish that it couldn't be sold that way. In my  
7 view, that seems to be reasonable in a good real  
8 estate market.

9 I don't know whether there was evidence  
10 that other homes would sell quickly during the same  
11 period of time. There was evidence that it was  
12 financially infeasible to create two or three units in  
13 the building because of the building size and layout,  
14 the renovation costs, and the real estate market.

15 I think that the applicant in this case  
16 presented evidence that, actually, he was going to be  
17 living in one of the units and would be actually  
18 taking a loss in this case. So it's not a case where  
19 it's a question of someone being able to make more  
20 money for the use variance. And this is in a source  
21 where demolition is not an option.

22 Applicant cited Palmer for the proposition  
23 that a use variance is justified that a property can't  
24 be put to any conforming use with a fair and  
25 reasonable return therefore.

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1 And I think also Downtown Cluster v. D.C.  
2 BZA also supports that, in which the court has found  
3 that historical and interesting market conditions and  
4 circumstances affecting the decline in traditional  
5 downtown stores has made it impossible to find another  
6 user for the building which strictly complies with the  
7 zoning regulations.

8 I guess I'll go through my next question,  
9 and then anybody else can, you know, jump in. And  
10 that's a question of substantial detriment. And I  
11 think in this case it's a positive impact, as opposed  
12 to substantial detriment. The building used as a  
13 school, which has a much greater impact on traffic  
14 than would a four-unit condominium.

15 And we looked at the question of whether  
16 or not it was inconsistent with the comprehensive  
17 plan. And I don't think it is based on the evidence  
18 that has been presented.

19 It's being converted to a residential use  
20 from a school usage to be more compatible with a  
21 comprehensive plan in accordance with the word, one,  
22 "objective: to stimulate the production of new and  
23 rehabilitating housing."

24 It's consistent with other Board-approved  
25 conversion to multi-family dwelling units in the

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1 neighborhood. And those decisions were attached to  
2 the applicant's pleading.

3 It's interesting in this case the Office  
4 of Planning in their supplemental report actually did  
5 support a use variance, but they said only to a flat.

6 To the question of whether two more units  
7 actually would have such a negative impact on the  
8 comprehensive plan, I don't see that.

9 CHAIRPERSON GRIFFIS: Excellent. Thank  
10 you very much. I think that sets the discussion up  
11 very well and aptly.

12 I wanted to make a quick comment on some  
13 of the court cases that you actually cited. The  
14 Downtown Cluster was a fascinating one. And I think  
15 it's a good read also.

16 Palmer speaks to that issue additionally.  
17 And Palmer does say that the purpose of granting a  
18 variance can be looked at in order to prevent unused  
19 or vacant or under-used or boarded-up, one might say,  
20 properties.

21 And so it does go into the confluence of  
22 issues that we need to look at of whether there is a  
23 reasonable return that would not be a matter of right  
24 use for this property because certainly the  
25 regulations are not written with the intent to keep

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1 places dark or unused. So I think that's an important  
2 aspect.

3 Did you want to speak at all to the other  
4 variances or did you want to take each of them  
5 individually because you've laid out, I think,  
6 excellently the use variance for this.

7 Let me open it up to others, then, to talk  
8 about the use variance. And then we can move on to  
9 the other aspects of the relief sought.

10 MEMBER MANN: Mr. Chairman?

11 CHAIRPERSON GRIFFIS: Yes, Mr. Mann?

12 MEMBER MANN: I would like to make a  
13 comment regarding some of the testimony that was  
14 provided by OP, some of the information that was  
15 provided by OP regarding the size of the structure.

16 They did present some information that  
17 there are some other very large residential units in  
18 the neighborhood, I mean, some of them almost matching  
19 or coming close to the same square footage of this  
20 potential residential unit. But by any measure, this  
21 one always had more floors. It always had more square  
22 footage. And it was always bigger.

23 And it's not like there were 1,000 other  
24 homes in this neighborhood that were of comparable  
25 size or close to comparable size or close to

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1 comparable size. I mean, although there were several  
2 examples, several examples is not the entire  
3 neighborhood. And this one always did seem to strike  
4 me as being somewhat unique because it was and is  
5 always larger, no matter what the measure is.

6 CHAIRPERSON GRIFFIS: Excellent point and  
7 good clarification or deliberation that unique doesn't  
8 mean singularly independent, no others are similar to  
9 it. And we have had that notion put before us  
10 numerous times but the fact that it is unique, which  
11 means it is not in consistent character with the  
12 majority of the properties around it. That's an  
13 excellent point.

14 Others?

15 (No response.)

16 CHAIRPERSON GRIFFIS: Very well. Just to  
17 summarize, Ms. Miller, I believe, as I understood your  
18 deliberations, you were saying that the applicant had  
19 actually presented persuasive evidence in your mind  
20 that the subject property cannot be reasonably used  
21 for a matter-of-right use or a special exception use.  
22 Is that correct?

23 VICE CHAIRPERSON MILLER: That is correct.

24 CHAIRPERSON GRIFFIS: Excellent. Okay.  
25 Then let's move ahead, then, to the other aspects of

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1 this. We do have the variances that would go to the  
2 nonconforming closed court and also the lot occupancy  
3 if I'm not mistaken on this, number 403.

4 Does anyone want to speak to those  
5 aspects?

6 VICE CHAIRPERSON MILLER: I just want to  
7 make one point before the decision is up. The Office  
8 of Planning did not really address the area variances.  
9 They took the position that because they opposed the  
10 use variance, they opposed the area variance. And  
11 that was it.

12 CHAIRPERSON GRIFFIS: Okay. Did you want  
13 to speak in any direction on that issue?

14 VICE CHAIRPERSON MILLER: I just want to  
15 say that I think they regarded the movement and the  
16 substantial detriment. And what remains to be  
17 discussed is how that uniqueness might lead to a  
18 practical difficulty in line with the regulations. So  
19 I think I'll defer to my colleagues to articulate the  
20 facts.

21 CHAIRPERSON GRIFFIS: Excellent. Well  
22 said. I think we do need to talk a little bit more  
23 about the uniqueness that arises out of a conforming  
24 of closed court requirements and also the conforming  
25 the lot occupancy.

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1           There are two independent pieces. First  
2 of all, the nonconforming closed quarters, where they  
3 are proposing to place an elevator, the elevator would  
4 serve the units obviously in the building. I do not  
5 believe we need to render a decision on the fact that  
6 this has to be placed there, but, rather, it's given  
7 that they are placing this elevator there. It seems  
8 to make some common sense that this is an area that  
9 would enable the floors, of which the elevator is to  
10 serve, to be served.

11           Now, going to the uniqueness of that, so  
12 what is the uniqueness? Well, one is the  
13 nonconforming quarters in existence. Secondly, it is  
14 in an historic district, which means that there would  
15 be additional review and possibly some difficulty in  
16 removing portions of the structure to open it up or  
17 putting an addition of an elevator tower on the front  
18 of the building clearly would not be, I would think,  
19 rather -- not clearly, but I would think it wouldn't  
20 be the most successful historic preservation review  
21 application.

22           That being said, they're placing in -- the  
23 closed court already counts toward the lot occupancy.  
24 So really what this is is in addition to that  
25 nonconforming structure. And it's under 2001.3.

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1           So the uniqueness that is in existence is  
2       it's a building in an historic district that can't  
3       easily be manipulated in terms of mass and design.  
4       And the practical difficulty is there are no other  
5       places to put this as proposed. And in order to  
6       conform with the regulations, you would have to make  
7       it a conforming court, which it isn't already.

8           And whether it would impair the zoning or  
9       planner map, I certainly say it would not as no  
10      persuasive evidence has originated but, rather, that,  
11      in addition, the addition of an elevator I don't think  
12      rises to a level of changing the overall parameters of  
13      an entire zoned district.

14          The parking is even more clear to me in  
15      the rear of the building. And what is being proposed  
16      is a level pad. It's a level pad from the alley to  
17      the structure itself.

18          The graphic representation of the property  
19      shows that there is an extreme slope and a very short  
20      one. The rear yard is no more than 19 feet, I believe  
21      it is, if that. And it so drops dramatically away.

22          By adding a level area of which you can  
23      then communicate, whether it be walking or be from a  
24      passenger car or whether it be anything else,  
25      producing that platform because it would be above the

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1 adjacent grade of the building would count towards the  
2 lot occupancy.

3 And in order to provide that pad for  
4 communication from the alley to the building, the  
5 unique aspect of the dropping slope creates a  
6 difficulty in complying with the regulation because  
7 the regulations require that nothing be put back  
8 there.

9 And whether that would impact the fair  
10 intent to your zone finder map, I certainly see that  
11 it would not. Whether this be a patio for outdoor  
12 space or whether it be, as proposed, a parking pad, it  
13 certainly falls within the utilization of the land  
14 itself that is obviously in according to the art  
15 redistrict.

16 Anything else?

17 MEMBER MANN: Also I think there is some  
18 practical difficulty regarding the elevator.

19 CHAIRPERSON GRIFFIS: Yes.

20 MEMBER MANN: I mean, the alternative  
21 would be to drill through each of those slabs on each  
22 floor. And I think that could potentially create a  
23 practical difficulty as well.

24 CHAIRPERSON GRIFFIS: Excellent point.  
25 Okay.

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1 MEMBER MANN: And also, Mr. Chairman, did  
2 you mention specifically the extreme slope in the rear  
3 of the yard?

4 CHAIRPERSON GRIFFIS: Yes but not a bad  
5 thing to repeat. Anything else, then, on those two or  
6 the use variance?

7 (No response.)

8 CHAIRPERSON GRIFFIS: Okay. I guess,  
9 then, the Board is prepared for action. Let us move  
10 ahead with that.

11 VICE CHAIRPERSON MILLER: At this point,  
12 then, Mr. Chairman, I would move to approve  
13 application number 17367 for Two Properties. It is  
14 pursuant to 11 DCMR section 3103.2 for a variance on  
15 the use provision to renovate and convert a vacant  
16 building formerly used as a private school into a  
17 four-unit condominium/apartment building under  
18 subsection 320.3 and variances to allow an elevator to  
19 be installed within an existing nonconforming closed  
20 court and to allow a parking pad to be constructed at  
21 the rear of a nonconforming structure under section  
22 403 and subsection 2001.3 in the R-3 district at  
23 premises 2129 F Street, Northwest, square 25-32, lot  
24 13.

25 CHAIRPERSON GRIFFIS: Excellent. Thank

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1       you.

2                       Is there a second?

3                       MEMBER MANN:   Second.

4                       CHAIRPERSON GRIFFIS: Thank you very much,  
5       Mr. Mann.

6                       A couple of quick clarifications.   Ms.  
7       Miller, on your initial deliberation, I believe you  
8       referenced ward 1.   Of course, I know you are  
9       well-aware that it's ward 2, but the point and  
10      substance of your comment I think is still there in  
11      terms of the comprehensive plan and your discussion on  
12      that.

13                      Going to the aspect of the parking, just  
14      to clarify a couple of additional points, of course,  
15      we weren't going in deliberation of whether and relief  
16      was not sought for reduction or relief of parking  
17      because none is required in this particular  
18      application, but, rather, it was an area element we  
19      were discussing in terms of the relief that would be  
20      required.

21                      Actually, it was interesting with the  
22      Office of Planning's analysis of it that there was  
23      support in their analysis of multiple dwellings on  
24      this, but it came down to an aspect of density or how  
25      many units were actually to be provided.   And they

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1 were in disagreement with the number that were  
2 proposed in this application.

3 It was interesting that the applicant did  
4 come in and made I think as I'm hearing from Board  
5 members a persuasive testimony regarding the need or  
6 the necessity for the number of units, even with  
7 building out one that was substantially larger than  
8 comparative condominiums in the area for his own use.  
9 Even with that, it was needed to be more than just two  
10 units in this structure.

11 I think that's all I need to say in terms  
12 of last deliberation and comments on this. I'll open  
13 it up for anybody else. Ms. Miller?

14 VICE CHAIRPERSON MILLER: I just want to  
15 clarify that the reason I referred to ward 1 was that  
16 both OP and applicant also analyzed it with respect to  
17 ward 1 because at the time of the adoption of the  
18 comprehensive plan in 1999, it was in ward 1.

19 I also want to note for the record that  
20 ANC voted unanimously to approve it.

21 CHAIRPERSON GRIFFIS: Good.

22 MEMBER ETHERLY: Mr. Chair?

23 CHAIRPERSON GRIFFIS: Yes? Go ahead.

24 MEMBER ETHERLY: Thank you. I would like  
25 to speak in support of the motion, but I will note for

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1 the benefit of my colleagues that this was a rather  
2 close case for me at the outset of our initial hearing  
3 and then even after reviewing much of the supporting  
4 documentation.

5 I think both the discussion that was  
6 submitted by the applicant as well as OP were very,  
7 very helpful and very instructive in kind of laying  
8 out what I think were some very close issues on kind  
9 of both sides of the fence here.

10 One of the items that you mentioned as we  
11 moved into the motion aspect of this, Mr. Chair, was  
12 that issue of density. It troubled me somewhat  
13 because, as my colleagues are aware, the Office of  
14 Planning report did have a different interpretation of  
15 how they viewed the density aspect of this; whereas,  
16 the applicant felt that this, indeed, was still very  
17 consistent with the comprehensive plan in the R-3,  
18 R-4, R-5A, and R-5B zones.

19 So I just want to kind of highlight that  
20 issue because I did feel it was a relatively close  
21 question for me on that particular point. And then,  
22 as Mrs. Miller excellently laid out the issue of this  
23 return, there was a lot of discussion about return on  
24 investment, costs of the units that could be sold if  
25 they were developed one way versus the other, that

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1 also represented something of a closed area for me.  
2 It's not an unusual matter for us to encounter here.  
3 I think we dealt with this issue in different settings  
4 throughout the city, but I would hazard a guess that  
5 it is not an issue that is going to be resolved very  
6 easily in many instances where we are dealing with the  
7 challenges of trying to read, if you will, this real  
8 estate market and what it means for development, for  
9 investors, for persons who are interested in residing  
10 in the property.

11 It just was a very, very difficult call on  
12 both sides. And I felt very close, but I would agree  
13 with the analysis that was laid out by Mrs. Miller and  
14 the rest of my colleagues as it related to, once  
15 again, the very solid documentation that helped to  
16 fill in some of those gaps around what happens,  
17 parking/no parking, larger unit versus smaller unit,  
18 because some of the, shall we say, notions that I  
19 might have come to this case with initially were  
20 somewhat antithetical to what I learned based on the  
21 submitting on the supporting documentation.

22 So, once again, that's really a  
23 long-winded way of applauding both the Office of  
24 Planning and the applicant for excellent background  
25 work in helping come sort this project out.

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1 CHAIRPERSON GRIFFIS: Good. Thank you  
2 very much.

3 Others? Last words?

4 (No response.)

5 CHAIRPERSON GRIFFIS: Very well. We have  
6 a motion before it. It has been stated. All of those  
7 in favor signify by saying "Aye."

8 (Whereupon, there was a chorus of "Ayes.")

9 CHAIRPERSON GRIFFIS: And opposed?

10 (No response.)

11 SECRETARY MOY: The staff would record the  
12 vote as 4 to 0 to 0 on the motion of the Vice Chair  
13 Ms. Miller to approve the application, seconded by Mr.  
14 Mann, also in support of the motion Mr. Griffis, Mr.  
15 Etherly.

16 We also have an absentee ballot from Mr.  
17 Hood, who also participated on the case. And his  
18 absentee ballot is to vote to approve the application,  
19 which would give a resulting vote of 5 to 0 to 0.

20 CHAIRPERSON GRIFFIS: Unless there is any  
21 objection from the Board members, I think we would  
22 waive our rules and regulations and issue a summary  
23 order on this case.

24 (No response.)

25 CHAIRPERSON GRIFFIS: Not noting any, why

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1 don't we do that, then. And let us move ahead.

2 SECRETARY MOY: The next application is  
3 number 17376 of E. L. Haynes Public Charter School  
4 pursuant to 11 DCMR 3103.2 for a variance from a  
5 requirement for an accessory use to be located on the  
6 same lot as the principal uses pursuant to section  
7 2500.1, "Accessory Uses and Buildings," which was a  
8 section amended by the Board at its hearing on October  
9 4th, 2005, to allow the lot to be improved for use as  
10 a play area for the E. L. Haynes Public Charter School  
11 located on an abutting lot in the C-3A district at  
12 premises 1366 Irving Street, Northwest, square 28-49,  
13 lot 98.

14 On October 4th, 2005, the Board completed  
15 public testimony on the application and scheduled its  
16 decision to October the 18th. The Board requested the  
17 following post-hearing documents from the applicant,  
18 which includes authorization letter from the property  
19 owner. That has been filed by the applicant and is  
20 identified in your case folder as exhibit 29. The  
21 staff will conclude by saying that the Board is to act  
22 on the merits of the application.

23 CHAIRPERSON GRIFFIS: Excellent. Thank  
24 you very much, Mr. Moy.

25 Let's get right into this. It was pretty

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1 clear what we left the record open for in terms of  
2 authorization to proceed and clarifying who the  
3 applicant was or more I think direct, if this was  
4 approved, where the relief would reside. If the  
5 question to the Board, we have had that submitted and,  
6 if so, we can move ahead with it, I'm going to open  
7 the record or open the mikes for comment.

8 Mr. Mann?

9 MEMBER MANN: Well, when we first the  
10 discussion, I was somewhat skeptical as to exactly the  
11 path that the applicant was trying to take to seek the  
12 relief that they're asking for.

13 But I must say, given the information that  
14 they submitted, I think they have laid out a fairly  
15 good sort of route to get to the point where the CVS  
16 property is accommodating the principal use and that  
17 adjacent lot is the one that is acting kind of  
18 subservient to the primary use, rather than the way  
19 that I was originally looking at it as sort of a  
20 stand-alone thing. And I think that they provided a  
21 couple of examples that kind of substantiate that  
22 position if that makes any sense.

23 CHAIRPERSON GRIFFIS: A little bit. How  
24 did the example substantiate the position?

25 MEMBER MANN: Because they showed

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1 information where variance was very likely kind of  
2 building accommodating the principal use, rather than  
3 the subject lot in the case, in the first one. And I  
4 thought that seemed very similar to this case that we  
5 are talking about here.

6 CHAIRPERSON GRIFFIS: Okay.

7 MEMBER MANN: And then the second case  
8 that they cited, 15013, I thought the analogy to sort  
9 of the receiving sites also was similar to the case  
10 that we have here.

11 CHAIRPERSON GRIFFIS: Yes.

12 MEMBER MANN: For instance, this was in a  
13 different location than the primary use.

14 CHAIRPERSON GRIFFIS: So where is the test  
15 being made, on which property, or is it the  
16 circumstance in your mind? It seems to me it's always  
17 for me individually looking at when cases are cited or  
18 past applications cited, I always wonder, well, how  
19 many disprove it that are out there. I mean, we can  
20 have two that set it up, and I think that is  
21 informative.

22 But from your standpoint now and your  
23 opinion, is the small site making the relief test or  
24 is it the unique situation? It seems to me this was  
25 the crux of some of your concerns during the hearing.

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1                   MEMBER MANN: Well, first of all, I think  
2 my primary concern during the hearing was whether or  
3 not the application was requested property and whether  
4 or not the application was being presented on behalf  
5 of the correct property owner. I think those were my  
6 main concerns. So that is sort of a separate issue  
7 than what you mentioned right there regarding whether  
8 or not it meets the test.

9                   Answering the first part of the question  
10 is a little bit more difficult, though. If it has to  
11 be a singular answer, I think that is less difficult  
12 than saying that it is a combination of both factors.  
13 And there is certainly not room where the existing  
14 school is to provide the play area. And there is  
15 certainly some unique aspects regarding the play area  
16 that is proposed.

17                  CHAIRPERSON GRIFFIS: I don't know that I  
18 will belabor the point, but if that is the case that  
19 it is difficult to provide the play area, then isn't  
20 the play area something that would be required from  
21 the school and, therefore, relief would need to be  
22 sought from it?

23                  And the relief being sought from it is an  
24 accessory use in order to comply fully with the  
25 regulations. And this doesn't seem to be that element

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1 at all.

2 Take it where you want to go with it as  
3 part of the issue for the --

4 MEMBER MANN: Well, I think the applicant  
5 makes a couple of good points. There is an  
6 exceptional condition, a practical difficulty, and  
7 that there is no land area on the lot where the school  
8 is where the accessory use could be located. Okay?  
9 Do you agree or disagree with that?

10 CHAIRPERSON GRIFFIS: I agree with that.

11 MEMBER MANN: Okay. So then they have an  
12 adjacent lot that simply isn't connected to that lot  
13 legally but that can accommodate that use, that  
14 accessory use, right?

15 CHAIRPERSON GRIFFIS: Yes. Okay. So how  
16 is the test made?

17 MEMBER MANN: Well, it seems to me  
18 relatively easy to make the test for the subject lot  
19 that the school is on.

20 CHAIRPERSON GRIFFIS: Here's my problem.  
21 What test would need be for that? That would  
22 presuppose the fact that the playground is a required  
23 zoning use.

24 MEMBER ETHERLY: Why would you need to  
25 kind of contemplate the answer to that question? I'm

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1 agreeing with Mr. Mann is at. So let me just kind of  
2 indicate that as we start to discuss. Is this just  
3 really a question of form for you in terms of how the  
4 application is perhaps offered in that the variance as  
5 I would read it applies to the property on which the  
6 school is presently located? Because the issue is the  
7 location of the accessory use, but what they cannot  
8 do, what they have demonstrated I think  
9 satisfactorily, as Mr. Mann has indicated, is that  
10 they cannot locate that accessory use on the existing  
11 lot where the principal use occurs because that lot is  
12 built to capacity.

13 CHAIRPERSON GRIFFIS: Yes. I'll defend  
14 that. I think, though, if we're looking at the  
15 accessory use and the presentation of test if you both  
16 are seeing it this way, you can't provide it on the  
17 existing site. Therefore, you have to find something  
18 out. Then I don't agree with that because then that  
19 is supposing that is required from zoning regulations  
20 to be provided on the initial site.

21 The relief that is being sought as it is  
22 presented actually was a variance from 199, which is  
23 the definition. We talked about that. And I think we  
24 ought to establish, I think it was clearly established  
25 in this hearing that we were looking at 2500.1. And

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1 they are almost identical, if not identical, in their  
2 phraseology but the use accessory in the definition,  
3 the use customarily, incidental, or subordinate to the  
4 principal use and located on the same lot with the  
5 principal use. So now we're looking at a variance  
6 relief from that, located on the same lot with the  
7 principal use.

8 And so what we're saying is, well, as I  
9 understand you folks are saying, you're persuaded by  
10 asking, well, if an existing structure, you have an  
11 existing occupancy, there is no possibility of  
12 providing tests for use on the existing site, the  
13 principal site.

14 MEMBER ETHERLY: Correct.

15 CHAIRPERSON GRIFFIS: And so that is the  
16 uniqueness and the practical difficulties provided on  
17 the existing site. You have to provide it on the  
18 other site. Is that correct?

19 MEMBER ETHERLY: No. I don't know why  
20 you're taking that other step.

21 CHAIRPERSON GRIFFIS: Then how do we get  
22 to the next lot? How do we get to the lot outside of  
23 the principal lot?

24 MEMBER ETHERLY: Help me understand. My  
25 reading of the variance test here, we're talking about

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1 an accessory use. I don't think there's any  
2 disagreement that the use that is contemplated here is  
3 accessory, as you indicated, it is indeed customary  
4 and incidental to the principal use of a school, not  
5 necessarily that it is required or mandated, but it is  
6 I would argue very much a customary part of an  
7 educational program in this particular instance.

8 CHAIRPERSON GRIFFIS: Right.

9 MEMBER ETHERLY: The question of where it  
10 goes, where does that come into play? Obviously we're  
11 not talking about the extreme scenario. Okay. The  
12 playground is contemplated to be located across the  
13 city, miles away from the principal use, but, rather,  
14 in a fairly adjacent lot to that principal use.

15 CHAIRPERSON GRIFFIS: The location comes  
16 directly from the application. They're asking us for  
17 relief in order to provide it at a different location.

18 MEMBER ETHERLY: Correct, correct. But if  
19 you demonstrate that the property on which they are  
20 situated, where the principal use is situated is  
21 simply unique by its reason of exceptional narrowness,  
22 shallowness, shape, topography, which I think we have  
23 here, clearly the site is built up to capacity. So  
24 there is nowhere where this accessory use could go on  
25 the principal site.

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1           The second question, then, is, will strict  
2 application of the zoning regs result in a peculiar or  
3 exceptional practical difficulty or exceptional undue  
4 hardship to the owner of the property? And the  
5 argument that's presented is yes, it does and that the  
6 students of the school currently have to walk some  
7 distance away to another location which has certain  
8 traffic issues, certain safety issues attendant to it.  
9 So the proposal, of course, is to locate at an  
10 adjacent site, once again, as long as that site  
11 doesn't present a substantial detriment to the public  
12 good.

13           And I think clearly here the introduction  
14 of a playground space with landscaping, gardening in  
15 front and at the rear definitely and in terms of how  
16 I contemplate the zoning regulations would not  
17 constitute a substantial detriment to the public good.

18           CHAIRPERSON GRIFFIS:     Have I missed  
19 anything? Mr. Mann?

20           MEMBER MANN: I think Mr. Etherly laid out  
21 the test very well, and I agree with what he said.

22           CHAIRPERSON GRIFFIS:     Okay. Is there  
23 anything else, then?

24           (No response.)

25           MEMBER ETHERLY: All right. Mr. Chair,

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1 with that discussion, it would be my motion to move  
2 approval of BZA application number 17376, the E. L.  
3 Haynes Public Charter School pursuant to 2500.1 if I  
4 have my citation correctly for variance from the  
5 requirement that an accessory use be located on the  
6 same lot as the principal use located in the C-3A  
7 district at 1366 Irving Street, Northwest and would  
8 invite a second.

9 MEMBER MANN: Second.

10 CHAIRPERSON GRIFFIS: Excellent.

11 MEMBER ETHERLY: Thank you very much, Mr.  
12 Mann.

13 I think, as we have discussed, the case  
14 for a variance has been very adequately laid out. As  
15 was indicated from our earlier hearing, I think the  
16 clarification, just for the benefit of rounding out  
17 the record, was helpful in terms of having both of the  
18 appropriate lot owners on the record with respect to  
19 this particular application.

20 But I think clearly here, as was indicated  
21 in the discussion, we have an accessory use that is  
22 customary and incidental to the operation of a school,  
23 in this case a playground. And clearly there is a  
24 difficulty in locating that accessory use on the  
25 principal lot in question here.

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1           The plan that has been laid out for use of  
2           the lot in question as a playground I think is a  
3           well-thought-out plan, clearly from a timing  
4           standpoint presents no major issues. We have had  
5           testimony both from parents who are familiar with the  
6           operation of the school as well as the school's  
7           leadership and consultants retained by the school, to  
8           indicate that both playtimes, ingress/egress issues  
9           will not be a cause for concern here, further that  
10          safety has been adequately taken into consideration  
11          with respect to fencing and adequate supervision of  
12          the subject lot here.

13               Clearly once again from the standpoint of  
14          substantial detriment aspect of the variance analysis  
15          here, I think the use of the lot in question as a  
16          playground with sufficient landscaping and fencing  
17          will, in fact, be a marked improvement in addition to  
18          the community in question here.

19               CHAIRPERSON GRIFFIS: Additional? Let me  
20          make one other comment here, Mr. Etherly. The Office  
21          of Planning had recommended a condition on this order.  
22          I would also advocate for that. The condition was  
23          that this would be for a period of three years from  
24          the date of the Board's approval.

25               MEMBER ETHERLY: No objection, Mr. Chair.

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1 CHAIRPERSON GRIFFIS: Mr. Mann?

2 MEMBER MANN: Yes, I think that's just  
3 fine.

4 CHAIRPERSON GRIFFIS: Excellent. Okay.  
5 Did you want to speak to the motion, Mr. Mann?

6 MEMBER MANN: Well, I just wanted to also  
7 add that the ANC supported this application.

8 CHAIRPERSON GRIFFIS: Very well.

9 MEMBER ETHERLY: Can I just note for the  
10 record, Mr. Chair, that while Office of Planning did  
11 not offer it as a condition, nor would I, I would  
12 simply note that the Office of Planning in the course  
13 of reviewing the application did indicate by virtue of  
14 the applicant's material, the specific times of which  
15 the play area would be used.

16 Once again, given the three-year length  
17 year -- you know, as a matter of fact, just for the  
18 sake of clarity, Mr. Chair, it might be helpful to  
19 include those as conditions as well. Once again, then  
20 Office of Planning doesn't recommend them, but just to  
21 be clear, the applicant has indicated that the play  
22 area would be used for the recess period, 11:30 a.m.  
23 to 1:00 p.m., for up to 24 students at 20 to 30-minute  
24 intervals. And then special classes of 12 would also  
25 use the play area between 12:30 p.m. and 2:30 p.m. for

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1 30-minute sessions.

2 What I would perhaps suggest is just --  
3 and I'm reading from what are pages 2 and 3 of the  
4 Office of Planning report at the bottom of page 3 is  
5 that first condition, as was indicated and accepted by  
6 me, would be that the play area would be for a term of  
7 three years.

8 The second condition would be that the  
9 play area would be used for the recess period, 11:30  
10 to 1:00 p.m., for up to 24 students. I'll leave out  
11 the interval length language.

12 CHAIRPERSON GRIFFIS: Before we get too  
13 detailed, can I interject and ask maybe that we don't  
14 be so specific on time of use because I think the one  
15 success -- and I'll go a little bit to my concerns to  
16 this -- but the one success for this is going to be  
17 the use of it in actually controlling it.

18 So maybe our conditions -- I think I  
19 understand where you're going with it. Maybe our  
20 conditions should go more towards should be used for  
21 school purposes only, it should be property that  
22 should be adequately secure when not in use. So we  
23 would allow the use during time --

24 MEMBER ETHERLY: However the school deems  
25 appropriate.

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1 CHAIRPERSON GRIFFIS: Right.

2 MEMBER ETHERLY: I'm fine with that.

3 CHAIRPERSON GRIFFIS: Okay. And then  
4 obviously the responsibility for maintaining it in a  
5 clean, safe, orderly manner during school time and  
6 outside of school time would be obviously the school's  
7 responsibility. Does that make sense?

8 MEMBER ETHERLY: I would be in complete  
9 agreement with that and perhaps to save us the time of  
10 having to kind of parse out those terms. I'm more  
11 than happy to leave technical discretion up to the  
12 Office of Attorney General in terms of working out  
13 delays that you just suggested.

14 CHAIRPERSON GRIFFIS: Okay.

15 MEMBER ETHERLY: I think that could be  
16 accomplished in one omnibus second condition.

17 CHAIRPERSON GRIFFIS: Great. And I think  
18 it will obviously directly outgrow from the testimony  
19 that was rendered and also the drawings that were  
20 submitted in terms of the lighting, the gate, the  
21 issue.

22 Okay. Anything else, then? Mr. Etherly?  
23 Mr. Mann?

24 (No response.)

25 CHAIRPERSON GRIFFIS: Then I won't have

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1 the last word unless no one else wants to follow me.  
2 But I have a couple of concerns to bring up, and I  
3 think it is interesting to be a three-member Board  
4 right now deliberating on this. However, one, I  
5 absolutely support the academics and the school's use  
6 in this area and this specific one.

7 I think it's incredibly important to have  
8 outside space. My concern, as I brought up in the  
9 hearing, was whether this was actually right into the  
10 level of proper recreation space. I think the  
11 proposed animation of this is good, but I guess in the  
12 base case scenario, it would be great to have even  
13 larger or more adequate exercise or outdoor play area.

14 I suppose in an urban situation, we need  
15 to make do with what we have. And this is I think a  
16 good example of that. One of the things I want to  
17 speak of in opposition to is some of the statements  
18 that were made by the applicant that this would be  
19 difficult to develop or redevelop. I don't think  
20 there's any persuasive facts to that. This was not  
21 noted as being on the market or there were plans that  
22 were drawn up that were not successfully implemented.

23 I'm not sure what the history of this  
24 specific lot is, but I think someone probably could  
25 put the structure on it. However, that being said,

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1 with this adjacent use, I have another difficulty, as  
2 I was hinting to a little bit today. One, why is this  
3 here? And if so, what relief are we actually granting  
4 for it?

5 Now, I understand that the Zoning  
6 Administrator has indicated that in order to get a  
7 certificate of occupancy, there has to be some relief.  
8 And that's why it was sent to us or it was referred,  
9 not directly sent to the Zoning Administrator, but  
10 that was the comment that was implied.

11 Going to that, looking at 2500.1, I'm  
12 still not strongly persuaded that actual relief would  
13 need to be provided under that as it seems -- I guess  
14 I don't get the link between not being able to provide  
15 it on site and, therefore, getting relief for an  
16 adjacent site to provide this accessory use when I  
17 guess, to put it the other way, I guess, what is  
18 stopping them from putting up a fence and putting a  
19 play area on it? But I'm not going to belabor that  
20 point but wanted to make it.

21 Other than that, I think it is absolutely  
22 important to take from the testimony of the applicant  
23 and the Office of Planning that certain conditions,  
24 that being timing, but also, importantly, to put in  
25 the intent that this should be obviously properly

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1 maintained, clean, free of debris.

2 I think some of the testimony that was  
3 provided, there are going to be some programming  
4 issues that obviously the school will take into great  
5 consideration, one drop-off and pickup.

6 There was testimony that I was a little  
7 bit shocked at by the parents that drive into that  
8 alley which will cross the place that they will need  
9 to be walking to get to the play area but also a  
10 little bit of conflicting testimony as to the trash  
11 receptacle that's in that area, whether it was  
12 actually clean and maintained. The most persuasive  
13 aspect of that, however, was if this is animated,  
14 built out that there will be more of a controlling  
15 environment, keeping it clean and well-maintained.

16 So that's enough for me. I'll let anyone  
17 else speak to it additionally if there needs to be  
18 further --

19 MEMBER ETHERLY: Never to allow the  
20 chairman to have the last word -- I say that tongue  
21 very much in cheek -- I understand the spirit of the  
22 chairman's remarks. I think the issue of the  
23 likelihood of some of the development activity taking  
24 place on the lot wasn't a major factor of  
25 consideration or deliberation for me. So I'll leave

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1 that aspect of the chairman's remarks alone.

2 I think part of what this application  
3 illustrates is a problem that we're all somewhat  
4 familiar with because of different hats that we wear  
5 or experience that we have with this city. And that  
6 is the issue of adequate space for all of our  
7 educational buildings, be they charter schools or be  
8 they traditional schools.

9 Given the dearth of space in such an  
10 active residential and professional or, I should say,  
11 commercial real estate market, oftentimes there are  
12 creative measures that institutions such as E. L.  
13 Haynes are compelled to pursue in order to provide the  
14 fullest and most rounded educational experience for  
15 their young charges.

16 I think we have an application in front of  
17 us that is consistent with the zoning regs but,  
18 indeed, helps to make the best of not an ideal  
19 situation, but I think we have a plan in front of us  
20 that offers temporarily for the next three years an  
21 adequate operational plan for their students to get  
22 the kind of exercise and activity that they need.

23 Lord knows if we had a play area  
24 constructed as part of our new build-out here, that  
25 would perhaps do myself and my colleagues well. A

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1 jungle gym every now and then would be helpful as we  
2 deliberate issues in zoning and other matters.

3 That being said, Mr. Chair, I am  
4 comfortable moving forward.

5 CHAIRPERSON GRIFFIS: Thanks. Thank you  
6 very much.

7 We do have a motion before us. It has  
8 been seconded. All of those in favor signify by  
9 saying "Aye."

10 (Whereupon, there was a chorus of "Ayes.")

11 CHAIRPERSON GRIFFIS: And opposed?

12 (No response.)

13 CHAIRPERSON GRIFFIS: Abstaining?

14 (Whereupon, there was a show of hands.)

15 CHAIRPERSON GRIFFIS: Very well. Mr. Moy?

16 SECRETARY MOY: The staff would record the  
17 vote as 3 to 0 to 2. That's on the motion of Mr.  
18 Etherly to approve the application, seconded by Mr.  
19 Mann, also in support of the motion Mr. Griffis. And  
20 the approval is with two conditions, as stated by the  
21 Board.

22 CHAIRPERSON GRIFFIS: Thank you very much,  
23 Mr. Moy.

24 Is there anything else for the Board's  
25 attention for this special public meeting this

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1 morning?

2 SECRETARY MOY: Just one. Is this a  
3 summary order or for order or how would the Board like  
4 to --

5 CHAIRPERSON GRIFFIS: I'll take comments.  
6 There's no objection to issuing a summary order?

7 (No response.)

8 CHAIRPERSON GRIFFIS: Very well. Then  
9 let's waive our rules and regulations to issue a  
10 summary order, and it's with conditions.

11 SECRETARY MOY: I thank you, sir.

12 CHAIRPERSON GRIFFIS: Okay. If there is  
13 nothing further, then let's adjourn the special public  
14 meeting and call to order the 18 of October 2005  
15 public hearing of the Board of Zoning Adjustment of  
16 the District of Columbia.

17 (Whereupon, the foregoing matter was  
18 concluded at 11:13 a.m.)

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