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OFFICE OF ZONING

January 4, 2011

Via E-Mail

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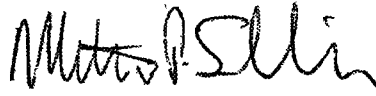
Re: Additional Submittal to Motion for Reconsideration of BZA Order No. 18095.

Dear Members of the Board,

Enclosed please find an additional submittal to the Motion for Reconsideration of a Condition of BZA Order No. 18095, being filed on behalf of the Applicant.

Thank you for your consideration of this submission.

Sincerely,



Martin P. Sullivan

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18095

EXHIBIT NO. 40

Board of Zoning Adjustment

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**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

**BZA APPLICATION NO. 18095 OF RONALD MCDONALD
HOUSE CHARITIES OF GREATER WASHINGTON, D.C.**

**Hearing and Decision Date: September 14, 2010.
BZA Order No. 18095 Issued on September 17, 2010.**

**ADDITIONAL SUBMITTAL ON THE MOTION FOR
RECONSIDERATION OF CONDITION**

The Board of Zoning Adjustment approved Application No. 18095 by Order dated September 17, 2010, granting Special Exception approval pursuant to Section 215 for a Religious Residence housing more than 15 persons. In Order No. 18095, the Board's Condition No. 1 limited the special exception approval to a term of five (5) years. The Applicant filed a Motion for Reconsideration on September 26, 2010. The Board provided the Applicant an opportunity to orally present its Motion for Reconsideration on November 30, 2010, at which time the Board stated that they were not inclined to grant the Motion, under the rationale that term limit "conditions" were distinct from all other conditions of a BZA approval and further, were not subject to the constraints placed on the Board in imposing conditions. In effect, the Board asserted that it had the right to impose a term limit condition on a special exception application without reference to any specific grant of authority or the requirement that conditions be supported by substantial evidence. The Applicant appreciates the opportunity to address this issue and respectfully requests that the Board reconsider and grant the Motion for Reconsideration.

1. Not Challenging Term Limits.

Term limit conditions on the Board's grant of an approval for a special exception or variance have been in use by the Board throughout the Board's existence. The Applicant is not questioning the Board's authority to impose term limits. The Applicant is merely pointing out that such term limits have always been properly identified/classified as "conditions" within the context of BZA approvals. As such, the term limit conditions, as conditions, are subject to the same restrictions provided for all other conditions, *i.e.*, the term limit condition "must relate directly to the zoning relief being requested, and must relate to specific findings, which in turn must be based upon reliable, probative, and substantial evidence in the record as a whole." See *National Black Child Development Institute v. District of Columbia Board of Zoning Adjustment*, 483 A.2d 687, 692 (D.C. 1984).

In the *National Black Child* case, the Court stated: We do not hold that the Board may never impose conditions in granting a variance. The record as it stands is inadequate to permit a determination regarding conditions in general. We hold only that the conditions imposed by the BZA in this instance are unlawful. On remand of the case, the BZA should more fully set forth the source of its authority to impose conditions and the specific findings supporting any such conditions.

As provided in *National Black Child*, the Applicant asserts that if the Board wishes to impose a term limit, then it should adhere to the directive from the Court of Appeals to fully set forth the source of its authority to impose this condition and the specific findings (based on substantial evidence) supporting the condition.

2. BZA Practice.

A cursory review of BZA Orders, as well as transcripts, Office of Planning reports, and any other related documentation, shows that term limits, or time limits, are unequivocally and consistently identified as “conditions.”¹ Further, the Applicant has found no evidence in BZA Orders or in Court of Appeals decisions providing that a term limit is treated differently from other conditions in regard to the requirement that the BZA adhere to the National Black Child standard. If the Board were to make such a determination here, it would be making new law out of thin air, not supported by anything in the applicable statute, the D.C. Zoning Regulations, or in case law.

3. The BZA’s Authority.

The issue in this matter is the Board’s authority. “The powers of the BZA are those defined by statute and regulation.” *Georgetown College v. D.C. Board of Zoning Adjustment*, 837 A.2d 58,68. The Board is authorized to “make special exceptions to the provisions of the zoning regulations in harmony with their general purpose and intent.” D.C. Code §6-641.07(d) (2001). “Implicit in the Board’s power to grant special exceptions is the authority to place reasonable conditions upon such approval.” See *Georgetown College* at 69 [emphasis added].

“An administrative agency is a creature of statute and may not act in excess of its statutory authority.” See *Georgetown College* at 68. The D.C. Court of Appeals has stated that “this Court, like other courts, has been reluctant to read into a statute powers for a regulatory agency which are not fairly implied from the statutory language, since the agency is statutorily created.” See *Georgetown College*, at 68. The D.C. Court of Appeals has also ruled that: “absent express statutory or regulatory authority, a regulatory agency may not impose remedial measures.” See

¹ When imposed, BZA term limit conditions are always included within an Order’s list of conditions, including the Order in this case.

Georgetown College at 68 (quoting *Davidson v. District of Columbia Bd. of Med.*, 562 A.2d 109,112).

For the reasons stated above, according to existing D.C. Law, the imposition of a time limit which relates directly to the zoning relief being requested, and also relates to specific findings which are based upon substantial evidence, is within the Board's authority. Conversely, the imposition of a time limit which does not relate to the zoning relief being requested, and does not relate to specific findings which are based upon substantial evidence, is clearly beyond the Board's statutory authority. For this reason, and because the term limit condition in this particular case is not supported by substantial evidence in the record, the Board should grant the Motion for Reconsideration and remove the (5) five-year term limit on its approval of Application No. 18095.

Respectfully Submitted,

 1/4/11

Martin P. Sullivan
Sullivan, Styles & Barros, LLP