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January 3, 2011

VIA FACSMILE

Meridith Moldenhauer, Chair
Board of Zoning Adjustment
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Washington DC 20001

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Reference Number
029508.00002

Re: Application of St. Paul's Rock Creek Parish, BZA Case No. 18138
Request for Reconsideration

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18138
EXHIBIT NO. 40

Dear Chairperson Moldenhauer and Members of the Board:

At the special public meeting of December 14, 2010, the Board voted 4-0-1 to approve the requested special exception in Case No. 18138 with certain conditions. Pursuant to 11 DCMR § 3126, we hereby request reconsideration of the Board's decision in two respects: 1) the imposition of a term as stated in Condition Number 1 of Order No. 18138 is unsupported by substantial evidence in the record, and 2) Condition Number 5, restricting access to and from the Applicant's property, is technically incorrect.

A. The Imposition of a Term is Inappropriate and Unsupported by Substantial Evidence in the Record.

Condition Number 1 of BZA Order no. 18138 states that the approval shall be for a term of five years, beginning on the final date of the Order. The Applicant respectfully requests that the Board reconsider its decision to impose a term of five years, and submits that a condition imposing a term is inappropriate and unsupported by substantial evidence in the record.

At the Board's decision meeting of December 14, 2010, Chairperson Moldenhauer stated on the record that the Applicant's expert in traffic engineering and transportation planning's (the "Traffic Expert") testimony was sufficient to resolve any questions regarding traffic, and yet suggested that a shortened term was necessary to mitigate against "concerns about traffic flows." There is no evidence in the record in this case to support the imposition of a term. None of the District agencies participating in this case (the Office of Planning ("OP"), the District Department of Transportation ("DDOT"), and the adjacent Advisory Neighborhood Commission ("ANC")) recommended imposing a term. Nothing in the record suggests that there is either a traffic concern that requires mitigation, or that the traffic flow would create an adverse impact on surrounding properties. In fact, the very notion that the Chairperson would credit the Applicant's Traffic Expert in finding that there would be no adverse impacts on surrounding properties due

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to traffic in one breath and then suggest in another that a shortened term is necessary to mitigate against potential adverse impacts due to traffic in another runs counter to the Board's limited authority to impose conditions of approval.

Section 205.6 authorizes the Board to "require special treatment in the way of design, screening of buildings, planting and parking areas, signs, or other requirements as it deems *necessary to protect adjacent and nearby properties*" (emphasis added). The Court of Appeals has previously held that the BZA may impose conditions only on findings that are reliable, probative, and supported by substantial evidence in the record as a whole. *National Black Child Development Institute, Inc. v. District of Columbia Board of Zoning Adjustment*, 483 A.2d 687, 692 (1984). There is nothing in the record to suggest that a term is necessary to protect adjacent and nearby properties or to mitigate any other objectionable conditions likely to be created by the special exception use.

The only evidence in the record that might suggest that the Applicant's requested use would have an adverse impact on surrounding property came in the form of a report from DDOT which was repudiated by DDOT's representative at the public hearing. In fact, on cross-examination by the Applicant's attorney, DDOT's representative conceded that the requested special exception would generate no change in the way that the surrounding road network currently operates and no adverse impacts:

MS. BRAY: SO, IN YOUR OPINION WOULD THE ADDITIONAL TRAFFIC, THE MINIMAL ADDITIONAL TRAFFIC AS [THE TRAFFIC EXPERT] STATED THAT WOULD BE ADDED IN ASSOCIATION WITH A SPECIAL EXCEPTION SHOULD IT BE APPROVED...WOULD THAT CREATE ANY CHANGE IN THE WAY THAT THE SURROUNDING ROAD NETWORK OPERATES, THAT IS, WOULD THERE BE ANY ADVERSE IMPACT DIRECTLY RELATED TO THE SPECIAL EXCEPTION?

MR. BOOKER: THERE WOULDN'T BE AN ADVERSE IMPACT OR OBJECTIONABLE TRAFFIC CONDITIONS.

BZA Transcript, November 30, 2010, at p. 122.

Moreover, nothing in the record at the public hearing on the merits of this case on November 30, 2010 suggested that a term might be imposed; therefore the Applicant did not have an opportunity to respond to the Board's imposition of the term. 11 DCMR § 3126.6 states that no request for rehearing shall be considered by the Board unless new evidence is submitted that could not have reasonably been presented at the original hearing. Because the suggestion of a term was not raised by any of the reporting District Agencies, but by the Board itself and only a

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the decision meeting at which no public testimony was taken, the Applicant was not permitted to address the impacts of a five-year term, which are significant. The Applicant is comprised of St. Paul's Rock Creek Church, a historic Episcopal congregation in Washington D.C. that is of limited means and experiencing a declining church population, and Christian Family Montessori School, another non-profit organization serving low- and moderate-income families. Returning to the Board in five years carries a significant financial cost that these organizations are not prepared to bear.

The Board's fees for requesting renewal of the special exception are currently \$3,250. If Condition Number 1 remains in place, the Applicant will need to engage its Traffic Expert to provide a study of traffic conditions and trip generation associated with the special exception use at that time, which we estimate will require between \$7,500 and \$10,000 in fees. Thus, not including attorneys fees, the cost of complying with a five-year term and seeking renewal will be, at a minimum, \$10,000. Because Christian Family Montessori School will be leasing the premises from St. Paul's for a period of just ten years, the burden of requesting renewal of the special exception term (in addition to the costs already incurred in connection with the instant case) simply cannot be reasonably amortized over the term of the lease in a way that make the transaction feasible.

Had the Applicant had the opportunity to address this on the record, we are confident that the Board would have found that this burden of filing a new special exception application in just five years would significantly outweigh the scant suggestion of any adverse impacts necessitating further review by the Board. We hereby respectfully request that the Board remove Condition Number 1 or, in the alternative, that the Board increase the term noted in Condition Number 1 to 10 years, running with the term of the lease between St. Paul's and Christian Family Montessori School.

B. Condition Number 5 is Technically Incorrect and Warrants Revision

We also respectfully request that the Board revise Condition Number 5 of Order No. 18138. That condition reads "Access to the Applicant's entrance shall be on Rock Creek Church Road and access to the exit from the property shall be at Allison Street." The Applicant's existing entrance is actually on Webster Street, not on Rock Creek Church Road. DDOT's representative at the hearing recommended that the Applicant continue to use existing entrances and exits into the subject property¹, and the Applicant's Traffic Expert made clear in his oral testimony and in his written report that the existing entrances are on Webster Street and Allison Street. We do not believe it was the Board's intention to impose a requirement to create a new

¹ See, BZA Transcript, November 30, 2010, at p. 117: "...the DDOT position is that we should use existing entrances..."

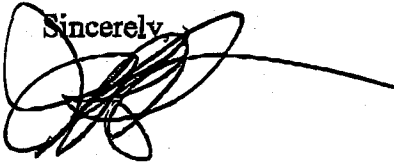
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entrance to the subject property, and as a result, we respectfully request that the Board correct its Order in this regard.

For the foregoing reasons, we respectfully request that the Board reconsider its decision in Case No. 18138 and rescind or revise Conditions Number 1 and Number 5 of Order No. 18138, as appropriate, and as based on the record before the Board in this case.

Sincerely,



Kinley R. Bray

Cc: Rev. Rosemari Sullivan
Wendy Shenk-Evans
Stephen Mordfin, Office of Planning
Advisory Neighborhood Commission 4D

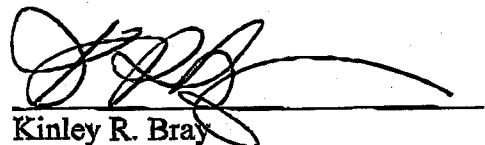
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed, postage pre-paid, to the following individuals on this 3rd day of January, 2011:

2011 (KRB)

Stephen Mordfin
Office of Planning
1100 4th Street NW, Suite 650-E
Washington DC 20004

Advisory Neighborhood Commission 4D
143 Kennedy Street, N.W.
Washington DC 20011


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