BEFORE THE
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT
WASHINGTON, D.C.

DISTRICT OF COLUMBIA
2000 JUN 23 P 1:16

Application of the Jewish Primary Day School of the Nation's Capital pursuant to 11 DCMR § 3104.1 for a special exception under Section 206 of the Zoning Regulations to establish a private school at 7712 16th Street, NW and 7701 16th Street, NW	)	Application No. 16556

APPLICATION OF SHEPHERD PARK/COLONIAL VILLAGE NEIGHBORHOOD ALLIANCE AND THE MEMBERS THEREOF FOR A STAY OF DECISION AND ORDER

By a Decision and Order served 15 June 2000 (the "Order"), the Board granted special exception relief to the applicant, the Jewish Primary Day School of the Nation's Capitol ("JPDS"), allowing JPDS to use two buildings in residential zones as a school. Under 11 DCMR §§ 3125.6 and 3125.9, that Decision and Order will not take effect until ten days after that service date, *i.e.*, on 25 June 2000.

The Shepherd Park/Colonial Village Neighborhood Alliance (the "Alliance"), an unincorporated association of adjacent and nearby property owners, and the individual members thereof, hereby ask the Board to stay the effectiveness of that order pending resolution of a petition for review that the Alliance will shortly file in the District of Columbia Court of Appeals challenging that order under the District of Columbia Administrative Procedure Act. Under D.C. App. R. 18, any request for a stay of an agency order pending review must first be directed to the agency.

The Alliance respectfully requests that the Board consider and act upon this application for a stay at the first available opportunity. Not only, as we demonstrate below, does the Alliance have a strong argument for a stay under the

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relevant criteria, but time is of the essence, given JPDS' intention to begin operations when the school year opens in less than three months. Accordingly, a prompt ruling on this application is in the interest of all concerned.

The Criteria for Issuing a Stay

To prevail on a motion for a stay, the movant must show that he or she is likely to succeed on the merits, that irreparable injury will result if the stay is denied, that opposing parties will not be harmed by a stay, and that the public interest favors the granting of a stay. *Barry v. Washington Post Co.*, 529 A.2d 319, 320-21 (D.C. 1987); *In re Antioch University*, 418 A.2d 105, 109 (D.C. 1980). This standard applies in agency cases as well as cases originating in Superior Court. *Kuflom v. District of Columbia Bureau of Motor Vehicle Services*, 543 A.2d 340 (D.C. 1988). As we now explain, the Alliance satisfies all four elements for relief.

The Alliance is Like to Prevail on the Merits.

The DCAPA subjects agency orders to judicial review under the "substantial evidence" test, which requires findings of fact on each material contested issue, with the conclusions of law flowing rationally from those findings. *Committee on Washington's Riverfront Parks v. Thompson*, 451 A.2d, 1177, 1193 (D.C. 1982); *Citizens Association of Georgetown v. District of Columbia Zoning Commission*, 402 A.2d 36, 41-42 (D.C. 1979). Agency orders will be overturned if there is a "fatal omission of fact-finding along the continuum between fact-finding and final decision," *Citizens Association of Georgetown*, 402 A.2d at 42. It is not enough for an agency simply to announce its conclusions. *Blagden Alley Association v. District of*

Columbia Zoning Commission, 590 A.2d 139, 147 (D.C. 1991); *National Black Child Development Institute v. District of Columbia Board of Zoning Adjustment*, 483 A.2d 687, 692 (D.C. 1984). Instead, the agency must disclose the basis of its order "by an articulation with reasonably clarity of its reasons." *Dietrich v. District of Columbia Board of Zoning Adjustment*, 293 A.2d 470, 473 (D.C. 1972). The Order at issue here fails to meet that respect is several crucial respects.

The key issues here are the negative impacts that a school would have because of traffic and parking. Unfortunately, the Order does not adequately address the concerns of the Alliance and the Advisory Neighborhood Commission ("ANC"), thus precluding a finding that the substantial evidence test has been met.

A notable example involves the Order's treatment of parking concerns. This is an unusual case in that the application seeks to operate a school on two non-adjacent sites, on separate lots, and in areas with different zoning classifications, yet it seeks to aggregate parking for the school, rather than require that parking requirements be met for each site separately. The Alliance and ANC objected on the ground that the section 2116.4 of the Zoning Regulations requires all required parking to be located on the "lot" of the building the spaces are intended to serve. To the extent that JPDS fails to meet this requirement, it is obliged to seek additional zoning relief, which it failed to do here. The Board nonetheless allowed JPDS to aggregate parking spaces in this fashion, reasoning that there will be more spaces in the aggregate than JPDS is required to provide. Order at 23, ¶ 2.

The Regulations mean what the Regulations say, and the Order fails to

address this objection. It is therefore likely that the Alliance will prevail on this point in a challenge under the DCAPA, as well as a related challenge that this decision failed to accord "great weight" to a similar objection voiced by the ANC. D.C. Code § 1-261.

Similarly, the Order acknowledged (Finding 73) that JPDS's parking plan "did not address the location, size, and design requirements of Chapter 21 of the Zoning Regulations," nor did it address "the requirements of Chapter 22 with respect to loading berths, loading platforms, and loading spaces." This is a point on which the applicant bears the burden of proof, and the Board's conclusion that adequate parking will be available cannot stand when, as here, JPDS has failed to make the minimum evidentiary showing on this point. The Alliance and ANC objected to this omission, and the Order swept the objection under the rug, reasoning that the applicant is obliged to address these issues during the building permit and certificate of occupancy permit process "and, if necessary, to seek appropriate special exception or variance relief from the technical requirements of Chapters 21 and 22." Order at 23 ¶ 2.

This is insufficient under the Zoning Regulations. An applicant is required at a very early stage either to obtain a letter from the Zoning Administrator advising as to the zoning relief that is required for the school to operate or else to "self-certify" that requirement. Nothing in the Zoning Regulations allows an applicant to finesse these requirements by making an inadequate showing before the Board and then waiting until the permitting stage to make an evidentiary

showing. It is the Board's responsibility to address these concerns during the contested-case proceedings and to respond to objections that the school cannot operate under the requested exception relief because the request for relief is inadequate. There are basic due process reasons for such a procedure. Questions of the sort the Alliance and ANC raised here go directly to the Board's expertise in zoning matters, and the contested-case requirement affords neighbors the opportunity to explore an applicant's claims through cross-examination and other procedures that are simply not available if such issues are deferred to the building permit/certificate of occupancy stage of proceedings. The Alliance is thus likely to prevail on this issue as well.

Another concern expressed by the Alliance and ANC was about traffic flows, particularly in light of the network of alleys that residents use and that would be subject to additional traffic if the school is allowed to operate (Findings 28-32). The Board acknowledged the validity of this concern, noting that the "drop-off, pick-up, and queuing operations and the parking arrangements, has the potential to result in the obstruction of the alley." Order at 22 ¶ 4. Rather than deny the application, however, the Board instead chose to reduce the proposed student enrollment and staffing, reduce the number of vehicles accessing the site, require additional parking, and impose additional conditions relating to alley use. *Id.*

The problem with this approach is that the Order nowhere explains how, even with these restrictions, the JPDS will nonetheless be able to operate in a manner that satisfies the requirement that an exception shall not be granted unless

the proposed operations "is not likely to become objectionable" on the basis of traffic and other concerns. 11 DCMR § 206.2. The Order seems to reason that the restrictions in question will make the school "less objectionable," but there is no explanation why the limitations in questions were selected and why they meet the "not likely to be objectionable" standard. For example, JPDS first proposed 215, then 205 students, Finding 16, and the Board capped the total enrollment at 185, a ten percent reduction. Order at 24, Condition 3. At no point, however, did the Order explain why such a modest reduction (even when coupled with other restrictions) would render the proposed use "not likely to be objectionable."

Moreover, this slight reduction does not eliminate the core problem, namely, that school drop-offs coincide with the busy morning rush hour, a time when many nearby residents are leaving for work and when many commuters are traveling along 16th Street as well. This is the time of day when one should *not* be increasing congestion, yet that is the undeniable effect of the Board's Order.

With due respect, these particulars are indicative of the flawed approach that the Board brought to bear on this issue. At various points along the way, the Board acknowledged the serious problems that another school would visit upon this residential neighborhood, a view that found some support not only from the ANC, but also from the Office of Planning, Department of Public Works and Metropolitan Police Department. Rather than declaring the problems to be insurmountable, however, the Board opted to approve the school, but with conditions that the Alliance views as wholly inadequate to protect the neighborhood from "objection-

able" impacts. The conditions amount to a band-aid solution that will not work and that are, at minimum, inadequately explained contrary to the requirements of the DCAPA.

The Alliance Will be Irreparably Injured if a Stay is Denied.

The irreparable injury here is clear. JPDS plans to open its doors in less than three months' time and to operate a school serving nearly 200 children, with all the attendant traffic, parking, congestion and related concerns to which the Alliance and its members object. As a practical matter, it is unlikely that the Court of Appeals will be decide the case within that short a period, even though the Alliance is willing to do what it can to expedite consideration. Even so, particularly in light of the strength of the Alliance's case on the merits, a stay is vital if neighbors are to avoid the negative impacts that were described at the hearing and that the Board appeared to acknowledge were a legitimate concern.

Lack of Harm to Opposing Parties

Any "harm" to JPDS resulting from a stay is entirely self-inflicted, and as such, this factor cannot trump the irreparable injury that the Alliance and its members would suffer.

JPDS made a decision in 1998 to establish itself as an independent school and negotiated a deadline of June 30, 2000 for a departure from its current site. JPDS thus gave itself an unreasonably short time frame to find a new location for the school, particularly given the fact that JPDS chose to locate in an area where schools are not permitted as a matter of right and where zoning relief would be

essential for any such project. Poor planning by the JPDS leadership is hardly an excuse for ramming this project down the neighborhood's throat.

Moreover, it is worth recalling that a major argument in favor of the JPDS application was that the 16th Street sites were the only site at which a school could feasibly be located. Not so. As evidence, we attach "Dear Congregants" letter from the President of Adas Israel Congregation, which was dated 12 May 2000 (after the decision date in this case), which was thus not available to the Board for consideration during the hearing.[1]

In that letter, President Jordan Baruch notes that after making its plans to depart in 1998, the JPDS approached Adas Israel in fall 1999 and again in spring 2000 to request an extension of its tenancy. Both requests were denied. According to the 12 May 2000 letter, JPDS is now asking that grades K-3 remain in the building, and the matter is being given active consideration.

The 12 May 2000 letter attaches a letter of the same date from Adas Israel to Howard Stanislawski, who represents JPDS. That letter indicates that there are or were several other sites under consideration, including the former Hebrew Academy and the Franklin School – apart from the preferred JPDS site in Forest Hills. See Letter to Howard Stanislawski at 3, ¶ 3(d), (e).

It appears therefore that there are or were several sites where the school could have located and that the 16th Street buildings are not the only feasible location where the JPDS can locate. Under the circumstances, any harm to the

[1] To the extent the Board may deem it necessary to consider this correspondence, we ask that the record be supplemented to include the correspondence.

JPDS that may occur as a result of a stay is self-inflicted and not an offsetting reason for denying a stay.

The Public Interest Favors Granting a Stay.

This factor is met here as well. This case involves an effort by the JPDS to disrupt established land use patterns in a fragile, residential neighborhood. The issuance of a stay would thus preserve the status quo. It would protect District residents who are entitled to the quiet enjoyment of their homes and neighborhood according to the public policy decisions that are reflected in the Zoning Map and Regulations, namely, the decision to classify this neighborhood as residential.

CONCLUSION

For these reasons, the Alliance respectfully asks that this application for a stay be granted.

Respectfully submitted,



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23 June 2000

CERTIFICATE OF SERVICE

I hereby certify that a copy of this application for a stay was served by first class mail, postage prepaid, this 23rd day of June, 2000 upon

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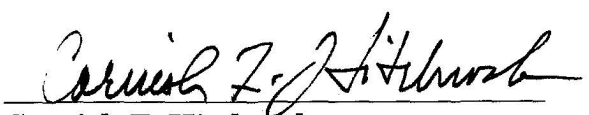
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Cornish F. Hitchcock

ADAS ISRAEL CONGREGATION

עדת ישראל

May 12, 2000

Dear Congregants,

As most of you know, in 1998 the Jewish Primary Day School (JPDS) notified Adas Israel of its wish to become an independent school, separating institutionally and physically from the congregation. In addition, the school asked to remain in our building for at most one year while it searched for a permanent home. The Board of Managers, although sorry to see the school it had nurtured depart, agreed to the separation. To accommodate JPDS's request, Adas Israel obtained an extension of the Certificate of Occupancy from the District's Board of Zoning Adjustment (BZA). As part of the process we assured our neighbors and the District authorities that we would not seek a further extension. And, given that certificate, both the school and the synagogue formally committed June 30, 2000 for the school's departure. At that point, the congregation began to make other plans and commitments for the space JPDS-NC has been using.

In fall 1999, Jewish Primary Day School of the Nation's Capital (JPDS-NC) requested an extension of their tenancy. In November, the Board of Managers voted by a significant margin to reaffirm the terms of the separation agreement, specifically the departure date of June 30, 2000.

This spring JPDS-NC again approached the congregation seeking an extension for the whole school. After much deliberation, the Executive Committee felt compelled to turn down the school's request in order to honor commitments already made based on the reaffirmed separation agreement. JPDS-NC has now requested that only grades K-3 stay in the building. The Executive Committee is undertaking appropriate due diligence to assess whether accommodating this request is feasible for the congregation and the community. As the attached letter stresses, we are very aware of the time constraints and are working to assure a speedy response. Please be assured that any proposal that the Executive Committee presents to the Board will balance the needs and concerns of the school, the congregation, the community and of all the children.

The synagogue leadership has been wrestling with this very difficult situation, and this letter is an attempt to clarify where things stand at present. We will do our best to keep you informed. In the meanwhile, we appreciate your continued support and goodwill.

L'shalom,

Jordan Baruch
President

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ADAS ISRAEL CONGREGATION

עדת ישראל

May 12, 2000

Howard Stanislawski
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Dear Howard:

On behalf of the Executive Committee and Trustees of Adas Israel, I want to present to you, as the authorized representative of JPDS-NC, the Synagogue's current position regarding JPDS-NC's future location.

At the outset, I want to express some important thoughts to you. First, Adas Israel has been, is and will remain committed to Jewish education. The enrollment at our nursery school and religious schools, our adult education and visiting scholar programs all attest to our dedication to that principle. I do not need to review for you the long history of Adas Israel's support for JPDS. I think that many at Adas Israel and JPDS-NC share the view that the current situation between us results in many ways from our desire to do all we could to maintain a Jewish day school at Adas Israel in spite of serious differences both large and small. Once JPDS determined that it wished to become independent, we have tried to assure that day-to-day operational problems never interfered with JPDS-NC's ability to accomplish its mission. I hope you agree that the additional year of occupancy at the Synagogue by JPDS-NC was indicative of our determination in that regard.

Adas Israel cannot, however, insure the survival of JPDS-NC as an independent school, precisely because JPDS-NC is independent. Since July 1, 1999, JPDS-NC has been responsible for those key decisions about its short-term and long-term location, the actions of its leadership, parents and friends, and its finances, operations and public actions in the Washington community. As you and others have acknowledged, it is those decisions and actions by JPDS-NC which have in fact brought about the current situation regarding location, rather than any position taken by Adas Israel. Moreover, it has become clear over the past few months that whatever Adas Israel might do will not affect the ability of all qualified students in Washington that wish to obtain a Jewish education to do so.

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It is our understanding that Jewish day schools in the area have gone to extraordinary lengths to assist JPDS-NC parents in this regard.

One of the most difficult problems we face now in dealing with JPDS-NC is the fact that despite Adas Israel's commitment to Jewish education, our support for JPDS and JPDS-NC, and our respect for JPDS-NC's independence, there continues to be an effort to hold the Synagogue responsible for the future of JPDS-NC. This is, to put it plainly, wrong, and the fact that this effort has persisted for an extended period of time has made it increasingly difficult, and perhaps impossible, for the Synagogue to determine what appropriate assistance we may be able to lend to JPDS-NC in dealing with what we recognize is a serious problem. As I have noted to you and others this matter is now weighed down by fundamental questions involving trust, credibility, respect, understanding, sensitivity, and professionalism.

In this extremely difficult climate, we continue to be determined to do right by JPDS-NC, without sacrificing the current and future needs, operations, programs of Adas Israel. As a result, when on May 3 the Executive Committee and Trustees considered a request from JPDS-NC to occupy Adas' premises for "at least one more year," and voted unanimously not to accept that request, we informed JPDS-NC's Board that such a request was "not feasible." There are a number of reasons why that is the case. In reliance on the Separation Agreement between Adas Israel and JPDS-NC, we have expanded our nursery school, committed additional needed space to our religious school, promised additional rooms to our Hebrew Literacy and Jewish Study Center programs, and hired a new librarian for an extended program. Adas Israel simply could not physically accommodate seven JPDS-NC grades and carry on these new and vital programs.

Again, in reliance on the Separation Agreement, we have made promises to our neighbors, the two Advisory Neighborhood Commissions that represent those neighbors, and the Board of Zoning Adjustment that our current certificate of occupancy covering JPDS-NC would not be renewed. We have a number of matters that are essential to the future vitality of Adas Israel as the District's largest and most important Conservative congregation, fully committed to our urban location and our community, all of which turn on a good relationship with our neighbors, the ANCs and the BZA. We simply cannot jeopardize that relationship by seeking a zoning waiver for all of JPDS-NC, with its accompanying traffic, parking and other issues.

Finally, although JPDS-NC representatives briefed us on JPDS-NC's efforts to find alternative space, in our subsequent internal discussions we determined that it was unclear the extent to which the space at Adas Israel was absolutely necessary to the survival of JPDS-NC, rather than simply preferable to other space. These questions were reinforced by JPDS-NC's announcement to its parents last week that the entire school would be going to the two synagogues on Sixteenth Street, despite

prior statements that such a move was financially and operationally impossible under the terms of the BZA order.

Your request proposes a much different occupancy situation, and calls for a new response. We will undertake the following actions:

1. We will meet with our religious school and nursery school directors and their committee chairs to assess precisely how many classrooms we might have available next fall for use by day school students.

2. We will consult with our legal advisors about the prospects and appropriate approach were we to seek some action from the BZA to permit us to accommodate the number of day school students for whom we have space. In this regard, it is essential that JPDS-NC take no action and make no contact with the BZA, the ANCs, or the neighborhood as to possible occupancy at Adas Israel.

3. We request that you be prepared as soon as possible to provide us with the following information:

a. The complete order of the Board of Zoning Adjustment, and any (non-privileged) analysis of it that JPDS-NC or your zoning counsel may have prepared.

b. The plans for renovating Ohev Shalom, including the contractor, estimated costs, options, and physical limitations.

c. How relocating all of JPDS-NC to the two Sixteenth Street synagogues will affect the financial situation of JPDS-NC, including how expenses will be financed, and most importantly an objective and reliable projection of revenues including donations for the year 2000-01.

d. JPDS-NC's plan for relocation for the year 2001-02. This includes whether an agent has been retained by JPDS-NC, and who that agent is, what locations are under consideration, the costs involved in each location. Please provide detailed information on the availability, costs and plans of JPDS-NC with respect to the former Hebrew Academy and the Franklin School.

e. A detailed, objective assessment of the status of the Forest Hills site and JPDS-NC's plans for that site.

f. A detailed breakdown, by grade, of the actual, fully committed enrollment for the year 2000-01, as of May 10. I would caution you that since Adas Israel's available space is going to be very limited, figures which might include students who have already notified JPDS-NC of their intent to go elsewhere will be a negative factor in our deliberations. We could not accommodate an enrollment which expanded because our space became available.

Once we have received this information from you and made our internal and community review, I will contact you immediately so that Adas Israel and JPDS-NC can meet. As I have emphasized to you, Adas Israel is sensitive to the time constraints on JPDS-NC and we will try to act as quickly as we can. If appropriate, we are prepared to call a special meeting of the Board of Managers.

As I have noted to you in our conversations and to other JPDS-NC representatives in our meetings, Adas Israel is not engaging in negotiations with JPDS-NC. I do not know what the outcome of our review will be. If all the circumstances so warrant, and we do present terms in response to your request, they will represent what we consider the best approach for the Synagogue, and the most reasonable conditions we are able to offer to JPDS-NC. Your understanding of the realities of this situation will affirm to us the welcome changes we have seen in our recent discussions with you and your determination to extend those changes into the future.

Again, I want to express my personal appreciation for the sincere, positive, and friendly conduct by JPDS-NC representatives toward me in recent days. However we proceed, I hope this is indicative of Adas Israel's future relationship with JPDS-NC.

I look forward to hearing from you.

Sincerely,

Russell L. Smith