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June 30, 2000

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BY HAND

Clerk
District of Columbia Board of Zoning Adjustment
441 Fourth Street, NW
2nd Floor
Washington, DC 20001

Re: Application of 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

Dear Sir/Madam:

Enclosed please find an original and 11 copies of JPDS's Opposition to Application of Shepherd Park/Colonial Village Neighborhood Alliance and the Members Thereof for a Stay of Decision and Order. Please file the original, distribute the remaining copies to the members of the Board, and return a date-stamped copy of the same to me via the messenger awaiting.

Please give me a call if you have any questions. Thank you for your cooperation in this matter.

Sincerely,

Marc E. Miller

Enclosures

cc: Marsha G. Gentner (via mail w/encl.)
Allison C. Prince (w/encl.)

15730-002/201753

BZA
Case No. 16556
Exhibit No. 347

Board of Zoning Adjustment
District of Columbia
CASE NO.16556
EXHIBIT NO.347

BEFORE THE
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

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

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

Applicant Jewish Primary Day School of the Nation's Capital ("JPDS"), by undersigned counsel, opposes the request for stay of decision and order filed by Shepherd Park/Colonial Village Neighborhood Alliance (the "Alliance").

A. Introduction

By a final Order dated June 15, 2000 ("Order"), the Board of Zoning Adjustment ("BZA" or "Board") approved a special exception to allow JPDS to establish a private school at 7712 16th Street, NW (Square 2745-D, Lot 802) and 7701 16th Street, NW (Square 2739, Lot 804). The Order expires on July 1, 2001, and is, by its terms, nonrenewable.

On June 23, 2000, the Alliance filed the application for a stay of the Order pending resolution of an appeal yet to be filed in the District of Columbia Court of Appeals[1]. Because the Alliance's motion does not demonstrate any reasonable basis for a

[1] Despite the fact that the Alliance claims that it will be irreparably harmed if the Board does not stay its Order pending Appeal, the Alliance has yet to file a petition for review of the Order with the Court of Appeals.

stay and because a stay would be devastating and unfair to JPDS, the Alliance's application for stay must be denied.

B. The Alliance Lacks Standing to Request a Stay

The Alliance was not a party to the proceedings before the BZA and never requested party status. See Order at p.2. The Board's rules do not authorize non-parties to file motions for relief. Accordingly, the Alliance's motion for stay should be dismissed for lack of standing to seek the requested relief.

C. The Alliance Fails to Meet the Requirements for a Stay

Even assuming that the Alliance had standing to pursue this request, it has failed to meet the requirements for stay of the BZA's Order. To prevail on a motion for a stay of an agency order, the movant must demonstrate (i) that irreparable injury will result if the stay is denied, (ii) that the opposing party will not be harmed by the stay, (iii) that the movant is likely to succeed on the merits, and (iv) that the public interest favors the granting of the stay. Barry v. Washington Post Co., 529 A.2d 319, 320-21 (D.C. 1987). The Alliance cannot satisfy any of these factors and a stay of the Board's Order is unwarranted.

1. The Alliance has failed to demonstrate any irreparable harm.

In order to obtain a stay, threatened harm must be an immediate threat to a substantial right. See District of Columbia v. Group Insurance Administration, 633 A.2d 2, 21 (D.C.1993)(loss of business from denial of stay is not irreparable unless evidence shows that, without stay, enterprise will be driven out of business).

The Alliance has failed to articulate any irreparable injury that would result if the Order is allowed to be implemented during the pendency of an appeal. In fact, the only "injury" alleged by the Alliance is that its members will be temporarily inconvenienced by increased traffic and congestion. See Application at p.7. This injury - - even if supported by evidence and proven to be true - - is certainly not irreparable.

As to traffic and congestion, the Board concluded that 16th Street "carries an average daily traffic volume of 39,800 vehicles in the vicinity of the subject properties"(Order at p.12) and that the relocation of JPDS would add only an additional 68 vehicles to the morning rush hour and an additional 37 vehicles to the afternoon rush hour" (Order at p.14) - - an increase of between .09 and .17 percent. Not surprisingly, the Office of Planning and the Board concluded that the additional traffic would "not have an adverse impact on the affected neighborhoods." (Order at p.15). In fact, the Board's Order permits only less than one-half of that traffic volume – 32 vehicles. It should also be noted that the ANC 4A recently approved the relocation of a pre-school to the Ethical Society Building at Jonquil and 16th Streets, N.W. The Ethical Society case is scheduled to go before the Board on July 11, 2000. The Alliance has not opposed this new use even though the Alliance claims that JPDS' use of the same alley system will trigger "injury."

Based on JPDS's current enrollment for next year, its student body will not exceed 140 - - not the 200 the Alliance asserts, or even the 185 that the Board's Order permits. JPDS is already undertaking extensive efforts to assure strict compliance not only with the letter, but also the spirit, of the BZA Order. (Hahn Affidavit ¶ 8). It is inconceivable that the presence of this small school under the very strict conditions of the

BZA Order, for one academic year, could be the source of any grave, irreparable or lasting harm to the Shepherd Park/Colonial Village community.

2. JPDS will be irreparably harmed if the stay is granted.

Contrary to the unsubstantiated assertions of the Alliance, the harm to JPDS should the Board grant the stay is clearly irreparable. A stay with only two months before the school year starts could cause JPDS to close not only for the 2000-2001 academic school year but, in all likelihood, forever. The requested stay, in other words, would operate as an outright reversal of the BZA's Order, not a temporary stay pending resolution of an appeal on the merits. JPDS will be effectively denied any opportunity to operate its school at the locations approved by the Board.

Moreover, as detailed in the Affidavit of Margaret Hahn (attached as Exhibit A), the Ohev Sholom and Tifereth sites are the only assured locations for JPDS for the 2000-2001 academic year. JPDS's permitted tenancy at Adas Israel Congregation expired on June 30, 2000. (Hahn Affidavit ¶ 2). Continued tenancy at Adas Israel Congregation for the 2000-2001 academic year is not "being given active consideration," as the Alliance asserts, and is not an option available to JPDS. (Hahn Affidavit ¶ 3). The Board and Executive Committee of the Adas Israel Congregation have repeatedly turned down requests by JPDS for the school to remain at its current location for the upcoming academic year. The May 12, 2000 letter of the President of Adas Israel Congregation, attached to the Alliance's Application for stay, confirms this. The Franklin School site is not an available or even a viable alternative for the 2000-2001 academic year. (Hahn Affidavit ¶ 3).

For the last two years, JPDS has undertaken extensive and exhaustive effort to locate space on a temporary or permanent basis. Simply put, there are no other viable sites in the District of Columbia available to JPDS at this time, other than the sites approved by the Board. (Hahn Affidavit ¶ 4).

A stay of the Board's Order pending appeal would irreparably harm JPDS. Without a location which JPDS is assured would be available for the forthcoming year, and with little more than two months left before the start of the school year, JPDS's very existence would be in grave jeopardy. (Hahn Affidavit ¶ 7). Indeed, in view of JPDS's very tight construction schedule at Ohev Shalom, a process which could not commence until the Board's Order issued, any delay at this juncture could well imperil JPDS's ability to open in the Fall.

Aside from the irreparable harm to JPDS if a stay is granted, there is also the irreparable harm to JPDS students, faculty and staff who relied on the BZA decision, made in April. If the stay is granted and JPDS has no place to locate for the coming year, JPDS students - - including special needs students - - would have only two months to find other schools. JPDS teachers and staff would have less than two months to find other employment. (Hahn Affidavit ¶ 6).

A stay of the BZA's order allowing JPDS to temporarily relocate to Ohev Sholom and Tifereth sites could also result in insurmountable financial losses for JPDS. However, such financial losses pale in comparison to the loss of the school. If unable to operate for the 2000-2001 academic year, JPDS may yet remain liable on all employment contracts entered into with its teachers and staff for that year. Employment and re-enrollment contracts were offered based on the BZA's April 12, 2000 ruling. Similarly, JPDS would

be forced to return to the parents of its students all tuition collected for the 2000-2001 academic year, eliminating JPDS's major source of revenue. Additionally, the requirement by the BZA that JPDS present signed leases for the sites prior to the issuance of the Order resulted in an additional financial liability of approximately $200,000. (Hahn Affidavit ¶ 7).

3. JPDS is likely to prevail on the merits.

The Alliance's contention that it is likely to prevail on the merits is equally specious. The role of the Court of Appeals in reviewing a decision of the BZA is quite limited. The Court of Appeals "must uphold decisions made by the BZA if they rationally flow from findings of fact supported by substantial evidence in the record as a whole." Draude v. District of Columbia Bd. of Zoning Adjustment, 582 A,2d 949, 953 (D.C. 1990)(citations omitted). This standard is applicable even if the Court of Appeals would have reached another result. Stewart v. District of Columbia Bd. of Zoning Adjustment, 305 A.2d 516, 518 (D.C. 1973). Indeed, in recently upholding the BZA's approval of a special exception for construction at National Cathedral School, the Court of Appeals affirmed the Board in an order issued only 8 days after oral argument. See National Cathedral Neighborhood Assoc. v. District of Columbia Bd. of Zoning Adjustment, -- A.2d -- (D.C. May 10, 2000) (No. 99-AA-1230), WL 719487.

The Alliance's argument in support of its application for stay -- that the temporary relocation of JPDS will negatively impact parking and traffic -- is nothing more than a rehashing of the argument presented to and rejected by the Board during the special exception application process. See Application at p. 3. This Board heard approximately

24 hours of testimony, a significant portion of which was directed to the issues of traffic and parking. Thus, the assertion by the Alliance - - which was not even a party to the Board proceeding - - that it was denied due process is nothing less that specious. Based upon the record as a whole, the Board concluded that the special exception should be granted subject to an exhaustive list of conditions specifically tailored to address the traffic and parking issues. See Order at pp. 24-26.

These conditions imposed by the BZA in its Order were specifically designed to alleviate the very traffic and parking problems complained of by the Alliance. See Order at pp. 24-26. For example, the Order sharply reduced the number of cars during the morning rush hour to 32; the Order requires that the affected public alleys be kept open for two-way traffic (Condition No. 13); and the Order requires that all buses serving the JPDS sites shall not load or unload on Juniper, Jonquil or 16th Streets (Condition No. 16). Thus, if JPDS adheres to the conditions imposed by the Order, the Alliance will not suffer any injury, irreparable or otherwise. If JPDS does not adhere to these conditions, the Alliance and its members are certainly not without a legal remedy by which to be made whole assuming they could demonstrate any damage. In either case, neither the Alliance or its members will sustain any irreparable injury if the Order is not stayed.

Based upon the deferential standard of review applied by the Court of Appeals in reviewing BZA Orders and the fact that the parking and traffic issues were addressed extensively during the special exception process, it is extremely likely that JPDS, not the Alliance, will prevail on the merits of an appeal. For purposes of its request for a stay, the Alliance has certainly not carried its burden of showing a substantial likelihood that it will prevail.

4. The public interest favors denial of the application for stay.

Finally, the public interest overwhelmingly favors denial of the application for stay. The harm complained of by the Alliance if the stay is denied is merely the potential inconvenience of increased traffic and parking problems along 16th Street. However, as discussed above, the conditions of the Order specifically address these concerns. The alleged inconvenience - - even if true - - would be limited to school days during the period from September, 2000, the date on which JPDS opens school, to July 1, 2001, when the nonrenewable Order expires.

In stark contrast, the public interests served by denying the stay are both real and substantial. JPDS provides primary education to elementary students (including special needs students) and provides employment to numerous teachers and staff. Absent denial of the stay, JPDS's ability to open for the 2000-2001 academic year is in serious jeopardy and if that occurs, JPDS likely will close for good. As a result, its students will be forced to make last minute arrangements for schooling for the 2000-2001 academic year. Similarly, its teachers and staff would be forced to find alternative employment. Clearly, the public interest is not served by displacing JPDS students and staff and closing JPDS for good in favor of prohibiting 32 additional vehicles in an area that has an average daily traffic volume in excess of 39,000 vehicles.

D. Conclusion

The Alliance has failed to allege any irreparable harm entitling it to the requested stay. The harm to JPDS should the Board grant the stay is immediate and truly irreparable. Given that the Alliance's argument in favor of the stay is nothing more than a rehash of its argument before the Board on the application for the special exception, it

is highly unlikely that the Alliance would prevail on appeal should it in fact file a petition for review of the Order with the Court of Appeals. Finally, the public interest significantly favors the denial of the stay.

Because the Alliance does not have standing to file this motion and because the motion does not satisfy any of the criteria for a stay, JPDS asks that the request be denied.

Respectfully submitted,

WILKES ARTIS, CHARTERED

By: _____

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Counsel for Jewish Primary Day School of the Nation's Capital

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by first class mail, postage prepaid, this 30th day of June, 2000 upon

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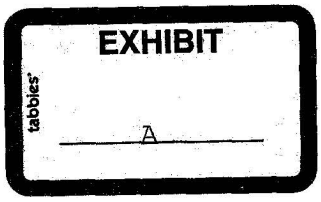
AFFIDAVIT OF MARGARET HAHN

I, Margaret Hahn, being duly sworn, state as follows:

1. I am the president of the board of directors of the Jewish Primary Day School of the Nation's Capital (JPDS). I have served in that capacity since May 31, 2000. I have served on the board of directors, and been an officer of JPDS, since July 1, 1999.

2. The Application for Stay filed by the Shepherd Park/Colonial Village Neighborhood Alliance ('the "Alliance") makes a number of factual assertions regarding JPDS which are incorrect. Thus, it is not accurate to state, as the Alliance does, that JPDS "gave itself an unreasonably short time frame to find a new location for the school." JPDS was forced to vacate its classrooms from its current site at Adas Israel Congregation on June 30, 2000.

3. Moreover, tenancy at Adas Israel Congregation for the 2000-2001 academic year is not "being given active consideration," as the Alliance asserts, and is not an option available to JPDS. The Board and Executive Committee of the Adas Israel Congregation have repeatedly turned down requests by JPDS for the school to remain at its current location for the upcoming academic year. The May 12, 2000 letter of the President of Adas Israel Congregation, attached to the Alliance's Application for stay, confirms this. The Franklin School site is not a viable alternative either. First and foremost, the Franklin School site was never made available for occupancy by JPDS. Second, we have been informed by the officials in charge of the disposition of Franklin School that a charter school, not JPDS, has the first right to the site. Most significantly,



the Franklin School is not habitable for an elementary school, and construction to render it so (at an estimated cost of $10 million) could not possibly be completed by September – or even December – of 2000, even if JPDS was awarded the site or a lease today.

4. For the last two years, JPDS has undertaken extensive and exhaustive effort to locate space on a temporary or permanent basis. Simply put, there are no other viable sites in the District of Columbia available to JPDS at this time, other than the sites approved for use by the BZA.

5. A stay of the BZA Order pending appeal would irreparably harm JPDS. Since the Order is for a one year term, such a stay effectively would operate as a reversal of the BZA's Order not a temporary stay. Without a location which we are assured would be available to us for the forthcoming year, and little more than two months left before the start of the school year, JPDS's very existence would be in grave jeopardy.

6. Aside from the irreparable harm to JPDS if a stay is granted, there is also the irreparable harm to JPDS students, faculty and staff who relied on the BZA decision, made in April. If the stay is granted and JPDS has no place to locate for the upcoming academic year, JPDS students – including special needs students – would have only two months to find other schools. JPDS teachers and staff would have less than two months to find other employment.

7. A stay of the BZA's order allowing JPDS to temporarily relocate to Ohev Sholom and Tifereth sites will also result in insurmountable financial losses for JPDS. While unable to operate for the 2000-2001 academic year, JPDS could remain liable on all employment contracts tendered to its teachers and staff for that year. Employment

and re-enrollment contracts were offered based on the BZA's April 12, 2000 ruling. Similarly, JPDS would be forced to return to the parents of its students all tuition collected for the 2000-2001 academic year, eliminating JPDS's major source of revenue. Additionally, the requirement by the BZA that JPDS present signed leases for the sites prior to the issuance of the Order resulted in an additional financial liability of approximately $200,000.

8. Based on JPDS's current enrollment for next year, its student body will not exceed 140. We are already undertaking extensive efforts to assure strict compliance not only with the letter, but also the spirit, of the BZA Order. We cannot imagine that the presence of our small school under the very strict conditions of the BZA Order, for one academic year, could be the source of any grave, irreparable or lasting harm to the Shepherd Park/Colonial Village community.

Margaret Hahn

Sworn to and subscribed before me this 29th day of June, 2000

Notary Public

TONIE R. DAVIS, III
NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires October 31, 2002

My Commission Expires:

Doc. #201638