Neighbors United for Livable Streets

Upton Street Neighbors

Van Ness South Tenants' Association, Inc.

Van Ness East Condominium Association

The Consulate

4107 Connecticut Avenue

4007 Connecticut Avenue, NW Tenants' Association

August 27, 2001

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Ms. Sheila Cross
Chairperson
Board of Zoning Adjustment
441 4th Street, NW, 2nd Floor
Washington, DC

Re: Edmund Burke School Expansion
BZA Application No. 16611

Dear Madam Chair:

Enclosed please find the Neighbors United for Livable Streets' Proposed Findings of Fact and Conclusions of Law in the above-captioned case for the Board's review.

Thank you for your attention to this.

Sincerely,

Jodie Smolik, Coordinator
Neighbors United for Livable Streets
202-537-3071

BZA
Case No. 16611
Exhibit No. 226

Board of Zoning Adjustment
District of Columbia
CASE NO.16611
EXHIBIT NO.226

NEIGHBORS UNITED FOR LIVABLE STREETS (NULS)
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER

BZA APPLICATION NO. 16611

Application of Edmund Burke School pursuant to 11 DCMR 3104.1, for a special exception from the provisions of Section 206 for an addition to an existing private school for 360 students and 70 faculty and staff and for a variance to section 411 to allow more than one roof structure for the properties at 2969 Upton Street and 4101-4103 Connecticut Avenue, NW (Lots 27, 28 and 65, Square 2243) in the R-5-D Zone District.

HEARING DATES: May 15, 2001, May 22, 2001, and July 10, 2001

DECISION DATE: September 4, 2001

FINDINGS OF FACT

1. Neighbors United for Livable Streets (NULS) is an adhoc committee of neighbors representing Upton and Tilden Street and Connecticut Avenue, which was granted party status in this case. The NULS group has more than 70 members.

2. The proposed expansion, if granted, would adversely affect the neighboring properties and would have a detrimental effect to the health, safety, and general welfare of the surrounding neighborhood.

3. The proposed use of the site is inconsistent with the land use map of the Comprehensive Plan. ANC 3F introduced verbal and written testimony from the Ward 3 Plan that identifies the Comprehensive Plan's general objectives and policies. The Ward 3 Plan states that, "There are a large number of institutional uses in Ward 3 and that many of these facilities have structures that are an exception to the neighborhood land use or do not conform to the underlying zoning, and that these uses must be maintained and expansion carefully controlled." "Redevelopment pressures must be strictly limited and redirected to other areas of the city specified in the Comprehensive Plan for new economic development." The plan further states that "A distinctive feature of Ward 3 is the clustering of retail nodes at regular intervals along major arteries and the commercial nodes are separated by long segments of residential development." Placing a school at the intersection of Connecticut Avenue and Upton Street will insert a private school zone into a portion of Connection Avenue designated for housing thereby changing the character of a well laid-out corridor in a way that is contrary to the uses identified in the Comprehensive Plan.

4. The subject site is located in an R-5 D district. Section 206 of zoning regulations provides the applicable rules for locating private schools. It states, "The private school shall be located so that it is not likely to become objectionable to adjoining and nearby property because of noise, traffic, number of students or otherwise objectionable conditions."

5. The street system east of the subject site consists of narrow residential streets that do not follow a complete grid system due to geography and land use patterns. These streets and public alleys are not designed to support the large volumes of traffic associated with current institutional uses and cannot support any new use.

6. The cumulative impact of institutional special exceptions and expansions on Upton Street has created an adverse traffic, parking and safety impact on the residential neighborhood. The special exceptions and expansions have included the Levine School of Music, Hillwood Museum, Howard University Law, the Netherlands Embassy and the Burke School.

7. Advisory Neighborhood Commission 3F has opposed the Burke application, citing unworkable traffic circulation routes, non-compliance with past BZA Orders, and an unwillingness on the part of the School to come up with a plan that effectively manages the school's traffic and the other impacts that the School's operation has on the neighborhood. In its resolution, report and July testimony before the BZA regarding the new traffic management plan, ANC 3F requests that a full one-year test must be established with Metrochek, shuttles, and compliance plan and committee before any approval by the BZA. By law, the BZA must give "great weight" to a decision of the ANC.

8. The Office of Planning has recommended denial of the Burke application, citing unmitigated traffic problems associated with Burke's plan.

DPW

9. Kenneth Laden, Associate Director for Transportation Planning of the Department of Public Works, reviewed the proposed Burke traffic management plan dated December 20, 2000. Mr. Laden also met on several occasions with the applicant and members of NULS. He also conducted site visits at the school to observe traffic conditions.

10. Prior to the May 15 BZA hearing, Mr. Laden presented the DPW's conclusion that the Department "does not support the proposed application of the Edmund Burke School to expand to the adjacent property."

11. At the May 15 hearing, Gorove Slade presented a new Transportation Management Plan (TMP). The new information was not served to all parties as

required by law, including DPW, the ANC 3F and NULS. The hearing was continued until May 22.

12. The new Gorove Slade TMP proposes to reduce vehicular traffic by implementing a morning shuttle bus, a Metrochek incentive for MD/VA students, and a compliance pledge and committee.

13. In a May 21, 2001 memorandum to the BZA, Ken Laden concludes: "However, even with these proposed measures, there is no way, at this time, to determine whether these measures will be effective in the near-term or long-term. Therefore, the Department recommends a one year demonstration of the effectiveness of these proposed transportation mitigation measures before the application is approved."

14. Upon questioning by the Board, Mr. Laden testified that a partial test of the proposed TMP could be implemented without the construction of the proposed school expansion and parking garage.

15. He made the recommendation that the Edmund Burke School would during the next academic year; divert as many students to other forms of getting to school, whether it be the Metro subsidy or a shuttle bus service. DPW would help monitor that effort with the existing school building and the existing school population and determine whether or not there is a commitment by the parents and the school to have a beneficial impact. (BZA transcript, p. 155, Lines 14 – 22)

16. Mr. Laden testified that a 30 – 100 day test would be too short. (BZA tr, p. 161, line 8).

17. Upon cross examination by NULS, Mr. Laden testified that if the transportation management plan did not work, then traffic would be greater than existing school conditions and would impact the neighborhood.

18. Mr. Laden also testified that the access and circulation plan has numerous vehicular/vehicular and vehicular/ pedestrian conflict points on Connecticut Ave and Upton Street and the public alley.

MCV ASSOCIATES TRAFFIC ANALYSIS

19. Joe Mehra, President of MCV Associates, was approved as an expert traffic witness for NULS. He submitted a detailed analysis of the Gorove/ Slade traffic reports dated Sept. 25, Nov 8, Dec 20, 2000 and April 10, 2001. MCV also provided analysis of the May 16, 2001 Gorove Slade Transportation Management Plan.

20. Mr. Mehra of MCV testified that the Gorove Slade Traffic Analysis and TMP are "NOT VALID" due to major errors in Gorove Slade's use of existing traffic data, calculations and bold assumptions.

21. He concluded that the Gorove Slade circulation plan would result in unsafe conditions on Upton Street at the intersections with the school driveway and the public alley.

22. He testified that the circulation plan and access routing proposed by the school for the parents, students and faculty is not enforceable.

23. Mr. Mehra testified that traffic impacts of the proposed school expansion would make the exiting bad situation worse on Upton Street, the alleys between Veazey, Van Ness and Upton Streets and Connecticut Avenue.

24. He testified that the use of shuttle buses on Upton Street is unsafe due to the narrow roadway width, parking on both side of the street and the fact that Upton Street is a two-way street.

25. He testified that the Gorove Slade estimation of the trip reductions due to the TMP is erroneous, showing a higher reduction than possible.

26. Mr. Mehra's analysis determined that the proposed school's 200 vehicle trips would be reduced to 189 vehicles, not 124 vehicles as assumed by Gorove Slade.

27. Regarding the vehicle reductions of the TMP, Mr. Mehra demonstrated that Gorove Slade made a major error by calculating one student = one vehicle; thereby overstating the amount of traffic reduction associated with the shuttle and transit option. Based on Gorove/ Slade data, Mr. Mehra testified that the correct calculation would be 1.3 students per vehicle because of student car pools. This testimony was unrefuted by Burke and Gorove Slade.

28. Mr. Mehra demonstrated another major error by Gorove Slade for shuttle use. He determined that Gorove/Slade incorrectly calculated a much higher target audience for shuttle service by including the faculty, Metro subsidy trips and shuttle trips as part of the target audience. Based on Gorove Slade's own assumptions, then the total of vehicle trips would be reduced by 26 vehicles (not 40). This testimony was unrefuted by Burke and Gorove Slade.

29. Mr. Mehra testified that Gorove Slade made bold assumptions that 40 students will use the shuttle every morning.

30. He testified that there are no incentives for the parents to drop off their children at remote shuttle lots because of many factors including inclement weather; if they

are running late; the child has heavy school items; or the shuttle lot is empty because the shuttle is on a run.

31. During cross-examination by NULS, Lou Slade of Gorove Slade could not answer what would happen if students did not utilize the shuttle bus.

32. Also during cross-examination, Lou Slade confirmed that the shuttle sites would have to be determined each year. He testified that the shuttle site selected at 42nd Street near Wilson High is very busy and there is nearby construction of town homes.

33. No evidence was submitted on how the shuttle buses would exit from Upton Street. NULS questioned whether or not the shuttle buses would use the public alley to access Tilden Street or be delayed at the intersection of Upton Street and Connecticut Avenue.

NULS presented written evidence that the Burke School did not have permission to use WMATA Kiss and Ride and Pierce Mill as shuttle sites, even though the school had previously reported that it did.

METROCHEK INCENTIVE

34. Mr. Mehra of MCV testified that the transit subsidy reduction for VA/ MD students as assumed by Gorove Slade was incorrect based on bold assumptions and miscalculations.

35. Almost half of Burke's students come from VA and MD. Of this portion, Gorove Slade reports that 24% will use Metro (a total of 44 students). By adding a $1.10 subsidy, Gorove Slade assumes that 36 more students will accept this incentive and take the Metro from VA and MD, bringing the new total to 80 students – almost a 100% increase in Metro rider ship.

36. The MCV analysis estimates future transit use from Virginia and Maryland students is 48 students, not 80 students (Gorove Slade) resulting in a decrease of 3 vehicles and not 36 vehicles as estimated by Gorove Slade.

37. Gorove Slade also incorrectly calculated that one student using the Metro subsidy equals one vehicle trip reduction. (Actual one car = 1.3 students)

38. Mr. Mehra testified that the issue of shifting over from automobile to Metro from Virginia and Maryland relates to the fact that the Metro must be convenient to the students and their residential locations.

39. He testified that the process of the student being driven from home to the Metro, transferring lines and the number of stops, and then walking from the Van Ness Metro stop to school is so tedious that an incentive of $1.10 is not enough to

cause the change of transportation from automobile to Metro. He testified that the age of the child is also a consideration.

40. Jodie Smolik of NULS testified that the $1.10 subsidy is an insignificant financial incentive; it is less than 1/10 of 1% of the total cost of sending a child to Burke, for parents to change the transportation modes for their children.

41. She also testified that if the incentive has not been implemented, no one could predict its use.

CIRCULATION PLAN

42. Mr. Mehra testified that the Gorove Slade access and circulation plan has major flaws.

43. The circuitous route that parents must travel to the school (involving five turning movements and passing through several traffic lights) will add a considerable of travel time to the school traffic. The easier route is to turn left from southbound Ct Ave onto Veazey Terrace (using a protected left turn green arrow), cut through the alley between Veazey Terrace and Van Ness Street and cut across to the Van Ness and Upton Street alley.

44. He testified that the intersection of the public alley and the proposed school driveway would result in major vehicular and pedestrian conflict points and unsafe conditions.

45. The conflict points and unsafe conditions include students crossing over the school driveway as well as the public alley. At the same time, school traffic is exiting onto Upton Street, turning either left or right, and at the same time there is traffic coming off of the public alley that is also trying to turn left or right.

46. The intersections of CT Ave/ Upton St have a level of service ranked F.

47. A blocked intersection at Upton/ CT Ave will create backups onto Upton and would block the proposed new school driveway and the public alley. Mr. Mehra testified that it would only take four vehicles traveling west on Upton ST towards CT Ave to block the access from the school driveway onto Upton, which means that the traffic is going to back up all the way inside the parking garage back onto Ct Ave.

48. Connecticut Avenue during rush hour is two lanes traveling north during the AM peak hour, the same direction that Burke parents are supposed to be traveling to enter the school.

49. The intersections of CT Ave/ Van Ness have a level of service ranked F.

50. Mr. Mehra testified that both northbound lanes on Connecticut Avenue would be blocked due to traffic trying to turn left at Van Ness Street and Burke School traffic trying to turn right and enter the proposed entrance on Ct Ave.

51. Mr. Mehra testified that the traffic impacts for the Van Ness Street, the public alley and Upton Street are far greater than Gorove Slade reports.

52. Gorove Slade's transportation plan states "that the public alley will not be used" however the Gorove Slade Traffic Impact Analysis on page 11, instructs parent who cannot enter the Ct Ave stacking area "to continue northbound, then turn right onto Van Ness Street, turn right into the public alley and right onto Upton Street. They will have the option of performing their carpool operations at this operations at this location or to continue towards the Ct. Ave access."

53. In addition, Mr. Mehra found misleading information in Gorove Slade's transportation report, which shows that 45 vehicles are turning onto CT Ave and traveling northbound. However, the Gorove Slade directional distribution states that only 25% of the total traffic is actually traveling north. The majority of the 45 vehicles then may turn right onto Van Ness Street and use the alley to access Upton Street in order to head south or east.

54. The public alley between Van Ness and Upton is the only form of egress for many residences, including the six residences east of the school that are on a dead-end alley. Trash trucks use the alley daily.

55. Bus parking behind the school presents unsafe conditions for the public alley. In order to exit the school, the buses would have to back out in reverse into the public alley into the line of oncoming traffic and pedestrians in the alley. Bus parking would also block the residents who live east of the school in the dead-end alley.

GOROVE/SLADE FALSE TESTIMONY

56. Joe Mehra of MCV identified several errors in the Gorove Slade analysis that produced invalid results, including a traffic count performed on July 8, 1999 when the school was not in session.

57. During rebuttal, Lou Slade of Gorove Slade denied the summer count and testified that in his 30 years of work he has not performed summer counts for schools because it would invalidate the result

58. However, during cross-examination, the Gorove Slade technical appendix to the Traffic Impact Analysis was produced indicating that *July 8, 1999* was the date of the Ct. Ave/ Tilden Street count.

59. Mr. Slade testified that it was a clerical error and that the actual date was April 8, 1999.

60. However, upon cross-examination, Gorove Slade's Traffic Impact Analysis states that all counts were performed between September and October 1999. There was no mention of any April counts.

61. On August 20, 2001, Gorove Slade submitted photocopies of "handwritten" traffic count sheets supposedly dated April 8 and April 10, 1999 (04/08/99 and 04/10/99). **Upon examination of these documents, it has been concluded that these documents have been altered and truly represent a summer count taken on July 8, 1999.** On one form, someone from Grove Slade has attempted to turn the number seven into a four. On the second page of handwritten counts, the 07/08/99 is clearly discernible.

62. Gorove Slade in the memo to BZA on August 20, 2001, states that a count was also done April 10, 1999. Even if the April 10, 1999 were correct, that date was a Saturday, thereby the traffic count would be invalid.

63. Lou Slade of Gorove Slade has presented false testimony to the Board of Zoning Adjustment and his testimony regarding traffic counts and the new traffic management plan cannot be accepted as truthful and is inadmissible by the Board.

OTHER GOROVE SLADE ERRORS

64. Another error is that Gorove Slade used the wrong PM peak hour for calculating traffic. Using the Guidelines for Traffic Impact Analysis by the Institute of Transportation Engineers, the peak hour for analysis should have been 5 – 6 PM, instead of 2:30 – 3:30 PM. The reason being that more than 50% of Burke students remain after school for activities. This error invalidates the Gorove Slade Analysis.

65. Another error is that Gorove Slade did not include traffic that would be generated by developments that have approved in the vicinity such as the Embassy Complex on Van Ness and Tilden Streets.

66. Another error includes the level of service calculations for the intersections. Gorove Slade based calculations on "other areas" instead of as an urban area with sidewalks and bus stops. This error resulted in levels of service being rated higher than is existing and therefore skews the traffic data.

MCV TRAFFIC COUNTS

67. MCV performed traffic counts on November 9, 2000 of Upton Street and the two public alleys between Upton/ Van Ness and Veazey Terrace/ Van Ness.

68. MCV collected data during the hours of 7 – 9 AM, 2 – 6:30 PM, and 7 – 8 PM on November 9, 2000.

69. Gorove Slade's traffic numbers were at least 21 percent less than the numbers MCV counted on November 9, 2000.

70. Extensive use of the alleys was observed, including more than 100 vehicles.

71. A queue of 26 cars on Upton Street was observed at 8:07 AM.

72. A significant amount of pedestrian activity was observed during the AM peak hours. A total of 166 pedestrians were observed near the school. Many pedestrians crossed Upton Street, thus creating vehicle/ pedestrian conflicts.

73. NULS presented a 10-minute video depicting Burke traffic during the months of October and on November 9. The video shows heavy traffic, vehicular conflict points, unsafe pedestrian activities and lack of enforcement by Burke hired police officers. The video also has evidence of the police officer's personal vehicles blocking the public alley and yelling at a neighbor when confronted. (This portion of the video was not shown due to time constraints)

74. NULS also submitted as evidence a FOX 5 News video taken on the afternoon of November 9, 2000.

75. NULS also submitted into evidence, but was not permitted to show a 5-minute video depicting April 2001 school traffic, video footage of fire engines on Upton Street and the blocking of Upton Street by a Burke rented bus.

76. Jodie Smolik of NULS testified that she contacted the US Park Police and Rock Creek Maintenance Department and verified that during the hours of the traffic counts that there were no accidents or constructions on Rock Creek Parkway.

77. During rebuttal, Erwin Anders of Grove Slade testified that Beach Drive was closed during the period of MCV's morning counts. He did not present any written documentation to prove this claim. He testified that he called Rock Creek Maintenance and was told by Jimmy Wilson that Beach Drive was closed from 7:30 – 10:30 AM in conjunction with the MPD and the Park Police who were searching for a person who killed a police officer.

78. NULS has submitted a motion to reopen the BZA record to submit relevant evidence from the US Park Police and Rock Creek Maintenance to refute Mr. Anders rebuttal. She has received written documentation that Beach Drive was **NOT CLOSED** during the MCV traffic counts. The Beach Drive closure occurred briefly from 9:38 AM and ended at 11 AM while the US Park Police responded to a report of a sighting of the suspect for the murder of the MD State

Trooper. The north end of Rock Creek was closed from Sherill Drive to the MD Line. A subject was stopped, identified and released.

79. In addition, Ms. Smolik contacted Mr. Wilson at Rock Creek Maintenance and he stated that he has not given the inaccurate information to Mr. Anders. Mr. Wilson verified that his log showed no Beach Drive closure during the MCV 7 – 9 AM traffic survey.

SAFETY AND ENFORCEMENT

80. The Burke Traffic circulation plan has many vehicular and pedestrian conflict points, especially on Upton Street and the public alley. Most of the Burke students must cross two lanes of school and alley traffic just to get to the school.

81. The use of the alley for buses will result in unsafe conditions to the students as well as the motorists who use the public alley.

82. Burke's transportation plan has only one police officer to direct traffic.

83. NULS questioned if one officer can direct the two lanes of traffic in the alley/ driveway; in addition to the east/west traffic on Upton; the two shuttle buses on Upton pulling into incoming traffic. At the same time, the officer would have to write down the tag numbers of Burke pledge violators and serve as a cross guard

84. The ending of the 10-minute traffic video by NULS also has evidence of the police officer's personal vehicles blocking the public alley and yelling at a neighbor when confronted. (This portion of the video was not shown due to time constraints).

85. There is no police officer at the Ct Avenue school entrance if school traffic backs up on Connecticut Avenue.

COMPLIANCE PLAN

86. The compliance plan relies on a candid camera and a 2-page pledge that are not enforceable.

87. Burke's plan calls for video monitoring only once a month in front of the school on Upton and between the proposed buildings in the alley. There are no cameras to photograph parents dropping off students on Van Ness, 29th Street or further east on Upton. There is also no video in the dead-end alley behind the school. Pledge violators cannot be caught on videotape.

88. Ken Laden of DPW has stated that the video monitoring would have to be once a week, NOT once a month as the school has stated. In addition, Mr. Laden states that he believes this policy is subjective and unlikely to be effective.

89. A compliance committee of 3 neighbors, two Burke parents and a school administrator is ineffective and places a burden on the neighborhood to ensure the school's compliance.

90. Mr. Laden's DPW's May memorandum to the BZA states that an enrollment reduction of only four students in the following enrollment period for failure to achieve traffic reduction goals, is not strong enough a sanction. He states that the sanctions should be more directly tied to the traffic concerns and affect current enrollment, not future enrollment.

91. The penalties for pledge violators are unrealistic and unenforceable. There are no realistic penalties for senior students who violate the pledge.

BURKE'S CURRENT NONCOMPLIANCE WITH BZA ORDERS

92. The Edmund Burke School is currently in violation of its existing BZA Order issued in 1983 (BZA No. 13986). Mr. David Shapiro, EBS Head of School, admitted in testimony that the School has been in violation of its student population limits for the past several years. The School was allowed a student population of 270 in the 1983 BZA Order, and yet the total student population for the 2000/2001 school year was 299. He testified that he was the one who informed the neighbors about the school's noncompliance.

93. Robert Vricella, a neighbor and member of NULS, testified that he was the one who researched the BZA order and determined that the school was out of compliance. Afterwards, Julie Weisman, a neighbor and member of NULS, informed Burke with a certified letter two years ago that the school was in violation of student population and faculty limits prior to the commencement of the 2000/2001 school year and asked that the school come into compliance. Burke School actually increased its student enrollment. The School has made no effort to come into compliance.

94. Julie Weisman of NULS testified that Burke's track record for remedying non-compliance is not good, and is important for the BZA to recognize. She testified that the "reason they have not come into compliance (in the past several years) and the reason they're willing to put words on paper for a future compliance plan, is that there are no consequences associated with non-compliance."

95. The Burke School has realized additional income of more than $1 million in three years alone just by being out of compliance.

96. Burke is also in violation of faculty and staff limits. The 1983 BZA Order mandates a faculty /staff population of 35. By the School's own admission, that number is now 59. Burke is currently in violation of condition Number 3 of the 1983 BZA Order. The noise emanating from the structure, based on unrefuted

testimony, is 72 decibels at the property line. The allowable limit is only 55 decibels.

97. The Office of Planning, the Department of Transportation, and Advisory Neighborhood Commission 3F have all recommended to the BZA that it deny this application.

STUDENT ENROLLMENT

98. Jaynie Simmons, Vice President of the Tilden Court Condominium Association testified that even with the Burke School's proposed expansion, which would double their current property share, the school overwhelmingly reports the highest density levels of students per acre for any private school in Upper Northwest Washington.

99. The School projects a student density level of 450 students per acre (360 students on three quarters of an acre). Other private schools in the District similar to Burke have much more space per student than Burke; a minimum average of 100 students per one acre.

100. Jaynie Simmons testified that Burke's density is 17 and ½ times greater than the student density for the new Field School on Foxhall RD. (20.5 students per acre).

INADEQUATE PARKING

101. The number of conforming parking spaces proposed, combining the capacity of existing and proposed site as presented by Burke, are substantially less than the amount required, regardless of how the calculation is made. Even with Burke's calculation of 47 spaces, which is flawed, insufficient parking is provided. Only 6 spaces in the new building conform, once regulations governing aisles, tandem spaces and groupings of compact space are applied. Taking 24 of the existing building's spaces, and reducing those by 4 as proposed by Burke for van parking, then adding 6 in the new building, a grand total of only 26 spaces are provided, 2 more than are currently provided, which can be used to fulfill required zoning obligations. The applicant has failed to meet the parking burden.

102. Under its self-certified application Burke has not specified or presented evidence to support variances, which would be needed for its plan to be acceptable. In at least one case, transfer of *required* parking to another lot, variance relief is not available under regulation.

103. Burke has failed to detail, apply for, properly notice and provide evidence-supporting variances needed for its proposal. Accordingly, the application

improperly presumes approval of significant issues critical to the standards under 206.

104. Burke has failed to meet its burden of proof under section 206.3 that it will provide the minimum number of off street parking spaces required by DCMR 11.

OTHER OBJECTIONABLE CONDITIONS

105. Burke is using the surrounding neighborhood as an extension of its campus. Testimony by numerous neighbors supports the contention that the School is using residential neighborhood streets for its campus, which demonstrates the fact that the site does not have the capacity to support the number of students it currently has, and certainly will not be able to contain an expansion of 60 more students (90 above the authorized level) on its proposed three quarters of an acre.

106. The proposed expansion will provide no lunchroom and no outdoor playing field. The school intends to continue its unauthorized use the Howard Law School lawn for athletics. As documented by ANC 3F, this use is prohibited by Howard Law School's Campus Plan, BZA Order and agreement with ANC 3F and Howard Law's neighbors.

107. Numerous neighbors testified to the fact that Burke uses residential streets for recreational purposes creates noise and other disturbances that are incompatible with residential zoning.

108. Grace Lang of NULS testified that Burke is a 24/7 operation and the traffic management plan does not deal with illegal parking and traffic problems at nighttime events.

109. School activities—both the amount of activities and the length of time late into the night of the activities— are having a detrimental effect on the neighborhood's quality of life.

110. Noise generated by Burke equipment, including air conditioning units and potential generators present an adverse impact on the neighborhood. The School's existing air conditioning unit is louder than the BZA order stipulates.

111. Burke's proposed 21-month construction period presents an adverse impact on the neighborhood for traffic, blocking of the public alleys and noise. The school lacks a complete construction and staging plan.

112. The residents of the 4107 Apartment building will be adversely impacted by the construction, noise and traffic. The building uses the public alley for oil delivery trucks, daily trash trucks and service vehicles.

113. Burke has waived its BZA approval contingency and has already purchased the Kenneth Workman property on Upton Street. The school is in no position of losing any of the properties for sale because this contingency can and has been waived.

ADDITIONAL FINDINGS

114. NULS 10-minute video of depicting Burke traffic during the months of October and on November 9 shows heavy traffic, vehicular conflict points, unsafe pedestrian activities and lack of enforcement by Burke hired police officers. The video also has evidence of the police officer's personal vehicles blocking the public alley and yelling at a neighbor when confronted. (This portion of the video was not shown due to time constraints)

115. NULS submitted into evidence, but was not permitted to show a 5-minute video depicting April 2001 school traffic, video footage of fire engines on Upton Street and the blocking of Upton Street by a Burke rented bus.

116. The August 20, 2001 submission by Burke of a pedestrian bridge is objectionable and presents adverse impacts to the neighborhood. The bridge is a "new" submission that would require a variance because it violates public air space. In addition, the 16' bridge would not meet safety requirements for fire truck access through the public alley.

CONCLUSIONS OF LAW AND OPINION

Based on the foregoing Findings of Fact, the Board concludes that the Applicant is seeking a special exception under Paragraph 3101.42 to construct an addition to a private middle and secondary school.

Regarding the special exception, the applicant must prove that it has complied with the requirements of Paragraph 3101.42 of the Zoning Regulations. The Board concludes that the applicant has not met the burden of proof. The addition will be objectionable to the surrounding residents and property owners. This neighborhood is already over the saturation point with traffic and the additional students and faculty will overwhelm an already overburdened road network. The number of trips generated and the volume of traffic will have a definite adverse impact to the surrounding neighborhood.

Expert testimony submitted by the applicant to is not credible. The Board finds that the testimony and written report of NULS transportation consultant are more credible than the applicant's transportation experts, who have submitted false testimony regarding traffic count data and methodologically flawed traffic analysis and transportation management plan. The Board cannot grant a special exception in this

case based on information that does not accurately portray the traffic consequences of granting the special exception.

Furthermore, the Board finds that the Burke School has not met its burden of proof under section 206 because the school creates an adverse impact for the neighborhood with a student enrollment and lack of legally adequate parking, and compliance. The student density projected for 360-students/ ¾ acre is too large and the lack of adequate outdoor playing field and lunchroom provides a negative impact on the neighborhood. The school's parking garage does not meet the minimum by law as required due to aisle width, tandem spaces, stacking and accessibility.

Therefore, the Board concludes that the requested special exception will not be compatible with the neighborhood.

If, however, the Board approves special exception 16611, NULS requests that the following conditions be incorporated into the Board's Order of Approval:

PROPOSED OPERATING CONDITIONS

BZA APPLICATION NO. 16611

Application of Edmund Burke School pursuant to 11 DCMR 3104.1, for a special exception from the provisions of Section 206 for am addition to an existing private school for 360 students and 70 faculty and staff and for a variance to section 411 to allow more than one roof structure for the properties at 2969 Upton Street and 4101-4103 Connecticut Avenue, NW (Lots 27,28 and 65, Square 2243) in the R-5-D Zone District.

ALL OPERATING AND CONSTRUCTION CONDITIONS APPLY TO 2955 Upton Street, N.W., 2969 Upton Street, N.W., and 4101-4103 Connecticut Avenue, N.W. Burke must apply for special exception and/or variance relief from the BZA should the underground parking lot not conform to all Zoning Requirements and must apply for necessary approvals under Zoning and other applicable regulations should Burke decide to bridge the alley and connect the buildings with a walkway. Unless Burke has an approved building permit and has tangibly committed to construction of the bridge by signing a contract for its construction and paid monies toward same, the BZA shall not give credence to a bridge or consider its possible benefit. If the buildings are connected, and the BZA has not already required loading docks, then Burke must also provide standard loading docks or apply for special exception and/or variance relief from the loading dock provisions.

CONSTRUCTION CONDITIONS:

1. No construction trucks and/or construction machinery, including bulldozers, cement mixers, construction trailers, etc., performing work on the existing Burke site or proposed site will be allowed to stand and/or park on Van Ness Street or Upton

Street, N.W., nor will this machinery be allowed to block the public alleys between Veazey and Van Ness Street, between Van Ness Street and Upton Street, and between Upton Street and Tilden Street.

2. Burke and its respective contractors will respect the surrounding residential neighborhood and shall not perform demolition work, earth moving, construction staging, construction, or other construction activities on weekends and on D.C. and Federal holidays. All staging and construction work will take place Monday through Friday from 8:30 a.m. to 5:00 p.m.

3. All construction contracts will require that construction workers park at an off-site, commercial facility, and the contractor will provide shuttle service to the off-site facility. Burke will ensure through monitoring that no construction workers are parking on either Upton Street or Van Ness Street. The contractor shuttle will not use the residential alleys as short cuts to the site.

4. All construction traffic will access the site from the north and south on Connecticut Avenue using a new temporary entrance at Connecticut Avenue. All construction-related deliveries will be made from this new temporary entrance.

5. Burke will ensure that Upton Street, Van Ness Street, and the alleys are kept free from all construction debris and litter. All construction related debris would be contained in covered containers and/or dumpsters.

For violations of any items within provisions 1 through 5 above, for the first violation, the school shall pay a fine of $5,000.00. The second violation shall be for $10,000.00, with each subsequent fine doubling the previous amount. The monies collected shall be turned over to the Advisory Neighborhood Commission who shall decide how monies collected can be used for the public benefit.

6. Burke will be responsible for creating a 24-hour hotline number with a live on-call operator to respond to the caller's complaints. Burke will appoint a ranking staff member to mitigate and resolve neighborhood concerns about traffic and parking problems The name of the Burke and contractor liaison, along with a telephone and pager number, will be provided to the parties to the BZA case and the ANC prior to commencement of construction. Membership on the committee will be afforded to the parties of the BZA case and the ANC.

7. All staging and construction storage will be contained within the construction zone. All staging for work will be from the temporary driveway and Connecticut Avenue. During morning and evening rush hours, Burke will keep Connecticut Avenue open and will not park construction vehicles on Connecticut or in the public alleys.

OPERATING CONDITIONS:

1. A report certifying compliance with the operating conditions below shall be delivered to the Office of the Zoning Administrator, and the Advisory Neighborhood Commission, with a copy available for inspection by neighbors. The report shall be made by the Board of Trustees on behalf of the school and shall be issued every August 1st and January 1st. Each report shall include, in addition to the specific conditions below, the school's projected student enrollment and faculty/staff size for the next six-month period.

2. Use of the existing building and the proposed site shall be limited solely to the Edmund Burke School. Burke shall not rent, sublease, make available free of charge, or otherwise make available any space or facilities at the subject properties to any other persons or organizations for any purpose, other than voting for governmental elections.

3. Burke shall hold only those activities at the site that are directly related to the school's educational purpose.

4. The number of students shall not exceed 300, and at least 60% of the student population must reside in the District of Columbia. Should this number be exceeded at any time during the calendar year, the school shall immediately pay a fine of $30,000.00 per student in excess of 300. The monies collected shall be turned over to the Advisory Neighborhood Commission who shall decide how monies collected can be used for the public benefit.

5. The number of teachers and staff shall not exceed a total of 45. Should this number be exceeded at any time during the calendar year, the school shall immediately pay a fine of $30,000.00 per teacher in excess of 45. The monies collected shall be turned over to the Advisory Neighborhood Commission who shall decide how monies collected can be used for the public benefit.

6. Burke shall remain in compliance with student, faculty, and staff numbers and, if it comes out of compliance, Burke will immediately (within the next school semester) come into compliance.

7. All Metrocheck, shuttle bus, and vehicle reduction numbers must comply with requirements set forth by the neighborhood compliance committee and the BZA. The Metrochek use by VA/MD students must equal 80 students and the shuttle service must have 40 students riding the shuttle each morning.

8. The school's hours of operation shall be between 8:15 a.m. to 5:30 p.m., Monday through Friday.

9. Burke shall stagger hours of operations between the middle and upper school with an 8:15 a.m. start for six, seventh and eighth graders and no earlier than 8:30 a.m. start for ninth through twelfth graders.

10. Burke shall host no more than 3 evening events at the subject properties per month. The term "event" is defined as all after school activities, including, but not limited to, sports events, theater performances, "Back to School Night,"and any other activity that includes 5 or more students. Evening events must be completed by 9:00 p.m. The only exception to this is the prom. In no event shall Burke hold two events simultaneously in the auditorium and the theater. Should this event number and event time limit be exceeded at any time, exclusive of the prom, during the calendar year, the school shall immediately pay a fine of $25,000.00 per noncomplying event. The monies collected shall be turned over to the Advisory Neighborhood Commission who shall decide how monies collected can be used for the public benefit.

11. In cases where parent drop-off, pick-up is permitted, Burke would immediately implement a traffic control plan with approved travel routes and require parents, faculty, students and staff to follow only those approved routes. Parents, students, faculty and staff would be prohibited from using the neighborhood alley system to access the School, except those personnel who are provided parking behind the existing school. Burke shall prohibit all parent drop-off, pick-up on Upton Street, Van Ness Street, and the neighborhood alleys (Veazey-Van Ness; Van Ness-Upton; Upton-Tilden Street). Off-duty police officers shall be stationed to monitor and restrict non-sanctioned traffic: one at the north end (Van Ness intersection) of the Van Ness / Upton Street alley; and one at the Upton Street point of discharge from the drop-off area under the building. At that location, priority shall be given to non-school traffic, including non-school traffic departing the Upton / Van Ness alley.

12. Burke shall prohibit students, faculty, and staff from parking on the neighborhood residential streets of Upton Street, Van Ness Street, 29th Street, Tilden Street, and Linnean Avenue, regardless of zoned parking stickers.

13. Burke shall provide all parents and guardians of prospective and registered students, faculty, and staff with a copy of its traffic management plan in its parent handbook, and shall make the traffic management plan an integral part of each student, faculty, and staff contract. Burke shall fully implement the provisions of the traffic management plan, including the imposition of fines on parent, guardians, faculty and staff who do not comply. The traffic management plan, with approved routes and the following penalty schedule apply, regardless of who drives the students to or from school. Burke shall impose a fine of $300.00 for the first offense; $600.00 for the second offense; and $1,000 for the third offense. The fourth offense shall result in mandatory

expulsion of the student, or, in the case of staff and faculty, termination. All fines must be paid within 14 calendar days after the citation is issued. Fines that are not paid within 14 days shall be doubled, except that a fine for a third offense that is not paid within 14 days shall result in mandatory expulsion. The monies collected will be turned over to the Advisory Neighborhood Commission who shall decide how monies collected can be used for the public benefit. Burke shall maintain a log of all violations of the traffic management plan, which shall be made available to the neighborhood and the ANC during regular business hours.

14. All student, staff, and faculty vehicles must be registered with the School and will be required to have an Edmund Burke Identification Sticker, so that any violations can be easily reported to the school. A staff person will be tasked with monitoring student, faculty, and staff compliance, and responding promptly to any community complaints.

15. Burke shall implement a shuttle van system from the sites presented to the BZA—Van Ness Metrorail Station, Tenley Circle Metro Area, Tilden Street. The school shall maintain a log, open to inspection, as to how many students, faculty and staff are availing themselves of this program. The log shall record daily population of using vans, specifying morning and evening, and the total number of vans. There must be 40 students riding the shuttle each morning.

16. Burke use of the subject properties shall not cause any roadway safety or operational deficiencies and shall not affect the health, safety, or general welfare of roadway users or adjacent neighborhoods. The public alleys (Van Ness-Upton; Upton-Tilden, and the dead-end alley east of the school) must be kept open at all times. This restriction applies to parking, drop-off, and trash container storage.

17. Burke shall be required to build a parking garage under the proposed School that would be accessed off Connecticut Avenue, N.W. The driveway to the garage would be required to provide safe two-way access to and from the garage. A minimum of 75 parking spaces shall be provided on site; 25 spaces behind the existing school and 50 spaces in the underground parking lot of the proposed new building. All parking spaces shall be 9' by 19' for standard spaces, and 8' by 16' for compact spaces, with 20' aisles providing access to every space. No space shall be out of compliance with the requirements of the Zoning Regulations including, but not limited to provisions regarding tandem arrangement, handicapped spaces, etc. No spaces shall be considered legitimate for the purpose of the BZA approval, or for building permit issuance, or for Certificate of Occupancy issuance, which do not meet these requirements.

18. Should water be encountered during construction of the parking garage, a dewatering system shall be required. Discovery of subsurface conditions or

other obstacles during construction or prior to construction which increase the difficulty or cost of construction of underground parking to satisfy parking requirements under this Order shall not be grounds for reducing such requirements.

19. Parking shall be available for all daytime and evening activities at the School. In the event the school hosts a large function where on-site parking for students, parents, faculty, staff, and visitors exceeds the number of spaces available, Burke shall rent spaces in a nearby, commercial parking facility, and provide shuttle service between that location and the school. Burke shall hold daytime or evening events at an alternate site, which cannot be accommodated in such manner.

20. Burke shall be required to construct a student drop-off, pick-up site within the proposed School property that would be accessed off Connecticut Avenue and would provide for exit by either Connecticut Avenue or Upton Street.

21. Burke shall be required to construct a private 20-foot wide drive to allow vehicles leaving the student drop-off, pick-up area to exit onto Upton Street and maintain the existing alley width. The private drive and public alley must be separated by a permanent physical barrier no less than three feet in height from adjacent alley grade. Parent, guardian, student, faculty and staff vehicles will be prohibited from using the public alley, except for faculty and staff with parking privileges behind the existing school building

22. Burke shall be required to place 2 traffic control officers near the student drop-off, pick-up sites to direct vehicles, and at the intersection of the alley/private driveway with Upton Street to ensure safe turning movements and to prevent drivers from accessing the Upton-Tilden alley. Vehicles in the alley shall have the right of way over exiting school traffic. Merge with previous sections.

23. Burke shall submit its certificate of occupancy applications to ANC3F for review at least 10 days in advance of filing the applications with the Department of Consumer and Regulatory Affairs.

24. Burke shall establish a community/compliance outreach program to include: (A) A community liaison committee to meet at least once per month, beginning with the first month in which the new building is occupied, to discuss and resolve issues of mutual concern. Burke will have the responsibility of recording minutes and maintaining documents related to issues addressed. In addition Burke will have responsibility to maintain a log of all complaints made to the school, the date of the complaint, and the Burke response to the complaint. (B) Burke will have the responsibility to coordinate all evening events (defined as after-school activities) with the other institutions in the area (Howard University, Levine School of Music,

Hillwood Museum, and the Netherlands Chancery) so that no conflicting events/activities occur. Burke shall continue its participation on the Levine School coordinating committee. Burke events which conflict with previously announced events at Howard, Levine, Hillwood, or the Netherlands Chancery, should such conflicts not be resolved, shall result in a fine of $5,000.00. The monies collected shall be turned over to the Advisory Neighborhood Commission who shall decide how monies collected can be used for the public benefit.

25. To ensure compliance and good neighborhood relations, Burke shall place one Upton Street resident on their Board of Directors. This member shall be a full voting member of the Board and shall be selected in consultation with NULS and the ANC3F.

26. Burke shall develop and implement a circulation and parking policy for buses owned or chartered by the School, and buses from visiting from schools, which would prohibit their parking on Upton Street, Van Ness Street, Connecticut Avenue (during rush hours) or in the public alley behind the school, and prohibit buses from blocking nearby alleys. In order to minimize any adverse impacts on neighborhood streets and public alleys, Burke will ensure that all buses used by the school for special events, or buses bringing students from visiting schools are not parked, and there is no loading and unloading on Upton Street or Van Ness Street.

27. Buses of any kind are prohibited from parking, embarking or unloading students from behind the school in the public alley because this would eliminate four required parking spaces from the Burke plan In addition, buses in the alley are prohibited so as not impede or block residents who live east of the school in the dead-end alley.

28. Burke will ensure that morning and afternoon pickup is on the Burke School site, and Burke will ensure that no pickups and drop-offs take place on Connecticut Avenue or in the public alley between Van Ness Street and Upton Street and the public alley between Upton Street and Tilden Street.

29. Public alleys adjacent to, or within the traffic management area of the plan, must be kept completely open for one-way or two-way traffic at all times. The school shall permit no stopping for pick-up or drop-off of students or staff, nor for delivery, except in loading areas and docks. These may be accessed from the alley, provided they confirm in size and access standards to the requirements for off-street loading.

30. Burke use of the subject properties shall not result in the creation of an easement, constructive or otherwise, with regard to any use of the abutting public alleys.

31. Burke shall be responsible for snow removal and salting of the public alley and Upton Street abutting the subject properties and any other public ways used by the school as part of its traffic management plan.

32. Burke shall pick up litter daily around the perimeter of the subject properties.

33. Loading and delivery and refuse collection shall be restricted to the weekday hours of 9:00 a.m. to 2:30 p.m., and must not conflict with the morning arrival and afternoon pickup of students. The applicants may not operate any trash compactors on-site between the hours of 6:30 p.m. and 8:30 a.m. or on weekends and holidays. All trash receptacles must be kept within the new building. Burke shall ensure that no delivery trucks, trash trucks, etc. block the public alley and shall ensure that these trucks do not park on Upton Street or Connecticut Avenue during the rush hour restrictions.

34. Any exterior lighting used to illuminate the subject properties and parking areas must be installed and operated so that all direct rays of such lighting are confined to the subject premises.

35. Any sign advertising the school must not be illuminated and must be consistent with the sign requirements for a residential neighborhood, including the school sign on Connecticut Avenue.

36. Burke shall develop and implement a landscaping plan to minimize the school's impact on the residential neighborhood.

37. Burke shall sign a restrictive covenant to maintain the side yard landscaped buffer from the east face of the existing school to the property line of 2951 Upton Street, and shall maintain that area in such a manner as to diminish the existing school impact on neighboring properties. The area shall not be used for parking. No HVAC equipment of any kind shall be located in this east side yard. At least 60% of the ground surface shall be planted area. Existing trees shall not be removed without replacement of like kind.

38. The HVAC system and all mechanical equipment at both the existing school site and the new site shall not exceed 60 decibels during the day and 55 decibels at night as measured from the nearest property line. The school shall make available to the neighbors a certified report of these sound levels, prepared by qualified experts. The report shall be repeated every April 1st and the results made available by April 15th. The HVAC system shall not be used if these sound levels are exceeded.

39. Burke shall cease using the outdoor athletic fields at Howard University School of Law within 30 days of approval of this agreement as this use violates the Howard University Campus Plan approved by the BZA and

agreed to by the ANC and neighborhood. Burke will also cease using as an outdoor play area the State Department owned property on Upton Street.

40. Burke programs, curricula, and activities shall be confined to the Burke site and not the neighborhood streets and/or neighborhood residential properties, and Burke shall monitor its students to ensure safety by confining them to paved sidewalks and prevent students walking through the traffic-congested alley system.

41. Burke shall not sell the air rights over the School-owned properties, nor transfer any unused FAR to any other site.

42. Burke shall ensure that the outside terrace space is used for only passive recreation and shall not pose any noise-related problems for the adjoining residential building or residential neighborhood.

43. The school shall post a performance bond with the District Government in the amount of $3 million to ensure compliance with this Order. Penalties for non-compliance: $30,000 per student for each student over the BZA approved population limit. If the transportation management plans are not being complied with and not meeting the vehicle trip reduction as set forth in the school's traffic management plan, then the School must pay a penalty equal to $25,000 per vehicle. See previous suggestions.

44. Burke will provide funds for the compliance committee to do surprise traffic monitoring studies, which may include the use of videotaping Van Ness, Upton Street, Tilden Street, and surrounding alleys. Videotaping shall be performed no less frequently than once per week. Such costs shall be paid solely from the school's funds.

45. Rooftop recreational activities shall have a sound buffer on all sides, and no rooftop activity shall take place after 3:30 pm during the week, and no rooftop activity shall be permitted during the weekends.

46. Burke shall conduct a noise study annually to detail all noise emanating from the site to each property line bounding the properties, and to perimeter distances of 75, 150, and 225 feet from the site. All noise shall be limited to 55 decibels. If the noise exceeds this standard, the source must be removed and/or modified to achieve this requirement. A second test must be performed to ensure that modifications have been successful. The test / correction / retest process must take place in less than 30 days. All noise reports must be given to the ANC, the compliance committee, and the DCRA.

47. Burke shall prohibit students from leaving the school during the school day except for emergencies, when authorized by a parent or guardian, and for school organized trips.

Certificate of Service

I hereby certify that on August 27, 2001, a copy of the attached Findings of Fact and Conclusions of Law from the July 10, 2001, hearing were served via US mail, properly stamped for First-Class Mail Service, addressed to the following;

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