ANC 3F Forest Hills/North Cleveland Park

August 27, 2001

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Board of Zoning Adjustment
for the District of Columbia
441 4th Street NW
Suite 210-S

Re: Application 16611, Edmund Burke School

Dear Members of the Board:

I want to bring to the Board's attention an administrative irregularity that is of grave concern to ANC 3F and that occurred in connection with the referenced case. This irregularity was the decision of the Board of Zoning Adjustment (BZA) staff to extend the due date for applicant's Findings in the referenced case. The staff, however, failed to extend the due date for other parties and failed to notify other parties of that the applicant's due date had been extended. It was only after the due date extension was discovered by ANC 3F and Neighbors United for Livable Streets (NULS) that BZA staff belatedly acknowledged the extension and agreed to an extension for all other parties.

At the July 10, 2001, hearing on Application 16611 the Board established August 20, 2001, as the due date for all submissions to the Board in case 16611. At the conclusion of the July 10 hearing Mr. Paul Hart of the BZA staff stated:

> The decision date, Madam Chair, is going to be September 4th . . . . Now, what I need to find out before we leave the room is, what submissions are needed or expected by the Board from the applicants and opponents between now and that date? . . . I'll just say that everything has to be here by the 20th of August, to give us ample time to get it to the Board, the 20th of August to get to the Board for the September 4th meeting. Are we all clear? Thank you.

The transcript shows that there were no objections to the August 20 date. It is clear from the transcript that when Mr. Hart said "everything" he was referring to everything, all submissions including Findings and that there were no objections. In comments made following the closing of the record, the Chair admonished the parties to also include proposed conditions with their Findings. When asked when these were due the Chair responded: "August 20." Attendees at the hearing understood the due date for Findings to be August 20. Ms. Carol Woodward, a legal secretary, has handwritten notes of the proceedings which identify the August 20 date and confirm the transcript. Mr. Lyle Blanchard of Greenstein DeLorme & Luchs recalls the date for

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BZA
Case No. 16611
Exhibit No. 231

Board of Zoning Adjustment
District of Columbia
CASE NO.16611
EXHIBIT NO.231

Findings being set as August 20. Ms. Cynthia Giordano of Arnold & Porter filed her Findings on August 20, the date she understood the Findings to be due.

In accordance with instructions from the Board at the July 10 hearing, at about 4 p.m. on August 20, 2001, ANC 3F Commissioner Karen Perry delivered ANC 3F's Findings of Fact and Conclusions of Law in case number 16611 to the BZA office at 441 4th Street NW. Commissioner Perry reviewed the Burke School file and determined that there were no Findings of Fact submitted by the applicant. Ms. Perry repeatedly asked staff in the BZA office if the applicant had submitted Findings and was told they had not. Commissioner Perry repeatedly asked staff if the applicant had requested an extension of the filing period. She was told they had not. Jody Smolick and Rob Vricella of Neighbors United for Livable Streets arrived at the BZA office at about 4:55 p.m. and submitted their Findings in case number 16611. In response to their repeated inquiries to the staff, they were told that the applicant had filed no findings and had requested no extension.

On the morning of August 21, 2001, Ms. Smolick called Ms. Sherry Pruitt of the BZA staff and was told that the submission date for Findings was August 27. I phoned Ms. Pruitt and she told me the submission date for Findings as set on July 10 and was August 27 not August 20. Ms. Pruitt maintained that August 20 was the due date for submissions other than Findings and that Findings were due on August 27. Ms. Pruitt said that individuals familiar with BZA procedures understand that Findings are always due seven days following other submissions. There is no rule in the BZA procedures that supports this assertion. Ms. Cynthia Giordano who often practices before the BZA submitted her findings in Application 16611 on August 20, pursuant to instructions she received at the July 10 hearing. ANC 3F submitted its findings on August 20, pursuant to instructions received at the July 10 hearing. And NULS submitted its findings on August 20, pursuant to instructions received at the July 10 hearing. Ms. Pruitt also stated she was about to call me to notify me of the change from August 20 to August 27. I asked Ms. Pruitt what good it could possibly do to notify me on August 21 that an extension had been granted from an August 20 due date.

Inquired were made to Sherry Pruitt about the circumstances surrounding the change in the due date for Findings. Ms. Pruitt stated that someone from Mr. Feola's office had called the BZA during the week of August 17 and inquired about the date for submission of Findings in the Burke School case. Ms. Pruitt thought the caller may have been Mr. Feola's associate Ms. Sarah Shaw. According to Ms. Pruitt, Ms. Shaw indicated to BZA staff that Findings are usually due seven days following other submissions. Ms. Shaw maintained that submissions were due August 20 and that the Findings should be due on August 27. Ms. Shaw was told by BZA staff that the applicant's Findings, indeed, were
due on August 27. In effect, the applicant was granted a one week extension from the August 20 date identified in the hearing record. This should not have occurred. The transcript is clear. Mr. Hart admonishes that "everything has to be here by the 20th of August." He did not say everything except Findings and he did not say August 27. Mr. Hart said "everything has to be here on August 20."

Even if the BZA had the authority to extend the due date for Findings, it violated its own rules and the due process requirements of the Administrative Procedures Act by failing to notify all parties of the extension. By granting a unilateral extension to the applicant and only the applicant, and by and failing to notify all parties, the BZA clearly acted in a manner that was prejudicial toward the applicant and biased against the parties in opposition. The BZA's action meant that the applicant was given one schedule for submitting Findings and all other parties were given a different schedule. In this case, the applicant's schedule was materially more favorable since it granted one week more time to prepare Findings than was granted to other parties. This favorable schedule also could have provided the applicant the opportunity to review Findings submitted by other parties and rebut these in the applicant's own findings, an opportunity not afforded to the other parties. This possibility may have been averted when ANC 3F and NULS retrieved their Findings from BZA staff on August 21st after learning that an improper and erroneous extension had been granted to the applicant, but we have no way of knowing whether Shaw Pittman made a copy prior to our retrieval. Ms. Giordano's findings and proposed order were faxed to Shaw Pittman on August 20th, giving Shaw Pittman a distinct advantage in having these one week prior to the extension for its own findings. We later learned that the retrieval of documents that had already been posted by the BZA violates the integrity of the file and should not have been allowed by BZA staff. The BZA's decision to grant an extension only to the applicant and the failure to notify all parties that this extension had been granted violates due process as well as basic concepts of fairness. It also suggests an institutional bias toward the applicant and against other parties.

It is troubling that the granting of the extension was initiated by the applicant's phone call to the BZA staff. It also troubling that the extension stemmed from the applicant's suggestion to the BZA staff that the due date for Findings should be extended beyond the August 20 date identified in the transcript. The worst part of this incident, however, is that the BZA staff failed to provide all the parties the information about the extension. It is difficult to imagine the BZA staff responding to a phone call from an ANC 3F commissioner or a member of NULS in this way. Even if one stretches one's imagination to conceive of such an occurrence, it is even more difficult to believe that the staff would have granted an extension to ANC 3F or NULS and that the applicant would not have been notified of this by BZA staff.

We are also very concerned that the granting of the extension by the staff to the applicant means that the Board is now required to work on a schedule that is very compressed. Given a due date for Findings of August 27, very little time is available for BZA staff to file and photocopy the Findings documents and prepare information packages for the Board Members to review prior to the September 4 decision date. We fail to understand how the Board will have any time at all to review this material since they will receive the material only a precious few days before the Labor Day holiday weekend.

Events surrounding the granting of an extension to the applicant in this case suggest that a double standard is being applied, one for the applicant and one for all other parties. This suggests an institutional bias in favor of the applicant and against the parties in opposition to the

referenced application. This is matter requires the immediate attention of the Board. This is particularly the case when the granting of the extension is considered along with the numerous procedural errors and administrative irregularities that have occurred in this case. See the enclosed letter from Commissioner Kogan and Commissioner Perry to the Board on these matters. We strongly suggest the Board examine the circumstances surrounding the granting of an extension to the applicant in this case along with the other procedural errors and administrative irregularities in this case.

Sincerely,

Phil Kogan
Commissioner

cc: Marie Sansome, Office of Corporation Counsel
Carol Mitten, Chair, Zoning Commission

Enclosure