August 27, 2001

Board of Zoning Adjustment
for the District of Columbia
441 4th Street NW
Suite 210-S
Washington, DC 20001

RECEIVED
D.C. OFFICE OF ZONING
2001 AUG 27 PM 4:33

Re: Board of Zoning Adjustment Application No. 16611, Edmund Burke School

Dear Members of the Board:

We want to bring to the Board's attention the fact that the subject case has been characterized by very serious procedural errors and administrative irregularities. These errors and irregularities are described in detail below. An additional irregularity, the granting of an extension of the due date for Findings to the applicant without notifying other parties and without granting the same extension to other parties, is of particular concern and is addressed in the enclosed letter to the Board from Commissioner Kogan.

Taken as a whole, these procedural errors and administrative irregularities point to two very significant problems with this case. First, these errors and irregularities have worked primarily to the disadvantage of the parties in opposition and raise serious questions about the Board's conduct of the proceedings. In particular, the admission of evidence into the hearing record on May 15 in the form of a revised traffic management plan and a revised compliance plan without proper notice to the parties and without meeting the due process requirements of the Administrative Procedures Acts was an extremely serious error. The applicant shares responsibility for this error which was avoidable since the applicant is well aware of due process requirements that apply to evidence submitted in public hearings. Once made, this error was extremely damaging to the case of opposition parties who had no opportunity to review, analyze, assess and respond to the revised plan which was allowed into the record. More than likely, this was the applicant's intent. This problem was compounded, when the opposing parties received Ken Laden's analysis of the new plans less than 5 minutes before the May 22nd hearing.

Of equally high concern to ANC 3F is the possibility that the Chair may have engaged in ex parte communications with a mediator paid by the applicant. If such communications occurred, the Chair would have to recuse herself from the case and would be disqualified from participating in a decision.

The second problem with this case is that many of the errors and irregularities stem from the methods and practices used by the applicant in presenting its case to the Board. In particular, the applicant's August 20, 2001, submission presents serious procedural issues relating to due process. We believe that this submission alone provides sufficient grounds for the Board to deny

P.O. Box 39290 Washington, D.C. 20016-9290
362-6120 (voice)
686-7237 (fax)

BZA
Case No. 16611
Exhibit No. 232

Board of Zoning Adjustment
District of Columbia
CASE NO.16611
EXHIBIT NO.232

the application. In any event, this case should not be allowed to proceed to the decision stage until the circumstances surrounding the errors and irregularities identified in this letter and the enclosed letter are examined and addressed.

At a minimum, additional public testimony should be allowed on the need for a variance for a pedestrian bridge over a public alley. As discussed below, we believe the applicant removed the pedestrian bridge from previous versions of the proposal dating back at least two years and did so in order to avoid the rigorous standards that apply to requests for variances and in order to avoid a public hearing on the issue. We believe that by including the pedestrian bridge in its submission to the Board, the applicant seeks to place itself in the position of maintaining that since the bridge is a part of the hearing record, approval of the special exception carries with it approval of the pedestrian bridge over a public alley even though the bridge was not part of the application, was not part of the hearing process, and was not publicly noticed. If the Board allows this to occur, the applicant would be in a position to request from the Zoning Administrator a construction permit on the basis that Board approval of Application 16611 carries with it approval of a pedestrian bridge over a public alley. The Board should not allow this possibility to exist. A public hearing on the granting of a variance for the pedestrian bridge is required under the zoning regulations and is mandated by the due process requirements of the Administrative Procedures Act.

As the Board reviews the circumstances of this case, it should bear in mind that many of the errors and irregularities that occurred are directly tied to the methods and practices employed by the applicant in presenting its case.

APPLICANT'S AUGUST 20, 2001, SUBMISSION

ANC 3F has reviewed the applicant's August 20, 2001, submission to the Board in the referenced case. We are very concerned that serious procedural problems result from this submission and the applicant's presentation of this case. These include (1) the applicant's failure to request a variance for the pedestrian bridge over a public alley which is discussed in the August 20 submission and which would link the existing building with the proposed addition; (2) the applicant's submission of evidence in the August 20 submission which purports to convey the views of Zoning Administrator Michael Johnson whereas such views are required to be provided through the direct testimony of Mr. Johnson; and (3) the applicant's introduction of new evidence in the August 20 submission in the form of a drawing not previously submitted which shows a loading dock not previously shown as part of this project.

We believe these procedural problems provide grounds for denying Application 16611. At a minimum, additional public testimony must be allowed on the need for a variance for a pedestrian bridge over a public alley and the evidence on the parking requirements for this project, and on the matter of the loading dock should not be allowed. As discussed below, we believe the applicant removed the pedestrian bridge from previous versions of the proposal dating back at least two years and did so in order to avoid the rigorous standards that apply to

requests for variances for such structures and with the intent of avoiding a public hearing on the issue. We believe that by including a discussion of the pedestrian bridge in its submission to the Board, the applicant seeks to place itself in the position of maintaining that since the bridge is a part of the hearing record, approval of the special exception for a private school carries with it approval of the pedestrian bridge over a public alley even though the bridge was not part of the application and was not part of the hearing process. If the Board allows this to occur, the applicant would be free to request from the Zoning Administrator a construction permit on the basis that Board approval of Application 16611 carries with it approval of a pedestrian bridge over a public alley. The Board should not allow this occur. A public hearing on the granting of a variance for the pedestrian bridge over a public alley is required under the zoning regulations and by the due process standards that apply in this casse. We also believe that the applicant's failure to present the Zoning Administrator for direct testimony can only be rectified by either rejecting Application 16611 or by requiring such testimony at a duly noticed public hearing.

1. Pedestrian Bridge. A pedestrian bridge over a public alley has been part of the proposed project for at least two years and perhaps longer. This bridge was identified on a Fact Sheet used in the applicant's discussion of the project with neighbors in September 2000 and also appeared in a Fact Sheet that was part of a presentation to ANC 3F in March 2000. In fact the second floor drawing provided to the Board in April 2001 with the pre-hearing statement for Application 16611 shows a roughed in representation of a structure connecting the two buildings, a pedestrian bridge over a public alley . We believe the applicant's failure to present evidence and testimony on the pedestrian bridge connecting the existing school and the proposed addition was intentional based on the applicant's understanding that a bridge over a public alley would require a variance and/or a special exception. Rather than submit to the rigorous standards that apply to such structures over a public alley during the public hearing on the application, the applicant chose instead to present the bridge into the record as part of a pedestrian safety plan included in the August 20 submission. This was done after the record was closed and constitutes a denial of due process. This action by the applicant denied to ANC 3F and other parties the right to cross the examine the applicant and the right to present their own testimony on the matter of the pedestrian bridge over a public alley.

   The transcript of the May 15th and May 22nd hearing shows that the subject of pedestrian bridge was raised, both by Commissioner Hood and Chair Reid. In fact, Commissioner Hood in the July 10th transcript expressed surprise that the applicant had included nothing on this bridge connector in their submission for their rebuttal case.

   To support our contention that the pedestrian safety bridge was deliberately omitted by the applicant in presentation of the case, a review of the background of this bridge is important to the record. ANC 3F has a Fact Sheet dated September 1999 which was prepared by the applicant to describe the proposed project to neighbors. This Fact Sheet describes a "bridge over alley." Neighbors were also shown a 3-D model of the proposed building that included the pedestrian connecting bridge between the proposed and existing buildings. Other drawings show the pedestrian bridge over a public alley and include its dimensions and

height. A March 8, 2000, Fact Sheet prepared by the applicant and presented to ANC 3F describes a second floor "Bridge (Lounge)" that is 611 square feet and has an occupancy of 40 individuals. Most significantly, the second floor drawing submitted to the BZA with the applicant's pre-hearing statement for this application, shows a roughed out structure linking the existing building with the proposed addition. This bridge has a long and detailed history with reference to it included even in the pre-hearing statement submitted to the Board by the applicant.

David Shapiro, Walter Aisles, and Sarah Shaw presented the proposed project to ANC 3F on March 13, 2000. At this meeting, Commissioner Perry noted the existence of the bridge in the applicant's description of the project and raised a question about a variance and/or special exception that would be required to construct such a bridge over a public alley. At this meeting Commissioner Perry also raised the question of a special exception that would be required for the number of parking spaces proposed to be provided by the applicant. ANC 3F was informed by the applicant that a variance might be needed for the bridge, but that the applicant's counsel Mr. Phil Feola hoped to deal with the bridge at a later date through the building permitting process. ANC 3F was also told that the applicant was hopeful that it would be possible to grandfather existing parking. At the time of this meeting the applicant had not yet filed for a special exceptions with the BZA. Through these statements, however, the applicant made known its strategy for avoiding the due process requirements of the Administrative Act as they relate to the pedestrian bridge and parking requirements. The events at this meeting was reported in an article in the May 15 edition of the Northwest Current.

Following this meeting, the applicant submitted an application with the BZA using self-certification procedures and applied only for a special exception for a private school under Section 206 and for relief of roof structure requirements under Section 411. We believe that the applicant did not include the pedestrian bridge in the filing because the applicant knew that a variance and/or special exception for the bridge would be a more rigorous standard to meet than the special exception for a private school. The applicant chose not to face this rigorous test in a public hearing which is subject to rules evidence and due process and which provides opposition parties the right to cross examine the applicant, provide testimony, and present evidence. Instead the applicant chose to limit the request to a special exception for a private school and relief from roof structure requirements. During Chair Reid's questioning of David Shapiro's on whether or not the applicant had considered a pedestrian bridge Mr. Shapiro responded "We have. We have. That would connect the existing school to the proposed addition. It's complicated and it's – there are issues involved with that."

The complication referred to by Mr. Shapiro is the variance and/or special exception required for such a structure.

We also note that when the applicant came before ANC 3F on April 23, 2001, plans were

presented for the proposed addition. At this meeting Commissioner Kogan observed a dotted line on the second floor plan which he asserted represented the pedestrian connector spanning the public alley between the existing building and the proposed building. Both Mr. Feola and architect Frank Schlesinger stated there was no connector. However, the Board must take note that this is the same drawing included in the applicant's pre-hearing statement and this drawing clearly shows a roughed in structure at the second floor level that connects the existing building with the proposed addition and which spans the public alley between Van Ness and Upton Streets.

The applicant's August 20 submission states that immediate construction of the bridge was decided against "primarily due to cost." We note, however, that approximately six months following the decision to remove the bridge from its plans, ostensibly for reasons of cost, the application decided to absorb the additional costs of a significant expansion of the size and scope of the project. This expansion includes a two story underground parking garage as well as two additional stories above ground that were not included in any previous versions of the plan. This was not a quid pro quo where the applicant decided to drop the bridge to pay for the additional space. The bridge was eliminated from the project when it was first presented to the BZA in September 2000. It was also missing from the January 2001 submission. No parking garage and no additional stories appeared in either of these plans. There was nothing in these plans to pay for by eliminating the bridge. The bridge was simply dropped.

The parking garage was first proposed by the applicant in a March 2001 meeting sponsored by DPW and it appears in drawings included in the April 2001 pre-hearing statement to the BZA. The applicant proposed the garage because of neighborhood objections to the insufficient amount of parking proposed to be provided. The applicant was concerned that these objections could lead to denial of the application. The August 20 submission suggests that any concerns the applicant may have had about student safety were overridden by cost considerations. Yet cost considerations did not prevent the applicant from including a two level parking garage in the pre-hearing statement submitted in April 2001. We are asked to believe that the same who applicant who managed to absorb the costs of a parking garage and two additional stories in order to address neighborhood objections, had decided against a pedestrian bridge to address student safety because of cost reasons. This is not a believable scenario.

The applicant has had numerous opportunities to discuss and present the pedestrian connector. The applicant, however, the applicant had adopted a strategy to wait until the submission process, when the record was closed, to put the bridge into the record as part of their pedestrian safety plan. The applicant did this for reasons the applicant discussed in the March 2001 ANC 3F meeting. Specifically, the applicant wanted to avoid the public hearing process and deal with the bridge in the permit application process. This circumvents the requirements for the posting of notice of the variance to the community and denies the community the right of cross examination, presentation of testimony, and submission of evidence on the possible implications of the pedestrian bridge over a public alley. In sum, the

community is denied due process. We believe that if the Board, in its decision refers to this connecting bridge, this decision will be presented by the applicant to DCRA and a permit will be granted for the bridge without the required public hearing before the Board on the bridge. We also contend that the applicant believed that if the special exception was granted for a private school, the applicant could, if necessary, come back to the Board after receiving such approval and, citing safety reasons, seek to justify the need for the pedestrian bridge over a public alley and thereby expedite the granting of a variance. At this point the proposed addition would be either completed or well under construction and the Board would be placed in an awkward situation if it did not grant the bridge for reasons relating to student safety.

It is our understanding that the proposed pedestrian is bridge is only 16 feet in height. We have had no testimony on how this bridge might affect alley traffic, especially for emergency vehicles including fire trucks, moving vans, trash trucks, and other vehicles that are required to service buildings in the alley. We have had no evidence, written or verbal, from the fire department on how this bridge could affect hook and ladder trucks that would need to enter the alley.

The alley over which the bridge would be constructed is one-way southbound from Van Ness Street to Upton Street. Testimony during the public hearing, including the testimony from Lou Slade the applicant's traffic consultant, bears this out. Ken Laden was asked to provide a submission relative to when this alley was made one-way and this submission was due to the BZA by July 3rd in order to have it for the July 10th hearing. His submission was not posted at the BZA until July 11th at 4:18 p.m. However, we believe, Mr. Laden misunderstood the Board because all he commented on was the southern portion of the alley being made one way in 1977. ANC 3F has documents which show the entire alley was made one-way. However, because we did not have Mr. Laden's document at the time of our July 10th hearing, we were not able to cross-examine Mr. Laden, or present this evidence into record for clarification. Further, because the applicant did not present the bridge plans during their rebuttal case, we were not able to hear from Mr. Laden as to how this bridge might affect traffic in the alley including the directional flow of this traffic.

Had the applicant submitted the pedestrian bridge plan with the application, parties would have had the opportunity to determine whether a decision by the Board approving this bridge would de facto change the direction of alley traffic, thus creating the possibility of traffic conflicts with Van Ness Street for pedestrians and vehicles, something not part of the original testimony or the applicant's submission. We do not know whether large trucks would have sufficient clearance to go under the pedestrian bridge or would have to back out of the 16 foot wide alley on to Van Ness Street or whether a turn around area would need to be created behind the Burke School. These are all issues that due process requires be presented in public testimony, subject to the rules of evidence in a public hearing.

The application should be denied on the basis that it is incomplete and did not set forth all of the improvements contemplated by the applicant. At a minimum, the due process

requirements of the Administrative Procedures Act demand that a duly noticed public hearing be held on the pedestrian bridge over a public alley and its implications for alley and neighborhood traffic.

2. Parking Requirements. The applicant's August 20, 2001, submission includes a September 27, 2000, letter from the applicant to the Zoning Administrator. This letter contains the applicant's interpretation of parking requirements for the proposed facility was presented to the Zoning Administrator at a September 12, 2000, meeting. The applicant's interpretation is that the zoning code suggests that only 23 parking spaces need to be provided in addition to the existing 24 spaces mandated by the existing BZA order, a total of 47 spaces. The applicant proposes to enter this letter into the record as representing the official views of the Zoning Administrator and as a way to document for the Board that the applicant's calculation of parking requirements is code compliant. Submission of this evidence is not allowed under the rules of due process. If the applicant sought to enter the views of the Zoning Administrator into the hearing record, due process requires that this should have been done by direct testimony. It is only through direct testimony that the Board and all parties to the case have the opportunity to understand the factual basis for the Zoning Administrator's position and to question and cross examine the witness as well as present their own evidence.

   The September 27 letter describes a two party conversation between the applicant and the Zoning Administrator. But this letter contains only one party's recollection and conclusions about this conversation – the applicant's. While the Zoning Administrator concurred in the letter, the Zoning Administrator's interpretation and understanding of the meeting are left unknown. Also unknown is what specific information the applicant shared with the Zoning Administrator and what the factual basis was for the Zoning Administrator indicating agreement with the applicant's interpretation of parking requirements. It is unknown whether the applicant shared with the Zoning Administrator the fact that some of the existing 24 parking spaces are not zoning code compliant because of the size of the spaces or because they are tandem spaces and are not accessible at all times. ANC 3F has no way of knowing what facts were given to Michael Johnson since no member of the public nor ANC 3F nor any of the parties was present during this meeting. We have no way of knowing whether the applicant disclosed to Mr. Johnson the fact that according to BZA Order 13986 the applicant obtained "variances from the parking space size requirements under Sub-section 7204.1, from the prohibition against parking spaces not being accessible directly from streets or alleys under Sub-section 7206.4, and from the lot occupancy requirements under Sub-section 3303.1."

   Michael Johnson did not appear at any of the hearings and neither ANC 3F, the Upton Street neighbors, nor the members of the Board were availed the opportunity to cross-examine him on how and why he reached his decision and upon what set of facts this decision was based. ANC 3F does not know if Mr. Johnson took into account section 2100.6 of the zoning regulations which states that "When the intensity of use of a building or structure existing before May 12, 1958, is increased by an addition or additions of employees, dwelling units,

gross floor area, seating capacity, or other unit of measurement, specified in Subsection 2101, parking spaces shall be provided for the addition or additions, subject to Subsections 2100.7 through 2100.9." Subsection 2100.9 states that the determination of the increase of intensity of use shall be based on the total increase in intensity of use the structure undergoes on or after May 12, 1958, whether the total increase occurs at one time or in successive stages.

We would also call attention to Section 2100.10, which states that "In the case of a building or structure for which the Zoning Regulations now require more parking spaces than were required when the building or structure was built, the following shall be required: (a) If the existing number of parking spaces now provided is less than or equal to the minimum number of parking spaces now required by this chapter, the number of parking spaces cannot be reduced. This chapter requires that the following formula be applied for private school parking spaces: 2 for each 3 teachers, plus 1 for each 10 classroom seats or 1 for each 12 stadium seats or 1 for each 10 auditorium seats, whichever is greater. Using the current parking formula and based on the regulations quoted above, ANC 3F believes that the applicant must provide 72 parking spaces and that these parking spaces must conform to the size, width, and aisle access requirements of the zoning regulations. Had the Zoning Administrator been aware of these facts at the September 12 meeting, his conclusions would have been different. It is only through cross examination, questioning by the Board, and presentation of evidence by all parties that such information can be brought to light.

ANC 3F believes the applicant is asking the Board to rule that all existing buildings have grandfathered with them previous parking conditions even when the intensity and use of those buildings has changed. This ruling will have implications not only for this project, but for projects and development all across the city. The applicant is asking for such a decision from the Board based on evidence submitted after the hearing record closed. This evidence is in the form of a letter prepared by the applicant which purports to convey the views of the Zoning Administrator. Submission of evidence in this form after the hearing record is closed violates the due process requirements of the Administrative Procedures Act, since parties to the case were not afforded the opportunity to have this evidence presented in direct testimony, the witness was not subjected to cross examination, the evidence was based solely on a private conversation, and the parties had no opportunity to present their own evidence on the matter. The applicant failed to present the Zoning Administrator for direct testimony and thereby denied the parties their right to cross examine and present their own evidence. Therefore, due process requires that the September 27, 2000, letter not be entered into the hearing record.

3. Loading Dock. The Applicant's August 20, 2001, submission contains new evidence which was not presented as part of the hearing record. This violates the due process requirements of the Administrative Procedures Act. Page 3 of the Applicant's August 20, 2001, submission states that "the project provides a loading dock as can be seen in Exhibit B." Exhibit B is an architectural drawing containing the name Frank Schlesinger Associates Architects and marked "Edmund Burke School First Floor Plan 04.09.01 Revision 05.08.01". This drawing,

while dated May 8, 2001, was never previously provided to the parties in this case. On this drawing, at the northeast corner of the first floor of the proposed building there is an area with the words "Platform" and "Delivery Berth".

However Exhibit B is materially different from the drawing contained in the applicant's April 2001 pre-hearing statement that is marked "First Floor Plan Edmund Burke School 04.09.01". The drawing in the pre-hearing statement has no area identified as a "Platform" and no area identified as a "Delivery Berth". In fact the April 2001 drawing displays different dimensions for the north side of the proposed building from the dimensions shown on the drawing included in the August 20 submission. The April 2001 drawing shows dimensions of 10'-0", 92'-3.5", and 27'-8.5" while the August 20 drawing shows dimensions of 10'-0", 89'-8", 30'-4". Clearly, these are different drawings.

The applicant is familiar with the due process requirements of the Administrative Procedures Act and with the prohibition against introducing new evidence after the hearing record is closed. This raises the question of the applicant's motive in submitting a drawing showing a platform and delivery berth in response to being challenged in a public hearing but after the parties in opposition have lost their opportunity to question and cross-examine the applicant. The purpose of the due process requirement is plain and clear. It is intended to ensure that all parties are treated fairly in administrative proceedings and that all parties are given an equal opportunity to review and comment on evidence.

The submission of new evidence after the closing of the hearing record clearly violates these basic precepts of fairness. It also raises the question of why the applicant did not submit this evidence during the hearing and why the applicant waited until after the hearing record was closed to introduce it. One explanation is that the applicant simply forgot to include it. Another explanation might be that the applicant did not want to accept the burden of providing a loading dock on a site that is very limited in size and is an extremely tight fit for the building the applicant is proposing to construct. Another explanation is that the platform and loading berth do not meet the requirements of Section 2200 of the Zoning Code for number required, size, screening from contiguous residential property, and other provisions, thereby creating the need for a special exception that was not requested in the applicant's Self Certification filing and which was not noticed to the public. Approval of this application by the Board would put the applicant in a position to request from the Zoning Administrator a construction permit, without the Zoning Administrator sending the Applicant back to the Board for a special exception, by claiming that Board approval of Application 16611 carries with it approval of the loading dock. By not specifically including a loading dock in the April 2001 drawings provided to the Board the applicant thereby creates the opportunity to decide after the public hearing whether or not a loading dock would be provided. Whatever the explanation, it is clear that the introduction of new evidence violates the due process requirements of the Administrative Procedures Act.

ANC 3F is very concerned that the applicant's August 20, 2001, submission attempts to

circumvent the due process requirements of the Administrative Procedures Act. Our review of this submission shows that the applicant failed to request a variance for a pedestrian bridge that has been part of this project for more than two years; the applicant sought to enter evidence into the record about the the views of Zoning Administrator Michael Johnson whereas such evidence is required to be provided through the direct testimony of Mr. Johnson; and the applicant sought to introduce new evidence in the form of a drawing not previously submitted showing a loading dock not previously shown as part of this project. This brings us to the question of remedy.

The Board should deny this application. In doing so the Board would send a message to this applicant, as well as any other applicant, that the rules of due process apply to the Board's proceedings and that attempts to circumvent these rules will not be tolerated. At a minimum, the Board should order a duly noticed public hearing on the pedestrian bridge variance disallow the applicant's parking information and loading dock drawing included in the August 20 submission.

APPLICANT WAS ALLOWED TO SUBMIT EVIDENCE WITHOUT PROVIDING NOTICE TO THE PARTIES

At the May 15, 2001, hearing on Application 16611, the applicant submitted a revised traffic management plan. This plan contained completely new information about traffic mitigation including new traffic projections. This information had never before been shared with other parties to the case. It had never been shared with ANC 3F or with DPW despite the fact that these agencies had been involved in numerous meetings with the applicant regarding traffic issues. The data contained in the revised traffic management plan were significantly and materially different from the data upon which DPW and ANC 3F had based their recommendations to the Board.

The revised traffic management plan proposed traffic mitigation measures that had never been presented, discussed, or analyzed in meetings and public forums. Strong objections were raised by ANC 3F, NULS, Sirrus, LLC, and Van Ness South Tenants Association to the introduction of completely new data on the day of the hearing without any opportunity review and analysis of this information by the parties. This clearly violates the due process requirements of the Administrative Procedures Act. Yet the this new information was allowed to be submitted and parties were afforded no opportunity to review and analyze it. This created an undue advantage for the applicant and put the opposition parties at a serious disadvantage. This error was compounded when the parties in opposition were given no time to respond to Ken Laden's analysis of the revised plans which was presented on May 22 without any prior notice.

These events occurred in spite of the fact that the applicant is familiar with and conversant in the rules of due process as they apply to BZA proceedings.

THE CHAIR MAY HAVE ENGAGED IN EX PARTE DISCUSSIONS WITH A MEDIATOR HIRED BY THE APPLICANT

In June 2001 the applicant hired David Julyan as a mediator in an attempt to resolve differences with the neighborhood. In a June 26, 2001, e-mail to Julie Weisman, a neighborhood resident, Mr. Julyan reported the following:

> BZA member Reid's term is expiring at the end of September. Legally, she may continue to serve on the BZA for a period not to exceed 120 days or until a successor is sworn in. *She indicated* [emphasis added] that if the Burke case is continued, she'll seek a new hearing date early enough in September to ensure she can participate in all BZA actions prior to leaving. Today I also learned that another BZA member, Susan Hinton, is likely to leave the BZA this summer when she takes a new federal job. Ms. Hinton sits on the BZA as a representative of the National Capital Planning Commission (NCPC). If Ms. Hinton leaves the BZA, NCPC will name a replacement. If the Burke Case has been continued, that new NCPC designated member can read the file (as can any BZA new member) and participate fully in the case.

This communication suggests that there may have been an ex parte communication between the Chair and Mr. Julyan. Such discussions, if they did occur, would require the Chair's recusal and would disqualify the Chair from participating in a decision in this case. Even if these discussions occurred through an intermediary, they raise serious questions about the Chairs impartiality in this case as well as the role of the intermediary if that individual is an employee of the Board. This e-mail also suggests that there is a high concern on the part of the applicant and the Chair for ensuring that the Chair is available to participate in "all BZA actions" relating to the referenced application prior to her scheduled departure from the Board. There is no similar concern expressed about Board Member Hinton's departure. In fact, the e-mail states that Ms. Hinton's replacement "can read the file" and "participate fully in the case." The Chair's replacement could do the same. This incident raises serious questions about why it is so important to the applicant for the Chair to be available for a decision in the case and why it is substantially less important that Board Member Hinton be available. Serious questions are also raised about why the matter of the Chair's availability is the subject of communications between between the Chair and a mediator paid by the applicant.

OTHER PROCEDURAL ERRORS AND ADMINISTRATIVE IRREGULARITIES

At the May 22, 2001, hearing, the Board requested that certain documents be submitted to them by July 3rd so they would be available for the continuation hearing on July 10. In each case these documents were of great importance to ANC 3F and the opposition parties' case. However, these documents were never submitted as requested and do not appear in the hearing record or the case file as of July 10. These included the following.

1. Ken Laden of DPW was requested to supply information about the one way alley and traffic accident data at the intersections of Upton Street, Tilden Street, and Van Ness Street. The accident data would have supported the opposition case. This information was not entered

into the file until July 11 at 4:18 p.m. and dealt only with the southern portion of the alley. ANC 3F has documents which show the entire alley was one way.

2. Ken Laden was requested to send his traffic report to the Fire Department for comment. No information was provided to the Board on Fire Department comments and nothing was included in the file to this effect in the July 11 report.

3. Corporation Counsel was requested by the Board to submit with ideas for sanctioning applicant and to develop performance standards. This information is not included in the case file and would have greatly assisted the ANC and NULS in preparing enforceable operating standards.

4. The applicant was requested by Board Member Renshaw to spell out ANC 3F's role relative to the compliance committee proposed by the applicant and to have the role reviewed by ANC 3F. This was not done.

Sincerely,

Phil Kogan
Commissioner

Karen Lee Perry
Commissioner

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

Enclosure