September 19, 2001

RECEIVED
D.C. OFFICE OF ZONING
2001 SEP 19 PM 1:20

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

Re: Board of Zoning Adjustment Application No. 16611, Edmund Burke School – *Ex Parte* Communication

Dear Members of the Board:

Our August 27, 2001, submission indicated that the Chair may have had an *ex parte* communication with Mr. David Julyan, a mediator hired by the applicant. On September 4, 2001, we provided the Board a copy of an e-mail Mr. Julyan sent to Ms. Julie Weisman, an Upton Street neighbor, in which Mr. Julyan discusses his communication with the Chair. This letter provides additional information regarding this communication.

In early June 2001, Mr. David Julyan telephoned Ms. Weisman, a resident of Upton Street NW, and told her that the Burke School was interested in entering into a formal mediation with its neighbors. The neighbors agreed to meet with Mr. Julyan to find out more about the mediation process. At a June 19, 2001, meeting Mr. Julyan explained to the neighbors that he was an attorney and a mediator and that he had been hired on a fee basis by the Burke School to mediate an agreement between the school and its residential neighbors. The school's intention was that this agreement would produce a set of conditions that would become part of a BZA order voted upon by the BZA. Mr. Julyan cited his recent experience in mediating an agreement between the Phillips Gallery and its residential neighbors as an example of how the mediation process works. Mr. Julyan indicated that he had worked with Phil Feola on the Phillips case.

When questioned by the neighbors about how he learned of the Burke School case, Mr. Julyan said that he had been contacted by Ms. Sherry Pruitt of the BZA staff. This is the first indication the neighbors received of any direct role played by BZA staff in assisting the Burke School in hiring a mediator who would obtain agreement on conditions that would be voted on by the BZA. Additionally, on June 4, 2001, Mr. Rob Vricella and Ms. Jody Smolick Upton Street residents and members of the NULS organization had visited the BZA office and had encountered Ms. Pruitt. She stated to them at that time that "I heard that you're mediating." Mr. Vricella and Ms. Smolick expressed complete surprise at Ms. Pruitt's remark since they knew nothing about a proposed mediation. In hindsight, however, it appears that Ms. Pruitt was reflecting a conversation she had already had with Mr. Julyan.

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

BZA
Case No. 16611
Exhibit No. 245

Board of Zoning Adjustment
District of Columbia
CASE NO.16611
EXHIBIT NO.245

Coincidentally, also on June 4, 2001, Commissioner Kogan received an unsolicited telephone call from Commissioner Vince Micone of ANC 2B02 who called to recommend David Julyan as a mediator in the Burke School case. Commissioner Micone told Commissioner Kogan that he had heard the Burke School case would be going to mediation. Commissioner Micone had been involved in the Phillips Gallery case which recently was before the BZA and that case had been mediated by David Julyan. Commissioner Kogan expressed surprise at hearing that the Burke School case was going to mediation and thanked Commissioner Micone for the information. It appears that a number of individuals had the understanding that the Burke School case was going to mediation with the notable exception of the immediate residential neighbors of the school and the Commissioner representing the SMD in which the school is located.

During the June 19 meeting with Mr. Julyan, neighbors of the Burke School expressed interest in exploring the mediation option and asked a question about the mediation process which Mr. Julyan said he would present to Burke School officials and provide a response to the neighbors within one week. Specifically, the neighbors wanted to know whether or not the Burke School would agree to a request for a continuance of the scheduled July 10 BZA hearing if the neighbors agreed to enter into mediation. The neighbors raised this question because the July 10 hearing was only three weeks away. They did not want to enter mediation while at the same time preparing their case for presentation to the BZA. They also did not want to be under severe time pressures that would be inherent in a mediation occurring so close to the July 10 hearing.

In response to this question Mr. Julyan sent an e-mail message to Julie Weisman on June 26 (see enclosed). In this e-mail Mr. Julyan relates his communication with the BZA Chair. It is important to bear in mind that the neighbors asked Mr. Julyan only if the Burke School would agree to a continuance and did not ask him to contact the BZA Chair. It appears from this communication that the Chair had a high interest in being available to vote on the Burke case. Mr. Julyan states that "She [Chair Reid] indicated that if the Burke case is continued, she'll seek a new hearing date early enough in September to *ensure* [emphasis added] she can participate in all BZA actions prior to leaving." We believe that Chair Reid's communication with Mr. Julyan, a paid representative of the applicant, was *ex parte,* since it was conducted without the knowledge of other parties to the case. We also believe the Chair should recuse herself from further participation in this case since, regardless of the Chair's intent, this communication creates the perception that the Chair may not be impartial in deciding this case.

The Chair's communication with Mr. Julyan is troubling because it creates the appearance that the Chair was working with the applicant to develop a strategy that would result in approval of the application. At the time of the Chair's communication with Mr. Julyan, the Burke School had already paid him for his pre-mediation services and he had already met with the school's representatives prior to meeting with the neighbors. This was not simply a communication with an ordinary citizen; rather, it was a communication with an individual in the employ of the Burke School. Given that the Chair was communicating with a person on the payroll of the applicant without any other parties present, the Chair's assurance that she would "participate in all BZA actions [on the Burke School case]" suggests that the Chair's intention was to be

available to cast a vote for the applicant. Further, since this communication occurred *before* the opposition parties had presented their case, this also creates the perception that the Chair may not be impartial and, in fact, may be predisposed to vote for the applicant. On this basis, as well, it would be appropriate that the Chair recuse herself from any further participation in this case.

In the June 26 e-mail Mr. Julyan also discusses the status of Board Member Susan Hinton. He states that

> . . . 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.

Clearly, two different standards are being applied in dealing with the votes of Chair Reid and Board Member Hinton. In the case of Ms. Hinton, the position is taken that the vote of a replacement for Ms. Hinton would be acceptable. In the case of Chair Reid, there is an expressed interest by the Chair in participating directly in a vote on the case. Again, regardless of the Chair's intent, this creates the appearance and the perception that Chair may not be impartial in this case.

In Mr. Julyan's e-mail a high degree of importance is placed on having the "current Board membership decide the matter." But this e-mail makes clear that the definition of the phrase "the current Board membership" does not include Susan Hinton and expressly includes Chair Reid. This is a peculiar definition of the phrase "current Board membership". In fact, this e-mail suggests that ensuring that Chair Reid would be available to vote on the Burke School case is one of the applicant's three highest priority conditions for agreeing to mediation with its residential neighbors. This raises questions about why the Chair's availability to vote was so important to both the applicant and the Chair and further creates the appearance that the Chair may not be impartial. In fact, this communication suggests that it may have been important to both the Chair and the applicant that the Chair be available to vote on the application because the Chair was inclined to vote in favor of the application.

The events around the communication between the Chair and Mr. Julyan create the appearance that the BZA may be less than impartial in this case. From Mr. Julyan's remark to the neighbors, we know that a member of the BZA staff actively aided the Burke School in hiring Mr. Julyan as a mediator. The context for such assistance was that mediation would produce a set of conditions that the Board would vote on as part of its decision on the application. Since a hearing on Application 16611 was ongoing at this time, these actions run contrary to the requirements for impartiality in the BZA's management of its cases. But the break down in impartiality is more acute from the perspective of the communication between the Chair and Mr. Julyan. As a voting member of the Board, the Chair actively engaged in a communication with an individual paid by the applicant in a BZA case she was currently hearing. In this communication the Chair provided assurances that in the event of a continuance, a hearing

would be scheduled within a time frame *acceptable* to the applicant, and also provided assurances that she, the Chair, would be available to vote on the case. This was an *ex parte* communication between the Chair and the applicant. Whatever the Chair's intent may have been, this communication suggests there may have been an interest on the part of the Chair in accommodating the applicant's effort to produce a set of conditions that she would vote on.

The recent Sunrise case raised the question of the recusal of Board Member Renshaw. This question came up because the case had been before the ANC on which Ms. Renshaw sits as a Commissioner. In the public discussion of this matter, Chair Reid made the point that even if Board Member Renshaw did not participate in the Sunrise case as an ANC Commissioner, her position on the ANC creates the appearance that she might not be impartial in hearing the case as a BZA Member and she should, therefore, recuse herself. We believe the same standard applied by Chair Reid in the Sunrise case should be applied in this case. Regardless of intent, Chair Reid's actions create the appearance and the perception that she may not be impartial in this case. Based on the fact that she had an *ex parte* communication with a paid representative of the applicant as well as the fact that this communication creates the appearance of assisting the applicant in its case, Chair Reid should recuse herself from further participation in the case.

Sincerely,

Phil Kogan
Commissioner

Karen Lee Perry
Commissioner

Enclosure

Enclosure

From: Weisman, Julie [JAWeisman@SWIDLAW.com]
Sent: Tuesday, June 26, 2001 4:50 PM
To: Kogan, Phil (HHS/OS)
Subject: FW: Burke

Phil-

I just received this from David Julyan. Can you distribute to everybody? Thanks.

Julie

-----Original Message-----
From: JulandJul@aol.com [mailto:JulandJul@aol.com]
Sent: Tuesday, June 26, 2001 4:33 PM
To: jaweisman@swidlaw.com
Subject: Burke

Last week Burke agreed to ask the BZA for a continuance if three conditions were met:

1. The BZA recognized parties agree to mediation.
2. The mediator attest that the BZA recognized parties are ready for mediation which shall include a schedule of meeting dates in July and August, a structure for how the BZA recognized parties will be represented at mediation, and a procedure for accepting or rejecting an agreement.
3. The BZA agrees that the current Board membership will decide the matter.

With respect to #3 ... 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 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.

With respect to #2 ... If the neighbors decide to mediation, it's important that the mechanics of mediation are addressed and agreed to. At a minimum, you will need to decide:

1) Schedule: Please pick eight (8) dates between June 28 and July 19 for mediation sessions. Each session will be scheduled for approxiumately two hours, although the parties can agree to meet longer. Burke is availalble to meet on any date between June 28 and July 19. August dates, if necessary, will be selected later.

2) Representatives: There are five entities represented at mediation. Burke, ANC, and the three BZA recognized parties. The number of representatives from each party can vary with the parties or the subject matter of a particular session. My experience is that 1 to 3 representatives from any party at a particular meeting works best. While some rotating of representatives will work, it is important that a core group remain constant. Attorneys may attend at the discretion of their client, but this is not a forum for legal discussion or debate.

3) The parties need to decide how their representatives are to be chosen and authorized to negotiate. That can include instructions prior to mediation beginning, periodic meetings during mediation, etc. The decision is entirely up to each party, but it must be agreed to up front.

4) The parties must also decide on a mechanism for accepting or rejecting an agreement if one is reached during mediation. Again, how this is done is entirely up to each party as long as a mechanism is agreed to.

If the parties decide to enter mediation, I'll be pleased to work with you on any of these mechanics issues.

Based on my experience and discussions, I believe there is an opportunity here for mediation to succeed. I hope you'll agree.

Personal regards,
DSJ

CERTIFICATE OF SERVICE

A copy of this letter has been provided to the parties or their representatives:

Phil Feola, Shaw Pittman
Cynthia Giordano, Arnold & Porter
Pat Brown, Greenstein DeLorme and Luchs
Jody Smolick, NULS
Ken Laden, District Division of Transportation, DPW
Jennifer Steingasser, Office of Planning
Marie Sansome, Corporation Counsel