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This document is filed in Case #16915 and is the statement in support of Barbara Allan's application for a renewed special exception for Barbara's Montessori School. The BZA hearing is scheduled for Sept. 24th.

BZA
Case No. 16915
Exhibit No. 69

Board of Zoning Adjustment
District of Columbia
CASE NO.16915
EXHIBIT NO.69

To: Mr. Griffis, Chair, Board of Zoning Adjustment

From: Laura Griffen, Esq., on behalf of Barbara's Montessori School

Date: September 10, 2002

RE: BZA Application #16915 – September 24, 2002 BZA Hearing Concerning the Renewal of a Special Exception to Operate a Child Development Center at 2828 Hurst Terrace, NW.

This statement is filed in support of Barbara Allan's application for the renewal of a special exception for a child development center known as Barbara's Montessori School, located at 2828 Hurst Terrace, NW.

Summary

Barbara's Montessori School ("the School") is entitled to an indefinite special exception in accordance with District law and policy applied to the facts of this case. The School has educated many of the Palisades' community children and is supported by the community. The School has made every effort to address the legitimate concerns of neighbors. Even the few opponents of the School admitted at a recent ANC hearing that the measures taken by the School over the last year have addressed their traffic concerns. The School has offered to make these measures, and a permanent cap of 23 students, binding obligations under a BZA permit. In light of the District's strong preference for schools, the measures taken by the School to address neighbor concerns, and the paucity of preschools in the District, the permit should be granted.

Background: A Community Pre-School

Barbara Allan is the current owner of property located at 2828 Hurst Terrace, NW. For the past 18 years, she has operated a child development center at this site known as Barbara's Montessori School. BZA has already renewed the school's permit twice since the original was granted in 1984 – once in 1987 and again in 1992. All relevant facts are exactly the same as when BZA granted the previous permit 10 years ago: enrollment is limited to 23 children per day plus 3 employees; the ages of the children range from 2 to 4 years old; and the center operates for only 3 hours a day, 5 days a week from September through May. The School is not asking for any increased enrollment or longer operating hours and does not contemplate any new uses or structures for the school.

The Montessori School is truly a *community* preschool: the center has served 10 families on the block and hundreds throughout the Palisades area. This year, approximately 22 children enrolled in the center live within two miles of it. The School's policy has always been to accept neighborhood children first. As the record shows, a vast number of people in the community have written in support of its continued existence.

Indeed, with the exception of some immediate neighbors on Hurst Street, virtually everyone on the adjoining streets where a real traffic condition might spill over, including Fulton, Garfield, and North Glade, supports the School's application. The majority of people living within 200 feet of the center support it. As the section on Traffic below makes clear, Ms. Allan has initiated numerous measures to mitigate any traffic concerns. Given the center's overwhelming community support and impeccable track record, the school asks for a permanent special exception, or at a minimum a 10-year term (the same term as the last one granted in 1992). The law and facts make this an easy case for the BZA to approve. Denying a special exception to this tiny and well-run school, or placing unreasonable restrictions on the duration or owner of the permit, would effectively subvert the District's longstanding policy in favor of pre-schools and allowing them to operate in residential areas.

The Law and Regulations

The Board of Zoning Adjustment is authorized to grant special exceptions to childcare development centers where such special exceptions "will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property . . ." Title 11, District of Columbia Municipal Regulations ("DCMR" or "the Regulations"), Section 3104.1. The Regulations state that in interpreting and applying the regulations, the Regulations shall be regarded as promoting among other things educational opportunities in the District. 11 DCMR § 101.2. The D.C. Court of Appeals has held that in general, uses of land for educational purposes are highly favored. Glenbrook Road Ass'n v. District of Columbia Board of Zoning Adjustment, 605 A.2d 22 (D.C. App. 1992).

The Regulations state that a child development center "shall" be permitted in residential neighborhoods as a special exception if approved by the BZA under Section 3104, subject to a number of provisions. 11 DCMR § 205. The Regulations thus make explicit that childcare development centers such as Barbara's School are not only in harmony with the intent and purpose of the regulations, but are sanctioned. Schools by their nature are placed in residential neighborhoods where parents and children are found. One of the purposes of residential districts expressed in 11 DCMR Section 200.2 is to "promote a suitable environment for family life."

Section 205 sets forth defined conditions under which childcare development centers shall be permitted. By the opposition's own admission in its July 15th letter to ANC 3D and the issues raised at the previous two ANC meetings, their main concerns and the only two that are even arguably relevant here are subsections 205.3 and 205.4, relating to traffic and parking. The Montessori School easily satisfies both.

Section 205.3 states that "the center shall be located and designed to create no objectionable traffic condition and no unsafe condition for picking up and dropping off children..." The location and design of the school have not changed in the 18 years of its operation. Furthermore, Section 205.3 explicitly states that parents picking up and dropping off children by car is a normal function of a permitted school. Finally, Section

205.3 assumes that such pick up and drop off may create a traffic condition, which is to say that any time cars drop off and pick up students there will be more traffic and some cars momentarily parked, but only relates to an "objectionable" traffic condition.

Section 205.4 states that the center shall provide sufficient off-street parking spaces to meet the reasonable needs of teachers, other employees, and visitors. The parking schedule set forth in 11 DCMR Section 2101.1 requires 1 parking space for every 4 teachers and other employees. Because the School only employs 3 individuals as teacher's aides, there is no requirement for off-street parking. The reasonable needs of occasional visitors to the school can easily be satisfied by existing parking nearby.

The Montessori School Creates No Objectionable Traffic Conditions

Ms. Allan has always been mindful of possible traffic impacts in her neighborhood, and has endeavored to work closely with the police, local schools, neighbors, traffic experts and others. As the D. C. Court of Appeals has noted, the BZA's function in looking at special exceptions is "to determine whether a reasonable accommodation has been made between the [school] and the neighbors which does not interfere with the legitimate interests of the latter." Glenbrook Road Ass'n, 605 A.2d at 25.

The traffic condition created by the drop off and pick up of children at Barbara's School is not objectionable under Section 205.3. Ms. Allan has made every effort to minimize any impact on her neighbors. No more than 23 students attend the school on a given day, and often the number is less due to absences (sickness, vacations, etc.). The actual number of cars dropping off and picking up children is well below that number when you factor in those who walk, carpool, and siblings. For example, in school year 2002-2003 there will be one set of triplets, 2 sets of twins, 5 who can walk (they are within 2 blocks of the school), and at least 4 carpools with 2-3 children in each car – effectively taking 13 cars out of the pick up/drop off calculation. Clearly this is not a normal "school" where there are hundreds of cars and buses picking up and dropping off students, teachers, and administrators each day. (Even in those cases, the BZA often approves schools, balancing the neighbors' interests with the public weal.) This is a small-scale child development center generating only minimal traffic.

The time when traffic is even arguably an issue is limited to roughly 1% of the year (total number of minutes for pick up and drop off divided by total number of minutes in a year). The School is only in session for 160 mornings a year – for more than 200 days a year, there are no traffic issues related to the center. For the other 160 days, pick up and drop off is allowed only for twenty minutes in the morning and fifteen minutes around lunchtime.

The short time frame for pick up and drop times was not required by the Board's 1992 Order but was voluntarily adopted by Ms. Allan to accommodate her neighbors when, in late 2001, some of them complained about traffic. Furthermore, and again based on her own voluntary action, she has required that even in that narrow window of

time, cars may only line up at the curb in front of her own property so as not to impinge on other neighbors' property. Drivers remain in the cars during pick-up and drop-off times and aides shuttle the children into and out of their cars in order to expedite the process. Ms. Allan has sent detailed arrival and dismissal procedures to all parents to remind them of this protocol. Ms. Allan estimates that the total time required to take a child out of the car is approximately 20 seconds. Drop off and pick up areas have been designed to ensure the children's safety, an important consideration enumerated in the regulations along with traffic concerns. No one wants 2 to 4-year olds darting across the streets with their parents in order to attend school (there are no sidewalks on this street).

Ms. Allan has undertaken other consultative initiatives with local neighbors and authorities. She has attempted to devise the safest most efficient traffic plan possible by consulting with Lieutenant Patrick Burke, traffic coordinator for the Second District, over the last two years. He made the following suggestions, which Ms. Allan has fully implemented: 1) place "no parking" cones in front of her school to allow parents to pull over to pick up/ drop off their children without blocking street traffic; 2) distribute notices to parents detailing drop off/ pick up procedures. The record contains a favorable report from Officer Burke related to the traffic management plan proposed by Ms. Allan. In addition to meeting with Officer Burke on several occasions, Ms. Allan has also hired, at her own expense, an expert traffic engineer (Marty Wells) to write a report and further consult on any traffic issues. She worked with the traffic coordinators (Alma and Henry Gates) for the Palisades Citizens Association and they were supportive of her traffic plan. Finally, she has also offered to hire an off-duty police officer at the beginning of the school year to facilitate traffic.

Ms. Allan also has offered to meet with her neighbors to discuss the traffic situation. At one time or another, she has discussed the issue with all of her neighbors informally over the last year. On August 20, 2002, Ms. Allan met with concerned neighbors and ANC representative Eleanor Lewis, who acted as facilitator. She has asked neighbors to offer constructive solutions to their traffic concerns, although since they only want to shut the school down she has undertaken most measures on her own.

Ms. Allan remains open to suggestions to mitigate any traffic concerns and has asked neighbors for input on her traffic plan. Ms. Allan's willingness to consult with her neighbors and offer solutions is not because there has been an objectionable traffic situation created by her center. To the best of Ms. Allan's knowledge, no neighbor has complained to any authority about the center, at least prior to concerns being expressed in this current proceeding. Indeed, she has never received a traffic citation in connection with her center.

Any traffic issue in any event will be diminished with the anticipated completion of Key School construction in September 2002. The Key School has been under construction for the past two years and all of the traffic has been diverted to Hurst Terrace during this time. Key School's main entrance will move from Hurst Terrace to Eskridge Terrace and teachers will have their own parking lot for the first time in September. Any traffic and pressure on existing parking places on Hurst Terrace will be

dramatically reduced. Ms. Allan contacted the principal of Key School and they have agreed to host quarterly meetings with neighbors to discuss any traffic concerns.

The Opposition

The School's renewal application has received strong support from most members of the community as is evidenced by the record. Nonetheless, some neighbors have made arguments in opposition that either incorrectly characterize the School and its history of neighborly relations or are not legally relevant.

(1) The opponents argue that an "objectionable traffic condition" exists at the school now where it did not before because more people drive their kids to the school. As noted, the school's size has remained constant over the last 10 years and has only increased by 3 students since the original permit was granted in 1984. The school continues to give priority to neighborhood children. The fact that more people may be driving cars than walking is part of a larger societal issue that the school cannot be expected to address beyond the traffic measures the School already has taken.

The opponents also argue that traffic in their neighborhood generally has increased. At the ANC hearing, opponents testified that commuters use Hurst Terrace as a cut through, people are driving larger cars like SUVs, density in the neighborhood has increased, and commercial traffic from MacArthur Boulevard establishments has increased. None of this was shown to create a specific objectionable condition related to the School.

The bottom line is that the neighbors have admitted that traffic conditions have improved since the beginning of 2002. At the end of 2001, the neighbors did complain about traffic on the street. The photographs of double-parked cars presented to the ANC date from around then. While the School does not believe even then there was an objectionable traffic condition, and presented testimony to the ANC that these pictures were taken on atypical days, the School immediately took action to mitigate the traffic condition. At the ANC hearing on September 4, 2002, one neighbor opposed to the School admitted in response to a question from the ANC that she had not perceived any traffic problems since then. The other opponents present did not contradict her.

The only two concrete issues cited in the opposition's filing before the ANC are (1) that one contractor won't come by the neighborhood at the pick off and drop off times; and (2) an emergency vehicle once came through. In weighing whether to educate Palisades' children or worry about a contractor's convenience for half an hour a day, it should be clear that the children's education is more important. On the second point, while an emergency vehicle came to Hurst during morning pick-up, that vehicle made it without any issue or complaint being generated. Once it was clear an emergency vehicle was coming through, the traffic got out of the way. Both issues, in any event, are addressed by the measures the center is putting in place limiting car lines and by the changes at Key Elementary.

Here many of the current neighbors bought houses on the street knowing there was a center already there. A large elementary school has been on the block since 1929. Most of all, though, the real "change" from the last three special exception approvals is not that there are a few more cars on the street, but that now the immediate neighbors no longer have a need for the center and want to shut it down. Many of the neighbors who are complaining about the "objectionable traffic condition" supported the school when their own children attended. Of the 13 families who signed the petition in opposition, 5 families have children educated by Barbara, and 2 of those families no longer oppose her permit. This NIMBY attitude is destructive to the fabric of communities.

It is against District policy, and – as the hundreds of families who have written in support of the center attest – it is against the best interest of the Palisades community to have this center shut down for the perceived interests of eleven opponents. There is a paucity of preschools in the neighborhood. Indeed, the School received more than twice as many applicants than available spots for the 2002-03 school year. The demand for quality pre-school programs in the community will only continue to grow as the population in Ward 3 continues to become younger.

Schools with much larger traffic impacts are routinely approved in residential neighborhoods. This is because the location of schools in residential neighborhoods is desirable: one of the purposes of residential districts expressed in 11 DCMR Section 200.2 is to "promote a suitable environment for family life." The Montessori School's success and appeal is due in large part because of its location and the fact that parents can walk or drive a short distance from home to drop off their little ones. The warm, cozy atmosphere of Barbara's home provides an ideal atmosphere for 2 to 4 year olds away from home for the first time.

(2) The opponents further argue that the center is required to provide off-street parking for employees and visitors, and has failed to do so. The language in the regulations states that the center "shall provide sufficient off-street parking spaces to meet the reasonable needs of teachers, other employees and visitors." §205.4 As noted above, section 2101.1 sets forth that for every 4 teachers or employees, the center is required to provide one parking space. Barbara's Montessori employs only 3 individuals so she is not required to provide off-street parking. She also has an available spot in her driveway for one of the teacher's aides (another one currently walks). Furthermore, sufficient parking exists for the visitors who come to the school on an irregular and sporadic basis. Prospective parents come for staggered half-hour interviews. The school is only open for a 3-hour interval in the morning. There is ample 2-hour zoned parking on Hurst Terrace and unzoned parking on the adjacent streets in the neighborhood.

(3) The Opponents argue that they are upset because Ms. Allan has mentioned she may sell the house and retire, a concern that is legally irrelevant. The D.C. Court of Appeals has held that zoning conditions imposed by public agencies may only run with the property, not with the person. National Black Child Dev. Institute, Inc. v. District of Columbia Bd. Of Zoning Adjustment, 483 A.2d 687 (D.C. App. 1984). The BZA in that case had imposed a condition that the variance would terminate if the non-profit that

owned the property sold or transferred title to the property. The Court reversed the BZA, noting that "[p]ersonal conditions impermissibly regulate the business conduct of the owner, rather than the use of his property, and are *unlawful per se*." Id. (emphasis added). The special exception simply cannot be restricted to Barbara Allan personally; it is for the property, so that if Ms. Allan died tomorrow or transferred the property to someone else the childcare development center could continue.

The Permit Should Be Granted Indefinitely, or in the Alternative for 10 Years

The license period should be granted with a view to providing stability to the school and neighborhood. Short-term permits might be appropriate for new schools that have to establish a record with the community, but not for a center with an impeccable record that has been in existence for 18 years. By way of comparison, the Community Preschool of the Palisades, a much larger preschool in the neighborhood that was started after Barbara's Montessori's School (with her assistance) and which is in residential neighborhood, was granted an indefinite permit at its renewal hearing in 2000.

There are several reasons why the Barbara's Montessori School's permit should be indefinite, or at the least ten years like the last permit.

First, and most importantly, a limited-duration permit is tantamount to closing the School down. Ms. Allan has mentioned she plans to retire at some point. No rational person would take on the expense of purchasing the home and business and the demanding job of educating young children if he or she had no assurance the school would continue to exist in a few years. Costs associated with running this center include purchase of the house, operation of the business, taxes, license fees, utilities, administrative filings, insurance, staff and many others. Ms. Allan estimates that costs related to the school amount to over $10,000 a month, an enormous capital cost for an individual to incur. Any new owner must be assured that the permit will be valid for a sufficient term of years to justify the financial commitment and uprooting of family.

Second, establishing the precedent of a short-term special exception in this case would create a general deterrent to educators. The Palisades area already suffers from a shortage of pre-schools. If prospective pre-school operators know that a few neighbors can force a perpetual renewal application process by raising objections, however unwarranted, they will not open new schools. Even putting aside the daunting financial commitment, good educators invest an enormous amount of time, energy and love into raising the District's children. Placing added demands on them at the whim of NIMBY neighbors will discourage many from even trying. This will create harm -- to the District, its children, and its strong policy favoring education. Ms. Allan's previous permits were for 3, 5, and 10 years respectively. It is against everyone's interests to go backwards.

Third, both future permit violations and substantially changed conditions in a given neighborhood can and should be addressed using the BZA's power to review and condition special exception permits. Pursuant to 11 DCMR § 3205, failure to abide by the conditions in a BZA order shall be grounds for revocation of a permit. Rather than

foster perpetual renewal battles, the BZA can and does condition issuance of special exception permits on the school's observance of the conditions. In the Board's approval of Georgetown's University Campus Plan for a period of ten years, for example, it specifically noted that if Georgetown failed to comply with the terms of its conditions, the Board could revoke its approval of the plan. Furthermore, the Board noted that if conditions in the surrounding neighborhood substantially changed, the Board also could revisit the plan. Board of Zoning Adjustment, Order on Reconsideration, Application No. 16566A re: University Campus Plan, Years 2001-2010 (Aug. 6, 2001). These remedies, and not a perpetual re-licensing process, are the appropriate way to prevent any perceived abuses or worries about changing neighborhood conditions.

Fourth, absent finality, the neighborhood will find no peace. Each new permit proceeding begins a divisive and contentious process that begins nearly a year in advance of permit expiration. Those adjacent neighbors who already are strongly opposed will not be satisfied with its continued existence in any form. The Opponents have only discussed shutting the School down or forcing it to relocate. A five-year permit would only exacerbate the tensions in the neighborhood, by giving everyone a reason to continue fighting the battle. Ms. Allan has spent an inordinate amount of time and energy on this process over the last year – time that should be spent focusing on the educational curriculum.

Finally, the interests of the children must be taken into account. Children apply for Barbara's school a full year before starting and may attend for a few years. If in the interim the School is shut down, those children may be without a school to attend. Even if the permit is finally granted, parents may be scared off from applying precisely because they know that certain neighbors will make another run at shutting it down.

The ANC Correctly Approved the Permit, But Imposed Two Illegal and Unreasonable Terms

The BZA must give "great weight" to the recommendation of the Advisory Neighborhood Commission. D.C. Code §1-261(d) (1999). As the D.C. Court of Appeals has noted, the Code requires the BZA to specifically address the ANC's findings and recommendations. On the other hand, the Court has noted that "great weight in this context is not a quantum requirement, and the agency is not obliged to follow the ANC's recommendations or adopt its views." Draude v. District of Columbia Bd. of Zoning Adjustment, 582 A.2d 949, 953 (D.C. 1990). The "ANCs do not enjoy 'expert' status...rather, the agency must pay specific attention to the source, as well as the content, of ANC recommendations, giving them whatever deference they merit in the context of the entire proceedings, including the evidence and views presented by others." Kopff v. District of Columbia Bd. Of Zoning Adjustment, 381 A.2d 1372, 1384 (D.C. 1977), cited in Neighbors Against Foxhall Gridlock v. Bd. of Zoning Adjustment, 792 A.2d 246 (D.C. 2002)

The ANC for the Palisades neighborhood, ANC 3D, recommended in a hearing on September 4, 2002 that Barbara's Montessori School be granted a special exception to

operate and proposed six conditions. The recommendation that the School be granted a renewed special exception to operate is sound. Moreover, the School agrees with Conditions 1-4. The School has not sought to expand either the number of students or its operating hours, and has offered voluntarily to adopt Conditions 3-4.

The ANC also, however, recommended two inappropriate conditions that the BZA should reject.

First, in Condition 6, the ANC recommends that the special exception should be "granted only to the current property owner, Barbara Schreiver Allan, without the inclusion of the additional non-owner listed on the original application." This condition is illegal under well-established case law. National Black Child Dev. Institute, Inc. v. District of Columbia Bd. Of Zoning Adjustment, 483 A.2d at 687 (personal conditions are "per se illegal"). A special exception permit runs with the property, not with the person.

Second, the ANC recommends that the "special exception will be renewed only for an additional five years, not the ten years or indefinite term requested by the applicant." This recommendation relates to the ANC's observation that overall traffic on Hurst Terrace at all hours has been increasing and that the ANC wanted "an opportunity for future review of the impact of these changing conditions . . ." This condition is not logically or persuasively related to the facts presented in this case or to past BZA orders.

The only additional traffic generated by the school has been less than 20 cars during two short time periods during the day. Even during that limited time frame, ANC heard testimony that neighbors had complained about traffic at the end of 2001, but that Ms. Allan had taken measures that effectively addressed their complaints relating to the School traffic. These measures are addressed by Conditions 1-4 and already have proven to be effective.

The other sources of traffic cited by ANC– "the enlargement of Key School across the Street and the greater density of residential and commercial uses in the neighborhood" –generally are not affected by the Montessori School. The Key School and the Montessori School start and end at different times of day. The ANC made no attempt to determine whether commercial traffic related to MacArthur Boulevard establishments coincides with the School's drop off and pick up times. While a perceived increase in general traffic may be unwelcome to many neighbors, that is not relevant to determining whether Barbara's Montessori School itself generates objectionable traffic conditions.

Nor is a possible increase in general traffic conditions in the neighborhood over the next few years relevant in determining the duration of the permit. Conditions change in every neighborhood, yet the Board has granted indefinite special exceptions to the Community School of the Palisades a few blocks from Barbara's School, to the Field School, and to others. The only justification given by the ANC for treating the Montessori School's term differently from others schools, such as the Community

Preschool of the Palisades, is that at the time of the renewal of this special exception some neighbors have objected to the school. But "objectionable" is an objective, not a subjective, standard. The D.C. Court of Appeals noted in Glenbrook that schools must try to address only the "legitimate" concerns of neighbors and not all concerns. 605 A.2d at 25.

The BZA has authority to revisit its grant of a special exception should conditions in the neighborhood change. See, e.g., BZA, Order on Reconsideration, Georgetown University Campus Plan. Furthermore, to the extent the BZA is concerned about traffic conditions, the most rational condition related to the ANC's concern would be to create a review process for traffic. The School has offered to have a traffic expert review traffic each year, consult with neighbors, and file an annual report with the ANC. If traffic concerns cannot be worked out, the ANC could petition BZA to revisit the order granting a special exception.

Conclusion

Barbara's Montessori School has become one of the premier child development centers in the District. The community overwhelmingly supports it and the school has made every effort to address the legitimate concerns of the few neighbors who are opposed. District policy and careful application of the regulations argue strongly for the center's continued existence.