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Mr. Geoffrey Griffis, Chairman
Board of Zoning Adjustment
441 4th Street, N.W.
Second Floor
Washington, DC 20001

Re: BZA Application No. 16970
National Child Research Center
3209 Highland Place, NW; Square 2072, Lot 30

NCRC'S SURREPLY TO "RESPONSE TO OPPOSITION" TO THE MOTIONS TO DISMISS AND FOR DECLARATORY RELIEF

Dear Chairman Griffis and Members of the Board:

Our firm represents the National Child Research Center ("NCRC"), the Applicant in the above referenced case. NCRC hereby files its surreply to the "Response to Opposition" filed by the Neighbors in Opposition. Both motions should be summarily denied for the reasons discussed below.

I. ARGUMENT

A. The Board Has No Authority Either to Refuse to Consider NCRC's Special Exception Application or to Entertain or Grant a Request for Declaratory Relief in this Contested Case.

The BZA is neither precluded from, nor is it authorized to refuse considering NCRC's pending application for a special exception. Nor is the Board authorized to even entertain a request for declaratory relief – let alone grant one – in this matter. NCRC's application for continuation of its prior special exception approval and for permission to undertake new construction on its property undeniably constitutes a "contested case" for purposes of the District of Columbia Administrative Procedures Act ("DCAPA"), D.C. Code § 2-501 *et seq*. Therefore the Neighbors' motions to dismiss and for declaratory relief should be summarily denied.

BZA
Case No. 16970
Exhibit No. 95

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.95

As NCRC stated in its Opposition, the BZA must have explicit authority granted by statute or provided within the zoning regulations to take any action; otherwise its action will be reversed. *See Spring Valley Wesley Heights Citizens Ass'n v. District of Columbia Bd. Of zoning Adjustment,* 644 A.2d 434, 436 (D.C. 1994) (stating that "[t]he BZA's powers are those defined by statute and regulation, and that "[t]his court, like other courts, has been 'reluctant to read into a statute powers for a regulatory agency which are not fairly implied from the statutory language, since the agency is statutorily created'" (quoting *Chesapeake & Potomac Tel. Co. v. Public Service Comm'n of the District of Columbia,* 378 A.2d 1085, 1089 (D.C. 1977))). *See also District Intown Properties, Ltd., v. District of Columbia Dept. of Consumer and Regulatory Affairs,* 680 A.2d 1373, 1379 (D.C. 1996) (emphasizing that "[a]n administrative agency is a creature of statue and may not act in excess of its statutory authority"); *Davidson v. District of Columbia Bd. of Medicine,* 562 A.2d 109, 112 (D.C. 1989) (ruling that "[a]bsent express statutory or regulatory authority, a regulatory agency may not impose remedial measures").

Proffering a convoluted argument in the hope of convincing this Board not to even consider NCRC's pending application, the Neighbors insist that "the Board should either refer this matter to the Office of Zoning Compliance Review Program or order NCRC to comply with Order No. 16307, including ordering a reduction in enrollment set forth in Order No. 16307." In doing so, the Neighbors unabashedly place the proverbial cart before the horse.

As NCRC thoroughly demonstrated in its Opposition, NCRC has not failed to comply with any of the conditions of its prior special exception approval, and, on November 12, 2002, it filed an application with the BZA for special exception relief to continue its existing child development center use and to permit new construction on the site. That perfectly permissible application, which is currently scheduled for hearing on Tuesday, February 11, the Neighbors would rather the BZA not hear at all, essentially on the ground that NCRC has made its application with "unclean hands," by virtue of failing to comply with a condition of its prior special exception approval that does not even exist. Of course, NCRC has not committed any "failure to comply."

Even were NCRC not in compliance with its prior special exception approval, there is no statutory or regulatory authority for the Neighbors' remarkable proposition that the BZA either is precluded from or is permitted to refuse considering a property owner's application to continue and/or modify a special exception use. Neither of the provisions invoked by the Neighbors as purported authority warrants such (in)action by the BZA. In fact, these provisions make clear that the proper action for the Board to take in this matter is to exercise its authority under 11 DCMR § 3108 to rule on NCRC's

special exception application. The BZA regularly hears and decides cases where it is alleged that applicants have not complied with conditions and it allows each case to proceed on the merits.[1] First and foremost, D.C. Code § 6-641.07(d) (authorizing the BZA to "make special exceptions to the provisions of the zoning regulations in harmony with their general purpose and intent") is nothing more than the *statutory* authority for the Board's *regulatory* authority to consider and either grant or deny special exceptions.

Second, that the BZA is authorized, pursuant to 11 DCMR § 3100.4 to "make any order that may be necessary to carry out its decision or authorization" in an *appeal* brought before the Board can hardly be reasonably twisted into the requisite explicit authorization for the BZA to refuse considering, let alone to be precluded from considering, a *contested case*, such as NCRC's application for a special exception. *See Dupont Circle Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 390 A.2d 1009, 1011 (D.C. 1978) (treating special exception application as contested case under DCAPA); *Rose Lees Hardy Home and School Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 324 A.2d 701, 707 (D.C. 1974) (holding that application for special exception to allow construction in residential zone of private school for kindergarten and elementary school age children resulted in "contested case" within meaning of DCAPA); *Clerics of St. Viator, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 291, 296 n.12 (D.C. 1974) (stating that a "proceeding before the Board of Zoning Adjustment is a contested case and therefore subject to the requirements of" the DCAPA).

Moreover, it is this same failure to recognize that NCRC's special exception application constitutes a contested case under the DCAPA that is the critical flaw in the Neighbors' insistence that the BZA is empowered to issue a declaratory order in this case. D.C. Code § 2-508's allowance of agencies in the District to "issue a declaratory order with respect to the applicability of any rule, regulation, Council act or resolution, or statute enforceable by them . . ., to terminate a controversy (*other than a contested case*) or to remove uncertainty" (emphasis added) can provide no support for the Neighbors' request for declaratory relief in this matter. As the text of this provision itself makes

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[1] See, e.g., the Georgetown Day School case, where the opponents alleged that there were conditions in the prior order that were not being met. The Board heard the case and stated in its order of approval: "As to the alleged violations of conditions contained in prior orders of the Board in which the requested relief was granted, *the Board cannot say what was in the minds of prior Board members. Based on the present precedents, this Board would deem such findings of fact and not conditions imposed on the grant.*" (BZA Order No. 14140, dated September 14, 1984.)

clear, an agency's authority to issue a declaratory order is strictly for either (1) the purpose of removing uncertainty as to the applicability of pertinent legislative and quasi-legislative provisions or (2) to terminate a controversy *other than a contested case.* Under the circumstances of this case, neither purpose for the declaratory relief authorized by § 2-508 is cognizable or effectual. There is no apparent uncertainty as to the applicability of any statutory or regulatory provisions to NCRC's application, nor have the Neighbors asserted any such uncertainty. Nor can the Board terminate any dispute between NCRC and any opponents to its pending application for a special exception by issuing a declaratory order: NCRC's application constitutes a contested case pursuant to the repeated decisions by the District of Columbia Court of Appeals to that effect, as cited above.

Finally, the Neighbors' invocation of 11 DCMR § 3100.6 is clearly inapposite. As that provision states, "No application or appeal shall be dismissed on the grounds that the applicant failed to comply with the provisions of this Chapter [31] unless, after due notice of the deficiency and expiration of a reasonable time as fixed by the Board, the deficiency has not been corrected." Contrary to the Neighbors' reading, 11 DCMR § 3101.7 hardly stands as broad authority for the BZA to dismiss applications pending before it for whatever reasons it may see fit. Rather, as even the Neighbors must concede, the BZA's authority under 11 DCMR § 3101.7 to dismiss applications is limited to an applicant's failure to comply with the Board's "Rules for Practice and Procedure," as set out in Chapter 31 of the Zoning Regulations. The Neighbors' motion to dismiss is based upon no such allegation of a procedural misstep by NCRC in submitting its application for a special exception. Furthermore, even were the Neighbor's motion so grounded, the Board is proscribed from dismissing NCRC's application without first providing due notice of the alleged deficiency and allowing a reasonable period of to correct it. *See id.*

In sum, there is no statutory or regulatory authority for the Board either to dismiss NCRC's pending application for a special exception or, instead of deciding this contested case, to issue the declaratory relief requested by the Neighbors.

B. The Opposition's Other Arguments Fail.

In their filing, the Neighbors ignore the case law and are not able to cite even one case where the courts have held that statements made at a public hearing are conditions.

Further, even the statements made at the public hearing in 1998 support NCRC's position that the school was requesting a new certificate of occupancy for 120 children to meet DOH licensing requirements. Both the DOH license and the certificate of

occupancy restrict the number of children at any one time. Further, since DOH regularly inspects such facilities, for the Neighbors to imply that DOH cannot count the number of children, or did not realize that the school has a morning and afternoon program is absurd.

The St. Columba's case is directly on point. First, if, as the Neighbors contend, a certificate of occupancy limits enrollment, not the number of children at any one time, then St. Columba's would have had to request a new certificate of occupancy, since its current certificate of occupancy is for 90 children and Ms. Taylor testified that they were planning to add 40 children. It did not request a new certificate of occupancy and Ms. Taylor testified that the certificate of occupancy limits the number at any one time. She cannot now change her position.

Second, if, as the Neighbors contend, the number stated on the BZA application form and repeated in the first paragraph of the order limits the total enrollment, then again St. Columba's is in violation. In 1996, the date of its last approval, it applied for a child development center for 90 children and the order referenced that number. In its most recent application, it did not request a change to anything but the hours of operation. Under the Neighbors' reasoning, the 90 still controls.

Third, in the St. Columba's case there was even an express condition in the 1996 order which stated, "The number of children shall not exceed 90." Even with this express condition, the applicant did not request a change nor did the Board require it, even though the school was adding 40 children. The reason is simple. The condition limits the number of children at any one time, not the total enrollment. The same reasoning applies here.

To adopt the Neighbors' arguments would mean that the BZA would have to invalidate the orders for St. Columba's, the Washington Hebrew Center, National Children's Center, and a host of other preschool cases. This would be an absurd result.

II. CONCLUSION

For the foregoing reasons, NCRC requests that the BZA deny the Motions to Dismiss and for Declaratory Relief.

Respectfully submitted,

SHAW PITTMAN, LLP

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Certificate of Service

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