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April 25, 2003

BY HAND

Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
441 Fourth Street, N.W., Room 201
Washington, D.C. 20001

Re: BZA Application No. 16970
National Child Research Center
3209 Highland Place, N.W.; Square 2072, Lot 30 (the Property)

OPPOSITION OF THE CLEVELAND PARK NEIGHBORS

The following Opposition to the relief requested in BZA Application No. 16970, as amended, is submitted on behalf of the Cleveland Park Neighbors. For the reasons stated below, the Cleveland Park Neighbors oppose the relief requested by the National Child Development Center ("NCRC") in the instant application. In addition to the reasons set forth below, the Cleveland Park Neighbors hereby incorporate by reference the arguments on the merits of the application made in their Motion to Appear as a Party, Motion to Dismiss Application, Motion for Declaratory Relief, and Request for Hearing on Motions to Dismiss and Declaratory Relief (the "Motion") and Opposition filed on January 28, 2003.

BZA
Case No. 16970
Exhibit No. 141

Word 45643913.1

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.141

Summary of Opposition

As outlined below and as previously determined by this Board in other matters, the variance relief sought under § 3202.3 of the zoning regulations requested by NCRC is a use, not an area, variance. NCRC has not (and cannot) prove the undue hardship requirement for a use variance. Simply put, NCRC would not be deprived of all use of their Property were the Board to deny the requested use variance.

In reviewing the instant application, one cannot loose sight of the fact that NCRC has continually violated previous orders of this Board regarding the operation of its nursery school and has made numerous misrepresentations to this Board, the ANC, community and governing agencies with regard to its use and occupancy of the Property. NCRC is proposing extensive additions to the Property for one simple reason – it has allowed its enrollment to expand beyond the capability of its physical facilities. This expansion was in violation of its licensing restrictions, as demonstrated by its need to obtain a waiver from the licensing regulations in October 2002, as well as previous orders of the Board. As such, NCRC's need for additional space, and thus the requested relief, results from a self-created hardship and must be denied.

Finally, with regard to the requested variance, in the unlikely event that the Board determines the variance is, in fact, an area variance, the relief should be denied because (1) the Property is not unique, (2) there are no practical difficulties in using the Property and (3) the requested variance will adversely impact the surrounding neighborhood. Furthermore, although not an absolute bar to an area variance, the Board may consider the fact that the requested relief arises from a self-created hardship in dealing with the issue of practical difficulties, as the hardship arises as a direct result of NCRC's deliberate actions.

With regard to relief from the parking requirements, NCRC cannot meet the burden for such relief, whether it be in the form of a variance or special exception, due to the substantial harm such waiver would cause the surrounding community.

A. The Proposed Variance is a Use Variance.

1. Use v. Area Variance Dichotomy.

A use variance "permits a use other than that prescribed by the zoning regulations" whereas an "area variance has no relation to change of use but, rather is primarily a grant to erect, alter or use a structure for a permitted use in a manner other than that prescribed by the ordinance." *Ass'n for Preservation of 1700 Block of N Street v. Board of Zoning Adjustment*, 384 A.2d 674 (D.C. 1978). A use variance is required by an applicant when the applicant seeks to use a structure or property in a manner other than that prescribed by the zoning regulations for that site, as distinct from a use which is permitted by special exception or otherwise. *See Association for Preservation of 1700*

Block of N Street v. Board of Zoning Adjustment, 384 A.2d 674 (D.C. 1978). In *1700 Block of N Street*, the Court stated that

> [t]he distinction between a use variance and an area variance is that the former "'permits a use other than that prescribed by the zoning regulations' whereas an "area variance has no relation to change of use. It is primarily a grant to erect, alter or use a structure for a permitted use in a manner other than that prescribed by the ordinance.'" [footnotes and citations omitted].

Indeed, even where the requested variance is a hybrid, the court has still applied the stricter burden of proof applicable to a use variance. *See Taylor v. Board of Zoning Adjustment*, 308 A.2d 230, 233 (D.C. 1973).

In the leading case of *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535 (D.C. 1972), the Court interpreted D.C. Code §§ 5-420, 5-424(g)(3) and the corresponding provision of the zoning regulations, 11 D.C.M.R. § 3103.2, which permits the Board to grant variances, pursuant to the following:

> Where, by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under this Act would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from such strict application so as to relieve such difficulties or hardship, provided such relief can be granted without substantial determent to the public good and without substantially impairing the intent, purpose, and integrity of the zoning plan as embodied in the zoning regulations and map.

The above regulation sets up separate statutory requisites to the granting of variances, i.e., a showing of "practical difficulties" or "undue hardship". In *Palmer*, the court adopted the dichotomy recognized in other jurisdictions between area variances and use variances, applying the statutory requisite of "practical difficulties" to a showing of the former, and applying the separate statutory requisite of "undue hardship" to a showing of the latter. *Id.* at 541. Because "an area variance, relating to restrictions such as side yard, rear yard, frontage, set-back or minimum lot requirements, does not alter the character of the zoned district, whereas a use variance seeks a use ordinarily prohibited in the particular district", the court held that a "more stringent showing is warranted with respect to the more drastic relief inherent in a use variance". *Id.* at 541.

The principal rationale for the different standards applicable to the two types of variances is that an area variance does not affect the neighborhood or adjacent landowners with the maintenance of an incompatible use of the subject property. *Association For The Preservation Of 1700 Block Of N Street, N.W. v. Board of Zoning Adjustment*, 384 A.2d 674, 678 (D.C. 1978). That is, an area variance does not alter the character of the zoned district (i.e., it does not deviate from the uses permitted in that district), whereas a use variance seeks a use ordinarily prohibited in the particular district. *Monaco v. Board of Zoning Adjustment*, 409 A.2d 1067, 1072 n.17 (D.C. 1979); *1700 Block of N Street, N.W.*, 384 A.2d at 677; *Palmer*, 287 A.2d at 541.

2. The Requested Variance is a Use Variance.

Determinations of whether the variance at issue is one of area or use are to be made on an *ad hoc*, case by case basis by the BZA. *Monaco*, 409 A.2d at 1072. The differences between the two kinds of variances are essentially one of degree and are to be determined on the basis of the facts and circumstances of each case. *Capitol Hill Restoration Society v. BZA*, 534 A.2d 939, 941-42 (D.C. 1987); *Carliner v. BZA*, 412 A.2d 52, 53 (D.C. 1980); *Monaco*, 409 A.2d at 1072. As mentioned above, a use variance is required by an applicant when the applicant seeks to use a structure or property in a manner other than that prescribed by the Zoning Regulations for that site, as distinct from a use which is permitted by special exception or otherwise.[1] *See 1700 Block of N Street*, 384 A.2d 674 (D.C. 1978).

At the February 25, 2003 hearing, when the Board determined that the construction and use the proposed additional primary building by NCRC's required relief from § 3202.3, the Board left unresolved the nature of the variance required. February 25, 2003 Tr. At 266 & 267. The Board invited input on this issue from the parties.

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[1] It is irrelevant, for this discussion, whether a child development center is allowed through a special exception (*see* NCRC's Supplemental Statement at 9), since the issue of use in this analysis is whether the regulations permit the construction and/or occupancy of two principal structures on a single lot of record in a residential district. Although two principal buildings may be allowed on a single lot of record in a residential district by way of § 2516 of the zoning regulations, NCRC has not sought to subdivide the Property into such lots and thus that issue is also not before the Board. Moreover, to the extent that there can be any ambiguity left in the type of variance required pursuant to § 3202.3, given the drastic change the additional primary building will impose on the surrounding area, such ambiguity must be resolved by requiring the application of the stricter test of an area variance. *See Taylor at* 233.

Consistent with case law and its prior decisions, as recently as its decision in Application No. 16693 of Carroll O. Little, the Board held that a variance from § 3202.3 is a use variance. *See* Exhibit 1. In BZA Application No. 16693, the Board stated:

> Since a variance from § 3202.3 would result in a use ordinarily prohibited in all zone districts, [*i.e.*] the use of a single lot for the construction of an addition to one of two principal structures on the lot, the application must meet the higher burden of proof established for *use variances*. *See Wolf v. District of Columbia Bd. of Zoning Adjustment*, 397 A.2d 936, 941-42 (D.C. 1979). (Emphasis added.)

See also Jenney v. Durham, 707 A.2d 752, (Del. 1997)(under Steep Slope Ordinance restricting allowable use of land, applicant's request to build two houses where ordinance would allow only one required a use variance). Finding a variance pursuant to § 3202.3 to be a use variance, the Board went on to state that:

> Under the three-prong test for use variances set out in 11 D.C.M.R. § 3103.2, the applicant must demonstrate that (1) as a result of exceptional narrowness, shallowness, or shape of property or by reason of exceptional topographic conditions or another extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter *undue hardship* if § 3202.3 is strictly applied; and (3) the requested variance will not result in substantial detriment to the public good or the zone plan. *See Wolf*, 397 A.2d at 941.

The Board's decision in that case is, as already stated, consistent with case law and a reading of the zoning regulations. And, there have not been any changes in §3202.3 or any other relevant sections of the zoning regulations since 2001 that would warrant revisiting the issue of whether variances pursuant to that section are anything other than use variances.

B. NCRC Cannot Meet the Requirements for a Use Variance.

As stated above, a use variance is required by an applicant when an applicant seeks to use a structure in a manner other than that prescribed by the zoning regulations for that site as distinct from a use which is permitted by special exception or otherwise. *See Association For Preservation of 1700 Block of N Street v. Board of Zoning Adjustment*, 384 A.2d 674 (D.C. 1978).

The criteria for use variances are:

a. Unique and physical aspect or "other extraordinary or exceptional situation or condition of a specific piece of property;

b. Undue hardship; and

c. No harm to the public or to the zone plan.

1. The Property is Not Unique.

NCRC asserts that it needs the additional primary building to allow it to continue to "provide the exemplary preschool environment for which it is known". NCRC's January 28, 2003 Submission to the Board at p. 4 and Supplemental Submission at 2. NCRC seeks to provide additional classrooms and indoor motor space, as well as space for gatherings of children and parents, and meeting space and work space for teachers and parents.

The mere facts that the Property is located within the historic district or that it shares the topography noted in the designation of that historic district (Supplemental Statement at 9) does not make the Property unique. *Gilmartin v. Board of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990); *Capitol Hill Restoration Society v. Board of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987). Moreover, this is not a case where the uniqueness lies in the structures and not the land. The fact of having three (3) buildings on the property, as well as ample open space and a large play ground, does not make the Property unique, as these are common factors in properties used as nursery schools. Indeed, NCRC has not shown why it cannot simply subdivide the Property into two record lots

NCRC has also failed to show that it cannot operate within the existing buildings through modernization of those existing structures. Indeed, when it sought approval for an enrollment of 120 children in 1998, NCRC stated that it could accommodate its entire enrollment within the existing building and would not need to do any additional what construction. What has apparently changed since that time when NCRC misrepresented its enrollment, is the mission that NCRC has ascribed for itself. NCRC wants to be more than a neighborhood nursery school. It has ambitions of being a conference center for nursing schools and a vastly larger nursery school than represented in the past.

As NCRC is quick to point out, it has operated at the Property for over 73 years. It has done so without the benefit of the institutional campus that it now proposes. Rather than explore alternative options to accommodate the expansion of its programs, NCRC has simply chosen to justify its increase in enrollment and alteration of its program by

expanding its facilities at the Property. Such expansion is proposed (and has largely been undertaken) without regard to zoning and other applicable regulations. It is obvious that this application is nothing more than an attempt by NCRC to avoid living within its means and facilities (such as decreasing its enrollment to a number that can be accommodated at the Property, as well as by the surrounding streets, an in keeping with prior representations) inherent in alternative methods of expansion. *See e.g. Russell v. D.C. Board of Zoning Adjustment*, 402 A.2d 1231, (D.C. 1979), *citing Barbour v. Board of Zoning Adjustment*, 358 A.2d 326 (D.C. 1976).

Finally, as noted above, the fact that NCRC has increased its enrollment in violation of zoning and other ordinances, or misrepresented it in the past, cannot be ignored. The need for NCRC to expand its physical facilities clearly stems from the fact that the existing historic structures on the Property cannot accommodate its current vision and future enrollment desires. To allow the requested variance in light of the fact that the enrollment beyond 120 was unauthorized is contradictory to established precedent that unique circumstances cannot "refer to the personal misfortunes of the applicant or to the previous use of the property." *Capitol Hill Restoration Society, Inc. v. D.C. Board of Zoning Adjustment*, 398 A.2d 13 (D.C. 1979). Likewise, previous illegal use of the a property cannot justify a finding of uniqueness. *Monaco*, 407 A.2d at 1097, *referring to Capitol Hill Restoration Society, Inc.*

2. There Would Be No Undue Burden to NCRC if § 3202.3 Were Strictly Applied.

a. The Fact that the Need for the Requested Variance Arises from a Self-Created Hardship Bars the Granting of the Relief.

First of all, as already stated, since the existing lot is large enough to be subdivided into to record lots, there is no hardship in applying the zoning regulation prohibition against having two or more principal buildings on a single subdivided lot.2 In addition, any hardship here is "self-created."

A "self created" hardship rule has been applied to restrict claims of undue hardship. *See Foxhall Citizens Association*, 524 A.2d at 761-762. In *Foxhall Citizens Association*, the Court listed a variety of applications of the self-created hardship rule in use variance cases:

> The self-created hardship rule applies, for example, to owners who purchase property with actual or constructive knowledge of zoning restrictions from which they intend to seek administrative relief. 3 R. Anderson, American Law of Zoning § 20.44 - 20.45; *see, e.g., Salsbery v. Board of Zoning Association*, 357 A.2d 402, 404-405 (D.C. 1976) (applicant contracted to purchase existing property for non-conforming use without conditioning contract upon obtaining use variance). Similarly hardship is self-created if it is later manufactured by an owner, that is, "caused by improvements to the land constructed by the applicant with knowledge of the restrictions from which he [or she] seeks relief." 3 R. Anderson, American Law of Zoning § 20.46 at 514-15. In *Taylor*, for example, the applicant subdivided the property in a manner that created, among others, a narrow, elongated lot that could not be

2 Presumably NCRC is willing to seek a use or area variance rather than comply with the zoning regulations because it must believe that it will not be able to obtain approval for the subdivision from the Historic Preservation Review Board. That speculation does not entitle NCRC to a variance nor does it render the Property unique.

> improved in conformity with zoning restrictions he had known about at the time of subdivision. 308 A.2d at 235-36. *See also Dwyer*, 320 A.3d at 306-08 (whatever hardship the applicant suffered arose from his own acts in using residentially zoned property for law offices); *Bernstein*, 376 A.2d at 820 (where owner had illegally used property as an office, any hardship that resulted from conversion back to legal use was self-imposed). (citations omitted).

The Court in *Foxhall Citizens Association* reversed the Board's grant of a use variance to a church to permit conversation of its existing church building to twenty-one residential condominium units. The Court based its decision on the grounds that the church itself took the affirmative steps that rendered its church building unusable, namely, its own design and construction decisions which led to several additions to the church building over several years. *Id.* at 763. The Court determined that the church had failed to prove that the undue hardship which necessitated the need for the variance was not a self-created hardship:

> [E]ven if a church should not be expected to foresee every turn of events that might require a physical plant tomorrow far different from the one designed today, the church to avoid a self-created hardship would have to justify its history of design decisions in a way that convinces the BZA, and ultimately the court, that those decisions were not the principal reasons the church eventually had to seek the variance.

Id. at 764.

Similarly, in the instant case, it was NCRC's affirmative actions in altering its mission, misrepresenting its enrollment and/or allowing its enrollment and staff to exceed the physical restrictions and capabilities it has claimed to necessitate its appeal to the Board for relief to create the institutional campus it proposes. What's more compelling

in the instant matter is that NCRC's expanded enrollment and increased staff violated both the previous orders of this Board or its representations to the Board and the community, as well as the licensing restrictions of the Department of Health ("DOH"). *See* Exhibit 2. Because of its unauthorized expansion, after a complaint by a neighboring property owner, NCRC was forced to obtain a waiver from the DOH's licensing restrictions, which waiver was granted only as to the current school year. *Id.* The limitation on the waiver was imposed on the representation of NCRC that it was expanding its facilities, a representation that was, at the very least, premature. *See* Exhibit 3.

The requested variance from § 3203.2 must be denied either because there is no identified impediment to NCRC complying with the zoning regulations or the need for relief arises from NCRC's deliberate act of increasing its enrollment beyond the capacity of its facilities and in violation of applicable orders and regulations.

b. <u>The Denial of the Relief Would Not Result in Depriving NCRC of All Beneficial Use of the Property</u>.

With regard to the request for a use variance, the applicant must also demonstrate that it has been deprived of all beneficial use of the property. See *Russell v. Board of Zoning Adjustment*, 402 A.2d 1231 (D.C. 1979) *citing Clerics of Saint Viator, Inc. v. Board of Zoning Adjustment*, 320 A.2d 291, 294 (D.C. 1974). *See cases collected in Monaco v. Board of Zoning Adjustment*, 407 A.2d 1091 (D.C. 1979). In other words, it must be demonstrated that the property cannot be "put to any conforming use with a fair and reasonable return arising out of the ownership thereof." *Downtown Cluster of*

Congregations v. Board of Zoning Adjustment, 675 A.2d 484, 491-492, (D.C. 1996) *quoting Palmer, supra*, 287 A.2d at 542. Furthermore, the applicant is not entitled to a use variance where the site could be used more profitably than that required under the zoning regulations or where the profitability of the use permitted is slight. *See* cases collected in *Monaco v. Board of Zoning Adjustment*, 407 A.2d 1091 (D.C. 1979). That is because the highest and best use are irrelevant to establish undue hardship.

NCRC's own application and prior use of the Property illustrates that it is able to use the Property without the need of the proposed additions and requested relief. *See* NCRC's January 2, 2003 Submission to the Board of Zoning Adjustment. In its January 28, 2003 submission, NCRC boasts that "[f]or the last 73 years, NCRC has provided its excellent preschool program within the same amount of space." *Id.* at p. 2. Furthermore, by NCRC's own admissions, it is seeking to expand its facilities rather than reduce its enrollment. *Id.* at p. 6.

NCRC attempts to justify its need to increase its enrollment in two parts: (1) the desire to serve children in the community; and (2) to serve its mission of maintaining a diverse student body. However, NCRC ignores the fact that these goals and missions can be met even with a reduction in its enrollment. NCRC need look no farther than its surrounding community to maintain a diverse student body.

NCRC's self-created hardship notwithstanding, NCRC has failed to prove that it would be deprived of all beneficial use of its Property if the requested variance were denied.

3. The Approval of a Variance from § 3202.3 Would Result in Substantial Harm to the Surrounding Community and the Zone Plan.

NCRC's current operations result in objectionable traffic conditions in the surrounding neighborhood and allowing the expansion in its facilities will only result in an increase in traffic. It cannot be ignored that the magnitude of the proposed additions and new building will necessitate the need for NCRC to further increase its enrollment beyond the numbers set forth in its application, so as to provide the necessary capital for the upkeep of the facilities.

Current drop-off of and pick-up procedures result in severe problems in the surrounding streets. Parents and guardians of NCRC students regularly double or triple park and/or block driveways while escorting there children to and from the Property. Given that the majority of the students come from outside the neighborhood, the amount of traffic traveling to and from the school clogs the surrounding narrow, residential streets. Allowing an increase in enrollment and expansion of the facilities will only add to existing objectionable traffic conditions.

As to parking, the existing main house is a contributing building to the Cleveland Park Historic District and, as such, received a waiver from the parking requirements of Chapter 21 of the Zoning Regulations. However, the new building cannot be a contributing building since by being new it was not constructed during the "period of significance" for the historic district, a prerequisite to any determination of contributing status. Furthermore, to qualify for the special exception sought by NCRC pursuant to §205 of the zoning regulations, NCRC must still prove that it provides adequate parking.

For its permitted twenty-eight (28) full time equivalent staff, NCRC currently provides no parking and is not proposing to add any parking to accommodate its increased staffing. As a result, many of the staff members park in the surrounding neighborhoods, creating a further hardship on traffic, parking and the community. An increase in staff will only exacerbate this effect.

In addition to the exacerbation of existing traffic problems caused by NCRC, the institutional campus sought to be created by NCRC is not in keeping with the residential development patterns in this special area. To the contrary, the proposed additions will constitute a wholesale change in the residential neighborhood. The proposed additions double the gross floor area of the "campus". Moreover, the proposed improvements and increases in enrollment would be overly burdensome on the non-arterial streets of the neighborhood, a characteristic noted years ago when the Board denied NCRC relief which would have resulted in a similar consequence. *See* Motion Exhibit 4a. As in the instant case, objection to the requested expansion of enrollment and construction of additional improvements at the Property sought by NCRC in BZA Appeal No. 7503 were based on: "objectionable traffic conditions brought about by parents bringing children to the school and taking them home", as well as the institutional nature of the proposed construction, which was not compatible with the residential character of the neighborhood. Motion Exhibit 4a; *see also* Motion Exhibit 4b. BZA Appeal No. 7503 emphasizes NCRC's sustained violations of the Board's prior orders and the Zoning Regulations.

4. In the Unlikely Event that the Board Were to Conclude That An Area Variance Is Required, NCRC Cannot Meet the Requirements for an Area Variance.

The Board is empowered to grant an area variance where it finds three conditions:

> (1) The property is unique because, inter alia, of its size, shape or topography;
>
> (2) The owner would encounter practical difficulties if the zoning regulations were strictly applied;
>
> (3) The variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zoning plan.

Roumel v. District of Columbia Bd. of Zoning, 417 A.2d 405, 408 (D.C. 1980); *see also Association For The Preservation Of 1700 Block Of N Street, N.W. v. Board of Zoning Adjustment*, 384 A.2d 674, 678 (D.C. 1978)(the applicant must demonstrate that compliance with the area restriction is unduly burdensome and the practical difficulties are unique to the property).

Reviewing the criteria for an area variance, the Court, in *Capital Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939, 941-942 (D.C. 1987), stated that the

> threshold requirement to show that the property is unique with respect to the hardship or difficulty asserted as grounds for the variance means the property owner must present proof that "the circumstances which create the hardship uniquely affect the petitioner's property * * * ." Taylor, supra note 6, 308 A.2d at 234 (emphasis in original).

Id.; *see also Russell v. Board of Zoning Adjustment, supra*, 402 A.2d at 1235 (the requirement that the practical difficulty be caused by the uniqueness of the property "insures relief for problems peculiarly related to the * * * land or structure, and not shared by other property in the neighborhood, thus avoiding a de facto amendment of zoning laws."); *Gilmartin*, 579 A.2d at 1168.

a. The Property is Not Unique.

As illustrated above, the Property is not unique. The property is large enough to be subdivided into two record lots.

In addition, many schools in the District have faced what NCRC is now facing – that is, a desired growth of enrollment and change in program beyond the capabilities of its current facilities. In those cases, rather than expanding enrollment beyond allowable limits and seeking necessary relief after the fact, as in the case of NCRC, those schools have found alternative facilities.

b. Assuming the Property is Unique, Any "Practical Difficulties" Do Not Arise from Such Uniqueness but, Rather, Arise from NCRC's Affirmative Actions.

NCRC provides the Board with a list of factors it claims result in the Property being unique. *See* Supplemental Statement at 9. However, even if the Board were to adopt NCRC's argument of uniqueness, the factors set forth by NCRC do not give rise to any practical difficulties in NCRC's ability to use its Property if the zoning regulations were to be strictly applied. That is to say, the large size of the Property, the three (3) existing buildings, the topography of the Property, the very large playground and

significant open space or HPRB's grant of conceptual approval of its proposed institutional campus do not create any difficulty in NCRC's ability to either subdivide the property into two record lots or renovate the existing structures and to continue to use them as a nursery school.

The fact that NCRC's difficulties are either illusory or self-created (or self-imposed) is one of the many factors that can be considered by the Board in determining whether there are any practical difficulties. *See Gilmartin v. Board of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990); *Azcarate v. Board of Zoning Adjustment*, 388 A.2d 1233, 1239 (D.C. 1978) *see also* 83 Am. Jr. 2nd, Zoning & Planning § 828. In *Azcarate*, the court noted that the self-created hardship rule is a "manifestation of the equitable principle of estoppel," and explained that "where an applicant for an applicant for an area variance, or his predecessor in title, has committed an *affirmative act* which directly results in the hardship complained of, variance relief will be withheld." *Azcarate*, 388 A.2d at 1239, *citing* 2 A. RATHKOPT, LAW OF ZONING, § 48-6 (3rd. ed. 1972). Examples of instances where courts have denied area variances based on self-created hardships resulting from direct actions of the applicant include situations where: (1) substandard lot results from faulty survey and surveyor was hired by the applicant; (2) the applicant proceeded with construction in disregard of applicable zoning ordinances or without the necessary permits; (3) a substandard lot was created and the deficiency could have been avoided. *See* 83 Am. Jr. 2nd, Zoning & Planning §§ 824-827. Additionally, the Board may consider weather there is an alternate use of the property that would require a less extensive variance. *Id.* at § 827.

In *Azcarate*, the court found that the hardship at issue – the failure of the configuration of the lot in question to meet the lot-width requirements of the zoning regulations -- was not a direct consequence of the applicant's sole affirmative acts, as the zoning officials played a "significant part by approving three separate applications during the original subdivision of [the lot]." *Id.* In contrast, NCRC's increase in its enrollment resulted from its sole affirmative acts; acts which NCRC has gone to great lengths to conceal and/or misrepresent. As illustrated in the Motion and previous Opposition, beginning in the late 1980s, it became apparent that NCRC was both increasing its enrollment and undertaking improvements to the Property without going through the necessary reviews and permitting processes. NCRC's attempts of deceit have continued into the instant matter, wherein NCRC has unilaterally changed its limitation on enrollment from an enrollment cap of 120, to a limitation on occupancy of 120 at "any given time". Additionally, NCRC, to its demise, attempted to construe its proposed new building as an accessory structure, despite the obvious fact that the proposed use of the building is to be for the primary purposes of the nursery school – that being classrooms. Given the egregious nature of NCRC's actions, the equitable considerations (i.e., self-created hardship rule) weigh strongly against the finding of any practical difficulties.

Finally, NCRC does not need the requested relief in order to continue its use of the site as a school or to renovate and continue to use the existing structures. *See* Supplemental Statement at 11. The neighbors would support the renovation of the existing structures, provided that NCRC adhered to its prior promises regarding its caps on enrollment.

c. The Proposed Relief Would Have an Adverse Affect on the Surrounding Neighborhood.

Finally, whether the relief be deemed an area or use variance, the fact still remains that the proposed relief would create a substantial burden on the surrounding community, which is already overtaxed by NCRC's unauthorized expansion of its enrollment.

C. NCRC Cannot Meet the Standards for Relief From the Parking Requirements of § 2101.1 of the Zoning Regulations.

1. NCRC Cannot Meet the Burden of Proving the Need for a Parking Variance.

With regard to parking, this matter has been advertised for "relief from § 2100.6 which requires the provision of parking spaces for the proposed additional principal structure on the NCRC property". Pursuant to Order No. 16307, NCRC is authorized to have fulltime equivalent staff of 28.[3] Presumably, this would mean that, if allowed to proceed with constructing its institutional campus, NCRC would be required to provide three (3) on-site parking spaces.[4]

If the relief is strictly from § 2100.6 of the zoning regulations, such relief is in the form of a variance. For the reasons set forth in Section B, *supra*, NCRC cannot meet its burden of proving that it is entitled to the variance from the parking requirements. *Association for Preservation of 1700 Block of N Street, N.W., and Vicinity v. Board of*

[3] By its own admission, NCRC is in violation of this provision in that it currently has a fulltime equivalent staff of 36.

[4] Given NCRC's failure to be forthcoming with its number of staff, it is impossible to determine the actual number of on-site parking spaces that would be required, as the number of spaces is to be determined by "the greatest number of persons to be employed at any one period during the day or night, including persons having both full-time and part-time employment." 11 D.C.M.R. § 2118.3. Regardless, given that the community is already overtaxed and overburdened by teachers, consultants and guests of NCRC parking on the streets, any reduction in parking, no matter how minimal, will result in an even greater burden on the community.

Zoning Adjustment, 384 A.2d 674 (D.C. 1978)(the applicant has the burden of proving it is entitled to the requested relief). That is to say: (a) the Property is not unique; (b) there is no undue burden or practical difficulty, as NCRC has operated as a nursery school at the Property without the requested relief for seventy-three (73) years and any difficulties it now faces are as a direct result of its deliberate actions of increasing its enrollment and staff beyond that allowed by applicable regulations; and (c) the proposed relief would have an adverse impact on the surrounding community. Clearly, as the testimony presented to date illustrates, one of the primary negative impacts of NCRC's operations includes traffic problems. NCRC teachers and staff are regular culprits of blocking driveways of neighbors and otherwise parking illegally. Allowing a waiver from the parking requirements will only exacerbate this problem.

2. NCRC Cannot Meet the Burden Required for a Special Exception from the Parking Requirements Pursuant to §§ 2107 or 2108 of the Zoning Regulations.

Section 2107 allows the Board, by special exception, to reduce or eliminate the amount of required parking spaces for a nonresidential building, provided the property has a direct connection to a Metrorail station. 11 D.C.M.R. § 2107.1 Section 2108 of the zoning regulations allows the Board, again by special exception, to reduce the amount of parking spaces in a nonresidential building by up to twenty-five percent (25%). 11 D.C.M.R. § 2108.2. In both cases, the Board must consider, *inter alia*:

a. The nature and location of the building or structures (and the nature and location of the connection to Metrorail for relief pursuant to § 2107);

b. The maximum number of students, employees, guests, customers, or clients who can reasonably be expected to use the proposed building or structure at one (1) time;
c. The amount of traffic congestion existing or which the building or structure can reasonably be expected to create in the neighborhood;
d. The quantity of existing public, commercial, or private parking, other than on-street parking, on the property or in the neighborhood which can reasonably be expected to be available when the building or structure is in use; and
e. The availability of public transportation service in the area, or a ride-sharing sharing program approved by the District of Columbia Department of Public Works (and the proximity of public transportation, particularly Metrorail stations for relief under § 2108).

11 D.C.M.R. §§ 2107.2 & 2108.3.

In both cases, it is the amount of traffic generated by this nursery school and the inability of the surrounding streets to handle such traffic, including the lack of available on-street parking, that warrants denial of a special exception pursuant to either provision. Without further belaboring the point, there is little on-street parking on the surrounding streets. Many neighbors share driveways and, as such, are left with no choice but to park on the streets surrounding NCRC. The ever increasing popularity of SUVs creates an even higher burden on the limited available on-street parking. Finally, NCRC has numerous visitors and consultants to the Property on a regular basis, further overwhelming the surrounding community in terms of traffic and availability on-street parking.

D. NCRC Cannot Meet the Burden for the Special Exception to Increase the Staff and Enrollment at the Property.

As set forth in the Cleveland Park Neighbor's Motion and Opposition dated January 28, 2003, incorporated herein by reference, NCRC cannot meet its burden of proof with regard to the proposed (and, by and large, already implemented) increase in its staff and enrollment. As a recap, NCRC cannot meet the specific requirements for a special exception pursuant to § 205 of the zoning regulations in that: (a) NCRC has failed to adhere to applicable code and licensing requirements; (b) it creates objectionable traffic conditions and unsafe conditions for picking up and dropping off children; and (c) it does not provide sufficient off-street parking spaces to meet the reasonable needs of teachers, other employees, and visitors.[5] Finally, the proposed institutional campus is inconsistent with the surrounding residential neighborhood.

CONCLUSION

The variance sought pursuant to § 3202.3 of the zoning regulations is a use variance, as opposed to an area variance. However, regardless of the nature of this variance, NCRC cannot meet the burden for such relief given that: (a) the Property is not unique; (b) the sole cause of any undue burden or practical difficulty to NCRC is a direct result of its own doing or its unwillingness to subdivide the site, which it can do without any zoning relief; (c) NCRC has failed to prove that it would be denied all beneficial use of the Property without the relief; and (d) the requested relief would have a severe negative impact on the surrounding community, which is already overly burdened by the

[5] As set forth in the previous opposition, this third requirement must be taken into consideration by the Board regardless of the fact that the building is a contributing building to the Cleveland Park Historic District.

operations of NCRC by way of traffic, parking and noise. For these same reasons, the variance from the parking requirements must be denied.

NCRC does not meet the criteria for a special exception for a child development center. Specifically, the institutional nature of its proposed plans are not consistent with the zone plan for this residential neighborhood and would adversely affect the nature of the neighborhood, including its scenic vistas. Finally, the traffic imposed upon the surrounding narrow, residential streets adversely affects the use of neighboring properties. It is the negative impact on traffic and parking generated by NCRC that necessitates the denial of any special exception from the parking requirements of § 2101.1 of the zoning regulations.

For the foregoing reasons including the reasons stated in our initial opposition and the evidence to be adduced at the hearing on the application, the Neighbors respectfully request that the relief requested by NCRC in the instant application be denied.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Richard B. Nettler
Jeannine Rustad Zigner

cc: Neighbors
Mr. Denzel Noble (by hand)
Office of Planning, Attention Arthur Jackson (by hand)
ANC 3C (by hand; c/o Nancy MacWood)
Gaylord Neely & Linda Badami (by hand)
Sallie R. Beckner & R. Bruce Beckner (by hand)
Steven R. Hunsicker (by hand)
Henry P. Little (by hand)
"The Friends of NCRC" (by hand)
Katharine Marshall (by hand)
Maureen E. Dwyer (by hand)

EXHIBIT ONE

DISTRICT OF COLUMBIA REGISTER

ISSUE: Volume 48, Number 30

ISSUE DATE: July 27, 2001

SUBJECT: BOARDS, COMMISSIONS, AND AGENCIES

AGENCY: GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

48 D.C. REG. 6969

Star pagination is in accord with DCRGST hardcopy pagination.
To view the next page, type .np* and ENTER
To view a specific page, enter p* and the page number. E.G. p*1.

Application No. 16693 of Carroll O. Little, pursuant to 11 DCMR § 3103.2, for a variance from subsection 3202.3, to allow the construction of a second story addition where more than one principal building exists on a single lot of record in an R-1-B District at premises 904 Ridge Road, S.E. (Square 5383, Lots 60 and 61).
HEARING DATE: April 24, 2001
DECISION DATE: April 24, 2001
DECISION AND ORDER

Carroll O. Little, the owner of Lots 60 and 61 in Square 5383, filed an application with the Board of Zoning Adjustment on January 12, 2001, for a variance from 11 DCMR § 3202.3 to allow the construction of an addition to one of two principal buildings on a single lot of record. The existing buildings are located on Lot 60 in Square 5383, with street addresses of 900 and 904 Ridge Road, S.E., in an R-1-B Zone District. The application is accompanied by a memorandum from the Zoning Administrator dated November 14, 2000, certifying the required zoning relief. After a public hearing, the Board denied the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated February 7, 2001, the Office of Zoning advised the D.C. Office of Planning; Advisory Neighborhood Commission (ANC) 7E, the ANC for the area within which the property that is the subject of the application is located; the ANC Commissioner for the affected single-member district; and the Ward 7 Councilmember of the filing of the application.

The Board scheduled a public hearing on the application for April 24, 2001. Pursuant to 11 DCMR § 3113.13, the Office of Zoning on February 21, 2001, mailed the applicant, the owners of all property within 200 feet of the subject property, and ANC 7E notice of the hearing. Notice of hearing was also published in the *D.C. Register* on February 23, 2001, at 48 DCR 1691. The applicant's affidavit of posting indicates that on March 28, 2001, a zoning poster was placed on the front of the subject building, in plain view of the public.

Applicant's Case. The applicant, Carroll O. Little, stated that he was seeking a variance to reconstruct an existing one-family dwelling on a record lot containing two one-family **[*6970]** dwellings in order to provide housing for family members. He submitted photographs of the existing dwellings, along with architectural plans for the proposed addition.

D.C. Office of Planning (OP) Report. After reviewing the property's zoning, the proposed addition, and the legal tests for a variance, OP, in its report dated April 16, 2001, recommended that the Board deny the application. John Moore, development review specialist, presented the report at the hearing.

ANC Report. In its report dated April 13, 2001, ANC 7E indicates that on April 10, 2001, at a duly-noticed meeting with a quorum present, the ANC was in agreement with the requested variance. The ANC states that it does not have any issues with the proposed addition.

Persons in Support of the Application. Wilks and Juanita Clemont, nearby neighbors, submitted a letter supporting the application.

Persons in Opposition to the Application. There are no persons in opposition to the application.

Closing of the Record. The record closed at the conclusion of the public hearing.

Decision. After the hearing, the Board, voting 3-0-2, with two members not present, not voting, denied the application.

FINDINGS OF FACT

The Subject Property and Proposed Addition

1. The subject property is Lot 60 in Square 5382. The applicant also owns the adjacent lot to the west, Lot 61. Lots 60 and 61 are located in an R-1-B District.
2. The subject property is located in the Benning Heights Neighborhood. The neighborhood is generally bounded by Benning Road to the north, the northern property line of Fort Dupont Park to the south, Southern Avenue to the east, and Texas Avenue to the west. It consists predominantly of one-family detached and semi-detached residential dwellings, with garden apartments and row dwellings concentrated in the northeastern portion of the neighborhood.
3. Lot 60 is trapezoidal in shape. It is located at the intersection of Ridge Road, S.E., and Burns Street, S.E. There is a 15-foot wide unimproved public alley that runs along the eastern lot line and intersects Ridge Road.
4. Lot 60 is developed with two principal buildings, both of which are one-family dwellings. The applicant resides in the dwelling located closest to the intersection of Ridge Road and Burns Street, "Building No. 1," with a street address of 900 Ridge Road, S.E. The proposed addition would be constructed on the smaller dwelling to the east, "Building No. 2," which is **[*6971]** closest to the intersection of Ridge Road and the public alley, with a street address of 904 Ridge Road.
5. Building No. 2, which is presently vacant, was constructed in the 1920s as a dwelling unit. It is in poor condition and unsafe for human habitation.
6. Lot 60 has a lot area of 7,836.8 square feet and a lot width of 117.49 feet. The lot occupancy, with both buildings, is 21.95 percent.
7. Building No. 1 has a rear yard with an average depth of 14 feet, while the distance from Building No. 2 to the rear property line ranges from 5.85 feet to 8.35 feet.
8. The two buildings are six feet apart. Building No. 1 has an eight-foot wide side yard to the west, while the side yard for Building No. 2 to the east varies from two to six feet.
9. The applicant seeks to repair and reconstruct Building No. 2 by building a new foundation wall between existing brick piers, replacing the floors and walls, and adding a new second floor and roof. The proposed building would have the same footprint as the existing building. While characterized as an addition, the extent of required repairs and reconstruction for all practical purposes amounts to the construction of a new building.

Unique or Exceptional Conditions of the Property

10. Under 11 DCMR § 401.3, the minimum lot area in an R-1-B District is 5,000 square feet and the minimum lot width is 50 feet. The subject lot, which exceeds the minimum lot area and lot width requirements for the R-1-B District, does not qualify as an exceptionally narrow, shallow, or uniquely shaped property.
11. There is no exceptional topographic condition or other extraordinary or exceptional situation or condition of the property.

Undue Hardship

12. The applicant could construct a second one-family dwelling on the adjacent lot, Lot 61, either by (1) combining Lots 60 and 61 into a single lot of record and then subdividing the lot into two theoretical lots under 11 DCMR § 2516, which permits the construction of two principal buildings on a single lot; or, (2) pursuing variance relief to permit construction on Lot 61, a substandard lot with a width of only 25 feet.
13. The Board finds that strict application of the Zoning Regulations would not result in undue hardship upon the owner since the applicant is able to use Lot 60 for a one-family dwelling and there are two alternatives available that would allow the applicant to construct a second one-family dwelling by using the adjacent property, which he owns. **[*6972]**

Impact on the Public Good

14. Due to the close proximity of the two dwellings, the proposed addition to Building No. 2 would restrict air circulation between the two buildings and block light from reaching Building No. 1.

Impact on the Zone Plan

15. The District of Columbia Generalized Land Use Map identifies the area of the subject property as within the Low-Density Residential Land Use Category. The predominant use in this category consists of one-family detached and semi-detached dwellings.

16. As stated in the Zoning Regulations at 11 DCMR § 200.1, the R-1 Districts are "designed to protect quiet residential areas now developed with one-family detached dwellings and adjoining vacant areas likely to be developed for those projects."

17. Since the proposed addition would be constructed on the same footprint as Building No. 2, it would have an extremely short rear yard for an R-1 District, 5.85 to 8.36 feet compared to the required minimum under § 404.1 of 25 feet.

18. A "side yard" is defined in § 199.1 as "a yard between any portion of a building or other structure and the adjacent side lot line, extending for the full depth of the building or structure. Under § 405.9, the minimum width of each side yard is eight feet. Under § 405.8, in the case of a building existing before May 12, 1958, with a side yard less than eight feet, an extension or addition may be made to the building provided the width of the side yard is not decreased and provided further, the width of the side yard must be at least five feet wide.

19. Since Building No. 2 only has a side yard ranging from two to six feet along the east side and no side yard along the west side, the proposed construction would not meet the side yard requirements of the R-1 District.

20. The requested variance would perpetuate the existing rear yard and side yard nonconformity.

21. The added height and floor area would adversely affect the low-density character of the R-1 District by overcrowding the southeast corner of the lot.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799, as amended; D.C. Code § 5-424(g)(3) (1994)), to grant variances from the strict application of the Zoning Regulations. Carroll O. Little is seeking a variance from 11 **[*6973]** DCMR § 3202.3 to permit the construction of an addition to a principal building, a one-family dwelling, that is located on the same lot as another principal building, also a one-family dwelling, in an R-1-B District. The notice requirements of 11 DCMR § 3113 for a public hearing on the application have been met.

The Zoning Regulations in 11 DCMR § 3202.3 n1 specify, with certain exceptions that are not relevant here, that a building permit may not be issued for the proposed construction of any principal structure or any addition to a principal structure unless the land for the proposed construction has been divided so that each structure will be on a separate lot of record. n2 The requirement that each principal structure be located on a single lot provides the basis for the application of the Zoning Regulations. *See* Norman Williams, Jr. & John M. Taylor, 1 *American Planning Law* § 16.12 (1988 Rev.) ("In a zoning ordinance, the normal unit of control is a lot . . . ."). For example, the area restrictions in chapter 4 of the Zoning Regulations, applicable to Residence Districts, all relate to the placement and size of a building on a single lot.

n1 Subsection 3202.3 states:

Except as provided in § 2516 [relating to theoretical lot subdivision] and the Act of Congress of June 28, 1898 (30 Stat. 520, chapter 519, § 5) [D.C. Code § 7-114 (1995), relating to lots encumbered by highway plans], a building permit shall not be issued for the proposed erection, construction, or conversion of any principal structure, or for any addition to any principal structure, unless the land for the proposed erection, construction, or conversion has been divided so that each structure will be on a separate lot of record; except buildings and structures related to a fixed right-of-way mass transit system approved by the Council of the District of Columbia. Any combination of commercial occupancies separated in their entirety, erected, or maintained in a single ownership shall be considered as one (1) structure.

n2 The term "lot" is defined in 11 DCMR § 199.1 as:
the land bounded by definite lines that, when occupied or to be occupied by a building or structure and accessory buildings, includes the open spaces required under this title. A lot may or many not be the land so recorded on the records of the Surveyor of the District of Columbia.
A "lot of record" is defined in § 199.1 as "a lot recorded on the records of the Surveyor of the District of Columbia."

Since a variance from § 3202.3 would result in a use ordinarily prohibited in all zone districts, the use of a single lot for the construction of an addition to one of two principal structures on the lot, the applicant must meet the higher burden of proof established for use variances. *See Wolf v. District of Columbia Bd. of Zoning Adjustment, 397 A.2d 936, 941-42 (D.C. 1979).* Under the three-prong test for use variances set out in 11 DCMR § 3103.2, the applicant must demonstrate that (1) as a result of exceptional narrowness, shallowness, or shape of property or by reason of exceptional topographic conditions or another extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter undue hardship if § 3202.3 is strictly applied; and (3) the requested variance will not result in substantial detriment to the public good or the zone plan. *See Wolf, 397 A.2d at 941.*

In reviewing a proposed variance to determine whether it meets the three-prong test, the Board is required under D.C. Code § 5-412.4 to give "great weight" to OP recommendations. **[*6974]** The Board has carefully considered OP's report and, as explained in this decision, finds its recommendation to deny the application persuasive.

The Board is also required under D.C. Code § 1-261(d) (1999) to give "great weight" to the affected ANC's recommendations. Under § 3(d)(3)(A)-(B) of the Comprehensive Advisory Neighborhood Commissions Reform Act of 2000, effective June 27, 2000 (D.C. Law 13-135, 47 DCR 5519 (2000)),

(A) The issues and concerns raised in the recommendations of the Commission shall be given great weight during the deliberations by the government entity. Great weight requires acknowledgement of the Commission as the source of the recommendations and explicit reference to each of the Commission's issues and concerns.

(B) In all cases the government entity is required to articulate its decision in writing. The written rationale of the decision shall articulate with particularity and precision the reasons why the Commission does or does not offer persuasive advice under the circumstances. In so doing, the government entity must articulate specific findings and conclusions with respect to each issue and concern raised by the Commission. Further, the government entity is required to support its position on the record.

In this case, the ANC, while indicating that it was "in agreement" with the requested variance, did not identify any specific issues and concerns relating to the application. The Board is therefore unable to make specific findings and conclusions with respect to the ANC's issues and concerns. As explained in this decision, the Board has determined that the requested variance does not meet the legal criteria for variance relief.

Based on the above findings of fact, the Board concludes that the applicant has not met his burden of proof. First, the property is not unusually narrow or shallow. To the contrary, it has a lot area and width that substantially exceed the minimum requirements for the R-1 Districts. While the property is trapezoidal in shape, there is no evidence that would support a conclusion that the property is unique by virtue of its shape or that by reason of its shape, the strict application of the Zoning Regulations would result in an undue hardship on the owner. There are no other extraordinary or exceptional conditions of the property.

Second, the existing dwelling is in an advanced state of deterioration, such that the proposed repairs and addition essentially amount to new construction. Under the Zoning Regulations, the applicant has available two alternatives that would allow the construction of a new dwelling on the adjacent lot, which he owns: (1) the combination of the Lots 60 and 61 into a single lot of record, with subdivision of the lot pursuant to 11 DCMR § 2516 into two theoretical lots to permit two principal buildings on a single lot; or (2) a variance to permit the **[*6975]** construction on Lot 61, a substandard lot. n3 The strict application of the Zoning Regulations therefore would not result in undue hardship to the owner, since the owner is able to use his property for a one-family dwelling and has available two alternative means of constructing a second principal dwelling.

n3 See *Russell v. District of Columbia Board of Zoning Adjustment, 402 A.2d 1231 (D.C. 1979),* relating to variance relief for substandard lots.

Third, the proposed addition would result in the substantial detriment to the public interest and the zone plan. Since it would be built on the footprint of the existing building, the proposed building would continue to intrude into the required minimum side yard and rear yard. Given the close proximity of the two principal buildings, the added height and floor area of the proposed addition would exacerbate the congested appearance of the southeast corner of Lot 60. The added height would also result in substantial detriment to the existing one-family dwelling on the lot by obstructing light and air circulation.

For the reasons stated above, the Board concludes the applicant has failed to meet his burden of proof. It is hereby **ORDERED** that the application is **DENIED.**

VOTE: 3--0--2 (John G. Parsons, Susan Morgan Hinton, and Anne M. Renshaw, to deny; Sheila Cross Reid and the third mayoral appointee not present, not voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order.

FINAL DATE OF ORDER: July 12, 2001

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME EFFECTIVE UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

EXHIBIT TWO

20

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Health

Child & Residential Care Facilities Division

November 26, 2002

Ms. Susan Piggott
National Child Research Center
3209 Highland Place, NW
Washington, DC 20008

Re: Mixed-Age Grouping

Dear Ms. Piggott:

The Department of Health, Health Regulation Administration, Child & Residential Care Facilities Division (DOH/HRA/C&RCFD) acknowledges receipt of your October 23, 2002, letter regarding compliance with age grouping requirements at your facility, National Child Research for Child Development Center. In the letter, you requested special permission to place seventeen (17) children three and one-half (3 1/2) to three years and eleven months (3.11) in the Sunshine Classroom and twenty-one (21) children four and one-half (4 1/2) to five (5) years of age in the Explorers and Treetop Classrooms, pursuant to special approval allowed under Title 29 District of Columbia Municipal Regulation (DCMR) § 316.3

DOH/HRA/C&RCFD has reviewed all the information you submitted. The proposed staffing pattern of (1) teacher and (2) assistants for the Sunshine Class' mixed-age grouping, is acceptable and therefore, **approved**. The proposed staffing pattern of two (2) teachers and one (1) assistant teacher for the Explorer and Treetop Classes' mixed-age groupings is acceptable and therefore, **approved**.

Based on your letter, the Sunshine, Explorers and Treetop Classes, are not adhering to the maximum group size requirements, pursuant to Title 29 DCMR § 316.1. Effective **September 1, 2003**, the National Child Research Center must maintain compliance with Title 29 DCMR § 316.1.

A copy of the referenced section of the regulation is enclosed for your information.

If you have any question regarding the above, you may contact Denise Ryles-McKoy, Supervisory Human Services Licensing Specialist, of the Child and Residential Care Facilities Division, on 442-5929.

Sincerely,

Valerie A. Ware
Program Manger

Enclosure

VAW/za

DCMR 29

PUBLIC WELFARE

Excerpt:
Chapter 3,
Child Development Facilities.

★ ★ ★

D.C. OFFICE OF DOCUMENTS

MAY, 1987

ANTHONY A. WILLIAMS
MAYOR

ARNOLD FINLAYSON
DIRECTOR
OFFICE OF DOCUMENTS AND
ADMINISTRATIVE ISSUANCES

316 GROUP SIZE AND ADULT-CHILD RATIOS

316.1 The size of any one (1) group of children shall not exceed that specified in the following chart for each age group:

AGE	MAXIMUM SIZE OF GROUP	CHILD-ADULT RATIO
2 years to 2 years, 6 months	8	4 to 1
2 years, 6 months through 3 years	16	8 to 1
4 years	20	10 to 1
5 years	25	15 to 1
6 years through 14 years	30	15 to 1

316.2 There shall be a teacher, who may also be the director, and an assistant teacher or aide for each group at all times. In part-day programs (up to four (4) hours per day), a volunteer may be substituted for an assistance teacher or aide. During non-peak hours (before 8:30 a.m. and after 4:30 p.m.), an assistant teacher may substitute for a teacher.

316.3 When children of different ages are placed in one (1) group, the ratio shall be adjusted, subject to the approval of the Mayor, to protect the welfare of the younger children in the group.

316.4 A change in child-adult ratios shall be made only with the approval of the Mayor when he or she finds that the change will not result in decreasing the effectiveness of the child development program.

317 CHILD DEVELOPMENT CENTER PROGRAM REQUIREMENTS

317.1 The daily child development program of a center shall do the following:

(a) Reflect knowledge and understanding of the fundamental needs of development of children;

(b) Have continuity and flexibility so the needs of individual children as well as the needs of the group are met; and

(c) Provide a balance between periods of active play and quiet activities.

317.2 Full-day programs for children under six (6) years of age shall provide for rest during the day, the length of which may vary with the age of the child, but shall not exceed a total of three (3) hours.

Notification for Child Development Facility License Renewal
Page 2

RECEIVED
LICENSING REGULATION
ADMINISTRATION
2002 JAN 31 P 2:13

I/We, the undersigned, hereby apply for a child development facility renewal license to care for

108 ~~168~~ children between the ages of 2 1/2 and ____.

The hours of operation for this facility are from 8:00 ~~AM/PM~~ to 5:00 ~~AM/PM~~.

(Please attach a calendar indicating your scheduled dates of closure.)

CHANGES:

I/We affirm that all statements contained herein are true.

Susan L. Puppa — Social Security Number 299-46-6768
Signature of Applicant

Abby S Clemens — Social Security Number 577-70-4781
Signature of Applicant

Ellen L. Fu — Social Security Number 037-32-4339
Signature of Applicant

Date

National Child Research Center, 3209 Highland Place, NW, Washington, DC 20008
Address including ZIP Code

202-363-8777
Telephone Number

202-244-3459
Fax Number

RETURN THIS WITH A CLEAN HAND ACT CERTIFICATION TO:

Department of Health, Health Regulation Administration, Child & Residential Care Facilities Division, 825 North Capitol Street, NE, 2nd Floor, Washington, DC 20002
Phone: (202) 442-5929

ATTENTION: M. Ryan **, Licensing Specialist/Social Worker**

YOU CAN MAKE A DIFFERENCE! Report violations of fraud, waste, abuse and mismanagement in DC Government to the Office of the Inspector General (OIG) by FAXING the OIG at (202) 727-9864 or calling the OIG HOTLINE at (202) 727-0267. All calls are CONFIDENTIAL.

EXHIBIT THREE



NCRC
National Child
Research Center

Susan L. Piggon
Director

October 23, 2002

Ms. Valerie Ware
Program Manager
Department of Health
Health Regulation Administration
Child & Residential Care Facilities Division
825 North Capitol St. NE
Washington, DC 20002

Dear Ms. Ware:

Ms. Zahra Ahmed Ali came to the National Child Research Center (NCRC) yesterday in response to a complaint about group size in one of our classrooms. Ms. Ali examined the group size for all classes and determined that three classrooms were one student over the group size regulations for child development centers. She also noted that NCRC should have a waiver for mixed age groups.

Regarding group size in the three classrooms (Sunshine AM & PM, Explorer and Treetop), if required to reduce group size, NCRC requests permission to reduce group size in the next school year (03-04). This request is based on the following:

Sunshine Classroom of 17 children, 3.5 – 3.11 year olds:

The group size in this classroom has been 17 students since 1995. Between 1987 and 1994, group size was 17 students for 4 of the 8 years. NCRC's license has been renewed annually throughout this time.

Explorer and Treetop Classrooms of 21 students each, 4.5 - 5 year olds:

These are full-day classes (8:35 - 3:00) with a rich and varied curriculum to prepare the children for Kindergarten. The children have been students at NCRC, do not meet the age requirement of schools they plan to attend or are not ready to proceed to Kindergarten. They have matriculated through NCRC's nursery program and are ready for and greatly benefit from a full-day program to prepare them for Kindergarten. Each year we plan to enroll 20 students in each class. We sometimes find that we must accommodate already enrolled students who do not move on to other schools. This year, the result was 2 classrooms, Explorer and Treetop, that exceeded group size (20) by 1 child each. It would be developmentally inappropriate to move any of these students into our half-day classroom of children 4 – 4.5.

To insure the best preschool experience for our children, we add teacher assistants throughout our classes based on the needs of each class. This year the staffing patterns for the classrooms described above are:

Sunshine Class (AM & PM): 1 teacher & 2 assistant teachers
Explorer Class: 2 teachers & 1 assistant teacher
Treetop Class: 2 teachers & 1 assistant teacher

We also are requesting a waiver to permit mixed age groups in our 3 and 4 year old age groups and our 4 and 5 year old age groups. When children are placed in classes for the school year, consideration is given to chronological and developmental age, gender balance, cultural, racial and ethnic factors. We attempt through our admission and placement process to create groups of children within appropriate age ranges in which learning is enhanced for all. This requires some overlap in age bands. Once the school year begins, class placements are only adjusted if it is in the best interest of the student and his/her family. We, therefore, request a waiver for mixed age groups.

NCRC's Board of Trustees has adopted a strategic plan for NCRC which sets goals to reduce group size in all classrooms to a range from 8 students with two teachers to 19 students with two teachers. Under this plan, the Sunshine classroom would have 15 students and the Explorer and Treetop classrooms would have 19 students each. We will add a full-day class to accommodate students who do not move on to other schools and, thus, eliminate the group size issue in the Explorer and Treetop classrooms. To achieve this goal, the Trustees are in the permitting process for approval to add new classrooms, a motor room and a new music/library area. The school will enroll 10 additional students, add program space and reduce all group sizes.

We welcome the opportunity to talk to you further about our program. Please contact me at 202-363-8777 x22 or our Business Manager, Maryann McGowan at 202-363-8777 x27. Thank you for your consideration.

Sincerely,

Susan Piggott

Susan Piggott
Director

Cc: Ms. Denise McCoy, Supervisor
Zahra Ahmed Ali, Licensing Specialist
Maureen Ryan, Licensing Specialist

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH

HEALTH REGULATION ADMINISTRATION
CHILD & RESIDENTIAL CARE FACILITIES DIVISION

LICENSE FOR CHILD DEVELOPMENT FACILITY

License Number: CDC-906778

Type of Facility: Child Development Center
Maximum Capacity: 108

Date Issued: June 3, 2002
Date Expires: June 2, 2003
Hours of Service: 8:00am - 5:00pm

PERMISSION IS GIVEN TO: NATIONAL CHILD RESEARCH CENTER
FACILITY ADDRESS: 3209 HIGHLAND PL NW

To establish, operate and maintain a Child Development Facility, subject to the following conditions, in accordance with Title 29 of the District of Columbia Municipal Regulations, Chapter 3, Child Development Facilities.

.1: AGES: TWO AND ONE-HALF (2 1/2) THROUGH FIVE (5) YEARS OF AGE.

CONDITIONS:

1. The standards of care described in this regualtion should be provided at all times in order to protect the health, welfare, and safety of the children.
2. The holder of this license shall, at all times, keep a register or records showing the children's names, ages, date admitted and discharged, the reason for discharge, as well as the names of parents or guardians and their addresses and telephone numbers.
3. The Director of Health or his designee shall have the right to inspect the above-named child development facility and the register or records kept.
4. If at any time there is evidence that the health, welfare, or safety of the children is threatened, the Director of Health shall, after a hearing, order this license revoked.
5. This license and the Certificate of Occupancy shall be posted at a conspicuous place on the licensed premises.

For the Director of Department of Health

By _____
Administrator, Health Regulation Administration

JUN 3 2002
Date

THIS PERMIT APPLIES ONLY TO THE LICENSEE AND ADDRESS GIVEN HEREIN AND IS NOT TRANSFERABLE

STATEMENT OF EXISTING AND INTENDED USE

NCRC was founded in 1928 as a research center/school for children and in 1930 it moved to Highland Place where it has continuously operated with BZA approval. The child development center has morning and afternoon programs for 120 children at any one time, ages 2 ½ to 5 years. NCRC meets all D.C. licensing requirements for its child development center.

The current certificate of occupancy permits 120 children at any one time for both the morning and afternoon programs and no change is proposed to this. The current zoning approval does not expire until 2007.

NCRC is before the BZA to seek permission to construct additions to the existing buildings to add classroom capacity as well as meeting and work space for its teachers and parents. The plans showing the proposed construction are filed as part of this application. The new construction will add classrooms and enable the school to maintain its teacher/student ratio and to provide classrooms to accommodate the ages of the students. The new space will also include indoor playspace, motor space and a multi-purpose room. The school is not seeking to expand the capacity of its morning or afternoon programs. The school is seeking an increase in its FTE staff to 38.

Since NCRC is located within the boundaries of the Cleveland Park Historic District, an application has been filed with the Historic Preservation Review Board for conceptual approval of its building plans. That application is scheduled to be reviewed by HPRB at its November 21, 2002 meeting. As a contributing building in the Cleveland Park Historic District, NCRC is exempt from the parking and loading requirements pursuant to subsection 2100.5 of the zoning regulations.