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

ATTORNEYS AT LAW

SUITE 1200
1801 K STREET, N.W.
WASHINGTON, D.C. 20006-1307
TEL: 202-775-0725 FAX: 202-223-8604
www.rkmc.com

RICHARD B. NETTLER
JEANNINE RUSTAD ZIGNER
(202) 775-0725

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D.C. ZONING

June 19, 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)

REPLY OF THE CLEVELAND PARK NEIGHBORS TO NCRC'S BRIEF ON ISSUES RAISED BY THE BZA

In its brief responding to issues asked to be addressed by the Board at the last hearing in this matter, NCRC seeks reconsideration of the Board's ruling on whether the proposed construction seeks to locate another principal building on a single subdivided lot. That portion of NCRC's Brief should be struck since it is outside the scope of the brief requested by the Board.

In addition, NCRC has made some egregious misstatements of law in its brief which must be brought to light and addressed. As such, the Cleveland Park Neighbors offer the following clarification to the issues raised by NCRC in its Brief submitted on June 10, 2003:

1. NCRC's argument that the variance requested pursuant to section 3202.3 of the zoning regulations is an area variance completely misses the mark. NCRC artfully sites case law that defines the difference between use and area variances, but fails to offer any authority that the requested variance is an area variance. As set forth in the briefings of the Cleveland Park Neighbors, the variance requested by NCRC pursuant to section 3202.3 is clearly a use variance. Referring to the definitions for use and area variances cited by NCRC makes this point clear.

Unlike the "typical" area variance, the requested variance affects more than just "side yard, rear yard, frontage, setback or minimum lot requirements." *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). In conformity with the definition of a use variance, having more than one principle structure on a single lot of record is a

BZA
Case No. 16970
Exhibit No. 213

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.213

use of property which is specifically prohibited by the zoning regulations.[1] That prohibition is set forth in section 3202.3. The only exception to this prohibition is set forth in section 2516 *et seq.* As quoted by NCRC on page two of its submission, 3202.3 of the zoning regulations states, in plain english, that you cannot have more than one principal building on a lot "*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.***" 11 D.C.M.R. § 3202.3 (emphasis added). That a variance pursuant to section 3202.3 is a use variance is further supported by the fact that allowing more than one principal building on a single lot of record in a residential neighborhood is extremely intrusive and does adversely affect the use of land and threaten the neighborhood and adjacent owners. *See* 3 Anderson, American Law of Zoning § 14.45, at 3-4 (1968).

2. NCRC correctly acknowledges in paragraph D, page 3 of its brief that, if an applicant does not proceed under section 2516, the applicant's recourse is for a *use* variance under section 3202.3. This is not "absurd", as claimed by NCRC. In fact, this is the logical conclusion from the legislative purpose and intent of section 2516. *See* Legislative History discussion in the Cleveland Park Neighbors' Brief Dated June 10, 2003 at pp. 4-6 and Exhibit 1. Section 2516 provides safe guards that must be followed if deviating from the prohibition against locating more than one principal building on a single lot of record. Much more extensive review is required of a special exception pursuant to § 2516 of the zoning regulations than for area variances.

For example, in addition to the usual filing requirements, an applicant for relief under section 2516 must file four (4) site plans for all new rights-of-way and easements, and existing and preliminary landscaping and grading plans with approximate building footprints with the initial application. 11 D.C.M.R. § 2516.3. Furthermore, the Property must be subdivided into individual assessment and taxation lots ("A&T Lots"), which, in this case, will require an additional hearing before the Historic Preservation Review Board ("HPRB"). The applicant must demonstrate that the buildings, in relation to the A&T Lots, meet the requirements of the zoning regulations for the height, bulk and open spaces around each building. 11 D.C.M.R. § 2516.4. Once a complete application is submitted, more extensive review is required by OP and other government agencies, including environmental review and public safety relating to police and fire concerns. None of these measures are required of an applicant pursuant to section 3202.3. Because of the drastic affect of allowing more than one principal building on a single lot of record, without the safeguards provided for in section 2516 *et seq.*, the stricter test for a use variance is required to protect both the neighborhood, as well as to protect the intent, purpose and integrity of the zone plan.

[1] As noted in the Cleveland Park Neighbor's previous submissions, it is this use that is prohibited. The fact that a nursery school is permitted in the underlying zone district is irrelevant for the purposes of section 3202.3.

3. For the reasons stated in paragraph 2, NCRC's allegation that BZA *Application No. 16693 of Carroll O. Little* involved a misapplication of the law by the Board is erroneous and unsupported by any authority. Moreover, NCRC has offered no support for why the Board is not bound by this decision. *See* the Cleveland Park Neighbor's June 10, 2003 brief at 8-9 (the Board is bound by its prior decisions).

In *Little*, the Board correctly determined that allowing two (2) principal buildings on a single lot of record is a prohibited use under the zoning regulations. As in the instant application, the applicant in *Little* could have subdivided the property so as to permit two principal structures.

4. NCRC's interpretation of the parking regulations relating to historic structures is also mistaken. First, section 2100.5 of the zoning regulations applies only to contributing buildings, not new construction. Section 2100.6 of the zoning regulations deals with the situation where there are additions to a contributing historic building such that the intensity of use increases. When the intensity of uses increases more than twenty-five percent (25%) of the level present in 1958, parking must be provided for the increased use. With regard to the alleged "parking credit" provided in the zoning regulations, sections 2100.1 and 2100.4 of the zoning regulations only apply, by their very terms, when "the use of a *building or structure* ***is changed to another use*** which requires more parking spaces than required for the use existing use". 11 D.C.M.R. § 2100.4. In the present case, there is no change in use – NCRC is still using the main building and play house as a nursery school. As this credit only applies to existing structures, it has no effect on the required parking for the new carriage house. Lastly, as to section 2114.11 of the zoning regulations, NCRC has not received any confirmation from DDOT that an employed attendant of NCRC can manage the stacked spaces.

5. NCRC's request to reconsider whether the play house and carriage house are "accessory" or "principal" structures must be denied. NCRC's "new" information does not support a deviation from the plain wording of the regulations regarding accessory structures for nursery schools. Zoning Commission Case No. 98-8 does not change this outcome.

Zoning Commission Case No. 98-8 was initiated in response to the numerous requests of the BZA to approve

> special exceptions for a number of child development centers (CDCs) with programs and uses not previously accommodated in CDCs, which typically provide various types of day care for children under 15 years of age. ***Those additional uses have included adult education, adult counseling, parenting classes, and senior day care in individual and group sessions.*** These programs, either

> coupled with CDC activities or housed in CDC facilities, are not specifically identified in the Zoning Regulations.

NCRC Brief Exhibit I at 8284. As a result, the zoning regulations were amended so as to:

a. Include "elderly development center" in the definition;
b. Include in permitted accessory uses "counseling, education, training and health and social services of the parents or principal guardians of children attending the center." *Id.* at 8286.

In the instant matter, as previously argued by the Cleveland Park Neighbors, use of the new carriage house for classrooms (one third of the classroom space of NCRC will be housed in the new carriage house) is a primary, not incidental or accessory, purpose. Furthermore, unlike the issue addressed in Zoning Commission No. 98-8, the instant matter does not involve a use not provided for in the zoning regulations.

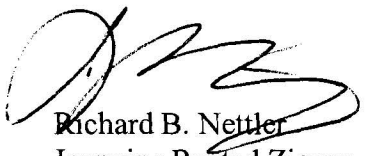
6. NCRC's argument that a nursery school should be afforded the same deference as primary schools and university cannot stand, as the zoning regulations have seen fit to distinguish between these uses and provide different standards for nursery schools, primary schools and universities.

Based on the foregoing clarification and the previous submissions of the Cleveland Park Neighbors, the Cleveland Park Neighbors submit that the relief sought pursuant to section 3202.3 of the zoning regulations is a use variance. The Board is obligated to follow its decision in the *Application of Carroll O. Little, BZA Application No. 16693* (2001), which previously determined this issue.

Your attention to these matters is appreciated.

Sincerely,

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



Richard B. Nettler
Jeannine Rustad Zigner

cc: Neighbors
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)