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October 7, 2003

The Honorable Geoffrey Griffis, Chairperson
The Honorable Members
Board of Zoning Adjustment
Government of the District of Columbia
One Judiciary Square – Suite 210 South
441 Fourth Street, NW
Washington, DC 20001

Re: **BZA 16970 – Additional Issues Arising in Connection with the Application of the National Child Research Center**, pursuant to 11 DCMR § 3104.1, for special exception approval to continue an existing child development center (last approved by BZA Order No. 16307) with morning and afternoon programs for 120 children at any one time, ages 2 ½ - 5 years and 38 FTE staff on all floors of the existing and proposed buildings on the site and for new construction of an addition and new building pursuant to § 205; and pursuant to 11 DCMR § 3103.2, for variance relief from § 3202.3, in order to allow the construction of an additional principal structure and the use of an additional principal structure, such that more than one principal structure will exist on a record lot and for relief from § 2100.6 which requires the provision of parking spaces for the proposed additional principal structure on the NCRC property, in an R-1-B District at premises 3209 Highland Place, NW (Square 2072, Lot 30 (855 & 866).

Dear Mr. Griffis and Members of the Board:

Early in the procedural history of this case, the Board determined and applicant agreed, to proceed in a manner that contemplated hearing the case with two variances, cited above. One of these deals with the long-standing provision of §3202.3 that allows only a single principal ***structure*** to be on a single ***record lot*** (terms emphasized and italicized ***as here*** are defined in the Regulations).

The applicant has presented its case in chief seeking this variance as well as a parking variance.

This letter is introduced at this time inasmuch as I believe that in considering the question of relief under §3202.3, at least in this instance, the Board must take steps to understand the implications this seems to have in terms of requirements for ***rear yards*** and ***side yards***, arguably unusual in its context here with proposed multiple principal ***buildings***, but little else in it is particularly unusual.

BZA
Case No. 16970
Exhibit No. 239

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.239

These issues should, in my view, also be joined with the requirements, not discussed thus far in the case, of §3203 relating to Certificates of Occupancy.

At this point, it seems clear that the case before the Board must consider issues of the status and placement of existing ***buildings*** relative to ***yard*** requirements, requirements for Certificates of Occupancy, determination of the nature of existing and proposed **buildings** (***accessory*** or not), and the effect on yard requirements of the request for one additional principal ***building*** and for a replacement ***building*** that is larger that the ***accessory building*** it replaces.

This letter lays out these issues in some detail. I suggest that the Board proceed with the hearing on October 7 as planned, request the applicant to reply to this letter by October 14, and invite/allow other parties to comment to the Board on this letter and the applicant's response by October 21. This would provide the Board and all parties an opportunity to reflect on these issues without unmanageable "surprise." The applicant could also use a part of the final hearing of October 28, established tentatively for summary arguments, to introduce other rebuttal evidence. I would agree to have the Board construe this letter as testimony and make myself available to answer questions from the Board or parties as though this were in the nature of direct testimony at any point in the hearing process; I would not agree to have this letter substitute for my direct testimony.

The land on which the National Child Research Center ("NCRC") is now situated is a single ***record lot*** (Lot 30). It consists of over 45,000 square feet and has, grossly, four sides.

- Lot 30's southern side consists of two segments of Highland Place, the right of way of which indents somewhat into that overall edge and runs, generally, on an east-west course in the 3200 block where NCRC is located.

- Lot 30's northern side is at Ordway Street, which runs east-west.

- Lot 30's eastern side is on a north-south axis where Lot 30 abuts Lot 32 (owned by Ms. Neely and Ms. Badami, parties to the case) and, at the extreme northern extent, extends further north than Lot 32's Ordway Street frontage (Lot 32 also being a ***through lot***, as is one other lot on the Square (Lot 883) and one other is in the Square to the south (Lot 837, Square 2075)).

- Lot 30's western side is established by two or three segments, one major one being its boundary with Lot 27 (the Beckners, parties to the case), possibly a short segment extending east less than 10 feet that is part of the rear lot line of Lot 882 (the Littles, parties to the case), and a secong major segment running north-south along the common side yard lot line with the Littles.

The land is not flat. Rather, the site rises about four feet from the level of Highland to a subtle crest that runs more or less east-west between Lot 27 and Lot 32,

perhaps 25 feet north of the most indented part of Highland Place and more than that from the eastern and western limits of the property along Highland Place. From this crest, the land slopes down to Ordway Street, whose vertical alignment is significantly below that of Highland Place. The slope is gentle along the western limits of Lot 30, now punctuated by a series of small retaining walls that separate a number of distinct play areas where various play equipment and ***structures*** are now located. Whereas the land at the western limit descends gently, most or all the land at the northeast corner of the site is only slightly below the elevation of the land at the corresponding Highland Place frontage, but cascades dramatically down a slope toward Ordway that is on, or mostly on, public space. Except for the part that cascades sharply down, the bulk of the northeastern corner of Lot 30 drains west and then north toward Ordway Street. Lot 32 shares the same overall grade characteristics on its side of their common property line, just as Lots 27 and 882 have topography in common where their properties abut Lot 30. *Thus, the land, while not flat is not topographically unique.*

The land is now developed with a number of ***buildings*** and ***structures***. Among these are:

- The main ***building*** is a multi-story brick ***building*** that faces Highland Place, NW; this ***building*** is located in the southeastern portion of the overall ***lot***. This ***building*** appears to have three stories both to the eye and from computations and diagrams applicant and architect introduced earlier in the case proceedings in response to questions the undersigned posed earlier. It has a porch that spans its entire front that wraps around parts of both sides, extending toward the rear. The ***building*** appears to be oriented due east-west, as does the residence to the east (Neely & Badami). It has bay windows on its eastern and western faces. The ***building*** extends further to the north on its east side than its west side, with an open court formed on each side as the northern element recedes a few feet from the eastern side of the main ***building*** and many feet from its western side. Having two sides, each of these recessed areas constitute ***open court yards*** in zoning. The is now occupied under authority of a Certificate of Occupancy issued in 1998 for 120 students (B-00182078, issued November (?) 17, 1998 "on the FIRST, SECOND, AND THIRD BASEMENT [sic.] floor(s) of the building *[singular]* located on lots 855 and 866 square 2072 known as premises 3209 HIGHLAND PLACE N.W...." Arguably, this Certificate of Occupancy would also apply to the remaining areas of open land, including play areas. This main ***building*** is clearly a "principal ***structure***" within the meaning of §3202.3. Most rooms on the first and second floors are occupied by pre-school children. The third floor is used by staff for administrative purposes. The existing condition of the level below the main floor is unknown to the undersigned in terms of its existing or planned excavation, finish, and use.

- Another ***building*** is the former two-story carriage house, which was renovated in 1990 ("interior only") under permit 49010520 dated 7/9/90, the first floor of which became the NCRC library and is used by faculty and

students for that purpose and numerous other school-related purposes. This ***building*** is located close to NCRC's Ordway Street property line, all to the west of any part of the main ***building***. From applicant's testimony and Ms. Piggot's reply to a question posed by ANC Chairman Nancy Macwood, it seems clear that this space is a critical part of the school's program and would continue to be. What is not so clear is whether this ***building*** is an ***accessory building*** or a second principal ***building***. If it is an ***accessory building***, its location falls clearly within area of the ***rear yard*** of the main ***building***, the only by-right location for ***accessory buildings***. No evidence has been introduced, to date, that establishes that the school may validly occupy this ***structure*** either as an ***accessory building*** or as a second principal ***structure*** since the Certificate of Occupancy noted above extends only to the premises the Certificate describes (and, arguably, the remaining open land areas). See § 3203, which requires that a Certificate of Occupancy be sought, secured, and clearly posted within nearly every ***structure*** that is to be used. Since this ***building*** is used by those children and staff described in one Certificate of Occupancy, it seems reasonable to expect another Certificate to cover use of this ***building***, ***accessory*** or not. In its first report on this case from February 2003, the Office of Planning also noted this issue as one requiring response from the applicant or zoning administrator (page 10).

- A third ***building***, clearly (at least to me) accessory (tools, lawn equipment) in nature and not occupied by any of the pre-school children, is the shed now located in the northeastern corner of Lot 30. It is not occupied as such by staff or children, except to retrieve or return goods stored therein. This **building** is also located in what would be the ***rear yard*** formed from the limits of the existing main ***building***.

- The fourth ***building*** is the small playhouse located between the main ***building*** and the Beckner's property. It has a "permanent location on the ground" (see definition of ***structure***). It is located along or near the crest of the land between the Beckner property and the main ***building***, further south than any portion of the main ***building***. It appears to have neither plumbing nor electric power and is used for short periods of time by children at play. It has a roof and could be said to "shelter" and "enclose" (making it appear to be a ***building***) NCRC's pre-school population. Its location is not in the ***rear yard*** of the existing property, the only area where such would be allowed, and in fact is located forward of the ***side yards*** formed by the main ***building***. While this siting may be pleasant and appealing, this may not be a location satisfactory to the present zoning code. It was established at that location in the mid-1990s, apparently without benefit of any building permit or review by the Historic Preservation Review Board. There is no Certificate of Occupancy for this ***structure*** or ***building***. I would professionally classify this ***building*** as ***accessory*** in character.

- Other play equipment occupies the open land area on the western side of Lot 30. Each piece of equipment appears to be secured to the ground in a fixed location to safeguard the children using same and are thus ***structures*** that are in use (albeit without explicit authority of a Certificate of Occupancy).

These facts and questions being understood, the Board should determine, with input from the applicant and parties to this case, the precise nature of each existing and proposed principal ***building***, each existing and proposed accessory ***building***, and each existing and proposed ***structure*** that is subject to zoning controls including:

For each ***building***:

Is the ***building*** now or will it become a principal ***building***?

What are its present and intended use(s)?

What Certificate of Occupancy now applies (existing ***buildings*** only) or would be sought (all buildings)?

Has the State Historic Preservation Office determined the ***building,*** if existing at the time the Cleveland Park historic district was created, to be one that contributes to the character of the Cleveland Park Historic District?

What ***court*** requirements apply to the ***building*** as now configured and as modified or created?

For each principal ***building***:

What ***rear yard*** requirements apply? Where does the ***rear yard*** begin and end? What is its width? Within each principal ***building's rear yard***, what portion is "required" and where does that lie (diagram each)?

If more than one principal ***building*** already exists, do separate side and rear yard requirements apply to each or only to the principal ***building*** whose depth is the greatest at the time the determination is made, e.g. to the rear of the present two-story ***building*** in which the library is located?

Over what area does (or would) each ***building's side yards*** exist (or be created)? What is the minimum width of the ***side yards*** so determined (or to be established)?

Has the ***building*** always been a principal ***building*** or did it convert from being an ***accessory building***, if the latter when and with what approvals from zoning authorities?

What percentage of the required ***rear yard*** is now (or would be) occupied by ***accessory building***s?

For any new or replacement ***accessory building***:

Is each new or replacement ***accessory building*** located in a ***rear yard***? If not, what area variance standards have to be satisfied to allow such to be considered? (Note that the tool shed is only now in a rear yard if the Board determines the "library" ***building*** itself to be an ***accessory building***).

Moreover, if the new Carriage House is allowed to be located on the same ***lot***, even if it faces Ordway Street, would this not create a second "principal structure" (or third one, if the "library" is determined to be one as well) under §3202.3 both (or all three) of which would have their respective **side** and ***rear yard*** requirements? Would not the library ***building*** and the replacement/expanded tool and bicycle shed become non-conformities, the library not changing in scope and coverage (not expanding) but the shed being enlarged in addition to its being an additional non-conformity? Would the rules of § 2001 governing non conforming ***structures*** devoted to conforming uses then not apply, rules that essentially state that non-conforming ***buildings*** may not expand in any manner that is not allowed by right nor may they be replaced, even at the same scale, unless the replacement arises from an Act of God that is limited (for non-contributing buildings in an historic district) to 75 percent of the cost of total reconstruction thereof?

As I see it, if there were but one ***record lot***, Lot 30, with the an expanded main ***building*** and a new Carriage House facing Ordway, the present rear yard would be diminished as the rear limit of the main ***building*** would be further north but would only extend to the southernmost part of the new Carriage House, creating a narrow ***rear yard*** at best in which no present or planned ***accessory building*** would be located. This would deviate from the core requirements that ***accessory buildings*** be located only in ***rear yards*** and only then if no more than 30 percent of their footprints fall within the "required rear yard area" (see §§ 2500.2 and 2500.3). If these requirements are not to be met, then variances from those sections would seem essential.

Prior Cases Under Section 3202.3 or Equivalent

To the best of my knowledge, cases that present issues at all similar to this one under § 3202.3 are few and far between. I find three cases expressly heard by the Board of Zoning Adjustment in the last fifteen years[1]:

BZA 14583 – This application (in the name of Edward Markowitz) taxation approved building on a residential dwelling on a nearly landlocked assessment and ***lot***

[1] There are many institutions, particularly universities, colleges, and private schools that have multiple ***buildings*** on a given ***record lot***. While ***public schools*** are afforded some additional flexibility in that the use is defined to include a range of ***accessory buildings***, that definition is narrow in both scope and interpretation (see BZA Order 16433, footnote 9). The reasons for this are perhaps best left for separate analysis as they have no immediate impact on the issues in this case.

(instead of a ***record lot***), arising from change of plans that eliminated a public street that had earlier been planned.

BZA 16352 – This application (in the name of Edward Johns) was approved in a summary Order that provides no accompanying details about the lots involved other than their identity (Square 1284, Lots 837 and 838) and intended/approved use (single family dwelling and pool). (Those lots still exist and contain a total of about two acres).

BZA 16693 – This application (in the name of Carroll O. Little) was denied by the Board, applicant seeking approval to construct an addition on a lot on which two principal buildings existed, both single family dwellings in an R-1-B district on two assessment and taxation lots, only one of which conformed as to area requirements). The Board found applicant had other viable alternatives, namely subdivision to create two conforming lots or seeking an area variance approval to subdivide the one non-conforming lot (whose total area was inadequate) and develop after securing such relief if granted. While this case was described in the Order as a use variance, the facts of the Order read as being in the nature of an area variance to the undersigned.

In addition, in the Hillandale Planned Unit Development, the Zoning Commission approved development of the entire area as a single record lot with a large number of private streets, common areas, and individual assessment and taxation lots for single family homes and other uses, most or all of which have conforming (or at least accepted) side and rear yards, and provide accepted minimum lot areas.

Against this, can the applicant in this case demonstrate that the present ***record lot*** 30 has not come about at its own hand, effectively creating themselves much of hardship from which they now seek some relief?

From what I can determine, the land area now owned by NCRC in Lot 30, is the majority of land formerly in assessment and taxation lot 832, which from the 1925 and 1931 Baist atlases is noted as containing 52,317 square feet of area. By 1945, this had changed to two assessment and taxation lots, lot 855, with 24,417 square feet (that contained the present main ***building***, what is now the "library" ***building***, and the land on which the tool shed sits) and lot 854 (containing 27,900 square feet and all of the rest of what is now Lot 30 **plus** what is now Lot 882 (the Little lot) and possibly a portion of Lot 883 (all or a portion of the Cleveland Park Club's narrow access path to Ordway Street)).

By 1968 the land now owned by Little had been sold off by the school, creating what is now his lot that reportedly contains 5,324 square feet, leaving a balance of as much as 2,256 square feet. The bulk of that difference likely is found in former A&T lot 858 as it existed in 1968, a narrow strip of land somewhere at the western end of the school's property and the eastern side of what is now the Beckner property, land area I suspect may now be included in Beckner's present lot (Lot

27); the rest may be in the Cleveland Park Club's access strip or is simply unaccounted.

Suffice it to say that the land areas remaining with in school ownership in the 1990s and now were and are fully sufficient to establish more than one ***record lot***, which NCRC has, to date, failed to pursue. As in BZA 16693, given the alternatives available, what is the hardship to NCRC's creating multiple conforming ***record lots*** and then seeking to develop each in a manner consistent with the yard and use requirements of the zoning regulations? A separate ***record lot*** for a present but expanded primary ***building*** would (assuming the library ***building*** is determined to be ***accessory*** in nature now and prospectively along with a second *accessory building* (a replacement shed for tools and other equipment) meet all side and rear yard requirements and restrictions on placement of accessory buildings, and another record lot containing the new ***building***, with accessory play ***structures*** and possibly the existing accessory play ***building*** in its ***rear yard***.

Moreover, if the "library" ***building*** is determined to be ***accessory*** in nature now and prospectively, the fact that the applicant was directed by the Historic Preservation Review Board to create an opening in the Ordway Street frontage between it and the new Carriage House did not create a hardship *per se* inasmuch as a primary ***building*** could not logically be added to an ***accessory building***. As in pregnancy, a ***building*** is not "just a little bit primary" in nature. Thus, while HPRB's criteria provided direction, it is not the stuff from which "hardship" arises in this instance.

If this alternative were pursued, it would leave only the overall special exception and parking variance for decision.

While I remain opposed even to the latter as planned, having two ***record lots*** seems the far preferable route to pursue. It also moots the question I posed previously about the potential applicability of § 2516, a question that remains open in my mind.

I remain particularly opposed to the granting of the overall special exception and the requested variance from the parking requirements as I see the difficulties the applicant is encountering as ones of their own making with the overall facility and program design they have sought to pursue. That argument, however, falls beyond the narrow scope of this letter and will be included within my direct testimony in opposition to the case. I also oppose the expansion of the school in terms of number of students and numbers of faculty, staff, and others affiliated with the school or its children that arrive, park, and depart at least daily. That, too, will be a factor in my direct testimony.

Thank you for your consideration of the above.

Sincerely,

LW

Lindsley Williams

cc: Office of Planning
Parties to the Case