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TO: Secretary, Board of Zoning Adjustments

FAX: 202-727-6072

ACCOUNT: 1053.9999

FROM: R. Bruce Beckner

DATE: November 17, 2003

TOTAL NUMBER OF PAGES INCLUDING COVER SHEET: 14

MESSAGE: **From parties in opposition Case No. 16970.**

Reply fax numbers: Regulatory Group (202) 745-0916 (Primary)
(202) 745-1863
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BZA
Case No. 16970
Exhibit No. 321

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.321

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

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

Joint Motion of Parties in Opposition to Require Appearance of Department of Transportation or to Exclude "Evaluation of NCRC TMP Operations" submitted November 14, 2003

Dear Mr. Chairman:

ANC 3-C together with parties in opposition, R. Bruce and Sallie R. Beckner, the "Cleveland Park Neighbors," Steven Hunsicker, Henry Little, and Gaylord Neely/ Linda Badami, hereby request that the Board of Zoning Adjustment provide them an opportunity to cross examine Colleen Smith Hawkinson of the Department of Transportation regarding the "District Department of Transportation's Evaluation of NCRC TMP operation." (hereinafter the "November 14 Report") submitted on Friday, November 14, 2003 or, in the alternative, that the November 14 Report be stricken from the record.[1]

I. Factual Background

Without serving any of the parties in opposition or their counsel, the Department of Transportation on Friday November 14, transmitted the November 14 Report to the Secretary of

[1] On inspection of the BZA record today, it appears that a *different* version of the November 14 Report than the one originally transmitted was been cataloged as Exhibit No. 306 in this case. The version that is attached hereto as Attachment A is time-stamped in by the Office of Zoning at 11:10 a.m. on November 14, and the cover page is from "Colleen Smith." However, it appears that a later version of the November 14 Report, logged in at approximately 1:48 p.m., has been catalogued as Exhibit 306. The later version includes a memo from Department of Transportation Assistant Director Kenneth Laden, which was not included in the first version, and the fax cover page of the later version is not identified as being from "Colleen Smith." At the request of party in opposition Sallie Beckner, the 11:10 a.m. version of the November 14 Report is being added to "Exhibit 306."

the Board by facsimile.[2] A true copy of the November 14 Report is Attachment A hereto. The November 14 Report consists of accounts by Colleen Smith Hawkinson, an employee of the Department of Transportation, of her observation of the NCRC morning drop off on Highland Place on October 29, November 7 and November 13. The Report claims that, except for one period of less than a minute, no cars were observed "double standing"[3] on Highland Place, yet the area of Highland Place where double standing typically happens is not visible from all portions of the sidewalk in front of NCRC. Neighbors observing the same street during the same 2-week period *have* reported double standing at the same time of day as Ms. Hawkinson's observations. There is no explanation for why Ms. Hawkinson failed to visit the NCRC at other times and failed to observe the situation on Ordway Street, where the 1998 Order of this Board requires NCRC personnel in attendance at all times children are dropped off and collected.

II. Argument

The November 14 Report is highly irregular. Both its contents and the circumstances of its submission appear calculated to disadvantage the parties in opposition and favor the applicant. Although this case has been in hearing since January, although the Department of Transportation submitted the two reports dated February 5 and April 14, 2003; and although Mr. Kenneth Laden of the Department of Transportation testified on September 16, the Department performed its latest "evaluation" at the 11th hour and submitted it to the BZA at the last minute – without giving the parties in opposition notice of its existence and at a stage in the proceedings when they have no opportunity to cross examine its author.

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[2] ANC 3C Chair Nancy MacWood was advised telephonically of the filing on Friday November 14 by the Department of Transportation, but the Department did not serve her with a copy. Rather, it invited her to go to the office of the Secretary of the BZA to view the November 14 Report.

[3] Presumably, Ms. Hawkinson's use of the term "double standing" refers to the presence – or absence – of a queue of cars occupying a travel lane on the street.

This is contrary to the Board's regulations and to the D.C. Administrative Procedure Act. First, this Board's regulations contemplate that reports will be submitted in advance of the public hearing, not after the opposing parties have completed their case. 11 D.C.M.R. §3114.2.[4] 11 D.C.M.R. §3114.4 requires the presence of an officer, member or employee of the public agency to be available for cross examination on the report or recommendation, unless the parties waive that opportunity by agreeing otherwise.[5] There is no such agreement here.

Secondly, not only is the right of cross-examination established by this Board's Rules, it also is established by the D.C. Administrative Procedure Act ("APA"), which is the ultimate authority. *See* 11 D.C.M.R. §3102.3. The APA provides that "in contested cases, . . . Every party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." It is universally understood that, except for certain official records, no document is admissible in evidence in a proceeding without a sponsoring witness. This affords the party against whom the document is offered the opportunity to cross-examine its author and develop information that, as a minimum, should inform the decision of the Board as to what weight, if any, the document should be given.

It is fundamentally unfair to the parties in opposition and to the ANC to admit the November 14 Report without insisting that its author be present for examination. Recognizing that we are in the rebuttal stage of the proceeding, the undersigned parties and ANC 3C ask that

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[4] The full text is as follows: "When an application is referred in advance of the public hearing to any public agency for a report or recommendation [as this one was], that report and recommendation shall be filed with the Board at least seven (7) days prior to the date set for hearing on the application."

[5] The text is as follows: "In the absence of any such agreement, the report and recommendation shall not become a part of the exclusive record unless an officer, member, or employee of the public agency appears at the hearing to present the report and recommendation and be cross-examined by the parties, unless the Board finds the report and recommendation to be full and complete on its face, having given due regard to the importance of the evidence, availability of witnesses, and the need of cross-examination for a full and true disclosure of the facts." It cannot be said that the November 14 Report is "full and complete on its face." In fact, its obvious incompleteness is one reason why its author needs to be cross examined.

the Board either require the author of the November 14 Report to sit for cross examination by all parties and for questioning by the Board members or strike the November 14 Report from the record.

Respectfully submitted,

Nancy MacWood
Chairperson ANC 3C

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Counsel for Cleveland Park Neighbors

Dated: November 17, 2003

Certificate of Service

I, R. Bruce Beckner, hereby certify that on this the 17th day of November, 2003, I caused to be transmitted by facsimile one copy of the foregoing "Joint Motion of Parties ir Opposition to Require Appearance of Department of Transportation or to Exclude "Evaluation of NCRC TMP Operations" submitted November 14, 2003" together with Attachment A thereto to the offices of Maureen Dwyer, Esq., counsel for the National Child Research Center. I alsc, on the same date, served all parties to the motion with a "portable document file" copy of the "Joint Motion" and Attachment A thereto by electronic mail.

R. Bruce Beckner

Attachment A

FROM : Sallie Beckner PHONE NO. : 202 9660492 NOV. 14 2003 01:53PM P2

11-14-03;12:03PM;

2000 14th Street, NW 7th Floor
Washington, DC 20009

District Department of Transportation

Fax

To:	Board of Zoning Adjustment	**From:**	Colleen Smith
Fax:	202-727-6072	**Pages:**	7, including cover sheet
Phone:		**Date:**	November 14, 2003
Re:	BZA Application No. 16970/ National Child Research Center		

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

A representative from the District Department of Transportation has been to the NCRC site to evaluate the effectiveness of the Transportation Management Plan. These unannounced site visits occurred on three separate occasions – October 29, November 7 and November 13.

Following is an evaluation of the TMP for each visit.

Feel free to contact me with any questions.

Colleen Smith Hawkinson

Ward 3 Neighborhood Transportation Planner

01 11 NOV 2003
D.C.
GOVERNMENT

FROM : Sallie Beckner PHONE NO. : 202 9660492 NOV. 14 2003 01:53PM P3
11-14-03;12:03PM; ;2026710517

District Department of Transportation's
Evaluation of NCRC TMP operation

827/6970

Date of Field Observation: October 29, 2003

Time of Field Observation: 8:40 – 9:05

Representative: Colleen Smith Hawkinson

NCRC cars outfitted with school sticker:

_X_ **Yes**

____ **No**

NCRC cars using one-way approach to school:

_X_ **Yes**

____ **No**

If no, number of cars: ____

Presence of school personnel in orange vests:

_X_ **Yes; Number:** ___3___

____ **No**

Two uniformed officers during a.m. peak:

_X_ **Yes** – One uniformed officer was stationed in front of the school during the am peak. I did not leave the drop off area during this visit so I cannot confirm the presence of the uniformed officer at the Newark Street/33rd Street intersection.

____ **No**

Double standing on Highland Place:

____ **Yes**

_X_ **No**

If yes, number of cars observed: 1 2 3 4 5 more____

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2003 NOV 14 AM 11:10

Time period that cars were double standing:

Number of vehicles:

____ **1 minute or less**

____ **3 minutes or less**

____ **5 minutes or less**

____ **7 minutes or less**

____ **10 minutes or more**

NCRC cars blocking driveways on Highland:

____ **Yes**

__X_ **No**

If yes, number of cars: ____

NCRC cars blocking driveways on Ordway:

____ **Yes**

__X_ **No**

If yes, number of cars: ____

NCRC cars making illegal U-turns on Highland:

____ **Yes**

__X_ **No**

If yes, number of cars: ____

Other Observations/ Notes:
The TMP operations proceeded smoothly during this visit.

District Department of Transportation's
Evaluation of NCRC TMP operation

Date of Field Observation: November 13, 2003

Time of Field Observation: 8:20 AM – 8:45 AM

Representative: Colleen Smith Hawkinson

NCRC cars outfitted with school sticker:

__X__ **Yes**

_____ **No**

NCRC cars using one-way approach to school:

__X__ **Yes**

_____ **No**

If no, number of cars: _____

Presence of school personnel in orange vests:

__X__ **Yes; Number:** ___6___

_____ **No**

Two uniformed officers during a.m. peak:

__X__ **Yes**

_____ **No**

Double standing on Highland Place:

__X__ **Yes**

_____ **No**

If yes, number of cars observed: 1

Time period that cars were double standing:
During my visit, I noted one car that was standing. This is because the drop off queue lane in front of NCRC was filled. The standing car was further east of the bend in the

road, so any oncoming traffic would be able to see it (there was no oncoming traffic during this time). In less than a minute the queue line opened and that car was waved through by the uniformed guard.

Number of vehicles:

__X__ 1 minute or less

_____ 3 minutes or less

_____ 5 minutes or less

_____ 7 minutes or less

_____ 10 minutes or more

NCRC cars blocking driveways on Highland:

_____ Yes

__X__ No

If yes, number of cars: _____

NCRC cars blocking driveways on Ordway: N/A

_____ Yes

_____ No

If yes, number of cars: _____

NCRC cars making illegal U-turns on Highland:

_____ Yes

__X__ No

If yes, number of cars: _____

Other Observations/ Notes:

The AM peak drop-off continued to operate in a very safe and efficient manner.

FROM : Sallie Beckner PHONE NO. : 202 9660492 NOV. 14 2003 01:55PM P7
11-14-03;12:08PM; ;2028710617 = 8/ 7

District Department of Transportation's
Evaluation of NCRC TMP operation

Date of Field Observation: November 7, 2003

Time of Field Observation: 8:20 AM – 9:00 AM

Representative: Colleen Smith Hawkinson

NCRC cars outfitted with school sticker:

__X__ **Yes**

____ **No**

NCRC cars using one-way approach to school:

__X__ **Yes**

____ **No**

If no, number of cars: ____

Presence of school personnel in orange vests:

__X__ **Yes; Number:** ___6___

__ **No**

Two uniformed officers during a.m. peak:

__X__ **Yes** - One uniformed officer was present in front of the school throughout the am peak, and after. I did not leave the drop off site during this visit and therefore cannot confirm the presence of the second officer at the Highland/Newark intersection. However the uniformed officer located in front of NCRC informed me that there is a second uniformed officer at the Newark Street/33rd Street intersection daily.

__ **No**

Double standing on Highland Place:

__X__ **Yes**

____ **No**

If yes, number of cars observed: 2 before the peak period, 2 during the peak period

Time period that cars were double standing:
I noted two cars that were double standing just before 8:25. This is before the official drop-off time period began. The uniformed officer signaled the cars to the queue line in front of NCRC at 8:25 – about one minute after their arrival.

During the peak AM period, there were two additional cars that were double standing – each at different times. This was due to the drop off queue line being full. Both occurrences lasted less than 1 minute before the uniformed on-duty officer waved them to the drop off queue line in front of NCRC.

Number of vehicles:

__X__ 1 minute or less

____ 3 minutes or less

____ 5 minutes or less

____ 7 minutes or less

____ 10 minutes or more

NCRC cars blocking driveways on Highland:

____ Yes

__X__ No

If yes, number of cars: ____

NCRC cars blocking driveways on Ordway: N/A

____ Yes

____ No

If yes, number of cars: ____

NCRC cars making illegal U-turns on Highland:

____ Yes

__X__ No

If yes, number of cars: ____

Other Observations/ Notes:

The AM peak drop-off operated in a very safe and efficient manner. The staggered arrival of students was working very well. The six school personnel that were present efficiently helped students from the cars at the drop off area in front of the school and walked them to the building. After the drop-off period ended, orange cones were place in front of the school and the remaining parents parked in the available spaces and walked their child or children into the school.