ShawPittman LLP

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December 17, 2003

By Hand Delivery

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

Re: BZA Application No. 16970 - 3209 Highland Place, NW; Applicant's Motion to Strike Certain Materials Submitted into the Record by the Party Opponents

Dear Chairman Griffis and Members of the Board:

MOTION TO STRIKE CERTAIN MATERIALS FROM THE RECORD SUBMITTED BY THE PARTY OPPONENTS AFTER THE RECORD HAS CLOSED.

The National Child Research Center ("NCRC" or "Applicant") hereby submits this Motion to Strike Certain Materials from the Record in response to the materials submitted by Linda Badami and Bruce Beckner (on behalf of the Cleveland Park Neighbors, Steven Hunsicker, Henry Little, and Sallie Beckner), (collectively the "Party Opponents") on December 15, 2003 in this case.

At the conclusion of the November 18, 2003 public hearing in this case, the Chairman of the BZA closed the record of this case, except for the submission of three items: comments on the November 14, 2003 submission of the District Department of Transportation ("DDOT"); proposed conditions of approval; and proposed findings of fact and conclusions of law. (See attached pages of the BZA public hearing transcript.) The Party Opponents' December 15, 2003 submissions include new evidence in the form of charts and pictures that were not previously submitted in the record of this case. These submissions are clearly beyond comments on the DDOT reports and are merely additional testimony sought to be entered into the record by the Party Opponents. In fact, the submission of Linda Badami is referred to as "Supplemental Testimony".

In accordance with 11 DCMR §3121.5, "[T]he record shall be closed following the public hearing, except that the record may be kept open for a stated period for the

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receipt of specific exhibits, information or legal briefs as may be directed by the presiding officer." Further, under 11 DCMR §3121.9, "[A]ny material received by the Board after the close of the record that bears upon the substance of the appeal or application shall be returned by the Director and not received into the files of the Board."

The District of Columbia Court of Appeals has deemed the enabling statutes of the DCMR and the D.C. Administrative Procedures Act ("APA") to give broad authority to administrative agencies to properly regulate proceedings and close the records of those proceedings. In D.C. v. PSC of the Dist. of Columbia, 802 A.2d 373, 379 (D.C. App., 2002), the D.C. Court of Appeals stated:

> [a]gencies may exercise their discretion in determining the admissibility of evidence. Given the flexibility of their proceedings and their expertise, administrative agencies are "invested with a correspondingly greater discretion than trial judges in determining the admissibility of evidence." Haight v. District of Columbia Alcoholic Beverage Control Bd., 439 A.2d 487, 491 (D.C. 1981).

The Board clearly has the authority to strike from the record information that is submitted after the case has been closed. The present Motion to Strike the December 15, 2003 Party Opponents' submissions from the record should be granted as the Chairman of the Board of Zoning Adjustment clearly stated:

> There is no additional testimony. As Ms. Bailey just indicated the record is closed except for that which we've just [said] and that is very specific. So you can spread the word and you can also note. If you decide to submit something in addition to what we've just listed, it will not be accepted, meaning it's not in the record and the Board will not see it.
> (Transcript of November 18, 2003 public hearing, p. 172, copy attached.)

If the Board were to allow the Party Opponent's December 15, 2003 submissions of new evidence and additional testimony into the record, it would surely lead to an endless stream of additional observations, photographs and statements being submitted into the record regarding personal observations of traffic and parking impacts that are merely different than those witnessed by the DDOT representative. In the present case, the Board has already received substantial information in the record from NCRC, the parties in support of the application, the parties in opposition to the application and the

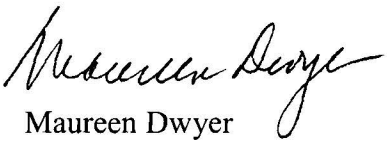
government agencies regarding NCRC's traffic and parking impacts on Highland Place and Ordway Street.

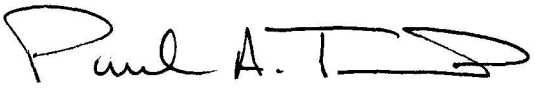
Therefore, we believe that the Board of Zoning Adjustment has the authority to strike the materials submitted by the Party Opponents on December 15, 2003 from the record, and that such a decision of the Board is entirely proper in this case given the clear direction to all parties in the case that the record was only to be left open for comments on the DDOT report and not for the submission of additional testimony.

We request that the Board of Zoning Adjustment address this issue prior to its January 6, 2004 public meeting when it is scheduled to make a decision on NCRC's application.

Respectfully submitted,

SHAW PITTMAN, LLP

By 
Maureen Dwyer


Paul Tummonds

Enclosures

cc: See attached Certificate of Service

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY
NOVEMBER 18, 2003

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The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 8:00 a.m., Geoffrey Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY GRIFFIS	Chairperson
CURTIS ETHERLY, JR.	Vice Chairperson
RUTHANNE G. MILLER	Board Member
DAVID A. ZAIDAIN	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

ANTHONY J. HOOD	Commissioner

COMMISSION STAFF PRESENT:

Beverley Bailey, Office of Zoning
Clifford Moy, Office of Zoning
John Nyarku, Office of Zoning

OTHER AGENCY STAFF PRESENT:

Arthur Jackson, Office of Planning
David McGhettigan, Office of Planning
John Moore, Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:
Lori Monroe, Esq.

dates. Those are around Christmas. I just wanted to remind you of that.

CHAIRMAN GRIFFIS: It's a good reminder actually. But that's not going to affect any of the submission dates. What I'd like to do is as we've done in previous cases which are quite large and extensive especially with this record, let's have final submissions two weeks before. If we can get that before the 23rd and approximately set that for Monday, the 22nd. That way it could be distributed to the Board for their review substantially prior to the 6th of January.

MS. BAILEY: So those are the submissions, Mr. Chairman.

CHAIRMAN GRIFFIS: That would be the findings and conclusions.

MS. BAILEY: Findings. Okay. Then the 15th for the submissions then.

CHAIRMAN GRIFFIS: That would be good.

MS. BAILEY: Okay. Now the record is going to be closed, Mr. Chairman, except for three specific things that I have that the Board requested or the Board anticipates to come in, one of which is the response from the parties concerning the supplemental report that was filed by DDOT.

CHAIRMAN GRIFFIS: Right.

MS. BAILEY: Are we asking for proposed conditions from Ms. Dwyer?

CHAIRMAN GRIFFIS: Yes, they are going to be amended as they have given indication to today.

MS. BAILEY: Mr. Nettler, were you going to file pages five, six and seven? Those were the three things that I have, Mr. Chairman, other than as you indicated the findings of fact and conclusions of law.

CHAIRMAN GRIFFIS: Indeed. Board members, are you aware of anything else? Okay, so those submissions will come in on the 15th of December and then findings will come in on the 22nd. Is that correct, Ms. Bailey?

MS. BAILEY: Yes, sir.

CHAIRMAN GRIFFIS: Now I'll take questions on the schedule and submissions if there are any clarifications that are needed. Everyone is clear. Fabulous. Then any other procedural questions I can answer regarding this case? Very well. It has been a pleasure to be through this. I say that with great sincerity. Clearly this is a lot of information and believe me, we will be looking at it in its entirety. So any submissions that come in of course should be

on point and succinct or as you want to put it and then we'll look at it.

Of course the December 6th is a public meeting. There is no additional testimony. As Ms. Bailey just indicated the record is closed except for that which we've just set and that is very specific. So you can spread the word and you can also note. If you decide to submit something in addition to what we've just listed, it will not be accepted, meaning it's not in the record and the Board will not see it.

Yes, Ms. Badami.

MS. BADAMI: You said January 6th for the decision date. Did you say a time?

CHAIRMAN GRIFFIS: No. Our meetings start at 9:30 a.m. and I'm not sure right now as I look at my schedule which may not be the most current, it's the first in the morning. But again going to that point, our meeting don't have any additional testimony. It is all deliberation. You are obviously all welcome to be here but we will not be hearing from anybody. In fact, you'll hear a lot from us. I would imagine we'll put it "- Well, I don't know where we're going to put it but it's going to be in the morning on the 6th. Any other questions or clarifications or additional information? Now I've never known this

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2003 a copy of the foregoing letter was hand-delivered to the following parties:

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The Friends of NCRC
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The Cleveland Park Neighbors
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