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December 19, 2003

BY HAND

Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustments
441 4th Street, NW, Room 201
Washington, DC 20001

Re: BZA Application No. 16970 / National Child Research Center ("NCRC")

Dear Chairman Griffis and Members of the Board:

ANSWER IN OPPOSITION TO MOTION TO STRIKE CERTAIN MATERIALS FROM THE RECORD

The undersigned "Party Opponents" hereby submit this Answer In Opposition in response to the Motion to Strike Certain Materials From the Record submitted by the applicant National Child Research Center ("NCRC") on December 17, 2003 in this case.

NCRC's Motion to Strike is entirely misplaced and should be summarily denied. The Chairman and the Board were entirely clear at the November 18, 2003 hearing that the record was to remain open to permit the parties in opposition to address and rebut the DDOT observations that were filed with the Board on November 14 as Exhibit No. 306A:

Statement of Chairperson Griffis: "What I would like to do is keep the record open if there are submissions that want to address this information." November 18, 2003 transcript at 151.

Statement of Board Member Zaidain: "I would agree with your stance in letting the parties in opposition submit rebuttals to this . . . ." November 18, 2003 transcript at 152.

Statement of Commissioner Hood: "I would agree with your synapses, Mr. Chairman, on accepting it and allowing the parties to be able to comment . . . ." November 18, 2003 transcript of 153.

NCRC's Motion to Strike ignores the reason the Parties in Opposition's December 15 submissions were permitted to be made in the first place: the November 15, 2003,

Case No. 16970
Exhibit No. 337

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.337

Joint Motion to Exclude the DDOT report by the Parties in Opposition on the grounds that, because the zoning regulations require such reports to be submitted in advance of the hearing, the report was untimely. "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" (November 15, 2003; hereinafter "Joint Motion to Exclude"). The Joint Motion to Exclude argued that the untimeliness of the DDOT submission prejudiced the Parties in Opposition because, having completed their case in opposition, they were unable to submit evidence that contradicted the report (even though they had such evidence) and they were unable to cross-examine the author of the report. *See* Joint Motion to Exclude at page 3. At the hearing in this proceeding on November 18, 2003, the Chairman denied the relief requested in the Joint Motion to Exclude but granted substitute relief in the form of leave to make the submissions described above, to be filed on December 15, 2003. In reliance on that ruling, the Parties in Opposition and the ANC (which had joined the Joint Motion to Exclude) made the submissions that are now, with the exception of the ANC's submission, the subject of NCRC's Motion to Strike.[1]

NCRC's protestations notwithstanding, it can come as no surprise that the Party Opponents would seek to address and rebut the DDOT's recent observations with observations of their own. That was the clear direction of the Board at the November 18 hearing and the understanding of the parties. Indeed, the ANC and NCRC's supporters responded to DDOT's observations and filed their own observations of the current traffic situation either in support or in rebuttal of the DDOT observations. See, e.g., December 10, 2003 submittal of The Friends of NCRC: "We are not surprised with the DDOT observations." "[T]hey are typical of the daily operation of the Traffic Management Plan at NCRC."[2]

The NCRC Motion makes no effort to explain let alone to justify its efforts to strike the rebuttal submissions and observations of the Party Opponents while preserving the supportive submissions and observations of NCRC's supporters. The fact that the Party

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[1] There is no principled distinction between the December 15 submission of the ANC and the December 15 submissions of the Party Opponents. All of the submissions are the reports of personal observations of NCRC's morning drop-off observations that respond to DDOT's November 15 report. NCRC has not told the Board the basis upon which the Party Opponent's submissions could be stricken from the record while the ANC's submission could be left in.

[2] NCRC seeks to help its argument by noting that the submission of Linda Badami is referred to as "Supplemental Testimony." However labeled, the Badami submission in no more nor less "testimony" than are the statements submitted by the Friends of NCRC or the other parties.

Opponents' submissions and observations may contain more detailed substantiation than the conclusory submissions and observations filed by NCRC's supporters does not provide a principled basis for striking the Party Opponents' submittals. The observations filed by the various parties may differ in substantiating detail and certainly in the conclusions reached but are nonetheless the same in kind.

Moreover, as indicated by the above-quoted statement of Board Member Zaidain, the contemplation of the Board was that the record would be left open to allow the Parties in opposition the opportunity to rebut the DDOT observations, because they were the ones whose procedural rights were compromised by DDOT's untimely report. As such, this opportunity was intended primarily or solely for the benefit of the parties in opposition.[3] In any event, the intended opportunity for the parties in opposition to address and rebut the DDOT's observations would be destroyed if NCRC's Motion to Strike is granted.

Further, NCRC's suggestion that the Board intended that submissions filed to address or rebut DDOT's observations would be limited to unsubstantiated statements makes no sense. If that were the case, the Board would not have left the record open for such additional factual matters and the parties could have made such conclusory statements without further substantiation in the parties' final submission on December 22, 2003. NCRC also makes the empty threat of 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." But the record was left open for one such submission on December 15, 2003 in order to respond to the report of the DDOT representative. Those submissions have now been filed and, except for the proposed findings of fact and conclusions of law to be filed on December 22, the record closed as to this matter. There is no risk of an "endless stream" of such submissions absent further instruction from the Board.

In sum, the Board properly exercised its broad discretion to direct that the record would remain open to receive submissions prepared to address DDOT's recent observations of the operation of NCRC's Traffic Management Plan. See D.C. v. PSC of the Dist. of Columbia, 802 A.2d 373, 379 (D.C. App. 2002). The Board is entirely capable of receiving and considering the submissions filed by the Party Opponents, ANC, NCRC and NCRC's allies in response to the Board's' direction at the November 18 hearing without prejudice to any party and without risking

[3] Even if the opportunity to address and rebut the DDOT's observations may have been intended primarily or solely for the benefit of the Party Opponents, unlike NCRC, the Parties Opponents have chosen not to burden the Board with an unnecessary and (in the case of NCRC's motion) misplaced motion to strike.

unnecessary disruption of the proceeding. On the other hand, striking the Party Opponents' December 15, 2003 submissions would be severely prejudicial to the Party Opponents' rights.

For all the foregoing reasons, the NCRC Motion to Strike should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2003 a copy of the foregoing letter was mailed to the following parties:

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