"in an adverse effect upon adjoining and surrounding properties unique and different from the adverse effect that would otherwise result from the development of such a special exception use located anywhere within the zone." *Id.* at 1327. In sum,

> the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect, and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects beyond those inherently associated with such a special exception use irrespective of its location within the zone. [*Id.* At 1331].

"[T]he applicant is not charged with considering every option that any party in opposition might conceptualize." *Don't Tear it Down, Inc. v. District of Columbia Dept. of Hous. And Community Dev.*, 428 A.2d 369, 379 (D.C. 1981). The Board's discretion in reviewing an application for a special exception is limited to a determination of whether the applicant has complied with requirements of the section. If the applicant meets this burden, the Board ordinarily must grant the application. *First Baptist Church of Washington v. District of Columbia Board of Zoning Adjustment*, 432 A.2d 695, 698 (D.C. 1981).

Specific requirements that NCRC must also meet for a special exception in this matter for its child development center are as follows:

> 205.2 The center shall be capable of meeting all applicable code and licensing requirements.
>
> 205.3 The center shall be located and designed to create no objectionable traffic condition and no unsafe condition for picking up and dropping off children.
>
> 205.4 The center shall provide sufficient off-street parking spaces to meet the reasonable needs of teachers, other employees, and visitors.
>
> 205.5 The center, including any outdoor play space provided, shall be located and designed so that there will be no objectionable impacts on adjacent or nearby properties due to noise or activity, or visual or other objectionable conditions.
>
> 205.6 The Board may require special treatment in the way of design, screening of buildings, planting and parking areas, signs, or other requirements as it shall deem necessary to protect adjacent and nearby properties.

NCRC cannot meet the requirements of §§ 205.2, 205.3 and 205.4. With regard to § 205.2, NCRC has a track record of violating code and licensing requirements and seeking

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.340A2

increases in its capacity only when forced to do so. Moreover, as found by the Board, NCRC has been in violation of the Board's prior order in many respects, with complete indifference to the provisions of that Order.

NCRC has the burden of demonstrating that its proposal addresses the issues reflected in §§ 205, 3108.1 and that "the use, height, bulk, and design are in harmony with existing uses and structures on neighboring property," ample parking space is provided and that "the use will not create dangerous or other objectionable traffic conditions." In passing on an application for a special exception in a residential use district, the Board must consider all pertinent factors enumerated in the ordinance, such as fire hazards, traffic problems, transportation requirements and facilities, streets and paving, and schools, parks, and playgrounds, and its action must be reasonable in light of the facts relating to these factors. *Levy v. Board of Zoning Adjustment*, 570 A.2d , 739, 742 (D.C. 1990); *Health v. Mayor and City Council of Baltimore*, 49 A.2d 799, 804 (Md. 1946). Furthermore, with respect to traffic problems, adverse traffic impact is a sufficient basis to deny an application for a special exception if, as with other adverse impacts, the impacts uniquely affect neighboring property owners. *See Schultz v. Pritts*, *supra*, 432 A.2d at 1325. Based on the testimony and evidence presented at the public hearing, NCRC has not met its burden.

We recognize that the zoning regulations consider a child development center to be compatible with the Zone Plan for residential areas, although unlike public schools which are permitted as a matter of right in the R-1 District, child development centers are not permitted as a matter of right in any low density residential district, and only first permitted in an R-4 district. Moreover, the zoning regulations require that NCRC demonstrate that it is not *likely* that the proposed relief will become objectionable to neighboring properties. *See* 11 DCMR § 206.2 (1991). NCRC has not been able to do so regardless of the laudatory purposes of the proposed expansion of the use and the history of the use of the premises.

The proposal by NCRC does not accommodate the reasonable concerns of the residents and is in violation of the previous orders of the Board regarding this property. In the first place it is clear that NCRC is in violation of the orders of the Board in BZA Application No. 16307, when NCRC last sought an increase in staff and enrollment.

Based upon representations and assurances from NCRC, including, most notably, that (1) it would not seek to increase its enrollment and (2) there would be no new construction on the property, the neighbors withdrew their opposition to that application. Not only did NCRC represent that there would be no increase in its enrollment, NCRC repeatedly represented to the community and the Board that it was seeking the increase in its enrollment in BZA Application No. 16307 to reflect the actual number of students enrolled at the time. That is, NCRC was seeking to increase its cap on enrollment to cure its then existing violation of its certificate of occupancy. As a result of the community's withdrawal of its opposition, the ANC supported BZA Application No. 16307. Subsequently, the Board approved the relief requested in BZA Application No. 16307 which sought permission for an enrollment of 120 toddlers, but did not vacate its prior order. In addition to withdrawing its opposition, the community supported approval of BZA Application 16307 for eight (8) years, rather than the five (5) year limitation it initially sought. However, contrary to its representations to the community in BZA Application

No. 16307, less than four (4) years later, NCRC asks permission to do exactly what it assured the neighbors it would not do.

In this application, NCRC, for the first time, states that it is seeking approval for occupancy of 120 students at *any one time* for both morning and afternoon sessions. NCRC further argues that Order No. 16307 permits occupancy of 120 students *at any one time* rather than imposing a total enrollment limit of 120 students. However, it is clear that the Board limited NCRC's enrollment, as distinct from occupancy at any one time, to 120 students with a staff of twenty-eight (28). Any different conclusion results in an intolerable adverse impact on the surrounding neighborhood traffic conditions.

In evaluating the increased enrollment proposed by NCRC, we are required to assess the impact of that increase in light of the prior order of this Board and the relief sought in 1998. *The Washington Ethical Society v. District of Columbia Board of Zoning Adjustment*, 421 A.2d 14 (D.C. 1980) (reviewing denial of special exception for a private school seeking to increase enrollment from 65 students to 80 students). In other words, the Board must address the future impact of an increase in the number of children over the enrollment previously authorized. Here, NCRC is seeking to increase the enrollment authorized from 120 students to 181 students, an increase of more than 50%. As we have found and as further discussed herein, such an increase, together with the construction of a new facility, will exacerbate existing objectionable conditions to nearby property.

As noted above, the April 1, 1998 hearing in BZA Application No. 16307 proceedings focused on the adverse impacts caused by traffic congestion. NCRC now argues that the relevant condition imposed by the Board was intended to refer to a maximum occupancy at any one time, rather than a cap on total enrollment. This argument makes no sense. Given the existence of half-day classes at NCRC (a common situation with child development centers), the concern of the ANC, neighbors and the Board over increasing traffic impacts that were the focus of the Application No. 16307 proceedings could not be addressed by a limit on occupancy at any given time but only by an enrollment cap. Traffic impacts could not be addressed by a condition that could be construed as permitting multiple populations of 120 young children during the day, e.g., in separate morning, mid-day or afternoon sessions. Given the concern about increasing traffic impacts in 1998, it is not credible to suggest that when BZA set a maximum limit of 120 children, it intended to specify a condition that could be construed as allowing the potential additional traffic and parking congestion of multiple populations of up to 120 children, so long as there were no more than 120 children in NCRC's buildings at one time.[157]

---

[157] At the January 21, 1998 hearing on Application No. 16307 before the Board, the Acting Director of NCRC testified that the hours of operation were 8:00 a.m. to 4:00 p.m., with students present from 8:35 a.m. to 3:30 p.m. Moreover, at this hearing, it was represented that NCRC had a license for 120 students. Specifically, when questioned about the number of students sought under BZA Application No. 16307, it was represented by NCRC's attorney that "[t]he original request for student occupancy was at 120 which was previously the number that was in the license. At present, they have 108 students. We would like it for 120." Similar representations were made to the Advisory Neighborhood Commission (ANC). And, at the April 1, 1998, hearing, NCRC testified through the same witness who provided testimony on this subject at the earlier hearing, that its operations were from 8:00 a.m. to 6:00 p.m. This testimony of the Acting Director at the April 1998 hearing was not accurate. Transcript of that hearing attached to Exhibit 241, testimony of ANC-3C.

In sum, the Board, the ANC and the community understood NCRC's representations in 1998 to mean that it would not seek to increase its enrollment above 120 students. Without this representation, the ANC and the community would have continued pursuing their opposition to BZA Application No. 16307. More to the point, the Board imposed a condition that reflected this understanding of NCRC's representations: "the maximum number of children shall not exceed 120." If the Board had intended to refer to occupancy, it would have expressed the condition as "the maximum number of children in occupancy at any one time shall not exceed 120," similar to language that NCRC now proposes in Application No. 16970.[158] NCRC now claims, in effect, that in 1998 the BZA meant to approve morning and afternoon programs for 120 students at any one time. But that interpretation is contrary to NCRC's 1998 commitments to the community, the record of the proceedings in Application No. 16307 and the clear meaning of the final restrictions set forth in Order No. 16307.

Order No. 16307 limits enrollment at the Property to 120 students and limits staffing to twenty-eight (28). In violation of these limitations, NCRC currently enrolls 171 students and has a staff of thirty-seven (37). In addition, other outside contractors (e.g., occupational therapists, other specialists) travel regularly to the Property to provide services to the children pursuant to direct contractual relationships with the students' parents and not with the school. Thus, they are independent contractors using the school as a venue to deliver their services and not part-time members of its faculty. Staffing has exceeded the permitted twenty-eight (28) full-time equivalents.

On November 8, 2002, NCRC held a "conference" at its premises for other early childhood educators and specialists. This use of the Property, which did not involve interaction with NCRC's students or their parents, was also in violation of the zoning regulations and Order No. 16307. Nor was such a conference accessory to NCRC's use of the premises. Billed as the first of a series of annual conferences, it demonstrates a continuing indifference to the regulations and the specific order issued by this Board.

NCRC is also in violation of those aspects on the Board's prior order which limited use of the premises to weekdays from 8:00 a.m. until 5:00 p.m. The school has held an increasing number of special events, frequently on a weekend day, and the noise generated from some of the events (e.g., loud blowers to clear the property in the early morning, loudspeakers with music

---

By summary order dated March 3, 1999 (Order No. 16307), the Board approved Application 16307 for an increase in students to 120 and a staff of twenty-eight (28), with conditions. Conditions included a limitation on the hours of operation from 8:00 a.m. to 5:00 p.m. on weekdays and the implementation of policies and procedures to lessen the adverse impact on traffic in the neighborhood. Despite the limitations on enrollment and staff of 120 and twenty-eight (28), respectively, and the limitations on the hours and days of operation, (8:00-5:00, Monday-Friday), NCRC currently enrolls at least 171 students and has a staff of at least thirty-seven (37) and as many as 44, and operates almost non-stop.

[158] We refer the parties to our prior orders regarding child development centers. Since 1992, the Board has never limited enrollment to the enrollment at "any one time" unless it has specifically stated as such. See, e.g., Order Nos. 15747, 15799, 15820, 15838, 15885, 1592415954, 15964, 15986, 15997, 16008, 16023, 16044, 16068, 16097, 16098, 16109, 16115, 16143, 16145, 16147, 16153, 16161, 16162, 16183, 16192, 16197, 16200, 16214, 16252, 16337, 16817-A, 16915, 17065, 17067. The Board has never approved an enrollment in excess of 100 children for a child development center limited to use by children whose ages are below 6.

or announcements) has intensified. These events draw the entire school population – teachers, staff, children, parents, grandparents all at one time – and impose even more severe parking, noise and safety problems on the Neighbors. One specific and recent example is this year's Halloween pumpkin party.[159] D.C. Noise regulations prohibit the operation of leaf blowers before 9:00 a.m. on Saturdays and Sundays. NCRC had one leaf blower in operation beginning at 7:15 a.m. and refused to stop when asked. In residential areas, D.C. Noise regulations prohibit, unless specifically exempted, noise levels in excess of 60 dBA, measured at the property line. For the recent Halloween party, the noise, measured with a sound level meter, was between 65 to 70 dBA twenty feet (20') from the property line. The source of the noise was not children playing, rather it was generated by an amplified public address system that was playing loud music. What this sound level meant in practical terms was that the sound was obtrusively audible inside the house that adjoins the NCRC property, with the windows closed. When a neighbor asked a second time that the music be reduced in volume, the NCRC director refused to do so.

The institutional campus sought to be created by NCRC is not in keeping with the residential development patterns in this special area. To the contrary, the proposed additions will constitute a wholesale change in the residential neighborhood. The proposed additions double the gross floor area of the "campus." Moreover, the proposed improvements and increases in enrollment would be overly burdensome on the non-arterial streets of the neighborhood, a characteristic noted years ago when the Board denied NCRC relief which would have resulted in a similar consequence.

NCRC has not met its burden of proof with regard to the proposed (and, by and large, already implemented) increase in its staff and enrollment. As a recap, as the record and the testimony has shown that NCRC cannot meet the specific requirements for a special exception pursuant to § 205 of the zoning regulations in that: (a) NCRC has failed to adhere to applicable code and licensing requirements; (b) it creates objectionable traffic conditions and unsafe conditions for picking up and dropping off children; and (c) it does not provide sufficient off-street parking spaces to meet the reasonable needs of teachers, other employees, and visitors.[160] Finally, the proposed institutional campus is inconsistent with the surrounding residential neighborhood.

This is a child development center, not a university campus. Like many other pre-school programs, it has been run out of a residence in a very residential setting – in this case for over 70 years. And, unlike the analogy between private schools and public schools, it is not a use that is typically found in any public building (except perhaps as day care centers in office buildings) nor is it a use that historically encompasses a myriad of programs over many buildings.

NCRC has failed to meet the express conditions relating to traffic and traffic management attendant to the grant of its special exception in 1998. Following the grant of its special

---

[159] Exhibit 82 (request for party status – Beckners – with attachment); Exhibit 207 (Declaration of R. Bruce Beckner).

[160] This third requirement must be taken into consideration by the Board regardless of the fact that the building is a contributing building to the Cleveland Park Historic District.

exception in 1998, NCRC did perform one of its undertakings; it painted stripes on the streets in front of neighbors' driveways in an effort to discourage NCRC parents in the pickup/drop-off queue from blocking driveways. NCRC has only inconsistently informed its parents of its so-called traffic management plan; it has not provided radio-equipped traffic monitors at both its Ordway Street and Highland Place drop off locations. And, until it began to take traffic issues seriously in late 2001 and in 2002, in contemplation of the filing of the application that is the subject of this hearing, it was indifferent at best to neighbors' traffic concerns, which were first voiced in 1998 in the process that led to Order No. 16307. The result of this has been a sometimes chaotic traffic situation in which NCRC parents park illegally, sometimes on lawns, block neighbors' driveways, obstruct the exit from nearby streets and perform illegal maneuvers putting neighbors and children alike at risk. Additional traffic is generated by NCRC because of its summer camp, its nighttime programs, conferences and ongoing recruitment efforts, all of which are either in violation of the prior zoning order or create additional traffic safety impacts.

While at its inception NCRC primarily served children residing in the surrounding neighborhood, who were able to walk to the property, over the years, the number of children enrolled at the Property from outside the immediate area, including the District of Columbia, Virginia and Maryland, has significantly increased. This has resulted in a corresponding increase in traffic in the surrounding neighborhood, which has adversely affected the neighborhood. Because the children are young and require car seats, what we know as car pooling is not a realistic possibility, and the volume of traffic and size of the vehicles only continues to increase.

Less than four (4) years after the date of Order No. 16307, NCRC now seeks to *double* its physical size with new construction and increase its authorized enrollment by 50 percent, disregarding both its commitments to the community, as well as the dictates of the orders in Application No. 16307. There is no basis for the Board to grant the relief requested.

Based upon the record before the Board, the Board finds that NCRC has not met its burden of proof, pursuant to 11 DCMR §§ 205, 3108 & § 3103.2, and the requested relief cannot be granted since it is not in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further finds that granting the requested relief will tend to affect adversely the use of neighboring property. It is therefore ORDERED that the application is DENIED.

VOTE:

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
FINAL DATE OF ORDER:

If, notwithstanding the foregoing, the Board should vote to grant the relief requested, we recommend the following conditions:

1. The maximum enrollment shall not exceed 169 children. The maximum number of children attending per day shall not exceed 161, regardless of what portion of the day they are in attendance. The maximum number of children on site at any one time shall be 108.

2. The maximum number of employees, whether paid or volunteer, shall not exceed 28 per day, regardless of what portion of the day they are in attendance. The maximum number of persons coming to the school associated with special needs children shall not exceed 5 per day.

3. NCRC's hours of operations shall be from 8:00 a.m. to 5:00 p.m. Monday through Friday. Except for special events and as needed for cleaning and maintenance, the buildings shall be closed, locked and unoccupied at all other times. There shall be no more than 6 after school (i.e. after 5:00 p.m.), and/or weekend "special events" per calendar year. Evening events must end no later than 9:30 p.m. Daytime events, including preparations therefore that involve the operation of any powered machinery, shall not begin before 9:00 a.m. Traffic enforcement officers must be present to assist with the smooth, safe and legal traffic and parking needs generated by each special event.

4. Use of any type of public address or speaker systems outside is prohibited. A consumer "boombox" or portable stereo may be used outside at special events to play recorded music, provided that sound levels generated comply with all District of Columbia requirements.

5. Rental of facilities is prohibited.

6. On-site conferences, seminars or other events that attract participants other than exclusively NCRC families and NCRC staff are prohibited, except that NCRC may invite guest speakers to address NCRC families or NCRC staff.

7. Notwithstanding the restrictions referenced above, NCRC will hold two neighborhood community meetings per school year on a Saturday morning. The first meeting will be held in October and the second in April. NCRC shall announce the date and time of the meeting not less than four weeks in advance by posting signs at each entrance, by notifying ANC-3C in writing, and by notifying, in writing, all individual residences in the affected area. The purpose of the meetings will be for neighbors and school representatives to monitor the success of these conditions and mediate any adverse impact by consensus. Duly identified adverse impacts that can not be successfully negotiated, will be reported to the ANC. The failure of any neighbor to object to any aspect or effect of NCRC's operations at any such meeting shall not be raised as a defense by NCRC to such objection if raised by a neighbor at a subsequent proceeding before the BZA or other regulatory authority with jurisdiction over NCRC.

8. Vehicle trips to drop off or pick up students from the school will be limited to the existing vehicle trips at each designated time period as listed in the NCRC submission

titled "Daily Site Activity and Trip Generation Summary," with the exception that "4:00 pm-5:00 pm" vehicle trips will be reduced to 10.

9. Attendants must be at both the Highland Place and Ordway Street locations for the duration of each and every pick up and drop off period to assist children in safe exiting from and entering of vehicles. Traffic enforcement officers must be placed at these locations and at the intersection of Highland Place and 33rd Place and the intersection of 33rd Place and Newark Street to assist in the safe and efficient flow of traffic during the following time periods: 8:30-9am, 11:30am-12:15pm, and 3:15-4pm. NCRC shall request DC DOT to create a painted crosswalk on Ordway Street immediately in front of its Ordway Street entrance, with appropriate signage. The traffic enforcement officer must be available to stop traffic on Ordway Street at this crosswalk between the hours of 8:30 and 9:00 a.m.

10. NCRC shall prohibit parents from parking and walking from Newark Street between 33rd Place and 34th Street. It shall encourage parents to use the queue line and to park and walk only from Highland Place or Ordway Street.

11. To enhance safety, the Highland Place queue line shall not begin closer than 50 feet from the east side "blind curve". Traffic monitors shall be placed to guide eastbound cars safely. If the queue line extends to Ashley Terrace, another traffic monitor shall be placed at that curve, Monitors shall communicate with one another by radio communications device.

12. NCRC shall distribute "NCRC" vehicle stickers and require that they be prominently placed in or on all vehicles coming to the school on a regular basis, including, but not limited to, staff, auxiliary staff, consultants, contractors, parents, and caretakers. NCRC shall inform the ANC and neighbors that the stickers have been distributed and placed in the appropriate vehicles no later than one week after the beginning of the school year. NCRC will also provide a description of the stickers. These stickers shall be visible and recognizable at a distance of 20 feet from the vehicle, when placed as instructed.

13. NCRC shall place a traffic enforcement officer to direct traffic at the intersection of Newark and 34th Streets between the hours of 8:30 – 9:30 a.m. and 3:00 – 4:00 p.m.

14. All outside lighting will be consistent with the residential outside lighting in the immediate neighborhood and will not be placed so as to shine on neighboring properties. To the maximum extent possible, outside lighting should be activated by infra-red control devices so as to not burn all night. Interior lighting of buildings shall be extinguished after the departure of custodial and maintenance staff.

15. Summer camp enrollment will not exceed 108. The camp session will not exceed one 6-week period. Camp hours will be 9:00 a.m. to 3:00 p.m. Attendants will be in place to assist children at each location during all pick up and drop off time periods. Traffic enforcement officers must be in place to assist the smooth and safe flow of traffic and to stop traffic at the Ordway Street crosswalk during the 8:30 to 9:00 a.m. period.

Summer camp participants will follow the same requirements regarding vehicle stickers, drop off and pick up, and parking and walking restrictions as is required for children enrolled during the school year.

16. NCRC shall develop a plan to landscape the school grounds so as to screen and buffer their activities. If they so request, screening of the neighbors on NCRC's western boundary shall include both man-made fencing of a compatible architectural style to the houses in the neighborhood as well as trees and shrubs. Adjacent and across-the-street neighbors will consult with NCRC on the plan and approve the final product.

17. NCRC will permanently eliminate runoff from and correct erosion of the hillside along Ordway Street. Remedial measures may include, but are not limited to, additional plantings and the installation of retaining walls.

18. At least 2 weeks prior to the beginning of the school year, NCRC will submit a written report to the ANC detailing the hours of operation, the beginning and end of each daily child development session, the time periods for pick-up and drop-offs, the total number of children enrolled, the total number of staff, and a schedule of all school year special events including dates, times, and expected number of participants for any events and any other informational requirements listed in the conditions. The same information is required for the summer camp at the beginning of the camp session. This report shall be available for public inspection.

19. By June 30 of each year, NCRC shall submit to the ANC a report of its efforts to obtain parental compliance with its TMP. Such report shall include a copy of the TMP and explanatory literature mailed to parents before the beginning of NCRC's fall session in September, a copy of the provisions of the enrollment contract that relate to parental compliance with the TMP, a report on NCRC's response to each instance of a traffic-related complaint by a neighbor, including (1) the nature of the compliant, (2) the address of the complainant, (3) the date and manner the complaint was lodged, (4) the action taken by the school, including imposition of sanctions on the offender, if any. A similar report with respect to the operation of the summer camp shall be submitted by August 15 of each year.

20. Prior to the beginning of its fall session in September and prior to the beginning of its Summer Camp, NCRC shall mail to each parent a copy of its Traffic Management Plan, an explanation of each parent's compliance obligations with respect to that plan, and an enumeration of all enforcement measures and sanctions which may be taken against each parent with respect to such plan. NCRC shall obtain from each parent the license plate numbers of all vehicles in the household and shall maintain a list of such license plate numbers.

21. No later than June, 2004, the noise made by the air handling equipment located on the west side of the main building must be reduced either by changes to the equipment and/or relocation. The precise solution to be negotiated between the school and its immediate neighbors. All air handling equipment and other h/v/a/c machinery, when in operation,

shall not generate a noise level in excess of 60dBA, measured at any point on any neighbor's residence.

22. Collection of commercial trash shall not be before 8:00 am or later than 4:00 pm, Monday through Friday. Commercial trash haulers shall be admonished to obey speed limits and stop signs on Highland Place.

23. NCRC may not reconfigure or re-declare any of its existing facilities in such a way as to increase its number of classrooms or licensed capacity.