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December 22, 2003

BY HAND
Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, DC 20001

Re: Application of the National Child Research Center, BZA Application No. 16970
3209 Highland Place, N.W.
Our File No. 092441.0000

Dear Mr. Griffis:

Enclosed you will find the Proposed Findings of Fact and Conclusions of Law on behalf of (1) the Cleveland Park Neighbors, R. Bruce and Sallie R. Beckner, Henry Little and Lydia Mendoza, and Steven R. Hunsicker and (2) Gaylord Neely and Linda Badami.

Thank you for your attention to this matter.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Richard B. Nettler
Jeannine Rustad

Enclosures (as stated)
cc: (see attached list; all with enclosures)

Word 45652711.1

Case No. 16970
Exhibit No. 341

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.341

Government of the District of Columbia
Board of Zoning Adjustment

Application No. 16970 – 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 a total enrollment of 171 children, ages 2 1/2 – 5 years, and 38 FTE staff on all floors of 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, 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).

HEARING DATES: February 11, 2003, May 6, 2003, June 24, 2003, September 16, 2003, October 7, 2003, October 28, 2003, November 4, 2003 & November 18, 2003.
DECISION DATE: January 6, 2004.

Proposed Findings of Fact and Conclusions of Law of Cleveland Park Neighbors, R. Bruce and Sallie R. Beckner, Henry Little and Lydia Mendoza, and Steven R. Hunsicker

I. STATEMENT OF EVIDENCE AND FINDINGS OF FACT

A. Description of NCRC's location, current operations and facilities

1. The Applicant, National Child Research Center ("NCRC"), is a child development center that has a present enrollment of 171 children.[1] NCRC is already, in terms of enrollment and staffing, the largest child development center in the City by a substantial margin.[2] By this Application, NCRC seeks to further expand staff and authorized enrollment and obtain authority for new construction that nearly doubles the physical size of its facilities. NCRC currently operates pursuant to a special exception granted by this Board in 1998, which expires in 2006.[3]

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[1] June 24 Transcript at 214 (Piggott).

[2] The comparisons to other child development centers made by NCRC's counsel, Maureen Dwyer, Esq. in her November 18 closing statement (November 18 Transcript at 164) are misleading. Although the Barbara Chambers Center (Final Order 16817-A) is licensed to operate with 150 children, 88 percent of NCRC's current enrollment, and 31 staff (one less than NCRC's current staff), it is licensed for **children up to 14 years of age.** Therefore, unlike NCRC, the Barbara Chambers Center is functioning as an elementary and a middle school, not just a preschool. St. Columba's Episcopal Church has a child development center licensed for 90 children, 53 percent of NCRC's enrollment, and 16 staff (14 staff "at any one time"), 50 percent of NCRC's staffing. Final Order 16098. Washington Hebrew Congregation is licensed for 95 children, only 56 percent the current size of NCRC, and 24 staff, 75 percent of NCRC's current staff. Summary Order 16898, subsequently modified as to hours of operation only by Modification Order 16844. Significantly, all of these child development centers are located on streets that give easier access to them than the streets that give access to NCRC.

[3] Final Order 16307 (1998). Thus, a denial of this Application will have no effect on NCRC's current operations. Those operations may continue, as they have since 1998, until 2006.

That special exception permits NCRC to operate a child development center of 120 children during licensed hours of operation from 8:00 a.m. to 5:00 p.m. Monday through Friday. Normal class hours are from approximately 9:00 a.m. to 3:30 p.m. There is an early drop-off program and an extended day program. Not every class meets every day of the week; and some classes are all-day, while others are half-day. The Department of Health permits NCRC to have an occupancy of the buildings of no more than 108 children at any one time.[4]

2. NCRC's facilities are located at 3209 Highland Place, N.W., in a residential portion of the Cleveland Park Historic District. The neighborhood in which NCRC is located is zoned R-1-B, except that properties across Ordway Street from NCRC, on the north side of the street, are zoned R-2.[5] The facilities consist of a large, nearly 100-year old brick house of three stories plus basement that faces Highland Place, an accessory two-story building (called the "Playhouse") that faces Ordway Street and a small bicycle shed on the eastern property line.[6] The Playhouse does not serve as a classroom but serves as a combination library, music room and physical training room.[7] NCRC's property is a single record lot of slightly more than one acre that fronts on Highland Place and runs through to Ordway Street in the rear.[8] Most of the lot that is not occupied by the buildings is used as a playground and has various play structures and paved areas for children to play. The western half of the lot slopes gently downhill from Highland Place to Ordway Street.[9] The eastern half of the lot is more level and terminates in a very steep hillside that drops down to Ordway Street. Except for the steep hillside, there is no part of the lot that is unused or unusable. The southern and western boundaries of the property are separated from adjoining properties and the street by a four-foot high chain link fence. The northern boundary, from the northwest corner of the lot to the Playhouse, is separated from the street by a six-foot wooden fence. The northern boundary of the property from the northeast corner of the lot to the Playhouse is separated from the street by the same type of chain link fence that is used elsewhere. The eastern boundary of the property is separated from the neighboring property by a six-foot wooden fence.[10] There are no other natural or man-made barriers separating the NCRC property from that of its neighbors on the east or the west. The main entrance to NCRC is on Highland Place; in addition there is a back entrance on Ordway Street, which requires climbing a number of steps up the hill to reach the side of the Playhouse.

3. NCRC's annual tuition is from $12,000 – $14,000.00 per year, depending upon the age of the child and the class he or she is attending.[11] The school has a small number of scholarship students and a small number of "special needs" children. It is not primarily a "special education" school. NCRC therefore caters primarily to a class of parents who can afford to spend a

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[4] June 24 Transcript at 215 (Piggott).

[5] Memorandum dated February 6, 2003 from Andrew Altman, Director Office of Planning to BZA at p. 1, filed as Exhibit 102 (hereinafter cited as "February 6 OP Report").

[6] *Id.* There are various permanently installed play structures on the playground to the west of NCRC's main building, including a playhouse that is in the side yard, less than eight feet from the eastern property line.

[7] October 7 Transcript at 140 (Williams, NCRC teacher).

[8] February 6 OP Report at 1-2.

[9] *See generally for description* May 6 Transcript at 82-83.

[10] Exhibit 206.

[11] Exhibit 177 (Washington *Post* article of February 11, 2003, submitted by NCRC supporter).

substantial sum to send their children to a preschool. A not insubstantial number of NCRC children – approximately seventy-five percent (75%) - reside outside of the District of Columbia in suburban Maryland or Virginia.[12] NCRC turns away substantial numbers of applicants for whom it does not have room. A number of current parents of NCRC children testified that they were attracted to NCRC because of its current programs and facilities.[13] There is no evidence that NCRC is in financial difficulty; and no one from NCRC testified that the facilities requested by this application are required for some new program that NCRC plans to provide or for expanding either the number of scholarships it provides or the number of "special needs" children that are served .

4. This matter was initially advertised as an application for a special exception under Sections 205 and 3104.1, DCMR (formerly, §3103.13, DCMR). At a hearing on February 25, 2003, the Board identified the proposed new classroom building as a second principal building within the meaning of Section 3202.3, DCMR, the construction of which in a single record lot would require a variance. Thereafter, this matter was re-advertised for a request for a variance from the requirements of Section 3203.2 DCMR (permitting the construction of only one principal building on a single lot of record), pursuant to Section 3103.2, DCMR and for a variance from the requirements of Section 2100.1 (requiring one parking space for each four teachers in a child development center) and Section 2100.6 DCMR (requiring addition of parking spaces when intensity of use of a building is increased), as well as for a special exception under Sections 205 and 3104.1 DCMR.

5. Although the current special exception authorizes NCRC to have only 28 staff, it is undisputed that NCRC has substantially exceeded that number. The Office of Planning finds that NCRC has violated the terms of its current special exception by exceeding the number of authorized staff.[14] NCRC claims it has 32 "full-time equivalent" ("FTE") staff, but the testimony is not clear as to how this calculation was reached.[15] A number of NCRC staff do not work a full day. It appears that NCRC's number was arrived at by counting as many as three part-time staff members as one FTE staff member.[16] In addition, an unspecified number of "independent contractors" hired by the parents attend NCRC to work with individual children.[17]

6. All but ten percent (10%) of NCRC's children live too far from the school to walk.[18] Children the age of NCRC's students are not capable of walking great distances, and the uneven

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[12] May 6 Transcript at 30 (Halaby, NCRC Board member); Exhibit 265 (Written testimony of Laine Kaufmann, neighbor who lives across Highland Place from NCRC; parent of former NCRC student).

[13] May 6 Transcript at 220 (Alfonso); October 7 Transcript at 110 (Jarvis) at 114 (Wassmer).

[14] September 16 Transcript at 305 (Jackson); OP Report at p. 2.

[15] June 24 Transcript at 214 (Piggott). The "full time equivalent" concept is one that is not recognized in our orders when regulating the number of staff. The reason for this is that it offers no control of such community impacts as parking demand. For example, using NCRC's formula of three part-time staffers equaling one "FTE," if all three of those persons were required to be at NCRC in the morning, even for only two hours, and each drove in a car, that would require three parking spaces. One real full-time staff person arriving in a car would require only one parking space.

[16] *See generally,* testimony of NCRC director Susan Piggott, June 24 Transcript at 239-240.

[17] *Id.*

[18] Ms. Piggot testified that "walkers" was defined as children within a four (4) block radius of NCRC, which includes those areas east across Connecticut Avenue, N.W. and west across Wisconsin Avenue, N.W.

sidewalks in the area make it difficult to use a stroller to transport them. Those children who do not live close enough to walk to NCRC must be transported by private automobile. Each child thus generates two roundtrips by a parent or caregiver to the school. Unlike with older children, the requirement that children the age of those who attend NCRC ride in a car seat makes it difficult to car pool because car seats must be switched back and forth among the cars. The streets most directly impacted by this traffic are: Highland Place, 33rd Place, Ordway Street east of 34th Street to Connecticut Avenue and Newark Street east of 34th Street to Connecticut Avenue. These are the streets that must be used to access either of the entrances to NCRC. In addition, residents of Ashley Terrace, a very short, dead-end street off Highland Place are affected by NCRC traffic because they must use Highland Place to reach their homes.[19]

B. NCRC's Application and Requested New Facilities

7. NCRC's application requests authorization for three construction projects: (a) the construction of a new classroom building that fronts on Ordway Street and will entirely occupy the space between the western property boundary and the existing Playhouse, extending south toward Highland Place, (b) the construction of a substantial two-story addition onto the rear of the main building that will project back towards Ordway Street and east toward the neighboring house, and (c) the construction of a "maintenance building" on the eastern property line that replaces a very small bicycle shed that currently occupies that location.[20] The separation between the eastern side of the Playhouse and the western side of the existing main building is more than 16 feet, sufficient to permit NCRC's lot to be subdivided into two lots of record without requiring side yard variances for either lot.

8. The proposed new construction would permit a net addition of two classrooms, a large multi-purpose room that could be used variously, for large group (in excess of 100 attendees) meetings, rainy day play, and physical training; small meeting spaces for parent-teacher conferences, staff offices and teacher work and substantial storage areas.

9. NCRC argues that because its current certificate of occupancy is for 120 children and it has no present plans to have more children in the building at any one time than that, it does not need a new certificate of occupancy. However, the additional classroom capacity supplied by this project would permit an occupancy "at any one" time of 160 children, rather than the current 120 occupancy limit. This is a 1/3 increase in available occupancy. Thus, NCRC is asking for authority to construct new facilities that are substantially larger than what are needed to house the number of children that NCRC says it wants to have permission to enroll. NCRC also says it is asking for permission to have 38 "FTE" staff.

10. NCRC's application requests permission to have no more than 120 children "at any one time" in the morning and in the afternoon, which would provide a theoretical maximum enrollment of 240. Nevertheless, NCRC says it is "willing to agree to" an enrollment cap of 181

[19] November 4 Transcript at 140 (Oberdoerfer, Ashley Terrace resident) and at 147-148 (Feldman, resident on corner of Ashley Terrace and Highland Place). Exhibits 181 (letter from Adler and Robin, Ashley Terrace residents), and 209 (collective exhibit that includes letters from Rives Carroll, David and Joan Wise, and Milton Viorst – Ashley Terrace residents)

[20] May 6 Transcript at 79 (Anthony).

with a four child margin of increase, an increase of 10 - 14 children above the current actual enrollment.

11. NCRC's witnesses testified that the current facilities were lacking in three significant respects: (1) there was no large room that could be used for physical training activities, large group meetings or for play during inclement weather[21], (2) there were inadequate private meeting rooms for parent-teacher conferences and (3) there were no work areas for teachers to prepare teaching materials, outside of the classrooms themselves.[22] In addition, NCRC's witness testified that NCRC wishes to replace the classroom currently on the third floor with a classroom lower down to avoid the children having to use an enclosed outdoor fire escape, and that it wishes to build an elevator on the east side of the main house to provide access to all floors for wheel chair-bound persons.[23] However, the proposed elevator will not go to the third floor but will only service the basement through second floors.

12. NCRC's project chair testified that NCRC's goal was to reduce the size of classes by up to two children,[24] to a level below the maximum permitted by the Department of Health and accrediting agencies. However, she said, she did not want to accomplish this reduction by attrition, but rather, wanted to admit additional children who, when added to the children taken out of the original classes, would form new classes.[25] These new classes would meet in the two additional classrooms provided by the proposed new construction.[26]

C. Supporters and Opponents of the Application

13. Those who testified in support of the application were primarily parents of children who attend NCRC or those connected with NCRC as trustees or employees. Katherine Marshall, a party here[27] but not a parent, lives across the street from NCRC, and testified in support although she indicated that, at times, the traffic was severe.[28] Hilary Rosen, a parent who moved into a rental house across from NCRC during the summer of 2003, testified in support; but admitted that she had experienced the traffic of NCRC's full-time operation as a resident of Highland Place only in the approximately two and a half weeks immediately prior to her testimony.[29] Moreover, she will not be affected by this project because her lease expires before any

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[21] The existing Playhouse serves some of these functions, but NCRC's witnesses said it was too small. October 7 Transcript at 140 (Williams, NCRC teacher).

[22] *Id.* at 139 and May 6 Transcript at 25 (Halaby, parent and trustee).

[23] *Id.* at 26.

[24] May 6 Transcript at 24 (Halaby).

[25] *Id.* at 25.

[26] *Id.* at 80.

[27] February 11 Transcript at 231.

[28] Highland Place is a place "where you can go out and walk in, except when they [NCRC parents] pile up for their dismissal." September 16 Transcript at 378.

[29] October 7 Transcript at 177. Ms. Rosen admitted that NCRC did not begin full-scale operations until mid-September and even these were disrupted when Hurricane Isabel felled a tree across the intersection of Highland Place and 33rd Place, blocking all traffic.

construction could possibly begin.[30] Finally, the owner of Ms. Rosen's residence, Consuelo Newman, applied for but was denied individual party status in opposition, as her request was untimely. However, Ms. Newman was permitted to join the Cleveland Park Neighbors party in opposition. Two other neighborhood residents, also not parents of NCRC children, who live on Ordway Street more than 300 feet east of the back entrance to NCRC, testified in support of the Application.[31] Neither was able to speak to the traffic impact of NCRC's operations on the neighborhood.[32] In addition, several other NCRC parents who reside in Cleveland Park, but not in the affected neighborhood, testified in support of the Application.

14. Two NCRC parents who live in Cleveland Park, Jon Thoren and Ann Large, organized a group called "Friends of NCRC" which was granted party status.[33] They also testified in support of the Application. Mr. Thoren lives on Ordway Street, about 100 yards east of NCRC's rear entrance and cannot see NCRC from in front of his home.[34] He testified that he observed traffic only occasionally.[35] Ms. Large testified that she lived approximately four tenths of a mile from NCRC, on the other side of 34th Street and that the traffic that passed her house, she believed, was not related to NCRC.[36] The Friends of NCRC collected signatures on a petition, which Mr. Thoren offered into evidence at the hearing.[37] The Friends of NCRC also launched a letter-writing campaign to the BZA in support of NCRC including, apparently, a website, which generated an automatic form letter for each person who supplied his or her name and address. More than half of these letters were from people residing outside of Cleveland Park, and no new supporters residing in the affected area who were not already represented on the "Friends'" petitions.[38] In addition, the volume of these letters were inflated by having separate letters written by each adult member of a household. Support for NCRC's expansion plans from its parents is to be expected; what is significant is the absence of such support from residents of the affected neighborhood, even though many of those residents are not only parents of former NCRC students but former members of the NCRC board of directors.

15. City Council Member Jack Evans (Ward 2) wrote in support of the project in November, 2002, prior to the Board's re-advertisement of the variance relief necessary for the construction of a second principal building on a single record lot.[39]

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[30] *Id.* at 126.

[31] October 7 Transcript at 141 (Marcus) and at 147 (Weigast).

[32] *Id.* at 167 (Marcus) and at 150 (Weigast).

[33] February 11 Transcript at 220.

[34] October 7 Transcript at 97.

[35] *Id.*

[36] *Id.* at 99.

[37] Exhibit 243. Of those who used the website, only four households were from the affected area (representatives of which all testified at the hearing). Representatives of an additional seven households in the affected area signed the "Friends'" petition, after eliminating duplication and multiple signers from the same household. An additional 75 households in the geographic limits of Cleveland Park (as defined by the Cleveland Park Civic Association) also signed petitions in support. The remainder of the signers resided outside of Cleveland Park.

[38] Of the total of 46 letter sent to the BZA, 27 were from addresses outside of Cleveland Park.

[39] Exhibits 22 and 23 (filed November 19 and 22, 2003).

16. By contrast the neighborhood surrounding NCRC was solidly opposed to the project. The "Cleveland Park Neighbors," an *ad hoc* neighborhood group granted party status, presented signed petitions opposing the project from 104 **households** (not persons, which could inflate the number) or 79% of the households in the immediately affected area.[40] In addition, other households outside the affected area signed the petition. More than 40 witnesses from the neighborhood (including individuals with party status) testified in opposition at the hearing; other neighbors wrote letters in opposition both directly to the Board, to City Council members and to other city government officials.

17. The Advisory Neighborhood Commission for this area, ANC-3C, by two unanimous votes, opposed the Application.[41] The ANC's written submission[42] and its oral testimony said that it found, based on written correspondence from NCRC's lawyer and from its acting director at the time (attached to Exhibit 241) that NCRC had misrepresented its actual enrollment to both the ANC and the BZA in the course of seeking the special exception under which it now operates. The ANC cited statements by NCRC that its *enrollment* at the time of the 1998 hearing was 108 when in fact, NCRC subsequently told the ANC at recent public meetings relating to this Application that its enrollment at that time was 168. The ANC also concluded that the "traffic management conditions that the Applicant [NCRC] has implemented have fallen short of the intention to provide safety for the children and the neighbors."[43] This conclusion was based on viewing video made by the neighbors, neighbors' testimony at the ANC meetings, and personal observations of some of the ANC Commissioners. The ANC also concluded that, on Ordway Street, there is no "orderly or safe system for helping children from cars."[44] The ANC also complained of NCRC's failure to honor repeated requests for NCRC's traffic study, even after January 24, 2003, when NCRC had supplied such a study to DDOT.[45]

18. Regarding the physical facilities that NCRC seeks permission to construct, the ANC did not understand why NCRC needs to double the size of its facilities for only 10 more students, and it noted the very large size of the proposed new building in relation to the houses around it, as well as the adverse effects in terms not only of loss of light but of noise from music and sports activities inside a classroom building that is only eight feet from the property line of an adjacent house.[46]

19. After NCRC re-advertised this project for a variance, the ANC met again and voted unanimously to recommended against grant of a variance, finding that the property could continue to be used successfully as a child development center without a variance (noting NCRC's evident success with its current facilities) and found that there was nothing unusual about the shape or size of NCRC's lot, that NCRC's property was one of many in the Cleveland Park Historic District and that, therefore, there were no peculiar or exceptional practical

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[40] November 4 Transcript at 122; Exhibit 275.

[41] Exhibits 96, 142, 151, and 241.

[42] Exhibit 241.

[43] *Id.* at p.4.

[44] *Id.*

[45] October 7 Transcript at 22.

[46] *Id.* at 5.

difficulties that justified a variance.[47] Rather, the ANC found, the matter was simply that NCRC wanted a second principal building on its single record lot. The ANC concluded by stating not only that it was "strongly opposed" to the grant of a new special exception and variance but that it wished the Board or order NCRC to come into compliance with existing BZA orders because NCRC "felt no responsibility to be in compliance with the existing Orders."[48]

20. The Board is aware that Section 1-309.10 (c)(3)(A) of the D.C. Code requires that great weight be given to the issues and concerns raised in the recommendations of the ANC and that our written decision must, under Section 1-309.10(c)(3)(B), articulate with precision why the ANC does or does not offer persuasive advice under the circumstances and also that our decision must articulate specific concerns and findings with respect to each issue and concern raised by the ANC, and that such findings must be supported in the record. For the reasons stated throughout these findings, we agree with the recommendations of the ANC and have accorded great weight to those recommendations.

21. Also opposed to the Application are the Cleveland Park Citizens' Association,[49] The Federation of Citizens Associations of the District of Columbia[50] and the Cleveland Park Historical Society.[51]

22. City Council Members Kathy Patterson (Ward 3)[52] and Phil Mendelson (At-Large) wrote the Board opposing this project.[53] Councilman Mendelson testified in opposition to the Application.

23. Party status in opposition was granted an *ad hoc* group, the Cleveland Park Neighobrs, consisting of 33 families who live in the immediate area of NCRC,[54] as well as to four households on the immediate perimeter of NCRC: Bruce and Sallie Beckner (sharing a common property line with NCRC on the west, on Highland Place), Henry Little and Lydia Mendoza (sharing a common property line with NCRC on the west, on Ordway Street), Steven Hunsicker (directly across the street from NCRC on Ordway Street) and Gaylord Neely and Linda Badami (sharing a common property line with NCRC on the east, with a through lot that runs between Highland Place and Ordway Street). Each of these individual parties demonstrated a showing of unique harm should the Application be granted; and the Cleveland Park Neighbors appeared to represent the residents of the affected area, including some whose homes were directly across the street from NCRC on both Highland Place and Ordway Street.[55]

24. NCRC testified that, in response to neighbors' concerns, it reduced the size of its proposed new classroom building, adding only two classrooms, not three and put part of it

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[47] *Id.* at 6-7.

[48] *Id.* at 7.

[49] Exhibit 98 and November 4 Transcript at 138-139 (testimony of George Idelson, president).

[50] Exhibit 117.

[51] Exhibit 105.

[52] Exhibits 210 and 227.

[53] Exhibit 126.

[54] February 11 Transcript at 181.

[55] February 11 Transcript at 185, 188, 195, 202

underground to reduce its apparent mass. In a written submission and in oral testimony neighbors said they attempted to work with NCRC to improve existing facilities – Dickson Carroll[56], one of the neighbors who is an architect even proposed some concepts for NCRC – but were unwilling to embrace the idea of a new classroom building or support either any increased enrollment or construction of capacity that could be used for increased enrollment in the future.[57]

D. Findings Relating to the Requested Variances

25. NCRC's lot does not have any unique characteristics that are an impediment to development. Arthur Jackson, the Office of Planning's representative at the hearing, testified that being an Historic District was not a unique characteristic and that the existing structures on NCRC's lot were "contributing structures" but not historic landmarks.[58] All the witnesses, including Mr. Jackson and Mr. Anthony (NCRC's architect) agreed that NCRC's lot was not the only large lot in the neighborhood,[59] was not the only through lot in the neighborhood,[60] and was not the only lot that had some slope to it.[61]

26. Moreover, the entire neighborhood is an historic district, so any alterations to any contributing structures face the same regulatory requirements that NCRC claims prevented it from making its proposed new classroom building an addition to the existing Playhouse.[62] Therefore, there is nothing unique about the requirement that NCRC obtain HPRB approval for an addition to the playhouse – or that HPRB staff refused to recommend approval of certain features, like making the new classroom building an addition to the Playhouse.

27. We also find that NCRC has failed to demonstrate that any practical difficulty exists which would preclude subdivision of the lot into two record lots. NCRC considered only one solution, that would require other variances to implement; and not any other alternatives to that solution which would not result in the need for other variance relief.[63] Mr. Jackson acknowledged that the site could easily be subdivided into two record lots.[64] For example, given the size, width and depth of the lot, Mr. Jackson testified that it is physically possible to subdivide the lot to the east of the existing Playhouse – an option not considered by NCRC's architect – and do the construction that NCRC plans without creating the need to obtain any variance.[65] Finally, Mr. Jackson testified that the need to obtain HPRB review of a subdivision

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[56] November 4 Hearing Transcript at 126, 127 (Dixon Carroll).

[57] *See generally,* Written testimony of Gregory Craig. Exhibit 259.

[58] September 16 Transcript at 309 and 312.

[59] May 6 Transcript at 130.

[60] May 6 Transcript at 130 (Anthony) and September 16 Transcript at 309 (Jackson).

[61] *Id.* Mr. Jackson testified that other lots have similar topographical characteristics.

[62] In addition, other lots in the historic district have both a principal building and accessory buildings which are contributing buildings to the historic district.

[63] May 6 Transcript at 114-118.

[64] September 16 Transcript at 313.

[65] *Id.* at 314 and 315.

of NCRC's lot is not a "practical difficulty."[66] Indeed, there is no testimony that NCRC even attempted to subdivide its lot, much less that such an attempt failed.

28. Although NCRC offered hearsay testimony by its architect, Mr. Anthony, that is was the HPRB staff that required the new classroom building not be an addition to the existing Playhouse,[67] that testimony is flatly contradicted by the HPRB staff report, which states:

> A two-story addition is proposed to the playhouse, located at the northwest corner of the site fronting Ordway Street, to house community and music rooms on the first level and two classrooms above. **While technically an addition,** the "carriage house" [new classroom building] would appear as a separate building, visibly connected to the playhouse by a fenestrated brick arcade seen only on Ordway Street.[68]

From this language it is clear that HPRB staff was not responsible for the new classroom building being something other than an addition to the existing Playhouse. To the contrary, in staff's view it **was** an addition; it just did not look like one.

29. Moreover, even assuming it has a basis in fact, the central premise of NCRC's argument – that, but for HPRB staff's objection to the idea of making the new classroom building an addition to the existing Playhouse, NCRC would have needed no variance[69] – is simply wrong. We find that the Playhouse, based on its current and historical use, is not a principal building. It is an accessory structure. There are no classrooms in the Playhouse; rather the building is simply a large open area downstairs that currently is used for library, music and physical education, with small spaces upstairs that are not suitable for classrooms. If NCRC were to make the proposed new classroom building – which we already have found to be a principal building – an addition to the Playhouse, then necessarily, the Playhouse would thereby be transformed from an accessory structure to a principal building. Therefore, the need to obtain a variance to construct two principal buildings on a single record lot would remain even if the classroom building were permitted as an addition to the Playhouse.

30. We also find that granting the variance would be inconsistent with the Comprehensive Zoning Plan. NCRC, based on its current enrollment, is already the largest child development center in the city – and it wants to become even larger still. The comprehensive plan requires controlling and maintaining the residential scale of the buildings in residential neighborhoods, and institutional use buildings must be compatible with this scale.[70] As we already have concluded, NCRC's proposed expansion projects are not in scale with the residential buildings that surround it. Especially on Ordway Street, where NCRC's additions and new building would be most visible, the existing houses are of modest, not grand, size. We also note that the

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[66] *Id.* at 319.

[67] *See* November 18 Transcript at 10, 14.

[68] Exhibit 5 to February 6 OP Report at p. 1.

[69] May 6 Transcript at 85 (Anthony).

[70] October 28 Transcript at 120 (Schwartz, qualified and accepted as an expert in planning and architecture).

comprehensive plan mandates that increased child care (which is the function of NCRC, since it is not a school) should be located in commercial areas of the city, not residential areas.[71]

31. Finally, NCRC has completely failed to show that it would be subject to any hardship absent a grant of this variance. As we have already determined, there are other avenues available to NCRC to accomplish its construction without requiring a variance. The fact that NCRC would be required to get regulatory approvals, such as for a subdivision of its lot, in order to pursue those avenues is not a "hardship"; nor can this Board assume that such approvals would be denied in the absence of a documented unsuccessful effort by NCRC to obtain them. Secondly, as we have already held, there is no evidence at all that NCRC is in any financial difficulty, is not attractive to parents in its present condition, and is not able to continue carrying out the mission that NCRC has followed for some 70 years with the facilities that it has. Indeed, NCRC's director testified that she identified none of the needs that she now claims justify this project when she interviewed for her job in 1997, even though NCRC's operations and enrollment then were virtually identical to what they are now.[72] And, even more telling, since the current director has been at NCRC, it has received accreditation from the most respected pre-school accrediting agency.[73] Thirdly, there is no evidence that, but for the requested variance, NCRC is effectively denied *all* use of its property. In fact, NCRC is now using all of its property, either for buildings or for a play area. The fact that NCRC is barred from making a **particular** use of its property (i.e. to have two principal buildings on a single record lot) is not a hardship and is no reason for a variance. Indeed, every applicant for a variance does so because that applicant is barred from making a particular use of a property. If that were a "hardship," then every variance application would be granted; and the zoning regulations would be meaningless.

32. For these reasons, we conclude that NCRC has not met the tests for obtaining an area variance that would permit construction of a second principal building on a single record lot.

33. Regarding the parking variance, apart from general statements, NCRC has offered no evidence of an inability to provide parking for the proposed new classroom building. In fact, NCRC's architect testified that he had drawn in three parking spaces on the east side of the property, although there is no driveway in existence to service them.[74]

E. Conditions for the Dropping Off and Picking Up of Children

34. Highland Place, the street where NCRC's primary entrance is located, has a narrow sidewalk on the north side of the street, where NCRC is located; and no sidewalk on the south side of the street, from 33rd Place to the west until well to the east of NCRC's entrance.[75] Utility poles are placed in the sidewalk, making the pathway just wide enough for a stroller.[76]

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[71] *Id.* at 121.

[72] June 24 Transcript at 291-292.

[73] June 24 Transcript at 292.

[74] May 6 Transcript at 89-90 (Anthony).

[75] June 24 Transcript at 301 (Piggott).

[76] October 28 Transcript at 87 (Kaufman – Highland Place resident across from NCRC).

35. Highland Place itself is narrower than a standard city street.[77] It is a two-way street, but parking is permitted only on the north (NCRC) side of the street.[78] There is a no-parking zone immediately in front of the school's main building. Neighbors immediately across the street from NCRC have either shared driveways or no off-street parking.[79] Consequently, they use legal parking spaces flanking the no-parking zone in front of the main NCRC building.

36. 33rd Place, which is the link between Highland Place and Newark Street closest to NCRC, has no sidewalks on either side of the street. 33rd Place has two-way traffic; and parking is permitted along portions of the west side of the street and along all of the east side of the street.[80] These spaces are used heavily. Thus, a person who walks to NCRC from Newark Street must walk in the middle of the street for that portion of his or her trip that covers 33rd Place. That person cannot walk on the sidewalk, nor can that person walk next to the curb.

37. Just east of the NCRC entrance, Highland Place curves rather sharply to the south. As a result, east bound and west bound vehicles cannot see each other until they are very close.[81]

38. The Department of Transportation identified the creation of a drop-off (or pickup) queue of cars extending on Highland Place east from NCRC's entrance as dangerous because it forces the two-way traffic on Highland Place into a single lane of travel around a blind curve.[82] We agree.

39. The Department of Transportation's potential solutions to the problem (other than reducing enrollment) – making Highland Place one-way westbound from Newark Street past Ashley Terrace to 33rd Place and eliminating parking on all of NCRC's street frontage to accommodate more cars dropping off – would impose substantial burdens on the neighborhood. First, the neighbors who live across from this area that would become "no parking" wrote both DDOT and this Board vehemently pointing out that would result in the elimination of essential on-street parking and that they would have no place to park legally near their houses to unload groceries.[83] Secondly, a number of neighbors testified that a one-way Highland Place would require people who live on the north side of Newark between Highland and 33rd Place who are returning home from 34th Street or Wisconsin Avenue to make an illegal U-turn in order to park in front of their houses.[84] Moreover, in hearing testimony, DDOT's representative was uncertain as to whether either of these "solutions" would solve the problem or would not create other, more serious safety problems. Arthur Jackson, who testified on behalf of the Office of Planning, stated that the one-way street proposal for Highland Place would create "adverse impacts."[85]

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[77] September 16 Transcript at 35 (George – qualified as an expert in transportation planning).

[78] Exhibit 116 at p.3.

[79] October 28 Transcript at 92 (Kaufman); November 4 Transcript at 214, 216 (Ince – neighbor resident across the street)

[80] Exhibit 116 at p. 3.

[81] *Id.*

[82] *Id.*

[83] *See* Exhibit 209 (collection of neighbors' letters to various agencies on this proposal).

[84] November 4 Transcript at 175-176 (Stovall) and at 203-204 (Poole).

[85] September 16 Transcript at 267.

40. Observations by neighbors, still photos and videos show that up to one half of the children arriving at NCRC's Highland Place entrance are not dropped off in front of the school.[86] Rather, their parent or caregiver parks and walks the child in to the school. Some of this parking happens on Highland Place; but some of it happens on 33rd Place and on Newark Street. In order to walk from Newark Street to NCRC, a pedestrian must walk on 33rd Place, which has no sidewalks and has parked cars on both sides of the street, for at least its length. Therefore, children and parents walking to NCRC on 33rd Place are in the middle of the street at precisely the time the maximum volume of traffic – from a combination of residents going to work and NCRC parents leaving after having dropped off their children – is flowing down 33rd Place.[87]

41. All westbound traffic on Highland Place must turn left at the intersection with 33rd Place. Video shown at the hearing and neighbor observation shows that many cars making that turn fail to stop for the stop sign on Highland Place.[88] Surprisingly, NCRC's director testified that she was not making an effort this year to get parents and caregivers to observe this stop sign[89]; and we saw repeated instances on traffic video presented by the neighbors of NCRC personnel in orange vests taking no action as drivers ran the stop sign. Given that drivers cannot see clearly around the corner of Highland and 33rd, it is entirely possible that a driver who fails to come to a full stop will abruptly come upon an adult and child walking down the middle of 33rd with possible tragic consequences.

42. We find, with the Department of Transportation, that the presence of a double-standing drop-off queue of NCRC cars at the blind curve on Highland Place to be a dangerous condition which will be exacerbated by the increase in student enrollment and by the new construction proposed by NCRC. The actual dropping off and picking up of children in front of the school, assisted by NCRC personnel who take the children from the cars, is not hazardous. Nor is the situation of parents parking in legal spaces on Highland Place and walking their children to NCRC on the sidewalk on the north (NCRC) side of the street. However, the practice of parents parking on 33rd Place or on Newark Street and then walking down 33rd Place to get to Highland Place, we find is a dangerous condition that will be exacerbated because children and adults must walk in the middle of the street, head-on into the full volume of NCRC and neighbor traffic leaving Highland Place.

43. Lt. Keith Roch of the Second District of the Metropolitan Police Department, testifying as MPD's representative[90] stated that the video was a "fair representation" of the situation and that people walking strollers in the middle of the street is not typical of Cleveland Park.[91] Lt. Roch said he did not observe parents walking in the street with children at other Cleveland Park schools.[92]

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[86] October 28 Transcript at 111-112 (Petersen, recognized as an expert in transportation planning).

[87] The neighbors' traffic video and the certification that all cars identified in the narrative to the video were associated with NCRC are Exhibits 255 and 256 respectively.

[88] *Id.*

[89] November 18 Transcript at 71.

[90] October 28 Transcript at 70.

[91] *Id.* at 75.

[92] *Id.* at 66.

44. Ordway Street, which is the site of NCRC's secondary drop off, is a standard-width residential street. It is a through street between Wisconsin and Connecticut Avenues and carries commuter traffic.[93] The entrance to the Cleveland Park Metro Station as just by the corner of Ordway and Connecticut Avenue. Parking is generally permitted on both sides of the street.[94] However, when cars are parked on both sides of the street, there is barely enough room for oncoming vehicles to pass each other. Trucks and other large vehicles cannot pass each other or even pass large passenger vehicles, like SUVs, without one vehicle pulling over into a vacant space.[95] Residences on Ordway Street have limited or no off-street parking and many have shared driveways.[96] Residents of Ordway Street report that their cars on the street repeatedly have been sideswiped by moving traffic.[97]

45. On the south (NCRC entrance) side of Ordway Street there is no sidewalk from 34th Street east until well beyond the end of NCRC's street frontage.[98] There is a sidewalk on the north side of Ordway Street, but there is no crosswalk on Ordway Street anywhere near the NCRC entrance. The intersection of Ordway and 34th Streets is not controlled by a traffic signal.

46. There is a no-parking area immediately in front of the NCRC entrance on Ordway Street that is large enough to accommodate two cars. The remainder of NCRC's street frontage on Ordway is used by NCRC staff for parking.[99] It is the only area on Ordway Street where all-day parking is permitted for cars not displaying a Ward 3 Residential Parking Permit.[100]

47. A substantial amount of testimonial evidence from Ordway Street residents,[101] other residents who observe the NCRC drop off at that entrance, together with still photographs and a video show the following: (1) adults and children walking in the street, because there are no sidewalks on the south side of Ordway Street and parked cars prevent walking near the curb; (2) children being removed from cars on the street side, into traffic and, in some instances, standing unattended while adults reach into pockets or purses for keys to lock the car; (3) adults and children scurrying across Ordway Street in front of traffic, from cars parked on the north side of Ordway Street, (4) NCRC parent cars double-standing on Ordway Street waiting for a parking place to open up and blocking traffic, forcing cars behind them to go into the oncoming lane of traffic, (5) NCRC parent cars making U-turns or turning around in driveways in an effort to get a parking place near the school entrance and (6) NCRC staff cars parked very close to the steps, which forces pedestrian traffic into the street to go around these vehicles and also obstructs vision of oncoming traffic for anyone attempting to cross the street at this point.

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[93] *Id.* at 165.

[94] *Id.* at 166.

[95] November 4 Transcript at 193 (Shelburne – Ordway resident).

[96] September 16 Transcript at 103.

[97] November 4 Transcript at 193 (Shelburne).

[98] June 24 Transcript at 268 (Piggott).

[99] *Id.* at 266 (Piggott).

[100] Exhibit 258 (Petersen report).

[101] *See, e.g.* November 4 Transcript at 114 (Afzal), 173 (Fetterman), 206 (McLaughlin); Exhibits 203 (letter from Carabetta and Molinaroli), 233 (letter from Biltchik), Exhibit 209 (letters from Hunsicker, Sotsky, Vanneman)

48. Although required by this Board's 1998 Order, only recently has NCRC become faithful in sending a staff member to the Ordway Street entrance at the morning drop-off time, when it began prosecuting this application.[102] Even when the person arrives, he or she is present for no more than a brief period at the morning drop-off.[103] Moreover, only a single person is posted at that location, so a parent cannot pull in, drop off a child and have one of the school staff walk the child up the stairs to his or her classroom. The parent must park and walk the child into the school.

49. The Board finds that the NCRC Ordway Street entrance is unsafe for the picking up and dropping off of children and the dangerous condition will be exacerbated by the approval of this application. The no-parking zone in front of the school's entrance is too small to allow more than one or two cars at a time; and NCRC has insufficient staff present to remove children from cars so that parents do not have to park and walk the child in themselves. There are a very few open parking spaces on the south side of Ordway Street and, even if one of them is vacant, the absence of a sidewalk forces the adult and child to walk in the street with the traffic, which is dangerous.

50. Even if additional staff were present to remove children from cars that pull up to the entrance, the creation of a double-standing drop-off queue on Ordway Street, comparable to what exists on Highland Place, is unacceptable.[104] Given the volume and speed of traffic on Ordway street, forcing two-way traffic to share one lane – as is done on Highland Place – is dangerous, and will be even more so with the additional students over what was approved in 1998.

51. Likewise parking on the north side of Ordway Street, which does have a sidewalk, still forces the adult and child to cross Ordway Street in midblock, a practice that is dangerous, given the volume and speed of the Ordway Street traffic, especially in the morning. It is especially dangerous here because small children cannot move as quickly as adults, do not perceive the danger from moving cars and do not respond as quickly to directions as adults. While some children are small enough to be carried across the street, not all are; nor are all adults equal in their ability to carry a child.

52. We therefore find that Ordway Street is unacceptable for the dropping off and picking up of children. It is simply too dangerous and this condition will worsen if this application is approved.[105]

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[102] October 28 Transcript at 18 (S. Beckner); Exhibit 255 (neighbors' video).

[103] *See generally,* December 15, 2003 Letter from R. Bruce Beckner re Supplemental Submission in Response to Reports from DC Department of Transportation, filed November 14, 2003 and attachments thereto (hereinafter "Neighbors' December 15 submission").

[104] Even NCRC's traffic consultant, Osborne George, testified that double-standing on Ordway Street would be a "serious situation" and that he was not recommending a carpool line on Ordway Street. September 16 Transcript at 121, 122 and 254.

[105] From time to time, NCRC's counsel has mentioned that the Department of Transportation is going to "improve" or renovate Ordway Street. There is no evidence in the record of what these improvements will be, nor of how they might ameliorate the conditions described. Ken Laden, the Assistant Director of the Department of Transportation, testified that that the "design process" for renovations to Ordway street would not begin until "early summer" 2004. September 16 Transcript at 296-297. While building a sidewalk on the south side of Ordway Street would permit safe passage along the street for adults and children who park between NCRC's entrance and 34th Street, given that residents along that portion of Ordway use the street for parking, it seems unlikely that this would free up more than

53. In summary, we find that Ordway Street is not a safe location for the picking up and dropping off of children, that parking and walking children to school from parking places other than on Highland Place is not safe and that maintaining a line of double-standing cars waiting to drop off or pickup children immediately in front of the blind curve on Highland Place is unsafe, and will be increasingly unsafe if this application is approved.

F. NCRC Impact on Traffic Conditions

54. In the first instance, it is worth noting that, unlike a regular school, where children come once in the morning and are collected once at the end of the day, NCRC generates traffic in the neighborhood six times a day, twice in the morning, twice at mid-day (when morning half-day session children are collected and afternoon half-day session children are dropped off) and then twice again in the afternoon when both the all-day and afternoon half-day children are discharged and when the extended day children are released.[106]

55. Both the applicant and the parties in opposition offered evidence from traffic consultants regarding the impact of NCRC's traffic on nearby streets as a consequence of NCRC's violation of the Board's prior order and should this application be approved. The most useful information was offered by Stephen Petersen, a traffic consultant hired by the Cleveland Park Neighbors, and accepted as an expert by the Board. Mr. Petersen measured traffic on Highland Place and Ordway Street at the NCRC entrance by means of automatic counters on a weekday when NCRC was in operation and on a similar weekday when NCRC was on spring break and therefore not in operation.[107] Since Highland Place is not a through street, all traffic on that street can be attributed either to residents or to NCRC.

56. Osborne George, a traffic consultant hired by NCRC, testified that he did not do such "in session/out of session" comparison measurements, although he did measure traffic volumes when NCRC was in session.[108] It was also difficult to compare Mr. George's figures with Mr. Petersen's because Mr. George apparently considered that each student arriving at NCRC by car generated only one "trip" (on the assumption that the driver of the car did not leave the neighborhood until the child had completed the day's session at NCRC).[109] Mr. George attempted to impute the number of "trips" (as he defined them) generated by NCRC, not by measuring traffic volume with counters, but on the basis of information supplied to him by the school regarding children's residences, etc.[110]

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a handful of spaces for use by NCRC parents. In any event, we must decide this application on the basis of conditions that exist, not as they might be in the future. Obviously, the Board of Zoning Adjustment has no power to order the construction of a sidewalk or any other alteration of the streets.

[106] September 16 Transcript at 14 (Piggott).

[107] October 28 Transcript at 105 (Petersen); exhibit 258 (Petersen's traffic report).

[108] September 16 Transcript at 243.

[109] *See* September 16 Transcript at 220-226. We find this assumption to be completely false. There would be no reason for a non-resident of the neighborhood to remain there even half a day. There are no other establishments there of any kind open to the public; and there is available parking closer to the commercial district on Connecticut Avenue than Highland Place, 33rd Place and the portions of Newark and Ordway streets near NCRC.

[110] September 16 transcript at 206 and 244 (George: only looked at impact of 10 more students; did not attempt to determine impact of entire school on neighborhood; data about school trips "anecdotal.").

57. Mr. Petersen's comparative measurements of traffic volume over a 24-hour period, which we consider far more reliable than Mr. George's imputed data from information supplied to him by NCRC, showed that traffic volume on Highland Place when NCRC was in operation was five times what it was on a similar weekday when NCRC was not in operation.[111] Given that NCRC's operations are only from 8 a.m. to 5 p.m., it is likely that the impact of NCRC on daytime traffic volume on Highland Place is even greater and would be exacerbated by approval of this application. Put differently, Mr. Petersen says, NCRC generates as much car traffic on Highland Place as all of the residents of that street combined.[112]

58. We agree with a number of professional treatises cited by Mr. Petersen, and recognized as authoritative by Mr. George, that "level of service" is not an appropriate measure of traffic impact on a residential neighborhood because it focuses on the perspective of the driver and not on the resident who sees this volume of traffic passing by daily.[113] It cannot be disputed that NCRC causes a very significant impact on the traffic on Highland Place.[114] To be sure, NCRC does not transform Highland Place into the equivalent of a major arterial street like Connecticut Avenue, but we find it unreasonable to assume that a volume of traffic that would not be objectionable on an artery like Connecticut Avenue should therefore not be objectionable on a neighborhood street like Highland Place. Rather, we think a person who chooses to live on an artery like Connecticut Avenue expects to have significant traffic volumes passing him by; whereas a person who chooses to live on a street like Highland Place does not expect to have significant volumes of car traffic passing by his house.

59. However, the impact of NCRC-related traffic is not limited to the presence of five times as many cars driving down the street and the double-standing queue line that forces traffic going two directions to share a single traffic lane. Neighbors' testimony, still photographs and videos showed numerous instances of NCRC cars making U-turns, parking illegally, blocking driveways, double-parking, turning around in driveways and generally complicating the traffic situation.[115] In fact, on his visit to Highland Place, Arthur Jackson of the Office of Planning, testified that he personally witnessed this kind of behavior, which he characterized as "unsafe operation."[116] This appears to be the result of parents' or caregivers' desire, in many cases, to find a place to park the car and then walk the child into NCRC, rather than wait in a drop-off

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[111] There is no basis for NCRC's counsel's suggestion that the nearby "Cleveland Park Club" was responsible for significant traffic volumes during the measurement period. Testimony and written submissions by officers of the Club state that the only activity taking place at the club during the times these measurements were made was a five-person morning yoga class, and three of the attendees of that class live within walking distance from the Club. The principal activities of the club take place in the summer, not during the regular school year, when these measurements were made. Those activities consist of the operation of a small swimming pool and a morning camp for neighborhood children. *See* Exhibit 248 (Letter from Malcom Bertoni, president Cleveland Park Club) and October 28 Transcript at 141 and 157 (Taylor, co-president of Cleveland Park Club).

[112] October 28 Transcript at 145 (Petersen).

[113] October 28 Transcript at 135-137.

[114] September 16 Transcript at 229-230 (George: "no traffic" when NCRC not in session).

[115] *See, e.g.*, October 28 Transcript at 11-22 (S. Beckner), 95 (Kaufman), 127 (Taylor), 129 (J. Vanneman); November 4 Transcript at 107 (Pelletreau), 109 (Sheehy), 125 (Newlin), 138 (Idelson), 148-149 (Feldman); 171,172 (V. Stern); 177-178, 180 (Both); 188 (D. Craig), 189 (Harter), 196 (Tennille), 209 (Atkeson), 216 (Naimian), and 222 (Haas).

[116] September 16 Transcript at 286.

queue. While there is no way to quantify these actions, in aggregate, they make the traffic more disruptive and objectionable than an equivalent amount of traffic that simply moved through the street on to a destination elsewhere.

60. In addition to the impact of moving traffic, NCRC's operations create a parking impact on Highland Place. This impact is both short-term and long-term. As described above, parents who choose to avoid the drop off queue and park and walk their child to NCRC use legal and illegal parking places in the vicinity of NCRC. In addition, because the school has no on-site parking, all of its staff must park on the street. While Mr. George focused on the supply of available parking on Highland Place, Mr. Petersen, as he did with traffic volume, attempted a comparative measurement of parking activity between weekdays when NCRC was in session and days that it was not. Mr. Petersen concluded that there was a 73 percent increase in parking at the morning drop-off time as the result of NCRC's operations and a 54 percent increase in parking throughout the day.[117]

61. In summary, like Kenneth Laden, the Assistant Director of the Department of Transportation who testified at the hearing, we find the traffic conditions created on Highland Place by NCRC to be objectionable and that the mitigation measures identified by NCRC will not relieve the objectionable nature of the impacts if this application were granted.[118] While NCRC's operations' effect on neighborhood parking is substantial, the combination of both the volume and behavior of NCRC-related traffic on Highland Place we find to be objectionable. Like Mr. Laden and the Office of Planning, we believe that these sometimes dangerous conditions should be addressed before any expansion of NCRC is permitted.[119]

62. Ordway Street presents a different situation. Mr. George did not measure traffic on Ordway Street at all; and, although he did measure traffic on Ordway Street, Mr. Petersen said that NCRC's operations did not have much effect on Ordway Street's traffic volumes.[120] There were two reasons for this: first, in absolute terms, NCRC-related traffic on Ordway Street is much less than it is on Highland Place because most parents use the Highland Place entrance to bring their children to NCRC, not the Ordway Street entrance.[121] (A fact that is not surprising given the evident hazards associated with using the Ordway Street entrance.) Secondly, because Ordway Street is a through street linking arterials Wisconsin Avenue, 34th Street and Connecticut Avenue, it has a high volume of through traffic; unlike Highland Place which, being just a loop off Newark Street carries no through traffic.

63. The effect of NCRC's operations on parking, however, is different. Mr. Petersen's parking survey showed that, in his words, "Ordway Street serves as NCRC's parking lot."[122] According to Mr. Petersen, parking volume increased 159 percent on days when NCRC was in

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[117] October 28 Transcript at 106-107 (Petersen).

[118] September 16 Transcript at 321-322.

[119] *Id.* at 323-324 (Laden) and at 307 (Jackson: Office of Planning "not supportive" of the idea of building first and seeing if traffic can be controlled).

[120] October 28 Transcript at 105.

[121] Exhibit 116 at p. 2.

[122] October 28 Hearing Transcript at 107.

session, as compared to similar weekdays when it was not in session.[123] There were two reasons for that. First, most of the NCRC frontage on Ordway Street is unrestricted parking, so it is the location of choice for NCRC staff to park. Secondly, of course, is the park and walk phenomenon described above.

64. Like their neighbors on Highland Place, Ordway Street residents complained of NCRC cars parking illegally, blocking their driveways, making U-turns and damaging shrubs while turning around in the driveways; and they showed photographs to support these claims.[124]

65. We conclude that NCRC creates an objectionable traffic condition on Ordway Street of a different kind than it creates on Highland Place. The condition on Ordway Street does not relate to increased traffic volume but to excessive pedestrian traffic in the street and crossing the street, creating hazards not only to pedestrians but to drivers and to neighbors parked cars as drivers attempt to dodge pedestrians that are sharing the street with them. In addition, frequent illegal parking, U-turns and occasional double-standing while waiting for a parking place to free up all create hazards for other drivers and for neighbors attempting to exit their own driveways, if they have them. Any effort by NCRC to increase the number of its parents who use the Ordway Street entrance would increase the number and severity of these problems as Ordway residents are already reporting this school year.

G. NCRC's Traffic Management Plan

66. NCRC has proposed a traffic management plan that has essentially five elements: (1) the use of hired security guards and NCRC personnel to help with the morning drop-off (NCRC personnel only help at other drop off and pickup times), (2) holding the double-standing car queue farther back from the blind curve and dispatching cars to the drop-off area in front of the school in groups of three, (3) limited staggering of class arrivals and dismissals, (4) an enforcement system against parents who are observed to violate traffic regulations and (5) increased use of the Ordway Street entrance.

67. What NCRC proposes is little different from the "traffic management" conditions of the 1998 BZA Order under which it currently operates.[125] Those conditions require: distribution of a pamphlet to all adults associated with the school setting forth the traffic policies, "clearly defining" the carpool waiting line "to minimize the blocking of traffic **particularly at the curve on Highland Place**" [emphasis added], prohibiting the formation of a waiting line more than 10 minutes before a scheduled dismissal, use of staff at both Highland Place and Ordway Street to ensure that driveways and traffic are not blocked; marking of portions of 33rd Place as "no parking," and warning violators of traffic regulations and requesting MPD enforcement if violations persist.

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[123] *Id.* at 107.

[124] *See, e.g.* October 28 Transcript at 129 (J. Vanneman); November 4 Transcript at 21,22 (Hunsicker); 112 (Moreno), 113, 115 (Afzal), 145-146 (R. Vanneman), 174 (Fetterman), 193 (Shelburne), 207 (McLaughlin); Exhibits 203 (letter from Carabetta and Molinaroli) and 233 (letter from Biltchik).

[125] February 6 OP Report, Exhibit 2.

68. Any traffic management plan or traffic management conditions in a special exception must be carried out over a period of years, during which there is very little effective recourse available to remedy non-compliance. While we have previously ruled that NCRC's misrepresentations of its enrollment to the Board, the ANC and the Department of Transportation are not a sufficient reason to dismiss its application outright,[126] an applicant's record of past candor and compliance with a regulatory agency should be considered in evaluating the likelihood that promises of future conduct by the applicant will be fulfilled.

69. In this case, we find, on the basis of uncontradicted evidence,[127] that NCRC not only misrepresented its enrollment to the Board and to the ANC, but that it is in material non-compliance with the 1998 special exception granted by this Board. Those elements of material non-compliance are: NCRC has admitted that it has four more staff (32) than is permitted under its current special exception; NCRC has admitted to an enrollment of 170 that is nearly 50% greater than that permitted by its special exception; NCRC has admitted holding an "educators" workshop at its facilities that does not involve interaction with the children who attend NCRC or their parents, but is calculated to involve and did involve 100 other persons not otherwise connected with NCRC;[128] and NCRC has admitted holding numerous "special activities" outside its licensed operating hours and times of 8 to 5:30, Monday through Friday.[129]

70. In addition, we find from both testimony and the neighbors' videotape that NCRC has not consistently complied with the traffic management provisions of our prior order. In particular, NCRC seemed confused about whether it was even obligated to station a staff member at the

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[126] For the record, the parties in opposition believe this ruling to be in error. They argue that common sense as well as the equitable principle of "clean hands" should dictate that an applicant coming before a regulatory agency seeking permission to expand or enlarge its operations be in compliance with all current regulatory restrictions.

[127] That evidence is not only the testimony, at this hearing, of Councilman Mendelson and neighbor participants in the 1998 proceedings, but also the record of the testimony and argument offered by all of NCRC's representatives to this Board in 1998. November 4 Transcript at 155 and attachments to Exhibit 241. The self-serving *post hoc* letter of NCRC's counsel in the 1998 hearings to the effect that "everyone understood" that the number 120, which NCRC was using, did not refer to enrollment is belied by that same counsel's own 1998 letter which uses the very term, "enrollment" in relation to the number 120 and by a similar letter to the community from NCRC's acting director. *Compare* Exhibit 4 (Letter from Matthew J. Watson dated February 10, 2003) *with* letter of Matthew J. Watson dated October 24, 1997 to Phillip Mendelson: "in actual fact, the school enrollment is now at 108," attached to Exhibit 241.

[128] June 24 Transcript at 277, 295-296 (Piggott). We think this activity is not permitted by the special exception and, indeed is not permitted by the zoning regulations pursuant to which the special exception is granted. Holding "educators' conferences," "workshops," "training sessions" and the like for persons other than NCRC staff is not an activity for a "child development center." NCRC has requested express authority from us to hold more such "conferences." We decline to do that as being outside of our authority.

[129] *Sse, e.g.* June 24 Transcript at 257. The fact that the neighbors acquiesced in such activities over the years does not mean a *de facto* modification of our prior Orders, any more than parents have the power to waive the class size limitations contained in the Department of Health regulations that govern NCRC's operations. In any event, there was testimony from neighbors to the effect that the objectionable impacts of these "special events" were increasing, as were their number. October 28 Transcript at 16-17 (S. Beckner); November 4 Transcript at 107 (Pelletreau), 206 (McLaughlin). So, whatever "waiver" the community may have granted NCRC, it clearly has been withdrawn. The suggestion made by NCRC's counsel, that because these events are not specially prohibited by this Board's Order, they are permitted is ludicrous. The days of operation are specified as Monday through Friday, and the hours of operation specified are 8 a.m. to 5 p.m. Necessarily, any other NCRC activities outside of those times and days are unauthorized. To attempt to distinguish between "normal" NCRC operations and "special events" invites endless arguments over semantics that would render this Board's orders unenforceable if we were to accept this argument.

Ordway Street entrance during the morning drop off. The evidence is that NCRC failed to do so on numerous occasions. In testimony, neither NCRC's director nor the teacher in charge of supervising traffic activity seemed familiar with the traffic management provisions of the 1998 special exception under which NCRC now operates. In fact, the teacher who is supposed to be in charge of traffic management testified that she had **never** read the 1998 Order.[130]

71. Accordingly, based on this record of past non-compliance, we find it unlikely that the latest NCRC traffic management plan will be followed for the duration of any special exception that we might grant nor do we find, based on the experience reported by neighbors since 1998 and the similarities between this plan and the 1998 BZA Order conditions, that it will ameliorate the dangerous conditions that neighbors, the DC DOT and the Office of Planning have all described.[131]

72. Regarding the traffic management plan itself, we agree that holding the drop off line farther back from the blind curve and dispatching cars in groups of two is a good idea and may ameliorate the dangerous condition of having bi-directional traffic share a single lane of travel around the blind curve. We do not understand why NCRC elected to hire two traffic guards for the morning drop off only when even its own traffic consultant's study showed an equal or greater volume of traffic at the afternoon pickup time.[132] Indeed, there was anecdotal testimony from neighbors that many more of them were out and about at 3:00 in the afternoon than at 8:30 in the morning.[133] The staggering of class start times can reduce the bunching of cars at the morning drop off; but as evidence from neighbors shows, it has no effect on the length of the double-standing queue at pickup times when parents come and wait for their children.[134] We question whether the large numbers of staff members (including teachers) that NCRC claims it will put in the streets four times a day to manage traffic will, in fact, continue to be present. They all have other duties at the school, and managing traffic is an interruption in the performance of those duties. Likewise, we wonder how effective some "enforcement" system will be against parents. Although an enforcement system was mandated by the 1998 Order, the NCRC trustee in charge of the program testified that he knew nothing of that Order and that the

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[130] October 7 Transcript at 158 (Williams).

[131] As City Councilman Mendelson testified, neighbors and the ANC thought the conditions in the 1998 Order would reduce the adverse impact from traffic that neighbors described at that time. November 4 Transcript at 158, 160. However, experience has shown that these conditions do not mitigate the adverse impact. *Id.* at 163.

[132] September 16 Transcript at 251.

[133] November 4 Transcript at 109 (Sheehy), 188 (D. Craig); and October 28 Transcript at 95 (Kaufman), 127 (Taylor).

[134] In response to a last-minute submission of three morning observations on Highland Place by the Department of Transportation, neighbors submitted the results of a two and a half week survey of the morning drop off at both Ordway Street and Highland Place beginning on November 18 and running through December 13. Neighbors' December 15 submission. This showed that, while the length of the morning queue on Highland Place was reduced, this was accomplished by spreading out students' arrivals for almost an hour period, well beyond the 8:50 end of the drop off time specified by NCRC's witnesses. Neighbors observed that sometimes more than half of the children arriving at both entrances came outside of the 20-minute time identified by NCRC as the morning drop-off time and also, significantly, outside of the time when NCRC has traffic assistants in the streets. Moreover, photographs included with the submission showed that, especially in inclement weather, the queue was quite large at pickup times.

"penalty process" had only begun this year.[135] Finally, as we have concluded earlier, the Ordway Street entrance is not safe for the dropping off and picking up of children. We reject categorically any traffic management plan that calls for use of that entrance, much less one that calls for expanding the number of cars that use that entrance.[136]

73. The traffic management plan completely fails to address the "parking and walking" phenomenon – its safety aspects and its impact on the neighborhood. It appears that NCRC encourages parking and walking because that practice shortens the length of the drop off queue. However, parking and walking turns the immediate neighborhood into a situation worse than a shopping center parking lot. Parents are continually jockeying (and, lately, circling the block) for parking spaces. They park, remove their child, walk the child into the school, return to their car and leave, in the space of about five minutes – only to be replaced by another NCRC car that repeats the process all over again. We have seen videos of other cars getting their bumpers crunched, cars parked illegally and cars blocking neighbors' driveways – all the result of this process.

74. In summary, while we are not called upon to decide the question of NCRC's continuing operations in this case but only to decide whether NCRC can expand its enrollment above its current, non-compliant, level and substantially expand its facilities, it is clear that NCRC's current operations create an objectionable traffic condition on Highland Place and any expansion will only make them worse.[137] We do not find that NCRC's traffic management plan, even if faithfully implemented to the letter, will materially ameliorate these objectionable traffic conditions.

H. Noise, activity, visual or other objectionable conditions

75. It is clear from the photographs submitted and the testimony, that there is no barrier, natural or man-made, between NCRC and its neighbors to the west, the Beckners and the Littles. NCRC's plans show a fairly substantial natural barrier to be planted along the boundary with the Little's house but only a few shrubs to be planted along the boundary with the Beckner's house.[138] This is inadequate to shield the neighbors visually or attenuate playground noise.

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[135] October 7 Transcript at 125, 135 (Niles).

[136] We note anecdotal evidence from a number of Ordway Street residents that NCRC use of the Ordway Street entrance has increased this year, no doubt in an effort to reduce the size of the double-standing queue on Highland Place that was the subject of attention from the Department of Transportation in its February report. We believe this is an instance where solving one problem creates another, equally dangerous, one. *See, e.g.* November 4 Transcript at 174 (Fetterman); Exhibit 203 (letter from Carabetta and Molinaroli) October 28 Transcript at 156-157 (J. Vanneman).

[137] We reject NCRC's suggestion that we overlook this problem because, in the Department of Transportation's April 14, 2003 Supplement (Exhibit 136), the Department's Assistant Director opined that the addition of 10 more children would not make the condition "significantly worse." We reject this for two reasons. First, as the Department's February report (included with the February OP Report) notes, the last approved enrollment for NCRC was 120 children; and NCRC now seeks authorization of 184 children, an increase of 64, not 10 children. Secondly, we believe it irresponsible of us to perpetuate an unsafe condition, which is what a grant of approval of this Application would do, whether for 10 children or 64.

[138] Exhibit 206.

76. NCRC's plans call for construction of buildings of an institutional scale and appearance in what heretofore had been a neighborhood of exclusively residences, even, in some cases, very large residences like the house that is NCRC's principal building. Steven Hunsicker, a party to the case, and other Ordway Street neighbors point out that NCRC's plans call for the construction of an eight-foot high (or more), solid façade covering more than one half of NCRC's street frontage, by linking up the front of the proposed new classroom building with the existing Playhouse.[139] In addition, not shown clearly on the drawings, there will have to be a fence connecting the Playhouse with the two-story portion of the new classroom building to keep the children from falling over the edge on to the ground in front of Ordway Street. Since this wall-like structure is to the south of these neighbors, this will block winter sun that currently falls on their houses.[140] In addition the proposed maintenance building, on the top of the hill to the east, will cast a shadow across Ordway Street, especially in the winter.[141] While there was no testimony about what activities would take place in the "maintenance building," its very title conveys the sense that activities will be conducted there that are not customarily found in residential neighborhoods; and they will be conducted right on the property line of a neighboring house (Gaylord Neely/Linda Badami).[142]

77. Likewise, adjacent neighbor Henry Little complains that the proposed new classroom building, set back the minimum distance from the property will completely "box in" his rear yard view with a building that, although no higher than the peak of the roof of his house, is of much greater volume.[143] Similarly adjacent neighbor to the east, Linda Badami, complains that the proposed addition on the back of the existing main house will block both light and view from her house, which is located close to the property line.[144] This addition will increase the footprint of the already large existing main building by one-third.

78. All of these neighbors are concerned about the consequences of the considerable site disturbance that will be required to bury the one-story portion of the proposed new classroom building underground and the long-term consequences for drainage and runoff.[145]

79. We find that NCRC's proposal would create two disproportionately large buildings in the neighborhood with significant visual impacts, impacts on light and possible impacts on drainage that would affect neighboring property owners. We also find that even the current site is inadequately screened to the west, a deficiency only partially remedied in NCRC's plans. If we were to approve any part of this project, we would require more dense screening, at least six feet high, along the entire western boundary of NCRC's property.

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[139] October 28 Transcript at 116 (Schwartz: qualified and recognized as an expert in urban planning and architecture); November 4 Transcript at 24; Exhibit 204 (Hunsicker); November 4 Transcript at 75 (Badami); November 4 Transcript at 174 (Fetterman).

[140] October 28 Transcript at 130 (Vanneman); November 4 Transcript at 24; Exhibit 204 (Hunsicker) and November 4 Transcript at 80, 81 (Little).

[141] October 28 Transcript at 130 (Vanneman).

[142] November 4 Transcript at 41 (Badami).

[143] *Id.* at 79, 81.

[144] *Id.* at 43.

[145] *Id.* at 23.

I. Code and Licensing Requirements

80. NCRC has not submitted any document that shows that it is currently in compliance with all fire code requirements and building access requirements. Nor has NCRC submitted any document that shows that its proposed expansion meets such requirements.

II. CONCLUSIONS OF LAW AND OPINION

This matter was advertised for the applicant is seeking a variance and a special exception. With regard to the variance, the Board first had to determine whether a use variance or an area variance was the appropriate remedy.[146]

A. The construction of another principal building on a single subdivided lot requires a use variance.

A use variance "permits a use other than that prescribed by the zoning regulations" whereas an "area variance has no relation to change of use but, rather is primarily a grant to erect, alter or use a structure for a permitted use in a manner other than that prescribed by the ordinance." *Ass'n for Preservation of 1700 Block of N Street v. Board of Zoning Adjustment*, 384 A.2d 674 (D.C. 1978). A use variance is required by an applicant when the applicant seeks to use a structure or property in a manner other than that prescribed by the zoning regulations for that site, as distinct from a use which is permitted by special exception or otherwise. *See Ass'n for Preservation of 1700 Block of N Street v. Board of Zoning Adjustment*, 384 A.2d 674 (D.C. 1978). In *1700 Block of N Street*, the Court stated that

> [t]he distinction between a use variance and an area variance is that the former permits a use other than that prescribed by the zoning regulations whereas an area variance has no relation to change of use. It is primarily a grant to erect, alter or use a structure for a permitted use in a manner other than that prescribed by the ordinance. [footnotes and citations omitted].

Indeed, even where the requested variance is a hybrid, the court has still applied the stricter burden of proof applicable to a use variance. *See Taylor v. Board of Zoning Adjustment*, 308 A.2d 230, 233 (D.C. 1973).

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[146] Although we concluded during the hearing that NCRC needed an area variance so as to construct another principal building on a single subdivided lot, we now recognize that the underlying use of the building for a child development center is irrelevant to consideration as to whether the relief requested should be characterized as an area or use variance. The prohibition in the zoning regulation is unconcerned with what use is being made of the second principal building but only with whether the lot in question can be used at all for two principal buildings.

In the leading case of *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535 (D.C. 1972), the Court interpreted D.C. Code §§ 5-420, 5-424(g)(3) and the corresponding provision of the zoning regulations, 11 D.C.M.R. § 3103.2, which permits the Board to grant variances, pursuant to the following:

> Where, by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under this Act would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from such strict application so as to relieve such difficulties or hardship, provided such relief can be granted without substantial determent to the public good and without substantially impairing the intent, purpose, and integrity of the zoning plan as embodied in the zoning regulations and map.

The above regulation sets up separate statutory requisites to the granting of variances, i.e., a showing of "practical difficulties" or "undue hardship." In *Palmer*, the court adopted the dichotomy recognized in other jurisdictions between area variances and use variances, applying the statutory requisite of "practical difficulties" to a showing of the former, and applying the separate statutory requisite of "undue hardship" to a showing of the latter. *Id.* at 541. Because "an area variance, relating to restrictions such as side yard, rear yard, frontage, set-back or minimum lot requirements, does not alter the character of the zoned district, whereas a use variance seeks a use ordinarily prohibited in the particular district", the court held that a "more stringent showing is warranted with respect to the more drastic relief inherent in a use variance." *Id.* at 541. Indeed, the typical area variance application seeks relief from precisely one of those **physical** requirements of the zoning regulations for which the lot's unique characteristics make compliance impossible. Such requirements typically include street frontage, setback, lot coverage and the like. NCRC's application, of course, does not seek relief of that type; but seeks to use the lot for "use" that is precluded by the zoning regulations, namely for two principal buildings, rather than one.

The principal rationale for the different standards applicable to the two types of variances is that an area variance does not affect the neighborhood or adjacent landowners with the maintenance of an incompatible use of the subject property. *Association For The Preservation Of 1700 Block Of N Street, N.W. v. Board of Zoning Adjustment*, 384 A.2d 674, 678 (D.C. 1978). That is, an area variance does not alter the character of the zoned district (i.e., it does not deviate from the uses permitted in that district), whereas a use variance seeks a use ordinarily prohibited in the particular district. *Monaco v. Board of Zoning Adjustment*, 409 A.2d 1067, 1072 n.17 (D.C. 1979); *1700 Block of N Street, N.W.*, 384 A.2d at 677; *Palmer*, 287 A.2d at 541.[147]

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[147] In 1958, when the present zoning structure was created, a zoning advisory panel was also created to study modifications to the regulations to facilitate public housing. Report of the Zoning Advisory Council, p. 2. The 11-member panel (composed of District of Columbia and Federal officials and a representative of the Office of the Corporation Counsel) completed its work in 1963 and determined that the adoption of a uniform "Building Lot

In our decision in *Application No. 16693 of Carroll O. Little*, we held that a variance from § 3202.3 is a use variance.

In BZA Application No. 16693, we stated that :

> Since a variance from § 3202.3 would result in a use ordinarily prohibited in all zone districts, [*i.e.*] the use of a single lot for the construction of an addition to one of two principal structures on the lot, the application must meet the higher burden of proof established for *use variances*. *See Wolf v. District of Columbia Bd. of Zoning Adjustment*, 397 A.2d 936, 941-42 (D.C. 1979). (Emphasis added.)

Finding a variance pursuant to § 3202.3 to be a use variance, we went on to state that:

> Under the three-prong test for use variances set out in 11 D.C.M.R. § 3103.2, the applicant must demonstrate that (1) as a result of exceptional narrowness, shallowness, or shape of property or by reason of exceptional topographic conditions or another extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter *undue hardship* if § 3202.3 is strictly applied; and (3) the requested variance will not result in substantial detriment to the public good or the zone plan. *See Wolf*, 397 A.2d at 941.

The property at issue in the *Little* case was improved with two structures – a single-family dwelling, occupied by the applicant/owner, and a small residential structure constructed in the 1920s, which was in poor condition and unsafe for human habitation. Application No. 16693.

We are bound by our prior administrative decisions that such relief requires a use variance under section 3202.3 of the zoning regulations. *See District of Columbia v. Fisher*, 258 A.2d 456, 458 (D.C. 1969). S*ee also Upper Georgia Avenue Planning Committee v. Alcoholic Beverage Control Board*, 500 A.2d 987, 993 n.7 *citing Food Marketing Institute v. ICC*, 587 F.2d 1285 (D.D.C. 1978)(wherein the agency's departure from its precedent led to a remand from the Court of Appeals); *Draude v. Board of Zoning Adjustment*, 527 A.2d 1242, 1252 (D.C.

Control" regulation would be the best means of accomplishing this objective. *Id.* According to the Zoning Advisory Council, it was explained that the adoption of section 8103.3 (now section 3202.3) would "provide the most drastic policy change during the more than four decades of zoning control in the District of Columbia." *Id.* It was explained that "the proposal would prohibit (as a matter of right) the issuance of all future permits to erect, construct, convert or alter any building which is not now located upon, or which could not be legally be converted to a sub-divided lot of record." *Id.* This was aimed at stopping the filing of building plans with "outline surveys." The Zoning Commission adopted the provision now at issue. Testimony of Mr. Henry F. Davenport p. 3. So, a property owner seeking to construct another principal building on a single subdivided lot of record was left with two options, either obtain a theoretical lot under § 2516 or seek the creation of a substandard lot of record and obtain an area variance from the side yard, rear yard and width requirements. In the absence of doing either, NCRC would need a use variance.

1987)(given that the BZA had, in past cases, accepted that adverse effect on light and air to neighboring property could constitute a reason for denying a variance under the zoning regulations, it was bound to count in the effect on light and air in special exception cases); *French v. Board of Zoning Adjustment*, 658 A.2d 1023, 1033 (D.C. 1995)(Board upheld where its interpretation of section 217.1 of the zoning regulations was consistent with its interpretation of that provision in four (4) prior cases). Accordingly, we conclude that the variance relief sought by NCRC is for a use variance and that NCRC has not presented any evidence to demonstrate that it meets the stringent requirements for such a variance. Furthermore, since NCRC has not explored he myriad options available to it to comply with the regulation, we conclude that the hardship, to the extent one may be alleged, is self-created and also precludes the relief sought.

We also note that, if we were to accept NCRC's position regarding the relief requested it would result in the need for another variance since construction of the new building on the single subdivided lot is within the required side yard of the existing residence/child development center. However, a "yard required by the provisions of [the zoning regulations] * * * shall not be occupied by any building or structure." As such, NCRC would need additional variance relief from that requirement, which NCRC did not seek in this application. Such a consequence also counsels against granting the relief requested by NCRC.

B. NCRC does not meet the requirements for an area variance for its use of a single record lot.

Even if we were to agree that the appropriate relief for the construction of a second principal building on one single subdivided lot was an area variance, NCRC has not presented any evidence that it meets the requirements since (1) the property is not unique, (2) there are no practical difficulties in complying with the zoning regulation requirement for a single subdivided lot for each principal building and (3) the requested variance will adversely impact the surrounding neighborhood. Furthermore, although not an absolute bar to an area variance, we conclude that the requested relief arises from a self-created hardship because it is a direct result of NCRC's deliberate actions. Therefore, it further demonstrates that the practical difficulty alleged is non-existing.

NCRC must show that the property is unique, that it would encounter practical difficulties if the zoning regulations were strictly applied and that approval of the variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zoning plan.[148]

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[148] NCRC argued that, pursuant to the decision in *Monaco v. Board of Zoning Adjustment*, 407 A.2d 1091 (D.C. 1979), and *National Black Child Development Institute, Inc. v. Board of Zoning Adjustment*, 483 A.2d 687 (D.C. 1984), a more flexible standard applies when considering a non-profit entity as an applicant for an area variance. Those cases deal with the "hardship" standard applicable in use variance cases (not area variance cases) because non-profits are not seeking to maximize investments. Thus, those cases have no application to the area variance review required by the Board. Moreover, they would provide no support for the Application if we were to treat this as a use variance since NCRC consistently testified that operation of the child development center would not be precluded if it did not obtain any variance relief.

The mere fact that the property is located within the historic district or that it shares the topography noted in the designation of that historic district does not make the Property unique. *Gilmartin v. Board of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990); *Capitol Hill Restoration Society v. Board of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987). The fact that new construction is subject to historic preservation review or that the property has ample open space and a large play ground, also does not make the property unique. Indeed, NCRC's witness on this issue, its architect, besides professing ignorance as to the difference between an area variance and a use variance or that such relief was even needed, testified that he really was not familiar with any aspect of the surrounding properties but ultimately agreed that neighboring properties had the same characteristics as that owned by NCRC.

Furthermore, as the Court stated in *Capital Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, "the property owner must present proof that "the circumstances which create the hardship uniquely affect the petitioner's property * * * ." *Taylor*, *supra* note 6, 308 A.2d at 234 (emphasis in original). *Id.* The Court stated further that:

> Where the circumstances which create the hardship or difficulty affect the entire neighborhood rather than merely a specific piece of property, the problem is properly addressed by seeking amendment of the regulations from the Zoning Commission. *** If the BZA were to grant variances where the hardship or difficulty is not peculiar to a particular piece of property, similar requests could follow from property owners similarly situated, "which, as a matter of due process, would have to be granted." *Id.* (citations omitted).

The Court went on to invalidate the BZA's grant of an area variance that was based on the effect of the property's location in an historic district and the property's large size, coupled with topographical conditions which affected adjacent properties.

As illustrated above, the property is not unique. NCRC provided the Board with a list of factors it claims result in the property being unique, and NCRC's architect, Chuck Anthony, testified that the property is unique because of its size, 45,000 square feet, because it is a through lot from Ordway to Highland Place, because it is improved with buildings which contribute to the Cleveland Park Historic District, and because it has a significant grade change. Mr. Anthony included an additional grounds for uniqueness, namely, that the property is unique because, **after** it is improved, over 80% of the site will be devoted to open space. A future condition has nothing to do with whether the property is today unique.[149]

Instead, as the testimony demonstrated, none of those factors make the property unique. In the first place, like the property in *Capitol Hill*, NCRC's property shares a characteristic common to all of its neighboring properties, it is in the Cleveland Park Historic District. Second, the large size of the lot is not unique. That is a characteristic shared by some of its neighbors and, in fact, instead of being an impediment, is actually, as OP recognized, an advantage since it is large enough to be subdivided into two record lots. Lastly, the topography and the fact that it

[149] May 6 Transcript at 83-84.

is a through lot are other attributes that are shared by the same NCRC neighbors, which Mr. Anthony admitted.[150] Thus, there isn't even a "confluence of factors" which would support a finding of uniqueness.

Even if we were to adopt NCRC's claims, the factors set forth by NCRC do not give rise to any practical difficulties in NCRC's ability to use its property if the zoning regulations were to be strictly applied. In responding to the issue of practical difficulty, Mr. Anthony stated that the property's location in the Cleveland Park Historic District and the need to match the character of the historic district and the site by separating the new classroom building and the existing Playhouse building is what creates the "practical difficulty" of complying with the requirement that the second principal building be located on another record lot.[151] Mr. Anthony went on to note that, by creating another record lot, you would "diminish the open wooded setting" and need to comply with other zoning area requirements.[152]

On cross-examination, Mr. Anthony acknowledged that he had never developed plans that provided for the buildings to be located on two record lots. Mr. Anthony said that creating a new lot line might create other issues but it was only a very quick look since he thought it was not something the neighbors would go along with. Ultimately, Mr. Anthony testified that he did not know if NCRC would need any other area variance or zoning relief if he subdivided the lots into two lots of record and, in any event, he is not even sure of the definition of a variance since he has never been asked to testify on such an issue before this Board.[153] Since he did not believe, at the time he certified the application, that he needed any variance relief to construct two buildings on one record lot, his post-hoc rationalizations are not credible.

On rebuttal, Mr. Anthony testified that the requirement of the zoning regulations that precludes two principal buildings on a single subdivided lot was "manufactured merely as an impediment to the project," betraying a lack of understanding of the zoning regulations applicable to the proposed development.[154] In any event, Mr. Anthony also testified that, if a separate lot was created and he followed the existing plans (which he prepared at a time when he was unaware that he could not, as a matter of right, construct two principal buildings on a single subdivided lot) subdividing the lot in the way that he analyzed would create a situation in which the existing playhouse would not meet the side yard setback. In other words, Mr. Anthony did not try and subdivide the lot in a manner which would avoid creating a need for any other variances; he simply looked at it one way, found a potential need to obtain other variances (presumably the result he or his client wanted) and gave up.

Mr. Anthony also stated that a subdivision would also create the need for compliance with the off-street parking requirements, or for a variance from those requirements. However, this was either inconsistent with his testimony that the entire site, including the Playhouse, which

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[150] *Id.* at 135.

[151] *Id.* at 86.

[152] *Id.*

[153] June 16 Transcript at 119-120.

[154] November 18 Transcript at 10.

would be located on the new lot, does not have to comply with the off-street parking requirements, or is self-serving since Mr. Anthony did not make any attempt to show where the parking could be accommodated on the new lot. In conclusion, Mr. Anthony stated that a new lot was undesirable because compliance with the zoning regulations through the only subdivision he considered might result in a loss of some other trees. This testimony also failed to take into account any other subdivision which would comply with the zoning regulations, such as a division line that was eight feet from the eastern wall of the playhouse on a southwesterly slant back to Highland Place. Moreover, the loss of some unidentified trees does not constitute a "practical difficulty" as implementation of NCRC's current plans would result in the destruction of a substantial number of trees to make way for the new structures.

The decisions of the Board relied upon in Tab B of NCRC's prehearing statement do not support any "practical difficulties" claim. Moreover, neither the large size of the Property, the three (3) existing buildings, the topography of the Property, the very large playground and significant open space nor HPRB's grant of conceptual approval of NCRC's proposed institutional campus create any difficulty in its ability to continue to use the property as a nursery school or to create two record lots to comply with zoning requirements.

The fact that NCRC's difficulties are self-created (or self-imposed) is one of the many factors that must be taken into account by us in determining whether there are any practical difficulties in the area variance context. *See Gilmartin v. Board of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990); *Azcarate v. Board of Zoning Adjustment*, 388 A.2d 1233, 1239 (D.C. 1978) *see also* 83 Am. Jr. 2nd, Zoning & Planning § 828. While a self-created hardship is not an absolute bar to area variance relief, as it is with a use variance, it is an aspect of the practical difficulty analysis. In *Azcarate*, the court noted that the self-created hardship rule is a "manifestation of the equitable principle of estoppel," and explained that "where an applicant for an area variance * * * has committed an *affirmative act* which directly results in the hardship complained of, variance relief will be withheld." *Azcarate*, 388 A.2d at 1239, *citing* 2 A. RATHKOPF, LAW OF ZONING, § 48-6 (3rd ed. 1972). That is the situation here.

As we have found and as testified to by the applicant, NCRC does not need the requested relief in order to continue its use of the site as a child development center, to renovate and continue to use the existing structures, or to subdivide the lot. Nor did those in opposition have any burden to demonstrate that the proposed construction could be built on a separate subdivided lot. Rather, the burden rested with NCRC to demonstrate that there was no way in which the lots could be subdivided. Instead, NCRC's architect merely looked at one alternative and admitted that he had never looked at any other means of doing so. This self-serving testimony, in the midst of the hearings, was not credible. Nevertheless, it is clear from a review of the site plan, when considering the applicable area requirements, that the existing 45,000 square foot lot, which is 209 feet wide on Highland Place and 230 feet wide on Ordway Street, and which is approximately 180 feet deep at a point immediately to the east of the existing playhouse, could be subdivided in a manner which would have permitted the construction proposed without the need for any other zoning relief.[155] This was the testimony of the Office of Planning, as well as the expert witness presented by the Cleveland Park Neighbors.[156]

[155] The site is zoned R-1-B. The zoning regulations, § 401.3, require a minimum lot area of 5,000 square feet and a minimum lot width of 50 feet. Dividing the lot from a point close to the center of the lot on Highland Place, at a

Finally, whether the relief be deemed an area or use variance, the fact still remains that the proposed relief would create a substantial burden on the surrounding community, which is already overtaxed by NCRC's unauthorized expansion of its enrollment, and the requested relief is not consistent with the Zone Plan. As we have already noted, when the subject zoning requirement was adopted the 11-member panel that studied the issue and recommended adoption of the current prohibition said that the adoption of this regulation would "provide the most drastic policy change during the more than four decades of zoning control in the District of Columbia." The proposal would prohibit the issuance of all future permits to erect, construct, convert or alter any building which is not now located upon, or which could not be legally be converted to a sub-divided lot of record." In only one instance, *Application of Carroll O. Little*, has the Board reviewed a variance request by a property owner to construct a second principal building on an existing subdivided lot. In that instance the relief was denied. And the Board has certainly never granted a variance to a property owner whose lot is large enough to be subdivided into either another record lot or a theoretical lot, as here.

By granting the relief requested, the Board will do violence to the zoning regulation in other ways as well. The consequence of allowing more than one principal building on a single subdivided lot, is it then requires a variance from other zoning prohibitions, since a "yard required by the provisions of [the zoning regulations] * * * shall not be occupied by any building or structure." Thus, NCRC is not entitled to an area variance.

C. Area Variance Required From The Parking Requirements

Section 2100.5 of the zoning regulations provides that:

> No additional parking spaces shall be required for a historic landmark or a building or structure located in a historic district which is certified by the state historic preservation officer *as contributing* to the character of that historic district.

11 D.C.M.R. § 2100.5 (emphasis added). Clearly, section 2100.5, by its terms, only applies to historic **landmarks** or **contributing** buildings to historic districts, not to the lot which these buildings occupy. *Id.* NCRC's proposal includes no off-street parking on its property because, it argues, Section 2100.5 exempts it from this requirement. We conclude that NCRC is not exempted from the on-site parking requirements by Section 2100.5 and therefore must obtain an area variance from the parking requirements.

NCRC argued that its proposed construction came within the purview of Section 2100.5 because its new construction was considered compatible with the character of the Cleveland Park Historic District and therefore the new structure must be treated as a "contributing" building under that section. Specifically, NCRC points out that the Historic Preservation Division

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diagonal so that it leaves an 8-foot side yard for the existing playhouse, an accessory building, would not disturb any trees, according to NCRC's Landscape Plan, and would result in two conforming lots.

[156] October 28 Transcript at 120 (Schwartz, accepted and qualified as an expert in zoning and urban planning.)

("HPD") of the Office of Planning opined that the new classroom building ("Carriage House") will be "generally compatible in its height, orientation, rooflines, and materials' use with the residential character of Ordway Street and the historic district." NCRC also relies upon HPD's recommendation, adopted by the Historic Preservation Review Board ("HPRB"), that the design of the proposed additions be approved "as consistent with the purposes of the preservation act." *Id.*

NCRC's argument confuses compatibility with contributory status. While they may be "compatible" with the existing contributing buildings in the Cleveland Park Historic District, the new construction proposed by NCRC will not produce "contributing buildings" to the historic district and thus NCRC cannot avail itself of the waiver provided in § 2100.5 of the zoning regulations.

In order to determine whether a building or structure is a contributing building to its historic district, one must first look to the period of significance of the historic district in relation to the construction of the building or structure. In accordance with *National Register Bulletin 15*, and its other Bulletins, properties can be eligible for the National Register if they are associated with events important in the defined historic context. Mere association with historic events is insufficient; the association must be significant as well.

> *Period of Significance* is defined in the *National Register* as:
>
> the length of time when a property was associated with important events, activities, or persons, or attained the characteristics which qualify it for National Register listing. Period of significance usually begins with the date when significant activities or events began giving the property its historic significance.

Id. Generally, fifty years is used as the closing date for periods of significance. *Id.* In order for events or activities occurring within the last fifty (50) years to justify extending a period of significance beyond this limitation, the events or activities must be "exceptionally important." *Id.*

The Mayor's agent for D.C. Law 2-144, has concluded that buildings and structures in historic districts constructed outside the period of significance cannot be contributing buildings. *Id., citing* HPA Nos. 96-214 and 96-342; HPA No. 00-31; HPA No. 01-149; and HPA No. 02-223. The period of significance for the Cleveland Park Historic District is 1880-1941. Thus, although the HPRB may have found that the proposed new buildings or structures to NCRC's property to be "consistent" or "compatible" with the surrounding historic district, such a finding does not support NCRC's assertion that the new buildings or structures can be characterized as contributing buildings to the historic district, as such terms were intended to be used in the zoning regulations. Instead, because the new buildings or structures have yet to be constructed and the period of significance ended more than sixty (60) years ago, they could not be possibly be considered contributing buildings and, therefore, will not be eligible for the parking waiver in accordance with section 2100.5 of the zoning regulations.

Additionally, section 2100.7 of the zoning regulations provides that, in the event that the intensity of use of a building or structure existing before May 12, 1958 is increased by more than twenty-five percent (25%) of the aggregate, parking must be provided for the expanded use. 11 D.C.M.R. §2100.7. This provision also requires the variance relief claimed necessary by the Cleveland Park Neighbors and the Office of Planning.

NCRC's interpretation of the parking regulations relating to historic structures is also mistaken. First, section 2100.5 of the zoning regulations applies only to contributing buildings, not new construction. Section 2100.6 of the zoning regulations deals with the situation where there are additions to a contributing historic building such that the intensity of use increases. When the intensity of uses increases more than twenty-five percent (25%) of the level present in 1958, parking must be provided for the increased use. With regard to the alleged "parking credit" provided in the zoning regulations, sections 2100.1 and 2100.4 of the zoning regulations only apply, by their very terms, when "the use of a *building or structure* ***is changed to another use*** which requires more parking spaces than required for the use existing use". 11 D.C.M.R. § 2100.4. In the present case, there is no change in use – NCRC is still using the main building and Playhouse as a child development center. As this credit only applies to existing structures, it has no effect on the required parking for the new classroom building. Accordingly, the variance relief sought from the parking requirements should be denied as NCRC has not demonstrated that it would suffer a practical difficulty from application of those requirements.

D. NCRC does not meet the requirements for a Special Exception

The Board may grant special exceptions, "where, * * * those special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps * * * ." *Levy v. Board of Zoning Adjustment*, 570 A.2d 739, 742 (D.C. 1990) (quoting 11 D.C.M.R. § 3108.1). *See Rose Lees Hardy Home and School Association v. District of Columbia Board of Zoning Adjustment*, 324 A.2d 701, 706 (D.C. 1974).

With regard to special exceptions, such a use

> [i]s part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible *absent any fact or circumstance negating the presumption.* The duties given the Board are to judge whether the *neighboring properties in the general neighborhood would be adversely affected* and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

Schultz v. Pritts, 291 Md. 1, 17, 432 A.2d 1319, 1325 (1985) (emphasis in original). Nevertheless, a special exception must be denied when the grant of such a request would result