GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

March 4, 2004

Richard B. Nettler, Esq.
Robins, Kaplan, Miller & Ciresi LLP
1801 K Street, N.W., Suite 1200
Washington, D.C. 20006-1307

Re: BZA Application No. 16970 – NCRC

Dear Mr. Nettler:

The Office of Zoning (OZ) received your "Response To Reconsideration Suggestion By The Board", dated February 24, 2004, concerning the above-referenced application. The OZ is returning this correspondence to you because the record in this case is closed. Please be advised that all parties will be informed should the record be reopened by the Board of Zoning Adjustment (Board) for further deliberation. To date, the Board has not decided to reconsider or rehear this case. However, as you know, the Board has scheduled a special public meeting to discuss this application at 9:00 AM on Tuesday, March 9, 2004.

Please call Richard Nero, Chief, Support Services, on (202) 727-6311, if you have any questions relevant to the foregoing.

SINCERELY,

JERRILY R. KRESS, FAIA
Director, Office of Zoning

Attachment
Certificate of Service to Parties

BZA
Case No. 16970
Exhibit No. 347

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.347

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16970

As Director of the Office of Zoning, I hereby certify and attest that on MAR 0 5 2004 a copy of the attached letter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Maureen E. Dwyer, Esq.
Paul Tummonds, Esq.
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037

Nancy MacWood, Chairperson
Advisory Neighborhood Commission 3C
3417 Woodley Road, N.W.
Washington, D.C. 20016

The Cleveland Park Neighbors
c/o Richard Nettler, Esq.
Robins, Kaplan, Miller & Ciresi, LLP
Suite 1200
1801 K Street, N.W.
Washington, D.C. 20006

Gaylord Neely & Linda Badami
3207 Highland Place, N.W.
Washington, D.C. 20008

Sallie R. Beckner and R. Bruce Beckner
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1400 16th Street, N.W.
Washington, D.C. 20036

The Friends of NCRC
c/o Anne Large
3520 35th Street, N.W.
Washington, D.C. 20016

Katharine Marshall
3208 Highland Place, N.W.
Washington, D.C. 20008

Henry P. Little
The Nature Conservancy
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Steven R. Hunsicker
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The Warner
1299 Pennsylania Avenue, N.W.
Washington, D.C. 20004

Ellen McCarthy
Deputy Director
Office of Planning
801 North Capitol Street, N.E.
Washington, D.C. 20002

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

rsn

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
ATTORNEYS AT LAW

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RICHARD B. NETTLER
(202) 736-2720

February 24, 2004

BY HAND

Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
Mr. Anthony Hood
Commissioner
D.C. Zoning Commission
441 Fourth Street, N.W., Room 201
Washington, D.C. 20001

Re: BZA Application No. 16970
National Child Research Center
3209 Highland Place, N.W.; Square 2072, Lot 30 (the "Property")

RESPONSE TO RECONSIDERATION SUGGESTION BY THE BOARD

Dear Chairman Griffis, Commissioner Hood and members of the Board of Zoning Adjustment:

It has been related to me and the other parties in opposition to the above-referenced application, that the Board of Zoning Adjustment ("Board"), on February 17, 2004, without Commissioner Hood being present, decided to reconsider, at the scheduled March 2 public meeting, a portion of its decision denying the application for special exception filed by National Child Research Center ("NCRC"). Specifically, we have heard that the Board intends to consider "bifurcating" the application to seek separate approval of the proposed new construction without addressing the question of NCRC enrollment or staffing. We note that, as of today, no party in opposition has received notice of such a meeting or hearing, nor has the agenda for the BZA's meetings, posted on the Office of Zoning website, been modified to reflect such a hearing or meeting.

On behalf of the Cleveland Park Neighbors and other parties in opposition, we request that the Board refrain from taking such action for the reasons stated below. In addition, we request that the Board hold a hearing to determine if there have been ex parte contacts with any Board member on the issue from anyone speaking for or on behalf of the applicant, either in a representative capacity or otherwise, either subsequent to the Board's closing of the record in December 2003,

BZA
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Exhibit No.

when the parties submitted their proposed findings of fact and conclusions of law, or after the January 6, 2004 public meeting.

There is no legal basis for the action proposed to be taken by the Board. In the first place, the issue about bifurcating the Board's decision on the special exception was raised, albeit inappropriately, by applicant's counsel during the Board's deliberations on January 6, 2004, and rejected by the Board. Neither Counsel for the Cleveland Park Neighbors nor any of the other parties in opposition were notified that such a request would be made, or even that any of the parties or their representatives would be allowed to address the Board for any purpose at that meeting. NCRC's bifurcation request was raised inappropriately by counsel for the applicant at the January 6 meeting. Counsel was out of order, and her request should not have been entertained.

The bifurcation issue was raised again by the Applicant in a written submission from its counsel, lodged with Board on January 12, 2004. The next day, January 13, the Applicant's submission was returned by the Director of the Office of Zoning as procedurally inappropriate. Today, there should be no copies of that submission in any file; and that submission should never have been delivered to – or read by – any Board member.

More importantly, the Board has not yet issued its final decision in this matter. Post-hearing procedures are governed by 11 D.C.M.R. § 3124. Under 11 D.C.M.R. § 3124.2, the Board may, prior to the filing of a final decision, on its own motion, reopen the record and require further hearing on issues designated by the Board. Notice of a further hearing must be given to the parties ten (10) days prior to such a hearing. The Board has not provided such notice to the parties, nor has it scheduled a further hearing.

Under 11 D.C.M.R. § 3126.7, the Board may, on its own motion, decide to reconsider or rehear an application, but it may only do so not later than 10 days following the filing of a final decision. A final decision has not been filed, nor has a motion for reconsideration been properly filed with the Board, again because no final decision has yet been issued. Thus, the Board cannot rely on §3126.7 for reconsideration now.

As far as we are aware, the applicant has not filed a proper application for reconsideration. If the Board's action is prompted by a request or conversation of which we are not aware, the parties in opposition have a right to know of such an ex parte effort. We therefore request that the Board place on the record prior to any further proceeding any ex parte contacts with the applicant or any person concerning this matter.

Finally, the Board should not entertain a request to "bifurcate" this proceeding and to decide whether to permit new construction without dealing with the troublesome enrollment issue. We

understand that it is the applicant's view that there is at present no limitation on the enrollment at the Center. If the Board were to consider and approve construction and take no action on or deny the application to increase enrollment, we believe NCRC would proceed to construct new facilities and populate them with as many students as it chose. In that way it would be able to circumvent the Board's clear authority to control enrollment at this and every other child development center and private school in the District. Furthermore, since the Board voted to deny the special exception sought by the applicant because of present traffic and safety conditions, those same concerns, given the applicant's position regarding the lack of limitations on students, would require rejection of any new construction that added classroom capacity, as NCRC has proposed.

In summary, my clients request the Board to refrain from "reconsidering" a request which was in the first place improperly injected into this proceeding. The record was closed and the parties had all filed their findings and conclusions and the Board was deliberating on the merits when the applicant's counsel, realizing that the application was doomed, sought to save it with "bifurcation." If there is any doubt about the matter, we respectfully request the right to fully brief both the procedural and substantive issues.

Sincerely,

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

Richard B. Nettler

cc: Office of Planning
ANC 3C
All other parties