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March 23, 2004

BY HAND
Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
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)

Dear Mr. Griffis:

On behalf of the Cleveland Park Neighbors, enclosed you will find the original and twenty copies of the Statement in Opposition to the Grant, on Reconsideration, of a Special Exception Permitting New Construction. Also attached for your reference is a copy of the May 6, 1999 transcript.

Sincerely,

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

Richard B. Nettler
Jeannine Rustad Zigner

cc: Attached Certificate of Service
(via hand delivery)

BZA
Case No. 16970
Exhibit No. 357

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.357

Certificate of Service

I certify that on March 23, 2004, a copy of the foregoing letter was hand-delivered to the following parties:

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Richard B. Nettler
Jeannine Rustad

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Application of the National Child Research Center BZA Application No. 16790

STATEMENT BY THE CLEVELAND PARK NEIGHBORS, STEVE HUNSICKER, SALLIE R. AND R. BRUCE BECKNER, LINDA BADAMI AND GAYLORD NEELY IN OPPOSITION TO THE GRANT, ON RECONSIDERATION, OF A SPECIAL EXCEPTION PERMITTING NEW CONSTRUCTION

In response to the Board's decision to consider the granting of relief for new construction as a separate issue from the request for relief to increase enrollment and staffing, the Cleveland Park Neighbors, Steven Hunsicker. R. Bruce and Sallie R. Beckner, Linda Badami and Gaylord Neely join in opposition and submit the following statement:

INTRODUCTION

Having already voted 3-1 to deny the application of National Child Research Center ("NCRC") for a special exception, and having determined to reconsider its decision only with respect to the impact of the proposed new buildings, the Board has created for itself a false choice. That false choice, improperly suggested to the Board by NCRC's counsel during its deliberations on January 6, is that the Board may, by the simple expedient of declining to grant any increase in enrollment or staff, consider (and authorize) the proposed new construction without regard to the traffic impact of NCRC's operations on the neighborhood and without regard to the conditions for the dropping off and picking up of children. This is simply wrong, for at least four reasons:

- NCRC's application is unitary and is not severable. As both the application and the testimony in support make clear, the proposed construction will result in a net addition of two classrooms to the preschool, which NCRC has said it intends to fill with a combination of children from existing classes and additional children.

- There is nothing in Section 205 of the zoning regulations (which is the section under which this Application is brought) or any other zoning regulation or statute that authorizes the Board to grant any kind of special exception, without considering *all* of the enumerated factors, including traffic impact and conditions for dropping off and picking up of children. Thus, the Board's analysis must be the same, whether the application for new construction and increased enrollment, new construction alone or even for continuation of existing operations with no changes whatsoever.

- NCRC's own witnesses' testimony establishes that the preschool is violating its current special exception, substantially exceeding the number of both staff (28) and children (120) for which it applied and received a special exception in 1998.

In this proceeding to date, the Board has been unwilling even to examine, much less resolve, those issues of non-compliance. However, if the Board were to issue any special exception permitting new construction, even one that authorized no increase in staffing or enrollment, the Board would have to either ratify that non-compliance by specifying the current actual enrollment and staffing as what is permitted (a 30 percent increase over the number specified in the 1998 Order) or, if it failed to regulate enrollment and staff, it would be facilitating a substantial increase in enrollment and staffing by authorizing the construction of a nearly 50 percent increase in child capacity.

- NCRC's consistent position in this proceeding, repeated as recently as in its "Proposed Findings and Conclusions" filed last December, is that the only present limitation on its enrollment is the Department of Health, which regulates class size as a function of age, number of instructors and room size. NCRC's own witnesses state that the proposed new construction, when completed, will, under the Department of Health's rules, authorize NCRC to have 150 children in the buildings, as opposed to the current limit of 108. Thus, without more, the new construction will increase NCRC's licensed capacity by nearly 50 percent.

Regardless of the starting point of the analysis, the Board's January 6 adverse determination regarding traffic conditions – that it is not reconsidering – precludes the authorization of new construction for NCRC. That is because traffic conditions are an issue in every special exception. The Board simply cannot permit such an increase, either directly, through an express authorization of more enrollment, or indirectly, by authorizing construction of additional capacity, without discarding its adverse determinations with respect to current conditions for dropping off of children and traffic impact. The Board has already said it is not reconsidering those determinations; therefore it cannot authorize this construction, even without addressing the issue of enrollment or staffing.

The evidence of the record, fully supports the Board's initial decision to deny the instant Application, including the construction of additions and new buildings. Apart from the traffic impact and conditions associated with NCRC's current operations, the new construction would adversely affect the neighborhood by exacerbating dangerous traffic conditions and noise, and by reducing in light, air and privacy of surrounding neighbors. Moreover, NCRC has failed to show how it is in current compliance with all applicable regulations and licensing requirements or how the new construction will comply with applicable regulations and licensing requirements.

I.

RELIEF TO ALLOW THE NEW CONSTRUCTION SHOULD BE DENIED

A. The Necessary Relief From Section 3202.2 is a Variance, Not a Special Exception.

Without belaboring the point, the proper relief from section 3202.2 is a variance, as the Board correctly held at the February 25, 2003 hearing, and again at the June 24, 2003 hearing, when the Board denied the Applicant's motion to reconsider. The Board's reversal of its previous decision[1] is contrary to its own precedent and sound judgment. As to this issue, the Neighbors hereby incorporate by reference their filings dated January 2, 2003, January 24, 2003, February 19, 2003, April 25, 2003 and June 10, 2003

B. Under the Special Exception Standards, the Application Must Be Denied, as it Will Result in Adverse Impact on the Neighborhood.

New construction would result in an adverse impact on the surrounding neighborhood. Even with no additional students or staff, a grant of NCRC's application would perpetuate the unsafe traffic and parking conditions and result in conversion of the NCRC property to an institutional campus for the purpose of a nursery school. In addition, NCRC has stated that, apart from any enrollment increases, the proposed new classroom building will include a large meeting space that will produce new, traffic generating uses. The proposed additions will create two disproportionately large buildings in the neighborhood with significant visual impacts on light, air and privacy, and possible impacts on drainage that would affect neighboring property owners. Furthermore, the current site is inadequately screened to the west, a deficiency only partially remedied in NCRC's plans. This lack of screening will be exacerbated by the loss in a significant amount of trees on the property, as well as fatal damage to trees on adjoining properties.

1. The requirements for all Special Exceptions Granted under Section 205 Include Traffic Impact and Conditions for the Picking Up and Dropping Off of Children.

The specific requirements that NCRC must also meet for a special exception in this matter for its child development center are set out in Section 205 of the Zoning Regulations, which pertains to child development centers, as follows:

> 205.2 The center shall be capable of meeting all applicable code and licensing requirements.
>
> 205.3 The center shall be located and designed to create no objectionable traffic condition and no unsafe condition for picking up and

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[1] The Board's previous ruling that the required relief was a variance was flawed only in that the Board held the variance was an area, not a use variance.

dropping off children.

205.4 The center shall provide sufficient off-street parking spaces to meet the reasonable needs of teachers, other employees, and visitors.

205.5 The center, including any outdoor play space provided, shall be located and designed so that there will be no objectionable impacts on adjacent or nearby properties due to noise or activity, or visual or other objectionable conditions.

205.6 The Board may require special treatment in the way of design, screening of buildings, planting and parking areas, signs, or other requirements as it shall deem necessary to protect adjacent and nearby properties.

Each of these criteria is relevant to the issue of the proposed new construction. If the application fails any one criterion – as the Board has held this one fails the requirements of Section 205.3 – it must be denied. In passing on an application for a special exception in a residential use district, the Board must consider all pertinent factors enumerated in the ordinance, such as fire hazards, traffic problems, transportation requirements and facilities, streets and paving, and schools, parks, and playgrounds, and its action must be reasonable in light of the facts relating to these factors. *Levy v. Board of Zoning Adjustment*, 572 A.2d 739, 742 (D.C. 1990); *Health v. Mayor and City Council of Baltimore*, 49 A.2d 799, 804 (Md. 1946). There is no provision in Section 205 or elsewhere for omitting certain criteria under any set of circumstances, including an application for a special exception that simply continues the *status quo* for another term of years.

2. <u>The Total Traffic Conditions must be Considered, not just Changes Resulting from any New Construction</u>.

Unlike a zoning variance, which is permanent, a special exception (which is what NCRC requires to operate a child development center in a residential neighborhood) is often, as in this case, only for a term of years. So, for example, merely to continue its operations with no changes at all, NCRC must file for a new special exception when its current one expires in 2006. This means that *each time a private school or child development center seeks to re-authorize its operations by renewing its special exception, all of the criteria in Section 205 must be evaluated.* [2] If it were otherwise, then nothing

[2] During the January 6, 2004 deliberations, corporation counsel for the Board opined that the adverse impacts should only be measured with respect to the proposed increases. Specifically, counsel stated that:

> If the level of objectionable conditions or impacts is increased by that modification so much so that you feel that this can't be granted, then you have to deny the modifications, but the special exception will still stand until 2007. . . . So essentially, I think you're looking at the effect of the modification.

would be at issue when a special exception comes up for renewal and no changes are sought. Put differently, if the drafters of the Zoning Code had intended that only the changes in traffic or other conditions would be relevant in an application for special exception, they would have required all special exceptions to be perpetual, so long as the *status quo* continued.

Moreover, in this case, the special exception under which NCRC is currently operating (BZA Application No. 16307), the BZA, in response to the neighbors' concerns about NCRC-related traffic conditions, granted a special exception for only eight years, rather than the customary 15, a relatively short time. In their deliberations, the Board Members expressly stated that, at the expiration of that order, the neighbors would be free to come back and present evidence that the traffic management plan ("TMP") was not working.[3] Therefore, even if, in the ordinary case of a renewal of a special exception with no changes in operation, traffic conditions are not evaluated, *in the case of NCRC, the BZA specifically intended that a renewal of the 1998 Special Exception include an examination of traffic conditions.* For the Board to approve any new special exception, for new construction with no change in enrollment, or even for a continuation of existing operations with no changes whatsoever, and not evaluate traffic conditions, would be a breach of its own 1998 Order.

3. Adverse Traffic Impacts Generated By NCRC Warrant Denial of the Requested Relief.

The Board has already found that traffic conditions are "at the tipping point" and are not acceptable – a finding that the Board is not reconsidering. The new construction alone, without an increase in staff or enrollment, will intensify the use of the site and will shift more children to Ordway Street, which is an unsafe drop-off location.[4]

The proposed new classroom building includes a large meeting space that NCRC has said will be used, in part, to hold city-wide educators' conferences three times a year.[5] Already NCRC held the first of these conferences in 2002, and directed participants to park at various locations in the neighborhood.[6] In addition, NCRC's witnesses have identified other activities that cannot now be held because of the limitations of their facility, that will be made possible by the new construction – parent conferences, dinners and the like. These, too, will generate additional traffic without a change in enrollment.

(January 6 Transcript at 69-70.) It is not clear from counsel's comments whether she was simply advising the Board that NCRC would continue to operate until 2006 under its current special exception if the Board denied the Application or whether she was advising that only incremental increases in traffic, resulting from a grant of the Application, can be considered. If the latter, we strongly disagree.

[3] *See* Transcript of Deliberations in Application No. 16307 May 6, 1998, attached as Exhibit A hereto.

[4] Even NCRC Director Piggot admits this. *See* June 24 Transcript at 268-269.

[5] We do not concede that such conferences are a permitted activity under NCRC's Special Exception, nor that the Board has the power to make them a permitted activity.

[6] June 24 Transcript at 225 and 277-279 (Piggot).

NCRC's witnesses have testified that, following completion of the new classroom building, they expect the children who attend classes in that building will be dropped off on Ordway Street, not Highland Place.[7] Since the two classrooms have a capacity of between 15 and 25 children each (depending upon their ages), that could be anywhere from 30 to 50 children who would be dropped off and picked up at the Ordway Street entrance. However, there is no place for a drop off at NCRC's Ordway Street entrance. NCRC's frontage is used exclusively by its staff for parking; and, given the volume of through traffic on Ordway Street, having a line of parent cars double-standing like the one that exists on Highland Place would be even more dangerous. The only possible use of the Ordway Street entrance is the current "park-and-walk" use, which requires parents to find a vacant, legal parking place, get out of the car and walk the child to school, often crossing the street in mid-block to do so.

2. The Proposed Construction will create noise, activity, visual or other objectionable conditions

    a. There is Inadequate Buffering Between the NCRC Property and Its Neighbors and the Construction Will Result in a Significant Amount of Loss of Trees.

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.[8] This is inadequate to shield the neighbors visually from the new construction or attenuate playground noise.

The lack of adequate screening will be exacerbated by the loss of a significant amount of trees. In 1994, NCRC initiated significant construction on the existing playhouse and playground area, including the cutting down of many mature trees, construction of a large deck and concrete pad, and the addition of deck facing and wood latticing. This work was commenced without the necessary building permits and, consequently, without review by the Historic Preservation Review Board. Because NCRC failed to obtain the necessary permits, a stop work order was issued by DCRA. As a consequence of its violation of the building regulations, NCRC agreed to abandon certain features of its plans, including the retention of a driveway off of Ordway Street that was being used for access to the construction site. NCRC also agreed to install permanent landscaping along Ordway Street, including trees and bushes that have since matured. In return for these concessions by NCRC and upon the belief that NCRC was committed to keeping the neighborhood informed of its plans, the neighbors agreed not to push for further remedial or enforcement action by the District.

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[7] *See, e.g.* June 24 Transcript at 268-269 (Piggot).

[8] Exhibit 206.

In the instant application, NCRC listed twenty-one (21) trees that will be removed if the proposal is approved. Most of the landscaping trees that were planted in a 1995 compromise between NCRC and neighbors will be removed with this Plan.

NCRC provided an arborist's opinion that the mature oak tree between the Main Building and Neely/Badami residence would not be jeopardized by the proposed construction. Badami presented an arborist's opinion that it would be damaged.[9] Badami also stated that, because the tree had grown between the two buildings for over 100 years, the roots were likely more condensed and thus excavation more likely to damage the root base.[10] Badami testified that NCRC's drawings had failed to show over six (6) trees on Neely/Badami property line, all of which would be damaged or threatened by the proposed construction.[11] With the addition to the main house, the eastern footprint expansion and sidewalk enlargement will increase the impervious soil over the remaining tree roots.[12]

The last stand of buffer trees that remain on NCRC's rear lot is on the west side of the lot by Henry Little's 3220 Ordway home. With the loss of that stand, the Neely/Badami residence would loss the only screening between them and the remainder of Ordway north to 34th Street / Reno Road.[13]

Anthony identified one construction entrance on Ordway. All the trees at that entrance, both on the north and the west, are to be removed. Badami submitted testimony stating that Ordway entrance could not be used as the only construction entrance, one reason being the planned structure would disallow it. Therefore, construction vehicles, equipment delivery, material delivery, dumpsters, dumpster pulls and workers would thus be diverted to the only two remaining possibilities, Highland Place either by the Beckners or by the Neely/Badami residence. Both alternatives have the potential of permanent construction damage as they would be over the roots of trees in each location, threatening trees by both root damage and collision by vehicles or equipment.[14]

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[9] Written Testimony of Badami Dated June 24, 2003, "Trees and Greenspace NCRC's Grounds", with Appendix I.

[10] Nov. 24, 2003 Transcript (Badami).

[11] Written Testimony of BAdami Dated June 10, 2003, "NCRC Plans: Mistakes and Clarifications of the Submission to the Board of Zoning Adjustment dated 31 October 2002", with Appendix 08 and 09.

[12] Nov. 24, 2003 Transcript (Badami).

[13] *Id.* and supplemental photographs submitted at hearing.

[14] Written Testimony of Badami Dated June 24, 2003, "From Plans to Construction: NCRC Plans Are Not Feasible", with Appendix J,K and L

b. The New Construction Would Create an Institutional Campus, Out of Character of the Surrounding Residential Neighborhood, for a Nursery School.

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 and other Ordway Street neighbors testified 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.[15] 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.[16]

c. The Maintenance Building, sitting right on the Property Line, adjacent to a Neighbor's house, will create Adverse Impacts.[17]

The proposed maintenance building, on the top of the hill to the east, will cast a shadow across Ordway Street, especially in the winter.[18] It replaces an existing bicycle shed at that location, a non-conforming structure. The only structures permitted to be built in the side yard on residential properties are garages. 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 performed in residential garages. The Neely/Badami house is immediately adjacent to that property line and to the site of the proposed "maintenance building." If it were constructed, they would be subject to noise and other activities that they do not presently experience and that they would not expect to experience were that a residential property with a conforming structure in that location.[19]

d. Adverse Impacts of the Addition to the Main Building.

The Neely/Badami property, which has a street address of 3027 Highland Place, N.W., is located to the immediate east of NCRC fronting on Highland Place, N.W. The Neely/Badami house is situated so that it is set back slightly from the front of NCRC's

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[15] 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).

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

[17] The proposed maintenance building is located at the southeast corner of the NCRC property in the required rear yard and does not have the required side yard setbacks. NCRC has failed to apply for any relief with regard to the location of the maintenance building.

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

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

main building but is the minimum distance from the property line that it shares with NCRC. By the same note, the Neely/Badami house extends slightly further north on the property line than the NCRC main building. There is a small rear addition on the western side of the Neely/Badami residence, which is parallel with the north and west original footprint of the house, measuring only 8'x25'. Given this current configuration and relation to the main building, the Neely/Badami residence enjoys considerable light into the northwest side of the building on all levels. The existing rear porch on the NCRC main building allows ample light to pass through to the Neely/Badami residence.

The proposed addition to the NCRC main building will extend further north beyond the footprint of the Neely/Badami residence. The addition will also extend the NCRC main building eight to thirteen feet (8'-13') closer to the Neely/Badami residence. In total, this addition will increase the footprint of the already large existing main building by one-third.

The size and location of the rear addition will block natural light and air to the Neely/Badami residence. Because the proposed addition has a peaked roof, the impact of the addition will be that of two and a half (2.5) stories. The addition, if constructed, will block natural light and air to and the view from the Neely/Badami basement (which already gets limited sunlight), as well as the first and second floor rooms on the northwest corner of the residence.[20]

NCRC has three (3) commercial grade HVAC condensers on the east side of its main building, facing the Neely/Badami home. Neely/Badami have two residential grade HVAC condensers on the west side of their property. Badami testified that, since the installation of the NCRC's commercial HVAC units, the noise from units has made their front porch unusable in the summer. The additional space proposed to the main building will increase the noise from these (or potentially other) HVAC units. The increased noise generated will also affect the quality of life inside the Neely/Badami home.

d. Adverse Impact of the New Classroom Building.

Adjacent neighbor Henry Little testified 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.[21] With the increased drop-off/pick-up activity resulting from the construction of the new classroom building and use of its entrance by all 30-50 children attending classes in that building, Henry Little will experience a level of traffic activity much greater than he experiences now, including a much more intensive use of the street parking in front of his house and driveway.[22] Moreover, since both the new classroom building and Mr. Little's house are at minimum setback from the common

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[20] Written Testimony of Badami Dated June 24, 2003, "Irreparable Harm to 3207 Highland Place and our Neighborhood", with Appendix E; *see also* Nov. 4, 2003 transcript and supplemental photographs.

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

[22] *See* Henry Little Letter Dated March 22, 2004 at p.2.

property line they share, all of this "coming and going" will be very close to Mr. Little's house, to a degree that does not exist now and that certainly would not exist if there were simply another private residence next door.

e. Soil Erosion and Destabilization of Terrain.

At the rear of the Neely/Badami residence is a two (2) car historic garage, constructed *circa* 1916. Currently, NCRC has a small bicycle shed adjacent to the Neely/Badami garage. The bicycle shed is the same length as the Neely/Badami garage, but significantly narrower. The proposed maintenance building will have a significantly larger footprint than the existing bike shed and will extend further south (towards the main building) into the property. The new maintenance building will be three feet (3') longer than the Neely/Badami garage. The resulting structure will, in fact, be almost the same size as the Neely/Badami garage and will be four times (4x) the size of the existing bicycle shed. Moreover, the new maintenance building will be two (2) levels, and require new footings and foundation.

The proposed construction would require significant cutting away of the terrain and regarding on the NCRC property. The cut would begin at the maintenance building and cross over eight feet (80') to the east side of the Playhouse. The maintenance building will have two (2) entrances at two (2) different levels. The western entrance will be used for play equipment and the southern entrance as a maintenance entrance. The southern entrance will require three to four feet (3-4') of the existing berm on the southeast of the NCRC property to be removed. This will cause erosion of the steep hill on the southern lot line and threaten the structural stability of the Neely/Badami historic garage.[23]

In addition to destabilizing the terrain by construction, the new maintenance building creates additional threats to the Neely/Badami residence. NCRC currently has a maintenance shed at the northwest corner of its main building. The area surrounding that shed is used to store various maintenance equipment, such as ladders and saw horses. However, this area will be replaced with the rear addition to the main building, and the materials stored in and around that maintenance shed will be moved to the new maintenance building. The addition to the main building will focus foot traffic of maintenance personnel closer to the lot line by narrowing the passage between the NCRC main building and the Neely/Badami property line by one third to one half (⅓ to ½). In addition to the increased maintenance traffic in this area, trash cans and dumpsters for NCRC are currently stored along the fence between NCRC main building and the Neely/Badami property line. NCRC proposes to maintain its dumpsters in this location, and the twice weekly garbage pick up will be forced to use the resulting narrower passage. This increased activity will cause erosion and wear of the soil in this area damage the roots of any surviving trees along the property line.[24]

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[23] Nov. 4, 2003 Transcript (Badami).

[24] *Id.*

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.[25] Steve Hunsicker testified that drainage from NCRC to his driveway is excessive since NCRC's 1995 construction. Architect Schwartz testified that drainage was an adverse impact of this proposal. NCRC provided drawings show that the backfill of the carriage house will divert rainwater from running directly to Ordway, to running into the rear of 3220 Ordway, Henry Little's backyard.

3. Compliance with Code and Licensing Requirements (Section 205.2).

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. Specifically, NCRC has failed to demonstrate that the proposed plans will satisfy outstanding building code issues, particularly the requirement of the Health Regulations (at 29 D.C.M.R. § 327) that the facilities conform with the Building Code or, for a facility built prior to 1975 (as existing parts of this one originally were), that the it has sought and obtained a whatever variances are needed from the Mayor as allowed by § 313.1 (29 D.C.M.R.) for the program as it now operates and for the program as it would operate in the expanded and renovated. For example, the present facility includes classrooms on the third floor, which are accessible by only one enclosed stairway and an exterior metal fire escape.

C. NCRC's Contradictory Position on Enrollment Limitations Means that a Grant of a Special Exception "for Construction Alone" would Result in Increased Enrollment.

1. NCRC's Position that the BZA Currently does not Limit its Enrollment or Occupancy Means that a Special Exception "for construction alone" will Clear the Way for Increased Enrollment.

The problem with the "bifurcation" concept is that NCRC contends that the BZA presently has no control over its enrollment. Consequently, granting an application "for construction only" leaves in place the present, unregulated, enrollment situation; and there is every indication that NCRC will be compelled to increase its enrollment, for both "educational" and financial reasons.

It cannot be disputed that the Board's Order in Application No. 16307 (the special exception granted in 1998 under which NCRC now operates) says that it is granting NCRC's application for a special exception for a child development center of 120 children and 28 staff. Nor can it be disputed that NCRC's witnesses in this proceeding have testified that its actual enrollment is 171 children and that its actual staffing is 39, plus as many as five "consultants" who come intermittently through the week.

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[25] *Id.* at 23.

NCRC's application in this case states that it "seeks special exception approval for the continued operation of a child development center with morning and afternoon programs for 120 children at any one time . . . and for construction of an addition to the existing main building and construction of a new accessory building in an R-1-B district at the premises 3209 Highland Place, N.W. (Square 2072, Lot 30)."[26] The Application goes on to say the "existing BZA Order [in Application No. 16307] *does not limit the number of children on the site at any one time, nor the school's total enrollment.*"[27] NCRC says that it "is willing to accommodate concerns expressed by neighbors about NCRC's future growth by agreeing to two new conditions" – "clearly" limiting the number of children on the site at any one time to 120 and limiting the "base enrollment" to 181 children, with a maximum of 185.[28]

Thus, NCRC did not apply for a special exception for a child development center of 185 students and for new construction. It simply said it would agree to a condition imposing that limitation. This distinction is important, because if the Board now determines to "bifurcate" this application to deal only with the requested new construction, what is eliminated is the "child development center with morning and afternoon programs for 120 children at any one time" language from NCRC's application. And what remains, then, is an authorization for new construction and NCRC's position that both enrollment and occupancy are not regulated by the BZA.[29]

In explaining its re-shuffling of children to make use of the two new classrooms that will be in the proposed new classroom building, NCRC says it will reduce the number of children in each class but, "[t]he groups in these newly-created classrooms would . . . be smaller than the optimal group size; therefore, *in order to bring group sizes in the new classrooms to the optimum level,* the school proposes to enroll eight new children for the older group . . . and two new children for the younger group. . . Thus, the school's total enrollment would increase by 10 children."[30] Moreover, NCRC Board Member and Project Director Alexa Halaby testified at the hearing that the "minimal" number of students needed to pay for this project was 181 and that was the number used in NCRC's financial planning and budgeting.[31]

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[26] NCRC "Statement of the Applicant" at p. 1.

[27] *Id.* at p. 7; emphasis added.

[28] *Id.* Having dismissed the 120 number in the Board's Order granting its Application in Case No. 16307 as being neither a limit on enrollment nor a limit on occupancy, NCRC essentially has written that number out of the Board's Order.

[29] This position was reiterated in NCRC's "Proposed Findings of Fact and Conclusions of Law" at p. 12.

[30] NCRC "Statement of the Applicant" at p. 7.

[31] The following exchange is on page 59 of the May 6 Transcript:

Q: In the course of developing your strategic plan, did you also do some financial projections in terms of the cost of building and operating a bigger facility and the revenues from additional students?

A (Halaby): Yes.

Q: In doing your projections, you came up with a budget that would provide for paying all these expenses,

That NCRC would be hard pressed to finance the construction and daily maintenance of the additions without a corresponding significant increase in enrollment is also illustrated by NCRC's letter to DDOT dated March 18, 2003. In response to the Neighbors' suggestion that there be a period of time to measure the impact of the traffic management plan (TMP) changes proposed by NCRC before any increases in student and staff levels are approved by the BZA request, NCRC stated that:

> Further, the hiring of additional staff to monitor traffic, the additional financial incentives for staff to use Metro, and many of the other changes *can only be funded by having the additional students at the school.*

This statement shows the connection between the requested increase in enrollment and staff and the infeasibility of the project (and likelihood that NCRC will increase its enrollment with continued disregard of the limitations currently imposed on its enrollment) in two respects. First, additional staff must be hired to monitor traffic. This would result in further violation of its staffing limitations. Second, if NCRC could not afford to hire additional (presumably part time) staff to monitor traffic and provide financial incentives for Metro use, costs which would be minimal in comparison to the cost of new construction and maintenance and upkeep of the new additions, it is unimaginable how NCRC will afford the new construction without *significant* increases in enrollment.

Finally, NCRC was cited for violating Health Department class size regulations and obtained a waiver, which expires in September 2004.[32] Despite having added eight additional students in violation of its licensing requirements[33], NCRC boldly claimed that it would not add the additional ten (10) students until a building is constructed.[34]

So, it is therefore reasonable to assume that, if the Board grants the "new construction" part of NCRC's Application, the need to bring the new classes to an "optimum level," the need to cure this violation of Department of Health regulations without reducing class size and the need to pay for all of these facilities and new staff will require an increase in enrollment of at least ten above the current level, a number which the Board already has found produces objectionable traffic conditions.

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correct?

A: (Halaby) I think we've come up with several budgets. We've had to go over and over and over again trying to decide what our minimal could be in terms of numbers.

Q: And did those budgets then end up with an enrollment of 181 students approximately?

A: (Halaby) Yes.

[32] June 24, 2003 Transcript at 215 (Piggot).

[33] November 18 Transcript at 58 (Piggot).

[34] *Id.* at 227.

2. If the Board Grants a Special Exception that specifies Enrollment levels, then that is a Change in Authorization that Requires Comprehensive Review of all of the Section 205 Factors.

If the Board accepts NCRC's argument that the current special exception does not regulate its enrollment or its occupancy and it concludes that it must impose such regulation in order to avoid creating (or exacerbating) the adverse impacts that led it to vote on January 6 to deny the Application, then that itself is a change from the regulatory *status quo*. In other words, the Board would be moving from the 1998 situation of either 120 children as the authorized level, or, if it accepts NCRC's view of things, no regulation of the number of children, to a new regulatory limit of 171 students. However one characterizes it, this is clearly an increase in *authorized* enrollment of at least 51 children. And, even under NCRC's crabbed reading of the Zoning Regulations, an increase in authorized enrollment requires an examination of the traffic conditions and impact. The Board having made that examination and having found that conditions and impacts were adverse, it has no choice but to deny even a "bifurcated" application.

II.

THE MATTER SHOULD NOT BE REOPENED BY THE BOARD.

A. NCRC's Application is not Severable.

NCRC's application to the BZA was a "package," consisting of requested new construction that would add nearly 50 percent to its enrollment capacity an express authorization for "at any one time" occupancy nearly 20 percent greater, and additional staff to service these expanded facilities and increased number of students. [35] Both the Application and the testimony made it clear that the proposed additional space, its use and the funds to pay for it are all inter-related.

1. The Application.

The instant application was filed seeking relief for:

> Request special exception approval for continuation of a child development center with morning and afternoon programs for 120 children at any one time ages 2-½ to 5 years in all floors of the existing buildings on the site *and* for construction of additions to the existing buildings in an R-1-B District at premises 3209 Highland Place, NW (Square 2072, Lot 30 (855 and 866)).

Thus, by the very terms of the application, the purpose was to seek an increase in enrollment, as well as to construct the additions and the new buildings (collectively referred to as the "additions") so as to accommodate this increase and the present illegal population of students and staff. The application did not state that NCRC was seeking to increase enrollment "and/or" construct the additions.

2. Testimony.

NCRC's project chair testified that NCRC's goal for the expansion of its facilities was to reduce the size of classes by up to two children,[36] 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.[37] These new classes would meet in the two additional classrooms provided by the proposed new construction.[38] Because the number of

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[35] *See* NCRC's "Proposed Findings of Fact and Conclusions of Law" at p. 15 (Proposed Finding No. 18.)

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

[37] *Id.* at 25.

[38] *Id.* at 80.

classrooms is being increased and because there is more facilities to clean, additional teachers and maintenance personnel will be hired.[39]

It is undisputed that the number of staff was limited to twenty-eight (28) in BZA Application No. 16307. Indeed, the certificate of occupancy reflects such limitation. (BZA Case No. 16970 Exhibit 5.) Contrary to this restriction, NCRC's director testified that in 2000, NCRC hired an additional five (5) staff, bringing its total staff to thirty-nine (39) at that time.[40] As it did with the number of children enrolled, NCRC attempted to play with the staffing figures to hide the truth about its operations and violations[41], in this case by excluding in its count consultants and aids not hired by the school who regularly visit the school to assist students and by inventing the "full-time equivalent" concept, which is not a part of the BZA Order that currently authorizes its operations.[42]

Finally, as discussed at page 12, *supra*, NCRC's financial planning for constructing and operating these new facilities included, as a minimum, an increase in enrollment to 181.

If NCRC had presented the new construction and the increased enrollment as an "either/or" proposition, then both the parties in opposition and the Board members would have questioned NCRC's witnesses about the need for such a large facility in the absence of any enrollment increase and the ability of NCRC to pay for this substantial expansion without any addition revenues from new students.[43] As it is, the Board is faced with a complete lack of evidence on these important questions – which are highly relevant if the Board is considering granting permission for new construction without adding to the number of students. In fact, under the "bifurcation" concept, it is not even clear whether a requested increase in staff is, or is not, part of what is being reconsidered.

B. NCRC's Current Violations Cannot Be Ignored or Minimized in the Board's Deliberations of Whether to Allow the Construction of the Additions.

Clearly, regardless of whether the additions are constructed or not, it has always been NCRC's intention to increase enrollment and staffing; and NCRC has undertaken such increases despite the resulting violations of both the previous BZA order and its licensing requirements. If the Board is to decide whether or not to allow the construction of the additions, it must also further deliberate the nature and extent of NCRC's current violations of both the previous BZA order (Order No. 16307) and its licensing requirements, deliberations which were minimized in the final decision of the case. The

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[39] June 24 Transcript at 214.

[40] June 24 Transcript at 242.

[41] In fact, NCRC's concealment efforts even go to the point of not even requesting an increase in authorized staff in its current application.

[42] *Id.* at 235 – 243.

[43] It certainly seems a smaller construction project, perhaps just the proposed addition on to the existing main building, would meet NCRC's stated need for a "multipurpose room" and conference space for parents and teachers.

limitations imposed on NCRC in Order No. 16307 are relevant, as they reveal the true intent of NCRC in seeking to construct the additions – that is, NCRC is seeking sanctification of its newly formed belief that there are NO restrictions on its total enrollment.[44] Moreover, if NCRC were compelled to comply with the approved staffing and enrollment set forth in BZA Order No. 16307 – 28 staff and 120 enrollment versus its current staff of no less than 39 (exclusive of outside consultants regularly visiting the site) and enrollment of 171 – its need for the extensive additions could not be substantiated.

As set forth more fully in Section I.C., *supra*, allowing the new additions will only further assist NCRC in maintaining its current levels and making increases in the future. These increases have an overwhelming and immediate adverse impact upon the surrounding neighborhood.

C. The Applicant Improperly Brought the Issue of Bifurcation Up at the January 6, 2004 Public Meeting.

At the conclusion of the November 18, 2003 hearing in the instant matter, the Board closed the record with the exception of three items: (1) responses from the parties to a supplemental filing by the D.C. Department of Transportation ("DDOT"); (2) pages 5-7 of the Traditional Neighborhood Development Manual to be filed by the Neighbors; and (3) proposed findings of fact and conclusion of law by the parties.[45] With regard to the closing of the record, Chairman Griffis emphasized that:

> Of course the December 6th [sic] is a public meeting. *There is no additional testimony.* As Ms. Bailey just indicated *the record is closed* except for that which we've just set and that is very specific. So you can spread the word and you can also note. [*sic*] *If you decide to submit something in addition to what we've just listed, it will not be accepted*, meaning it's not in the record and the Board will not see it.[46]

Contrary to this admonition, counsel for NCRC was permitted at the January 6 public meeting to suggest, for the first time, to the Board that it could consider the new construction as a separate issue from the requested increase in enrollment and staffing.

As the Board surely recalls, deliberations on this matter at the January 6, 2004 public meeting were lengthy, running close to five (5) hours. Near the end of the deliberations, just as the Board was about to vote on the matter and it was clear that the vote would not be with a majority in favor of the application, counsel for NCRC, Maureen Dwyer, Esq., approached the Board and requested, for the first time, that the

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[44] NCRC's "Statement of the Applicant" at p. 7.

[45] November 18, 2003 Transcript at pp. 170-171.

[46] *Id.* at 172.

relief be bifurcated so that the Board could consider the construction of the additions independent of its request for increases in enrollment and staffing (again, increases in authorized levels which simply ratify NCRC's present non-compliance with the existing BZA Order).

That was the first, and only, time that "bifurcation" was mentioned in this proceeding, orally or in writing. Section 3127.2 of the Board's Rules requires that any Board action be based exclusively on what is properly in the record. Given that Ms. Dwyer's statement was out of order (because the record had been closed), it is not part of the record. However, the fact that it was made to the Board and the Board subsequently decided to take up the issue of construction alone now taints any action the Board might take to "bifurcate" the application on its own motion. The proper method for NCRC to have raised the "bifurcation" issue was by way of a motion for reconsideration following the issuance of a written decision based on the Board's January 6 vote.

CONCLUSION

For the reasons stated herein and on the evidence in the record, the Cleveland Park Neighbors, Steve Hunsicker, R. Bruce Beckner, Sallie R. Beckner, Linda Badami and Gaylord Neely respectfully submit that the bifurcation of relief in this should be denied or, in the alternative, that the special exception to allow the construction of the proposed additions should be denied.

Respectfully submitted,
ROBINS, KAPLAN, MILLER & CIRESI, LLP

By: _____
Richard B. Nettler
Jeannine Rustad

Dated: March 23, 2004.

NCRC May 6, 1999 Transcript

STAFF: Case is number 16307 application of NCRC, pursuant to 11 DCMR 3108.1 and 3107.2 for a special exception under section 205 to establish a child development center for 120 students for ages 2 1/2 to 5 years and 28 staff in the basement through third floor of an existing building and a variance from the provisions of section 2101 for off-street parking in an R-1-B district, 3209 Highland Place NW, Square 2072 Lot 30, 855 and 866. Hearing dates were 1/21/98 and 4/1/98 decision date was 1/21/1998; which was a bench decision

Board Members present on January 21, 1998 were King, Hinton, Reid and Bennett; Board Members present on April 1, 1998, Reid, King and Franklin.

Application initially granted by a vote of 4-0 with Ms King, Ms. Hinton, and Ms. Reed, and Ms. Bennett to grant by absentee vote; Ms. Richards not present, not voting. At the Public Meeting of February 4, 1998, Board granted a request from ANC3 to rehear the application due to problems associated with notice. At the end of the rehearing on 4/1/1998, the record was closed except that the parties were to submit a agreement reached between them.

The agreement was due on April 30, 1998, the parties waived the right to respond to resubmission. This matter is before you for a decision today.

KING: We haven't heard from the Applicant, I mean, we are presuming that the ANC's explanation of the conditions that the NCRC has agreed to.

STAFF: Yes, we haven't received anything else.

WATSON: We haven't received anything else.

KING: Mr. Watson is lurking.

REID: There isn't supposed to be any discussion from the floor during our meeting.

WATSON: I thought she was asking the question.

REID: What we were asking the staff was if we have received the agreement we were supposed to have received by today's date.

STAFF: There was nothing else in the record, that was pat of the discussion that they would agreement on something and make one submission.

REID: And we are saying that as of that date, April 30, the Office of Zoning had not received a set agreement?

STAFF: From the ANC.

KING: From the ANC, and not from the applicant and so therefore we trust the ANCs probity; this is what was given to us in the package this morning.

REID: Oh, this agreement that came in late.

KING: No, it came in the day before the deadline, which was April 30.

REID: Well, we received it today.

KING: Yes, we got it today.

REID: Well, what concerns me is that with the agreement, my understanding is that it should be signed by both entities.

KING: I don't think it's necessary. Ultimately it is what we say that counts. They can sign anything they want and we have the authority to make a decision that incorporates that either in total or amend it if we feel it needs to amended, so I don't know that we have to have the concurrence of the NCRC.

REID: Well, I do. I mean, what you are saying is well taken; however, it makes me feel more comfortable to see that, if we could.

KING: But if we have Mr. Watson here, if we waive our rules and agree that he can speak, I think we will have what we want.

REID: We can't do that.

STAFF: He can tell us and I guess and we can tell you.

KING: He can tell the staff and he can tell you.

REID: That's exactly what I'm saying. We want to know if there is any dissention or if there is anything that is in this ANC letter that we received that specifies the conditions they are not agreeable to, the NCRC. All we want to know is if they are agreeable to this letter?

WATSON: The Applicant is agreeable to the conditions, but the applicant is silent as to the length of time.

STAFF: The Applicant is agreeable to the conditions, but the applicant is silent as to the length of time.

KING: Could I see, do you have your copy Sheila, could I have mine back?

REID: Yes.

KING: What is the length of time?

REID: Eight years

MAIN: And the original request was for how many years? The original request was for what period of years?

REID: I'm not sure.

MAIN: I was asking Staff.

STAFF: I'm not sure.

WATSON: It was originally approved for 15 years.

STAFF It was not a request, he said it was originally approved for 15 years.

REID: And the ANC is asking for a compromise essentially and the Applicant is filing apparently on that particular issue. So, again, as you said before, that would be our decision.

REID: Can we have a motion on the floor regarding this? Are you ready? Do have a readiness or unreadiness?

KING: I'm ready.

KING: I would move that we grant the application, congratulate NCRC and ANC 3C on having reached an agreement and incorporate that agreement into our order. Now with regard to the time period; I move the incorporation of these conditions because we are so strongly in favor of applicants and community people coming to an agreement and meeting of minds. It strikes me that NCRC may have some difficulty in implementing this agreement, since they are not police persons and when you are dealing with private cars operating on a public thoroughfare they can jawbone and they can convince the parents and so forth, but ultimately, it's whether the parents are willing to cooperate and help. That notwithstanding I think we must to recognize that NCRC may have some difficulty with rogue parents, if I can put it that way. But that otherwise we want to encourage

this kind of cooperation between the applicants and community organizations, particularly ANCs.

As far as the eight years versus 15 years is concerned, I would defer to my colleagues as to what they think about that.

REID: I would second it, but with discussion before I take a vote. And that is in regard to the eight years, from my understanding and reading Mr. Mendelson's letter, that was the only area that was kind of tippish, and the eight year number came as a compromise and I think that the idea was to prevent NCRC from having to incur the expenses of reapplying in a shorter period of time. In that regard, they want to also make sure that any adverse impact that may arise in the interim was taken care of sooner rather than later. So, we could come of with a number somewhere between 8 and 15 that we could put in as a condition.

MAIN: If NCRC has agreed to remain silent on the question of 8 versus 15, we may as well go with the ANC, giving great weight to---cause they have had a quorum.

REID: Is that your position? You are comfortable with the 8?

KING Yeah, I think so.

REID: I mean is that what we say, how do you feel about that?

STAFF: He's not involved in this.

REID: Oh, right, that's right, I'm sorry.

Clerk: Mr. Franklin,--he is not involved in that.

REID: Mr. Franklin, did he address that?

CLERK The number of years? No he just mentioned that he was in support of the conditions in the ANC letter.

REID: Okay, okay, then I will concur with that position.

KING Oh, this..oh, this is for the other case.

STAFF: We are on another case right now, we'll come back to this one.

REID: Okay, it has been moved and seconded. All in favor of motion.

REID: Aye.

KING: Aye.

STAFF: Staff will record the vote as 3-0 with Ms, King and Ms Reid to approve the application Mr. Franklin to approve by absentee vote and two conditions.

KING: Well, the conditions.

STAFF: The conditions of the eight years and then the conditions in the ANC letter of March 25.

REID: What is the date of the letter, April 29, 1998.

STAFF: Did you want to go on.

KING: No, this isn't what is referred to.

REID: Oh, this is the same thing that we already have.

KING: This what we have in front of us.

REID: What we were asking for is the parking agreement that was referred to in the conditions

KING: The 1993 parking agreement.

REID: Um hum. We still don't have that?

STAFF: Would you mind if we moved on and then took a break and looked for it?

REID: Okay.

ATTORNEY: I'm from the law firm that prepared the application.

REID: What you'd have to do is speak to the Staff privately and then she could then talk to us.

STAFF: She was just indicating that the agreement was on ANC letterhead with an early March date, and we can check the record for that. It doesn't have just a separate or blank sheet of paper that says agreement, but it is on ANC letterhead.

KING: But this is not what we are looking for.

STAFF: The early March date.

REID: If you can ask the representative of the law firm if they have a copy of that letter, it may be more expedient to have staff call the law firm and have it faxed over hear. That may be the easiest way to handle it at this time. Thank you..