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

ATTORNEYS AT LAW

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RICHARD B. NETTLER
JEANNINE RUSTAD
(202) 775-0725

April 2, 2004

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

Re: BZA Application No. 16970
Our File No. 092241.00000

REQUEST FOR EXPEDITED CONSIDERATION

Dear Mr. Griffis:

It has recently been brought to our attention that the Office of Corporation Counsel's ("OCC") advice to the Board on the reopening and bifurcation of this matter was tainted by *ex parte* communications from the counsel for the applicant with the OCC's. Accordingly, and as evidence of these *ex parte* communications, attached you will find the Request of the Cleveland Park Neighbors, Steve Hunsicker, Sallie R. and Bruce Beckner, Harry Little, and Linda Badami and Gaylord Neely for an evidentiary hearing on *ex parte* communications by the applicant with the Office of the Corporation Counsel for the Board and request for the imposition of sanctions.

As noted in the enclosed filing, because of the serious nature this issue and to avoid any further appearance of impropriety, an evidentiary hearing on this request must be held before the Board engages in any further deliberations on the substantive issues of this matter.

Thank you for your attention to this matter.

Sincerely,

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

Richard B. Nettler
Jeannine Rustad

Word 45651543.1

BZA
Case No. 16970
Exhibit No. 360

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.360

Enclosure (as stated)
cc: See Certificate of Service to attached Motion
D.C. Council Chair Linda Cropp
D.C. Council Member Phil Mendelson
D.C. Council Member Kathy Patterson

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Application of the National Child Research Center BZA Application No. 16970

REQUEST OF THE CLEVELAND PARK NEIGHBORS, STEVE HUNSICKER, SALLIE R. AND R. BRUCE BECKNER, HARRY LITTLE, LINDA BADAMI AND GAYLORD NEELY FOR AN EVIDENTIARY HEARING ON EX PARTE COMMUNICATIONS OF THE APPLICANT AND CORPORATION COUNSEL FOR THE BOARD AND THE IMPOSITION OF SUCH SANCTIONS AS DEEMED APPROPRIATE AND MOTION TO HAVE THE OFFICE OF CORPORATION COUNSEL RECUSE ITSELF FROM ANY FURTHER INVOLVEMENT IN THE INSTANT MATTER

The Cleveland Park Neighbors, Steve Hunsicker, Sallie R. and R. Bruce Beckner, Harry Little and Linda Badami and Gaylord Neely (collectively referred to as the "Opposition") hereby request that the Board hold an evidentiary hearing on the National Child Research Center's ("NCRC") *ex parte* communications with the Office of Corporation Counsel ("OCC") for the Board regarding, *inter alia*, the reopening of this matter, and to impose sanctions against NCRC, including the possible dismissal of the bifurcation "request" or issue and the suspension of NCRC's counsel and her firm from appearing before the Board. The Opposition further moves that the contacted OCC members recuse themselves from any further involvement as counsel to the Board in the instant matter and that new OCC members, unaffected by the *ex parte* contacts, provide advice to the Board. In support of these requests, the Opposition states as follows:

At its March 9, 2004 public meeting, the Board voted to reopen the instant matter for the purpose of bifurcating the application to allow consideration of the proposed new construction separate from the request for an increase in enrollment and faculty (increases which, as noted by the Opposition, have already been instituted by NCRC). The Board, as justification for reopening the matter, stated that OCC had advised the Board that further deliberations were necessary on the issues of the proposed new construction and renovations in order to create a complete record. The Board stressed that its actions were solely influenced by the advice of OCC. As set forth below, there is now evidence that this advice from OCC is tainted by *ex parte* communications with OCC by the applicant.

As the Board is aware, the reopening of the matter has been of great concern to the Opposition. The first point of concern is that the original request was inappropriately made by NCRC at the Board's January 6, 2004 public meeting, during which the Board was deliberating on its final decision in this matter. The request was made during the Board's fifth (5^{th}) hour of deliberations on the matter and just as the Board was about to make a motion on its final decision on the case. As the Board made clear at its earlier meetings and again at the March 9, 2004 meeting, during public meetings, there is to be "no opportunity for public comment or engagement with the Board." Thus, NCRC's

counsel's request at the January 6, 2004 meeting was not only untimely, as the record was closed, but was a breach of the Board's procedures.

Despite being fully aware that the record was closed and the case decided, by letter dated January 12, 2004 to the Board (a copy of which is attached as Exhibit 1), counsel for NCRC requested that the Board bifurcate its decision on the application and make a separate ruling regarding the satisfaction of 11 DCMR § 205 with regard to the proposed construction. Counsel for NCRC, who has been practicing before the Board for many years, knew that the submission of such a letter is precluded by the zoning regulations. Although section 3121.9[1] of the zoning regulations prohibits the placement into the official files of the Office of Zoning of materials received by the Board after the closing of the record, the January 12, 2004 letter of NCRC was placed in the official record.[2]

When the Opposition was notified by the Office of Zoning that the Board would be taking up the issue of reopening the case and bifurcation at a public meeting, the Opposition grew increasingly concerned that this decision had been influenced by *ex parte* communications between persons connected with NCRC and Board members and/or OCC. Consequently, by letter dated February 24, 2004 (a copy of which is attached as Exhibit 2), counsel for the Opposition noted that:

> 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.

(Emphasis added).[3] However, the Opposition received notice from the Office of Zoning that their correspondence had not been accepted into the record, on the basis that the record was closed.[4]

---

1 Specifically, section 3121.9 states that: "Any material received by the Board after the close of the record which bears upon the substance of the application or appeal shall be returned by the Director and not received into the files of the Board."

2 Rather than place the letter of NCRC in the file, it would have been appropriate to only include the Office of Zoning's cover returning such correspondence.

3 One of the parties, Mr. Beckner, sent a similar letter on March 8, 2004, which also was returned.

4 Given that both the February 24 and March 8 letters addressed procedural, not substantive, matters with respect to the application, they should not have been returned. Likewise, if the Office of Zoning and the Board return this "Request," the inevitable conclusion from this pattern of conduct will be that the Board has no regard for the preservation of the integrity of its processes.

Because its concerns regarding *ex parte* communications went unanswered, on March 11, 2004, the Opposition filed a Freedom of Information Request ("FOIA") with OCC requesting all correspondence relating to this matter. On March 25, 2004, the Opposition received a response to its request.[5] This response confirmed what the Opposition had suspected – that NCRC had conducted *ex parte* communications with OCC regarding the reopening of the matter, as well as OCC's drafting of a final order in this matter, in an effort to insure that the order would be slanted in favor of NCRC. Attached for the Board's reference is the response received by the Opposition to the FOIA request.

The response to the FOIA request reveals that *ex parte* communications between OCC and NCRC date back as far as April 2003, in that instance, regarding the need of NCRC for area variance relief, which was a disputed issue at the time.[6] Exhibit 3. Email correspondence between counsel for NCRC and Assistant Corporation Counsel, Lori Monroe, reveal that there had been telephone discussions between these counsel regarding the area variance issue and that counsel for NCRC had sent over its memorandum on the issue for comment by OCC prior to submitting the brief with the Board. *Id.* That this correspondence was inappropriate is best illustrated by the response of Alan Bergstein, Chief of the Land Use and Public Works Section, Commercial Division, in which he reminded NCRC, on April 18, 2003, that "C'mon folks. You know we [OCC] don't accept substantive materials from parties. Any legal arguments are made on the record. We, of course, appreciate courtesy copies of what you submit to the OZ." *Id.*

Despite this admonition, NCRC persisted in efforts to discuss its pending Application with OCC on an *ex parte* basis. Four days *before* NCRC submitted a letter to the Board repeating the improper oral suggestion made at the January 6 public meeting that its application be "bifurcated," NCRC counsel sent the following e-mail to OCC:

> From: Maureen Dwyer
> Sent: Wednesday, January 07, 2004 8:07 PM
> To: Alan Bergstein
> Subject: Thanks
>
> Thank you for getting back to Allison [Prince]. I am away until Monday but Paul [Tummonds] is working on the letter so we can file on Monday.

---

5 OCC has acknowledged that its response to the Opposition's FOIA request is incomplete. OCC has promised to deliver the balance of its response no later than April 13. The Opposition reserves the right to supplement this "Request" in the event that evidence of new improper *ex parte* communications is contained in OCC's further response. *See* Exhibit 5 (cover letter).

6 This correspondence raises a serious question about the origins of the Board's reversal, at the January 6, 2004 public meeting, of its previous decision that the proposed new classroom building was a second principal building, which necessitated a variance.

Exhibit 4. In response, OCC sent an email correspondence to counsel for NCRC, that reflects both the existence of prior discussions of the subject and suggests a method of concealing the existence of these inappropriate communications from both the Board and the Opposition:

> Maureen [Dwyer],
>
> Ok, but please do not indicate that your [January 12, 2004] letter [seeking bifurcation] was prompted, recommended, etc. by OZ or OCC, since that is not the case. Please cc: me. Enjoy your time off.
>
> Thanks,
>
> Alan [Bergstein]

Exhibit 4.

Notwithstanding the admonition to NCRC and its own recognition of the improper nature of the communications a year earlier, *ex parte* communications between OCC and NCRC regarding the request for bifurcation continued. The January 7 & 8, 2004 emails raise a question of fact as to whether the advice given to NCRC was intended to conceal the fact that OCC and NCRC had been discussing the bifurcation issue in an inappropriate manner. *See* Exhibit 4. Finally, on February 9, 2004, counsel for NCRC corresponded with OCC regarding the drafting of the final order in the matter in an attempt to influence, off the record, the language of the final order so that it favored NCRC. Exhibit 6. In that correspondence, NCRC provided OCC with an outline of how the order should be written including findings favorable to NCRC on issues which either had not been resolved by the Board or were inconsistent with the Board's discussion at its decision meeting. *See* Exhibit 6.

Section 3127.2 of the zoning regulations regarding proceedings before the Board states that:

> No decision or order of the Board on an appeal or application shall be made except upon the exclusive record of the proceedings before the Board.

In the leading case on *ex parte* communications in this jurisdiction, *Jarrott v. Scrivener*, 225 F. Supp. 827 (D.D.C. 1964), the court noted that:

> Although procedures and rules of evidence are less rigid in quasijudicial bodies than in courts, there can be no difference, under our concept of justice, between the two tribunals in respect of these fundamental requirements [of fairness, impartiality and independence of judgment].

> For a fair trial by an unbiased and nonpartisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, *the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication* where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed.

Jarrott, 225 F. Supp. At 833 (citations omitted)(emphasis added); *see also Citizens Association of Georgetown v. D.C. Board of Zoning Adjustment*, 289 A.2d 380 (D.C. 1972); *Brown v. D.C. Board of Zoning Adjustment*, 413 A.2d 1276, 1281 (D.C. 1980)("parties before the Board are entitled to a fair hearing free of conflicts of interest") *citing* 3 RATHKOPF, THE LAW OF ZONING AND PLANNING, § 37.07 (4th 3d. 1979). With regard to *ex parte* communications, the question is whether the communications influenced the judgment of the Board to such an extent that they impaired its independence of judgment and thus deprived the objecting party of a fair and impartial hearing. *Id.* It is not necessary that there be any intentional wrongdoing, but merely an intent to influence the Board. *Id.* at 834. Furthermore, the contacts must be "significant, and not trivial" and must actually influence the Board or "be of "such a character that it may reasonably be inferred that they did impair, consciously or unconsciously, their independence of judgment." *Id.* The court specifically warned that

> *Surreptitious evidence to influence* an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisprudence, eat at the very heart of our system of government – due process, fair play, open proceedings, unbiased, uninfluenced decision.

Jarrott, 225 F. Supp. at 835 *citing WKAT, Inc. v. F.C.C.*, 296 F.2d 375 (D.C. Cir. 1958).

Clearly, the decision to reopen this matter (if not other decisions) was influenced by *ex parte* communications between OCC and NCRC. That these communications were not directly with the Board is of no consequence, as the result is the same and for purposes of this proceeding *ex parte* communications with OCC is the same as *ex parte* communications with the Board. That is, the *ex parte* communications with OCC had the effect of influencing the Board, which had previously decided against any bifurcation of the matter at the January 6 public meeting, after NCRC's counsel had improperly suggested that the Board do so. But for these *ex parte* communications with OCC, OCC would not have raised the issue of reopening the matter with the Board, as indicated by OCC's failure to admonish the Board's refusal to bifurcate the matter at the January 6, 2004 meeting. As such, the communications are significant, not trivial.

The attached correspondence casts serious doubt as to the legitimacy, fairness and impartiality of the proceedings in this matter. However, the full extent of the *ex parte* communications cannot be gleaned by the email correspondence, which references telephone calls between OCC and counsel for NCRC. Therefore, so as to complete the record on this matter and to shed full light on the influence NCRC has exerted over the proceedings, including what sanctions may be appropriate for the improper conduct exhibited by NCRC, the Opposition hereby requests that the Board hold an evidentiary hearing on the scope of the *ex parte* communications between NCRC and OCC. That an evidentiary hearing is required in this matter is buttressed by the *Jarrott* case, where the court, finding that the *ex parte* contacts deprived the opposition of a fair and impartial hearing, noted that:

> . . . there might be room or a basis for a different conclusion, if these contacts, verbal and written, had been recorded in the public file for all to see, and for those who desired, to oppose, in the full glare of a *public hearing*.

Jarrott, 225 F. Supp. At 834 (emphasis added); *see also Gladden v. D.C. Board of Zoning Adjustment*, 659 A.2d 249, 257 (D.C. 1995)(improper influences on BZA members was part of the record); *Spevak v. D.C. Alcoholic Beverage Control Board*, 407 A.2d 549 (D.C. 1979)(Corporation Counsel's *ex parte* contacts with the petitioner on pertinent facts remedied by opposition request for reconsideration and the holding of a new hearing on those facts).

Naturally, OCC counsel Lori Monroe and Alan Bergstein, who were involved in this correspondence, will be necessary witnesses to this hearing, as will NCRC's counsel, Maureen Dwyer and Paul Tummonds. For this reason, as well as the fact that OCC's advice to the Board is now tainted by its *ex parte* communications with the applicant in this matter, the Opposition further requests that OCC recuse itself from further involvement in the instant matter.[7]

The Opposition believes further that the sanctions appropriate should include, a refusal to further consider the "bifurcation" issue and may even include dismissal of the application so as to insure that such inappropriate conduct is precluded in the future. This is particularly appropriate in this case where NCRC has flaunted its violation of the conditions established in the Board's prior order governing the operations of the day care center and has dissembled in testimony and argument to the Board regarding its current operations.

Moreover the egregious nature of NCRC's counsel's conduct, along with the

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[7] It is important to keep in mind that this taint exists regardless of whether the Board -- or any of its members -- knew that OCC was having these *ex parte* communications with the applicant's counsel or not. Either the Board did not know a material fact: that OCC's legal advice may have been the product of -- and influenced by -- communications with the NCRC's counsel or some members of the Board knew that OCC attorneys were serving as conduits for improper *ex parte* communications from NCRC's counsel. This is *precisely* the type of "surreptitious evidence to influence" that the *Jarrott* court warned would "eat away at the very heart of our system of . . . due process, fair, play, open proceedings, unbiased, uninfluenced decision."

repeated efforts of *ex parte* contacts by counsel for NCRC, warrant suspension of counsel and her firm from appearing before the Board.

Finally, so as to avoid any further appearance of impropriety, the evidentiary hearing on *ex parte* communications must be held before the Board holds any further deliberations on the substantive issues of this matter.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI, LLP

By: _____
Richard B. Nettler
Jeannine Rustad

Dated: April 2, 2004.

cc: See attached Certificate of Service
D.C. Council Chair Linda Cropp
D.C. Council Member Phil Mendelson
D.C. Council Member Kathy Patterson

Certificate of Service

I hereby certify that on April 2, 2004, a copy of the foregoing letter was served, as indicated, on the following parties:

By Hand
ANC 3C
Nancy MacWood, Chairperson
2737 Devonshire Place, N.W.
Washington, D.C. 20008

Maureen Dwyer
Shaw Pittman LLP
2300 N. Street, N.W.
Washington, D.C. 20037-1128

Mr. Denzel Noble, Deputy Administrator
Building & Land Regulation Admin.
Department of Consumer & Regulatory Affairs
941 North Capitol Street, N.E. - Room 2000
Washington, D.C. 20002

Arthur Jackson
Office of Planning
801 North Capitol St., N.E.
Washington, D.C. 20002

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

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

Katharine Marshall
3208 Highland Place, NW
Washington, DC 20008

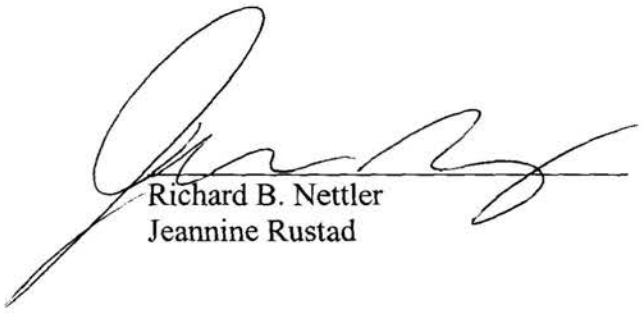
By Email:

Gaylord Neely & Linda Badami
3207 Highland Place, NW
Washington, DC 20008

Bruce and Sallie Beckner
Fleischman and Walsh, LLP
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The Nature Conservancy
201 Mission Street, 4th Floor
San Francisco, CA 94105



Richard B. Nettler
Jeannine Rustad

ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

January 12, 2004

By Hand Delivery

Mr. Geoffrey Griffis, Chairman
Board of Zoning Adjustment
441 4th Street, N.W.
Second Floor
Washington, DC 20001

Re: BZA Application No. 16970 - 3209 Highland Place, NW; Applicant's Request for the Board to Rule Solely on Application Related to Proposed Construction on the NCRC Property

Dear Chairman Griffis and Members of the Board:

The National Child Research Center ("NCRC" or "Applicant") hereby requests that the Board of Zoning Adjustment ("BZA" or "Board") bifurcate its decision on this application and make a separate ruling regarding the satisfaction of 11 DCMR §205 with regard to the proposed construction on the NCRC property. This request for bifurcation does not impact the Board's decision to deny the Applicant's request for ten additional students and six additional full-time equivalent ("FTE") staff. Rather, this request seeks a separate ruling on the new construction to conform the Board's decision with the evidence of record in this case, as well as the Board's discussion of this application at the January 6, 2004 public meeting, both of which provide indisputable evidence that the proposed new construction on the NCRC property fully satisfies the requirements of 11 DCMR §205.

It is entirely appropriate for the Board to bifurcate its decision in this case. The Applicant's request for relief in BZA Application No. 16970 clearly differentiated the request for new construction of the Carriage House, the addition to the main building and the larger maintenance shed on the NCRC property pursuant to §205. The notice of public hearing clearly made this distinction regarding the separate aspects of the BZA application. Moreover, the Applicant provided substantial evidence in the record identifying the need for this additional space to serve the *existing* student population. The Applicant also provided testimony that final approval by the Historic Preservation Review Board ("HPRB") could not occur until the BZA approved the proposed construction. The Applicant's witnesses noted that the HPRB approval, building permit review, and construction processes will take a considerable amount of time and that NCRC needs to move forward with the proposed construction as soon as possible in order to provide appropriate facilities for its students and staff.

While the Board determined that the proposed increase in the student and staff population does not satisfy 11 DCMR §205.3 at this time (regarding objectionable traffic conditions related to the drop-off and pick-up of NCRC children), the Board also determined that the proposed new construction on the NCRC property fully complied with the requirements of 11 DCMR §205. In

ShawPittman LLP

addition, the Board determined that the Applicant was not required to obtain variance relief from 11 DCMR §§ 3202.3 and 2100.6 in order to undertake the proposed construction activity. NCRC's representatives, as well as the Office of Planning, testified and submitted evidence in the record that the proposed new construction would not create objectionable impacts on adjacent or nearby properties due to noise, activity, visual, or other objectionable conditions. At the January 6, 2004 public hearing all of the BZA Commissioners recognized this fact and stated so on the record. Therefore, the Board's decision to deny the Applicant's proposed new construction is not based on the evidence of the record in this case, or even on the views expressed by the BZA Commissioners at the public meeting.

For these reasons, we request that the Board make a separate ruling regarding whether the Applicant has satisfied the requirements of 11 DCMR §205 with regard to the proposed new construction on the NCRC property. The Board clearly has the authority to address this request at this point in the case. In addition, the Board has the ability to address this request based on the existing record and there is no need for the Board to reopen the record to allow additional information on this issue. As discussed above, there is substantial evidence in the record of this case evidencing that the Applicant has satisfied this burden, and that the BZA Commissioners *determined* that the Applicant met the standards of 11 DCMR §205. We request that the Board address this request for a ruling at its January 27, 2004 public meeting.

Respectfully submitted,

SHAW PITTMAN, LLP

Maureen Dwyer

Paul Tummonds

cc: See attached Certificate of Service

ShawPittman LLP

Laurie Monroe, Esq.
Office of Corporation Counsel
One Judiciary Square, 441 Fourth Street, N.W.,
Room 680 North
Washington, DC 20001

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,

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

Coaxum, Tarifah (OCC)

From: Bergstein, Alan (OCC)
Sent: Tuesday, March 16, 2004 11:57 AM
To: Coaxum, Tarifah (OCC)
Subject: FW: NCRC - BZA App. No. 16970 - Area Variance Relief

-----Original Message-----
From: alan.bergstein [mailto:alan.bergstein@dc.gov] <mailto:[mailto:alan.bergstein@dc.gov]> On Behalf Of Bergstein, Alan (OCC)
Sent: Friday, April 18, 2003 6:18 PM
To: 'Paul.Tummonds@shawpittman.com'; 'Maureen.Dwyer@shawpittman.com'
Cc: Monroe, Lori (OCC)
Subject: RE: NCRC - BZA App. No. 16970 - Area Variance Relief

C'mon folks. You know we don't accept substantive materials from parties. Any legal arguments are made on the record. We, of course, appreciate courtesy copies of what you submit to OZ.

Thanks

Alan

Alan Bergstein
Commercial Division
Chief, Land Use and
Public Works Section
Room 6N96
(202) 442-9777

-----Original Message-----
From: Paul.Tummonds@shawpittman.com [mailto:Paul.Tummonds@shawpittman.com] <mailto:[mailto:Paul.Tummonds@shawpittman.com]>
Sent: Thursday, April 17, 2003 12:42 PM
To: Monroe, Lori (OCC)
Cc: Bergstein, Alan (OCC); Maureen.Dwyer@shawpittman.com
Subject: NCRC - BZA App. No. 16970 - Area Variance Relief

<< File: S9XM01!.DOC >>
Lori -

Per our phone conversation I have attached a memo that addresses the appropriateness of the request for area variance relief in the above-mentioned BZA Application. Please give me a call (663-8873) or send me an e-mail if you have any questions or comments.

Paul.

NCRC - Area Variance
(See attached file: S9XM01!.DOC)

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BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

NATIONAL CHILD RESEARCH CENTER

BZA APPLICATION NO. 16970
Public Hearing: May 6, 2003
ANC 3C

SUPPLEMENTAL STATEMENT OF THE APPLICANT

In this application, NCRC is seeking two areas of relief: special exception relief under section 205 for its child development center/nursery school and variance relief from sections 2100.6 (parking) and 3202.3 (principal structure.) This prehearing submission supplements the prehearing submission previously filed on January 28, 2003 and incorporates by reference all of the testimony and exhibits of record.

CASE HISTORY/BACKGROUND

When the case was heard by the BZA on February 11th, a number of preliminary issues were decided. Specifically, the BZA denied a Motion to Dismiss the application for failure to comply with prior BZA conditions finding that the prior order did not contain a specific condition limiting the number of children at the school. (Transcript, pp. 271, 280, 284.) At that time, the BZA also determined the parties who would participate in the case. The case was continued until February 25th and all parties were asked to address the issue of whether additional relief was required for a second principal structure on a single record lot.

At the hearing on February 25th, the BZA decided that additional variance relief was needed from Section 3203.2 in order to permit a second principal building on a single record lot and NCRC agreed to amend its application accordingly. During that discussion, Corporation Counsel also advised the BZA that the relief would be an area variance. (Tr. p. 267.) As to the issue of whether variance relief was required from the parking requirement, the BZA did not decide the issue but was awaiting the decision of the Zoning Administrator. The Zoning Administrator has not ruled on that issue. Instead, NCRC advertised the case in the alternative and in this submission is demonstrating that it is entitled to either the exemption under Section 2100.5 or the variance.

At the time of the initial hearings, DDOT had filed a report that did not support the application due to five transportation safety concerns and recommended that NCRC modify its Transportation Management Plan (TMP) to safely accommodate the existing enrollment level and proposed future expansion. Subsequent to the hearings, NCRC met with DDOT and made several changes to its TMP to address their concerns. DDOT has now filed a report recommending several alternatives, including NCRC's modified TMP, but concluding that the preferred solution is to make Highland Place one way. (See DDOT's April 14, 2003 report.)

DDOT has also stated that the resulting increase in traffic from the additional 10 children and 10 staff would not significantly worsen traffic conditions in the neighborhood. NCRC supports DDOT's recommendation. NCRC also proposes to implement the changes to its TMP that are within its control in order to provide an interim mitigation measure until the engineering solution is in place. Once Highland Place is one-way, NCRC will also continue its TMP to further ensure that its operations continue to be safe.

At the time of the initial hearings, OP filed a report recommending denial and suggested that the applicant and neighboring residents continue to work with DDOT to resolve the traffic issues. OP stated that if additional information were submitted by DDOT, the applicant and neighbors, it would consider whether to modify its recommendation. In its report, OP also noted that it was still awaiting information from several agencies. The additional agency report from the DOH has now been filed with OP, as has DDOT's new report. As part of this submission, NCRC is filing additional information including a recommendation by OP that it consider locating some parking on-site along the side property line of the school. This is presented as an alternative and would be subject to final review and approval by the HPRB.

Also in the record is a letter in support of the application from the District of Columbia's Department of Human Services, Office of Early Childhood Development, which points out the number of children in the District of Columbia who are on waiting lists for licensed child care centers, including 689 in Ward 3, alone, and which supports NCRC's programs and expansion plans. As the letter states, "During its 70+ years of operation, NCRC has always provided an important and valuable service to the residents of the District of Columbia" and its current application "should be supported by all branches of the District of Columbia Government."

REVIEW OF PROPOSED PLANS

For the last 73 years, NCRC has provided its excellent preschool program within the same amount of space. It has done so even though the program has changed over time in response to the needs of the children of the community. During the 1980's, the school maintained a stable, total enrollment of between 141 and 145 students. Some students attended in the morning and some in the afternoon. In 1990, research in several areas brought about changes to NCRC's program. The first of these was the idea that early intervention could make a big difference in a child's later school success. To that end, NCRC added its inclusion program for children with special needs and lowered its entry age to two and one-half years. Because of this younger group, its enrollment increased to a total of between 167 and 171 children and has remained the same since. NCRC also added staff to work with the children with special needs, as well as their parents and teachers. It now has a full-time speech therapist, a part-time occupational therapist, and a counselor.

Additional research in the area of motor development also influenced NCRC's program. NCRC learned that motor activities improve not only physical development but brain development for later learning. Accordingly, it hired a part-time motor teacher to carry out the goals of this program.

NCRC now plans to add two additional classrooms and indoor motor space for its children as well as a combined music room/library. The plans for the new space have been reviewed and approved in concept by the Historic Preservation Review Board.

There are several advantages to the new plan:

(1) By adding two additional classrooms, it will allow NCRC to reduce the number of children in each class.

(2) Ten new spaces will open up at the school for children. This helps in small measure to address the recognized shortage of preschool spaces in the District of Columbia.

(3) By eliminating classrooms from the third floor of the existing building and by adding an elevator, NCRC is able to provide greater access and accommodations for its "special needs" students.

(4) The indoor activity space provides an opportunity for students to play indoors during inclement weather and motor activity has been demonstrated to have a significant impact on a child's intellectual development.

(5) The building location and design maximizes the amount of open space on the site by providing 80% open space even though only 60% is required.

(6) The school can continue to be an important community and city resource for all residents.

NCRC is unique in that it provides an inclusion program for children with special needs, and it is the only preschool in the District of Columbia to do so. Based on research, early intervention for these children is vital for their development. NCRC places two to three children with special needs in each classroom along with other typically developing children. NCRC serves a wide range of children with special needs, including children with autism, Downs syndrome, cochlear implants, blindness and language problems. (See the attached Exhibit ___ for a complete description of the school's special needs program.)

Over the last school year, NCRC enrolled 24 children with special needs in its preschool program. During that same time period, NCRC had to turn away 29 children with special needs because of a lack of space. In addition, NCRC also had to turn away 234 of its "typically developing" children because of a shortage of space. Thus, there is a critical need for the services NCRC provides. Nonetheless, in order to balance the needs of the children in the larger DC community with the needs of its neighbors, NCRC has agreed to limit its enrollment to 10 additional children.

Presently, NCRC has a total enrollment of 171 children in its morning and afternoon programs. This application requests an increase to 181, with 2% flexibility. NCRC will agree to a specific condition limiting the total enrollment to 181 (185 with the two percent flexibility) as well as a condition limiting the total number of children at any one time to 120. Even though the

new classroom space could accommodate up to 150 children at any one time, NCRC agrees to limit the number to 120 and to continue its tradition of smaller class sizes.

SPECIAL EXCEPTION RELIEF UNDER SECTION 205

Section 205 of the Zoning Regulations permits a child development center/nursery school use as a special exception in residential districts provided certain requirements are met. NCRC meets those requirements.

Burden of Proof

The D.C. Court of Appeals has determined that:

> Special exceptions, unlike variances, are expressly provided for in the Zoning Regulations. The Board's discretion to grant special exceptions is limited to a determination whether the exception sought meets the requirements of the regulation. The burden of showing that the proposal meets the prerequisite enumerated in the particular regulation pursuant to which the exception is sought rests with the applicant. In sum, the applicant must make the requisite showing, and once he has, the Board ordinarily must grant his application.
>
> Glenbrook Road Association v. D.C. Board of Zoning Adjustment, 605 A. 2d. 22, 30 (D.C. 1992), quoting Stewart v. D.C. Board of Zoning Adjustment, 305, A. 2d 516, 518 (D.C. 1973).

Specific Standards Under Section 205

Section 205.2: The Center Shall be Capable of Meeting All Applicable Code and Licensing Requirements

NCRC has been in continuous operation as a licensed child development center since 1930. It is licensed by the DC Department of Health. (DOH)

Its current license permits 108 children in the morning program and 108 in the afternoon program. (See DOH report as Exhibit ___ in the record.)

With two additional classrooms, it will be able to accommodate 150 children at any one time. (See DOH report as Exhibit ___ in the record.)

NCRC has agreed however, to limit the number of children to 120 at any one time. (See applicant's proposed conditions.)

DOH has no objection to the application. (See DOH reports in the record.)

Section 205.3: The Center Shall be Located and Designed to Create No Objectionable Traffic Conditions and No Unsafe Condition for Picking Up and Dropping Off of Children.

The Center has been in continuous operation since 1930 with no history of accidents or safety issues.

The current system includes the use of walkie talkies and school personnel with orange vests to ensure smooth operation of the pick up and drop off of children on Highland Place.

Future changes to its TMP include the following:

Staggered drop off times in the morning to reduce the number of cars at any one time.
Use of two uniformed personnel to monitor the carpool operation and to identify any NCRC staff or parents who do not comply with the school's TMP.
Use of stickers on NCRC cars to clearly identify them and to distinguish them from users of the Cleveland Park Club or commuters who park and use Metro.

NCRC will implement these changes in the fall of 2003 to further ensure that there will be no objectionable or unsafe conditions.

Once the new building is in place on Ordway, traffic on Highland will be reduced since more children will be using the Ordway Street entrance.

Additionally, DDOT is recommending that Highland Street be made one-way which will further improve traffic operations.

Section 205.4 The Center Shall Provide Sufficient Off-Street Parking Spaces to Meet The Reasonable Needs of Teachers, Other Employees and Visitors.

Since NCRC is a contributing building within the Cleveland Park Historic District, it believes that it is exempt under Section 2100.5.

In the event the BZA disagrees, the parking variance is discussed below.

Further, even through no parking is required, NCRC can accommodate three parking spaces on the side of the existing building provided the HPRB approves the plan.

Section 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.

NCRC is unaware of any objectionable impacts from or any complaints regarding its outdoor play space area. The area is large and well-removed from neighbors.

This area also provides a community amenity in that it is used by neighborhood residents from 3:30 in the afternoon on weekdays and all day weekends and holidays.

No amplification equipment is permitted outside on NCRC property.

New mechanical equipment has been located within the mansard roof walls.

Section 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.

No special treatment is required. The property is of significant size, with substantial open space and has adequate screening.

The HPRB has reviewed and approved the design as compatible with the historic district and site.

Even with the new construction, the site will only be at 19.8% lot occupancy, whereas the regulations permit a lot occupancy of 40%.

Over 80% of the site will continue to be devoted to open space.

Section 205.7 Any Off-Site Play Area Shall be Located So as Not to Result in Endangerment to the Children.

NCRC does not use an off-site play area.

Section 205.8 The Board May Approve More Than One (1) Child Development Center in a Square or Within 1000 Feet of Another Only When The Board Finds Certain Conditions Have Been Met.

There is no other child development center within the square or within 1000 feet.

PARKING EXEMPTION UNDER SECTION 2100.5

Section 2100.5 of the Zoning Regulations was adopted by the Zoning Commission in order to exempt historic structures from providing additional parking when the use is changed. The intent of this section is to encourage the renovation and adaptive reuse of historic structures without impeding that adaptive reuse by requiring the structures to provide parking. The specific language is as follows:

> 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.

On February 7, 2003, the State Historic Preservation Officer certified that NCRC's property, which consists of Lot 30 in Square 2072, is "either a historic landmark or a building or structure contributing to the character of a historic district listed in the DC Inventory of Historic Sites." (See the certification attached as Exhibit ____.) The certification applies to the entire site, not to any individual building on the site, or to any particular portion of the site. Indeed, all of the new construction on the site, including the carriage house, was required to be reviewed and approved by the Historic Preservation Review Board in order to determine whether the alterations and rear addition to the 1905 Colonial Revival house, as well as the carriage house addition, would be consistent with the purposes of the Historic Preservation Act.

On January 23, 2003, the HPRB gave its approval of the conceptual design and adopted the staff report, a copy of which is attached as Exhibit ____. In that report, as well as in the pages of the hearing transcript on the application, it is clear that the Review Board looked to the entire site to determine whether the proposed additions and new construction were sympathetic to and compatible with the Colonial Revival style house, the property's site, the streetscape along Ordway Street, and the historic district in general. The transcript makes equally clear that topography is an important component of the Cleveland Park Historic District and that the HPRB was looking at the general architectural compatibility of the additions with the site, the contour and historic topography of the site, the relationship of the new building to the "magnificent central house" and the overall compatibility of the new construction.

Based on the decision of the Historic Preservation Review Board, the hearing testimony, and the certification by the State Historic Preservation Officer, it is clear that the site qualifies for the exemption under section 2100.5. Accordingly, no additional parking spaces are required.

This exact issue was raised in connection with the BZA case for The Atlantic Building, located at 920, 922-924, 926, 938, 940 and 942 F Street, NW. In that case, the new construction

consisted of all but the facades of the four eastern buildings and the retention of three western buildings. Notwithstanding that the new construction involved seven different buildings, and would contain substantially more floor area than the existing construction, the new construction was considered an addition, and the Board approved the exemption under section 2100.5. As the record in that case indicates, the Zoning Administrator has consistently applied the language of this provision and it has been uniformly applied to all qualifying properties without regard to the degree of increase in intensity.[1] There is nothing in the cited section or in any other provision of the regulations which limits the size of the increase or authorizes the Zoning Administrator to determine that parking would be required for some additions and not others. (Compare this section to 2100.7 and 2200.7, which differentiate increases in intensity above and below 25% for non-historic buildings.)

Even though no spaces are required, NCRC has developed a plan that shows the location of three parking spaces on the side of the house which may have minimal impact on the historic site. These parking spaces are shown in response to a suggestion by the Office of Planning. Even though these parking spaces are not required, NCRC proposes to request that the HPRB approve these parking spaces in order to provide some parking to address OP and neighborhood concerns. Whether or not these spaces can be provided on site is up to the Historic Preservation Review Board, which has final authority under the Historic Preservation Act. This plan would be filed as part of the final permit application for review and approval by HPRB after the BZA has taken action on the application. If the HPRB does not approve the location of these parking spaces, it would have no affect on the school's operation since the parking is not required under either section 2100.5 (exemption) or under the variance relief test discussed below.

VARIANCE RELIEF FROM THE PARKING AND PRINCIPAL STRUCTURE REQUIREMENTS OF THE REGULATIONS

The Requested Variances are Area Variances

There are two categories of variances: area and use. The D.C. Court of Appeals addressed the difference between these types of variances in Association for the Preservation of 1700 Block of N Street, N.W., and Vicinity, et al. v. District of Columbia Board of Zoning Adjustment, 384 A. 2d 674. In that case the Court determined that:

> The distinction between a use variance and an area variance is that the former "permits a use other than that prescribed by the zoning ordinance' 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

[1] The Board's discussion of this issue can be found in the Public Hearing Transcript of July 2, 2002. Attached as Exhibit _____ is a copy of BZA Order No. 16892 which approved The Atlantic Building and did not site the need for variance relief from the parking requirement. Also attached are copies of the BZA orders for Applications 16631 and 16681, which similarly found that the parking exemption applied to the entire historic site without any need to evaluate intensity of use.

permitted use in a manner other than that prescribed by the ordinance." (citing 2 Anderson, American Law of Zoning § 14.07 (1968), quoting in part *Alumni Control Board v. Lincoln*, 179 Neb. 194, 137 N.W. 2d 800, 802 (1965).

The Burden of Proof

A three prong test must be satisfied in order for an area variance application to be approved. In order to grant the request, the BZA or Zoning Commission must find that:

- As a result of exceptional narrowness, shallowness or shape of the specific property or by reason of an exceptional topographic condition or other extraordinary or exceptional situation or condition on the property;
- The strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties upon the owner of the property; and
- Granting the variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the Zoning Regulations.

The Test is Met

1) The NCRC property is unique by reason of its exceptional size, shape, topography or other extraordinary and exceptional situation or condition.

- The NCRC property is located in the Cleveland Park Historic District, which has .written into its designation the contour and historic topography of the district.
- The NCRC property is the largest site in the neighborhood by a substantial amount, comprising 45,000 square feet.
- The site is also unusual in that it is a through lot with significant grade changes from Highland Place, which is up on a hill, to Ordway Street, which drops significantly.
- The site is also unusual in that it is improved with three existing buildings, two of which are deemed contributing to the district – the 1905 main building (a Colonial Revival house) and the 1915 playhouse. The D.C. Court of Appeals held in *Clerics of St. Viator v. D.C. Board of Zoning Adjustment,* 320 A. 2d. 291 (D.C. 1974) that the exceptional situation or condition standard goes to the "property", not just the "land"; and that "property generally includes the permanent structures existing on the land." *Id.* at 293-294

- The NCRC property is unusual in that it includes a very large playground and significant open space. Even with the construction of the proposed new structure, over 80% of the site will continue to be devoted to open space.

- HPRB has granted conceptual design approval for the proposed renovation and new construction to the existing buildings and site.

2) By reason of the aforementioned unique or exceptional condition of the NCRC property, the strict application of the Zoning Regulations will result in peculiar and exceptional practical difficulty upon the owner of the property.

- NCRC has used the entire property since 1930 as a child development center. NCRC has always utilized the multiple buildings on the NCRC property for child development center use without being required to have separate record lots for each building.

- In 1998, NCRC obtained special exception relief to increase its certificate of occupancy and was not required to obtain variance relief from §3202.3 at that time. Both the main house and the playhouse were existing in a single record lot at that time and both were used for school use.

- NCRC originally proposed to construct the carriage house as an addition to the existing playhouse which, under the Zoning Regulations, would not require variance relief. The HPRB staff recommended visual separation of the buildings above grade and the HPRB recommended further that the connector piece be eliminated. (See Exhibit ____, HPRB January 23, 2002 Transcript, p. 90.) This action separates the building and creates the need for the variance relief.

- In other cases, the Office of Planning and the BZA have found that applications that are subject to historic preservation requirements and other obligations impose burdens significantly in excess of a typical development. Thus satisfying the "practical difficulties" standard for an area variance. (BZA Application No. 16892, 16681, 16631.)

- Requiring NCRC to create separate record lots for each of the principal structures on the property will result in an exceptional practical difficulty in that it will require the "carving – up" of this large, predominantly open and wooded lot in a historic district. Each of these lots would be required to satisfy all applicable zoning requirements, including lot occupancy, side yard and rear yard requirements. Satisfaction of these requirements not only pose an exceptional practical difficulty for NCRC, but would also very likely diminish the open and wooded setting that currently exists on the site.

- NCRC currently does not have any parking spaces on the property. The creation of parking spaces will result in numerous negative impacts on the property including the removal of grass and wooded areas, the loss of pervious ground cover, and potential negative aesthetic impacts.

- In the 1998 BZA case, the Board of Zoning Adjustment determined that variance relief from this section was not necessary, and stated in its Order No. 16307 that, "The Board determined that a parking variance is not needed based on subsection 2100.5 of the zoning Regulations which exempts such historic structures from providing additional parking when the use is changed."

3) Granting the variance will not cause substantial detriment to the public good and will not impair the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map.

- NCRC's satisfaction of the special exception requirements to operate a child development center in the R-1-B District (§205 and 3104.1), including the proposed conditions of approval that have been submitted by NCRC, evidence that the proposed continued use of the NCRC property for a child development center will satisfy this standard.

- The requested variances would permit continued use of this site as a school to which it has been devoted for more than 70 years.

- The requested variance would also permit renovation and reuse of contributing buildings in an historic district and help preserve the open space and topography of the site.

WITNESSES

In support of this application, NCRC expects to call the following witnesses:

1. Susan Piggott, Director of NCRC
2. Charles E. Anthony, Architect of the Project
3. Osborne George, Traffic Consultant
4. Pedro Alfonso, Parent and Trustee

Outlines of their testimony are attached hereto as Exhibit ____.

EXHIBITS IN SUPPORT OF APPLICATION

In addition to the exhibits previously filed in the record, the Applicant submits the following exhibits in support of its application:

Exhibit A	Description of NCRC Special Needs Program.
Exhibit B	Copies of precedent BZA orders in which the parking exemption under section 2100.5 has been granted.

Exhibit C	Site map showing the NCRC site, as well as the location of other non-residential (institutional and commercial) uses in the surrounding vicinity.
Exhibit D	NCRC Revised Transportation Management Program
Exhibit E	Supplemental Traffic Report by Osborne George
Exhibit F	Outlines of witnesses' testimony.
Exhibit G	Revised site plan showing proposed location of three parking spaces.
Exhibit H	HPRB Certification under Section 2100.5
Exhibit I	Selected portions of January 23, 2003 HPRB hearing transcript.

CONCLUSION

As demonstrated above, and as the testimony at the public hearing will address, the application meets the criteria set forth in section 205 for special exception approval, as well as the variance requirements from sections 2100.6 and 3202.3; in the alternative, the application is entitled to the exemption from the parking requirements under section 2100.5. The school has demonstrated that the relief sought is in harmony with the general purpose and intent of the Zoning Regulations, and that it will not adversely affect neighboring properties. Accordingly, NCRC respectfully requests that the Board of Zoning Adjustment approve this application.

Respectfully submitted,

Maureen E. Dwyer

Paul A. Tummonds

Coaxum, Tarifah (OCC)

From: Bergstein, Alan (OCC)
Sent: Tuesday, March 16, 2004 11:06 AM
To: Coaxum, Tarifah (OCC)
Subject: FW: Thanks

Forgot about email.

This was in my "sent items". I will check my other folders.

Thanks

Alan

Alan Bergstein
Commercial Division
Chief, Land Use and
Public Works Section
Room 6N96
(202) 442-9777

-----Original Message-----
From: Bergstein, Alan (OCC)
Sent: Thursday, January 08, 2004 9:49 AM
To: 'Maureen.Dwyer@shawpittman.com'
Cc: 'Paul. Tummonds (E-mail)'
Subject: RE: Thanks

Maureen,

OK. But please do not indicate that your letter was prompted, recommended, etc by OZ or OCC, since that is not the case. Please cc: me. Enjoy your time off.

Thanks

Alan

Alan Bergstein
Commercial Division
Chief, Land Use and
Public Works Section
Room 6N96
(202) 442-9777

-----Original Message-----
From: Maureen.Dwyer@shawpittman.com [mailto:Maureen.Dwyer@shawpittman.com] <mailto: [mailto:Maureen.Dwyer@shawpittman.com]>
Sent: Wednesday, January 07, 2004 8:07 PM
To: Alan Bergstein

Subject: Thanks

Thank you for getting back to Allison. I am away until Monday but Paul is working on the letter so we can file on Monday.

Sent from my BlackBerry Wireless Handheld
Maureen Dwyer
Shaw Pittman

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CORPORATION COUNSEL

March 25, 2004

Steven R. Hunsicker
3083 Ordway Street, NW
Washington, DC 20008

Re: Freedom of Information Act Request, dated March 11, 2004 (AFOCC 04-006)

Dear Mr. Hunsicker:

This letter acknowledges receipt of your check in the amount of $18.00 as payment for a copy of records responsive to your March 11, 2004 request pursuant to the District of Columbia Freedom of Information Act ("FOIA"). Attached is a copy of the responsive records. If you have any questions, please contact the undersigned at (202) 724-5508.

Sincerely,

ROBERT J. SPAGNOLETTI
Corporation Counsel

BY: _____
TARIFAH COAXUM
Freedom of Information Act Officer

(AFOCC-04-006-B)

Coaxum, Tarifah (OCC)

From: Bergstein, Alan (OCC)
Sent: Tuesday, March 16, 2004 11:13 AM
To: Coaxum, Tarifah (OCC)
Subject: FW: NCRC

This was in my deleted mail folder.

Thanks

Alan

Alan Bergstein
Commercial Division
Chief, Land Use and
Public Works Section
Room 6N96
(202) 442-9777

-----Original Message-----
From: Maureen.Dwyer@shawpittman.com [mailto:Maureen.Dwyer@shawpittman.com] <mailto:[mailto:Maureen.Dwyer@shawpittman.com]>
Sent: Monday, February 09, 2004 5:21 PM
To: alan.bergstein@dc.gov
Subject: NCRC



16611_2243-27-28-65.pdf

Alan:
You are already very familiar with this order (which was the denial of the Edmund Burke school case back in 2001) since your office is now working on the new order, but it may also be a helpful model for the NCRC order. The Order makes clear that the denial was based on traffic impacts and that in all other respects (parking, noise impacts,) the school met the requirements of the regulations. In NCRC's case, the Board was clear in its decision that all requirements were met except for section 205.3 so it seems that the order could address the new construction in that respect and make clear that there were no issues with the buildings themselves (location, noise, etc.) Additionally, the order can, and should address the preliminary issues the Board decided so that those do not have to be revisited. These include the parking exemption for the entire site so that no variance relief is required for parking, the Board's conclusion that the building was three stories not four, and the Board's conclusion that no variance from section 3202.3 was required since the new building was accessory. The findings should also reference the existing enrollment (171) and number of students at any one time (120 per the c/o) and staff numbers (32 FTE), the fact that there are morning and afternoon programs, and the activities that presently take place at the school (Pumpkin party, etc.) All of these are in our draft order.
These are just my thoughts after re-reading the Burke order.
Thanks.
M.

----- Forwarded by Maureen Dwyer/SPPT/US on 02/09/2004 04:53 PM -----

Sheryl Jackson
02/09/2004 04:42 PM

To: Maureen Dwyer/SPPT/US@SPPT
cc:
Subject: Burke School 2001 order

(See attached file: 16611_2243-27-28-65.pdf)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

★ ★ ★

Application No. 16611 of Kenneth Workman, Josef Straka, and Carl and Elizabeth Richmond, pursuant to 11 DCMR 3104 and Section 206 for a special exception to expand and establish a private school and Section 411 for relief from the roof structure requirements to allow for the construction of more than one roof structure, a waiver from the roof structure setback requirements and roof structures with walls of an unequal height in an R-5-D District at premises 2969 Upton Street N.W. and 4101 and 4103 Connecticut Avenue, N.W. (Square 2243, Lots 27, 28, and 65).

HEARING DATES: May 15, May 22, and July 10, 2001

DECISION DATES: September 4 and September 25, 2001

DECISION AND ORDER

The applicant is Edmund Burke School ("Burke School"), on behalf of the owners of the subject property, located at 2969 Upton Street, N.W. and 4101-4103 Connecticut Avenue, N.W. (Square 2243, Lots 27, 28, and 65). Burke School filed an application pursuant to 11 DCMR § 3104 with the Board of Zoning Adjustment on July 7, 2000 for a special exception under 11 DCMR § 206 for an addition to an existing private school in an R-5-D zone district. Burke School sought special exception authorization to construct an additional school building next to its existing building and to increase enrollment capacity to 360 students and 70 staff. Burke School also sought relief under 11 DCMR § 411 to allow more than one roof structure housing mechanical equipment. The zoning relief requested in this application is self-certified pursuant to 11 DCMR § 3113.2. After public hearing, the Board denied the application because the proposed private school expansion was likely to become objectionable to adjoining and nearby property because of traffic impacts associated with the proposed increase in the number of students and staff.

Preliminary and Procedural Matters

Notice of Application and Notice of Public Hearing. By memoranda dated August 16, 2000, the Office of Zoning advised the Office of Planning, the Zoning Administrator, and Advisory Neighborhood Commission (ANC) 3F, the ANC for the area within which the subject property is located, of the application.

The Board originally scheduled a public hearing on the application for October 24, 2000. Pursuant to 11 DCMR § 3113.13, the Office of Zoning on September 14, 2000 mailed the applicant, the owners of property within 200 feet of the subject property, and ANC 3F notice of

the hearing. Notice was also published in the D.C. Register. The applicant's affidavits of posting and maintenance indicate that zoning posters were posted beginning October 6, 2000 in front of the subject property in plain view of the public.

The hearing was postponed several times, until November 14, 2000, January 23, 2001, and May 15, 2001, to provide additional time for discussions between Burke School, ANC 3F, and interested neighbors to address concerns about traffic on Upton and Van Ness Streets and the public alley, the amount of parking provided by Burke School, and the preservation of green space between the existing school building and its eastern property line. The applicant submitted modified plans for the expansion that, among other things, addressed traffic circulation and parking.

Requests for Party Status. The Board granted timely requests for party status to (1) Neighbors United for Livable Streets ("NULS"), a coalition of residents of Upton and Tilden Streets, N.W. and Connecticut Avenue in the vicinity of Burke School; (2) Linda M. Jay, a resident of Upton Street in a house immediately east of the existing Burke School building; and (3) Sirrus LLC, the owner of a 37-unit apartment building located at 4107 Connecticut Avenue, N.W., immediately adjacent to the site of the proposed expansion.

Van Ness South Tenants' Association ("VNSTA"), an organization representing residents of the 625-unit apartment building at 3003 Van Ness Street, N.W., submitted a late application for party status. The Board also granted party status to VNSTA, because it represented residents who rely on the alley system also used by Burke School and are affected by the use of Van Ness Street for bus parking and other traffic associated with the school.

Applicant's Case. The applicant provided testimony and evidence from David Shapiro, Head of School; Steve Pruitt, Vice Chairman of the school's Board of Trustees and parent of a Burke School student; Frank Schlesinger, an expert in architecture; Louis Slade and Erwin Andres, experts on transportation, traffic, and parking matters; and Lisa Myers, a Metropolitan Police Department officer who also works part-time directing traffic at Burke School during the morning and afternoon rush hours.

Office of Planning Report. The Office of Planning ("OP") report noted that the location of the subject property is a logical area for expansion of Burke School that would place the new building on a major thoroughfare, away from residential properties. OP identified the major issue, among the adverse impact criteria enumerated in 11 DCMR § 206, as the impact of the proposed expansion on traffic and the applicant's ability to mitigate that impact. OP relied on the transportation personnel of the Department of Public Works ("DPW") for analysis of the traffic issue. OP recommended denial of the application in light of DPW's conclusion that continued traffic congestion would result under the applicant's proposed traffic plan.

DPW Report. By report dated May 3, 2001, the Department of Public Works ("DPW"), Office of Transportation Planning, stated that the existing Burke School currently generates traffic congestion and presents traffic safety problems. DPW concluded that the proposed expansion would increase the existing traffic problems and would cause local residents to continue to experience traffic congestion, although the applicant's proposed mitigation measures

would improve traffic congestion and safety over existing conditions. Accordingly, DPW recommended against approval of the application to expand the school to the adjacent property, with associated increases in the student and faculty populations. In a subsequent supplemental report, dated May 21, 2001, DPW reviewed the applicant's revised traffic management plan and recommended a one-year demonstration of the effectiveness of the proposed mitigation measures before approval of the application.

ANC Report. At a duly noticed public meeting held April 23, 2001, with a quorum present, ANC 3F passed a resolution to oppose the application. The ANC's written report, dated May 8, 2001, recommended denial of the application and identified the following specific issues and concerns:

1) Traffic – Burke School is located in a densely populated residential neighborhood, which houses several institutions in addition to Burke School that generate very heavy traffic and parking demands on Upton, Van Ness, Tilden, and 29th Streets and Connecticut Avenue. Approval of the application would produce unacceptable and intolerable increases in already high traffic volumes in the neighborhood surrounding Burke School.

2) Recreation Space – Burke School provides no on-site space for outdoor student recreation activities or on-site food service facilities for student lunches. An increase in Burke School's authorized student level would exacerbate existing disruptive activities and would be objectionable.

3) Compliance – Burke School has failed to comply with conditions of prior Board orders.

At a duly noticed public meeting held June 18, 2001, with a quorum present, ANC 3F passed a resolution to support DPW's recommendation for a one-year demonstration of the effectiveness of Burke School's proposed traffic management plan.

Parties in Opposition. NULS opposed the application due to concerns that the proposed addition would exacerbate existing traffic problems. Joe Mehra, an expert traffic consultant retained by NULS, testified that the applicant's traffic report was inaccurate and understated actual traffic volumes in the vicinity of Burke School. NULS contended that existing conditions in the area are unsafe and congested, and would be made worse by any additional traffic on the roadways adjacent to Burke School.

Sirrus opposed the application on grounds that the proposed addition would adversely affect residents of the adjacent apartment building by increasing noise, traffic, and parking problems. VNSTA also testified that approval of the application would worsen traffic conditions.

Persons in Support or in Opposition. The Board received numerous letters and heard testimony from many persons interested in the application. Persons in support generally described the many attributes of Burke School and its need for additional space and facilities. Persons in opposition generally described problems associated with traffic congestion on small

residential streets and narrow alleys, and with increased parking demand associated with Burke School and other educational facilities in the vicinity.

Closing of the Record. The record was closed at the conclusion of the hearing on July 10, 2001, with the exception of certain information requested by the Board and the parties' proposed findings of fact and conclusions, which were due on August 20, 2001. The record was reopened on September 4, 2001 to receive certain post-hearing submissions by the parties, which were due by September 18, 2001.

Decision Meeting. At its decision meeting on September 25, 2001, the Board, by a 4-0-1 vote, denied the application.

FINDINGS OF FACT

The Subject Property and Surrounding Area

1. Burke School, a private, coeducational school for grades six through twelve, was established in 1968 and has been located since 1973 in its existing building at 2955 Upton Street, N.W. (Square 2243, Lot 67).

2. The proposed addition would be located on adjacent property to the west at 2969 Upton Street, N.W. and 4101-4103 Connecticut Avenue, N.W. (Square 2243, Lots 27, 28, and 65). The subject property, an irregularly shaped parcel with an area of 14,305 square feet, is separated from Burke School's existing building by a public alley.

3. The subject property is zoned R-5-D, which permits matter-of-right development to a height of 90 feet, 3.5 floor area ratio, and 75 percent lot occupancy, with rear yards of at least 15 feet. 11 DCMR §§ 400.1, 402.4, 403.2, 404.1.

4. The site of the existing school is zoned R-2, as is the neighborhood to the east of Burke School. The southern side of Upton Street to 29th Street is developed with rowhouses. Along the north side of Upton Street, heading east, are six semi-detached dwellings, the Levine School of Music, Howard University Law School, and several large detached residential houses.

5. Areas to the north and west of Burke School are zoned R-5-D and contain medium to high-density residential developments consisting of rowhouses and apartment buildings of varying heights and bulk. The block of Van Ness Street behind Burke School is developed with high-density residential apartment buildings. On the west side of Connecticut Avenue, across from the subject property, are the Van Ness Campus of the University of the District of Columbia and the Intelsat office building. North of the site at Connecticut Avenue and Van Ness Street is a C-3-A zone district of mixed-use development.

The Proposed Private School Use

6. The applicant proposes to construct a new five-story school building for middle school students. The Burke School expansion, at 28,167 square feet, would contain classrooms, a library, computer rooms, photography labs, music rooms, art studios, administrative space, a 150-seat auditorium, and outdoor terrace space for passive recreation.

7. The proposed expansion would comply with the building restrictions of the R-5-D zone with respect to height, floor area ratio, rear yard, and lot occupancy requirements.

8. The core school hours would be 8:25 a.m. to 3:30 p.m., with after-school programs operating until 6:30 p.m. The applicant stated that trash would be collected in the new building and serviced by a private contractor between 8 a.m. and 6 p.m.

Noise Impacts

9. The proposed expansion of Burke School would not create adverse noise impact on neighboring property as a result of the increase in student population.[1] The private school use of the property would involve older children in grades six through twelve, and would occur principally indoors in an urban setting. The proposed addition would be oriented toward Connecticut Avenue, away from the residential area.

Traffic Impacts

10. Connecticut Avenue is a major arterial, but other streets in the vicinity of Burke School, including Upton, Tilden, and Van Ness Streets, are much smaller and residential in nature. The neighborhood does not have a complete grid system of streets. The intersection of Connecticut Avenue and Upton Street is an unsignalized location. The Board credits DPW's testimony that traffic congestion on Connecticut Avenue results in the diversion of both through traffic and local residential and commercial traffic onto residential streets and into the public alley system. The neighborhood's streets and alleys are not designed to handle this high level of traffic, compounding congestion and traffic safety problems.

11. Surrounding land uses and background traffic patterns add to the traffic congestion problems in the vicinity of Burke School. The high-density housing north of the school, commercial properties on Connecticut Avenue, and other institutional uses in the neighborhood all contribute to the existing traffic congestion.

12. The subject property is located one block south of the Van Ness Metrorail station and adjacent to Connecticut Avenue bus routes.

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[1] In light of its decision to deny the application on other grounds, the Board declines to address the applicant's request under 11 DCMR § 411 for relief from roof structure requirements, and therefore makes no finding with respect to whether air conditioners or other mechanical equipment in the proposed expansion would become objectionable to adjoining or nearby property.

13. The proposed expansion of private school use would serve the entire metropolitan area. Approximately half of Burke School's current students come from the District of Columbia, and approximately half of those students use public transportation. An additional number of District of Columbia students live within walking distance of the school. A small percentage of students drive themselves to school; the remainder arrive by vehicle. Approximately one-third of the staff uses public transportation; the remainder drive and park at the school.

14. Burke School employs off-duty police officers to direct traffic flow during the peak morning and afternoon periods when most students are dropped off or picked up from school; that is, from 7:30 to 8:30 a.m. and from 3:00 to 7:00 p.m. Most morning drop-offs occur between 7:45 and 8:15 a.m., while most afternoon pick-ups occur between 2:45 and 3:45 p.m.

15. The Board credits DPW's testimony that the existing Burke School currently generates traffic congestion and presents traffic safety problems when students are being dropped off and picked up, as well as during some evening events at the school, and that the expansion of Burke School would increase those traffic problems. The Board also credits the ANC report, which described heavy traffic and parking demands in a densely populated residential neighborhood that contains several institutions, as well as the testimony of the NULS traffic expert, who stated that existing conditions in the area are congested, that unsafe traffic conditions exists at Connecticut Avenue and Upton Streets, and that any additional traffic on streets and alleys around Burke School would exacerbate the existing traffic problems.

16. The applicant's traffic impact analysis indicated that the proposed expansion, with the associated increases in student and staff populations, would result in 29 additional trips to and from Burke School in the morning peak period and 18 additional trips in the afternoon peak hour.

17. The applicant proposed a traffic management plan to lessen traffic impacts of the private school use of the property, with mitigation measures such as transit subsidies for students and employees, efforts to facilitate carpool operations, and a shuttle van service that would bring students from two locations to Burke School on school day mornings, thereby eliminating trips by parents who would otherwise drive their children to school. The applicant also proposed an operations plan and a compliance plan intended to ensure that Burke School would remain in compliance with zoning requirements and conditions of approval of the application.

18. The Board credits the testimony of DPW that implementation of the proposed traffic management plan would improve traffic congestion and safety over existing conditions, but that the proposed increases in student and faculty populations – even with the traffic management plan – would cause increased traffic congestion in the vicinity of Burke School.

Number of Students

19. Burke School currently has 299 students in grades six through twelve, and employs 59 faculty and staff. The applicant proposed to increase student enrollment to 360 (240 high school students and 120 middle school students), with a total staff of 70 teachers and employees.[2]

Parking

20. Burke School currently provides 24 parking spaces on-site. A garage underneath the proposed expansion would add 51 more parking spaces, for a total of 75 spaces.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797, as amended, D.C. Code § 6-641.07(g)(2) (2001)), to grant special exceptions as provided in the Zoning Regulations. The applicant applied under 11 DCMR § 3104.1 for a special exception pursuant to 11 DCMR § 206 to allow the use of the subject premises as a private school. The notice requirements of 11 DCMR § 3113 for the public hearing on the application have been met.

To meet their burden of proof under Subsection 3104.1, the applicant must demonstrate that the proposed private school use is in harmony with the general purpose and intent of the Zoning Regulations and Maps, that it will not adversely affect the use of the neighboring property in accordance with the Zoning Regulations and Maps, and that it meets the special conditions listed in Subsection 206 for private schools. Under Subsection 206.2, "The private school shall be located so that it is not likely to become objectionable to adjoining and nearby property because of noise, traffic, number of students, or otherwise objectionable conditions." Under Subsection 206.3, "Ample parking space, but not less than that required in chapter 21 of this title, shall be provided to accommodate the students, teachers, and visitors likely to come to the site by automobile."

The Board's discretion in reviewing a special exception application is limited to a determination of whether an applicant has complied with the requirements of these subsections. If the applicant meets its burden, the Board ordinarily must grant the application. *First Baptist Church of Washington v. District of Columbia Bd. of Zoning Adjustment*, 432 A.2d 695, 698 (D.C. 1981).

Further, the Board is required under D.C. Code § 1-309.10(d) (2001) to give "great weight" to the affected ANC's recommendation. The Board must "articulate why the particular

[2] In light of its decision to deny the application on other grounds, the Board declines to address the ANC's concern that an increase in Burke School's authorized student level would create objectionable disruptive activities, and therefore makes no finding with respect to whether the proposed number of students would become objectionable to adjoining or nearby property.

ANC itself, given its vantage point, does – or does not – offer persuasive advice under the circumstances." *Kopff v. District of Columbia Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1384 (D.C. 1977). The Board has carefully considered the ANC's report and as discussed below finds the ANC's recommendation pertaining to traffic persuasive.[3]

Based upon the findings of fact and having carefully considered the ANC's recommendations, the Board concludes that the proposed private school use does not meet the requirements of the Zoning Regulations. Specifically, the Board finds that the proposed use will adversely affect adjacent and nearby properties in the following respects.

Objectionable Conditions (11 DCMR § 206.2). The Board concludes under Subsection 206.2 that the proposed private school expansion is likely to become objectionable to adjoining and nearby property because of traffic impacts associated with the proposed increase in the number of students and staff. The Board concludes that the proposed drop-off and pick-up operations would result in serious pedestrian and traffic safety hazards that cannot be effectively managed. They include lack of sufficient space to safely drop off and pick up students, and safety hazards related to the traffic back-ups that would occur as drivers waited to drop off and pick up students and then re-entered or continued on in the traffic lane. These conditions would also result in traffic congestion, and would compound existing traffic problems associated with the presence of numerous institutional uses in the residential neighborhood and the diversion of traffic onto residential streets and public alleys not designed to accommodate heavy traffic.

Given the likely traffic impacts, the Board concludes that the proposed increased number of students and staff coming to the expanded Burke School is objectionable. The Board finds the ANC's report as to these conditions persuasive, and concludes under 11 DCMR § 206.2 that the traffic conditions associated with the proposed private school use provide a sufficient basis upon which to deny the application.

The Board is not persuaded that the applicant's proposed transportation management, operations, and compliance plans would effectively eliminate the hazards and other objectionable conditions associated with additional school-generated traffic that would result from the requested increases in student and staff populations. Traffic is already extremely difficult in the vicinity of Burke School in light of such factors as the volume of traffic on Connecticut Avenue, the lack of a complete grid system of streets, the narrow residential streets, the extensive use of public alleys in the area, and the prevalence of institutional uses that also generate traffic in the neighborhood. An increase in student and staff populations would likely bring a significant number of additional vehicles to Burke School, notwithstanding its proximity to public transportation, thereby unacceptably exacerbating the already congested morning and afternoon peak periods.

Nor is the Board persuaded to adopt DPW's recommendation of a one-year trial demonstration of the proposed mitigation measures. A temporary demonstration, without construction of the proposed expansion, would not accurately reflect the effectiveness of the

[3] In light of its conclusion that approval of this application would create objectionable conditions that cannot be mitigated by means of conditions of approval, the Board declines to address the ANC's concern regarding Burke School's failure to comply with conditions of prior Board orders.

proposed mitigation measures, because several of the purported improvements to traffic circulation, such as the on-site queuing, additional parking spaces, and on-site loading facilities, would not be in place until after construction of the proposed expansion.

The "Ample Parking" Requirement (11 DCMR § 206.3). The applicable schedule of parking spaces in 11 DCMR § 2101.1 requires the proposed expanded private school use to provide two parking spaces for each three teachers and other employees, plus the greater of one space for each 20 classroom seats or one space for each 10 seats in the largest auditorium, gymnasium, or area usable for public assembly. With the proposed addition, Burke School would have 70 employees, requiring 47 parking spaces. The requirement of one space for each 10 seats in the largest assembly area, the gymnasium in the existing building, necessitates an additional 24 spaces. Therefore, Chapter 21 requires a total of 71 parking spaces for the combined existing and proposed additional private school use.

The proposed private school must provide sufficient parking to comply with other provisions of the Zoning Regulations. Subsection 206.3 requires that the proposed private school provide "ample parking" to accommodate the students, teachers, and visitors likely to come to the site by automobile, while Subsection 3104.1 requires that the proposed special exception not adversely affect the use of neighboring property. The Board concludes that the proposed parking arrangements provide a sufficient number of parking spaces to accommodate the students, teachers, staff, parents, visitors, and guests likely to come to the school by vehicle. In concluding that the proposed expansion would satisfy the "ample parking" requirement of Subsection 206.3, the Board credits DPW's conclusion that the proposed parking facilities comply with zoning requirements, as well as the Office of Planning's conclusion that the number of additional parking spaces proposed as part of the new addition would be sufficient to mitigate any adverse parking impacts resulting from the proposed increases in student enrollment and staff population.

General Requirements for Special Exceptions (11 DCMR § 3104.1). Subsection 3104.1 requires first that the proposed special exception be in harmony with the Zoning Regulations and Map. The site of the proposed Burke School expansion is located in an R-5-D zone district. Under 11 DCMR § 350, an R-5 district permits the construction of those institutional and semi-public buildings that would be compatible with adjoining residential uses and which are excluded from the more restrictive Residence districts. The Board concludes that but for the objectionable conditions related to traffic and number of students discussed in this decision, the use of the subject property for a private school would be in harmony with the Zoning Regulations and Map.

Finally, the Board concludes that the applicant fails to meet the second requirement of Subsection 3104.1 that the proposed special exception not adversely affect the use of neighboring properties. As discussed above with respect to the requirements of Section 206 for private school use, the Board concludes that the proposed private school expansion would result in an increase in traffic congestion and serious pedestrian and traffic safety hazards. These impacts would adversely affect the use of neighboring property and require denial of the application.

In light of the Board's conclusion that the proposed private school use fails to satisfy the requirements of Section 206, there is no need to consider the applicant's request pursuant to Section 411 for relief from roof structure requirements.

For the reasons stated above, the Board concludes that the applicant has not met its burden of proof. It is hereby **ORDERED** that the application is **DENIED.**

VOTE: 4-0-1 (Sheila Cross Reid, Anne M. Renshaw, Geoffrey Griffis, and Anthony J. Hood voting to deny the application; David Levy not voting, not present.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring Board member approved the issuance of this Decision and Order.

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

FINAL DATE OF ORDER: FEB - 8 2002

UNDER 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBSECTION 3125.6 OF THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES.

MN/BAB

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPLICATION NO. 16611

As Director of the Office of Zoning, I hereby certify and attest that on FEB - 8 2002 a copy of the order entered on that date in this matter 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:

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