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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:

Enclosed you will find the original and twenty (20) copies of the Opposition's Reply to NCRC's "Post-Hearing Submission."

Thank you for your attention to this matter.

Sincerely,

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

Richard B. Nettler
Jeannine Rustad

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

Word 45651543.1

BZA
Case No. 16970
Exhibit No. 364

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.364

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

16970

Application of the National Child Research Center BZA Application No. [redacted]

REPLY OF THE CLEVELAND PARK NEIGHBORS, GAYLORD NEELY AND LINDA BADAMI, RICHARD BRUCE AND SALLIE R. BECKNER, HENRY LITTLE AND LYDIA MENDOZA TO NCRC'S "NCRC POST-HEARING SUBMISSION"

The Cleveland Park Neighbors, Gaylord Neely and Linda Badami, Richard Bruce and Sallie R. Beckner, Henry Little and Lydia Mendoza (collectively, the "Opposition") respond to the post-hearing submission of the National Child Research Center and ask the Board to reject NCRC's disingenuous effort to seek approval for the construction of new facilities alone, including two additional classrooms, while pretending that these facilities were not designed and planned for additional enrollment and staffing.

There are four reasons why the Board should dismiss reconsideration of NCRC's "bifurcated" application and let stand the original January 6 vote, denying the application.

First, it is clear that this *sua sponte* "reconsideration" by the Board is tainted by the misconduct of NCRC's attorneys working on this case, beyond what the Opposition stated in its March 23, 2004 filing on the issue. As explained in more detail in the "Request for Hearing,"[1](at pp. 3 – 4) filed by the Opposition on April 2, beginning the day after this Board rejected NCRC's application, NCRC's counsel and Corporation Counsel assigned to the Board were conferring on how to implement the "bifurcation" that improperly was suggested to the Board at its January 6 public meeting by NCRC's counsel. On January 12, counsel for NCRC submitted a formal written request that, with elaboration, repeated the substance of her oral request made on January

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[1] Request of the Cleveland Park Neighbors [*et al.*] for an Evidentiary Hearing on Ex Parte Communications of the Applicant and Corporation Counsel for the Board and the Imposition of Sanctions Deemed Appropriate and Motion to have the Office of Corporation Counsel Recuse itself from any Further Involvement in the Instant Matter, filed April 2, 2004.

6. That January 12 letter was "returned" as procedurally improper, the record being closed. *See*, Request for a Hearing at 2.[2] When it was reported that the Chairman had earlier announced that the Board might consider the question of whether to reconsider a "bifurcated" NCRC application *sua sponte*, both counsel for the Cleveland Park Neighbors and one of the *pro se* parties wrote saying that such an action would be improper because it necessarily would be the result of counsel for NCRC's January 6 outburst and January 12 letter, neither of which are – or should be – properly part of the record in this case.[3] Both of these letters from the Opposition were "returned," even though they did not address the substance of the pending application, just procedural issues.[4]

Apparently recognizing the problem, a solution was concocted, which was revealed at the March 9 public meeting discussing this case: the Chairman announced that the reconsideration was solely the result of a recommendation by Corporation Counsel who feared that a Board decision rejecting NCRC's application that was based only on the January 6 deliberations was subject to reversal because the Board did not deliberate sufficiently on the building. Yet, NCRC's "Post-Hearing Submission" states that "[a]t its public meeting of January 6, 2004, the Board decided all issues and ruled favorably on all aspects of the application with the exception of Section 205.3 [which concerns traffic]." Post-Hearing Submission at 2. In other words, NCRC, the party which has the right to appeal the denial of its application, says not only that the Board deliberated about the buildings, but that the Board viewed its application favorably with

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[2] The January 12, 2004 letter is attached as Exhibit 1 to the "Request for a Hearing."

[3] *See* "Request for a Hearing" at 2 and Exhibit 2, thereto, which is a copy of the February 24 letter of counsel for the Cleveland Park Neighbors.

[4] 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." (Emphasis added.) As the Opposition's correspondence did not address the substance of the application, it should not have been returned.

respect to all the specified criteria other than traffic and the conditions for picking up and dropping off of children. Thus, the basis for the Board's *sua sponte* reconsideration of a "bifurcated" NCRC application is revealed to be a complete sham.[5] The "need" for the Board to deliberate further was a fabrication designed to permit this reconsideration.[6]

Second, NCRC's "bifurcation" proposal completely ignores the discrepancy between its current enrollment (171) and what was authorized in its current special exception, granted in 1998 (a child development center for 120 children) and also the discrepancy between its authorized staff (28) and its actual staff (38-41, depending upon which portion of Ms. Piggot's testimony one reads). The Opposition now knows that NCRC's counsel is attempting to have a draft order written which cured these problems by approving an enrollment of 171 and a staff of 32 "FTE."[7] *See* E-mail from Maureen Dwyer Esq. to Alan Bergstein, Esq., dated February 9, 2004.[8] So, any Board order granting a "bifurcated" application is going to have to address the 51-child increase over the current authorized level, which necessarily means that the effects of that increase on the § 205.3 special exception factor (traffic impact; unsafe conditions) have to be

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[5] It is also worth noting that, since § 205 of the zoning regulations specifies seven criteria for the grant of a special exception for a child development center, the failure of the applicant to meet any one of the applicable criteria requires that the application be denied. Thus, since the Board already determined that NCRC's application failed to meet the criteria specified under § 205.3, there is no need for it to determine whether or not NCRC's application meets the other criteria and therefore no need to deliberate more about the building unless the application is "bifurcated." Given that NCRC could not properly "bifurcate" its application once it was under submission to the Board for a vote, the Board was under no legal obligation to consider the application as to severable parts. In other words, having submitted a unified application to the Board under § 205, NCRC cannot be heard to complain if the application were denied because, as a whole, it failed one of the applicable § 205 criteria.

[6] The response to the Opposition's FOIA requests from the Office of Corporation Counsel is incomplete. In particular, the collection of e-mails from OCC lawyer Lori Monroe, yet to be produced, may shed additional light on how this was arranged.

[7] "FTE" is an abbreviation for "full-time equivalent." This is NCRC's device – unprecedented in this Board's decisions – for allowing it to expand the number of staff, while concealing the magnitude of the increase. Indeed, two half-day teachers (which would count as one "FTE"), if they came at the same time of day, would produce twice as much demand on local streets' parking and make double the contribution to traffic congestion, than would one true full-time teacher.

[8] Attached as Exhibit to the Opposition's April 2 "Request for Hearing."

considered. Alternatively, if the Board maintains the status quo and adopts the position of NCRC in this case – that the BZA has no regulatory control of NCRC's enrollment – then the Board must consider NCRC's witnesses' statements that at least 10 more children are needed to achieve optimum class size in the re-shuffled classes and to pay for operating this expanded facility. *See* Statement by the Cleveland Park Neighbors, Steve Hunsicker, Sallie R. and R. Bruce Beckner, Linda Badami and Gaylord Neely in Opposition to the Grant, on Reconsideration, of a Special Exception Permitting New Construction ("Opposition to Reconsideration") at pp. 12-13 and hearing testimony cited therein. If NCRC's enrollment were limited only by the capacity of its new facility (150 children at any one time vs. 108 today), then the Board has every reason to believe that approving the construction would be tantamount to approving an increase in enrollment.

Third, as the Opposition wrote in its initial submission (*see* Opposition to Reconsideration at pp. 11-13), NCRC is not candid with the Board about how its proposed new construction would be needed or used, in the absence of any increase in enrollment or staff. For example, NCRC does not say how it plans to use the two additional classrooms, given its director's testimony that, without additional enrollment, the classes would be of "sub-optimum" size. *See* Opposition to Reconsideration at p. 12 and testimony cited therein. Nor does NCRC explain how it would have teachers for these two additional classes, without an expansion of authorized staff. Finally, in view of the testimony of NCRC's witnesses that the requested additional students were the minimum number required to make the project viable economically (Opposition at pp. 12-13 and testimony cited therein), it has not told the Board how it will avoid returning in a year to seek an enrollment increase, pleading financial hardship – or even worse – if it does not get one. As Commissioner Hood said on January 6: "[W]e need to err on the side

of caution and make sure that what we do first of all can be changed and second of all does not cause any more adverse impacts than already exists, because there are obviously some adverse impacts, what already exists . . . ." January 6 Transcript at 102 (emphasis added). Clearly, permitting this construction to go forward without considering any impact from enrollment, while turning a blind eye to both its substantial cost and the substantial increase in capacity it produces would be to permit something which can not be changed and which could have very great adverse impacts, on either NCRC or on the neighborhood.

Finally, NCRC persists in its effort to re-write the zoning regulations, something that is beyond this Board's authority. In particular, NCRC persists in the notion that an application for construction alone, without an increase in enrollment, does not require the Board to scrutinize traffic. Yet, there is no authority for that proposition.[9] More importantly, the Board's January 6 deliberations reflect the instruction of corporation counsel – an instruction that is now suspect in light of recently discovered evidence – that the Board could not consider traffic impact from existing enrollment, but only traffic impact from the incremental increase in enrollment.[10] Notwithstanding that, the deliberations reflect that all three of the Board members who voted to deny the application considered current traffic conditions unacceptable, relying in part on the DC DOT Report that recommended against granting the application. *See* January 6 Transcript at 102 (Commissioner Hood); at 116-117 (Vice Chair Etherly) and at 117-118 (Member Zaidain).

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[9] NCRC also persist in relying on case law that is inapposite. *Glenbrook Road Citizens Association v. BZA,* 605 A.2d 22 (DC 1992) did not concern the application of § 205, governing child development centers in R-1 residential neighborhoods, it concerned construction of a new building on a university campus. Likewise, *National Black Child Development Institute, Inc. v. District of Columbia Board of Zoning Adjustment*, 483 A.2d 687 (D.C. 1984) does not stand for the proposition that traffic conditions are not evaluated when there is a renewal of a special exception or an application for which no enrollment increase is sought. That was not even a contested issue in the case; the contested issue was the adequacy of evidence in the record on traffic to support the Board's decision. The quotation that NCRC seizes upon addressed that question, not the question of whether § 205.3 can be ignored in certain applications or whether the Board can consider only incremental increase in traffic.

[10] Ms. Monroe (corporation counsel): "Are you to determine whether the impacts are objectionable based on the entire special exception use or only on the incremental increase that's asked for in the modification? And I think the latter is correct." January 6 Transcript at 68.

Therefore, approval of the "bifurcated" application for the building alone cannot be granted on this reconsideration, given that existing traffic conditions and conditions for the dropping off and picking up of children have been found by the Board to be not acceptable.

For these four reasons and for reasons stated in the Opposition's March 23, 2004 Opposition to Reconsideration, reconsideration of a "bifurcated" application for approval of new construction alone should be denied.

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

By: _____
Richard B. Nettler
Jeannine Rustad

Dated: April 6, 2004

Certificate of Service

I hereby certify that on April 6, 2004, a copy of the foregoing Reply was served, as indicated, on the following parties:

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