BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Application of the
National Child Research Center

BZA Application No. 16970

OPPOSITION TO REQUEST (MOTION) FOR AN EVIDENTIARY HEARING, IMPOSITION OF SANCTIONS, AND RECUSAL

The National Child Research Center ("NCRC"), the Applicant in the above-referenced case, through counsel, respectfully submits its opposition to the request (motion) filed by the Cleveland Park Neighbors, Steve Hunsicker, Sallie and Bruce Beckner, Henry Little, and Linda Badami and Gaylord Neely ("Opposition") for an Evidentiary Hearing, Imposition of Sanctions and Recusal of Corporation Counsel. For the following reasons and as discussed more fully below, it is respectfully requested that the Board deny the request:

- There have been no improper *ex parte* communications between counsel for NCRC and the Board members.
- The Board has previously held in analogous circumstances that parties, through counsel, are permitted to communicate with counsel to the BZA and Office of Zoning staff.
- Communication with Corporation Counsel is not prohibited *ex parte* communication under the Zoning Regulations, the D.C. Administrative Procedures Act ("DCAPA"), or the decisions of the courts.
- None of the cases cited by the Opposition provides any support for their position.
- The Board has fully complied with all zoning and due process requirements in the development of a complete record for its decision in this case.

The opposition parties have not cited one single case, regulation, or other authority for the proposition that communications ***between lawyers*** is an *ex parte* or otherwise improper communication. That is because Corporation Counsel, through Mr. Bergstein, is not the trier of fact or the decision maker. Mr. Bergstein is the lawyer for the Board; he is not the Board.

BZA
Case No. 16970
Exhibit No. 365

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.365

Lawyers practicing before the BZA and Zoning Commission routinely have contact with lawyers from Corporation Counsel; sometimes it is initiated by the Corporation Counsel lawyers, and sometimes by a party's lawyer.[1] The Opposition's supposed surprise and outrage in this context, particularly when presented as a personal attack on the ethics of NCRC and its counsel, by a lawyer who himself practices in this same forum with the same clear practice and precedent available, is incredible in every sense of the word. There is no occasion for a "full investigation" of anything, much less for the "sanctions" and "recusal" — including the suspension of counsel's entire *firm* from appearing before the Board — which the Opposition, through its counsel, seeks.

I. THERE HAVE BEEN NO IMPROPER EX PARTE COMMUNICATIONS

Counsel for NCRC is well aware of the prohibition on *ex parte* communications between parties to the case and members of the Board of Zoning Adjustment. Specifically, Section 3023.1 of the Zoning Regulations states:

> In any proceeding that is a contested case within the meaning of § 3 of the D.C. Administrative Procedure Act, 2001 Ed. §2-502(8) (formerly codified at D.C. Code § 1-1502(i) (1999 Repl.)), all members of the Commission shall be prohibited from receiving or participating in any *ex parte* communication relevant to the merits of the proceeding.[2]

The section applies equally to the members of the Board of Zoning Adjustment. Attached as Exhibit A is an affidavit from counsel for NCRC stating unequivocally that, as the Board is no

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[1] Confirming that this has been a long-standing practice, the Court of Appeals decision in *Brown v. D.C. Bd. of Zoning Adjustment*, 486 A.2d 37, 56, 62 (D.C. 1984)(*en banc*), is replete with references to meetings and letters between counsel for the applicant and the Office of Corporation counsel. Throughout the long history of the case, there was never any suggestion that such contacts were in any way improper.

[2] The *Citizens Association of Georgetown v. Zoning Commission,* 392 A.2d 1027 (DC 1978) case stands for the proposition that there are limits on the prohibition on *ex parte* contacts. In that case, one of the Commission members had *ex parte* contacts with the applicant in his capacity as an advisor to the National Capital Planning Commission. The court held that since the Commission member's service to NCPC was authorized by statute, and necessarily required some contact with the applicant in the presentation of its plans to NCPC, such contact was not impermissible, and the Commission's action was not invalidated.

doubt already aware, there have been no *ex parte* communications between counsel for NCRC and any of the members of the Board of Zoning Adjustment sitting on this case. Counsel for NCRC has been *representing* parties before the Board for many years, and scrupulously abides by the prohibition on *ex parte* communications as interpreted by this Board.

II. COMMUNICATION WITH CORPORATION COUNSEL IS NOT PROHIBITED EX PARTE COMMUNICATION

Counsel for the Opposition parties wrote to the Board on February 24, 2004, requesting a hearing on whether there had been "*ex parte* contacts with any Board member" on the issue of bifurcating NCRC's application. Apparently having subsequently determined that counsel for NCRC did *not* improperly contact members of the Board, the Opposition changed its attack, arguing now that communications with the Office of Corporation Counsel were improper *ex parte* contacts. While counsel for NCRC did communicate with Office of Corporation Counsel,[3] those contacts were not improper, and cannot be construed as having prejudiced the Opposition in any way.

The Board has previously addressed this very situation, and expressly ruled that only communications with the members of the Board themselves are considered *ex parte* communications prohibited by the Regulations. In that case, the Board specifically stated that communications with the Office of Corporation Counsel or Board staff were *not* prohibited. In BZA Appeal No. 16405, appellant filed a motion similar to the Opposition's motion in this case, arguing that communications between counsel for intervenor and Corporation Counsel constituted improper *ex parte* communications. The appellant sought a stay of proceedings and a full evidentiary hearing regarding those communications with the OCC. As a preliminary matter at the start of the public hearing on the appeal, the Board ruled on the motion, denying the

[3] NCRC certainly admits that it communicated with OCC, but denies vehemently the characterization that counsel for the Opposition puts on those contacts.

request. (See the attached Exhibit B.) Specifically, the Board held that *ex parte* communications are only communications directed towards members of the BZA and not towards BZA staff, the Office of Planning, or the Office of Corporation Counsel. Announcing its decision, the Board stated:

> VICE CHAIRPERSON KING: Madam Chair, I move that we dismiss the motion to stay on the basis of the ex parte communications because in fact the ex parte communications would be only communications directed toward members of the BZA and not towards BZA staff, the Office of Planning, Office of Corporation Counsel. It seems to me that Corporation Counsel's office has handled this quite properly and...But in any case, ex parte applies only to communications with members of this Board and therefore I move to dismiss the motion to dismiss.
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> ***
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> CHAIRPERSON REID: I would agree with you, Ms. King. I feel that the request for this motion was proffered to us saying that [the communication with Office of Corporation Counsel] should be considered an ex parte communication. And once we went back to review the record — regulations and determined that, as you said, the ex parte pertains only to the board members and this in fact is not the case.

Exh. B at 8-9.

It is not clear whether the Opposition is suggesting that the BZA should change its interpretation of its own rules of procedure, as the Opposition does not acknowledge this clear precedent on point or the fact that communications with Corporation Counsel are commonplace among lawyers who practice land use law in the District of Columbia. To the extent that they are requesting that the Board effectively adopt a new interpretation that would preclude such contacts, it should be aware that such changes may only be adopted, if they are appropriate at all, prospectively. To the contrary, parties are entitled to rely on an agency's prior interpretations of its rules. As the Court of Appeals has said, this policy "underlie[s] the very notion of an ordered society" and prevents "fundamental unfairness." *Reichley v. D.C. Dep't of Emp. Servs.*, 531

A.2d 244, 248, 253 (D.C. 1987). *See also Goto v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 917 (D.C. 1980). They are never to be adopted retroactively under these circumstances, and there is, needless to say, no support anywhere for the proposition that conduct that complies with the articulated interpretation of the Board is a basis for sanctioning a party, or, indeed, for suspending a lawyer and her entire firm from practice before the Board.

Nor is there any basis to change the Board's interpretation of the *ex parte* rules. The Board's previous ruling on this point is consistent with the plain language of the District of Columbia Zoning Regulations, the District of Columbia Administrative Procedures Act, and the rulings of both the local and federal courts. Similarly, ethical and regulatory restrictions on *ex parte* communications are directed to communications to the other party or the decision maker, not to counsel for the other party or decision maker. The District of Columbia Zoning Regulations prohibit Zoning Commission ***members*** from receiving or participating in any *ex parte* communication. 11 DCMR § 3023, D.C. Code (1987). Similarly, as Rule 4.3 of the District of Columbia's Rules of Professional Conduct prohibits counsel from communicating with an opposing party, but allows communication through the party's counsel, Rule 3.5 governing "impartiality and decorum of the tribunal" states that a lawyer shall not communicate *ex parte* with ... a judge, juror, prospective juror or other official ... except as permitted by law." Canon 3 of the ABA's Model Code of Judicial Conduct advises judges not to "initiate or consider *ex parte* or other communications concerning a pending or impending proceeding." The comment to that Canon sensibly adds, however, that the proscription "does not preclude a judge from consulting with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities."

None of these professional rules or laws suggests for a moment that it would be an improper *ex parte* communication for one party to communicate to the lawyer for an agency any

more than it would be improper to communicate with counsel for the other party, court personnel or the jury commissioner. If the communication is not made directly to the trier of fact or the decision maker, as the Board has previously held, it is, by definition, not an improper *ex parte* communication. Parties properly and frequently submit vital information to staff, to counsel, and to others who do not decide cases.

Moreover, Corporation Counsel can advise this Board at any time, even when the record is closed. 11 DCMR § 3309. In *Daro Realty, Inc. v. D.C. Zoning Commission,* 581 A.2d 295, 307 (1990), the Court of Appeals affirmed that the advice of Corporation Counsel is not "evidence" in a proceeding and a party is therefore not entitled to a hearing to contest that advice. It certainly follows that since what Corporation Counsel says is not evidence and cannot be contested by a party to a proceeding, it cannot be an improper *ex parte* communication to provide Corporation Counsel with arguments, related case cites, and other information which Corporation Counsel may (or may not) find helpful in the discharge of his duties.

III. NONE OF THE CASES CITED BY THE OPPOSITION PROVIDE ANY AUTHORITY FOR THEIR POSITION.

The Opposition parties cite a number of cases purportedly in support of their novel position that a lawyer for a party may not communicate with a lawyer for the Board. None of the cases they cite comes even close to suggesting that their interpretation is correct.

In the *Jarrott* case,[4] there were secret, direct contacts with Board members which the court held deprived plaintiffs of a fair and impartial hearing. Even in that case, the court stated that it might have reached a different conclusion if those contacts had been recorded in the public file for all to see and respond to, but in that case there was no opportunity for the opposition to rebut their impact upon the Board. That case has no applicability to the instant case. Here, there were no direct contacts with any of the Board members. Moreover, the issue of whether the new

[4] *Jarrott v. Scrivener,* 225 F.Supp. 827 (D.C. 1964).

construction could be approved was presented in public at an open meeting of the Board and on the record.[5] Further, the Board later decided to reopen the record and allow the opportunity for additional testimony and evidence on this issue. Here, as in the *Gladden*[6] case, all parties have had the opportunity to focus on and develop their points in the public record, and all of that information will be part of the record before the Board when it makes its ultimate decision.

The *Rose Lees Hardy Home* case,[7] on which the Opposition relies, presents a completely different situation. There, the Board of Zoning Adjustment invited comments from the Board of Education after the record had been closed, and without providing notice to all parties and an opportunity to present and rebut evidence. Based on the information it received from the Board of Education, the Board made its decision and made specific reference to the information contained in the Superintendent's letter. Here, the Board has reopened the record and has provided an opportunity for all parties to respond or rebut to any filings by the other parties. Thus, the full protections under the D.C. Administrative Procedures Act are provided.

The *Wilson* case,[8] cited by the Opposition, is also inapposite to the facts of this case. In the *Wilson* case, the Board had decided an application and issued a written order on March 17, 1971. Subsequently, on April 14, 1971, the applicant's attorney appeared before the Board, *ex parte,* and requested that two conditions included in the order be vacated. There was no notice provided by the Board of this additional hearing, nor were any of the other parties to the case

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[5] The Opposition's contention that counsel's oral request at the January 6th public meeting was a breach of procedures and somehow improper, is totally without merit. The Board has complete authority to regulate the course of its proceedings and there is nothing under the Zoning Regulations or the Rules of Practice and Procedure Before the Board that prevents the Board from hearing from the parties at any point in the process. It is completely within the discretion of the Board. In this case, the Board not only entertained but indeed ruled on the request.

[6] *Gladden v. D.C. Board of Zoning Adjustment,* 659 A.2d 249 (D.C. 1995).

[7] *Rose Lees Hardy Home and School Association v. D.C. Board of Zoning Adjustment,* 324 A.2d 701 (D.C. 1974).

[8] The Opposition cited *Citizens Association of Georgetown v. DC BZA*, 289 A. 2d 380 (DC 1972) but the correct name for that case is *Wilson v. DC BZA.*

notified. The court appropriately found that the presentations were *ex parte* and remanded the case for a new hearing in full compliance with the zoning requirements.

The *Spevak* case [9] is also distinguishable. In that case, Corporation Counsel contacted one of the parties to encourage the party to change the underlying facts of the case, in a manner that would remove one of the obstacles to a favorable decision by the ABC Board. Rather than granting the approval based on the new information, the Board denied the original application and had the applicant submit another application, which it immediately approved. The Board, however, did not reopen the record or allow any of the parties to respond to the new information. The Court of Appeals affirmed the Board's action and the issue of the propriety of Corporation Counsel's action was not even raised on appeal and thus was not addressed by the court.

Finally, in *Citizens Association of Georgetown v. Zoning Commission,* 392 A.2d 1027 (DC 1978), the appellants argued that the DCAPA prohibition on *ex parte* contact applied to rulemaking as well as contested case proceedings. The court disagreed and held that the mere fact of secretive contact did not invalidate the rulemaking. The court noted that, "In our view, if the Commission had meant to provide further procedural rights it would have done so explicitly rather than by creating requirements by implication only." The same rationale applies here. The contacts which the opposition attacks violated no explicit or implicit procedural strictures. Were the Commission to prohibit such contacts, it would clearly have done so in its regulations.

IV. THE BOARD HAS FULLY COMPLIED WITH ALL ZONING AND DUE PROCESS REQUIREMENTS IN THE DEVELOPMENT OF A COMPLETE RECORD FOR ITS DECISION

The Board made its decision to reopen the record in order to create a complete record on the issue of whether the new construction meets the requirements of Section 205.5. Significantly, this is the only decision the Board has made in this case that is the subject of the

[9] *Spevak v. DC Alcoholic Beverage Control Board*, 407 A.2d 549 (DC 1979).

Opposition's motion. This decision was presumably made in order to provide all parties with a full and fair opportunity to highlight the testimony and evidence of record. In all respects, this fully complies with the requirements of the Zoning Regulations and the due process requirements of the D.C. Administrative Procedures Act. All parties to the case received notice of the Board's decision and have had full opportunity to reference the testimony and evidence of record as to whether or not the proposed new construction meets the special exception requirements. No rights of any party have been prejudiced and each party has the opportunity to not only present its position, but also to rebut any filings by the other parties. Thus, there is full compliance with all of the requirements of the D.C. Administrative Procedures Act and no basis on which to allege that the Board's ultimate decision will not be based on a complete record.

The issue as to whether there is sufficient evidence on the record on which to approve the proposed new construction is not a new issue. It has been consistently raised by NCRC throughout all of the public hearings on this case. Through testimony and evidence, NCRC has established that the proposed new construction meets the requirements of the special exception. The issue was also raised by counsel for NCRC at the Board's decision meeting on January 6, 2004. Counsel for NCRC raised this issue since under the Zoning Regulations, the Rules of Practice and Procedure of the Board of Zoning Adjustment, and past precedents, as well as the substantial evidence of record, the Board has the authority to approve the new construction.[10]

The action the Board took to reopen the record is no different than the action the BZA has taken in prior cases. Indeed, at the same decision meeting at which the Board decided the NCRC application (January 6, 2004), the BZA announced that it was reconsidering its decision

[10] Counsel for NCRC advised Corporation Counsel on January 8, 2004 that it would be filing a letter with the BZA requesting bifurcation, the same issue counsel had already raised with the BZA at its open public meeting. The letter was filed with the BZA on January 13, 2004 and returned the next day with a cover letter from staff indicating that it was being returned since the record was closed. The additional email communication between NCRC counsel and Corporation Counsel was regarding another school case precedent and had nothing to do with the issue of bifurcation.

in BZA Application No. 17087, also after the record had been closed. Likewise, on February 10, 2004, the BZA announced that it would reconsider its decision in the Stanton Park Neighborhood Association Appeal No. 17043 and on February 24th, without reopening the record, the Board reversed its decision.

In the instant case, the BZA decided to reopen the record to make certain that all parties had additional opportunity to point to the testimony and evidence of record on the issue. It thus went above and beyond what would have been required under the Zoning Regulations. Whatever advice Corporation Counsel gave the BZA in this and other cases, the Board's decision was based on its own deliberations and its own interpretation of the Zoning Regulations and the facts of each case.

V. CONCLUSION

An attack upon the professionalism and, indeed, the ethics of an attorney is a serious matter, which should never be undertaken, nor received, lightly. In their most recent filing, the Opposition accuses counsel for NCRC of professional misconduct and ethical impropriety; they accuse two attorneys in the Office of Corporation Counsel of professional misconduct; they assert that, should the BZA not agree with these accusations, then the Board "has no regard for the integrity of its processes"; and they accuse witnesses for the Applicant of lying (the word they use is "dissemble.")

By the BZA's own recorded precedent, none of the communications between Counsel for NCRC and OCC may be considered "*ex parte*" and none of those communications even remotely violated any standards, whether they are standards of administrative law practice in general, BZA practice in particular, or ethical conduct for attorneys. The Opposition and their attorneys had to have known that their claims of misconduct were baseless because the precedents cited in

this submission are a matter of public record, readily available to them, and generally known to attorneys who practice before the BZA.

The opposition understandably seeks to create a smokescreen in order to avoid a decision by the Board on the merits of the proposed new construction. In doing so, it has impugned the integrity of counsel for a highly ethical and well-respected school, it has (again) impugned the integrity of the school,which has heretofore been forced to stand by while its own credibility has been repeatedly attacked during hearings, and it has impugned the integrity of Corporation Counsel and challenged the integrity of the Board. We respectfully request that the Board deny the request.

Respectfully submitted,

SHAW PITTMAN, LLP

By _____
Maureen Dwyer

By _____
Paul Tummonds
Counsel for National Child Research Center

cc: All Parties (See attached Certificate of Service)
Alan Bergstein, Office of Corporation Counsel

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Application of the
National Child Research Center

BZA Application No. 16970

AFFIDAVIT OF MAUREEN DWYER

I, Maureen E. Dwyer, hereby depose and state as follows:

1. I am a partner with the law firm of Shaw Pittman LLP, and am counsel to the National Child Research Center ("NCRC") in the captioned matter.

2. I have been a partner at Shaw Pittman since August, 2000. Prior to joining Shaw Pittman, I was a member of the Washington, D.C. firm of Wilkes, Artis, Hedrick & Lane, Chartered, and was affiliated with that firm since 1978.

3. During the 26 years I have practiced in Washington, D.C., both at Shaw Pittman and at Wilkes Artis, I have specialized in the representation of parties in land use matters before various agencies, including particularly the Board of Zoning Adjustment ("BZA") and the Zoning Commission. As such, I have had a substantial opportunity to become quite familiar with the rules and practices followed by counsel appearing before those bodies.

4. Throughout the years in which I have practiced before the BZA, I have abided consistently and strictly by the restriction against contacting, *ex parte*, any member of the BZA. In this matter, I have never attempted to contact a member of the BZA regarding this matter, nor have I been contacted by any member with respect to this matter.

5. Over the years, in the course of my representation of numerous parties before the BZA and Zoning Commission, I have frequently been contacted by lawyers in the Office of Corporation Counsel regarding matters that were pending before either the BZA or Zoning Commission. Similarly, I have not hesitated to call those lawyers regarding issues that come up from time to time in connection with such matters. I am also aware that other lawyers at other

Exhibit A

firms practicing before these bodies have engaged in similar practices. I have never been advised by anyone that it was in any way inappropriate to communicate with Corporation Counsel regarding pending matters, or that such contacts were considered prohibited *ex parte* communications.

6. To the contrary, I was counsel to the intervenor, Mr. Charles Sisson, in BZA No. 16405, when a motion was made asserting allegations similar to those which the Opposition, through Mr. Nettler, make in this case. In the *Sisson* matter, the Board denied the motion, explaining plainly that the rule prohibiting *ex parte* communications applied only to communications with members of the Board, and, expressly, said that the rule did *not* cover communications with Corporation Counsel's office. I have since that time relied on that ruling as confirming what I have always understood to be the case, *i.e.,* that lawyers are not permitted to communicate *ex parte* with members of the Board regarding a pending case, but are permitted to communicate with the lawyers with Corporation Counsel's office who are counsel to the Board.

Maureen E. Dwyer

Subscribed and sworn before me this 8th day of April 2004.

Notary Public

Document #: 1392336 v.1

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Application of the
National Child Research Center

BZA Application No. 16970

AFFIDAVIT OF PAUL TUMMONDS, JR.

I, Paul A. Tummonds, Jr., hereby depose and state as follows:

1. I am a lawyer with the law firm of Shaw Pittman LLP, and am counsel to the National Child Research Center ("NCRC") in the captioned matter.

2. I have been a lawyer at Shaw Pittman since August, 2000. Prior to joining Shaw Pittman, I was a member of the Washington, D.C. firm of Wilkes, Artis, Hedrick & Lane, Chartered, and was affiliated with that firm since 1996.

3. During the 8 years I have practiced in Washington, D.C., both at Shaw Pittman and at Wilkes Artis, I have specialized in the representation of parties in land use matters before various agencies, including particularly the Board of Zoning Adjustment ("BZA") and the Zoning Commission. As such, I have had a substantial opportunity to become quite familiar with the rules and practices followed by counsel appearing before those bodies.

4. Throughout the years in which I have practiced before the BZA, I have abided consistently and strictly by the restriction against contacting, *ex parte*, any member of the BZA. In this matter, I have never attempted to contact a member of the BZA regarding this matter, nor have I been contacted by any member with respect to this matter.

5. Over the years, in the course of my representation of numerous parties before the BZA and Zoning Commission, I have frequently been contacted by lawyers in the Office of Corporation Counsel regarding matters that were pending before either the BZA or Zoning Commission. Similarly, I have not hesitated to call those lawyers regarding issues that come up from time to time in connection with such matters. I am also aware that other lawyers at other

firms practicing before these bodies have engaged in similar practices. I have never been advised by anyone that it was in any way inappropriate to communicate with Corporation Counsel regarding pending matters, or that such contacts were considered prohibited *ex parte* communications.

Paul A. Tummonds, Jr.

Subscribed and sworn before me this 6th day of April 2004.

Notary Public

Document #: 1392387 v.1

GOVERNMENT OF THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

WEDNESDAY,

MAY 19, 1999

+ + + + +

The public hearing took place in Room 222, 441 - 4th Street, N.W., Washington, D.C., at 9:00 a.m.

PRESENT:

SHEILA CROSS REID	Chairperson
BETTY KING	Vice Chairperson
JERRY GILREATH	Board Member
ANGEL F. CLARENS	Commissioner
HERBERT M. FRANKLIN	Commissioner
ANTHONY HOOD	Commissioner

STAFF PRESENT:

PAUL HART
BEVERLY BAILEY
JOHN NYARKU
ALAN BERGSTEIN, ESQ.
MARY NAGELHOUR

Exhibit B

AGENDA

Page

16405 ANC-3D	Appeal of Mildred Rogers Crary, pursuant to 11 DCMR 3105, from the administrative decision of the Zoning Administrator to issue issue the following building permits allowing various alterations and additions to the subject property: Permit No. B413166, dated January 29th, 1998 for a "2-story Addition To the Rear"; Permit No. 413424, dated January 23rd, 1998 for an "Addition to a garage, Length 20 feet, Height 14 feet"; and Permit No. B417814, dated August 17th, 1998 for "Repair of an Existing Roof, Roof in Place, No Structural Change"; Permit No. B415675, dated May 27th, 1998 for a "New Garage to be located on the same spot as previous garage"; and Permit No. B419108, dated October 5th, 1998 to "Build a new porch roof as per plans." The appellant also challenges the R-1-B zoning classification attributed to the property by the Zoning Administrator. These permits were issued for property located in premises 3020 - 43rd Street, N.W. (Square 1621, Lot 810)	5
16435 ANC-2E	Application No. 16435 of William Martin, pursuant to 11 DCMR 3107.2, for a variance from Subsection 771.2, the allowable floor area ratio requirements; a variance from Subsection 774.1, the rear yard setback requirements; and a variance from (Subsection 2001.3(b)) and (c) to allow an enlargement to	15

P-R-O-C-E-E-D-I-N-G-S

9:13 a.m.

CHAIRPERSON REID: Good morning. Now, before this public meeting this morning, we will have – we will meet in executive session. And we will come out and we will then take the vote. So, we're doing it a little bit different than we normally do it. But, we will be coming before you in short order. I don't know exactly how much time.

MR. BERGSTEIN: About 15 minutes.

(Whereupon, the foregoing matter went off the record at 9:14 a.m. and back on the record at 10:01 a.m.)

MR. HART: Good morning, Madam Chairperson and members of the board. This morning we are here for a special public meeting. The first case to be considered by the board is 16405 which is an appeal of Mildred Rogers Crary, pursuant to 11 DCMR 3105, from the administrative decision of the Zoning Administrator to issue the following building permits allowing variance alterations and additions to the subject property: Permit No. B413166, dated January 29th, 1998 for a "2-story Addition to the Rear"; Permit No. 413424, dated January 23rd, 1998 for an "Addition to a garage, Length 20 feet, Height 14 feet"; and Permit No. B417814 dated August 17th, 1998 for "Repair of an Existing Roof, Roof in Place, No Structural Change". Permit No. B415675, dated May 27th, 1998 for a "New Garage to be located on the same spot as previous garage"; and Permit No. B419102 dated October 5th, 1998 to "Build a new porch roof as per plans".

The Appellant also challenges the R-1-B zoning classification

attributed to the property by the Zoning Administrator. These permits were issued for a property located in premises 3020 - 43rd Street, N.W., Square 1621, Lot 810.

CHAIRPERSON REID: Thank you.

VICE CHAIRPERSON KING: Madam Chair --

CHAIRPERSON REID: Before we get into that, I want to explain about the previous --

Yes, Ms. King, go ahead.

VICE CHAIRPERSON KING: I believe that the two parties were going to be given a short -- a brief time --

CHAIRPERSON REID: To attorneys, counsel for the applicant, for the Appellant and for the Intervenor?

VICE CHAIRPERSON KING: Is there anybody here who wishes -- Mr. Brown, do you wish to make any statements at this time?

MR. BROWN: Yes.

VICE CHAIRPERSON KING: On the material that was supplied by Ms. Dwyer.

CHAIRPERSON REID: I do recall, we had agreed to give each of you time to respond to the materials that were submitted this morning. Are you prepared to do that? Did you desire to do that? If not, we can just proceed with where we were.

MR. BROWN: That was not my understanding that we had the right to the written materials based on the schedule provided by the Board. I'm prepared to answer questions. There were two matters, I think, before the board. The first a preliminary matter, the pending motion to stay the proceedings on the

question of the ex parte matters. And then, also, the question of the Intervenor's motion to dismiss and my opposition to that. So, I'm prepared to answer questions but I don't -- again, that's the preliminary matter of the ex parte communications and then the issue of the motion to dismiss, and my request that the matter go to a full evidentiary hearing in order to allow the development of the facts that are critical to the issue.

CHAIRPERSON REID: Thank you.

We had in our recollection, we had determined that there was a request from, and also an agreement to, allow both counsels to have time to say a few words this morning. But, that's, okay, that's fine.

Ms. Dwyer, did you have any comments?

MS. DWYER: If Mr. Brown has nothing that he wants to say, then I have nothing that I need to say in response. I believe that our case stands on the basis of the written materials that we supplied the board.

Thank you.

CHAIRPERSON REID: Thank you.

VICE CHAIRPERSON KING: Madam Chair, I move that we dismiss the motion to stay on the basis of the ex parte communications because in fact the ex parte communications would only be communications directed towards members of the BZA and not towards BZA staff, the Office of Planning, the Office of the Corporation Counsel. It seems to me that the Corporation Counsel's office has handled this quite properly and --

But in any case, ex parte applies only to communications with the members of this board. And therefore, I move to deny the motion to dismiss.

CHAIRPERSON REID: To stay.

VICE CHAIRPERSON KING: I mean, motion to stay, dismiss the motion to stay.

BOARD MEMBER GILREATH: I second the motion.

CHAIRPERSON REID: I would agree with you, Ms. King. I feel that the request for this motion was proffered to us saying that it should be considered an ex parte communication. And once we went back to review the record – regulations and determined that, as you said, that ex parte pertains only to the board members and this in fact is not the case.

All in favor?

(Whereupon, a chorus of ayes.)

CHAIRPERSON REID: Opposed?

(No response.)

VICE CHAIRPERSON KING: I would further move, Madam Chair, that we have a full hearing on this case. That we hold in abeyance the motion to dismiss and that we hear all the evidence with regard to this case from the Appellant and from the Intervenor on all issues still pending in this case, including the motion to dismiss. That to hold it in abeyance until we've heard the full evidence of the appeal.

I would also note that on advice of counsel, estoppel is not germane in this case since that would be against government and not against neighbor. And therefore, I move that we have our scheduled hearing on the 26th as we discussed at our last meeting on this case and hear the full appeal.

CHAIRPERSON REID: I would second it. I think that this

particular case is so convoluted and it has so many twists and turns in it that it merits hearing the case so that we can get to the bottom of the actual -- bottom of the issues and to be able to ask questions that would clarify for us what we need to know in order to be able to make an adequate determination.

BOARD MEMBER GILREATH: Madam Chair, as I understand, and we will, in the hearing, evidentiary hearing, we will be focusing on timeliness and laches. Are those the two basic issues we have to come to grips with in this? Is that the focus? Or, it's just--

MR. BERGSTEIN: Well, if I may, my name is Alan Bergstein. I'm the Chief of the Land Use section.

You have before you an appeal challenging the issuance of certain permits and an administrative determination of the zoning category. And you have a motion to dismiss based upon the timeliness of the appeal and laches. What I believe the motion is, is to combine those two issues into a single hearing to hear the merits of the appeal, but to allow the intervenor to make their case on the parts of the motion to dismiss that are left. That is, the laches and the timeliness issues.

VICE CHAIRPERSON KING: Alan, do you feel that -- can we proceed with this case without the presence of a knowledgeable representative of the Department of Consumer and Regulatory Affairs?

CHAIRPERSON REID: Zoning Administrator's office.

VICE CHAIRPERSON KING: The Zoning Administrator's office?

MR. BERGSTEIN: Well, they're a party and they've had notice. And if they're not here, that's--

VICE CHAIRPERSON KING: What can we do to compel them

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2004, a copy of the foregoing was hand delivered to the following parties:

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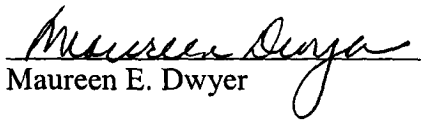
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