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

ATTORNEYS AT LAW

SUITE 1200
1801 K STREET, N.W.
WASHINGTON, D.C. 20006-1307
TEL: 202-775-0725 FAX: 202-223-8604
www.rkmc.com

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

April 9, 2004

Via Hand Delivery

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 "Opposition to Request (Motion) for An Evidentary Hearing, Imposition of Sanctions, and Recusal."

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. 367

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.367

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

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

REPLY TO THE NATIONAL CHILD RESEARCH CENTER'S "OPPOSITION TO REQUEST (MOTION) FOR AN EVIDENTIARY HEARING, IMPOSITION OF SANCTIONS, AND RECUSAL"

In reply to the National Child Research Center's ("NCRC") "Opposition to Request (Motion) for an Evidentiary Hearing, Imposition of Sanctions, and Recusal" ("NCRC Opposition"), the Cleveland Park Neighbors, Steve Hunsicker, Sallie R. and R. Bruce Beckner, Henry Little and Linda Badami and Gaylord Neely (collectively referred to as the "Opposition") state as follows:

In it's Opposition to Request for an Evidentiary Hearing, NCRC denies assertions that were not made (that its lawyers had direct contact with the members of the Board of Zoning Adjustment (the "Board")) but avoids discussing the merits of the real question presented: Should corporation counsel be used as a "back door" to the Board by the parties to a proceeding? In the first instance, it is important to note that the limited information available to the Opposition parties suggests that Corporation Counsel does not share NCRC's view that the rule on private communications by a party with OCC's lawyers is "anything goes." However, regardless of the position of corporation counsel on this question, NCRC's defense of its counsel's actions fails for three very important reasons:

1. It fails to recognize, much less discuss, the essential procedural due process problem created by substantive private communications between one of the parties and someone in a confidential relationship with the Board – that such communications are the functional equivalent of *ex parte* communications.[1]
2. It fails to recognize that the D.C. Court of Appeals' decision in *Spevak v. Alcoholic Beverage Control Board*, 407 A.2d 549 (DC 1979) is not distinguishable on the facts from the situation here and, as such, supports the position of the Opposition taken in their April 2 submission that private communications between a party and Corporation Counsel are *ex parte* communications within the meaning of the rules.
3. It deliberately misconstrues the proceedings in the Appeal of Mildred Rogers Crary, No. 16405 by omitting reference to (a) the serious admonishment NCRC's counsel, Maureen Dwyer, received

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[1] Contrary to NCRC's implied suggestion, the role of Corporation Counsel as adviser to the Board is fundamentally different from that of other executive agencies, such as the Office of Planning and the Department of Transportation, or a jury commissioner. *See*, NCRC Opposition at pp. 5 – 6.

> from the Board, (b) the numerous statements by the Board and Corporation Counsel that the communications were improper and (c) Corporation Counsel's repeated statements that it the policy of the Office of Corporation Counsel that it does not entertain communications with parties on legal issues in on-going matters. With regard to the portions of the transcript NCRC counsel does chose to refer to, there is, in fact, no Board Order embodying this decision. The transcript that NCRC attaches says little more than that a motion for a stay based on alleged *ex parte* communications with Corporation Counsel was denied. It says nothing about the nature or extent of the communications. NCRC's reliance on this transcript is nothing more than an artful attempted to distract the Board by clouding the issue of what is really at state in this matter – due process.

A. NCRC Accomplished Indirectly What it Could Not do Directly – Influence the Board and Violate the Fundamentals of Due Process.

The prohibition on *ex parte* communications to decision-makers in a legal context – judges, juries, and administrative boards conducting adjudications – is no mere technicality. It is grounded on the basic legal principle that parties whose rights and property are going to be adjudicated are entitled to know, and respond to, the evidence and arguments made by their adversaries.

NCRC argues for the right to unlimited private communications with the Office of Corporation Counsel ("OCC"), which advises the Board. The problem with this contention is that OCC serves as legal adviser to the Board – and the advice of OCC, protected by the attorney-client privilege, is not knowable to any party. So, as NCRC would have it, its lawyer could communicate a fact or legal argument to OCC (unbeknownst to the Opposition) and OCC could, in turn, give legal advice to the Board based on the existence of that fact.

Spevak v. Alcoholic Beverage Control Board, 407 A.2d 549 (DC 1979), cited in the Opposition's Motion and discussed in more detail, *infra*, involved precisely that situation, which was held to be an *ex parte* contact. Or, as this case well illustrates, there can be disputes about the application of law, which the Board must resolve. NCRC would have the Board believe that NCRC could send a "private" brief on the subject to Corporation Counsel, who would then advise the Board on the basis of having read that brief. In fact, the limited evidence available to the Opposition suggests that is precisely what happened a year ago when the question of what kind of variance NCRC would require – area or use – was a matter of dispute between the parties. OCC's ultimate advice to the Board – that an area variance was what was appropriate – was the product of its discussions with NCRC's counsel. As illustrated below, even OCC has acknowledged it has a policy against accepting legal arguments from parties to avoid this possibility of impropriety – a policy that, sadly, was disregarded in the instant matter.

1. NCRC Used the Office of Corporation as a Back Door to Get to the Board After the Record was Close.

Counsel for NCRC has been clever in handling this matter. Clearly, no one would dispute that if NCRC or its counsel had contacted the Board directly off the record regarding the bifurcation issue, such contact would have constituted *ex parte* communications. Moreover, the attempt to bring this issue before the Board at the January 6, 2004 public meeting was rebuffed. The Record being closed, NCRC had but one option – convince the Office of Corporation Counsel ("OCC") to advise the Board that it must reopen the matter to consider the bifurcation. When put in its simplest form, it becomes abundantly clear that the conduct of NCRC's counsel is precisely what the court in *Jarrott v. Scrivener*, 225 F. Supp. 827 (D.D.C. 1964) counseled against. Or, to use *Reichley v. D.C. Dep't of Emp. Sevs.*, 531 A.2d, 248 (D.C. 1987), relied upon by NCRC in its opposition, the conduct of NCRC's counsel complained of strikes at the "very notion of an ordered society" and has prevented "fundamental fairness" in these proceedings. *See* NCRC Opposition at p. 4.

2. NCRC's Reliance on the Proceedings in BZA Appeal No. 16405 Is Misplaced and Purposefully Deceptive.

NCRC sites only two paragraphs of what was, in actuality, the second hearing in BZA Appeal No. 16405 on the issue of *ex parte* communications. Keeping in mind that it was the conduct of NCRC's counsel, Maureen Dwyer, at issue, the omissions from that proceeding can be construed as nothing more than an attempt to deceive the Board. This deception has two prongs: (1) attempt to fool the Board into believing that the issue of communications between a party (or its counsel) and OCC staff assigned to the Board has been decided in a manner that favors NCRC; and (2) attempt to conceal the fact that, in BZA Appeal No. 16405, all (but Ms. Dwyer) agreed that the communication between Ms. Dwyer and Corporation Counsel were improper. Moreover, as outlined below, a review of the April 21, 1999 transcript from that proceeding reveals that Ms. Dwyer, in that case, also attempted to misconstrue the nature of her contacts with OCC.

What transpired in BZA Appeal No. 16405 was that Ms. Dwyer had requested a meeting with the Zoning Administrator ("ZA"). *See* BZA Appeal No. 16405, April 21, 1999 Transcript at p. 26. Being new to the case, Ms. Dwyer read the previous transcript and gleaned from that transcript that OCC was advising the Board on the issue of timeliness of the appeal. *Id.* Accordingly, Ms. Dwyer submitted to OCC what she called an "agenda" of the proposed meeting with the ZA to OCC. *Id.* However, she did not submit a copy of this "agenda" to the appellant. *Id.* at pp. According to Ms. Dwyer, in response to this submission, Alan Bergstein, counsel for OCC, contacted Ms. Dwyer and stated:

> I received a copy of your agenda. *What I would like to do is avoid any appearance of impropriety* is to have a conference call with Mr. Pat Brown [counsel for the appellant]. If you are willing to do that, would you set it up?

Id.

The conference call took place between Ms. Dwyer, Mr. Brown and Mr. Bergstein. After the conference call, Mr. Brown inquired as to what document it was that Mr. Bergstein was referring to. Ms. Dwyer testified that she informed Mr. Brown that "it was a copy of an agenda for the meeting with the Zoning Administrator . . ." *Id.* at p. 27. When asked by the Board if Ms. Dwyer could provide Mr. Brown with a copy of that agenda, Ms. Dwyer, conveniently, did not have a copy of it with her and could not have it faxed to the Board until she returned to her office. *Id.* at pp. 27-28. Ms. Dwyer pressed to have the hearing proceed, as scheduled, despite the questionable contacts she had with OCC.[2]

What transpired next is that a copy of the "agenda" was produced and proved to be more than a mere "agenda". Instead, it was a document about ½ inch thick containing legal argument. *Id.* at pp. 32 – 33. As stated by both Mr. Brown and the Chairperson, the characterization of the document by Ms. Dwyer as an "agenda" was clearly a "mischaracterization." *Id.* at p. 41; *see also* pp. 42 (Statement of Vice Chairperson King at lines 11-14) and 44 (comment of Member Clarens at lines 4-6).

However, the most striking aspect of this transcript is the discussion of Ms. Dwyer's conduct. The transcript is replete with references that the correspondence between Ms. Dwyer and OCC was "improper" and that the record had been "tainted" by her conduct. *See e.g.,* id. at pp. 36-37, 39, 42, 44, 49 and 50. For example, Vice Chairperson King made the following statement:

> Madam Chair, I might tend to agree with Ms. Dwyer if *this whole case had now not become tainted* with the fact that there had been communication outside the frame work of being on the record with Corporation Counsel. *That gives me great concern.*
>
> It seems to me that the document that the representative of the Corporation Counsel has given us, which Mr. Brown has, should be duplicated and should become part of the record. Should be given to Mr. Brown. And that this whole matter – it would be a great shame if we went

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[2] As in the instant case, Ms. Dwyer attempted to "blame the victim" and avoid responsibility for her actions as evidenced by her statement to the Board that

> if Mr. Brown had – was so concerned at [the time of the conference call], I don't know why he didn't raise it with Alan Bergstein and say that he was going to file something in the record, and would like him to respond. And it could have been resolved in advance of today."
>
> There was no objection raised at that time.

Id. at p. 30. Not surprisingly, Mr. Brown did not agree with Ms. Dwyer's construction of that conference call. *Id.* at p. 31.

> through all of this agony and then ended up in court *because there was some suggestions that we did not follow due procedures* and that there was ex parte conversations or communications between the – Mr. Sisson and his attorney, and the Corporation Counsel.
>
> *I'm really surprised that such thing occurred, Ms. Dwyer.* And – But I – But not having given that *thick package* of information to Mr. Brown, I think argues in favor of entering it into the record now, giving Mr. Brown an opportunity to respond in a useful way, and then getting on with this at a later date.

Id. at 36-37 (emphasis added).

From Commission Member Clarens:

> CLARENS: Well, it seems to me that there – one thing we want to make sure we do is that when we make a decision, that the decisions holds. And it is as unappealable as it can be. And it seems to me that we're entering this whole issue with this muddy issues and the possibility that some impropriety might have taken place and that we need to cure that. That needs to be resolved before we proceed. To proceed otherwise is imprudent –
>
> VICE CHAIRPESON KING. I totally agree.
>
> COMMISSION MEMBER CLARENS: - for the Board. So, it seems to me that what I hear is that we need to hear from both parties as well from the administrator, from Corporation Counsel as to what this situation is. And what is that you propose to cure it. So that when we proceed, we proceed *with a clean slate.*

Id. at p. 39 (emphasis added).

Later, Vice Chairperson King added:

> Regardless, I think we should retrieve from Mr. Brown this document from the Corporation Counsel. That it should be duplicated and become part of the record, and then become part of our information as well as a copy given to Mr. Brown. And that I think that we need to have – not only do we need to have the Zoning Administrator, but we need to have the Corporation Counsel and so forth here at a subsequent date – so that our whole proceeding not going to end up in appeals court and we don't have to do the whole damn thing over again, I suggest that we continue

> this. Do it right. Do it clean. Have everybody here at the same time singing off of the same page and with the same information.
>
> An agenda for a meeting with the Zoning Administrator is not an enormous amount of case law and so forth. Your agenda was to find out what happened. We want to find that out, too. And let's do it in a formal, on the record, way in which that we do not end up in appeals court.

Id. at 42; *see also* p. 44 (comment by Commission Member Clarens "We can hear the merits, but the whole thing is tainted").

Mr. Bergstein was called into the hearing. His statement supported the concerns of the appellant that the communications had been improper. More importantly to the instant matter, they directly refute Ms. Dwyer's claim in the instant matter that OCC regularly communicates with parties to on-going contested cases. Mr. Bergstein testified that:

> First, I haven't researched the issue [of ex parte communications with Corporation Counsel]. My sense has been that an ex parte communication would take place if a party in a contested case spoke with a Board member. I don't believe it would be ex parte communication for a party to speak with a member of the Board's staff or with me in my capacity as general counsel.
>
> *However, it is a standing order in my section that neither I nor any member of my legal staff speak with a party,* not because I think it's ex parte, but because I'm concerned about the record becoming confused in that the rules of the Board require that its opinions be based upon the record.
>
> *If you ask me for an opinion and a party that's involved in that opinion speaks with me, and I somehow, inadvertently, without referring to the fact that my views are influenced in part by that communication, if I don't share that with you and then you accept those views, my concern has been that your decision will be based upon materials that were never actually presented to you by the parties. And that the other party did not have an opportunity to respond to.*
>
> So, *there is a standing order in my section* to which, when I recognized in this particular case, and I just walked in here, but when I recognized that this particular case was a contested case before the Board, I indicated to Ms. Dwyer that I would not speak with her further but that I would

> speak with her and the counsel for other parties in a conference call if that's what was desired.

Id. at pp. 47-48 (emphasis added).

3. Contrary to Ms. Dwyer's Pleas of Innocence in the Instant Matter, Ms. Dwyer was Put on Notice That, in the Future, OCC Should NOT Be Contacted with Legal Issues in Contested Cases.

There is a second, practical, problem with NCRC's position that it is free to communicate with OCC to the exclusion of the Board and the other parties: it makes the OCC another venue for argument of a contested case. If "open season" is declared on communications with Corporation Counsel, the wise party will always seek a hearing before Corporation Counsel to present its legal position, although it will be dependent upon the goodwill of Corporation Counsel to share the adversary's opposing view and give the party an opportunity to respond to it. Freedom of Information Act requests capture only documents, not oral conversations; and the law allows 10 business days for compliance with an FOIA request.[3] So, the Freedom of Information Act is a poor mechanism for learning the arguments that one's adversary is addressing to Corporation Counsel and was never intended for that purpose.

Moreover, Ms. Dwyer's assertion that there is no limitation on a party's ability to correspond with OCC is contradictory to OCC's policy, as clearly spelled out in BZA Appeal No. 16405.

In BZA Appeal No. 16405, even though Mr. Bergstein did not view Ms. Dwyer's correspondence with him as constituting "*ex parte* communications", he did take measures to avoid any appearance of impropriety. Even more, he requested, repeatedly, that the Board issue a "standing order for parties not to communicate with my office directly" unless the other parties were included in the communications *Id.* at pp. 48, 49 and 50. Mr. Bergstein cautioned that:

> But because I'm often called upon to review legal issues that come before this Board, I believe that the *legal issues must be presented to the Board directly.* And that, then, those materials can be sent by the Board to me if it's appropriate for me to review. And then everybody knows whats in the record. Everybody knows the decisions are being based upon the record.

Id. at p. 50.

[3] Interestingly, the Office of Corporation Counsel has yet to comply with the Opposition party's FOIA request with respect to the communications of its lawyer most deeply involved in this case, Lori Monroe, even though weeks have passed since the request was made.

4. OCC has Given Advice to the Board Based on its Improper Communications with NCRC's Counsel.

Mr. Bergstein's testimony cited above makes it abundantly clear in his testimony in BZA Appeal No. 16405 that OCC's policy against communicating with any parties off the record is to safe guard against the possibility that advice given to the Board on legal issues is not influenced by anything not in the record. However, OCC's refusal to enforce this policy in this case has resulted in just this pitfall occurring.

What distinguishes the communications in BZA Appeal No. 16405 from the instant matter is that, at the time the questionable communications were revealed, OCC had not rendered any opinion to the Board which may have been tainted by the communications. The following exchange underscores the significance of this distinction:

> COMMISSION MEMBER CLARENS: And, but we have not received an opinion or advice from Corporation Counsel?
>
> VICE CHARIPERSON KING: Yes, and *thank God for that.*

Id. at p. 45.

What's more, Mr. Bergstein, again, admonished Ms. Dwyer in the instant matter in his email in which he stated:

> "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."

See Motion at Exhibit 3.

B. NCRC's Opposition Supports the Imposition of the Harshest of Sanctions.

1. Ms. Dwyer Clearly Had Notice that Communications With OCC Are Improper.

In NCRC's Opposition, Ms. Dwyer pleads innocence. She even goes so far as to attach a sworn affidavit claiming, with regard to past contacts with OCC that:

> 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.

Dwyer Affidavit at ¶ 5.

Not only did Ms. Dwyer have notice by way of Mr. Bergstein's email cited above, she was admonished by the Board and Mr. Bergstein in Appeal No. 16405 that her communications with OCC on legal issues in pending contested cases was, indeed, improper.

Ms. Dwyer's blatant and deliberate misstatements in this case warrant the harshest of sanctions – her suspension from appearing before this Board. Her conduct goes beyond mere "zealous representation" of her client and crosses the line of attempting to improperly influence the Board through improper means, by deliberately withholding information and by making material misstatements.[4]

2. The Result of the Communications is that any Advice Given to the Board is Now in Question.

The communications in this matter and resulting tainted advice from OCC goes beyond the issue of bifurcation. Rather, it calls into question the entire proceedings, given the nature of what has been revealed.

As set forth in the Opposition's Motion, the *ex parte* communications (and admonishment of the same) go back to the issue of whether a special exception or variance was needed for the construction of the carriage house. The Board, after full briefing, correctly decided that a variance was required. Ms. Dwyer asked the Board to reconsider this decision, which request the Board declined. Then, without warning or opportunity to respond, and much to the surprise of the Opposition, at its January 6, 2004 meeting, the Board reversed its decision on this matter. A decision that was contrary to both its own, as well as court, precedent. This reversal was made without adequate explanation as to why the Board was reversing both its previous decisions in this case and others, as well as the court precedent on the issue. Now that NCRC's counsel's *ex parte* communications have been revealed, this decision of the Board is tainted.

The Board made it clear that its decision to reopen this matter was based on advice of OCC (and not any direct *ex parte* communications with the applicant). The record is now clear that advice to the Board was spurred by behind the scenes (and off the record) communications with Ms. Dwyer and her colleagues.

Finally, Ms. Dwyer has attempted to influence OCC into writing an order that does not accurately reflect the Record in this case and in such a manner that puts NCRC in a more favorable light when it comes before the Board in 2006 after the expiration of its current special exception (or, at the completion of its new buildings, at which time it will be forced to request an increase in enrollment on the basis that it needs the increase to pay for the construction).[5]

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[4] The Board also must consider how to deal with Ms. Dwyer submitting a sworn affidavit which contains statements that are flat out contradictory of the Transcript in BZA Appeal No. 16405.

[5] Since each party had already submitted proposed findings of fact and conclusions of law with the Board, and served upon each other, it can only be concluded that this attempt to influence OCC with a document that was neither served on the parties or permitted by the Board's closing of the record was an

Again, given Ms. Dwyer's knowledge that communications with OCC on legal issues in pending matters is improper, the fact that she has previously been admonished for similar conduct and her misrepresentations in both this case, as well as her misrepresentations of the nature of BZA Appeal 16405, denial of any reconsideration or bifurcation is warranted, as is suspending Ms. Dwyer's further appearance before this Board.

C. The Communications Between NCRC's Counsel and OCC Clearly Rise to the Level of *Ex Parte* Communications.

Ms. Dwyer makes a big issue of the fact that in BZA Appeal No. 16405, the Board held that communications with OCC do not constitute to *ex parte* communications. However, the basis of that decision is not apparent from the Record. Rather than blindly follow this unexplained conclusion, the Board is best advised to look at this case on its merits.

Unfortunately, the District of Columbia Administrative Procedure Act does not provide a clear definition of *ex parte* communications. The Opposition submits that it has provided ample support in its Motion that the communications, in this instant, do rise to the level of *ex parte* communications.

1. *Spevak v. D.C. ABC Board*, 407 A.2d 549 (D.C. 1979).

Finally, while NCRC's Opposition cites an off-the-point provision of the American Bar Association Model Code of Judicial Conduct from the obvious proposition that judges may consult with other judges or court personnel about a pending case (NCRC Opposition at p. 5), NCRC can point to no circumstance where private contacts by a party with such personnel are permitted, which is the situation here. In fact, as discussed below, the federal statutes severely restrict the scope of personnel who may be contacted *ex parte* by a lawyer representing a party and strictly limit the nature of those contacts. Furthermore, many administrative agencies with more elaborate sets of *ex parte* contact rules expressly prohibit contacts of the kind that NCRC's counsel had with OCC. For example, the Rules of the Federal Energy Regulatory Commission prohibit *ex parte* contacts with staff in a decision making role such as where they aid the Commissioners or draft the orders as distinct from staff counsel that advocate on behalf of staff.

The DC Court of Appeals recognized the application of all of these principles when it affirmed the decision of the *Alcoholic Beverage Control Board in Spevak v. Alcoholic Beverage Control Board*, 407 A.2d 549 (DC 1979). The court described the situation as follows:

> After the record was closed, the Board became concerned that default on a loan due Rodman by Triangle Liquors might allow Rodman to take control of Triangle, thus

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improper attempt to violate the due process rights of the parties to this contested case.

> violating D.C. Code 1973, § 25-113(b)'s ban on dual licensing of Class A and Class B retailers. n3 It therefore asked the Corporation Counsel's opinion on whether the potential for default control of Triangle was a form of dual control forbidden by § 25-113, supra. The Corporation Counsel's office decided it needed further information and, without notice to opponents of the license application, had an extensive series of ex parte conversations with Rodman's counsel which resulted in an early payment of the loan, thus ending the potential for Rodman to gain control over Triangle. Thereafter, on November 3, 1977, the Board granted Rodman's application, relying, in part, on a final opinion of the Corporation Counsel that there was no further potential for Rodman to assume control of a second liquor license.

Spevak, 407 A.2d at 551-552; footnotes omitted. After the grant of the license, the parties in opposition immediately protested, citing the extensive *ex parte* communications that had taken place with corporation counsel and the applicant. *Id.* However, the Board reversed itself and denied the application, allowing the applicant to file a new application ten days later which afforded all of the parties a new hearing:

> The Board, after considering the petition and holding brief further hearings reversed itself and issued an order on January 31, 1978, denying Rodman's application. The denial relied solely upon the impropriety of the disputed ex parte contacts."

Id.; emphasis added.

The issue before the DC Court of Appeals was not whether the Alcoholic Beverage Control Board had acted properly in dismissing Rodman's application as being tainted by *ex parte* contacts; there was no dispute that the Board's action was correct. Rather, the issue was whether the Board's allowing a reapplication within 10 days rather than the one year specified by regulations was within the exception permitted for new evidence. The DC Court of Appeals held that it was, making clear that it concurred in the Beverage Control Board's recognition of the due process issues raised by the *ex parte* communications with Corporation Counsel:

> We are persuaded, however, that the Board's final resolution of this problem was correct. The supposedly new evidence (of the removal of an impediment to licensing) had never been considered in an adversarial setting. It was relevant to a significant and contested issue. The effect of allowing reconsideration of the licensing application was to hold a new set of hearings with full opportunities for opponents and advocates of the license to speak. This

> solution, while perhaps not as satisfactory as reopening the earlier hearings, certainly protected any due process concerns of all participants in the case.

Id. at 552.

Significantly, the DC Court of Appeals did not say that the *ex parte* contacts were permissible; and it could not have said so and reached the result that it did.[6] If the *ex parte* contacts were permissible in *Spevak*, then the supposed "new evidence" that had been put before the Board prior to its dismissal of the first application, which came through Corporation Counsel, would have been properly before the Board. Thus, the dismissal of the first application would have been in error; and there would have been no new evidence to justify the Board's allowing Rodman to re-file its application inside of the 1-year period mandated by regulations.

Section 557(d) of the Federal Administrative Procedures Act, 5 U.S.C. § 557(d), prohibits ex parte communications "relevant to the merits of the proceeding" between an "interested person" and an agency decisionmaker, including employees or others "who are or may be reasonably be expected to be involved in the decisional process." See 2 Am. Jur 2d: Administrative Law § 319 at p. 331. The agency is granted the authority to require an agency to require an infringing party "to show cause why his claim or interest should not be dismissed, denied, disregarded, or otherwise adversely affected on account of [a] violation. 5 U.S.C. § 557(d)(1)(D). Congress intended that the terms of the Act be considered broadly. *See Professional Air Traffic Controller Organization (PATCO) v. Federal Labor Relations Authority (FLRA)*, 685 F.2d 547 (D.C. Cir. 1982).

In *PATCO v. FLRA*, the Court stated that "Congress sought to establish common-sense guidelines to govern" such contacts "to prevent the appearance of impropriety from secret communications in a proceeding that is required to be decided on the record" and to ensure fair decisionmaking. *Id.* At 563. The District of Columbia APA was based in substantial part on the federal APA and the provisions dealing with ex parte communications differ only in that the prohibition does not apply to District agencies engaged in rulemakings. Nevertheless, the underpinnings for the prohibition in contested cases, under both statutes, is at stake here. A party to a contested case should not be allowed to engage in ex parte communications with counsel to the Board on issues relevant to the merits of the proceeding, as distinct from mere procedural questions. The purpose of those contacts here, as indicated by the undisclosed materials sent to the Corporation Counsel and the e-mails obtained via a FOIA request, was to influence both the substance of the Board's decision and the manner in which the Board considered the issues raised by the parties. To gauge whether those contact were made for an improper

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[6] Attempting to distinguish *Spevak* from the situation here on the basis that *Spevak* involved facts that were the basis for the Board's decision will not work. The last thing the Board – or Corporation Counsel – should want is to have to have an inquiry into the substance of the private communications between counsel for a party and Corporation Counsel to determine on which side of the *ex parte* communications line these communications fell. Were they factual, legal arguments, legal arguments mixed with facts? No one should want to become enmeshed in inquiries of that nature, which is why a blanket prohibition on any communication of legal or factual substance is required.

purpose, the Board need only ask itself why the materials sent and the communications made by NCRC's counsel were kept a secret from those opposed to NCRC's application.

We request that the Board hold an evidentiary hearing and impose the sanctions suggested by the Opposition in its Request filed on April 2, 2004.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI, LLP

By: _____
Richard B. Nettler
Jeannine Rustad

Dated: April 9, 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 9, 2004, a copy of the foregoing Reply 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

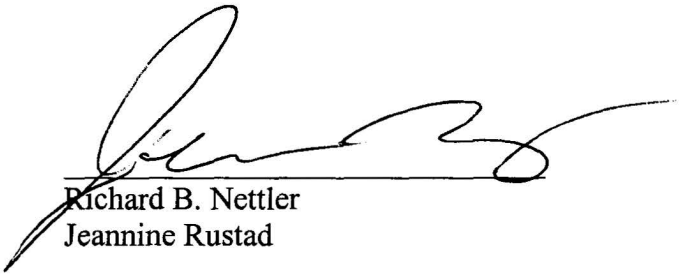
By Email:

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

Bruce and Sallie Beckner
Fleischman and Walsh, LLP
1400 16th Street, NW
Washington, DC 20036

Steven R. Hunsicker
Baker Botts, LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400

Henry P. Little
The Nature Conservancy
201 Mission Street, 4th Floor
San Francisco, CA 94105



Richard B. Nettler
Jeannine Rustad