BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Application of the
National Child Research Center

BZA Application No. 16970

RESPONSE TO THE OPPOSITION'S REPLY[1]

The Applicant stands firms on its position as set forth in its Opposition to the Motion and replies that nothing in the Opposition's latest filings provides any legal basis for a finding of improper *ex parte* communications. Rather, it attempts to further confuse the issues legitimately before the Board, by casting unwarranted aspersions at counsel for the Applicant, Office of Corporation Counsel and the Board, suggesting that the Board permitted its decisions to be improperly influenced. This brief response seeks only to highlight three points, which completely undercut the Opposition's latest arguments:

1. First and foremost, the Opposition cannot get around the fact that BZA Appeal No. 16405 is directly on point and the Board ultimately ruled that communications with Corporation Counsel are not *ex parte*. **The April transcript references which the Opposition cited in their reply were discussions that preceded the Board's May 19, 1999 ruling. While there was clearly some confusion that preceded the Board's ruling on the issue, at the May 19 meeting, the Board affirmatively ruled that there was no *ex parte* communication, no tainting of the proceedings and no improper action by any of the parties.** Indeed, even at the April meeting from which the Opposition quotes, Corporation Counsel plainly stated its view that such communications **are not *ex parte*.** As the Board acknowledged when it made its decision, the Board agreed, having reviewed its own regulations, and therefore conclusively held that the regulations do not prohibit communications with corporation counsel, the Office of Planning or its staff, despite the attempts by the appellant in that case to confuse and mischaracterize the communications. The Board **did not** separate communications with corporation counsel into a different category, the Board **did not** find that such communications were the functional equivalent of *ex parte* communications, and the Board **did not** admonish counsel. Rather, the Board held:

> 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***

[1] The Board's Rules only provide for a response to a motion (within 7 days) and not a reply to that response (which is what the Opposition has filed.) If the Board permits the Opposition's reply, then it should also permit the Applicant's response.

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> ***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.**

2. All of the relevant issues in this case were presented to the Board directly, on the record and with full opportunity for all parties to respond. Given the amount of time the Board has spent on this case, there can be no question that the variance and special exception issues were fully briefed by all parties. Even the Opposition attaches to its motion the filing made by the Applicant on the variance issue, to which the Opposition and all parties responded. Likewise, the bifurcation issue was presented to the Board on the record, at an open public meeting. This is dramatically different from the case of *Spevak v. Alcoholic Beverage Control Bd.*, 407 A.2d 549 (D.C. 1979), in which the applicant, through communications with Corporation Counsel (at Corporation Counsel's initiative) actually created and submitted **new evidence** upon which the Board made its preliminary decision. That, of course, was promptly corrected. There is no suggestion here that counsel for the applicant discussed anything other than law with the lawyer for the Board. Moreover, the Opposition's argument conveniently ignores that other cases acknowledge the consistent practice of carrying on such communications with Corporation Counsel. *See, e.g., Brown v. D.C. Board of Zoning Adjustment,* 486 A.2d 37, 56, 62 (D.C. 1984) (Court's opinion describing in detail the lengthy and repeated communications between counsel for an applicant and Corporation Counsel, without ever suggesting that such practice was in any way unusual or improper).

3. Finally, and perhaps most fundamentally, the only decision the Board has made is to reopen the record to provide additional opportunity **for all parties** to address the issue of whether there is sufficient information in the record for the Board to take action on the new construction. All parties have now responded and have also had the opportunity to rebut the

filings by the other parties. The only possible goal of the Opposition's current motion is therefore not to seek an opportunity for all to be heard, as all are being heard, but to challenge and tarnish any number of reputations through their own sharp tactical practices. The case is ready for decision.

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

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2004, a copy of the foregoing was hand delivered to the following parties:

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