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BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

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

OPPOSITION TO MOTION TO DISQUALIFY CHAIRMAN GEOFFREY GRIFFIS AND TO VACATE VOTES TAKEN MARCH 9 AND APRIL 13, 2004

The "Cleveland Park Neighbors," Steve Hunsicker, Sallie R. and R. Bruce Beckner, Henry Little and Linda Badami and Gaylord Neely (hereafter, the "Opposition Parties") now take aim at the Board Chair and in so doing impugn the integrity of the entire Board and its processes. The current motion seeks to disqualify BZA Chairman Geoffrey Griffis, alleging generally that he is personally biased in favor of NCRC based on a vaguely alleged "close personal relationship" with a former NCRC Trustee.[1] On this basis alone, with no allegation — much less evidence — that the alleged "relationship" was in existence at the time of the decisions in question in this matter, the Opposition Parties ask the Board to vacate votes taken on March 9, and April 13, 2004. As demonstrated herein, under the circumstances present here, the relevant precedent would not support taking any action. This is no doubt why the Opposition Parties cite no authority whatsoever that suggests that remotely similar circumstances warrant recusal.

Before addressing the relevant law, a brief description of the history of these proceedings is appropriate in order to correct some significant misimpressions that could be created by the Opposition Parties' motion. While their motion suggests that the BZA Chairman alone led the

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[1] The motion alleges a relationship with a person described merely as a "Trustee." As stated in the motion, however, the name of the "Trustee" was provided to counsel for NCRC. That person has rotated off the Board and is in fact no longer a Trustee, having attended her last NCRC Board meeting on April 13, 2004.

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Board to take unwarranted positions, the record facts demonstrate otherwise. On January 6, 2004, the Board voted *unanimously* that, contrary to its previously expressed position, no variance relief would be required in this matter. Nevertheless, the Board then voted to deny NCRC's application for a special exception by a 3-1 vote. Also in January, before any public meetings on the subject, the Board privately discussed in executive session the possibility of bifurcating the case and thereby handling NCRC's two requests (for new construction and for an increase in enrollment) separately. (April 13, 2004 Transcript at p. 31, Comments of Comm'r Hood.) On March 9, 2004, the Board voted, again *unanimously,* to reopen the record solely for the purpose of considering the new construction issue in isolation. On April 13, 2004, the Board publicly voted, 3-1, to approve the new construction. It also voted, unanimously, to reject the Opposition Parties' motion to disqualify NCRC's counsel on the basis of alleged *ex parte* communications because the communications alleged did *not* constitute improper *ex parte* communications under previously expressed Board precedent.

With respect to the Opposition Parties' most recent motion, as they well know, NCRC is a private pre-school, with a Board of Trustees comprised of 22 individual members (19 since May 2004). The Board's members rotate on and off the Board, and have continued to do so throughout the course of the lengthy proceedings before the BZA. NCRC does not, and cannot, know the complete complexion or parameters of any of its Board member's range of personal relationships throughout the community. They, like the BZA members, have varied relationships throughout the community. NCRC therefore has no "personal" knowledge of, and cannot itself attest to, the facts of an alleged relationship between Chairman Griffis and one of its former Trustees. To the best of NCRC's knowledge, however, there was no "close personal relationship" as broadly alleged (but not supported) by the Opposition Parties in existence at the

time of any of the decisions in this matter, *i.e.,* on or before April 13, 2004.[2] Indeed, it is noteworthy, and in fact determinative under the relevant law as discussed below, that the Opposition Parties do not even *allege* that any such relationship was in existence in that relevant time period.

The Opposition Parties highlight the fact that it was Chairman Griffis who announced many of the Board's decisions. (Motion at 2-3.) This, of course, is because he is the Board Chairman. They also note that he "identified issues" and "prepared agendas," and "scheduled hearings." Again, it would be surprising if, as BZA Chairman, he had *not* done so. Shockingly, the Opposition Parties also allege, with not a scintilla of support, that he "used his position behind the scenes as well as in public hearings to advance the school's cause...[and that he] served as an advocate for the school's cause with [sic] the internal discussions and deliberations of the BZA." (Motion at 3.) It is remarkable that the Opposition Parties can purport to state what the BZA Chairman has done "behind the scenes" or in the BZA's "internal discussions and deliberations."

In the District of Columbia, the courts have adopted a three-part test by which to measure the legal sufficiency of a claim of personal bias whenever a party seeks to have either a judge or an administrative decision-maker disqualified based on a personal bias, as follows:

1. The facts alleged must be material and stated with particularity.
2. The facts must be such that, if true, they would convince a reasonable man that a bias exists.

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[2] Chairman Griffis would presumably be in the best position to confirm or deny this fact, if necessary. NCRC can only assume that he has already done so as it has every confidence in the personal ethics of both Chairman Griffis and the other Board members such that it believes that none of them would stand for a decision to be made under legally improper circumstances.

3. The facts must show that the bias is personal as opposed to judicial, in nature.

Vann v. D.C. Bd. of Funeral Dirs. And Embalmers, 441 A.2d 246, 250 (D.C. 1982). The first criterion, that requiring a particularized recitation of material facts by way of affidavit or other evidence, has been rigidly enforced by the courts and agencies, and is strikingly lacking in the Opposing Parties' motion. *See, e.g., Vann* (affirming Board's denial of motion to disqualify Board members where statements in support of motion "did not set forth facts with particularity.") *See also York v. United States,* 785 A.2d 651 (D.C. 2001) (affirming judge's refusal to recuse herself based on personal relationships with two testifying police officers because bias was insufficiently alleged). In this case, the motion broadly alleges a "personal relationship," but does not allege that it began or existed during the time that the relevant decisions were made. Given the lengths to which the Opposition Parties have gone to attempt to undo the rulings in this case to date, it can only be assumed that, if they had any such evidence, they would have alleged it. On this critical failure, the motion should be denied without further consideration.[3]

It is not at all surprising that BZA members have personal relationships with individuals who have some relationship to a party. As one court observed in rejecting a claim that the judge

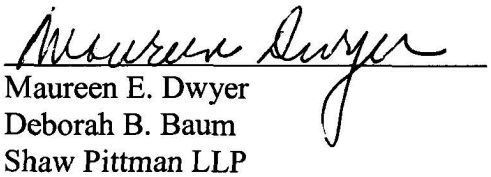
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[3] We note that it is not settled whether the full Board has the right to review the decision of an individual Board member whether to disqualify him or herself. Courts have observed that judges accused of bias are uniquely situated to decide such motions because judge alone "knows fully his own thoughts and feelings and the complete context of the facts alleged." *United States v. Mitchell,* 377 F. Supp. 1312, 1315 (D.D.C. 1974), *aff'd,* 559 F.2d 31 (D.C. Cir. 1976). The District of Columbia Court of Appeals, however, has noted that the question whether an individual Board member should decide the disqualification question himself, or whether the full Board should review that decision is "a matter over which the court has almost no review authority....If we were to agree...that a party's only recourse for a Board member's erroneous refusal to recuse is *judicial* review, we would interfere unnecessarily with an important aspect of agency self-governance." *Dupont Circle Citizens Assn v. D.C. Alcoholic Beverage Control Bd.*, 766 A.2d 59, 65 (D.C. 2001).

was personally biased in favor of a party because the party's wife had worked for the judge, a judge is not expected to "withdraw from society and live an ascetic, antiseptic and socially sterile life." *United Farmworkers of America v. Super. Ct.*, 170 Cal. App.3d 97, 100 (1985). For that reason, among others, the matter of disqualification based on personal bias is a sensitive, difficult matter that will not be ordered lightly, and is left to the agency as a matter of its own self-governance. *Dupont Circle Citizens Assn v. D.C. Alcoholic Beverage Control Bd.*, 766 A.2d 59, 65 (D.C. 2001). *See also In re Evans*, 411 A.2d 984, 994 (D.C. 1980); and *In re J.A.*, 601 A.2d 69, 75-76 (D.C. 1991) (relaxation of stringent requirements for disqualification motions could lead to frivolous claims which are detrimental to the judicial system).

It is regrettable indeed that the Opposition Parties have now seen fit to challenge not only the ethics of NCRC and its counsel, but also the personal ethics of the BZA chair and indeed, by extension, the entire Board. NCRC has every confidence that the BZA has already considered the facts as presumably described to it by Chairman Griffis and found them to be irrelevant to the decisions made in this matter, particularly given the margins by which the votes in question were won. If it has not yet made that decision, NCRC would urge the Board to put this whole matter to rest by denying the motion for failure even to allege facts suggesting that any inappropriate relationship existed at the time the relevant decisions were made, much less submitting evidence of such facts with the particularity required to support a legally sufficient motion to disqualify under well-established District of Columbia law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2004 a copy of the Opposition to Motion to Disqualify Chairman Geoffrey Griffis and To Vacate Votes Taken March 9 and April 13, 2004 was served by mail on the following:

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