Pillsbury
Winthrop
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Pittman LLP

April 11, 2005

2005 APR 11 AM 9:46

Curtis Etherly, Jr., Esq., Vice Chair
Board of Zoning Adjustment
441 4th Street, N.W.
Second Floor
Washington, DC 20001

Re: BZA Application No. 16970
National Child Research Center - 3209 Highland Place, NW
Applicant's Motion For Stay

Dear Members of the Board:

On behalf of the National Child Research Center (the "Applicant"), enclosed please find a Motion for Stay of the effectiveness of BZA Order No. 16970 issued on March 29, 2005. If you have any questions or comments regarding this Motion for Stay, please call either of the undersigned at (202) 663-8000.

Respectfully submitted,

Maureen E. Dwyer

Paul A. Tummonds, Jr.

Enclosure

cc: See attached Certificate of Service

Document #: 1472463 v.1

BZA
Case No. 16970
Exhibit No. 385

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.385

BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA

In Re: Board of Zoning Adjustment Order No. 16970

APPLICANT'S MOTION FOR STAY

Introduction

The National Child Research Center ("NCRC"), pursuant to 11 DCMR §3029, hereby asks the BZA to stay the effect of its Order No. 16970, issued on March 29, 2005 ("the Order"). If enforced, the Order would require NCRC to eliminate a unique preschool educational opportunity for more than 50 preschool–age children currently enrolled by contract. The undisputed factual record in this case establishes that NCRC's enrollment has been at approximately the current level for nearly two decades. There is neither a legal nor a factual basis for the BZA to limit NCRC's total enrollment to 120 students, which is far fewer children even than were enrolled in 1958, when the District first adopted zoning regulations. The Order is not only legally unfounded but also completely at odds with the orally expressed views of the Board members at the hearings in this matter.

Because NCRC cannot responsibly (or lawfully) simply eliminate fifty preschoolers from its roster, the BZA's action appears to place the school in automatic—and, for all practical purposes, unavoidable—non-compliance with the Order. Enforcement of the Order will have immediate, dire, and irreparable harmful impacts on the school from both a financial and an academic standpoint. More important, however, is the irreparable harm to the many small children and their families who rely on their spaces at NCRC, particularly given the widely–acknowledged scarcity of preschool opportunities in the District of Columbia. Accordingly, NCRC intends to seek immediate relief in the District of Columbia Court of Appeals, but seeks in the first instance

the Board's stay of its Order pending such review, in order to obviate the need to request such a stay from the Court. Due to the immediate urgency of the situation created by this Order, however, NCRC asks that the Board advise NCRC of its decision by April 15, 2005. If a decision by that time is not possible, NCRC will file a motion in the Court of Appeals.

Relevant Background

NCRC has operated a child development center at its current location in Cleveland Park since 1930. As the record in this case reflects, prior to 1990. NCRC maintained a relatively steady enrollment at approximately 141-145 students. *See, e.g.,* Exh. 218 attached hereto as Tab A (NCRC Enrollment Chart). During that time period, and certainly prior to the adoption of Zoning Regulations in the District, NCRC operated without any zoning-based limit on the number of students it could enroll. It also complied with the District's applicable licensing requirements (currently enforced by the Department of Health). In 1990, NCRC added a program for children with special needs, responding to research indicating that early intervention for such children could materially improve their later school success. As the record indicates, this improvement brought NCRC's enrollment to approximately 170 children and it has stayed roughly constant for fifteen years since then.

To quote the attorney for one of the party opponents in this case, "Occupancy and enrollment are terms of art." (*See* Record discussion at February 11, 2003 transcript, page 258.) As the Board found in this proceeding (FOF#8), NCRC in 1998 filed an application "*for a new certificate of occupancy* to increase the number of children at the child development center from 90 to 120, and was directed to seek a special exception" (emphasis added). At that time, NCRC's *enrollment* approximated its current level of 171 students. *See, e.g.,* Exh. 218, Tab A. With this context, it is of course hard to see how the BZA could logically now take the position the BZA's

1998 Order limited NCRC's enrollment to 120 students when in that proceeding the school's then-current enrollment of approximately 170 students was well-known and it was nevertheless instructed to obtain (and then given) a new certificate of occupancy for 120 students. Testimony from that 1998 proceeding demonstrates that the application was designed to address a technical issue. Department of Health requirements (with which the school had fully complied) regarding the number of students occupying NCRC's facilities were inconsistent with the certificate of occupancy, which described an occupancy of 90 students at any given time. (See, e.g., Exh. 104, attached hereto as Tab B). Accordingly, the BZA approved the special exception and issued Order No. 16307, which included many explicit conditions regarding the use of the land as a child development center, but, significantly, did *not* include a cap on enrollment.

The record in this case reveals that not all of NCRC's preschool–age students attend school five days per week, nor do all students attend school for a full day. Some children attend morning session only while others attend only in the afternoon. (*See* Record discussion at June 24, 2003 transcript, page 214.) Therefore, NCRC's total enrollment number necessarily differs from the number of students actually at the school, or coming to or going from the school, at any given time. This long–established fact of NCRC's operations, which differ markedly from the operations of an elementary school or a secondary school, is an inherent aspect of the established preschool use at this location. The documented facts of this case make it clear that the certificate of occupancy merely displays the maximum occupancy of the facility at any given time, in the same manner that the certificate of occupancy for a movie theater would show the number of patrons who may attend a particular showing of a movie—without limiting the total number of viewers who may patronize the theater in any day, week, or month.

In 2002, NCRC filed a new application for a special exception to authorize construction of an addition to the existing facility and construction of an accessory building. These additions were designed to allow smaller group sizes and to allow NCRC generally to better serve its pre-school students and their parents. Before NCRC even filed its application, certain neighbors expressed concern that a larger facility for NCRC could lead to future growth in the school's enrollment. After extensive consultation with neighbors regarding their concerns, NCRC reduced the size of its proposed new construction. In addition, it included as a feature of its special exception application a proposal that it would voluntarily subject itself to a cap on enrollment. This new, zoning–based cap would be in addition to limitations placed on NCRC as a matter of child-care licensing (by the Department of Health) and as a matter of building code (reflected in its certificate of occupancy). After a careful analysis of its present and anticipated operations, NCRC volunteered to cap its enrollment for the first time ever at 181 students, a level just ten students above its then–current level of 171 students. (NCRC also requested a small degree of flexibility to address the uncertainties inherent in the enrollment process, as faced by any school.) (*See* Exh., 87, p. 7.)

Early in the proceedings on this application, the "neighborhood" group in opposition filed a preliminary motion to dismiss on the basis that NCRC was not in compliance with its current limitations on enrollment, arguing that enrollment should be limited to 120. The Board, on the record, as a preliminary matter at the February 11, 2003 hearing denied that motion, pointing out that, while a certificate of occupancy limited *occupancy* of the NCRC *building* to 120 students, there was *no cap* on enrollment. Indeed, there never has been. *(See* Record discussion at February 11, 2003 transcript, pages 271-280.)

In its ruling on the motion, the board made several significant findings. As to whether the second order supersedes the first, the Board relied on the advice of its counsel, Lori Monroe from the Office of the Attorney General, who stated:

> Monroe: I think the second order supersedes the first order. It's generally the way it works. The second order was on a full rehearing. It wasn't a reconsideration of the first. And the first order and the second order actually have conditions that conflict because the first order had a condition allowing I think 15 years. The second order had eight years. So you can't really read them together and the second order nowhere incorporates the first one into it.
>
> So the second order is really all we're dealing with which doesn't have a specific enrollment condition. (Tr. pp 271-272)

The Board went on to find that there was no condition limiting enrollment:

> Griffis: It may well have been a mistake of the second order not to fully define what –
>
> Monroe: It speaks to 120 children but it doesn't have a condition.
>
> Griffis. Right.
>
> Etherly: And I think, Mr. Chair, that's probably the real critical issue here, that sways me to side with the Applicant on this side. *** The fact that there is no clear enrollment cap language after those important words, ordered that this application be granted subject to the following conditions. I'm not swayed. *** if you don't have language there, you then run the risk of not having that predictability, that sense of certainty that you like to see in regulation, in law. (Tr. pp 272-273)
>
> ***
>
> Zaidain: I'm in favor of what Mr. Etherly advocated in terms of moving forward. I think we're walking down a really rocky road here. If we get to the point that every time there's a contested case in front of us we're going to hear hours and hours of testimony of whether or not that proposal is in compliance or not. (Tr. p. 279)

Accordingly, the Board voted 3-2 to deny the motion to dismiss, with Etherly, Zaidan, and Griffis voting to deny.

At the hearings on this application, the Board heard testimony regarding the impact of NCRC's current operations. Specifically, it heard extensive testimony regarding the school's proposed Traffic Management Plan and other measures designed to shield the neighborhood against any impact from the proposed new facilities. Nevertheless, despite (a) the acknowledged critical need for preschool slots in the District of Columbia, (b) support for the application from many neighbors, and (c) the Office of Planning's expressed view that the proposed Traffic Management Plan (with achievable improvements) could address concerns about traffic *(See* Record discussion at September 16, 2003 transcript, page 292), the Board rejected the proposed cap on enrollment of 181. It did not stop there, however.

The Board in its Order not only rejects the voluntarily-proposed enrollment cap, but for the first time it interprets Order No. 16307 as establishing a cap on the school's total enrollment at 120. The Board does this despite the fact that in *this* Order it acknowledges that Application No. 16307 was framed as a request for a new certificate of occupancy (FOF #8). Further, the Board has presented no rationale whatsoever to explain how a certificate of occupancy logically could be set at the same number as an enrollment cap for a preschool where, by definition, the full enrollment will virtually never be in the building at the same time. Moreover, even if the BZA could find a legal basis by which to mandate that a school reduce its enrollment, there was no evidence—at all—to support establishment of a cap at the level of 120 students. This Order, if enforced, would require an immediate reduction in enrollment of approximately fifty preschoolers, roughly one third of NCRC's enrollment.

NCRC requests that the Board stay the Order pending review in the Court of Appeals, due to the irreparable harm that its enforcement will cause both to NCRC and its preschool students and their families. The matter would be of extreme urgency at any time of year; it is par-

ticularly urgent now, as area schools have completed their admission processes for the fall of 2005; there is virtually no prospect of any students who are turned away from NCRC finding placement at another comparable school.

The Board Should Stay Enforcement of the Order

Given the dire impact of the Order if enforced immediately, NCRC requests that the Board stay enforcement of the Order pending review in the Court of Appeals. In deciding whether to grant a motion for stay, the Board must consider the following four factors: 1) whether the applicant is likely to prevail on the merits; 2) whether irreparable injury will result if the stay is denied; 3) whether the opposing parties will be harmed if the stay is granted; and 4) whether the public interest favors granting a stay. *Kuflom v. District of Columbia Bureau of Motor Vehicle Services*, 543 A.2d 340, 344 (D.C. 1988). All of those factors weigh heavily in favor of granting a stay in this matter.

1. Likelihood of Success

To grant a stay, the Board need not even find that NCRC affirmatively is likely to prevail in its challenge. If it concludes that NCRC has established serious and substantial issues going to the merits of legal challenge to the Order, that is sufficient under these circumstances. Where, as here, the balance of hardships and public interest obviously weigh heavily in favor of a stay, a stay will issue if the moving party has demonstrated serious issues going to the merits of its claims. *See, e.g., Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (affirming stay of decision); *Barry v. Washington Post Co.*, 529 A.2d 319, 320-21 (D.C. 1987) ("When the last three factors strongly favor interim relief, only a 'substantial' showing of likelihood of success, not a 'mathematical probability,' is necessary for the Court to grant a stay.").

NCRC can do more than show a serious issue. It is demonstrably likely to succeed on the merits of a legal challenge to the Order. First, the Board had no authority to unilaterally amend downward a certificate of occupancy. The Board was explicit that it viewed its action as remedial, with an objective of ameliorating what it found to be a negative traffic situation in the surrounding neighborhood. (*See* Order at p. 23.) It is, however, well-established that the Board does not have the authority to undertake remedial measures. In an Order vacating and remanding the BZA's Campus Plan Order for Georgetown University, which order attempted to freeze Georgetown's enrollment and impose a variety of other remedial measures that the Court struck down as well beyond the bounds of proper "zoning," the Court of Appeals in *President and Directors of Georgetown College,* 837 A.2d 58, 69 (D.C. 2003) (*quoting Davidson v. District of Columbia Bd. of Medicine,* 562 A.2d 109, 112 (D.C. 1989)), reiterated that "Absent express statutory or regulatory authority, a regulatory agency may not impose remedial measures." Additionally, NCRC has irrefutably operated at its current location since 1930, without any prior condition limiting enrollment. As such, the use is grandfathered under the Zoning Regulations and its enrollment cannot now be capped by BZA action.

Second, even if the BZA had the theoretical legal authority to impose any cap on NCRC's overall enrollment (as opposed to NCRC's building occupancy), there was no evidentiary basis—at all—that would justify a mandatory reduction in the school's enrollment to 120 students. The Court in the *Georgetown* case struck down the BZA's attempt to freeze Georgetown's undergraduate enrollment for precisely that lack of evidentiary basis, among other reasons. It explained its decision by reference to *Washington Ethical Society v. District of Columbia Bd. of Zoning Adjustment,* 421 A.2d 14, 16-17 (D.C. 1980). There, the Court reversed a BZA refusal to permit a private school to increase its enrollment, reasoning as follows:

> [N]owhere in the record is there a rational basis for the Board's conclusion that the addition of 15 students would cause the school to become objectionable and inconsistent with R-1-A zoning.
>
> There are no findings of fact of a 'basic or underlying nature' about the future impact of an increased student body on noise and traffic in the Shepherd Park area. ....The Board's findings are '[generalized], conclusory (and) incomplete." [citations omitted]...They appear to be based on lay observations of current conditions, not future impact. ...
>
> Although the Board finds that petitioners' school now has 65 students and that the school exceeds its occupancy certificate by 25 students, the finding is in limbo. Nowhere in the record is there any evidence which distinguishes the impact of 40 students from the impact of 65 students or 80 students. There is no indication of whether the Board found adverse effects attributable to the 25 students who exceed the current occupancy certificate or to the 15 who might be added.

The Court in the *Georgetown* case also highlighted the fact that in *Washington Ethical Society,* the Court had "rejected as altogether inadequate the Board's conclusory finding that existing problems 'would be magnified if petitioners' application were granted.'" *Georgetown* at 75-76 (quoting *Washington Ethical Society,* 421 A.2d at 17.) That, however, is precisely the sort of rationale applied by the Board in this case, and recently identified as clearly reversible by the Court of Appeals. The rationale is all the more pointed when the result is a mandated reduction in enrollment as opposed to the mere refusal of an increase.

Finally, the District of Columbia Court of Appeals has held it to be fundamental that the Board may regulate the use of land, but *may not* regulate the "business" of the user. *Nat'l Black Child Dev. Inst., Inc. v. D.C. Bd. of Zoning Adjustment*, 483 A.2d 687, 691 (D.C. 1984) ("Personal conditions impermissibly regulate the business conduct of the owner, rather than the use of his property, and are unlawful *per se*.") The Board in this case has crossed the line between appropriate regulation of the school's use of its land, and has entered the realm of managing details

of its operations that directly impact a fundamental school function—the admission and retention of students. NCRC, like other similar schools, carefully balances its enrollment, taking into account the numbers of children attending morning, afternoon, and mid-day programs, and the numbers that attend every day versus only attending some days. All of this of course has implications on staffing and curriculum. By imposing a cap of 120 students, the BZA will by definition be dictating the most basic and delicate aspects of the school's operations. This is a line that the Court of Appeals, and other courts to examine similar situations, have repeatedly said land use regulators should not cross. *See, e.g., Georgetown,* 837 A.2d at 74-75 ("imposition by the BZA of an enrollment cap at least approaches (if, indeed, it does not cross) the line between the exercise of legitimate zoning and land use authority [fn omitted] and an *ultra vires* intrusion into the [school's] educational mission"). NCRC in all likelihood will succeed in its legal challenge to the Order's overreaching, irrational, and essentially impossible limitation.

2. Irreparable Harm

The Court concluded in *George Washington University v. District of Columbia Board of Zoning Adjustment*, 148 F. Supp. 2d 15, 18 (D.D.C. 2001), that placing a school in the position of having to violate a BZA Order in order to maintain its compliance with other obligations to its students was by definition irreparable harm. In response to the BZA's contention in that case that the university could avoid the potential for dire harm by "simply violating [the BZA Order]"; the Court responded that "[s]uch a suggestion is, of course, untenable for a great university, ..." *Id.* That is precisely the position into which the BZA has forced NCRC, and it is equally untenable for NCRC as it was for GW.

Moreover, in the GW case, enforcement of the Order would not have required the University to turn away anywhere close to one-third of its student enrollment; it was a far cry from

the grim prospects facing NCRC were the Order enforced. NCRC's only alternative to violating the Order is to reduce its enrollment by fifty pre-schoolers, nearly one-third of its total enrollment. The effects on the young children and their families who were denied the pre-school opportunity on which they relied, at a time when there is likely no alternative available, is without question irreparable. There is no legitimate argument in favor of imposing such a draconian result on the school and families while NCRC pursues its necessary, and plainly well-grounded legal appeals.

3. Balance of the Equities

With respect to the harm to the community if the stay is granted, it is hard to imagine how there could be any harm to any community by maintaining the status quo, pending judicial review, of a student population of preschoolers consistent with that present for nearly the two past decades. Certain neighbors did indeed express concerns regarding traffic and parking in opposing NCRC's proposed voluntary cap, arguing that the modest increase in enrollment portended by that cap was unacceptable to them. There was no evidence in the record, however, that remotely suggested that the current situation warranted a dramatic and immediate reduction in overall enrollment to below the level that has existed for decades. Indeed, NCRC had proposed implementing an improved traffic management plan, which many District officials were optimistic could ameliorate any traffic issues going forward assuming steady enrollment. *(See* Record discussion at September 16, 2003 transcript, pages 292 and 303-305).

4. Public Interest

Totally apart from the specific positive societal contributions that NCRC makes, both locally and on a much broader level, there was ample evidence of record before the Board that

there is a dire need in the District for *more,* not fewer, preschool spaces. *(See* Exh. 112, Letter from the Department of Health, Office of Early childhood Education; and Record discussion at June 24, 2003 transcript, pages 227-228). Reducing the already scarce availability of such spaces by more than 50 is hardly in the public interest; rather, it is directly contrary to the public interest on many levels.

Conclusion

NCRC respectfully requests that the Board stay enforcement of the Order pending appeal to the District of Columbia Court of Appeals.

Dated: April 11, 2005

Respectfully submitted,

PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
Phone: 202-663-8000
Fax: 202-663-8007

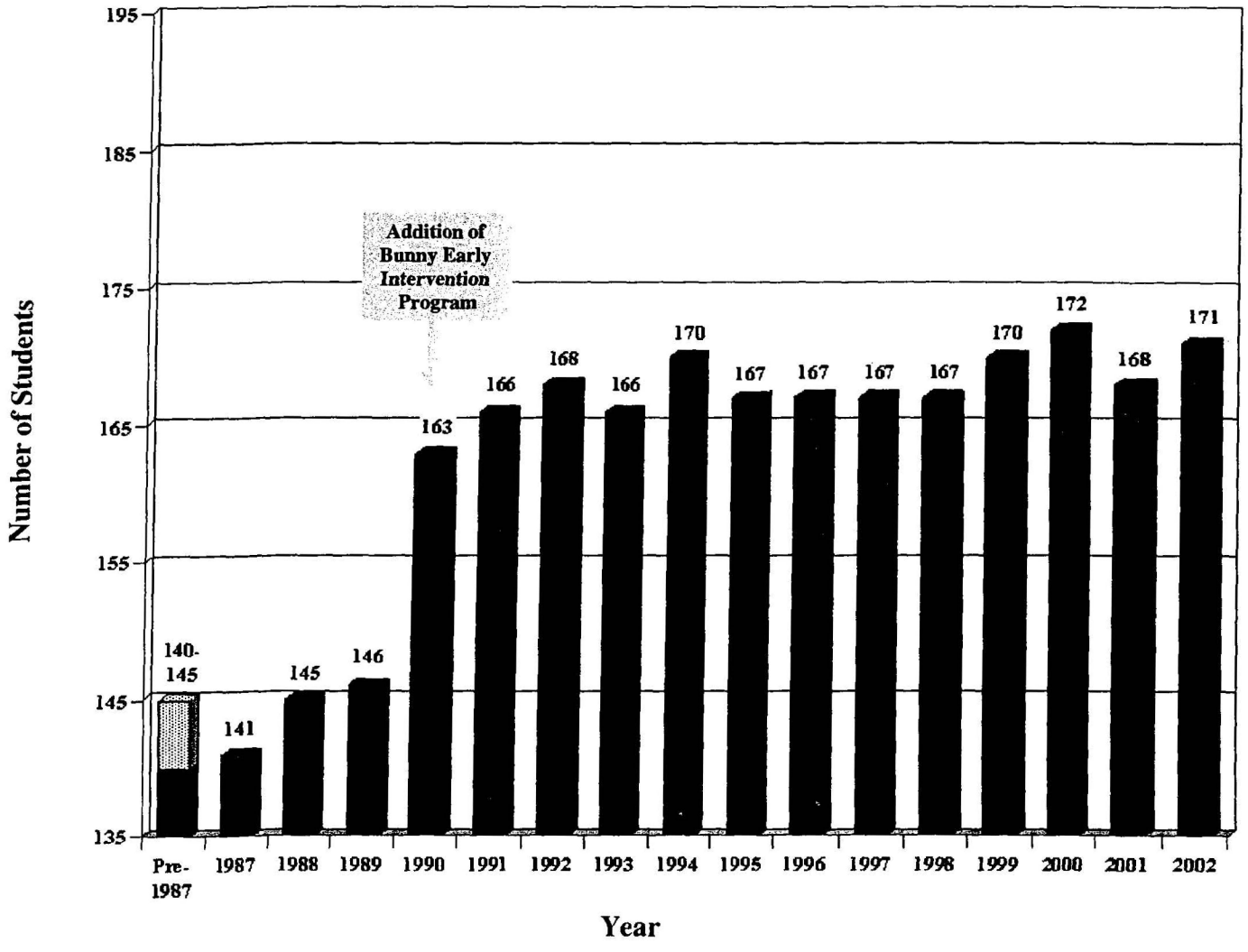
By:

Maureen E. Dwyer

Deborah B. Baum /PHT

Document #: 1470756 v.1

National Child Research Center Student Enrollment



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February 10, 2003

Maureen E. Dwyer, Esq.
Shaw Pittman, LLP
2300 N Street, NW
Washington, DC 20037

RECEIVED
D.C. OFFICE OF ZONING
2003 FEB 10 PM 1:58

Dear Ms. Dwyer:

I represented the National Child Research Center in the application and hearing before the Board of Zoning Adjustment of the existing certificate of occupancy. At that time the occupancy was increased to 120 children. As part of my representation, I addressed various community meetings and met with surrounding residents. You asked specifically as to my recollection of discussions concerning the maximum number of students.

It is my clear recollection, although I do not remember specific discussions, that the maximum occupancy of 120 was always considered as the maximum number of students in class at one time, not the maximum number of children enrolled at the school. This is consistent with the common meaning of occupancy. A movie theater with 200 seats has an occupancy of 200, even if it has three showings and 600 people view the film on the same day. None of the discussions with the community involved any special meaning of occupancy.

This meaning is also clear from the context in which the issue of the number of children at NCRC arose. Child development centers are subject to regulation by a number of District agencies. Issuance of the certificate of occupancy which requires a hearing before the Board of Zoning Adjustment, for which I was retained to represent NCRC, is just one of the required permits to operate a nursery school. Schools are also licensed and annually inspected by the Department of Human Services. The DHS regulations enforce various educational and health provisions. In its licensing program, DHS insures that there is sufficient square footage of educational and play space at the school, as well as plumbing facilities, for the number of students who will be present at any one time. Such evaluation is, and can only logically be made, on the basis of students' presence, not total enrollment. Thus, the space required by DHS for 100 all-day children would be twice the space required for 50 separate morning and 50 separate afternoon children, even though the "enrollment" is the same. It would be ludicrous to determine the need for plumbing fixtures by counting children who were not present at the school at the same time. It was the DHS inspector who noted that the license granted by DHS was for a larger number of students than the then existing certificate of occupancy. This meant that more students were intended by DHS to be present at the

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Exhibit No. 104

school at one time than permitted by the certificate of occupancy. Since the facilities met the space and fixture requirements of DHS, the inspector directed that the school request and increase in the occupancy figure so that the two permits would be consistent. The inspector, who also reviewed the educational staffing, was fully aware that there were, as there are in most nursery schools, part time students, each present for parts of the day, but not overlapping. The inspector only requested and expected the C of O to be increased to the number of students for which the license was issued.

It is also clear from the discussions I recall with the community that there was an understanding that occupancy meant the number of children present at any one time. Questions were raised, for instance, as to whether there would be any weekend programs. Although there were none, certainly no neighbor suggested that weekend programs would be welcome if they involved children registered during the week, which would thus have no effect on enrollment. Nor did anyone expect that were a weekend program contemplated that an enrollee for one weekend day would be reduce the number of children which could be enrolled for 5 days during the week. Neither would have made sense.

The community's quite reasonable concern was the number of cars which would drop children off. In response to the neighbors, we discussed the number of cars which would be arriving each morning and how traffic could be managed The neighbors were largely concerned with arrivals in the morning and it was understood that the number of children arriving on a particular morning would never be greater than the occupancy level The neighbors understood that the same children might not be arriving each day and that some children may leave at noon and others arrive for the afternoon, but were no more concerned with these facts than they were concerned that a mother might drop the child off one day and a father or caregiver bring the child the next morning. The concern was the maximum number of vehicles which would use the street on any morning. The level of occupancy was always discussed in these terms.

It is my opinion that the school is in full compliance with the limitation of the certificate of occupancy, as understood by the neighbors and the Board of Zoning Adjustment when the current permit was issued, if no more than 120 children are present at any one time, regardless of the total number of different children who may be present during an entire week.

Sincerely,

Matthew S. Watson

cc: Geoffrey Griffis, Chair
Board of Zoning Adjustment

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February 10, 2003

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It is my opinion that the school is in full compliance with the limitation of the certificate of occupancy, as understood by the neighbors and the Board of Zoning Adjustment when the current permit was issued, if no more than 120 children are present at any one time, regardless of the total number of different children who may be present during an entire week.

Sincerely,



Matthew S. Watson

cc: Geoffrey Griffis, Chair
Board of Zoning Adjustment

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2005 a copy of the Applicant's Motion for Stay was served by hand on the following:

Advisory Neighborhood Commission
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The Friends of NCRC
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Washington, D.C. 20016

The Cleveland Park Neighbors
c/o Richard Nettler, Esq.
Robins, Kaplan, Miller & Ciresi, LLP
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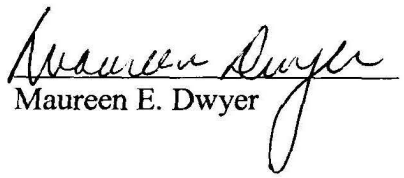
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Maureen E. Dwyer

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