Government of the District of Columbia
Board of Zoning Adjustment

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Application No. 16970 of National Child Research Center

HEARING DATES: February 11, 2003; May 6, 200;, June 24, 2003; September 16, 2003; October 7, 2003; October 28, 2003; November 4 and 18, 2003.

DECISION DATES: January 6, 2004; February 17, 2004; March 9, 2004; April 13, 2004; and July 27, 2004.

OPPOSITION TO MOTION FOR STAY FILED BY THE NATIONAL CHILD RESEARCH CENTER

For the reasons stated below, The Cleveland Park Neighbors, Gaylord Neely, Linda Badami, Sallie R. Beckner, R. Bruce Beckner, Henry P. Little and Steven R. Hunsicker (hereinafter "Parties in Opposition") oppose the motion for stay on the grounds that the National Child Research Center (hereinafter "NCRC") has made no meritorious attempt to show that it can satisfy the requirements for obtaining a stay of the Board's March 29, 2005 Order (the "Order") and, indeed, it is likely that any appeal of the Order will also fail.[1] Because this Board has held in this case that it does not have the power to enforce its Orders, but must rely on other D.C. Government agencies to perform that function and because the portion of the Order that NCRC complains of is nothing but an interpretation of a prior, non-appealable order, NCRC is not threatened with imminent injury of any kind as a result the Order which NCRC says it will appeal. Thus, even if NCRC did have a winning argument on the merits – which it does not – no stay would be appropriate here.

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1 Insofar as the Board may construe the instant motion as a motion for reconsideration, it must be rejected since NCRC has not presented any new evidence, much less evidence which could not have been presented at the multiple hearings held in this case, as required by 11 D.C.M.R. § 3332.6.

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Moreover, if NCRC is in some imminent peril as a result of the possibility that the enrollment and staffing limits in Order 16307A from 1998 will be enforced, it is in that position only because it placed itself in such jeopardy by choosing to enroll 171 students (instead of 120) and to employ 38 staff (instead of 28) after the Board voted in January 2004 to deny NCRC's application for increased enrollment and staffing, a decision that the Board has not reconsidered. The current Order's reiteration of the enrollment and staffing limits in the still-operative 1998 Order 16307A can hardly be said to be a surprise. The current Order is consistent with comments made by all of the participating BZA members in their deliberations, beginning in January 2004 and continuing through the Board's final deliberations in the July 2004 meeting in this case, at which the Board voted to partially reverse its January decision and grant the requested authority for new construction.

The standard for issuance of a stay is well established in this jurisdiction. It requires the moving party to show that:

(1) there is a substantial likelihood of prevailing on the merits;
(2) they are in danger of suffering irreparable harm during the pendency of the action;
(3) more harm will result to them from the denial of the order that will result to defendants from its grant; and
(4) the public interest will be served by the issuance of the requested order.

District of Columbia v. Sierra Club, 670 A.2d 354, 361 (D.C. 1996); *Don't Tear It Down, Inc. v. District of Columbia*, 395 A.2d 388, 390 (D.C. 1978). NCRC has made no attempt to address any of these issues or factors.

1. NCRC is not likely to succeed on the merits.

a. NCRC's Application.

NCRC is a child development center that has a present enrollment of 171 children. It currently operates pursuant to a special exception granted by final order of this Board in 1999, which expires in 2007.[2] (Order in Application No. 16970 ("Order"), Findings of Fact ("FF") 14.) That special exception permits NCRC to operate a child development center with a total enrollment of 120 children and 28 staff during licensed hours of operation from 8:00 a.m. to 5:00 p.m. Monday through Friday. (Order fn.3&4 and pp. 21-22.) Normal class hours are from approximately 9:00 a.m. to 3:30 p.m. (*See* Order fns. 1 & 4.) Although the current special exception authorizes NCRC to have only 28 staff, it is undisputed that NCRC has substantially exceeded that number. The Board found that NCRC presently has 38 full-time employees on the property.[3]

NCRC's application requested authorization for three construction projects: (a) the construction of a new classroom building that fronts on Ordway Street and will entirely occupy the space between the western property boundary and the existing Playhouse, extending south toward Highland Place, (b) the construction of a substantial two-story addition onto the rear of the main building that will project back towards Ordway Street, and (c) the construction of a "maintenance building" on the eastern property line that replaces a very small bicycle shed that currently occupies that location. NCRC's application also sought permission to have no more than 120 children "at any one time" in the morning and in the afternoon, which would provide a theoretical maximum

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2 NCRC's current operating authority derives from two prior BZA Orders, numbered 16307A and 16307B. The latter Order, No. 16307B, is dated March 3, 1999. See Order in Application No. 16970 (March 29, 2005) at n. 7.

3 March 29, 2005 Order Finding of Fact No. 12.

enrollment of 240, but was "willing to agree to" an enrollment cap of 181 with a four child margin of increase, an increase of 10 - 14 children above the current actual enrollment.

b. The Board's Order.

i. Traffic and Parking Issues.

The Board granted NCRC's application, in so far as it sought permission to construct additional structures, and denied the application to increase the size of its enrollment. In rejecting NCRC's enrollment increase request the Board credited the testimony of the District of Columbia Department of Transportation ("DDOT") that vehicles participating in student drop-offs and pick-ups at the child development center operated by NCRC create congestion on Highland, Ordway and Ashley Terrace. (Order, FF. 44.) The Board also credited DDOT's testimony that the existing configuration of the area designated by NCRC for student drop-offs (the white line painted in the street to indicate the start of the vehicle queue) creates dangerous conditions on those same streets (Order, FF. 45), and credited the testimony of DDOT and Parties in Opposition that some vehicles coming to the subject property to drop off or pick up children from NCRC on both Highland and Ordway do not always comply with the Applicant's transportation procedures or applicable regulations. (Order, FF. 46.) Finally, the Board credited DDOT's conclusion that student drop-offs and pick-ups at NCRC presently create "a frustrating and unsafe traffic situation" on Highland Place, as well as on other adjacent streets such as Ordway. (Order, FF. 48.) According to the Board,

> [t]he existing operation of NCRC's child development center is creating adverse traffic impacts in the vicinity of the subject property due to the high volume of school-related traffic on narrow

> local streets during periods of student drop-offs and pick-ups. As a consequence, the Board finds that the child development center on the subject property, as a result of its present unauthorized level of enrollment, creates objectionable traffic conditions and unsafe conditions for picking up and dropping off children.[4]

Id.

ii. Enrollment.

In its conclusions of law, the Board properly felt compelled to address the issue of the permissible enrollment at NCRC in order to apply its findings of fact to the request by NCRC to increase its enrollment and staffing levels. (Order pp. 20-22.) In that regard, the Board stated that it was not persuaded by NCRC's contentions that there is no limit on total enrollment at NCRC's child development center, or that the reference to 120 children in Order No. 16307A applies to the number of preschoolers who may attend the child development center at any one time. (Order pp.20-22.) Rather, the Board concluded that reference to 120 children must be read as the maximum number of children who may be enrolled at the child development center, whether all are in attendance at the same time or not. (Order p. 22.) This conclusion is amply supported by a reasonable construction of the Board's prior order and the record in that case, that was made a part of the record in this matter.

The Board also rejected, as without merit, NCRC's assertion that an application to establish a child development center for a particular enrollment does not entail any limit or restriction on enrollment. (Order pp. 20 & 221.) Rather, the Board concluded that approval of an application to establish a child development center for 120 children necessarily restricts the total number of children who may use the child development center at all times to a maximum of 120. (Order pp.

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4 The Board also found that the child development center operated by NCRC, at its present levels of staffing and enrollment, does not provide sufficient off-street parking spaces to meet the reasonable needs of teachers, other employees, and visitors. (Order pp. 23-24.)

20-22.) As the Board stated in its Order, its longstanding practice has been to adopt a cap on total enrollment unless another measure is specified. (Order p. 21.) The maximum total enrollment is a fact relevant to and necessary for findings the Board is required to make under the Zoning Regulations when assessing all potential adverse impacts, such as those relating to traffic and parking, and when considering whether a given child development center will tend to affect adversely the use of neighboring property.

Thus, the Board concluded that, as of June 17, 1998 (the effective date of Board Order 16307A) and ever since the maximum authorized enrollment at NCRC has been 120 children, ages two to five years, and NCRC admitted that it had a cap on staff, which it blatantly violated. (Order pp. 20-21, FF. 12 and n.4.) Consistent with this conclusion and the Board's prior findings, the Board stated that NCRC's child development center, operating at its unauthorized current levels of enrollment and staffing, is creating adverse impacts. (Order pp. 23-24.) The Board further concluded that, given the fact that NCRC now has 171 enrolled students and 38 employees, there is compelling evidence in the record that these higher levels exert considerable and unacceptable pressures upon the surrounding residential community. *Id.* Accordingly, the Board concluded that,

> [t]o both ratify this noncompliance and allow further increases in enrollment and staffing would be irresponsible. Such increases would only aggravate the objectionable traffic and parking conditions that currently exist by generating additional traffic and creating more demand for on-street parking by vehicles associated with operation of the child development center at the subject property.

(Order p. 24.)

c. NCRC's Argument on the Merits.

NCRC argues that a stay of the Board's decision in this case should be granted because it cannot bring itself into compliance with the 120 children/28 staff limits first established in 1998 by Orders 16307A and reiterated by the current Order; and enforcement of those limits "will have immediate, dire and irreparable harmful impacts on the school from both a financial and an academic standpoint." Motion at p. 1. NCRC persists in repeating this argument, which the Board has consistently rejected since the Parties in Opposition first raised, in January 2003, the issue of NCRC's violation of the limits established by Order 16307A. Moreover, in its public discussions, all of the members of the Board who signed this decision have, at various times, beginning in February 2003, indicated their belief that the 120 children number in Order 16307A is a total enrollment cap, not an occupancy limit. Thus, NCRC has, by ignoring these arguments and statements by Board members over a period of more than two years, simply created its own hardship by knowingly persisting in actions directly violating the Order 16307A rather than, for example, seeking a satellite location to absorb its over-enrollment (which might also absorb its desired growth as well). Having deliberately avoided choosing a path that would lead to an outcome satisfactory to everyone, NCRC should not be heard to complain about the consequences of that choice. Moreover, while focusing on the student enrollment issue, NCRC conveniently ignores the undisputed fact that its staffing of 38 is clearly in violation of any construction of the 28 staff limit in the Order 16307A. As such, NCRC comes before this Board seeking a stay with unclean hands.

On the merits, NCRC argues that the Board had no authority to "unilaterally amend downward a certificate of occupancy," or to take remedial measures. Motion at p. 8. Furthermore, NCRC argues that even if the Board had the authority to impose a cap on enrollment (without

addressing at all it's admitted violation of the limit on staff), as the Board has repeatedly done for years, the Board has no authority to reduce NCRC's enrollment. NCRC's arguments defy logic and the cases relied upon (i.e. cases involving the grant of use variances and campus plans) have no application to the relief sought by NCRC.

This is not a situation where the Board has ordered a reduction in enrollment or a freeze on enrollment, as in *President and Directors of Georgetown College v. District of Columbia Bd. Of Zoning Adjustment*, 837 A.2d 109 (D.C. 2003). The Board simply rejected a request for an increase in enrollment and staff because of the adverse impacts that currently exist from NCRC's violation of the enrollment and staff cap imposed by the Board's prior Orders and sought by NCRC. NCRC's post-hoc construction of the enrollment cap was properly rejected by the Board as meritless, and given its admitted violation of the cap on staff and other conclusion would have been an abuse of discretion. Furthermore, unlike in *Washington Ethical Society v. District of Columbia Bd. Of Zoning Adjustment*, 421 A.2d 14, 16-17 (D.C. 1980), this is not a case where the Board has refused to permit an increase in enrollment and staff based on a prediction of adverse impacts that are unrelated to the amount of the increases sought. Here, as DDOT testified and the Board found, the existing enrollment and staff, far above what was permitted in the Board's prior Order 16307A creates the adverse conditions that exist and thus, any increases would simply perpetuate and aggravate those adverse conditions. And, the Court, in *President and Directors of Georgetown College, supra,* did not hold that the Board lacks authority to impose an enrollment cap (much less a cap on staff). Rather, the Court of Appeals held only that any enrollment cap imposed to address adverse impacts must be supported by substantial evidence in the record. Here, the Board was not imposing a new enrollment cap, but reiterating, as a framework within which to judge the increase sought in this

application and its impacts, an enrollment cap already existed under a prior order granted pursuant to an application fled by NCRC in 1997. Indeed, in its decision here, the Board expressly declined NCRC's request for permission to raise the staff and enrollment limits above those established in Order 16307A in 1998. So, beyond any doubt, the Board's current Order is no more than maintenance of the *status quo* with respect to NCRC's staffing and enrollment. That NCRC now fears a greater likelihood of enforcement of those previously-established limits as a result of the Board's March 29, 2005 Order is not a basis for granting a stay.

With regard to NCRC's claim regarding its certificate of occupancy, the Board did not amend NCRC's certificate of occupancy or impose a remedial measure for NCRC's violation of the Board's prior order. The Board engaged in an interpretation of the Board's prior Orders 16307A and B, which continue to govern NCRC's operations and which are final and non-appealable, so as to address the consequences of the relief sought, that is, an increase in enrollment and staff and a proffer to cap enrollment at a particular level. The Board cannot grant NCRC's request to stay this Order without, in effect, staying the 1998 and 1999 Orders 16307A and B, including the staff cap admittedly violated by NCRC, and those orders are not subject to being stayed because they are final and non-appealable.

Even if the Board's 1998 and 1999 Orders were open for review, NCRC's so-called present "intentions," "understandings" and post-hoc rationalizations are not relevant to the interpretation of those Orders. Moreover, if the Board looks into the circumstances of the 1997 NCRC application that resulted in Order16307A and B, it will find that NCRC mischaracterizes the facts. In the first instance, certificates of occupancy are not issued by the Board; they are issued by DCRA. So it's not possible for NCRC to have applied to the Board in 1997 for a "certificate of occupancy." The

application was for a special exception, and it speaks for itself. It is significant that the record of that proceeding, including the hearing, contains no statement by anyone speaking on NCRC's behalf to the effect that 120 is an occupancy number or an "at any one time" number. The self-serving Watson letter of 2003, is inconsistent with the Watson letter of 1998 to Phil Mendelson, which was contemporaneous with the proceeding and which refers to the 120 number as "enrollment." Moreover, NCRC's own witness testified that enrollment means the total enrollment and not the number of children present at any one time. Thus, in order for the Board in 1997 and 1998 to engage in a discussion about the impact of traffic about which the neighbors were then complaining,[5] it had to determine the number of children properly permitted to be enrolled at the school, and not the number at the site at any one time because traffic is a function of total enrollment, not the number on the site at any one time. If, for example, NCRC had an occupancy limit of 120 but an enrollment of 240 and half of the children came to school for a morning half-day session while the other half came for an afternoon half-day session, that would mean 480 car roundtrips to the neighborhood every day (if all of the children came in cars). But, if NCRC had an enrollment of only 120, that daily car trip number would be reduced by one half.

Finally, NCRC cannot and does not dispute that it has greatly exceeded the 28 staff limit in the 1998/1999 order, with its current staffing of 38. It has no offered no basis to stay the enforcement of that limit. NCRC's argument essentially is that not only did the Board's 1998 and 1999 Orders not limit its enrollment but that the Board lacks authority to regulate NCRC's

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[5] It also is worth remembering that NCRC's 1997 Application was resolved by a settlement with the neighbors and the ANC, under the leadership of Phil Mendelson, in which the neighbors gave up a number of street parking spaces to improve traffic flow, and NCRC promised to implement a traffic management plan to ameliorate traffic conditions.

enrollment under any circumstances, despite its request for an "increase in enrollment." This is a frivolous argument and certainly does not "raise a serious question" let alone is it likely to succeed.

2. NCRC has not demonstrated that it will suffer irreparable harm if a stay is not issued during the pendency of its other appeal

NCRC must demonstrate that, if a stay is not issued it will suffer irreparable injury. NCRC has made little attempt to do so. *Reed Enterprises v. Corcoran*, 354 F.2d 519, 122 U.S. App. D.C. 387 (1965)("the traditional basis for injunctive relief is irreparable harm and inadequacy of legal remedies."). NCRC has not demonstrated that an immediate stay is necessary in order to preserve the *status quo* pending completion of any appeal. Nor is this a situation where the facts will have "'progressed so far and been so largely set along irreversible lines that a' stay is necessary to 'serve the public interest.'" *East 63rd Street Ass'n v. Coleman*, 414 F. Supp. 1318, 1330 (S.D.N.Y. 1976), quoting *Steubing v. Brinegar*, 511 F.2d 489 (2d Cir. 1975). *See also Realty Income Trust v. Eckerd*, 564 F.2d 447, 457, n. 36 (D.C. Cir. 1977).

Since the Board does not have authority to enforce its own Orders but must depend upon the Zoning Administrator to do so, the mere existence of this Order does not create an imminent threat to NCRC. Enforcement of a zoning violation, including violation of a zoning order is a separate legal process, subject ultimately to judicial review in the Court of Appeals. When and if NCRC is threatened with an enforcement action that requires it to turn away students to whom it has promised enrollment, NCRC may have another avenue for seeking temporarily relief to avoid the irreparable injury it claims here. It is worth noting that, to date, despite the fact that numerous private schools have exceeded their enrollment caps, no school has been forced to turn away children already enrolled. The only sanction that has been imposed against any school for these violations (and not

all instances of violations resulted in imposition of *any* sanctions) was a monetary fine, which clearly is not "irreparable."

NCRC's reliance on the decision in *George Washington University v. District of Columbia Board of Zoning Adjustment*, 148 F. Supp. 15 (D.D.C. 2001) on the issue of irreparable injury is also misplaced. While the District Court did grant George Washington University a preliminary injunction, and overturned the Board's order imposing caps on enrollment, that decision was reversed by the D.C. Circuit. *See George Washington University v. District of Columbia*, 318 F.3d 203 (D.C. Cir. 2003). As the Court stated in its reversal of the District Court, "it cannot be irrational for the District to adopt rules [or conditions] likely to limit or reduce the number of students in the area", where "an excess of students is negatively affecting the character of the neighborhood." *Id.* at 210. The Circuit then denied a stay of the effectiveness of its order. Secondly, unlike in the federal case involving George Washington University, in this case the Board is referring to an enrollment cap sought by NCRC and approved in a prior order and a staff cap placed on NCRC that it admittedly violates. Again, the injury complained of results from NCRC's willful violation of a prior order not the current order and thus its injury is of its own making.

3. More harm will result to the community from the grant of a stay than will result to NCRC from denying the relief requested.

As the moving party, NCRC had an obligation to demonstrate that the harm to the community is less than any injury to NCRC. It is not a "hardship" to be required to comply with regulatory restrictions. Otherwise, no regulatory limits could be enforced until after complete judicial review of the action, including all appeals, has been completed. Furthermore, beginning even before the Board's deliberations in January 2004 (which resulted in votes to deny NCRC's applications for

additional enrollment and staff, as well as any new construction) and at successive deliberations in April 2004 and July 2004 on the bifurcated "construction" portion of NCRC's application, a number of the Board members stated their view that the 120 number in the prior special exception was an enrollment cap. Thus, if NCRC this March invited 171 children to attend the preschool for the 2005-2006 school year, and continues to employ staff in excess of limits imposed upon it which it does not challenge, it did so with the clear knowledge that (1) the Board had voted not to expand its enrollment and staffing beyond the level authorized in 1998 in Order 16307A, and (2) the view of every member of this Board currently participating in this case that the 120 number in the 1998 Order 16307A was an enrollment cap, not an occupancy limit or an "at any one time" number. Thus, it was NCRC's action, and not the Board's, that created its current "hardship," not the Board's. And, to the extent that NCRC could be in legal jeopardy from the children's parents, the jeopardy would arise from NCRC's apparent failure to advise the parents of the possibility that the preschool's enrollment could be ordered to be reduced by fifty children to come into compliance with the Board's Order, not from having to turn away those parents' children next fall.

On the other hand, the community will continue to be impacted adversely by the dangerous and unsafe conditions created by the traffic and parking problems which have resulted from NCRC's blatant violation of the Board's past order. The community's safety clearly outweighs NCRC's economic blunder.

4. The public interest will be disserved by the issuance of a stay.

The public interest will not be served with the issuance of a stay. The public has a right to rely on the 1998 and 1999 decisions of the Board until the conditions in those decisions expire.

Failure to enforce such conditions can substantially diminish the owners' enjoyment or their property and perpetuate existing dangerous conditions.

The Board expressly found that NCRC's non-compliance with the enrollment and staffing limits of Order 16307A was creating adverse impacts in the neighborhood and dangerous conditions. (Order p. 23.) The essence of NCRC's request is for this Board to block any official action that would eliminate the source of these impacts and dangerous conditions – NCRC's non-compliance with its enrollment and staffing caps. Clearly, this would not be in the public interest. Moreover, if, as NCRC argues, meeting the enrollment and staffing limits of Order 16307A is a condition imposed by this Order, the Order provides that no building permits shall be issued (or that issued permits will be revoked) if those conditions are not satisfied. The public interest would not be served by staying enforcement of those conditions as NCRC asks, while allowing NCRC, in violation of those conditions, to obtain building permits for the construction authorized by the Order while an appeal of the Order is pending. Therefore, either the stay should be denied; or, if granted, it should apply to the entire Order, not just to that portion reiterating NCRC's enrollment and staffing limits first established in the 1998 Order 16307A.

CONCLUSION

For the reasons stated above the request for a stay by NCRC should be denied.

Respectfully submitted,

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

Dated: April 18, 2005

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