GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16970-A of National Child Research Center, pursuant to 11 DCMR §§ 205 and 3104.1, for a special exception to increase the enrollment of an existing child development center from 120 to 185 children, ages 2½ to 5 years, to increase staff from 28 to 44, and to authorize the construction of an addition to an existing building and the construction of an accessory building in an R-1-B District at premises 3209 Highland Place, N.W. (Square 2072, Lot 30).

HEARING DATES: February 11 and 25, 2003; May 6, 2003; June 24, 2003; September 16, 2003; October 7 and 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

STAY DECISION DATE: May 10, 2005

ORDER DENYING MOTION FOR STAY

By Order issued March 29, 2005, the Board granted in part and denied in part an application submitted November 12, 2002 by the National Child Research Center ("Applicant" or "NCRC"), the owner of the property that is the subject of the application. The Applicant had sought modification of an approved special exception, under conditions specified in 11 DCMR § 205, to construct an addition to an existing building, a new accessory building, and a replacement maintenance shed, to increase enrollment from 120 to 185 children, ages 2½ to 5 years, and to increase the number of employees from 28 to 44 in an expansion of an existing child development center use in the R-1-B district at 3209 Highland Place, N.W. (Square 2072, Lot 30). The application was granted with respect to the Applicant's proposed new construction but denied with respect to proposed increases in enrollment and staff. Further, the portion of the Order denying the request to increase enrollment and staff found that as of June 17, 1998 (the effective date of BZA Order No. 16307[1] that conditionally approved NCRC's existing special exception), the maximum authorized enrollment at NCRC has been 120 children, ages 2½ to five years, and the maximum number of employees has been 28; that the current operation of the child development center at the subject property is generating adverse impacts on the use of neighboring property, particularly with respect to traffic congestion and unsafe driving and parking practices; and that these conditions are the direct result of the Applicant's exceeding the limits on enrollment and employees established by the Board.

Parties in this proceeding, in addition to the Applicant, are Advisory Neighborhood Commission ("ANC") 3C, the ANC for the area within which the subject property is located; two parties in support of the application, Katharine Marshall and the Friends of NCRC, a group including

[1]Two summary orders resulted from Application No. 16307. (*See,* footnote no. 7 in Order No. 16970.)

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approximately seven households within 200 feet of the subject property; and, in opposition to the application, a group of approximately 30 households in the immediate vicinity of NCRC known as the "Cleveland Park Neighbors," Bruce and Sallie Beckner, Steven Hunsicker, Henry Little, and Gaylord Neely and Linda Badami.

Motion for Stay. On April 11, 2005, the Applicant filed a motion asking the Board to stay the effect of its order pending review in the District of Columbia Court of Appeals, citing "the irreparable harm that its enforcement will cause to both NCRC and its preschool students and their families." A response was filed by the parties in opposition on April 18, 2005.

In support of its motion, the Applicant stated that, if enforced, the Order "would require NCRC to eliminate a unique preschool educational opportunity to more than 50 preschool-age children currently enrolled by contract." The Applicant asserted that "NCRC is demonstrably likely to succeed on the merits of a legal challenge to the Order," arguing that the Board had "no authority to unilaterally amend downward a certificate of occupancy" or to take remedial action "with an objective of ameliorating what it found to be a negative traffic situation in the surrounding neighborhood." The Applicant also contended that "even if the BZA had the theoretical legal authority to impose any cap on NCRC's overall enrollment," no evidentiary basis justified a mandatory reduction in enrollment to 120 students. Instead, according to NCRC, imposition of an enrollment cap of 120 students was not appropriate regulation of NCRC's land but in "the realm of managing details of its operations."

The Applicant claimed irreparable harm arising from NCRC's "untenable position" of having to violate the Order because NCRC "cannot responsibly (or lawfully) simply eliminate fifty preschoolers from its roster." NCRC also asserted that reducing enrollment by 50 preschoolers – nearly one-third of NCRC's current enrollment – would harm "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."

The Applicant could not "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 two decades." Finally, NCRC asserted that the reduction in "the already scarce availability of [preschool] spaces by more than 50 is hardly in the public interest; rather, it is directly contrary to the public interest on many levels."

In response to the Applicant's motion, the parties in opposition argued that the Applicant had "made no meritorious attempt to show that it can satisfy the requirements for obtaining a stay" of the Order. The parties in opposition argued that the Applicant was not likely to succeed on the merits of its appeal and disputed NCRC's claims of irreparable harm, stating principally that NCRC had "created its own hardship" by continuing to act in violation of the Board's decision in Application No. 16307 by increasing its enrollment and staffing levels above the limits previously authorized by the Board. The parties in opposition also countered NCRC's claim that a stay would not harm the community in the vicinity of the child development center, citing adverse impacts arising from dangerous and unsafe traffic and parking conditions that have resulted from NCRC's violation of its existing special exception.

Decision Meeting. Although characterized as a motion to stay the Board's order, the Motion does not seek to stay the Board's ultimate decisions as to the application's merits; *i.e.* that the new construction may be built, but that enrollment and staff may not be increased over the levels established in 1998. Rather, it is the Board's finding that such caps have been in place since June 17, 1998 that the Applicant now seeks to "stay."

Although the Board is unclear whether a party has the right to seek to stay a finding upon which a Board decision is predicated, as distinguished from the decision itself, the Board nevertheless considered the Motion at a special public meeting on May 10, 2005, and voted 3-0-2, with two members not participating, to deny the Motion for Stay.

CONCLUSIONS OF LAW AND OPINION

To prevail on a motion for stay, the party seeking the stay must demonstrate that: it is likely to prevail on the merits; irreparable injury will result if the stay is denied; the opposing parties will not be harmed by a stay; and the public interest favors the granting of a stay. *See Kuflom v. District of Columbia Bureau of Motor Vehicle Services*, 543 A.2d 340, 344 (D.C. 1988) (administrative agency required to consider the four specified factors in considering a motion for stay). Where the last three factors strongly favor temporary relief, only a "substantial" showing of likelihood of success, not a "mathematical probability," is necessary for the grant of a stay. *See Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987).

The Applicant is not likely to prevail on the merits.

As noted above, this Application included two separate requests: (1) that the Applicant be permitted to undertake certain new construction; and (2) that it be permitted to increase its enrollment to 185 children and its staff to 44 employees. The Applicant has petitioned the Court of Appeals to review the Board's decision with respect to the second aspect of the appeal. However, the Motion before the Board does not argue that the enrollment increase should have been granted, but contends, incorrectly, that the Board imposed an enrollment cap where none had existed before. Even if the Applicant were to succeed on this argument, the ultimate result would be the same, since if there had been no enrollment cap imposed at the time when this special exception was originally approved, the Board could not grant an increase over a non-existent number.[2] However, a brief review of the procedural evolution of this proceeding reveals that the Applicant has conceded that an enrollment cap has always been in place.

Although this proceeding could have been a relatively straightforward inquiry into whether the proposed new construction should be approved, it was, from the beginning, mired in the controversy over whether the Applicant was exceeding an enrollment cap. The Applicant sought to preempt the issue in its advertised caption for this case by describing itself as "an existing

[2] If the Board had found no enrollment cap existed, it would have been senseless for it to go on to consider whether NCRC should be able to increase enrollment since, in the absence of an enrollment cap, NCRC could enroll as many children as it pleased.

child development center with morning and afternoon programs for 120 children, ages 2 ½ to 5 years, *at any one time*" (emphasis added). That caption was consistent with the Applicant's interpretation of the Board's prior order as only placing a limit on the occupancy of the structure, with no enrollment limit at all. Nevertheless, the Applicant also indicated if the new construction were approved, it would agree to cap enrollment at 181, an increase of 10 children over the current actual level (171 children), provided that it could also have the flexibility to increase that figure by four children, for a maximum of 185. Yet, by the time of the Board's January 6, 2004 decision meeting, the enrollment increase was no longer tied to the grant of the new construction, but had become a separate request, as the following statement by NCRC's counsel demonstrates:

> MS. DWYER: Highly unusual, but one point of clarification. The application requested an increase in enrollment. It also requested new construction and I didn't know whether the Board wanted to separate your discussion of those two issues.

By formally asking the Board to permit NCRC to increase enrollment, the Applicant acknowledged that it was bound to adhere to some lower enrollment figure. In order for the Board to consider the request, it needed to make a finding as to what that lower figure was. In concluding that this figure was the 120-child limit imposed in 1998, the Board's Order did not, as the Applicant contends, "unilaterally amend downward [the Applicant's] certificate of occupancy" or impose an impermissible "remedial measure" through "a mandatory reduction in the school's enrollment." The Order only stated, and did not change, the legal status quo.

The Applicant's argument concerning the certificate of occupancy reflects a fundamental misunderstanding of the separate but interrelated roles that licensing and zoning play in the certificate of occupancy process. The child development center use is subject to both forms of approval. The licensing scheme establishes an occupancy limit to safeguard the health and safety of persons inside the facility. The special exception process establishes enrollment limits intended to ensure that the use will not adversely impact properties and persons outside the facility. It may be that in some instances the number of children who may safely occupy a child development center is greater than the number of children that the Board can permit in order to avoid adverse impacts. In other cases, the reverse may be true. But each limitation (enrollment and occupancy) stands on its own, with the more restrictive governing. Thus, the 120-child enrollment limitation does not authorize NCRC to exceed its occupancy limitation. Conversely, NCRC's occupancy limitation would not prevent the Board, if and when NCRC seeks to renew its special exception, from reducing enrollment below the occupancy limit allowed by its license. However, for the reasons explained above, that is not what occurred in this case.

The Applicant next argues that there was no evidence before the Board to justify denying an enrollment increase from 120 to 185 children (which the Applicant erroneously describes as a mandatory reduction to 120). Just the opposite is true. The record includes voluminous evidence presented of adverse impacts to the surrounding community at the current unauthorized enrollment of 171 students. (*See e.g.*, Order, Findings of Fact 44-48, and Conclusions, at 23-24.) Based on all the evidence of such impacts, the Board concluded that it could not ratify the Applicant's existing level of noncompliance and certainly could not authorize a further increase,

since that would only exacerbate the problem. This level of detailed fact-finding more than satisfies that required by the District of Columbia Court of Appeals in *President and Directors of Georgetown College v. District of Columbia Board of Zoning Adjustment,* 837 A.2d 109 (D.C. 2003), upon which the Applicant relies.

The Applicant last argues that the Board's finding that NCRC is operating in excess of its lawful enrollment cap amounts to an unwarranted regulation of the Applicant's business operations. In essence, the Applicant is attempting to collaterally attack an enrollment cap that was imposed in 1998. However, it was not the Board that raised the enrollment cap issue in this case, but the Applicant, who first insisted that none existed and then requested that it be increased. Once that request was made, the Board had no choice but to consider its merits, which first entailed ascertaining what the existing cap permitted. This is not regulation, but deliberation. The fact that the Applicant disagrees with the conclusion reached does not make it otherwise.

To summarize, the Board's Order only authorized the construction of new improvements and denied an increase of enrollment to 185 children. It did not change the enrollment cap that has applied to NCRC since 1998, but refused to ratify NCRC's noncompliance with that cap. NCRC's mischaracterization of the Order is premised upon its assertion that no enrollment cap exists, a contention contradicted by its seeking the Board's permission to increase enrollment and by substantial evidence in the record. For these reasons there is not a substantial likelihood that the Applicant will prevail on the merits.

The Applicant will not be irreparably injured if the stay is denied.

The Applicant claims that it will be irreparably harmed if the stay is denied. It bases this claim on its assertion that the Order leaves it with only two alternatives – violating the Order or turning away 50 preschoolers. First, there is nothing in the Order that compels compliance with the existing 1998 enrollment cap, although compliance is a reasonable expectation. Second, compliance with the 1998 Order would not irreparably harm NCRC itself. To the extent that NCRC might suffer reduced revenues, "'economic loss does not, in and of itself, constitute irreparable harm,' unless the "loss threatens the very existence of the movant's business.'" *District of Columbia v. Group Ins. Admin.*, 633 A.2d 2, 23 (D.C. 1993), *quoting, Wisconsin Gas Co. v. FERC,* 244 U.S. App. D.C. 349, 354, 758 F.2d 669, 674 (1985). NCRC does not claim that reducing enrollment to 120 children will cause it to close and there is no evidence to this effect.

In fact, the focus of the Applicant's claim of irreparable harm is not itself, but the 50 preschool children who will not be able to attend NCRC should it comply with the 1998 enrollment cap. The impact of a decision on third parties is properly analyzed in the "public interest" element of the stay analysis, not in the analysis of irreparable harm.

In any event, the notion that a child between the ages of 2½ to 5 will be irreparably harmed because he or she could not attend NCRC is absurd on its face. With but a short time left in NCRC's present term, the Board neither wants nor expects NCRC to immediately expel 50 children. Rather, the focus of the Board's analysis is directed to the families of those children

who were to attend the center in September 2005, and who may not be able to do so. No doubt these families will be disappointed to learn that other preschool arrangements must be made, but there is nothing in the record to demonstrate that irreparable harm will result and it is implausible that it would.

The Board does not wish to appear unsympathetic to the plight of parents whose preschool arrangements fall through. However, it is somewhat disingenuous for NCRC to use this misfortune to justify its continued noncompliance, particularly since NCRC had the means to mitigate the harm. NCRC knew throughout this proceeding that the issue of its lawful enrollment would be addressed in the Order. NCRC therefore could have adjusted its acceptance level in anticipation of an adverse finding or at least informed prospective families that the issue was in play. Certainly any acceptance letters for the 2005-2006 term, particularly those sent after the Board's Order was issued, could have raised the possibility that some acceptances might need to be withdrawn. This would have prevented any possible harm to the Applicant's reputation and allowed families to make informed decision while keeping their options open.

The opposing parties will be harmed by a stay.

In contrast to the purely theoretical harm predicted by the Applicant, the damage that would result by granting the stay is real and significant. The Board's Order was based on the substantial and persuasive evidence in the record concerning the adverse and unsafe impacts of traffic, parking, and pick-up/drop-off activities which are directly related to the number of students attending the school. The Order, at 24, states:

> When the Board last reviewed this use in 1999, it approved a child development center with a maximum enrollment of 120 children and a maximum staff of 28, and found no likely adverse impact at that level. However, NCRC now has 171 enrolled students and 38 employees and the Board finds compelling evidence in the record that these higher levels exert *considerable and unacceptable* pressures upon the surrounding residential community. (Emphasis added.)

The Applicant's claim that "many District officials were optimistic" that an improved traffic management plan "could ameliorate any traffic issues going forward assuming steady enrollment", is not supported by the record. There may have been some such optimism indicated in the record, but on the whole, the opposite was true. *See, e.g.,* Order at 23, where the Board credits the conclusion of the District Department of Transportation that even the improved traffic management plan would not "provide a complete solution" to existing unsafe conditions caused by the current enrollment.

As noted throughout this Order, the Board does not view its March 29th Order as directing the Applicant to do anything. Nevertheless, if the Order prompts NCRC to become compliant, that will go a long way towards alleviating the adverse impacts its over-enrollment has caused. On the other hand, granting the stay would no doubt encourage the Applicant to maintain its

unauthorized enrollment level. This would result in the continuation of the present adverse conditions with no hope of amelioration. Such a result would greatly harm the opposing parties.

The public interest does not favor granting a stay.

The public interest does not favor granting a stay of the 120-child enrollment cap imposed in 1998. In fact, the Board concludes that the public interest would be disserved by the granting of a stay. As noted above, a stay would likely perpetuate the conditions that cause the unacceptable and unsafe traffic and parking situation in the surrounding neighborhood. The continuation of such a situation cannot be in the public interest.

The Board recognizes that, as the Applicant contends, NCRC makes "positive societal contributions," but concludes that denying a stay does not prevent it from continuing to do so, albeit at a somewhat reduced level. The Board's 1998 Order permits an enrollment of 120 students, all of whom, presumably, will be enriched by their experience at the Applicant's facility. The Board continues to conclude, however, that no explanation exists for the adverse parking and traffic conditions that surround NCRC other than its failure to comply with the 120-child enrollment limitation. While the families of any children unable to attend NCRC may be disappointed and inconvenienced in the short term, their situation will improve with time. Unfortunately, unless and until NCRC complies with the 1998 Order, the adjacent neighborhood will continue to suffer harm. Balancing these factors results in a conclusion that the public interest favors a denial of the Applicant's Motion to Stay.

Conclusion

For the reasons stated above, the Board concludes that the Applicant has not met its burden of proof with respect to the Motion to Stay the effect of the Board's Order issued in this proceeding on March 29, 2005. It is hereby **ORDERED** that the Motion for Stay is **DENIED.**

VOTE: **3-0-2** (Anthony J. Hood, David A. Zaidain and Curtis L. Etherly, Jr. to deny. Geoffrey H. Griffis and Ruthanne G. Miller, both having recused themselves, not participating, not voting.)

BY ORDER OF THE D. C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: MAY 18 2005

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE

SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16970-A (Order Denying Motion for Stay)

As Director of the Office of Zoning, I hereby certify and attest that on MAY 18 2005 a copy of the attached order was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Maureen E. Dwyer, Esq.
Paul Tummonds, Esq.
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037

Nancy MacWood, Chairperson
Advisory Neighborhood Commission 3C
3417 Woodley Road, N.W.
Washington, D.C. 20016

The Cleveland Park Neighbors
c/o Richard Nettler, Esq.
Robins, Kaplan, Miller & Ciresi, LLP
Suite 1200
1801 K Street, N.W.
Washington, D.C. 20006

Gaylord Neely & Linda Badami
3207 Highland Place, N.W.
Washington, D.C. 20008

Sallie R. Beckner and R. Bruce Beckner
Fleishman and Walsh, LLP
1400 16th Street, N.W.
Washington, D.C. 20036

The Friends of NCRC
c/o Anne Large and Jon Thoren
3520 35th Street, N.W.

Washington, D.C. 20016

Katharine Marshall
3208 Highland Place, N.W.
Washington, D.C. 20008

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

Steven R. Hunsicker
Baker Botts, LLP
1299 Pennsylania Avenue, N.W.
Washington, D.C. 20004

Ellen McCarthy
Interim Director
Office of Planning
801 North Capitol Street, N.E.
Washington, D.C. 20002

Toye Bello, Zoning Administrator
Building and Land Regulation Administration
Department of Consumer and Regulatory Affairs
941 N. Capitol Street, N.E.
Washington, D.C. 20002

Alan Bergstein, Esq.
Office of the Attorney General
441 4th Street, N.W., 6th Floor
Washington, D.C. 20001

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

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