**BZA APPLICATION NO. 16970-B (Corrected Decision and Order)**

As Director of the Office of Zoning, I hereby certify and attest that on JUN 2 8 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

BZA
CASE No. 16970
EXHIBIT No. 393



Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.393

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

Corey Buffo, Acting 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**

twr

**Application No. 16970-B 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).[1]

**HEARING DATES:** February 11 and 25, 2003; May 6, 2003; June 24, 2003; September16, 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

## CORRECTED DECISION AND ORDER*

*This order corrects BZA Order No. 16970 by describing with clarity the involvement of ANC 3C in the procedural issues raised. The corrected portion of the order is underlined in the Conclusions of Law and Opinion under the heading Procedural Issues.

This application was submitted November 12, 2002 by the National Child Research Center, the owner of the property that is the subject of the application. Following a public hearing, the Board voted on January 6, 2004 and April 13, 2004 to grant the application with respect to the proposed new construction and to deny the application with respect to proposed increases in enrollment and staff.

Application. The National Child Research Center ("Applicant" or "NCRC") filed an application pursuant to 11 DCMR § 3104 for a special exception under 11 DCMR § 205 for continuation and expansion of a child development center with morning and afternoon programs for 120 children at any one time, ages 2½ to 5 years, in all floors of the existing buildings on the site and for construction of an addition to the main existing building as well as a new accessory building in an R-1-B district at 3209 Highland Place, N.W. (Square 2072, Lot 30 (855 and 866)). The zoning relief requested in this application was self-certified pursuant to 11 DCMR § 3113.2.

[1] This caption reflects the actual relief requested and differs from the caption drafted by the Applicant and used previously for this case. That caption indicated that the relief sought was:

> [T]o continue an existing child development center with morning and afternoon programs for 120 children, ages 2 ½ to 5 years, *at any one time* and 38 staff in all floors of the existing buildings on the site under section 205, and the construction of additions to the existing buildings in an R-1-B District at premises 3209 Highland Place, N.W. (Square 2072, Lot 30).

The italicized language appeared in no prior order of the Board with respect to this use and reflects only the Applicant's interpretation, which the Board rejects, as will be explained in this Order.

Notice of Application and Notice of Public Hearing. By memoranda dated November 13, 2002, the Office of Zoning sent notice of the application to the Office of Planning; the Department of Transportation; the Department of Health; the Councilmember for Ward 3; Advisory Neighborhood Commission ("ANC") 3C, the ANC for the area within which the subject property is located; and the single-member district ANC 3C05.

The public hearing on the application was scheduled for February 11, 2003. Pursuant to 11 DCMR § 3113.13, the Office of Zoning on December 10, 2002 mailed notice of the hearing to the Applicant, the owners of property within 200 feet of the subject property, and ANC 3C. Notice was also published in the D.C. Register (49 *D.C.R.* 11227 and 49 *D.C.R.* 11384).

After the second hearing session, held February 25, 2003, the application was amended to request, in addition to the initially requested special exception, a variance from § 3202.3 to allow the construction and use of an additional principal structure such that more than one principal structure will exist on a record lot, and a variance from § 2100.6, concerning the provision of parking spaces for the proposed additional principal structure.[2] The hearing on the amended application was scheduled for May 6, 2003. Notice of the hearing was mailed March 6, 2003 to the Applicant, ANC 3C, and owners of property within 200 feet of the subject property. Notice was also published in the D.C. Register (50 *D.C.R.* 2236).

Requests for Party Status. ANC 3C was automatically a party in this proceeding. The Board granted requests for party status in support of the application from Katharine Marshall, a resident of the 3200 block of Highland Place, N.W., and from the Friends of NCRC, a group including approximately seven households within 200 feet of the subject property, represented by Anne Large and Jon Thoren. The Board granted requests for party status in opposition to the application from a group of approximately 30 households in the immediate vicinity of NCRC (known as the "Cleveland Park Neighbors"); and from Bruce and Sallie Beckner, residents of the 3200 block of Highland Place, N.W.; Steven Hunsicker, a resident of the 3000 block of Ordway Street, N.W.; Henry Little, owner of a residence in the 3200 block of Ordway Street, N.W. adjoining the subject property to the west; and Gaylord Neely and Linda Badami, residents of a house in the 3200 block of Highland Place, N.W. abutting the subject property to the east.

Applicant's Case. The Applicant provided testimony and evidence from Alexa Halaby, a member of NCRC's board of trustees; Charles Anthony, principal of Charles E. Anthony Architects and an expert in architecture; Susan Piggott, executive director of NCRC; Osborne George of O.R. George & Associates, an expert in traffic; Pedro Alfonso, parent of an NCRC student and trustee-elect; Tiffany Williams, NCRC teacher and staff person assigned to monitor student drop-off activities; and Leo Wilson, a retired police officer who consults with NCRC with respect to implementation of its traffic management plan. The witnesses described school operations, including NCRC's need to expand its facilities and increase its enrollment, and discussed traffic conditions and the effectiveness of the Applicant's traffic management plan.

The Applicant proposed new construction projects on the subject property that would, among other things, increase the number of classrooms available for the child development center. The

[2] The Board subsequently determined that the additional variances were not necessary.

new classroom space was intended to enable NCRC to eliminate classrooms on the third floor of the main building and instead devote that area for use by school administrators, and to reduce the number of children currently in each classroom (*i.e.* the "group size").

According to the Applicant, previous Board orders did not limit NCRC's total enrollment or the number of children permitted on the subject property at any one time. While not recognizing any Board-adopted limit on enrollment, the Applicant nonetheless requested permission to increase the total enrollment at the child development center "by 10 children" to bring the group sizes in the new classrooms to their optimum level.[3] The application proposed (a) to limit to 120 the number of children on-site at any one time, and (b) to limit the total enrollment to 185 children, representing a base enrollment of 181 and the flexibility to add 4 children if necessary given the uncertainly of the enrollment process. The Applicant also sought approval to increase the number of employees at the subject property to a total of 44.[4]

Government Reports. The Office of Planning ("OP") submitted reports dated February 6, 2003, February 24, 2003, and April 29, 2003, and testified at the public hearing. OP initially did not make a recommendation, pending its receipt of information from other government agencies. In its second report, OP recommended denial of the application, citing adverse impacts related to traffic and parking. In its final report, OP recommended postponing consideration of the application until the Applicant had an opportunity to implement its proposed transportation management plan and monitor compliance for at least four months from the beginning of the Fall 2003 school year. The Office of Planning questioned whether the existing Playhouse building on the subject property actually functions as a second principal building, rather than an accessory building, and whether zoning relief from 11 DCMR § 3202.3 would be required for the additional new building proposed in the application.

The Department of Transportation ("DDOT") submitted reports dated February 5, 2003 and April 14, 2003, and testified at the public hearing. DDOT did not support the Applicant's proposal due to concerns about transportation safety. According to DDOT, the proposed new construction and subsequent increase in staff and enrollment at the subject property would have

---

[3] As discussed in this Order, the Board previously approved a maximum total enrollment of 120 children at the child development center on the subject property. In essence, the Applicant sought in this application to have the Board ratify its current unsanctioned enrollment of 171 children and, at the same time, allow an increase of 10 children above that figure as its newly authorized base enrollment, with a potential maximum enrollment of 185 children. Because the Board finds *infra* that there is currently an enrollment cap of 120, the Board treats the application as a request to increase enrollment by 65 children.

[4] As discussed in this Order, the Board previously approved a maximum of 28 employees at the child development center on the subject property. NCRC currently employs a total of 38 people (28 full-time and 10 part-time employees), which the Applicant considers 32 "full-time equivalent" employees. The Applicant requested to increase the staff of the child development center to 38 "full-time equivalent" employees by adding six full-time employees, bringing the total number of employees at the subject property to 44. As with enrollment, the Applicant in essence sought in this application to have the Board ratify its current unsanctioned number of employees at 38, and, at the same time, allow an increase of six employees above that figure as its newly authorized maximum number of employees at the site. Because the Board finds *infra* that there is currently a staff cap of 28, the Board treats the application as a request to increase the number of employees by 16.

an adverse impact on parking supply, would create dangerous and otherwise objectionable traffic conditions, and would increase vehicular volume on neighboring streets.

In its second report, DDOT described three options that could improve the safety of existing traffic conditions, while acknowledging that none would "provide a complete solution" to "a frustrating and unsafe traffic situation" that currently exists on Highland Place. The options were: (i) adjust NCRC's traffic generation – *i.e.*, require NCRC to reduce the traffic on Highland Place by decreasing enrollment or reducing vehicle trips; (ii) implement a regulatory solution, such as NCRC's proposed transportation management plan; and (iii) implement an engineering solution, including the possible designation of Highland Place as a one-way westbound road from Newark Street to 33rd Place, so as to use the current westbound lane for the traffic queue at NCRC and the current eastbound lane as the through lane. DDOT noted that traffic enforcement issues raised in conjunction with NCRC-generated traffic, such as illegal parking, blocked driveways, and running stop signs, could not be easily addressed with additional regulatory or traffic engineering solutions.

By memorandum dated December 16, 2002, the Department of Health ("DOH") recommended approval of NCRC's application for continuation of a child development center with morning and afternoon programs. DOH recommended that NCRC be allowed to continue its programs for 108 children, ages 2.5 through 5 years of age, consistent with its current licensure capacity.

By letter dated February 5, 2003, the Department of Human Services, Office of Early Childhood Development indicated its support for the application, citing the important service provided by NCRC and the need for additional licensed child care centers.
By memorandum dated January 3, 2003, the Fire and Emergency Medical Services Department recommended approval of the application, provided that the new construction met building code requirements.

ANC Report. At a public meeting held January 27, 2003 with a quorum present, ANC 3C passed two resolutions concerning the application. In Resolution 2003-001, approved by a vote of 9-0, ANC 3C recommended denial of the application. According to the ANC, the Applicant's proposal to increase student enrollment and staffing would aggravate traffic problems associated with current operation of the child development center. In testimony at the public hearing, ANC 3C contended that the application should be denied because the Applicant was in violation of conditions of approval adopted by the Board in prior orders; because of objectionable traffic conditions in the vicinity of the subject property, exacerbated by unsafe practices by vehicles dropping off and picking up children from NCRC; because the size and location of the proposed new construction would create adverse noise impacts and obstruct light and air to neighboring properties; and because granting the application would impair the purpose and intent of the zone plan.

By letter submitted June 10, 2003, the ANC indicated that, at a regularly scheduled public meeting on April 28, 2003, with a quorum present, ANC 3C voted 8-0, with one abstention, to oppose any variance relief for the Applicant, because the Applicant had not satisfied the requirements for the variances. With regard to § 2100.5, ANC 3C argued that the proposed new

Carriage House would trigger a new parking requirement as a principal building that had not been certified as contributing to the historic district.

Parties in Support. The parties in support of the application testified that the child development facility currently operates without causing adverse traffic impacts, and described the Applicant's need for additional space to carry out its purpose as a child development facility.

Persons in Support. The Board received numerous letters and heard testimony from nine persons in support of the application. Persons in support generally described the attributes of NCRC's educational programs, its need for additional space, the design of the proposed new building so as to be compatible with both character of the historic district and the surrounding residential neighborhood, and the Applicant's successful efforts to minimize adverse impacts related to traffic and parking.

Parties in Opposition. The parties in opposition presented evidence and testimony from several witnesses, including persons who live near the subject property; Stephen Petersen, an expert in traffic planning; and Robert Schwartz, an expert in architecture and planning. The parties in opposition generally argued that the application should not be granted because the Applicant has not complied with conditions of prior zoning approval, and because operation of the child development center currently generates adverse impacts that would be exacerbated by the proposed expansion, including objectionable conditions concerning traffic, parking, and noise. According to the parties in opposition, the Applicant's transportation management plan has not been effective in eliminating unsafe conditions or decreasing traffic congestion on neighborhood streets caused by student drop-offs and pick-ups, in part due to inadequate supervision and enforcement of the plan by the NCRC staff.

The parties in opposition also objected to the perceived institutional character of the proposed expansion, and contended that the new construction would be too large and too close to nearby houses, infringing on privacy, blocking views and sight lines, and diminishing light and air to the residences. Concerns were raised about storm water management and the destruction of trees, both during and after the construction of the proposed expansion.

Persons in Opposition. The Board received numerous letters or heard testimony in opposition to the application from 33 persons and from the Federation of Citizens Associations of the District of Columbia. Persons in opposition generally opposed the expansion of an institutional use in an area zoned for single-family detached dwellings and contended that NCRC had outgrown its current location; that the new construction was not needed but would create objectionable noise impacts, especially from air conditioning equipment; and that an increase in enrollment would exacerbate existing adverse traffic and parking conditions associated with the operation of the child development facility.

Deliberations. At a public meeting on January 6, 2004, the Board initially voted to deny the entire application. On February 17, 2004, the Board announced its intention to deliberate further on the application. At its public meeting on March 9, 2004, the Board voted on its own motion to consider the Applicant's proposed new construction separately from its proposal to increase

enrollment and the number of employees at the subject property. The Board scheduled an additional public meeting to deliberate further on the proposed new construction, and voted to reopen the record to permit the parties to submit written information concerning the new construction proposed by the application, particularly with respect to its compliance with the requirements of 11 DCMR §§ 205.6 and 3104.1. At a public meeting held April 13, 2004, the Board voted to approve the application with respect to the new construction only.

Alleged *Ex Parte* Contacts. By letter dated April 2, 2004, the parties in opposition requested an evidentiary hearing on alleged *ex parte* communications between the Applicant and the Office of the Corporation Counsel with respect to the Board's decision to reopen its deliberations on the application.[5] In a response submitted April 8, 2004, the Applicant opposed the motion, arguing that there had been no improper *ex parte* communications between the Applicant and members of the Board, and that communication with the Office of the Corporation Counsel is not prohibited *ex parte* communication.

Motion to Disqualify Chairman and Vacate Decisions. On July 8, 2004, a motion was filed by the parties in opposition seeking to disqualify the Board's Chairman on grounds of personal bias and to vacate certain decisions of the Board.[6] The motion alleged a personal relationship between the Chairman and a person involved in the proceeding in support of the application, and asserted that decisions made by the Board by votes taken on March 9, 2004 and April 13, 2004 should be vacated in order to avoid tainting the proceeding. In its response, the Applicant urged the Board to deny the motion for failure to allege facts suggesting that any inappropriate relationship existed at the time the relevant decisions were made. On July 19, 2004, the parties in opposition filed a supplement to the motion to provide evidence in support of their allegations, including evidence that the Chairman and the other person – who had been a member of the Applicant's board of trustees until April 2004, and who had submitted letters in support of the application – had, *inter alia,* engaged in a conversation in January 2004 outside the school attended by their respective children.

At a public meeting on July 27, 2004, the Chairman recused himself prospectively from this proceeding on the grounds that there may be an appearance of bias, and the Board voted to deny the motion to disqualify the Chairman and to vacate its decisions.

## FINDINGS OF FACT

### The Subject Property and Surrounding Area

1. The subject property is located at 3209 Highland Place, N.W. (Square 2072, Lot 30), in the Cleveland Park neighborhood of Ward 3. The subject property is a large irregularly shaped lot on the north side of Highland Place between Ashley Terrace and 33rd Place.

---

[5] On May 26, 2004, the Office of the Corporation Counsel was renamed the Office of the Attorney General for the District of Columbia. *See* Mayor's Order 2004-92, 51 *D.C.R.* 6052.

[6] The motion was originally submitted June 16, 2004 but was returned by the Office of Zoning as untimely. On the advice of the Office of the Attorney General, the Office of Zoning accepted the motion for filing on July 8, 2004.

2. The lot area of the subject property is 45,208 square feet. The subject property is a through lot with frontage on Highland Place and Ordway Street, and has a significant change in grade – approximately 20 feet – from Ordway Street up to Highland Place. The slope has been partially regraded and terraced to provide space for a playground.

3. The subject property is improved with a large former residence built on the southeastern portion of the lot close to Highland Place (the "main building"), and a smaller outbuilding (known as the "Playhouse") located at the rear of the lot near the center of its Ordway Street frontage. A small maintenance shed is located at the rear of the lot near the eastern property line.

4. The main building has three stories and a basement, and houses a total of six classrooms on the three stories. The Playhouse, which has one story and a basement, is used for multiple purposes, including a library/reading room, optional programs (that is, early arrival, lunch, and afterschool programs), a motor skills room, teacher/parent meeting space, a music room, and occupational and speech therapy spaces.

5. The fenced portion of the subject property has several large trees, a terraced playground with play equipment, and a paved bicycle course. The playground is used continuously throughout the school day, and is open for neighborhood use when school is not in session. NCRC does not utilize any off-site play area.

6. The subject property is located in the Cleveland Park historic district, which is listed in the D.C. Inventory of Historic Sites and the National Register of Historic Places. The main building, a Colonial Revival-style house, was constructed in 1905, and the Playhouse was built in 1915. Both buildings have been designated as contributing to the historic district.

7. The subject property and areas to the east, west, and south are zoned R-1-B. Properties to the north across Ordway Street are zoned R-2. Development surrounding the subject property is primarily large single-family dwellings on wooded lots. Single-family detached dwellings abut the subject property on both its east and west sides.

**Preschool operations**

8. NCRC was founded in 1928 as a research center/school for children, and moved to its current location in 1930. In 1998, NCRC applied 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. The Board approved, subject to conditions, an application under 11 DCMR § 205 to establish a child development center for 120 students, ages 2½ to five years, and 28 staff.[7]

---

[7] The 1998 proceeding, Application No. 16307, resulted in two summary orders. Following a hearing on January 21, 1998, the Board voted to approve, by bench decision, an application "to establish a child development center for 120 students ages 2½ to five years and 28 staff." The first summary order, issued June 17, 1998, indicated four conditions of approval, which specified: (i) a term of 15 years; (ii) that the "maximum number of children shall not

9. NCRC's certificate of occupancy (B00182078; issued November 17, 1998) permits use of the basement, first, second, and third floors of the building located on lots 855 and 866 for purposes of a child development center for 120 children, ages 2½ to 5 years, and 28 staff.

10. The "License for Child Development Facility" issued to NCRC by the Department of Health gives permission to operate a child development center with a maximum capacity of 108 children. The maximum capacity is determined according to the quantity and size of NCRC's classrooms and the number of staff.

11. The Board finds that the Applicant's child development center is capable of meeting all applicable code and licensing requirements.

12. NCRC has a total of 38 employees at the subject property. Twenty-eight are full-time employees (12 teachers, one speech language pathologist, five assistant teachers, the executive director, a business manager, a receptionist, a development director, four administrative assistants, one maintenance person, and a counselor). The 10 part-time employees include teachers, a librarian, and an occupational therapist.

13. The Applicant proposes to employ an additional six full-time employees, adding four teachers, one resource teacher, and a maintenance person, for a total of 44 employees at the subject property.

14. The Applicant conducts morning, afternoon, and full-day programs for children ages 2½ to 5 years. Current enrollment is approximately 171 children, who may attend NCRC all day, in the morning or in the afternoon only, or fewer than five days per week.

15. After completion of the new construction proposed in the application, NCRC will have sufficient space to increase its licensed maximum capacity from 108 to 150 children.

16. Child development center operations are conducted between 8:00 a.m. and 5:00 p.m., Monday through Friday. School-related special events, such as an annual pumpkin party, are occasionally held on Saturdays. NCRC also holds an annual back-to-school night, which takes place during the evening.

---

exceed 120"; (iii) that the "maximum number of teachers and support staff shall not exceed 28"; and (iv) that the authorized hours and days of operation are 8:00 a.m. through 5:00 p.m., Monday through Friday.

Meanwhile, the Board granted rehearing of the application at a public meeting on February 4, 1998 upon the request of ANC 3C, which protested that "inadequate public notice" had been given for the January 21, 1998 hearing. Following a second hearing, held April 1, 1998, the Board voted May 6, 1998 to approve the same application. The Summary Order Upon Rehearing, issued March 3, 1999, indicated nine conditions of approval. Of the nine newly adopted conditions, two addressed the same subject matter as conditions contained in the first order (decreasing the term of approval from 15 to eight years, and maintaining the same hours and days of operation); the remaining seven newly adopted conditions addressed matters pertaining to traffic management, especially student drop-offs and pick-ups. Conditions adopted in the second order did not address the caps on numbers of children and employees that were set forth in the application and adopted by the Board in the first order.

17. The Applicant operates an eight-week summer camp program at the subject property that follows the operation hours and staff patterns of the child development center. Admission is open to NCRC students and to the community. Enrollment is approximately 130 children, or roughly 80 percent of the school-year enrollment.

18. In 2002 NCRC hosted a workshop, held in the Playhouse, intended to share best practices with other child-development facilities in the District of Columbia. NCRC closed the preschool for the day, notified neighbors in advance, hired three uniformed persons to assist with parking, and provided off-site parking with shuttle service for some visitors.

19. The Applicant indicated that future workshops would be held in the new Carriage House, and would be limited to no more than three in any 12-month period. Whenever a workshop is conducted, the Applicant will close the preschool for the day, hire three uniformed persons to assist with traffic management, provide off-site parking for 30 vehicles for use by persons attending the workshop, and provide shuttle service from the off-site parking to the subject property.

20. No other child development center operates in the same square or within 1,000 feet of NCRC.

**The Proposed Expansion**

21. The Applicant proposes several new construction projects on the subject property.

    (a) In the main building, the Applicant will replace a rear porch area with a new addition (one story plus basement) providing approximately 1,700 square feet of space for classrooms and parent-teacher conferences as well as toilet facilities on the first floor and an equal amount of space on the ground level. The new addition will also provide a fire stair and elevator access in the main building.

    (b) A new building, known as the Carriage House, will be constructed at the northwest corner of the subject property near the existing Playhouse. The Carriage House will provide approximately 4,080 square feet of space for classrooms, indoor play and motor space, and toilet facilities on the ground level, and almost 2,000 square feet of classroom space and an outdoor plaza on the upper level. The Carriage House will be one story with basement, but will appear as a two-story building on the Ordway Street elevation because of the sloping grade of the site.

    (c) The maintenance shed will be replaced by a larger structure providing an enclosure of 448 square feet for storage of bicycles and equipment for yard maintenance and repairs. The new shed will replace an outdoor storage area displaced by construction of the addition at the rear of the main building.

22. The new constructions will almost double the existing building area on the subject property. Currently the total floor area is 9,500 square feet; after completion of the new

projects the floor area will be 18,000 square feet. However, the density of development and lot occupancy on the subject property will increase only slightly; density will increase from a floor area ratio of 0.21 to 0.40, and lot occupancy will increase from 10 to 20 percent.

23. After completion of the new construction, the rear yard at the subject property will decrease from 46 feet to 44 feet, where a minimum of 25 feet is required. The smallest side yard will decrease to 10 feet, where a minimum of 8 feet is required.

24. The Applicant submitted an application for conceptual design review by the Historic Preservation Review Board ("HPRB"). On January 23, 2003, HPRB adopted its staff report recommending approval. The staff report stated that the Carriage House would be "generally compatible in its height, orientation, rooflines, and materials' use with the residential character of Ordway Street and the historic district."

25. The Carriage House will be an accessory building on the subject property, incidental and subordinate to the main building. The Board credits the Applicant's testimony that the proposed use of the Carriage House is related to the education purpose of the child development center, of a sort customarily engaged in at child development centers.

**Traffic Impacts**

26. The intersection of Highland Place and Newark Street is one block west of Connecticut Avenue. Connecticut Avenue in the vicinity of the subject property is a primary arterial street that serves approximately 41,000 vehicles per day. Porter Street is also classified as a primary arterial, while Macomb Street is a collector roadway. 34th Street is a secondary arterial street that serves considerable commuter traffic. Other streets in the vicinity of the subject property are considered local streets.

27. Highland Place is two blocks long, running between Newark Street on the east and 34th Street on the west. The longer segment of Highland Place, between its intersections with Newark Street and 33rd Place, is not straight but angles twice – once near the intersection with Ashley Terrace and again just east of the subject property. Highland Place is one-way eastbound between 34th Street and 33rd Place; the remainder allows two-way traffic. Highland Place is a narrow street approximately 25 feet wide. The speed limit is 15 miles per hour.

28. Highland Place is estimated to carry between 700 and 800 vehicles per day. NCRC accounts for approximately 250 vehicle trips per day, or 30 to 35 percent of the daily traffic volume on Highland Place.

29. Highland Place has narrow sidewalks (approximately four feet wide) on the north side of the street. The south side does not have sidewalks. The south side of Ordway Street – at the northern edge of the subject property – also lacks sidewalks.

30. Children are brought to and depart from the subject property at scheduled times throughout the school day, arriving as early as 8:00 a.m. and departing as late as 5:00 p.m. The majority are dropped off and picked up by car.

31. Arrivals are scheduled primarily between 8:00 a.m. and 9:00 a.m. or at 12:30 p.m. Most children arrive at the Highland Place entrance to the subject property, although children who participate in the before-school program are dropped off on Ordway Street and access the subject property via the staircase at the rear of the lot.

32. Most departures are scheduled at 11:30 a.m., 3:00 p.m., or 3:30 p.m. An after-school program, conducted from 3:00 until 5:00 p.m. in the Playhouse, was begun in 2001. Generally, between five and 12 children attend on any given day. Departure from the after-school program is via the stairs to Ordway Street.

33. After completion of the new Carriage House, children using classrooms in that building will be directed to use the Ordway Street entrance so as to reduce the number of student drop-offs and pick-ups on Highland Place.

34. Generally, about 10 staff members are posted in locations on Highland Place and on Newark, Ordway, and 33rd Streets in the mornings to assist with student drop-offs and traffic management. In the afternoons, six to eight staff members assist with student pick-ups at locations including Highland Place and 33rd and Newark Streets. Each vehicle displays a number; teachers with walkie-talkies communicate the number and walk the corresponding child to the vehicle.

35. NCRC's statement of transportation procedures, provided to parents of NCRC students, instructs persons dropping off or picking up children at the child development center to form a single line in a designated part of the street in front of the subject property or, if that area is full, to queue at a white line painted on westbound Highland Place east of the subject property. Drivers may avoid the queue by parking and using the rear entrance steps on Ordway Street to reach the child development center. Drivers are instructed not to turn around in driveways, perform U-turns, double-park, or park contrary to posted parking signs.

36. The Applicant has implemented a traffic management plan ("TMP") intended to facilitate student drop-off and pick-up activities. Provisions of the plan include that:

    (a) At 8:00 a.m. NCRC staff place cones at a number of locations along Highland Place and Ordway Street to mark driveways and illegal parking spaces for the purpose of discouraging preschool-related traffic from parking there.

    (b) At 8:30 a.m., some NCRC staff, wearing orange vests, take their places on Highland Place and on Newark, Ordway, and 33rd Streets, while other staff members take children from cars and accompany them to the classrooms. Drivers are not permitted to leave their vehicles.

(c) A one-way traffic pattern is in effect, whereby vehicles coming to NCRC are required to travel only westbound on Highland Place and are not permitted to turn onto 33rd Place but must proceed down Newark Street to the east entrance of Highland, drop off their children, and exit at Newark and 33rd Place.

(d) NCRC staff members remain on the street assisting student drop-offs until at least 8:50.

37. The Applicant recently improved its TMP through measures that are intended to:

(a) Reduce double standing associated with drop-offs by extending the morning arrival time to 8:50 a.m.;

(b) Increase NCRC's oversight of student drop-offs by hiring two uniformed persons to monitor vehicles on Highland Place between 8:15 and 9:15 a.m. and to direct traffic so as to avoid safety issues;

(c) Reduce the traffic volume during the morning peak period by scheduling tours for parents of prospective students during nonpeak traffic periods;

(d) Improve compliance with the TMP by incorporating a series of escalating sanctions, including a $250 fine, suspension, and possible expulsion for noncompliance, and by adding a provision in the NCRC enrollment contract that would allow NCRC to expel families who do not agree to abide by the TMP;

(e) Assist enforcement of the TMP by requiring parents and staff to place identification stickers on their vehicles and to register their tag numbers with the Applicant; and

(f) Improve traffic management during special all-school events by hiring three uniformed persons.

38. The Applicant encourages carpooling but recognizes that carpools for preschoolers are difficult in light of the ages of the children and car seat requirements. Around 26 NCRC students participate in a carpool with at least two children per vehicle.

39. Despite its location near the Cleveland Park Metrorail station and the Applicant's offer of Metrochek benefits to encourage commuting by public transportation, most NCRC employees – approximately 70 percent of the staff – drive to the subject property.

40. Parents of NCRC students may hire consultants (such as speech pathologists or occupational therapists) to work with their children. Approximately four or five consultants visit the child development center regularly.

41. Between October and December, parents of prospective students may tour NCRC. The tours, which begin at 9:15 a.m. and last an hour, are conducted daily for approximately eight families at a time. Participants generally park on streets in the vicinity of the subject property.

42. Preadmission play sessions are held in January and February, in which groups of children who are prospective NCRC students and their parents visit the subject property. One group, usually involving eight children, is held per day, four days per week. Each session lasts approximately 45 minutes. Previously, play sessions began at 8:45 a.m., but the Applicant indicated that future play sessions would be held later in the day so as not to coincide with the peak traffic time. Approximately 300 applications are received each year, and approximately 90 percent of prospective students attend a play session.

43. ANC 3C's resolution of January 27, 2003 stated that "traffic generated by NCRC continues to be a serious problem to individuals residing on the neighboring streets," notwithstanding the Applicant's efforts to regulate the flow of traffic to and from the school.

44. The Board credits the testimony of DDOT that vehicles participating in student drop-offs and pick-ups at the child development center create congestion on a local street. Based on a traffic and parking assessment provided by the Applicant, DDOT determined that student drop-off and pick-up activities for NCRC's four programs (morning, afternoon, full-day, and lunch) overlap, with the majority of the children arriving and departing in vehicles. DDOT indicated that between 8:00 and 8:50 a.m., a total of 106 students are dropped off, using 82 vehicles. The 50 children participating in the morning program are picked up between 11:20 and 11:40 a.m., overlapping with the drop-off time for seven children enrolled in the lunch program (who arrive between 11:25 and 11:35 a.m.), so that 48 vehicles arrive at and depart from the subject property during a 35-minute period. An additional 53 children, using 35 vehicles, are dropped off between 12:30 and 12:50 p.m. for the afternoon program. A total of 102 students (participating in the full-day or afternoon programs) are picked up between 2:50 and 3:40 p.m., using 66 vehicles. DDOT's field observations showed that approximately 70 percent of NCRC students use the Highland Place entrance, while the remaining 30 percent use the Ordway Street access.

45. The Board credits 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. The queue line is in the westbound lane of Highland Place, rather than along the curb, so that vehicles may double-park for as long as 10 minutes while waiting to reach the subject property. The queue line extends east toward Ashley Terrace, so that through traffic intending to avoid the queue line uses the eastbound lane while traveling west on Highland Place past the subject property. Sight distances are limited due to a substantial downhill grade change around a curve near the intersection of Highland Place and 33rd Place.

46. The Board credits 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 do not always comply with the Applicant's transportation procedures or applicable regulations. Violations include approaching the subject property traveling east on Highland Place, then making a U-turn at Ashley Terrace to join the queue line heading west; parking on streets where parking restrictions are in effect; parking so as to block private driveway entrances; double-parking; and failing to stop at stop signs.

47. Pursuant to the Applicant's TMP, drivers are not supposed to leave their vehicles, but to utilize NCRC staff to assist with student drop-offs and pick-ups by escorting children between the vehicles and the subject property. However, the Board credits the testimony of the parties in opposition that during student drop-off and pick-up activities, vehicles may be parked – sometimes illegally – while the driver walks the child to or from NCRC. Particularly in light of the narrow, obstructed, or absent sidewalks, pedestrians often walk in the street while approaching or leaving the subject property.

48. The Board credits DDOT's conclusion that student drop-offs and pick-ups at NCRC presently create "a frustrating and unsafe traffic situation" on Highland Place. The existing operation of the Applicant'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.

**Sufficient Parking**

49. No part of the subject property is used for parking. Pursuant to 11 DCMR § 2100.5, no additional parking spaces are required on the subject property because it contributes to the character of the Cleveland Park historic district.

50. Most on-street parking spaces near the subject property are located in zones where parking is restricted to a two-hour maximum for vehicles without the applicable zone sticker. There are some unrestricted on-street parking spaces in the vicinity of the subject property, including three on Highland Place, as well as on Ordway Street at the north edge of the subject property.

51. Many houses in the vicinity of the subject property lack space for off-street parking to accommodate the residents' vehicles.

52. Demand for parking on the streets in the vicinity of the subject property is also generated by nearby commercial uses on Connecticut Avenue and by commuters using the Cleveland Park Metrorail station.

53. NCRC staff park on streets in the vicinity of the subject property, including the unrestricted portion of Ordway Street abutting the subject property.

54. The child development center regularly attracts numerous visitors to the subject property, including consultants assisting current students and the families of prospective students. The majority arrive by vehicle and park on neighborhood streets in the vicinity of the subject property.

55. The Board finds that the child development center on the subject property, 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.

**Other Impacts**

56. The Applicant does not use amplified sound as part of its daily operations but has used amplifiers at special events two times per year. The Applicant stated that in the future amplified sound will not be used outdoors on the subject property.

57. Mechanical equipment, currently located on one side of the main building, will be moved to the roof of the new addition at the rear of the main building, where a mansard roof will conceal the equipment and mitigate any noise impacts.

58. ANC 3C's resolution of January 27, 2003 stated that "neighbors have complained that NCRC events have generated unacceptable noise levels," specifically with respect to noise from "commercial air conditioning equipment, and ... the close proximity of students/staff in the proposed classroom space designated for music and gymnastics."

59. ANC 3C's resolution of January 27, 2003 also stated that "numerous surrounding neighbors, especially those living on Ordway Street next to and across from NCRC, have expressed objection to the proposed new building due to adverse impacts resulting from diminished sunlight...."

60. The Board finds that the proposed new construction at the child development center is located and designed so that there will be no objectionable impacts on adjacent or nearby properties due to noise, activity, visual, or other objectionable conditions. The Applicant has addressed potential adverse noise impacts by indicating its intent not to use amplified sound outdoors, and by relocating mechanical equipment away from neighboring residences and behind a roof enclosure to muffle the associated sound. The Board is not persuaded that other conditions described by the ANC or parties in opposition constitute objectionable conditions. The light and air impacts of the new construction will be minimal, given the large proportion of the lot that will remain open and considering the siting, height, and massing of the new construction projects, which will be smaller than development permitted as a matter of right on the subject property.

61. The Board finds that no special treatment in the way of design, screening of buildings, or planting, beyond that proposed by the Applicant, will be necessary to protect adjacent and nearby properties.

**Harmony with Zoning**

62. The subject property is zoned R-1-B. The purposes of the R-1 district include to stabilize and protect quiet residential areas developed with one-family detached dwellings, and to promote a suitable environment for family life. 11 DCMR §§ 200.1-200.2. The R-1-B zone provides for districts of higher density than the R-1-A zone. 11 DCMR § 200.3.

63. The new construction projects will conform to applicable zoning requirements with respect to lot occupancy, height, bulk, and side and rear yards.

64. The Board finds that, with respect to the proposed new construction only, the requested special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property.

65. The Board does not find that the new construction will create an "institutional campus" inappropriate in an area zoned for single-family residences. The size of the subject property, while large, has not increased, but remains a single lot in a neighborhood of relatively large lots. The principal building on the lot will remain the large Colonial Revival former residence, with smaller accessory buildings located at the rear. The Applicant's proposed design – which was found generally compatible with the residential character of Ordway Street and the historic district by HPRB – ensures that the new construction will not overwhelm the site.

## CONCLUSIONS OF LAW AND OPINION

**Procedural Issues**

Before reaching the merits of this application, the Board will address three procedural issues raised in the application. One procedural issue which was raised by the ANC, concerned the Board's decision to reopen the record to consider the Applicant's construction-related requests separately from the Board's decision to deny the increases in enrollment and employees. The other parties in opposition raised two issues concerning alleged *ex parte* communications between the Office of the Attorney General and Applicant's counsel; and motions to disqualify the Chairman and vacate prior votes in which he participated.

1. The Reopening of the Record

By letter dated March 22, 2004, ANC 3C protested the "extraordinary" action of the Board "to rescind in part and reconsider in part" the decision made January 6, 2004 to deny the application in its entirety. The ANC mischaracterized the Board's action as a reconsideration. This is not the

case. A decision is not final until the written order is filed in the record and served on the parties. 11 DCMR § 3125.6. Until the decision becomes final, the Board may deliberate as many times as it finds necessary; nothing in the Board's Rules of Practice and Procedure limits the number of decision meetings permitted to decide an application. The Board often conducts several decision meetings on complex applications, and may revisit a vote prior to issuing a final written decision.[8]

2. Alleged *Ex Parte* Contacts.

The Board finds no merit in the motion filed by the parties in opposition concerning alleged *ex parte* communications between the Applicant's counsel and the Office of the Corporation Counsel (now the Office of the Attorney General). As the Applicant correctly noted, there were no improper *ex parte* communications between the Applicant or its counsel and members of the Board, and communication with the Office of the Attorney General is not prohibited *ex parte* communication.

The Board is required to make its decision on an application on the exclusive record of the proceeding before the Board. 11 DCMR § 3127.2. The Board may seek and receive legal advice from the Office of the Attorney General at any time. 11 DCMR § 3102.4. The Zoning Commission Procedures, 11 DCMR § 3000 *et seq.*, which are also applicable to the Board, provide that in "any proceeding that is a contested case ... *all members of the Commission* shall be prohibited from receiving or participating in any *ex parte* communication relevant to the merits of the proceeding." 11 DCMR § 3023.1 (emphasis added).

Because the Office of the Attorney General ("OAG") is not a member of the Board – and is not a trier of fact or decision-maker in this proceeding – no communication with OAG can constitute an *ex parte* communication within the meaning of the Board's rules. The rules prescribe an advisory function for OAG, which does not, and cannot, substitute for the decision-making role of the Board. Thus, any materials provided by a party to OAG are not improper *ex parte* communications and do not compromise the fairness of a contested case so long as the decision issued by the Board is properly based on "consideration of [the] exclusive record" compiled during the administrative proceeding. D.C. Official Code § 2-509 (2001).

3. Motion to Disqualify the Chairman and to Vacate Decisions.

On July 27, 2004, immediately prior to the Board taking up the Motion to Disqualify, the Chairman of the Board of Zoning Adjustment prospectively disqualified himself from the case. The Chairman's decision mooted the Motion to the extent it sought prospective disqualification, but left to be decided its request to make the disqualification apply retroactively and vacate the Board's prior decisions in this case. Removing the Chairman's past votes would result in the reinstatement of the Board's January 6, 2004 decision to deny all aspects of the application, including the portion requesting permission to undertake new construction.

---

[8] *See, e.g.*, Application No. 16875 (March 1, 2004) and *Gage v. D.C. Board of Zoning Adjustment*, 738 A.2d 1219, 1221 (D.C. 1999).

The Board finds that the Motion and all materials offered in its support present no basis for disqualification or vacating the earlier votes.

The District of Columbia Court of Appeals has held that:

> There is no controlling statute or board regulation governing the disqualification of board members. In order to insulate the administrative process and its decision makers from prejudice and bias, it has generally been recognized that the same rules requiring the recusal of judicial officers are applicable to administrative officers who act in an adjudicative or quasi-judicial capacity. . . . In the absence of a statute providing otherwise, a judge must recuse himself when his alleged bias arises from a source outside the "four corners of the court-room," and results "in an opinion on the merits on some basis other than what a judge learned from his participation in the case."

*Morrison v. D.C. Board of Zoning Adjustment*, 422 A.2d 347, 349 (D.C. 1980) (citations omitted). A legally sufficient claim of personal bias requires that: (i) the facts (alleged) must be material and stated with particularity; (ii) the facts must be such that, if true, would convince a reasonable person that a bias exists; and (iii) the facts must show the bias is personal, as opposed to judicial, in nature. *In re Bell*, 373 A.2d 232, 234 (D.C. 1977); *Vann v. D.C. Board of Funeral Directors and Embalmers*, 441 A.2d 246, 250 (D.C. 1982).

The Board is not persuaded that the parties in opposition have stated a legally sufficient claim of personal bias by the Chairman in this proceeding that would warrant his disqualification. The facts alleged by the parties in opposition indicate that the Chairman was acquainted with a person with an affiliation to the Applicant, but the only evidence of a relationship beyond a potential chance encounter of people active in their community occurred after the hearing was completed, the record was closed, and the Board had voted on the application. The Board does not find that the facts alleged by the parties in opposition, if true, would convince a reasonable person that a bias existed by the Chairman in support of the Applicant. The Chairman conducted all proceedings in a manner that was fair to all parties, consistent with the role of the presiding officer as set forth in § 3117.3 of the Zoning Regulations. The Chairman did not "advocate" on behalf of the Applicant during the Board's deliberations but stated his own findings and opinions based on the evidence in the record compiled by the Board.

Even if disqualification were warranted, there is no basis to vacate the prior votes. The United States Supreme Court has held, under analogous circumstances, that a determination of whether a vote should be vacated is based on three factors: (i) the risk of injustice to the parties in the case; (ii) the risk that denial of the relief will produce injustice in other cases; and (iii) the risk of undermining the public's confidence in the judicial process. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864; 108 S. Ct. 2194; 100 L. Ed. 2d 855 (1988). The Board finds no risk of injustice to the parties in this proceeding based on its conclusion that the public hearing and decision meetings were conducted properly and were not tainted by any alleged bias on the part of the Chairman. The Board compiled a voluminous record and conducted numerous public hearing sessions and decision meetings in consideration of this application, allowing full

participation by all parties and ample discussion of the merits of the Applicant's requested zoning relief by all participating members of the Board. Similarly, the Board finds no reason to conclude that a decision not to vacate certain votes in this case would risk producing injustice in any other case, or would undermine the public's confidence in the process implemented by the Board. Rather, the Board's adherence to its Rules of Practice and Procedure and the prospective recusal of the Chairman in this case demonstrate the Board's commitment to ensuring that the process is fair and impartial, avoiding even the appearance of impropriety.

The Board's vote to deny this motion was unanimous, with all three remaining Board members voting in favor of denial. Included in that tally was the vote of Board member Etherly, who consistently opposed all aspects of this application throughout the Board's deliberations. Indeed it was Mr. Etherly who cast the lone dissenting vote at the Board's April 13, 2004 decision to approve the construction. If anyone would have been cognizant of bias in favor of the Applicant during the Board's deliberations it would have been Mr. Etherly. The fact that Mr. Etherly voted against retroactive disqualification, notwithstanding his opposition to approval of the construction, is indicative of the fairness and impartiality that characterized the Board's actions throughout this difficult and acrimonious case.

## The Merits

The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2), to grant special exceptions, as provided in the Zoning Regulations. Pursuant to those § 3104.1 of those regulations, the Board must find that the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map, subject to specific conditions.

The specific conditions that apply to child development centers are found at 11 DCMR § 205, which provides that a child development center must be located and designed to create no objectionable traffic condition and no unsafe condition for picking up and dropping off children, and must provide sufficient off-street parking spaces to meet the reasonable needs of teachers, other employees, and visitors. 11 DCMR §§ 205.3, 205.4. The center, including any outdoor play space, must be located and designed so that there will be no objectionable impacts on adjacent or nearby properties due to noise, activity, visual, or other objectionable conditions. 11 DCMR § 205.5.

The Applicant seeks a modification of an approved special exception, under the conditions specified in 11 DCMR § 205, to (i) construct an addition to an existing building, a new accessory building, and a replacement maintenance shed, and (ii) to increase enrollment from 120[9] to 185 children, ages 2½ to 5 years, and 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).

---

[9] As will be explained and rejected *infra*, the Applicant contends there no enrollment cap, but has offered to voluntarily adhere to a cap of 171 children, provided it can increase that amount by 15.

The Applicant is currently operating under a Board order that found all of these elements had been met. The question before the Board is whether the modifications sought would alter these findings. For the reasons stated below, the Board finds that the Applicant has failed to meet its burden with respect to the requested increases in enrollment and employees, but has met its burden with respect to the new construction proposed.

1. Increases in Children Enrolled and Employees

*A. Is there an enrollment cap?*

When an applicant seeks to increase a number of some kind (students, employees etc), the Board normally assumes that the applicant believes that such a numeric limitation actually exists. Not here. The application was originally phrased as a request for expansion of an existing child development center permitted to serve "120 children, ages 2½ to 5 years, *at any one time*" (emphasis added). The italicized language reflected the Applicant's contention that there is no limit on the total number of children who may be enrolled in NCRC, just on the number who may be at the subject property at any one time.

If, as the Applicant claims, there has never been an enrollment cap imposed, it would seem to follow that there is nothing to be increased. Yet, throughout these proceedings the Applicant has insisted it is seeking just such relief. Specifically, the Applicant characterizes its request as the addition of 10 children to achieve a base enrollment of 181. Subtracting the former from the latter results in an enrollment of 171, a figure not derived from any past decision of the Board, but identical to the Applicant's current enrollment. NCRC's contradictory positions can perhaps be reconciled as constituting an offer to establish an enrollment cap of 171, coupled with a request to increase that amount by 10 (actually 15)[10] children. However, there is no need for the Applicant's offer, since an enrollment cap of 120 children has existed since 1998.

The Board is not persuaded by the Applicant's contentions that there is no limit on total enrollment at the child development center at the subject property, or that the reference to 120 children in Application No. 16307 applies to the number of preschoolers who may attend the child development center at any one time. Rather, the reference to 120 children must be read as the maximum number of children who may be enrolled at the child development center on the subject property, whether all are in attendance at the same time or not.

The initial order in Application No. 16307 (issued June 17, 1998) specifically adopted a condition stating that "[t]he maximum number of children shall not exceed 120." The second order in Application No. 16307 (issued upon rehearing on March 3, 1999) adopted nine conditions, none of which addressed the number of children permitted at the child development facility. The Applicant contends that the second order superseded the first, and that therefore no cap on enrollment was adopted as part of the Board's final order. However, even if the first order was superseded, the decision reflected in the second order was premised on an application for a

[10] A request for the unbridled flexibility to add 5 children above the 10 to be initially enrolled is a convoluted way of asking for an enrollment increase of 15.

child development center with a maximum enrollment of 120 children. Although not expressly adopted as a condition in the second order in Application No. 16307, the fact that the application proposed a child development center limited to 120 children was central to the special exception that was requested and granted in Application No. 16307.

The Board rejects as without merit the Applicant's assertion that an application to establish a child development center for 120 children does not entail any limit or restriction on enrollment. Rather, 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.

Nor is the Board persuaded by the Applicant's contention that the reference to 120 children in Application No. 16307 indicated a limit on on-site capacity rather than total enrollment. The Applicant requested approval of a child development center for 120 children but did not specify an intention to request approval for 120 children on-site *at any one time.* The Board's long-standing practice has been to adopt a cap on total enrollment[11] unless another measure is specified.[12] The maximum total enrollment, and not just the number on-site at any one time, is a

---

[11] In many instances, the Board adopts a condition specifying the maximum number of children who may use a given child development facility. An unqualified maximum – because its application or meaning is not specifically limited to, for example, the maximum number on-site at any one time – refers to the maximum total enrollment. *See, e.g.,* orders approving child development centers in Application No. 16446 (Jun. 23, 1999) ("the total number [of] children to be enrolled ... would be 50," where current enrollment was 36); Application No. 16357 (Aug. 7, 1998) ("shall not exceed a maximum of 100 children"); Application No. 16344 (Aug. 9, 1998) ("[t]he number of children shall not exceed 30," where "20 children would be enrolled in the center's all day program and 10 would be enrolled in the before and after school program"); Application No. 15456 (Aug. 16, 1991) ("[t]he number of children at the facility shall not exceed 50," where the applicant sought to "serve up to fifty children"); and Application No. 14272 (May 25, 1985) ("number of students shall not exceed seventy-five," where current enrollment was 62).

In some instances, a cap on maximum enrollment, and not a limit on occupancy at any one time, is necessarily inferred from the circumstances of the particular child development center. The parameters specified in a request for approval – a relatively large number of children in a range of ages, a limited area devoted to child development center use, small staff, and long hours of operation – indicate that the Board contemplated that not all the authorized number of children would be at the facility at any given time, but that a maximum total number of children who could be enrolled in a facility should be specified for purposes of evaluating any potential adverse impacts associated with operation of the child development center. *See, e.g.,* orders approving child development centers in Application No. 16413 (Jan. 14, 1999) (100 children, ages from infancy to 12 years old, with 20 staff, operating from 7:00 a.m. until 6:00 p.m. in the basement and first floor of an apartment building housing a transitional living program); Application No. 16337 (Jul. 2, 1998) (80 children, ages infant to five years, with a maximum of eight staff, operating from 6:00 a.m. until 7:00 p.m.); Application No. 16183 (Feb. 21, 1997) (100 children, ages 33 months to 9 years, with 18 staff, operating from 6:00 a.m. until 7:00 p.m. in 10,3000 square feet of space); Application No. 16147 (Oct. 11, 1996) (155 children, ages infant to 14 years, with 14 staff, operating from 6:00 a.m. until 6:30 p.m.); Application No. 14943 (Feb. 24, 1989) (77 children, ages 2 to 14, and 11 staff, operating from 7:00 a.m. until 6:00 p.m. on the ground floor of an apartment building); Application No. 14651 (Aug. 11, 1987) (40 children and 8 staff, open from 7:00 a.m. until 6:00 p.m., using 2,260 square feet on the ground floor of an apartment building); and Application No. 14641 (Sept. 17, 1987) (50 children, ages 2 to15, and five staff, housed in a church basement).

[12] *See, e.g.,* orders approving child development centers in Application No. 16915 (Mar. 21, 2003) ("[e]nrollment shall be limited to a maximum of 23 children...on site at any one time"); Application No. 16657 (Jun. 15, 2001) ("may enroll up to 30 children" provided that "[t]here shall be no more than 25 children present at the center at any one time"); Application No. 16501 (Oct. 22, 1999) ("the maximum number of children to be enrolled at the center at

fact relevant to and necessary for findings the Board is required to make under the Zoning Regulations, especially 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.

To accept the Applicant's argument in this regard would be tantamount to recognizing a distinction between total enrollment and on-site enrollment where none exists for the purposes of assessing adverse impacts. Both numbers can and do have consequences for the analysis of adverse impacts. For example, while an entity may have an on-site cap of 120 at any one time, an unlimited total enrollment number could mean that parents, faculty and other personnel associated with those students who may not be on-site at a given time might nevertheless still be on the property for various and sundry business and thereby contributing impacts that would require review.

The Board concludes that as of June 17, 1998 (the effective date of BZA Order 16307) and ever since the maximum authorized enrollment at NCRC has been 120 children, ages 2½ to five years.

*B. Ramifications of Applicant's Non-Compliance with Enrollment and Staffing Caps.*

Contrary to the position taken by the ANC and the parties in opposition, the fact that the number of children enrolled and persons employed exceeds the limitations set by the Board does not, alone, furnish grounds to deny this application. The scope of the Board's authority is defined by section 8 of the Zoning Act of 1938 (D.C. Official Code § 6-641.07 (2001 ed.)) and the Zoning Regulations. *See Spring Valley Wesley Heights Citizens Ass'n. v. District of Columbia Bd. of Zoning Adjustment, 644 A.2d 434, (D.C. 1994).* Courts are "'reluctant to read into a statute powers for a regulatory agency which are not fairly implied from the statutory language, since the agency is statutorily created." *Chesapeake & Potomac Tel. Co. v. Public Service Comm'n of District of Columbia,* 378 A.2d 1085, 1089 (D.C.1977)". *Id.* at *436.*

Pursuant to Section 8 of the Zoning Act of 1938, the Board may grant special exceptions when permitted by the Zoning Regulations "subject to appropriate principles, standards, rules, conditions, and safeguards *set forth in the regulations.*" D.C. Official Code § 6-641.07(d) (emphasis added). There is no principle, standard, rule, condition, or safeguard set forth in the Zoning Regulations that makes noncompliance with a granted special exception grounds for denying a request for its modification. Although the Board can include in its orders a condition making proof of compliance a prerequisite to the grant of further zoning relief (as the Board customarily did in campus plan orders), the Board did not do so in its order granting Application No. 16307.

---

any one time shall be 100; however the maximum number of children to be at the premises at one time shall be 80"); Application No. 15670 (Mar. 7, 1994) ("number of students shall not exceed 65 children during a 24-hour period"); Application No. 15559 (Dec. 4, 1991) ("number of employees on-site shall not exceed three"); Application No. 14943 (Feb. 24, 1989) (rejecting proposed condition limiting "the number of children permitted to use the outdoor play area at any one time"); and Application No. 12239 (Mar. 15, 1977) ("[t]he average attendance is twenty (20) to twenty-five (25) students and the enrollment constitutes pre-schoolers, elementary school students and Junior High students").

This is not to say that the Applicant's noncompliance is irrelevant. With respect to both its enrollment and employees, the Applicant seeks increases above the current unauthorized levels. As a threshold matter, the Board cannot consider such requests unless the Applicant shows that its unauthorized level of operation is not resulting in adverse impacts. For the Board to focus solely on predicting the adverse impacts of increases above the unauthorized student and staffing levels, while ignoring the adverse impacts caused by the noncompliance, would skew its analysis, reward noncompliance, and make permanent any adverse conditions caused by the misconduct.

*C. Are the Applicant's Current: Unauthorized Enrollment and Staffing Levels Causing Adverse Impacts?*

Based on the findings of fact, the Board concludes 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.

Traffic. The lack of a dedicated area for a queue of preschool-related traffic has become a significant problem as a result of the Applicant's noncompliance with the enrollment and staffing limitations previously adopted by the Board. While the unsafe traffic situation has been further exacerbated by poor compliance with provisions of the Applicant's traffic management plan, the Board cannot find that even total compliance with the improved TMP would mitigate the objectionable traffic conditions presently caused by NCRC, particularly in light of the narrow residential streets in question and the lack of safe pedestrian access in the vicinity of the subject property. The Board credits DDOT's conclusion that implementation of the Applicant's improved TMP (one of three options proposed by DDOT to lessen the adverse traffic impacts associated with current operation of the child development center at the subject property) would not "provide a complete solution" to the existing unsafe traffic conditions on Highland Place.

Parking. The subject property is not required to provide parking on-site by virtue of its status as a property contributing to the character of a historic district. However, as a use permitted only by special exception, this child development center could not have been approved unless the Board found that the proposed use did not tend to affect adversely the use of neighboring property, including with respect to parking impacts generated by the child development center. Specifically, the Board was required to find that this child development center "provide[d] sufficient off-street parking spaces to meet the reasonable needs of teachers, other employees, and visitors." 11 DCMR § 205.4.

The Board finds that the Applicant's child development center, operating at its unauthorized current levels of enrollment and staffing, is creating adverse impacts related to parking, principally because NCRC is not providing sufficient off-street parking spaces to meet the reasonable needs of employees and visitors to the subject property. Besides the need for short-term parking associated with student drop-offs and pick-ups, the child development center generates significant parking demand through its current 38 employees, the vast majority of whom drive to work; through occasional special events that attract many visitors to the site at the same time; and through a relatively large number of regular visitors to the subject property,

including the consultants hired to work with students and the families of prospective students, who may attend tours or play sessions four or five times per week for five months of the school year, as many as eight families at a time. The adverse impact arising from the large demand for parking created by the Applicant's child development center use is exacerbated by characteristics of the surrounding neighborhood, particularly the scarcity of off-street parking on residential properties in the vicinity of the subject property and the competing demand for on-street parking created by other nearby uses, especially commercial activities on Connecticut Avenue and the Cleveland Park Metrorail station.

*D. The Requests to Increase Enrollment and Staffing over the Current Unauthorized Levels.*

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. It would not be logical for this Board to accept the contention that no relationship exists between the Applicant's noncompliance and the adverse impacts evidenced in the record. To both ratify this non-compliance 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.

The Applicant's requests to increase enrollment from 120 to 185 children and to increase staffing from 28 to 44 are denied.

New construction. The Applicant proposes to construct a new addition at the rear of the main building, a new accessory building known as the Carriage House, and a new maintenance shed that will replace a smaller existing shed. Based on the findings of fact, in particular that the new construction will be in harmony with the zone plan and will not tend to affect adversely the use of neighboring property due to noise, activity, visual, or other objectionable conditions, the Board concludes that the requested special exception for new construction to expand the child development center use should be granted.

The new construction projects proposed by the Applicant would not have a significant effect on traffic or parking. After completion of the new Carriage House, students using that building will arrive at and depart from the subject property via the stairs at the rear of the lot on Ordway Street, thereby moving a portion of the daily drop-off and pick-up activities from Highland Place to Ordway Street. The Board concludes that the minimal changes in preschool-related traffic and parking associated with the new construction will not create additional objectionable traffic impacts or tend to affect adversely the use of neighboring property.

The parties in opposition have argued that the new construction and the requested enrollment increases are economically codependent on each other, so that the Board should not deny one without denying the other. This argument seems driven by a concern that the Applicant may later claim that because the Board approved construction intended to support a higher enrollment and

because the approval was granted so close to the expiration of the underlying special exception, the Board will be estopped from denying future requests to increase enrollment and staffing and\or to renew NCRC's special exception once the construction is completed..

Estoppel requires good faith reliance and there is no basis for such reliance to exist in this instance. The Board wishes to make it very clear that it is up to the Applicant to determine whether it should undertake the approved construction based upon an enrollment limit of 120 and whether it makes sense to do so this far into the special exception term. That a decision to go forward may later turn out to be a poor one will be of no relevance to the Board when considering in any future proceedings involving this use. What will matter is whether the Applicant succeeds in alleviating the adverse conditions it has caused.

Additional Relief. In light of the Board's finding that the proposed new Carriage House will be accessory to the main building on the subject property, the Applicant was not required to seek either a special exception under § 2516 to permit two or more principal buildings on a single lot or a variance from § 3202.3, concerning multiple structures on a single lot of record.[13] No variance or special exception relief was required from on-site parking requirements in light of the Board's finding that § 2100.5, concerning an exemption from parking for buildings certified as contributing to a historic district, applies to the subject property as a whole.

ANC Issues and Concerns. The Board accorded ANC 3C the "great weight" to which it is entitled. In doing so, the Board fully credited the unique vantage point that ANC 3C holds with respect to the impact of the proposed expansion of the existing child development center use on the ANC's constituents. The Board credits the ANC's testimony that the Applicant's proposal to increase student enrollment and staffing would exacerbate existing traffic and parking problems. However, the Board concludes that the ANC has not offered persuasive advice that would cause the Board to find that the proposed new construction would create adverse impacts due to noise, traffic, or parking; would obstruct light and air to neighboring properties; or would impair the purpose and intent of the zone plan. The Board notes that the ANC itself did not assert that the

---

[13] The Board finds that no special exception under § 2516 is required in this instance because the Applicant is proposing to construct an accessory building, rather than a new principal building on the same lot as the existing main building; the Board rejects the Applicant's argument that § 2516 is inapplicable to a child development center use. Section 2516 "applies to construction on a lot that is located in, or within twenty-five feet (25 ft.) of, a Residence District." 11 DCMR § 2516.2. The subject property is a lot zoned R-1-B and therefore located in a Residence district. Nothing in § 2516 limits its relevance only to residential developments, or exempts child development centers (or any other use) located in a Residence district from its application. By statute, the Board lacks authority to amend any regulation, and would be exercising powers reserved to the Zoning Commission if it exempted any particular use from a regulation whose scope was not limited by the Zoning Commission. *Spring Valley Wesley Height Citizens Association v. D.C. Board of Zoning Adjustment,* 644 A.2d 434, 436 (D.C. 1994). The Board may interpret the meaning of the Zoning Regulations when their meaning is ambiguous or open-ended, but § 2516.2 is not ambiguous or open-ended so as to require interpretation. *Draude v. D.C. Board of Zoning Adjustment*, 527 A.2d 1242, 1247 (D.C. 1987). Rather, the interpretation favored by the Applicant would greatly change the plain meaning of the regulation.

The Board finds no merit in the Applicant's assertion that the Board did not apply § 2516 when deciding Application No. 16307. That application, unlike the present one, did not involve any new construction, but rather the continuation and expansion of an established use in the already-constructed main building and Playhouse.

proposed new construction would be objectionable, but indicated only that "neighbors" had complained or objected to certain aspects of the application.

## CONCLUSION

For the reasons stated above, the Board concludes that the Applicant has met its burden of proof with respect to that part of the application seeking approval of certain proposed new construction but not with respect to proposed increases in student enrollment or number of employees at the subject property. It is hereby **ORDERED** that the application is **GRANTED** in **PART** and **DENIED** in **PART.** Approval is granted subject to the conditions adopted by the Board in Application No. 16307 (March 9, 1999), which remain in effect.

**VOTE: 3-1-1** (Curtis L. Etherly, Jr., David A. Zaidain, and Anthony J. Hood voting to deny the application; Geoffrey H. Griffis opposed; Ruthanne G. Miller, not voting, having recused herself)

**VOTE: 3-1-1** (Geoffrey H. Griffis; David A. Zaidain, and Anthony J. Hood voting to approve the application with respect to proposed new construction only; Curtis L. Etherly, Jr., opposed; Ruthanne G. Miller, not voting, having recused herself)

**VOTE: 3-0-2** (Curtis L. Etherly, Jr., Anthony J. Hood, and David A. Zaidain voting to deny the motion to disqualify the Chairman and vacate decisions; Geoffrey H. Griffis and Ruthanne G. Miller not voting, having recused themselves)

**BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**
Board members Curtis L. Etherly, Jr., Anthony J. Hood, and David A. Zaidain have approved the issuance of this Order.

**ATTESTED BY:** Jerrily Kress
**JERRILY R. KRESS, FAIA**
**Director, Office of Zoning**

**FINAL DATE OF ORDER:** JUN 2 8 2005

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE

WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION; POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

GOVI MENT OF THE DISTRICT OF C JMBIA
Board of Zoning Adjustment

★ ★ ★

**BZA APPLICATION NO. 16970-B (Corrected Decision and Order)**

As Director of the Office of Zoning, I hereby certify and attest that on JUN 2 8 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

Corey Buffo, Acting 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 Kress
**JERRILY R. KRESS, FAIA**
**Director, Office of Zoning**

twr