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January 13, 2003

By Hand Delivery

Mr. Geoffrey Griffis, Chairman
Board of Zoning Adjustment
441 4th Street, N.W.
Second Floor
Washington, DC 20001

Re: BZA Application No. 16970
National Child Research Center
3209 Highland Place, NW; Square 2072, Lot 30

NCRC'S OPPOSITION TO THE MOTION TO DISMISS AND THE MOTION FOR DECLARATORY RELIEF

Dear Chairman Griffis and Members of the Board:

Our firm represents the National Child Research Center ("NCRC"), the Applicant in the above referenced case. On Monday, January 6, at approximately 5:00 p.m., we were served with a copy of a motion filed on behalf of several neighbors in opposition ("Opposition".) The motion was apparently filed with the Board of Zoning Adjustment on Thursday, January 2, but was not served on the Applicant until January 6th. The Applicant is filing this response within the 7 days required under the Board's rules.

NCRC opposes the Motion to Dismiss and the Motion for Declaratory Relief and requests that both motions be summarily denied for the following reasons and as discussed more fully below.

1. The Board has no authority to entertain or grant a request for declaratory relief.

2. The motions imply an enrollment cap condition in a prior BZA order, which in fact does not exist.

3. Absent an express condition restricting or limiting enrollment, the Board has no authority to find that NCRC is not in compliance.

BZA
Case No. 16970
Exhibit No. 69

Board of Zoning Adjustment
District of Columbia
CASE NO. 16970
EXHIBIT NO. 69

4. The only conditions with which NCRC is required to comply are those set forth in BZA Order No. 16307, all of which pertain to traffic management policies at the school.

5. NCRC is in full compliance with all conditions of its prior special exception approval.

Since the entire premise on which the Opposition's motions are based does not exist – namely, there is no condition even discussing, let alone limiting, enrollment – the motions fail and should be summarily denied.

I. THE FACTS

NCRC has operated a child development center at this location since 1930 and has consistently endeavored to meet all zoning and licensing requirements. The most recent BZA order approving its special exception use was issued by the BZA on March 3, 1999. (See the attached Exhibit A.) In that order, the BZA granted the application subject to nine conditions. Condition No. 1 limits the approval to eight years. Conditions Nos. 2 through 8 describe traffic management measures and policies to be implemented by the school. Condition No. 9 limits the hours and days of operation to between 8:00 and 5:00 p.m., Monday through Friday. NCRC has been operating its child development center in full compliance with the conditions of its approval.

On November 12, 2002, NCRC filed an application with the BZA for special exception relief to continue its existing child development center use and to permit new construction on the site. That case is scheduled to be heard by the BZA on Tuesday, February 11.

II. ARGUMENT

A. The Board Has No Jurisdiction to Entertain or Grant a Request for Declaratory Relief.

Since the Board has no jurisdiction to even entertain a request for declaratory relief, the motion must be denied. The BZA must have explicit authority granted by statute or provided within the zoning regulations to take the actions it does, or its action will be reversed. In *Spring Valley Wesley Heights Citizens Ass'n v. District of Columbia Bd. Of zoning Adjustment,* 644 A.2d 434 (D.C. 1994), the Court articulated this principle as follows:

> The BZA's powers are those defined by statute and regulation. *See* D.C. Code §5-424 (1988); [fn omitted] 11 DCMR §§3100 *set seq.* This courtly, like other courts, has been "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 the District of Columbia,* 378 A.2d 1085, 1089 (D.C. 1977).

ID. At 436. See also *District Intown Properties, Ltd., v. District of Columbia Dept. of Consumer and Regulatory Affairs,* 680 A.2d 1373, 1379 (D.C. 1996) ("An administrative agency is a creature of statue and may not act in excess of its statutory authority.") Importantly, this Court has also made clear on numerous occasions that "[a]bsent express statutory or regulatory authority, a regulatory agency may not impose remedial measures." *Davidson v. District of Columbia Bd. of Medicine,* 562 A.2d 109, 112 (quoted in *District of Columbia Preservation League v. Dep't of Consumer and Regulatory Affairs,* 646 A.2d at 436, and cited in *District Intown Properties, Ltd.,* 680 A.2d at 1379.

The BZA's authority is set out in its "enabling" statute, which authorizes it to approve special exceptions or to grant variances pursuant to the provisions of the Zoning Regulations and also to entertain appeals from zoning decisions of administrative officials.[1] The Board has no authority to entertain or grant declaratory relief and the DC Court of Appeals has consistently refused to read into a statute powers for a regulatory agency which are not fairly implied in the statutory language. *Chesapeake & Potomac Telephone Co. v. Public Service Commission of the District of Columbia,* 378 A.2d 1085 (D.C. 1987). "Absent express statutory or regulatory authority, a regulatory authority may not impose remedial measures." *Davidson v. District of Columbia Board of Medicine,* 562 A.2d 109 (D.C. 1989). The Opposition has cited no provision in the statute or regulation, and we know of none, that would empower the BZA to take the action which the Opposition is requesting. Accordingly, the Motion for Declaratory Relief should be denied by the Board as clearly beyond its jurisdiction.

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[1] See, 11 DCMR §3100, which sets forth the jurisdiction and authority of the Board. Pursuant to §3100.1, the Board has jurisdiction to grant variances and special exceptions. Pursuant to §3100.2, the Board also has the authority to hear and decide appeals from any zoning decision of any administrative officer or body.

B. The Motion to Dismiss and Motion for Declaratory Relief Should Be Denied Since They Are Both Based on a Non-Existent Condition.

The motions filed by the Opposition are predicated on the belief that NCRC is not in compliance with an enrollment cap set forth in its prior BZA order. This claim is completely without merit. The prior BZA order contained no condition limiting enrollment nor any condition even addressing the number of children. All of the conditions relate to either the term of use or the traffic management policies to be implemented by NCRC. The Opposition does not challenge NCRC's compliance with the traffic management conditions other than a conclusory statement that parents and guardians continue to park on the streets and disrupt traffic flow. Rather, the motion focuses on a non-existing enrollment cap and requests that the BZA find that NCRC is in violation of its BZA approval and that it should be barred from coming before the Board seeking special exception relief until 2007. Not only is NCRC entitled to have its case heard and decided by the Board; it is coming to the Board in full compliance with its prior approval.

There is no question that the Board is empowered to impose reasonable conditions upon granting a special exception. In its review and approval of special exception applications, the Board may impose conditions to ensure that the use will be in harmony with the Zoning Regulations and such conditions are to be enforced if the applicant takes advantage of the special exception's benefit. *Citizens Association of Georgetown v. DC BZA*, 365 A.2d 372, 377 (1976); *Nathanson v. DC BZA*, 289 A.2d 881 (1972); see also, *Levy v. DC Board of Zoning Adjustment*, 570 A.2d, 739, 749 (DC 1990).[2] Indeed, Section 3205 of the Zoning Regulations clearly states that when a building permit or

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[2] The case law of other jurisdictions is in accord with ours. In *Summit School v. Board of Zoning Appeals,* 82 A.D.2d 463 (NY 1981), the court stated that, "While there is no question that an educational use is, by its very nature, in the furtherance of public morals and general welfare, municipalities may place reasonable zoning restrictions upon such uses carried on by private institutions." Id at 466. The court went on to state, however, that "the power of a board of appeals to impose conditions is not unlimited. The conditions so established must relate directly to, and be incidental to, the proposed *use* of the real property and not to the manner of the operation of the particular enterprise conducted on the premises which are the subject of the special permit." Id at 467. In that case, the court struck down a condition limiting the total number of students since there was no support in the record for a finding that the number of students should be limited for reasons of safety.

certificate of occupancy has been issued under the authority of a decision of the Board of Zoning Adjustment to approve a special exception or variance, then each condition to the approval of the special exception or variance shall be treated as a condition to the issuance of the building permit or certificate of occupancy. NCRC does not dispute the authority of the Board of Zoning Adjustment to impose conditions.

What is equally clear, however, is that the only conditions with which the applicant must comply are the conditions included in the order approving the special exception. There is no authority or legal basis for any person, any zoning official or even the current Board of Zoning Adjustment, *post hoc,* through an inspection of the prior record or transcript, to imply a condition which the prior BZA did not choose to include in its order of approval. Yet, this is precisely what the Opposition is asking this Board to do.

The purpose of a condition in a BZA order is to put a party on notice as to what the limitations are on the use of the property. The order is a legally binding document and the Zoning Regulations make clear that each of the conditions has the force of law. The corollary to this rule is that conditions that are not stated in the order cannot be imposed on the applicant and the courts have made clear that only those conditions expressly stated in the approval are binding. *Appeal of Farrell & Desautels*, 383 A.2d 619 (Vt. 1978); *South Woodbury Taxpayers Association v. American Institute of Physics,* 104 Misc.2d 254, 428 N.Y.S.2d 158 (NY 1980).[3]

In the *Appeal of Farrell & Desautels*, a landowner had obtained permission to develop a portion of the site and then was later denied permission to develop the balance of the site on the basis that at the prior hearing, he had verbally committed to devoting the property to another use. The Court noted that regardless of the transcripts of the hearings and the specific recollection of the board members, no condition respecting the future use of the site had found its way into the findings as filed or the order as issued. The court stated:

> We cannot subscribe to the proposition that a formal written order which contains some express terms and

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[3] *See, also, Omps v. Omps*, 1987 WL 488641 (Va. Cir. Ct.) in which the court held that the Board of Zoning Appeal had no authority to amend a previously granted special exception to include verbal representations made by an applicant seeking to obtain a special exception.

> conditions can also be said to carry with it silent and unexpressed terms and conditions. (Id at 617.)

The court went on to hold that the contention that the applicant had been legally committed based on certain self-imposed restrictions mentioned at the public hearing was "untenable." "Conditions imposed by a zoning board must be expressed with sufficient clarity to give notice of the use of the land and cannot incorporate by reference statements made by an applicant at a hearing." (Id at 619.)[4] *See, also, 83 Am.Jur.2d, Zoning and Planning, §1108.*

The same issue arose in a later case, *In Re Kostenblatt,* 640 A.2d 39 (Vt. 1994) in which a conditional use permit had been granted for a shooting range with only two conditions which restricted the days and months of use. The use was later challenged by neighbors who argued that the use of the range exceeded the permit based on the number of participants, number of shots, and number of cars to the site, all of which they implied as conditions based on the hearing transcripts. The court disagreed and prohibited the zoning officials from attempting to enforce requirements that were not express conditions of the approval. As the court held, "Conditions that are not stated on the permit may not be imposed on the permittee." *Id* at 44.

Applied to this case, it is clear that the Opposition has no legal basis to challenge NCRC's use of its property. There is no condition restricting or limiting enrollment and thus there is no basis for a finding that NCRC is not in compliance. Accordingly, the motions should be denied.[5]

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[4] The court also noted that extensive review of the evidence presented was not required to dispose of the single issue before them, since the only relevant issue was what the order said. (Id at 615.) Likewise, here, no hearing is required on the motions since the language in BZA Order 16307 is clear.

[5] The Office of Zoning has put in place a zoning compliance process whereby any person can file a request with the Zoning Compliance Officer to enforce any conditions of any BZA order. The opposition has not availed itself of this process and indeed cannot, since there is no condition in the BZA order respecting enrollment which can be enforced. Likewise, the Opposition has not sought to institute any proceedings within the Department of Consumer and Regulatory Affairs against NCRC and, indeed, cannot do so since NCRC is in full compliance with all zoning requirements.

As is evident from the materials filed by the Opposition, the 1998 BZA case which led to the adoption of BZA Order No. 16307, was focused primarily on conditions related to traffic management policies at the school. Indeed, the Board ended up adopting the very conditions recommended by ANC 3C for inclusion in the Board's order to ensure that the school use would have minimal adverse impact on the community. Not one of these conditions relates to the number of children, or the number of teachers or staff.[6] While there are statements on the record by a representative of NCRC that it was seeking approval for a certificate of occupancy for 120 children, there was no discussion by the Board or any parties about the number of children at any one time, about the total enrollment at the school, or about the number of faculty or staff at the school. These issues were not raised by any parties in opposition and there is absolutely no evidence in the record to support a finding or condition that the number of students, or teachers, or staff was an issue. The neighbors, including the ANC, had the opportunity to propose conditions for the Board's consideration. The only conditions they proposed were traffic related and those were the only conditions adopted by the Board.[7] If the community disagreed with the conditions, they had the opportunity at that time to raise the issue and they did not. They cannot now suggest that there was an implied condition not expressly stated in the order.

The BZA cannot at this point in time, through an inspection of the prior record or transcript, imply or impose a condition which the prior BZA did not choose to include in its decision. Indeed, the case law is clear that any condition must be expressly stated in the order of approval. Further, under the District of Columbia Administrative Procedure Act ("DCAPA") and the decisions of the DC Court of Appeals, any condition must also be supported by substantial evidence of record, and there is no evidence in the record to support any condition relating to a cap on the number of children or the number of teachers.[8]

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[6] While it is true that the prior order of the Board in that case did include conditions addressing the number of children and staff, that order was superceded by the order on rehearing.

[7] When the BZA wants to limit the total enrollment, it is certainly able to do so based on clear evidence in the record and a clear statement of its intent. See, e.g., BZA Order No. 15984 for the Levine School of Music in which the BZA included conditions limiting the maximum number of people on site at any one time (150) as well as the maximum number of students enrolled at the facility (1500.) These conditions recognized the unique nature of the part-time programs at the school and was based on specific testimony as to the traffic and parking impacts.

[8] See, e.g., *National Black Child Development Institute v. DC BZA*, 483 A.2d 687 (DC 1984) in

Footnote continued on next page

C. The Opposition's Motions Are Based on Incorrect Facts.

In addition to reading into the BZA order a condition which does not exist, the Opposition's motions include numerous statements based on incorrect facts and assumptions. While these are not germane to the limited issue before the Board – namely, the lack of any condition restricting or limiting the number of children - NCRC would like to correct the record. First, the Opposition incorrectly states that the licensing of a child development center by the Department of Health ("DOH") limits the total number of children over the course of the day and thus jumps to the conclusion that NCRC is limited to 108 children, its current licensing.[9] On the contrary, the Department of Health regulations make clear that its licensing applies to the maximum number of children on the premises at any one time, based on a detailed analysis of the square footages of the classrooms and play areas, and the ratio of teachers to staff. Indeed, in its recent draft amendments to the child development facilities regulations, DOH clearly defines occupancy limit as "the maximum child occupancy at any one time as opposed as to the average child occupancy over a period of time." (*See, Section 300.53.*) It also makes clear that "licensed capacity means the maximum number of children in each age category for whom a licensee is authorized to provide child development services at any one time. License capacity is not the same as the total number of children enrolled in the center, or the total number of children attending the facility on any given day." (*See, Section 300.42.*) The regulations go on to state that for purposes of determining the number of children in attendance at any one time, children away from the facility on a field trip or a special outing and under the supervision of a child care staff member shall

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which the BZA included a condition limiting the number of employees to 12. The court struck down this condition finding that it was unsupported by evidence in the record. Instead, it was based only on a finding that the Institute had 12 employees at the time it applied for its variance. As the Court held: "The BZA heard no evidence from the NBCDI regarding its present or future needs for staff, nor did it relate the conditions to specific findings regarding traffic, parking, or availability of public transportation. If the BZA imposes a condition limiting the number of employees at the site, it must base its findings on reliable, probative, and substantial evidence in the record as a whole."

[9] The licensing capacity under DOH may be different than the certificate of occupancy, depending on changes the school makes to its classroom sizes, or number of teachers and staff. For example, back in 1996 when it was first preparing its application to the Board of Zoning Adjustment, NCRC had a DOH license for 120 children. (See the attached Exhibit B.)

be included in the count. (*See, Section 302.09.03.*) Thus, under DOH's own regulations, and consistent interpretations, a license for 108 children means 108 children at any one time, which permits that number in the morning program, and that same number in the afternoon program.

The Opposition also assumes erroneously that a certificate of occupancy limits the total number of children over the course of the day. Again, this is contrary to the consistent interpretations of the Zoning Administrator, Department of Consumer and Regulatory Affairs ("DCRA"), and prior decisions of the BZA. Following the BZA's approval of its special exception application in 1998, NCRC applied for and received a certificate of occupancy for 120 children. This was consistent with its stated intention at the BZA. Under the zoning and building code regulations, and under the consistent interpretations of the Zoning Administrator and the BZA, a certificate of occupancy application indicates the maximum number of people that would be on the premises at any one time.[10] Thus, under its certificate of occupancy, NCRC is permitted to have 120 children in its morning preschool children and 120 children in its afternoon preschool program. As a practical matter, since several children attend a full day program, the current total enrollment over the course of the day is 171.[11]

The Opposition's position that a certificate of occupancy limits the total number of children over the course of a day is also inconsistent with other BZA approvals of child development centers, including St. Columba's Church, the Washington Hebrew Congregation Child Care Center, and the National Children's Center, all of which have a larger total number of children over the course of the day, but their certificates of occupancy limit the maximum number of children at any one time. The St. Columba's Church Preschool is particularly on point. St. Columba's recently went back to the BZA to expand its hours of operation. (BZA Application No. 16844.) In that application, St. Columba's sought to modify one condition of its prior approval – the hours of operation –

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[10] See, BZA Order No. 15941, in which the BZA upheld the zoning administrator's determination that in reviewing applications for building or occupancy permits, the figures placed on the applications indicate the maximum number of people that would be expected on the premises at any one time.

[11] It is disingenuous at best for the Opposition to suggest that it was not familiar with this total enrollment number when several of the opponents had children enrolled in the school. Indeed, Bruce Beckner, one of the Opposition neighbors and the author of the affidavit attached to the motions, had a child enrolled in the school in calendar year 1996-97 when the total enrollment was 165. At that point in time, as today, NCRC had both a morning and afternoon program.

to permit the addition of an after school program. Susan Taylor[12] testified at the hearing that no change would be required to its certificate of occupancy (which permitted 90 children) or to its health department license (which was for 90 children) "since the number of children on site at any one time would not change" even though the total enrollment would be higher.[13] In fact, the prior BZA approval included as a condition that "the number of children shall not exceed 90" which St. Columba's did not seek to modify.

Certainly in the St. Columba's case, with an express condition limiting the number of children, it could be argued that any number above 90 was a violation of its approval. Yet even with testimony that the total enrollment was higher, the BZA did not modify its condition limiting the number of children and St. Columba's was not required to get a new certificate of occupancy or a new license. Thus, that case is clear precedent for an enrollment number being higher than either the certificate of occupancy or the health care license since both control the maximum number at any one time. That case is also precedent for an interpretation that at least with regard to preschools, a condition limiting the number of children means the number of children at any one time.[14]

The Opposition also seems to suggest that NCRC is in violation of the Zoning Regulations by holding a conference for preschool teachers on its site. This presumes, erroneously, that a school use is limited strictly to the teaching of students from 8:00 to 5:00. On the contrary, school use assumes all of the accessory uses of the school, which includes Halloween parties for the children, parent-teacher meetings and conferences, and other school-related events. The fact that once a year NCRC holds a meeting at its site for preschool teachers from schools around the area in order to share information on ways to improve early childhood education is fully consistent with NCRC's mission and is in no way a violation of the Zoning Regulations. Further, NCRC went out of its way to ensure that this limited use would have no adverse impact on the neighbors by (a) scheduling the meeting on a school day and canceling classes for that day; (b) limiting

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[12] Susan Taylor is listed as one of the opposition neighbors in Exhibit 1 to the motion.

[13] BZA Application No. 16844, March 12, 2002 hearing transcript, p. 8-92. (See the attached Exhibit C.)

[14] In that case, the ANC voted to support the application and in its resolution stated "they will not increase the total number of children at the site." In fact, however, the total number of children over the course of the day was higher than the 90 number which, it could be argued, was the number the ANC supported.

the number of attendees so that the number of persons on the site would in fact be less than the number of students, teachers and staff on a typical school day; and (c) requiring all participants to park at an off-site location and be brought to NCRC by shuttle. Additionally, NCRC sent a letter to all of its neighbors advising them about the event and asking them to contact the director of NCRC if they had any questions or complaints.

Finally, the Opposition suggests that NCRC is somehow estopped from seeking to increase its enrollment because the neighbors relied on its representations in 1998. There is no factual basis upon which to make this statement.[15] If anything, the prior BZA case indicates that the number of children was not even an issue and that the entire focus of both NCRC and the neighbors was on traffic management measures. There was no testimony by the neighbors at the public hearing on this issue, and there would have been no basis in the record for the Board even to include a condition. Rather, all of the testimony was focused on the traffic impacts from the dropping off and picking up of children. The opposition of the neighbors was withdrawn based on traffic measures to which the school agreed, all of which have been implemented.[16]

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[15] In their filing, the Opposition has not even plead the required elements of promissory estoppel. At a minimum, a finding of promissory estoppel requires evidence of a promise that reasonably reduced reliance and was in fact relied upon to the detriment of the promisee. *Simard v. Resolution Trust Corporation*, 639 A.2d 540, 552 (D.C. 1994); *Duke v. American University*, 675 A.2d 26, 28 (D.C. 1996). Here there was neither a promise nor reliance. *See, also*, *Omps v. Omps*, 1987 WL 488641 (Va. Cir. Ct.) where the court held that estoppel cannot be based on argument or inference, citing *American Security & Trust Co. v. Juliano, Inc.* 203 Va. 827, 834 (1962).

[16] The Opposition also wrongly states that there was no testimony in the prior BZA case about a morning and afternoon program. In fact, the transcript indicates that the neighbors referenced three times when parents would be coming to the school to drop off and pick up children – one in the morning at the start of the school session, one mid-day when the morning session ended and the afternoon session began, and a third pickup time in the late afternoon at approximately 3:30 p.m. See, e.g., the testimony by the neighbors concerning the 11:30 and 3:30 pick ups (TR, pp. 37 and 43) and the reference to the two times a day when students are picked up (TR. P. 72) in addition to the morning drop off. This testimony clearly demonstrates that the neighbors were fully aware of the morning and afternoon programs at the school.

III. CONCLUSION

For the foregoing reasons, NCRC requests that the BZA deny the Motion to Dismiss and the Motion for Declaratory Relief.

Respectfully submitted,

SHAW PITTMAN, LLP

By Maureen Dwyer
Maureen Dwyer

Document #: 1298856 v.1

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16307 of National Child Research Center, pursuant to 11 DCMR 3108.1 and 3107.2 for a special exception under Section 205 to establish a child development center for 120 students ages 2 ½ to five years and 28 staff in the basement through third floor of an existing building, and a variance from the provisions of Section 2101 for off-street parking in an R-1-B District at premises 3209 Highland Place, N.W. (Square 2072, Lot 30 (855 & 866)].

HEARING DATE: January 21 and April 1, 1998
DECISION DATE: January 21, February 4 and May 6, 1998

SUMMARY ORDER UPON REHEARING

The application was amended at the public hearing to eliminate the variance from 11 DCMR 2101 for off-street parking. The applicant submitted into the record a letter dated November 12, 1997, from the State Historic Preservation Officer for the District of Columbia stating that the subject building is either a historic landmark in the D.C. Inventory of Historic Sites or is located within a historic district and contributes to the character of the historic district. The Board determined that a parking variance is not needed based on Subsection 2100.5 of the Zoning Regulations which exempts such historic structures from providing additional parking when the use is changed.

For the January 21, 1998 hearing, the Board provided notice of public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 3C and to owners of property within 200 feet of the site.

The site of this application is located within the jurisdiction of ANC 3C. ANC 3C, which is automatically a party to this application, submitted a written statement of issues and concerns in support of the application. However, on, February 3, 1998, ANC 3C submitted a letter dated January 27, 1998 protesting the inadequate public notice in the application and requested that a new public hearing be held after proper notice has been given. The ANC noted that the notices were received very late due to the holiday season and new hearing would allow for a full discussion about parking and child drop-off and pick-up.

The Board considered the request at its public meeting of February 4, 1998 and granted the rehearing. The new hearing was held on April 1, 1998.

For the April 1, 1998 hearing, the Board provided proper and timely notice of public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 3C and to owners of property within 200 feet of the site.

As directed by 11 DCMR 3324.2, the Board has required the applicant to satisfy the burden of proving the elements which are necessary to establish the case for a special exception pursuant to 11 DCMR 205. No person or entity appearing as a party to this case testified in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, the Board concludes that the applicant has met the burden of proof, pursuant to 11 DCMR 3108, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map. It is therefore **ORDERED** that this application be **GRANTED, SUBJECT** to the following **CONDITIONS:**

1. Approval shall be for **EIGHT (8) YEARS.**

2. The applicant shall prepare a pamphlet, separate from other school notices, which will define clearly the school's policies and regulations with regard to traffic and parking. The pamphlet will recognize specifically the interests and concerns of neighbors regarding school-related traffic and parking. The pamphlet will be distributed at the start of the school year and three additional times during the school year to parents and child care providers. In addition, the pamphlet will be given to families that change caregivers, and the applicant will further distribute the pamphlet at such other times to individual drivers if violations of the policy are noted by the monitors or neighbors.

3. The applicant shall clearly define the carpool waiting line on Highland Place and any carpool waiting line, and the location of its starting point shall be marked with a traffic cone placed in the street at each scheduled pick-up time to minimize blocking of traffic, particularly at the curve on Highland Place. In this instance, "carpool" refers to any automobile used to pick up one or more NCRC students.

4. Formation of the carpool waiting line shall not be permitted prior to 10 minutes before dismissal time.

5. Clearly identifiable NCRC staff using walkie-talkies (or other communication technology) shall monitor drop-off and pick-up points on Highland Place and Ordway Street with specific attention to ensuring that driveways and traffic is not blocked.

6. The applicant and ANC 3-C shall jointly request that the Department of Public Works mark no-parking areas at all the corners of Highland and 33rd Places with both signs and pavement markings to indicate clearly the limit of parking close to these corners. They will further request that parking adjacent to the school property along Ordway Street be limited to 15 minutes on school days between 7:00 a.m. and 8:30 a.m. with appropriated signage and pavement markings.

7. The applicant's staff shall warn violators of traffic regulations and shall request enforcement by the Metropolitan Police if violations persist.

8. The applicant shall not object to or in any way discourage any extension of residential permit parking on streets within the area of the school (except with regard to the actual frontage of NCRC on Highland Place and Ordway Street, N.W.).

9. The hours and days of operation shall be between 8:00 a.m. and 5:00 p.m., Monday through Friday.

Pursuant to 11 DCMR 3301.1, the Board has determined to waive the requirement of 11 DCMR 3331.3 that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is appropriate in this case.

DECISION DATE: February 4,1 998

VOTE: **4-0** (Susan Morgan Hinton and Sheila Cross Reid to **APPROVE** the request to **REHEAR** the application; Betty King and Maybelle Taylor Bennett to approve by absentee vote).

DECISION DATE: May 6, 1998

VOTE: **3-0** (Betty King and Sheila Cross Reid to grant; Herbert M. Franklin to grant by absentee vote).

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

ATTESTED BY: Sheri M. Pruitt-Williams
SHERI M. PRUITT-WILLIAMS
Interim Director

Final Date of Order: MAR - 3 1999

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL

COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR § 3103.1, "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 BEFORE THE BOARD OF ZONING ADJUSTMENT.

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

16307ord/twr/ljp

★★★ GOVERNMENT OF THE DISTRICT OF COLUMBIA
SFRA-5
(Rev. 5/89)

Department of Consumer & Regulatory Affairs
Service Facility Regulation Administration

PERMIT FOR CHILD CARE FACILITIES

Permit Number: 906778-CDC Date Issued: 08/25/95

Type of Facility: CHILD DEVELOPMENT CENTER Date Expires: 08/24/96

Maximum Number of Children allowed: 120 Hours of Service: 08:45 AM-03:30 PM

PERMISSION IS GIVEN TO (Name) NATIONAL CHILD RESEARCH CENTER

(Address) 3209 HIGHLAND PLACE, N.W.

to establish, operate and maintain a child care facility, subject to the following conditions, in accordance with the DCMR 29 Public Welfare and DCMR 22 Public Health and Medicine.

AGES: TWO AND ONE-HALF (2 1/2)
THRU FIVE (5)

For the Director, Department of Consumer & Regulatory Affairs

By JAMES R. MURPHY
Administrator, Service Facility Regulation Administration

Hampton Cross
Director
Department of Consumer and Regulatory Affairs

DENISE R. MCKOY
Child Care Specialist

THIS PERMIT APPLIES ONLY TO THE LICENSEE AND ADDRESS GIVEN HEREIN AND IS NOT TRANSFERABLE

82-2435

additional class time in the afternoon and what we've asked for is a change in the special exception to just eliminate a couple of sentences but not change the overall parameters of the operation. I'm here to answer any questions you may have for the content of the application and Ms. Taylor is here to answer any questions about the operation of the program on site.

CHAIRPERSON GRIFFIS: Great, and thank you. It is very straightforward and again, just to underline for the board that this is a very minor modification, so I think we can get through this very quickly and we'll get into substances where we need to.

First of all, I just wanted to quickly ask, you're requesting an extension of the time to 4:00 p.m.; is that correct?

MS. TAYLOR: No. What we're requesting is that within our current hours of operation, which are 8:00 to 4:00 currently the language reads that the center, meaning our nursery school, shall conduct classes for children between 9:00 a.m. and 12:00 p.m. An extended day program may be conducted until 2:30 p.m.

What we're seeking is to eliminate that language so that we can have an afternoon program for approximately up to 40 children. We don't expect to have that many children any time soon.

CHAIRPERSON GRIFFIS: And that would go to what

time?

MS. TAYLOR: Approximately 3:45.

CHAIRPERSON GRIFFIS: Okay.

VICE-CHAIRPERSON RENSHAW: Is that in addition to the number of children you have there?

MS. TAYLOR: Yes, right now --

VICE-CHAIRPERSON RENSHAW: Is that 40 new children?

MS. TAYLOR: Correct. Right now, we have 90 children in our certificate of occupancy and we're zoned to serve 90 children. Some of those children continue at school through what we call a lunch bunch program, an extended day program. Because some of our children stay beyond the 12 hour -- the 12:00 p.m. classroom time, we can only add a certain number of kids in the afternoon to have an afternoon class without violating our 90-children rule so that we are planning on adding 26 children to an afternoon session.

We can potentially go up to 40 and whether we will do that or not, I don't know but right now, our plan is to simply add an afternoon session and then we're doing this because we had to in the -- this year, last year and the year before, we've had to turn away approximately 50 percent of our applicants and so that neighborhood people came to us and requested that we expand our school and we cannot do that. What we can do is to add an afternoon session. So we're trying to figure out how to accommodate the request made by the neighborhood.

VICE-CHAIRPERSON RENSHAW: But you are not going to increase the total number of children at the site.

MS. TAYLOR: We are not going to increase the total number of children on the site at any given time, that is correct.

VICE-CHAIRPERSON RENSHAW: Because that is what the ANC understood and it's --

MS. TAYLOR: That is correct. The enrollment will change but the number of children on site at any given time will not change.

MEMBER ETHERLY: Mr. Chairman, if I may, just to follow up with Ms. Renshaw's questions, if I understand correctly Ms. Taylor, what you're saying is you're authorized for 90. You have some additional kids who very frequently will stay over on the property beyond the 12:00 p.m. program.

MS. TAYLOR: Correct.

MEMBER ETHERLY: And you want to have an opportunity to get some of those young people involved in afternoon programming.

MS. TAYLOR: No, it's a little bit different. We have a morning class that runs from 9:00 to 12:00. Some of the older children, the four and five-year old children are able to participate in what we call lunch bunch, which is they bring their own lunch to school and they stay in a less structured environment. It's not classroom environment, per se, it's more

playtime aftercare.

The number of those children varies somewhat from year to year and current, if you'll excuse me one minute, I have to ask how many kids, 40 children. So in order for us to have an afternoon session of new and different children coming to participate in the school, we are restricted because we cannot have more than 90 children on campus at any given time, we're restricted to increase the enrollment by a maximum of I think probably around 40 kids.

We have had indication from the neighborhood that there would be about 20 to 30 children that would like to become --

CHAIRPERSON GRIFFIS: Participate.

MS. TAYLOR: -- students at St. Columbus (sic) Nursery School and so we'd like to add an new afternoon classroom session, not daycare but classroom. Those 40 children that stay for lunch bunch will leave at 2:30 which is what they do now and that's a four day a week program -- three day a week program, excuse me. And what we're proposing is to add an afternoon session four days a week, not five days a week.

MEMBER ETHERLY: Okay, so from the standpoint of the 90 -- the 90 child target --

MS. TAYLOR: Right.

MEMBER ETHERLY: -- you're getting close, what, 70 maybe, maybe even 80 or so but you're still -- I think the key

point is for Ms. Renshaw and for me is that you're still below the 90. You're not in danger of --

MS. TAYLOR: That is correct.

MEMBER ETHERLY: Okay.

MS. TAYLOR: For example, our zoning currently enables us to have 16 staff but our certificate of occupancy restricts that to no more than 14 on site at any given time and we want to be very up front about that. Our current certificate of occupancy enables us to have 90 children on site at any given time.

We would be increasing the enrollment by adding this afternoon session but we would not be increasing the number of children on site at any given time. And then we can explain to you how we feel we can do that without causing any neighborhood impact.

MEMBER ETHERLY: Okay, great. Thank you, Mr. Chair. Thank you, Ms. Taylor.

CHAIRPERSON GRIFFIS: Okay, so just to be clear, we're just looking at condition number 3 of the original order and you want condition number 3 to read, "The hours of operation shall not exceed 8:00 a.m. to 4:00 p.m. Monday through Friday.

MS. TAYLOR: Right, thereby eliminating the restrictive language on what we do --

CHAIRPERSON GRIFFIS: That's where I'm going. So the second and third sentences would come out, "The Center shall