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January 24, 2003

BY HAND

Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
441 Fourth Street, N.W., Room 201
Washington, D.C. 20001

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Re: **BZA Application No. 16970**
National Child Research Center
3209 Highland Place, N.W.; Square 2072, Lot 30 (the "Property")

RESPONSE TO OPPOSITION

Dear Mr. Griffis:

The following is in response to the National Child Research Center's ("NCRC") Opposition to the Neighbor's Motion to Appear as a Party, Motion to Dismiss Application, Motion for Declaratory Relief, and Request for Hearing on Motions to Dismiss and Declaratory Relief. Specifically, the Neighbors (as defined in the Motion) respond to NCRC's claims that (1) the Board of Zoning Adjustment ("Board") has no authority to grant the relief requested and (2) Order No. 16307 does not limit enrollment to 120 students & staff to twenty-eight (28).

A. The Board Has the Authority to Grant the Relief Requested.

D.C. Code § 6-641.07(d) provides that the Board may "make special exceptions to the provisions of the zoning regulations in harmony with their general purpose and intent." *See also* 11 D.C.M.R § 3104.1. In cases of appeal, the Board has the authority "make any order that may be necessary to carry out its decision or authorization." 11 D.C.M.R. § 3100.4. However, NCRC's violations were not discovered by the Neighbor's until the events immediately preceding the filing of the instant application. As such, the filing of the instant application has served to circumvent the prospect of any enforcement action by DCRA, or any authorized authority, or an appeal of such authority's failure to act. Consequently, NCRC comes before the Board with "unclean" hands. The appropriate remedy would have been for NCRC to file for additional relief seeking to increase its enrollment prior to implementing such increases. This end run-around the zoning regulations should be allowed. Rather, the Board should either refer this matter to the Office of Zoning Compliance

BZA
Case No. 16970
Exhibit No. 78

Board of Zoning Adjustment
District of Columbia
CASE NO.16970
EXHIBIT NO.78

Review Program or order NCRC to comply with Order No. 16307, including ordering a reduction in enrollment set forth in Order No. 16307.

That the Board has the power to grant declaratory relief is clear from a reading of the zoning regulations and the D.C. Administrative Procedure Act ("APA"). Section 3102.1 of the zoning regulations provides that:

> The rules of practice and procedure in this chapter supplement the procedures set forth in the Zoning Act, the Zoning Regulations, and the District of Columbia Administrative Procedure Act, D.C. Code, 2001 Ed. §§ 2-501 to 2-511 (formerly codified at D.C. Code §§ 1-1501 to 1-1510 (1999 Repl.)).

11 D.C.M.R. § 3102.1. Section 2-508 (Declaratory Orders) of the APA provides that:

> On petition of any interested person, the Mayor or an agency, within their discretion, may issue a declaratory order with respect to the applicability of any rule, regulation, Council act or resolution, or statute enforceable by them or by it, to terminate a controversy (other than a contested case) or to remove uncertainty. A declaratory order, as provided in this section, shall be binding between the Mayor or the agency, as the case may be, and the petitioner on the state of facts alleged and established, unless such order is altered or set aside by a court. A declaratory order is subject to review in the manner provided in this subchapter for the review of orders and decisions in contested cases, except that the refusal of the Mayor or of an agency to issue a declaratory order shall not be subject to review. The Mayor and each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

D.C. Code § 2-508 (1999 Repl.).

Just as the Board has the authority to take the necessary actions to see that its orders are carried out and to make declaratory orders, it is authorized to dismiss applications. *See* 11 D.C.M.R § 3100.6. The only restriction on the Board's authority to dismiss applications and/or appeals is that if dismissal is based upon an applicant's failure to comply with the provisions of chapter 31 of the zoning regulations, the Board must first provide due notice of the deficiency and allow a reasonable period of time, as determined by the Board, for the applicant to remedy the deficiency. *Id.* If the deficiency is not timely remedied, the Board is then free to dismiss the matter.

B. NCRC is in Violation of Order No. 16307.

1. Order No. 16307 Granted a Special Exception for a Child Development Center for 120 Students and a Staff of Twenty-Eight (28).

NCRC spends a good part of its opposition arguing that is in compliance with Order No. 16307 in that the grant of the special exception in that application was not conditioned on a cap on enrollment of 120 students and a staff of twenty-eight (28). Similarly, NCRC goes to great length to attempt to convince the Board that it cannot look to the record to impose an implied condition not explicitly set forth in the order. However, these arguments are nothing more than a desperate attempt to confuse the issue. In making these arguments, NCRC ignores the blatantly obvious fact that Order No. 16307 granted a special exception for a "child development center for 120 students . . . and 28 staff" – the caps requested by NCRC in that application. *Motion Exhibit* 2. Thus, as the special exception was expressly limited to these numbers, it was unnecessary for the Board to make these limitations conditions of the order. Including these limitations in the conditions would have, in fact, been redundant.

The record in BZA Application No. 16307 illustrates that NCRC was aware that the licensing cap was a cap on enrollment. For example, the following exchange took place between NCRC's counsel and NCRC's only witness, Kay Stafford, the program administrator/acting director of NCRC:

> QUESTION: And do you expect now to have any increases in enrollment or staffing?
>
> ANSWER: No.

Motion Exhibit 18 at p. 12. Additionally, based on NCRC's presentation to the ANC 3C, the ANC noted in its March 25, 1998 letter to the Board that:

> . . . NCRC has presented to this ANC that it is "not intending to do any construction, *nor is it intending to increase the number of students from its current* ***enrollment*** or to change its operation in any other way."

Motion Exhibit 16 (quotations in original; emphasis added).[1] Nowhere in the record of the former BZA action or in the order granting the special exception, is there any distinction between the

[1] Contrary to the quotation in footnote 14 of the Opposition, the ANC resolution quotes NCRC as having stated that NCRC was not seeking to increase its *enrollment* – not that NCRC represented that it was not increasing the number of students on its site.

number of students enrolled at NCRC and the number of students who NCRC intended as occupants during any one particular time. Having made misrepresentations then, NCRC should not be able to take advantage of those misrepresentations now.

2. Limitations in Order No. 16307 Were Limitations on Enrollment.

Presumably realizing that its argument that there is no restriction on enrollment fails, NCRC attempts to change the parameters of the 120 limitation by arguing that this limitation is on the number of students permitted on the premises at any given time, rather than a cap on enrollment. In making this argument, NCRC relies solely on proposed draft regulations regarding licensing of child development centers to support its argument that the limitation set forth in Order No. 16307 is a limitation on the number of children at any one time. However, regulations that have yet to be adopted cannot support NCRC's position. Instead, the provisions of the licensing requirements at the time of the issuance of Order No. 16307 control.

As there was no similar provision to the draft cited by NCRC at the time of the issuance of Order No. 16307, we must look to the correspondence and notes of the Department of Health to determine whether the then-existing license restrictions pertained to enrollment or number of students allowed on the premises at any one time. These documents make it clear that the limitations represented a cap on total enrollment. *See Motion Exhibit* 14 (informing NCRC that they "must reduce the number of *enrolled* through attrition immediately"); *see also Exhibit A*.

As set forth in *Exhibit A*, On March 11, 1998, NCRC represented to the Department of Health ("DOH") that "*enrollment* would be 90 or less for the summer and that number would be maintained until a new certificate of occupancy was received". (Emphasis added.) In response, DOH noted on March 12, 1998 that it sent a letter to NCRC informing them that "if the center has more than 90 *enrollees* and it does not have the new C of O [,] *enrollment* must be reduced through attrition." (Emphasis added.)

Finally, NCRC's argument fails to address the fact that it is in violation of the cap on staffing of twenty–eight (28).

3. NCRC's Other Arguments Fail.

a. Traffic Concerns Were Directly Related to Enrollment Numbers.

In an attempt to dismiss the enrollment issue, NCRC also argues that the community's primary concerns in BZA Application No 16307 related to traffic. However, this argument ignores the fact that the traffic issues were driven by the increased enrollment at NCRC. That is, the greater the enrollment, the greater the number of cars entering the neighborhood to drop-off and pick-up students. Once assured by NCRC that it was not increasing its enrollment, the community then

sought to address unresolved traffic issues. *See Motion Exhibit* 16. That enrollment was the driving issue is evident from the fact that the ANC resolution quotes NCRC's statement that NCRC was not intending to "increase the number of students from its current enrollment [of 120] or to change its operation in any other way."

b. NCRC's Reliance on Susan Taylor's in BZA Application No. 16844 is Misplaced.

NCRC makes much of the fact that Susan Taylor, one of the Neighbors in opposition, testified in support of BZA Application No. 16844. However, that application is clearly distinguishable from the instant matter. Unlike the instant matter, the applicant in BZA Application No. 16844 explicitly requested to increase enrollment by adding a second session. *See Opposition Exhibit C* at pp. 89 (lines 8-16) and 90 (lines 4-5 & 8-10). In doing so, the applicant indicated it would remain in compliance with its certificate of occupancy, as the number of students at the premises at any given time would remain the same. However, BZA Application No. 16844 does not support the position of NCRC that the grant of a special exception in Order No. 16307 for a child development center for 120 students was intended to as a cap on the number of students at any given time, rather than a cap on enrollment as specifically indicated in the decision of the BZA. Again, in making such an assertion, NCRC ignores both its own representations regarding its commitment that it would not increase its *enrollment*, as well as the well-established record in BZA Application that the limitation of 120 students referred to enrollment. In fact, the record in BZA Application No. 16307 is completely devoid of *any* reference to NCRC's present *post hoc* claim that the limitation it agreed to, and which the community and the ANC understood as referring to an enrollment cap, was instead the number of students at the Property of any given time. This argument was not formulated until the filing of the instant application in an effort to disguise the fact that NCRC is currently in violation of Order No. 16307 and, consequently, its certificate of occupancy.

c. There is No Reference in the Record of BZA Application No. 16307 of Two (2) Drop-Off Times.

Contrary to NCRC's assertions, there is no evidence in the record that NCRC had two drop-off times and, consequently, that the figure of 120 students referred to a cap on the number of children at any given time, rather than a cap on enrollment (as specifically testified to by NCRC). Rather, the testimony from both NCRC and the community illustrates that NCRC had a single morning drop-off with staggered pick-up times. *See Motion Exhibit18* at pp. 12, 37 and 43. Most notably, Ms. Stafford testified as to the following during questioning from NCRC's attorney:

> QUESTION: With regard to questions in the surrounding area, however, how are the students dropped off at the center?

ANSWER: The procedures are that there is a carpool line accessible *in the morning for arrivals* and at *each of the staggered release times.*

Motion Exhibit 18, p. 12 (emphasis added). In closing, NCRC's attorney reiterated that "there are two times a day of picking up students". *Motion Exhibit* 18 at p. 72. Similarly, testimony from the neighbors only addressed one drop-off with staggered pick up times at 11:30 and 3:30 p.m. *Motion Exhibit 18* at pp. 37 and 43.

The Record is unambiguous that NCRC's afternoon session was comprised of those students that where picked up at the later pick-up time, not by new students being dropped-off at the Property. If NCRC had intended to convey to the Board that there were or would be two (2) drop-off times, it did not do so. Instead, NCRC gave testimony to the contrary, thus misleading both the community and the Board. Clearly, the additional drop-off time would significantly increase the traffic in the neighborhood, a hardship that would have been vigorously objected to by the Neighbors, had they been given an opportunity to do so.

CONCLUSION

Based on the foregoing, the evidence presented in the Neighbor's Motion and the evidence to be presented at the hearing on this matter, it is clear that (1) the Board has the authority to grant the requested relief and (2) NCRC is in violation of Order No. 16307. For these reasons, as well as the reasons set forth in the Neighbor's Motion, the Motion should be granted.

Sincerely,

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

Richard B. Nettler
Jeannine Rustad Zigner

Enclosures (as stated)
cc: Neighbors
Mr. Denzel Noble (by hand; w/encl.)
Office of Planning (by hand; w/encl.)
DCRA, Zoning Administrator (w/encl.)
ANC 3C (w/encl.)
Maureen Dwyer, Esquire (by hand; w/encl.)

HSFD 060 REV. 1/98

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
LICENSING REGULATION ADMINISTRATION
HUMAN SERVICES FACILILTY DIVISION

FACILITY CONTACT RECORD

NAME National Child Research Center LICENSE NO 906778-CDC

PHONE NO. 363-8777 FAX NO. 244-3459

ADDRESS: 3209 Highland Pl N.W. ZIP CODE 20008

DATE	CONTACT PERSON	RECORDING	SIGNATURE/ DURATION
10/1/97	M. Pavetto	Renewal inspection conducted deficiencies cited	VS
10/22/97		Fire inspection in non compliance	
1/16/98		Follow up inspection conducted deficiencies corrected. C of O not received hearing (BZA) scheduled for April 1, 1998.	
2/27/98		Fire Approval received	
3/11/98		License may be issued for 90 children until new C of O approved for increase of 108 children. D/C maryann Pavetto informed of change. She stated that enrollment would be 90 or less for Summer and that this number would be maintained until new C of O is received	
3/12/98		The CRS will write a letter to the Provider to recapitulate the conversation w/the Center. If the Center has more than 90 enrollees and it does not have the new C of O enrollment must be reduced through attrition. Licensure is Approved.	JGordon 90 minutes
3/19/98		Approved.	Eff 5y

HSFD 060 REV. 1/98

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