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BY HAND

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

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

OPPOSITION

Dear Mr. Griffis:

The following Opposition to the relief requested in BZA Application No. 16970 is submitted on behalf of the Neighbors, as set forth in Exhibit A to that certain 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 (the "Motion"). For the reasons stated below, the Neighbors oppose the relief requested by the National Child Development Center ("NCRC") in the instant application.

A. Statement of Facts.

A complete statement of facts is set forth in the Motion and is incorporated herein by reference. Additional relevant facts regarding NCRC's use and occupancy of the Property (as defined in the Motion) are as follows:

In March of 1981, NCRC was issued a certificate of occupancy for ninety (90) students. In 1994, NCRC initiated significant construction on existing playhouse and playground area, including the cutting down of many mature trees, and the construction of a large deck and concrete pad, and the addition of deck facing and wood latticing. This work was commenced without the necessary

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building permits and, consequently, without review by the Historic Preservation Review Board. Because NCRC failed to obtain the necessary permits, a stop work order was issued by DCRA. As a consequence of its violation of the building regulations, NCRC agreed to abandon certain features of its plans, including the retention of a driveway off of Ordway Street that was being used for access to the construction site. NCRC also agreed to install permanent landscaping along Ordway Street, including trees and bushes that have since matured. In return for these concessions by NCRC and upon the belief that NCRC was committed to keeping the neighborhood informed of its plans, the neighbors agreed not to push for further remedial or enforcement action by the District.

In September 1996, an inspector for DCRA noted that the school's actual enrollment was 166 students and, therefore, instructed NCRC to obtain a new certificate of occupancy to increase its capacity. On January 9, 1997, NCRC's application number 513293 for a certificate of occupancy for 120 students was denied based on the need for approval from the Board of Zoning Adjustment ("Board"). *See Motion Exhibit 7.*

B. Given NCRC's Violation of Order No. 16307, as well as the Fact that Order No. 16307 Has not Expired, the Current Application Should Be Denied.

1. NCRC is in Violation of the Order in BZA Application No. 16307.

As set forth in the Motion and the Neighbor's Response to NCRC's Opposition thereto, NCRC is currently in violation of the order in BZA Application No. 16307 ("Order No. 16307"). Specifically, in BZA Application No. 16307, NCRC sought, and was granted, a special exception for a child development center for 120 students and staff of twenty-eight (28). *See Motion Exhibit __.* Contrary to these limitations, NCRC, by its own admission, has 171 students (NCRC Opposition at p. 9) and a staff of approximately thirty-seven (37). As set forth in the Motion and Response, the limitations in Order No. 16307 were clearly limitations on enrollment, not on the number of students at the Property at any given time. By exceeding the limitations it sought in Order No. 16307, NCRC is in violation of that order.

It should be noted that NCRC filed BZA Application 16307 seeking an increase in its enrollment due to the fact that the Department of Health had discovered that NCRC was in violation of its certificate of occupancy in that its license and corresponding enrollment was for a greater number of children then permitted by its certificate of occupancy. The Department of Health instructed NCRC to reduce its enrollment until such time as it received authorization from the Board for increased enrollment. *Motion Exhibit 14* and *Response Exhibit A.* Additionally, the Department of Health reduced NCRC's license to conform to its certificate of occupancy. This fact is noteworthy in that it highlights NCRC's history of disregard and violation of applicable regulations – seeking relief only when forced to do so.

Rather than abiding by the zoning regulations and seeking relief prior to increasing its enrollment and staffing, NCRC is now attempting to change the meaning of the limitations in Order No. 16307 to conceal and justify its violations. As such, NCRC comes to this Board with unclean hands. If the Board were to accept NCRC's arguments that the limitation on the number of students was intended to be a limitation on the number of students on the Property at any one time, rather than a cap on enrollment, the Board would deny the Neighbor's meaningful redress of the harm that would be imposed upon their neighborhood.

In BZA Application No. 16307, NCRC represented to the community, ANC 3C and the Board that the limitation of 120 students was a cap on enrollment. *See Motion Exhibits16, 18* at pp. 11-12. Based on this repeated representation, the community did not pursue its objection to Application No. 16307. However, had they been aware that NCRC intended this limitation as to the number of students of any given time, given the resulting additional traffic and the corresponding burden to the surrounding residential streets, the Neighbor's would have pursued an opposition to that application. As over three (3) years having passed since the effective date of Order No. 16307, the Neighbors are without recourse to reopen that matter to object to the reality of the operations of NCRC that have just come to light by the filing of the instant action. If the Board is to accept that the limitation of 120 students was intended as a limitation on the number of students on the Premises at any one time and such limitation was supported by the community in BZA application, the Neighbor's will be denied the opportunity in the instant matter to demonstrate how such a limitation is unduly burdensome to the community. The end result will be that NCRC will profit from its misrepresentations to the community, ANC and the Board.

2. Order No. 16307 is Valid Until March 3, 2007, and Given the Circumstances of its Approval, Should be Enforced.

As set forth above, approval of Application No. 16307 by the ANC and community was based upon NCRC's commitment that it would not be seeking further increases in enrollment and that it would not be engaging in any new construction on the Property. These representations, were repeated to the Board, induced the Neighbors to drop their objection to BZA Application No. 16307. Relying on these commitments and representations, the community, including the Neighbors, agreed to a duration of Order No. 16307 of eight (8) years, rather than the five (5) it initially sought by the neighbors and as opposed to the fifteen (15) year duration requested by NCRC. Given NCRC's representations, the community's reliance on the same and the fact that Order No. 16307 does not expire until March 3, 1007, NCRC should be held to its commitment not to seek to increase enrollment or engage in new construction during that time.

C. NCRC Does Not Meet the Criteria for a Special Exception Pursuant to Section 205 of the Zoning Regulations.

As for the criteria for a special exception, 11 D.C.M.R. § 3104.1 permits the Board to grant special exceptions, pursuant to the following:

> Pursuant to authority contained in the Zoning Act of June 20, 1938 (52 Stat. 797), as amended, the Board is authorized to grant special exceptions, as provided in this title where, in the judgment of the Board, those special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special conditions specified in this title...

In short, the Board is empowered to grant a special exception where it finds

(1) The proposed use is in harmony with the Zone Plan and Zone Maps; and
(2) The proposed use is not likely to adversely affect the use of neighboring property.

Specific requirements that NCRC must meet are:

205.2 The center shall be capable of meeting all applicable code and licensing requirements.

205.3 The center shall be located and designed to create no objectionable traffic condition and no unsafe condition for picking up and dropping off children.

205.4 The center shall provide sufficient off-street parking spaces to meet the reasonable needs of teachers, other employees, and visitors.

205.5 The center, including any outdoor play space provided, shall be located and designed so that there will be no objectionable impacts on adjacent or nearby properties due to noise or activity, or visual or other objectionable conditions.

205.6 The Board may require special treatment in the way of design, screening of buildings, planting and parking areas, signs, or other requirements as it shall deem necessary to protect adjacent and nearby properties.

NCRC cannot meet the requirements of Sections 205.2, 205.3 and 205.4. With regard to Section 205.2, NCRC has a track record of violating code and licensing requirements and seeking increases in its capacity only when forced to do so.

1. NCRC's Operations Result in Objectionable Traffic Conditions in the Surrounding Neighborhood.

Current drop-off of and pick-up procedures result in severe problems in the surrounding streets. Parents and guardians of NCRC students regularly double or triple park and/or block driveways while escorting there children to and from the Property. *See Motion Exhibit 3.* Given that the majority of the students come from outside the neighborhood, the amount of traffic traveling to and from the school clogs the surrounding narrow, residential streets. Allowing an increase in enrollment and expansion of the facilities will only further the objectionable traffic conditions.

As to parking, although the building is a contributing building and receives a waiver from the parking requirements of Chapter 21 of the Zoning Regulations, to qualify for a special exception, NCRC must still prove that it provides adequate parking. For twenty-eight (28) full time equivalent staff, NCRC currently provides no parking and is not proposing to add any parking to accommodate its increased staffing. As a result, many of the staff members park in the surrounding neighborhoods, creating a further hardship on traffic, parking and the community. An increase in staff will only exacerbate this effect.

2. NCRC Has Failed to Adhere to Applicable Regulations and Licensing Requirements.

As indicated above, NCRC has a history of violating licensing, zoning and certificate of occupancy requirements and limitations. In 1998, NCRC was forced to apply for an increase in enrollment when the Department of Health reduced its license to conform to its certificate of occupancy. Likewise, NCRC now seeks further expansion, however, the magnitude of this expansion is masked by NCRC's efforts to unilaterally change the parameters of Order No. 16307. That is, NCRC attempts to justify its current violation of enrollment of 171 students while seeking yet another increase in enrollment. Thus, in a short period of time, NCRC will have increased its enrollment from an approved 90 children, to a potential of 240 children.

In November 2002, NCRC held what NCRC touted to be the first annual conference at its premises for other early childhood educators and specialists. *See Motion Exhibit 20.* Contrary to NCRC's assertions that this was an accessory use to a "school", as the conference did not involve interaction with NCRC's students or their parents and/or guardians, it was in violation of the zoning regulations for accessory uses for a child development center and Order No. 16307. *See* 11

D.C.M.R. § 199.1.[1] Such use of the Property only serves as further evidence of NCRC's intended use of the Property as an institutional campus.

Finally, the new classroom building, which is proposed as an "addition"[2] to the existing playhouse, is not an accessory building, as it is being used for the primary purposes of NCRC.[3] Rather, the new building is an additional principal building on the Property. As such, NCRC's application is incomplete in that it fails to seek relief pursuant to 11 D.C.M.R. §2516 to allow two principal structures on a single lot in a residential district.

3. NCRC's Proposal Would Create an Institutional Campus That is Inconsistent with the Surrounding Residential Neighborhood.

The institutional campus sought to be created by NCRC is not in keeping with the residential development patterns in this special area. To the contrary, the proposed additions will constitute a wholesale change in the residential neighborhood. The proposed additions double the gross floor area of the "campus". Moreover, the proposed improvements and increases in enrollment would be overly burdensome on the non-arterial streets of the neighborhood, a characteristic noted years ago when the Board denied NCRC relief which would have resulted in a similar consequence. *See Motion Exhibit 4a.* As in the instant case, objection to the requested expansion of enrollment and construction of additional improvements at the Property sought by NCRC in BZA Appeal No. 7503 were based on: "objectionable traffic conditions brought about by parents bringing children to the school and taking them home", as well as the institutional nature of the proposed construction, which was not compatible with the residential character of the neighborhood. *Exhibit 4a; see also Exhibit 4b.* BZA Appeal No. 7503 emphasizes NCRC's sustained violations of the Board's prior orders and the Zoning Regulations.

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[1] Accessory uses for a child development center include "counseling, education, training and health and social services for the parents or principal guardians of children attending the center." 11 D.C.M.R. § 199.1. As NCRC is not a public school (*i.e.*, NCRC is not "operated and maintained by the District of Columbia Board of Education") and, therefore, cannot rely on accessory uses for a public school. However, assuming that accessory uses for public schools can be referred to for guidance, they do not justify NCRC's use of the property for conferences such as the one held by NCRC at the Property in November 2002, as such use is not "normally incidental to a public school." 11 D.C.M.R. § 199.1.

[2] It is misleading to call the new classroom building an "addition", as the only connection to the existing play house is via a large wall with fence top. Because the existing playhouse and the "addition" are separated from the ground up, each portion is to be deemed a separate building. 11 D.C.M.R. § 199.1. Regardless, whether considered one building or two buildings, NCRC's proposed plans require additional relief in accordance with section 2516 of the zoning regulations.

[3] The new classroom building cannot be considered "accessory", as its use is not incidental to the primary building but, rather, it will be used to carry out the main functions of NCRC, namely teaching. *See* 11 D.C.M.R. § 199.1.

In addition to creating an institutional campus setting, the massive façade of the proposed improvements would impede on the historic, scenic vistas of the area.

CONCLUSION

Based on NCRC's history of violating applicable regulations and orders, including its current violations of Order No. 16307, the relief requested in the instant application should be denied. Denial of the requested relief is additionally supported by the fact that Order No. 16307 has not yet expired and because of NCRC's representations and commitments that it would not seek to increase enrollment or new construction during the duration of Order No. 16307. Having misled the community, as well as the Board, and having induced the community to drop its opposition to BZA Application No. 16307, NCRC cannot now be allowed to benefit from its deceptive tactics.

Finally, the relief must be denied as NCRC does not meet the criteria for a special exception for a child development center. Specifically, the institutional nature of its proposed plans are not consistent with the zone plan for this residential neighborhood and would adversely affect the nature of the neighborhood, including its scenic vistas. Finally, the traffic imposed upon the surrounding narrow, residential streets adversely affects the use of neighboring properties.

For the foregoing reasons, the Neighbors respectfully request that the relief requested by NCRC in the instant application be denied.

Sincerely,

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

Richard B. Nettler
Jeannine Rustad Zigner

cc: Neighbors
Mr. Denzel Noble (by hand.)
Office of Planning (by hand.)
Mr. Robert Kelly, Zoning Administrator
ANC 3C