ShawPittman LLP

*A Limited Liability Partnership Including Professional Corporations*

PHIL T. FEOLA
(202) 663-8789
phil.feola@shawpittman.com

2003 OCT 14 AM 11:05

October 14, 2003

VIA HAND DELIVERY

Mr. Geoffrey Griffis, Chairman
D.C. Board of Zoning Adjustment
Suite 210
441 4th Street, N.W.
Washington, D.C. 20001

**Re: BZA Application No. 17022, Edmund Burke School**

Dear Chairperson Griffis and Members of the Board:

The Edmund Burke School ("Burke") opposes the Motion to Dismiss submitted by the Van Ness South Tenants Association (the "Tenants Association"). The Tenants Association claims that Burke should not be granted a hearing because of its "continuing and longstanding noncompliance" with the Board's 1983 Order. In support of its argument, the Tenants Association infers the seemingly attractive possibility that such dismissal would provide an opportunity for the Board to enforce its orders. However, the dismissal of an application based on noncompliance is inappropriate for several reasons. Neither the D.C. Administrative Procedure Act ("DCAPA") nor the Zoning Regulations provides for dismissal of a special exception application on the grounds of noncompliance. Both the DCAPA and the BZA's delegating statute require the BZA to hold a hearing on special exception applications. Further, the D.C. Court of Appeals has held that, in deciding special exception applications, the Board must consider only those factors listed in the Zoning Regulations. Finally, dismissing applications based on noncompliance would create unsound public policy and frustrate the purpose of the Zoning Regulations.

## I. DISCUSSION

### A. Neither the D.C. Zoning Regulations nor the DCAPA Provides that an Application Can be Dismissed for Noncompliance

The Zoning Regulations provide that an application for a special exception may be dismissed prior to a decision on the merits only if the applicant fails to follow procedural requirements. 11 DCMR § 3113.11. The requirements for special exception applications are set forth in § 3113.2-3113.6. Noticeably absent is any requirement that the application demonstrate its compliance with prior BZA orders or the Zoning Regulations. *See Id.* at § 3113. In addition, § 3117.3 lists the powers of the presiding officer at the hearing, none of which include dismissing an application for noncompliance. *Id.* at § 3117.3. The DCAPA likewise contains no

BZA
Case No. 17022
Exhibit No. 134

Board of Zoning Adjustment
District of Columbia
CASE NO. 17022
EXHIBIT NO. 134

provision allowing an application to be dismissed for noncompliance. Accordingly, there is no statutory or regulatory authority that would allow the Board to dismiss Burke's application for failure to comply with a prior BZA order.

**B. The D.C. Zoning Regulations and DCAPA require the BZA to Hold a Hearing on Every Special Exception Application.**

Section 3117.2 of the Zoning Regulations clearly provides that "[a] public hearing ... shall be held on each appeal or application." *Id.* at § 3117.2 (emphasis added). During the hearing, the applicant is granted the opportunity to present evidence and testimony. *Id.* at §§ 3117.4, 3119.3-3119.5. In addition, the DCAPA provides that an agency must hold hearings in all contested cases, and "opportunity shall be afforded all parties to present evidence and argument ...." D.C. Code § 2-509(a) (2001). Moreover, "[e]very party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence and to conduct such cross examination as may be required for a full and true disclosure of the facts." *Id.* at § 2-509 (b). Accordingly, under the Zoning Regulations and the DCAPA, the Board must hold a hearing on Burke's application and give it the opportunity to demonstrate that it meets the requirements of § 206 of the Zoning Regulations.

**C. The BZA Must Limit its Consideration of the Special Exception Application to the Criteria Set Forth in § 206 of the Zoning Regulations**

The discretion of the Board to grant or deny special exceptions is limited to a determination of whether the application meets the requirements of the Zoning Regulations. *See, e.g. Bakers Local Union v. Dist. of Columbia Bd. of Zoning Adjustment,* 437 A.2d 176, 178 (D.C. 1981). Once the applicant has made the requisite showing, the Board ordinarily must grant the application. *Id.* The Zoning Regulations do not permit the Board to go beyond its delegated function in special exception cases. *Gladden v. Dist. of Columbia Bd. of Zoning Adjustment*, 659 A.2d 249, 255 D.C. 1995) ("The BZA has no authority to amend any regulation or map."); *Rose Lees Hardy Home and School Ass'n v. Dist. of Columbia Bd. of Zoning Adjustment,* 343 A.2d 564, 566 (D.C. 1975) (Board not to address legislative standards, but "must presume that [they] are embodied in the Zoning Regulations as written."). Furthermore, any conditions imposed by the Board in granting a special exception must be directly related to the proposed use of the property and may not be more severe than the ordinance itself. *See* 1 Op. Corp. Corp. Counsel 176-81 (1976). Section 206 of the Zoning Regulations provides that a private school shall be permitted so long as it is "not likely to become objectionable to adjoining and nearby property because of noise, traffic, number of students, or otherwise objectionable conditions." 11 DCMR

§ 206.2. The school also must provide ample parking space. 11 DCMR § 206.3. The Tenants Association's argument does not relate to § 206 and does not relate to the use of the land. Because past compliance is not a requirement of the Zoning Regulations and does not relate to the use of the land, the Board may not dismiss an application on that basis.

### D. Dismissing Applications for Noncompliance would Frustrate the Purpose of the Zoning Regulations

If the Board dismisses Burke's application for noncompliance, the consequences will be far more detrimental than beneficial to the Board, future applicants, and the residents of the District. If the Board punishes applicants for past noncompliance, they will have no incentive to come into compliance, and many will not have the means to come into compliance. For example, a small business that unknowingly has been operating in violation of the Zoning Regulations will be required to cease operations for several months during the application and hearing period. Such applicants would have an incentive to continue to operate illegally rather than come to the Board in an attempt to comply with the Zoning Regulations.

## II. CONCLUSION

Burke was in compliance with the Board's 1983 Order for many years. Contrary to the arguments of the Tenants Association, Burke did not purposely disregard the enrollment cap contained in that Order. Indeed, Burke has taken steps to reduce the school's enrollment in a manner that would not devastate the families whose children are enrolled there. The current application requests only a modest increase in enrollment – fifty students more than was approved under the 1983 Order and only twenty-five more than are currently enrolled. For the reasons stated above, Burke requests that the Board deny the Motion to Dismiss.

Sincerely,

Phil Feola

Ashleigh Dale Horne

cc: Office of Planning – Jennifer Steingasser – By Hand
Office of Planning – Steve Cochran – By Hand
DOT – Ken Laden – By Facsimile
DOT – Colleen Smith – By Facsimile
David Shapiro – By Hand

# Certificate of Service

I hereby certify that on October 14, 2003, a copy of the foregoing material was sent via first class mail and/or hand delivered to the following:

Ms. Catherine J. Wiss
Chairperson
Advisory Neighborhood Commission 3F
3810 Albemarle Street, NW
Washington, D.C. 20016

ANC 3F
4401-A Connecticut Avenue, N.W.
Box 244
Washington, D.C. 20008

NULS
c/o Steven Gell
1101 30th Street, N.W., Suite 500
Washington, DC 20007

Ms. Linda Jay
2951 Upton Street, NW
Washington, DC 20008

Van Ness South Tenants Association
and Consulate Tenants Association
c/o Pat Brown, Esquire
Greenstein, DeLorme & Luchs
1620 L Street, NW, Suite 900
Washington, DC 20036

Sirius LLC
c/o Thomas P. Brown Management, Inc
4545 42nd Street, NW, #301.
Washington, D.C. 20016

NARDS
c/o Deirdre Karambelas
2938 Upton Street, N.W.
Washington, D.C. 20008

Phil Feola /HDK

Phil Feola

Document #: 1356460 v.1