District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001

BZA 17022

GARLAND F. PINKSTON
CLERK OF COURT

Telephone: 879-2700
Area Code 202

September 3, 2004

04-AA-1057 Neighbors United for Livable Streets, et al vs. District of Columbia Board of Zoning Adjustment

District of Columbia Board of Zoning Adjustment
Jerrily Kress, Director
441 4th Street, N.W.
Suite 210S
Washington, D.C. 20001

Dear Sir/Madam:

Pursuant to the rules of this Court I am transmitting, herewith, a copy of the petition for review filed on September 3, 2004, in the above-entitled case.

Yours very truly,

Garland F. Pinkston
Clerk of Court

By: Ruth Gant
Information Center Supervisor

cc: Edward Schwab, Esq.

Case No. 17022
Exhibit No. 202

Board of Zoning Adjustment
District of Columbia
CASE NO. 17022
EXHIBIT NO. 202

DISTRICT OF COLUMBIA
COURT OF APPEALS

NEIGHBORS UNITED FOR LIVABLE STREETS
2940 Upton Street, N.W.
Washington, D.C. 20008

and

RICHARD & PEARL RICHARDSON
2940 Upton Street, N.W.
Washington, D.C. 20008

and

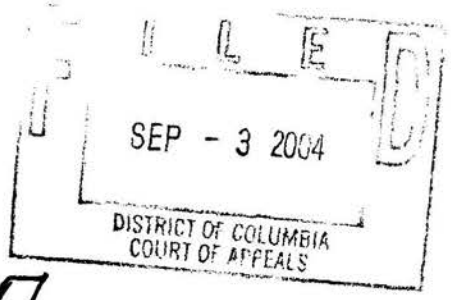
RUTH MCDIARMID
2936 Upton Street, N.W.
Washington, D.C. 20008

Petitioners,

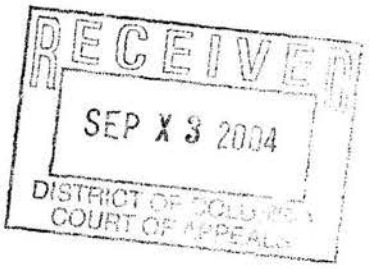
v.

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
Room 210
441 Fourth Street, N.W.
Washington, D.C. 20001

Respondent.



No. 04AA-1057



PETITION FOR REVIEW FROM AN ORDER OF THE DISTRICT OF COLUMBIA ZONING COMMISSION

Petitioners, Neighbors United for Livable Streets[1] ("NULS"), Ruth McDiarmid, Pearl Richardson and Richard Richardson (collectively "Petitioners"), petition for review the order of the

[1] NULS has standing to bring this appeal pursuant to D.C. Code § 29-971.07 (2001).

District of Columbia Board of Zoning Adjustment dated August 4, 2004, in Application No. 17022 granting the request of the applicant, the Edmund Burke School (the "Burke School"), for a special exception to allow a private school. Specifically, the Burke School sought and was granted approval to construct a new school building across a public alley from its existing building and to expand the private school use to both buildings, with an increase in enrollment from 270 to 320 students and an increase in faculty/staff from 35 to 70. In support hereof, Petitioners state as follows:

1. Respondent erred when it granted the Burke School's request for a special exception to allow the construction of the new building and conditioning the approval on the construction of a pedestrian bridge across a public alley connecting the new building to the existing building, as the proposed bridge violates the rear yard provisions of section 2503.1 of the zoning regulations (11 D.C.M.R.). Respondent findings in support of its decision are not supported by substantial evidence in the record and its interpretation of the zoning regulations on the pedestrian bridge and the rear yard requirements of those regulations is inconsistent with the plain meaning of those regulations. As a result, Respondent erroneously concluded that no variance from the rear yard provisions of section 2503.1 of the zoning regulations was required.

2. Respondent erred in failing to determine whether additional relief from the loading and/or parking requirements of §§2200 *et seq.* and 2000 *et seq.*, respectively of the zoning regulations was required. Additionally, Respondent failed to consider evidence that construction of the proposed underground parking garage would not be feasible due to geotechnical conditions at the site.

3. Respondent failed to include in its final order conditions Respondent voted to approve at its December 2, 2003 meeting.

4. Respondent erred when it granted the Burke School's requested relief, since the Burke School failed to demonstrate that the relief could be granted without causing substantial detriment to the public good or impair the intent, purpose or integrity of the zone plan.

5. Respondent's findings are not supported by substantial evidence in the record and they bear no rational relationship to the relief requested and granted.

6. Respondent's decision is otherwise arbitrary, capricious, not supported by substantial evidence and in violation of applicable law in that it fails to address all relevant issues raised by those opposed to the request.

7. Respondent's decision fails to adequately address the concerns and issues raised by the affected Advisory Neighborhood Commission.

WHEREFORE, Petitioners request that the Court of Appeals vacate the order of the Board of Zoning Adjustment and direct Respondent to deny the special exception and relief requested.

Respectfully submitted,

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

Richard B. Nettler #929471
Jeannine Rustad #451110

1801 K Street, N.W.
Suite 1200
Washington, D.C. 20006
(202) 775-0725
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 3, 2004, a copy of the foregoing Petition for Review was mailed, first-class, postage prepaid, to:

The Burke School
c/o Phil Feola, Esq. and Ashleigh Horne, Esq.
Shaw Pittman, LLP
2300 N Street, N.W.
Washington, D.C. 20037

Advisory Neighborhood Commission 3F
Capital Memorial Church
4401-A Connecticut Avenue, N.W.
Box 244
Washington, D.C. 20008

Van Ness South Tenants Association And Consulate Tenants Association
c/o J. Patrick Brown, Esquire
Greenstein, DeLorme & Luchs
1620 L Street, N.W., Suite 900
Washington, D.C. 20036

Linda Jay
2951 Upton Street, N.W.
Washington, D.C. 20008

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

Neighbors Allied for the Reasonable Development of Schools
c/o Deirdre Karambelas
2938 Upton Street, N.W.
Washington, D.C. 20008



Richard B. Nettler

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17022 of Edmund Burke School, pursuant to 11 DCMR § 3104, for a special exception to allow an addition to an existing private school and to increase the enrollment from 270 to 320 students and faculty/staff to 70, under § 206, in the R-2 and R-5-D Districts at premises 4101 Connecticut Avenue, N.W. and 2955 Upton Street N.W. (Square 2243, Lots 67 and 68).

HEARING DATES: July 15, 2003, October 14, 2003, and October 28, 2003
DECISION DATES: December 2, 2003 and August 3, 2004

DECISION AND ORDER

This application was submitted April 14, 2003 by the Edmund Burke School, the owner of the property that is the subject of the application. Following a public hearing, the Board voted 5-0-0 on December 2, 2003 to grant the application subject to conditions.

Procedural Matters

Application. The Edmund Burke School ("Burke School" or "Applicant") filed an application pursuant to 11 DCMR § 3104 for a special exception under 11 DCMR § 206 to construct a new school building next to its existing building and to expand the private school use to both buildings, with an increase in enrollment from 270 to 320 students and an increase in faculty/staff from 35 to 70, in the R-2 and R-5-D zones at 4101 Connecticut Avenue, N.W. and 2955 Upton Street, N.W. The zoning relief requested in this application was self-certified pursuant to 11 DCMR § 3113.2.

Notice of Application and Notice of Public Hearing. By memoranda dated April 21, 2003, the Office of Zoning sent notice of the application to the Office of Planning; the Department of Transportation; the Councilmember for Ward 3; Advisory Neighborhood Commission ("ANC") 3F, the ANC for the area within which the subject property is located; and the single-member district ANC 3F07.

The Board originally scheduled a public hearing on the application for June 24, 2003. Pursuant to 11 DCMR § 3113.13, the Office of Zoning on April 29, 2003 mailed notice of the hearing to the Applicant, the owners of property within 200 feet of the subject property, and ANC 3F. Notice was also published in the D.C. Register (50 *D.C.R.* 3687). The hearing was postponed at the Applicant's request until July 15, 2003. Notice of the rescheduled hearing was sent by letter dated May 12, 2003 to the Applicant, the owners

of property within 200 feet, and ANC 3F, and was published in the D.C. Register (50 *D.C.R.* 4152).

Requests for Party Status. ANC 3F was automatically a party in this proceeding. The Board granted a request for party status in support of the application submitted by Neighbors Allied for the Reasonable Development of Schools ("NARDS"), a group of residents of 28th Place, Upton and Tilden Streets, and Connecticut Avenue in the vicinity of the subject property represented by Deirdre Karambelas. The Board granted timely requests for party status in opposition to the application by (1) Neighbors United for Livable Streets ("NULS"), a coalition of residents of Upton and Tilden Streets, N.W. in the vicinity of Burke School; (2) Sirius LLC ("Sirius"), the owner of a 37-unit apartment building located at 4107 Connecticut Avenue, N.W., abutting the site of the proposed expansion; (3) Linda Jay, a resident of Upton Street in a house immediately east of the existing Burke School building; and (4) 2950 Van Ness Tenants' Association and Van Ness South Tenants' Association, organizations representing residents of large apartment buildings (269 and 625 units, respectively) at 2950 and 3003 Van Ness Street, N.W. (collectively, "Van Ness Tenants"). The Board denied a request for party status in opposition submitted by Virginia Wilson Worthington, a resident of the 2800 block of Upton Street N.W.

Applicant's Case. The Applicant provided testimony and evidence from David Shapiro, Burke School's Head of School; Steve Pruitt, chairman of its Board of Trustees; William Gridley, a principal in Bowie Gridley Architects, recognized by the Board as an expert in architecture; Martin Wells of Wells & Associates, recognized by the Board as an expert in transportation and traffic engineering; and Officers Michael Boyd and Michael Auls of the District of Columbia Metropolitan Police Department.

Government Reports. By report dated July 8, 2003 and through testimony at the public hearing, the Office of Planning ("OP") recommended approval of the application subject to certain conditions pertaining generally to transportation, school management, sound levels, and student conduct. OP concluded that the Applicant's proposed new building – which would expand the school's occupiable space and provide a parking garage, a queuing ramp for student drop-offs and pick-ups, and a pedestrian bridge connection to the existing building – would allow the Applicant to make operational changes and implement new traffic and parking management plans that would lessen the current impacts of the private school use and accommodate the requested increases in number of students and employees without creating additional adverse impacts.

The Department of Transportation ("DDOT") noted that the Applicant's proposed expansion would add traffic to an already congested area, and that the number of institutional land uses in the vicinity of the subject property presented unique transportation challenges, but concluded that the Applicant demonstrated an ability to

reduce the traffic impacts of Burke School through the implementation of various transportation management programs. By report dated July 3, 2003 and through testimony at the public hearing, DDOT indicated its support for the proposed expansion "linked with successful implementation" of the Applicant's proposed expanded traffic management plan, which could reduce or contain traffic impacts from a limited expansion of student population. Based on field visits to the subject property, DDOT concluded that the Applicant's current traffic management plan has had a positive effect on traffic patterns in the immediate area of Burke School, and that the compliance rate, although less than 100 percent, was substantial enough to improve the traffic situation over pre-existing conditions. DDOT indicated its willingness to continue working with the Applicant to revise the traffic management plan, if necessary, in response to future changes in traffic conditions in the vicinity of the subject property.

DDOT's analysis of the requested special exception was undertaken in the context of a larger study commissioned by DDOT to examine existing and projected transportation conditions along relevant segments of Connecticut Avenue. The DDOT study of Connecticut Avenue traffic was completed in 2003.

ANC Report. At a duly noticed public meeting held July 1, 2003 with a quorum present, ANC 3F passed a resolution, by a vote of 5-0-1, recommending denial of the application. By a vote of 5-1-1, the ANC adopted a report, also dated July 1, 2003, that identified issues and concerns relating to the application; they were: (a) the Applicant's "lobbying campaign" and neighborhood advisory committee, which was unable to generate neighborhood consensus due to its "flawed composition"; (b) adverse conditions in the surrounding neighborhood associated with the existing Burke School operation pertaining to traffic, parking, and student conduct that would be exacerbated by the Applicant's proposed expansion; (c) the potential risk to neighboring buildings, and to subsurface water in the surrounding neighborhood, during construction of the proposed addition due to the need for excavation and blasting at the subject property; and (d) the incomplete nature of the application, which failed to request necessary variance relief with respect to loading requirements and to court and yard setback requirements affected by the Applicant's proposed pedestrian bridge.

The ANC concluded that approval of the proposed expansion of the Burke School would violate 11 DCMR § 206.2 primarily because of noise caused by students and air-conditioning equipment, traffic congestion, student misconduct, and construction issues. ANC 3F recommended denial of the application with instructions to Burke School that the caps on the number of students and faculty/staff previously adopted by the Board remain in effect.

Party in Support. The representative for Neighbors Allied for the Reasonable Development of Schools testified that Burke School has made a stronger, more consistent

effort to be a good neighbor in the community; for example, through implementing successful measures to reduce school-related traffic, providing information to residents of the neighborhood, and cleaning litter from Upton Street. According to NARDS, many persons in the community support or are neutral about the Applicant's proposed expansion.

Persons in Support. The Board received numerous letters and heard testimony from many persons interested in the application. Persons in support generally described the many attributes of Burke School, the success of its recent efforts to reduce the volume and improve the flow of school-related traffic, the suitability of the subject property as a location for a school, the desire to have the Applicant's proposed building on the site rather than a larger apartment building that would create additional traffic and parking demands without benefit of a traffic management plan, and the need for private schools and more school options in the District.

Parties in Opposition. Neighbors United for Livable Streets presented evidence and testimony from several witnesses, including expert testimony from Milton Shinberg, an architect, and from Joe Mehra, a traffic consultant. The traffic consultant did not perform an independent study of traffic in the vicinity of the subject property, but commented on the results of the Applicant's transportation study.

NULS's opposition to the application cited especially traffic and parking concerns; safety concerns related to the presence of students outdoors in the neighborhood near the subject property, particularly in the alley behind the existing school building; deficiencies in the Applicant's proposed school management plan and traffic management plan; the commercial or institutional appearance of the proposed new building; and the erosion of the residential fabric of the neighborhood caused by the expansion of an institutional use. NULS's traffic expert testified that the Applicant's plan to create a new curb cut on Connecticut Avenue, a major arterial, would affect the flow of traffic, especially northbound. NULS also contended that the driveway exit onto Upton Street, next to the public alley exit, would create points of conflict between vehicles and between vehicles and pedestrians.

Sirius opposed the application on grounds that the requested special exception would (a) create objectionable noise impacts for residents of the apartment building abutting the subject property as a result of the placement of mechanical equipment and an outdoor recreation space on the roof of the proposed new building, (b) compromise the operational efficiency of the apartment building by creating additional traffic in the rear alley, (c) create objectionable visual impacts due to the institutional appearance of the pedestrian bridge, (d) create traffic-related safety concerns, especially with respect to the entrance to the garage from Connecticut Avenue directly south of the pedestrian entrance to the abutting apartment building, and (e) erode the residential character of the

Avenue, one block from the subject property. The campuses of Intelsat Corporation and the University of the District of Columbia are located on the west side of Connecticut Avenue across the street from and to the north of the subject property.

5. The existing school building is located in an R-2 district that encompasses the neighborhood to the east of the subject property. Upton Street is predominantly residential in the vicinity of Burke School, although the Levine School of Music and Howard University law school are also nearby.

6. A five-story apartment building (owned by Sirius, LLC, a party in opposition) abuts the subject property to the north along Connecticut Avenue. The remainder of Connecticut Avenue frontage on Square 2243 is occupied by townhouses, some of which are used for commercial purposes.

7. Connecticut Avenue in the vicinity of the subject property is characterized by a pattern of medium- and high-density residential uses alternating with moderate- and medium-density commercial centers, with lower-density residential areas typically located behind the higher density uses along the avenue.

The Proposed Private School Use

8. The Applicant proposes to construct a new building on the subject property that will be used, along with the existing Burke School building, to expand the Applicant's private school operation. The proposed new building will contain classrooms, computer rooms, photography labs, music rooms, art studios, and administrative space, and will also have a black-box auditorium. An outdoor terrace space of approximately 1,500 square feet will be provided for recreational purposes at the Connecticut Avenue corner, buffered by walls on the north and east sides.

9. The entrance to the new building will be at the corner of Connecticut Avenue and Upton Street. The new building will incorporate a curved driveway, entered from Connecticut Avenue north of the pedestrian entrance, that will lead to the new underground garage and exit onto Upton Street.

Loading facilities

10. The Applicant asserted that the new building would not require loading facilities because its size, as measured consistent with 11 DCMR § 2205.2, would be less than 30,000 square feet of gross floor area, the threshold size for a loading berth requirement pursuant to 11 DCMR § 2201.1. Alternatively, the Applicant stated

that, if loading facilities were required under the Zoning Regulations, the new building could provide a loading berth, 30 feet by 12 feet, at the rear of the property accessible by the driveway leading to Upton Street. The loading facility would include a 100-square-foot loading platform and a service/delivery loading space.

11. DDOT testified that a loading dock would not be necessary for use of the subject property as a private school, provided that occasional loading or unloading activities could be accomplished using a portion of the garage parking area.

12. The ANC and parties in opposition contended that the Applicant's proposed new building would require a loading facility under the Zoning Regulations, and that the Applicant misapplied § 2205.2 in asserting that no loading berth was needed.

13. The Board makes no finding with respect to whether the proposed new building will require loading facilities pursuant to chapter 22 of the Zoning Regulations. Rather, the Zoning Administrator will make that determination upon review of the Applicant's plans submitted as part of its application for a building permit. The Board credits DDOT's conclusion that a loading berth is not necessary to avoid any adverse traffic impacts associated with the proposed private school use of the subject property, and notes that the Applicant has indicated that a loading berth and platform could be provided at the site with access from the public alley at the rear (Exhibit 126, Attachment B-2).

Pedestrian bridge

14. The Applicant proposes to construct a pedestrian bridge to connect the new and existing buildings at the second-floor level. The bridge, approximately 33 feet long and 15 feet above ground, would cross the public alley between the existing and proposed buildings near Upton Street.

15. The Applicant testified that the front of the subject property is the property line facing Connecticut Avenue, so that the rear yard is the rectangular area (approximately 17 by 30 feet) located immediately opposite the front, where the property line bends, parallel to Connecticut Avenue, at the corner adjacent to the alley. The property line parallel to the alley separating the new building from the existing building would therefore constitute a side, and – but for the presence of the proposed pedestrian bridge – the area between the new building and the alley would constitute a side yard. (That area would be large enough to satisfy the applicable minimum width requirement.) According to the Applicant, because no side yard is required, the pedestrian bridge could be constructed as proposed, and would constitute an extension of the new building that would create two courts –

the open areas to the north and south of the pedestrian bridge – that would exceed the minimum size requirements for courts.

16. The ANC and parties in opposition asserted that the pedestrian bridge would violate zoning provisions that require unobstructed yards or courts. They argued that the rear of the subject property should be defined by the entire property line running from the Upton Street frontage to the corner of the side abutting the Sirius apartment building.

17. The Board finds that the Applicant has properly designated the rear yard of the subject property – a five-sided, irregularly shaped corner lot – as a result of its selection of the Connecticut Avenue property line as the front. Therefore, the proposed pedestrian bridge would be located where a side yard would be required, and would not violate the zoning provision requiring an unobstructed rear yard. The Board finds that the pedestrian bridge would create two open courts consistent with the minimum size required under the Zoning Regulations.

School operations

18. Trash will be removed from Burke School through the Van Ness-Upton alley, and not from the east-west alley serving residents to the east of the school. Trash removal will occur between 9:00 a.m. and 3:00 p.m.

19. Most deliveries to Burke School will continue to occur through the front door of the existing school building during school hours.

20. The Applicant proposed a "school management plan" that was made mandatory for all students as an element of their enrollment contract with Burke School. Highlights of the school management plan include:

    (a) regular operation of the private school use is limited to programs and activities of Burke School;

    (b) all non-school-related use of the buildings will be limited to no more than three events per month;

    (c) the Applicant will not lease or rent its new theater or existing gym to any outside organization, although the Applicant will, from time to time, donate the use of the theater or gym as a public service; for example, to serve as a polling place or meeting space for public bodies;

(d) an annual report of student enrollment will be made available to an enforcement committee (described below in Finding of Fact No. 22) and to ANC 3F each September;

(e) noise emanating from the Applicant's buildings will not exceed 60 dba during the day and 55 dba during the night, as measured at the property line; and

(f) trespass by Burke School students on private property is identified as an infraction of the enrollment contract.

21. The school management plan includes guidelines for monitoring and assessing the Applicant's compliance with the student enrollment and faculty/staff limits adopted by the Board, with institutional sanctions if Burke School fails to comply. The plan also addresses the monitoring and assessment of the Applicant's traffic operations and the creation of institutional sanctions if the Applicant fails to achieve an acceptable standard.

22. The Applicant proposed to establish a seven-member enforcement committee to assess the success of its school management plan, including the traffic management plan (described in Findings of Fact No. 35-37). Three members of the committee would be appointed by Burke School; three members would be residents of the surrounding neighborhood; and the seventh member would be a nonvoting mediator, skilled in mediation of neighborhood, school, and community disputes, selected by the committee from a list provided by the Federal Mediation and Conciliation Service or other neutral agency. Any dispute about which the committee cannot reach agreement could be submitted to binding arbitration. Burke School would pay the full cost of the first arbitration, and the committee could decide how to apportion costs for any additional arbitrations in the same year. The Applicant indicated a willingness to pay all mediation and arbitration costs.

23. The enforcement committee will evaluate the Applicant's performance with respect to (a) the number of violations of restrictions on student pick-ups and drop-offs (the Applicant is allowed a maximum of 10 violations per week); (b) measures taken by the Applicant to ensure successful implementation of the school management plan; and (c) the number of students and faculty/staff, as reported by the Applicant by sworn affidavit every September and January.

24. The enforcement committee may assess fines against the Applicant under certain circumstances, and will have the choice of using the fines to support

improvements in traffic management or as a donation to an agreed-upon charitable organization.

(a) The committee will issue three management evaluation reports each academic year. Two consecutive grades of unsatisfactory or three consecutive grades of poor or unsatisfactory will trigger a management sanction in the form of a fine in the dollar amount of two tuitions (currently approximately $40,000).

(b) The committee will issue enrollment evaluation reports each year in September and January. If Burke School is out of compliance with enrollment, it will pay a fine equal to the tuition paid by the number of students over-enrolled. If Burke School is out of compliance with faculty/staff, it will pay a fine equal to one tuition.

25. The Applicant will establish and maintain an escrow fund with a minimum balance of $40,000 to pay any fines imposed by the enforcement committee. The escrow fund will be held, managed, and administered by an independent trustee selected by the committee. The trust agreement will require the trustee to issue a check upon notification of a decision by the enforcement committee or an arbitrator requiring sanctions.

26. The ANC objected that the Applicant's compliance plan was not satisfactory and would place too heavy a burden on nearby residents, who would be required to monitor daily compliance with a complicated traffic management scheme, note violations, report violations to Burke School, and participate as members of the enforcement committee. The ANC also asserted that the Applicant's proposed $40,000 penalty was too small in light of the requested increase in enrollment from 270 to 300 and ultimately 320 students.

27. The Board finds that the Applicant's school management plan, together with the other conditions imposed by this order, is adequate to mitigate any adverse impacts potentially arising from operation of the proposed private school use on the subject property. The Applicant has proposed adequate measures to ensure compliance with the school management plan, including formation of the enforcement committee, designation of a contact person to receive complaints pertaining to school-related traffic and parking, and enforcement action by traffic monitors (as discussed in Finding of Fact No. 39). The Board does not agree with the ANC that the plan would require residents of the surrounding neighborhood to monitor compliance with the traffic management plan or other components of the school management plan. Rather, the Applicant's effort to ensure compliance by

students and their families allows for input from neighborhood residents but is not dependent on their participation.

Noise Impacts

28. The Applicant proposed to relocate the air conditioning and emergency electric generator now used by Burke School, currently located between the eastern wall of the existing building and the adjacent residence on Upton Street, to the center of the roof of the new building. The mechanical equipment will be located away from the neighboring apartment building, and sound-baffling will be installed to minimize noise impacts. Additional equipment also located on the roof of the new building will be surrounded by 10-foot masonry walls.

29. The Board credits the testimony of the Office of Planning that noise generated by the proposed private school use within the perimeter of the subject property will be acceptable. OP concluded that approval of the application would likely lessen the noise impacts of the private school use, in part because the expanded space available in the new building and the pedestrian bridge, which would provide enclosed access between the Burke School buildings, would encourage students to remain inside the school when not in class. In particular, the outdoor area on the roof of the new building will provide outdoor recreation space buffered by walls on two sides and will channel any noise away from the nearby residences and toward Connecticut Avenue.

30. The private school use in the existing building and in the proposed new building on the subject property will occur principally indoors or in the rooftop terrace. The new addition will be oriented toward Connecticut Avenue, away from the residential area.

31. The mechanical equipment located on the roof will be constructed so as to minimize any noise impacts. The roof structure and penthouse will be higher than the adjacent apartment building, and will comply with the requirements of § 411 of the Zoning Regulations, including with respect to setbacks from the roofline and enclosure behind walls.

32. Based on the above findings, the Board concludes that the requested special exception will not create adverse noise impacts on neighboring property.

Traffic Impacts

33. Connecticut Avenue is a major arterial street radiating from downtown Washington. The Board credits the testimony of the Applicant's traffic expert that

Connecticut Avenue presently carries approximately 3,000 to 3,700 peak-hour trips.

34. The public alley system in the vicinity of the subject property includes an alley (approximately 16 feet wide) between Upton and Van Ness Streets generally parallel to Connecticut Avenue and separating the subject property from the existing school building. This alley intersects with another alley that runs parallel to Upton Street and provides access to the six dwellings on the north side of Upton Street before dead-ending in the eastern part of Square 2243.

35. Burke School is located one block south of the Van Ness/UDC Metrorail station and is served by Connecticut Avenue Metrobus lines. The Metrorail station provides an underground pedestrian connection between the east and west sides of Connecticut Avenue that can be used by the general public without having to pay to enter the Metrorail system.

36. The Applicant's new building will contain a curved driveway crossing the subject property. Upon entering the driveway from Connecticut Avenue, drivers will choose to enter the ramp to the underground garage or to join a queue for student drop-offs and pick-ups; as many as 15 vehicles could be queued in the driveway at one time. The 10-foot-wide driveway will exit onto Upton Street and will be separated from the alley it parallels by a series of removable bollards along the eastern property line.

37. In March 2002, the Applicant implemented a morning drop-off plan in effect between 7:30 and 8:30 a.m. The morning plan was designed to reduce school-related traffic on Upton Street without burdening other residential streets and alleys. The Applicant proposed to expand the morning plan after construction of the new building so as to:

    (a) prohibit school-related traffic traveling west on Upton Street toward Burke School;

    (b) prohibit student drop-offs in front of the existing school building or in the public alley between Upton and Van Ness Streets;

    (c) prohibit access to the driveway on the subject property via any public alley between Veazey Terrace and Van Ness Street, between Van Ness and Upton Streets, or between Upton and Tilden Streets;

(d) allow use of the driveway by vehicles dropping off two or more students, with vehicles permitted to turn east or west onto Upton Street when exiting, after yielding to traffic in the adjacent public alley;

(e) allow student drop-offs from vehicles traveling south on Connecticut Avenue at the "Kiss & Ride" located outside the Van Ness/UDC Metrorail station as well as on Van Ness Street west of Connecticut Avenue and on Tilden Street either east of 29th Street or west of Connecticut Avenue; and

(f) employ two uniformed traffic monitors – stationed at the entrance to and exit from the driveway from 7:00 until 10:30 a.m. – who will help to maintain the flow of traffic from Upton Street to Connecticut Avenue and to identify families who do not adhere to traffic requirements.

38. The Applicant also proposed an afternoon pick-up plan, in effect between 3:30 and 4:30 p.m., that would move school-related traffic off Upton Street and onto pick-up lanes on the subject property. The Applicant proposed to implement the afternoon plan after construction of the new building so that:

(a) all student pick-ups will occur on the driveway and not in front of the existing building on Upton Street;

(b) vehicles arriving to pick up students will be prohibited from using Upton Street to approach the driveway;

(c) vehicles leaving the driveway will be permitted to turn east or west onto Upton Street, but may not use the alley between Upton and Tilden Streets;

(d) vehicles will leave the driveway in a single lane, yielding to alley traffic; and

(e) two uniformed traffic monitors will be stationed at the entrance to and exit from the driveway between 2:30 and 6:30 p.m.

39. In addition to the drop-off and pick-up plans, other elements of the Applicant's traffic management plan include:

(a) a Metro benefit, providing a 50-percent rebate, for all students using public transportation, where previously only students living in the District of Columbia were eligible;

(b) a Metro benefit for all faculty and staff;

(c) a shuttle van service, operating on normal school days between shuttle stops designated by the Applicant and the subject property, from 7:30 to 8:15 a.m.;

(d) a requirement that faculty, staff, and students who drive to Burke School must register their vehicles with the Applicant and display Burke School identification stickers on the vehicles;

(f) enforcement action by two uniformed traffic monitors who will monitor Upton Street for school-related vehicles parked in any restricted space in the 2900 block of Upton Street in violation of the traffic management plan;

(g) training for Burke School employees, at the beginning of each semester, on the implementation and enforcement of the traffic management plan; and

(h) designation of a contact person who will receive, and maintain a telephone log of, comments and complaints with respect to traffic and parking.

40. The Applicant's implementation of its traffic management plan – initially voluntary but subsequently made mandatory – has decreased the number of vehicles that travel to the existing Burke School for student drop-offs and pickups. Metro benefits are used by 157 students (up 24 percent from the prior year), while between 30 and 40 students ride the shuttle bus on average (double the number of the prior year).

41. The Applicant's enrollment contract obligates students and their parents to comply with the traffic management plan and imposes penalties for noncompliance. After the first violation, the parents would be required to meet with the head of school, who would explain again that each student's enrollment is contingent upon compliance and remind the parents of penalties imposed in case of future violations. A $250 fine would be imposed after a second violation by the same family, and a $500 fine after a third violation. In case of a fourth violation, the student's enrollment contract would not be renewed for the following year; or, if the student was a senior or non-returning student, disciplinary action would be taken.

42. To supplement enforcement measures, the Applicant anticipates installation of video surveillance cameras that would capture the front of the existing school building on Upton Street and the Van Ness-Upton Street alley. Additional video surveillance is possible to monitor the entrance to the driveway across the subject property.

43. The Board credits the conclusion of the Applicant's traffic expert that the additional students and employees attendant to the Applicant's proposal will have a negligible impact on traffic on Connecticut Avenue in the vicinity of Burke School. The Applicant's traffic expert estimated that traffic related to Burke School would increase by 11 morning peak-hour trips and 14 afternoon peak-hour trips. Similar estimates were made by DDOT in its study of Connecticut Avenue, which concluded that the Applicant's proposed expansion and several other new developments (residential and institutional) anticipated in the same vicinity along Connecticut Avenue would have a negligible impact on traffic, and would increase only slightly the peak-hour traffic at the intersections of Connecticut Avenue and Tilden, Upton, and Van Ness Streets.

44. The Board credits the testimony of DDOT that approval of the application would improve existing traffic conditions in the neighborhood, considering especially the Applicant's additional focus on carpools and public transportation, the shuttle bus service, and the circulation pattern associated with the new building, all of which would reduce traffic on local streets adjacent to the school. DDOT recognized that school-related traffic will likely use some residential streets during student drop-offs, but did not believe that a more dangerous situation would result; rather, DDOT concluded that the Applicant's proposed traffic routes presented the best possible solution available. The Board also credits DDOT's conclusion that the Applicant's plans for the drop-off lane exit on Upton Street and its proximity to the alley exit was proper and safe, especially with uniformed monitors present to help direct traffic.

45. The Board finds that the proposed expansion of the private school use is not likely to become objectionable to adjoining and nearby property because of traffic. The Applicant's traffic management plan is sufficient to mitigate any adverse impacts arising from an increase in school-related traffic associated with the requested special exception. Based on the findings above, the Board is not persuaded by the arguments of the ANC or parties in opposition that the Applicant's proposed drop-off locations would create congestion or unacceptable traffic safety problems in those locations.

Adequate Parking

46. Burke School currently provides 24 parking spaces on-site behind the existing building pursuant to BZA Order in Application No. 13986. Under the Applicant's proposal, three of those spaces would be reserved for the school's vans, leaving 21 parking spaces for students, employees, and visitors.

47. The proposed new building will provide parking for 47 vehicles in a two-level parking garage below grade, for a total of 68 parking spaces provided by Burke School (21 spaces behind the existing school building, after reserving three spaces for school vans; and 36 self-park and 11 tandem spaces in the new garage). The new garage will contain at least 56 full-size parking spaces (nine feet by 19 feet) as well as smaller spaces (eight feet by 16 feet) for compact cars.

48. The Applicant calculated its parking requirement on the basis that the requested increase of 35 additional faculty/staff would be allocated to the new building, creating a new parking requirement of 23 spaces on the subject property (two spaces for every three employees, pursuant to § 2101.1). The largest assembly space at the Burke School will remain the gymnasium in the existing building, for which the Board previously established a parking requirement of 24 spaces. The Applicant's parking requirement is therefore a minimum of 47 spaces.

49. Students are discouraged from driving to Burke School. Approximately 12 students drive to school during the school year. The Applicant will attempt to assign each student vehicle a parking space in the new garage or elsewhere on the school grounds. Pursuant to the Applicant's traffic management plan, students and faculty are prohibited from parking in the 2900 block of Upton Street N.W. during school hours.

50. Three 14-passenger vans, used for school activities, may be parked in the driveway. Loading and unloading will take place either in the driveway or in front of the existing building on Upton Street. Vans or buses from visiting schools will park in front of the existing building or on Connecticut Avenue when parking regulations permit, or at other locations identified with the concurrence of DDOT.

51. With respect to school-related events held in the evening, the Applicant proposed that:

    (a) Burke School will host no more than six events per year that will generate 50 or more vehicles;

    (b) special events will be scheduled to begin at 6:30 p.m. (the end of the peak period on Connecticut Avenue) or later;

    (c) an annual calendar, with monthly updates, will inform the community as to when events are scheduled;

    (d) persons attending evening events will be required to park in the underground garage at the subject property, with personnel from Burke

School assisting to manage traffic on Upton Street and to maximize the capacity and safety of the garage, including the use of stacked spaces; and

(e) during events likely to generate parking demand in excess of the capacity of the garage, the Applicant will make available off-street parking in other locations and provide shuttle service to Burke School.

52. The Board credits the conclusions of OP and DDOT that the Applicant's proposal will provide adequate parking for employees of Burke School and will be sufficient to mitigate any adverse parking impacts resulting from proposed increases in student enrollment and staff population.

53. The Board finds that the proposed expansion of the private school use is not likely to become objectionable to adjoining and nearby property because of parking, and that the Applicant's proposal – which provides for construction of a new underground garage as well as parking elements of the traffic management plan applicable to the regular operation of the private school use and to special events – will provide for ample parking space to accommodate the students, teachers, and visitors likely to come to the site by automobile.

Number of Students

54. Burke School is currently authorized to enroll a maximum of 270 students. However, the Applicant's actual student population was 299 in academic year 2001-2002 and 295 in 2002-2003. The Applicant anticipated a student population of 290 during the 2003-2004 school year.

55. The Applicant proposed to increase its authorized student enrollment initially to 300 students, with an incremental increase to 320 after four consecutive trimesters in compliance with its traffic management plan.

56. The Applicant also proposed to increase the number of faculty and staff on-site to a total of 70. Burke School currently employs 55 faculty and staff at the existing school (59 total).

57. The Office of Planning noted that the Applicant's proposed increase in enrollment – to 300 and ultimately to 320 – would represent an increase of five to 25 students over Burke School's actual enrollment in the 2002 academic year. OP concluded that the Applicant's proposed new building would provide additional facilities and allow operational changes that would likely reduce impacts of the larger student enrollment requested by the Applicant.

58. DDOT supported the proposed expansion of the student population linked with successful implementation of the Applicant's traffic management plan. DDOT noted that further adjustments of the traffic management plan and possibly a reduction in the number of students might be required if adverse traffic impacts remained after full implementation of the traffic management plan.

59. ANC 3F opposed any increase in student enrollment, and instead indicated that the enrollment cap of 270, adopted in 1983, should remain in effect.

60. The Board finds that no objectionable conditions are likely to result from an increase in enrollment to 320 students. The Board concludes that the proposed new building and attendant operational changes would mitigate any adverse impacts of the relatively small increase requested by the Applicant.

Harmony with Zoning

61. The R-5 district is a general Residence district designed to permit flexibility of design by permitting all types of urban residential development that conform to applicable height, density, and area requirements. The R-5 district also permits the construction of institutional and semi-public buildings compatible with adjoining residential uses. 11 DCMR § 350.1. The R-5-D zone permits a relatively high height and density. 11 DCMR § 350.2.

62. The Applicant's proposed new building, with four stories above grade and a two-level below-grade parking garage, will contain 34,247 square feet of gross floor area, with a height of 53 feet, floor area ratio ("FAR") of 2.1, 33 percent lot occupancy, and a rear yard of approximately 17 feet, 6 inches. The building will conform to building restrictions of the R-5-D zone, which permits maximums of 90 feet in height, 3.5 FAR, and 75 percent lot occupancy, with rear yards of at least 15 feet. 11 DCMR §§ 400.1, 402.4, 403.2, 404.1.

63. The Board credits the testimony of the Office of Planning that a 55-unit apartment building could be built on the subject property as a matter of right, given the lot size, 3.5 FAR, and 75 percent lot occupancy, and assuming that the size of a typical apartment would be 900 square feet and that 15 percent of the building would be devoted to common areas. The Board is not persuaded by the parties in opposition that the subject property is too small and "unforgiving" to serve as the location of a private school.

64. The Generalized Land Use Map of the Comprehensive Plan designates the subject property and adjacent land to the north as suitable for high-density residential use.

The Board credits the testimony of the Office of Planning that schools are generally considered part of the fabric of a residential community.

65. The Board also credits the testimony of the Office of Planning that the requested special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Maps. OP based its conclusion in part on (a) the location of the subject property on a principal arterial street, adjacent to the existing Burke School, convenient to public transportation, and (b) the design of the proposed new building, which will reorient the private school use toward the high-density activity of Connecticut Avenue and away from the lower-density residential neighborhood to the east.

66. The Board does not find that the design or appearance of the Applicant's new building, including the proposed pedestrian bridge, would be objectionable as having an inappropriately commercial or industrial quality in a residential neighborhood.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2001) to grant special exceptions, as provided in the Zoning Regulations, where, in the judgment of the Board, 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. *See* 11 DCMR § 3104.1. The Applicant seeks a special exception pursuant to 11 DCMR § 3104.1 to construct a new building in an expansion of an existing private school use, under the conditions specified in § 206, with an increase in enrollment from 270 to 320 students in grades 6 through 12, and an increase in the maximum of faculty and staff from 55 to 70 in the R-5-D district at 4101 Connecticut Avenue, N.W. and 2955 Upton Street, N.W. (Square 2243, Lots 67 and 68).

In accordance with § 206, a private school must be located so that 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. Ample parking space must be provided "to accommodate the students, teachers, and visitors likely to come to the site by automobile." 11 DCMR § 206.3. The Applicant must also demonstrate that the proposed private school use will be in harmony with the general purpose and intent of the Zoning Regulations and Map. 11 DCMR § 3104.1.

The Board's discretion in reviewing an application for a special exception is limited to a determination of whether an applicant has complied with the requirements of §§ 206 and

3104.1 of the Zoning Regulations. If an applicant meets its burden, the Board ordinarily must grant the application. *First Baptist Church of Washington v. District of Columbia Bd. of Zoning Adjustment*, 432 A.2d 695, 698 (D.C. 1981). The scope of the Board's authority is defined by statute. *See* D.C. Official Code § 6-641.07 (2001 ed.). Where permitted by the Zoning Regulations, the Board may grant a special exception "subject to appropriate principles, standards, rules, conditions, and safeguards *set forth in the regulations*." D.C. Official Code § 6-641.07(d) (emphasis added). Contrary to the argument asserted by the parties in opposition, the Board lacks the legal authority to deny an application for a special exception solely on the ground that the applicant has failed to comply with provisions of a prior grant of zoning approval.

Based on the findings of fact, and having given great weight to the recommendations of the Office of Planning and to the issues and concerns of ANC 3F, the Board concludes that the proposed expansion of the existing private school use, as conditioned by the Board, can be located at the subject property so that it is not likely to become objectionable to adjoining and nearby property. The Board has imposed conditions in this order in response to the Applicant's proposal, recommendations of OP and DDOT, and concerns raised by ANC 3F and the parties in opposition.

The Applicant's school management plan and traffic management plan adequately address adverse impacts potentially arising from the private school use. The subject property is located in an area where higher density uses are appropriate, and the Applicant's proposal, particularly the traffic management plan, offers more mitigation of the impacts of development on the subject property than would likely occur with a matter-of-right project permitted in the R-5-D zone. The new building will greatly increase Burke School's supply of parking, while the increases in enrollment and faculty/staff are not likely to create a substantial increase in demand for parking attendant to the private school use. The traffic impacts on nearby streets will likely be diminished as a result of the Applicant's proposal, especially the emphasis on public transportation and carpools, and the construction of the driveway in conjunction with the new building, which will allow student drop-offs and pick-ups to occur entirely on the subject property.

The Board accorded ANC 3F the "great weight" to which it is entitled. In doing so, the Board fully credited the unique vantage point that ANC 3F holds with respect to the impact of the proposed expansion of the existing private school use on the ANC's constituents. However, the Board concludes that the ANC has not offered persuasive advice that would cause the Board to find that the proposed new building and increases in student enrollment and in number of faculty/staff at Burke School would be contrary to the Zoning Regulations or would adversely affect the use of neighboring property, particularly in light of the conditions imposed on approval of the Applicant's proposal.

Specifically, the ANC raised concerns principally pertaining to noise generated by students and the Burke School's mechanical equipment, traffic congestion, student conduct, and construction. The Board accepts the expert testimony offered by the Applicant and the testimony of OP and DDOT on issues pertaining to noise and traffic, and concludes that the proposed private school use will not adversely affect the use of neighboring property. The Board is not persuaded by the ANC or parties in opposition that student behavior in the vicinity of the subject property is an objectionable condition related to the Burke School. With regard to construction of the new building, the Board notes that the issues and concerns raised by the ANC are not within the purview of the Zoning Regulations.[1]

For the reasons stated above, the Board concludes that the Applicant has met its burden of proof. It is hereby **ORDERED** that the application is **GRANTED** subject to the following **CONDITIONS:**

1. The new building shall be constructed in accordance with the plans prepared by Bowie Gridley Architects and marked in the record as Exhibits No. 4 and 117.

2. Upon issuance of a certificate of occupancy for the new building, the maximum enrollment shall be 320 students, phased in from an initial increase to 300 students.

3. Upon issuance of a certificate of occupancy for the new building, the maximum number of faculty and staff shall be 70.

4. The Applicant shall fully implement and comply with the school management plan (Exhibit 1 to the Applicant's pre-hearing submission, Exhibit No. 31; as modified by Finding of Fact No. 20).

5. The School shall fully implement and comply with the enforcement plan (Exhibit 2 to the Applicant's pre-hearing submission, Exhibit No. 31; as revised by Findings of Fact No. 22 and 23).

6. The School shall fully implement and comply with the traffic management plan (Applicant's pre-hearing submission, Exhibit No. 31; as revised by

[1] The Board notes that the Applicant agreed to implement a construction management plan (Exhibit 3 to the Applicant's prehearing submission, Exhibit No. 31) that will help minimize adverse impacts during construction of the new building.

Findings of Fact 37-39), with flexibility to modify its elements with the concurrence of DDOT in response to changes in traffic conditions in the vicinity of the subject property.

7. The Applicant shall resume participation in the scheduling committee with the Howard University law school, the Levine School of Music, the Hillwood Museum, the Royal Netherlands Embassy, and ANC 3F to reduce the frequency of overlapping special events held at the participating entities and to minimize the difficulties that coincident scheduling of events might impose on the surrounding neighborhood.

8. By October 1 each year, the Applicant shall provide to the Board and to ANC 3F: (a) a report indicating current student enrollment and the number of faculty/staff; and (b) an annual report by the enforcement committee reflecting its evaluation of the Applicant's performance in implementing the school management plan and traffic management plan.

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., Anthony J. Hood, and David A. Zaidain voting to approve)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Order.

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: AUG 04 2004

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPLICATION NO. 17022

As Director of the Office of Zoning, I hereby certify and attest that on AUG 04 2004 a copy of the order entered on that date in this matter 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:

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ATTESTED BY:

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