Before the Board of Zoning Adjustment, D. C.

PUBLIC HEARING - April 18, 1973

Application No. 11307 - Florence Crittenton Home, Applicant

On motion duly made, seconded and carried by a vote of 4-1 (Lilla Burt Cummings dissenting), the following Order of the Board was entered at the meeting of June 20, 1973.

EFFECTIVE DATE OF ORDER JUL 19 1973

ORDERED:

That the application of Florence Crittenton Home for establishment of a private school for pre-school and elementary children in the R-1-B one at 4759 Reservoir Road, N.W., part of lot 809, Square 1372, be CONDITIONALLY GRANTED.

FINDINGS OF FACT:

1. The property is located in an R-1-B District and contains 75,000 square feet fronting on Whitehaven Parkway approximately 500 feet from Foxhall Road and approximately 500 feet from MacArthur Boulevard, N.W.

2. The property is located in an area in which there are many institutional uses. Immediately to the west is the Florence Crittenton Home; immediately to the north is Mount Vernon College and immediately to the east is a United States Reservoir. Also, in the area are Our Lady of Victory Elementary School and the Georgetown Day School previously approved by the Board.

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3. The applicant proposes to establish a school for kindergarten through the 6th grade on the site in a single building for the St. Patrick's Church Episcopal Day School. There will be a maximum of 50 students enrolled in the kindergarten and approximately 230 students enrolled in grades 1 through 6, for a total maximum future enrollment on the site of 280 children. There will be approximately 29 teachers and administrative personnel.

4. The subject site has a varied topography with a high point at the southeastern corner at an elevation of approximately 232 feet and a low elevation at the northwestern corner of the property of 167 feet. The site is steep in its topography at the southern portion and relatively level at the northern portion.

5. Applicant seeks approval of a Site Plan B submitted to the Board and contained in the record. Site Plan B calls for a building to be located approximately 45 feet from the southern property line, and approximately 55 to 60 feet from the eastern and western property lines. The building will be set into the hill at the southern site of the property so as to have an approximate height above finished grade on the southern side of 14 to 27 feet. The lot occupancy of the site will be approximately 20%. The play area will contain approximately 20,000 square feet located at the northern portion of the site.

6. Between the proposed school building as shown on Site Plan B and the southern property line, applicant proposes to plant approximately 30 trees having a height of 10 to 12 feet. This screening, by virtue of the topography and siting of the building, will substantially separate and screen the school building from the only adjoining lot that is developed with a single family house. The other portions of the site are developed with natural screening, including some large trees.

7. Access to the site will be by way of Whitehaven Parkway over and through a bridge and auto court as shown on the site plan. The applicant proposes to provide 21 parking spaces.

8. The site plan provides a greater rear yard, greater side yards, less lot occupancy and approximately the same height as would be required for a single family dwelling in the R-1-B District. Institutional buildings as a matter of right can be constructed to a height of 90 feet provided there is adequate set-back.

9. St. Patrick's School has existed at 1655 Foxhall Road, N.W. since 1956 with Board approval for approximately 130 nursery school students. The school has provided kindergarten and elementary educational facilities (grades 1-5) at the Briggs Baptist Church in Maryland for 158 students, of which 84% are from the District of Columbia. The school seeks to locate these students plus added capacity at the proposed location.

The new site is approximately 2,500 feet from the St. Patrick's Episcopal Church and Day School.

10. The applicant presented detailed testimony in support of the application consisting of the statement of the Rector of St. Patrick's Episcopal Church, who testified on the school philosophy, need for the school and search for an appropriate site; the Director of the school who testified as to the operation of the school; the architect who testified as to the siting and location of the school as well as the compatibility with surrounding properties; a land planner and a traffic consultant who testified as to the compatibility of the proposed school with surrounding uses and zoning in the area as well as traffic flows; and an appraiser and realtor who testified as to the lack of adverse effect of a private school upon neighboring properties.

11. The applicant complies with the specific requirements of Section 3101.41 as follows:

a. The school will have no articles of commerce for sale as indicated by the Director of the School.

b. The use and activities to be conducted at the school are so located that they will not be objectionable to adjoining and neighboring property because of noise, traffic, number of students or other objectionable conditions.

c. The proposed school is set back substantially from all lot lines and will be screened by existing and new plantings and topography from the only abutting lot which has been developed for single family use.

d. The remainder of the uses to the east and west being a reservoir and an institutional use will not be adversely affected by reason of noise or number of students.

e. With respect to traffic, Whitehaven Parkway will adequately serve the property and there is no contention that there will be any traffic congestion.

f. The Department of Highways and Traffic has no objection to this application.

g. The site has good access to major arterial roadways in the District of Columbia via Foxhall Road, Reservoir Road and MacArthur Boulevard.

h. The interior circulation provides an auto court for arrival and departures with a roadway width of 20 feet. Parking of 21 spaces the Board finds will be adequate although the Department of Highways and Traffic has recommended 28 spaces.

i. The number of students will not have any adverse effect upon surrounding properties because they will be substantially removed from the lot lines.

j. Approximately 50 students will be the maximum number of students in the kindergarten and there is more than 100 square feet of play space available for each pre-school child.

k. The hours of operation will be from 8:30 or 8:45 a.m. to 3:00 p.m. for regular classes with occasional special activities outside these hours.

l. The preschool use will be reasonably necessary or convenient to the neighborhood which it will serve since it has excellent access to the ten block radius area. The testimony of the Director of the School established that 66% of the kindergarten children come from within a ten block radius.a The Director expects the percentage to increase by virtue of the move of the school to the new site from the Maryland location.

12. The applicant complies with the provisions of 3101.42 as follows:

a. The use is not likely to become objectionable to adjoining and nearby property by virtue of the careful site lay-out and building design as previously described herein.

b. The Board finds that ample parking spaces are provided by the 21 spaces proposed which will accommodate students, teachers and visitors likely to come to the site by automobile. Article 72 of the Zoning Regulations requires 18 parking spaces. Testimony of the School Director, architect and land planner indicates that through car pool arrangements it is not expected that even the required number of spaces will be fully utilized. Thus the Board

finds that 21 spaces will be ample.

13. This Board in previous cases has granted similar requests for the establishment of pre-schools and elementary schools for similar locations. This site, however, is uniquely favorably situated by virtue of the surrounding uses and topography which permits separation of the school building from surrounding uses.

14. There are many letters in the file in support of this application from persons residing both within and outside the neighborhood. The only opposed neighboring property owner was the owner of lot 810 located adjacent to the site on the south. At the public hearing, this objector stated that he did not oppose the location of the building on the site or private schools themselves. The primary point of opposition concerned this property owner's idea that the private schools permitted under Section 3101.41 and Section 3101.42 may have an adverse effect on the public schools permitted under Section 2101.211 of the Zoning Regulations.

15. The owner of lot 810 knew of the application as early as January, 1973 at approximately the same time that it was filed with the Board. In early April, approximately four months later, this property owner initiated a request to the District of Columbia Board of Education to review and to report on this application. No referral is required by the

regulations to any agency although applicant worked in cooperation with the Department of Highways and Traffic with regard to its site plan. At the instigation of the property owner, a request dated April 17, one day before the hearing, from one member of the Board of Education was received requesting a delay of our hearing until the Board of Education could review the application.

16. The applicant stated at the public hearing that there were substantial damages and adverse social impact that would result if a delay were granted. Counsel for applicant also objected to the scope of inquiry of the Board which would go beyond the standards adopted by the Zoning Commission, in Sections 3101.41 and 3101.42, as well as Section 8207.2. See also letter dated April 20, 1973 submitted to the Board.

17. By letter dated May 2, 1973, Mr. Albert A. Rosenfield withdrew his request for delay of the Board's decision in view of a letter-determination from the Superintendent of Schools dated May 1, 1972, which letter is also contained in the record. The School Board, through its representatives, "reached the conclusion that there should be no D. C. School involvement in this matter ...." However, there is no requirement in the Zoning Regulations that the Board rely in any manner on the Board of Education in this type of case.

OPINION:

The Board is of the opinion that this proposed school use for kindergarten through Grade 6 is an appropriate use of the property and is in keeping with the Zoning Regulations and maps for this area of the city. We do not believe that the establishment of the school in any way will adversely affect surrounding or neighboring properties by virtue of the careful site lay-out, topography and building design. We are of the opinion that the applicant has satisfied all the requirements of Sections 3101.41, 3101.42 and 8207.2, and more specifically we do not believe that the school use will have any adverse effect upon lot 810. This is so not only because of the careful set-backs, screening and by virtue of the topography, but also because the testimony indicated that similar buildings have not had adverse effect on the subject or similar properties.

Prior to making a final determination on the requests for delay, the Board received a letter withdrawing the request for such delay from Mr. Albert Rosenfield, with an attached letter from the Superintendent of Schools. We believe that these make the requests for delay of the decision moot. Moreover, it is our belief that the requests would be beyond the scope of our intended inquiry under the Zoning Regulations. As a separate basis, even if the scope of inquiry were within the jurisdiction of the Board, it would be unfair to the applicant to delay the

granting of this application further. The request for the delay was made at the public hearing with no prior notice to the Board or to the applicant even though it was initiated by the owner of lot 810 who knew of the application as early as January, 1973. We do not believe that it would be fair or fundamental due process to deprive the applicant of a prompt decision. Additionally, we note that the Zoning Regulations do not permit the Board of Zoning Adjustment to go beyond its delegated function in special exception cases. Moreover, private schools are permitted in residential zones along with public schools.

The following conditions are made part of this Order:

a. The site shall be developed in accordance with Site Plan B, Exhibit No. 49.

b. Applicant will plant evergreen screening generally as shown on Site Plan B and as represented at the hearing on the southern portion of the site.

c. The applicant will not park or utilize school buses other than as indicated at the hearing without the prior approval of this Board.

No Certificate of Occupancy shall be issued until all conditions of this Order have been complied with, and further, the Board reserves the right to direct revocation of permit upon proper showing that any terms or conditions of this Order have been violated.

PUBLIC HEARING - - April 18, 1973

Application No. 11307 Florence Crittenton Home, Applicant

Dissenting Opinion of Lilla Burt Cummings.

I cannot concur with the Board's Order in this case. Specifically, I take issue with FINDINGS OF FACT (ORDER, p.4-8) #11 b. and i., #12 a., #13, #14, #15, #16, and #17; it necessarily follows that I cannot concur in the OPINION (ORDER, p. 9-10).

The property in question is located in an area zoned R-1-B. The Zoning Regulations permit a private school in such an area only where:

(1) "in the judgment of the Board such special exceptions will be in harmony with the general purpose and intent of the zoning regulations and maps" (§8207.2); and

(2) the exception "will not tend to affect adversely the use of neighboring property in accordance with said zoning regulations and maps" (§8207.2); "subject to the special conditions specified in" (3) and (4), "as follows:"

(3) the proposed school "is so located and the activities to be conducted therein will be such that it is not likely to become objectionable to adjoining and nearby property because of noise, traffic, number of students, or other objectionable conditions" (§3101.41 (b));

(4) "It is so located that it is not likely to become objectionable to adjoining and nearby property because of noise, traffic, number of students, or otherwise objectionable conditions" (§3101.42 (a)).

(For the purposes of this dissent, these are the pertinent regulations, although there are other lettered paragraphs under Sections 3101.41 and 3101.42 of the regulations involved in the Application.)

Whether exception should be granted, then, is subject to limitations - the exception sought must meet the requirements of the regulations, both 1.) in being in harmony with the general purpose and intent of the regulations and maps contained in Section 8207.2, and 2.) in not tending to affect adversely the use of neighboring property in accordance with said regulations and maps, and if the Board has satisfied 1.) and 2.), then as to specifics contained in Sections 3101.41 (b) and 3101.42 (a) of the Regulations.

If it is, "in the judgment of the Board," determined by the Board that it can grant (the exception 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 etc.) then, and only in that event, the Board proceeds to the special conditions specified in Sections 3101.41 and 3101.42 of the Regulations. In other words, without such predetermination by the Board that it can grant the exception under § 8207.2, bearing in mind the purposes of the Zoning Regulations (D.C. Code § 5-414) as well as the purposes for which the District is designed (§3101.1), the Board does not proceed to Sections 3101.41 and 3101.42. The Board proceeds to Sections 3101.41 and 3101.42 of the Regulations only after the determination in the first instance or prima facie that it can grant the exception under §8207.2.

It is thus seen that the adjudicativeprocess of the Board involves the passing through, in orderly fashion, of a primary sieve (§8207.2 of the Regulations, § 5-414 of the D.C. Code, § 3101.1 of the Regulations) and then, if the Application successfully passes through the primary sieve, a secondary sieve (§§ 3101.41 and 3101.42 of the Regulations).

D.C. Code 1967, §5-414 entitled "Purposes of zoning regulations" provides in pertinent part:

"Such regulations shall be . . . designed . . . to promote such . . . uses of land as would tend to create conditions favorable to . . . protection of educational . . . opportunities, and as would tend to further economy and efficiency in the supply of public services." (Zoning Act of June 20, 1938, 52 Stat. 797, ch. 534, §2.)

The effect of a grant of the exception here upon the purpose and intent of the regulations and maps and whether such a grant will tend to affect adversely the use of neighboring property in accordance therewith is the primary issue before this Board. This issue was properly and timely introduced by the Opposition at the Hearing. The Board permitted testimony (Transcript p. 228 ff.) by Mrs. Edward Cohen that the proposed school "threatens their (Hardy and Key Schools) ability to stay open". The Board permitted testimony from Mr. Cohen (Transcript p. 240 ff.) "as adjoining property owner, we are entitled to know how the public schools will be affected at sometime in the future by a draining of the

clientele of those facilities. We are asking what the impact might be as far as our children being able to go to a public school that is open and viable. There is not enough information here about what the implications might be. Hardy School approximately one half the children are bussed. We want the school to stay open. The school has only 144 children. Key School has approximately the same amount. It is the responsibility of this Board to find out what the impact is." Continuing (Transcript p. 243), Mr. Cohen pointed out, "In 1971 talking about 200 students (last application-St. Patrick's plan), now talking a total of over 400 students. Growth of the school raises very serious question - as to whether our children will be able to attend public school in the years to come. Concern is whether there is going to be any future, negative kind of impact on public schools."

The thrust of this testimony - the effect of a grant of the exception upon the purpose and intent of the regulations and maps and whether it will tend to affect adversely the use of neighboring property in accordance with said regulations and maps - strikes with deadly accuracy into the heart of § 5-414 of the D. C. Code - "Such regulations shall promote such uses of land as would tend to create conditions favorable to PROTECTION OF EDUCATIONAL OPPORTUNITIES, and as would tend to further ECONOMY AND EFFICIENCY IN THE SUPPLY OF PUBLIC SERVICES." (D. C. Code 1967, § 5-414. Purposes of Zoning Regulations) (emphasis added), and Section 3101.1 of the Regulations.

The effect of a grant of the exception here, upon the public schools, upon their ability to stay open, which is to say upon the "protection of educational opportunities," the impact of such a grant, the implications, that is to say whether a grant would "tend to create conditions favorable to economy and efficiency in the supply of public services" is precisely within the Board's delegated function to determine, a fortiori, it is charged with determining under Section 8207.2 of the Regulations. It is further charged under Section 8207.2 with determining that the grant of exception "will not tend to affect adversely the use of neighboring property in accordance with said zoning regulations and maps". The neighboring property is zoned R-1-B, single family residences. Section 3101.1 of the regulations provides in pertinent part that this zoning is "designed to protect quiet residential areas now developed with one-family detached dwellings and adjoining vacant areas likely to be developed for such purposes. The regulations are designed to stabilize such areas and to promote a suitable environment for family life. For that reason only a few additional and compatible uses are permitted." (emphasis added).

FINDINGS OF FACT #16 (ORDER, p. 8), while not constituting a finding, within the legal significance of that word in my opinion, makes reference to a "letter dated April 20, 1973 submitted to the Board,"

concerning Sections 3101.41 and 3101.42, as well as Section 8207.2 of the Regulations. The letter, in fact, outlines a Supplemental Memorandum of Applicant filed in Support of Application, said Memorandum attached to the letter and filed in the case, in which Applicant, through its counsel, attempts to buttress its position - that the Board must render prompt decision without inquiring into the impact upon the Hardy and Key Schools of á grant of the exception - by bringing to the Board's attention an analysis of the background attending the enactment and adoption of the Regulations (Sections 3101.41 and 3101.42), together with three Exhibits submitted as "legislative history". Unfortunately, Applicant falls upon his own lance in this attempt, as will be seen by advancing applicant's argument ad verbum: "In the course of enacting and adopting these sections (3101.41 and 3101.42), the Zoning Commission carefully reviewed the relationship of private schools to the public school system. The Zoning Commission, among other things, determined that private schools were an important supplement to the public school system and provided an educational choice..." (emphasis added). The pivotal words are underlined, supplement and choice. The word "supplement" connotes the providing of an alternative (by definition, making an addition to something already established and set apart) to public schooling, not to supplant it; the providing of an educational choice means nothing less than the common, ordinary meaning of the word choice, and where the granting of the exception can conceivably lead to the closing of the public schools serving the neighboring property then, clearly, this is not a supplement or an addition to something but can constitute a deprivation, a taking away, eliminating choice. Where such a situation is found to exist, or is likely to exist, it will "tend to affect adversely the use of neighboring property in accordance with said zoning regulations and maps" (§8207.2); and then clearly it cannot be a compatible use, the only use permitted under Section 3101.1 of the regulations. In the 1970's, it is conceivable, alas, that the addition of a private school in a given neighborhood is incompatible with the continued life of neighborhood public schools.

FINDINGS OF FACT #15 (ORDER, p.7) makes reference to the fact that the Opposition to the Application knew of the application in January, and in early April, four months later, initiated a request to the Board of Education to review and report on the Application, and that, subsequently, one day before the Hearing requested a delay in the hearing.

The fact is that the hearing went ahead and testimony was heard on this issue. Further, the fact is that the Board, by majority vote (3-2), held the Order open for 30 days to receive additional evidence from the Board of Education on this point (the impact of the proposed school on the neighborhood public schools). That "No referral is required by the regulations to any agency" (ORDER, p. 7-8) must clearly be erroneous, as "number of students" and "other objectionable conditions", and "otherwise objectionable conditions" (Sections 3101.41 (b) and 3101.42 (a)) is read by this Member to specifically require hard data, when read together with Section 8207.2, requiring a judgment by the Board that the special exception sought will - prima facie having been determined by the Board to be in harmony with the general purpose ("as would tend to create conditions favorable to Protection of educational opportunities, and as would tend to further economy and efficiency in the supply of public services." D.C. Code, 1967, § 5-414) of the zoning regulations, etc., and read together with Section 3101.1 which seems to impose upon the Board the obligation "to promote a suitable environment for family life" by granting only "compatible uses" - at this second stage of the Board's determination, not upset the prima facie determination by the Board (BZA) because how else would the Board develop the hard data, if not through the Board of Education?

I have gained no illumination from oft-repeated reminders from senior Board Members, my predecessors in tenure by decades, that there is no specific requirement in the Regulations that the Board seek an impact report from the Board of Education in this case (such as appears in § 1301.5 of the Regulations). While appreciative of their guidance, this fails to turn me from my course, for the phrases "number of students" and "other objectionable conditions" and "otherwise objectionable conditions" when read together with Section 8207.2 and 3101.1 amply apply to this situation, or why else were they inserted? Not to evoke considerations of "noise" or "traffic", certainly, as these are both specifically enumerated. The dictionary definition (Webster's New Collegiate Dictionary, 2d ed., 1951, p. 595) of other is "being distinct from the one already mentioned or understood, not the same, different," and otherwise is defined as "in a different manner; in other ways; in other respects." The phrases can mean only one thing - the impact of the proposed private school upon nearby property - apart from noise and traffic - in a different manner, on the public schools.

This (impact on the public schools) is not, then, beyond the Board's reach, beyond its adjudicative determination, but is, rather, within the conditions to be considered under the Regulations after the Board's determination, prima facie, that Section 8207.2 has been satisfied before exception can be granted, a material issue, requiring

a concise statement of conclusion, a finding of fact. The record was held open by majority vote of the Board (Minutes of Executive Session of April 24, 1973, p. 8, as corrected by Minutes of May 22, 1973, p. 1, and as subsequently corrected, "to hold the record open for 30 days to give the Board of Education time to respond to the opposition re the impact on public schools." Corrected Minutes not yet available.) with directions to the Board of Education to provide the Board (BZA) with an impact statement. The Board's (of Education) response was no response at all. It "did not wish to be involved"! It may be that the Board (BZA) has no power to compel a response from the Board of Education, that only the court has this power. At a minimum, however, in order to discharge its obligation under the requirements of §§ 8207.2, 3101.41, 3101.42, and 3101.1 of the Regulations, the Board (BZA) should, in my opinion, make express findings of fact on the following:

1) Number of schools closed in the District of Columbia in the past 10-15 years and reasons for closing.

2) Number of schools in the District of Columbia which staff (school's or Board of Education) recommended closing in past 10-15 years and reasons for recommendations.

3) Projected enrollment of Hardy School 1974, 1975, 1976, 1977, 1978, 1979, 1980. Enrollment, by year, for past 10-15 years.

4) Projected enrollment of Key School 1974, etc., as above. Enrollment, by year, for past 10-15 years.

5) Costs per pupil in Hardy, Key, at present enrollment. Costs per pupil at projected enrollment, by year, as above. Costs per pupil for past 10-15 years (when BZA began to grant private school exceptions in this neighborhood), by year.

6) Effect on educational program, quality of education, educational opportunities of pupil attrition reflected by change in number of teachers, number of courses, changes in program, pupil-teacher ratio, etc., by year, for past 10-15 years. Whether construction of proposed school is likely to or will tend to affect enrollment at Hardy and Key Schools within reasonable and foreseeable future, causing further attrition, and reasons for conclusion citing examples.

The Board cannot do so without an adequate response from the Board of Education.

The Board (BZA) has been admonished that "When Congress requires a finding, its instruction is not to be ignored or given only lip service." (Dietrich et al. v. Dist. of Col. Board of Zoning Adjustment, 293 A. 2d 470 (1972) at 472, quoting from Joseph v. F.C.C., 131 U.S. App. D.C. 207, 211, 404 F. 2d 207, 211 (1968)) and yet the Board, in this instance, may be powerless to comply without the assistance of the Court. To assure full, complete, and reasoned consideration of material facts and issues, the Board (BZA) by majority vote turned to the Board of Education for its expertise. Then, thwarted in its attempt, it voted 4-1 (Lilla Burt Cummings dissenting) to grant the exception, sweeping aside its heretofore recognized need to make findings of basic facts on the material issue of the impact of the proposed school, including number of students, on the survival of area public schools. I cannot concur. If the impact on area public schools was a material issue when the Board voted 3-2 to seek evidence from the Board of Education on this point, it still is a material issue, and there can be no determination, no Order, by this Board until this is resolved, it being within the limitations and conditions to be considered under the zoning regulations before special exception can be granted.

In addition to the foregoing, I take issue with FINDINGS OF FACT of the majority, as follows: #11 - I do not agree that applicant complies with the specific requirements of Section 3101.41. Paragraph b. is objected to as an incomplete reference to the Regulation, paragraph (b), and objections previously stated. #12 - I do not agree that applicant complies with the specific requirements of Section 3101.42. Paragraph a. fails to mention "number of students", the gravamen of prime contested issue - which is the impact on public schools. #13 - "similar locations" objected to. Similar how? Was the continued existence of area public schools threatened? Was this in issue? Continuing with the second sentence, I object to this finding because the totality of objectionable conditions is to be considered by the Board, not just the physical characteristics of a piece of land, the site. #14 - At the public hearing, the Opposition objected to the location of the building on the site, in addition to raising the issue of the impact of the proposed school on the continued existence of the public area schools. I do not believe Opposition by themselves, or through counsel, tethered their objection to the Sections of the Regulations quoted in the finding. ## 15 and 16 have been disposed of previously in this Dissent. #17 - It was voted, 3-2 by the

Board that the Board of Education was to be specifically requested to provide information to the Board of Zoning Adjustment and the record was held open 30 days exclusively for this purpose alone. Further, the parties in interest themselves, and through their counsel, did not withdraw - see letters of April 23, 1973, May 8, 1973, May 11, 1973, June 15, 1973, and June 19, 1973 in the record. See also letter of May 10, 1973 from Key School PTA President, letter of May 12, 1973 from co-Presidents of Hardy School Home and School Association, and letter of July 4, 1973 signed by all three officers.

In the majority OPINION (p. 9-10), objection is raised to the entire first paragraph. Granting the exception can conceivably deprive the neighboring citizenry of an educational choice if the public schools are forced to close. Whether the establishment of the school will "in any way adversely affect surrounding or neighboring properties" is not known. The first paragraph confines itself to the physical impact of physical factors only (set-backs, screening, topography), and does not reach the issue of the projectable impact of the proposed facility on public schools. It concerns itself with things that might well be described as frivolous when weighed against and compared to a matter of pre-eminent import - a matter involving potentially grave and far-reaching considerations - the question of the continued survival and existence of area public schools! I strongly and vigorously dissent.

The last paragraph of the majority Opinion concerns itself with the request for delay. Hearing was held. Testimony was taken on the issue that has been raised before this Board. It was raised timely at the Hearing. It is, in my opinion, as expressed herein, precisely within the Board's delegated function to determine, - is charged with determining under the Regulations. Nothing is mooted by Mr. Rosenfield's withdrawal, as he is not the party in interest, Mr. and Mrs. Cohen are, and they have vigorously and continually and unrelentingly urged upon the Board that the Board press its inquiry to the Board of Education. The Board voted to hold the record open in order to hear from the Board of Education on this issue. But the Board received no response, for indeed, a response as inadequate at that from Mr. Scott, then Superintendent of Schools, is no response at all. "Moreover," the ultimate sentence of the Opinion reads, "private schools are permitted in residential zones along with public schools." Indeed that is so, by special exception PROVIDED SUCH 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 SAID REGULATIONS AND MAPS.

It is therefore concluded that the effect of a grant of the exception on the area public schools continued existence being precisely within the Board's delegated function to determine under those Sections, and all of them, of the Regulations previously cited, that there being no finding on a material fact - material because it is within the limitations and conditions to be considered under the Zoning Regulations before an exception can be granted -, that ample opportunity not having been afforded the parties to present evidence and argument with respect thereto in conformity with the contested case requirements of the A. P. A., D. C. Code 1967, § 1-1509 (Supp. V. 1972), the Board is therefore not possessed of all the relevant basic facts on which it must make definite findings. A finding that the impact of such a private school will not be likely or tend to close or threaten the continued existence of the existing area public schools in the foreseeable or predictable future is a finding which has not been and could not have been, under the circumstances, made.

This may well be one of the most profound issues ever to come before this Board involving, as it does, the question of whether public integrated education, such as we know it in the District of Columbia, can long endure. It is unthinkable that a Residential District in the District of Columbia would be, at any time in the foreseeable future, deprived, directly or in convergence with other factors, of a public school or schools by action of this Board. It is submitted that such a consequence, should it flow, would not be tolerable. But even as one cannot unring a bell, once sounded, one cannot unestablish a private school, once founded by action of the Board. Certainly if the current trend continues, it may well extinguish not just the existence but the concept of neighborhood schools for a large area of the city and no court has yet rejected the premise that equal education embraces equal opportunity to go to neighborhood schools. In this case, one can hear that premise, coming hand-in-hand with integrated education, knocking at the legal gates. And it is submitted that it is not, in the 1970's, altogether unpredictable that this issue will be presented again to this Board in some future case as yet unformed, as yet unargued and unheard. Therefore great care in deliberation is urged upon the Board by its dissenting Member. If the parties have no forum before the BZA, where, then, will they be heard? Are they to be left where they have been found? Are they without a remedy? I do not think so.

Under the Regulations, the Board has the obligation, the duty to consider the full impact of the full facts upon this issue, timely raised. The full facts have not been developed prior to the Board's action. Not possessed of the necessary facts, and all of them, on which to make a decision, in my opinion the Board cannot grant. I therefore dissent from the majority.

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

ATTESTED:

By: James E. Miller

JAMES E. MILLER
Secretary of the Board

THAT THE ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS ONLY UNLESS APPLICATION FOR A BUILDING AND/OR OCCUPANCY PERMIT IS FILED WITH THE DEPARTMENT OF ECONOMIC DEVELOPMENT WITHIN A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER.

E

EXHIBIT E

PROPOSED CONDITIONS

1. The maximum number of faculty and staff shall be 93 FTE.

2. The School shall be required to file an annual report with the Board of Zoning Adjustment indicating the total number of faculty and staff. The report will include a breakdown of the number of full time and part time employees.

3. If requested by the ANC, the School shall hold a meeting with the community each quarter to discuss issues relating to the operation of the School.