GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17081 of St. Patrick's Episcopal Day School, pursuant to 11 DCMR § 3104.1, for modification of a condition to a special exception approval for a child development center and private school under sections 205 and 206, to permit an increase in faculty and staff from 60 to 93 in the R-1-B District at premises 4700 Whitehaven Parkway, N.W. (Square 1372, Lot 817, and Square 1374, Lot 5).

HEARING DATE: December 2, 2003
DECISION DATE: January 13, 2004

DECISION AND ORDER

St. Patrick's Episcopal Day School ("Applicant" or "School") was founded as a nursery school in 1956 and elementary grades were added in 1967. In 1973, Board Order No. 11307 granted the Applicant a special exception for a child development center and private elementary school. The School moved to the subject property in 1977. The special exception use has no term limit and continues to include a child development center and elementary school.

The School has grown since 1973 and has been the subject of several Board Orders, some of which have addressed the maximum number of faculty and staff, which is the issue in question in this proceeding. In 1983, a faculty and staff cap of 48 was imposed by Board Order 14009. In 1990, Board Order 15347 increased the cap on "staff" to 60. On September 10, 2003, the Applicant filed an application with the Board of Zoning Adjustment ("Board") for permission to modify the staff cap of 60 set in Board Order number 15374.[1] The Applicant requests permission for a new cap of 93 full time equivalent ("FTE") faculty and staff or, if the Board chooses not to use the FTE counting method, for a new staff and faculty cap of 105 actual persons.

Following a public hearing on December 2, 2003, and a public decision meeting on January 13, 2004, the Board voted 4-0-1 to grant the application to permit a total person count of faculty and staff employed by the School not to exceed 105.

PRELIMINARY MATTERS:

Notice of Application and Notice of Hearing On September 11, 2003, the Office of Zoning ("OZ") sent notice of the filing of the application to the District of Columbia Office of Planning ("OP"), the District of Columbia Departments of Health ("DOH") and Transportation ("DDOT"), Advisory Neighborhood Commission ("ANC") 3D, the ANC in which the subject

[1]The latest Board Order concerning the School is number 16517, but that Order has only to do with the construction of a gymnasium and an addition and renovation of a classroom. It does not mention, let alone condition, the number of faculty and/or staff. Therefore, although Order No. 16517 is last in time, this Order amends the maximum faculty/staff condition (Condition no. 2) in the 1990 Order, number 15374.

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property is located, the 3D06 Single Member District Member, and the Council Member for Ward 3. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing in the District of Columbia Register and mailed notices of the hearing, dated September 25, 2003, to the Applicant, ANC 3D, and all owners of property within 200 feet of the subject property. Further, the Applicant's Affidavit of Posting shows that the property was properly posted pursuant to 11 DCMR § 3113.

Request for Party Status. Mr. Michael Lovendusky applied for party status. At the hearing, Mr. Lovendusky indicated that he also represented his wife, and two other couples – Mr. and Mrs. D. Ormerod and Douglas Fenton and Nora Carbine – all of whom reside in close proximity to the separate campus of St. Patrick's Middle School, located on MacArthur Boulevard ("middle school"). Mr. Lovendusky argued that the middle school and elementary school campuses should be treated as one cohesive unit for purposes of determining party status.

The Board, by consensus, denied Mr. Lovendusky's request for party status. The Board ascertained that the request was untimely filed and that, although Mr. Lovendusky lives within 200 feet of the middle school campus, he does not live within 200 feet of the campus in question here, which is on Whitehaven Parkway. The Board determined that the two campuses should be treated separately and that the middle school campus is controlled by a separate Order, not in question here. Mr. Lovendusky lives at some distance from the subject property and would not be affected by the outcome of this case any more so than any other member of the general public. The Board therefore concluded that Mr. Lovendusky and the others he claimed to represent would be treated as persons in opposition to the application.

Applicant's Case. The Applicant seeks to update a condition of an earlier BZA order to increase the staff and faculty cap to accurately reflect the current number of employees at the school. The Applicant stated that the number of employees exceeded the cap imposed by the previous order as a result of the school's misinterpretation of that order. Ms. Katherine Bradley, Chairman of the Board of the Applicant and Mr. Peter Barrett, the School's headmaster, testified in its behalf. They indicated that the application to increase the faculty and staff cap to 93 was intended to mean 93 FTE's – full-time equivalents -- as opposed to 93 persons. They explained that the Applicant preferred use of the FTE counting method because the part-time positions allowed greater flexibility to their teachers and other employees. Ms Bradley testified that the breakdown of part-time and full-time employees at the School would not change significantly in the future, but that the School would annually share this breakdown with the ANC. She also represented that the School would accept a condition which capped its part-time employees at a certain percentage of its work force.

Government Reports. On November 24, 2003, OP filed a report recommending that the Board grant the application to increase the staff and faculty cap. OP generally supported the ANC's proposed conditions, but recommended that only one condition actually be adopted by the Board. OP's recommended condition would continue the current student cap of 440 and would permit a maximum number of staff and faculty of 93 FTE.

During the hearing, OP stated that it had mentioned the use of the FTE counting method to DDOT, which had no particular concerns with it. Neither OP nor DDOT, however, performed any independent analysis of its use or the potential consequences thereof.

DDOT submitted to the Board a memorandum in support of the application dated November 18, 2003. DDOT opined that granting this application would have no negative effect on the existing Traffic Management Plan employed by the School.

DOH submitted to the Board a memorandum, dated November 3, 2003, supporting the continuation of the operation of the Applicant's child development center.

ANC Report. The ANC submitted a report dated November 14, 2003, which reflected that, at a duly noticed meeting with a quorum present, the ANC voted 7-0-0 to approve, with conditions, the application to increase the cap to realistically reflect the current size of the faculty and staff at the school. The ANC proposed the following three conditions: (1) that the School hold quarterly meetings with the ANC and the community, (2) that the School not return to the Board for any increase of faculty, staff, or students, for five years, and (3) that the School provide the ANC and the Board with an annual report on faculty and staff with a break-down of full- and part-time employees. The ANC, both in its report and in its testimony, expressed serious concern over the inappropriateness of using the FTE counting method. The ANC stated in its written testimony that the FTE method cannot be applied to the St. Patrick's case because the cap is tied to zoning regulations governing parking requirements. The school has a limited number of parking spaces available and each school employee represents a "full" person when he or she parks at the school. The employee's car represents a "whole" vehicle, regardless of the employee's part-time or full-time status.

FINDINGS OF FACT

1. The subject property is located in an R-1-B zoning district at address 4700 Whitehaven Parkway, N.W. in the Palisades neighborhood of Ward 3. Whitehaven Parkway bisects the site, dividing it into two parcels (Square 1372, Lot 817 and Square 1374, Lot 5).

2. The south parcel is improved with a two-story, plus basement, elementary and nursery school building that was built in 1976. The School's gymnasium and parking facility are located on the north parcel.

3. The School was founded in 1956 as a nursery school and elementary grades were added in 1967.

4. In 1973, Board Order No. 11307 granted the Applicant a special exception for the pre-school and elementary school on property in the vicinity of the subject property. Order No. 11307 does not condition the special exception with a term of years and does not condition, or set a maximum number for, faculty and/or staff on the site.

The Order merely states that there will be approximately 29 teachers and administrative personnel. Exhibit No. 26, Tab D.

5. In 1977, the School moved to the subject property and the special exception use continued thereon.

6. In 1983, Board Order No. 14009 granted the Applicant permission to expand the school and set the total number of faculty and staff for both facilities (*i.e.*, the child development center and the elementary school) at 48. Exhibit No. 26, Tab D.

7. In 1990,[2] the Applicant applied to the Board for permission to alter and repair its physical facility and to increase its student enrollment and staff. The Board, in Order No. 15374, dated October 30, 1990, granted the application and conditioned the use, in pertinent part, as follows: "[t]he number of staff shall not exceed sixty." Exhibit No. 26, Tab D.

8. There has been only one Board Order concerning the School since 1990. In 1999, Board Order No. 16517 granted the Applicant permission to construct a gymnasium and to renovate and expand an existing building. The Order says nothing about a faculty/staff number or cap, therefore there has been no new faculty/staff cap established since Order No. 15374 in 1990.

9. Between 1990 and 2003, the School concluded erroneously that the cap of 60 "staff" established in 1990 pertained only to "staff" and not "faculty," and that therefore there was no cap on "faculty." Therefore, by 2003, the School employed 64 faculty and 29 staff.

10. The Board finds that the cap of 60 staff established in 1990 by Order No. 15374 applied to both "faculty" and "staff."

11. The Applicant, acknowledging its erroneous interpretation of the 1990 cap, on September 10, 2003, applied for permission to have a 93 FTE faculty and staff cap in order to update the cap to reflect its real-life faculty and staff numbers.

12. The School currently employs a total of 103 persons, 77 of whom work full-time and 26 part-time. This translates into a total FTE count of 92.7 FTEs.

13. There are currently 20 employees of the child development center and 83 employees of the elementary school.

14. The School is proposing a cap of 93 FTEs with a maximum head count of 105 persons. This proposal reflects the School's current faculty and staff levels (with a 2

[2]There is one other pre-1990 Board Order, No. 11933, dealing with this School. It was issued in 1976, but addressed only changes to the site plan approved in Order No. 11307, and is not relevant here.

–person flexibility) and so, will not cause any change in existing conditions associated with the numbers of faculty and staff.

15. The School is not proposing any increase in the cap on student enrollment.
16. Pursuant to the Zoning Regulations, a private school must provide two off-street parking spaces for every three teachers and other employees. 11 DCMR §§ 206.3 and 2101.1.

17. Pursuant to the Zoning Regulations, a child development center must provide one off-street parking space for each 4 teachers and other employees. 11 DCMR §§ 205.4 and 2101.1.

18. For 105 employees, 62 spaces are required. Five spaces would be required for the 20 employees of the child development center and 57 spaces would be required for the 85 staff and faculty members of the elementary school. 11 DCMR §§ 205.4, 206.3 and 2101.1.

19. The School provides the required 62 parking spaces on the subject property. The School also provides 23 spaces on leased property adjacent to the subject property and 42 angled parking spaces in the public space along Whitehaven Parkway, which are leased from the District of Columbia. Therefore, the School provides a total of 127 off-street parking spaces.

20. One hundred and twenty-seven parking spaces are ample for this special exception use and are sufficient to accommodate the regular, day-to-day use of the subject property, even with a maximum faculty and staff head count of 105 persons.

21. The maximum number of faculty and staff on the subject property at any one time is 100 persons. This "peak" parking use occurs usually at approximately 11:00 a.m. on Tuesdays.

22. The School uses a Traffic Management Plan, instituted as part of an earlier special exception proceeding, including a carpool, which mitigates traffic impacts associated with the operation of the School.

23. The existing numbers of faculty and staff employed by the School operate within the framework of the School's Traffic Management Plan, therefore the proposed cap increase to reflect these numbers will cause no further negative traffic impacts.

CONCLUSIONS OF LAW

The Board is authorized to grant a special exception where, in its judgment, 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." 11 DCMR § 3104.1. Certain special exceptions must also meet the conditions enumerated in the particular sections pertaining to them. In this case, the Applicant had to meet both the requirements of §

3104.1 and those subsections of §§ 205 and 206 implicated by this modification to the already-existing special exception. Because this is a request to increase the staff and faculty cap, the requirements of subsections 205.4 and 206.3, regarding off-street parking, and §§ 205.3 and 206.2, regarding objectionable conditions, must be met. Once the necessary showings are made, the Board ordinarily must grant the special exception, or modification thereof. *First Baptist Church of Washington v. District of Columbia Board of Zoning Adjustment,* 432 A.2d 695, 698 (D.C. 1981).

Section 205.4 of the Zoning Regulations requires that a child development center provide "sufficient" parking to meet the reasonable needs of the center. Section 206.3 requires that a private school provide "ample" parking, but not less than that required by § 2101.1. Section 2101.1 requires one off-street parking space for each 4 teachers and other employees of a child development center and two spaces for every three teachers and other employees of a private school. 11 DCMR § 2101.1.

The School has 62 off-street parking spaces on the subject property. This number of spaces allows the School to have a staff and faculty maximum of 105 individuals using the head count method. Using this method, the 20 employees of the child development center require 5 spaces. After subtracting these 5 spaces, the school is left with 57 spaces, which is sufficient, under §§ 206.3 and 2101.1, for the current 83 employees of the elementary school and would be sufficient for a maximum of 85 employees. Therefore, the School, with a current staff and faculty of 103, has sufficient parking space, and if the head count cap of 105 were granted, the School would still have sufficient parking space under the Zoning Regulations.

The School is proposing use of an FTE counting method. An FTE is a "full-time equivalent," meaning that if three persons each work one-third time, together they are counted as one FTE. The School proposes that § 2101.1's more restrictive standard applicable to private schools (2 spaces for every 3 employees) be applied to both the child development center and the elementary school and that if this is done, its 62 spaces would allow for 93 FTEs. The School currently has an FTE count of 92.7, therefore it has sufficient parking space under the Zoning Regulations and if the FTE cap of 93 were granted, it would still have sufficient parking space under the Regulations.

The School also provides 23 off-street parking spaces on leased property adjacent to the subject property and 42 angled spaces in the public space along Whitehaven Parkway, which are leased from the District of Columbia. The School therefore provides a total of 127 parking spaces, which are available to meet the reasonable needs of faculty, staff, and visitors. This is ample parking space for the School's operations and is sufficient to mitigate any adverse effects on neighboring properties. The School also has a Traffic Management Plan ("TMP"), which was implemented recently and reflects a recognition of 103 employees. The provisions of the TMP also help mitigate traffic and parking impacts on neighboring properties.

At present, the number of faculty and staff may not exceed 60. The school currently employs 103. The discrepancy results from the Applicant's mistaken belief that the cap applied only to staff. Thus, the increase requested here will not result in an actual increase, but rather will modify the Board's condition to comport with reality. The fact that the Applicant is in non-

compliance should not bar the Board's consideration of the request. It would be counterproductive for the Board to dissuade efforts to come into compliance. The Applicant has admitted its error, is not seeking to add more faculty or staff, and has demonstrated that the increase, although unauthorized, did not result in adverse impacts. In addition, a faculty and staff cap of 60 is clearly out-dated and a new cap is necessary to bring the paper cap in line with reality. There are now 103 persons employed by the School and permitting a cap of 105 will not cause any significant change in existing conditions nor cause any objectionable conditions due to noise, traffic or the like. Therefore, based on the ample parking provided and the lack of any real change of conditions if the cap is increased, the Board concludes that a staff and faculty cap increase is in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and can be granted without causing any adverse effects to neighboring properties.

The Board further concludes, however, that such an increase must be based on a head count of faculty and staff. The Zoning Regulations speak about individual persons;, they do not use, define, or interpret the concept of FTEs in any context. Section 2118.3 of the Zoning Regulations is pertinent here. It is a rule of interpretation of the Zoning Regulations dealing with parking and states:

> [t]he number of teachers or employees shall be computed on the basis of the greatest number of persons to be employed at any one period during the day or night, including persons having both full-time and part-time employment.

Section 2118.3 treats both part-time and full-time employees as whole "persons." It does not sanction the creating of one full-time position by amalgamating two or three part-time positions, as would occur if a FTE counting method were used.

Use of FTEs is particularly inappropriate where parking is in issue as even a part-time employee drives a whole vehicle and needs a whole parking space. Three part-time people may equal one FTE, but they would still be driving three vehicles. In fact, § 2101.1's requirement of 2 parking spaces for each 3 employees would trigger the need for 2 parking spaces for 3 part-time employees if they are treated as individual persons, but would trigger no parking requirement if the 3 part-timers were considered one FTE, *i.e.,* one person. This is counter to the intent of the Zoning Regulations to prevent or mitigate adverse impacts created by parking congestion.

The Board also notes that, although the Applicant preferred an FTE count, it was willing to accept an increase in staff and faculty cap based on head count. *See,* December 2, 2003 hearing transcript at 261, lines 15-17. Further, the person who testified in opposition to the application *urged* the Board to adopt "a real person count of 103 and 105." *Id.* at 310, lines 17-19.

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive. The ANC voted to approve the special exception to increase the staff and faculty cap to reflect the status quo - 93-FTEs or 103 employees, with three conditions. The ANC, however, expressed

serious reservations concerning the use of the FTE calculation method. As set forth above, the Board concurs with the views of the ANC with respect to the inappropriateness of employing the FTE calculation method in this regulatory context which ties the number of parking spaces to the number of employees. The Board agrees with two of the ANC's three proposed conditions, which are included below. The third condition, to which the Board cannot agree, is that the School not return to the ANC or this Board to request any further expansion of faculty, staff, or students for 5 years. This proposed condition is beyond the jurisdiction of the Board to impose because neither the Zoning Act nor the Zoning Regulations place limitations on the ability to seek additional zoning relief. In addition such a condition would not mitigate the potential adverse impacts of this or any other use. OP also recommended approval of the 93-FTE cap, but beyond soliciting DDOT's opinion of the use of FTEs, did not prepare any independent analysis of their use. The Board agrees with OP that the cap should be increased, but not that an FTE counting method is appropriate.

For the reasons stated above, the Board concludes that the Applicant has satisfied the burden of proof with respect to the application for a modification of an existing special exception for a faculty and staff cap increase from 60 to 105, pursuant to §§ 3104.1, 205 and 206. Accordingly, it is therefore **ORDERED** that the application is **GRANTED, subject to the following CONDITIONS:**

1. Condition number 2 of Order No. 15374 is amended to read as follows: "The number of students in the elementary school and the child development center shall not exceed four hundred and forty (440). The total number of staff and faculty shall not exceed one hundred and five (105) persons."

2. The Applicant shall file an annual report with this Board and ANC 3D indicating the total number of faculty and staff, with a breakdown showing how the number of employees is under 105.

3. The Applicant will hold quarterly meetings with ANC 3D and the community.

VOTE: **4-0-1** (Geoffrey H. Griffis, Curtis L. Etherly,Jr.,Ruthanne G. Miller, and David Zaidain to grant. Zoning Commissioner member not participating, not voting.)

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

ATTESTED BY: Jerrily Kress
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: OCT - 7 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 SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.
THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.SG/RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 17081

As Director of the Office of Zoning, I hereby certify and attest that on OCT - 7 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: Jerrily Kress

JERRILY R. KRESS, FAIA
Director, Office of Zoning

rsn