Barry Kreiswirth
427 Warner Street, NW
Washington, DC 20001

April 27, 2004

Re: Party Filing in Application No. 17136, Application of Africare, Inc.

To Board of Zoning Adjustment:

The attached 20 copies of the Reply Testimony of Barry Kreiswirth, a party in Application No. 17136, Application of Africare, Inc., are being filed pursuant to the schedule for filings set forth by the Board at its hearing on the application.

Sincerely,

Barry Kreiswirth

BZA
Case No. 17136
Exhibit No. 35

Board of Zoning Adjustment
District of Columbia
CASE NO. 17136
EXHIBIT NO. 35

Reply Testimony of
Barry Kreiswirth, Party

in

Application No. 17136
Application of Africare, Inc.

Before the
District of Columbia
Board of Zoning Adjustment

FILED: April 27, 2004

Reply Testimony of Barry Kreiswirth, Party, in BZA Application No. 17136, Application of Africare, Inc.

I. Summary

The Board of Zoning Adjustment should deny Africare's application for a variance from the rear yard requirement of section 404.1 of the Zoning Regulations ("rear yard variance") and for a variance from the lot occupancy limit established by section 403.2 of the Zoning Regulations ("lot occupancy variance").

As a preliminary matter, the application should denied because Africare's proposed project requires a use variance, and Africare has not applied to the Board for such a variance.

Second, even if the Board finds that a use variance is not required for the project, Africare's application should be denied because it fails to meet any of the three prongs of the variance test.

II. Africare's Application Should be Denied Because Africare's Proposed Project Requires a Use Variance, and Africare Has Not Applied for a Use Variance

Under section 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(3)(2001), and section 3017.2 of the Zoning Regulations, the Board has the power to issue a variance only to a limited extent. Specifically, the Board may authorize a variance "*so as to relieve the difficulties or hardship*" imposed by the unique conditions of a property. (Emphasis added.) Under the terms of this statutory provision, therefore, the Board may not grant a variance that is greater than that reasonably needed to relieve the difficulties or hardship an applicant is facing.

In 1982, Africare applied to the Board for a use variance to authorize it to convert the Morse School building on the subject property to office use. The Board agreed that exceptional circumstances existed in the property which created peculiar and exceptional practical difficulties and -- through its grant of the variance -- found that allowing the conversion of the building to office use relieved those difficulties. Having thereby relived the difficulties created by the exceptional

circumstances, the Board's authority to grant a variance was thereby terminated. The variance the Board granted in 1983 therefore applied to the building itself, not to the entire property, and Africare must now request a new variance for its new and expanded project.

This view of the Board's 1983 order as limited to the building -- i.e., to the extent necessary to relieve the hardship -- is a necessary result. If the Board's authority were not limited in this way, the law would effectively give the Board *carte blanche* to grant whatever form and whatever extent of variance it found to its liking, no matter the relationship of the relief to the exceptional circumstances or hardship. It would be unreasonable to interpret section 8 of the Zoning Act in this way.

Moreover, Africare in the earlier proceeding did not request a variance for anything beyond the use of the building. In the Board's own words, Africare sought "a variance from the use provisions . . . to use all floors of the subject premises as" a headquarters office of a charitable organization. BZA Order in Application No. 13904, at 1 (Sept. 27, 1983). The application therefore applied to the building itself, and the Board's relief granted in 1982 is properly viewed as limited to that specific request.

The applicant seeks in 2004 to receive a variance to use the remainder of the parcel in a manner inconsistent with the Zoning Regulations. This use variance, which was not sought in Africare's 1982 application, must now be considered separately by the Board.

Africare argues that it is not required to apply for a use variance because its current use is conforming and therefore an enlargement of the use is automatically authorized. The cases its sites for this argument are inapposite. In Industrial Lessors Inc. v. City of Garfield, 290 A.2d 737 (Super. Ct. App. Div. 1972), cited by Africare on page 7 of its application, the property owner was rebuilding a structure that had previously been granted a variance but had since been destroyed. As such, *no expansion of the previously granted variance was at issue*. In Esquire Floors, Inc. v. Gunevald, 218 N.Y.S.2d 720 (Sup. Ct. 1961), also cited by Africare on page 7 of its application, the property owner sought to expand a

building that had previously been granted a yard space variance; again, however, *no expansion of the previously granted variance was at issue*, because "the proposed addition . . . conforms to all requirements of the zoning ordinance." Gunevald, 218 N.Y.S.2d at 721. Here, of course, Africare's proposed addition does not conform to the use requirement.

The final case that Africare cites (on page 8), Atlantic Richfield Co. v. Senn, 482 N.Y.S.2d 380 (4th Dept. App. Div. 1984), is ironic in its inapplicability. In Senn, the property owner sought to modify the use of a property that had previously been granted a variance. *The court rejected the modified use, reapplying the variance test to the property which had previously been granted a variance*, even though it appears that the new use of the property would be an equally or more restrictive use than the prior use. The court stated:

> Special Term erred in construing the provisions of the Lockport City Ordinance. That statute permits a property owner who enjoys a nonconforming use to switch to another nonconforming use of equal or more restrictive classification. This provision does not apply to petitioners, who operate their gas station pursuant to a variance, not pursuant to a nonconforming use (Matter of James v Town of New Hartford, 49 AD2d 247). Although Special Term did not reach the issue, we find petitioners' proof inadequate to establish the "dollars and cents" proof necessary to support a use variance (Matter of Village Bd. v Jarrold, 53 NY2d 254).

Senn, 482 N.Y.S.2d at 381. Senn clearly does not stand for Africare's proposition that a use existing pursuant to a variance may be changed or expanded without further consideration by the zoning authority -- in fact, it suggests the opposite.

At the hearing, it was suggested that once a use variance is approved for a property, the variance authorizes that use for the entire property in perpetuity. To the extent that the exceptional circumstances of a property inhere in the land (rather than a structure) and the Board's grant of the variance clearly applies to the exceptional circumstances of the land, this interpretation

has some appeal, particularly because of the reasonable expectations of the property owner. Where, as here, however, the exceptional circumstances are related to a specific structure, and the variance was requested for the specific structure, the scope of the variance should be interpreted as limited to the structure and an expansion of the use beyond the structure should require an application for an additional variance.

The New Jersey case of Alpine Tower Company v. Borough of Alpine, 555 A.2d 657 (N.J. Super. Ct. 1989) is instructive. In that case, the applicant applied for, and was granted, a use variance to construct a 4,900 square foot building. That variance was granted in 1983. In 1985, the applicant sought to expand the building to 6,900 square feet, and the court ruled that a new use variance was required. The court said: "[Applicant's] application for a variance and site plan approval filed in October 1982 sought approval for construction of a 4,900 square foot building. . . . Therefore, the Board's 1983 resolution implicitly limited plaintiff's use variance to the building shown in the application. . . . [T]he Board's approval of a use variance for 4,900 square foot building did not provide the requisite authorization for construction of a 6,900 square foot building." Alpine at 660-661.

For the reasons above, Africare's application should be denied and Africare should be required to apply for a use variance for its proposed project.

III. Africare's Application Should Be Denied Because Africare Has Not Shown that an Extraordinary or Exceptional Situation or Condition Exists with Respect to the Subject Property

Even if the Board determines that a use variance is not required for Africare's proposed project, the Board should deny Africare's application for the rear yard and lot occupancy variances because no extraordinary or exceptional situation or condition exists with respect to the property.

An applicant for an area variance is required to show that an extraordinary or exceptional situation or condition exists with respect to the property for which it seeks a variance. See Monaco, infra, at 1096. Africare first attempts to rely on the construction and configuration of

the Morse School building as creating an extraordinary or exceptional situation or condition. See Application at 11. However, that condition was already recognized and relieved by the Board's grant of a use variance in 1983 -- and the property is now being used productively.

Perhaps recognizing this, Africare appears in a later filing to rely in part on its status as a public service organization, citing Monaco v. D.C. Board of Zoning Adjustment, 407 A.2d 1091 (D.C. 1979), to justify its requested variance. In Monaco, the court stated that the needs of a public service organization to expand could be properly considered in the Board's determination of whether an extraordinary and exceptional situation or condition exists. In Monaco (and its successor Draude, discussed below), however, the court looked at the status of the applicant as a public service organization and its interest in expanding only as one factor in a number of factors that warranted the finding of extraordinary or exceptional situation or condition.

In Monaco, a highly unusual set of circumstances existed. The Republican National Committee sought to expand its office building, which was located in an R-4 zone. The court found that a variety of factors existed -- the close relation of the applicant to Congress; the property's location near Congress; a right of first refusal and restrictive covenant held by House of Representatives Office Building Commission; and prior actions of the Zoning Commission and Board of Zoning Adjustment. In this unique context, the court held that the Board of Zoning Adjustment could consider the needs of a public service organization to expand in its determination of whether extraordinary situation exists. No such highly unusual set of circumstances exist here.[1]

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[1] Africare attempts to equate its supposed reliance on this Board's lapsed 1999 order with the lapsed order in Monaco. This is unconvincing. First, the Monaco court looked not simply at the Board order, but also at a related Zoning Commission determination; moreover, the court indicated that the central element of the reliance was that the applicant proceeded to construct the first stage of the building. Monaco at 1097 ("[T]he Zoning Commission...implicitly approved the site and indicated that intervenors should proceed by means of variance. Moreover, the BZA granted variances for the greatest part of the project. Intervenors proceeded in good faith to construct the Capitol Hill Club and stage one of the office building...These actions by the zoning authorities provided implicit assurance that the project could be completed.") No such situation exists here: no Zoning Commission

Similarly, in Draude v. D.C. Board of Zoning Adjustment, 527 A.2d 1242 (D.C. 1987), the applicant's status as a public service organization with an interest in expanding its building was merely one of several significant factors the Board considered in its decision to grant a variance. In that case, the Board found that exceptional circumstances existed not simply because of the existing building and the applicant's desire to expand it, but more importantly because of "the irregular shape of the lot [and] the narrowness of its southern portion." Draude v. D.C. Board of Zoning Adjustment, 582 A.2d 949, 955 ("Draude II"). Moreover, the Board found that the expansion "requires that the [a]ddition be physically linked to an interconnected with the [existing building]," which was an ambulatory health care facility. Draude II, 582 A.2d at 955. No such necessity has been shown here, nor does any exist.

Even if the Board determines that Africare's interest as a public service organization to expand its current space could potentially be considered as part of its determination of whether an extraordinary or exceptional situation or condition exists, Africare does not satisfy the court's standards for this factor.

In Draude, the court stated that a public service organization's interest in expanding its current building may be taken into account in the determination of whether an extraordinary or exceptional situation or condition exists only where: (1) the specific design the applicant wants to build "constitutes an institutional necessity, not merely the most desired of various options"; and (2) the applicant shows "precisely how the needed design features require the specific variance sought". Draude, 527 A.2d at 1256.

Africare has not met these standards. With respect to the rear yard variance, the applicant at the Board's hearing indicated that the rear yard setback requirement could be satisfied by expanding the width of the proposed addition into the proposed courtyard. The applicant's supplemental information filing of March 16, 2004, also

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action is at issue; Africare did not renovate the Morse School in the 1980s in anticipation of a new variance in 2004; nor does it appear that Africare has detrimentally relied on the lapsed 1999 order in any significant way.

indicates that the decision to encroach into the rear yard setback area is largely based on aesthetic reasons, rather than necessity. See Africare's Supplemental Information at 3-6 (filed March 16, 2004). Africare therefore has not satisfied its burden of showing a need for the rear yard variance; it is merely a desire or convenience.

With respect to the lot occupancy variance, Africare has again failed to show institutional necessity, rather than a mere desire or convenience. In fact, the applicant essentially admits that it does not need much of the space it is proposing. In its application, Africare states that the proposed addition "provide[s] for future staff expansion of an additional 20 employees", but in the same sentence states that "Africare has no present intention to enlarge the current Africare staff." Application at 3-4. Thus, Africare itself makes clear that there is no institutional necessity to the size of its proposed expansion.

Moreover, Africare has not provided any evidence that its expansion goals could not be accomplished by placing more functions underground or by locating additional space at a non-contiguous location -- nor has it provided clear information on what its institutional needs, rather than interests or desires are.

Because the one condition of the property that might be considered extraordinary or exceptional -- the existence of the Morse School -- has been relieved by a prior variance, and because Africare's interest in expanding its space as a public service organization does not meet the standards established by Monaco and Draude, Africare fails to satisfy the first prong of the variance test and its application should be denied.

IV. Africare's Application for a Variance Should Be Denied Because Africare Has Not Shown that Peculiar and Exceptional Practical Difficulties will Result from Application of the Rear-Yard and Lot Occupancy Requirements

Africare also has failed to show that it meets the second prong of the variance test, that strict application o the zoning regulations "would result in peculiar and exceptional practical difficulties." See Capitol

Hill Restoration Society, Inc. v. D.C. Board of Zoning Adjustment, 398 A.2d 13, 15 (D.C. 1979).

Africare first incorrectly equates this second prong with the Monaco/Draude test for whether a public service organization's interest in expanding its existing space may be considered as part of the Board's determination of whether an extraordinary or exceptional situation or condition exists. Specifically, in its application for the rear yard and lot occupancy variances, Africare states that the test for practical difficulty is that "(1) the design the [public service entity] wants to build its an institutional necessity, and not merely the most desirable of various options, and (2) how the design requires the specific variances sought." Application at 14, citing Draude.

However, this is analysis is incorrect. Neither Monaco nor Draude suggests that the standards for the first and second prongs of the variance test should be collapsed together where a public service organization is seeking an expansion of its building. In fact, in Monaco the court quite clearly, and at some length, discussed separately whether the second prong of the test was met. See Monaco, 407 A.2d at 1100-1101.

Africare's additional filing of April 20, 2004, may be read to backtrack from the position it takes in its application. It seems to argue that Africare's supposed reliance on the Board's lapsed 1999 order in Application No. 16506 is similar to the situation in Monaco and therefore helps show peculiar and exceptional practical difficulty. See Additional Filing at 3 (April 20, 2004). As discussed in footnote 1 above, however, Africare's putative reliance on a prior Board order is not comparable to the actual reliance in Monaco. Africare also appears to argue in its additional filing that Monaco suggests that a public service organization's interest in expansion helps satisfy the practical difficulty test, see Additional Filing at 3; this, however, is not the case. Although Monaco considered the expansion need as part of its "extraordinary or exceptional situation or condition" test, it did not consider this factor in its consideration of the second prong of the variance test (here, practical difficulty).

In any event, there simply is no peculiar or exceptional practical difficulty in this case. There is merely the desire of a particular owner to expand its use of a property in a way which suits the current desires of that particular owner. There is nothing peculiar or exceptional about such a situation. (As noted above, the applicant does not even now intend to need all of the space it seeks to construct.) If this were the "practical difficulty" test, it would be no test at all.[2]

Africare's filings shed little light on the organization's alleged peculiar and exceptional practical difficulties in complying with the zoning regulations and leaves a reader to guess at what the applicant's argument really is. It is neither the Board's job, nor an opponent's, to fill in the applicant's blanks; "it is the [applicant's] burden to show that it is entitled to variance." Clerics of Saint Viator, Inc. v. D.C. Board of Zoning Adjustment, 320 A.2d 291, 296 (D.C. 1974).

Having misstated the test for practical difficulty, and providing insufficient evidence to show that Africare would suffer a peculiar and exceptional practical difficulty in complying with the zoning regulations, the Board should reject Africare's application for failing to meet the second prong of the variance test.

V. Africare's Application Should Be Denied Because the Grant of the Variance Would Detrimentally Affect the Public Good and Impair the Intent, Purpose, or Integrity of the Zone Plan

Finally, Africare's application should be denied because it does not meet the third prong of the variance

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[2] Even a need to move because of the rear yard and lot occupancy restrictions would not alone satisfy the practical difficulty test. The ultimate difficulty, should all types of variance relief be denied to Africare, would be that Africare would need to relocate its headquarters. The costs incurred by an organization to move from a space that it has outgrown hardly rise to the level of "peculiar and exceptional". Indeed, the court in Monaco indicated that an applicant might be required to move to relieve its overcrowding, but did not require that outcome in the particular case because the value of the Monaco applicant's investment in its existing building would be "greatly reduce[d]" in a move because of a covenant with the House of Representatives Office Building Commission. See Monaco, 407 A.2d at 1101. No such unusual circumstance exists here, and Africare is likely to receive a reasonable return on its investment in its current building if it were to relocate.

test, that "the public good would not be detrimentally affected and the intent, purpose, and integrity of the zone plan would not be impaired." Capitol Hill Restoration Society, 398 A.2d at 15-16 (internal quotation marks omitted).

As the Office of Planning explained, Africare's proposed "intensity of use would be detrimental to the public good and will impair the intent, purpose, and integrity of the zone plan and be especially contrary to the R-4 zone..." Office of Planning Memorandum, at 4 (dated March 5, 2004).[3]

Moreover, the increased intensity of uses which would be authorized by the requested variances will increase the noise impacts on neighboring properties in a manner inconsistent with the public good and zone plan. As stated in my testimony of March 30, 2004, and as brought out more fully in the hearing, there will be significant noise impacts from the proposed project (especially on the properties to the rear of Africare), including: additional air handling and mechanical equipment, a service entrance within the 20-foot required rear setback, a possible trash receptacle within the 20-foot required rear setback, the removal of a sound-mitigating fence along a large portion of the rear yard, and new parking activity in the rear of the property.

It is possible that these noise impacts could be mitigated, with appropriate conditions, such as all of the following:

1. Require consolidation of the seven current compressors to one unit; require placement of the new, consolidated compressor on the side of the property which faces the side alley, across from the vacant lot owned by Africare; and require that this new, consolidated compressor be completely shielded and noise-mitigated.
2. Prohibit any new garbage pickup or disposal area in the rear of the building.
3. Prohibit the proposed rear parking area.

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[3] Africare argues that the Office of Planning ignored what it claims are the Monaco standards in the Office's Memorandum. See Africare Filing of April 20, 2004, at 2-3. However, there is no suggestion in Monaco or Draude that the third prong of the variance test is in any way relaxed based on the public service status of the entity requesting the variance.

4. Prohibit the proposed rear service area, to the extent it will generate vehicular, rather than pedestrian, traffic.
5. Maximize compliance with the rear yard requirement (i.e., require that the addition be set back 20 feet or as close to 20 feet as reasonably feasible).
6. Require that the final plan for the rear yard setback and placement of the air handling and mechanical facilities, parking, garbage, fencing, and service entry should be subject to the review of all parties in the proceeding, and if there is any deviation between the final plan and the currently proposed plan (other than those imposed by the Board as a condition of the grant of any variance), a party may apply to the Board for reconsideration of its order in this case.

In addition, to mitigate the impact of the loss of open space which would otherwise be maintained through the lot occupancy requirements, the Board should require that the lot that the applicant owns to the east of the current building be landscaped, re-fenced, and properly maintained. Although the Board may not have the authority to regulate the use of that lot through this proceeding, the Board may have the authority to impose this limited condition in order to mitigate the impact of the proposed project on the public good, since the condition will not change the current use of the other property nor interfere with a future new use of the property.[4]

VI. Conclusion

Because Africare's proposed project requires a use variance, for which it has not applied, and because Africare's application for rear yard and lot occupancy variances fails to meet any of the prongs of the variance test, Africare's application should be denied.

[4] The applicant might also offer to take this action on its own.