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August 10, 2004

Via Facsimile and Mail

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

Re: BZA Application No. 17149, Sidwell Friends School;
Comments on Master Plan Phasing and Roof Structures

Dear Chairman Griffis and Members of the Board,

In response to the Board of Zoning Adjustment's (BZA) request for party submissions commenting on the proposed phasing of the construction projects included in Sidwell Friends School's (Sidwell) application for a special exception, and for comments regarding the additional zoning relief sought for a proposed stairwell roof structure, Advisory Neighborhood Commission 3C (ANC) submits the following comments.

PHASING OF CONSTRUCTION PROJECTS APPROVED BY SPECIAL EXCEPTION

It is noteworthy that there are no citations to Title 11 DCMR in either the July 13, 2004 submission by Mr. Feola and Mr. Utz on behalf of Sidwell or in the attached zoning orders, which are described as supporting the authority of the BZA to approve the phasing of construction projects subject to special exception review. It seems clear that there are no supporting or authorizing citations because Title 11 DCMR is silent on extending this authority to the BZA and thus, it does not exist, unless the BZA waives the pertinent zoning regulations.

The BZA is authorized pursuant to 11 DCMR Sect. 3104.1 to grant special exceptions where they will be in harmony with the purpose and intent of the Zoning Regulations and Zoning Maps, subject to conditions, which in the case of a school located in a residential zone are outlined in 11 DCMR 206. The conditions are a series of tests to determine whether or not there will be adverse impacts associated with the applicant's proposal. If the proposal involves construction or alterations to an existing structure, there are additional zoning regulations that pertain. 11 DCMR 3130.1(February 2003) outlines the time limit on BZA orders authorizing the erection or alteration of a structure:

> **No order authorizing the erection or alteration of a structure shall be valid for a period longer than two (2) years, or one (1) year for an Electronic Equipment Facility (EEF), unless, within such period, the plans for the erection or alteration are filed for the purposes of securing a building permit.**

BZA
Case No. 17149
Exhibit No. 83

Board of Zoning Adjustment
District of Columbia
CASE NO. 17149
EXHIBIT NO. 83

.Two additional sections, 3130.2 and 3130.3, stipulate that a permit must be issued within six months of application, and that once issued construction work must commence within six months, **"and shall proceed to completion in accordance with its terms. If the work is not started within such period the permit shall expire and shall not be renewed."** The level of detail in these zoning sections leaves no doubt that the maximum period between issuing a zoning order authorizing construction and the beginning of that construction is three years. Thus, Sidwell's request for a seven year delay between the issuance of a zoning order and the beginning of construction cannot be approved, unless the BZA decides to waive Sections 3130.1 through 3130.3.

Counsel for Sidwell attached two zoning orders to their July 13, 2004 submission explaining that the BZA granted phased construction in these special exception cases, and thus, the precedent for doing so has been established. ANC 3C does not believe that either of these orders provides the foundation for the BZA to grant phasing in this case.

The Levine School, Application No. 15984, wanted to convert an existing nonconforming structure, the Carnegie Institute building, into a private music school and build a performance space wing to this existing structure. In 1995, the BZA granted the special exception application. After a period of litigation, the Levine School petitioned the BZA for a modification of their order. The modification included a request to accomplish the construction approved in the original order in two phases, with the second phase to begin five years after Levine took occupancy of the Carnegie Institute building. In its decision the BZA noted:

> **On the issue of construction and timing, the Board noted that in approving an application, the Board does not direct applicants to begin construction by a certain time. The Board only requires that the applicant apply for the building permit within a specified time. Therefore, in this case, it is not a matter of the Board's jurisdiction if the performance wing is not constructed by a certain time, as long as the applicant has applied for the building permits in a timely fashion.**[1]

This decision was granted in 1997, at which time the zoning regulation pertaining to the timing of special exception approvals was 11 DCMR 3104.1(July 1995):

> **No order of the Board authorizing the erection or alteration of a structure shall be valid for a period longer than six (6) months unless, within that period, the plans for the erection or alteration are filed for the purpose of securing a building permit.**

Thus, when the BZA issued its order, which in part approved the motion for modification of approved plans, "subject to the condition that approval of the modified plans shall be for a period of five years from the date of this order," they were only approving a time limit on the plans. The BZA was not addressing when construction would begin because, as they pointed out, they had no authority to change the zoning requirement that the building permit process must begin within 6 months of the issuance of the order.

The Maret School, Application No. 16313, requested a special exception to build new structures and alter existing structures on their campus, and they sought a variance from parking requirements. The BZA issued a bench decision in 1998 granting the application with conditions. Condition No. 2 stated:

> **The applicant shall have up to two years to apply for a building permit for Phase I of the project. The applicant shall have up to ten years to apply for a building permit for Phase II of the project.**[2]

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[1] BZA Order, March 31, 1998, Application No. 15984, Page 7
[2] BZA Order, April 3, 1998, Application No. 16313, Page 2

At the time of this decision 11 DCMR 3104.1 was still in effect. It required the process of securing a building permit to begin within 6 months of the order. While reasonable people might differ on how long the process for securing a building permit might last in the District of Columbia in 1998, it does not seem reasonable to infer that compliance with 11 DCMR 3104.1 would extend to presenting plans for the purpose of securing a building permit, but not actually applying for ten years. The BZA did not have the authority to waive this section since their waiver authority, Section 3301.1, was limited to the sections in Chapter 33, Supplemental Rules of Practice and Procedure. The action taken by the Board in approving condition No. 2 is in error. But even if the BZA does not agree that this case is irrelevant to the present Sidwell case, it still cannot use this case as precedent since the zoning rules affecting special exceptions and building permits have changed. As indicated above, 11 DCMR 3104.1 has been replaced by 11 DCMR 3130.1 through 3130.3.[3] These new sections make it clear that construction projects approved by special exception must proceed in a timely fashion. Given that approval for these projects is conditioned on a demonstration that the private school will not become objectionable to adjoining and nearby properties because of noise, traffic, number of students, or otherwise objectionable conditions, it is consistent to require that any approved construction be undertaken before conditions might change. Objectionable conditions are not static, so the time limits imposed on construction are designed to provide an applicant adequate time to prepare for construction while insuring that the Section 206 conditions have not changed. A maximum of three years should be ample time for any applicant to begin construction. Delaying construction for five or ten years, places an undue burden on parties, who must persuasively predict impacts from construction that is many years ahead. No party to a special exception proceeding could predict with any certainty what conditions may be in five or ten years. But before a project is constructed in 2011the BZA should know if traffic conditions will worsen, if the Wisconsin Avenue corridor will be more densely developed, if Hearst School will expand as projected, if Fannie Mae will relocate and sell their property. All of these potential changes are likely, and all would have an impact on determining both the approval and the conditions for approval of Sidwell development seven years from now. The zoning regulations rightly require that an applicant must be ready to move forward with construction once an order has been issued. If the applicant is not prepared to secure a building permit and begin construction, they should only apply for that portion of the project that can be under construction within three years of the order being issued.

11 DCMR 3100.5 allows the BZA, for good cause shown, to waive Sections 3130.1 through 3130.3 if the waiver will not prejudice the rights of any party and is not otherwise prohibited by law. ANC 3C believes the granting of such a waiver in this case would prejudice the commission and the community, and would further establish an unwanted precedent. We have devoted enormous amounts of time to this application, as have community members. It has been difficult to secure reliable information about some aspects of this proposal. Indeed some relevant information about this project was learned after the hearings began. It seems clear that the proposed Phase II of this project is too conceptual to reliably determine that there will be no objectionable impacts to the adjoining and nearby property owners. We don't even know where the Meeting House will be located or how large it will be. We have a conceptual landscaping plan, but not one that would be enforceable by the Zoning Administrator. With more time Sidwell will surely be able to fill in the details, but if the BZA approves Phase II without this information there will be no opportunity for the ANCs or the community to enforce compliance with conceptual exhibits. This would surely prejudice the parties.

Sidwell has stated that they need a phased construction period in case their fundraising falls short or the financial markets alter their projections. If the BZA approves a waiver of Sections 3102.1, 3102.2, and 3102.3 on this basis, a similar argument could be made by every school that applies for a special exception to build or alter multiple buildings. A demonstration of "good cause" should be a unique set of conditions that would not easily apply to another applicant. To do otherwise would effectively change the zoning regulations. Fundraising for capital projects is a fact of life. Every school has to factor their ability to finance construction into the scope of project they can undertake. Zoning

[3] Final Rulemaking published at 46 DCR 7853, 7916 (October 1, 1999); as amended by Final Rulemaking published at 48 DCR 9830, 9841 (October 26,.2001).

regulations protect communities from schools that try to overwhelm them with multiple projects by stating that if approved the school has to begin the project within a reasonably prescribed time period. If the school is not prepared to follow the timetable established in the zoning regulations, the BZA should not waive the right of the community to be protected and the intent of Section 206 that certain conditions will be met before a project is approved.

ROOF STRUCTURES

Sidwell has requested special exception relief under 11 DCMR 411.11 for the setback of the stairwell housing from the exterior walls of the Zavitz Middle School proposed addition. Section 411.11 in pertinent part states:

> **Where impracticable because of operating difficulties, size of building lot, or other conditions relating to the building or surrounding area that would tend to make full compliance unduly restrictive, prohibitively costly, or unreasonable, the Board of Zoning Adjustment shall be empowered to approve the location, design, number, and all other aspects of such structure regulated under Sections 411.3 through 411.6, even if such structures do not meet the normal setback requirements of Section 400.7, when applicable, and to approve the material of enclosing construction used if not in accordance with Sections 411.3 and 411.5; Provided, that the intent and purpose of this chapter and this title shall not be materially impaired by the structure, and the light and air of adjacent buildings shall not be affected adversely.**

Sidwell's application argues that by placing the stairwell on the edge of the proposed addition they can "maximize the amount of classroom and academic space the Middle School can house." The submission does not address what specific difficulties make compliance unreasonable or prohibitively expensive. It is obvious that placing a stairwell on the edge of a building preserves interior space for program needs, but that isn't the focus of the regulation. Section 400.7 provides that housing for a stairwell on the roof of a building shall be "set back from all exterior walls a distance at least equal to its height above the roof upon which it is located." The regulation seems aimed at reducing the visual impact of roof structures by locating them away from the sides of a building. ANC 3C has taken no position on whether the special exception should be approved, so we only note that it appears further explanation is needed before the BZA could reach the conclusion Sidwell should not be required to comply with 11 DCMR 400.7.

The roof structure issue, however, raises another compliance problem. Another provision of Section 400.7 states that housing for roof structures "shall meet the requirements of Section 411." The Middle School addition proposal includes four roof structures, including the stairwell. While the additional three roof structures meet the requirements for setback, they do not comply with the requirements of Section 411.3, which states that all penthouses and mechanical equipment

> **shall be placed in one enclosure, and shall harmonize with the main structure in architectural character, material, and color.**

The architectural plans showing the roof design for the Middle School addition reveal four separate enclosures for roof structures. While Section 411.11 authorizes the BZA to ignore setback requirements if the roof structure meets the standards of Section 411.3, it does not authorize the BZA to waive the requirement of a single enclosure. The final clause of Section 411.11 additionally authorizes the BZA to waive part of Section 411.3, "and to approve the material of enclosing construction used if not in accordance with Sections 411.3 and 411.5," but it does not extend the authority to waive the first part of that section, which requires a single enclosure. It is the opinion of ANC 3C that the proposed roof structure design should be redrafted to comply with 11 DCMR 411.3.

ANC 3C appreciates the opportunity to comment on these two issues before the BZA in the matter of the Sidwell Friends School special exception application.

Sincerely,

Nancy J. MacWood
Chair, ANC 3C

Service by fax or email to:

Phil Feola
Karen Perry