NEIGHBORS UNITED TRUST
4911 Ashby Street, NW
Washington, DC 20007

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April 3, 2005

Board of Zoning Adjustment of the District of Columbia
441 4th Street, NW, Suite 210
Washington, DC 20001

Re: BZA "Special Exception" Application No. 17300; hearing date April 12, 2005
St. Patrick's Episcopal Day School,
Junior High School Campus at 4925 MacArthur Blvd. at Ashby Street, NW

Dear Board Members:

Neighbors United, a group of neighbors residing in the area surrounding St. Patrick's junior high school at 4925 MacArthur Blvd., is requesting that the Board of Zoning Adjustment turn down the school's Special Exception application to expand the student body from 40 to 60. We also oppose the school's request to change its Condition No. 7 in order to allow students to walk through the neighborhood, several times a day, to the school's other campus on Whitehaven Parkway.

I am serving as the Administrative Officer of the Trust, and as such am pleased to have the opportunity to address the Board on an issue of importance to us. Although prior commitments preclude us from applying for party status, we are submitting our views in this letter, for your careful consideration.

In summary, our objections are:

- The Application is not timely, as the use has been in operation barely more than one year (since on or about Jan. '04) and the BZA definitively rejected an automatic increase after a year of operation in its prior determinations;

- The instant Application is actually in the nature of a requested amendment to BZA Orders No.16852 and 16852A allowing the use, and the Conditions set forth in those Orders were for 40 students, but the Applicant is asking that they now be applied *per se* to 60 students;

- The Applicant has misinformed the Board in its Statement, dated Jan. 27, 2005, that there were no neighborhood complaints regarding the facility or non-compliance with Conditions, although even full compliance would have indicated only that the restrictions were in place for 40 students.

- Allowing adolescent students to walk through the neighborhood is a material deviation from St. Patrick's transportation plan (Conditions 7 and 8), was rejected by DDOT in the the previous proceeding, and raises other issues regarding the tranquility of the neighborhood.

BZA
Case No. 17300
Exhibit No. 25

Board of Zoning Adjustment
District of Columbia
CASE NO. 17300
EXHIBIT NO. 25

Background

When the junior high school use was approved, BZA No. 16852-A, the BZA decided upon a cap of 40 students, as recommended by the Office of Planning, rather than the 60 requested by the school. The Board members further discussed and rejected the notion of an automatic increase after a year, whether or not the school was in compliance with the conditions, see Attachment A, excerpts of the BZA Decision meeting of December 3, 2002.

Concerns were raised by the Board members that the school was new and might not have its full complement of students in the early period. There also was a comment that compliance might mean only that things appeared to be working acceptably at the existing level, rather than a justification to increase beyond that level. And there was explicit recognition that "the prejudice in the enforcement process is that DCRA is very reluctant to just revoke someone's certificate of occupancy" (Remarks of Commissioner Mitten).

Significantly, the Board expressed its determination that the school be made to come back to the BZA for any increases, which would require school officials to make a showing that the requested result "would not tend to become objectionable to adjoining and nearby property because of noise, traffic, number of students and otherwise objectionable conditions....." [the 11 DCMR §206 criterion], cited in the Findings of Fact and Conclusions of Law, dated (corrected version) Jan. 21, 2004, at p. 12.

"The Board ... adopts OP's recommendation of 40 students as a reasonable enrollment cap that will avoid potential adverse impacts on adjoining and nearby property. The Board declines to adopt the Applicant's proposal for an "automatic increase" in the enrollment cap to 60 after the first year of operation, because the Board cannot find, based on the testimony and evidence in the record in this proceeding, that a maximum enrollment of 60 students is not likely to become objectionable to adjoining and nearby property because of noise, traffic, or otherwise objectionable conditions that might arise with the higher enrollment..." *Supra*, at p. 13. Now, **the Applicant nevertheless is ignoring the BZA's decision and is essentially asking for an automatic increase after barely one year of operation at the site**.

[See extract of Findings of Fact and Conclusions of Law at Attachment B.]

Current Situation

The current Conditions are applicable to a 40-student maximum, as forcefully expressed by the Board; nevertheless the Applicant has not provided any new traffic, carpooling, outside playground/management controls or neighborhood protections, to address a **proposed increase of 50 percent** in students. Instead, the Applicant is disregarding the BZA's prior findings and saying, in both its Jan.27, 2005 and March 29, 2005, Statements, that its existing Conditions were originally planned for 60 students and that is sufficient.

Existing Conditions Have not Been Met

(1) Condition No. 8(b) requires that the school "shall submit a progress report evaluating the carpool program once per year; copies of the annual progress report and DDOT's response shall be given to the community liaison committee established by the Applicant pursuant to this Order."

Although the school has been in operation since Jan. '04 on Ashby Street, and the liaison committee has had four meetings, no such reports have been given to the committee members. In fact, there apparently were several traffic/carpool reports generated, but no such information was provided to the committee members, at least until the ANC Chair requested it and received some relevant data the night before the ANC considered this application, much too late for the ANC or the neighbors at the liaison committee to evaluate it, and to consider it in conjunction with the proposed 50% increase. We still have yet to receive the DDOT responses to the school regarding the recently proffered reports.

(2) Condition No. 7 requires that "the Applicant shall provide a shuttle bus system to minimize the number of vehicles coming to the subject property to drop off or pick up students." Subpart (a) provides, "Students who do not walk to the school or arrive at the subject property by public transportation will be required to arrive at the gymnasium at the applicant's Whitehaven campus between 7:30 a.m. and 7:55 a.m. on school days for transportation to the subject property by shuttle bus. In the afternoon, the students will be required to return to the Whitehaven campus vis shuttle bus for pick up."

Now the Applicant, while calling the traffic plan an "unqualified success" (January 28, 2005 Statement, at p. 12), freely admits that it has been violating this Condition by having staff drive late students to Ashby Street (same page). The quarterly reports, e.g. the April 20, 2004 meeting, page 5, notes further self-created exceptions such as ferrying students back and forth to Whitehaven during the day, and faculty trips between campuses as well. In addition, Applicant's counsel, Ms. Prince, in spite of the clear wording of the Order, opines that bicycle transportation generally would be permissible because it is not specifically addressed See Minutes, October 14, 2004, committee liason meeting, at p. 2). (What's next? Motor scooters? Segways?) All of this demonstrates an attitude in derogation of the regulatory language as well as the intent of the Condition to minimize vehicles coming to Ashby Street.

Other Continuing Problems

(3) The Applicant in both of its Statements assures the Board that it has established substantial set-backs from neighboring properties to mitigate noise problems. However, the neighbors have been complaining that the students are now often playing on the paved parking lot, which magnifies noise throughout the block, rather than on the touted "green space", in direct contradiction of Applicant's offered limitations for recreational activities and the Board's consequent findings, see Findings of Fact in BZA Order No. 16852A at p. 6.

The neighbors have indeed been complaining about student noise and also noise from the ventilators. As the Board knows, however, with regard to official complaint filings, there has been until recently a longstanding vacancy in the Compliance Officer position and lack of follow-up on filed complaints and procedures, as the neighbors experienced, and after several such tries, we could not be faulted for refusing to engage in futile activity.

(4) In the BZA's Order No. 16852A, Finding of Fact No. 6 at page 4, the Board found that the Applicant's stormwater management plan (with the National Park Service) to be installed beneath the parking lot, was designed to protect the integrity of the retaining wall and reduce or eliminate stormwater runoff onto neighboring properties, and on that basis, the Board concluded that it would not become an objectionable condition, Conclusions of Law at p. 14.

More than two years later, we invite you to view runoff spilling onto the sidewalk and roadway of Ashby Street and MacArthur Boulevard, as well adjoining property. It is our understanding that the DC Health Dept. Is concerned about the resulting debris. The sandbags littering the site near the Skrivseth property are eloquent testimony to this still unresolved major problem, that the Applicant should have addressed long ago. See photographs at Attachment C.

(5) Under Findings of Fact No. 4, at page 4 of Order No. 16852A, the Applicant proposed to preserve existing trees, and has boasted in its Statement, at page 6, that it had preserved the existing mature trees. However, it should be noted from its own photographs, see Applicant's Statement of January 28, 2005, BZA Exhibit Log #6, "View from Lawn, South Side", and "Southeast Corner of Life Safety Addition", that the large mature beech tree appears to be dead, and the magnolia, near the building, chopped back from a large leafy specimen to a much reduced and compromised canopy.

CONCLUSION

It is too soon to tell if the Board's Conditions will be met, and the junior high school use of this property of less than one-half an acre in a residential setting will be comfortably accommodated without objectionable impact upon the neighbors, after the initial flurry of compliance is over. Approving the increase after a year of operation, even with a tiered approach, is tantamount to the automatic increase the school requested and the Board rejected after exhaustive consideration and processing.

If, however, the Board sees fit to grant an increase, then we would ask that the Board only approve an increase to 50 students at this time, as the school assured the Board it would utilize until 2007, in order to provide an adequate track record of performance; and further, that any "steps" or other limitations or restrictions be recorded in the actual amendatory Condition language.

Katherine Van Sickle DeMallie April 3 2005

Katherine Van Sickle Demallie, Administrative Officer, Neighbors United Trust

A

From: "Campbell & Tina DeMallie" <demallie@erols.com>
Subject: **Carol Mitten's Remarks of 12-03-02 In Context**
Date: February 17, 2005 9:52:53 PM EST
To: "Nancy Feldman" <nlfeldmanlaw@earthlink.net>

Here are Carol Mitten's remarks of December 3, 2002 in context:

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA
+ + + + +
BOARD OF ZONING ADJUSTMENT
+ + + + +
PUBLIC MEETING
+ + + + +
TUESDAY
DECEMBER 3, 2002
+ + + + +
The Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Geoffrey H. Griffis, Chairperson, presiding.
PRESENT:
GEOFFREY H. GRIFFIS, Chairperson
ANNE MOHNKERN RENSHAW, Vice Chairperson
DAVID ZAIDAIN, Board Member
CAROL J. MITTEN, Zoning Commission
STAFF PRESENT:
SHERI M. PRUITT, Secretary, BZA
BEVERLEY BAILEY, Office of Zoning
CLIFFORD MOY, Office of Zoning
JOHN NYARKU, Office of Zoning
D.C. OFFICE OF CORPORATION COUNSEL:
MARY NAGELHOUT, ESQ.
CHAIRMAN GRIFFIS: Let's resume. I think it would be appropriate to look at the issue of whether a condition is warranted for the number of students and I'll open it up for discussion. In the application there was talk about an enrollment cap at 40 and that is for grades 7 and 8 for the first year and that would be, in fact, increased within a year, depending on the compliance with any conditions. There is also some testimony in the record on an additional grade, 9th. It would be my judgment that perhaps for our discussion we perhaps establish an assumption that we look at the student body and that assumption would be that it would be 7, 8 and 9 and the limiting factor that I think is of more

importance is the number of students, not necessarily, 15
7th, 8th or 9th grade. There was some discussion and 16
testimony from this Board of what is the difference 17
between an 8th and a 9th grader in terms of how we 18
view this application and I didn't feel that there was 19
substance in order for us to make that 20
differentiation. So again, I would say we focus on 21
numbers and we'd open it up for discussion at this 22
time. 23
MEMBER ZAIDAIN: I agree, Mr. Chair. I 24
think the real issue that is going to -- the real 25

issue is impact and I don't see how differentiating 1
between 7th, 8th and 9th graders is going to -- 2
VICE CHAIRPERSON RENSHAW: Except that in 3
9th grade, you're in high school and this is a middle 4
school arrangement. 5
CHAIRMAN GRIFFIS: True. 6
VICE CHAIRPERSON RENSHAW: And the 7
Applicant is talking about some kind of a high school. 8
The neighbors do not have or do not want, it seems a 9
high school at that location. They want less of an 10
impact at that location. 11
MEMBER ZAIDAIN: Are you saying adding 9th 12
grade makes it a high school? 13
VICE CHAIRPERSON RENSHAW: Well, it's on 14
its way. 15
MEMBER ZAIDAIN: But to me, that's 16
nomenclature. We're talking about in terms of like 17
traffic impact, how is the difference between 7th or 18
9th graders. 19
VICE CHAIRPERSON RENSHAW: If you control 20
the number of students. 21
MEMBER ZAIDAIN: I'm all for discussing 22
the number of students, but we're not there to that 23
point yet, I didn't think. I think I was just 24
agreeing with the Chair in terms of not getting into 25

saying it can only be 7th, 8th and 9th or 7th and 8th. 1
I think we need to look at what is tied to the impact 2
and that is the number of students. 3
VICE CHAIRPERSON RENSHAW: This is again 4

an application for a middle school, so 7th and 8th are middle school grades.
MEMBER ZAIDAIN: To me, it's just a name. If it's called -- I don't see the connection between whether or not it's a middle school or junior high, given the parameters that we looked at and any impacts.
CHAIRMAN GRIFFIS: Right, Mr. Zaidain, your point is that a ninth grader in terms of the issues that we're talking about in this application, there is no difference between those issues, a ninth grader and an eighth grader.
MEMBER ZAIDAIN: Right. Exactly. That's exactly what I'm saying.
VICE CHAIRPERSON RENSHAW: I would disagree.
CHAIRMAN GRIFFIS: Okay. Before us being a proposed condition is 40 students with an increase to 60 in a year. Discussion? Motion?
MEMBER ZAIDAIN: Well, what's -- let's discuss that for a second. In terms of what's going

to trigger the increase to 60?
CHAIRMAN GRIFFIS: That's an excellent point. Right now I think what's before us is -- well, frankly, it's for us to craft, certainly within our jurisdiction, if we decide to go that route.
What is being proposed was that there would be a submission of a report to establish compliance with an order and its conditions and that reporting would go through the Office of Zoning and also representatives from the Office of Planning, Department of Transportation and the established neighborhood representatives. That would obviously include the parties in this case, the ANC and any other representatives that were established.
MEMBER ZAIDAIN: Looking at OP's report or memo, dated November 8th, they discuss the time limit and reading their expectations of the operation and their analysis, I would have to concur with their recommendation that it just be capped at 40.
CHAIRMAN GRIFFIS: Okay.
MEMBER ZAIDAIN: I'm not sure, but I think having it go to 60 in a year with a mechanism, I don't think I can support that.

CHAIRMAN GRIFFIS: Your difficulty is with the --

MEMBER ZAIDAIN: Well, for one thing, I think a year is too short.
CHAIRMAN GRIFFIS: Okay.
MEMBER ZAIDAIN: First of all. And secondly, every other condition we've talked about we've reiterated the fact that they can always come back to this Board for a modification.
CHAIRMAN GRIFFIS: Okay.
MEMBER ZAIDAIN: Where we would go through a hearing process to get testimony on impacts and I think in terms of increasing enrollment from 40 to 60, that's the crux of impact level we're dealing with. And I wouldn't want to just kind of waive the process to deal with that important issue.
CHAIRMAN GRIFFIS: Okay, so your point is that you agree with the Office of Planning's analysis and that would be for a cap of 40 students if an increase in enrollment was to be anticipated, they could come through for modification in the order?
MEMBER ZAIDAIN: Yes, yes.
CHAIRMAN GRIFFIS: Okay. Ms. Mitten?
COMMISSIONER MITTEN: I agree with Mr. Zaidain on that. I think that we need to have -- we would need to have a showing of sort of long-standing compliance, not one year's worth of compliance because

the school probably isn't going to be fully populated for the first year with students because they're -- it's possible that they wouldn't have reached their full complement at that point. So just for one year's experience, I don't think it's sufficient and I think we're confronting this in another case that's in front of the Zoning Commission right now where it suggests that your reward for compliance is to increase intensity of use. Instead of saying, you know what? Those conditions are working just fine as things are and saying we did a good job and sort of let well enough alone for some period of time. So I'm in favor of a maximum of 40 students.

VICE CHAIRPERSON RENSHAW: Mr. Chairman, I would suggest or recommend that the full complement be less than 40 due to the fact that this is a new location, that the school will be trying to implement an unproven, untested transportation plan. It is a greater intense use on the neighborhood. We are reminded that back in some years ago, 1962, the BZA denied the request by the German School to increase from 25 to 75 in that same building and I would suggest that it would be much more sensible to go with not more than 30 in the school.
CHAIRMAN GRIFFIS: Okay. Speaking to the

previous denial, I don't think any of us sat on that, but that is good information.
My difficulty in taking that beyond some of the initial stages that you just made is not knowing all the facts of the case and not to mention talking about even a larger population, 75 and I'm not sure how they -- what the operations or programs are.
I agree with the fact that unless -- in my mind there are two ways to go if we wanted to look at having an enrollment increase and that is spending quite an amount of time today actually creating the system by which the Applicant could have that relief.
I do not strongly advocate doing that and think that, in fact, 40, based upon the issues that we have addressed is appropriate for an enrollment cap.
VICE CHAIRPERSON RENSHAW: How so?
COMMISSIONER MITTEN: Mr. Chairman, I would move that the maximum enrollment shall be limited to 40 students in grades 7 through 9.
VICE CHAIRPERSON RENSHAW: I had asked the Chair who stated that 40, based on the issues, was an appropriate number and I asked him how so and I think it got lost.
COMMISSIONER MITTEN: Sorry.
CHAIRMAN GRIFFIS: An excellent question.

Let me give Ms. Mitten an opportunity to speak to the motion and then I will address that.
COMMISSIONER MITTEN: The question being

how is 40 an appropriate number?
CHAIRMAN GRIFFIS: No, no. You don't need to speak to that. Speak to your motion.
COMMISSIONER MITTEN: I already did. Mr. Zaidain spoke about -- he gave his reasoning and I supported it and I don't want to belabor this any more.
CHAIRMAN GRIFFIS: In terms of answering that question for the Vice Chair in terms of how so, first of all, the application is for 40 students. I have deliberated and looked at the entire record based on that and also based on 60. I think fundamentally if we were to decide that in a year the school could increase with compliance, then actually we have an application for an enrollment of 60 students. That, to me, was getting to a level of -- that I could not start to measure the overall impact in terms of the issues that are important to us and that's the noise and the traffic. With the 40 students, it felt very comfortable in terms of addressing those issues. The plan that's been put by the Applicant -- it's a fine line, as you start to add 10 or subtract 10 in terms

of the monumentality of the use of this. I think the previous and established use and the timing of the use, the population that was in there set a beginning stage for me to appropriately deliberate on the number of students. And I feel very comfortable with what we're doing in terms of conditioning this order and addressing the issues that have come up in the testimony based on the 40 students.
VICE CHAIRPERSON RENSHAW: I would feel much more comfortable starting with a lower number and having the Applicant prove to the Board that it can accommodate 10 more and then work up to whatever the community feels is acceptable, but I think that this whole application has given us time to pause. We needed to pause over these issues. The issues are still there and have not been resolved. The issues are still there. They have not been resolved. They have yet to be proven, so I feel that 30 would be a much more responsible place to start from.
CHAIRMAN GRIFFIS: Very well. Others on the motion?
If not, then I would ask all those in

favor of the condition of maximum enrollment limited 23
to 40 students in grades 7 through 9 signify by saying 24
aye. 25

(Ayes.) 1
Opposed? 2
VICE CHAIRPERSON RENSHAW: Opposed. 3
MEMBER ZAIDAIN: I voted in favor. I 4
wanted to clarify my vote. I was a little slow there. 5
CHAIRMAN GRIFFIS: For our purposes now, 6
let's record Mr. Etherly's vote in favor with the 7
majority. 8
SECRETARY PRUITT: Staff would record the 9
vote 4:1 to approve the maximum enrollment shall be 10
limited to 40 students, grades 7 through 9. 11
CHAIRMAN GRIFFIS: Can we give that vote 12
again? 13
SECRETARY PRUITT: 4-1-0. 14
CHAIRMAN GRIFFIS: Four in support, one 15
opposed. 16

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Both DDOT and OP concluded that employees of the proposed private school and occasional visitors would be adequately served by 15 spaces at the subject property, while ANC 3D was "skeptical" that 15 parking spaces would provide the required ample parking space. The Board is persuaded by site-plan drawings submitted into evidence by the Applicant that the planned reconfiguration of the existing lot will provide at least 15 spaces while also providing adequate space on the subject property for landscaping buffers, play area, and turn-around room for delivery and trash trucks.

To minimize potential adverse impacts associated with the private school use of the subject property, the Applicant proposed, among other things, to limit the frequency of special events conducted during evening hours during the school year. The Board concurs that the number of special events – whether held during or after the school day – should be limited. The Board concludes further that the Applicant should be required to arrange adequate off-street parking at an appropriate location separate from the subject property to minimize the likelihood that parents or other persons attending the special event will park on residential streets in the vicinity of the subject property. For example, the Applicant might accommodate vehicles at its Whitehaven campus and arrange shuttle buses to and from the subject property.

In light of the number of employees, limits on use of the subject property, and requirements for off-site parking for special events, the Board is not persuaded by the ANC's assertion that the reconfigured parking lot would be inadequate and that school employees and visitors will park on Ashby Street. The Board concludes that a minimum of 15 parking spaces constitutes "ample parking space" for the Applicant's private school use in accordance with the requirements of subsection 206.3, subject to conditions relating to the provision of off-street parking for limited daytime and evening special events associated with the school. These requirements are established in Conditions No. 9-15.

Number of students. The Applicant proposed a maximum enrollment of 60 students at the subject property, or an initial maximum of 40 students with an automatic increase to a maximum of 60 students after the first year provided the Applicant remained in compliance with conditions of approval of its special exception request. The Office of Planning recommended a maximum of 40.

The Board does not agree with the contention of the parties in opposition that the subject property is "inherently too small" for private school use, and adopts OP's recommendation of 40 students as a reasonable enrollment cap that will avoid potential adverse impacts on adjoining and nearby property. The Board declines to adopt the Applicant's proposal for an "automatic increase" in the enrollment cap to 60 after the first year of operation, because the Board cannot find, based on the testimony and evidence in the record in this proceeding, that a maximum enrollment of 60 students is not likely to

become objectionable to adjoining and nearby property because of noise, traffic, or otherwise objectionable conditions that might arise with the higher enrollment. Accordingly, the Board adopts Condition No. 16.

The ANC's objection to an enrollment cap of 60 students was based in part on a Board decision reached 40 years ago not to allow expansion of an elementary school on the subject property to 75 students. The Board is not persuaded that the 1962 decision is apposite to the instant application however, given the likelihood of substantially changed conditions and in light of the differences between two proposed private school uses, including different plans for alteration of the existing building and the fact that the instant application involves students in grades 7 through 9 rather than as many as 75 young children in nursery and the lower elementary school grades.

The ANC also expressed concern about the likelihood that the Applicant would eventually seek to expand the size of its middle school student body at the subject property. The Board notes, however, that the Applicant is not permitted to exceed the cap established in this order, and that any proposal to increase enrollment at the subject property in the future would require approval by the Board as a special exception consistent with the requirements of section 206.

Otherwise objectionable conditions. The Board is not persuaded by the parties in opposition that the proposed private school use would create any otherwise objectionable conditions, including potential adverse impacts relating to stormwater runoff, privacy, diminished property values, or obligations for enforcing conditions of approval of the proposed private school. The Applicant, in coordination with the National Park Service, has designed a stormwater management system to be installed beneath the reconfigured parking lot to reduce or eliminate stormwater run-off from the subject property onto neighboring properties.

With regard to privacy, the Board notes that the Applicant's proposal will preserve the existing green space on the subject property, including several mature trees and side and rear yards that greatly exceed the minimum yards required under the Zoning Regulations in a location where both abutting properties are nonconforming lots with substandard side yards. The subject property has a fence along the eastern property line at the rear of the lot, which provides a buffer between the parking lot and the residence on the abutting property. To minimize potential intrusions on privacy, the Board adopts the Applicant's pledge to install a fence on the subject property if requested by the owner of the abutting property to the south (4913 MacArthur Blvd.). This requirement is set forth in Condition No. 17.

The Board heard testimony from the Applicant, ANC 3D, and the parties in opposition about the purported effect – positive or negative – that the proposed private school use on the subject property would have on the value of surrounding properties. However, no party offered compelling evidence demonstrating the proposed school's impact on property values. The Board is unable to make any finding or conclusion, as asserted by

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