



March 8, 2022

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

**VIA IZIS**

**Re: BZA Application No. 20643 of the Maret School**

Dear Members of the Board of Zoning Adjustment (the “**Board**”):

The Office of the Attorney General (“**OAG**”) respectfully submits the following comments in opposition to the application of the Maret School for the following relief:

A special exception pursuant to Subtitles U § 203.1(m) and X § 104<sup>1</sup> of the Zoning Regulations (Title 11 of the DCMR, Zoning Regulations of 2016, to which all references are made unless otherwise indicated) for a “private school” as a “principal use” to allow the Maret School to construct an off-campus athletic facility (the “**Off-Campus Athletic Facility**”) at 5901 Utah Avenue, N.W. (the “**Off-Campus Site**”) in the R-1B zone.

As detailed below, OAG asserts that approving the Maret School’s application would not be in the public interest because the proposed Off-Campus Athletic Facility is a commercial-scale high-intense use that is prohibited in the Off-Campus Site’s R-1B zone. If the Board approves the Off-Campus Athletic Facility as a private school principal use, the Board would effectively amend the Zoning Regulations governing the uses permitted in the R-1B zone in order to allow the proposed Off-Campus Athletic Facility - an overly intense use for the low-intensity R-1B zone. The Zoning Regulations were adopted by a public rulemaking process and can only be amended by the Zoning Commission, not the Board. In particular, use restrictions are intended to protect the public from the adverse impacts of uses deemed unsuitable for a specific zone due to their intensity. Enabling an end-run around the plain text of the Zoning Regulations based on legal obfuscation that conflates a subsidiary use with its dominant use not only diminishes the public’s faith in the zoning process by confirming that the “game is rigged” but strips the public of the procedural protections they would be entitled to if the Zoning Regulations were properly followed.

Specifically, OAG asserts that:

- The Off-Campus Athletic Facility does not qualify as a “private school” principal use eligible for a special exception in the R-1B zone because the Off-Campus Athletic Facility is not located on the same premises as the Maret School’s campus as required by Subtitle B § 203.3 but is instead more than three miles away the Maret School’s campus;

<sup>1</sup> OAG notes that the Application fails to include the special exception requirements under Subtitle X § 105 (*e.g.*, “105.3 Approval of a **private school** shall be based on the determination by the Board of Zoning Adjustment that ...” (emphasis added)).



- A private school use may include accessory athletic facilities (Subtitle B § 200.2(k)(2)) along with accessory dormitories and cafeterias, but use of the premises exclusively as an athletic facility is not a “private school;”
- An athletic facility accessory to a private school must comply with the requirements of Subtitle B § 203.3 that “accessory uses shall ... be customarily incidental and subordinate to the principal use, and located on the same lot with the principal use.”
- As a stand-alone athletic facility, the Off-Campus Athletic Facility is analogous in its intensity to a private recreation center or commercial gymnasium (particularly since the Maret School is leasing the Off-Campus Site from the Episcopal Center for Children (“ECC”) in a purely financial transaction and plans to sublease the Off-Campus Athletic Facility to unidentified third parties), which falls under the “Entertainment, Assembly, and Performing Arts” (“EAPA”) use category (Subtitle B § 200.2(m)), as identified by the “Parks and Recreation” use category (the Off-Campus Athletic Facility would not fall under the Parks and Recreation use category as that is limited to facilities “under the jurisdiction of a public agency that is used for community recreation facilities” (Subtitle B § 200.2(y)); and
- A commercial gym and other EAPA uses, which include facilities where athletic activities and sports can be actively played by residents as well as watched by residents, are not allowed in the Off-Campus Site’s R-1B zone or any RF or RA zone because these uses are too intense for the low-intensity residential uses for which the R-1B zone is intended. Indeed, EAPA uses are not allowed until the higher-intensity Mixed-Use Zones, where EAPA uses are permitted first as a special exception for Use Group B by Subtitle U § 506.1(h).

Instead, OAG asserts that the Off-Campus Athletic Facility is a use that is **not** permitted in the Off-Campus Site’s R-1B low-intensity residential zone and therefore requires a use variance pursuant to Subtitle X, Chapter 10, as either:

- A use variance from Subtitle U §§ 201-203 to allow an EAPA use in the R-1B zone; or
- A use variance from Subtitle B § 203.3’s requirement that an accessory use be located on the same lot as the principal use.

For either use variance, the Maret School would have to demonstrate to the Board’s satisfaction that the Off-Campus Site is unique and exceptional such that:

*“[a] reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations. An inability to put property to a more profitable use or loss of economic advantage is not sufficient to constitute hardship. It must be shown that the regulations preclude the use of the property in question for any purpose for which it is reasonably adapted, i.e., can the premises be put to any conforming use with a fair and reasonable return arising out of the ownership thereof?”* Palmer v. DC BZA, 287 A.2d 535, 542 (DC 1972).

Alternatively, the Maret School could propose an amendment to the Zoning Map or to the Zoning Regulations to authorize the proposed private recreation center use on the Off-Campus Site.

**The Off-Campus Athletic Facility is not a “private school” principal use**

The Zoning Regulations define:

- A “principal use” as “[t]he **primary purpose or activity for which a lot, structure, or building is occupied**” (Subtitle B § 100.1); and
- A “private education” use as:

“1. An educational, academic, or institutional use with the primary mission of providing **education and academic** instruction that provides District or state mandated basic education or educational uses;

2. Above uses may include, but are not limited to: accessory play and athletic areas, dormitories, cafeterias, recreational, or sports facilities ...”

(Subtitle B § 200.2(k)) – emphasis added)

OAG asserts that the Off-Site Athletic Facility does not qualify as a “private school” principal use because the Off-Site Athletic Facility would use the Off-Campus Site exclusively for athletic activities – there will be no on-site academic instructional element to which the proposed athletic uses will be accessory. Per Subtitle B § 200.2(k)(1), a sports training center would not be eligible for to be a “private education” use because that type of facility would not provide the academic instruction required to be a “private education” or “private school” use in the meaning of the Zoning Regulations.

The only way for the Off-Site Athletic Facility to fall within the “private education” use category is if it is accessory to the Maret School’s primary academic purpose under Subtitle B § 200.2(k)(2).<sup>2</sup> OAG notes that “accessory” in Subtitle B § 200.2(k)(2) applies to all of the subsequent terms (athletic areas, dormitories, etc), each of which must be “accessory” to the private school use, which must be present to “include” these accessory uses. The Maret School acknowledges that the proposed Off-Campus Athletic Facility is accessory to the Maret School’s primary purpose:

“While Maret makes extensive use of its Woodley Park campus athletic facilities, the Maret sports programs still require additional field space for athletic practices and competitions”  
(Ex. 17 at 3).

However, the Maret School’s campus is located in Woodley Park, more than three miles away from the Off-Campus Site and so fails the requirement of Subtitle B § 203.3 that an accessory use be located on the same lot as the principal use and that it be “incidental and subordinate” to the principal use. Devoid of any meaningful physical connection with the Maret School’s campus or academic use, the Off-Campus Site is merely property rented by the Maret School which has no other physical or academic presence in the immediate neighborhood of the Off-Campus Site.

The Maret School’s submission of the final order in BZA Application No. 16433 (“**BZA 16433**”; Ex. 203 at 3) in support of its assertion that the proposed Off-Campus Athletic Facility qualifies as a “private school” principal use is inapposite because:

- The athletic facility proposed in BZA 16433 was located on the same lot as the main administrative offices of the private school that it served with the remaining school buildings across a street; and
- Based on this physical proximity, the Board in BZA 16433 concluded that the proposed athletic facility was either:
  - An “extension of the principal use” of the private school on the same lot; or

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<sup>2</sup> The proposed Off-Campus Athletic Facility cannot be accessory to ECC that owns the Off-Campus Site since ECC has not operated since 2019 with no clear timeline to reopen and since the Maret School’s proposed use far exceeds ECC’s scale.

- Alternatively, an accessory use to the private school principal use on the lot because the proposed athletic facility met the twin standards of being on the same lot and “subordinate and incidental” to the principal use as a private school (BZA 1644, at 8-9).

OAG asserts that BZA 16433 supports OAG’s contention that the proposed Off-Campus Athletic Facility fails the requirements for a private school use as either a principal or accessory use due to the physical separation between the Off-Campus Site and the Maret School campus.

Recognizing the inability to obtain a special exception as an accessory use to a private school use from which the proposed Off-Campus Athletic Facility is physically and academically removed, the Application acknowledges that the proposed use is a principal use of the Off-Campus Site. However, being a subsidiary part of a private school that is literally miles away does not make the proposed Off-Campus Athletic Facility itself a private school.

**The Off-Campus Athletic Facility is a private recreation center or commercial gym that is not allowed in the Off-Campus Site’s R-1B zone because of the intensity of its use**

As a stand-alone facility completely separated from the Maret School’s academic and physical campus, the proposed Off-Campus Athletic Facility is a private recreation center for the Maret School and the unidentified third parties to whom the Maret School will sublease the Off-Campus Athletic Facility. As a private facility, the Off-Campus Athletic Facility does not qualify as a “Parks and Recreation” use that only applies to facilities “under the jurisdiction of a **public** agency” and that specifically excludes “**private recreation centers such as a commercial gymnasium**, or uses which more typically would fall within the entertainment, assembly, and performing arts ... use category” (Subtitle B § 200.2(y) – emphasis added).

Commercial gyms or private institutional athletic facilities fall under the EAPA use category as:

*“A use involving facilities designed primarily for public assembly that enables patrons to ... attend sporting events or ... to participate in active leisure activities ...*

*These uses may be characterized by activities and structures that draw large numbers of people to specific events ...”*

(Subtitle B § 200.2(m) – emphasis added)

The proposed Off-Campus Athletic Facility will host athletic events for students from the Maret School and its opposing teams as well as for a number of unidentified third parties that will sublease the Off-Campus Athletic Facility. The Application states that the Maret School anticipates that its sporting events will draw potentially hundreds of spectators. The Application does not provide estimates of the numbers of players and observers of the third-party sublessees of the Off-Campus Athletic Facility, even though the Maret School estimates that these third parties will use the Off-Campus Athletic Facility at least as much, if not more than the Maret School itself (Full Year Anticipated Uses: Maret uses 15%; 3<sup>rd</sup> party uses 16%; Maret and 3<sup>rd</sup> party uses 5%<sup>3</sup>).

EAPA uses are not allowed in any of the low-intensity residential zones, including the R-1B zone in which the Off-Campus Site is located, nor in any of the higher intensity residential flat and apartment (RF and RA) zones. Instead EAPA uses are allowed only in the higher-intensity Mixed-

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<sup>3</sup> [Field Usage Charts - Maret School](https://www.maret.org/athletics/proposed-new-fields-at-ecc/field-usage-charts) (February 1, 2022), accessed on March 8, 2022 at <https://www.maret.org/athletics/proposed-new-fields-at-ecc/field-usage-charts>.

Use zones that include commercial uses which generate more intense traffic and activity than predominately residential zones. The R-1B zone is not designed to accommodate high intensity activities – instead the Zoning Regulations define the purposes of the R-1B zone as to:

*“(a) **Protect quiet residential areas** now developed with detached dwellings and adjoining vacant areas likely to be developed for those purposes; and*

*(b) Stabilize the residential areas and promote a suitable environment for family life”*

(Subtitle D § 300.1 – emphasis added).

To allow a private recreation center or commercial gym like the Off-Campus Athletic Facility in the R-1B zone is completely antithetical to the “quiet residential” neighborhood surrounding the Off-Campus Site.

Although a private school is allowed as a special exception in the R-1B zone, the intensity of a private school use, most of which will take place indoors with limited noise impacts, is substantially less than a concentrated outdoor athletic facility, particularly one that is to be subleased to unidentified third parties. With a private school, the academic facilities will take up the majority of the property with athletic facilities constituting only an ancillary part of the private school use. Yet even so, the Zoning Regulations require that a private school obtain a special exception to ensure that potential impacts, primarily of noise and traffic, are prevented or mitigated principally by controlling the number of students and staff using the facility and not by relying solely on other regulatory requirements. For example, though the Noise Control Act does not regulate the unamplified human voice, that does not mean that 10 excitedly screaming parents, let alone 100 such parents, make no more noise than what is expected in a “quiet residential area” that the R-1B zone is intended to protect. The special exception process allows the Board to consider how to evaluate and control the intensity of the proposed use by limiting the number of users and imposing other conditions in order to protect adjacent residential uses – in this case by limiting the number of users to prevent unreasonably intrusive impacts due to the increased intensity of use.

With approximately 650 students, use by the Maret School alone would represent a dramatic intensification of the use of the Off-Campus Site that would be inconsistent with the surrounding residential uses. The Maret School recognizes this in proposing specific limits on the number of students, staff, and parents. However, Maret plans to sublease the Off-Campus Athletic Facility to a number of unidentified third parties who will have use of the space without limits, vastly increasing the number of players and observers using the Off-Campus Athletic Facility and converting it into a year round facility with a commercial-level intensity of use that would shatter the surrounding “quiet residential” neighborhood and directly contravenes the intent of the Off-Campus Site’s R-1B zone.

OAG therefore respectfully recommends that the Board reject the Maret School’s application and request it to either seek a use variance or pursue an amendment of the Zoning Regulations or Zoning Map to authorize the commercially-intense use of the proposed Off-Campus Athletic Facility in the low-intensity R-1B zone.

**Recommended Conditions**

If the Board decides to grant the Application, OAG respectfully recommends that the Board impose the following conditions, in addition to those proposed by the ANC, with which OAG concurs except as amended by the following:

- 1) *The Application shall be approved for a period of three (3) years from the effective date of the Order. If the Maret School chooses to extend this approval beyond this three (3) year period, it shall file a new application for zoning relief, and not a time extension or modification of terms to extend the time period, prior to the conclusion of the three-year period to allow the Board of Zoning Adjustment to review the use and its impacts on the surrounding community in a public hearing.*

OAG believes that this condition will ensure that:

- The impacts of the proposed use can be evaluated based on actual events instead of the hypothetical forecasts to which the Board is currently limited; and
- All neighbors, including new residents who move in within this three-year period, are allowed to participate fully in the evaluation of the new application, instead of limiting the parties to those who participated in the current proceedings.

- 2) *Third Party Usage – The Maret School shall not charge non-Maret School persons and entities for the use of the property.*

OAG believes that barring charging for the use of the Off-Campus Athletic Facility is consistent with the non-commercial purpose of the low-intensity R-1B zone and its predominantly residential uses. Charging for the use, especially if non-Maret School use is approximately the same as the Maret School use, would convert the Off-Campus Athletic Facility into a commercial enterprise that is not allowed or contemplated in the R-1B zone.

- 3) *The rules and regulations concerning the use of the field, including hours and noise restrictions shall be prominently posted on the property with a telephone number to contact the Maret School administrator in charge of the facility.*

- 4) *The Maret School shall provide owners of neighboring properties the telephone number of the Maret School administrator in charge of the facility, and of appropriate representatives of any non-Maret School users, to address concerns regarding noise, or other nuisances on the fields.*

- 5) *The Maret School shall not expand the permitted uses of the field beyond those specified in this order.*

OAG respectfully requests that the Board consider these issues and recommendations in its deliberations on the case.

Respectfully submitted,

**KARL A. RACINE**

**OAG Comments in Opposition – March 8, 2022**  
**B.Z.A. Application No. 20643 – Maret School**

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cc:

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