BEFORE THE ZONING COMMISSION OR
BOARD OF ZONING ADJUSTMENT FOR THE DISTRICT OF COLUMBIA

FORM 150 – MOTION FORM

THIS FORM IS FOR PARTIES ONLY. IF YOU ARE NOT A PARTY PLEASE FILE A FORM 153 – REQUEST TO ACCEPT AN UNTIMELY FILING OR TO REOPEN THE RECORD.

Before completing this form, please review the instructions on the reverse side. Print or type all information unless otherwise indicated. All information must be completely filled out.

CASE NO.:	20643
Motion of:	☐ Applicant ☐ Petitioner ☐ Appellant ☑ Party ☐ Intervenor ☐ Other _____

PLEASE TAKE NOTICE, that the undersigned will bring a motion to:

Reopen the record and stay the final decision and order.

Points and Authorities:

On a separate sheet of 8 ½" x 11" paper, state each and every reason why the Zoning Commission (ZC) or Board of Zoning Adjustment (BZA) should grant your motion, including relevant references to the Zoning Regulations or Map and where appropriate a concise statement of material facts. If you are requesting the record be reopened, the document(s) that you are requesting the record to be reopened for must be submitted separately from this form. No substantive information should be included on this form (see instructions).

Consent:

Did movant obtain consent for the motion from all affected parties?

- ☐ Yes, consent was obtained by all parties
- ■ No attempt was made
- ☐ Consent was obtained by some, but not all parties
- ☐ Despite diligent efforts consent could not be obtained

Further Explanation: All parties to the case were served.

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of February, 2023

I served a copy of the foregoing Motion to each Applicant, Petitioner, Appellant, Party, and/or Intervenor, and the Office of Planning in the above-referenced ZC or BZA case via: ☐ Mailed letter ☐ Hand delivery ■ E-Mail ☐ Other _____

Signature:	E. L. Donohue
Print Name:	Edward L. Donohue
Address:	117 Oronoco Street, Alexandria, VA 22314
Phone No.:	703 549-1123
E-Mail:	edonohue@dtm.law

D.C. Board of Zoning Adjustment
441 4th Street N.W., Suite 200 South
Washington, D.C. 20001
bzasubmissions@dc.gov

Friends of the Field	)	
	)	
	)	
Party in Opposition,	)	
	)	
v.	)	BZA Case No. 20643
	)	
The Maret School	)	
	)	
Applicant.	)	

MOTION TO REOPEN THE RECORD AND STAY THE FINAL DECISION AND ORDER

Friends of the Field ("Friends"), a Party in Opposition in Board of Zoning Adjustment ("BZA") Case Number 20643 (the "Project"), by undersigned counsel and pursuant to 11 Y DCMR § 701 and § 602.6, files this Motion to Reopen the Record and Stay the Final Decision and Order in this matter for the reasons set forth below.

All parties have been served pursuant to 11 Y DCMR § 407.3.

Justification for Reconsideration

In his February 17, 2023 letter ("AG Letter" attached as Exhibit 1) to Advisory Neighborhood Commission ("ANC") 3/4G, Assistant Attorney General, Joshua A. Turner, answered four questions posed to the Office of the Attorney General by the ANC in regard to the Memorandum of Understanding ("MOU") that the ANC executed with the Applicant in this case, The Maret School (the "Applicant"). The letter concluded as follows:

1. The MOU was unlawfully entered into. "[T]he Home Rule Act and ANC Act do not authorize an ANC to enter an agreement with a developer over conditions for the design, construction, and operation of a project within the ANC, outside the context of an administratively enforced settlement agreement." AG Letter at Page 1-2.
2. Whether the MOU is void or voidable would need to be determined by the court according to the specific facts of the case. "Whether a community benefit agreement that is not incorporated into an agency order would be treated by courts as void or voidable likely requires a case-by-case determination." AG Letter at Page 4.
3. Even a *valid* community benefit agreement is unenforceable by the ANC or any task force. "Even when an ANC has entered a binding community benefit agreement and creates a task force in keeping with the terms of that agreement, the ANC cannot delegate any of its authority to that entity, since the ANC Act prohibits ANCs from "delegat[ing] official decision-making authority to any committee or task force."[18] An ANC-created task force also cannot exercise any powers that the ANC itself does not possess, such as the power to impose fines, since a government entity cannot delegate authority it does not have. Accordingly, while nothing prevents such a task force from monitoring compliance with the terms of an agreement and reporting any breaches, the task force cannot (just as the ANC itself cannot) take measures to enforce it." AG Letter at Page 4.

The MOU between the Applicant and ANC 3/4G was a critical factor in the ANC's decision to support the Application. That support and the great weight afforded it by the Board of Zoning Adjustment in its decision to approve may very likely not have existed if the legal analysis negating the efficacy of the MOU had been known at the time of the hearing.

Based on the newly discovered evidence of the AG Letter, Friends hereby renews the Motion to Stay originally filed on April 6, 2022 (attached as Exhibit 2). That Motion is incorporated by reference.

For the above-stated reasons, Friends respectfully requests that the Board grant its Motion to Reopen the Record and Stay the Final Decision and Order in this case pending consideration of the AG Letter.

Submitted on February 23, 2023 by:

Edward L. Donohue (D.C. Bar No. 412301)
For Friends of the Field, Party in Opposition

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Friends of the Field	)	
	)	
	)	
Party in Opposition,	)	
	)	
v.	)	BZA Case No. 20643
	)	
The Maret School	)	
	)	
Applicant.	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2023, I sent a copy of the MOTION TO REOPEN THE RECORD AND STAY THE FINAL DECISION AND ORDER to counsel for the Applicant, Paul Tummonds, via electronic mail to ptummonds@goulstonstorrs.com, to ANC 3/4G Chair Lisa Gore, via electronic mail to 3G01@anc.dc.gov, and to the Office of Planning, via electronic mail to jennifer.steingasser@dc.gov.

Edward L. Donohue (D.C. Bar No. 412301)
For Friends of the Field, Party in Opposition

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donohue
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April 4, 2022

Chairman Hill
D.C. Board of Zoning Adjustment
441 4th Street, N.W., Suite 210
Washington, D.C. 20001

Re: Maret/BZA Application #20643
Motion for Stay

Chairman Hill,

On behalf of Friends of the Field (the "Friends") and following the decision of the Board today to approve the referenced application, we are submitting the attached Motion for Stay. We ask that the Board consider this request at the next opportunity.

Copies of this filing are being sent to all parties.

Thank you.

Sincerely,

Edward L. Donohue
for Friends of the Field

Enclosures

BEFORE THE ZONING COMMISSION OR
BOARD OF ZONING ADJUSTMENT FOR THE DISTRICT OF COLUMBIA

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CASE NO.:	20643
Motion of:	☐ Applicant ☐ Petitioner ☐ Appellant ☑ Party ☐ Intervenor ☐ Other _____

PLEASE TAKE NOTICE, that the undersigned will bring a motion to:

Stay the Board's decision pending appeal to the Court of Appeals.

Points and Authorities:

On a separate sheet of 8 ½" x 11" paper, state each and every reason why the Zoning Commission (ZC) or Board of Zoning Adjustment (BZA) should grant your motion, including relevant references to the Zoning Regulations or Map and where appropriate a concise statement of material facts. If you are requesting the record be reopened, the document(s) that you are requesting the record to be reopened for must be submitted separately from this form. No substantive information should be included on this form (see instructions).

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- ☐ Yes, consent was obtained by all parties
- ☐ Consent was obtained by some, but not all parties
- ■ No attempt was made
- ☐ Despite diligent efforts consent could not be obtained

Further Explanation: Motion to be filed immediately upon announcement of BZA decision.

CERTIFICATE OF SERVICE

I hereby certify that on this 06 day of APRIL, 2022

I served a copy of the foregoing Motion to each Applicant, Petitioner, Appellant, Party, and/or Intervenor, and the Office of Planning in the above-referenced ZC or BZA case via: ☐ Mailed letter ☐ Hand delivery ☒ E-Mail ☐ Other _____

Signature:	E. C. Donohue
Print Name:	EDWARD L. DONOHUE
Address:	117 ORONOCO STREET
Phone No.:	703 549 5384
E-Mail:	EDONOHUE@DTM.LAW

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Application of
The Maret School BZA Case No. 20643

Friends of the Field's Motion for Stay of BZA Decision
April 6, 2022

Friends of the Field ("Friends"), a party in this proceeding, will appeal from the BZA's decision and Order permitting the Maret School ("Maret") to construct a multi-purpose athletic facility on land Maret leases from the Episcopal Center for Children ("ECC"). Section 701.2 of the BZA's Regulations authorizes the BZA to stay the effectiveness of its final decision either on its own motion or at the request of a party pending an appeal to the Court of Appeals. Unless the Board issues a stay sua sponte, Section 701.3 provides that the party seeking a stay must prove that:

(a) The party seeking the stay (or, in the case of a stay to be issued on the Board's own motion, the party in whose favor the stay would be ordered) is likely to prevail on the merits of the motion for reconsideration or rehearing, the sua sponte review, or the appeal;
(b) Irreparable injury will result if the stay is denied;
(c) Opposing parties will not be harmed by a stay; and
(d) The public interest favors the granting of the stay.

We show below that the Friends satisfies these requirements.

(a) Friends Is Likely to Prevail in the Court of Appeals.

The Board ignored the law in contravention of the authority of the Zoning Commission, the plain language of the Zoning Regulations and its own precedent.

Prior to its decision in this case, the Board had never held that a private educational institution could build a sports complex, a dormitory, or a cafeteria that was not an accessory to the educational institution. In *National Cathedral School*, Application No. 16433, the Board considered whether a pre-existing special exception could be extended. The Board determined that:

> to approve an expansion of a special exception, the use must also be either part of or accessory to, the existing special exception principal use.

Id. at 8. The Board found that the proposed sports field was "an extension of the principal use," *Id.*, and if that characterization could not be fairly established, an accessory use. In doing so, the Board stated that:

> an athletic facility is nearly always provided to students of a private school and can be characterized as customarily incidental and subordinate to a private school.

Id. at 9.

Because the Applicant in this case has no existing principal use to expand, the Board has simply created new law in this case. The Board has decided, contrary to its own precedent, that an athletic facility alone can be characterized as a principal private school use. In doing so, the Board has, in the words of the Office of the Attorney General, "effectively amend[ed] the Zoning Regulations governing the uses permitted in the R1-B zone," supplanting the public rulemaking process and the legal authority of the Zoning Commission. BZA Exh 268. The Board has "conflate[d] a subsidiary use with its dominant use" and in doing so, "diminish[ed] the public's faith in the zoning process by confirming that the 'game is rigged' [and] strip[ping] the public of the procedural protections they would be entitled to if the Zoning Regulations were properly followed." *Id.*

The Board has abandoned its determination in the *National Cathedral School* case that an athletic facility is customarily incidental and subordinate to a private school. In doing so, the Board disturbs the entire accessory use analysis it conducted in the *National Cathedral School* case, and all cases relying on it since. The Board has adopted the Applicant's unprecedented theory that "the proposed Athletic Facilities are, in fact, educational facilities – no matter how close to, or how far from, Maret's Woodley Park campus they are located." BZA Exh 282, Applicant's Post-Hearing Statement, page 3.

The Board ignored the law in contravention of its own precedent and that of the Court of Appeals.

There is no precedent for the Board's decision in this case, and it is contrary to the precedents of the Court of Appeals. As such, the Party in Opposition has a high likelihood of success on the merits in its appeal of the Board's decision.

In the *National Cathedral School* case, the Court of Appeals affirmed the BZA's either/or analysis:

> Specifically, the BZA found that the facility constitutes either an extension of the principal use of the school or an "accessory use." Because the Board's finding that it is an accessory use is sustainable, we need not consider whether the facility is reasonably characterized as an extension of the principle [sic] use.

Because the Court of Appeals decided the appeal on the basis of accessory use, the BZA's alternative "extension of a principal use" determination has no precedential value.

The Board's decision in this case marks an extreme departure from both Application No. 16433 and the Court of Appeals' decision affirming that case on the basis of accessory use. When considering Friends' appeal, the Court will determine (1) whether a multi-sport athletic facility more than three miles from the private educational institution it serves is consistent with the District's zoning regulations, and (2) whether a multi-sport athletic facility which will be subleased to non-

school third parties for more hours than it will be used by the educational institution is a principal educational use or is an impermissible business imposed in an R-1B zoned residential neighborhood.

Friends' appeal will have the implicit or explicit support of the Office of the Attorney General. The Court will understand that, as the Board's former counsel, the OAG has considerable expertise in interpreting the District's zoning regulations.

We hope the Board will understand that its Order will likely be overturned by the Court.

(b) Irreparable Injury Will Result if the Stay is Denied.

If the Board grants Maret's application, Maret will immediately begin construction of its multi-sports complex. As the attached affidavits demonstrate, Maret's contractors have already begun, before the issuance of a Board Order, to prepare for cutting down trees, including heritage trees, and moving other heritage trees. On March 25 and 26, there was a full scale effort by workmen to begin digging the perimeter of heritage trees to be relocated, and at least in one location erect a silt fence. The workmen doing the work explained that they were root pruning the heritage trees. Site preparation is clearly underway in anticipation of receiving zoning approval to move these stately heritage trees. The foreman pointed out all four heritage trees are to be saved. Their above-ground root ball diameters have already been marked with white paint. Trees have been pruned to conform to the root ball diameter. The foreman also stated that tree transplanting must begin immediately. [Attachment 1 - Russell Declaration; Attachment 2 - Patton Declaration; Attachment 3 - Zachary Declaration].

Tree removal is but the first step in Maret's construction project. After trees are removed, Maret's contractors will begin excavation and grading. Contractors will begin to install drainage structures to manage stormwater, prior to installing approximately 3.7 acres of artificial turf.

Maret has indicated that it plans to begin using the Field in the fall of 2023. Litigation in the Court of Appeals is not likely to be concluded before the commencement of the athletic use of the Field.

When Friends prevails in the Court of Appeals, it will be virtually impossible to undo Maret's construction. Maret cannot restore the trees or heritage trees. The heritage trees Maret will have moved cannot survive a second transplanting.

The damage to the Field will be irreparable if Maret is permitted to begin construction during the processing of the Friends' appeal.

(c) Neither the ECC, the Maret School nor the ANC Will Be Harmed by a Stay.

Although the Episcopal Center for Children is not a Party to this case, a significant portion of the public support for Maret's Off-Site Athletics Facility is based on the promise of reviving the

ECC, which has been closed for almost three years. Though not necessary to grant the stay, it is important to note that a stay will not harm ECC. ECC chose to close its school in June 2019, leaving its students to find new placements and its teachers to find new jobs. No ECC students or teachers will suffer harm if the stay is granted. The institution will also not suffer harm if the stay is granted. ECC advocated against protecting its entire campus via the historic preservation process. The campus, already subdivided, will not suffer any harm if the stay is granted.

The Maret School will not be harmed by a stay because its sports teams use the Maret school grounds and District of Columbia facilities at Jelleff and Wilson High School. Maret's rights to use Jelleff extend to 2029 and its rights to use Wilson High School athletic facilities has no termination date. Additionally, the record is clear that there are other options such as Dwight Mosley, the public, natural turf field on which Maret had a previous successful arrangement for its students to play. That arrangement lasted for 6 years. A Court of Appeals ruling will certainly come in time for Maret to begin and complete construction to begin operations on the Field well before 2029.

Importantly, if construction is not stayed and the Court of Appeals overturns the Board's Order, Maret will have spent millions of dollars to construct the multi-sports complex, to the detriment of its current and future students and parents, and will be required to spend untold millions to attempt to restore the Field to its pre-construction condition.

Although the ANC is a party to this proceeding, it has no independent interest which would be harmed by a stay.

(d) The Public Interest Favors a Stay

Friends' arguments to the ANC and to the Board raised several aspirational issues. We believe that a stay will give the District time to update its regulations to protect its citizens and the environment in which they live. Current District regulations require developers to prepare for 15-year storms. Although Maret has stated that they will prepare for 25-year storms. the District has already concluded that protection from even 25-year storms is inadequate. [Attachment 4 - Climate Ready DC]. The District is actively investigating whether and how to improve stormwater management in a future sure to see more intense storm events at more frequent intervals.

We acknowledge that the District now permits construction of artificial turf athletic fields.

But it is undisputed that every form of artificial turf contains PFAS, a carcinogen and a "forever chemical." It is undisputed that people playing on artificial turf will come in physical contact with PFAS and will breathe PFAS particles escaping from the turf. Athletes will carry PFAS particles home on their athletic shoes and clothing. Neighborhood residents will breathe PFAS. And PFAS seeping from the artificial turf will be conveyed by stormwater throughout the Rock Creek watershed to the Chesapeake Bay. On March 25, THE WASHINGTON POST published an article about restaurant chains beginning to remove PFAS from wrappings surrounding food products. [Attachment 5 - Washington Post]. Everyone except Maret (and the ANC) acknowledges the danger of PFAS. Every parent of a Maret athlete or of a child whose sports team subleases the Field is, or should be, concerned of the harm the turf could cause. The District will have to consider its current position allowing PFAS in artificial turf, in food packaging, and other aspects affecting the environment of its residents. A stay will give the District time to reconsider its approval of material containing PFAS.

The public interest would also be served by hearing from District planners about the City's long-range needs for parks and recreation facilities. Maret and its supporters have claimed they would create a "wonderful benefit" for the City by allowing their off-site athletics facility to be used some of the time by outside groups, while Maret would control access and use. Meanwhile, the City's Department of Parks and Recreation ("DPR") is engaged in a District-wide parks and recreation master planning effort, Ready2Play, and expects a draft of the plan to be made public in April. Ready2Play will: develop a 20-year vision for DPR; take a broad look at parks and recreation throughout DC; assess trends and community needs, including equity considerations; provide a blueprint for investments and improvements; and develop a roadmap of strategies and actions. Residents would benefit from this impartial assessment of parks, sports, and recreation provision. Mayor Bowser's $19.5B FY 2023 Fair Shot Budget has been characterized as "the most equitable budget in the history of the District of Columbia," and includes $13.5 million for expanded recreation," so, in the Mayor's words: "we can ensure kids in all eight wards, regardless of their families' income, can grow up with the same opportunities to play sports and enjoy the benefits of being an athlete that wealthy and middle-class children all across our country have access to." So far, discussion of the Maret ECC proposal has been dominated by private interests telling residents what is good for them.

For each of the foregoing reasons, Friends of the Field respectfully requests that the BZA stay the effectiveness of its final decision pending Friends' appeal to the Court of Appeals of the BZA's decision and Order permitting Maret to construct a multi-purpose athletic facility on land Maret leases from the Episcopal Center for Children.