D.C. Board of Zoning Adjustment
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Friends of the Field	)	
	)	
Party in Opposition,	)	
	)	
v.	)	BZA Case No. 20643
	)	
The Maret School	)	
	)	
Applicant.	)	

SUPPLEMENTAL STATEMENT IN OPPOSITION

I. The Applicant Is Seeking Incorrect Relief

In this matter, the Maret School (the Applicant), located at 3000 Cathedral Avenue, NW, seeks a special exception for a private school use and a parking lot in the R-1-B Zone on a five-acre site leased from the now-closed Episcopal Center for Children (the ECC), which we refer to herein as the Field. It is undisputed that the Applicant is located in Cleveland Park and that the leased Field is located at 5901 Utah Avenue NW, approximately 3.8 driving miles from the Applicant's campus, in a different Ward and a different ANC. It is also undisputed that the special exception sought by the Applicant does not involve the development of an academic institution or any sort of school. It is undisputed that there is no private school in operation on the five-acre Field where the Applicant proposes to construct athletic areas, or on the 2.4-acre lot where the ECC's buildings are located. The ECC has been closed and has had no students or faculty for almost three (3) years. The ECC has never had a special exception for a private school on either the 2.4-acre or the 5-acre lot, and the Applicant does not have a special exception today for either the 2.4-acre lot retained by ECC, or the 5-acre lot they have leased.

On November 2, 2021, the Applicant filed its application for special exceptions for a private school use and a parking lot with the D.C. Board of Zoning Adjustment (BZA). The as-filed application described the proposed development of the athletic areas as a principal private education use. The draft application had described the proposal as an accessory use pursuant to 11-B DCMR § 200.2(k) (2). The change to a principal private school use was the result of Advisory

Neighborhood Commission 3/4G Chair Speck's review and comment on the draft pre-hearing statement.[1] The as-filed application incorporates this change and states:

> The proposed development of the Athletic Facilities ***as a principal use on the Property*** and the use of those facilities by Maret is consistent with the definition of private education in the Use Categories of Subtitle B, §200.2, which defines "Education, Private" 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; and
> (3) Exceptions: This use category does not include uses which more typically would fall within the daytime care, public education or college/university education use category. This use category also does not include the home schooling of children in a dwelling by their parent, guardian, or private tutor. See, Applicant's November 2, 2021 BZA Application (emphasis added).

This change, however, fails to correct the problem. As explained in detail below, the proposed athletic areas are not a principal private education use (as they do not meet the definition in 11-B DCMR § 200.2(k) (1)[2]). They are not an accessory use to a principal private education use due to the fact that they are not located on the same parcel (or even adjacent to) the Applicant's campus. The Applicant should be requesting a use variance to allow these private athletic areas that fall within the definition of entertainment, assembly or performing arts pursuant to 11-B DCMR § 200.2(m).

The Applicant addressed the significant legal issue of accessory use by simple wordsmithing, which did not address the substantive zoning legal issue. The Applicant did not, as the Chair recommended, "***explain how the ECC property qualifies as an 'accessory' use***," because the Applicant cannot explain this. Instead, the Applicant simply asserted that its proposed athletic areas are a "principal use" of the Field and that it is entitled to a special exception. But the Applicant is seeking a special exception for *private school* use, and athletic areas are not a private school, by any magical wordsmithing. While the Applicant has attempted to obscure this flaw with their application, based on applicable law, the flaw is fatal, because the proposed use is an accessory use on a lot 3.8 miles away from the Applicant's private school.

As demonstrated below, the Applicant may call the athletic areas it proposes to build on the five-acre Field a "principal use," however, the proposed use is actually an accessory use that needs to be located on the same parcel as the principal private school use to which it is accessory. This conclusion is supported by decades of clear zoning case law decided by both the BZA and

[1] Chair Speck redlined the Applicant's pre-hearing statement prior to its submission and questioned if the proposed use was properly an accessory use. That redlined statement is attached as Exhibit 1.

[2] 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.

the DC Court of Appeals. These cases cannot be ignored when considering this case. Failure to consider the issue of accessory use, or determining that the athletic areas proposed to be constructed on the Field are a principal use, would require reversing a long line of established legal precedent in the District, and disregarding the zoning legal issue raised by the Chairman of the ANC, ignored by the ANC and obscured by the Applicant.

II. The Applicant's Proposed Use is An Impermissible Accessory Use Based on the Clear Language of the Zoning Code and Applicable Decisions of the BZA and Court of Appeals

The Zoning Code defines the term "Use, Principal" as the primary purpose or activity for which a lot, structure, or building is occupied. As to accessory use, Section 203.3 states as follows:

203.3 Accessory uses shall:
(a) Be customarily incidental and subordinate to the principal use, **and located on the same lot with the principal use**; and
(b) Meet all of the conditions of the appropriate use category.

See, DC Zoning Code, Section 203.3 (emphasis added).

The term "accessory use" has a geographic component. In Hilton Hotels v. BZA, the Court of Appeals, 363 A.2d 670 (D.C. 1976) (Hilton 1), the Court of Appeals upheld the BZA's determination that a laundry facility on the premises of one hotel, the Statler Hilton, did not constitute "an accessory use" of another hotel, the Washington Hilton, which was located a mile away from the Statler Hilton's laundry facility. The Court held that the Washington Hilton's use of the Statler's laundry facility was improper under the Zoning Regulations, because the laundry was not located on the Washington Hilton's lot.

In this matter, the Applicant's private school that the proposed athletic areas would serve is located 3.8 miles from the Field. The Applicant's campus is four (4) times as far from the Field as the Washington Hilton was from the Statler's laundry facility. Based on the Court's ruling in Hilton 1, the BZA must deny the Applicant's application for a special exception in this case. Granting the special exception would be inconsistent with the Zoning Code and overrule Hilton 1.

III. The Applicant Cannot Demonstrate that the Proposed Use is a Principal Use

The Applicant relies on two arguments to persuade the BZA that, as asserted in its application, the proposed athletic areas are a principal use of the Field. The first argument is that the proposed athletic areas are a private school. This argument would require writing the accessory use requirements out of the Zoning Code and disregarding long established case law of the Court of Appeals, and should be rejected by the BZA. The second argument is that a decision of this BZA in the National Cathedral case on principal use, based on significantly different facts and not affirmed by the Court of Appeals, requires the BZA to reach the Applicant's conclusion.

A. An Athletic Area Is Not A School

The Use Categories of Subtitle B, §200.2, which define "Education, Private" use, say that a private school use is:

> (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 (emphasis added)

The Applicant argues that because Clause (2) of this definition of "Education, Private" does not include the word "accessory" in front of the phrase "sports facilities," a sports facility is not an accessory use but instead is no different from the educational uses enumerated in Clause (1). There is no BZA decision or case law that supports Applicant's pinched and nonsensical reading of the plain, and substantive, language of the Zoning Code.

The phrase "**Above uses may include, but are not limited to**" in Clause (2) refers to *something*, namely to Clause (1). The only logical and correct reading of the plain language in the definition is that "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" may include other things, namely the subordinate accessory uses listed in Clause (2) that are subordinate to the academic uses enumerated in Clause (1).

The Applicant's reading is that every word or phrase not preceded by the word "accessory," *i.e.*, athletic areas, dormitories, cafeterias, recreational, sports facilities, is itself a principal use on the same footing as the academic uses listed in Clause (1). The Applicant's interpretation would render the phrase "Above uses may include, but are not limited to" in Clause (2) completely superfluous. Fundamental principles of statutory interpretation do not support the Applicant's reading of the Zoning Code. See, Wash. Teachers' Union v. D.C. Pub. Schs., 77 A.3d 441 (2013) (in interpreting a statute as a whole, each provision of the statute should be construed so as to give effect to all of the statute's provisions, not rendering any provision superfluous).

The plain language reading of the "Education, Private" definition, which gives meaning to Clause (2), is that the word "accessory" modifies each and every one of the subordinate uses that is listed in Clause (2). To read the definition otherwise would render the concept of an accessory use meaningless.

The Applicant's interpretation also reads the words "**with the primary mission of providing education and academic instruction that provides District or state mandated basic education or educational uses"** out of the Zoning Code. Neither athletic areas, dormitories, cafeterias, recreational, nor sports facilities have the primary mission of providing academic instruction. Simply put, athletics areas, dormitories, cafeterias and sports facilities are not schools. See, National Cathedral Neighborhood Association v. District of Columbia Board of Zoning

Adjustment, 753 A.2d 984, 986 (D.C. 2000) (athletic facilities, and the buildings housing them are *an adjunct* to the educational mission of a school).

The Applicant's interpretation would enable any applicant for a special exception to transform an accessory use into a principal use simply by calling it a "principal use," with no regard for the plain language of the Zoning Code or the opinions of the BZA, as the Applicant has done in this case. If the Applicant's statutory interpretation were correct, the Applicant could obtain a special exception to construct a dormitory for its private school in Cleveland Park on the five-acre Field which is located 3.8 miles away. Or the Applicant could obtain a special exception for a cafeteria building on the Field, or a recreational facility such as a bowling alley or indoor climbing wall, or a sports facility such as a water park and mini-golf course. The Applicant's reading of the Zoning Code would also allow private schools not located in the District to build such facilities. DeMatha Catholic High School in Hyattsville, Maryland, or The Potomac School in McLean, Virginia, would also be able by special exception to construct athletics fields, dormitories or a sports facility on the Field, and call them 'principal uses.'

The Applicant's reading of the Zoning Code renders the concept of accessory uses meaningless. In zoning, identifying accessory uses allows communities to selectively permit (or prohibit) uses associated with the principal use of the land. See, LBCS Working Paper: Treatment of Accessory Uses in Land-Based Classification Standards, by Sanjay Jeer, AICP, December 13, 1997. The requirement that an accessory use be located on the same lot as the principal use enables communities that establish zoning requirements to manage uses of land within the designated zone and establish accountability of the lot owner for the associated (accessory) uses that the community has deemed allowable. The Applicant's interpretation, if accepted, would also strip the BZA of the ability to evaluate and opine on accessory uses.

The Applicant argues that the proposed athletic areas are sports facilities that are an integral component of its educational and academic instruction and mission, and that its students must fulfill a physical education requirement in order to graduate. No one disagrees that athletics comprise an important part of the educational mission of any school. No one disagrees that schools may require athletic participation as a condition of graduation. However, the Applicant's assertion that athletics are academics is simply specious. They are two words with very different meanings. An athletic scholarship is not the same thing as an academic scholarship. None of the Applicant's arguments, no matter how often they may be repeated, support the conclusion that an athletic field, or a cafeteria, or recreational or sports facilities or a dormitory, is a school.

Importantly, Applicant also plans to lease the proposed athletic areas to third-party sports leagues the majority of the time. The Applicant has provided a pie chart that shows that the percentage of proposed field use by the paying tenants of the Applicant will exceed the percentage of proposed use by the Applicant. See, ECC/Maret Annual Usage Chart. The Applicant's paying tenants' (Youth Sports and Youth Camps) hours are 16% (18.5% if Youth Sports are allotted half of the slice characterized as "Maret or Youth Sports"). The Applicant's hours are 15% (17.5% if the Applicant is allotted half of the slice characterized as "Maret or Youth Sports"). The principal use of the proposed athletics facility is for-profit rental. Granting a special exception to allow a private school to operate a business in an R-1-B zone would be contrary to the Zoning Code, and to the underlying principle of accountability of the lot owner,

or in this case the lessee, the Applicant, for accessory uses. The Applicant's paying tenants will also have no accountability to the community[3]. None of the "youth sports" leagues or camps or food sellers operates a school, and none own property at or near the Field. The Applicant does not explain how its intended field rental business is a principal use of the Field, either.

Athletic areas, while subordinate to a private school use, are not a private school. A field rental business is even more attenuated; it is neither a subordinate use to a private school use, nor a permissible use in an R-1-B zone by special exception. Athletic fields are an accessory use if located on the same property as the principal school use. In this case, the proposed athletic areas are an impermissible accessory use, because the proposed athletic areas are not on the same lot as the Applicant's private school which is remote and located miles away in Cleveland Park. The ability of the community to hold a lot lessee accountable for its proposed accessory use is non-existent if that lessee is remotely located and permitted to operate a business on the lot. The BZA's approval of the Applicant's special exception application would strip District communities of their right to hold neighbors accountable.

B. This Application does not involve an Extension of an Existing Private School Special Exception

The second basis upon which the Applicant argues that the athletic areas alone are a principal use is BZA Application No. 16433 (final order issued August 17, 1999), affirmed in National Cathedral Neighborhood Association v. District of Columbia Board of Zoning Adjustment, 753 A.2d 984, 986 (D.C. 2000), which we will refer to as the National Cathedral case. The Applicant's reliance on the BZA's decision is misplaced, and the Applicant simply ignores the Court of Appeals' decision, which affirmed the BZA's ruling only in part.

In the National Cathedral case, the Protestant Episcopal Cathedral Foundation of the District of Columbia sought an expansion of an existing special exception to construct a new athletic facility at a private school in an R-1-B zone, on the grounds of the National Cathedral. The private school applicant in the National Cathedral case was in operation as a school and was seeking to replace an existing athletics facility on the site. These factual distinctions are critical differences between that case and the Applicant's application under consideration by the BZA here.

In National Cathedral, the National Cathedral School (NCS), one of three (3) private schools onsite (the other two (2) being the Beauvoir School and St. Albans School), was and had been in continuous operation for decades, and already had a special exception to operate a private school in an R-1-B residential zone. Prior to seeking to expand its preexisting special exception to build a new athletic facility, NCS also had operational athletic facilities located onsite that included two (2) non-regulation-size athletic fields, eight tennis courts, and related support facilities. The athletic facilities proposed in the National Cathedral case were to be located on and under the existing athletic facilities.

[3] Over the strong objection of the community, the ANC has voted to approve food on the proposed field. There is no indication that food trucks or other food sales would be prohibited. Such businesses will also have no accountability to the community, or to the Applicant.

In sharp contrast, in this case, the Applicant does not operate, and never has operated a private school on the Field; the Applicant's private school is located approximately 3.8 miles from the Field, in a different Ward and a different ANC. There is no private school operating on the Field today, or on the separate 2.4-acre lot retained by the ECC and not leased to the Applicant. The ECC closed its doors in June, 2019 has no students or faculty.[4] The ECC has never had a special exception for a private school, and neither the Field nor the retained 2.4-acre lot has a special exception today.

Based on these facts, the BZA's decision in the National Cathedral case does not even apply. The principal use in the National Cathedral case was long established and a special exception for private school use was already in place. Neither is true here. In this case, the Applicant does not operate and has never operated a school on the five-acre Field, nor is there an existing special exception to operate a private school on the five-acre Field. For these reasons alone, the BZA's decision in the National Cathedral case is inapplicable to this case.

The BZA stated in the National Cathedral case 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***. (emphasis added).

The BZA went on to explain that:

> the athletic facility is an extension of the principal use. Athletics is a form of education, and thus the athletics facilities are educational facilities. It, therefore, follows that the applicant need only meet the standard for a private school special exception. However, **even if it [sic] the proposed athletic facility could not be fairly characterized as an extension of the existing principal use**, it would nevertheless meet the test for accessory uses as set forth in the Zoning Regulations.

Id. (emphasis added). Simultaneous with opining that athletic facilities are educational facilities, the BZA questioned this opinion and expressly recognized the potential flaw in it. For this reason, after granting the special exception on the basis that NCS' proposed athletic facility was an extension of NCS' existing principal use as a private school, the BZA nevertheless felt compelled to provide an *alternative* basis on which to rule that the special exception should be granted. That basis was **accessory use**. The BZA determined that if the "extension of the existing principal use" theory was inadequate to support the special exception as a private school, it could still be granted because the proposed athletics facility met the requirements of an accessory use under the DC Zoning Code.

In reaching the conclusion, the BZA applied the two-part test for determining accessory use:

[4] The Episcopal Center for Children (ECC) began its operation as a private school prior to the enactment of the Zoning Code. The question whether ECC, which has closed, would require a special exception to operate a private school on the 2.4-acre site is not part of the matter under the Board's consideration.

1. Whether the proposed athletic facility could be characterized as customarily incidental and subordinate to a private school; and
2. Is the proposed use on the same lot as the principal use?

The BZA determined that an athletic facility could be characterized as **customarily incidental and subordinate to a private school**. There was a private school at the site that already had an incidental and subordinate athletics facility.

The BZA's decision in the National Cathedral case was appealed. The Court of Appeals, after acknowledging "this court's limited role in reviewing the BZA's decision," rejected the BZA's analysis that the athletic facility was an extension of the principal use, a detail omitted in the Applicant's Opposition to the Request for a Postponement in the instant case. In National Cathedral Neighborhood Association v. District of Columbia Board of Zoning Adjustment, 753 A.2d 984 (D.C. 2000), the Court found that because NCS met the accessory use test, it was unnecessary to consider "whether the facility is reasonably characterized as an extension of the principal use." Because the reason for deciding the appeal was accessory use, the BZA's 'extension of a principal use' determination has no precedential value and cannot be relied upon in consideration of this instant case. The Court noted that "The BZA could also properly find that the building met the 'same lot' test for accessory use."

The Court of Appeals' decision established three (3) key rulings that must be applied in this case. First, the Court explicitly determined that the "same lot" requirement of the "accessory use" test applied to private educational institutions. Second, the Court recognized the application of the accessory use requirement to a sports facility. Third, the Court held that the "principal use" argument alone was insufficient to establish the special exception, and that an athletics facility must satisfy the requirements of an "accessory use."

IV. Granting the Application Would Require the Board to Change the Law and to Disregard Established Legal Precedent

The legal question here – not presented in the National Cathedral case - is whether the Zoning Code permits an applicant to extend an existing special exception for a private school to a site located many miles away, that has no special exception to operate a private school. Said differently, can a private school export its existing private school special exception from its home site (here, Cleveland Park) to a remote site (here, the Field) which has no special exception, such that the remote site is "either part of, or accessory to, the existing special exception principal use"?

Based on the BZA's decision on accessory use in the National Cathedral case, and the Court of Appeals' affirmation of the BZA's accessory use decision, the answer in this case must be **no**, as the Applicant's proposed use in this case is neither a part of nor accessory to, the Applicant's existing special exception principal use.

National Cathedral established that an athletic facility could be characterized as customarily incidental and subordinate to a private school. Even if the athletics facility that the Applicant proposes to be built on the Field were deemed "incidental and subordinate" to the Applicant's private school in Cleveland Park, the special exception application would still fail part two of the

accessory use, test because the proposed athletic areas are not on the same lot as the Applicant's private school.

As the BZA noted in the National Cathedral case, "the definition of "accessory use" requires that the proposed use be on the same lot as the principal use." In this case, the proposed athletic facility is 3.8 miles away from the Applicant's private school. The Court of Appeals' ruling in Hilton 1 makes clear that the Zoning Code requires an accessory use to be on the same lot as the principal use. If the accessory use cannot be located a mile away, it surely cannot be located 3.8 miles away from the principal use. See, Georgetown Residents Alliance v. DC Board of Zoning Adjustment, No. 98-AA-1819, DC Court of Appeals, February 6, 2003 (citing Hilton 1 with approval for the holding that a laundry facility was not an accessory use to a hotel because it was not on the same lot as the hotel).

As noted above, the Court of Appeals confirmed the BZA's accessory use ruling in National Cathedral, determining that the BZA's accessory use decision – not the BZA's 'extension of an existing principal use' decision - was the more solid of the two (2) legal footings on which to rest its own decision. In affirming the BZA's decision to grant the special exception, the Court of Appeals specifically did *not* affirm the BZA's 'extension of an existing principal use' decision, on which Applicant in this case relies. The Court of Appeals ruled:

> 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.

In affirming only the BZA's accessory use analysis, the Court of Appeals noted that the BZA properly found that the NCS' proposed athletic facility met the "same lot" test, citing Hilton 1:

> [i]n contrast ***to the separate locations involved in*** Hilton Hotels Corp. v. District of Columbia Bd. of Zoning Adjustment, 363 A.2d 670 (D.C.1976), here the [NCS] Upper School is located on the same lot as the proposed facility, and the Lower and Middle Schools are situated directly across the street.

Id. (emphasis added). In contrast to the National Cathedral case, in this matter, the Applicant's campus is located 3.8 miles from the site where it seeks the special exception. As such, the Applicant cannot meet this standard. Accordingly, the BZA should not grant the Applicant's special exception for a private school.