goulston&storrs
counsellors at law

Paul Tummonds
ptummonds@goulstonstorrs.com
202-721-1157

May 26, 2023

VIA IZIS

D.C. Board of Zoning Adjustment
Office of Zoning
441 4th Street, N.W., Suite 200S
Washington, DC 20001

Re: **BZA Application No. 20643 – Response of The Maret School ("Applicant") to Friends of the Field Motion to Stay the Effectiveness of BZA Order No. 20643**

Dear Members of the Board:

The Applicant opposes the Friends of the Field ("**FoF**") Motion to Stay the final written order in BZA Case No. 20643 ("**Motion to Stay**"). FoF filed the Motion to Stay on May 19, 2023, and this response is being filed within the seven-day period for responses.

The standards for granting a stay are enumerated in Subtitle Y, §701.3, which states:

> Except for stays granted upon its own motion, the Board shall grant a stay only upon finding that **all four** of the following criteria are present:
>
> (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. (Emphasis added.)

Pursuant to Subtitle Y, §701.4, the Board may consider the following factors in determining whether to grant a stay:

(a) Whether the party filing the motion is likely to succeed on the merits;
(b) Whether denial of the stay will cause irreparable injury;

(c) Whether, and to what degree, granting the stay will harm other parties; and
(d) Whether the public interest favors granting a stay.

As detailed below, FoF has failed to satisfy its burden for the Board to grant the Motion to Stay. Therefore, the Motion to Stay should be denied.

A. FoF is Unlikely to Succeed on the Merits of its Appeal.

FoF is unlikely to succeed on the merits of its appeal before DC Court of Appeals (the "**Court**"). The Court "give[s] deference to the BZA's factual determinations, and . . . must uphold the validity of the BZA's findings if they are supported by and in accordance with . . . reliable, probative, and substantial evidence." *Dorchester Assocs. LLC v. D.C. Bd. of Zoning Adjustment*, 976 A.2d 200, 212 (D.C. 2009) (internal quotation marks and citation omitted). The Court therefore only reverses a BZA decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* (quoting *Lovendusky v. D.C. Bd. of Zoning Adjustment*, 852 A.2d 927, 932 (D.C. 2004). The Court avoids "second-guessing the BZA's decision or substituting [its] judgment for that of the Board." *Id.* (quoting *Miller v. D.C. Bd. of Zoning Adjustment*, 948 A.2d 571, 575 (D.C. 2008)).

Here, the substance of FoF's appeal is its argument that the proposed Athletic Facilities cannot be considered a private school use, and therefore cannot be located on a different lot from Maret School's main campus in Woodley Park at 3000 Cathedral Avenue, NW[1]. This argument is likely to fail before the Court. The record in BZA Case No. 20643 makes clear that the Board carefully addressed whether the proposed Athletics Facilities can be considered to be a private school use and concluded that they are.

The Applicant comprehensively addressed this issue at the BZA hearing and in a post-hearing submission, Exhibit 282 of the record. The Applicant's post-hearing submission detailed how the proposed Athletic Facilities are sports facilities that are an integral component of Maret's educational program, as one of the four essential pillars – along with academics, arts, and wellness – that define Maret's educational mission. The Applicant's post-hearing submission noted:

[1] The Court's decisions in *Neighbors on Upton Street v. District of Columbia Board of Zoning Adjustment*, 697 A. 2d 3 (D.C. 1977) and *Youngblood v. District of Columbia Board of Zoning Adjustment*, 262 A.3d 228 (D.C. 2021) are not relevant to Board's reasoning in BZA Order No. 20643. In *Upton*, the Court affirmed a BZA ruling that a music school qualified as a private school use, which, if anything, cuts against FoF's arguments. Specifically, in *Upton*, not only did the Court promote a flexible interpretation of private school use, but it held that the School's planned auditorium, much like the Athletics Facilities here, "contributes to the educational mission of the . . . School". *Upton* at 9. FoF also finds no help in *Youngblood*. There, the Court examined whether a non-profit organization offering some educational programming qualified as a private school. It bears no corollary to the questions in dispute here.

> Combining the plain meaning of the Zoning Regulations with the undisputed factual record, it is clear that the proposed Athletic Facilities are in fact educational facilities and constitute "[a]n educational, academic, or institutional use with the primary mission of providing education and academic instruction." Because the Athletic Facilities are consistent with this use definition for "Education, Private" in Subtitle B, §200.2, the only issue associated with their distance from Maret's existing Woodley Park campus is transportation-related impacts. (Ex. 282, p. 4.)

BZA Order No. 20643 (the "**Order**") clearly articulates why the proposed Athletics Facilities are properly considered a private school use. Drawing on its prior holdings, the Board explained that "the Zoning Regulations do not require classification of a private school's athletic facilities as an accessory use or their location on the same lot as the private school's academic buildings." *See e.g.* Order p. 19.

The Order goes on to consider, *and reject*, the precise arguments that FoF plans to place before the Court. The Order states,

> "The Board rejects, as overly narrow, the premise that for zoning purposes a 'private school' must be restricted only to academic functions such that all other aspects of a private school must be considered accessory rather than an inherent aspect of a private school use. The Zoning Regulations take a more expansive approach, recognizing 'private education' as a use category that comprises '*educational, academic, or institutional use*' with the primary mission of providing *education and academic instruction* . . . [a]ccordingly, the Board reaffirms its prior holding that athletics is a form of education when athletic facilities are operated as an integral component of a private school use." Order, p. 20 (*citing* Subtitle B § 200.2(k)(l)) (emphasis added).

In light of the foregoing, and the clarity of the record on this issue, it is highly unlikely that FoF will be able to demonstrate to the Court that the Order or the Board's reasoning was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." As such, the Motion to Stay should be denied.

B. The Denial of the Stay Will Not Cause Irreparable Injury to FoF

FoF's Motion fails to identify any legally cognizable way that it will be harmed in the absence of a stay – much less *irreparably* harmed. Nonetheless, FoF alleges it will be harmed by: (1) the Board's alleged "inconsistent application of its own precedent;" (2) the Board's refusal to

impose certain conditions on the Maret School;[2] (3) removal of trees and regrading of the property; and (4) the installation of artificial turf, (See Motion to Stay, at p. 12–13). These allegations are a woefully deficient showing of irreparable harm.

First, FoF cannot sustain its burden by simply alleging that it will be harmed by the BZA's "inconsistent application of its own precedent." This type of ambiguous general harm, not unique to any particular party, does not qualify as irreparable injury. *Allegheny Def. Project v. FERC*, 964 F.3d 1, 8 (D.C. Cir. 2020) (Noting that "generalized claims of . . . harm . . . do not constitute sufficient evidence of irreparable harm that would justify a stay."); *see also Proctor v. D.C.*, 310 F. Supp. 3d 107, 116 (D.D.C. 2018) (Observing that the movant "must establish not only that the injury they would suffer . . . is beyond remediation, but also that it is imminent and certain if preliminary relief is not provided.").

Second, FoF has not even attempted to explain as to how it will be irreparably harmed by the Board's rejection of its proffered limitations on the school (*e.g.* one field, no artificial turf, and no leasing of the athletics facilities) other than to say that "games will be played that cannot be un-played." FoF's other vague allegations are also unavailing – particularly, its claim that should "a stay [be denied], in addition to using the athletics fields for its own students, Maret will be able to lease the athletic fields throughout the year with no limitations . . . [t]hey will be open for business on Saturdays and Sundays in complete disregard for the community." Motion to Stay, at p. 12. As noted in the Order, the Applicant proposed limits on the use of the Athletics Facilities in the application (Order, Findings of Fact Nos. 14-18). Those restrictions on the use of the Athletic Facilities are noted in the Order's Conclusions of Law and Opinion section in addressing how the Applicant satisfied the relevant special exception standards for the private school use.[3]

Third, despite FoF's numerous allegations concerning alterations to the land, FoF makes no showing that these alterations impact *its own land* or any land other than that leased by the

[2] FoF alleges that neighbors requested conditions including "one field, no artificial turf, and no leasing to outside parties." Motion at 12.

[3] *See* Order p. 21-22 ("The Board concludes that the Applicant's planned use of the athletic facilities will not tend to create objectionable conditions related to noise given the nature of the planned use and ***the restrictions delineated in the application***, especially with respect to the number of students and spectators, the limits on hours of operation, the absence of amplified sound or noisemakers, the distance between the facilities and nearby dwellings, and landscaping to buffer sounds.") ***(emphasis added)***. *See also* Order p.22. ("The Board concludes that the Applicant's proposal will not create objectionable impacts with respect to traffic, ***given the restrictions on the use delineated in the application*** and the Applicant's implementation of measures to manage automobile traffic and to promote travel to the subject property by means other than automobile consistent with the conditions recommended by DDOT.") ***(emphasis added)***. *And See* Order p.23 ("The Board concludes that the Applicant's proposal will not create objectionable impacts with respect to the number of students, given the layout of the athletic facilities, such that both fields cannot be used simultaneously, and ***the restrictions on the use delineated in the application.")*** ***(emphasis added)***.

Maret School. Not only are such allegations insufficient to show irreparable harm, they are insufficient for standing to bring any claim at all. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992) (explaining that standing "requires that the party seeking review be himself among the injured."). All of the necessary permits for the tree removal were appropriately obtained and the work was completed in accordance with those validly issued permits.

Finally, FoF's arguments concerning the purported health effects of artificial turf are extraordinarily speculative. Indeed, these concerns hinge on "particles" of turf that athletes could allegedly carry home on "their shoes and clothing." Motion to Stay, p. 13. These concerns are not within the jurisdiction of the Board to consider.[4] The Applicant also notes that FoF refers to information (an EPA report dated March 4, 2023) that was not included in the record of the case, since the EPA report was issued well after the record in this case was closed. There is no basis for the Board to consider cherry-picked materials that have not been tested by the adversarial process of special exception approval.

C. Granting the Stay Will Cause Harm to the Applicant and to Members of the Community

If the Motion to Stay were granted, the Applicant, members of the surrounding community, and District youth will be harmed.[5] During, and even prior to, the formal filing of the BZA application, the Applicant noted that it did not have adequate spaces and facilities to meet the needs of its athletics program. Therefore, any additional delays to the construction and use of the approved Athletics Facilities by the Applicant cause harm to the Applicant. In response to FoF's discussion about the Applicant's use of Jelleff Field and the facilities at Jackson-Reed High School, the Applicant notes that its use of Jelleff Field is limited to specific times pursuant to permits issued by the District Department of Parks and Recreation. In addition, the Applicant's ability to use fields and facilities at Jackson-Reed High School are even more limited. The use of these facilities is not sufficient to meet the athletic department needs of the Applicant.

While the application included restrictions on the use of the Athletic Facilities by both members of the community and youth sports organizations, it does allow for some limited use of

[4] The Applicant notes that there are currently no restrictions on the construction and use of turf fields in the District of Columbia. The Applicant is not aware of any recently constructed athletic fields in the District of Columbia that have used a surface other than turf.

[5] While the Episcopal Center for Children ("ECC") is not a party to this case, the references in the Motion to Stay regarding the impacts on the ECC are callous and likely hurtful to the former students and staff of the ECC. Such tactics are unnecessary in a dispute waged by sophisticated counsel (*See e.g.* "When ECC closed its school in June 2019, its students were left 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 Athletic Facilities by those groups. If the Motion to Stay is granted, the Applicant will not be allowed to move forward with the construction of the Athletics Facilities while the appeal is pending. Members of the community and youth sports organizations will also be harmed as these sorely needed facilities will not be available to them.

D. The Public Interest Does Not Favor a Stay.

The public interest does not favor a stay. The BZA's public hearing process allowed the FoF, ANC 3/4G, the Office of Planning, the Department of Transportation, members of the surrounding community, and the BZA to fully and thoughtfully review the proposed impacts that the Athletic Facilities will have on nearby properties and the adjacent community and determine whether such Athletic Facilities create any adverse impacts. After significant input from the community, the ANC, District Agencies, the Office of the Attorney General, and FoF, the BZA determincd that the Athletic Facilities would not create adverse impacts.

FoF's arguments regarding the likelihood of success on appeal have been refuted above, as have FoF's arguments regarding the harm that they will suffer. The "aspirational issues" noted in the FoF's arguments concerning the public interest are entirely speculative. The public interest is best served when an applicant, and all parties, are provided a fulsome opportunity to participate in the BZA process. However, once that process has been completed, the applicant should be able to move forward with the approved project, even if an appeal is filed with the Court – particularly where there is no showing of irreparable injury.

For all of these reasons, the Court should deny the Motion to Stay. The Applicant looks forward to the Board's decision on the Motion at the June 14, 2023, Public Meeting.

Sincerely,

Paul Tummonds

Certificate of Service

The undersigned hereby certifies that copies of the Applicant's Response to the FoF Motion to Stay the Effectiveness of BZA Order No. 20643 were delivered by electronic mail to the following addresses on May 26, 2023:

Jennifer Steingasser
Karen Thomas
Office of Planning
Jennifer.Steingasser@dc.gov
Karen.Thomas@dc.gov

Aaron Zimmerman
District Department of Transportation
Aaron.Zimmerman@dc.gov

ANC 3/4 G
3G@anc.dc.gov

Lisa Gore - Chair, ANC 3/4G
3G01@anc.dc.gov

Edward L. Donohue, Esq.
c/o Friends of the Field
edonohue@DTM.law

Paul Tummonds