GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 13398, of Francis S. Murphy, pursuant to Sub-section 8207.2 of the Zoning Regulations, for a special exception under Paragraph 3101.41 to use the first floor of the subject premises as a day nursery consisting of twelve children in an R-2 District at the premises 3938 McKinley Street, N.W., (Square 1747, Lot 50).

HEARING DATE: December 17, 1980
DECISION DATES: January 7, February 4 and March 4, 1981

FINDINGS OF FACT:

1. The subject property is located in an R-2 District on the south side of McKinley Street between Belt Road and 41st Street, N.W.

2. The subject property is fifty feet wide, and 129 feet deep. It has an area of 6,450 square feet.

3. The subject property is improved with a two story detached dwelling.

4. The application proposes the operation of a child care center on the subject premises. Such a center is considered to be a pre-school or kindergarten under the requirements of the Zoning Regulations.

5. The proposed facility is known as The Shoe, and is operated by Mrs. Judith Heinz.

6. Mrs. Heinz is a tenant on the property with a nineteen month lease from the owner. She resides on the subject property, and has so resided for approximately three years.

7. Mrs. Heinz testified that she began caring for one neighbor's child after school on an informal basis. She further testified that other children were gradually added, until she now cares for twelve children. The operator was not aware that she needed a Certificate of Occupancy for her use of the premises, until so advised by a District Zoning Inspector. Upon being so advised, Mrs. Heinz instituted proceedings that ultimately lead to the filing of the subject application.

8. The proposed school would use a portion of the first floor of the subject premises. The dining room has been converted to a play room. The children also use the living room and a bathroom on the first floor. The kitchen is used to prepare snacks for the children. No portion of the second floor is to be devoted to the school. The second floor as well as the first floor, is used as the operator's residence.

9. The children also use the large concrete porch at the front of the house, and the rear yard for outdoor play space. The rear yard is enclosed by a six foot high stockade fence.

10. The maximum number of children to be accommodated in the school would be twelve. The school basically operates after public school hours, from 3 p.m. to 6:30 p.m. There are also three children on the premises for approximately one hour before school, and two children arrive at noon after a half-day of school.

11. The children range in age from six to nine.

12. The children arrive at the school on foot or by school bus. They are picked up by their parents, some of whom walk and some of whom drive. The departures from the school are staggered between 5:00 and 6:30 p.m. There are usually only one or two parents at the school at any one time picking up children.

13. The school has no articles of commerce for sale.

14. The rear yard of the premises contains approximately 2,800 square feet, enough to provide more than 100 square feet of play area for each child, as required by Sub-paragraph 3101.41d of the Regulations.

15. The subject property is located in the middle of an area zoned R-2, developed almost exclusively with detached and semi-detached single family dwellings. To the west, immediately across 41st Street, is the Chevy Chase Playground.

16. The school uses the facilities of the Chevy Chase Playground for additional recreational needs. The children also use the facilities of the Chevy Chase Community Center at Connecticut Avenue and McKinley Street, two blocks to the east.

17. Of the twelve children presently enrolled at the school, seven reside within ten blocks of the site.

18. There have been no physical changes made to the subject building which preclude it from being used as a dwelling.

19. The only physical evidence of the presence of the school is a small unobtrusive sign located adjacent to the front door.

20. Mrs. Heinz has incorporated her school as "The Shoe Inc." under the laws of the District of Columbia. She pays various kinds of taxes normally imposed on an incorporated business in the District.

21. There is extensive testimony in the record on the need for quality day care services in the District of Columbia. The Board finds that the school as proposed is reasonably necessary and convenient to the area in which it is located and which it proposes to serve.

22. The Office of Planning, by memorandum dated December 5, 1980 and by testimony at the public hearing, recommended that the application be approved. The OPD was of the view that the center provides a needed service with little or no disturbance to the surrounding properties. The OPD further noted that the traffic generated by this facility is negligible. The OPD was unaware of the existence of a covenant restricting the use of the property and the opposition of various neighboring property owners.

23. Advisory Neighborhood Commission - 3G, by letter dated December 3, 1980, advised the Board that it supported the application "provided that there emerges no significant neighborhood opposition." The ANC did not identify any of its issues or concerns for the Board to address.

24. There was substantial support for the application, from owners and occupants of surrounding properties, from persons whose children attend the school, and from teachers and other persons concerned with child care issues. The testimony and evidence indicated that the school provided a needed service in the area and was well run and that the school was not objectionable in the neighborhood.

25. There was opposition to the application from several owners of property in the immediate vicinity of the subject property, both at the public hearing and by letters in the record. Their opposition was based on the intrusion of an inappropriate business use into an area zoned for residential use. Some of the neighbors also objected to an inordinate amount of noise and activity generated by the twelve children in attendance at the school when added to the four children already residing on the premises.

26. The property is subject to a restrictive covenant, a copy of which is marked as Exhibit No. 76 of the record. The operative portion of the restriction provides that "all houses upon the premises hereby conveyed shall be built and used for residence purposes exclusively, except stables, carriage houses, sheds, or other outbuildings, for use in connection with such residences, and no trade, business, manufacture or sales or nuisance of any kind shall be carried on or permitted upon said premises."

CONCLUSIONS OF LAW AND OPINION:

Based on the findings of fact and the evidence of record, the Board concludes that the applicant is seeking a special exception. In order to be granted such an exception, the applicant must demonstrate that he has complied with all of the requirements of Paragraph 3104.41 and Sub-section 8207.2 of the Zoning Regulations. The Board concludes that the applicant has not demonstrated compliance with all of the requirements of Paragraph 3101.41 and that the application therefore must be denied.

The Board concludes that the testimony and evidence presented in support of the application demonstrated that the proposed school meets most of the criteria established by the Zoning Regulations. There will be no articles of commerce for sale. There is more than 100 square feet of play area per child. The enrollment of the school is primarily from children residing in the neighborhood. The use is reasonably necessary and convenient to the area it serves.

The Board further concludes, however, that the school has been objectionable and is likely to continue to be objectionable to some of its surrounding residents because of noise and number of students. The subject property is developed with a building intended to be used as a single family dwelling. It is quite common to that neighborhood. If used as a single family dwelling, a normal level of noise and activity would be associated with it. However, when used as a school, for the care of a much larger number of children than would ordinarily be associated with a dwelling, the noise and activity increases to a level beyond a tolerable point.

The Board notes that although there was much support for the application, many of the supporters had vested interests in approval of the application. Supporters included parents of children who now attend, did attend or may attend the school, as well as friends of the operator. While the Board appreciates their support of what appears to be a well run facility, the Board concludes that the rights of the objecting neighboring residents must prevail in this matter. The R-2 District, as set forth in Sub-section 3102.1 of the Regulations, "consists of those areas which have been developed with one-family semi-detached dwellings and is designed to protect them from invasion by denser types of residential development. It is expected that they will continue to contain some small one-family detached dwellings." The Board concludes that to grant this application would be contrary to the general purpose and intent of the Zoning Regulations and Maps and approval would tend to affect adversely the use of neighboring property in accordance with said regulations and Maps.

The Board further notes the existence of the restrictive covenant applicable to this property. Courts in the District of Columbia have reviewed substantially similar deed restrictions, and have held that (1) the use of the land was restricted to residence purposes, (2) neither the land nor the structures on the land could be used for any trade, business, manufacturing or mercantile purpose, and (3) the intent was that the Chevy Chase Land Co. and those holding under it exclude private persons from carrying on business in the restricted area. The Courts of the District of Columbia have further held that such a covenant is enforceable in equity in this jurisdiction.

The Board further notes the case of Barry v. Hemlepp, 460 S.W. 2d 352 (Kentucky, 1970). In that case, the covenant at issue was very similar to the restrictions on the subject property, and the characteristics of the day care center were also very similar to the subject school. In that case, the Court of Appeals of Kentucky enjoined the operation of the day care center, construing the covenant strictly to protect the neighbors. While the Kentucky case is not binding on the Board, it is a persuasive precedent. The Board concludes that operation of a day nursery on the subject premises, to the extent that it constitutes a non-residence business use, would violate the restrictive covenant contained in the indenture.

In consideration of all of the above findings and conclusions, it is therefore hereby ORDERED that the application is DENIED.

VOTE: 4-0 (John G. Parsons, William F. McIntosh and Douglas J. Patton to DENY; Charles R. Norris to DENY by PROXY; Connie Fortune ABSTAINED).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: Steven E. Sher
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 12 MAY 1981

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**BOARD OF ZONING ADJUSTMENT**

Application No. 13398, Motion for Reconsideration, filed May 22, 1981, in the application of Francis S. Murphy, pursuant to Subsection 8207.2 of the Zoning Regulations, for a special exception under Paragraph 3101.41 to use the first floor of the subject premises as a day nursery consisting of twelve children in an R-2 District at the premises 3938 McKinley Street, N.W., (Square 1747, Lot 50).

HEARING DATE: December 17, 1980
DECISION DATES: February 4 and March 4, 1981

DISPOSITION: The Board DENIED the application by a vote of 4-0 (John G. Parsons, William F. McIntosh and Douglas J. Patton to DENY; Charles R. Norris to DENY by PROXY; Connie Fortune ABSTAINED).

FINAL DATE OF ORDER: May 12, 1981

ORDER

The applicant filed a timely Motion for Reconsideration of the Board's Order denying the application. The applicant requests that the Board reconsider its decision and enter an Order granting the application or in the alternative to grant a Rehearing to hear new evidence not available at the public hearing of December 17, 1980. The Motion requests that the Board reconsider its decision for the FOLLOWING REASONS:

> First, the Board based its decision on a restrictive covenant contained in the deed to 3938 McKinley Street, N.W., which is wholly irrelevant to a determination of whether to grant a special exception under Sections 8207.2 and 3101.41 of the Zoning Regulations. Second, the Board did not give Mrs. Heintz, the lessee, and other interested parties notice that the validity and effect of the restrictive covenant would be at issue in the application hearing and denied Mrs. Heintz an opportunity to submit evidence and argument addressing the covenant, in violation of D.C. Code §1-1509(a) and Board rule 4.71. Third, the Board never reached the merits of the application in its deliberations; several members stressed that their votes concerning the application addressed only the Board's authority to grant an exception for a use that appeared to violate a restrictive covenant and did not reach the merits of the application. Accordingly, the conclusions of law concerning the impact of the Shoe on the neighborhood set forth in the May 12 decision were never reached by the Board.

Fourth, the Board's conclusions of law do not flow rationally from its findings and are contradicted by substantial and probative evidence in the record.

Upon consideration of the applicant's Motion and the opposition's response thereto, the Board concludes that as to the first alleged error, its decision was not based solely on the restrictive covenant contained in the deed to the subject site as evidenced in Paragraphs three and four of its Order. It is not sufficient that the applicant comply with the requirements of Paragraph 3101.41 of the Zoning Regulations. The applicant must also meet the burden of proof for Subsection 8207.2. The Board concluded that the applicant had not.

As to the second alleged error, Section 1-1509(a) of the D.C. Code requires that, in a contested case, the notice of hearing "shall state the time, place and issues involved." The notice of public hearing in this case sets forth the portions of the Zoning Regulations which govern the application. Any party may submit evidence regarding those standards for the Board to use in deciding an application. The restrictive covenant became an issue for the first time at the public hearing, when it was introduced by a neighbor. There was nothing in the record as to its existence prior to that time. Even if the issue had been raised prior to the public hearing, the Board is not obligated in any sense to alert any parties of how it will address issues. The record is a public record and available to all citizens to examine. As to the opportunity for the applicant to address the covenant, the Chair advised counsel for the applicant that the Board would be advised by its own counsel, the Corporation Counsel, in the matter of an interpretation of the restrictive covenant, applicant's brief notwithstanding. As to Section 4.71 of the Supplemental Rules of Practice and Procedures, the Board concludes such section is irrelevant to the issues raised.

As to the third and fourth alleged errors, the Board concludes that the merits of the application were stated throughout the Findings of Fact and Paragraphs two, three and four of its Conclusions of Law and Opinion and that such conclusions flow rationally from its findings. The Board further concludes that no materially different evidence has been submitted in support of the motion for Reconsideration/Rehearing that the Board had not considered previously. Accordingly, it is ORDERED that the Motion for Reconsideration/Rehearing is DENIED.

VOTE: 3-0 (Douglas J. Patton, William F. McIntosh and Connie Fortune to DENY; Charles R. Norris not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: Steven E. Sher
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 17 JUL 1981

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

REVISED DECISION AND ORDER

Application No. 13398, of Francis S. Murphy, pursuant to Sub-section 8207.2 of the Zoning Regulations, for a special exception under Paragraph 3101.41 to use the first floor of the subject premises as a day nursery consisting of twelve children in an R-2 District at the premises 3938 McKinley Street, N.W., (Square 1747, Lot 50).

HEARING DATE: December 17, 1980
DECISION DATES: January 7, February 4 and March 4, 1981

FINDINGS OF FACT:

1. The subject property is located in an R-2 District on the south side of McKinley Street between Belt Road and 41st Street, N.W.

2. The subject property is fifty feet wide, and 129 feet deep. It has an area of 6,450 square feet.

3. The subject property is improved with a two story detached dwelling.

4. The application seeks Board approval of an operating child day-care center on the subject premises. Such a center is considered to be a pre-school or kindergarten under the requirements of the Zoning Regulations.

5. The facility is known as The Shoe, and is operated by Mrs. Judith Heintz.

6. Mrs. Heintz is a tenant on the property with a nineteen month lease from the owner. She resides on the subject property, and has so resided for approximately three years. Mrs. Heintz' four children also reside on the property.

7. Mrs. Heintz began caring for one neighbor's child after school on an informal basis. Other children were gradually added, until she now cares for twelve children in addition to her own. Mrs. Heintz was not aware that she needed a Certificate of Occupancy for her use of the premises, until she was so advised by a District Zoning Inspector. Upon being so advised, Mrs. Heintz instituted

proceedings that ultimately led to the filing of the subject application.

8. The proposed school would use a portion of the first floor of the subject premises. The dining room has been converted to a play room. The children also use the living room and a bathroom on the first floor. The kitchen is used to prepare snacks for the children. No portion of the second floor is to be devoted to the school. The second floor, as well as the first floor, is used as the operator's residence.

9. The children also use the large concrete porch, at the front of the house, and the rear yard for outdoor play space. The rear yard is enclosed by a six foot high stockade fence.

10. The maximum number of children to be accommodated in the school would be twelve, in addition to the four children of Mrs. Heintz. The school basically operates after public school hours, from 3 p.m. to 6:30 p.m. There are also three children on the premises for approximately one hour before school, and two children arrive at noon after a half-day of school.

11. The children range in age from six to nine.

12. The children arrive at the school on foot or by school bus. They are picked up by their parents, some of whom walk and some of whom drive. The departures from the school are staggered between 5:00 p.m. and 6:30 p.m. There are usually only one or two parents at the school at any one time picking up children.

13. The school has no articles of commerce for sale.

14. The rear yard of the premises contains approximately 2,800 square feet, enough to provide more than 100 square feet of play area for each child, as required by Sub-paragraph 3101.41 (d) of the Regulations. Most of the time, the children play in the back yard. The children also play on the large front porch and, from time to time, some use the nearby public playground. In the winter months, the children play and watch television inside the house when darkness comes. When the children play in the back yard of the subject property, they laugh, shout and quarrel.

15. The subject property is located in the middle of an area zoned R-2, developed almost exclusively with detached and semi-detached single family dwellings. The R-2 District, as set forth in Sub-section 3102.1 of the Regulations, "consists of those areas which have been developed with <u>one-family semi-detached dwellings</u> and is designed to protect them from invasion by denser types of

residential development. It is expected that they will continue to contain some small one-family detached dwellings."

16. The school uses the facilities of the Chevy Chase Playground, located across 41st Street to the west, for additional recreational needs. The children also use the facilities of the Chevy Chase Community Center at Connecticut Avenue and McKinley Street, two blocks to the east.

17. Of the twelve children presently enrolled at the school, seven reside within ten blocks of the site.

18. There have been no physical changes made to the subject building which preclude it from being used as a dwelling.

19. The only physical evidence of the presence of the school is a small unobtrusive sign located adjacent to the front door.

20. Mrs. Heintz has incorporated her school as "The Shoe Inc." under the laws of the District of Columbia. She pays various kinds of taxes normally imposed on an incorporated business in the District.

21. There is extensive testimony in the record on the need for quality day care services in the District of Columbia. The Board finds that the school is reasonably necessary and convenient to the area in which it is located and which it serves.

22. The Office of Planning and Development, by memorandum dated December 5, 1980 and by testimony at the public hearing, recommended that the application be approved. The OPD was of the view that the center provides a needed service with little or no disturbance to the surrounding properties. The OPD further was of the view that the traffic generated by this facility is negligible.

23. Advisory Neighborhood Commission - 3G, by letter dated December 3, 1980, advised the Board that it supported the application "provided that there emerges no significant neighborhood opposition." The ANC letter did not identify any issues or concerns for the Board to address.

24. There was substantial support for the application, from owners and occupants of some of the surrounding or nearby properties, from persons whose children attend the school, and from teachers and other persons concerned with child care issues. This testimony and evidence demonstrated that the school provides a needed service in the area, is well run and that the school is not objectionable to some of

those persons who reside in the immediate vicinity of the premises.

25. There was opposition to the application from several owners of property in the immediate vicinity of the subject property, both at the public hearing and by letters in the record. Their opposition was based on the intrusion of what they believed to be an inappropriate business use into an area zoned for residential use. By letter and by testimony at the hearing, neighbors objected to the noise generated by the children in attendance at the school.

26. The Board finds that the school as operated, with the total of sixteen children on the premises, has been objectionable to adjoining property because of activities which result in noise and other commotion on and around the property. The Board further finds that the school is likely to continue to be so objectionable in the future if this application were granted. The level of noise and activity resulting from the 12 extra children in attendance on the premises substantially exceeds the level of noise and activity that would normally be associated with a single family dwelling. The Board credits the testimony of a backyard-abutting neighbor, Max Barth (an older, retired person who has lived at 5535 41st Street for forty-one years), that the operation of the school has been objectionable because of noise. There is no evidence in the record demonstrating that conditions with respect to noise and activity would significantly improve in the future.

27. The property is subject to a restrictive covenant, a copy of which is marked as Exhibit No. 76 of the record. The operative portion of the restriction provides that " [a]ll houses upon the premises hereby conveyed shall be built and used for residence purposes exclusively, except stables, carriage houses, sheds, or other outbuildings for use in connection with such residences, and no trade, business, manufacture or sales or nuisance of any kind shall be carried on or permitted upon said premises."

CONCLUSIONS OF LAW AND OPINION:

The Board concludes that the applicant is seeking a special exception. In order to be granted such an exception, the applicant must demonstrate that he has complied with all of the requirements of Paragraph 3104.41 of the Zoning Regulations. The Board concludes that the applicant has not demonstrated compliance with all of the requirements of Paragraph 3101.41. Specifically, the applicant has not satisfied Sub-paragraph 3101.41(b) in that the activities conducted and to be conducted have been objectionable and are likely to be objectionable because of the number of students and the noise and other conditions that result. Therefore, the application must be denied.

The Board concludes that the testimony and evidence presented in support of the application demonstrated that the proposed school meets most of the criteria established by the Zoning Regulations. There will be no articles of commerce for sale. There is more than 100 square feet of play area per child. The children of the school come primarily from the neighborhood. The use is reasonably necessary and convenient to the area it serves.

The Board further concludes, however, that the operation of the school has been objectionable and is likely to continue to be objectionable because of the number of students and the noise and activity that results. The subject property is developed with a building intended to be used as a single family dwelling. It is quite common to that neighborhood. If used as a single family dwelling, a normal level of noise and activity would be associated with it. However, when used as a school for the care of a much larger number of children than would ordinarily be associated with a single family dwelling, the noise and activity have increased to an objectionable level. The applicant failed to make any proposal which would reduce the noise to an acceptable level. (Mrs. Heintz had a fence built enclosing the back yard, but the fence did not have any significant effect on the noise generated by the children.) It is undisputed that the children playing in the backyard of the premises make a considerable amount of noise. This is to be expected from a group of children in the six to nine age group. The fact that others within earshot of these children do not consider their noise objectionable does not render Mr. Barth's objection to the noise unreasonable.

In Finding No. 27, the Board has noted the existence of a restrictive covenant applicable to this property. The Board notes that the applicant is before the Board seeking a special exception. In such a case, the Board's jurisdiction is limited to determining whether the application meets the applicable requirements of the Zoning Regulations. Neither the Zoning Act nor the Zoning Regulations requires the Board to determine whether action on a special exception application would or would not be contrary to the provisions of a private restrictive covenant. The Board therefore concludes that the existence of the covenant is immaterial to its decision on this application. Enforcement of the covenant is appropriately within the jurisdiction of the Superior Court of the District of Columbia. The Board's decision is based solely on its determination that the applicant failed to satisfy Sub-paragraph 3101.41(b) of the Zoning Regulations.

In consideration of all of the above findings and conclusions, it is therefore hereby ORDERED that the application is DENIED.

VOTE: 4-0 (John G. Parsons, William F. McIntosh and Douglas J. Patton to DENY; Charles R. Norris to DENY by PROXY; Connie Fortune ABSTAINED).

Following the Remand of the Record to the Board by the D.C. Court of Appeals, this order was adopted by a vote of 4-0 (Connie Fortune, William F. McIntosh, Douglas J. Patton and Charles R. Norris to ADOPT the order and DENY, John G. Parsons ABSTAINED)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: Steven E. Sher
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 17 DEC 1981

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."