BEFORE THE OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS FOR MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF THE APPLICATION	:	
OF HOLTON ARMS SCHOOL, INC. FOR A	:	**Conditional Use Application**
MAJOR MODIFICATION OF SPECIAL	:	**Nos. CBA-1174-E, S-2467-A**
EXCEPTION FOR A PRIVATE	:	**S-2503-B, S-516, & S-729**
EDUCATIONAL INSTITUTION	:	

PRE-HEARING SUBMISSION OF VIVIAN RIEFBERG AND BRADLEY BOULEVARD CITIZENS ASSOCIATION

EXHIBIT A

Resolution of the Board of Appeals for Montgomery County,
Case No. CBA-1174, effective September 7, 2001

BOARD OF APPEALS
FOR
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. CBA-1174

PETITION OF THE HOLTON ARMS SCHOOL

RESOLUTION TO MODIFY AND REAFFIRM SPECIAL EXCEPTION
(Show Cause Hearing Held: February 28, March 6,
March 7, March 13, March 27 and March 28, 2001)

(Effective Date of Resolution: September 7, 2001)

BACKGROUND

Case No. CBA-1174 is a special exception granted to the Holton Arms School on November 29, 1961 for the construction and operation of a private educational institution for girls.

Pursuant to Section 59-G-1.3(e) of the Montgomery County Zoning Ordinance, the Board of Appeals for Montgomery County conducted a Show Cause Hearing on the above captioned special exception use. Jody S. Kline, Esquire appeared on behalf of the special exception holder, The Holton Arms School. He called as witnesses: Diana Beebe, Head of the Holton Arms School, Geraldine Wilson, Chair of the Music Department at Holton Arms, Christopher Townsend, Theater Director, Theater Manager and Technical Director at Holton Arms, Susan Spingler, Director of Special Programs at Holton Arms, Pamela Yerg, Area Director for Montgomery County Special Olympics, Michael DelGrande, Athletic Director at the Bullis School, Peter Karl, coach for the Capital Sea Devils Swim Team, Ron Goldblatt, Executive Director of the Association of Independent Maryland Schools, Sherman Isbel, Pastor of the Presbyterian Reform Church, and Lee Cunningham, an expert in transportation planning and traffic engineering. Mr. Kline himself testified as the former Chairman of the Building and Grounds Committee for Holton Arms.

Norman Knopf, Esquire, appeared on behalf of the complainants. He called as witnesses Linda Kauskay, George Esenwein, and Ralph Shofer, an expert in engineering.

Stanley N. Garber, Zoning Investigator with the Department of Permitting Services also testified.

The subject property is Lot N-624, Parcel 2, and Part of Lots 6 and 7, Outlot A, Block B, Burning Tree Valley Subdivision, located at 7303 River Road, Bethesda, Maryland, in the R-90 and R-200 Zones.

Modifications to the special exception have included :

S-516 - to permit the construction of a playground area and a small vehicle parking area - December 23, 1976.

CBA-1174 - to permit construction of a maintenance building - March 15, 1985.

CBA-1174 - to permit the operation of a Day Care Center for 8-10 children of Holton Arms faculty and staff - April 10, 1985.

CBA-1174 - to permit regrading and enlargement of a soccer field May 27, 1987.

CBA-1174-A - to permit construction of a performing arts center, gymnasium, tennis courts, and track and soccer field – October 23, 1987.

CBA-1174-B - to permit an increase in enrollment to 650 students, a decrease in the amount of property subject to the special exception; the construction of an addition for a semi-detached elevator tower; the construction of an addition to contain bathrooms accessible to handicapped persons, and to contain some kitchen facilities; re-grading and realignment of several athletic fields; construction of seven tennis courts; realignment of the lower school driveway system and relocation of the lower school recreation areas - April 15, 1994.

CBA-1174-B - to permit the construction and use of a new maintenance building - August 11, 1995.

CBA-1174-B - to approve changes to the school's signage – October 24, 1996.

CBA-1174-B – to permit construction of an entry feature including a wall, piers and a gate - August 27, 1998.

FINDINGS OF FACT

1. On February 14, 2000, The Holton Arms School filed an application for a modification of Case No. CBA-1174. The Application proposes an increase in land area of 3.60 acres; an increase in enrollment of 15 students for a total of 665 students; construction of a new science wing; construction of additions to the existing Performing Arts Center; construction of an addition to the Lower School Building; construction of a third athletic field with a building, seating for 750 spectators, and space for team buses;

and construction of a driveway onto Beech Tree Road. A separate application, Case No. S-2467, requests approval of a child daycare facility on the campus of the school.

2. On February 25, 2000, the Board of Appeals received a written complaint from Peter Masters, Jane Kinzie, George Esenwein, Carrie Fitch, Richard Fong and Wendy Meer, residents of the neighborhood, citing a number of alleged violations of the school's special exception [Exhibit No. 117.9].

3. On March 16, 2000, the Board requested that the Department of Permitting Services conduct an investigation of the special exception.

4. By memorandum dated May 29, 2000, Stanley N. Garber, Zoning Investigator reported the findings of his investigation to the Board [Ex. No. 27]. In a Notice of Violation issued to Holton Arms School and dated May 19, 2000, Mr. Garber listed the following six violations of the special exception:

i. Enrollment at the school exceeded the permitted enrollment of 650 students by 10 students;
ii. The school obtained a building permit to build a patio and external stairs in its Centennial Garden without modifying the special exception;
iii. Enrollment at the on-campus childcare facility exceeds the 10 children allowed in the special exception by nine children;
iv. Enrollment at the on-campus childcare facility includes children of staff from schools other than Holton Arms in violation of the special exception;
v. Holton Arms's summer camp begins in June; and
vi. Several co-educational programs are being offered to the general public seven days a week without the Board's approval.

5. The Board of Appeals' April 14, 1994 Opinion allowed enrollment at Holton Arms to increase to 650 students. Diana Beebe testified that in 1994 enrollment at the school increased to 663 students, and between 1994 and the present, ranged from 660 to 662. Ms. Beebe also testified that the enrollment attrition rate in the last school year was a little over two percent. [Transcript, March 6, 2001, pp. 76-79].

6. The Board of Appeals' April 4, 1985 Opinion allows enrollment at the on-campus child care facility for up to ten children. Diana Beebe testified that enrollment at the child care facility has typically been 18-20 [Transcript, March 6, 2001, p. 102]. In 1994, Holton Arms applied to increase enrollment at the child care facility, but later withdrew the application in anticipation of filing a separate special exception for the child care facility [Transcript, March 13, 2001, pp. 76-77].

7. In May of 1999, Holton Arms obtained a building permit for the construction of an outdoor patio and stairs as part of its Centennial Garden. The school did not modify the special exception to add this amenity. [Exhibit No.117, Transcript, February 28, 2001, pp. 111-120.]. Ms. Beebe testified that she was told by the school's construction manager for the project that "except for a permit for lighting, which we needed to get,

that there was no further permission that was necessary as a part of the special exception". [Transcript, February 28, 2001, p. 118].

8. By letter dated February 9, 2001, the Board received a subsequent complaint that the school is renting space to the World Presbyterian Church for Sunday services [Exhibit No. 76]. The Board requested that Mr. Garber conduct an additional investigation of the use, pertaining to this complaint. Mr. Garber found that Holton Arms rents space to the Church for two meetings on Sundays for 25 - 40 people per meeting. At the public hearing on February 28, 2001, Holton Arms agreed to have this additional complaint added to the subject matter of the Show Cause Hearing. [Transcript, February 28, 2001, pp. 27-28].

9. By letter dated March 7, 2001, the Board also received a complaint that Holton Arms was conducting repairs and renovations to its entrance at River Road without permission from the Board of Appeals. Following a request from the Board, Mr. Garber also investigated this complaint and reported to the Board at the public hearing on March 13, 2001 [Exhibit No. 126]. In addition, Mr. Kline, as former Chairman of the school Building and Grounds Committee, testified that in order to provide a sheltered, safer place for students and others to wait at the bus stop outside the school property on River Road, in 1998 the school submitted an application to Montgomery County's Adopt a Bench program. Mr. Kline testified that the renovations at the entrance arose out of discussions with Montgomery County officials about what would be necessary to fulfill requirements of the Americans With Disabilities Act and to improve pedestrian circulation at the intersection where the bus stop is located [Exhibit Nos. 127(d), (e), (f) and 128; Transcript, March 13, 2001, pp. 36-37]. Holton Arms agreed to have this matter added to the subject matter of the Show Cause Hearing. [Transcript, March 7, 2001, p.6].

10. Holton Arms conducts an extracurricular creative arts program on its campus called Center of the Arts. Total enrollment of the program for Spring 2001 was 365 [Exhibit No. 130]. Of those enrolled at Center of the Arts, 112 are Holton Arms students. None of the faculty for Center of the Arts are also Holton Arms faculty [Transcript, March 7, 2001, pp.40]. The actual number of enrollees is 311, some enrollees in the program are enrolled in more than one class, and may therefore count for multiple 'slots'.

11. Holton Arms conducts a summer camp program on its campus, called Creative Summer. During the summer of 2000, enrollment at the camp was 800 children. In its modification request, Holton Arms proposes to reduce enrollment in the camp to 750 children. [Transcript March 6, 2001, p.156]. Thirty-six Holton Arms students attended the camp during Summer, 2000. Some of the camp attendees were siblings of Holton Arms students. Of 180 faculty anticipated for Summer, 2001, 20 will be Holton Arms faculty. [Transcript, March 6, 2001, p. 181-182].

12. Holton Arms rents its swimming pool to the Capital Sea Devils Swim Team for competitive swim training. During the current academic year, 80 students are training at

the Holton Arms pool, 15-20 of them are Holton Arms students. [Transcript, March 7, 2001, p. 61].

13. Holton Arms has a performing arts theater on its campus. The theater hosts twelve events per year. In the last school year, Holton Arms made the theater available to 6 non-Holton Arms groups for such events. [Transcript, March 6, 2001, pp. 137-138, 144].

14. Holton Arms rents space to affinity groups such as the Yale Club or the Dartmouth Club for meetings which may or may not involve Holton Arms students. [Transcript, March 6, 2001, p. 45].

15. The Applicant's Traffic Analysis states that during the 1999-2000 school year, with an enrollment of 661 students, the total traffic trips generated by Holton Arms were 504 incoming and 302 outgoing during the morning peak travel hour of 7:15 to 8:15. Afternoon peak trips were 247 incoming and 291 outgoing [Exhibit No. 48(b)].

16. A subsequent, hand traffic count conducted March 20, 2001 through March 22, 2001 [Exhibit Nos. 138, 139 and 139A], shows a total of 864 a.m. trips to Holton Arms on Tuesday, March 20, 2001 during the morning peak travel hour of 7:15 to 8:15. [Exhibit No. 138 and Transcript, March 28, 2001, pp. 51-52].

17. Lee Cunningham testified that a table from the Institute of Transportation Engineers, Trip Generation Report, *Sixth Edition*, [Exhibit No. 149] indicates that private schools with an average enrollment of 413 students generate an average of .92 trips per student. Mr. Cunningham stated that he believes that these calculations can be accurately applied, in a linear fashion. [Transcript March 28, 2001, pp. 84-88]. Therefore, for example, with an approved enrollment of 650 students, Holton Arms would be expected to generate 598 traffic trips.

18. Under cross-examination by Mr. Knopf, Mr. Cunningham confirmed that the Applicant's Traffic Report shows that there is a total of 5,027 east and west bound trips on River Road, at its intersection with Royal Dominion Drive, between 7:15 and 8:15 a.m. Therefore, the a.m. peak trips for Holton Arms on Tuesday, March 20, 2001, would comprise seventeen (17) percent of the trips moving through the intersection [Exhibit No. 48(b), Transcript, March 28, 2001, 9:30 a.m., pp. 61-63].

19. In addition, Maryland State Highway Administration statistics for the same intersection submitted by the Applicant show a total of 8,243 trips during the hours of 5 p.m to 7 p.m. The Applicant's driveway count, conducted on Tuesday, March 20, 2001, shows a total of 680 trips for Holton Arms during this time period. [Exhibit Nos. 146, 139, Transcript, March 28, 2001, 9:30 a.m., pp. 63-64]. Therefore, these evening trips at Holton Arms on Tuesday, March 20, 2001, would comprise eight (8) percent of all trips using the intersection of River Road and Royal Dominion Drive.

CONCLUSIONS OF LAW

THE PROCEEDINGS

1. Although Holton Arms has filed a petition for a modification of its existing special exception, and a separate petition for a special exception for a child day care facility, Section 59-G-1.3(e)(4) requires that the Board give a show cause hearing "priority on its docket" and that such hearings be held "as promptly as possible." Therefore, this hearing has been held and the issues decided in advance of the other pending petitions related to this property.

2. Section 59-G-1.3(b) of the Montgomery County Zoning Ordinance sets out the applicable procedures for the Department of Permitting Services relating to the Department's inspection of a special exception upon receipt of a complaint. Section 59-G-1.3(b)(3) provides:

> ... the Department shall forward to the Board written findings which shall state the nature of the complaint and the results of the inspection conducted pursuant thereto and shall provide a description of the corrective action ordered; the department may recommend modification of the terms and/or conditions of the special exception and/or propose remedial action as deemed appropriate under the circumstances.

Section 59-G-1.3(b)(4) then provides:

> Upon receipt of the Department's findings and recommendations, the Board may dismiss the complaint if the Department report indicates that such complaint is without merit, or the Board may initiate action as provided for in this section....

3. This proceeding was conducted pursuant to Section 59-G-1.3(e) of the Montgomery County Zoning Ordinance. That Section provides:

> If, under this Article, the Board receives a written notice from the Department that the terms or conditions of a special exception grant . . . are not being complied with, the Board, by an affirmative vote of at least 3 members, may order the special exception holder and the property owner to appear before the Board at a date, time, and place specified to show cause why the special exception should not be revoked.

4. At its Pre-hearing Scheduling Conference on January 9, 2001, the Board unanimously voted to order a show cause hearing based on the May 29, 2000 memorandum from Stanley N. Garber, Zoning Investigator. [Evidence Presented, para. 4]. The scope of the proceeding was expanded to include two additional issues with the consent of Holton Arms. [Evidence Presented, para. 8 and 9].

5. Section 59-G-1.3(e)(6) sets forth the actions that the Board may take in the event of the finding of a violation. It provides in part:

> The Board, by the affirmative vote of at least 4 members, may reaffirm or revoke the special exception, or amend, add to, delete or modify the existing terms or conditions of the special exception.

The Board believes that implicit in this authority is the authority to make necessary changes in the terms and conditions of the special exception to remedy the detrimental circumstances arising out of any violation found to exist.

THE DOCTRINE OF ACCESSORY USES

Several of the complaints at issue involve programs offered at the school, claimed by the school to be accessory to the primary, private educational institution use. These programs include the Center of the Arts program [Evidence Presented para.10], the Creative Summer program [Evidence Presented para 11], and the theater for the Performing Arts [Evidence Presented para. 13].

So long as a program or use is "accessory", such a use is permissible under the original special exception. The question presented to the Board is: have these programs/uses exceeded what should be considered accessory? It is argued by the complainants that the current intensity of these programs, and their lack of a "nexus" to the school's primary, educational use, exceeds the permissible level of "accessory use" and instead requires separate special exception approval. In fact, the school implicitly admits that it's child care program requires a special exception in this manner, and has made a separate application to the Board for a child care facility [Case No. S-2467].

Section 59-A-2.1 of the Zoning Ordinance defines an accessory use as follows:

> A use which is (1) customarily incidental and subordinate to the principal use of a lot or the main building thereon, and (2) located on the same lot the principal use or building.

In *County Commissioners of Carroll County v. Zent*, 86 Md. App. 745, 587 A. 2d 1205 (1991) the Court of Special Appeals, after finding "a paucity of Maryland cases defining accessory uses" surveyed a number of accessory use cases from other jurisdictions. It concluded its survey with the following quotation from the case of *Lawrence v. Zoning Bd. of Appeals of the North Branford*, 158 Conn. 509, 264 A.2d 552 (1969):

> The ordinance in question defines an accessory use as one which is subordinate and customarily incidental to the main building and use on the same lot. The crucial phrase "customarily incidental" is typically present in this type of legislation....

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> The word "incidental" as employed in a definition of "accessory use" incorporates two concepts. It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance. Indeed, we find the word "subordinate" included in the definition in the ordinance under consideration. But "incidental," when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant....
>
> The word "customarily" is even more difficult to apply. Although it is used in this and many other ordinances as a modifier of "incidental," it should be applied as a separate and distinct test. Courts have often held that use of the word "customarily" places a duty on the board or court to determine whether it is usual to maintain the use in question in connection with the primary use of the land. In examining the use in question, it is not enough to determine that it is incidental in the two meanings of that word as discussed above. The use must be further scrutinized to determine whether it has commonly, habitually and by long practice been established as reasonably associated with the primary use.
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> Id. 264 A.2d at 554 (citations omitted).
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> *Zent*, 86 Md. App. at 767-768.

The Court in *Zent* then applied *Lawrence* and other cases surveyed to the case before it. For purposes of this matter, the Board observes that the ordinance described in *Lawrence* is strikingly similar to 59-A-2.1. Application of the doctrine of accessory uses will be discussed below.

THE VIOLATIONS

The Board finds that each of the violations as identified by the Department, both in the Department's May 29, 2000 memorandum [Evidence Presented, para. 4], and the two violations subsequently added [Evidence Presented paras. 8 and 9] are, in fact, violations of the terms and conditions of the special exception. Each violation is discussed individually below:

1. School Enrollment. The Board finds that the school allowed its enrollment to exceed the limits previously established by the Board, and that this constitutes a violation of the special exception terms and conditions. The Board's opinion of April 15, 1994 authorized enrollment of 650 students. Ms. Beebe's testimony from that hearing is described in the opinion as follows:

> Diana Beebe, Head of School, explained that the requested increase in enrollment [from 630 to 650] was designed to address two problems. The rate of acceptances fluctuates, and it is difficult for the school to determine exactly how many students will be enrolling. In addition, a "demographic bubble" is moving through the school from the lower grades, and is expected to reach the upper school in the next few years. While the upper school is normally limited to 300, a larger enrollment will be needed to accommodate the additional students currently enrolled in the lower school. If the maximum enrollment is increased to 650, as requested, the school will have the flexibility to remain within the requirements of the special exception. The additional enrollment will not result in changes to the program or an increase in the intensity of the use.
>
> Opinion, April 15, 1994, page 2.

The 1994 Opinion provides the Board relevant information in two areas. First, the need for the 650 enrollment maximum was a temporary condition to deal with a "demographic bubble". Second, the increase would allow the school to deal with fluctuating acceptance rates.

The school was aware that it had to return to the Board when it exceeded the maximum enrollment. [Beebe testimony, March 6, 2001 Transcript pp. 76-79]. In fact, the school exceeded its maximum enrollment in the 1994-1995 school year with 663 students. Yet the school waited seven years before returning to the Board to request an increase.

The Board notes that the school has recently been able to control its enrollment, which has been maintained between 660 and 663 over the last five years. The Board believes that the school can control fluctuations in enrollment by limiting acceptances

The Board is extremely concerned about an act first and request permission later approach among special exception holders. Ms. Beebe repeatedly stated that the actions of the school both in this instance, as well as for the following violations, had a "minor impact" [Transcript, March 6, 2001, p. 85] and that they did not rise to the level of import for the Board to consider. This has the effect of replacing the discretion of the Board with determinations made by special exception holders. Clearly this was not the intent of the County Council in the adoption of the special exception program.

The decision of whether a change in the conditions of a special exception is minor or material should always be a matter for the Board. Such a decision is a basic component in the evaluation of compatibility. See, *Crowther, Inc. v. Johnson*, 225 Md. 379, 383 (1961). It should never be left to the special exception holder to evaluate the impact of a change to a special exception operational activity, or approved site plan. In every instance that such a change is being considered, the issue must be brought to the attention of the Board prior to its implementation under the modification provisions of Section 59-G-1.3(c).

Based on the representations in the 1994 opinion of the temporary need for the increase in enrollment, and the overall impact on traffic in the area of this violation in combination with those discussed below, the Board shall amend the condition permitting enrollment of 650 to reduce enrollment to 645. The Board notes that this reduction is within the ability of the school based on its attrition rate in the 2000-2001 school year of 2%, [Beebe testimony, Transcript, March 6, 2001, p. 79]. The cumulative traffic impact will be discussed below.

2. Centennial Garden. The Board finds that renovation of the Centennial Garden, without a request to the Board for modification of the approved special exception site plan, is a violation. According to Mr. Garber, the changes required the issuance of a permit by DPS. [Transcript, February 28, 2001, p. 29]. The construction of the Centennial Garden required both the issuance of a building permit and an electrical permit. Both of these permits should have been an indication to the school of the need to modify both the approved site plan as well as the approved landscape and lighting plan.

Again, the school took the position that these changes would have no impact. However, the addition of lighting is always of interest to the Board because of its potential impact on neighboring properties. The construction should have been brought to the attention of the Board in order for the Board to make this determination. At a minimum, such notice and approval is necessary so that when DPS inspectors go onsite, they are aware of what is permitted under the special exception approval. As a general rule, **any** change to plans previously approved by the Board must be submitted, in advance, for approval under Section 59-G-1.3(c). This requirement is also contained in the specific standards for private educational institutions in Section 59-G-2.19(b)(2) which states:

> No special exception, building permit or certificate of occupancy shall be granted or issued except in accordance with a site plan of development approved by the Board. In reviewing a proposed site plan of development the Board may condition its approval thereof on such amendments to the plan as shall be determined necessary by the Board to assure a compatible development which will have no adverse effects on the surrounding community, and which will meet all requirements of this chapter. **Any departure from a site plan of development as finally approved by the board shall be cause for revocation of the special exception, building permit or certificate of occupancy, in the manner provided by law.** (Emphasis added.)

In order to remedy this particular violation, the school must submit to the Board a revised site plan and a revised landscape and lighting plan showing the construction of the Centennial Garden, as well as a photometric plan showing that no illumination from the Centennial Gardens will leave the site.

3. Child Care Facility Enrollment. The school received approval for a day care center in the Board's opinion of April 4, 1985. That opinion authorized:

> . . . that petitioner may operate a Day Care Center to be used by the faculty and staff of Holton-Arms school only, and which may accommodate up to ten (10) children.

The investigation by DPS established 19 children at the day care center instead of 10 [Garber testimony, Transcript, February 28, 2001, pp. 29-29]. The complainants obtained information from the State Department of Health and Mental Hygiene [Ex. No. 117.9] that in 1996 the school was licensed for 21 children in day care, and for 26 in 1998. Mrs. Beebe testified that typically, the number of children was between 18 and 20 over the last several years. [Transcript, March 6, 2001, p. 102].

DPS also provided evidence of a second violation of this condition. Mr. Garber testified that the day care center was used by teachers employed at the Norwood School and Landon School. [Transcript, February 28, 2001, p. 30]. The complainants submitted evidence from the Holton Arms School Handbook that the day care operation was open to the community [Exhibit 9-1(d)]. Finally, Ms. Beebe testified that four to five children per year out of the 20 children in day care were from teachers teaching at Norwood School, Primary Day School and Landon School, [Transcript, March 6, 2001, p. 101].

The April 4, 1985 opinion made a finding that the modification allowing the child day care center would not substantially change "the nature, character or intensity of the use of the property." Presumably this finding was made as no additional traffic would come onto the school property since the Holton-Arms staff would already be at the school. By adding children brought by parents outside the school, this would not be true, and up to twenty additional trips would be added daily.

In 1994, the school made a modification request to increase the limit of the number of children in the day care program. The school was informed by Board staff at that time that they would need a separate special exception if they wished to expand the day care center enrollment beyond the 1985 limits. [Beebe testimony, Transcript, March 13, 2001, pp. 76-77]. It was not until 2001 that such a request was made, seven (7) years later. Despite this knowledge, in the interim, the school took it upon itself to double the approved enrollment, without the Board's permission.

It was the determination of the Board in 1985 that, with the limitations provided, the child day care use would be accessory to the primary private educational use. The school was advised that the change proposed in 1994 would require a second special exception, by implication, being no longer accessory. Mr. Goldblatt, the Executive Director of the Association of Independent Maryland Schools was asked if, in his experience, the private schools that were members of his organization had child day care. He stated that he was not aware of any [Transcript, March 7, 2001, p. 91].

The Board finds that the child day care center as presently operated by the school is in violation of the April 4, 1985 authorization and is no longer accessory to the use. The school must limit enrollment in the child care center to Holton-Arms faculty and staff only. This should be done as quickly as possible, by attrition, as the Board does not wish to harm the children presently enrolled in the program. There shall be no non-Holton children in the day care program by September 2001.

In addition, the enrollment at the child care facility shall be capped at a maximum of 15 Holton-Arms faculty and staff children only, for the next two (2) years. Thereafter, the school may request a new special exception for a child care facility which will be evaluated by the Board at that time.

4. Creative Summer. The Board's opinion in Case No. S-516 dated November 11, 1976, observed that the school conducted "a summer camp program" and that it was "offered in July and August." The DPS Notice of Violation [Ex. No. 27] noted that the summer camp program began in June, instead of July.

The Board notes that the summer camp was never formally approved, but was merely observed as existing in the 1976 opinion. The 1976 opinion itself only authorized additional playground and parking areas.

The Board finds that ordinarily, a summer camp program is an accessory use to a private educational institution. Mrs. Spingler testified that there are numerous examples of such programs throughout the county, including programs at Landon, Norwood, Bullis and Stone Ridge. [Transcript, March 6, 2001 p.158]. Mr. Goldblatt, Executive Director of the Association of Independent Maryland Schools testified that summer programs are not unusual at private schools. [Transcript, March 7, 2001, p.80]. However, the evidence provided the Board also shows that these camp enrollments are usually less than the enrollment of the school. [See, Ex. No. 136 (h) and (I).] In 2000, the enrollment at the Holton-Arms summer program was 800 campers and 200 counselors. The complainants testified that they had observed the enrollment creeping up and the amount of traffic caused by the summer camp increasing over time. [Kauskay, Transript February 28, 2001, p. 73].

Mr. Garber testified that he obtained the information for the June opening of the camp from the information made publicly available by the school. [Garber testimony, February 28, 2001, p. 30]. Mrs. Beebe testified that the summer camp had been in existence since 1973. She also testified that more than half of the students in the camp were not registered at the school. [Transcript, February 28, 2001, p. 144].

The Board finds, that while the summer camp is accessory to the school, the intensity of the summer camp use exceeds what would customarily be subordinate and incidental. While the school proposes to reduce enrollment at the camp to 750, there was evidence presented to the Board that only thirty-six Holton Arms students attended the camp in the summer of 2000, and of the 180 faculty members anticipated for the 2001 camp, only 20 will be Holton-Arms faculty. [Evidence presented, para. 11].

In order to bring the summer program into compliance with the zoning ordinance, the program must be structured in such a way that it is accessory. Therefore, the Board finds that, beginning with the summer 2001 season, enrollment in the Creative Summer Program must consist of at least 50% children who are Holton-Arms students or from families of Holton-Arms students. Any child accepted into the camp as of March 28, 2001 is permitted to remain enrolled. Enrollment of the camp shall not exceed 645 children.

5. Center of the Arts. Authorization for the Center of the Arts program is not found in any of the Board's opinions. Although after school programs for students of a private educational institution are not unusual, again it is the scope and intensity of the accessory use that creates difficulty for the Board.

The school advertises the Center of the Arts as open to the public. [Exhibit 9-4(a)i-vi]. According to Ms. Beebe, the program started in 1984. Currently, approximately 150 of those participating in the program are Holton-Arms students and 200 are non-Holton-Arms students. [Transcript, March 6, 2001, p.4]. Ms. Spingler testified that only 46% of the participants are Holton-Arms students.

In order to be an accessory use, the Center of the Arts Program must be incidental to the primary use, i.e., serving the students at the school, as well as subordinate. In this case the Board finds that the larger percentage of children enrolled in the Center of the Arts Program who are not Holton-Arms students renders the program neither incidental nor subordinate. The Board finds that the program can continue, provided however, that 75% of the enrollment must be Holton-Arms students or children from the families of Holton-Arms students.

6. Rentals. The Board finds that none of the rentals of Holton-Arms facilities to non-Holton- Arms students or families is permitted in the opinions granting or modifying the special exception. Further, the Board finds that such rentals cannot be considered accessory to the school use, and therefore must cease. Rental of the pool, theater, and space for affinity groups must cease at the conclusion of the current school year or the governing contract, whichever occurs sooner. With respect to use of Holton-Arms facilities by the World Presbyterian Church, that contract must also be terminated in not more than one year from the date of this opinion.

7. Entrance Renovations. The Board finds that the renovations to the River Road entrance constitute a change in the school's approved site plan that requires prior approval by the Board in accordance with Section 59-G-2.19(b)(2). The school must include all changes to the entrance on the revised site plan required in connection with the Centennial Garden.

8. Excessive Traffic Generation. The evidence presented to the Board by the school's traffic engineer [Ev. Pr. para 17] established the expected traffic impact of a private education institution. Based on the Institute of Transportation Engineers Trip Generation Manual, the expected number of trips is .92 trips per student. With an approved enrollment of 650 students, Holton Arms would be expected to generate 598

trips during the am peak. This calculation is consistent with the Local Area Transportation Review Guidelines (April 1998) adopted by the Montgomery County Planning Board, Table B-5, page 35. The evidence establishes, however, that with 864 am peak hour trips and 680 trips during the evening hours, the traffic impact of the school is greater than should be expected for this type of use, and not inherent to a private educational institution. Based on this evidence, the Board finds that the several accessory uses identified above, along with the overenrollment at the school and at the day care facility, are a substantial cause of the excessive traffic impact. This excessive traffic impact, in conjunction with the application of the accessory use doctrine, necessitates the remedial amendments to the special exception conditions as imposed above.

9. Reporting Requirements. Beginning at the conclusion of the current school year, for a period of two years, the school shall submit quarterly reports to the Board regarding compliance with the terms and conditions of the special exception, including those imposed in this opinion. The report shall include student enrollment numbers, number of children in day care and shall confirm that all are children of Holton-Arms faculty or staff, number of participants in Center of the Arts program and percentage of Holton-Arms students and family members, details regarding the Creative Summer program, including dates and number of participants and staff, and updates on the termination of existing non-accessory contracts.

SUMMARY

Section 59-A-4.127 of the Zoning Ordinance provides:

> Special exceptions or variances granted by the board shall be implemented in accordance with the terms and conditions set forth in the opinion of the board which shall include the requirement that the petitioner shall be bound by all of his testimony and exhibits of record, the testimony of his witnesses and representations of his attorneys, to the extent that such evidence and representations are identified in the board's opinion granting the special exception or variance.

The Board believes that to preserve the integrity of the special exception process there must be public confidence in the imposition and enforcement of the conditions originally imposed. The conditions of a special exception act as a covenant between the community, the special exception holder, and the County. The conditions ensure that the special exception operation will be harmonious with the character of the neighborhood. The refusal to abide by the conditions is a violation of the representations made in public before the Board, and relied on by the Board in granting its approval.

In this case the Board imposes remedies for the violations that were found, and amends the conditions of the special exception appropriately. The Board imposes these remedies based on (1) the impact of the violation on the community, i.e.,

excessive traffic, (2) compliance with applicable law, e.g., the law of accessory uses, and (3) compliance with the site plan approval requirements of the zoning ordinance. It was suggested during the proceeding by counsel for the complainants that the mere fact of a violation, in and of itself, permitted the imposition of a remedy. In this case, the Board did not need to reach this issue, as compelling as this notion was for the Board. The Board does not believe that it is precluded from exploring this issue at a later date in another case.

Therefore, the Board amends the existing special exception as identified above, and otherwise reaffirms the special exception for a private educational institution.

On a motion by Angelo M. Caputo, seconded by Louise L. Mayer, with Donna L. Barron, Mindy Pittell Hurwitz and Donald H. Spence, Jr., Chairman, in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled case.

_____

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 7th day of September, 2001.

_____

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63

of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.