IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

MICHAEL LOVENDUSKY, MELEVA LOVENDUSKY,
& LAWRENCE SKRIVSETH

Petitioners, :

- Versus - : **No. 03-AA-419**

DISTRICT OF COLUMBIA **[BZA Order #16852]**
BOARD OF ZONING ADJUSTMENT, :

Respondent, and :

ST. PATRICK'S EPISCOPAL CHURCH AND :
DAY SCHOOL,

Intervenor. :

D.C. ZONING COMMISSION
2003 JUL 31 PM 3:41

PETITIONERS' MOTION TO TAKE JUDICIAL NOTICE
AND SUPPLMENT THE RECORD

Pursuant to District of Columbia Court of Appeals Rule 27(a), Petitioners respectfully request the Court to notice the application of Intervenor St. Patrick's Episcopal Church and Day School (private school) filed with the Board of Zoning Adjustment (board) as case number 17081 (BZA 17081). In particular, Petitioners request the Court notice the existence and contents of BZA 17081 Exhibits 1 and 5, for reasons stated below. BZA 17081 Exhibits 1 and 5 are attached, accompanied by affidavit establishing their origin. The Intervenor private school indicated it is unlikely to consent to this motion. Respondent board has indicated it withholds decision regarding its posture toward the motion pending review of its contents.

BZA
Case No. 16852
Exhibit No. 363

Board of Zoning Adjustment
District of Columbia
CASE NO.16852
EXHIBIT NO.363

The case at bar relates to Board of Zoning Adjustment Order Number 16852 (Order). Both the Order and BZA 17081 involve the same private school, the same counsel of record for the private school, the same neighborhood of the District of Columbia (the Palisades), the same advisory neighborhood commission (ANC3D), and a common issue regarding the number of faculty and staff at the private school. BZA 17081 Exhibit 5 makes specific reference to "compelling evidence" presented by the ANC "during the 2002 hearings for the junior high school", i.e., the subject matter of the instant case. It expressly cites the Order. It is the Order's failure to address in any way the implications of this exact same "compelling evidence" that is the basis of one of Petitioners' substantive arguments.

The Brief of the Petitioners relates to the Court how the board in the Order erred in not addressing "other objections" regarding the credibility of private school officials as required by 11 DCMR § 206.2. Brief of the Petitioners', Fifth Argument, p. 30. The Petitioners, the neighbors, and the ANC argued to the board that it must consider the credibility of private school officials, citing, among numerous examples, the private school's misrepresentations relating to violations of faculty and staff caps imposed by the board. Record 39-41 and 1539; *See* Brief of the Petitioners at p. 31. The Order does not address the neighbors' or the ANC's concerns regarding the credibility of private school officials. Now, when it suits its ambitions *du jour*, the private school agrees

> ...that the governing "staff only" cap was written in error. In light of [the evidence presented by the ANC to the BZA in the instant case regarding the Order], the Applicant [private school] forthrightly admits that it should have returned to the BZA as soon as the faculty and staff total exceeded 60 in the early 1990s. Since the faculty and staff grew gradually over the decade, several incremental increases to the cap would have been required...

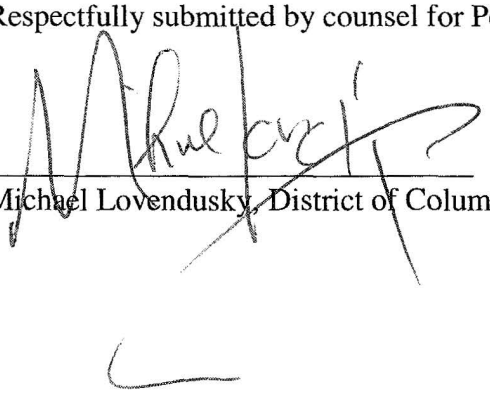
BZA 17081 Exhibit 5. *See* Brief of Petitioners at page 37 (regarding behavior of private school officials when caught in a violation).

Petitioners appreciate the private school's acknowledgment in BZA 17081 that the board erred and that the private school compounded the board's error "during the 2002 hearings for the junior high school" by rejecting the ANC assertions regarding faculty and staff count. Petitioners submit that the private school's admission combined with the same "compelling evidence" referred to in BZA 17081 Exhibit 5 are material to the instant proceedings. Indeed, they are more material to this case than to BZA 17081. The existence and contents of BZA 17081 Exhibits 1 and 5 are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Federal Rules of Evidence, Rule 201(b). The Court exercises its discretion to extend judicial notice when appropriate. S*ee*, e.g., White v. Hyman, 647 A.2d 1175, Footnote 4 (DC 1994)(Court assumed, without deciding, that it can take judicial notice of agency documents). For these reasons, Petitioners respectfully request the Court grant this motion and take notice of the existence and contents of BZA 17081 Exhibits 1 and 5. The Record on Review currently ends at Record 2737. Petitioners have marked attached BZA 17081 Exhibits 1 and 5 as Record 2738-2740 to facilitate their immediate use by all parties and the Court should the Court grant the motion.

Attachments:

- Affidavit of Michael Lovendusky (20 November 2003) (one page)
- BZA 17081 Exhibit 1 (one page)
- BZA 17081 Exhibit 5 (two pages)

Dated: 21 November 2003
Respectfully submitted by counsel for Petitioners:



Michael Lovendusky, District of Columbia Bar # 364415

AFFIDAVIT

I, Michael Lovendusky, attest to the following:

1. I am the Petitioners' counsel of record for the Case No. 03-AA-419 before the District of Columbia Court of Appeals. This case relates to District of Columbia Board of Adjustment Order Number 16852.

2. I reviewed Application Number 17081 filed before the District of Columbia Board of Zoning Adjustment on 18 November 2003.

3. Attachment BZA 17081 Exhibit 1 is the Application for Special Exception "to permit 93 faculty and staff" signed 10 September 2003 by Allison C. Prince of Shaw Pittman LLP on behalf of St. Patrick's Church, consisting of one page.

4. Attachment BZA 17081 Exhibit 5 is entitled "St. Patrick's School Amendment to Cap on Faculty and Staff" consisting of two pages.

5. Attachments BZA 17081 Exhibits 1 and 5 to Petitioners' Motion To Take Judicial Notice are true copies of the originals to be found in the relevant Board of Zoning Adjustment file.

So sworn this 20 November 2003.

Michael Lovendusky
DC Bar Number 364415
4927 MacArthur Boulevard NW
Washington DC 20007
W: 202-624-23990

Notary Public:

Subscribed and sworn to before me this 20th day of November 2003.
Notary Public

Jo Anne Mimms-Bolden
Notary Public, District of Columbia
My Commission Expires Sept. 30, 2004

Form 120 – Exhibit 1
(Revised 04/29/02)

Case No. 17081

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

APPLICATION

Notice: See other side of application form for instructions

Pursuant to Sections §3103.2 - Use Variance, §3103.2 - Area Variance and/or §3104.1 - Special Exception of Title 11 DCMR- Zoning Regulations an application is hereby made, the details of which are as follows:

Address(es)	Square	Lot No(s).	Zoning Districts	Relief Being Sought Area Variance · Use Variance Special Exception	Section No(s).
4700 Whitehaven Pkwy, N.W.	1372	817	R-1-B	Special Exception	205 & 206
	1374	5	R-1-B		

Present use(s) of Property:	Church and Day School
Proposed use(s) of Property:	Church and Day School

Owner of Property:	Vestry - St. Patrick's Church	Telephone No:	(202) 342-2805
Address of Owner:	4700 Whitehaven Pkwy., N.W., Washington, D.C. 20007		

Written paragraph specifically stating the "who, what, and where of the proposed action(s)". This will serve as the Public Hearing Notice:

Special exception to permit 93 faculty and staff for an existing child development center and private school in the R-1-B Zone District pursuant to Sections 205 and 206 of the Zoning Regulations at premises 4700 Whitehaven Pkwy, N.W. (Square 1372, Lot 817 and Square 1374, Lot 5)

Estimated construction cost	$ N/A	Advisory Neighborhood Commission Single-Member District(s)	3D06

Date:	9/10/03	Signature:	Applicant* Allison C. Prince

** The Owner of the Property for which the application is made or his/her authorized agent. In the event an authorized agent files an application on the behalf of the Owner, a letter signed by the Owner authorizing the agent to act on his/her behalf shall accompany the notice of application.*

To be notified of hearing and decision:
(Owner or Authorized Agent*)

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Name:	Allison C. Prince, Shaw Pittman, LLP				
Address:	2300 N Street, N.W., Washington, D.C. 20037				
Phone No.:	(202)663-8853	Fax No.:	(202)663-8007	E-Mail:	

ANY APPLICATION THAT IS NOT COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS ON THE BACK OF THIS FORM WILL NOT BE ACCEPTED.

R2738 ORIGINAL

ST. PATRICK'S SCHOOL
Amendment to Cap on Faculty and Staff

Currently, St. Patrick's School (the "Applicant") employs 92 full-time equivalent (FTE) faculty and staff in connection with its campus at 4700 Whitehaven Parkway (the "Whitehaven Campus"). The campus contains 62 parking spaces in the gymnasium. In addition, the Applicant leases public space from the District of Columbia that is improved with 42 angled parking spaces. The Applicant also leases a portion of the adjacent property (owned by the Army Corps of Engineers), which it uses for 23 spaces. Thus, the Applicant has 127 parking spaces to accommodate regular day-to-day school use.

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In April 2002, the Applicant appeared before the BZA requesting approval for a junior high school at 4925 MacArthur Boulevard, NW. Approval was granted by the BZA pursuant to Order No. 16852, dated March 25, 2003. During the 2002 hearings for the junior high school, ANC 3D testified that the Whitehaven Campus was operating with a faculty and staff count significantly in excess of the cap established by the BZA in the 1990 BZA Order relating to that campus (BZA Order No. 15374). The Applicant rejected this assertion, citing the wording of the 1990 order, which capped staff, and not faculty. Specifically, the order reads: "The number of *staff* shall not exceed 60." (Emphasis added.)

In the 13 years since the 1990 order was written, the Applicant's faculty and staff count has increased from an estimated 51 in 1990 to a current total of 92 FTEs. Throughout that decade, St. Patrick's considered its growth within the legal limit, which, as written, constrained staff, and not faculty. Indeed, in 1999, during a BZA hearing requesting permission for the construction of a new gymnasium and additional academic space, the Applicant's attorney specifically called attention to this unusual "staff only" condition. (See transcript of December 8, 1999 hearing, page 441). Neither the BZA nor the ANC questioned this irregularity at the time of the 1999 hearing.

During the 2002 hearings for the junior high school, the ANC presented compelling evidence – with which the Applicant now agrees – that the governing "staff only" cap was written in error. In light of that evidence, the Applicant forthrightly admits that it should have

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Exhibit No. 5

returned to the BZA as soon as the faculty and staff total exceeded 60 in the early 1990s. Since the faculty and staff grew gradually over the decade, several incremental increases to the cap would have been required.

The Applicant therefore now requests an amendment to the most recent order affecting the Whitehaven Campus, Order No. 16517, to reflect a new cap of 93 total allowed FTEs (faculty, staff, and administration) at 4700 Whitehaven Parkway, NW. Since the regulations require two parking spaces for every three teachers and other employees for school use, the existing 62 parking spaces fully satisfy the requirement.

Finally, the Applicant wishes to acknowledge the ANC's careful and exhaustive research, which has focused the school on the need to request the revision of the cap established in the 1990 order. The Applicant appreciates the ANC's efforts in uncovering this error and is determined to comply fully with the letter and the spirit of all BZA conditions governing its activities.

In light of these circumstances, the Applicant respectfully requests that the Board grant the requested relief.

R 2740

Certificate of Service

I hereby certify and attest that on 21 November 2003, a copy of the foregoing Petitioners' Motion To Take Judicial Notice was personally delivered or mailed first class, postage prepaid, to each of the following:

Allison C. Prince
Shaw Pittman LLP
2300 N Street NW
Washington DC 20037-1128

The Honorable Kathleen Patterson
City Council, Ward Three
1350 Pennsylvania Ave NW #107

John Finney, Chairperson and Commissioner
Advisory Neighborhood Commission 3D04
P.O. Box 40846
Washington DC 20016

Alma Gates
4911 Ashby Street NW
Washington DC 20007

Lawrence Skrivseth and Cathy Wright
4913 MacArthur Blvd NW
Washington DC 20007

Nancy Feldman
4911 W Street NW
Washington DC 20007

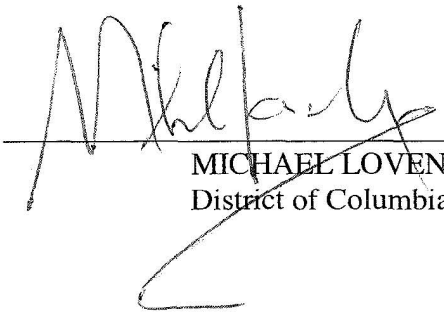
Mary Connelly, Esq.
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Washington DC 20007

Jerrily R. Kress, FAIA
Director, Office of Zoning
Board of Zoning Adjustment
441 Fourth Street NW Suite 210-S
Washington DC 20001

(Michael & Meleva Lovendusky
4927 MacArthur Blvd NW
Washington DC 20007)

ATTESTED BY:



MICHAEL LOVENDUSKY
District of Columbia Bar # 364415