IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

MICHAEL LOVENDUSKY, MELEVA LOVENDUSKY, & LAWRENCE SKRIVSETH		
Petitioners,	:	
- Versus -	:	**No. 03-AA-419**
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT,	:	**[BZA 16852]**
Respondent, and	:	
ST. PATRICK'S EPISCOPAL CHURCH AND DAY SCHOOL,	:	
Intervenor.	:	

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D.C. CLERK OF THE COURT

PETITIONERS' REPLY TO INTERVENOR'S OPPOSITION TO MOTION TO STAY DECISION OF AGENCY ON EXPEDITED BASIS AND SUPPLEMENT THE RECORD

Petitioners, by counsel, reply to the captioned response in subparagraphs tracking the opposing Intervenor private school's argument. District of Columbia Court of Appeals Rule 27(a).

1. There is No Administrative Remedy Because There is No Enforcement

The Petitioners' Motion to Stay Exhibits Two, Three, Four, Five and Six clearly demonstrate the impracticability of appeals to the relevant agencies required by Court Rule 18. Rather than enforce the plain meaning of its own Order No. 16852 (Order), the Board of Zoning Adjustment (board) ignores the plain meaning of the zoning regulations at 11 DCMR § 3205.3 and defers to another government agency for enforcement of "construction activities" that it admits "appears to confirm activity outside the scope of a

BZA
Case No. 16852
Exhibit No. 372

Board of Zoning Adjustment
District of Columbia
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EXHIBIT NO.372

building permit or activity for which an after-hours permit was not obtained." R(2757); R(2762); (R(2763). As of this writing the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) has not responded to the *Complaint and Request for Immediate, Emergency Revocation of Building Permits etcetera* found at Petitioners' Motion to Stay Exhibit One, filed 18 November 2003. R(2741).

Meanwhile, rather than attempt due process, the private school itself seeks special administrative relief to errors it perceives in the Order, expecting its special influence with the regulators to entitle it to extraordinary relief. *Attachment*, Letter of Allison Prince to D.C. Office of Zoning, 26 November 2003.

The private school argues that the Court should await its predicted denials of the agencies for the relief sought by the Petitioners and other aggrieved neighbors, in order to present "the Court with a better record on which to render its decision on the issue." Opposition at p. 3. It is to present the Court with a better record that Petitioners have moved the Court, first, to correct the Record (granted, at R2733 *et seq.*) and subsequently supplement the Record (two motions pending). The Petitioners and neighbors fully expect the agencies to rule against their complaints, not because they are without merit, but because the agencies have displayed their prejudice against them at every turn. *See, e.g.,* Brief of Petitioners, First Argument, page 15. The private school and its counsel have special influence with the agencies, including *ex parte* communication. R2733-2734

(Corrected).[1] For these reasons the Petitioners address themselves to the Court for relief including the temporary relief of a stay of the Order pending final adjudication.

2. Petitioners Have Established the Criteria Necessary to Grant the Stay

Petitioners' Motion to Stay the Order meets the criteria for granting a stay articulated in Barry v. Washington Post Co., 529 A.2d 319, 320-321 (D.C. 1987). First, Petitioners are likely to prevail on the merits, as discussed further below pursuant to the plan of this Reply tracking the Intervenor private school's opposition to the motion. Initially, and in reply to the private school's argument at this point, the refusal of the board and the DCRA to enforce the plain meaning of the law supports Petitioners' Sixth Argument. Brief of Petitioners, pages 36-41. Consider, e.g., the private school reaction to the grievance found at Petitioners' Motion to Stay Exhibit Three. R(2750); R(2751). The complainants directed their grievance to both DCRA and zoning officials, using the required new Form 300. R(2747)-R(2748). The board ignored the express language of its own regulations, opining the violations were "in the absence of a construction management plan" and that the conditions of the Order "are not applicable to

[1] The colloquy found in the corrected Record was not originally certified for submission to the Court by the board. Petitioners do not know whether it is extraordinary for the Court to correct administrative records for material omissions. Petitioners observe, however, the remarkable coincidence that in a record of 2,734 pages, the eleven missing pages included: (i) the appearance of the private school's counsel as a witness (ii) the private school's counsel testifying to the board as an expert; (iii) the private's school's counsel testifying to a yet unveiled innovation of a governmental mechanism (iv) the governmental mechanism revealed to be specially designed to address the enforcement problems of the case before the board (v) the revelation of an *ex parte* discussions between the applicant's counsel and the board's general counsel, and (vi) an express objection by the ANC chairman regarding communications. Petitioners' have a proper objection to the private school's counsel combining roles of lawyer and witness when such combination may prejudice the Petitioners' rights. *District of Columbia Rules of Professional Conduct*, Rule 3.7 ("Lawyer as Witness"), Comments 1 and 2. The Petitioners are entitled to receive from the board "the same fairness, impartiality and independence of judgment as are expected in a court of law." *Jarrott v. Scrivener*, 225 F. Supp. 827, 833 (1964). They did not receive a fair and impartial adjudication by the board in the matter now before the Court, and they do not receive a fair and impartial adjudication of their grievances by the regulators.

construction activities". The board based this conclusion on Order "finding of fact number twenty-four (24), *proposed by the applicant* (i.e., the private school)...". R(2757), emphasis added. It found "The origin of condition number three is instructive in this regard." *Id.* Yet the Order is silent about construction management plans and construction activities, and neither the school nor any official ever suggested that the zoning regulations at Section 3205.3[2] would fail to apply in the absence of such management plans. In short, the board relied upon the influence of the private school beyond the Order itself to hold itself irresponsible for admitted violation of the express terms of the Order and the plain meaning of the law.

There was no justification for the board to consult "the origin of condition number three" in "finding of fact number twenty-four (24), *proposed by the applicant* (i.e., the private school)" to reject the grievance based on the express language of the zoning regulation. Per Citizens Association, "The language of the regulation at issue here...is unambiguous, does not produce an absurd result, and plainly does not provide the BZA with the authority it purported to exercise" in rejecting the grievance.

> "[I]n construing the regulation, while giving due deference to the BZA, [the Court] cannot abandon our traditional rules for interpreting statutes. More specifically, when interpreting a statute or regulation, we first look to the language of the act [***], and when the language is unambiguous and does not produce an absurd result, we will not look beyond its plain meaning. [***]. We have stated on numerous occasions that 'when the language of a statute is clear and admits of no more than one meaning, we are not empowered to look beyond the literal words of the statute.' [***] Thus, if the meaning of the plain language of a statute is clear, we must enforce it according to its terms, [***] and there is no need to engage in an analysis of legislative intent." [***]

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[2] "If a building permit or certificate of occupancy has been issued under the authority of a decision of the Board to approve a special exception or variance, then for purposes of §§ 3205.4 and 3205.6, *each condition to the approval of the special exception or variance shall be treated as a condition to the issuance of the building permit or certificate of occupancy.*"11 DCMR § 3205.3 (emphasis added).

Citizens Association of Georgetown v. District of Columbia Board of Zoning Adjustment, 642 A.2d 125, 128 (D.C. 1994)(citations at asterisks omitted). Further, the board at the same conclusion points to the DCRA as the correct source of any relief for the grievance. R(2757). But the DCRA refused to enforce its rules because the private school "has expressed their regret regarding this incident to all the neighbors..." and "the *Zoning* Regulations require that violations of the *zoning* regulations be personally observed by a *zoning* division staff member in order for the infraction to be upheld in the adjudication process." R(2751)(emphasis added). Petitioners cannot find that such a regulation exists. The board found an infraction of the building code and pointed to the DCRA and the DCRA found the offense had been acknowledged and apologized for by even the private school in the absence of a witness *zoning* division staff member. But no penalty is levied by either agency, no sanction applies by either agency, even in the face of admissions and apologies and regulatory opinions of regulatory violations. Rather, the board indicates "no compliance effort will be forthcoming, nor will the two complaints be registered as violations with respect to the three strike clause of condition number twenty (20)" of the Order. R(2757). Thus do Petitioners' Motion to Stay Exhibits Three and Four prove with direct evidence Petitioners' Sixth Argument, originally raised as a matter of *prima facie* evidence. Brief of the Petitioners, pages 36-41. This demonstrated likelihood of success is but one of six of Petitioners' substantive arguments, all of which are likely to succeed independently of one another.

The irreparable harm resulting to Petitioners and the neighbors from a denial of the stay requested is that there will *never* be enforcement of any condition of the Order if the Court does not discipline the regulators at this time. The Court is the Petitioners' and neighbors' last chance of defense from the self-entitled impositions of the private school. The private school *modus operandi* is to ask for one thing, use its special influence to obtain it even in the face of unanimous opposition of neighbors and the advisory neighborhood commission, and then stretch the regulatory approval beyond what was requested regardless of the objections of neighbors. This is the basis of the grievance found at Petitioners' Motion to Stay Exhibit Two, Fourth Complaint. R(2744). The private school has a history of bootstrapping its violations of board orders into, among other things, higher student enrollments, higher numbers of faculty and staff, and greater territory. *See* citations to Record in Brief of the Petitioners at pages 30-32. Once the students are in the contested location, the private school will bootstrap agency deference against neighbor complaints time and again on the plight of its pawns.

The private school argues hardship for its students prospectively but the Petitioners argue hardship immediately. The temporary discomfiture of 35 students from Maryland and Virginia (R67-73; *see, also*, R334-335, R1535) because of the private school's bad planning is, with all respect, insignificant to the permanent discomfiture of 203 tax-payers of the District of Columbia who neighbor the contested school, because of the errors on appeal. The private school provides neither affidavit nor support for its allegation that it (and its student body) will be substantially harmed by the issuance of a

stay of the Order. The "impact on these students" is neither "obvious" nor "irreparable." They could just continue their studies exactly where they are today.

With regard to the public interest of the District of Columbia, the issue at hand is the ability of the taxpaying residents of the District of Columbia to rely upon the plain meaning of the zoning regulations of the District of Columbia. The *public* interest of the District of Columbia is not the educational problems of the residents of Maryland and Virginia or, for that matter, the whims of the *private* school, which as recently as the autumn of 2000 affirmed its "Master Plan" "to remain a school ending at grade six." R751, R89. The general authority relied upon by the private school about the educational use being "pre-deemed compatible" cannot overrule the specific authority that

> The private school shall be located so that it is not likely to become objectionable *to adjoining and nearby property* because of noise, traffic, number of students, or otherwise objectionable conditions.

11 DCMR § 206.2 (emphasis added). It is precisely the objections of the residents of adjoining and nearby property erroneously ignored by the Order and persistently disrespected by the school and agencies that are the bases of the Petition and Motion.

3. Petitioners' Allegations of Violations Are Well Established and Evidence A Fundamental Error in the Order.

The private school at this point in its opposition to the Motion to Stay displays its amusement regarding the grievances of the Petitioners and the neighbors, suggesting that a bureaucratic remedy would be at hand if only the Petitioners followed the bureaucratic guidance.[3] But the bureaucratic guidance of the Order is based on a form especially

[3] The subject residential district is zoned R-1-B and "The R-1 District is designed to protect quiet residential areas now developed with one-family detached dwellings and adjoining vacant areas likely to be

invented by the Office of Zoning in collusion with the private school (Footnote 1, *supra*); interpreted by regulators relying on private school influence beyond the Order (*supra* at page 4); ignorant of the controlling zoning regulation regarding the applicability of conditions to building permits (11 DCMR § 3205.3); and disrespectful of its own provisions regarding its expiration (R(2742-2743) or enforcement. The Order, with the influential, *ex parte*, interpretive assistance of the private school, is a labyrinth of bureaucratic dead ends. The private school knows it is likely to win a war of attrition with objecting neighbors forced hither and yon among the bureaucracies seeking one, any one, to enforce any condition of the Order or the zoning regulations or the construction regulations. The Order and the bureaucratic processes invented or deferred to by the bureaucrats are designed to frustrate, not provide, due process. A grant of the Motion to Stay the Order will discipline the agencies with dramatic, salubrious effect.

The private school provides yet another example of the problem confronting the Petitioners and neighbors as well as the Order itself. *Arguendo*, the Order's expiration term might indicate an ambiguity. R2708. By its express terms it expired on 4 October 2003. R(2742-2743). The private school argues variously that the provision is a "clerical error" (Attachment) or that the real expiration time limit must be divined by reference to 11 DCMR § 3130. But reference to Section 3130 is ambiguous itself. First, it raises questions whether the activity, variously described but considered in detail by the board

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designed for those purposes." 11 DCMR § 200.1. R-1 residential districts "are intended to stabilize the residential areas and to promote a suitable environment for family life." 11 DCMR § 200.2. The Petitioners and their neighbors are not amused by the routine violation of the zoning regulations and conditions of the Order. While no doubt a convenience to those from other jurisdictions and other neighborhoods dropping the kids off on their way to work or the supermarket, the private school proves daily to be an abusive nuisance to those who actually must live with its impositions. The nature of the private school's mundane behavior assuredly disturbs the peace and quiet of the neighborhood and is already destabilizing it. The diesel trucks of today are merely harbingers of the buses of tomorrow.

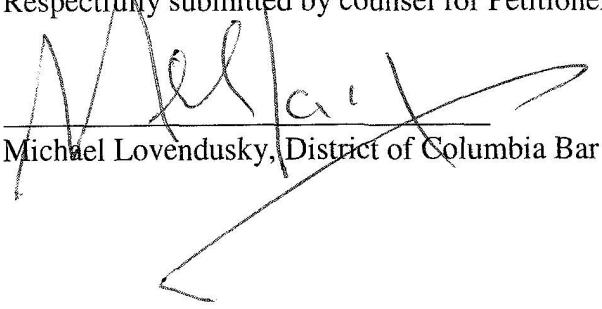
as a "rehabilitation" (Order Fact # 3, R2694) or an "expansion" (Order Condition # 19, R2707), is "dependent upon the erection or alteration of a structure" (Section 3130.4). The Court should accept the board's twice-repeated time period of six months (R2708), especially in light of the board expressly discussing the extent of the structure's "rehabilitation" and its conditioning of the construction activity – whatever it is called – as limited to the private school's site plan (Order Exhibit No. 340). R2707. Second, there is little relief to be found for the private school even if the Court is inclined to reach Section 3130.4 because valid building permits were not obtained within six months as required. *See* Petitioners' Motion to Stay Exhibit Two Complaints Second, Third and Fourth. R(2743-2745). Third, the private school knew or should have known that its site plans filed "for the purposes of securing a building permit" involved "plans for the erection or alteration" of its own building and, hence, required more than six months to complete. If the private school thought (at any time) it could not complete the necessary "renovation" within six months, it should have applied for relief to either of the proper authorities in timely fashion, rather than complain to a third agency (the Office of Zoning) after expiration of the Order about a "clerical error" warranting extraordinary relief. *See* Attachment.

Similarly, the private school's argument that the expiration of the Order is "stayed if an appeal of the BZA Order at issue is taken (as Petitioners have taken in this case)" fails because the same section indicates that the private school could proceed pursuant to the Order prior to the court's final determination unless stayed by the Board or a court. 11 DCMR § 3103.5. Petitioners did not initially seek a stay; nothing stopped the private

school from proceeding with its building rehabilitation of the building; the school did proceed; it failed to accomplish its task within the time limits of the Order; the Order expired; and only months after expiration have the Petitioners sought to stay further construction pending final adjudication of the case. Construction continues at this time despite the expiration of the Order, the appeal to the DCRA, and the instant appeal. Paradoxically, only the Court's stay of the Order will stay the expiration provision of the Order, triggering Section 3130.5 relief to the school's quandary that it neither obtained valid building permits nor effectuated the use approved in the Order within six months.

The fact is that the Order is a mess of error, with even the private school acknowledging it at this point. All parties will benefit from a grant of Petitioners' Motion to Stay the Decision of the Agency. For the reasons above and in the Motion itself, Petitioners request immediate grant of the motion. Alternatively, should the Court consider it beneficial to hear oral argument, Petitioners request a temporary stay of the Order and expeditious hearing of the motion. Finally, regardless of the Court's disposition of the Motion to Stay, Petitioners respectfully request the Court grant the ancillary Motion to Supplement the Record.

Dated: 12 December 2003
Respectfully submitted by counsel for Petitioners:



Michael Lovendusky, District of Columbia Bar # 364415

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November 26, 2003

Mr. Richard Nero
D.C. Office of Zoning
441 4th Street, N.W., Room 210
Washington, DC 20001

Re: St. Patrick's School
4925 MacArthur Blvd., NW
Square 1393, Lot 823
BZA Order No. 16852

Dear Mr. Nero:

In Order No. 16852, the BZA approved a special exception under Section 206 to allow the renovation and expansion of the above-referenced property for use as a junior high school. The renovation and expansion were discussed extensively throughout the hearing and proposed plans were submitted to the record. In addition, Condition 19 of the Order refers to the plan, filed as Exhibit 340. St. Patrick's is well underway in the renovation and expansion of the building pursuant to a building permit that was approved by DCRA.

As you know, under circumstances in which a special exception is granted for a use that contemplates construction or renovation prior to the use being undertaken, the BZA regularly includes a paragraph at the end of the order giving the property owner two years within which to obtain a building permit or certificate of occupancy, as follows:

> THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT. (See, for example, BZA Orders 16981, 16994 and 17067 attached hereto.)

Unfortunately, it appears that BZA Order No. 16852 inadvertently contains a paragraph stating that the use must be established within six months. Typically, this language is used in orders that do not involve any new construction or renovation (See, for example BZA Orders No. 16768, 16873 and 16972 attached hereto).

On the understanding that this paragraph reflects a clerical error, we would appreciate your arranging for the issuance of a corrected order replacing the above referenced paragraph.

Very truly yours,

Allison C. Prince

cc: See Attached Certificate of Service

Certificate of Service

I hereby certify and attest that on 12 December 2003, a copy of the foregoing Petitioners' Reply to Intervenors' Opposition to Motion for Stay and Supplement the Record was personally delivered (indicated by *) or mailed first class, postage prepaid, to the following:

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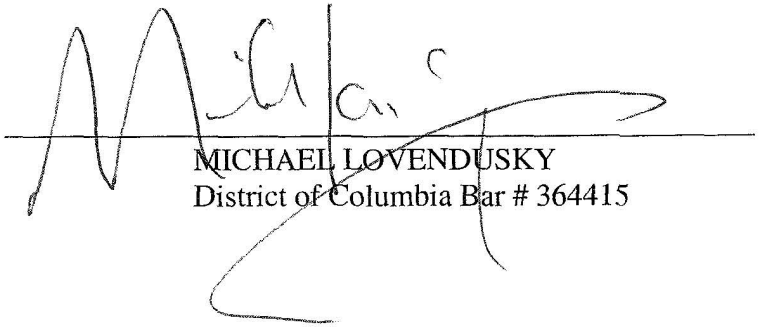
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ATTESTED BY:



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