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.	:	

PETITIONERS' REPLY TO INTERVENOR'S OPPOSITION TO MOTION TO TAKE JUDICIAL NOTICE AND SUPPLEMENT THE RECORD

Petitioners reply, by counsel, to the Intervenor private school's opposition to the captioned motion. District of Columbia Court of Appeals Rule 27(a). The lack of credibility of the private school's officials was raised by residents of adjoining and nearby property to the contested private school location in the proceedings that resulted in Board of Zoning Adjustment Order # 16852 (Order). Despite the neighbors' detailed assertions that the private school officials could not be trusted to deliver on their promises, including those that became conditions of the Order, and despite the regulatory requirement under 11 DCMR § 206.2 that such "otherwise objectionable conditions" be considered by the board, the board failed to address the credibility problem in the Order. The board's refusal to confront the incredibility of private school representations is an error requiring remand.

BZA
Case No. 16852
Exhibit No. 373

Board of Zoning Adjustment
District of Columbia
CASE NO.16852
EXHIBIT NO.373

Now comes the private school back to the board in BZA proceeding # 17081 admitting in its Exhibit # 5 that *in the Order for BZA 16852* (1) the board erred in trusting the private school; (2) the private school officials were in violation of their staff cap; (3) the neighbors' objections regarding private school credibility were justified; and (4) the ANC opinion regarding community distrust of the private school should have been given "great weight" as required by statute rather than ignored. Petitioners respectfully submit that the facts established by BZA 17081 Exhibit 5 are immediately relevant to the Court evaluation of the Order and the board's prejudice against the Petitioners, neighbors, and ANC in BZA 16852.

BZA 17081 Exhibit 5 also raises fresh credibility problems for the private school relevant to the immediate proceeding. The Exhibit indicates how "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." Written in error, that is, by the board itself. But the truth is that the board did not err in using the term "staff" to relate to both faculty and staff. It was none other than the private school's counsel of record that introduced the use of "staff" to refer to faculty and staff. She introduced it in her application to the board in 1990 in the proceedings that established the staff cap of 60. Attached to this document is the private school's Application to BZA Docket Number # 15374 (6/13/1990). The action sought in 1990 by the very same counsel again representing the private school is for "special exception relief...required in connection with the proposed school expansion which involves an increase of the number

of *students and staff* at the school." (emphasis added). In other words, private school counsel first advanced the distinction of "students and staff" to the board, succeeding in putting her words in the board's Order 15374. Private school counsel then invented a distinction between "faculty and staff" that comforted the private school in its violations of the 1990 caps for twelve years – until it was caught in 2002 by the advisory neighborhood commission in BZA 16852, i.e., the case on review. When the board looked away from the evidence of the private school's abuse of regulatory and judicial processes and failed to address the issue in the Order, it committed an error warranting remand, for it failed to deliver fundamental fairness. *See* Sheridan-Kalorama Neighborhood Council v. District of Columbia Board of Zoning Adjustment, 341 A.2d 312, 316 (D.C.1975). "If the agency makes no finding of fact on a material contested issue, this court on review many not 'fill the gap by making its own determinations from the record,' but must remand the case." Levy v. District of Columbia Board of Zoning Adjustment, 570 A.2d 739, 746 (D.C. 1990). For these reasons, Petitioners respectfully request the Court to grant the motion.

Dated: 15 December 2003
Respectfully submitted by counsel for Petitioners:

Michael Lovendusky, District of Columbia Bar # 364415
4927 MacArthur Blvd NW
Washington DC 20007
202.624.2390

Attachment: BZA Application, Docket No. 15374, Allison Prince for St. Patrick's, 13 June 1990.

BZA Form 2
(Revised 4/20/74)

Docket No. 15372A

'90 JUN 13 P3:11

ZONING SECRETARIAT
DISTRICT OF COLUMBIA

BEFORE THE

BOARD OF ZONING ADJUSTMENT

FOR THE

DISTRICT OF COLUMBIA

APPLICATION

NOTE: See reverse side of this form for filing instructions, filing fees, and information required by the Board.

DO NOT MAIL **DO NOT MAIL**

TO THE BOARD OF ZONING ADJUSTMENT:

Pursuant to Section(s) 3108.1 of the Zoning Regulations of the District of Columbia, an application is hereby made for the following action: special exception to increase the number of students and staff at an existing private day school, which is provided for by Section(s) 205.1 of the Zoning Regulations.

Premises affected are located at 4700 Whitehaven Parkway, N.W. (Street Address)

Lot(s) 817, Square(s) 1372, in the District of Columbia, in Zoning District R-1-B.

Present Use of Property: private day school.

Proposed Use of Property: private day school.

Owner of Property: Vestry of St. Patrick's Church.

Address of Owner: 4700 Whitehaven Parkway, N.W.

State briefly the basis for action sought: special exception relief is required in connection with the proposed school expansion which involves an increase of the number of students and staff at the school.

Date: June 13, 1990 Signature: Allison C. Prince
Applicant*

*The owner of the property for which application is made or his authorized agent may file an application. In the event an authorized agent files an application on behalf of the owner, the notice of application shall be accompanied by a letter signed by the owner authorizing the agent to act on his behalf in this application.

TO BE NOTIFIED OF HEARING AND DECISION:

Name Whayne S. Quin
Allison Carney Prince

Address Wilkes, Artis, Hedrick & Lane
1666 K Street, N.W., Suite 1100, Washington, D.C.

Zip Code 20006 Phone No. 457-7800

97

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

ATTACHMENT ONE
LOVENDUSKY APPLICATION PARTY OPPONEN
BZA CASE # 17081

Certificate of Service

I hereby certify and attest that on 15 December 2003, a copy of the foregoing Petitioners' Reply to Intervenor's Opposition to Motion to Take Judicial Notice *etcetera* was 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
Washington DC 20004

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

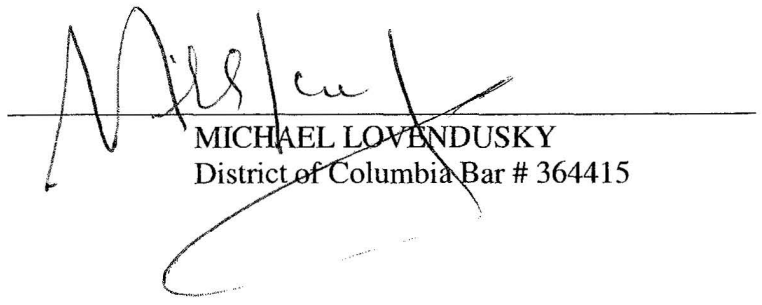
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Director, Office of Zoning
Board of Zoning Adjustment
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Washington DC 20001

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

ATTESTED BY:



MICHAEL LOVENDUSKY
District of Columbia Bar # 364415