MICHAEL LOVENDUSKY
Attorney at Law
4927 MacArthur Boulevard NW
Washington DC 20007

31 December 2003

Richard Nero
District of Columbia Office of Zoning
441 Fourth Street NW Room 210
Washington DC 20001

RE: St. Patrick's School, 4925 MacArthur Blvd NW
Square 1393, Lot 823, BZA Order # 16852

Dear Mr. Nero,

This letter responds to counsel Allison Prince's letter of December 9 regarding St. Patrick's request that you grant extraordinary relief and re-write, without hearing or due process, BZA Order # 16852. Should you grant such special relief, you will acknowledge that the Order contains errors and demonstrate prejudicial favor to the private school. As you know, both of these issues are now before the District of Columbia Court of Appeals. The case has been fully briefed and submitted for expeditious adjudication.

1. Contrary to Ms. Prince's allegation, the residents of property adjoining and nearby the contested location of the private school rely upon the plain meaning of the Order, the law, and the guidance of judicial authority. Surely the BZA was aware that "the Board's Rules of Practice and Procedure were changed in 1999 (46 DCR 7916)" when it wrote and published the Order in March of 2003. The BZA did not err with regard to the expiration provision of the Order.

2. The private school's allegation that important provisions of the Order "were automatically tolled pending the final decision of the court" leads the private school into untenable arguments regarding the Order. *Arguendo*, the Order's expiration term might indicate an ambiguity. Record at 2708 (R2708).[1] By its express terms it expired on 4 October 2003. The private school argues variously that the provision is a "clerical error" 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 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). You should accept the board's twice-repeated time period of six months (R2708), especially in light of

[1] References are to the Record before the Court of Appeals certified by the Board of Zoning Adjustment with regard to the Order.

BZA
Case No. 16852
Exhibit No. 377

Board of Zoning Adjustment
District of Columbia
CASE NO.16852
EXHIBIT NO.377

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 you are inclined to reach Section 3130.4 because valid building permits were not obtained within six months as required. 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 you after expiration of the Order about a "clerical error" warranting extraordinary relief.

3. Similarly, the private school's argument that the expiration of the Order is stayed because an appeal of the BZA Order was taken 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. The neighbors did not initially seek a stay of the Order in their appeal to the court; 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; and the Order expired. Construction continues at this time despite the expiration of the Order, an appeal to the DCRA, and the appeal to the Court of Appeals. The school's quandary is that it neither obtained valid building permits nor effectuated the use approved in the Order within six months. The proper recourse for the private school is to apply to the Board of Zoning Adjustment to amend the Order or to the Court of Appeals to stay the termination provision of the Order. For some mysterious reason, the private school thinks you will grant them special consideration.

The neighbors contesting the location of the private school respectfully recommend you reject the private school's request for extraordinary relief and special favor.

Sincerely,

MICHAEL LOVENDUSKY

Certificate of Service

I hereby certify and attest that on 31 December 2003, a copy of the foregoing was hand delivered or mailed first class, postage prepaid, to 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

Mary Connelly, Esq.
Deputy Corporation Counsel
441 Fourth Street NW Sixth Floor
Washington DC 20001

Katherine Van Sickle DeMallie
4923 Ashby Street NW
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

Ken Laden and Rachel MacCleery
DDOT
2000 14th Street NW Seventh Floor
Washington DC 20009

Maxine Brown Roberts
Office of Planning
801 North Capitol Street NE Fourth Floor
Washington DC 20002

ATTESTED BY:

MICHAEL LOVENDUSKY
District of Columbia Bar # 364415

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

MICHAEL LOVENDUSKY, MELEVA LOVENDUSKY, LAWRENCE SKRIVSETH, *JEAN LOUIS ATLAN, RONIT ARNSDORF ATLAN, NORA E. CARBINE, THOMAS E. CARROLL, TIEN H. CLAUDIO, HOWARD E. FENTON, DIANE HAARDT, RICHARD ERIC HILTON, ANA R. ORMEROD, DOUGLAS S. ORMEROD, CATHY M. WRIGHT**

*[*Motion to Join Petitioners Pending]*

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. :

MOTION TO JOIN PETITIONERS

Pursuant to District of Columbia Court of Appeals Rule 27(i), counsel for Petitioners moves to join the individuals listed *infra* as Petitioners in the captioned case. Counsel Mary Connelly for Respondent Board of Zoning Adjustment opposes the motion. A telephone inquiry was left for counsel Allison Prince for the Intervenor private school but counsel for Petitioners has not heard back. The individuals seeking to join Petitioners are:

Jean Louis Atlan, 2225 49th Street NW, Washington DC 20007. Affidavit attached; see Record at 496.

Ronit Arnsdorf Atlan, 2225 49th Street NW, Washington DC 20007. Affidavit attached; see Record at 496.

Nora E. Carbine, 4915 Ashby Street NW, Washington DC 20007. Affidavit attached; see Record at 8 and 471 and 634.

Thomas E. Carroll, 4918 Ashby Street NW, Washington DC 20007. Affidavit attached; see Record at 468.

Tien H. Claudio, 4905 MacArthur Blvd NW, Washington DC 20007. Affidavit attached; see Record at 7 and 468 and 634.

Howard E. Fenton, 4915 Ashby Street NW, Washington DC 20007. Affidavit attached; see Record at 8 and 466.

Diane Haardt, 4918 Ashby Street NW, Washington DC 20007. Affidavit attached; see Record at 7 and 468 and 634.

Richard Eric Hilton, 4905 MacArthur Blvd NW, Washington DC 20007. Affidavit attached; see Record at 7 and 468 and 634.

Ana R. Ormerod, 4901 Ashby Street NW, Washington DC 20007. Affidavit attached; see Record at 7 and 467.

Douglas S. Ormerod, 4901 Ashby Street NW, Washington DC 20007. Affidavit attached; see Record at 7 and 467 and 634.

Cathy M. Wright, 4913 MacArthur Blvd NW, Washington DC 20007. Affidavit attached; see Record at 7 and 466 and 634.

Each of the individuals is a resident of "adjoining or nearby property" within the meaning of 11 DCMR § 206.2, the zoning regulation governing the issues at bar. *See* BZA Order #

16852 at Record 2700. Each requested counsel for Petitioners to move the court on his or her behalf. Each signed the petition of 203 neighbors objecting to the application for special exception pursuant. Each was disfranchised by BZA Order # 16852 (Order), which omitted identification and mention of each individual's appearance in opposition to the application for special exception. *See* Brief of the Petitioners, First Argument, pp.10-17.

The individuals seeking to join Petitioners have an interest relating to the subject of the action. In particular, the individuals seek to impress upon the Court that the issues and concerns raised by the Petitioners are shared by other residents of property adjoining and nearby the contested location of the private school that is the subject matter of the instant case. Joinder of the individuals identified will not affect the jurisdiction of the Court or prejudice the respondents. *See, generally,* Multi-Family Management, Inc. v. Hancock, 664 A.2d 1210, 1214-1218 (D.C.1995). For these reasons, counsel moves that the individuals identified above be joined as Petitioners in the case at bar.

Respectfully submitted 29 December 2003

MICHAEL LOVENDUSKY
District of Columbia Bar #364415
Telephone 202-624-2390

AFFIDAVIT

I, Jean Louis ATLAN (*name*), attest to the following:

1. I reside at 2225 - 49th St NW. DC. 20007 Washington DC 20007. My residence is (*mark the most informative one only*):

   a. ____Within 200 feet (200')
   b. ____Within 500 feet (500')
   c. ____Within 1,000 feet (1,000')

   of the contested location of St. Patrick's School at 4925 MacArthur Boulevard NW, Washington DC 20007. I reside on a property adjoining or nearby the contested location of this private school.

2. I am familiar with the pleadings in Michael Lovendusky et al v. Board of Zoning Adjustment, Case No. 03-AA-419 before the District of Columbia Court of Appeals. This case relates to District of Columbia BZA Order Number 16852.

3. I request the Court to allow me to join the Case as a named Petitioner. I have requested counsel for the Petitioners to move the Court on my behalf in this regard.

So sworn this 9 **December 2003.**

Signature of Affiant

Notarization of Notary Public:

Washington DC

subscribed and sworn to before me the 9th day of December, 2003.

Tigabu Nigussie.

TIGABU NIGUSSIE
Notary Public, District of Columbia
My Commission Expires June 14, 2004

AFFIDAVIT

I, RONIT ARNSDORF ATLAN (*name*), attest to the following:

1. I reside at 2225 49th St. NW, Washington DC 20007. My residence is (*mark the most informative one only*):

   a. ____ Within 200 feet (200')
   b. ✓ Within 500 feet (500')
   c. ____ Within 1,000 feet (1,000')

   of the contested location of St. Patrick's School at 4925 MacArthur Boulevard NW, Washington DC 20007. I reside on a property adjoining or nearby the contested location of this private school.

2. I am familiar with the pleadings in Michael Lovendusky et al v. Board of Zoning Adjustment, Case No. 03-AA-419 before the District of Columbia Court of Appeals. This case relates to District of Columbia BZA Order Number 16852.

3. I request the Court to allow me to join the Case as a named Petitioner. I have requested counsel for the Petitioners to move the Court on my behalf in this regard.

So sworn this 22 December 2003.

Ronit Arnsdorf Atlan

Signature of Affiant

Notarization of Notary Public:

Washington, District of Columbia

Subscribed and sworn to before me, in my presence,

this 22 day of December 2003

by

Stephanie N. Bissessur, Notary Public

My Commission Expires April 14, 2007

AFFIDAVIT

I, Nora E. Carbine (*name*), attest to the following:

1. I reside at 4915 Ashby St. NW,

   Washington DC 20007. My residence is (*mark the most informative one only*):

   a. ✓ Within 200 feet (200')
   b. ____ Within 500 feet (500')
   c. ____ Within 1,000 feet (1,000')

   of the contested location of St. Patrick's School at 4925 MacArthur Boulevard NW, Washington DC 20007. I reside on a property adjoining or nearby the contested location of this private school.

2. I am familiar with the pleadings in Michael Lovendusky et al v. Board of Zoning Adjustment, Case No. 03-AA-419 before the District of Columbia Court of Appeals. This case relates to District of Columbia BZA Order Number 16852.

3. I request the Court to allow me to join the Case as a named Petitioner. I have requested counsel for the Petitioners to move the Court on my behalf in this regard.

So sworn this 17 December 2003.

Nora E Carbine
Signature of Affiant

Notarization of Notary Public:

Sharon Y. Foster 4/01/07
12/17/03

SHARON Y. FOSTER NOTARY PUBLIC MY COMMISSION EXPIRES 4/01/07 PRINCE GEORGE'S COUNTY, MD

AFFIDAVIT

I, THOMAS E CARROLL (*name*), attest to the following:

1. I reside at 4918 HSLEY ST NW, Washington DC 20007. My residence is (*mark the most informative one only*):

   a. ✓ Within 200 feet (200')
   b. ____ Within 500 feet (500')
   c. ____ Within 1,000 feet (1,000')

   of the contested location of St. Patrick's School at 4925 MacArthur Boulevard NW, Washington DC 20007. I reside on a property adjoining or nearby the contested location of this private school.

2. I am familiar with the pleadings in Michael Lovendusky et al v. Board of Zoning Adjustment, Case No. 03-AA-419 before the District of Columbia Court of Appeals. This case relates to District of Columbia BZA Order Number 16852.

3. I request the Court to allow me to join the Case as a named Petitioner. I have requested counsel for the Petitioners to move the Court on my behalf in this regard.

So sworn this 26 December 2003.

Signature of Affiant

Notarization of Notary Public:

Susan Haardt
Notary Public, District of Columbia
My Commission Expires 05-14-2008

AFFIDAVIT

I, Tien H. Claudio (*name*), attest to the following:

1. I reside at 4905 Mac Arthur Blvd, NW, Washington DC 20007. My residence is (*mark the most informative one only*):

   a. ✓ Within 200 feet (200')
   b. ____ Within 500 feet (500')
   c. ____ Within 1,000 feet (1,000')

   of the contested location of St. Patrick's School at 4925 MacArthur Boulevard NW, Washington DC 20007. I reside on a property adjoining or nearby the contested location of this private school.

2. I am familiar with the pleadings in Michael Lovendusky et al v. Board of Zoning Adjustment, Case No. 03-AA-419 before the District of Columbia Court of Appeals. This case relates to District of Columbia BZA Order Number 16852.

3. I request the Court to allow me to join the Case as a named Petitioner. I have requested counsel for the Petitioners to move the Court on my behalf in this regard.

So sworn this 22 **December 2003.**

Signature of Affiant

Notarization of Notary Public:

My commission expires Feb 14 2008

AFFIDAVIT

I, Howard E. Fenton, attest to the following:

1. I reside at 4915 Ashby Street, NW, Washington DC 20007. My residence is (*mark the most informative one only*):

   a. X ___Within 200 feet (200')
   b. _____Within 500 feet (500')
   c. _____Within 1,000 feet (1,000')

   of the contested location of St. Patrick's School at 4925 MacArthur Boulevard NW, Washington DC 20007. I reside on a property adjoining or nearby the contested location of this private school.

2. I am familiar with the pleadings in Michael Lovendusky et al v. Board of Zoning Adjustment, Case No. 03-AA-419 before the District of Columbia Court of Appeals. This case relates to District of Columbia BZA Order Number 16852.

3. I request the Court to allow me to join the Case as a named Petitioner. I have requested counsel for the Petitioners to move the Court on my behalf in this regard.

So sworn this 17 **December 2003.**

Howard E. Fenton

Signature of Affiant

Notarization of Notary Public:

State / District of Columbia
City / County of Washington DC
The foregoing instrument was acknowledged before me this 17th
day of Dec 2003 by HOWARD E. Fenton
Barbara A. Wright
Notary public

My commission expires: 7-14-2007

BARBARA A. WRIGHT
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires July 14, 2007

AFFIDAVIT

I, HAARDT, DIANE (*name*), attest to the following:

1. I reside at 4918 Ashby St, N.W., Washington DC 20007. My residence is (*mark the most informative one only*):

   a. ✓ Within 200 feet (200')
   b. ____ Within 500 feet (500')
   c. ____ Within 1,000 feet (1,000')

   of the contested location of St. Patrick's School at 4925 MacArthur Boulevard NW, Washington DC 20007. I reside on a property adjoining or nearby the contested location of this private school.

2. I am familiar with the pleadings in Michael Lovendusky et al v. Board of Zoning Adjustment, Case No. 03-AA-419 before the District of Columbia Court of Appeals. This case relates to District of Columbia BZA Order Number 16852.

3. I request the Court to allow me to join the Case as a named Petitioner. I have requested counsel for the Petitioners to move the Court on my behalf in this regard.

So sworn this 26th December 2003.

Diane T. Haardt

Signature of Affiant

Notarization of Notary Public:

Susan Heardt
Notary Public, District of Columbia
My Commission Expires 05-14-2008

AFFIDAVIT

I, Richard Eric Hilton (*name*), attest to the following:

1. I reside at 4905 MacArthur Blvd. NW,

   Washington DC 20007. My residence is (*mark the most informative one only*):

   a. ✓ Within 200 feet (200')
   b. ____ Within 500 feet (500')
   c. ____ Within 1,000 feet (1,000')

   of the contested location of St. Patrick's School at 4925 MacArthur Boulevard NW, Washington DC 20007. I reside on a property adjoining or nearby the contested location of this private school.

2. I am familiar with the pleadings in Michael Lovendusky et al v. Board of Zoning Adjustment, Case No. 03-AA-419 before the District of Columbia Court of Appeals. This case relates to District of Columbia BZA Order Number 16852.

3. I request the Court to allow me to join the Case as a named Petitioner. I have requested counsel for the Petitioners to move the Court on my behalf in this regard.

So sworn this 22nd December 2003.

Signature of Affiant

Notarization of Notary Public:

Washington, District of Columbia

The foregoing instrument was subscribed and sworn before me this 22nd day of December, 2003 by Richard Eric Hilton

Lucelle O'Flaherty Notary Public

My commission expires April 30, 2008

AFFIDAVIT

I, ANA R. ORMEROD (*name*), attest to the following:

1 I reside at 4901 ASHBY STREET, N.W., Washington DC 20007. My residence is (*mark the most informative one only*):

a. ✓ Within 200 feet (200')
b. ____ Within 500 feet (500')
c. ____ Within 1,000 feet (1,000')

of the contested location of St. Patrick's School at 4925 MacArthur Boulevard NW, Washington DC 20007. I reside on a property adjoining or nearby the contested location of this private school.

2. I am familiar with the pleadings in Michael Lovendusky et al v. Board of Zoning Adjustment, Case No. 03-AA-419 before the District of Columbia Court of Appeals. This case relates to District of Columbia BZA Order Number 16852.

3 I request the Court to allow me to join the Case as a named Petitioner. I have requested counsel for the Petitioners to move the Court on my behalf in this regard.

So sworn this 20 December 2003.

Ana R. Ormerod
Signature of Affiant

Notarization of Notary Public:

Subscribed and sworn to before me, in my presence, this 20 day of December, 2003, a Notary Public in and for the _____ of _____.

_____
Notary Public

My commission expires _____, 20___

SONIA M. MARQUEZ
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires September 30, 2008

AFFIDAVIT

I, Douglas S. Ormerod (*name*), attest to the following:

1. I reside at 4901 Askby Street N.W., Washington DC 20007. My residence is (*mark the most informative one only*):

   a. X Within 200 feet (200')
   b. ____ Within 500 feet (500')
   c. ____ Within 1,000 feet (1,000')

   of the contested location of St. Patrick's School at 4925 MacArthur Boulevard NW, Washington DC 20007. I reside on a property adjoining or nearby the contested location of this private school.

2. I am familiar with the pleadings in Michael Lovendusky et al v. Board of Zoning Adjustment, Case No. 03-AA-419 before the District of Columbia Court of Appeals. This case relates to District of Columbia BZA Order Number 16852.

3. I request the Court to allow me to join the Case as a named Petitioner. I have requested counsel for the Petitioners to move the Court on my behalf in this regard.

So sworn this 20 December 2003.

Signature of Affiant

Notarization of Notary Public:

Subscribed and sworn to before me, in my presence, this 20 day of December 2003, a Notary Public in and for the ____ of ____.

Notary Public

My commission expires ____, 20____

SONIA M. MARQUEZ
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires September 30, 2008

AFFIDAVIT

I, CATHY M. WRIGHT (*name*), attest to the following:

1. I reside at 4913 MACARTHUR BLVD, NW, Washington DC 20007. My residence is (*mark the most informative one only*):

   a. ✓ Within 200 feet (200')
   b. ____ Within 500 feet (500')
   c. ____ Within 1,000 feet (1,000')

   of the contested location of St. Patrick's School at 4925 MacArthur Boulevard NW, Washington DC 20007. I reside on a property adjoining or nearby the contested location of this private school.

2. I am familiar with the pleadings in Michael Lovendusky et al v. Board of Zoning Adjustment, Case No. 03-AA-419 before the District of Columbia Court of Appeals. This case relates to District of Columbia BZA Order Number 16852.

3. I request the Court to allow me to join the Case as a named Petitioner. I have requested counsel for the Petitioners to move the Court on my behalf in this regard.

So sworn this 22 December 2003.

Cathy M. Wright
Signature of Affiant

Notarization of Notary Public:

Washington, District of Columbia

Subscribed and sworn to before me, in my presence,

this 22nd day of December, 2003

[illegible] Notary Public

My Commission Expires September 30, 2006

Certificate of Service

I hereby certify and attest that on 29 December 2003, a copy of the foregoing Motion to Join Petitioners was hand delivered or mailed first class, postage prepaid, to 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

Mary Connelly, Esq.
Deputy Corporation Counsel
441 Fourth Street NW Sixth Floor
Washington DC 20001

Katherine Van Sickle DeMallie
4923 Ashby Street NW
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

ATTESTED BY:

MICHAEL LOVENDUSKY
District of Columbia Bar # 364415

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

MICHAEL LOVENDUSKY, MELEVA LOVENDUSKY, LAWRENCE SKRIVSETH, *JEAN LOUIS ATLAN, RONIT ARNSDORF ATLAN, NORA E. CARBINE, THOMAS E. CARROLL, TIEN H. CLAUDIO, HOWARD E. FENTON, DIANE HAARDT, RICHARD ERIC HILTON, ANA R. ORMEROD, DOUGLAS S. ORMEROD, CATHY M. WRIGHT**

*[*Motion to Join Petitioners Pending]*

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

The Petitioners, by counsel, reply to the Brief for Intervenor, which the respondent Board of Zoning Adjustment (board or BZA) joined by statement in lieu of a brief. District of Columbia Court of Appeals Rule 28(c). Petitioners focus their reply on the four arguments articulated by Intervenor St. Patrick's School (private school) in roman numerals and bold, capital letters rather than the dross of distractions otherwise served.

I. The Missing 203 Neighbors

Contrary to the private school's first argument, the board *is* required to identify and address the objections of the residents of "adjoining or nearby property" because "an agency must make 'findings of fact of a basic or underlying nature necessary to a determination of the ultimate facts, usually stated in terms of the statutory criteria'..." *See Palmer v. District of Columbia Board of Zoning Adjustment*, 287 A.2d 535, 538 (D.C.1972). The zoning regulation upon which BZA Order # 16852 (Order) is premised (*see* Record at 2700) requires the board to ascertain if the location of a private school in a R-1 residential neighborhood "is not likely to become objectionable to adjoining and nearby property...". 11 DCMR § 206.2. Identification of the residents of adjoining and nearby property thus is "of a basic or underlying nature necessary to a determination of the ultimate facts." *Palmer, supra.* There can be no doubt that identification of "adjoining and nearby" neighbors was of material importance because it is "within the conditions to be considered under the Zoning Regulations before an exception can be granted." *Dietrich v. District of Columbia Board of Zoning Adjustment*, 293 A.2d 470, 473 (D.C.1972). By failing to identify the very existence of the 203 objecting residents of "adjoining and nearby property", the Order fails to make a finding of fact on a material contested issue.

Further contrary to the private school's argument, the board must *especially* consider (the private school uses the term "give greater weight to") the objections of residents of adjoining and nearby property. To begin, the zoning regulations are addressed to benefit residents of the District of Columbia rather than residents of other jurisdictions. An

application for special exception to locate a private school within a District of Columbia residential neighborhood to benefit residents of a foreign jurisdiction should naturally raise special considerations for the board but the Order fails to address the fact that 38% of the students to be schooled at the contested location reside outside of the District of Columbia. R67-73; see, also, R334-335; R1535. Residential R-1 districts "are intended to stabilize the residential areas [i.e., of the District of Columbia] and to promote a suitable environment for family life [i.e., in the District of Columbia]. For that reason, only a few additional and compatible uses shall be permitted." 11 DCMR § 200.2. For these reasons, a grant of special exception to a private school to locate within a R-1 residential district should be made only "if it is not likely to become objectionable to adjoining and nearby property...". 11 DCMR § 206.2. Thus the zoning regulations *define with particularity* the community whose interest is to be protected and focused upon in any evaluation of an application for a special exception to locate a private school in a residential neighborhood – especially a private school with students who do not reside in the neighborhood or the District of Columbia.[1]

The private school attempts to make much of the general proposition that uses of land for educational purposes are highly favored (citing *Glenbrook Road*, 605 A.2d at 32 referring to 2 Robert M. Anderson, *American Law of Zoning*, § 12-09, at 508). But

[1] The zoning regulations require every applicant for a special exception to identify to the board "the name and addresses of the owners of all property located within two hundred feet (200 ft.) of the subject property" for which an exception is requested. 11 DCMR § 3113.5(a). The regulations then oblige the agency to provide notice of the public hearing required of the application by "mailing the notice to the applicant and to the owners of all property within two hundred (200) feet of the property involved in the application." 11 DCMR § 3113.13(b). These rules identify with specificity the "adjoining and nearby property" given official standing in 11 DCMR § 206.2, for they apply to "applications filed pursuant to [11 DCMR] § 3104." 11 DCMR § 3113.1. The application was filed pursuant to § 3104. See R6 and Order at R2691.

> This court has made it clear...that zoning laws apply to educational institutions, that universities [here, private schools] are not immune from land use controls, and that '[t]he Zoning Regulations of the District of Columbia...afford no privileged position to colleges or universities [or private schools]. *Marjorie Webster*, 309 A.2d at 318...The BZA's responsibility is 'to determine whether a reasonable accommodation has been made between the [private school] and the neighbors which does not interfere with the legitimate interests of the latter,' *Glenbrook Road*, 605 A.2d at 32...

Georgetown College v. District of Columbia Board of Zoning Adjustment, __ A.2d__, 2003 WL 22860760 (DC Court of Appeals No. 01-AA-1182, December 4, 2003), page 7. In the case at bar, the specific guidance of the zoning regulations should outweigh any general proposition about educational uses of land. *See* 11 DCMR § 3102.3. The omission of any reference to the objecting 203 adjoining and nearby neighbors in the Order requires remand of the case. *See Levy v. District of Columbia Board of Zoning Adjustment*, 570 A.2d 739, 746 (D.C.1990).

II. The Order Ignored Important Issues and Concerns of the Advisory Neighborhood Commission

Remand is doubly required in light of the recommendation of the commission established in District of Columbia law and designed to help guide the BZA toward achieving "a reasonable accommodation" between the private school and the neighbors "which does not interfere with the legitimate interests of the latter." The function of the advisory neighborhood commission (ANC) in the instant case is to "advise" the BZA "with respect to *all* proposed matters of District government policy...which affect that Commission area..." D.C. Code s 1-309.10(a)(emphasis added). Thus the ANC – elected by the residents of a particular Commission area to advise other government agencies about the particular area – is perfectly equipped to bring the larger community's perspective to bear

on any question. That is, the ANC area, or district, is the statutorily defined community one step greater than the community defined by the zoning regulations as comprised of residents of "adjoining and nearby property" to the location of private schools in residential neighborhoods.

The private school argues that the BZA could pick and choose the ANC issues and concerns it might want to address in the Order but the statutory and judicial guidance is to the contrary. The advisory neighborhood commission in the case at bar recommended 5-0 to the BZA that it reject the private school application for special exception and noted that "priority must be given to the objections of immediate neighbors of the proposed school over the views of the encompassing neighborhood..." R334. This was a reasoned recommendation based, *inter alia*, upon the "tremendous expansion of academic institutions...all located within about a half a mile of the proposed [contested] site" inundating the neighborhood with "hundreds of students from around the region, so numerous they begin to rival the number of residents..." R1537.

Unlike the Palisades Citizens Association, which is not recognized by law of the District of Columbia, the "issues and concerns raised in the recommendations of the [advisory neighborhood] Commission shall be given great weight during the deliberations by the [BZA]." D.C. Code § 1.309-10(d)(3). Yet it is impossible to understand from the Order how the BZA viewed the conscientious performance of the responsibilities by the ANC

because the Order is silent on multiple, material issues and concerns raised by the ANC. These issues include:

- Priority to be given to the opinion of residents of adjoining and nearby property (R334);
- Residential destabilization attributable to over-concentration of private schools (R89-90) and the "precedent-setting" application marking "the first time...that a private school has attempted to locate in the middle of a residential square" rather than on its fringes or in its commercial areas (R334);
- Lack of objectivity of the reports of the Office of Planning and Department of Transportation supporting the application for special exception (R1540); and
- the absence of "trust and cooperation that is now sadly missing" between the private school and the neighbors (R1539).

These are not legally irrelevant issues but rather "fatal omissions of fact-finding along the continuum between testimony and final decision." *Citizens Association of Georgetown, Inc. v. District of Columbia Zoning Comm'n*, 402 A.2d 36, 42 (D.C. 1979). The Order fails to meet statutory requirements because it does not articulate "with particularity and precision the reasons why the Commission does not offer persuasive advice under the circumstances" and it does not articulate "specific findings and conclusions with respect to each issue and concern raised by the Commission." D.C. Code § 1.309-10(d)(3). The Court has acknowledged the importance of these requirements. *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1384 (D.C.1977) ("great weight" means agency must elaborate with precision its response to the ANC); *Levy v. District of Columbia Board of Zoning Adjustment*, 570 A.2d 739, 746 (D.C.1990) (BZA must articulate why the particular ANC recommendation does or does not offer persuasive advice given its vantage point). The omission in the Order of consideration with precision of the ANC's issues and concerns requires remand. *Levy, supra.* The omission of the 203 missing neighbors combined with the refusal of the board to give any

weight to the several, particular issues and concerns raised by the ANC combined with the deliberate flouting of the law that infected the proceedings below warrants reversal. *Infra*.

III. The Fatal Omission of the Mysterious Ground Rule

Contrary to the argument of the private school, the mysterious appearance and disappearance of the "ground rule" articulated by a majority of the BZA members itself warrants remand and reversal of the Order. This is because, if the Court "fail(s) to decide the issue, the same error may well be repeated when the Board addresses what is to be done in future years." *George Washington University v. District of Columbia Board of Zoning Adjustment, 831 A.2d 921, 945 (D.C. 2003).* The ground rule is that private school location in residential zones is predicated in the zoning regulations regardless of the regulation's distinction between public and private schools, i.e., the private school is entitled to a special exception. The ground rule "precludes" the BZA from ever finding circumstances that would enable it to deny a private school application for special exception. R2542-2552. The ground rule was clear enough on the last day of hearing for three BZA members to discuss it for the Record but the conclusion of law inexplicably missed its appointment in the Order. Paraphrasing a recent decision:

> Realistically appraised for what it does, [the ground rule] amounts to the exercise by the Board of authority which the law entrusts to the Zoning Commission and not to the BZA, namely, the authority to rezone. *See Watergate West*, 815 A.2d at 768. [FN26 (omitted)]. That the Board has done so indirectly rather than directly does not save [the ground rule]. *Cf., e.g., AFL-CIO v. Bingham*, 187 U.S.App. D.C. 56, 69 n. 3, 570 F.2d 965, 978 n. 3 (1977)(Fahy, J., concurring in part and dissenting in part)(an agency may not "accomplish, either inadvertently or intentionally, that which it could not do directly...")[further citations omitted].

George Washington University, supra, at 949. Petitioners maintain the "ground rule" constitutes *de facto*, stealth rezoning. *Cf. ibidem at Footnote 27.* Hence, the Order must be reversed with regard to the BZA articulation of a substantively erroneous ground rule, especially in light of its erroneous procedural failures of not providing an opportunity to opponents to "present evidence and argument with respect thereto" (D.C. Code § 2-509(a)) as well as its failure to issue "in writing...conclusions of law...supported by...reliable, probative, and substantial evidence..."(D.C. Code § 2-509(e)). The opposition of the neighborhood as well as the ANC was premised on the discretion of the BZA to reject the application for special exception. The ground rule confounds all public expectations. Confronted with the analogous situation paraphrased above, the Court concluded the attempt at stealth rezoning was "arbitrary and capricious and constituted an impermissible exercise of the Board's authority." *George Washington University, supra, at 949.*

IV. The Order Fails to Address Two Other Objections Raised by the ANC and Neighbors Regarding Private School Credibility and The Impossibility of Enforcement

The private school distorts the Petitioners' Fifth and Sixth Arguments. Contrary to the private school's assertion that Petitioners seek the Court to "second-guess an agency's credibility determinations on review", the Petitioners assert that the BZA failed in the first instance to make a necessary credibility determination and the Order omits a material finding of fact with regard to the private school's credibility. The distrust leveled at the private school emanated from both the objecting neighbors as well as the written recommendations of the ANC. The authorities cited by the private school are inapposite

to the instant case because the tribunals in them addressed the credibility of the witnesses directly. Here, no credibility determination is "discernible from the face of the administrative decision". *Cf.* Braddock v. Smith, 711 A.2d 835, 839 (D.C.1998).

Further, the distrust leveled at the private school by the neighbors and the ANC was not only historical in context but included concerns current to the proceedings before the BZA. As such, the credibility concerns went to the ability – and willingness -- of the BZA to fashion any conditions that would be enforceable because of immediate concerns with the bad faith misconduct occurring in real time. The specific, real-time misconduct of the private school included its misrepresentations regarding its faculty and staff cap (R39-41; R1539); intentionally misleading expert testimony regarding legal protections against noise (R805-806; R1424-1427); and the *ex parte* invention by the private school and BZA officials of a zoning enforcement scheme establishing a process of bureaucratic dead ends (R2731-2734 (First Supplemental Record); *infra*).

For example, it was revealed during the proceedings below that the private school was influencing via *ex parte* communications officials from the Office of Planning, the Department of Transportation, and the BZA itself. R2733-2734 (First Supplemental Record). The eleven pages that went inexplicably missing from the certified Record but serendipitously found for correction establish: (i) the appearance of the private school's counsel as a witness during the proceedings below (ii) the private school's counsel testifying to the board as an expert during the proceedings below; (iii) the private's school's counsel testifying to a secret invention of a governmental mechanism (iv) the

governmental mechanism revealed to be specially designed to address the enforcement problems of the case before the board, and (v) the *ex parte* discussions between the applicant's counsel and the board's general counsel. The revelations elicited an express objection by the ANC chairman regarding communications. *Id.* The revelation of these egregious improprieties *during* the BZA proceedings alarmed the opposing neighbors to the likely inability or unwillingness to enforce any of the conditions of an order granting the special exception to this particular private school.

Thus, contrary to the private school's argument, it is impossible for the Petitioners to "ask the Court to reweigh the evidence regarding the Office of Zoning's new enforcement program" because the program did not exist but was specially, secretly invented without neighborhood or ANC input. Indeed, the Zoning Form 300 mandated to complain about any violation of the conditions of the Order and invented for the Order is entirely omitted from the Order.

There is further evidence in the Record that the Order is infected with the private school's bad faith. The private school commenced violating the Order soon after it issued and before the Record was certified. A neighbor filed a two complaints of non-compliance with Order Condition # 3 a month after the Order became final. R2713; R2721-2723. One of the complaints was based upon the published intent of the private school to ignore the condition. The law is clear that the violation of the condition would also constitute a violation of the zoning regulations at 11 DCMR 3205.3.[2] The private school's bad faith

[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*

during the proceedings below becomes evident upon review of its submission of its "Proposed Findings of Facts and Conclusions of Law" to the BZA. R2052-2118. In it, the private school expressly acknowledges that:

> Section 3205 requires compliance with conditions in orders of the Board and provides that if a building permit or certificate of occupancy has been issued pursuant to a decision of the Board to approve a special exception, *then each condition to the approval of that special exception shall be treated as a condition to the issuance of the building permit or certificate of occupancy as well.* 11 DCMR § 3205.3.

R2088 (emphasis added). Yet a few weeks later the private school intentionally violated its own recommended conclusion of law.[3]

The complaint elicited from the Office of Zoning a reminder to the private school of the Order's "termination clause" [i.e., Condition # 20] with the further reassurance that:

> If investigations affirm and confirm that these incidences constitute violations of the same condition, the office will initiate a collaborative dialogue amongst all stakeholders to address ways of achieving unbroken compliance with all conditions of the Board of Zoning Adjustment Order number 16852.

R2723-2724. But the Office of Zoning failed to include the complainant "amongst all stakeholders" (R2724-2725, *i.e., cf.* distribution of agency response with complaint); a "collaborative dialogue" was unwarranted in light of 11 DCMR § 3205.3; and the Order doesn't provide for "collaborative dialogues." R2707 (Condition # 20).

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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).

[3] "Courts do not look with favor on abrupt reversals of direction by litigants as they proceed from one court [or other forum] to the next. In general, parties may not assert one theory at trial and another on appeal." *George Washington University*, 831 A.2d at 937 (quoting *District of Columbia v. Wical Ltd. P'shp*, 630 A.2d 174, 182 (D.C. 1993))(internal citations omitted).

Hence, neighborhood and ANC distrust of the private school is well founded and material to the evaluation of "otherwise objectionable conditions" required of the BZA pursuant to 11 DCMR § 206.2. Significantly, the phenomena discussed above demonstrates how the unwillingness of the board to address the lack of credibility of private school officials in the Order goes beyond neglect to indicate a prejudicial deference to the private school. The prejudicial deference infects both the Order and the likelihood of its enforcement by zoning officials. It particularly resulted in a secretly developed enforcement condition # 20 designed to make enforcement of the Order impossible. The Record at 2723 establishes that zoning officials will refuse to enforce the plain meaning of both the Order and the zoning regulations in prejudicial favor of the private school against the residents of adjoining and nearby property. Condition # 20 and the improprieties that went into it constituted "a deliberate flouting of the law that trammels significant personal or property rights" constituting "egregious government misconduct." *George Washington University v. District of Columbia*, 318 F.2d 203, 209, 355 U.S.App. D.C. 12 (February 11, 2003, rehearing *en banc* denied March 18, 2003), quoting *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988). But the Court need not reach such a conclusion to find the omissions of the Order regarding the private school's credibility and the impossibility of enforcement arbitrary and capricious. By contrast, the Court's "own scope of review of the BZA's decision, while deferential, is substantially broader" than the doctrine of substantive due process constraining only egregious government misconduct. *George Washington University, supra, at 931.*

It is wholly appropriate for the Court to allude "to undisputed evidence as to certain events that have occurred since the Board issued its final orders." It should serve to confirm a proper disposition of the case. *George Washington University, supra, at Footnote 22.* Condition # 20 of the Order – the enforcement condition – is impossible of enforcement itself and, hence, arbitrary and capricious. Its deficiencies are a matter of both *prima facie* evidence at the time of its publication in the Order as well as direct evidence established after issuance of the Order but before certification of the Record.

At one point in the proceedings before the Court, the Intervenor cited one authority that Petitioners agree offers useful guidance. The authority states that the Court

> ...may set aside an agency action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, or if it is unsupported by substantial evidence in the record. (Citations omitted). In reviewing the merits of agency decisions, we examine: (1) whether the agency made a finding of fact on each material contested issue of fact; (2) whether substantial evidence in the record supports each finding; and (3) whether the conclusions of law follow rationally from the findings. (Citations omitted). We will defer to the agency's interpretation of the statute and regulations it administers unless its interpretation is unreasonable or in contravention of the language or legislative history of the statute and/or regulation.

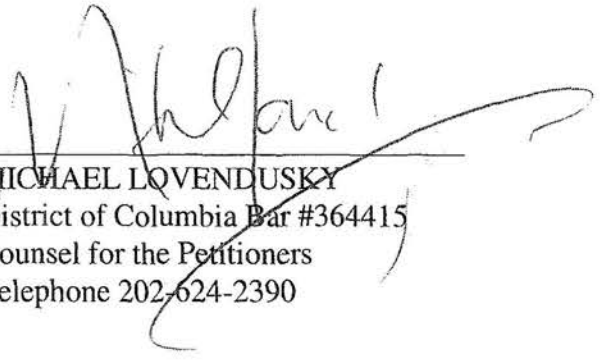
Cathedral Park Condominium Committee v. District of Columbia Zoning Commission, 743 A.2d 1231, 1239 (D.C. 2000). The Court has also observed that:

> Although the record of a proceeding may disclose a substantial amount of evidence which supports the agency's decision, a recurring problem in agency decision-making has been a fatal omission of fact-finding along the continuum between testimony and final decision...[A]n agency must make 'findings of fact of a Basic or underlying nature necessary to a determination of the ultimate facts, (I.e., conclusions of law) usually stated in terms of the statutory criteria'...

Citizens Association of Georgetown, supra (omitting citations); but see, especially, Dietrich v. District of Columbia Board of Zoning Adjustment, 293 A.2d 470 (1972).

The Petitioners respectfully propose that the Brief of the Petitioners, the Record, the First Supplemental Record, and this Reply, make clear that the Court in this matter should set aside and reverse the Order because it is arbitrary *and* capricious *and* an abuse of discretion *and* not in accordance with law *and* that its necessary elements are unsupported by substantial evidence in the record. The agency failed to make findings on material contested issues of fact; failed to base findings it did make upon substantial evidence; and advanced conclusions of law not reasonably deducible from its factual findings. The agency made such errors by ignoring the plain meaning of the statutes and regulations it is charged to enforce, inventing rules contrary to law, and misinterpreting other rules in prejudicial favor of the Intervenor. The way to such egregious error was paved by an overzealous counsel for Intervenor, who overstepped the bounds of propriety in her appearances before the Board as well as the government agencies that the board followed in losing its way. Petitioners pray the Court reverse the Order granting the special exception and remand the matter to the board to restore the contested location to residential status.

Respectfully submitted 31 December 2003



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I hereby certify and attest that on 31 December 2003, a copy of the foregoing Petitioners' Reply was hand delivered or mailed first class, postage prepaid, to the following:

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IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

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*[*Motion to Join Petitioners Pending]*

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' MOTION TO SUBMIT WITHOUT ORAL ARGUMENT

Petitioners, by counsel, move to submit the case for adjudication on the pleadings and Record and First Supplemental Record, without oral argument. District of Columbia Court of Appeals Rule 27(i). Counsel for Respondent takes no position on the motion. An inquiry for reaction to the motion was left on telephone voice mail for counsel for Intervenor but counsel for Petitioners has not received a response. The Court on 15 December 2003 ordered "that this appeal…be scheduled for consideration before a merits division as soon as the calendar permits." Petitioners intend that their submission without oral argument may expedite final adjudication.

Respectfully submitted 31 December 2003

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