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Washington DC 20007

6 February 2004

Geoffrey Griffis, Chairman
District of Columbia Board of Zoning Adjustment
441 Fourth Street NW Suite 210-S
Washington DC 20001

RE: St. Patrick's School– 4925 MacArthur Blvd.
Opposition to Request for Clarification or Modification of
BZA Order No. 16852

Dear Chairman Griffis and Members of the Board:

We oppose the Applicant St. Patrick's School (private school) request for clarification or modification of BZA Order No. 16852 (Order) for the reasons below. This matter relates to an effort by the private school to increase the occupancy load of its middle school in violation of the plain meaning of the Order, and to frustrate the enforcement of the Order before the District of Columbia Department of Consumer & Regulatory Affairs (DCRA). The private school attempts to accomplish its goal by deceiving the Board as to the extent of its excavations and development of its middle school building and avoidance of the requirements of the Zoning Regulations and the administrative procedures act.

The Order Has Expired

The private school has applied to the Board for clarification or modification of the Order.[1] The Final Date of the Order is 25 March 2003. *Order at page 18.* The Order became effective on 5 April 2003. The Order provides that

> PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

[1] The private school did not request modification pursuant to BZA Order 16852-A (Altered Order). The Altered Order is completely irregular, null and void. Few know the circumstances of how it came to pass that the Board conducted a secret proceeding in on 6 January 2004 to substantively alter the Order without providing notice to residents of property adjoining or nearby the contested location of the school or the advisory neighborhood commission. The Altered Order is on appeal to the District of Columbia Court of Appeals by motion to supplement the record in *Michael Lovendusky et al v. District of Columbia Board of Zoning Adjustment, No. 03-AA-419 (2003)(decision pending).* A motion for reconsideration or rehearing of the Altered Order and the private school "motion" was filed with the Board on 4 February 2004.

BZA
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Order at page 18. The use approved in the Order was not established by the time the Order expired on 4 October 2003. Consequently there was no authority for the building permits or certificate of occupancy granted pursuant to the Order. The Board should find that the special exception has expired.

The Zoning Regulations Do Not Provide for "Clarification" of an Order

The private school fails to cite authority for the Board to "clarify" the Order because none exists. To modify or alter the Order without authority would demonstrate the Board's complete corruption of the Regulations at the behest of the private school.

Time Has Expired to Modify the Order

The private school alternatively requests the Board to modify the building plans approved by the Order pursuant to 11 DCMR § 3129 (Modification of Approved Plans). The Zoning Regulations provide that "A request for modification of plans shall be filed with the Board not later than six (6) months after the date of the final order approving the application." *11 DCMR § 3129.3.* The opportunity for the private school to apply to the Board to modify the plans expired on or about 25 September 2003.

More importantly, the private school application is not merely to modify building plans but to modify the Order itself. The Order provides:

> 19. Expansion of the building on the subject property shall be limited to the area necessary for access as shown on the Applicant's site plan (Exhibit No. 340).

Order Condition 19. The private school request expands "the area necessary for access" and replaces Exhibit No. 340 entirely. There is no authority in the Zoning Regulations for the private school to move the Board to modify any provision of the Order. The Zoning Regulations expressly address the circumstances for Post-Hearing Procedures (11 DCMR § 3124) and Reconsideration or Rehearing (11 DCMR § 3126). The opportunity for the private school to move for reconsideration or rehearing of the Order expired on or about 5 April 2003. *11 DCMR § 3126.2.*

Waiver of Deadline for Modification Application Should Be Denied

While the preceding arguments should suffice to convince the Board that it should deny the private school request, even rational consideration of the request on its own terms warrants its denial. The private school acknowledges that the time to apply for a modification has expired and requests a waiver of the time period contained in § 3129.3 pursuant to § 3100.5. *St. Patrick's School Application for Clarification or Modification (2/2/04), page 6.* The Regulation provides in its entirety:

> Except for §§ 3100 through 3105, 3121.5 and 3125.4, the Board may, for good cause shown, waive any of the provisions of this chapter if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

11 DCMR § 3100.5. The Board should deny the private school request and not waive the expiration time for modification of the plans approved by the Order because (1) the waiver will prejudice the rights of opposing parties and (2) the circumstances regarding the request demonstrate bad faith rather than good cause on the part of the private school.

The waiver will prejudice the rights of opposing parties to the establishment of the private school in the R-1-B residential zone by altering the Order before the District of Columbia Court of Appeals finally adjudicates the appeal of the Order. *See Michael Lovendusky et al v. District of Columbia Board of Zoning Adjustment, No. 03-AA-419 (2003)(decision pending).* That case establishes that 203 residents of adjoining and nearby property to the contested location of the private school opposed the grant of special exception. Further, a waiver and modification will increase the possible occupancy of the building without providing notice and an opportunity for residents of adjoining and neighboring property to object pursuant to 11 DCMR § 206.2.

Rather than demonstrating good cause, as required by § 3100.5, the circumstances of the private school's request demonstrate its bad faith. Hundreds of residents of the Palisades question the credibility of the private school's officials. Their concerns were brought to the Board's attention in the proceedings resulting in the Order. The Board's refusal to confront the incredibility of private school representations is, itself, one of the elements of case before the District of Columbia Court of Appeals. Here, the private school intentionally excavated the basement, added ingress and egress, and fire suppression equipment -- all increasing the occupancy load of the building despite the appeal to the Court requesting reversal of the Order and the persistent opposition of the neighbors. The modifications indicate that they are extensive and not "minor" as required of the Board for approval pursuant to § 3129.7. The Board should require the school to itemize and disclose the cost of the basement excavation, doors, fire suppression system and interior remodeling to evaluate whether the modifications are "minor".

Further, the genesis of the private school request for modification is the complaint by twelve neighbors to the Department of Consumer and Regulatory Affairs asserting the private school's violation of the Order and building permits.[2] The Board received notice of this complaint as well as subsequent complaints filed with the Department. To modify the Order as requested usurps the ability of anyone to enforce the plain meaning of the Order or the Zoning Regulations. The inability to enforce the Order was an express

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[2] *Complaint and Request for Immediate, Emergency Revocation of Building Permits and Stop Work Order at 4925 MacArthur Boulevard NW, Washington DC 20007*, District of Columbia Department of Consumer and Regulatory Affairs (11/18/2003)(pending).

concern of the Board in the proceedings resulting in the Order and is one of the bases of appeal to the Court. There has been no enforcement of the plain meaning any condition or provision of the Order despite numerous attempts by numerous complainants citing numerous conditions and provisions of the Order and Zoning Regulations.

The St. Patrick's School *Modus Operandi* is Expansion By Deceit

The instant request is typical of a pattern of St. Patrick's School misbehavior that has occurred for years. The school asks permission for A. Once permission is granted, it proceeds to do A + B. If the expansion to B goes unchallenged or unnoticed, the expansion gets grandfathered with time. Eventually, the school attempts wrongful expansion beyond B. But if the private school's expansion to B is noticed and objected to, it will remedy the challenge with promises (e.g., the agreement to provide covenants to protect neighbors from future school misbehavior), buyoffs (e.g., the agreement to build driveways for neighbors), applications for "clarifications" of "ambiguities" (e.g., its current "request") and special influence on government officials including those of the BZA. The private school does not hesitate to cut legal corners and processes because it argues it is "entitled" to deference as a school with a holy mission. *See Attachment.*

This matter is not about the location of a music room. It is an attempt by the private school to avoid due process by an irregular "request" for a "minor" "clarification" or "modification" that is deceitful and raises ethical questions that might be reviewed in another forum. If the private school "request" is granted it will violate the plain meaning of the Order, the Zoning Regulations, the DC administrative procedures act, and efforts by taxpaying residents to protect the peace and quiet of their homes and the stability of their neighborhood from the private school's impositions. The school had many months to decide where to locate its music room or whether to request development of its basement but it failed to do so. To grant the private school request would irrationally reward school misconduct, arbitrarily expand school size, and exacerbate the fundamental error of allowing the school in the residential neighborhood in the first place. For these reasons, the Board should deny the request of the private school to modify the Order.

Sincerely,

MICHAEL LOVENDUSKY

Attachment

ST. PATRICK'S EPISCOPAL SCHOOL: EXPANSION BY TRICKERY AND DECEIT

The residents of property adjoining and nearby the contested location of St. Patrick's middle school at 4925 MacArthur Blvd NW declaimed the lack of credibility of private school officials from the very beginning of the proceedings before the Board that resulted in the Order granting the special exception to locate in the heart of residential Palisades. R53-57, 100, 109.[1] That the private school's officials cannot be trusted is well established in official records.

- In 1999 private school officials testified under oath to the board that it had a "Master Plan" and that it would not expand beyond elementary grades. "No additional grade levels, no additional students, no additional teachers, no additional cars" promised the official. Despite affirmation as late as the autumn of 2000 of its "decision to remain a school ending at grade six", the private school in December 2000 voted to expand to grades 7 and 8 and study the possibility of expanding further to grades 9 through 12. R751, R89.

- The private school announced in April 2002 its intention to expand to grade 9 "as a one year possibility to accommodate the current grade seven students" in its application for special exception that resulted in the Order.

- In 1999 the private school promised to mitigate traffic congestion at its Whitehaven primary school with carpooling. The carpooling failed. R773. Private school officials confided to commission officials "carpooling doesn't seem to work." R1536. Nevertheless the school premised its middle school application on a carpooling and bussing plan vastly more complicated that the one of its failed experience. Amazingly, "the numbers show" that the proposed new, more complicated carpooling and bussing plan "will have very little, if any, impact on neighbors." R772. The Board rewarded the failure of the private school's simple plan by approving a more complicated plan. R2705-2706.

- In December 1999 the private school announced completion of the "first phase" of its Whitehaven primary school Campus Master Plan, including "the re-grading and seeding of the former playground and Church Lawn on the east end of the building, which will remain green space." The school then took the green space and paved it for a parking lot. The land did not belong to the private school; it was the property of the United States. A school official confirmed that if the private school wants something belonging to another it will take it. R1001-1005; R1065.

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[1] Much of the following argument is from the Brief of the Petitioners in *Michael Lovendusky et al v. District of Columbia Board of Zoning Adjustment, No. 03-AA-419 (2003)(decision pending),* the appeal of the Order pending before the District of Columbia Court of Appeals. All citations marked "R" are to the Record certified to the Court by the Board in this case.

The same official promised maintenance of the "green space and ample terraces" at the contested location. R761.

- The Board in 1983 limited the private school's total "faculty and staff" to 48. Board of Zoning Adjustment Order 14009, Condition 3 (1983). The private school expanded "faculty and staff" to 60 without permission, obtaining approval after the fact of the limit violation. Board of Zoning Adjustment Order 15374, Condition 2 (1990). The private school then claimed that cap of 60 applied only to "staff" and not "faculty". Testimony of private school counsel in re Board of Zoning Adjustment Order 16517 (1999). Faculty and staff in 2002 exceeded 100, violating Board of Zoning Adjustment Orders and Conditions. R39-41; R1539.

- In December, 2003, in its BZA Application # 17081 (pending) regarding limits on its faculty and staff on its Whitehaven primary school campus, Applicant asserted that "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 BZA itself. But the truth is that the BZA 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 in her application to the Board in 1990 in the proceedings that established the staff cap of 60. (Application to BZA # 15374 (6/13/1990)). The action sought in 1990 by the very same counsel still representing the private school was 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, the private school's counsel first advanced the distinction of "students and staff", succeeding in putting her words in BZA 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 by the advisory neighborhood commission in BZA 16852. Even then the Board looked away at the clear record of the private school's abuse of regulatory and judicial processes. Further, in BZA Application # 17081, the private school counsel first blamed the Board for its erroneous simplification of reference to "staff" to justify yet another expansion into the fiction of the "Full Time Equivalent" (FTE). The FTE is a fiction by which the private school would reduce real persons to fractional numbers for the purpose of expanding the number of school employees beyond any enforceable limit. Only when the private school counsels' deceit was discovered and objected to did she confess to the Board. The Board has not penalized the private school for this misconduct.[2]

- Board of Zoning Adjustment Order (1990) conditioned approval of the private school's expansion partially on provision of a landscaping plan and plantings to buffer adjoining and nearby residents to school. The private school failed to comply until 1996, only when pressed by neighbors. R962-963.

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[2] From BZA Application # 17081, *Application of Michael Lovendusky To Appear Party Opponent.*

- The private school mischaracterized to the Board its proposed use of the contested location as so similar to preceding exceptional use that it really need not even ask for board approval for special exception, a characterization fantastic to the adjoining and nearby neighbors as well as the advisory neighborhood commission. R1077; R337; R1538.

- The private school's expert testified to the board there was no law protecting neighbors from school noise. R805-806. The expert's error was revealed to the Board. The expert's assertion was either an error of law uncorrected by the school's counsel or an error of fact raising credibility issues regarding the expert. R1424-1427. The private school suffered no consequences.

- Private school officials admitted that its governing board of directors could not be trusted and devised a special protection to "bind" its own board of directors to protect the neighbors. R774-776. The officials offered "an assurance in the form of a covenant agreement with neighbors, recorded among the land records and binding" on the private school. The proposed covenants were viewed with suspicion by the neighbors, who were not reassured to learn that "the covenant was not to make the BZA order enforceable in some way." R820-828. Two trusting neighbors bought this "assurance in the form of a covenant" for the price of standing down from their opposition to the grant of special exception. R633, R322. Counsel for the private school professed to represent these unfortunate neighbors in noting for the record that they: "...would like the BZA order, in the event that the case is approved, to include conditions that address the agreement to pay costs associated with the construction of the driveway and a condition that specifically mandates the provision of a covenant..." R713. The conditions were not included in Order # 16852. R2705-2707.

Certificate of Service

I hereby certify and attest that on 6 February 2004, a copy of the foregoing was hand delivered or mailed first class, postage prepaid, to the following:

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