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, :

Respondent, and :

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

Intervenor. :

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DISTRICT OF COLUMBIA
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PETITIONERS' OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY AFFIRMANCE

Petitioners respectfully oppose St. Patrick's Motion for Summary Affirmance and request the Court to deny it. District of Columbia Court of Appeals Rule 27(g). The motion should be denied in the first instance as being filed out of time. Rule 27(g) makes clear that a "motion for summary disposition shall be filed within 25 days after the date on which the movant informed the court of the intent to file the motion." Intervenor's Notice of Intent to File Motion for Summary Affirmance was filed 8 September 2003. Counsel for Intervenor filed a Motion for Summary Affirmance perhaps in time for Case Number 03-AA-491 but that is not this case. This case is Number 03-AA-419. An inspection of the pleadings in the case captioned above reveals that St. Patrick's has been filing papers in two matters: Number 03-AA-419 as well as Number 03-AA-491. St. Patrick's Motion for Summary Affirmance for the case captioned above has not yet been filed and now it is

BZA
Case No. 17081
Exhibit No. 23

Board of Zoning Adjustment
District of Columbia
CASE NO. 17081
EXHIBIT NO. 23

too late. The Court should rule that time has expired for St. Patrick's to file a motion for summary disposition and schedule briefing on the merits of the case.

St. Patrick's confusion of the two differently numbered matters it is arguing before the Court might explain the irrelevance of several arguments contained in its Motion for Summary Affirmance in Case Number AA-03-491 (sic) with regard to the subject matter of the case captioned above. In the case captioned above, Petitioners clearly have standing before the Court since the Board recognized them as Parties in Opposition in the matter upon appeal. Record at 2692. The Petition for Review identifies multiple petitioners by one name "et al" – an abbreviation for *et alii*, "and others". Black's Law Dictionary, Fourth Edition. The word "variance" does not appear in the Brief of the Petitioners and none if its authorities involve the adjudication of a variance.

St. Patrick's allegation in its motion for Case Number 03-AA-491 (sic) that Petitioners "essentially confuse the nature of special exceptions with the nature of variances" is a nonsensical distraction in Case Number 03-AA-419. If it is intended for the case captioned above, it appears evident that counsel for St. Patrick's believes the Court to be susceptible to the tactics it employed before the Board of Zoning Adjustment. The tactics include disparaging the opposition, distracting the adjudicators with irrelevancies, trivializing opposition arguments, twisting opponent's authorities into unrecognizable applications, and ignoring altogether the hardest opposition points. Indeed, the perfume of Intervenor's style of argument is such that even Corporation Counsel distances its support of the motion only "to the extent it is consistent with the BZA's decision."

Respondent District of Columbia Board of Zoning Adjustment's Statement Regarding the Intervenor's Motion for Summary Affirmance (14 October 2003). As will be seen, there is much distance between St. Patrick's arguments and the BZA's decision.

Intervenor cites one authority in its motion in Case Number 03-AA-491 (sic) that Petitioners agree offers useful guidance in this matter. 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 usefully noted 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, Inc. v. District of Columbia Zoning Comm'n, 402 A.2d 36, 42 (D.C. 1979) (omitting citations); *but see*, especially, Dietrich v. District of Columbia Board of Zoning Adjustment, 293 A.2d 470 (1972).

As set forth in the Brief of the Petitioners, incorporated in its entirety here by reference, and by the Memorandum accompanying this Opposition, it becomes clear that the Court

in this matter should set aide 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.

Indeed, the Intervenor has proceeded from initiation of its application to the board to its motion for summary affirmance *not* on the merits of its arguments but rather on its sense of entitlement. The sense is borne along by the status that both Intervenor and its counsel enjoy in a community *other* than the residential neighborhood where its welcome has worn thin but upon which it has further designs. With all respect, the errors committed by the board in its Order and in the proceedings preserved in the Record, and the impossibility of defending them, should lead irresistibly to remand and, more immediately, denial of the motion for summary affirmance.

Dated: 31 October 2003
Respectfully submitted by counsel for Petitioners:

Michael Lovendusky, District of Columbia Bar # 364415

Certificate of Service

I hereby certify and attest that on 31 October 2003, a copy of the foregoing Petitioners' Opposition to Respondents' Motion for Summary Affirmance and Petitioners' Memorandum of Points and Authorities in Opposition to Respondents' Motion for Summary Affirmance was sent by personal delivery or mailed first class, postage prepaid to each of the following:

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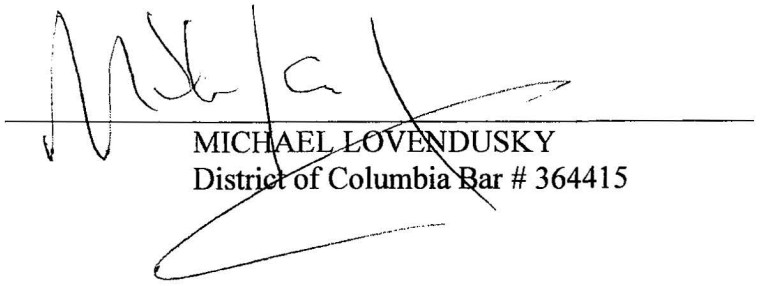
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ATTESTED BY:



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PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO RESPONDENT'S
MOTION FOR SUMMARY AFFIRMANCE

The Petitioners raise numerous independent grounds for remand of Board of Zoning Adjustment Order # 16852 (Order) because the Order is corrupt with error warranting remand. See Brief of the Petitioners. Intervenor's motion for summary affirmance of the Order fails to address at all two independent grounds justifying remand. These omissions alone warrant denial of the motion. Petitioners begin with discussion of the two bases justifying remand completely ignored by Intervenor in its motion.

The Order is unreasonable due to an ineffective, arbitrary enforcement condition prejudicially developed to deny the opponents of the location of a private school in a residential zone a fair adjudicatory proceeding before the board, as well as a genuine remedy for violations of the Order's conditions.

The Intervenor applied for a special exception to establish a private school use "under section 206 in an R-1-B zone." Record at 2691 (R2691). The Board of Zoning Adjustment (board) in its Conclusions of Law properly held that "In accordance with section 206, a private school must be located so that it is not likely to become objectionable to adjoining and nearby property because of...objectionable conditions. 11 DCMR s. 206.2". The board further concluded that the proposed private school "as conditioned by the Board" could be located in the contested location. R2700. The Order imposes 20 conditions. R2701.

The board found 53 facts requiring conditions on the use of the contested property. Many of the facts related to the persistent concern by the residents of adjoining and nearby property (neighbors) and the advisory neighborhood commission (ANC) that the numerous limitations and conditions would be unenforceable. An expert before the board "concluded that it would be difficult to monitor and enforce the policy against student drop-off at the subject property every day." Fact 43, R2698. "DDOT noted the importance of full implementation of the traffic management plan, and that 'some of the most crucial conditions are behavioral ones that will be difficult to monitor and enforce.'" Fact 41, R2698. The applicant private school "proposed to establish a community liaison program to address community concerns and to monitor enforcement of conditions of approval of the requested special exception." Fact 24, R2696. The Board as a Conclusion

of Law agreed that a "community liaison committee" could "be instrumental in *monitoring* compliance with the conditions of approval..." R2704 (emphasis added) Accordingly, the board adopted Condition No. 18. R2707.

But Condition 18 was the carrot to "head off *potential* problems *before* they become problems." R2704, emphasis added. Condition 18 did not address opponents' persistent concern that the "complex inter-related conditions...required under the even the most optimistic scenario, in order to force-fit the plan into workability, are unrealistic." R2704. Hence the board devised what it considered to be the hammer of enforcement: Condition 20. It provides:

> The special exception shall be valid except that this Order shall terminate and require modification upon a finding by the Board that the Applicant has either admitted violating, paid a fine for violating, or has found by the Department of Consumer and Regulatory Affairs, after hearing, to have violated the same condition on three or more occasions within five years.

Condition 20; R2707. But the hammer is obviously defective. Because it is defective, it does not follow rationally from the relevant findings of fact. Further, the Record shows how the hammer was intentionally made defective, revealing the unfairness of the proceedings below.

In light of the numerous Facts and Conclusions of Law regarding the fundamental importance of enforceability of conditions *per se*, the *prima facie* ineffectiveness of the enforcement Condition constitutes an agency action that is arbitrary and even capricious. The enforcement Condition is, itself, impossible of enforcement. Its terms reveal that enforcement will occur *if* (1) the private school admits violating the same condition three

times within five years; (2) the private school pays three fines for violating the same condition three times in five years; or (3) the Department of Consumer and Regulatory Affairs finds, after hearing, that the private school has violated the same condition three times within five years.

First, the applicant private school has never admitted violating any law, regulation or board of zoning adjustment condition. R851. Second, the private school has never paid a fine for violating a condition in its 56 years of presence in the District of Columbia despite violations of conditions of board orders enumerated with specificity in the Brief of the Petitioners' Fifth Argument.

Hence the question is the reasonableness of basing enforcement upon the Department of Consumer and Regulatory Affairs as provided for in the enforcement condition itself. The enforcement condition is the last of 20 conditions. Immediately it is seen that the board provides the private school 40 "free" offenses every five years. That is, the private school can violate every one of the 20 conditions twice every five years without reaching the threshold of an appearance before the board for termination and modification of its order granting the special exception.

In fact, the condition allows more than 40 free offenses every five years because the Department must first find that there has been a violation after a hearing. As a matter of bureaucratic process this condition describes an impossibility even at this early stage of analysis.

The arbitrary nature of enforcement Condition 20 of the Order becomes even clearer upon examination of the Record. There was *no* mechanism for enforcement of board conditions until the Office of Zoning invented one especially for the proceeding in the instant case. R1214-1218. Counsel for the Intervenor (private school) had special knowledge in advance of the ANC, the party opponents, and even the board itself about the nature of the new fangled enforcement mechanism:

> **Mr. Finney [ANC Chairman]:** Enforcement, how are you going to check on enforcement of these standards?
>
> **Ms. Prince [Counsel for the private school]:** Since that's a legal question, I would be happy to answer it. The condition, as it is outlined for inclusion in the order, were the case to be approved, would be that at the one-year period there would be essentially are [sic] report card issued by the Zoning Compliance Officer, which, as you know, is a position that was created by the Office of Zoning, has not yet been filled, but it is a person whose sole responsibility would be to ensure compliance with conditions in BZA orders. In the event, for whatever reason, that position were not created, it would fall upon the responsibilities of the enforcement personnel in the D.C. Office of Zoning.
>
> However, it's a complex condition. It is a condition that requires a great deal of material from the applicant. It also requires input and coordination with the Office of Planning, ANC-3D, Mr. Finney, and the Department of Transportation. And the Compliance Officer is not permitted to release his opinion on our ability to expand after one year unless he has coordinated with all three bodies. That's spelled out in the Office of Planning's proposed conditions.
>
> **Mr. Finney:** In other words, there's going to be one officer to observe, to monitor observance of all BZA orders, is that correct?
>
> **Ms. Prince**: That's been my understanding. That is something that I have discussed with [Board of Zoning Adjustment General Counsel] Jerrily Kress. It's a position that I understood had been created. However, were that not the case, there is an enforcement mechanism within the D.C. Government, and it would fall upon that existing enforcement mechanism with those identical conditions: cooperation with Office of Planning, Department of Public Works, and our ANC.
>
> **Mr. Finney**: That's the reason I asked, because I find that in the Department of Consumer and Regulatory Affairs, with a very small staff, they have great

> difficulty in enforcing the Zoning Code, and the same may be true if we have only one officer to monitor not just St. Patrick's, but all BZA orders with conditions on them.

R2733-2734 (Corrected).[1] The enforcement plan that was invented relies upon the private school to report upon its own performance; there is no independent or objective authority evaluating actual fulfillment of any conditions of the Order. The Record demonstrates the board had pre-judged the application before it, delegating authority to the applicant private school to work out the "Compliance Review Program" formally announced later in 2002. The Order commemorates the collusion of the private school and government agencies, including the board, in its enforcement Condition Number 20. But the "enforcement" scheme invented for and approved in the Order by private school and board officials disabled the possibility of reasonable enforcement of any condition of the Order. Hence, the board's conclusions of law found at R2704 "with regard to enforcement" do not "follow rationally from the findings." Cathedral Park Condominium Comm. v. District of Columbia Zoning Comm'n, 743 A.2d 1231, 1239 (D.C. 2000). Instead, they evidence the "fatal omission of fact-finding along the continuum between testimony and final decision" so often recurring in agency decision-making. Citizens

[1] This colloquy is not found in the Record originally certified for submission to the Court by the board. Rather, it is found in Appellants' [Petitioners'] Motion to Correct the Record (25 August 2003) granted by the Court on 23 September 2003. 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 (iii) the governmental mechanism revealed to be specially designed to address the enforcement problems of the case before the board (iv) the revelation of an *ex parte* discussions between the applicant's counsel and the board's general counsel, and (v) 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 opponents to the application for special exception 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.

Association of Georgetown, Inc. v. District of Columbia Zoning Comm'n, 402 A.2d 36, 42 (D.C. 1979) (omitting citations). The absence of argument from counsel for Intervenor addressing these matters is a cover up of evidence of prejudicial favoritism by the board for the applicant private school.

The board failed to find facts on the material objection raised by the neighbors and the advisory neighborhood commission regarding the destabilization of the residential district likely to occur if the private school is located in its center.

The Intervenor private school in its motion for summary affirmance failed to address another substantive argument of the Petitioners, and the omission warrants denial of the motion. The Order fails to address the likely destabilization of the residential district if the private school is permitted to locate in its center, an issue raised by 203 residents of adjoining and nearby property. See Brief of the Petitioners' Fifth Argument at p.34. The specific, destabilizing aspect objected to by the 203 neighbors was that the special exception will encourage other private schools to acquire small residential parcels in the Palisades on the expectation that they can effect residential conversions to non-residential use at a cheaper total price than buying property properly zoned for their activity. R465; R1472. The over-concentration of private schools in the Palisades generated important objections from the neighbors. R89-92. These concerns were recognized as legitimate by the ANC, which alerted the board in writing:

> It should be noted that the St. Patrick's proposal represents the first time in the Palisades neighborhood that a private school has attempted to locate in the middle of a residential square. In the past the schools have been located on the fringes of residential areas or in commercial zones. The case, therefore, assumes precedent-setting proportions in weighing the desire of a private school to expand against the desires of residents to preserve the residential nature of their neighborhood.

R334. The significance of this issue attracted the attention of the Honorable Phil Mendelsohn (R928 and R1097) and the Honorable Kathy Patterson (R1103), members of the District of Columbia city council, who opposed the location of the private school.

The Order signals that private schools may commence to play Monopoly with residentially zoned property. Opposing residents of adjoining and nearby property will be powerless, because their standing before the law will have been diminished to benefit residents from other neighborhoods and even other jurisdictions. *Infra.* Should the Court grant Intervenor's motion and affirm the Order, the private school will have effectuated a change in zoning policy at the cheap price of a board proceeding. The Order will destroy rather than "protect quiet residential areas now developed with one-family detached dwellings and adjoining vacant areas likely to be designed those purposes." 11 DCMR § 200.1. Yet the Order makes no mention of the objections of city council members, the neighbors, or the ANC with regard to these material issues. *See* Dietrich v. District of Columbia Board of Zoning Adjustment, 293 A.2d 470, 473 (D.C. 1972)("the function of the court is to assure that the agency has given full and reasoned consideration to all material facts and issues"). The incomplete record of fact finding from the board blocks the ability of the court to conduct its necessary review. The failure of the Intervenor to address this argument in its motion should be fatal to the motion.

The Order fails to find the material fact of the objections of 203 residents of adjoining and nearby property, prejudicially suppresses identification of the opposition, arbitrarily relies upon private school supporters from distant locales, and fails to provide a required conclusion of law.

The Intervenor, as Applicant before the board, sought "a special exception pursuant to 11 DCMR s. 3104.1 to allow a private school, *under the conditions specified in section 206*, ... in the R-1-B district..." R2700 (emphasis added). "In accordance with section 206, a private school must be located so that it is not likely to become objectionable *to adjoining and nearby property*...". R2700(emphasis added).

> 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). The Order concludes, as a matter of law, that the identification of the residents of "adjoining and nearby property" is of material importance. R2700. "There can be no doubt that the issues in question were 'material' because they are 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, *supra*. Without an identification of the extent and nature of objections by residents of adjoining and nearby property, the Order does not indicate, as required, whether a reasonable accommodation was made between the private school and the neighbors which did not interfere with the legitimate interests of the neighbors. Georgetown Residents Alliance v. District of Columbia Board of Zoning Adjustment, 802 A.2d 359, 363 (D.C. 2002).

The issue is of such material importance that an applicant for a special exception must identify the residents of "adjoining and nearby property"so that the board may notify such neighbors that a proceeding of legal interest to them has commenced. The private school dutifully identified the adjoining and nearby property to the board at the beginning of administrative proceedings. R6. Neighbors jockeying for party opponent status in the earliest minutes of the first hearing insisted the board find as a matter of fact who the regulation referred to by its plain language. The board agreed that, "certainly, there is a common-sense aspect that, if you live close to the subject property, you may have [i.e., suffer] more impact than others..." R707. Not only is there common sense in finding that the actual residents of adjoining and nearby property have standing before the law because of the relatively greater impact the location of the private school will have upon them, there is the letter of the law at 11 DCMR § 206.2, and the holding that "...the court cannot accept an interpretation which contradicts the plain language of the regulation itself." Dell v. Department of Employment Services, 499 A.2d 102, 106 (1985).

The Brief of the Petitioners details the appearance by petition of 203 residents of adjoining and nearby property in its First Argument. The 203 residents include those identified by the private school in order to provide the board information critical to the evaluation of the application required pursuant to regulation. Every neighbor objected to the location of the private school. 11 DCMR § 206.2. R465-472; R1472-1501. Neither the board nor the private school questioned the validity of the petition or the expressed objections of its signatories. The board in addition received specific notice from the ANC that "priority must be given to the objections of immediate neighbors of the proposed

school over the views of the encompassing neighborhood..." R334. These critically important material facts are entirely missing from the Order. If an agency fails to make a finding on a material, contested issue, the Court cannot fill the gap by making its own determination from the record but must remand the case for findings on that issue. Fontenot v. District of Columbia Dept. of Employment Services, 804 A.2d 1104, 1107 (2002).

The Order omits mention of the very residents identified in the controlling zoning regulation as having the only opinion whose weight expressly counted as a matter of law. R2692-2693. Not a mention of 203 opposing neighbors appears in either the descriptions of "Neighbors as a Party in Opposition" or the "Persons in Opposition to the Application." R2691. The Order's failure to "articulate with particularity and precision the reasons why the" ANC's written emphasis of the importance of evaluating the objections of the 203 neighbors "did not offer persuasive advice under the circumstances" is a material omission and a violation of D.C. Code s. 1.309-10(d)(3). By omitting any mention of the existence or objections of the 203 petitioners or of the ANC emphatic recommendation, the Order denies to the Court assurance that it has given full and reasoned consideration to all material facts and issues. The omission of the 203 petitioners and their objections resulted in incomplete findings, and "incomplete findings are not sufficient. The findings must support the end result in a discernible manner, and the result reached must be supported by subsidiary findings of basic facts on all material issues. In short, ... there must be findings on each material fact with full reasons given to support each finding." Dietrich, *supra*. The function of the Court is to require such

assurance. Id. "If the agency makes no finding of fact on a material contested issue, this court on review may 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).

The Order displays the prejudice of the board against the neighbors in its description of "Persons in Support of the Application" by erroneously accepting evidence of support from individuals without legal relevance to the controlling zoning regulation. R2693. The irrelevant witnesses relied upon in the Order were sycophants paraded by the private school before the board to create an illusion of legally material support. The parade constituted of residents from distant neighborhoods (R2693) and even outside the District of Columbia (R67-73; see, also, R334-335, R1535); school employees; and client parents with students in the school. See Brief of the Petitioners' First Argument at p.15. The Order elevated the opinion of irrelevant witnesses over that of 203 legally relevant witnesses as well as that of the ANC. The preferences and omissions with regard to the relevance of witnesses in the Order raise questions of the board's impartiality. Proceedings of the board must be characterized by fundamental fairness. Sheridan-Kalorama Neighborhood Council v. District of Columbia Board of Zoning Adjustment, 341 A.2d 312, 316 (1975).

The board gave no weight to issues and concerns raised in the advisory neighborhood commission's written reports recommending that the board deny the private school application for special exception.

In *completely* omitting mention of the 203 residents of nearby and adjoining property; suppressing the fact of their objections; and failing to address their material objections, the Order indicates that no weight was given to the ANC's two written recommendations regarding their importance. But the law states clearly the official importance of the advisory neighborhood commissions:

> (A) The issues and concerns raised in the recommendations of the Commission shall be given great weight during the deliberations by the government entity. Great weight requires acknowledgement of the Commission as the source of the recommendations and explicit reference to each of the Commission's issues and concerns.
> (B) In all cases the government entity is required to articulate its decision in writing. The written rationale of the decision shall articulate with particularity and precision the reasons why the Commission does not offer persuasive advice under the circumstances. In so doing, the government entity must articulate specific findings and conclusions with respect to each issue and concern raised by the Commission. Further, the government entity is required to support its position on the record.

D.C. Code § 1.309-10(d)(3). See, also, 11 DCMR § 3115.

The ANC's two written reports to the board advanced detailed issues and concerns regarding the surfeit of private schools in the community (R333, R1537); objectivity of the reports of the District of Columbia Office of Planning and Department of Transportation; and official ANC skepticism that the applicant private school could be trusted to fulfill its promises (R1540). The Order fails to address any of these particular issues and concerns. In Kopff v. District of Columbia Alcoholic Beverage Control Board,

381 A.2d 1372, 1384 (D.C. 1977), the court held that "great weight" meant that a board must elaborate, with precision, its response to the advisory neighborhood commission issues and concerns. It explained further that a board must make explicit reference to each commission issue and concern *as such,* as well as specific findings and conclusions with respect to each. A board is also obliged to "articulate why the particular ANC itself, given its vantage point, does — or does not – offer persuasive advice under the circumstances." Ibid.; Levy v. District of Columbia Board of Zoning Adjustment, 570 A.2d 739, 746 (D.C. 1990).

In Neighbors United for a Safer Community v. District of Columbia Board of Zoning Adjustment, 647 A.2d 793 (1994), the court reversed and remanded a decision of the board for a failure to address with precision an ANC finding and "recommendation that the application for special exception should be denied because the community is 'overrun with various types of residential facilities." Ibid. at 798. Similarly in the instant case, the commission expressly raised concern regarding the

> "tremendous expansion" of academic institutions...all located within about a half a mile of the proposed [contested] site...The Palisades is being inundated by private schools and is well on its way to becoming an academic enclave for a separate school system for the affluent. And to this expanding enclave, St. Patrick's wants to add an eighth school – a middle school located right in the midst of residential Palisades. I sometimes feel our urban village is being turned into an academic camping ground occupied daily by hundreds of students from around the region, so numerous they begin to rival the number of residents in their vicinity. Every academic day, about 5000 students and faculty and staff enter and leave the Palisades precincts of ANC3D. And to that daily onslaught, St. Patrick's would like to add another 72 in students and staff.

R1537. Just as in Neighbors United, *nothing* appears in the Order addressing the ANC concern regarding the surfeit of *private* schools; the questionable objectivity of the

The board failed to address a material issue and finding of fact regarding the credibility of private school officials.

The word "credibility" does not appear in the Order. The Order does not address the missing, material facts that the neighbors and the ANC distrust private school officials and have ample historical reason to distrust them. The ANC brought specific attention to the "trust and cooperation that is now sadly missing" with the private school. R1539. See Brief of the Petitioners' Fifth Argument. One hopes that such distrust focused on officials of a private, church-affiliated school respected for its educational services, as well as its lawyers from one of the District's most respected firms, is extraordinary and noteworthy. After all, when private school officials admit that the school's governing directors cannot be trusted and devise special protections to "bind" its own board of directors in order to protect the neighbors, citizens hope it is an "unusual case." R774-776. *See* Rafferty v. District of Columbia Zoning Comm'n, 583 A.2d 169, 177 (D.C.1990) ("Except in unusual cases, we will not second-guess credibility determinations by the agency…").

The lack of credibility of school officials is at the heart of the opposition to the private school's location in the center of a residential district. Yet the Order fails to mention, much less address, either the neighbors' objections or the ANC's written skepticism regarding the private school's lack of credibility. In a contested case, every decision adverse to a party shall be in writing and accompanied by findings of fact. The findings of fact must address "each contested issue of fact." D.C. Code § 2-509(e). The Order fails an unpleasant but necessary requirement. But "[d]ecisions of administrative agencies and

officials may not be predicated on personal desires or views, no matter how sincere they may be." O'Boyle v. Coe, 155 F. Supp. 581, 584 (D.D.C. 1957).

The board's failure to express in writing its announced but erroneous conclusion of law that the zoning regulations preclude it from disapproving a private school application for special exception to locate in a residential district raise procedural and substantive issues of first impression not appropriate for summary disposition.

Among the many unusual aspects of this case are the discovery by the board of a wholly new entitlement in the zoning law; its announcement as the controlling rule in the instant case; the express approval of the rule by three members of the board, constituting a majority; and the omission of the controlling rule as a Conclusion of Law in the Order.

The board announced its grant of the special exception for the private school with its conclusion that the regulations "preclude" it from ever finding circumstances that would deny such an application. R2542-2543. A majority of three of the board's commissioners found a "ground rule" that, in all cases, private school location in residential zones is predicated in the zoning regulation regardless of the regulation's distinction between public and private schools. R2542-2552.

No opportunity was afforded to opponents to the application to present evidence and argue against the board's finding and conclusion of law, even though the law requires such an opportunity be presented. D.C. Code § 2-509(a). By not providing notice and opportunity to argue against the board's "ground rule", the board relieved itself and the private school from the burden of proving its validity. The law provides that "the

proponent of a rule or order shall have the burden of proof." D.C. Code § 2-509(b). But "the applicant has the burden of showing that the proposal [for special exception] complies with the regulation..." Georgetown Residents Alliance v. District of Columbia Board of Zoning Adjustment, 802 A.2d 359, 363 note 4 (D.C. 2002). The Court can affirm the board's conclusions of law only if they are supported by substantial evidence in the record. District of Columbia v. Davis, 685 A.2d 389, 393 (D.C. 1996).

Clearly the ANC never perceived of the existence of a ground rule constraining board rejection of the application or it would not have recommended rejection. To the contrary, the ANC expressed fundamental concern about the "serious disconnect between your [i.e., the board's] orders, your conditions and their enforcement" as a reason supporting denial of the private school application. R1540. The board's ground rule precluding it from *ever* denying a private school's application for a special exception perversely renders the specific ANC concern about the ability of the board to enforce its conditions irrelevant and the ANC recommendation to deny the application completely weightless. Under the board's ground rule, no amount of weight was given to the ANC recommendation to deny an application for special exception and no amount of weight could ever be given to any such recommendation by any ANC.

As a matter of law, the board erred in interpreting the zoning regulations to find a ground rule precluding it from disapproving the location of a private school within a residential district. The board, "a creature of statute with *discretionary* and fact-finding authority, may not exercise its *discretion* in an arbitrary manner but rather is subject to statutory and

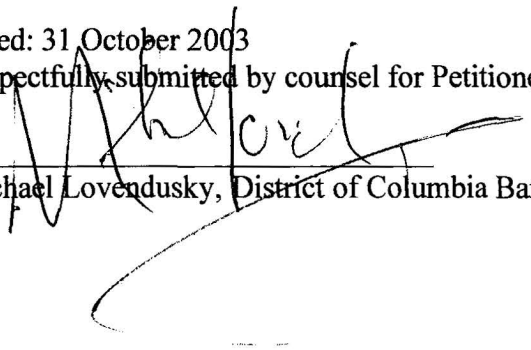
regulatory directives and guidelines." Rose Lee Hardy Home and School Association, 324 A.2d 701, 706 (1974) (emphasis added). The Order relied upon a zoning regulation by which the board *might* approve the location of a private school in a residential, R-1, district. 11 DCMR § 206.2. But the Order fails to indicate whether the ground rule precluding the rejection of the application announced by the board did or did not control the Order itself. The Court will not "defer to the agency's interpretation of the statute or regulation if administers [if] its interpretation is unreasonable or in contravention of the language or legislative history of the regulation." Cathedral Park Condominium Comm. V. District of Columbia Zoning Comm'n, 743 A.2d 1231, 1239 (D.C. 2000). The Court does not know from the Order itself whether the board utilized the ground rule announced by a majority of its members.

The Order displays no consideration of the structure and purpose of the regulatory provisions detailed above. "It would be incongruous to accord substantial weight to an agency's interpretation of a statute where the record is barren of any indication that the agency gave any consideration at all to the statutory language or to the structure and purpose of the provisions which were ostensibly being construed." Kirkpatrick, *supra* at 594. Even though the court is deferential to the board on questions relating to the interpretation of the zoning regulations, it will not uphold such interpretations if they are plainly erroneous or inconsistent with the zoning regulations. Georgetown Residents Alliance, *supra* at 363. Signficantly, the Intervenor private school does not disavow the ground rule announced by the board in its motion. To the contrary, it hopes to keep the illicit fruits of its labors by persuading the Court to look away.

Conclusion

For the reasons set forth above, Petitioners respectfully request the Court to deny the Respondents' and Intervenors' Motion for Summary Affirmance.

Dated: 31 October 2003
Respectfully submitted by counsel for Petitioners:



Michael Lovendusky, District of Columbia Bar # 364415

Certificate of Service

I hereby certify and attest that on 31 October 2003, a copy of the foregoing Petitioners' Opposition to Respondents' Motion for Summary Affirmance and Petitioners' Memorandum of Points and Authorities in Opposition to Respondents' Motion for Summary Affirmance was sent by personal delivery or mailed first class, postage prepaid to each of the following:

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