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1900 K STREET, N.W.
WASHINGTON, D.C. 20006-1109

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EMAIL: raguglia@hunton.com

FILE NO: 50137.000003

June 7, 2010

By Hand

Board of Zoning Adjustment
for the District of Columbia
441 4th Street, N.W.
Suite 210
Washington, D.C. 20001

Re: BZA Case No. 18070 (Appeal of ANC 6B from a decision of the Zoning Administrator to issue a building permit for a private club in the CAP/R-4 District at premises 136 D Street, S.E., SQ 733, Lot 41)

Dear Chair Moldenhauer and Board Members:

This firm is representing Airports Council International - North America ("ACI-NA" or "Owner"), a non profit organization as recognized by the IRS, with respect to the above described appeal by ANC 6B. My agent authorization is attached as Exhibit A. ANC 6B appeals the issuance of a building permit by the Zoning Administrator to the Owner for the interior renovation of its property located at 136 D Street, S.E. (Subject Property) for use as a private social club.

Request to Intervene

Pursuant to Section 3112.15 of the Zoning Regulations, the Owner requests that the Board allow it to intervene in this case since the Board's actions will affect its rights and interests in the Subject Property, specifically its ability to use the Subject Property for a private social club.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18070

EXHIBIT NO. 13

Board of Zoning Adjustment
District of Columbia
CASE NO. 18070
EXHIBIT NO. 13



Board of Zoning Adjustment
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Exhibit B is the Office of Tax and Revenue's Property Detail Card indicating ACI-NA's ownership rights in the Subject Property, which is also evidenced by the Building Permit issued by DCRA on September 16, 2009. See Exhibit C.

Motion to Dismiss the Appeal As Untimely

The Owner requests that the Board, as a preliminary matter, take testimony on the fact that the appeal is untimely. Under Section 3112.2 of the Board's rules, any person aggrieved by the decision of the Zoning Administrator has sixty (60) days from the date that person had notice or knowledge of the decision complained of, or reasonably should have such notice or knowledge of the decision complained of, whichever is earlier, to file a timely appeal to the Board.

In this case, the Owner applied for a demolition permit for the Subject Property for use as a private social club in February of 2009. In March of 2009, based upon complaints of unknown neighbors, the Zoning Administrator placed a hold on permit construction for private club use, but not interior demolition. On March 26, 2009, I met with Mr. Le Grant to discuss the matter as attorney for the Owner. On March 27, 2009, I presented Mr. Le Grant with the attached memorandum of law (Exhibit D) which indicates that a private (social) club is permitted as a matter of right in the CAP/R-4 zone district where the Subject Property is located, pursuant to Section 330.5(g) of the Zoning Regulations. See Exhibit E. The memorandum also



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demonstrated that ACI-NA met the test for a private club, since it was non-profit, registered with the IRS, and would use the Subject Property for avocational social purposes for selected members of its association. Based upon that memorandum and his own research, Mr. Le Grant lifted the hold on permit construction for use as a private club on or about April 24, 2009.

On June 26, 2009, the Owner filed a new application for building permit for interior alterations and repairs to the basement apartment. The Subject Property's entire use was proposed to be changed to a private club (formerly, a single family row house with rented English basement). After all required approvals and payment of the permit fee on September 14, 2009, the building permit was issued on September 16, 2009 and was posted on the Subject Property later that month, on or about September 28, 2009 by the contractors. This information was also readily available on the DCRA website under permits by address which, among other approvals, included structural review approval as follows: "Convert 2nd and Third Floor Apartments to a Private Club and Basement Apartment" on September 11, 2009; Fire Review Approval: "Approved based on Responding Letter and resubmitted application and drawings which states this building will be fully sprinkled" on September 15, 2009; and Zoning Review Approval as follows: "Application for conversion of basement apartment to private club. 2 parking spaces provided per attached plat" on September 15, 2009. See Exhibit F.



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Accordingly, these approvals were available on line for review by the ANC and the public as early as mid-September 2009.

Apparently, unknown neighbors called DCRA in December of 2009 to inspect the Subject Property on the allegation that the work being performed was not consistent with the approved plans/permit. During the week of December 14, 2009, a DCRA inspector visited the Subject Property and found no violations.

Nevertheless, ANC 6B did not file its appeal with the BZA until March 15, 2010, almost eleven (11) months after Mr. Le Grant lifted the hold on April 24, 2009 and almost six (6) months after the permit approval for a private club was available on line and was posted on the Subject Property on or about September 28, 2009. Indeed, on its appeal form, ANC 6B indicates that the date of the decision of Mr. Le Grant being appealed is April 24, 2009. See Exhibit G.

Moreover, ANC 6B's pre-hearing statement itself concedes that "on December 8, 2009, ANC 6B was informed that construction was underway at 136 D Street, S.E." which is more than 90 days prior to filing its appeal. Cover letter to Appeal at 1. See Exhibit G. This admission is consistent with the fact that neighbors called for a DCRA inspection of the subject property which took place in the very next week. The Owner denies that its permit for construction for use of the Subject Property as a private club was not posted until early January, 2010, as alleged by



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Michael Wilson, a neighbor immediately adjacent to the Subject Property, as set forth in the ANC's letter to the BZA of March 15, 2010. In any event, the proposed use was available on line in September of 2009.

The Owner will present the testimony of Brett McAllister, William Maiden, Andrew Tuzzio, and Freddy Benavides that the building permit for interior renovations for use as a private club was posted on the Subject Property in late September of 2009.

See, by way of example, BZA Cases No. 17391 on the dismissal of untimely appeals, attached as Exhibit L.

The Use of the Subject Property As A Private Club for Avocational (Social) Purposes is a Matter of Right in the CAP/R-4 Zone District

There is no dispute that the use of the Subject Property as a private club for avocational (social) purposes in the CAP/R-4 zone is a matter of right. Our memorandum of law attached as Exhibit D sets forth the pertinent facts, BZA decisions and case law on this issue which ACI-NA meets to classify the Subject Property as avocational (social) and not vocational (business). Further, in the same block as the Subject Property, there is located a rather sizeable building (the National Republican Club a/k/a the Capitol Hill Club) used as a private club. See Exhibit H, pictures and description of its activities.



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ACI-NA will use the Subject Property to provide a place of respite including sleeping accommodations if needed, study, educational instruction, social interaction, exercise, (non-alcoholic) refreshments and light food to certain of its members. No lobbying will be allowed on the premises.¹ The Subject Property is centrally located for use by its members for meetings on Capitol Hill and at various agencies that monitor its activities, such as the FAA and DOT. In addition, its proximity to the Capitol Hill South Metro Stop (5 minute walk), makes for easy commutes around the City and to and from National Airport.

The Subject Property's use as a private social club is an attractive benefit to its members, typically airport executives in the 50-65 age group, noting that ACI-NA has competition for its members from similar organizations, specifically American Association of Airport Executives, based in Alexandria, Virginia.

Photographs of the Subject Property are attached as Exhibit I. It should be noted that ACI-NA is in the process of constructing a very costly sprinkler system as required for fire protection.

The ANC's Argument

¹ In this regard, it should be noted that ACI-NA has its own headquarters office at 1775 K Street, N.W., Suite 500. See Exhibit M, amended lease and floor plans.



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ANC 6B's argument on appeal is that the Subject Property will be commercial in nature, in that it will function as a hotel whose use is vocational (business) and not avocational (social).

Accordingly, the ANC argues, the use fails the proposed private club test.

It is clear that the use of 1 or more rooms in the Subject Property for sleeping purposes for its members (not to exceed 3, 1 in the basement and possibly 2 upstairs depending on need with the 3rd bedroom serving as a fax-copy, computer, study and educational center) hardly meets the definition of a hotel under the Zoning Regulations. That regulation (see Exhibit J) indicates that there must be at least 30 rooms for sleeping accommodations rented to transient guests on a daily basis to constitute a hotel. In addition, the regulation states that the term "hotel" should not be interpreted to include inter alia a "private club".

Our research indicates that at least 2 other private clubs in the District of Columbia have, in addition to social, eating and study accommodations, rooms for sleeping for its members but not in excess of 29. See Exhibit K.

ANC 6B's argument is not with the BZA, but with the Zoning Commission. At various meetings with the ANC, and as set forth in its resolution to contest the permit here in issue, as well in its appeal, the ANC feels that the use of a building in this zone as a private club is at odds with the

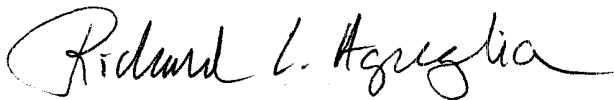
HUNTON WILLIAMS

Board of Zoning Adjustment
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residential character of the neighborhood. However, what the ANC is seeking is a text change which is beyond the jurisdiction of the BZA and is the role of the Zoning Commission.

We respectfully submit that the use of the Subject Property as a private social club, which is the intended use of the Owner, is a matter of right use. As such, ANC 6B's appeal should be dismissed.

Sincerely,



Richard L. Aguglia

cc: By Hand Delivery
ANC 6B
c/o David F. Garrison, Chair / Bert Randolph, Secretary

ACI-NA
Brett McAllister
Monica R. Hargrove, Esq.

Matt Le Grant
Zoning Administrator

Jay Surabian, Esq.
Counsel to the Zoning Administrator

List of Exhibits

Agent Authorization.....	Exhibit A
DC OTR Property Detail Card for 136 D Street, S.E.	Exhibit B
DCRA Building Permit for Renovation of 136 D Street, S.E.	Exhibit C
Memorandum of Law to Matt Le Grant	Exhibit D
Section 330.5 of the Zoning Regulations.....	Exhibit E
Statutes of Permit Approvals by DCRA	Exhibit F
Appeal of ANC 6B to the BZA dated March 15, 2010	Exhibit G
NRC/Capitol Hill Club	Exhibit H
Photographs of the Subject Property.....	Exhibit I
Zoning Regulations (Definition of Hotel).....	Exhibit J
List of Other Private Clubs in D.C.....	Exhibit K
BZA Order in Appeal No. 17391.....	Exhibit L
Lease for ACI-NA's offices at 1775 K Street, NW, Washington, DC	Exhibit M

Exhibit A



June 4, 2010

Board of Zoning Adjustment
Suite 210
441 4th Street, N.W.
Washington, D.C. 20001

Re: Agent Authorization for Richard L. Aguglia, Esq., in BZA Appeal No. 18070

Dear Board Members:

Please be advised that Richard L. Aguglia, Esq. of the firm of Hunton & Williams LLP is ACI-NA's authorized attorney agent in this case with the power to bind ACI-NA.

Sincerely, .

A handwritten signature in cursive script that reads 'Monica R. Hargrove'.

Monica R. Hargrove,
General Counsel

cc: Richard L. Aguglia, Esq.

Exhibit B

DC HOME

DC GUIDE

RESIDENTS

BUSINESS

VISITORS

DC GOVERNMENT

Kids



CFO HOME

TAXPAYER SERVICE
CENTERREAL PROPERTY
SERVICES

Property Tax Bills
Property Tax Rates
and Calculation
Property Assessment
Process
Property Assessment
Appeals
Tax Relief Credits
Search Real Property
Sales Database
Search Real Property
Assessment Database

CFO / OTR Search

Property Detail

Address: 0136 D ST SE

SSL: 0733 0041

Record Details

Neighborhood:	CAPITOL HILL	Sub-Neighborhood:	A
Use Code:	24 - Residential- Conversions-Less t	Class 3 Exception:	No
Tax Type:	TX - Taxable	Tax Class:	001 - Residential
Homestead Status:	** Not receiving the Homestead Deduction		
Assessor:	MITCHELL HAMBURGER		
Gross Building Area:		Ward:	6
Land Area:	2,032	Triennial Group:	2

Owner and Sales Information

Owner Name: AIRPORTS COUNCIL INTERNATIONAL
Mailing Address: 136 D ST SE; WASHINGTON DC20003-1810
Sale Price: \$1,250,000
Sale Date: 05/14/2008
Instrument No.: 52632

Tax Year 2011 Preliminary Assessment Roll

	Current Value	Proposed New Value (2011)
Land:	\$378,440	\$374,270
Improvements:	\$665,820	\$575,660
Total Value:	\$1,044,260	\$949,930
Taxable Assessment: *	\$1,044,260	\$949,930

* Taxable Assessment after Tax Assessment Credit and after \$67,500 Homestead Credit, if applicable. ([Click here for more information](#)).

** If you believe you should be receiving tax relief through the Homestead deduction program and if you are domiciled in the District and this property is your principal place of residence, you can access the link below, complete the form, and return it per the instructions. For additional information regarding the Homestead program, call (202)727-4TAX. [Click here to download the Homestead Deduction and Senior Citizen Tax Relief application *](#)

[View Tax Information](#) | [View Property Features](#) | [View Payments](#)

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 Feedback | Translation | Accessibility |
 Privacy & Security | Terms & Conditions

John A. Wilson Building
 1350 Pennsylvania Avenue, NW
 Washington, DC 20004

Exhibit C

Department of Consumer and Regulatory Affairs

Permit Operations Division

941 North Capitol Street NE Room 2100

Washington DC 20002

Tel. (202) 442 - 4589 Fax (202) 442 - 4862

TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557

B

BUILDING PERMIT

**THIS PERMIT MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS OF WORK
UNTIL WORK IS COMPLETED AND APPROVED**

Issue Date: 09/16/2009

PERMIT NO. B0906887

Expiration Date: 09/16/2010

Address of Project: 136 D ST SE		Zone: CAP/R-4	Ward: 6	Square: 0733	Suffix:	Lot: 0041
Description Of Work: INTERIOR ALTERATIONS AND REPAIRS FOR EXISTING BASEMENT APARTMENT. FOR USE AS A PRIVATE CLUB.						
Permission Is Hereby Granted To: Airports Council International		Owner Address: 136 D ST SE WASHINGTON, DC 20003-1810		PERMIT FEE: \$1,095.00		
Permit Type: Alteration and Repair		Existing Use:		Proposed Use:		Plans: Yes
Agent Name: Michelle Miller		Agent Address: 2529 Herrell Court Falls Church, VA 22043		Existing Dwell Units:	Proposed Dwell Units:	No. of Stories: Floor(s) Involved:
Conditions/ Restrictions: Interior work only. Does not include approval for replacement of exterior windows, doors, or other exterior features.						
This Permit Expires if no Construction Is Started Within 1 Year or if the Inspection Is Over 1 Year.						
All Construction Done According To The Current Building Codes And Zoning Regulations: As a condition precedent to the issuance of this permit, the owner agrees to conform with all conditions set forth herein, and to perform the work authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all work authorized by this permit and to require any change in construction which may be necessary to ensure compliance with the permit and with all the applicable regulations of the District of Columbia. Work authorized under this Permit must start within one(1) year of the date appearing on this permit or the permit is automatically void. If work is started, any application for partial refund must be made within six months of the date appearing on this permit.						
Director: Linda K. Argo		Permit Clerk Lucretia H. Gray				
TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL, CALL THE DC INSPECTOR GENERAL AT 1-800-521-1639 FOR CONSTRUCTION INSPECTION INQUIRIES CALL (202) 442-9557 TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557						

Exhibit D

HUNTON & WILLIAMS

MEMORANDUM BY HAND DELIVERY

TO: Matt Le Grant
D.C. Zoning Administrator

DATE: March 27, 2009

FROM: Richard L. Aguglia *RLA*

FILE: 50137.000003

136 D St., S.E. (SQ 733, Lot 41) (Subject Property)

As we discussed on March 26, 2009, your office has placed a hold on permit construction (but not interior demolition) for the Subject Property due to the allegation by unknown neighbors that it was being used for nonresidential purposes.

The purpose of the interior demo and interior build out applications is indeed for the establishment of a private club as set forth in those applications.

BACKGROUND

The Subject Property is zoned CAP/R-4 which allows a private club as a matter of right "except when the use is a service customarily carried on as a business". See § 330.5(g) of the Zoning Regulations.

My client, Airports Council International - North America ("Owner"), purchased the Subject Property in 2008 for use as a private social club for its members. Its members, most of whom are commercial airport operators in the United States that reside outside the area, typically fly into Washington for various meetings and events periodically during the year, cab to a hotel and then cab to the location of the meeting or event, some of which are meetings on Capitol Hill with members of Congress, Congressional Committee staffers, congressional staffers, and other governmental parties.

The Owner will offer the Subject Property solely to its members and select guests on an availability basis for their convenience in attaining educational, sleeping, eating, travel and social accommodations to avoid exorbitant hotel and related expenses. Further, the Subject Property is located close enough to Capitol Hill that the Owner's members, who will generally arrive at the Subject Property by cab, can walk to their meetings.

"Private Club" is defined in the zoning regulations as follows:

"Club, private – building and facilities or premises used or operated by an organization or association for some common avocational purpose such as, but not limited to, a fraternal, social, educational, or recreational purpose;

provided, that the organization or association shall be a non-profit corporation and registered with the U.S. Internal Revenue Service; goods, services, food, and beverages shall be sold on the premises only to members and their guests; and office space and activities shall be limited to that necessary and customarily incidental to maintaining the membership and financial records of the organization."

The Owner is a non profit corporation registered with IRS and in good standing with D.C. See Exhibit A.

COURT CASES

There are two court cases of note that have been decided under this section, one under the old now outdated and limited definition of private club and one under the current broader amended definition.

In 1976, in *Legislative Study Club, Inc. v. D.C. BZA et al.*, 359 A.2d 153 (D.C. 1976), under the former definition of "private club"¹, the D.C. Court of Appeals affirmed the decision of the Board of Zoning Adjustment (BZA) that a building used for lobbying purposes in the R-4 Zone was not a private club under the Regulations. The Court noted that the "Legislative Study Club" was a nonprofit society organized to advocate and maintain the principles of citizen participation in government, composed of two internal organizations, Citizen Action which prepares and publishes materials for public interest groups, and Congress Watch, a large public interest lobby. Of the Club's 21-22 members, 12 or 13 were full time salaried employees who work at the "clubhouse". Congress Watch and several of its members are registered lobbyists. The Zoning Administrator approved a Certificate of Occupancy (C of O) to the organization for a private club, with first floor use for reception purposes and "limited office use" and second and third floor uses for offices, a library, conferences and meetings. However, the neighbors filed an appeal of the issuance of the C of O to the BZA which reversed the decision of the Zoning Administrator. The court agreed with the BZA stating:

"We view petitioner's efforts to meet the R-4 criteria by calling itself a private club as little more than a device designed to circumvent the requirements of the Zoning Regulations. The Board found that the Legislative Study Club is a nonprofit organization for the benefit of the public in general but not a private club for the social benefit of its members. There is ample evidence to support the decision

¹ Under former Section 1202, a "club, private" was defined as "a building or portion thereof used by an association organized for the promotion of a common social objective and not for profit, whose facilities are limited to its members and their guests. Such building may or may not include facilities for the preparation and service of meals and alcoholic beverages and rooms or suites of rooms for residential occupancy."

of the Board.” (359 A.2d 155-156). (A copy of this case is attached as Exhibit B).

In 1978, the D.C. Court of Appeals affirmed the BZA’s decision to uphold the Zoning Administrator’s grant of a C of O to the YMCA as a private club. *Association for Preservation of 1700 Block of N Street NW and Vicinity, et al. v. DC BZA et al.*, 384 A.2d 668 (D.C. 1978). It is important to note that in reaching its decision, the BZA/Court relied upon an amended and broader definition of the term “private club” in Section 1202, now found in Section 199 (unchanged since that amendment).

In opposing the BZA’s finding that the YMCA was organized and operated for common avocational purposes, including educational and recreational, the Association (the neighbors) argued that its activities were vocational in nature, for the benefit of the public in general and not a private club for the social benefit of its members, relying principally on the *Legislative Study Club* case cited above. The court noted that its decision in that case “. . . is of limited value here since we construed in very general terms the former definition (§ 1202), which was more narrowly written.” The court went on to state:

The BZA found the activities of that “club” [Legislative Study] to be vocational as opposed to avocational because it [operated] as a clearing house for class groups by studying specific pieces of legislation and disseminating information to those groups regarding issues such as consumer affairs and public information.

* * *

There is ample evidence to support the BZA’s finding that the Metro YMCA is organized and operated for educational and recreational purposes, among other common avocational objectives.

(384 A.2d 672) See Exhibit C.

DISCUSSION

1. The Subject Property will be used as a private (social) club solely for the Owner’s members (and guests based upon availability) for educational, eating, drinking, travel scheduling and sleeping accommodations. As is reflected in the bylaws, there will be a charge for members in good standing for certain privileges at the Subject Property, and no charge for members who are in good standing and pay special assessments to ACI-NA. Occasional educational sessions and networking activities may be conducted on the premises, for the exploration of common areas of interest of Members and their invited guests. See Exhibit D, Owner’s Bylaws, Article 28.

2. The interior layout of the Subject Property will be as follows:

Existing: 1 kitchen
 1 dining room
 3 bathrooms
 2 bedrooms
 2 studies/libraries

Proposed²
(in basement): 2 bathrooms

 1 kitchen
 1 bedroom
 1 study/library

3. There will be no employees of the Owner living or working on site except as necessary for Club administrative purposes, and to welcome and acquaint members with the facilities in the house, upon arrival and throughout their stay.

Based upon these facts, I hereby request that you remove the "hold" and sign off on any building permits necessary for the Owner to use the Subject Property as a private social club.

R.L.A.

cc: Brett McAllister
Monica Hargrove Kemp, Esq.
General Counsel
William Maiden

² This is simply a modernization of prior conditions that existed in the house as a two family flat prior to the ownership change.

Internal Revenue Service

Department of the Treasury

District
Director

Baltimore District

31 Hopkins Plaza, Baltimore, Md. 21201

P.O. Box 13163, Room 817
Baltimore, MD 21203

Date: February 3, 1997

Employer Identification Number:
53-0209303

NORTH AMERICAN REGION OF THE AIRPORTS
COUNCIL INTERNATIONAL
1775 K STREET, N.W., SUITE 500
WASHINGTON, DC 20006

Person to Contact:
EP/EO Tax Examiner

Telephone Number:
(410) 962-6058

Dear Sir/Madam:

This is in response to your inquiry dated Jan. 27, 1997, requesting verification of your tax-exempt status.

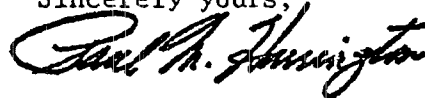
Our records show that your organization was granted exemption from Federal Income Tax under section 501(c)(6) of the Internal Revenue Code effective JANUARY, 1958.

You are required to file Form 990, Return of Organization Exempt From Income Tax, only if your gross receipts each year are normally more than \$25,000. However, if you receive a Form 990 package in the mail, please file the return even if you do not exceed the gross receipts test. If you are not required to file, simply attach the label provided, check the box in the heading to indicate that your annual gross receipts are normally \$25,000 or less, and sign the return.

A copy of our letter certifying the status of the organization is not available, however this letter may be used to verify your tax-exempt status.

Because this letter could help resolve any questions about your exempt status, it should be kept in your permanent records.

Sincerely yours,



Paul M. Harrington
District Director

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Adrian M. Fenty

Organization Information

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To view another organization from the search, select the **Return to Search Results** button below. You may also **print** the organization details, or start a **new search**. Use the **Back to Main Page** button to continue the registration process.

Organization	Registered Agent
Organization Name: AIRPORT OPERATORS COUNCIL INTERNATIONAL	ALAN P. DYE 1747 PA. AVE., N.W., STE.1000 Washington, DC 20006
State: DE	
Status: ACTIVE	
Initial Date of Registration: 1/8/1982	
File No.: 820101	
Organization Type: FOREIGN NON PROFIT CORPORATION	

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John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Exhibit B

**LEGISLATIVE STUDY CLUB, INC., PETITIONER, v. DISTRICT OF COLUMBIA BOARD OF ZONING
ADJUSTMENT, RESPONDENT, LAWRENCE A. MONACO, JR., CAPITOL HILL RESTORATION
SOCIETY, INTERVENORS**

**District of Columbia Court of Appeals
359 A.2d 153;1976 D.C. App. LEXIS 298**

No. 8756

October 9, 1975, Argued

June 16, 1976, Decided

Disposition: Affirmed.

Counsel

Arthur L. Fox, II, for petitioner.

James N. Dulcan, Assistant corporation Counsel, with whom C. Francis Murphy, Corporation Counsel at the time the brief was filed, Louis P. Robbins, Principal Assistant Corporation Counsel, and Richard W. Barton, Assistant Corporation Counsel, were on the brief, for respondent.

Lawrence A. Monaco, Jr., for intervenors.

Judges: Yeagley, Associate Judge. Korman, Associate Judge, Superior Court of the District of Columbia.

*

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner organization sought review of a judgment of the District of Columbia Board of Zoning Adjustment that denied the club a certificate of occupancy to use a building in an R-4 zoning district, after an administrator found that the organization qualified as a "private club." Because a non-profit organization could not qualify as a private club merely by including "club" in its name, the zoning board denied the organization's petition for a certificate of occupancy to use a building in an R-4 district.

OVERVIEW: After the organization was granted its certificate to use a building in an R-4 zoning district, an intervenor appealed the board's judgment and the board reversed its ruling, finding that the organization did not meet the requirements of a private club pursuant to D.C. Zoning Regs. § 1202. The court affirmed, holding that the organization was a nonprofit organization for the benefit of the public in general but not a private club for the social benefit of its members. To hold that an organization could, by the mere affixing of the word "club" to its name, change its status from that of a nonprofit "vocational" organization to that of a social club so as to qualify for an occupancy permit in an R-4 district would make a mockery of the Zoning Regulations and would destroy the careful distinctions drawn by the Zoning Commission. The court found that the board ruled properly that it was error to find that the organization qualified as a "private club" for occupancy in an R-4 zoning district.

OUTCOME: The court affirmed a judgment of the board that found that the organization did not qualify as a private club and therefore, could not qualify for an occupancy permit in an R-4 district.

LexisNexis Headnotes

Real Property Law > Zoning & Land Use > Judicial Review

Real Property Law > Zoning & Land Use > Judicial Review
Real Property Law > Zoning & Land Use > Judicial Review
Real Property Law > Zoning & Land Use > Judicial Review
Real Property Law > Zoning & Land Use > Ordinances

The Board of Zoning Adjustment's interpretation is binding on the courts unless it is plainly erroneous or inconsistent with the regulation.

Real Property Law > Zoning & Land Use > General Overview
Real Property Law > Zoning & Land Use > General Overview
Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview
Business & Corporate Law > Nonprofit Corporations & Organizations > Formation
Real Property Law > Zoning & Land Use > General Overview
Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview
Business & Corporate Law > Nonprofit Corporations & Organizations > Formation
Real Property Law > Zoning & Land Use > General Overview

A private club is defined in D.C. Zoning Regs. § 1202 as a building or portion thereof used by an association organized for the promotion of a common social objective and not for profit, where facilities are limited to its members and their guests. A nonprofit organization, on the other hand, is defined as an organization organized and operated exclusively for religious, charitable, literary, scientific, community, or educational purposes provided no part of its net income inures to the benefit of any private shareholder or individual. Both are nonprofit types of organizations, but there the similarity ends. In comparing the two definitions, it is readily apparent that "private club" was intended to cover personal, social matters, while "nonprofit organization" was aimed at non-personal, service-type activities.

Opinion

Opinion by: YEAGLEY

Opinion

[359 A.2d 154] This is a petition for review of a decision of the District of Columbia Board of Zoning Adjustment denying petitioner a certificate of occupancy to use a building in an R-4 zoning district in southeast Washington holding petitioner does not qualify as a private club. Finding that petitioner's contentions to the contrary are without merit, we affirm the judgment of the Board of Zoning Adjustment and dismiss the petition.

The property in question is located at 133 C Street, S.E., diagonally across the street from the United States House of Representatives' Cannon Office Building. It is zoned R-4, which includes row dwellings, conversions, apartments, and private clubs. The building was formerly occupied as a convent but had become vacant. Several persons who were to become the organizers of petitioner, the Legislative Study Club, were then operating as members or employees of Congress Watch or Citizen Action when they found this building and learned of its availability for an R-4 use. On August 14, 1973, they obtained articles of incorporation for a study club and on that date signed a lease for the premises and filed an application for a certificate of occupancy.

The "Club" is a nonprofit society organized to advocate and maintain the principles of citizen participation in government. It is composed of two internal organizations, Citizen Action, which prepares and publishes materials for public interest groups, and Congress Watch, a large public interest lobby. Of the "Club's" 21 or 22 "members" 12 or 13 are full-time salaried employees who work

at the "clubhouse". Congress Watch and several of its members are registered lobbyists.

On August 14, 1973, the "**Club**" applied to the District of Columbia Department of Economic Development for a certificate of occupancy to permit it to use the building as a **private club**, a use permitted in the R-4 zone in which the building is located. The "**Club**" submitted with the application its articles of incorporation which had just been approved on the same date and a letter from its president which stated, *inter alia*, that the first floor was to be used for reception purposes and "limited office use" and that the second and third floors would be used for "offices, for a library and for conferences and meetings." On the basis of this information, the **Zoning** Administrator found the "**Club**" to be a **private club** within the R-4 definition and issued a certificate of occupancy. Mr. Lawrence Monaco, a nearby property owner, and the Capitol Hill Restoration Society, intervenors here, filed an "appeal" with the Board of **Zoning** Adjustment. After a hearing the Board reversed the **Zoning** Administrator's ruling, finding that petitioner did not meet the requirements of a **private club** under District regulations for R-4 **zoning**. We concur.

Section 3104.39 of the **Zoning** Regulations provides that an R-4 district may include, as a matter of right, a "**Private Club**, lodge, fraternity house, sorority house, or dormitory, except when such use is a service customarily carried on as a business." Petitioner asserts that since it is organized for "charitable, educational and scientific purposes" it fits within the provisions of an R-4 district and asserts the B.Z.A. has adopted an unduly restrictive interpretation which must be reversed on appeal. We do not agree. We view petitioner's efforts to meet the R-4 criteria by calling itself a **private club** as little more than a device {359 A.2d 155} designed to circumvent the requirements of the **Zoning** Regulations.

The Board found that the Legislative Study **Club** is a nonprofit organization for the benefit of the public in general but not a **private club** for the social benefit of its members. There is ample evidence to support the decision of the Board. In its findings of fact and conclusions of law it said:

The **Zoning** Commission has in the regulations defined both a "**Private Club**" and a "Non-profit Organization", and a review of the progression of permitted uses in the regulations indicates that a "**Private Club**" is a more restrictive use than a "Non-profit Organization" since they are first permitted in the R-4 and SP Districts respectively. The Commission would not have done so had they not intended a distinction. In our opinion the Legislative Study **Club** is a nonprofit organization for the benefit of the public in general and not a **private club** for the social benefit of its members. The Board arrived at this conclusion after examining the evidence and interpreting the definitions in its regulations regarding a **private club** and a nonprofit organization. Its interpretation is binding on this court unless it is plainly erroneous or inconsistent with the regulation. *Dietrich v. District of Columbia Board of Zoning Adjustment*, D.C.App., 320 A.2d 282, 286 (1974); *Taylor v. District of Columbia Board of Zoning Adjustment*, D.C.App., 308 A.2d 230, 232 (1973). Here there is a reasonable basis for the Board's interpretation and it will not be disturbed.

A **private club** is defined in § 1202 of the **Zoning** Regulations as "*a building or portion thereof used by an association organized for the promotion of a common social objective and not for profit, where facilities are limited to its members and their guests. . . .*" A nonprofit organization, on the other hand, is defined as "an organization organized and operated exclusively for religious, charitable, literary, scientific, community, or educational purposes . . . provided no part of its net income inures to the benefit of any **private** shareholder or individual." Both are nonprofit types of organizations, but there the similarity ends. In comparing the two definitions, it is readily apparent that "**private club**" was intended to cover personal, social matters, while "nonprofit organization" was aimed at non-personal, service-type activities. The Board said in its memorandum decision that the petitioner

pursuant to its corporate purposes, operates as a clearing house for class groups by studying specific pieces of legislation and disseminating information to those groups regarding issues such

as consumer affairs and public information. The Board reasons that the activities of the Legislative Study **Club** are vocational in nature as opposed to avocational activities connoted by the term common social objectives.

Groups falling within the definition of nonprofit organizations are not permitted in R-4 **zoning** districts. They are listed in the **Zoning** Regulations under SP (Special Purposes) districts for conversions of buildings (*see* D.C. **Zoning** Regs. § 4101.35) and are not permitted in any residential district. To hold that an organization such as petitioner may, by the mere affixing of the word "**club**" to its name, change its status from that of a nonprofit "vocational" organization to that of a social **club**, so as to qualify for an occupancy permit in an R-4 district, would make a mockery of the **Zoning** Regulations and would destroy the careful distinctions drawn by the **Zoning** Commission. We hold that the Board ruled properly that the **Zoning** Administrator had erred in finding petitioner qualified as a **club** for occupancy in an R-4 **zoning** district.

Petitioner also alleges certain procedural errors on the part of the Board. It asserts first that the intervenors failed to carry {359 A.2d 156} their burden of proof in the proceedings before the Board. We have read the transcript of the hearing and have examined the evidence submitted and conclude that, contrary to what petitioner contends, the intervenors did indeed meet their burden. The evidence included a certified copy of petitioner's articles of incorporation; a letter from the president of the "**Club**" advising that much of the space at the premises was to be used for offices; extracts from the Congressional Record showing that a lobbying organization (Congress Watch) had listed its address as that of the "Club's"; and testimony by Mr. Monaco as to the nature of the operations of the "**Club**". In addition, there was testimony from a witness who had visited the premises on invitation of members of the "**Club**", and discovered that the building was being used for "an office". He testified the **private club** status appeared to be a subterfuge to get around the **Zoning** Regulations. The foregoing evidence was ample to establish a prima facie case for intervenors.

Petitioner also asserts that the Board unlawfully denied it access to the Board's previous decisions construing the **Zoning** Regulations, in violation of D.C. Code 1973, § 1-1504 and Commissioner's Order No. 71-370 (Nov. 2, 1971) [*see* 18 D.C.Reg. 289 (Nov. 15, 1971)]. The request by petitioner for such records was made on March 25, 1974, when it filed its motion for reconsideration and reargument which was over 3 months after the Board's hearing was concluded. Petitioner specifically asked the Board for "a list, or preferably copies of all Board and **Zoning** Commission decisions over the past 15 years dealing with questions of what constitutes a '**private club**' and a 'non-profit organization' within the meaning of the **zoning** regulations." It asserted that the Code and the Commissioner's Order required the furnishing of this material. 1

Decisions of the Board, as well as minutes of its executive sessions, are public records and are available to the public at the Board office. Reproductions may be obtained at a nominal fee. Unfortunately no index has been maintained of these documents. What petitioner seeks is to compel the Board to compile such an index. As beneficial as that result might be, there is no requirement in any statute or order compelling the indexing of the Board's decisions. We are unable to find any law or rule, nor are we referred to any, that would require the Board to cull out of its records relevant decisions in order to provide petitioner with a list of cases, should there be any, concerning the definition of "**private club**" or "nonprofit organization."

Petitioner cites us to the recent Supreme Court case of *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 44 L. Ed. 2d 29, 95 S. Ct. 1504 (1975), noting that the Court in that case specifically required the N.L.R.B. to prepare an index of its "final opinions." What petitioner ignores in its analysis of the case is that the Court did this pursuant to a specific statutory provision. The Court relied upon 5 U.S.C. § 552(a)(2) (1970), which provides *inter alia* that "[each] agency . . . shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967" This section of the United States Code is not applicable to the Board since § 551(1)(D) specifically exempts from its provisions "the

government of the District of Columbia." Nor is there any similar provision in either D.C. Code 1973, § 1-1504 or Commissioner's Order No. 71-370. Contrary to petitioner's assertion, the D.C. Code provision and the Commissioner's Order do not "closely parallel" the federal statute at all, especially in the area of keeping an index. There is no statute applicable to District **zoning** records {359 A.2d 157} which compels the keeping of an index. 2 Petitioner's argument that the absence of an index somehow renders the Board's decision void for lack of "fundamental" procedural due process is specious.

Finding no error in the proceedings before the Board of **Zoning** Adjustment, the order appealed from is

Affirmed.

Footnotes

1

In addition, petitioner also requested the decisions pursuant to another Commissioner's Order -- No. 68-211 (Mar. 19, 1968). However, this order was expressly repealed by Commissioner's Order No. 71-370 and is thus not relevant here.

2

We note that on May 4, 1976, the Mayor promulgated Mayor's Order 76-109 [*see* 22 D.C.Reg. 6351 (May 14, 1976)] repealing Commissioner's Order No. 71-370 and establishing new procedures for obtaining official information from governmental agencies. It requires that the requested documents must be identified with such reasonable specificity as "will enable an agency employee to locate the records" *See* § 1(d). As in Commissioner's Order 71-370, there is no requirement compelling the making or keeping of an index.

**JAMES R. BIGGS AND PHYLLIS M. WILSON, APPELLANTS, v. HARVEY LEE STEWART AND
DORIS LEOLA STEWART, APPELLEES**
District of Columbia Court of Appeals
361 A.2d 159; 1976 D.C. App. LEXIS 311
No. 8677
October 8, 1975, Argued
June 28, 1976, Decided

Editorial Information: Prior History

Exhibit C

**ASSOCIATION FOR PRESERVATION OF 1700 BLOCK OF N STREET, N.W. AND VICINITY, ET AL,
PETITIONERS, v. DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT;
YOUNG MEN'S CHRISTIAN ASSOCIATION OF METROPOLITAN WASHINGTON, D.C.,
INTERVENOR**

**District of Columbia Court of Appeals
384 A.2d 668;1978 D.C. App. LEXIS 444
No. 12202**

**January 25, 1978, Argued
March 29, 1978, Decided**

Editorial Information: Prior History

Petition for Review of a Decision of the District of Columbia Board of Zoning Adjustment

Disposition: Affirmed.

Counsel

Nicholas A. Addams, for petitioners.

S. Perry Jones, Assistant Corporation Counsel, for respondent.

Richard W. Barton, Deputy Corporation Counsel, also entered an appearance for respondent.
Respondent adopted the brief of the intervenor.

Norman M. Glasgow, with whom Whayne S. Quin and Iverson O.
Mitchell, III, were on the brief, for intervenor.

Judges: Newman, Chief Judge, and Gallagher and Mack, Associate Judges.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner association sought review of a decision of respondent District of Columbia Board of Zoning Adjustment (board), which denied the appeal of the association and upheld the decision of the zoning administrator that the proposed building of the Young Men's Christian Association (YMCA) was a private club within the meaning of D.C. Zoning Regulation, art. 12, § 1202. The YMCA was found to be a private club because it was used for common avocational purposes, was a non-profit corporation, and the goods and services were sold primarily to members and their guests.

OVERVIEW: The association filed with the board an appeal from the zoning administrator's private club determination of the YMCA building. The board concluded that the YMCA satisfied all the requirements of the private club definition found in Zoning Regulation, art. 12, § 1202. On appeal, the court affirmed. The court found ample evidence to support the board's finding that the YMCA was organized for common a vocational purpose. The YMCA sought to offer a wide range of educational and recreational facilities in order to attract members who share a vocational purpose of achieving better mental and physical health. The conclusion that the YMCA was a nonprofit corporation and registered with the IRS flowed rationally from the findings, which were supported by substantial evidence. Although goods and services were sold on the premises to nonmembers, the zoning administrator found that only a very small percentage of income was derived from nonmembers. Such income was considered to be incidental usage. Evidence showed that nonmember use of the health and physical education facilities accounted for less than one percent of income.

OUTCOME: The court affirmed the decision of the board, which denied the appeal of the association, and

upheld the decision of the zoning administrator that the proposed building of the YMCA was a private club.

LexisNexis Headnotes

Real Property Law > Zoning & Land Use > General Overview

Real Property Law > Zoning & Land Use > General Overview

Real Property Law > Zoning & Land Use > General Overview

Real Property Law > Zoning & Land Use > General Overview

D.C. Zoning Regulation, art. 12, § 1202 defines a private club as building and facilities or premises used or operated by an organization or association for some common avocational purpose such as, but not limited to, a fraternal, social, educational or recreational purpose, provided that the organization or association is a non-profit corporation and registered with the U.S. Internal Revenue Service, that goods, services, food and beverages are sold on the premises only to members and their guests, and that office space activities are limited to that necessary and customarily incidental to maintaining the membership and financial records of the organization.

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Review

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Review

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Review

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Environmental Law > Litigation & Administrative Proceedings > Judicial Review

Governments > Courts > Authority to Adjudicate

Real Property Law > Zoning & Land Use > Judicial Review

Real Property Law > Zoning & Land Use > Ordinances

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Review

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Environmental Law > Litigation & Administrative Proceedings > Judicial Review

Governments > Courts > Authority to Adjudicate

Real Property Law > Zoning & Land Use > General Overview

Real Property Law > Zoning & Land Use > Judicial Review

Real Property Law > Zoning & Land Use > Ordinances

In reviewing an administrative order, the court's duty is to determine whether the findings are supported by substantial evidence in the whole record and whether the conclusions flow rationally from those findings. If the administrative agency's decision to uphold the zoning administrator's determination is supported by substantial evidence, then the court must affirm its action even though the court might have reached another result, for it is not the function or authority of the reviewing court to superimpose its opinion upon the legitimate action of an administrative agency. The court must also show great deference to the administrative construction and interpretation of the regulations the agency enforces. Unless the administrative agency's interpretation is clearly erroneous or inconsistent with the regulations, we must defer to its decision on the meaning of a private club.

Opinion

Opinion by:

GALLAGHER

Opinion

{384 A.2d 669} This is a petition for review of an order of the District of Columbia Board of **Zoning** {384 A.2d 670} Adjustment (BZA). 1 The order denied the appeal of petitioners and upheld the decision of the **Zoning** Administrator that the proposed building of the Young Men's Christian Association of Metropolitan Washington (Metro YMCA) is a **private club** within the meaning of D.C. **Zoning** Regulation, art. 12, § 1202. 2 Petitioners raise one principal issue for our review: whether the BZA erred in upholding the **Zoning** Administrator's determination that the Metro YMCA facility is a **private club** within the applicable definition. 3

The site of this proposed Metro YMCA facility is at 1701 Rhode Island Avenue, N.W., which is located in a Special Purpose (SP) district. 4 On October 1, 1975, the **Zoning** Administrator's office issued a memorandum to the BZA stating that the then "proposed YMCA Functions Building (**private club**)" required the BZA's approval of the special exception to erect roof structures and for a variance from the parking requirements. Petitioners (the Association) intervened to contest the granting of both the exception and the variance and also attempted to dispute the **Zoning** Administrator's determination that the Metro YMCA is a **private club**. The BZA granted the Metro YMCA's application for the special exception and the variance, and concluded that the **private club** issue was not properly before it. Meanwhile, petitioners filed with the BZA an appeal from the **Zoning** Administrator's **private club** determination.

On May 3, 1976 the BZA decided the appeal adversely to petitioners, but did not issue its final order until a year later. The BZA concluded that: (1) the Association had not presented persuasive evidence to support its position; and (2) the Metro YMCA satisfied all the requirements of the **private club** definition found in **Zoning** Regulation, art. 12, § 1202. That definition reads as follows:

Building and facilities or premises used or operated by an organization or association for some common avocational purpose such as, but not limited to, a fraternal, social, educational or recreational purpose, provided that the organization or association is a non-profit corporation and registered with the U.S. Internal Revenue Service, that goods, services, food and beverages are sold on the premises only to members and their guests, and that office space activities are limited to that necessary and customarily incidental to maintaining the membership and financial records of the organization. The Association has petitioned us to review the conclusion of the BZA, claiming that the conclusion is not only erroneous, but also supported by inadequate findings.

In reviewing this order our duty is to determine whether the findings are supported by substantial evidence in the whole record and whether the conclusions flow rationally from those findings. *Wick v. District of Columbia Board of Zoning Adjustment*, D.C.App., 383 A.2d 7 (1978, slip op. at 5); *Dietrich v. District of Columbia Board of Zoning Adjustment*, D.C.App., 320 A.2d 282, 285 (1974). If the BZA's decision to uphold {384 A.2d 671} the **Zoning** Administrator's determination is supported by substantial evidence, then "we must affirm its action even though we might have reached another result, for it is not the function or authority of the reviewing court to superimpose its opinion upon the legitimate action of an administrative agency." *Coakley v. Police and Firemen's Retirement and Relief Board*, D.C.App., 370 A.2d 1345, 1347-48 (1977). This court must also show great deference to the administrative construction and interpretation of the regulations the agency enforces. *Coakley, supra* at 1348-49; *Barber v. District of Columbia Department of Human Resources*, D.C.App., 361 A.2d 194, 198 (1976); *see also Udall v. Tallman*, 380 U.S. 1, 16, 13 L. Ed. 2d 616, 85 S. Ct. 792 (1965). Unless the BZA's interpretation is clearly erroneous or inconsistent with the regulations, we must defer to its decision on the meaning of a **private club**. *See Taylor v. District of Columbia Board of Zoning Adjustment*, D.C.App., 308 A.2d 230, 232 (1973); *see also Udall v. Tallman, supra* at 16-17; *Barber, supra* at 198.

Petitioners specifically attack the BZA's decision with respect to four essential elements of the definition of a private club. We turn now to our evaluation of the evidence in light of each of those elements.

First, petitioners dispute the BZA's finding that the Metro YMCA is "organized and operated for common avocational purposes, including educational and recreational." The Association argues that the Metro YMCA's activities are vocational in nature, for the benefit of the public in general and not a private club for the social benefit of its members. It relies principally on this court's discussion on the meaning of a private club in *Legislative Study Club, Inc. v. District of Columbia Board of Zoning Adjustmen*, D.C.App., 359 A.2d 153 (1976) and on the Gladstone Report in evidence. 5

In *Legislative Study Club, supra*, we were presented with the issue of whether the BZA had erroneously concluded that the alleged club was not a private club under the prior definition found in former *Zoning* Regulation, § 1202. We upheld the BZA's determination that the petitioner was a nonprofit organization and not a private club. *Id.* at 155. Our decision and discussion in that case is of limited value here since we construed in very general terms the former definition (§ 1202), which was more narrowly written. It provided, in pertinent part, that a private club is "a building or portion thereof used by an association for the promotion of a common social objective and not for profit, where facilities are limited to its members and guests" We said that a "private club" was intended to cover personal, social matters, while a "nonprofit organization" was aimed at non-personal, service-type activities. *Legislative Study Club, supra* at 155. The BZA found the activities of that "club" to be vocational as opposed to avocational because it "[operated] as a clearing house for class groups by studying specific pieces of legislation and disseminating information to those groups regarding issues such as consumer affairs and public information." *Id.* We think the activities of the Metro YMCA are substantially different in nature from those found to be vocational in *Legislative Study Club*.

The word vocation is defined as "[one's] calling or business . . . [the] activity on which one spends [the] major portion of his time and out of which he makes his living." 6 Avocation is defined in opposite terms as meaning "[a] calling away, a diversion, suggesting [the] idea of smaller affairs of life, or occasional employments as distinguished from one's ordinary or principal occupation." 7 There is ample evidence to support the BZA's finding that the Metro YMCA is organized and operated for educational and recreational purposes, among other common *avocational* objectives. Metro YMCA's Charter says the organization is designed to promote "religious, {384 A.2d 672} moral, educational, and benevolent purposes" That charter provision was at least a partial basis for the *Zoning* Administrator's decision that the "common avocational purpose of the club is to improve the spiritual and mental, social and physical conditions of men and women." His decision was also based upon evidence of courses given by the Metro YMCA which he considered spiritual.

There is a schedule of activities for members and nonmembers which details: (1) the percentage of time particular facilities are available; (2) the percentage of square feet of space for each particular program; (3) the percentage of income derivable from each program; (4) the purpose of each program; and (5) whether membership is required for each program. This schedule divides Metro YMCA's activities into three principal categories. First is the health and physical education program which is designed to achieve good physical and mental health in youth and adults. Second, the youth outreach and development program is aimed at changing the conditions that foster delinquency and crime. Third, the international and inter-cultural program's purpose is to work for international understanding and world peace. The first program, health and physical education, appears to be the foremost function for members with its facilities available one hundred percent of the time, seventy-nine percent of the space being dedicated to that use, and providing eighty-one percent of the income to Metro YMCA.

Against this evidence, petitioners argue only that the responses of YMCA members to a survey

contained in the Gladstone Report indicate no common avocational purposes. Those responses generally showed that convenience of location, availability of facilities, and favorable rates were the primary reasons for membership for those surveyed. The fallacy of this is that no one is apt to join a club solely on account of convenience or for favorable rates, unless the club offers to fulfill some particular need or desire of that individual -- whether that is eating, exercise, amusements, or any other avocational purpose. Convenience and favorable rates may then be decisive factors in an individual's choice of a particular club. The availability of facilities is a response which cuts against petitioners' argument, since the Metro YMCA seeks to offer a wide range of educational and recreational facilities in order to attract members who share the avocational purpose of achieving better mental and physical health. None of these responses tend to indicate any vocational purposes for membership. Consequently, in light of the evidence supporting the BZA's finding on the existence of common avocational purposes, we see no merit to the contention.

The Association next attacks, as unsupported, the BZA's findings that the Metro YMCA is a nonprofit corporation even though so registered with the Internal Revenue Service (IRS). The Zoning Regulation, art. 12, § 1202 requires that a private club be "a non-profit corporation and registered with the U.S. Internal Revenue Service" Petitioners do not dispute that Metro YMCA is registered with the IRS as a nonprofit corporation. However, they construe the conjunctive "and" contained in the regulation as imposing two separate requirements. This first requirement -- that the Metro YMCA be a nonprofit corporation -- petitioners argue, is not met by evidence of the YMCA's status in the eyes of the IRS. They assert that the Metro YMCA is not nonprofit because its health and recreational facilities will produce a profit. Even if we were to assume that their reading of the conjunctive "and" is correct, their argument would stand or fall on proving the Metro YMCA will make a profit. The sole evidence to support this contention is found in the Gladstone Report which indicates that the new facility will offer its athletic facilities at rates that are expected to be lower than at other available facilities. That evidence does not directly support petitioners' contention that the Metro YMCA's athletic facilities will make a profit, much less that the Metro YMCA as a whole will make a profit.

In contrast to the absence of affirmative evidence adduced by petitioners to [384 A.2d 673] show the profitable nature of the Metro YMCA, the evidence to support the BZA's conclusion to the contrary is both strong and uncontroverted. The YMCA was chartered by an act of Congress as a nonprofit corporation. (Act of June 28, 1864, 13 Stat., L.411.) It is registered with the IRS as a tax-exempt organization under I.R.C. § 501(c)(7). It is exempt from the D.C. Sales Tax. Furthermore, there was testimony that the YMCA lost \$100,000 in its operation at the old G Street location in 1975. The conclusion that the YMCA is a nonprofit corporation and registered with the IRS flows rationally from the findings, which are supported by substantial evidence.

The third element to be considered is the requirement that "goods, services, food, and beverages are sold on the premises only to members and their guests, . . ." Zoning Regulation, art. 12, § 1202. Construed strictly, the Metro YMCA would not satisfy this element of the definition, because the Metro YMCA admits that some of its services are available to persons not members and not guests. A brief glance at the schedule of activities offered by the YMCA shows that many programs, if not all, are open to members and to nonmembers, who must pay a higher fee due to their nonmembership. Furthermore, petitioners point out that Metro YMCA will serve as a training center for staff members of the youth outreach program and as a counseling service for foreign-born residents in the Washington Metropolitan area.

The BZA found that

[goods], services, food, and beverages are sold on the premises only to members and their guests. The fact that the YMCA proposes to make some of its facilities available for the betterment and welfare of the general public of the Metropolitan area as well as for its members, does not alter its principal use. The YMCA activities available are such to maintain the membership. The Zoning Administrator testified that the Zoning Regulations express no intent to

prohibit any and all subordinate or occasional uses, even if outside the scope of the principal use. He referred to **Zoning** Regulation, art. 41, § 4101.52, which provides that "any other *accessory use* and *accessory building*, customarily incidental to the uses otherwise authorized by this section [are permissible]." He also testified that prior to making his determination, he examined a submission of the Metro YMCA that indicated a very small percentage of its income was derived from nonmembers. 8 The **Zoning** Administrator stated that even if the Metro YMCA derived as much as twenty percent of its income from nonmembers, he would consider that to be incidental usage under **Zoning** Regulation, art. 41, § 4101.52.

Petitioners argue that what the **Zoning** Administrator and the Metro YMCA consider accessory uses are actually the predominant uses of the facility. The Association introduced no evidence which supports its contention. Rather, it relied exclusively on its unsupported assertion that the YMCA is a commercial health facility and on the fact that the YMCA offers certain services to nonmembers.

There is no evidence to show the percentage of use of the facility by nonmembers, but there is evidence to show the percentage of income derivable from their use. As previously indicated, documentary evidence shows that membership use of the health and physical education facilities generate eighty-one percent of the YMCA's total income, and that nonmember usage of the same facilities accounts for less than one percent of income. No other income comes from nonmembers, according to the schedule of activities. Except for the youth outreach and development program, which generates six percent of total income -- all from members -- the funding for all the other programs for members and nonmembers comes from grants and YMCA partner memberships. The **Zoning** Administrator (384 A.2d 674) testified concerning a YMCA submission which similarly indicated a very low percentage of income derivable from nonmembers. On this record, we cannot say that the BZA's finding was without substantial support, nor can we say its conclusion that the Metro YMCA satisfied this part of the definition of *private club* is unreasonable or clearly erroneous. 9

We consider the BZA's conclusion that the YMCA is a *private club*, as defined, is neither unreasonable nor clearly erroneous.

The decision of the BZA is

Affirmed.

Footnotes

1

The order was issued in BZA Case No. 12139.

2

These same parties were before a different panel of this court in a petition for review of BZA Order No. 12045, in which the BZA granted to the Metro YMCA a variance from certain parking requirements and a special exception to erect certain roof structures. The decision in that case is reported in a subsequent opinion issued today. *Ass'n for Preservation of 1700 Block of N Street, N.W. v. BZA*, D.C.App., 384 A.2d 674 (1978). It was necessary to decide here whether the YMCA facility is a *private club* before reaching the parking restriction issue presented in No. 10903.

3

Petitioners also complain that, though requested to do so, the BZA declined to incorporate the prior record and file of Metro YMCA Application No. 12045. Petitioners contend this was a procedural error and resulted in a longer hearing as additional witnesses were required. We find no substance to this contention.

4

Private clubs are permitted as of right in an SP district. Zoning Regs., art. 41, §§ 4101.3, 4101.31; art. 31, §§ 3105.3-.31, 3104.3, 3104.39. Petitioners were attempting to prove that the YMCA facility is not a private club so that the YMCA would not be able to construct and operate the facility there as a matter of right.

5

What is here referred to as the Gladstone Report is a marketing study prepared for the Metro YMCA by Gladstone Associates.

6

BLACK'S LAW DICTIONARY (4th ed. 1957).

7

Id.

8

There was evidence in the record indicating that less than one percent of all income to the YMCA comes from nonmembers.

9

Petitioners also argue that the Metro YMCA failed to satisfy the requirement that the office space and activities are not "limited to that necessary and customarily incidental to maintaining the membership and financial records of the organization." Zoning Reg., art. 12, § 1202. They argue that any records pertaining to nonmember activities kept at the Metro YMCA would violate that requirement. As we have indicated, some incidental, accessory uses by nonmembers are permissible. Keeping records of those nonmember activities is a reasonable, necessary, and incidental use accessory to the keeping of records on membership activities.

Herbert SPRINGER, Appellant, v. UNITED STATES, Appellee; Reginald TURNER, Appellant, v. UNITED STATES, Appellee
District of Columbia Court of Appeals
388 A.2d 846; 1978 D.C. App. LEXIS 534
Nos. 11958, 12240
January 24, 1978, Argued
June 6, 1978, Decided

Counsel

Howard J. Schulman, Baltimore, Maryland, of the bar of the State of Maryland, pro hac vice, by special leave of court, with whom James E. Crawford and Nelson Deckelbaum, Washington, District of Columbia, were on the brief, for appellant Springer.

Patrick J. Christmas, Washington, District of Columbia, for appellant Turner.

J

Exhibit D

**BYLAWS
OF
NORTH AMERICAN REGION
OF THE
AIRPORTS COUNCIL INTERNATIONAL**

**Includes changes approved by the ACI-NA Membership at its business meeting in
Boston, Massachusetts on September 24, 2008**

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therefrom and operates on its own shall pay dues according to Article 25.

Article 27 - Dues Payment Date, Postponement and Delinquency

For U.S. Members and Associate Members, all dues and assessments shall be due and payable in U.S. dollars on January 1 of each year to ACI-NA Headquarters, unless otherwise approved by the Executive Committee. Canadian Member dues and assessments may be made due and payable in Canadian dollars to the CAC/ACI-NA office. The Board shall have the power to postpone the payment of dues of any Member, notwithstanding anything to the contrary herein. Any regular dues, or other assessments authorized herein not paid by a Member within six months from the date they become due shall be considered delinquent and interest at one and one-half percent per month thereafter shall be payable by such Member until paid or waived by the Board at the recommendation of the Executive Committee. All other amounts owed to the ACI-NA by a Member or others shall become due when billed and delinquent ninety days from the first of the month following the month billed and thereafter interest of one and one-half percent per month shall then be payable until the amount owed is paid.

Article 28 – Operation of Private Club for Social Benefit of ACI-NA Members

ACI-NA shall provide private club privileges set forth below to its dues-paying Members, Associate Members and ACI-NA World Business Partners. Such privileges shall be provided on a scheduled basis, subject to physical limitations on the ability of the facility to accommodate those seeking access. For those Members, Associate Members and ACI-NA World Business Partners that support ACI-NA through special monetary assessments to the legislative or policy funds, or through contributions to the ACI-NA PAC, (hereinafter referred to as “Premium Members”) access to the private club privileges shall be provided at no additional cost to such members. Other ACI-NA Members, Associate Members and ACI-NA World Business Partners and their invited guests may share in such privileges at established fee levels, which may be revised from time to time. The

privileges shall be provided from a privately owned location separate and apart from ACI-NA's primary business offices, and shall include:

a. Educational/Technical Privileges:

ACI-NA may provide educational and technical privileges for its Members, Associate Members and ACI-NA World Business Partners so that they are provided access to educational materials such as books, transportation trade publications, and software, computer and associated technical support equipment, to facilitate the education of others on air transportation and other issues.

b. Networking Privileges:

ACI-NA may provide networking privileges so that Members, Associate Members and ACI-NA World Business Partners may have access to telephones, conference facilities, kitchen and dining facilities, and social and recreational accommodations for the enjoyment and exploration of common areas of interest of its Members, Associate Members and ACI-NA World Business Partners.

c. Boarding Privileges:

ACI-NA may provide boarding privileges to its Members, Associate Members and ACI-NA World Business Partners so that they may obtain boarding accommodations, including private bathroom facilities and access to catered meals or kitchen facilities for self-prepared meals, during short-term stays in the city in which ACI-NA's privately owned location is maintained.

d. Administrative Privileges:

ACI-NA may provide administrative privileges to its Members, so that they may have access to administrative support during short-term periods for the conducting of personal and business needs.

e. Guest Privileges:

ACI-NA may extend the afore-mentioned privileges, listed as subparts a through d, above, to guests who are invited to accompany Members, Associate Members and ACI-NA World Business Partners to such privately owned location, subject to ACI-NA's criteria for the scheduling of the use of such facility, and physical limitations on the ability of the facility to accommodate such guests.

PART VI - BYLAW AMENDMENTS

These Bylaws may be amended at any annual ACI-NA Meeting or by correspondence vote if a simple majority of the votes cast are in favor of the proposed amendment. When amendments to these Bylaws are voted upon by correspondence, each Member shall have thirty days within which to return the ballot, provided that no ACI-NA Meeting is held during that time. The proposed amendment shall be deemed to have been rejected unless ballots are received from fifty percent of Members eligible to vote. The President shall announce by mail, fax, e-mail, or other electronic means, the results of the correspondence vote.

PART VII - GENERAL PROVISIONS

Whenever appearing herein, the singular shall include the plural and the masculine shall include the feminine and the word Chairman, chairman or chairmen wherever used herein may be substituted by the word Chairperson, chairperson, or chairpersons.

Those powers not expressly delegated in these Bylaws shall be reserved to the Membership.

PART VIII - POLICY WITH RESPECT TO ASSOCIATE MEMBERS AND WORLD BUSINESS PARTNERS

It is the Council policy that the procurement process of each Member will not

Exhibit E

320.3 The following uses shall be permitted as a matter of right in an R-3 District:

- (a) Any use permitted in an R-2 District under § 300.3; and
- (b) Row dwelling.

History of Regulations since Last Compilation (February 2003):
None

Section 321. Accessory Uses and Buildings (R-3).

321.1 The following accessory uses or accessory buildings incidental to the uses permitted in § 320.3 shall be permitted in R-3 Districts:

- (a) Any accessory use or accessory building permitted in R-1 Districts under §§ 202 and 204; and
- (b) Other accessory uses, buildings, or structures customarily incidental to the uses permitted in R-3 Districts under this chapter.

History of Regulations since Last Compilation (February 2003):
None

Section 322. Special Exceptions: General (R-3).

322.1 Any use or structure permitted in R-2 Districts under §§ 302.1 and 303 through 306 shall be permitted as a special exception in an R-3 District if approved by the Board of Zoning Adjustment under § 3104.

322.2 A college or university use permitted in R-2 Districts under § 302.2 shall be permitted as a special exception in an R-3 District if approved by the Zoning Commission under § 3104.

History of Regulations since Last Compilation (February 2003):
None

Sections 323—329. Reserved.

Section 330. R-4. Districts: General Provisions.

330.1 The R-4 District is designed to include those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of the dwellings into dwellings for two (2) or more families.

330.2 Very little vacant land shall be included within the R-4 District, since its primary purpose shall be the stabilization of remaining one-family dwellings.

330.3 The R-4 District shall not be an apartment house district as contemplated under the General Residence (R-5) Districts, since the conversion of existing structures shall be controlled by a minimum lot area per family requirement.

330.4 Except as provided in chapters 20 through 25 of this title, in an R-4 District, no building or premises shall be used and no building shall be erected or altered that is arranged, intended, or designed to be used except for one (1) or more of the uses listed in §§ 330 through 349.

330.5 The following uses shall be permitted as a matter of right in an R-4 District:

- (a) Any use permitted in R-3 Districts under § 320.3;
- (b) Flat;

(c) The conversion of a building or other structure existing before May 12, 1958, to an apartment house as limited by 401.3 and 403.2

(d) Child/elderly development center or adult day treatment facility; provided, that the center shall be limited to no more than sixteen (16) individuals;

(e) Child/Elderly development center located in a building that was built as a church and that has been used continuously as a church since it was built; provided, that all of the play space required for the center by the licensing regulations shall be located on the same lot on which the center is located;

(f) Hospital, sanitarium, or clinic for humans;

(g) Private club, lodge, fraternity house, sorority house, or dormitory, except when the use is a service customarily carried on as a business;

(h) Museum; and

(i) Community-based residential facility; provided that, notwithstanding any provision in this title to the contrary, the Zoning Administrator has determined that such community-based residential facility, that otherwise complies with the zoning requirements of this title that are of general and uniform applicability to all matter-of-right uses in an R-4 District, is intended to be operated as housing for persons with handicaps. For purposes of this subsection, a "handicap" means, with respect to a person, a physical or mental impairment which substantially limits one or more of such person's major life activities, or a record of having, or being regarded as having, such an impairment, but such item does not include current, illegal use of, or addiction to, a controlled substance.

330.6 A rooming or boarding house shall be permitted as a matter of right in an R-4 District provided:

(a) Accommodations are not provided to transient guests who stay ninety (90) days or less at the premises;

(b) No sign is displayed on the premises;

(c) No advertisement is displayed or published on or off the premises holding out the establishment to be a hotel, motel, inn, hostel, bed and breakfast, private club, tourist home, guest house, or other transient accommodation;

(d) Cooking facilities are not provided in any individual unit; and

(e) In a rooming house, no central dining or food preparation area is provided for guests.

History of Regulations since Last Compilation (February 2003):
September 14, 2007 330.5 amended at 54 DCR 8965 by the Zoning Commission
December 22, 2006 330.5 amended at 53 DCR 10085 by the Zoning Commission

Exhibit F

202/955-1610

AIRPORTS COUNCIL INTERNATIONAL
1776 K STREET, N.W. SUITE 500
WASHINGTON, DC 20008

SUNTRUST BANK
86-270650

015605 15605

App# 4168

PAY ***ONE THOUSAND SIXTY-TWO AND XX / 100**

DATE 09/14/09

CHECK AMOUNT *****1,062.00*

TO THE ORDER OF DC Treasurer

TWO SIGNATURES REQUIRED FOR AMOUNTS OVER \$5,000

Deborah C. McElroy

AUTHORIZED SIGNATURE

SECURITY FEATURES INCLUDED. DETAILS ON BACK.

⑈015605⑈ ⑈055002707⑈ 054102589⑈

Ms. Miller

FOR DEPOSIT ONLY
DC TREASURER
*****7438
Batch: 5418 09/16/09 Tran: 14
301C1140 \$1,062.00
Check ID: QFT25

US 15605
DATE 09/14/09
DIN 95051841

Posted : 09/18/2009
Bank : 00000001
R/T : 005500270
Account : 54102589
Check : 15605
Amount : 1062.00
DIN : 95051841

Permit Fee Payment
ON 9/14/09

District of Columbia

MAYOR FENTY

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Fireworks Sales Permit and License
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Photo Gallery
Proposed 2508 DC Construction Code Publications
Rooming Houses
Service Hours
Outdoor Advertising Signs
Used Car Lots and Enforcement Photo Gallery

ONLINE SERVICE REQUESTS

Building Plan Review Status

Project Information

- Application ID: B0906887
- Date filed: 6/26/2009
- Address: 136 D ST SE
- Agent: Michelle Miller, (703) 946-9512

Application Status

Please see the table below for review statuses. The table is not shown if the reviews have not been identified. A blank Status date means that the initial review has not been completed.

Discipline	Review Status	Status Date
CFA Review	CFA Review Approved	6/26/2009
Electrical Review	Electrical Review Approved	6/26/2009
File Room	Ready for Issuance	9/16/2009
Fire Review	Fire Review Approved	9/15/2009
HPRB Review	HPRB Review Approved	6/26/2009
Mechanical and Plumbing Review	Mechanical Review Approved	6/26/2009
Structural Review	Structural Review Approved	9/11/2009
Zoning Review	Zoning Review Approved	9/15/2009
Issue Permit	Permit Issued	9/16/2009

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ONLINE SERVICE
REQUESTS

Building Plan Review Status

Project Information

- **Application ID:** B0906887
- **Date filed:** 6/26/2009
- **Address:** 136 D ST SE
- **Agent:** Michelle Miller, (703) 946-9512

Review Status and Comments

Please see the table below for the status of this review and any comments.

Discipline	Review Status	Status Date
Fire Review	Fire Review Approved . Approved based on Responding Letter and resubmitted application and drawings, which clearly states this building will be fully sprinkled.	9/15/2009

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ONLINE SERVICE REQUESTS

Building Plan Review Status

Project Information

- **Application ID:** B0906887
- **Date filed:** 6/26/2009
- **Address:** 136 D ST SE
- **Agent:** Michelle Miller, (703) 946-9512

Review Status and Comments

Please see the table below for the status of this review and any comments.

Discipline	Review Status	Status Date
Structural Review	Structural Review Approved . CONVERT 2ND AND THIRD FLOOR APARTMENTS TO A PRIVATE CLUB AND BASEMENT APARTMENT	9/11/2009

If you have questions about a particular building application, please contact the Permits Division at: (202) 442-4589.

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ONLINE SERVICE
REQUESTS

Building Plan Review Status

Project Information

- **Application ID:** B0906887
- **Date filed:** 6/26/2009
- **Address:** 136 D ST SE
- **Agent:** Michelle Miller, (703) 946-9512

Review Status and Comments

Please see the table below for the status of this review and any comments.

Discipline	Review Status	Status Date
Zoning Review	Zoning Review Approved . App for conversion of basement apt to private club. 2 parking spaces provided per attached plat.	9/15/2009

If you have questions about a particular building application, please contact the Permits Division at: (202) 442-4589.

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Exhibit G



ANC 6B

Capitol Hill / Southeast

703 D Street SE
Washington, DC 20003
202.543.3344
FAX 202.543.3507

OFFICERS

Chairperson
David Garrison

Vice Chairperson
Ken Jarboe

Secretary
Kirsten Oldenburg

Treasurer
Carol Green

Parliamentarian
Neil Glick

COMMISSIONERS

SMD 1 *David Garrison*
SMD 2 *Mary Wright*
SMD 3 *Norman Metzger*
SMD 4 *Kirsten Oldenburg*
SMD 5 *Kenan Jarboe*
SMD 6 *Will Hill*
SMD 7 *Carol Green*
SMD 8 *Neil Glick*
SMD 9 *Michael Patterson*
SMD 10 *Francis Campbell*
SMD 11 *Vacant*

March 15, 2010

Marc C Loud, Chairman
DC Board of Zoning Adjustment
441-4th Street, NW
Washington DC 20001

Dear Mr. Chairman:

On February 23, 2010, at its regular monthly meeting, properly noticed and with a quorum present, Advisory Neighborhood Commission 6B voted unanimously (9-0) to appeal the decision of the Zoning Administrator to grant a construction permit to the Airports Council International (ACI) to renovate the property at 136 D Street SE as a "private club". As a result, ANC 6B requests that the BZA withdraw the permit on the grounds that the Zoning Administrator incorrectly approved the request.

On December 8, 2009, ANC 6B was informed that construction was underway at 136 D Street SE. The Commission was alerted through an email from Michael Wilson, the homeowner of the abutting property at 138 D Street SE. Mr. Wilson advised the Commission that he had contacted DCRA and was informed that the permit was issued on the grounds that the Zoning Administrator had decided that the proposed use of the property qualified as an of-right "private club". Mr. Wilson reported further that the permit had not been posted when it was issued in September 2009 and instead was posted in early January 2010, well after construction started.

After researching the issue, ANC 6B scheduled the matter for consideration at its regular February meeting (originally scheduled for February 9 but postponed to February 23 due to the snow emergency). At our February meeting, the ACI representatives explained that ACI purchased the property in May 2008 for the purpose of creating a place where ACI members could stay overnight while in town on ACI business and thus avoid having to pay for expensive hotel lodging. The property was selected because of its ready access to Congress, and to the FAA headquarters building on Independence Avenue, the two primary locations where meetings are held that AGI members attend while in the city. In June of 2009, AGI requested a construction permit from DCRA, arguing that its proposed use of the property was as a "private club", a permitted use under the DC Zoning Code.

Among the uses that are permitted as a matter of right in an R-4 District are the following:

“Private club, lodge, fraternity house, sorority house, or dormitory, except when the use is a service customarily carried on as a business.” (11 DCMR Section 330.5(i))

Further, at Section 199.1, the DC Code define the term “private club” as follows:

“a building and facilities or premises used or operated by an organization or association for some common avocational purpose such as, but not limited to, a fraternal, social, educational, or recreational purpose; provided that the organization or association shall be a non-profit corporation and registered with the U.S. Internal Revenue Service; goods, services, food, and beverages shall be sold on the premises only to members and their guests; and office space and activities shall be limited to that necessary and customarily incidental to maintaining the membership and financial records of the organization.”

ANC 6B notes that the purchase and use of residential properties by for-profit and non-profit organizations for business purposes in the blocks adjacent to the House and Senate Office buildings has long been a problem. Notwithstanding periodic discussions with the Office of Zoning Administrator about this problem over the years by both ANC 6B Commissioners and representatives of the Capitol Hill Restoration Society, the city has declined to take action to block inappropriate uses of these properties in residential areas.

In this regard, the case of 136 D Street SE is particularly troubling because of the Zoning Administrator’s approval of the request to treat the proposed use as fitting the definition of a “private club”. ANC 6B’s discussion with the representatives from ACI convinced the Commission that the actual use intended for this property is as lodging for the Council’s members – in other words, as a hotel. The proposed use is thus “vocational” rather than “avocational” and thus does not meet the requirements of the code provision cited above.

ANC 6B is concerned that if the ruling of the Zoning Administrator is not reversed, a new loophole of considerable size will have been opened up that could encourage other applications for “private clubs” in our neighborhood. For these reasons, ANC 6B seeks to appeal the decision of the Zoning Administrator and request that the Board of Zoning Appeals withdraw the permit.

Sincerely,



David F. Garrison
Commissioner, ANC 6B01
Chair, ANC 6B

CC: Airports Council International
Michael Wilson



**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**



APPEAL

Before completing this form, please review the instructions on the reverse side.
Print or type all information unless otherwise indicated.

Pursuant to Section (a) §3100 and §3101 of the Zoning Regulations of the District of Columbia, an appeal is hereby taken

from the administrative decision of:

Matthew Le Grant, Zoning Administrator

made on

April 24, 2009

, to the effect that

136 D Street, SE does meet the definition set forth

in DCMR 199.1 to be classified as a private club.

Address(es) of Affected Premises	Square(s)	Lot(s)	Zoning Districts
136 D Street, SE	0733	0041	DAP/R-4

Present use of Property: Private home

Proposed use of Property: Private club

Owner of Property:

Brett McAllister

Telephone No.:

202-861-8083

Address of Owner:

1775 K Street, NW; Washington, DC 20006

Name, address and telephone number of lessee:

Name, address and telephone number of appellant, if other than owner:

Advisory Neighborhood Commission -6B

703 D Street, SE; Washington, DC 20003; Phone: 202-543-3344

State specifically manner in which appellant is aggrieved by the administrative decision, the allegations of error in the administrative decision, and the relevant sections of the Zoning Regulations (see reverse for more detailed explanation).

Please use a separate piece of 8 1/2" x 11" to respond and attach it to the Form 125 Appeal.

I/We certify that the above information is true and correct to the best of my/our knowledge, information and belief. Any person(s) using a fictitious name or address and/or knowingly making any false statement on this application/petition is in violation of D.C. Law and subject to a fine of not more than \$1,000 or 180 days imprisonment or both.
(D.C. Official Code § 22-2405)

Date:

March 17, 2010

Signature:

* If appeal is filed by agent of the Appellant, Form 125 Appeal shall be accompanied by a letter signed by the appellant authorizing the agent to act on his behalf in this appeal.

To be notified of hearing and decision (Appellant or Authorized Agent*):

Name:

David Garrison

Address:

703 D Street, SE; Washington, DC 20003

Phone No.:

202-543-3344

Fax No.:

202-543-3507

E-Mail:

david6b01@anc6b.org

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

Department of Consumer and Regulatory Affairs

Permit Operations Division
941 North Capitol Street NE Room 2100
Washington DC 20002
Tel. (202) 442 - 4559 Fax (202) 442 - 4862
TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442 9557

B

BUILDING PERMIT

THIS PERMIT MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS OF WORK
UNTIL WORK IS COMPLETED AND APPROVED

Issue Date: 09/16/2009

PERMIT NO. B0906887

Expiration Date: 09/16/2010

Address of Project: 136 D ST SE		Zone: CAP/R-4	Ward: 6	Square: 0733	Suffix:	Lot: 0041
Description Of Work: INTERIOR ALTERATIONS AND REPAIRS FOR EXISTING BASEMENT APARTMENT. FOR USE AS A PRIVATE CLUB.						
Permission is Hereby Granted To: Airports Council International		Owner Address: 136 D ST SE WASHINGTON, DC 20003-1810		PERMIT FEE: \$1,095.00		
Permit Type: Alteration and Repair	Existing Use:		Proposed Use:		Plans: Yes	
Agent Name: Michelle Miller	Agent Address: 2529 Herrell Court Falls Church, VA 22043	Existing Dwell Units:	Proposed Dwell Units:	No. of Stories:	Floor(s) Involved:	
Conditions/ Restrictions: Interior work only. Does not include approval for replacement of exterior windows, doors, or other exterior features. This Permit Expires if no Construction is Started Within 1 Year or if the Inspection is Over 1 Year. All Construction Done According To The Current Building Codes And Zoning Regulations: As a condition precedent to the issuance of this permit, the owner agrees to conform with all conditions set forth herein, and to perform the work authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all work authorized by this permit and to require any change in construction which may be necessary to ensure compliance with the permit and with all the applicable regulations of the District of Columbia. Work authorized under this Permit must start within one(1) year of the date appearing on this permit or the permit is automatically void. If work is started, any application for partial refund must be made within six months of the date appearing on this permit.						
Director: Linda K. Argo		Permit Clerk Lucretia Hackney				
TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL CALL THE DC INSPECTOR GENERAL AT 1-800-521-1839 FOR CONSTRUCTION INSPECTION INQUIRIES CALL (202) 442-9557 TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557.						

Exhibit H

NRC - Capitol Hill Club in S 733 Lot

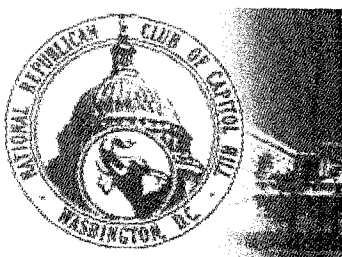
47

5/21/2010



NRC/ Capitol Hill Martin Sq 133 - 5/21/2010
Lot
47





Home	Club Info	Login
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[Club Info](#) > [About the Club](#)

History

The Capitol Hill Club has a rich heritage. The concept of a national social club for Republicans began as the dream of the late New Jersey Congressman, James C. Auchincloss, in 1950.

Auchincloss and a group of 100 founding members from 22 states formed the nucleus of what has become the nation's premier political club.

Beginning with the purchase of historic Capitol Hill property where the Library of Congress Madison Building stands today, the group opened the first clubhouse in 1951.

Eleven years later, the Club moved to more spacious headquarters, and in 1972 built its present home, just one block from the U.S. Capitol.

From its inception, members of the Capitol Hill Club have included the nation's most influential people – Presidents and Vice Presidents, GOP Members of Congress, Governors, state party leaders and influential Republicans everywhere. We invite you to be among them.

Our Clubhouse

The impressive five-level clubhouse evokes a spirit of American pride. In the lobby, portraits of distinguished Republicans – past and present – reflect the history and tradition that define the Capitol Hill Club.

Adjacent to the lobby is the richly appointed Eisenhower Lounge. Featuring portraits of its namesake couple and many Republican leaders, the Eisenhower Lounge is a prestigious location for Congressional receptions, parties and other important events.

The stately second floor Presidential Dining Room offers splendid cuisine prepared by our renowned chefs. This room is a favorite place for Senators, Representatives and their guests to dine and discuss the day's political agenda. The dining room is open for lunch and dinner and is a superb venue for your most memorable weekend events.

On our lower level, members enjoy the informal atmosphere of the Auchincloss Grill for breakfast, lunch, afternoon drinks and dinner. Always a popular spot, the Grill is especially busy after a late-night session of Congress.

Named after the Club's earlier address on C Street, the 75 Room feels like your own living room, with its sofas and nooks. The room offers wireless internet service to members for additional convenience.

The third and fourth levels include a variety of dining and meeting rooms appropriate for all types of business and social occasions. The newly renovated fourth floor suites are an elegant setting for all events, whether a lunch meeting or evening reception. Groups from 10 to 400 can be accommodated with ease. High speed internet access is available in all our rooms.

The third floor Bolton Room with its graceful furnishings is the perfect setting for distinctive banquets and receptions.

Banquets, parties and receptions are the Capitol Hill Club's specialty. Our professional Catering Managers work closely with you to ensure the complete success of each event. Please look for more information regarding events under the Meetings and Events heading.

Exhibit I

5/21/2010

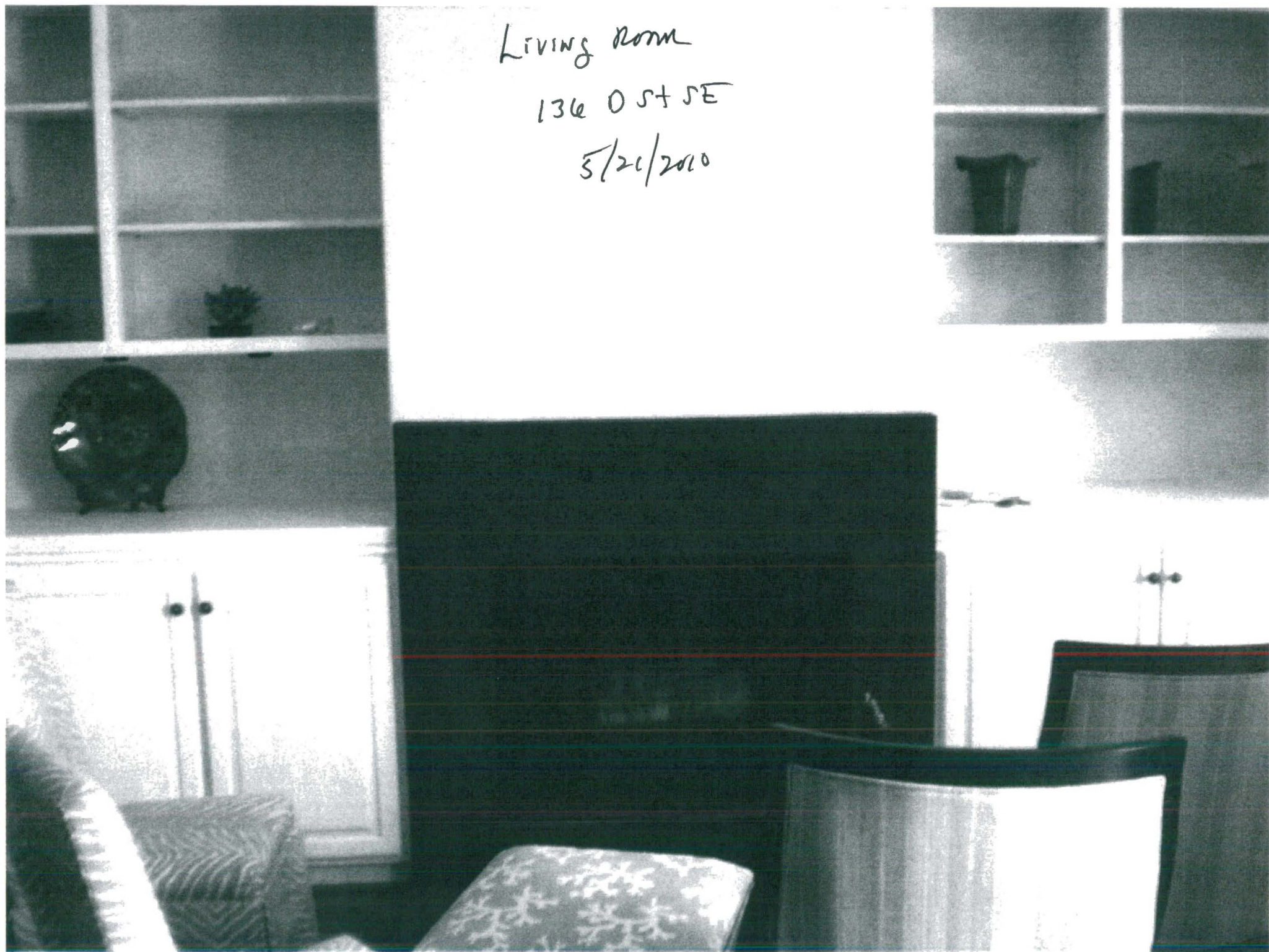
Subject
Property @
136 D St SE



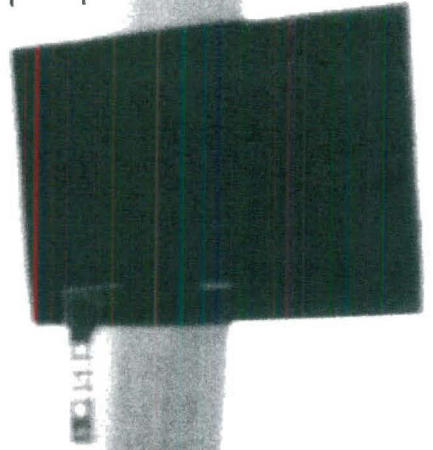
LIVING ROOM

136 05+5E

5/20/2010



Living Room
136 D St SE
5/21/2020



Living Room
136 D St SE
5/26/2010



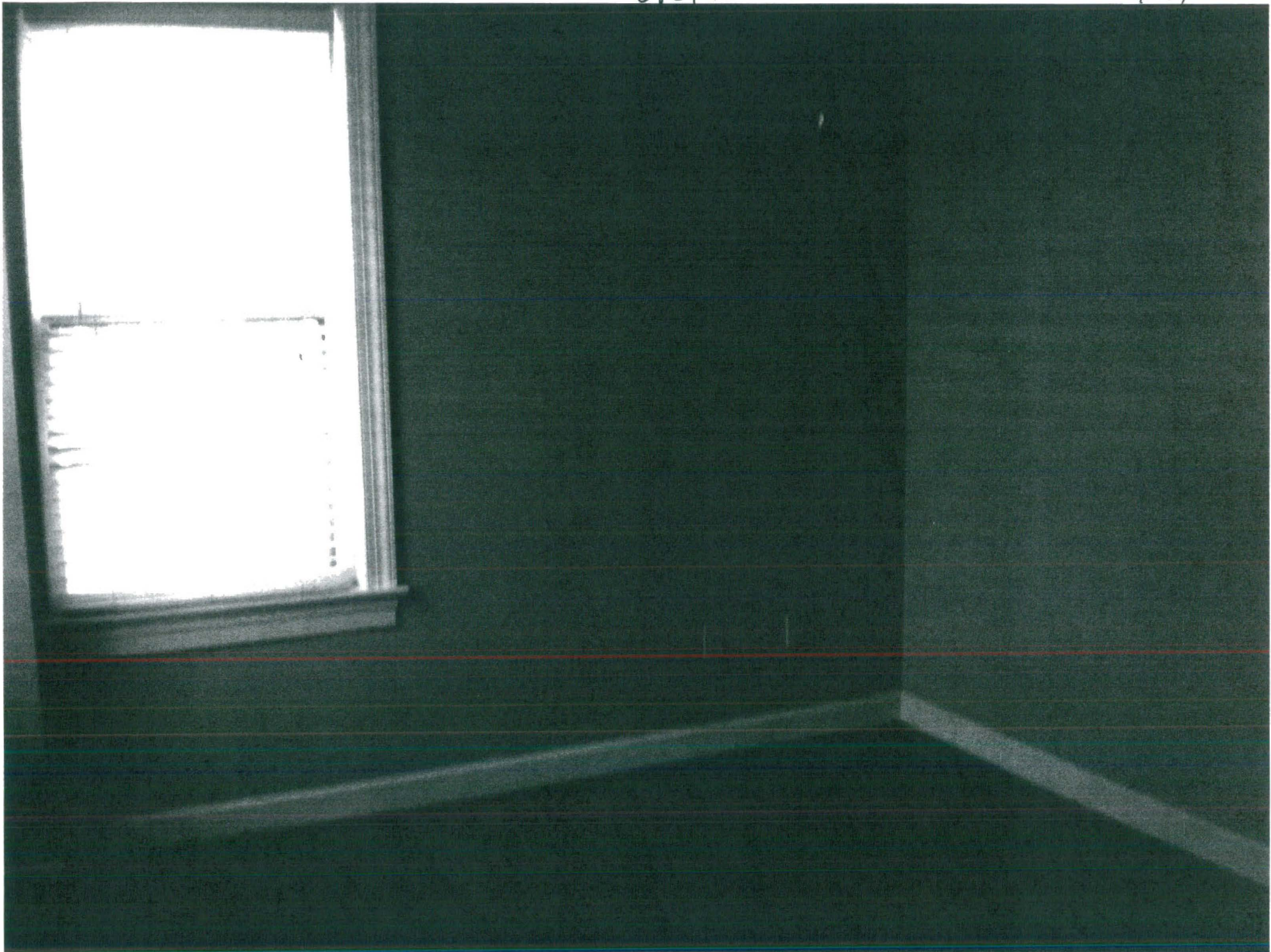
KITCHEN AREA - 136 DJS+JE - 5/26/2010



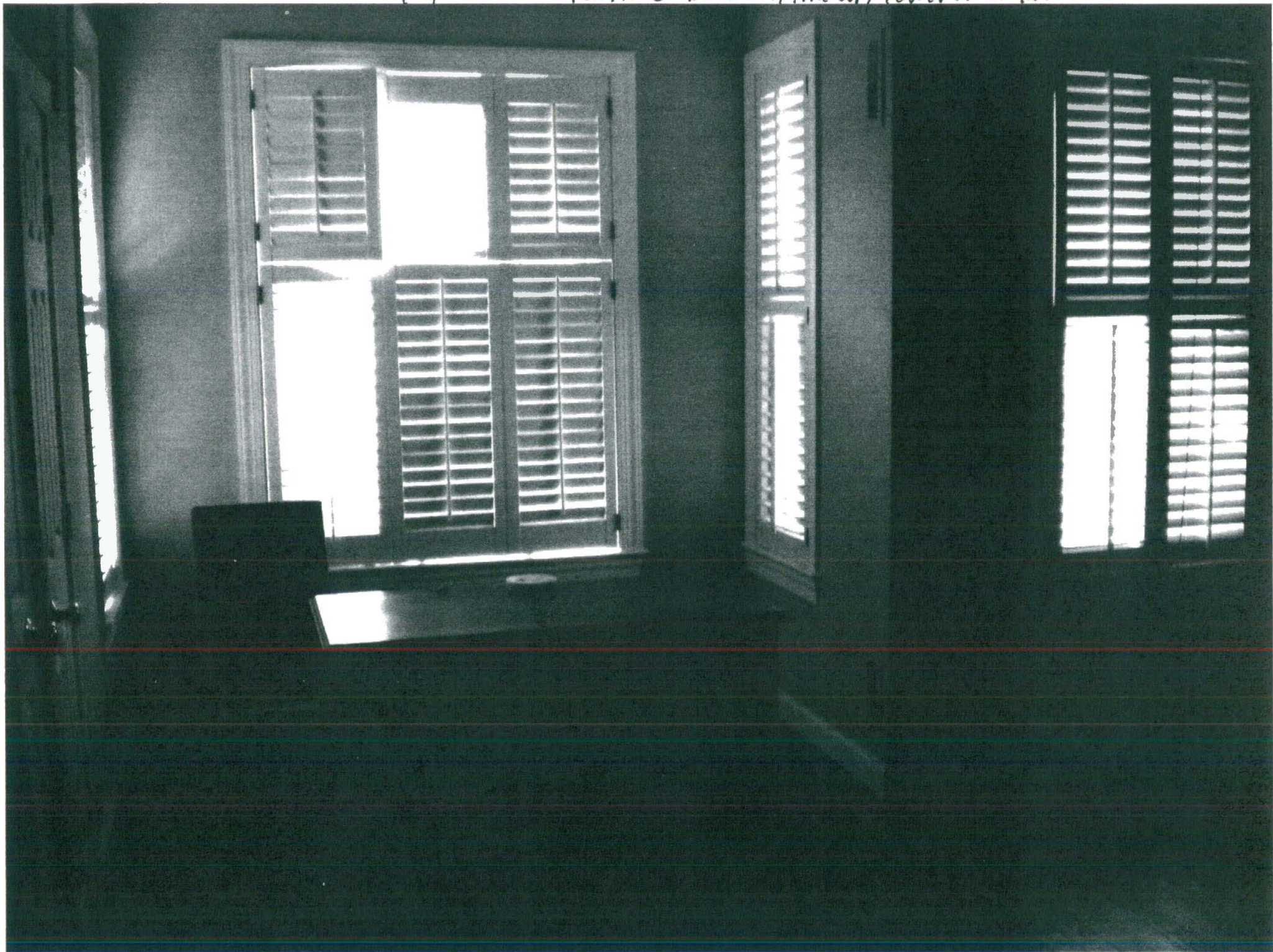
REAR YARD - 136 DUST JET - 5/21/2010



UPSTAIRS Bedroom - 136 D JSE - 6/21/2000



5/20/2010 UPSTAIRS Bedroom/FAX-COPY/COMPUTER Room- 136 - D5T5E





REAR ENTRANCE
5/21/2010
1310 D ST SE



ENGLISH BASEMENT
5/21/2010
136 D54 SE IN
REAR OF
PROPERTY

Exhibit J

Garage, private – a building or other structure, or part of a building or structure, not exceeding nine hundred square feet (900 ft.²) in area, used for the parking of one (1) or more motor vehicles and having no repair or service facilities.

Garage, public storage – a building or other structure, or part of a building or structure, in which any repair, greasing, washing, or similar services are incidental to its primary use for the parking of motor vehicles.

Garage, repair – a building or other structure, or part of a building or structure, with facilities for the repair of motor vehicles, including body and fender repair, painting, rebuilding, reconditioning, upholstering, equipping, or other motor vehicle maintenance or repair.

Gasoline service station – an area of land, including any structures on the area, used for the retail sale of motor fuel and lubricants and incidental services such as lubrication and hand-washing of motor vehicles, and the sale, installation, or minor repair of tires, batteries, or other automobile accessories. The term gasoline service station shall not include an automobile laundry or a repair garage.

Glass, Clear and/or Low-Emissivity – glass with a visible light transmission rating of at least seventy percent (70%) and an outdoor visible light reflectance rating of no greater than seventeen percent (17%). (52 DCR 9713)

Gross floor area – the sum of the gross horizontal areas of the several floors of all buildings on the lot, measured from the exterior faces of exterior walls and from the center line of walls separating two (2) buildings.

The term “gross floor area” shall include basements, elevator shafts, and stairwells at each story; floor space used for mechanical equipment (with structural headroom of six feet, six inches (6 ft., 6 in.), or more); penthouses; attic space (whether or not a floor has actually been laid, providing structural headroom of six feet, six inches (6 ft., 6 in.), or more); interior balconies; and mezzanines.

The term “gross floor area” shall not include cellars and outside balconies that do not exceed a projection of six feet (6 ft.) beyond the exterior walls of the building. (Case 62-32, May 29, 1962)

Ground floor – the floor that is nearest in grade elevation to the adjacent surface of the public right-of-way. (48 DCR 9832)

Habitable room – an undivided enclosed space used for living, sleeping, or kitchen facilities. The term habitable room shall not include attics, cellars, corridors, hallways, laundries, serving or storage pantries, bathrooms, or similar space; neither shall it include mechanically ventilated interior kitchens less than one hundred square feet (100 ft.²) in area, nor kitchens in commercial establishments.

Historic district – an area, place, site, vicinity, or neighborhood designated as such by the Joint Committee on Landmarks of the National Capital for inclusion in the District of Columbia Inventory of Historic Sites. (25 DCR 2772)

Historic landmark – a building, structure, site, place, monument, work of art, or other similar object

designated as such by the Joint Committee on Landmarks of the National Capital for inclusion in the District of Columbia Inventory of Historic Sites. (25 DCR 2772)

Home sales party – a gathering that is held at a dwelling of any kind for the purpose of selling or distributing goods or services. (35 DCR 6916)

Hotel – a building or part of a building in which not less than thirty (30) habitable rooms or suites are reserved primarily for transient guests who rent the rooms or suites on a daily basis and where meals, prepared in a kitchen on the premises by the management or a concessionaire of the management, may be eaten in a dining room accommodating simultaneously not less than thirty (30) persons. The dining room shall be internally accessible from the lobby.

The term “hotel” shall not be interpreted to include an apartment house, rooming house, boarding house, tenement house, or private club. All areas within a hotel shall be included in one (1) of the following categories:

(a) Commercial adjuncts - retail and service establishments customarily incidental and subordinate to hotel use, such as restaurant, dining room, cocktail lounge, coffee shop, dry cleaning, laundry, pressing or tailoring establishment, florist shop, barber shop, beauty parlor, cigar or news stand, and other similar uses;

(b) Exhibit space - floor area within a hotel primarily designed for the display and storage of exhibits for conferences, trade fairs, and similar group events;

(c) Function room - a room within a hotel used primarily to accommodate gatherings of hotel guests and visitors, such as meetings, banquets, and other group events;

(d) Guestroom areas - floor area within a hotel devoted to guestrooms or suites, including individual bathrooms, entrance foyers, corridors, elevators, stairs, floor pantries, and other space directly supportive of guestrooms. The main lobby, front desk, and hotel administrative offices are also included in guestroom areas for purposes of prorating floor area between residential and nonresidential uses in applicable zones; and

(e) Service areas - floor area within a hotel devoted to mechanical services and storage supportive of the hotel as a total entity, including boiler room, mechanical platforms, electrical switchboard, workshops and maintenance areas, storage areas, employee facilities (locker rooms, canteen, and engineer's office), and similar uses. (36 DCR 7625)

Impervious surface – an area that impedes the percolation of water into the subsoil and impedes plant growth. Impervious surfaces include the footprints of principal and accessory buildings, footprints of patios, driveways, other paved areas, tennis courts, and swimming pools, and any path or walkway that is covered by impervious material. (39 DCR 1904)

Impervious surface coverage – the percentage of the land area of a lot that is covered by impervious surfaces, which percentage shall be determined by dividing the gross impervious surface area of a lot by the total area of the lot. (39 DCR 1904)

Exhibit K

1. Cosmos Club

<https://www.cosmosclub.org/>

The Cosmos Club focuses on science, literature, and the arts. There are approximately 12 bedrooms available for members and guest of members. The Club has a personal library for members use and provided many calendar events every month, including luncheons, table discussions, evening lectures, musical concerts, and bridge games.

There are several dining options available, breakfast, lunch, dinner, afternoon tea, and evening cocktails. There are also private rooms available for dinners, parties, weddings, and receptions.

2. Army and Navy Club

<http://www.armynavyclub.org/>

The Army-Navy Club is home to about 7,000 member, approximately 3,000 in the DC area. It provides 29 guest rooms and suites for members and friends. The Club is host to business luncheons, meetings, social gatherings, lectures, elegant dinners, black tie events, ladies luncheons and weddings.

The club has several dining options, including a main dining room, grill, and cocktail lounge. It also is equipped with a gym and private library with 20,000+ volumes.

Exhibit I

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17391 of Diana de Brito and Jonathan Gottlieb pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Building Permit Nos. B-472018, B-450009, B-451175, B-452735, and B-452577 for property located at 2620 Foxhall Road, NW (Lot 1031, Square 1397).

HEARING DATES: November 29, 2005 and January 10, 2006
DECISION DATE: January 10, 2006

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on June 24, 2005, challenging DCRA's decisions to approve five building permits that were issued over a period spanning between May, 2003 and April, 2005. The property owner to whom the permits were issued moved to dismiss the appeal and the Board scheduled a hearing on the motion. At the hearing, the Board heard from the property owner, from DCRA (who had joined in the motion to dismiss), and from the Appellant and the affected ANC. The Board found that the appeal of the first four permits had been untimely filed and that the appeal of the fifth permit (the fence permit) did not state a claim for a zoning review error. As a result, the Board granted the property owner's motion to dismiss. A full discussion of the facts and law that support this conclusion follows.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on November 29, 2005. In accordance with 11 DCMR §§3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 3D (the ANC in which the subject property is located), the property owner, and DCRA.

Parties

The Appellant in this case is Diana de Brito and her husband, Jonathan Gottlieb (Appellant). Ms. de Brito and Mr. Gottlieb reside at 4610 Dexter Street, NW, which abuts the subject property to the north (See, tab B appended to Exhibit 20). Ms. de Brito authorized her husband to act on her behalf during the appeal (Exhibit 2).

Eugene and Carol Ludwig, the owners of the subject property, were represented by the law firm of Holland & Knight. As the property owner, the Ludwigs are automatically a party under 11 DCMR § 3199.1 and will hereafter be referred to as the owner.

ANC 3D, as the affected ANC, was automatically a party in this appeal. In a resolution dated December 5, 2005 (Exhibit 25), the ANC voted to support a continuance of the Board hearing. In a later resolution dated January 9, 2006, the ANC voted to support the appeal. The resolution was issued after a regularly scheduled monthly meeting with a quorum present (Exhibit 30). Among other things, the ANC cited the “piecemeal manner” in which the permits were obtained and the project had been developed, and a “massing of structures” that is inconsistent with the character of the Wesley Heights Overlay. Alma Gates, the ANC representative who testified at the hearing, stated that even though the subject property is outside of the Overlay, it impacts on nearby properties that are within its boundaries.

DCRA appeared during the proceedings and was represented by Lisa Bell, Esq.

Motion to Dismiss and Continuance

The owner filed a motion to dismiss prior to the hearing scheduled on November 29, 2005 (Exhibit 20). On that date appellant requested a continuance so that he and the ANC could respond to the owner’s motion. Appellant also asked that the hearing be continued until such time as the Board issued its decision in Appeal No. 17285 (the “Economides case”), a case appellant claimed was “similar” to the present appeal. The owner and DCRA each argued against a lengthy continuance. They asserted that the Economides case had no bearing on this matter because it applied only to properties within the Wesley Heights Overlay, and the subject property was located outside of the Overlay. The Board declined to hold this matter in abeyance pending a final decision in the Economides case¹. However, it did continue the hearing to January 10, 2006, directing filings from Appellant and the ANC by December 20, 2005, and any replies by January 3, 2006. It also granted appellant’s request to amend his appeal.

¹ A final order was issued on or about March 24, 2006, see, Appeal No. 17285 of Patrick J. Carome.

FINDINGS OF FACT

The Property

1. The property is located at 2620 Foxhall Road, NW, Lot 1031, Square 1397, and is zoned R-1-A. It is a large property consisting of approximately 124,980 square feet, which the owner has developed as a single-family home with a pool, tennis courts and related structures (Exhibits 1, 3).

2. Although the property is located within the Wesley Heights area, it is not located within the boundaries of the Wesley Heights Overlay (WH Overlay) (Exhibit 20, Tab C, Exhibit 27).²

The Permits

3. DCRA issued four building permits within four months of each other in 2003 (the 2003 permits), as follows:

- (a) Building Permit No. B451175, dated May 9, 2003 for site work and grading for a future single family dwelling, a retaining wall and a tennis court;
- (b) Building Permit No. B452577, dated June 26, 2003, for the footing and foundation for the single-family dwelling;
- (c) Building Permit No. B452735, dated July 1, 2003, which revised permit B451175 to change the structural design of the tennis court according to submitted plans; and
- (d) Building Permit No. B4550009, dated September 15, 2003, for construction of a three-story wood frame house, a new driveway, retaining walls, and terraces. (See, Exhibits 3, 20, 27).

4. DCRA issued Building Permit No. B472018 (the fence permit) dated April 27, 2005, authorizing the construction of fences at the property. The fence permit allowed the following:

- (a) "NEW FENCE – 7 [feet] ENTIRELY ON OWNER'S LAND"
 - (b) "BLACK VINYL COATED C/L 7 [FEET] FENCE"
 - (c) "(NATURAL) WOOD PRIVACY FENCE"
 - (d) "WROUGHT IRON (BLACK) FENCE"
- (See, Exhibits 3, 20, and Attachment A to Exhibit 27).

² The Wesley Heights (WH) Overlay is a zoning overlay that was designed by the Zoning Commission to preserve and enhance the low density character of the Wesley Heights area, see, 11 DCMR §§1541-1543. Properties within the Overlay are subject to more stringent restrictions than the development standards of the underlying R-1 zone.

Communications Between the Parties

5. Appellant contacted the owner within a few weeks after purchasing his own property in January 2003. During that discussion and subsequent discussions, appellant asked about development plans and sought assurances that he would not be adversely affected by those plans (Exhibit 26, p. 3, 4).

6. Appellant also contacted the owner and his agents to “express objections” once construction began at the subject property (Exhibit 26). The record is unclear as to the exact time period or frequency of communications between appellant and the owner. However, the Board finds that, based upon appellant’s own statement, there were several communications regarding the development and appellant was “repeatedly assured” that his objections would be cured (Exhibit 26, p. 4, 5).

Construction

7. Construction of the new home was completed to the point where it was completely under roof no later than April, 2004 (Exhibit 20).

The Appeal

8. The appeal was filed on June 24, 2005, more than 17 months after the last of the 2003 permits was issued³, and exactly 60 days after the fence permit had been issued (Exhibit 1). The appeal was filed more than one year after the dwelling structure was under roof.

9. Appellant filed a “Statement in Support of Appeal” detailing the basis of his claims (Exhibit 3). Appellant alleges that the 2003 permits violate various provisions of the Zoning Regulations, including side yard requirements (§ 405), rear yard requirements (§ 404), and restrictions of the Wesley Heights Overlay (§ 1541). Appellant also alleges that the fence permit allowed the construction of fences in violation of the seven feet height limit within the Building Code (12 DCMR 3110) (Exhibit 3).

The Restated Appeal

10. On or about January 9, 2006, Appellant submitted an “Amended and Restated Statement in Support of [its] Appeal”(Exhibit 29). In his Amended Statement and during argument before the Board, Appellant cited additional violations of the Zoning Regulations, including § 2503.3. Section 2503.3 allows construction of a fence in a required open space, but only if it is “constructed in accordance with the D.C. Building Code” (Exhibit 29, p. 18). Appellant maintains that the fence permit issued

³ The appeal was filed more than two years after permit B-451175 was issued on May 9, 2003, and nearly two years after permits B-452577 and B-452735 were issued on June 26, 2003, and July 1, 2003, respectively.

by DCRA allowed fences which exceed the maximum height of seven feet under the Building Code.

11. Appellant submitted photographs of the subject property that were taken in January, 2006 (Exhibit 32). The photographs depict construction at the subject property, including various fences and “platform structures”. (See, Tabs G – Q, appended to Exhibit 32). Appellant maintains that the fences are more than seven feet tall and, in some instances, consist of a fence placed “on top of” a platform structure Exhibit 32, Tr. at 102).

12. Appellant maintains that he could not know the scope of work at the property at the time the permits were issued because he was “misled” by the owner and the construction was ongoing as of the date of the public hearing.

CONCLUSIONS OF LAW

Motion to Dismiss

The owner filed a motion to dismiss the appeal on grounds that: (1) the appeal was untimely filed as to the 2003 permits; (2) the Board lacks subject matter jurisdiction as to the appeal of the fence permit because it is a challenge under the Building Code, not the Zoning Regulations; and (3) the appeal of the fence permit is without a factual basis in the Zoning Regulations because there is no provision of the WH Overlay regulations that applies to the property.

DCRA joined in the owner’s motion and argues, in addition, that: (1) whether the fence permit violates height limits under the Building Code is not an issue of zoning review; and (2) with respect to the fence permit, appellant has failed to identify or state an error in the zoning review process, and relies solely on the actual fence height after construction (see, Exhibit 27).

The Administrative Decision Complained Of

Pursuant to the Zoning Act, the Board has jurisdiction to hear appeals alleging “error in any order, requirement, decision, determination, or refusal made by ... any [District] administrative officer or body in the carrying out or enforcement of” the Zoning Regulations. D.C. Official Code § 6-641.07(g)(1) (2001). Therefore, the threshold question is to identify the administrative decision (or decisions) being complained of. There is no dispute that the appeal stems from the issuance of the four permits issued in 2003 (the 2003 permits) and the fence permit that was issued in 2005. Accordingly, the appeal relates to the issuance of the five building permits.

Timeliness

The District of Columbia Court of Appeals has held that “[t]he timely filing of an appeal with the Board is mandatory and jurisdictional.” *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994).

The rules governing the timely filing of an appeal before the Board are set forth in 11 DCMR § 3112.2. Subsection 3112.2(a) provides that an appeal must be filed within sixty (60) days from the date the person filing the appeal had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever is earlier. Section 3112.2 (b) also applies with respect to approval of the house construction. That provision states that no appeal shall be filed later than 10 days after the structure or part thereof in question is under roof.⁴ However, § 3112.2(c) provides that notwithstanding § 3112.2(a) and (b), an appellant shall have a minimum of sixty (60) days from the date of the administrative decision complained of in which to file an appeal. Finally, § 3112.2(d) provides that the Board may extend the 60-day time limit only if the appellant demonstrates that: (1) there are exceptional circumstances that are outside the appellant’s control and could not have been reasonably anticipated that substantially impaired the appellant’s ability to file an appeal to the Board; and (2) the extension of time will not prejudice the parties to the appeal.

The Appeal of Each of the 2003 Permits was Untimely

With respect to each of the 2003 permits, this appeal was filed well after the 60-day time period had expired. It was filed more than 17 months after the permit issued in September, 2003, nearly two years after the permits issued in June, 2003 and July, 2003, and more than two years after the permit issued in May, 2003. It was also filed more than one year after the dwelling was under roof (see, Finding of Fact 8).

As will be explained below, the Board does not find there were exceptional circumstances beyond appellant’s control which impaired his ability to file a timely appeal. Moreover, any extension of time would certainly prejudice the owner. Therefore, even if the Board were persuaded that an extension was justified, the appellant cannot make the required showing under § 3112 (d).

By his own admission, Appellant objected to the development at the site for nearly two years before filing this appeal. There is no doubt appellant engaged in discussion with the owner and his agents during this time. The owner may not have

⁴ The subsection goes on to define “under roof” as “the stage of completion of a structure or part thereof when the main roof of the structure or part thereof, and the roofs of any structures on the main roof or part thereof, are in place”.

been entirely candid during these discussions, and appellant may very well have wished to avoid the difficulty and expense of prosecuting an appeal. However, even if the Board were to find that appellant was misled by the owner at some point, the scope of work at the property should have been obvious once the house was under roof during the spring of 2004. A party who chooses to engage in negotiations or other ways to resolve a dispute does not thereby extend its time for filing an appeal, see, *Waste Management v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117 (D.C. 2001)⁵; *Woodley Park Community Ass'n v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628 (D.C. 1985). The Board need "not countenance delay in taking an appeal when it is merely convenient for an appellant to defer in making that decision." *Waste Management, supra*.

Appellant argues that the five permits were obtained in piecemeal fashion, hindering his ability to access the scope of development until the fifth permit -- the fence permit -- was issued. Appellant claims that, in this respect, the facts are similar to those in the *Sisson* case, a timely appeal that was filed long after the issuance of the initial permit, *Sisson v. District of Columbia Board of Zoning Adjustment*, 805 A.2d 964 (D.C. 2002). The Board does not find the facts in this case to be similar to *Sisson*.

In *Sisson*, the Board found that the time for filing an appeal could not be measured from the issuance of the initial permit because observers were not fairly on notice at that time regarding the scope of the entire project. Specifically, the Board found that the appellant could not access potential zoning issues such as lot occupancy until the last of five permits had been issued. In this case, the claims of violation relate to the siting of improvements and the bulk and height of those improvements, all of which were apparent to the appellant early on (Findings of Fact 5-7).

The Fence Permit

The appeal of the fence permit was timely filed. As stated in the Findings of Fact, the appeal was filed on the 60th day after the fence permit was issued (Finding of Fact 8). Thus, the issuance of the fence permit is properly before this Board.

⁵ Appellant claims the *Waste Management* case is distinguishable from this matter because it involved the issuance of a certificate of occupancy rather than a building permit, and a challenge by a corporation rather than an individual homeowner. The Board disagrees with this reasoning.

Subject Matter Jurisdiction

The Board finds that it has subject matter jurisdiction to decide the appeal of the fence permit. The Zoning Act of 1938 provides that “[a]ppeals to the Board of Adjustment may be taken by any person aggrieved ... by any decision ... granting or refusing a building permit ... based in whole or in part upon any zoning regulation,” D.C. Official Code § 6-6-641.07 (f). As will be explained later, the relevant zoning regulation for the purposes of this appeal is 11 DCMR § 2503.3, which is an exception to the requirement of § 2503.1 “that every part of a yard required under this title shall be open and unobstructed to the sky from the ground up.” Subsection 2503.3 permits the construction of a fence in a required yard, if “constructed in accordance with the D.C. Building Code”. The parties all agree that the Building Code imposes a maximum fence height of 7 feet, which Appellant contends was allowed to be exceeded by DCRA.

That the Appellant was aggrieved by the grant of the fence permit is not contested. Because section 10 of the Zoning Act (D.C. Official Code § 6-641.09) prohibits the issuance of a building permit “unless the plans of and for the proposed ... construction... fully conform to the provisions of” the Zoning Regulations, and because the fence at issue was in a required yard, DCRA was obligated to determine whether the owner’s plans fully conformed to § 2503.3, including the incorporated height limitation. The issuance of the permit signified DCRA determination that it did. Since the Appellant alleged he was aggrieved by the grant of a building permit, the issuance of which was based in part on the Zoning Regulations, the Board had subject matter jurisdiction to hear his appeal.

Failure to State a Claim of Zoning Error

However, the Board agrees with DCRA that appellant has not sufficiently identified a claim of zoning error. As the property is not within the WH Overlay, appellant cannot rely on violations relating to the Overlay restrictions. The only possible claim of zoning error was that DCRA issued the fence permit in violation of § 2503.3.

Yet, Appellant does not claim that DCRA improperly issued the permit. He points to no faulty plans or improper calculations, nor does he allege that the permit authorized a fence greater than 7 feet in height. In fact, the fence permit expressly limits the fence height to seven feet (Attachment A to Exhibit 27). Instead, the Appellant focuses on the actual height of the fence, as built, and argues that it exceeds 7 feet (See, Findings of Fact 9-11). However, this fact, even if established, would not constitute an error in DCRA’s zoning review process. Because this is an appeal arising from the grant of a building permit, and no error with respect to that decision

is alleged, the motion to dismiss the appeal as it relates to the fence permit must be granted.

ANC

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21), as amended; D.C. Official Code § 1-9.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. ANC 3D voted to support the appeal, supporting the appellant's position regarding timeliness and inconsistencies with the WH Overlay. As stated in this Decision and Order, the appeal relating to the 2003 permits was untimely filed and the property is not located in the WH Overlay.

For reasons discussed above, the Board must grant the motion to dismiss the appeal as it relates to the 2003 permits. It is hereby **ORDERED** that the motion to dismiss the appeal is **GRANTED** based upon Appellant's having untimely filed it.

Vote taken on January 10, 2006

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and John G. Parsons in support of the motion)

For reasons discussed above, the Board must grant the motion to dismiss the appeal as it relates to the fence permit. It is hereby **ORDERED** that the motion to dismiss is **GRANTED** based upon Appellant's failure to sufficiently identify a zoning review error.

VOTE: 3-2-0 (Geoffrey H. Griffis, Curtis L. Etherly, Jr. and John A. Mann II in support of the motion; Ruthanne G. Miller and John G. Parsons in opposition to the motion)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: 

JERRILY R. KRESS, FAIA
Director, Office of Zoning 

OCT 02 2006

FINAL DATE OF ORDER: _____

BZA APPEAL NO. 17391
PAGE NO. 10

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPEAL NO. 17391

As Director of the Office of Zoning, I hereby certify and attest that on **OCTOBER 2, 2006**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Diana de Brito, Esq.
c/o Cadwalader
1201 F Street, N.W.
Washington, D.C. 20004

Jonathan Gottlieb
4610 Dexter Street, N.W.
Washington, D.C. 20007

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Paul Kiernan, Esq.
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Holland & Knight LLP
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Washington, D.C. 20006

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Office of the General Counsel
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Washington, D.C. 20002

Eugene & Carol Ludwig
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Washington, D.C. 20007

Chairperson
Advisory Neighborhood Commission 3D
P.O. Box 40846
Palisades Station
Washington, D.C. 20016

Single Member District Commissioner 3D01
Advisory Neighborhood Commission 3D
P.O. Box 40846
Palisades Station
Washington, D.C. 20016

Bill Crews
Zoning Administrator
Dept. of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capitol Street, N.E., Suite 2000
Washington, D.C. 20002

Councilmember Kathleen Patterson
Ward 3
1350 Pennsylvania Avenue, N.W., Suite 107
Washington, D.C. 20004

Ellen McCarthy, Director
Office of Planning
801 North Capitol Street, N.E., 4th Floor
Washington, D.C. 20002

Alan Bergstein
Office of the Attorney General
441 4th Street, N.W., 7th Floor
Washington, D.C. 20001

Jill Stern
General Counsel
941 North Capitol Street, N.E., Suite 9400
Washington, D.C. 20002

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning 

Exhibit M



July 3, 2003

Ms. Nancy Zimini
Airports Council International
1775 K Street, NW
Suite 500
Washington, DC 20006

Dear Nancy:

Enclosed is one fully executed original of the Lease Amendment between United Food and Commercial Workers International Union and Airports Council International, effective July 1, 2003.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Teresa M. Dumas, Director
Operational Support and Services Office

Enclosure

Douglas H. Dority, *International President*
Joseph T. Hansen, *International Secretary-Treasurer*



United Food & Commercial Workers International Union, AFL-CIO, CLC
1775 K Street, NW • Washington DC 20006-1598
Office (202) 223-3111 • Fax (202) 466-1562 • www.ufcw.org

LEASE AMENDMENT

This Lease Amendment is made and entered into as of the latter date set forth below between and among DOUGLAS H. DORITY, Trustee and President, JOSEPH T. HANSEN, Trustee and Secretary-Treasurer, SARAH PALMER AMOS, Trustee and Executive Vice President, ANTHONY M. PERRONE, Trustee and Executive Vice President, MICHAEL E. LEONARD, Trustee and Executive Vice President (collectively, "Landlord") and the AIRPORTS COUNCIL INTERNATIONAL - NORTH AMERICA ("Tenant").

Recital

The parties have agreed to extend the term of the Office Lease dated February 17, 1994 (the "Office Lease"), in accordance with the terms set forth below.

In consideration of their mutual agreements, the parties agree to amend the Office Lease as follows:

1. The term of the Office Lease is hereby extended for 9 years beginning July 1, 2003 (the new "Lease Commencement Date"), and ending June 30, 2012 (such 9 year period being referred to herein as the "Extended Term").
2. Tenant has the option to terminate this Office Lease effective at the end of the 7th year of the Extended Term (i.e., effective as of June 30, 2010) by providing Landlord with written notice no later than June 30, 2009, and no earlier than April 30, 2009, with time being of the essence. If Tenant exercises this option, Tenant shall pay to Landlord all unamortized costs of this amendment for all unamortized leasing commissions and all unamortized costs of all improvements referred to below incurred by Landlord in connection with this Amendment. Within 90 days of the completion of such improvements, Landlord shall provide Tenant with an itemization of the costs of the

improvements. Landlord shall return to Tenant the Security Deposit in accordance with applicable Lease terms.

3. The Minimum Monthly Base Rental for the Extended Term shall be:

First year:
Second year:
Third year:
Fourth year:
Fifth year:
Sixth year:
~~Seventh year~~
Eighth year:
Ninth year:

[REDACTED]

It is expressly understood and agreed that the annual escalations set forth in Section 6 of the Lease shall not be applicable during the Extended Term.

4. The parties agree for the purpose of calculating Tenant's share of increases in Real Estate Taxes and Operating costs the Base Year is defined in Section 5(b) to 2004.

5. Tenant shall have one 5-year option to renew the Office Lease at the then market rate for comparable space and buildings within the Central Business District in Washington, D.C. "Market rate" means the fair market rate per square foot of rentable area that would be agreed upon between a landlord and tenant entering into a new lease for comparable space as to location, size and configuration in a comparable building taking into consideration the applicable base year for passthroughs of Real Estate Taxes and Operating Costs. Tenant shall exercise this option by giving Landlord written notice no later than September 30, 2011. If the parties cannot agree by December 31, 2011, rent shall be determined as follows: within 10 days after failing to agree, each party will select one licensed broker with at least 5 years experience in the downtown Washington, D.C., office market, and within 10 days following their appointment, those two shall select a third

broker with the same qualifications. The amount the 3 brokers determine shall be final and binding. If the 3 brokers can not reach agreement within 10 days after the appointment of the third, Minimum Monthly Base Rent shall be the average of the amounts the 3 brokers determine. Each party shall pay the fees and expenses of the broker each selects, and split the fees and expenses of the third broker.

6. Landlord shall make improvements to the Demised Premises in accordance with a mutually agreed plan. Landlord shall provide an allowance up to \$~~XXXX~~ ^[REDACTED] per rentable square foot. Tenant shall submit to Landlord for prior approval, which approval shall not be unreasonably withheld, delayed or conditioned, all plans and specifications for any improvements. Landlord shall review and approve or reject such plans and specifications within 10 business days of Tenant's submission in Landlord's reasonable discretion. In order to ensure timely completion of the Improvements, Tenant agrees to make any changes to the plans and specifications promptly after execution of the Lease Amendment. All improvements shall be made by a Union general contractor and Union subcontractors Landlord approves in advance. Landlord shall competitively bid all work to no less than two qualified contractors as the case may be.

7. Such allowance will be used only for improvements to the Demised Premises including the following categories of costs: construction, including the cost of architectural, engineering, design, space planning, construction oversight fee (2% of hard costs), design and permit fees.

8. The parties acknowledge that with the payment of the allowances set forth in this Lease Amendment, the Landlord will have complied with all of its obligations to improve, repair and alter the Demised Premises, and that Tenant accepts the Demised Premises in an "as is" condition.

Notwithstanding the foregoing, Landlord shall continue to maintain and repair the Building and the Demised Premises as required by the Lease.

9. The parties agree that the Gersten Commercial Realty Group represents the Tenant in this transaction. The parties agree that the Landlord shall pay the Gersten Commercial Realty Group ("Broker") a commission under a separate agreement between Landlord and Broker. Tenant represents that no other broker has represented Tenant in this transaction and hereby indemnifies Landlord for any fees or commissions any broker other than Broker claims Landlord owes in connection with this transaction.

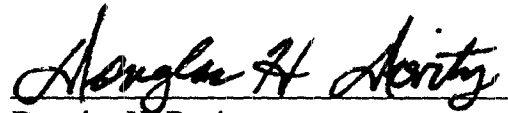
10. Section 29 of the Lease is hereby deleted.

11. Except as expressly modified hereby, the parties agree that all of the other terms and conditions of the Office Lease remain in full force in effect during the Extended Term.

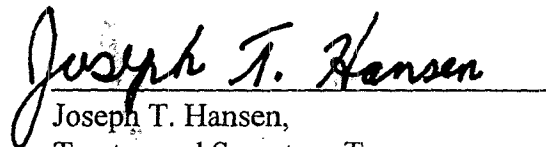
IN WITNESS WHEREOF, Landlord and Tenant have executed this Lease under seal on the day and year written below.

LANDLORD:

Date: June 30, 2003


Douglas H. Dority,
Trustee and President

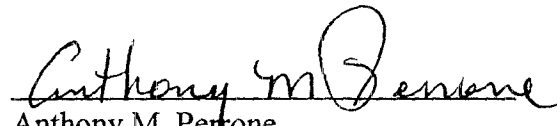
Date: June 30, 2003


Joseph T. Hansen,
Trustee and Secretary-Treasurer

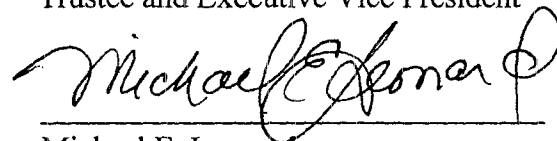
Date: June 30, 2003


Sarah Palmer Amos,
Trustee and Executive Vice President

Date: June 30, 2003


Anthony M. Perrone,
Trustee and Executive Vice President

Date: June 30, 2003


Michael E. Leonard,
Trustee and Executive Vice President

TENANT:

AIRPORTS COUNCIL INTERNATIONAL
NORTH AMERICA

Date: June 24, 2003

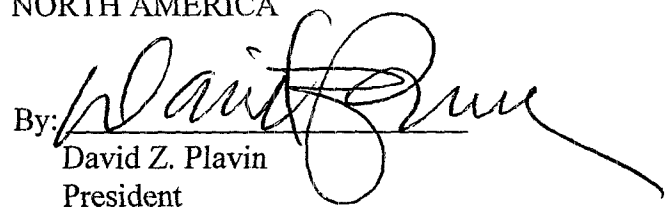
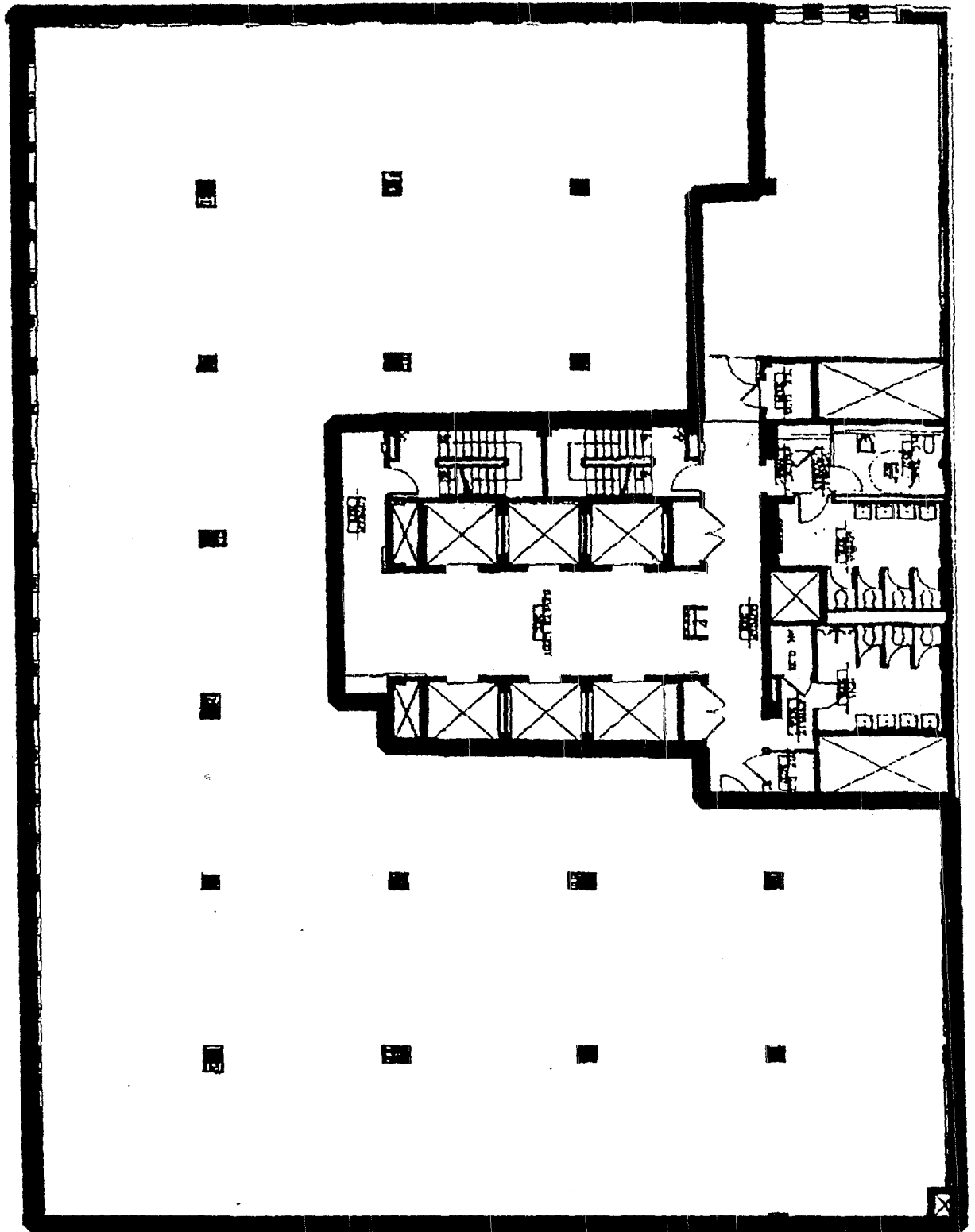
By: 
David Z. Plavin
President

EXHIBIT A

18th Street

K Street



5th Floor

*1775 K Street, N.W.
Washington, D.C. 20006*