

Mass Ave Heights Citizens Assoc
Amc

SETTLEMENT AGREEMENT

This Agreement made this _____ day of _____, 1972, by and between EMBASSY CORPORATION, a corporation organized under the laws of the District of Columbia and DR. CYRUS KATZEN, of Washington, D. C., as an individual, hereinafter called First Parties, and The MASSACHUSETTS AVENUE HEIGHTS CITIZENS ASSOCIATION, a District of Columbia non-profit corporation, BENJAMIN W. BOLEY, ESQ., of Washington, D. C., as an individual, and WILLIAM H. GREER, JR., Esquire, with offices in Washington, D.C., as attorney-in-fact and authorized representative for the individuals named as plaintiffs in H. Allen et al. v. Zoning Commission, Civil Action 1832-68, heretofore filed and decided in the United States District Court for the District of Columbia and affirmed on appeal by the United States Court of Appeals for the District of Columbia Circuit as reported in H. Allen et al. v. Zoning Commission, 449 F.2d, 1100, (CCA-DC, 1971), hereinafter called Second Parties.

W I T N E S S E T H:

WHEREAS, EMBASSY CORPORATION is the owner of the Wellington Apartment Hotel located at 2505 Wisconsin Avenue, N.W., Washington, D. C., which structure and appurtenances thereto is erected on Lot 45 in Square 1935 as shown in the land records of the Office of the Surveyor of the District of Columbia, said Lot 45 having been created on the 9th day of March 1970 by subdividing Lots 4 and 5 and the remainder of lots 2 and 3, (of subdivision by American Security and Trust Co. and Amos H. Plumb re-

as lots 804 and 805], of Square 1935, all as recorded in Book 156, page 125 of the Office of the Surveyor of the District of Columbia; and

WHEREAS, the predecessor or predecessors in interest to the Embassy Corporation had applied for a change in zoning of said lots 4, 5, 804 and 805 in Square 1935; the Zoning Commission Order of September 26, 1967 stated:

"66-115 Change from R-1-B to R-5-C lots 4, 5, 804 and 805, Square 1935. East side of Wisconsin Avenue, N.W. between Calvert and Davis Street";

and

WHEREAS, H. Allen et al, in the aforesaid Civil Action 1832-68 filed in the United States District Court for the District of Columbia on July 22, 1968, sought:

"(1) that the Court grant plaintiffs a mandatory injunction requiring the Zoning Commission of the District of Columbia and its members to vacate the order of the Commission entered September 26, 1967, in Zoning Commission file No. 66-115, and to restore R-1-B (single-family detached residential) zoning to lots 4, 5, 804 and 805 in Square 1935..."

and

WHEREAS, based on a stipulation of the parties in said Civil Action 1832-68 (after opening statements where the cause was called for trial) that the three members of the Zoning Commission who voted for the change of zoning from R-1-B to R-5-C were absent from the public hearing thereon, the then

District of Columbia on May 21, 1970, remanded the cause to the Zoning Commission for a re-hearing and, consonant with his opinion, entered a formal Order on May 25, 1970 restoring the zoning of the said property to R-1-B and remanding the cause to the Zoning Commission for a re-hearing "in accordance with the requirements of applicable law."; and

WHEREAS, on appeal of said cause to the United States Court of Appeals for the District of Columbia Circuit in H. Allen et al v. Zoning Commission, supra, that Court, after a hearing on July 9, 1971, affirmed the judgment of the District Court with rehearing denied on November 23, 1971; and

WHEREAS during the pendency of the foregoing litigation the Embassy Corporation and its predecessors in interest subsequent to the action of the Zoning Commission on September 26, 1967, had continued to have plans and specifications prepared for the construction of a high-rise multi-unit Apartment Hotel at said location; and

WHEREAS, on the 22nd day of January, 1970, Sylvia Katzen, a predecessor in interest to the Embassy Corporation filed an Application for Building Permit to construct an eight story Apartment Hotel on the aforesaid property and said Building Permit was granted (Permit No. 189110) on the 6th day of April, 1970; and

WHEREAS, on the 7th day of May, 1970, H. Allen and Anne Thurber Schultz filed a Complaint against the Embassy Corpora-

Court for the District of Columbia, seeking to enjoin the construction at said site until a final disposition of the zoning litigation; and

WHEREAS, Judge Barrington Parker of the United States District Court for the District of Columbia denied a Temporary Restraining Order on the same day, May 7, 1970; and

WHEREAS, said cause was not appealed and was dismissed under Rule 13 on November 16, 1970 by the United States District Court for the District of Columbia for want of prosecution; and

WHEREAS, on the 26th day of May, 1970, The Massachusetts Avenue Heights Citizens Association, five days after the ruling and one day after the Order of Chief Judge Curran, as aforementioned, filed a Complaint for Injunction in the United States District Court for the District of Columbia against Embassy Corporation in Civil Action No. 1604-70 and also filed a Motion for a Temporary Restraining Order and Preliminary Injunction; and

WHEREAS, Judge Parker denied the Temporary Restraining Order on May 26, 1970 and advanced the cause for hearing on the Motion for Preliminary Injunction; and

WHEREAS, Judge Barrington Parker, after an evidentiary hearing on the Motion for Preliminary Injunction, entered Findings of Fact, Conclusions of Law and an Order on June 17, 1970 denying said Motion for Preliminary Injunction; and

WHEREAS, on an appeal seeking summary reversal of Judge Parker, or in the alternative injunctive relief pending appeal of Judge Parker's Order, the United States Court of Appeals for the District of Columbia Circuit on July 16, 1970, affirmed Judge Parker and refused to reverse his denial of the injunction sought (Massachusetts Avenue Heights Citizens' Association v. Embassy Corporation, 433 F.2d. 513, CCA-DC, 1970); and

WHEREAS, Embassy Corporation applied to the District of Columbia for Certificate of Occupancy when the building at 2505 Wisconsin Avenue, N.W. reached a stage of completion where it could be occupied and was advised by a letter from the District of Columbia dated October 19, 1971, that it would not issue such certificate in view of the holding of the United States Court of Appeals for the District of Columbia Circuit in H. Allen et al v. Zoning Commission. 449 F.2d. 1100, supra; and

WHEREAS, Embassy Corporation on October 29, 1971, filed Embassy Corporation v. District of Columbia, et al Civil Action No. 2184-71 in the United States District Court for the District of Columbia seeking to compel the issuance of a Certificate of Occupancy for the property in question; and

WHEREAS, Judge Parker of the United States District Court for the District of Columbia, after a hearing on November 10, 1971 ordered that "a Temporary Certificate of Occupancy issue for the subject building owned by the Plaintiffs [sic] located at 2505 Wisconsin Avenue, N.W., in the District of Columbia pending further hearing by the Zoning Commission and subject to

further order of this Court following such hearing by the Zoning Commission or by this Court if requested"; and

WHEREAS, thereafter a Certificate of Occupancy stating on its face "R-5-C Zoning" was issued by the Department of Economic Development of the District of Columbia on November 11, 1971 for said premises for operation as an Apartment Hotel; and

WHEREAS, on January 6, 1972 a Retailer's Class "C" License was issued for the premises by the Alcoholic Beverage Control Board, without any protest of the application for said license which was valid until January 31, 1972; and

WHEREAS Embassy Corporation applied for a renewal of its Retailer's Class "C" License from the Alcoholic Beverage Control Board for the period February 1, 1972 through January 31, 1973 and such application, at hearing, was protested by various residents in the vicinity of 2505 Wisconsin Avenue, including but not limited to Benjamin W. Boley; and

WHEREAS, The Alcoholic Beverage Control Board despite such protests, on January 31, 1972 re-issued said Retailer's Class "C" License to the Embassy Corporation for its restaurant and cocktail lounge at its Apartment Hotel at 2505 Wisconsin Avenue, N.W.; and

WHEREAS, Benjamin W. Boley, pro se, filed in the District of Columbia Court of Appeals a Petition to Review said order, alleging inter alia that the Board had violated its own rules and regulations in re-issuing the license to Embassy pursuant

to a Certificate of Occupancy which had not been issued under the authority of the Zoning Act as required by 3 DCRR/Section 2.1(a); and

WHEREAS, Embassy Corporation intervened in the proceedings on the Petition to Review as provided by Rule 15(g) of the Rules of the District of Columbia Court of Appeals; and

WHEREAS, the District of Columbia Court of Appeals on June 30, 1972, issued its decision vacating and reversing the order of the Alcoholic Beverage Control Board on the grounds that the Board had failed to adhere to its own Regulations because it relied upon a Certificate of Occupancy reflecting on its face R-5-C zoning for the premises, when pursuant to an order of the United States District Court for the District of Columbia, approved by the United States Court of Appeals for the District of Columbia Circuit (all as set forth in the H. Allen et al v. Zoning Commission case, supra) a previous order of the Zoning Commission stating the premises to be R-5-C had been vacated, and the original R-1-B zoning had been restored; therefore, the Court concluded, the Certificate of Occupancy had not been issued under the zoning laws and regulations of the District of Columbia as required under the Alcoholic Beverage Control Board regulations as a pre-condition for a Retailer's Class "C" License; and

WHEREAS, the District of Columbia Court of Appeals refused to grant a re-hearing of the matter and on August 29, 1972 refused to grant a stay of its order and on August 30, 1972 issued its mandate to the Alcoholic Beverage Control Board in-

Re-issuance of a Retailer's Class "C" License "in accordance with the opinion filed herein this date ..."; and

WHEREAS, on August 30, 1972, the Embassy Corporation filed with the Department of Economic Development of the District of Columbia an Application for a Certificate of Occupancy for 2505 Wisconsin Avenue, N.W., for occupancy of said premises as an Apartment Hotel, as a non-conforming use based upon Title 5, Section 419, D. C. Code (1967 Ed.) and Article 71 of the Zoning Regulations of the District of Columbia, as amended; and

WHEREAS, the said Application was acted on favorably by said Department of the District of Columbia Government and Certificate of Occupancy No. B-53021 based on said Application was granted to the Embassy Corporation on August 30, 1972; and

WHEREAS, pursuant to the mandate of the District of Columbia Court of Appeals the Alcoholic Beverage Control Board of the District of Columbia did order the denial of the application of the Embassy Corporation's Retailer's Class "C" License on August 31, 1972; and

WHEREAS, Embassy Corporation then immediately moved the Alcoholic Beverage Control Board on August 31, 1972 to Reconsider, Rehear and Stay said Final Order in accordance with Section 20.18 of the Rules & Regulations of said Board on the grounds that Embassy corporation now had a Certificate of Occupancy issued in accordance with the Zoning Laws and Regulations of the District of Columbia on the basis of which the Board had

WHEREAS, after a hearing on said Motion the Board did stay the effective date of its Final Order until Friday, September 8, 1972, at 9 a.m. when it set down the Motion of Embassy Corporation for further hearing and consideration; and

WHEREAS, in a personal appearance by Benjamin W. Boley, Esquire, Pro Se, and by counsel for Embassy Corporation before the Board on Wednesday, September 6, 1972, said date for hearing was continued by agreement until 9 a.m. Friday, September 22, 1972 so that settlement possibilities among all the parties might be discussed and evaluated; and

WHEREAS, because of the settlement negotiations going on between the parties, counsel for the First Parties and Benjamin W. Boley, Esq. requested that the hearing date on the Motion for Rehearing, Reconsideration and Stay be continued until 9:00 A.M. Friday, September 29, 1972; and

WHEREAS, the First Parties and the Second Parties have evidenced a desire, through counsel, each to the other to settle and compromise all the differences between them and to terminate all the litigation between them in the Courts and administrative agencies and in consideration of the action to be taken by the Parties hereto as set forth hereinafter.

IT IS THEREFORE agreed between the First Parties and the Second Parties as follows:

1(a) The First Parties and the Second Parties agree that as soon as possible after execution of this Agreement by the

execution, they will enter into and file with the Court in the cause entitled Massachusetts Avenue Heights Citizens Association v. Embassy Corporation, Civil Action No. 1604-70, a joint stipulation of dismissal (in the form generally outlined in Exhibit A attached hereto) which shall provide that the Court shall dismiss said cause with prejudice if, at the same time, the Court in the cause entitled Embassy Corporation v. District of Columbia (Civil Action No. 2184-71) on the Motion of Plaintiff will enter a modified Order (in the form generally outlined in Exhibit B hereto) requiring the District of Columbia to issue a Certificate of Occupancy as a non-conforming use for use of the premises at 2505 Wisconsin Avenue, N.W., as an Apartment Hotel and appurtenant uses thereto, and in the aforesaid Motion the Court shall also be requested to attach a copy of this Agreement in said Order and incorporate it in said Order by reference.

(b) Benjamin W. Boley, Esq. agrees to file simultaneously with the aforesaid Motion a Motion for Leave to Withdraw as Amicus Curiae stating therein that he is aware of the Motion for an Order requiring the District of Columbia to issue a Certificate of Occupancy as a non-conforming use and that he has no objection thereto.

(c) The First Parties agree that, upon the entry of the aforesaid Order and the issuance, pursuant thereto, of a Certificate of Occupancy as a non-conforming use in accordance with paragraph 1(a) above, they will immediately withdraw the pending Petition before the Zoning Commission of the District of Columbia.

(d) Pending action by the Court on the Motion to Enter an Order Requiring the Issuance of a Certificate of Occupancy as set forth in 1(a) above, the Second Parties agree to join in seeking a further continuance of the Motion for Rehearing, Reconsideration and Stay presently pending before the Alcoholic Beverage Control Board of the District of Columbia so as to give the Court the time to consider said Motion to require issuance of said Certificate of Occupancy.

(e) The First Parties and Second Parties agree that this Agreement and any Order issued, or other agreements entered into, pursuant to this Agreement may be lodged with any Courts or Administrative Agencies deemed appropriate by any of the Parties hereto.

(f) The First Parties and Second Parties agree that if, upon consideration of the Stipulation of Dismissal and the Motion to require issuance of a Certificate of Occupancy and Motion for Leave to Withdraw as Amicus Curiae, all as set forth in paragraph 1(a) above, the Court refuses to order issuance of the Certificate of Occupancy as a non-conforming use substantially as requested in said Motion then this Agreement shall be of no force and effect and shall be a nullity.

2. The First Parties agree that there will be no more than 126 units, of varying numbers of rooms, in the premises at 2505 Wisconsin Avenue, N.W. and that no less than 30, and no more than 84, of such units shall be available for transient occupancy. "Transient occupancy" as used herein means occupancy

3. The First Parties agree that any rental by Embassy Corporation of a permanent or transient unit will include in the price thereof free parking in the garage of the building for one vehicle, provided that such inclusion does not violate any existing or future federal or District of Columbia rule, regulation, law or ordinance.

4. The First Parties agree that Embassy Corporation will provide free parking in the garage of the building, or other non-public parking space, for patrons of the restaurant from outside the building whether or not Embassy Corporation itself is the operator of the restaurant.

5. To the extent consistent with availability of parking spaces due to occupancy of the building and patronage of the restaurant, Embassy Corporation will advise its employees working in the building at 2505 Wisconsin Avenue, N.W., that they may park at no cost in said building garage and should do so rather than park on nearby streets.

6. The First Parties agree that neither of them directly or indirectly will seek further rezoning of the property from the R-1-B zoning so long as they are permitted to continue occupancy and operations of the premises as an Apartment Hotel under a non-conforming use; provided, however, that if any property north of Davis Street on the east side of Wisconsin Avenue from Davis to Massachusetts Avenue is rezoned to a higher density and use classification, then either of the First Parties may seek

rezoning of the instant property to the same or lesser density and use classification, as that permitted by any rezoning of property north of Davis Street on the east side of Wisconsin Avenue from Davis to Massachusetts Avenue. In the event that First Parties are entitled to and do seek rezoning under this Paragraph 6, the Second Parties under this Agreement shall be free to oppose such rezoning application. However in this event, and this event only, the monies noted in Paragraph 8 hereof shall not apply to opposing rezoning by Embassy.

7. Except as provided otherwise herein, the First Parties agree not to seek directly or indirectly the rezoning of any property within the area bounded on the south by the northeast corner of Wisconsin Avenue and Calvert Streets, N.W., thence north on Wisconsin Avenue to the southeast corner of Wisconsin and Massachusetts Avenues, thence in the southeasterly direction along Massachusetts Avenue to Observatory Circle and thence along Observatory Circle to Calvert Street and along Calvert Street to the northeast corner of Wisconsin Avenue and Calvert Streets, N.W., from whence these boundary lines began.

8. The First Parties agree that from the date of execution of this agreement that for a period of the next twelve (12) years they will pay, upon written demand of the Massachusetts Avenue Heights Citizens Association, a total of Five Thousand Dollars (\$5,000.00) for legal fees to counsel chosen by said Association to oppose any future rezoning applications within the perimeters of the area designated in paragraph seven

(7) above

9. The First Parties agree that they will not seek or support, directly or indirectly, without prior written approval of the Massachusetts Avenue Heights Citizens Association, any change in the present one-side-of-the-street-only permissible parking on any of the streets within the area prescribed in paragraph seven (7) hereof.

10. The First Parties agree that the alley immediately east of the building at 2505 Wisconsin Avenue, N.W., will not be used for vehicular entrance or egress.

11. The First Parties agree that any subsequent purchasers or lessees of all or any part of the property at 2505 Wisconsin Avenue will be given a copy of this Agreement and will agree to be bound thereby.

12. The First Parties agree to employ a qualified mechanical engineer to investigate and report in writing on the ability to change the venting on the east side of the building which the Second Parties claim is exhausting hot air into the building and property of H. Allen, 3628 Davis Street, N.W., and to give a copy of said report to the Second Parties. The First Parties agree that if a change in said venting may be legally effectuated at a cost of not more than One Thousand Dollars (\$1,000.00) (and without doing possible damage to, or decreasing the efficiency, of the machinery the heat from which is being exhausted by said venting) they will make such change.

13. The First Parties agree that all advertising of the apartment or hotel facilities at 2505 Wisconsin Avenue, N.W.,

will not use the word "Hotel" alone, but will instead use the words "Apartment Hotel", provided, however, that the premises may be listed in the Classified Section of the Telephone Directory and other regular directories of Hotels under the classification of Hotel, but any display advertising in any of said directories shall indicate that it is an "Apartment Hotel."

14. The Second Parties agree that they will not directly or indirectly oppose the non-conforming use of the property as an apartment hotel and will not directly or indirectly seek any change in such non-conforming use pursuant to the restrictions of this Agreement, and the Massachusetts Avenue Heights Citizens Association and Benjamin W. Boley agree to support the non-conforming use of the property as an apartment hotel in the event they are requested to do so by the First Parties.

15. The Second Parties agree to withdraw objection to the application before the Alcoholic Beverage Control Board of the District of Columbia for a Retailer's Class "C" License for the restaurant and cocktail lounge and room service at the premises of 2505 Wisconsin Avenue, N.W. The Massachusetts Avenue Heights Citizens Association and Benjamin W. Boley agree to join in the Motion for Rehearing, Reconsideration and Stay presently pending before said Board. If said Motion is granted Benjamin W. Boley and the Massachusetts Avenue Heights Citizens Association agree to actively support the granting of such license by informing the Board in writing of said support or by appearing in person or by counsel before the Board and stating such support. Should it be

agree to support a request by Embassy Corporation for Waiver of the one year rule for refiling applications before the Board and to support said new application before the Board and a stay of denial of the license pending such hearing and decision on a new application. If the Retailer's Class "C" License for the remaining period of time through January 31, 1973 is not granted to Embassy Corporation by the Board, either as a result of reconsideration of the denial resulting from the aforesaid mandate of the Court of Appeals of the District of Columbia, or as a result of a hearing on a new application filed after a Waiver of the one year rule for filing such new application, then this Agreement shall be of no further force and effect and shall be a nullity. Second Parties agree not to protest future annual renewals of such Retail Class "C" Alcoholic Beverage License, or other applicable classifications which may be established in the future, and Massachusetts Avenue Heights Citizens Association and Benjamin W. Boley agree upon written request of the First Parties to support such annual renewals before the Board in writing or by appearing in person or by counsel; provided, however, that if there is a change in the current manner of operation of the cocktail lounge and restaurant in said premises at 2505 Wisconsin Avenue, N.W. then the Second Parties or any of them shall have the right to protest renewals of any future applications for said alcoholic beverage license for said facilities on the ground of such change in the manner of operations.

16. The Second Parties agree that in addition to conventional Apartment Hotel leasing, the First Parties may either sell or lease units in 2505 Wisconsin Avenue, N.W., on a condo-

18. This Agreement shall be in effect for a period of twelve (12) years after its execution and shall be binding upon and inure to the benefit of the heirs, executors, administrators, assigns, representatives, successors, attorneys and agents of the First Parties and of the Second Parties. William C. Greer, Jr., Esquire, shall attach to the copies of this Agreement executed by him, a Power of Attorney in form and content satisfactory to counsel for the First Parties, (or such other document in form and content satisfactory to counsel for the First Parties) authorizing him to execute this Agreement on behalf of all of the named plaintiffs in Civil Action No. 1832-68 in the United States District Court for the District of Columbia. Certified copies of corporate resolutions of the Embassy Corporation and the Massachusetts Avenue Heights Citizens Association authorizing the execution of this Agreement by their respective Presidents and attested by their respective Secretaries, with corporate seals, affixed shall be attached to the copies executed by said Embassy Corporation and Massachusetts Avenue Heights Citizens Association.

IN WITNESS WHEREOF, the parties heretofore named have hereunto set their hands and seals the day and year hereinabove written.

ATTEST:

EMBASSY CORPORATION
a District of Columbia corporation

Secretary

By: _____ [SEAL]
Cyrus Katzen, President

_____[SEAL]
Cyrus Katzen
as an individual

FIRST PARTIES

MASSACHUSETTS AVENUE HEIGHTS
CITIZENS ASSOCIATION
a non-profit District of Columbia
Corporation

ATTEST:

Secretary

(Corporate Seal)

By: _____[SEAL]
George C. Denney, Jr.
President

_____[SEAL]
William H. Greer, Jr.
Attorney in Fact for Named
Plaintiffs in Civil Action
No. 1832-68 in the United
States District Court for
the District of Columbia

_____[SEAL]
Benjamin W. Boley,
as an individual

SECOND PARTIES