TESTIMONY OF ELLEN M. McCARTHY

BZA Application 16370

July 22, 1998

INTRODUCTION

Introduction and Overview. Good morning. My name is Ellen McCarthy. I am the Director of Land Use and Planning Services for Robins, Kaplan, Miller and Ciresi. I have a master's degree in city planning from Harvard University, and twenty-five years of experience in planning and zoning.

Today, I would like to focus on the planning issues involved in this case, beginning with some context regarding home occupation zoning, and a brief description of the site. Next I will review potential adverse impacts, and indicate why the granting of the requested special exception will not adversely affect nearby property owners, and, in fact, will contribute to the residential character of the neighborhood.

Site Description. The house is a rowhouse, attached on the south side. It is located on New Jersey Avenue, which is a street that is predominantly residential, in an area with decidedly mixed character, thus maintenance of the property as a residential use, albeit with a limited home occupation, is important. One block north of the site are the Cannon and the Rayburn House Office Buildings. At the north end of the block, across D Street, is a parking lot, the entrance to the Capitol South Metro station and a Congressional office annex. Across the Street, one can see the National Democratic Club, which is situated on Ivy Place, a narrow side street which runs roughly perpendicular to New Jersey Avenue. At the south end of the block is a three story office building for Beneficial Insurance Company. Across E Street is a power plant on the west side and a Congressional annex on the east side. According to conversations with neighbors, some houses on the block have been carved up into rental units.

On the next block to the east is an entire row of commercial buildings, many with restaurants or retail on the ground floor, and office space above.

The site is zoned CAP / R-4, and is designated as "moderate density residential" on the Generalized Land Use Map of the Comprehensive Plan.

Building Description. The townhouse is four stories, three of which are approximately 770 square feet in area. The ground floor is slightly larger, because of a glassed-in breakfast nook. The applicant proposes to use one floor, the second level above the street, as his office. The ground floor has a TV room / den in the front, and a kitchen and breakfast nook in the rear, along with a powder room. The first level above the street is a living room / dining room. The next level has two rooms and a large closet, which would be used as office space. The fourth floor has a bedroom in the rear, with an exercise room / sitting room in the front. The stairs begin immediately at the front door, and are somewhat closed off from the rest of the house, so that it is

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possible to go to the third level and still provide a relative degree of privacy for anyone in the rest of the house.

A home occupation permit has already been issued, for Mr. Fields and one additional employee. The issue before us today is whether the Board will grant a special exception to permit an additional two employees.

ZONING CONTEXT

Relevant Zoning Regulations. First, it is necessary to examine the context for this case, how the Zoning Regulations consider R-4 neighborhoods. §330.1 of the Regulations states:

> 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.

Matter of right uses include: hospital, sanitarium, clinic, museum, private club, fraternity or sorority house, a public school or child development center for up to 15 children. Clearly, in terms of the residential character of this block, any of these matter of right uses would have a more adverse impact than the proposed addition of two employees.

The site is included within the boundaries of the Capitol Interest Overlay District, which was established, according to the Zoning Regulations,

> "to promote and protect the public health, safety and general welfare of the U.S. Capitol precinct and the area adjacent to this jurisdiction." (§1200.1)

The proposed use is one which serves the Capitol, while minimizing the number of vehicle trips, since virtually all trips to and from the Capitol precinct will be on foot.

As for the criteria for a special exception, 11 D.C.M.R. § 3108.1, permits the Board to grant special exceptions, pursuant to the following:

> Pursuant to authority contained in the Zoning Act of June 20, 1938 (52 Stat. 797), as amended, the Board is authorized to grant special exceptions, as provided in this title where, in the judgment of the Board, those special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special conditions specified in this title..

In short, the Board is empowered to grant a special exception where it finds:

(1) The proposed use is in harmony with the Zone Plan and Zone Maps;

(2) The proposed use is not likely to adversely affect the use of neighboring property

In particular, Section 203.10 of the Regulations permits the Board to approve a home occupation even if it requires the modification of certain conditions:

> A home occupation which is not permitted or prohibited in this section may be permitted as a special exception by the Board of Zoning Adjustment; Provided, that the following requirements shall be met:
>
> (a) The proposed use and related conditions shall be consistent with the purposes set forth in §203.1 and shall generally comply with the requirements of §§203.4 through 203.8, subject to specific findings and conditions of the Board in each case;
>
> (b) An applicant for a home occupation which is permitted by §§203.6 through 203.8 may request the Board to modify no more than two (2) of the conditions enumerated in §§203.4 through 203.8; Provided, that the general purposes and intent of this section are complied with.

Legislative history of home occupation regulations. On December 3, 1986, the Office of Planning submitted recommended text to the Zoning Commission to update controls on home occupations. After four public hearings, and hundreds of letters and other written submissions, the Commission adopted the regulations which currently apply to home occupations. As the Commission noted:

> It is clear from the record that the opportunity to work at home has become of great importance to persons in a variety of occupations, including, for example: music teachers, therapists, bed and breakfast operators, artists, writers, **consultants**, dentists, and physicians. (Emphasis added.)

The Commission recognized the need to balance the desires of residents to work at home with the need to protect residential neighborhoods from harmful impacts. This was accomplished by enacting a rather strict set of standards to control against adverse impacts, and then to provide a special exception process so that if a business required additional flexibility, the Board of Zoning Adjustment could determine on a case-by-case basis whether the flexibility requested would create a difficulty. Order #557, which adopted the home occupation regulations resulting from Case 86-29, stated on page 6975 (DCR 9/16/88):

> The Commission believes that the special exception provisions offer a reasonable degree of flexibility to those practitioners who would seek greater

flexibility than is allowed under the matter-of-right controls. To the extent that the special exception process will require additional time and cost, that is reasonable for a process which serves to establish reasonable limits in special circumstances.

Two of the potential harms foreseen by the Office of Planning in its initial report were loss of housing stock and adverse external effects, particularly traffic. With regard to loss of housing stock, which has been mentioned as a concern by some letters to the Board in this case, the Office of Planning, in its December 3, 1986 memo noted:

> The proposed regulations are intended to be quite strict in this regard, including a maximum size limit on the home occupation, no use of non-domestic equipment or machinery [Note: later modified], no separate entrance and no nonresidential exterior alterations.

With regard to adverse external effects, OP went on to cite controls including limits on on-site sales (which was later modified) and, it added:

> Most importantly, we have proposed very strict standards on customer or client visits. The prohibition against retail trade and services found in the proposed text, together with specific prohibitions against customer visits is intended to accomplish this.

The legislative history indicates that the limitation on numbers of employees was also felt to be a protection against undue amounts of traffic. There was some notice taken regarding the inconsistency of permitting an unlimited number of residents of the house to work in the enterprise, but only one non-resident; however, the special exception provisions were seen as a way of dealing with that potential due process issue.

In this particular case, the amount of vehicular traffic generated by the two additional employees is virtually nil, as is discussed below. The assumption made in the Zoning Regulations that the number of employees is directly related to the traffic and other adverse impacts dealing with intensity of use was established long before laptops, pagers, cellular phones, e-mail and fax machines became a common means of communication, reducing the need for deliveries and face-to-face meetings, and it was established in the face of regulations authorizing home occupations ranging from bed-and-breakfast operations to dentists and doctors, all with substantially higher potential for generating unacceptable levels of vehicular traffic.

In fact, a look at the uses listed in §203.7 indicates clearly that the employees in the home occupations contemplated by the Zoning Commission typically worked on-site, producing the service or product at the residence. These uses included: tutoring, dressmaking, painting and other fine arts, home crafts, telephone answering service and phone sales,

computer programming, typing or word processing service, mail order business, cosmetologist, hair stylist or barber, home office of a scientist, clergyman, inventor, academician, licensed health care professional, doctors and dentists. Thus, the number of employees has a direct correlation with the amount of activity generated on-site. In the business which Mr. Fields would like to pursue from his home, other than an on-site receptionist who answers the phones, the staff is typically not in the office, spending most of their time on the Hill or meeting at their clients' offices. Mr. Fields estimates that 90% of their meetings take place outside of the office. Therefore, since the two additional staff people will rarely be in the office, it is difficult to imagine that they could be generating any adverse impacts.

THE PROPOSED USE WILL BE IN HARMONY WITH THE GENERAL PURPOSE AND INTENT OF THE ZONE PLAN AND MAPS

The Zoning Regulations consider a home occupation to be a legitimate way to permit a homeowner to pursue a living, as Section 203.1 of the Zoning Regulations explains:

> The purpose of the home occupation provisions shall be to allow home occupations as accessory uses to residential uses; Provided, that they are compatible with the residential neighborhood in which they are located. The intent is to protect residential areas from adverse effects of activities associated with home occupations, while permitting residents of the community to use the home as a workplace and source of livelihood under specific regulatory conditions.

The analysis of the zoning context provided earlier makes clear that home occupations are not per se inconsistent with the either the moderate density residential classification or the R-4 designation which exist for this site. Letters which have been submitted for the record from Advisory Neighborhood Commission 6B(ANC), the Capitol Hill Restoration Society (CHRS) and a number of neighbors uniformly mention inconsistency between the proposed home office and the residential character of the neighborhood as one of their major concerns, if not their primary objection, to the proposed special exception. However, a close observation of those submissions shows that their belief that granting such a use will erode the residential character of the neighborhood is based on the existence of the home occupation itself, and not on the impact of introducing two additional employees.

It is important to remember two basic facts: that a home occupation permit for one employee has already been granted, and that the home occupation permit is not transferrable. Mr. Fields business with only one employee meets all the conditions and standards established by the Zoning Commission to assure consistency with the Zone Plan and Maps. If the Board grants a special exception to allow Mr. Fields to employ two additional persons, based on its

conclusion that his business operations are not likely to have a negative impact on the neighborhood, that special exception does not convey. Any future purchaser who might wish to have a home occupation will have to return to the Board, and demonstrate how its operations will avoid harmful consequences. Thus, granting the special exception for the additional employees does not, in any way, contribute to the "encroachment" of commercialization which has been stated as a major concern of the neighbors.

THE PROPOSED USE IS NOT LIKELY TO ADVERSELY AFFECT THE USE OF NEIGHBORING PROPERTY

The three greatest potentials for adverse impact are visual impact (a visible alteration of the residential character of the building), traffic-related impacts (congestion, noise or parking shortages related to vehicles serving the business) and economic impacts (distorting the housing market by establishing an expectation of commercial usage and income). This section will deal with each of these potential impacts in turn, indicating why they are unlikely to occur. Then it will examine several benefits from the proposed use.

The addition of two employees to the previously-approved home occupation is not expected to have any discernible negative impact on the residential character of the 434 New Jersey Avenue. There will be no external or internal structural modifications to accommodate the office use. The additional employees will be located on the third floor, where their presence will not be visible to the street.

There will however, be several improvements to the appearance of the property, which should add substantially to the residential character of the neighborhood, and the visual attractiveness of the home. Mr. Fields has committed to several important maintenance tasks which had been deferred for the approximately three years which the house stood vacant. He will have the peeling paint in the front scraped off and the paint redone. At the suggestion of the next door neighbor, he has agreed to have a tree which is substantially dead removed. In addition, he has committed to cleaning up the alley, and improving the rear yard of the property.

With regard to traffic, this has been cited by the ANC, CHRS and the neighbors as a major problem which would result from granting the special exception. However, the additional traffic is expected to be minimal. There will be two additional cars driving to the vicinity. One, however, will be parking at a garage at South Capitol Street, and the other on First Street, so neither vehicle is expected to venture onto New Jersey Avenue. Regarding other types of vehicular traffic, as stated previously, 90% of the meetings attended by members of the firm will be held outside the office. Of those which will be held on the premises, there is an expectation for many of the attendees to arrive via Metro or on foot, given the proximity of the office to the House office buildings and to the Capitol South station. Of those who will arrive by vehicle, the overwhelming majority will utilize taxicabs; those few vehicles would be arriving related to the

home office, and not related to the additional staff people. The office is not a heavy user of messengers (who would largely be arriving by bicycle anyway) or of overnight delivery services (2 - 3 visits per week). In addition, every two to three weeks, office supplies are delivered. These levels of traffic do not constitute an adverse impact, particularly since they will occur during the workday, when a substantial number of residents are not at home.

The last traffic-related issue is parking. As was stated in the application, Mr. Fields has already leased two off-street parking spaces. A third employee will be parking in a garage in the South Capitol Street area. I have not observed a parking shortage on the block; on my three separate visits to the site, I observed on-street parking spaces available each time. A primary concern of the neighbors is evening fundraising events, which create a demand for parking spaces just as neighbors are returning from work and looking for spaces themselves. Several neighbors have mentioned problems created by other illegal "party houses" on the block. However, Mr. Fields' consulting business largely deals with telecommunications policy. He is not a campaign consultant, which entails frequent fundraisers for candidates. He expects to have very little in the way of evening events.

The final area of potential adverse impact is economic. CHRS argues in its letter that permitting the "proposed use" will "exacerbate the commercial pressure on the 400 block of New Jersey Avenue," stating that, "If future sellers set asking prices based on a potential for home occupation use beyond that permitted as a matter of right, the residential character of the neighborhood will be increasingly threatened." Mr. Thomas Alder uses a related argument, that the three year vacancy of the house was a self-inflicted hardship due to an unreasonably high asking price. However, it is instructive to note that Mr. Alder's own Exhibit A indicates that the previous sales price, in 1992, was $425,000, which we understand to be approximately the same as the sales price for the subject transaction. A sales price which has remained the same over the course of six years does not lend support to any suggestions of unreasonable profit. In fact, the three years of vacancy may more likely be related to the serious water damage in the interior which was left unrepaired, rather than to inflexibility of the seller over price. Once again, the charge of adverse impact from the proposed additional two employees does not hold up under closer examination.

Granting the requested special exception would, in fact, make a positive contribution to the neighborhood. Permitting Mr. Fields to operate out of the subject premises, makes it economically possible to purchase the property, thus restoring the building to residential use and retaining a 17 year Hill resident. The repairs and improvements he has committed to should enhance the attractiveness of the property, both in the front where clients can see, but also in the rear, where it is only the neighbors who benefit. Trips to Congressional office buildings, which previously required Mr. Fields and his staff to take vehicle trips, will now be made on foot, reducing the number of vehicles entering the neighborhood. In a neighborhood where the majority of residents work outside the home during the daytime, Mr. Fields and his staff constitute "eyes on the street" to provide a level of safety and security. In addition, Mr. Fields has indicated his desire to be a good neighbor, by accepting packages or providing keys for exterminators or

service technicians.

CONCLUSION

The home occupation regulations are a delicate balancing act. By setting strict standards regarding percentage of space which can be used, number of employees, number of vehicle trips per day, number of client visits per hour, signage, sales, etc., the regulations attempt to encompass a very wide variety of uses and to preclude adverse impacts from those uses. The regulations also provide for flexibility, through the special exception process, so that, if it can be demonstrated that exceeding one or two of those standards will not result in adverse impacts in the particular case at hand, relief may be granted.

The regulations were written largely based on businesses where the goods or services were produced on-site, by employees working on-site, therefore, there was a correlation between the number of employees and the potential for adverse impact. However, because of relatively recent innovations in electronic communication, employees are able to perform services from remote locations, and use their offices primarily as message centers and mail drops. That is the case with regard to the subject business. The business is clean, quiet and fully compatible with the residential setting in which it takes place. The proposed home occupation meets all the conditions set forth in the Zoning Regulations except the number of employees, but the additional employees will not cause any adverse impacts on the neighboring property. Indeed, granting permission to the applicant to operate his business out of his home will permit a house which stood vacant to contribute to the residential character of the neighborhood once again, and will provide an additional set of "eyes on the street" during a period when most of the neighborhood residents are away at work.