ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
ATTORNEYS AT LAW

ATLANTA
BOSTON
CHICAGO
LOS ANGELES
MINNEAPOLIS
ORANGE COUNTY
SAINT PAUL
SAN FRANCISCO
WASHINGTON, D. C.

SUITE 1200
1801 K STREET, N. W.
WASHINGTON, D. C. 20006-1301
TELEPHONE (202) 775-0725
FACSIMILE (202) 223-8604
TELEX 4931197 RKMC

RICHARD B. NETTLER
(202) 775-0725

September 15, 1998

BY HAND

Ms. Shelia Cross Reid
Chairperson
Board of Zoning Adjustment
441 Fourth Street, N.W., Room 201
Washington, D.C. 20001

'98 SEP 15 P4:09
OFFICE OF ZONING
DISTRICT OF COLUMBIA

Re: BZA Application No. 16370

Dear Ms. Reid and members of the Board of Zoning Adjustment:

I have enclosed for your consideration the applicant's opposition to the motion for stay filed by the Capitol Hill Restoration Society. I appreciate your consideration.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Richard B. Nettler

cc: Capitol Hill Restoration Society
Advisory Neighborhood Commision 6B

BZA
CASE No. 16370
EXHIBIT No. 36

Board of Zoning Adjustment
District of Columbia
CASE NO.16370
EXHIBIT NO.36

9/15/98

Government of the District of Columbia
Board of Zoning Adjustment

Application No. 16370 of Gerald Cassidy on behalf of Jack Milton Fields, pursuant to 11 D.C.M.R. 3108.1, for a special exception under Section 203.10 to allow an additional two employees in a home occupation at 434 New Jersey Avenue, SE (Square 694, Lot 811).

OFFICE OF ZONING
DISTRICT OF COLUMBIA
98 SEP 15 P4:09

HEARING DATE: July 22, 1998
DECISION DATE: September 2, 1998

OPPOSITION TO MOTION FOR STAY FILED BY THE CAPITOL HILL RESTORATION SOCIETY

For the reasons stated below, the applicant opposes the motion to stay on the grounds that the Capitol Hill Restoration Society has made no attempt to show that it can satisfy the requirements of obtaining a stay and, indeed, it is likely that its appeal of the Zoning Administrator's decision on February 5, 1998, will be dismissed as untimely.

The standard for issuance of a stay is well established in this jurisdiction. It requires the moving party to show that:

(1) there is a substantial likelihood of prevailing on the merits;
(2) they are in danger of suffering irreparable harm during the pendency of the action;
(3) more harm will result to them from the denial of the order that will result to defendants from its grant; and
(4) the public interest will be served by the issuance of the requested order.

District of Columbia v. Sierra Club, 670 A.2d 354, 361 (D.C. 1996); *Don't Tear It Down, Inc. v. District of Columbia*, 395 A.2d 388, 390 (D.C. 1978). CHRS has made no attempts to address any of these issues or factors.

1. CHRS is not likely to succeed on the merits.

CHRS argues that a stay of the Board's decision in this case should be granted because on September 14, 1998 it appealed (BZA Appeal No. 16404) the February 5, 1998 decision of the Zoning Administrator to issue a home occupation permit to Jack Milton Fields for the use of the

BZA
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premises for consulting services. According to CHRS, Mr. Fields was not qualified to obtain a home occupation permit because the office use is secondary to his residential use of the premises, as the premises are not the "principal residence" of Mr. Fields.

CHRS has made no showing that it is likely to succeed on the appeal in BZA No. 16404 either by reference to any facts, case law or the interpretation intended by the Zoning Commission of the term "principal residence" for purposes of the home occupation regulations. In addition, CHRS is not likely to prevail on its appeal because it is blatantly untimely. The question of timeliness is jurisdictional. *See Goto v. Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980)

The Zoning Regulations provide that any decision of an administrative officer granting or refusing a building permit or any other decision based on the zoning regulations is appealable to the Board. 11 D.C.M.R. § 3105.1. Furthermore,

> [a]ny party aggrieved by any order, requirement, decision, determination, or refusal; made by any administrative officer or body * * * in the administration or enforcement of the Zoning Regulations, may file a timely appeal with the Board.

11 D.C.M.R. § 3200.2. No specific time limit is provided in the regulations, so a standard of reasonableness is applied in determining whether an appeal is timely. *See Goto v. Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980). Hence, while thirty days is usually deemed the time that is reasonable, the "time for filing an appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of." *Woodley Park Community Ass'n v. Board of Zoning Adjustment,* 490 A.2d 628, 636 (D.C. 1985) (citations omitted).

Here, CHRS had both constructive and actual notice of the decision of the Zoning Administrator at least as early as April 1998, when, in response to the notice of hearing that had been

published regarding Mr. Fields' request for relief on the number of additional employees for his consulting business, CHRS was informed that Mr. Fields had obtained, in February 1998, a home occupancy permit for his consulting business and that Mr. Fields would rely on this fact in seeking his special exception.. CHRS did nothing in response to this information. Instead, four and a half months later, CHRS appealed the Zoning Administrator's decision only after CHRS determined that its failure to timely appeal the February 5, 1998 decision had an impact on the Board's review of the special exception sought by Mr. Fields. Under any interpretation of reasonableness and in light of the consequences of the tardy behavior of CHRS, the delay in seeking review of the Zoning Administrator's decision must be deemed unreasonable. Accordingly, the Board lacks jurisdiction to consider the appeal of CHRS which forms the underlying basis for its request for a stay.

2. CHRS has not demonstrated that it will suffer irreparable harm if a stay is not issued during the pendency of its other appeal

CHRS must demonstrate that, if a stay is not issued it will suffer irreparable injury. CHRS has made no attempt to do so. *Reed Enterprises v. Corcoran*, 354 F.2d 519, 122 U.S. App. D.C. 387 (1965)("the traditional basis for injunctive relief is irreparable harm and inadequacy of legal remedies."). CHRS has not demonstrated that an immediate stay is necessary in order to preserve the *status quo* pending completion of its appeal. Nor is this a situation where the facts will have ""progressed so far and been so largely set along irreversible lines that a" stay is necessary to 'serve the public interest.'" *East 63rd Street Ass'n v. Coleman*, 414 F. Supp. 1318, 1330 (S.D.N.Y. 1976), quoting *Steubing v. Brinegar*, 511 F.2d 489 (2d Cir. 1975). *See also Realty Income Trust v. Eckerd*, 564 F.2d 447, 457, n. 36 (D.C. Cir. 1977).

3. More harm will result to Mr. Fields from the grant of a stay than will result to CHRS from denying the relief requested

As the moving party, CHRS had an obligation to demonstrate that the harm to Mr. Fields is less than any injury to CHRS. On the contrary, more harm will come to Mr. Fields from a stay since it would require that Mr. Fields lease other premises for his employees and cause a substantial disruption in his business. It is Mr. Fields who will be unnecessarily harmed if he is made to suffer the loss of the full enjoyment of his property.

4. The public interest will be disserved by the issuance of a stay

The public interest will not be served with the issuance of a stay. The public has a right to rely on decisions of the Zoning Administrator until those decisions are overturned. Failure to enforce such decisions can substantially depreciate the value of properties and diminish the owners' enjoyment. The public needs to know that if they purchase property subject to approvals provided by the Zoning Administrator those approvals will be respected and followed.

CONCLUSION

For the reasons stated above the request for a stay by CHRS should be denied.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Dated: September 15, 1998

Richard B. Nettler #929471

1801 K Street, N.W.
Suite 1200
Washington, D.C. 20006
(202) 775-0725

Counsel for Applicant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition to Request For Stay was on this 15th day of September, 1998 served upon the following by first class mail, postage prepaid:

Lyle R. Schauer, Zoning Chair
Capitol Hill Restoration Society
420 Tenth Street, S.E.
Washington, D.C. 20003

and

Advisory Neighborhood Commission 6B
921 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

Richard B. Nettler