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 DCMR 3108.1 for a special exception under Section 203.10 for a home occupation permit to conduct a Consulting/Strategic Planning business in a CAP/R-4 District at premises 434 New Jersey Avenue, S.E. (Square 694, Lot 811).

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

DISPOSITION: The Board **GRANTED** the application with conditions at its public meeting of September 2, 1998 by a vote of 3 – 0 (Betty King, John G. Parsons and Sheila Cross Reid to grant).

MOTION ORDER

BACKGROUND:

The application for the subject property was filed with the Board of Zoning Adjustment on May 22, 1998. At the time of the filing, Gerald Cassidy owned the property and Milton Jack Fields was the contract purchaser. The application was a request for a special exception to allow a home occupation with three employees at the site. The Zoning Regulations allow for two employees (one of whom must be the resident of the property). On February 5, 1998, Mr. Fields was issued a certificate of occupancy permitting him to operate a home occupation on the premises.

The Board heard the application at a special public hearing on July 22, 1998. At that hearing, the Capitol Hill Restoration Society ("CHRS" or "the Society") opposed the application maintaining that to grant the application would cause substantial detriment to the public good. In the course of the hearing, CHRS learned that Mr. Fields also maintains a residence in Texas. The Society attempted to explore the issue of Mr. Fields' "principal residence" as this term is used in the Zoning Regulations governing home occupations. It was CHRS' intent to challenge the legitimacy of the certificate of occupancy, however, counsel for CHRS was informed that the such a challenge would not be appropriate in an application, but that an appeal would be the appropriate course of action to raise such an issue.

At the public meeting of September 2, 1998, the Board granted the special exception application with conditions.

On September 14, 1998, counsel for CHRS filed a motion to stay the effectiveness of the Board's Order in the application, pending resolution of Appeal No. 16404 filed by CHRS the

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same day. This appeal challenged the decision of the Zoning Administrator to issue a certificate of occupancy for a home occupation for the site, and was based on the position that the now-owner Mr. Fields has his principal residence elsewhere than at the subject site.

The Society served the motion on the applicant's representative in the case.

In the motion, the Society stated that it is appealing the decision by the Zoning Administrator to issue a home occupation permit to Mr. Fields, doing business as Twenty-First Century Group. The Society stated that if the appeal is successful, it would also be dispositive of the special exception application.

The Society noted that when the Board discussed the special exception application in this case at the public meeting of September 2, 1998, it did not rule on the Society's contention that the applicant was not qualified to hold a home occupation permit because 434 New Jersey Avenue, S.E. is not the applicant's principal residence and that the home occupation is not clearly secondary to residential use of the premises. The Board relied on the Zoning Administrator's issuance of the permit to mean that those issues were considered by the Zoning Administrator and resolved in the applicant's favor.

The Society contends that the Zoning Administrator was either unaware of the facts that indicate that the subject property was not the principal residence, or, if she was aware of those facts, she erred in interpreting the terms "principal residence," (11 DCMR 203.2) and "secondary to the use of a dwelling unit for residential purposes" (Subsection 203.4(a)). The society pointed out that its appeal will test the Zoning Administrator's decision to grant the home occupation license. If successful, it will also be dispositive of the special exception application.

The applicant, through counsel, filed a statement in opposition to the motion on September 15, 1998. In his response, the applicant stated that CHRS has failed to meet the elements necessary for granting the motion to stay. The CHRS must show that:

1. there is a substantial likelihood of the Society prevailing on the merits;
2. the Society is in danger of suffering irreparable harm during the pendency of the action;
3. more harm will result to the Society from the denial of the order than will result to the property owner from its grant; and
4. the public interest will be served by the issuance of the requested order.

The applicant stated that the Capitol Hill Restoration Society made no attempt to show that it can satisfy the requirements for obtaining a stay and it is likely that its appeal of the Zoning Administrator's decision will be dismissed as untimely. In the opposition statement, the applicant presented arguments addressing the elements for considering motions to stay.

Likelihood of Success on the Merits

The applicant maintains that the CHRS is not likely to succeed on the merits of the appeal. CHRS has not made a showing to the contrary either by reference to any facts, case law

or the interpretation intended by the Zoning Commission for the term "principal residence" for purposes of the home occupation regulations. Further, the applicant believes that the Society would be unsuccessful in the appeal because, the applicant maintains, that the appeal was not filed in a timely fashion and will be dismissed. The applicant argued that the Society filed an appeal of the Zoning Administrator's decision four and one-half months after it had notice of the decision to issue the c of o. Usually, 30 days is deemed reasonable (although admittedly no term is specified in the Zoning Regulations). *See Goto v. Board of Zoning Adjustment,* 423 A.2d 917, 923 (D.C. 1980).

Irreparable Harm

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

Balance of the Equities

The applicant argued that, as the moving party, CHRS had an obligation to demonstrate that the harm to the applicant is less than any injury to CHRS. In the applicant's view, more harm will come to the applicant from a stay since it would require that the applicant lease other premises for his employees and cause a substantial disruption to his business. It is the applicant who will be unnecessarily harmed if he is made to suffer the loss of the full enjoyment of his property.

Whether the Public Interest will be Served by Issuance of the Requested Order

In the applicant's view, 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 applicant argued that 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.

Based on the arguments made above, the applicant requested that the motion to stay the order be denied.

The Society submitted to the Board a **Response** to the applicant's opposition statement dated September 29, 1998. Because the Board's Rules do not allow for responses to responses, on October 5, 1998, the Society filed a **Request** for consideration of their response to the opposition statement. On October 2, 1998, the applicant filed a **Reply** to the Society's response and requested a waiver to allow the Board to consider the **Reply**.

No other documents were submitted by the parties to this case.

THE BOARD'S OPINION AND DECISION:

At the public meeting of October 7, 1998, the Board deferred the matter to the public meeting of November 4, 1998. At the meeting of November 4, 1998, the Board, by consensus, denied the requests to allow the additional documents into the record. The Board was of the view that the issues could be addressed without the Society's Response or the applicant's Reply. Therefore, staff was directed to exclude these documents and the Board made a decision based on the properly submitted material – the motion and opposition statement.

As to the likelihood of success on the merits, the Board was of the view that the appeal will be a fact-finding mission to learn what the Zoning Administrator was told and what knowledge the Zoning Administrator's Office had. The Board concluded that there is a high probability of success on the merits.

On the issue of irreparable harm, the Board concluded that the city is likely to suffer irreparable harm during the pendency of the action because the issue of principal residence needs to be addressed and resolved.

In balancing the equities, the Board considered both the applicant's arguments about economic harm and the Society's position that to allow the order in the special exception to be issued would promote a lack of certainty with regard to the establishment of the principal residence where the property owner's driver's license is from another state and he votes in another state. The Board concluded the applicant's harm is uncertain since he has already renovated the property and could probably sell it without difficulty. Therefore, the Board concluded that ultimately more harm will result to the Society from the denial of the motion than the applicant will suffer as a result of its grant.

Finally, the Board is of the opinion that the public interest will be served by the issuance of the requested order to stay the effectiveness of the special exception order.

In light of the foregoing, it is hereby **ORDERED** that the **MOTION TO STAY** is **GRANTED** and the **MOTIONS** to **WAIVE THE RULES** for a **RESPONSE** to the **OPPOSITION STATEMENT** and a **REPLY** to the **RESPONSE** are **DENIED**.

VOTE: **3 – 0** (John G. Parsons, Sheila Cross Reid and Betty King to grant; Jerry H. Gilreath not voting, not having heard the case).

By Consensus, the Board **DENIED the Waiver Motions** – John G. Parsons, Sheila Cross Reid and Betty King participating.

DECISION DATE: November 4, 1998

BY ORDER OF THE BOARD OF ZONING ADJUSTMENT

ATTESTED BY: Sheri M. Pruitt-Williams
SHERI M. PRUITT-WILLIAMS
Interim Director

Final Date of Order: FEB - 9 1999

UNDER 11 DCMR § 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16370

As Interim Director of the Office of Zoning, I hereby certify and attest that on FEB - 9 1999 a copy of the order entered on that date in this matter before the Board of Zoning Adjustment was mailed first class postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

Lyle Schauer
Zoning Chair
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Attested By: Sheri M Pruitt-Williams
SHERI M. PRUITT-WILLIAMS
Interim Director

Date: FEB - 9 1999

Att./twr