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May 21, 2003

VIA FACSIMILE (727-6072)

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D.C. OFFICE OF ZONING
2003 MAY 23 PM 4:08

Ms. Jerrily Kress
Director
Office of Zoning
441 4th Street, NW
Suite 210
Washington, DC 20001

Re: Zoning Order in Application No. 16370

Dear Ms. Kress:

In April of 1998, we filed with the Board of Zoning Adjustment ("Board"), on behalf of the applicant, Jack Milton Fields, Jr. a request for a special exception, pursuant to Section 203.10 of the District's Zoning Regulations in order for the applicant to operate a home based business at 434 New Jersey Avenue, S.E. and utilize one additional employee than provided for as a matter of right under the home occupation regulations. That application, Application No. 16370, was approved by the Board on September 2, 1998, but the decision was stayed by the Board pending consideration of an appeal filed by the Capitol Hill Restoration Society ("CHRS"), Appeal No. 16404, of the zoning administrator's decision to issue the matter-of-right home occupancy permit to Mr. Fields in February of 1998. The appeal sought to undermine the predicate for the special exception approvals. On March 8, 2000, the Board issued an order in Appeal No. 16404 denying the appeal, and subsequently, on September 21, 2001, issued an order denying a Motion for Reconsideration filed by the CHRS. However, the Board never lifted the stay of its approval of the special exception.

On behalf of the applicant in Application No. 16370, we hereby request that the Board lift its stay and issue its final order in this matter, and understand that you will treat this as a motion for the lifting of such stay. Also enclosed for your consideration is a proposed order for Application No. 16370.

BZA
Case No. 16370
Exhibit No. 43

Word 45645125.1

Board of Zoning Adjustment
District of Columbia
CASE NO.16370
EXHIBIT NO.43

Thank you for your attention to this matter.

Sincerely,

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

Richard B. Nettler

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion To Lift Stay was on this 21st day of May, 2003 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. 2003

And

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

Richard B. Nettler

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).

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

PROPOSED ORDER

STATEMENT OF PROCEEDINGS AND EVIDENCE:

1. The property which is the subject of this application is located at 434 New Jersey Avenue, S.E. (Square 694, Lot 811). It is located between D and E Streets, S.E. The property is located in the CAP/R-4 District.

2. The property is developed with a four-story residential semi-detached townhouse, structure. The property is now owned by the applicant, former Congressman Jack Milton Fields.

3. The subject application was filed on May 21, 1998, by Gerald Cassidy on behalf of the then contract purchaser, Jack Milton Fields (hereinafter "Fields"), to allow for minor use of the premises by two employees of Fields, who are not residents of the premises, in addition to the one non-resident employee already permitted in the home occupation at 434 New Jersey Avenue, S.E., as a matter-of-right A home occupation permit was granted to Mr. Fields for a consulting business on the site, with only one employee in addition to the resident, on February 5, 1998. No person or entity has sought review of the home occupation permit issued on that date for Mr. Fields and one employee.

4. An application for a home occupation permit for the two additional employees was rejected by the Zoning Administrator, with instructions that the request would have to be considered by the Board of Zoning Adjustment as a special exception. Aside from the special exception relief sought, no person or entity sought review of the determination by the Zoning Administrator that special exception relief was required for the two additional persons. The public hearing on the matter was held on July 22, 1998.

5. The site is in a neighborhood of mixed residential, commercial and institutional character, with the Capitol Building and two office buildings for the House of Representatives immediately north of the site. The Capitol Power Plant and a Congressional Annex lie immediately to the south, with a block of office and retail buildings to the east along First Street. The 400 block of New Jersey Avenue, where the property is located, however, is residential in character, except for a three story office building at the corner of New Jersey and E Street, which is grandfathered from a previous commercial use.

6. Under § 203.10 of the Zoning Regulations (11 D.C.M.R.), the Board may approve a special exception for a home occupation which modifies no more than two requirements for home occupation. The proposed use, a strategic planning and consulting firm, meets all the zoning requirements, except for the number of employees. Section 203.4(d) requires that no more than one person who is not a resident of the dwelling unit may be employed in the home occupation, though it places no restriction on the number of residents who may be so employed.

7. The subject site is a four story townhouse, attached on the south side only, with a driveway belonging to the townhouse to the north on the other side. The proposed use would occupy one floor of the dwelling, on the third level, which would make the office use not visible from the street. At the hearing, Mr. Fields, a former congressman and owner of the townhouse, indicated that no external or internal structural modifications would be made to accommodate the office use, and no sign would be placed outside, despite the fact that he is entitled to a sign of less than 144 square inches. He did indicate plans to repair some of the damage resulting from the fact that the property has largely been vacant for the last three years. Repairs will include fixing water damage, repainting the exterior, getting rid of dead trees and cleaning the alley.

8. Mr. Fields, who has resided in the Capitol Hill area for seventeen years, indicated that he has already leased two off-street parking spaces to accommodate the extra employees, with another employee leasing parking at the Fairchild Building on South Capitol Street, while he leases a parking space at his former residence; thus he did not expect the extra employees to have any adverse impact on the on-street parking supply. In response to objections from neighbors to the legality of the off-street spaces he has leased, Mr. Fields committed to lease off-street space at another location if there turns out to be a problem with those parking spaces on First Street.

9. Mr. Fields testified that his consulting business focuses primarily on telecommunications issues, as he was the author of the recent telecommunications reform legislation passed by Congress in the past few years. Mr. Fields expects that ninety percent of any meetings he has with clients will be held out of the office and that most of the time his employees, except for one receptionist, will be either on the Hill or at client's offices. Mr. Fields also testified that he will probably host coffees for three or four people at a time on some afternoons, particularly when Congress is in session, but does not expect to have any larger events. He also testified that such coffees will be only occasional.

10. Seven neighbors either submitted letters or signed a petition supporting Mr. Fields' application for a special exception.

11. Two neighbors appeared in opposition to the application, and other neighbors submitted letters in opposition. They indicated that their concerns were predominately that they felt that an office use was inappropriate to the residential character of the neighborhood. A specific concern was also broached regarding a desire to avoid excess foot traffic in the alley, leading from the off-street parking spaces. The most serious concern of the neighborhood is the use of at least one house on the block as a "party house", hosting frequent large fundraisers which bring a great deal of

traffic, parking demand and noise into the neighborhood in the early evening hours. Mr. Fields indicated that his business was largely related to advising clients regarding telecommunications matters, and that any fundraisers he sponsored were, as already noted, few in number and largely consisted of an afternoon coffee with three to four attendees.

12. Ellen McCarthy, an expert in urban planning, testified that the project was consistent with the legislative intent of the Zoning Regulations with regard to home occupations. She traced the legislative history of the home occupation regulations, in which the Zoning Commission indicated its desire to permit residents to use their residences, within limits designed to restrict adverse impacts on the neighboring properties. The Commission devised standards, which were designed as general guidelines, so that every home occupation did not have to come before the Board, but it explicitly provided for an appeal process that would permit no more than two such standards or conditions to be waived by the Board as a special exception. She pointed out that most of the home occupations explicitly named in the regulations involved the employees being present on the site, virtually all of the time. At the time the regulations were adopted in 1987, the state of the art in telecommunications, which permits a business to have more employees, but to allow them to operate outside the office, was not nearly as advanced and economical as it is today. Mr. Fields indicated that the office is used primarily as a mail drop and message center, with a substantial portion of his time and that of his employees (except for the receptionist / secretary) spent on Capitol Hill or meeting with clients, usually at their offices. Therefore, Ms. McCarthy pointed out, regulations which restrict the number of employees as a proxy for restricting the potential for adverse impacts to the neighborhood, are not relevant, if the employees are rarely present in the neighborhood.

13. Advisory Neighborhood Commission 6B testified at the hearing that its Planning and Zoning Committee, which was comprised of two commissioners and two residents, had voted to oppose the granting of the special exception. This was upheld at a subsequent meeting of the Commission, at which the applicant was not permitted to testify, or to correct what it felt were errors in the Planning and Zoning Committee report. The ANC listed the following objections: "Allowing an expanded consulting operation will produce all of the usual traffic problems," though it was not specific as to how much of a traffic problem it felt would be caused by the two additional employees. The P&Z Committee report cited "increased Fedex and messenger deliveries", trucks and what it felt was the likelihood that it would be used "as a lobbying and fund-raising venue," which would "lead to more traffic and double parking." However, the applicant's land planner indicated that she had been told that the office received express mail deliveries only 2 to 3 times per week. Also, Mr. Fields testified that all of his contracts with his clients require his personal participation in the work, so that the presence of two additional assistants did not mean additional traffic. The ANC also indicated that they felt that "there is little or no way of ensuring that the 25% limitation will be adhered to," though it did not directly address the applicant's explanation that he plans to use only one floor of the home for office use.

14. The Capitol Hill Restoration Society ("CHRS") also appeared in opposition to the application. The CHRS opposed the application on two grounds: (1) that Mr. Fields was not entitled

to a home occupation permit because this is not his principal residence and thus the office use is not secondary to a residential use; and (2) Mr. Fields needs a variance for the relief requested. The staff of the Board indicated at the hearing on this matter that, consistent with the letter of the Zoning Administrator and the regulations, only a special exception was needed, and the CHRS has abandoned that argument as reflected in its proposed findings of fact. As for the residence issue, the Zoning Administrator has already issued a home occupation permit to Mr. Fields for the site based on his affirmation of the fact that this site is his residence and CHRS never appealed that action. Moreover, while Mr. Fields acknowledged that he also has a residence in Texas, Mr. Field testified that his consulting business is located here, the site is his place of residence a majority of the year given the nature of his business and he has no other residence in this area.

II. PROPOSED FINDINGS OF FACT:

Based on the evidence of record, the Board finds as follows:

1. The applicant has previously been issued a home occupation permit for 434 New Jersey Avenue, S.E. for use with one additional employee, and this is his principal residence for purposes of the application of the home occupation regulations. The Board has recognized the use of residences for a consulting business in a residential district with less density than that of the subject site. *See Application No. 15925* (March 23, 1994). The site will be used primarily as the applicant's residence in the District of Columbia and secondarily for consulting office use.

2. The applicant must obtain a special exception to allow for minor use of the premises by two employees, who are not residents of the premises, in addition to the one non-resident employee already permitted, even where the employees will be spending most of their time off the premises. *See Application No. 15253* (March 21, 1990) (Approving home occupation as a law office with two resident and two non-resident employees); *Application No. 15582* (January 8, 1992), (Approving a home occupation use of a home improvement business in an R-2 district where the employees of the business would be doing most of their work off-site); *Application 15312 (July 11, 1990)* (Same); *Application No. 16035* (July 10, 1995) (Approving use as a meeting location for business and social events). The two additional individuals are employees of Mr. Fields and thus are not co-practitioners. *See Application No. 15253* (March 21, 1990) (Approving home occupation as a law office with two resident law partners and two non-resident employees/associates)

3. The applicant proposes to use only 25 percent of the floor area of the building for the home occupation.

4. No finished products would be produced as a result of the applicants' proposed home occupation. Any files and other related materials would remain in the area designated for the home occupation.

5. No more than one staff member will be employed to assist with secretarial and receptionist duties.

6. The applicant has provided for parking for his employees and the use of the property will not have an adverse impact on traffic or parking in the area.

7. Neither the applicant nor any other person would use any equipment or process which would create visual or audible electrical interference in television or radio receivers outside the subject home, or which would cause fluctuations in line voltage outside the subject home.

8. The proposed home occupation would not produce any noxious odors, vibrations, glare, or fumes which are detectable to normal sensory perception outside the home. Additionally, the proposed use would not produce a level of noise which exceeds the level which is normally associated with the category or dwelling or the immediate neighborhood.

9. The applicant will maintain the residential character and appearance of the premises and lot, and there would be no interior structural alterations for the proposed home occupation.

10. No District Government agency to which the Office of Planning referred the application for review and comments submitted any response, including the Office of Planning.

11. The applicant will adequately control the activities of his business to protect the subject property and the surrounding residential neighborhood.

12. The proposed home occupation would not be a retail service or other use specified in Section 701.1, 701.4, 721.2, 721.3, 741.2, 741.3, 751.2(b), 801.7, or 902.1, and is thus not disallowed by Section 203.9 of the Zoning Regulations.

III. CONCLUSIONS OF LAW AND OPINION:

Based on the findings of fact and the evidence of records, the Board concludes that the applicant is seeking a special exception to allow a home occupation which falls beyond the scope of the home occupations defined in the Zoning Regulations for a residential district only in that the applicant employs two additional non-resident persons, in addition to the one non-resident employee permitted as a matter of right. In order to be granted such an exception, the applicant must demonstrate substantial compliance with the requirements of Sections 203.10 and 3108.1 of the Zoning Regulations. The applicant must demonstrate that the proposed home occupation meets the requirements of Section 203.10 of the Zoning Regulations, and that the proposed use and related conditions shall be consistent with the purposes set forth in Section 203.1 and shall comply with the requirements of sections 203.4 through 203.8.

The Board concludes that the proposed home occupation is compatible with the residential neighborhood in which it is located. With regard to the contention that the residence is not the principal residence of the applicant, it should be noted that the primary concern of the Zoning Commission on this issue was to avoid the situation where, for example, a doctor or lawyer living in the Washington metropolitan area sought to establish an office in a residential zone merely by buying a house there. That concern is not involved in this application. The Zoning Regulations do not require that the residence be the place in which the applicant is domiciled, which is the location in which an individual pays income taxes. Rather, the regulations look to which location is the principal residence, namely, where the individual resides most of the time. Here, the residence is the only one utilized by Mr. Fields in this area, and it is utilized a majority of the week of every month of every year. Furthermore, in light of the fact that there has been no appeal of the home occupation permit already issued to Mr. Fields, it is not properly before the Board.

Section 203.10 provides that "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 applicant meets the requirements of sections 203.10(a) - (f). The Board concludes that one modification is necessary under Subsections 203.4(d) to permit the applicant to employ two additional non-residents, even though it is expected that the two additional employees will not be working on the premises for a majority of the time. and that the modification will not impair the general purposes or intent of the home occupation regulations.

The Board further concludes that the special exception for the proposed home occupation can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map, and as conditioned by this order, will not tend to affect adversely the use of neighboring properties in accordance wit the Zoning Regulations and Map.

The Board has accorded ANC 6B the "great weight" to which it is entitled.

In the light of the foregoing, the Board **ORDERS** that the application be **GRANTED**, subject to the following conditions:

I. At least two off-street parking spaces shall be provided for the applicant's employees.

II. The applicant shall maintain the residential character and appearance of the residence and lot;

III No interior structural alteration shall be permitted if it would make it difficult to return the premises to use which is exclusively residential;

IV The applicant shall not conduct or allow any operations outside the structure, nor maintain or allow any storage or other unsightly condition outside the structure;

V The applicant shall not use any equipment or process which creates visual or audible electrical interference in television or radio receivers outside the subject residence, or which causes fluctuations in line voltage outside the subject residence;

VI The use shall produce no noxious odors, vibrations, glare, or fumes which are detectable to normal sensory perception outside the subject residence shall be prohibited;

VII The use shall not produce a level of noise which exceeds the level which is normally associated with the category of dwelling or the immediate neighborhood;

VIII Vehicular trips to the premises by visitors, customers, and delivery persons, if any, shall not exceed eight (8) trips daily on a regular and continuing basis;

IX The applicant shall have no more than eight (8) clients or customers on the premises in any one (1) hour period; and

X The applicant shall not employ any additional employees without obtaining a relief from the Board of Zoning Adjustment.

VOTE: 3-0 (Sheila Cross Reid, Betty King and John Parsons to grant)

BY ORDER OF WAS THE D.C. BOARD OF ZONING ADJUSTMENT
FINAL DATE OF ORDER: