BEFORE THE
DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of:
Capitol Hill Restoration Society
420 10th Street, SE

BZA Appeal No. 16404
Hearing Date: December 16, 1998

Administrative Officer:
Gladys Hicks, Acting Zoning Administrator

Property involved:
434 New Jersey Avenue, SE
Square 694, Lot 811

'98 DEC -2 P2:44
OFFICE OF ZONING
DISTRICT OF COLUMBIA

STATEMENT OF THE APPELLANT

This is an appeal by the Capitol Hill Restoration Society (Hereafter, CHRS) from the decision of the Acting Zoning Administrator to issue an home occupation permit to Jack Milton Fields, DBA Twenty-First Century Group (Hereafter, Applicant), at 434 New Jersey Avenue, SE, Square 694, Lot 811 (Hereafter, 434 New Jersey).

Issues involved in this appeal.

(1) Whether 434 New Jersey was Applicant's principal residence as that term is used in 11 DCMR Sec. 203.2, and,

(2) Whether the home occupation is clearly secondary to use of 434 New Jersey for residential purposes as required by 11 DCMR Subsec. 203.4(a).

We believe that the facts demonstrate that 434 New Jersey is not Applicant's principal residence and that the home occupation is more important than the residential uses of the dwelling. Therefore, a home occupation permit should not have been issued.

Background.

Home Occupation Permit No. 98-0271 was issued to Applicant on February 5, 1998 with the special condition that it was for "One (1) Employee - Office Use Only." At the time, Mr. Fields was the contract purchaser of the property at 434 New Jersey. Earlier, on December 16, 1997, the Zoning Administrator had denied a Home Occupation Permit for three (3) nonresident employees. On February 26, 1998 an appeal from the Zoning Administrator's denial was filed by the Applicant (BZA 16336). CHRS and ANC 6B objected to the appeal because a special exception was the appropriate remedy. As a result, the Board dismissed BZA 16336 without prejudice; an application for a special exception, BZA 16370, was filed on May 22, 1998. A hearing for BZA 16370 was held on July 22, 1998 and on September 2, 1998 the Board voted 3-0 to approve the special exception. A chronology of events is attached (Exhibit 1).

434 New Jersey was not Applicant's principal residence.

The issue of whether 434 New Jersey was Applicant's principal residence was raised by CHRS at the July 22 hearing for BZA 16370. The following facts were established by Applicant's testimony:

1) Applicant is domiciled in Texas. (Tr. p. 21).

2) Applicant will pay income taxes in Texas rather than the District of Columbia. (Tr. p. 62)

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3) Applicant is registered to vote in Texas. (Tr. p. 66)

4) Applicant has a Texas driver's license. (Tr. p. 66)

[Note: See Exhibit 2 for selected pages from the transcript of the hearing.]

We contend that these facts demonstrate that 434 New Jersey was not Applicant's principal residence.

What meaning should be given to the term "principal residence?" It is not defined in the Zoning Regulations, nor have we discovered such a definition in the orders of this Board or the decisions of the Court of Appeals. By common use of the word "principal," the term "principal residence" would signify the most important residence, but could this mean simply that the residence is used a greater amount of time than any other? We think not. We believe that the Zoning Administrator and the Board should be guided by the conservative approach to home occupations in Section 203. Thus, the intent stated in Section 203.1 speaks to "residents of the community," indicating that a greater interest, a community interest, is sought, not merely a status as resident of a dwelling.

> Sec. 203.1. The intent is to protect residential areas from adverse effects of activities associated with home occupations, while permitting residents of the community the opportunity to use the home as a workplace and source of livelihood under specific regulatory conditions. (Emphasis added.)

Many provisions of Section 203 restrict home occupations. As examples we note the requirement to obtain a permit (203.3(a)), restriction of permits to persons that reside at the residential address (203.3(c)), restriction on transfer of permits (203.3(d)), and the requirement that a home occupation be clearly secondary to residential use (203.4(a)).

We believe that viewed in its totality, Section 203 signifies an intent that home occupation holders live and work in the community. A person who is domiciled elsewhere is unlikely to have a strong attachment to the community and be able to contribute to its residential vitality.

For additional guidance, we believe that the Zoning Administrator and the Board should consider the definition of "homestead" in connection with District real-property taxation. (See Exhibit 3.) Homeowners who own and live in a property can obtain an exemption of $30,000 from its assessed value. To obtain the deduction, homeowners must state that they are subject to District of Columbia income tax. Recognizing their divided loyalties and concerns, homeowners domiciled elsewhere are excluded from the homestead deduction program. Homestead deductions, like home occupation permits, are intended to stabilize and revitalize residential districts. Both should be restricted to persons who are subject to District of Columbia income tax.

What facts were before the Zoning Administrator?

Applicant believes that the Zoning Administrators's issuance of a home occupation permit on February 5, 1998 for one nonresident employee constitutes a determination that 434 New Jersey was Applicant's principal residence and that the home occupation was clearly secondary to the use of the dwelling for residential purposes. The July 22 Hearing Transcript at page 101 (See Exhibit 3) has the following statement by counsel for the Applicant:

> The Zoning Administrator has already made a determination regarding those two issues when the Zoning Administrator, with knowledge of all of the facts that you've heard here today,

> determined to issue the home occupation permit earlier this year for one employee.

[Note: The "facts" referred to are those developed at the July 22 hearing: that applicant is domiciled in Texas, that he will pay income taxes in Texas rather than the District of Columbia, that he is registered to vote in Texas, and that he has a Texas driver's license. (See p. 1 for citations to the transcript)]

We interpret counsel's statement to mean only that there is a presumption that the Zoning Administrator considered all of these facts when the Home Occupation Permit was issued. But that presumption can be rebutted if the facts mentioned were not presented to the Zoning Administrator. We do not believe that they were. The home occupation permit application form does not specifically request those facts. Instead, an applicant for a home occupation permit receives an information package that instructs the applicant to:

> "1. Read the attached Zoning Regulations regarding Home Occupations before completing the application for the Home Occupation Permit."
>
> "7. If you have questions after reading the Zoning Regulations attached, please see a Zoning Technician at the Zoning Counter (Second Floor of this Building) for clarifications or interpretations."

Applicant must show that he brought the facts established during the July 22 hearing to the attention of the Zoning Administrator. A conversation with the Zoning Administrator would indicate that he did not. We believe it is likely that the Applicant self-determined that 434 New Jersey was his principal residence. Unless Applicant can show that the Zoning Administrator was apprised of those facts at the time she made her determination, he cannot now claim that her determination considered those facts.

The home occupation is not clearly secondary to residential purposes.

One of the conditions for granting a home occupation permit is that the "home occupation shall be clearly secondary to the use of a dwelling unit for residential purposes". (Subsec. 203.4(a)) At the July 22 hearing, the Applicant stated that he would reside at 434 New Jersey when Congress is in session, but that his staff would be there continuously. This seems to us to describe a full-time office for the three employees but only a part-time residence. Further, the internal arrangement with the third-floor office sandwiched between on residential floor above and two below is likely to be disruptive of residential use. The Applicant should be required to demonstrate that the home occupation is in fact clearly secondary to the residential use of the rest of the building.

This appeal was timely filed.

The issue of timeliness is jurisdictional; if an appeal is not timely filed, this Board cannot consider it. Goto v. Board of Zoning Adjustment, 423 A.2d 917, 923. In the absence of a specific time limit, the Board has adopted a reasonableness standard. Woodley Park Community Association v. Board of Zoning Adjustment, 490 A.2d 628, 636.

We believe that the Board should find this appeal is timely filed. Appellant has asserted that CHRS received actual notice in April 1998 when notice was published regarding Applicant's request for relief on the number of additional employees. At that time we reviewed the BZA file and noted Home Occupation Permit No. 98-0271 dated February 5, 1998. However, there was nothing about

the application for the permit, or the permit itself, to alert us that there was an issue regarding primary residence.

Although CHRS knew in April that the Zoning Administrator had made a decision in February to issue a Home Occupation Permit, we had no factual basis to challenge her decision. At that time, the facts that have given rise to this appeal were known only to the Applicant. Not until the hearing for BZA 16370 on July 22 did we had knowledge of facts that brought into question the February decision to issue a Home Occupation Permit. Although we raised the primary residence issue at that hearing, we learned at the September 2 BZA meeting that the Board felt that the issue was not properly before it. This was because the Zoning Administrator's February 5 decision to issue a home occupation permit for one nonresident employee was not a part of BZA 16370. We filed this appeal on September 14 in order to bring the primary residence issue before the Board. Given these circumstances, we believe that the Board will find that this appeal was timely filed and that the Board has jurisdiction.

Exhibit 1.

BZA 16404 Chronology.

Nov 24, 1997	Application filed for HOP with 3 employees.
Dec 16, 1997	ZA denies application for HOP with 3 employees.
Feb 5, 1998	HOP No. 98-0271 issued to Jack Milton Fields for 1 employee.
Feb 26, 1998	Appeal filed from ZA's December 16, 1997 decison (BZA 16336).
May 20, 1998	BZA 16336 was dismissed without prejudice because a special exception, not an appeal, was appropriate remedy.
May 22, 1998	Application for special exception (BZA 16370) filed to allow HOP with 3 employees.
Jun 9, 1998	CHRS Zoning Committee heard BZA 16370 but, in absence of Mr. Fields, could not reach a conclusion regarding principal residence question.
Jun 11, 1998	BZA sends notice to neighbors that hearing on BZA 16370 will be held on July 22, 1998.
Jul 1, 1998	Fields closes on 434 New Jersey Avenue.
Jul 22, 1998	Hearing on BZA 16370.
Aug 19, 1998	Letter from CHRS to ZA asking her to revoke HOP dated 2-5-98.
Sep 2, 1998	BZA voted 3-0 to approve special exception (BZA 16370).
Sep 14, 1998	CHRS filed appeal of ZA's 2-5-98 decision to issue HOP (BZA 16404). CHRS also filed motion to stay final order in BZA 16370 pending resolution of BZA 16370.
Sep 15, 1998	Applicant filed "Opposition to Motion for Stay" in BZA 16370.
Nov 4, 1998	BZA grants CHRS motion to stay final order in BZA 16370.
Dec 16, 1998	Hearing on BZA 16404 is scheduled.

HOP= Home Occupation Permit
ZA = Zoning Administrator

Exhibit 2.

Extracts
Hearing Transcript
Application 16370
July 22, 1998

Pages 21, 62, 66, and 101.

as a resident of that area, I can do that at this point. That really has nothing to do with what we're talking about today. It's a permitted activity.

CHAIRPERSON CROSS REID: Ms. King?

MS. KING: Is this your principal residence?

MR. FIELDS: When I'm in D.C., yes, ma'am.

MS. KING: You're not a --

MR. FIELDS: I'm a resident of Texas.

MS. KING: You're not a domiciliary of the District?

MR. FIELDS: No, ma'am. I am here virtually when Congress is in session.

MS. KING: Okay. Thank you.

MR. PARSONS: Mr. Fields, I guess you're aware there's significant opposition to what you're proposing here today. There's a particular letter from a Mr. Adler, dated July 6th, which brings nine points of opposition to us, and it prompts a number of questions, and I wondered if Ms. McCarthy was going to respond to these questions --

MR. NETTLER: Yes, Ms. McCarthy --

MR. PARSONS: -- and I wouldn't have to bother you with it.

MR. NETTLER: She is.

door to door early on to ask for support or to explain to people what we were proposing to do, and in the course of that, those visits up and down the street, I found two other businesses, people that were home that, you know, talked to me.

And at the Capitol Restoration Society meeting when I spoke to Mr. Alder, he said he was aware of four total businesses, but I did not then go back to the Zoning Administrator to see which of those were legal and which were illegal.

MR. PARSONS: Mr. Fields, will you pay income taxes in the District of Columbia or in Texas?

MR. FIELDS: Texas.

MR. PARSONS: And your employees, however, would be paying income taxes to the District of Columbia?

MR. FIELDS: They'd be paying taxes where they live, and I think all of them live in Northern Virginia.

MR. PARSONS: Oh, you've retained these people already? You have employees?

MR. FIELDS: I do have employees.

MR. PARSONS: And where are they working at the moment?

MR. FIELDS: They're working at our -- our

MR. FIELDS: Okay.

MR. SIMON: You indicated that you had become vested in the area since your years of service in the Congress. Where are you currently registered to vote, sir?

MR. FIELDS: I'm registered in Texas.

MR. SIMON: In Texas, and does that imply also then that you would have a Texas driver's license?

MR. FIELDS: I do have a Texas driver's license.

MR. SIMON: You indicated that your representatives had been at the ANC meeting. You were not able to attend?

MR. FIELDS: I was not.

MR. SIMON: Were you in town or were you in Texas?

MR. FIELDS: I was in Texas.

MR. SIMON: I have no further questions.

CHAIRPERSON CROSS REID: Thank you.

MR. NETTLER: Could you explain why you -- excuse me. You were intending to go to that meeting, the planning and zoning meeting, weren't you?

MR. FIELDS: The reason I was not at the meeting, my daughter, who was two years old, had had

a few, very, very few closing comments which I would like to -- would rather expand upon them in the proposed findings of fact and conclusion of law that you may ask for.

But let me just state, as I said in our prehearing statement, and I touched upon in our opening statement, with regard to both the variance issue and with regard to the principal residence issue and actually with regard to the issue of whether the use is clearly secondary, let me take the last two first.

The Zoning Administrator has already made a determination regarding those two issues when the Zoning Administrator, with knowledge of all of the facts that you've heard here today, determined to issue the home occupation permit earlier this year for one employee.

Nobody ever challenged that issue, and that really is not relevant to what the issue is before you today, which is special exception for two employees, and I think and believe obviously the Zoning -- I would ask you to accept as well the Zoning Administrator's interpretation when it approved that first home occupation permit is consistent with how the Zoning Administrator has interpreted those

PROPERTY TAX RELIEF/CREDITS

District property tax relief and other credits are as follows:

HOMESTEAD DEDUCTION - This program deducts, for tax purposes, $30,000 from the assessed value of the property you own and live in. This means that qualifying homeowners do not pay tax on the homestead deduction portion of their property's assessed value. *The homestead deduction is limited to Class 1 property (owner-occupied) owners who are subject to District individual income taxation during the period in which the owner occupies the property.*

You must file an application every 5 years to continue to qualify for the deduction and/or the Class 1 tax rate. The current filing period began in 1997 and will end in 2001. However, if you currently do not have the homestead deduction and/or the Class 1 tax rate and meet the eligibility requirements, or if you buy and live in a home within this 5-year period, file **immediately.** *As of October 1, 1994, eligible property owners receive the deduction on a prorated basis, starting the first full month after the date they file properly completed applications.* Otherwise, your property will be classified as Class 2 property and taxed at a higher rate. **Everyone was required to file in 1996 for real property tax years 1997-2001**. For more information, please call (202) 727-4TAX

SENIOR CITIZEN PROPERTY TAX RELIEF - You can reduce your real property tax by one-half, if you meet the following requirements: you are 65 years of age or older; you own and live in your property; the total adjusted gross income of all people living in the home, excluding tenants, is less than $100,000 for the previous calendar year; and you or any other senior citizen owner-occupant owns 50% or more of the home.

When you become 65, you may file an application immediately for senior citizen property tax relief. Eligible seniors receive the tax relief on a prorated basis as of the first full month after the date they file properly completed applications. For more information, please call (202) 727-4TAX.

PROPERTY TAX DEFERRAL - If you have lived in a Class 1 property for a year or more, and your tax is more than 10% higher than the previous year's tax, you may defer payment on the amount over the 10%.

To be eligible for the Property Tax Deferral Program, you must file an application and meet the following conditions: 1) you must have owned your home for at least 1 year before the application date 2) you must have occupied the home for the 12-month period immediately before the application date 3) you must currently occupy the property 4) the current year's tax must be more than 10% higher than the previous year's tax, and 5) the total of all taxes deferred, plus annual interest of 8% accrued on the deferrals, must not exceed 25% of the property's assessment for the real property tax year in which the deferrals are provided. You must file an application by March 31 to defer the first-half tax; or by September 15 to defer the second-half tax.

INDIVIDUAL INCOME PROPERTY TAX CREDIT - This credit reduces the D.C. individual income tax liability of eligible homeowners and renters up to $750. If your household's total income is $20,000 or less, you may be eligible. To apply, file a Schedule H (Property Tax Credit Form) with your Form D-40 (Individual Income Tax Return). Forms are available in the Forms Unit, Office of Tax and Revenue, 441 4th Street N.W., Suite 550 (North). For more information, please call (202) 727-4TAX.

METROPOLITAN POLICE HOUSING ASSISTED PROGRAM - D.C. Metropolitan Police Department officers who are first-time homeowners and live in their homes may be eligible for a sliding-scale real property tax credit. To apply, please call Housing Counseling Services, Inc. at (202) 667-7006.

LOWER INCOME HOME OWNERSHIP TAX ABATEMENT - Eligible homeowners, including non-profit organizations and shared equity investors, may receive a 5-year tax abatement and be exempt from paying recordation and transfer taxes. The 5-year period for the Lower Income HOME OWNERSHIP Tax Abatement begins on October 1 after your deed has been recorded and you have previously applied for the abatement. To qualify, you must meet the following conditions: occupy your home; meet the income level requirement; and submit a Lower Income/Shared Equity HOME OWNERSHIP Exemption Application and Claim for Exemption from Real Property Recordation and Transfer Tax (FP-5) when you record your deed. For more information, call the Recorder of Deeds at (202) 727-2481.

HISTORIC PROPERTIES - For information on the District's special program for historic properties, contact the D.C. Historic Preservation Division, 614 H Street N.W., Room 305, Washington, D.C. 20001 or call (202) 727-7360. If you have met the Historic Preservation board's requirements, please call (202) 727-4TAX for more information.

TRASH COLLECTION CREDIT FOR CONDOMINIUMS, HOMEOWNERS' ASSOCIATION AND COOPERATIVE HOUSING ASSOCIATION - Real property owners who do not receive District trash collection services may receive a credit against their real property tax if their properties are owned: 1) as condominium units in a condominium building with more than 3 dwelling units; 2) by members of a homeowners association; or 3) is a cooperative housing association with more than 3 dwelling units. For more information, please call (202) 727-4TAX.

EXEMPT FROM REAL PROPERTY TAX - Properties owned by some non-profit, educational, charitable, and religious organizations may be exempt from real property tax. To get an exemption, a property must be used for an exempt purpose. See D.C Code § 47-1002. If you believe your property qualifies, file an application for Exemption from D.C. Real Property Tax (FP-300). For more information, please call (202) 727-4TAX.

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