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December 2, 1998

'98 DEC -2 P4:20
OFFICE OF ZONING
DISTRICT OF COLUMBIA

BY HAND

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

Re: BZA Appeal No. 16404
Notice of Intervention

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

On behalf of Jack Milton Fields the owner of the property which is the subject of the above-referenced appeal, we request party status as an intervenor in support of the action of the Zoning Administrator. We have filed contemporaneously herewith a motion to dismiss the appeal as untimely and a motion in limine, both of which have been served on the Capitol Hill Restoration Society ("CHRS"). We request an opportunity to argue each motion, and if needed, present testimony in support of the motion to dismiss, prior to the hearing on the appeal.

I appreciate your consideration.

Sincerely,

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

Richard B. Nettler

cc: Capitol Hill Restoration Society
Gladys Hicks, Office of the Zoning Administrator

BZA
CASE No. 16404
EXHIBIT No. 14

Board of Zoning Adjustment
District of Columbia
CASE NO.16404
EXHIBIT NO.14

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Appeal of Capitol Hill Restoration Society	BZA Appeal No. 16404 Hearing Date: December 16, 1998

INTERVENOR'S MOTION *IN LIMINE*

For the reasons stated below, intervenor, Jack Milton Fields, moves the Board of Zoning Adjustment to grant this motion *in limine* and preclude appellant, the Capitol Hill Restoration Society ("CHRS") from presenting any evidence in support of its appeal that was not directly relied upon or reviewed by the Office of the Zoning Administrator when it approved of the home occupation permit issued to Mr. Fields, including any portions of the transcript in Application No. 16370.

I.

Introduction

This is an appeal pursuant to 11 D.C.M.R. §§ 3105.1 and 3200.2. Appellant, the Capitol Hill Restoration Society seeks review of the February 5, 1998 home occupation permit issued to Jack Milton Fields. The home occupation permit authorizes Mr. Fields, at that time the contract purchaser of the property located at 434 New Jersey Avenue, S.E., to use the premises for his government affairs/strategic planning consulting business, with one employee. The premises are zoned CAP/R-4.

Based on information acquired by CHRS at its June 9, 1998 meeting and from the subsequent hearing on Application No. 16370, CHRS argues that the subject premises is not Mr. Fields' principal residence. On September 11, 1998, seven months after the home occupation permit was issued to Mr. Fields, five months after CHRS was specifically put on notice of the home occupation permit and two months after Mr. Fields purchased the subject premises, CHRS filed an appeal with this Board of the action of the Zoning Administrator authorizing the home occupation permit.

II

Argument

Since it appears that CHRS will rely on testimony given by Mr. Fields at the hearing held in July 1998 on his application for a special exception and other testimony and evidence which was not before the Office of the Zoning Administrator at the time the Office approved, in February 1998, the home occupation permit issued to Mr. Fields, intervenor asks the Board to preclude the introduction of such testimony and evidence.

To permit counsel to obtain a ruling on whether proposed proof will be admitted, and in order to avoid error by the Board, contemporary practice recognizes the motion *in limine*. *See e.g., Prout v. State*, 311 Md. 348, 356, 535 A.2d 445, 449 (1988) (The real purpose of a motion *in limine* is to give a judge the opportunity to avoid the introduction of evidence which may irretrievably effect the fairness of a hearing.). As the Corporation Council has previously advised the Board (*see e.g., Appeal Nos. 15992,* 15993),

> The burden of proof in this appeal rests with the appellants, and, if no evidence is presented in opposition to the appellants' case, the appellants shall not be relieved of this responsibility. 11 DCMR § 3107.7 and 3324.3. The appellants must show, applying the applicable law to the relevant facts, that the C of O was improperly issued.
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> * * *
>
> [T]he review of the instant matter would be limited to evidence that existed before the issuance of the C of O [at the time it was issued]. While what [the] Zoning [Administrator] knew, and when, is of relevance here, the ultimate issue is whether [the] Zoning[] [Administrator's] issuance of the C of O was correct given the information presented to it before the [date on which the C of O was issued.]

The same is true here, the only information which is relevant to this appeal is the information presented to the Zoning Administrator when a home occupation permit was issued to Mr. Fields in February 1998 and not any information developed since that date.

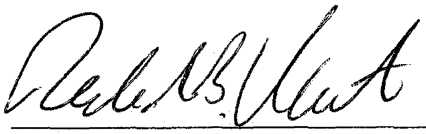
III.

Conclusion

For the above reasons, intervenor respectfully requests that the Board grant its motion *in limine*.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI



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BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Appeal of Capitol Hill Restoration Society	BZA Appeal No. 16404 Hearing Date: December 16, 1998

INTERVENOR'S MOTION TO DISMISS APPEAL AS UNTIMELY

For the reasons stated below, intervenor, Jack Milton Fields, moves the Board of Zoning Adjustment to dismiss the appeal filed by the Capitol Hill Restoration Society as untimely.

I.

Introduction

This is an appeal pursuant to 11 D.C.M.R. §§ 3105.1 and 3200.2. Appellant, the Capitol Hill Restoration Society seeks review of the February 5, 1998 home occupation permit issued to Jack Milton Fields. The home occupation permit authorizes Mr. Fields, at that time the contract purchaser of the property located at 434 New Jersey Avenue, S.E., to use the premises for his government affairs/strategic planning consulting business, with one employee. The premises are zoned CAP/R-4.

At the time he contracted to purchase the premises, Mr. Fields was also desirous of seeking special exception relief from the Board of Zoning Adjustment which would additionally permit Mr. Fields to employ one person more than allowed under the zoning regulations. Mr. Fields application for such relief, Application No. 16336, was inadvertently advertised as an appeal instead of for a special exception.

In April 1998, Mr. Lyle Schauer, on behalf of CHRS, called undersigned counsel to discuss the "appeal." Mr. Schauer was informed by undersigned counsel that the matter then pending before the Board of Zoning Adjustment should be a special exception. Mr. Schauer asked about the home

occupation permit that had been issued to Mr. Fields and was informed that while Mr. Fields had a home occupation permit that authorized the consulting use, special exception relief was need to expand the permit to include the additional employee, above that permitted by the zoning regulations. Mr. Schauer was also informed that Mr. Fields had a residence in Texas, which Mr. Schauer said he was aware of from Mr. Fields having represented a congressional district in Texas. Mr. Schauer was also informed that Mr. Fields was the contract purchaser on the property and intended to settle on the property within the next few months. Neither Mr. Schauer nor CHRS sought review of the home occupation permit issued to Mr. Fields.[1/]

Based on his having obtained the home occupation for the limited consulting use at the premises, in early July 1998, Mr. Fields purchased the subject premises and proceeded to restore the house for his residential and limited office use. The cost associated with the purchase and restorations were significant.

On July 23, 1998, a hearing was held on a re-advertised application (Application No. 16370) for special exception relief to cover the additional employees for Mr. Fields. At that hearing, and based on information acquired by CHRS at its June meeting and earlier, CHRS argued that the premises was not Mr. Fields' principal residence. The Board granted the special exception relief sought.

On September 11, 1998, seven months after the home occupation permit was issued to Mr. Fields, five months after CHRS was specifically put on notice of the home occupation permit and two

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1/ Undersigned counsel did not attend the June 9, 1998 meeting of CHRS at which it decided to oppose Mr. Fields' application for a special exception. Rather, Mr. Fields' assistant and Ms. Ellen McCarthy, an urban planner utilized as a witness for Mr. Fields, attended that meeting and confirmed the facts provided to Mr. Schauer in April 1998.

months after Mr. Fields purchased the subject premises, CHRS filed an appeal with this Board of the action of the Zoning Administrator authorizing the home occupation permit.

II

Argument

The appeal filed by CHRS is blatantly untimely and appellant's tardiness in seeking review has prejudiced Mr. Fields. 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).

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, five 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.

CHRS takes the position that the Zoning Administrator either was unaware of the facts that indicate that 434 New Jersey Avenue was not applicant's principal residence or, if she was aware of those facts, erred in interpreting the terms "principal residence." This argument has no bearing on the issues of whether the appeal is timely, and, in fact, it represents a misunderstanding of the Board's limited review authority over the action taken by the Zoning Administrator.

The Zoning Administrator is not taxed with understanding what CHRS's position may be and the interpretation given relevant terms by CHRS. Rather, the Zoning Administrator simple responsibility is to apply the Zoning Regulations based on the facts provided her. If CHRS had a basis for challenging the granting of a home occupancy permit, it had the burden of filing an appeal within a reasonable time of learning of its existence. CHRS failed to do so.

The timeliness of an appeal does not turn on whether the Zoning Administrator 's decision was determinative of issues to which CHRS takes exception.. Nor is the timeliness of CHRS' appeal dependent upon when adjacent property owners were aware of the issuance of the home occupation permit, and the fact that the notice filed in April 1998 regarding the special exception mislabeled the

relief being sought by the applicant is also irrelevant. The only relevant facts are when did CHRS know of the home occupation permit that was issued, not the new one that was being sought through relief before the Board and when was it appealed by CHRS. CHRS admits that it knew that a permit was issued as early as April 15, 1998 and did not appeal the permit until September 11, 1998. Under every interpretation given the filing requirements for an appeal by the courts of this jurisdiction, that appeal is untimely.[2]

III.

Conclusion

For the above reasons, intervenor respectfully requests that the Board dismiss the appeal filed herein.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI



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2/ CHRS also states in its response that it raised a third issue at the Board's July 22, 1998 hearing regarding whether special exception relief was appropriate for two nonresident employees. Aside from the fact that CHRS' position is not supported by prior Board decision, since, CHRS did not include that issue in its proposed findings of fact and conclusions of law, it has waived that issue as well.