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May 12, 1999

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OFFICE OF ZONING
DISTRICT OF COLUMBIA

BY HAND

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

Re: BZA Appeal No. 16404

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

I have enclosed for your consideration the intervenor's proposed findings of fact and conclusions of law in the above-referenced matter.

I appreciate your consideration.

Sincerely,

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

Richard B. Nettler

cc: Mr. Lyle Schauer, Capitol Hill Restoration Society
Mr. Jack Milton Fields

#23

BZA
Case No. 16404
Exhibit No. 23

Board of Zoning Adjustment
District of Columbia
CASE NO.16404
EXHIBIT NO.23

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16404 of the Capitol Hill Restoration Society, pursuant to DCMR 3105 and 3200.2. from the administrative decision of Gladys Hicks, Acting Zoning Administrator, Building and Land Regulation Administration, Department of Consumer and Regulatory Affairs, made on February 5, 1998, approving the issuance of a home occupation permit to Jack Milton Fields, the contract purchaser of the property located in a CAP/R-4 district at premises 434 New Jersey Avenue, S.E., (Square 694, Lot 11).

HEARING DATES: December 16, 1998, February 17, 1999, April 21, 1999
DECISION DATE: June 2, 1999

PROPOSED ORDER

INTRODUCTION:

1. The appeal was filed by the Capitol Hill Restoration Society, hereinafter referred to as the Appellant or CHRS.

2. The appeal challenges the administrative decision of the Acting Zoning Administrator of the Department of Consumer and Regulatory Affairs (DCRA), made on made on February 5, 1998, approving the issuance of a home occupation permit (No. 98-0271) to Jack Milton Fields for the property located in a CAP/R-4 district at premises 434 New Jersey Avenue, S.E.,

3. Jack Milton Fields (Fields or Intervenor) is the owner of property at 434 New Jersey Avenue, S.E. (the site or subject property), and intervened in the appeal. At the public hearings on the appeal, the Board of Zoning Adjustment (the Board or BZA) recognized Fields as an Intervenor to the appeal.

4. The other participant in the appeal was the Acting Zoning Administrator for the District of Columbia. Advisory Neighborhood Commission (ANC) 6B submitted a letter in support of the appeal but did present testimony or any specific issues.

5. A motion to dismiss the case was filed by the Intervenor who argued that the appeal was not filed timely. Intervenor also filed a motion to strike and a motion in limine.

Timeliness

6. The Intervenor noted that at the time he contracted to purchase the premises and received a home occupation permit in February 1998, he was also desirous of seeking special exception relief from the Board of Zoning Adjustment which would additionally permit him to employ one person more than allowed under the zoning regulations. Fields application for such relief, Application No. 16336, was inadvertently advertised as an appeal instead of for a special exception.

7. In April, 1998, Mr. Lyle Schauer, on behalf of CHRS, called Field's counsel to discuss the "appeal." Mr. Schauer was informed by Field's 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 Fields and was informed that while 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 Fields had a residence in Texas, of which Mr. Schauer said he was aware since he knew that Fields had represented a congressional district in Texas. Mr. Schauer was also informed that 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 then sought review of the February 1998 home occupation permit issued to Mr. Fields.

8. Based on his having obtained the home occupation for the limited consulting use at the premises, in early July 1998, 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 was significant.

9. 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 Fields. At that hearing, and based on information acquired by CHRS at its June meeting and earlier, CHRS argued that the premises was not Fields' principal residence. The Board granted the special exception relief sought by Fields. The issuance of the Board's decision on that application was stayed pending consideration on this appeal.

10. On September 11, 1998, seven months after the home occupation permit was issued to Fields, five months after CHRS was specifically put on notice of the home occupation permit and two months after Fields purchased the subject premises, CHRS filed the instant appeal with this Board of the February 1998 action of the Zoning Administrator authorizing the home occupation permit.

11. Intervenor argued that the appeal is untimely. According to Intervenor, 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).

12. According to Fields, 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, Fields argued that the Board lacks jurisdiction to consider the appeal of CHRS which forms the underlying basis for its request for a stay.

13. CHRS argued that the Zoning Administrator either was unaware of the facts that indicate that 434 New Jersey Avenue was not Fields's principal residence or, if she was aware of those facts, erred in interpreting the terms "principal residence." However, while Fields did not agree with the assertions made by CHRS or the interpretation to be given the facts relied upon, Fields argued that 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.

14. Fields further argued that 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. Accordingly, Fields stated that the appeal is untimely.

15. The Board indicated that the appeal was timely filed.

Motion In Limine

16. Fields asked the Board to preclude 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*. According to Fields, since it appears that CHRS is relying on testimony given by Mr. Fields at the hearing held in July 1998 on Fields' 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, the Board should preclude the introduction of such testimony and evidence, as well as the interpretation of such evidence or testimony by CHRS. In support of its motion, Fields referred the Board to the advice previously given it by the Corporation Counsel in *Appeal Nos. 15992,* 15993), where the Office of the Corporation Counsel stated that

> 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.]

Thus, Fields argued that 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 which CHRS argues supports a different conclusion.

17. The Board granted Fields' motion.

Motion To Strike

18. For the reasons stated in its motion *in limine*, Fields asked the Board to strike those portions of the pre-hearing statement of CHRS that reference the testimony in Application No. 16370 as well as the transcript portions attached to the prehearing statement on the grounds that this information was not before the Office of the Zoning Administrator on February 5, 1998 when it issued a home occupation permit to Fields.

19. The Board granted the motion to strike

SUMMARY OF EVIDENCE:

21. CHRS presented evidence through Mr. Lyle Schauer. According to Mr. Schauer, although he could find nothing in the files of the Office to indicate otherwise, the Office of the Zoning Administrator should have known that the premises were not going to be used as Fields' principal residence despite Fields' certification that they would be so used. In addition, Mr. Schauer testified that the premises could not be considered Fields' principal residence because Fields had no intention of participating in community activities. According to Mr. Schauer, even if Fields was domiciled in Houston, Texas but lived at the subject premises for most of the year, it could not be considered his principal residence if he did not also participate in community activities. CHRS presented no other evidence or testimony.

22. On behalf of the Office of Zoning Administrator, Mr. Ed Nunley testified that he could find nothing in the files of the Office of the Zoning Administator which would indicate that Fields' certification, on his application, that he would use the subject premises as his principal residence was incorrect or questionable. While Mr. Nunley did note that the application, which had been filed by Fields as the contract purchaser, did not contain a place for noting the fact regarding his contract purchaser status, he saw nothing inappropriate in the issuance of the home occupation permit for the subject premises. Mr. Nunley did acknowledge that if the premises were not used consistent with the application and the zoning regulations, such conduct would be enforced through the Civil Infractions Branch of the Department of Consumer & Regulatory Affairs.

23. Ms. Ellen McCarthy testified on behalf of Fields. Ms. McCarthy testified that she sent the application to Fields for his review and explained to him the qualifications for obtaining a home occupation permit. Ms. McCarthy then took the certified application, executed by Fields, for processing by the Office of the Zoning Administrator. According to Ms. McCarthy, she raised an issue with the person processing the application that it did not contain a place for noting that Fields was the contract purchaser of the property but was told to complete the application as it was filed. No issue was raised by the processor questioning any of the certifications made on the application and Ms. McCarthy testified that she had no facts which contradicted the assertions made in the application. In response to questioning, Ms. McCarthy said that she did not know when Fields began occupying the subject premises and that it was not unusual for a prospective purchaser or tenant of a building to obtain approval of the use proposed before purchasing or occupying the premises. As

Ms. McCarthy explained, the home occupation permit could only be used by Fields for the subject premises since it is not transferable and therefore if he had not purchased and moved his residence to the premises, the permit would be void.

24. The Office of the Corporation Counsel submitted a memo to the Board indicating that, since "principal residence" was not defined in the zoning regulations, the regulations provide for reliance on Webster's Unabridged Dictionary. The memo concludes that, with regard to Fields' application, principal residence could be considered to be either where the applicant spends most of his time, or where he is domiciled. In this case, there was no evidence adduced showing that the Office of the Zoning Administrator had any knowledge as to the domicile of Fields; rather the only information it had was that Fields intended to use the premises as his principal residence.

FINDINGS OF FACT:

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

1. That the Capitol Hill Restoration Society has failed to present any evidence or testimony which suggests that the Office of the Zoning Administrator committed error in issuing a home occupation permit to Fields for the subject premises based on his certification that the premises would be used in accordance with the zoning regulations.

2. That the Capitol Hill Restoration Society has failed to present any evidence or testimony which suggests that the Office of the Zoning Administrator had a basis for concluding that the subject premises would not be used as the principal residence for Fields.

3. The Acting Zoning Administrator properly issued a home occupation permit to Fields.

4. The Board has given the submission by the ANC great weight, but in light of its findings of fact, the ANC's December 9, 1998 submission does not warrant granting this appeal.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing summary of evidence and findings of fact, the Board concludes that the decision of the Zoning Administrator must be upheld. The Board concludes that the Acting Zoning Administrator properly based the decision on the home occupancy permit application and was not in possession of any contrary information.

The Board concludes that the evidence did not support appellant's arguments that the Office of the Zoning Administrator had a basis for concluding that the subject premises would not be used as the principal residence of the applicant, Fields.

The Board concludes that the Capitol Hill Restoration Society has failed to present evidence to the Board which indicates that the Acting Zoning Administrator failed to properly interpret the

provisions of the Zoning Regulations, or that an error was made in the administrative decision of the Acting Zoning Administrator on February 5, 1998 in issuing the subject home occupation permit. Accordingly, it is hereby **ORDERED** that the appeal is **DENIED** and that the decision of the Acting Zoning Administrator in issuing Home Occupation Permit No. 98-0271 is hereby **UPHELD**. It is further **ORDERED** that, in light of the decision herein, the February 9, 1999 stay of issuance of a decision entered in *Application No. 16370* is hereby **VACATED** and a decision on that Application shall be issued forthwith.

VOTE: (Angel Clarens, Zoning Commission Member, Sheila Cross Reid, Betty King and Jerry H. Gilreath _____)

BY ORDER OF THE BOARD OF ZONING ADJUSTMENT

FINAL DATE OF ORDER:

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."