GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16404 of the Capitol Hill Restoration Society, pursuant to 11 D.C.M.R. §§ 3105 and 3106, from the administrative determination of Gladys Hicks, Acting Zoning Administrator, Zoning Division, Building and Land Regulation Administration, Department of Consumer and Regulatory Affairs, made on February 5, 1998, approving the issuance of Home Occupation Permit No. 98-0271 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 811).

HEARING DATES: December 16, 1998; February 17, 1999; April 21, 1999

DECISION DATE: June 2, 1999

DECISION AND ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

This appeal is brought by the Capitol Hill Restoration Society (CHRS), a nonprofit association incorporated under the laws of the District of Columbia for various civic purposes, including supporting the preservation of Capitol Hill as a residential community. By letter dated September 11, 1998, the CHRS authorized Lyle R. Schauer, CHRS Zoning Committee chair, to represent CHRS in all matters related to this appeal.

On September 14, 1998, the CHRS filed a notice of appeal with the Board of Zoning Adjustment (Board) from the determination on February 5, 1998, by then Acting Zoning Administrator Gladys Hicks to issue Home Occupation Permit No. 98-0271, to Jack Milton Fields, d/b/a Twenty-First Century Group, Inc., for a home occupation in a CAP/R-4 district for the premises at 434 New Jersey Avenue, S.E., Square 694, Lot 811. The permit (exhibit number 2) is for the home occupation business government affairs consulting and strategic planning, with the conditions that the business be limited to one non-resident employee and office use only.

The Board has jurisdiction to hear this appeal pursuant to the Zoning Act of June 20, 1938, 52 Stat. 799, as amended, D.C. Code § 5-424(f)-(g) (1994 repl.). This appeal is brought pursuant to 11 D.C.M.R. §§ 3105.1 and 3106 (1995).[1] Sections 3200.2 and 3315.2 (1995) are also cited as authority.

[1] The Board's rules of practice and procedure were amended and renumbered effective October 31, 1999. The amendments do not affect this appeal. *See* 11 D.C.M.R. § 3102.2, 46 D.C. Reg. 7853 (Oct. 1, 1999). To conform to the citations used by the

#24

Board of Zoning Adjustment
District of Columbia
CASE NO.16404
EXHIBIT NO.24

In an attachment to its notice of appeal, CHRS asserts that at the time the Zoning Administrator made her decision, the subject premises, 434 New Jersey Avenue, S.E., were not Mr. Fields' principal residence, nor was his home occupation clearly secondary to residential use of the dwelling. The CHRS argues in the alternative that either (1) the Zoning Administrator knew of the factual circumstances relating to Mr. Fields' use of the subject premises and erred in her interpretation of the terms "principal residence" and "secondary to the use of a dwelling unit for residential purposes," as those terms are used in the Zoning Regulations; or (2) the Zoning Administrator was not apprised of the factual circumstances relating to Mr. Fields' use of the subject premises and had she been so apprised, she would have denied his application.

On September 15, 1998, pursuant to 11 D.C.M.R. § 3315.6, the Office of Zoning distributed a copy of the appeal form to Advisory Neighborhood Commission (ANC) 6B, the ANC for the area within which the subject premises are located. A copy of the appeal was also provided to the Office of Planning.

The Office of Zoning scheduled the public hearing on the appeal for December 16, 1998. Pursuant to 11 D.C.M.R. § 3315.11, notice of the public hearing was published in the *D.C. Register*. *See* 45 D.C. Reg. 7865 (1998). By separate letters dated November 5, 1998, the Office of Zoning provided CHRS, the ANC 6B, and the Zoning Administrator notice of the hearing. The public notice requirements for this appeal have been met.

On December 2, 1998, the CHRS filed a prehearing statement, with attachments, in support of its appeal. Also on December 2, 1998, Jack Milton Fields, the owner of the property that is the subject of this appeal, requested party status as an intervenor. Mr. Fields is represented in these proceedings by his attorney, Richard B. Nettler, of Robins, Kaplan, Miller and Ciresi, L.L.P. Mr. Fields filed a motion on December 2, 1998, to dismiss the appeal as untimely. He also filed a motion *in limine* to preclude CHRS from presenting any evidence in support of its appeal that was not directly relied upon by the Zoning Administrator at the time she approved Mr. Fields' permit. On December 8, 1998, Mr. Fields filed a motion to strike the portions of the CHRS prehearing statement and accompanying attachments relating to Application No. 16370, Mr. Fields' application for special exception relief for the subject premises.

By letter dated December 9, 1998, signed by the chair, ANC 6B advised the Board that, at a properly noticed meeting on October 13, 1998, with a quorum present, it had voted nine to zero to support the CHRS appeal. The ANC requested the Board waive its rules to receive the late-filed report.

---

parties, all citations to the Board's rules are to the rules as published in 11 D.C.M.R. ch. 31 and 33 (1995).

The Board held a public hearing on this appeal on December 16, 1998. Board members Sheila Cross Reid, Betty King, Jerry H. Gilreath, and John Parsons were present. The Board granted Mr. Fields' request to intervene. As discussed below, the Board heard and ruled on Mr. Fields' three preliminary motions, denying the motion to dismiss by a three to one vote and granting the motions *in limine* and to strike by a three to zero vote, with one abstention. The Board also accepted the late-filed ANC report, and heard testimony and arguments from Mr. Shauer on behalf of CHRS and testimony from Edgar G. Nunley, Chief of the Zoning Review Branch, Zoning Review Division, Department of Consumer and Regulatory Affairs, on behalf of the Zoning Administrator.

In its written recommendation, ANC 6B supported the CHRS appeal. The ANC submittal did not provide the Board with the reasons for its recommendation, and did not identify any specific issues or concerns.

The Board continued the public hearing to February 17, 1999, to accommodate a conflict in one of the Board member's schedule and to afford the Zoning Administrator the opportunity to present further testimony. On February 8, 1999, Mr. Nettler, with the consent of CHRS, requested a continuance of the hearing. The hearing was rescheduled to April 21, 1999.

Board members Ms. Reid, Ms. King, Mr. Gilreath, and Angel Clarens were present for the April 21, 1999, public hearing. The Zoning Administrator did not appear. The Board heard testimony from Ellen McCarthy, an urban planner employed by Robins, Kaplan, Miller and Ciresi, on behalf of Mr. Fields, and closing arguments by Mr. Fields and CHRS. There are no government reports relating to this appeal. The record was closed at the April 21, 1999 hearing, with the exception of proposed findings of fact and conclusions of law, submitted by CHRS and Mr. Fields on May 12, 1999.

The Board held its decision meeting on June 2, 1999, Board members Ms. Reid, Ms. King, and Mr. Gilreath participating. By a vote of three to zero, the Board denied the CHRS appeal.

FINDINGS OF FACT:

1. The subject premises, 434 New Jersey Avenue, S.E., are in a CAP/R-4 district.

2. In January 1998, Ellen McCarthy, acting on Jack Milton Fields' behalf, filed an application with the Office of the Zoning Administrator pursuant to 11 D.C.M.R. § 203 for a home occupation permit for the subject premises, to operate a government affairs consulting and strategic planning business, with one non-resident employee. Tr. at 138 (Apr. 21, 1999); exh. 18.

3. At the time of filing his application, Mr. Fields was the contract purchaser of the subject premises.

4. Edgar Nunley, Chief of the Zoning Review Branch, testified that when a contract purchaser applies for a home occupation permit for premises under contract, the Zoning Administrator's practice is to make a determination, based upon the application form and other facts ascertained by the Zoning Administrator, whether or not to issue the permit before the purchaser closes on the property. *See* Tr. at 71-72 (Dec. 16, 1998).

5. In this case, the Zoning Administrator had before her Mr. Fields' application form. Mr. Fields did not provide a home telephone number in question number 3, and did not complete question number 4 regarding his ownership status, which was "other." He did not annotate the form to show that he was a contract purchaser. He did not provide his residential or business address, answering instead that the address provided in question number 3, "434 New Jersey Avenue, S.E.", is an "Owner Occupied Single Family Dwelling." He listed Gerald Cassidy, at a different address, as the owner of the premises. The Board finds that in these regards, Mr. Fields' application form contained inconsistencies and was incomplete.

6. The application also contains an attestation and certification, signed by Mr. Fields, that the information provided on the application is true and correct to the best of his knowledge. In addition, it contains the statement, "I further certify that I understand that any information provided, pertaining to the type of business that I propose to conduct which is found to be *false*, will result in this application being voided." The Board finds that through his application, Mr. Fields has certified that he will operate his business within the constraints of the home occupation provisions of the Zoning Regulations.

7. Mr. Fields, through representations made by Ms. McCarthy on his behalf, verbally advised the Office of the Zoning Administrator that he was the contract purchaser of the property and that he was seeking to find out if the subject premises could be used for his consulting business. He also advised the Office of the Zoning Administrator that upon completion of the contract, he would be the "owner/occupant" of the premises. *See* Tr. at 140-50, 163, 165 (Apr. 21, 1999).

8. Based upon Mr. Fields' application and the representations made by Ms. McCarthy, the Zoning Administrator made a determination that Mr. Fields, as a contract purchaser of the premises, was eligible for the permit.

9. On February 5, 1998, the Zoning Administrator issued Mr. Fields a home occupation permit for the premises at 434 New Jersey Avenue, S.E., to operate a government affairs consulting and strategic planning business, with one non-resident employee.

CONCLUSIONS OF LAW AND OPINION:

This Board is authorized under 11 D.C.M.R. §§ 3105 and 3106 to hear and decide this appeal since the appellant, CHRS, alleges that the Zoning Administrator erred in the administration of the home occupation provisions of the Zoning Regulations when she issued Jack Milton Fields a home occupation permit. The CHRS is a person aggrieved by the Zoning Administrator's determination and may bring this appeal. Under 11 D.C.M.R. § 3103.7, the CHRS has the burden of proving the Zoning Administrator erred in issuing the permit.

The Zoning Regulations provide in 11 D.C.M.R. § 3315.2 that an appeal must be timely. Since the Zoning Regulations do not prescribe a time limit, the Board applies a standard of reasonableness in determining whether an appeal is timely. *See Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980). In appling the reasonableness standard, the courts have consistently held that the time for filing an appeal from a Zoning Administrator's determination commences when the appellant is chargeable with notice or knowledge of the determination. *See Mendelson v. District of Columbia Board of Zoning* Adjustment, 645 A.2d 1090, 1093 (D.C. 1994); *Woodley Park Community Ass'n v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628, 636 (D.C. 1985).

In this case, Mr. Fields argued that CHRS had both constructive and actual notice of the Zoning Administrator's February 5, 1998 determination to issue Mr. Fields a home occupation permit at least as early as April 1998. At that time, Mr. Nettler had advised the CHRS, through Lyle R. Shauer, of the permit and Mr. Fields' need for a special exception to expand the permit to include an additional employee. The CHRS argued on the other hand that while CHRS knew in April 1998 that the Zoning Administrator had issued Mr. Fields a permit, it was only after Mr. Fields' July 22, 1998, special exception hearing that CHRS had full actual knowledge of the facts upon which to raise the "principal residence" issue. The CHRS also asserted that it was not until the September 2, 1998, special exception meeting that CHRS learned that the Board felt that the principal residence issue was not part of the special exception case.

The CHRS appeal in large part alleges that the Zoning Administrator erred in issuing Mr. Fields a permit because the subject premises are not his principal residence. The Board finds that CHRS is not chargeable with notice or knowledge of the facts it believed were necessary to challenge the Zoning Administrator's determination until the July 22, 1998 special exception proceedings. Prior to that time, CHRS was not able to ascertain the facts relating to Mr. Fields' eligibility for the permit either from the permit or from Mr. Fields. Moreover, the CHRS filed its appeal within two weeks of learning on September 2, 1998, that the Zoning Administrator's determination was not an issue in the special exception proceeding. Under these circumstances, the Board concludes that CHRS filed its appeal within a reasonable time.

Mr. Fields also filed a motion *in limine*, seeking an order precluding CHRS from presenting any evidence in support of its application that was not directly relied upon or reviewed by Office of the Zoning Administrator at the time the February 5, 1998 home occupation permit was issued. Mr. Fields argued that such information is not relevant to the Board's determination of whether the Zoning Administrator erred in issuing the permit. For the same reasons, Mr. Fields filed a motion to strike those portions of the CHRS prehearing statement that referenced the testimony on the special exception application, as well as portions of the transcript of the testimony attached to the CHRS statement. The CHRS opposed the motions, arguing that CHRS only became aware of the facts relating to Mr. Fields' residency at the July 22, 1998 special exceptions hearing, and that the Zoning Administrator did not have those facts before her when she issued the February 5, 1998 permit. The Board granted Mr. Fields' motions, concluding that the information the Board learned in July 1998 is not germane to the question of whether the Zoning Administrator's February 5, 1998 determination was in error.

Turning to the merits, the only relevant legal issue in this appeal is whether the Zoning Administrator may issue a home occupation permit to a contract purchaser. For the reasons stated below, the Board concludes that a permit may be issued in these circumstances.

A contract purchaser such as Mr. Fields may need to ascertain prior to completing the contract whether the property under contract can be used as intended. The Zoning Administrator's practice in such cases has been to make a determination, based upon the facts and circumstances presented by the contract purchaser, whether to issue a home occupation permit for prospective use.

Section 203 of the Zoning Regulations is silent as to whether a contract purchaser may apply for and obtain a home occupation permit to be used at a dwelling under contract.[2] Under Section 203.3(c), a home occupation permit is issued to a designated person and enables that person to conduct a business at a specific residential address. Under Section 203.3(d), the permit may not be transferred from one person to another, nor from one address to another. If the Zoning Administrator issues a permit to a contract purchaser and the contract is not completed, the permit by its own terms

[2] The Board notes that the application form used by the Zoning Administrator does not contain questions that address the circumstances of a contract purchaser. Nor does it request information from the applicant that could be used to determine whether or not the applicant will use the premises as his principal residence. The Board recommends that the Zoning Administrator and the Office of the Corporation Counsel work together to clarify the application form and the circumstances under which someone who is a contract purchaser may obtain a home occupation permit.

becomes void. In light of these regulatory provisions, the Board concludes that the Zoning Administrator may issue a home occupation permit to a contract purchaser where the Zoning Administrator determines that the purchaser intends to operate within Section 203's constraints.

The Board must next determine whether the Zoning Administrator erred in her determination to issue Mr. Fields a permit. The Board has reviewed the Zoning Administrator's determination in light of the facts that were before her at the time she made her decision. The Zoning Administrator had before her Mr. Fields' application form, supplemented by Ellen McCarthy's verbal representations to the Zoning Administrator's staff regarding Mr. Fields' status as a contract purchaser, his intent to locate a consulting business on the premises, and his intent to become the "owner/occupant" of the dwelling. The Board concludes that the Zoning Administrator had sufficient information upon which to base her determination to issue Mr. Fields a permit. As Mr. Fields certified on his application form that he would operate his home occupation within the constraints of the home occupation provisions of the Zoning Regulations and verbally identified himself as a contract purchaser, the Board concludes that the Zoning Administrator did not err in her determination.

Finally, the Board agrees with Mr. Fields that since the Zoning Administrator issued Mr. Fields the home occupation permit for prospective use, the questions raised by CHRS of whether the premises are Mr. Fields' principal residence and whether his home occupation is secondary to residential use of the property are not relevant to this appeal and, if neither prove to be the case, are more appropriately addressed through the enforcement process. *See* Tr. at 175-76 (Apr. 21, 1999); *see also* Tr. at 12-16, 20-21 (Dec. 16, 1998).

The Board was unable to consider the ANC recommendation in deciding this case because the AND did not provide the Board with the reasons for its recommendation or identify specific issues or concerns. The Board can only give great weight to legally relevant issues identified by an ANC. *Neighbors United for a Safer Community v. District of Columbia Board of Zoning Adjustment*, 647 A.2d 793, 798 n.15 (D.C. 1994). The Board cannot give great weight to a conclusory recommendation that is not supported by evidence. *Id.*

For the reasons stated above, the Board concludes that the appellant Capitol Hill Restoration Society has not met its burden of demonstrating that the Zoning Administrator's February 5, 1998, determination to issue Home Occupation Permit No. 98-0271 was in error. It is hereby **ORDERED** that the Zoning Administrator's determination is **AFFIRMED** and this appeal is **DENIED.**

VOTE: 3-0 (Sheila Cross Reid, Betty King, Jerry H. Gilreath to deny).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: Jerrily Kress
JERRILY R. KRESS, FAIA
Director

FINAL DATE OF ORDER: MAR - 8 2000

UNDER 11 D.C.M.R. § 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA."

Appeal16404

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 16404:

As Director of the Office of Zoning, I hereby certify and attest that on MAR - 8 2000, a copy of foregoing Decision and Order in BZA Appeal No. 16404 was mailed first class, postage prepaid, or via D.C. Government interoffice mail, to each party who appeared and participated in the public hearing concerning the matter, and who is listed below:

Lyle R. Shauer
Chair, Zoning Committee
Capitol Hill Restoration Society
P.O. Box 15264
Washington, D.C. 20003-0264

Michael Johnson
Zoning Administrator
Building and Land Regulation Administration
Department of Consumer and Regulatory Affairs
941 N. Capitol Street, N.E.
Washington, D.C. 20002

Richard B. Nettler, Esquire
Robins, Kaplan, Miller & Ciresi, LLP, Suite 1200
1801 K Street, N.W.,
Washington, D.C. 20006-1301

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

ATTESTED BY: Jerrily R. Kress

JERRILY R. KRESS, FAIA
Director, Office of Zoning