BEFORE THE
BOARD OF ZONING ADJUSTMENT
FOR THE
DISTRICT OF COLUMBIA

Appeal No. 16404

MOTION FOR RECONSIDERATION
BY THE CAPITOL HILL RESTORATION SOCIETY

The Capitol Hill Restoration Society, Inc., the applicant herein, respectfully requests the Board of Zoning Adjustment (herein, the Board) to reconsider its decision and order in the above matter pursuant to Section 3106.2 of the Board's Rules of Practice and Procedure. Applicant believes that the Board's Conclusions of Law are erroneous for the following reasons:

1. The Board's statement of the legal issue in this appeal is incorrect.

2. The Board's order has the effect of amending Section 203 of the Zoning Regulations, a power reserved to the Zoning Commission

3. The home occupation permit issued to Mr. Fields as contract purchaser was issued contrary to accepted practice in the office of the Zoning Administrator

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ARGUMENT

I. STATEMENT OF THE LEGAL ISSUE IS INCORRECT.

The Board states the legal issue in this appeal to be "whether the Zoning Administrator may issue a home occupation permit to a contract purchaser." This is not the issue. The only issue is whether the Zoning Administrator may issue a home occupation permit to a nonresident of the premises for which a permit is ought.

The Board states that section 203 of the Zoning Regulations is silent as to whether a contract purchaser may apply for and obtain a home occupation permit. There is good reason for that silence: the status of contract purchaser is irrelevant. The status that is relevant is that of residence. If a contract purchaser is a resident in the premises and all other requirements are met, then a permit can be issued, but if a contract purchaser is not a resident, then a permit cannot be issued. Although most contract purchasers will be nonresidents of the premises, as was Mr. Fields in this instance, it is not uncommon for a contract purchaser to be a resident tenant in the premises.

Subsection 203.3(c) states: "A Home Occupation Permit may be granted only to a designated person or group of persons who reside at a residential address." (Emphasis added.) Mr. Fields was not resident in 434 New Jersey Avenue at the time the permit

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was granted. It, therefore, was granted in error. Mr. Fields status as a contract purchaser was irrelevant. The Board finds that Fields intended to become an "owner/occupant" of the premises. This is also irrelevant. The only test the Board should apply is whether Mr. Fields was a resident. Since he was not, the Board should find that the permit was issued in error.

The Board in footnote 2 on page 6 notes that the application form does not address the circumstances of a contract purchaser. There is good reason for that silence. It is unnecessary for the form to address those circumstances because contract purchasers should be treated like all other applicants: If they are residents of the premises, a permit can be granted (assuming they meet all other requirements); if they are not residents, a permit cannot be granted.

II. THE ORDER HAS THE EFFECT OF AMENDING SECTION 203 OF THE ZONING REGULATIONS, A POWER RESERVED TO THE ZONING COMMISSION.

The Board's order goes beyond interpretation of Section 203.3: The order eliminates the residency requirement for contract purchasers and presumably others (like prospective tenants) as well. The residency requirement is replaced with promises that a prospective resident will in fact become a resident. This has the effect of amending the regulation, an action reserved for rule making proceedings by the Zoning Commission.

III. THE HOME OCCUPATION PERMIT ISSUED TO MR. FIELDS AS CONTRACT PURCHASER WAS ISSUED CONTRARY TO ACCEPTED PRACTICE IN THE OFFICE OF THE ZONING ADMINISTRATOR.

The Board states as a conclusion of law that:

> 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 on the facts and circumstances presented by the contract purchaser, whether to issue a home occupation permit for prospective use. (Emphasis added)

There is no showing in the record that there was any such practice in the Zoning Administrator's office. The only testimony respecting practices in that office is that of Edgar Nunley, Chief of the Zoning Review Branch. His testimony described a very different practice for dealing with contract purchasers: A contract purchaser is issued a permit only if he or she already is a resident in the premises.

> If they give us a narrative that they are contract purchaser, well fine. Do you currently live there and are a contract purchaser or do you live somewhere else and are under contract to purchase this property?
>
> If they respond that they live somewhere else and that they have a contract on this property, then my response to them would be well, when you get there, when you have

> bought the property or once you reside there, whether you have yet bought it or not, then we can issue the certificate but not until then. (Tr. Dec. 16, 1998, p. 70.)

Later Mr. Nunley again makes the point:

> I've been in this business a number of years and I know that just because you have a contract doesn't mean that that contract will ever come to fruition to conveyance, and we don't issue an official document on something as speculative as this simple information that I have a contract to purchase this property. (Tr. Dec. 16, 1998, p. 72.)

The practice of the Zoning Administrator as described by Mr. Nunley, is to issue a home occupation permit to contract purchasers who currently live in the premises, and not to those who live somewhere else. Promises and pledges of prospective use are not sufficient. As Mr. Nunley put it: "Once you reside there...then we can issue the certificate but not until then.

The concern expressed by the Board that a contract purchaser may need to ascertain prior to completing the contract whether the property can be used as intended is handled by the Zoning Administrator in an informal manner. Mr. Nunley described the practice in those instances:

> If the person is speculating, in other words, they are going to use our action as a basis for making a decision whether to purchase, then we would give them verbal. We would not give then an official document allowing them to operate from a home when we have information that they do not reside there. I plan to buy or I plan to move does not make it their residence. Once you have moved, come back and see us. Tr. Dec. 16, 1998, p. 67.

There is no testimony in the record that Mr. Fields was a resident of 434 New Jersey Avenue at the time the home occupation permit was applied for or issued. Therefore, the permit was issued in error, contrary to practice of the Zoning Administrator's office.

## RELIEF SOUGHT

Reverse the Zoning Administrator's determination on February 5, 1998 to issue a home occupation permit to Jack Milton Fields at premises 434 New Jersey Avenue, SE, on the grounds that the permit was issued in error, contrary to the regulations and to the practices of the Zoning Administrator's office.

Section 203 of the Zoning Regulations, the application form, and established practice of the Zoning Administrator all suggest that this matter can be handled without creating a special requirement for contract purchasers, without revising the application form, and without disturbing established administrative practices of the Zoning Administrator.

Revocation of the home occupation permit is the appropriate remedy. This will not preclude Mr. Fields from applying for a new home occupation permit. Since he now presumably is a resident of 434 New Jersey Avenue, SE, the issue of residency would not arise. (See Beins v. Board of Zoning Adjustment, 572 A.2d 122, 129, in which the Court of Appeals ordered revocation of a building permit,

reasoning that a new permit could be sought.) We do not understand why Mr. Fields, on his own volition, has not already sought a new home occupation permit, unless he fears that it will not be granted.

CERTIFICATE OF SERVICE

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I hereby certify that on March 16, 2000 a copy of Motion for Reconsideration was served on the parties listed below by first class mail.

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