Office of Zoning

Appeal No. 16404 of the Capitol Hill Restoration Society, pursuant to 11 DCMR §§ 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 DATES: June 2, 1999; May 3, 2000; September 4, 2001; September 20, 2001

FINAL ORDER: March 8, 2000

ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION

The Appellant, Capitol Hill Restoration Society (CHRS), filed a timely motion with the Board of Zoning Adjustment for reconsideration of the Board's final Decision and Order in this case. After reviewing the motion and the opposition thereto by Intervenor Jack Milton Fields, the Board, on May 3, 2000, voted 4 – 1 – 0 to deny the motion for reconsideration.

Since a majority of the Board has not personally heard the case, the Board, pursuant to the District of Columbia Administrative Procedure Act, D.C. Code § 2-509(d) (2001), determined on September 4, 2001, to issue a Proposed Order Denying Appellant's Motion for Reconsideration, affording the parties the opportunity to submit written exceptions and arguments concerning the order.

No exceptions or arguments were received. On September 20, 2001, the Board voted 4 – 1 – 0 to issue the final Order Denying Appellant's Motion for Reconsideration.

BZA
Case No.
Exhibit No. 28
Board of Zoning Adjustment
District of Columbia
CASE NO.16404
EXHIBIT NO.28

Procedural Issues

CHRS states that its motion is made pursuant to § 3106.2 of the Board's Rules of Practice and Procedure.[1] This citation appears to be a typographical error, since there is no subsection numbered "3106.2" in the 1995 edition of Title 11. Rather, motions for reconsideration are made pursuant to § 3332. Under § 3332.4, a motion for reconsideration must state specifically the respects in which the final decision is claimed to be erroneous, the grounds of the motion, and the relief sought.

Citing §§ 3102.1 and 3332.6, the Intervenor argues that the motion for reconsideration is not properly before the Board because it fails to raise an issue or fact for rehearing that was not already considered by the Board. A rehearing would entail a new hearing and new evidence, while reconsideration involves reconsideration of specific issues based upon the existing record to determine whether the final decision is erroneous. Since CHRS has not requested a rehearing, §§ 3102.1 and 3332.6 are not applicable.

Because the CHRS motion states specifically three respects in which it claims the Board's final decision is erroneous, provides the reasons for its claims, and states the relief sought, the Board finds that the motion complies with the procedural requirements of § 3332.4 pertaining to motions for reconsideration.

Substantive Issues

CHRS raises three issues for reconsideration.

1. Whether the Statement of Issue as Characterized by the Board Is Correct.

CHRS initially asserts that the Board's statement of the legal issue in this case, whether the Zoning Administrator may issue a home occupation permit to a contract purchaser, is not a correct statement of the issue on appeal. CHRS now characterizes the issue on appeal as whether the Zoning Administrator may issue a permit to a nonresident of the premises for which the permit is sought.

The Intervenor objects that CHRS is attempting to re-cast its appeal and argue a position that the Board rejected. The Intervenor points out that since CHRS attempted to challenge the issuance of the permit on grounds that were not properly before the Board on appeal, the Board inquired into whether the Zoning Administrator's decision was erroneous since the permit was issued at a time when Mr. Fields was a contract purchaser.

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[1] The Board's rules of practice and procedure were amended and renumbered effective October 31, 1999, in 46 DCMR 7853. The amendments do not affect the appeal or the motion for reconsideration. To conform to the citations used by the parties, all citations to the Board's rules are to the rules as numbered and published in 11 DCMR chs. 31 and 33 (1995).

The Board found it somewhat difficult to discern the legally relevant appellate issues from the pre-hearing statements filed by CHRS and the arguments it presented during the appeal hearing. Ultimately, the Board concluded that CHRS had attempted to argue 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, alternatively, (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, would have denied his application.

Since CHRS was limited to presenting evidence and arguments relating to the issuance of the permit, the issue on appeal essentially boiled down to whether the Zoning Administrator may issue a home occupation permit to a contract purchaser who is not yet in residence at the subject premises. This is the issue that was addressed at the hearing and in the Decision and Order. To the extent any clarification is required, the Board concludes that the only relevant legal issue in this appeal is whether the Zoning Administrator may issue a home occupation permit to a contract purchaser who does not yet reside at the subject premises. Therefore, the Board concludes that CHRS has not shown that the Board's Decision and Order erroneously characterized the issue on appeal.

2. Whether the Board's Decision and Order Has the Effect of Amending § 203 of the Zoning Regulations.

CHRS asserts that the Board's Decision and Order effectively amends § 203.3 by eliminating the residency requirement for contract purchasers and others, such as prospective tenants. CHRS also asserts that the residency requirement has been replaced with a promise that the prospective resident will in fact become a resident.

The Intervenor responds that since the Board is responsible for interpreting and applying the Zoning Regulations, the effect of the Board's decision is not to amend the Regulations, but rather to hold that a contract purchaser is entitled to use a home occupation permit upon becoming a resident of the dwelling being purchased.

The Board's Decision and Order does not eliminate the residency requirement. Rather, it interprets § 203 as authorizing the Zoning Administrator to issue a home occupation permit to a contract purchaser in those circumstances where the Zoning Administrator determines that the contract purchaser intends to reside in the home and operate within the constraints of the home occupation provisions of the Zoning Regulations. Since the home occupation permit is void by virtue of its own terms if the permit conditions, including the residency requirement, are not met, the residency requirement has not been replaced with a mere promise of residency. The Board concludes therefore that CHRS has not shown the Decision and Order to be erroneous in this regard.

3. Whether the Home Occupation Permit Was Issued to Mr. Fields as Contract Purchaser Contrary to Accepted Practice in the Office of the Zoning Administrator.

In its Conclusions of Law and Opinion on page 6 of the Decision and Order, the Board concludes 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 upon the facts and circumstances presented by the contract purchaser, whether to issue a home occupation permit for prospective use.

CHRS claims that the record does not support this conclusion and that the testimony of Edgar Nunley, Chief of the Zoning Review Branch, was to the contrary. The Intervenor points out that Mr. Nunley testified that he saw nothing inappropriate in the issuance of Mr. Field's home occupation permit.

The Board's conclusion flows logically from Finding No. 4 that:

> 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).

At pages 70 - 72 of the Board's December 16, 1998, public hearing transcript, Board member Betty King had questioned whether the Department of Consumer and Regulatory Affairs (DCRA) would recognize the right of a contract purchaser to get an indication of whether he might be able to obtain a building permit before spending substantial sums on renovation. Mr. Nunley had previously stated that DCRA does not issue permits to contract purchasers. He explained that his statement had been in response to a simple question that did not refer to a contract purchaser's circumstances. Mr. Nunley then stated that DCRA makes decisions daily, and that "If there are additional facts, then those facts come into play." He stated further that "if there is additional information that gives assurance that this person will reside on the premises, then of course that can be taken into consideration. It's a judgment call."

The Board therefore concludes that Mr. Nunley's testimony supports the statements in its Findings and Conclusions regarding the practices of the Zoning Administrator's Office and that its Decision and Order is not erroneous.

CONCLUSION

Based upon the above, the Board concludes that the Appellant CHRS has not met its burden of proving of showing that the Board's final Decision and Order is erroneous. Appellant's motion for reconsideration is hereby **DENIED.**

Vote taken May 3, 2000, to deny the Appellant's Motion for Reconsideration:

VOTE: 4 – 1 – 0 (Robert N. Sockwell, Sheila Cross Reid, Anne M. Renshaw, and Rodney L. Moulden, to deny; Anthony J. Hood, opposed).

Vote taken on September 20, 2001, to approve the issuance of this final Order Denying Appellant's Motion for Reconsideration:

VOTE: 4 - 1 - 0 (Sheila Cross Reid, David W. Levy, Geoffrey H. Griffis, and Anne M. Renshaw (by absentee vote), to approve; Anthony J. Hood, opposed).

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

Each concurring member has approved the issuance of this final Order Denying Appellant's Motion for Reconsideration.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: SEP 2 1 2001

PURSUANT TO 11 DCMR § 3331.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE ON THE PARTIES. UNDER 11 DCMR § 3103.1, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

MS

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Office of Zoning

BZA APPEAL NO. 16404

As Director of the Office of Zoning, I hereby certify and attest that on SEP 2 1 2001, a copy of the foregoing Order Denying Appellant's Motion for Reconsideration in BZA Appeal No. 16404 was mailed first class, postage prepaid, to each party and public agency who appeared and participated in the public hearing and who is listed below:

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ATTESTED BY:

JERRILY R. KRESS, FAIA
Director