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

Re: BZA Application No. 16407; Square 895, Lot 76 (the "Property")
REQUEST TO VACATE ORDER

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

On May 2, 2001, the Capital Hill Group filed a Request for Modification of the order in the above-referenced matter (the "Order") so as to (1) reflect the existing conditions with regard to the actual parking provided as well as the number of beds provided and (2) reflect that the Square for which relief was sought was for Square 895 and not Square 865.

Since the filing of its Request for Modification, the applicant has had several communications with the Department of Consumer and Regulatory Affairs ("DCRA"). Although the applicant has never applied for a certificate of occupancy pursuant to the Order, DCRA, at the urging of several neighbors, has taken the position that the applicant is not in compliance with the Order by failing to provide the amount of parking required for the increase in beds. DCRA recently indicated that it will start issuing fines for $1,000.00 per day that the alleged noncompliance continues.[1] DCRA has taken this position despite the fact that the applicant has not taken action to implement to relief provided by the Board in Application No. 16407 and applicant's efforts to request modification of the Order to reflect the existing facts. In light of DCRA's position and for reasons outlined below, the applicant hereby respectfully requests that the Board vacate its order in the instant matter.

[1] In addition to disputing that it is in violation of the Order, the applicant is unsure what DCRA is basing its authority to issue fines in the amount of $1,00.00 per day on, as 11 DCMR § 3201.1 only permit fines in the amount of $100.00 per day.

BZA
Case No. 16407
Exhibit No. 108
Board of Zoning Adjustment
District of Columbia
CASE NO.16407
EXHIBIT NO.108

FACTS

As set forth more fully in the May 2, 2001 Request for Modification, in 1991, the Board granted a special exception to the owners of the hospital in order to establish a health care facility with 130 beds and 250 employees. *Application No. 15542* (hereinafter referred to as "Order No. 15542"). The required parking pursuant to Order No. 15542 was 176.

In 1999, at the District's request, the applicant took in patients from D.C. Village on an emergency basis. As a result of accommodating this request from the District, the applicant exceeded its certificate of occupancy. Consequently, by BZA Case No. 16407, the applicant sought to increase the number of beds in the health care facility from 130 to 162. As a condition of granting the special exception to allow the increase in beds, the Board required that the applicant provide 276 parking spaces, an amount that far exceeded the required parking pursuant to the Zoning Regulations and which reflected a misunderstanding of the lawful spaces then in existence. The Board further conditioned the relief upon the requirement that the applicant provide 162 beds.

The applicant has contracted to sell the Property to The Holladay Corporation ("Holladay") for a matter of right residential development. As a result of this contract, the applicant is currently working with the State Health Planning and Development Agency ("SHPDA") in efforts to relocate its patients and terminate its operations at the Property. Because of the efforts to terminate its operations at the Property, the applicant does not have the need for the additional 32 beds authorized under Order No. 16407 and, as the applicant has not applied for a certificate of occupancy under Order No. 16407, that order is set to expire on October 31, 2001. The applicant is currently licensed by SHPDA to provide 117 beds.

The prior owners of the site used two lots in Square 865 for parking pursuant to a special exception for accessory parking. However, the special exception for accessory parking expired in 1988, and in May, 2001, the applicant sold the lots in Square 865 to Holladay for construction of matter-of-right townhouses. The sale of the Property has been postponed due, in part, to difficulties the applicant has met in resolving the instant matter, as well as the pendency of a law suit in the D.C. Superior Court brought by St. James Episcopal Church, which case was captioned *St. James Episcopal Church v. The Capitol Hill Group, et al.*, Civil Action No. 00-004792. On June 19, 2001, the Court granted the defendants' motion for summary judgment and dismissed that action, with prejudice. Thus, the sale of the Property is imminent, pending resolution of the instant matter, as well as the finalization with SHPDA of arrangements to relocate the applicant's patients. Desirous of purchasing the Property, Holladay is currently seeking final review by the Historic Preservation Review Board of its proposed plans for a residential development at the Property.

DISCUSSION

Pursuant to 11 DCMR § 3130, the Order is "valid for a period of two years after the effective date of this order, *unless within such period an application for a . . . certificate of occupancy is filed with the Department of Consumer and Regulatory Affairs.*" Because the applicant has not applied for a certificate of occupancy, the Order will expire, by its own terms, on October 31, 2001. Nevertheless, since the applicant's has no done anything to effectuate the relief granted by the recent order, it is required to operate under prior orders of the Board which have been effectuated. Thus, Order No. 15542 and the parking requirements set forth therein are controlling.

Zoning Regulation Section 3205.3 provides that:

> If a . . . certificate of occupancy has been issued under the authority of a decision of the Board of Zoning Adjustment to approve a special exception or variance, then for purposes of §§3205.4 and 3205.5 of this section, each condition to the approval of the special exception or variance shall be treated as a condition to the issuance of the building permit or certificate of occupancy.

11 DCMR § 3205.3.

Zoning Regulation Section 3205.4 provides that "any person who owns . . . any building . shall at all times comply with any condition to the issuance of the certificate of occupancy of the building." 11 DCMR § 3205.4.

Based upon these provisions, it has been the applicant's position with DCRA that, as it has not applied for a certificate of occupancy pursuant to the Order, the conditions in the Order have not been triggered, and it is Order No. 15542 is controlling regarding the number of parking spaces required.[2] DCRA, however, remains committed to citing the applicant for the alleged violation of the Order, leaving the applicant with no alternative but to have the Order vacated so as to resolve any confusion regarding the amount of parking required to be provided.

The applicant has not expanded its operations as permitted by BZA Order 16407 and the current use of the Property is in accordance with that which was permitted by Order No. 15542. Because the applicant's current operation are no greater than that allowed by Order No. 15542, the parking needs for use by the hospital have not changed since the issuance of that order. The most recent count of the parking spaces available on the Property is 176,[3] including the garage,

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[2] In fact, as the applicant has sold the lots in Square 865 which were previously used for parking, it cannot provide 276 parking spaces and, as such, is precluded by 11 DCMR § 3205.3 from applying for a certificate of occupancy for the additional 32 beds.

[3] In its Request for Modification dated May 2, 2001, the applicant represented that it had 171 parking spaces on the Property. However, as a result of conversations with DCRA, the applicant has reconfigured its parking so as to provide 176 parking spaces in accordance with Order No. 15542.

which is now fully operational. This number of spaces clearly meets the needs of a facility with 130 beds, the guests of such patients and 140-150 employees on site at any given time. Thus, the applicant is in compliance with Order No. 15542.

Accordingly, the Capitol Hill Group respectfully requests that the Board vacate its order in this matter.

Sincerely,

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

Richard B. Nettler

Jeannine Rustad Zigner

cc: Michael Johnson (by facsimile)
Dr. Peter Shin (by facsimile)
Donna Beasley, Esquire (by facsimile)