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February 12, 2000

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DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

By Fax (202-727-4925) and Mail

Madeline H. Dobbins. Esq.
Director
Ms. Sharon Pruitt
Secretary
District of Columbia Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210
Washington, D.C. 20001

Re: **Application Lynne M. Hornyak and Michael Petite**
**Application No. 16552 (The Lauren, Square 115)**
**OPPOSITION**

Dear Ms. Dobbins and Ms. Pruitt:

This letter is submitted in opposition to Application No. 16552, the combined renewed applications by Lynne M. Hornyak and Michael Petite for Special Exceptions to use Units 104 and 117 in The Lauren, a Condominium, located at 1301 20th Street, N.W., Washington, D.C. 20036 (Square 115), as mental health offices. Please also consider this a request to be heard in this matter.

Although an owner and resident of the condominium in question, I received no written notice of the Hornyak/Petite renewed applications or of the hearing reportedly scheduled for March 1, 2000. After learning of the filing orally on February 10, 2000, I checked with several other owners and residents of The Lauren, who reported that they too had no knowledge of any new application(s) with respect to the building.

Apart from the lack of notice, there are a number of other reasons why the Hornyak/Petite renewed applications must be denied. Most importantly, the Board of Zoning Adjustment has already denied applications for Special Exceptions by Drs. Hornyak and Petite to use the same properties for the same purposes -- three times. *See D.C. Board of Zoning Adjustment, Applications Nos. 15030-46, 15207, 15246, 15249, 15332, 15377 & 14418.* Dr. Petite's was Application No. 15035 and Dr. Hornyak's No. 15040.

As both of you will undoubtedly recall, after protracted proceedings, by written Order dated January 20, 1995, the BZA denied a number of applications for Special Exceptions for mental health and other offices in The Lauren. Some of the

BZA
Case No. 16552
Exhibit No. 24

Board of Zoning Adjustment
District of Columbia
CASE NO.16552
EXHIBIT NO.24

applicants (the "Gage Group"), including Dr. Hornyak and Dr. Petite, filed a Motion for Reconsideration. After granting the Motion and reconsidering, by written Order dated October 1, 1996, the BZA reaffirmed its January 20, 1995 Order. The Gage Group then submitted a pleading entitled "Motion to Withdraw Reconsideration Order and for Issuance of Proposed Order," which elicited a written Order Denying Withdrawal of Reconsideration on February 3, 1997. Thereafter, the Gage group sought relief from the District of Columbia Court of Appeals, which affirmed the BZA action in denying all of the Lauren applications. A copy of the Court of Appeals decision in *Gage v. District of Columbia Board of Zoning Adjustment*, Nos. 96-AA-1519 & 97-AA-237 (D.C. Ct. App., filed Oct. 14, 1999), follows. *See also Dresser v. Sunderland Apartments Tenants Ass'n*, 465 A.2d 835 (D.C. 1983), *cited* in *Gage*, at 2 n. 1, which case concerned proposed establishment of a mental health office in The Lauren.

## A. FACTS: PRIOR APPLICATIONS AND DENIALS

Both Dr. Hornyak and Dr. Petite have already been using units in The Lauren as mental health offices for well over a decade without Certificates of Occupancy, in violation of the applicable law. *See* D.C. Code § 5-426; 11 D.C.M.R. § 3203.1. *see also* 11 D.C.M.R. § 3201.1. The following facts, most or all already of record, characterize the two applications here in question.

Hornyak Application. Lynne Hornyak initially practiced for some years in Lauren Unit 509 with Dr. Ellen Baker, under the name West End Psychological Associates. The two leased Unit 509 from Dr. Baker's husband, John Doolittle, a member of the Lauren Board of Directors.

In 1989, Dr. Hornyak purchased her own Lauren unit, Unit 117. While having actual knowledge of the requirement to obtain a C-of-O, Dr. Hornyak nevertheless commenced practicing in Unit 117 without one. She also served on a body known as the Lauren Mental Professional Advisory Committee.

An application by Dr. Hornyak for a C-of-O for Unit 117 was denied on August 29, 1988, and she apparently filed another application for the same use of the same property on or about October 30, 1989 (the C-of-O application and denial submitted by Dr. Hornyak to the BZA, at least as found in the Record in *Gage*, being incompatible, since an application filed in October 1989 could hardly have been denied more than a year earlier). *See* BZA Record as filed in *Gage, supra* ("R. ___"), at 133, 31. Dr. Hornyak sought a Special Exception, Application No. 15040 *supra*, on February 3, 1989 (R. 11). Her application was denied by the above-referenced Orders of January 20, 1995, October 1, 1996 and February 3, 1997 (R. 1745, 1850 & 1920 respectively).

Further, as already indicated, Dr. Hornyak was a petitioner in *Gage*, resulting in affirmance of the BZA denial of her application for a Special Exception.

Petite Application. Michael and Jeannette Petite purchased Unit 104 at the time of conversion of The Lauren to a condominium in late 1979 and early 1980. Closing and other documents demonstrate that, at that time of purchase, the Petites had actual knowledge of the SP-2 zoning status of the building and the commercial use issue.

Although already practicing as a psychiatrist in Lauren Unit 104, Dr. Petite did not seek a C-of-O for eight years or more. Dr. Petite finally applied for a C-of-O to conduct his Lauren practice on May 25, 1988 (R. 26), which application was denied on August 22, 1988 (R. 128). Dr. Petite's application for a Special Exception, No. 15035 *supra*, was filed together with Dr. Hornyak's on February 3, 1989 (R. 6), and it was likewise denied by the same three BZA Orders already discussed (R. 1745, 1850 & 1920). Dr. Petite was also a petitioner in *Gage*. Like Dr. Hornyak, despite being denied a C-of-O and Special Exception, Dr. Petite continues to see mental health patients in The Lauren.

## B. OPPOSITION: PROCEDURAL AND SUBSTANTIVE

On this record, there are numerous procedural and substantive objections to the renewed applications by Dr. Hornyak and Dr. Petite to validate their illegal mental health offices in The Lauren.

Procedural Defects. Procedural defects include the following:

First, as mentioned at the outset, owners and residents of the building in question did not receive notice of the renewed applications or of the March 1, 2000 hearing date as required by the applicable regulations. While the building manager, Walter Krolman, did receive a written notice, he was not asked to -- and did not -- provide such information to owners and/or residents of The Lauren. *See* 11 D.C.M.R. §§ 3317.3(b) & (c), 3317.4, 3317.5.

Second, the applicants have not complied with the one-year waiting period. It has been a mere four months since the decision in *Gage*, to which both Drs. Hornyak and Petite were parties, upholding denial of their original applications for Special Exceptions to use the same premises for the same purposes. *See* 11 D.C.M.R. § 3334.2; *see also id.* § 3102.3.

Third and most importantly, there has been no change of conditions since denial of the earlier Hornyak/Petite applications. Thus, the renewed applications are

barred by the preclusion doctrine, including claim preclusion (*res judicata*) and issue preclusion (direct and collateral estoppel). *See* 11 D.C.M.R. 3102.1. As the District of Columbia Court of Appeals held in similar circumstances in *Rhema Christian Center v. Board of Zoning Adjustment*, 515 A.2d 189, 198 (D.C. 1986), "preclusion doctrine has an important role in assuring finality to Board proceedings, the integrity of the zoning plan, and respite for property owners who seek to uphold that plan."

Substantive Objections. For the substantive reasons summarized above, and for all of the reasons for which I and scores of others -- including, most notably, Advisory Neighborhood Commission 2B -- opposed the prior applications for Special Exceptions by Drs. Hornyak and Petite, the renewed applications to use the same premises for the same purposes must be denied. In addition to being an Intervenor in *Gage, supra*, I am also the plaintiff in *Schneider v. The Lauren Condominium Association et al.*, No. 98-CA3887 (D.C. Sup. Ct., filed May 22, 1998), which case concerning the very properties, proposed uses and applications here in issue is still pending in the D.C. Superior Court. For present purposes, submissions by the plaintiff in that case are incorporated herein by reference.

Dr. Hornyak and Dr. Petite opened mental health offices in The Lauren, a residential condominium, knowing that the building was zoned SP-2 and that a C-of-O was required for such non-residential uses. They persisted in maintaining their illegal offices after being denied C-of-Os and in flagrant disregard of BZA final Orders, recently affirmed by the D.C. Court of Appeals. By such conduct, Drs. Hornyak and Petite violated not only the applicable District of Columbia laws and regulations, but also the Lauren condominium instruments. Among other relevant provisions, the Lauren Bylaws specifically require that "[a]ll valid laws, zoning ordinances and regulations of all governmental agencies having jurisdiction thereof shall be observed," and that "[a]ll laws, orders, rules, regulations, or requirements of any governmental agency having jurisdiction relating to any portion of the Property shall be complied with" (Lauren Bylaws, art. V, § 9 [c]). Moreover, the Lauren Public Offering Statement expressly advised purchasers that "[t]he property will comply with all zoning ordinances, housing codes, building codes and similar laws affecting the property," and in particular that "[t]he property is zoned SP-2" (Lauren POS, § III.E; see also *id.* § IV.E).

Meanwhile, lawful Lauren owners and residents are suffering injury and damages. As a result of the illegal offices maintained by Drs. Hornyak, Petite and others, hordes of mental health patients and other commercial visitors are accorded free access to the premises without having to be "buzzed in" or to identify themselves to Lauren desk personnel, during extended hours Monday through Friday and Saturday morning. Patients also transit, utilize and occupy the lobby, hallways, elevators and other common elements with impunity. Such increased traffic and congestion is

destructive of the peace, good order and security of the building for lawful residential purposes. In addition, the illegal offices make it more difficult for lawful owners to sell residential units in the Lauren, among other reasons due to the decreased attractiveness and security of the building for residential purposes, the added expenses and condominium fees caused by the heavy commercial use and resultant traffic in the building, and the failure of mortgages on residential units in The Lauren to qualify for resale on the secondary mortgage market pursuant to Fannie Mae and Freddie Mac owner-occupancy restrictions.

Through all the disputes and litigation that has already transpired, Drs. Hornyak and Petite, among others, have pressed the baseless argument that they can continue their illegal activities in The Lauren so long as they are "trying to get legal." Now, despite three adverse Orders by the BZA and denial of their petition to the D.C. Court of Appeals, they are attempting to start the whole process all over again with respect to the same uses of the same properties. Such conduct makes a mockery not only of the zoning laws and regulations and the private property rights they are designed to protect, but also of due process and fundamental fairness -- and, ultimately, of the whole rationale for having a BZA at all. The applications must be denied.

Respectfully submitted,

Jan Schneider

Enclosure

*Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.*

# District of Columbia Court of Appeals

Nos. 96-AA-1519 & 97-AA-237

DAVID F. GAGE, *et al.*, PETITIONERS,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT,

AND

JAN SCHNEIDER, INTERVENOR.

Petitions for Review of
Orders of the Board of Zoning Adjustment

(Argued May 13, 1999 Decided October 14, 1999)

*Paul J. Kiernan*, with whom *John T. Epting*, and *Karin M. Ryan* were on the brief, for petitioners. *Louis P. Robbins* also entered an appearance for petitioners.

*Jan Schneider*, with whom *Jeffrey A. Lovitky* was on the brief, for intervenor.

*Charles L. Reischel*, Deputy Corporation Counsel, filed a statement in lieu of brief, for respondent.

Before TERRY and REID, *Associate Judges*, and MACK, *Senior Judge*.

PER CURIAM: This is an appeal by a group of health professionals seeking special exceptions to open offices in a condominium complex (the Lauren) located at 1301 20th Street, N.W. (an SP-2 District) where office use is permitted by special exception. 11 DCMR §§ 501 & 508 (1995). Petitioners contend that the District of Columbia Board of Zoning Adjustment ("the Board") erred in denying their applications for such exceptions, specifically urging errors in: (1) reopening the applications after it

had voted to approve petitioners' applications, but before a written order had been issued; (2) failing to issue a written order in a timely manner; (3) issuing its final order without first issuing a proposed order; and (4) arbitrarily and capriciously denying petitioners' applications. We affirm.

In 1989, some of the petitioners filed applications for special exceptions to establish offices for mental health professionals in the units they owned.[1] A hearing was held on December 13, 1989. On January 3, 1990, the Board voted to grant those applications, subject to the condition that the offices' hours of operation be limited to 8:00 AM to 6:00 PM.

Other applications for special exceptions were filed with the Board in 1990, by people who owned units within the Lauren. During a July 18, 1990 hearing, the Board directed its staff to seek advice from the Corporation Counsel on whether petitioners' applications had been properly authorized, and on whether the Condominium Association should be a party. At a public hearing on November 7, 1990, the Board received a memorandum from the Corporation Counsel concerning the participation of the Condominium Association in the proceedings. During this hearing, the Board voted to reopen petitioners' applications in order to receive the Corporation Counsel's advice. Petitioners' applications were consolidated with later applications, and the Condominium Association was made a party to the proceedings.

The Board held public hearings in 1992 and 1993. On June 2, 1993, the Board voted to deny all pending

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[1] It is represented (and the record confirms) that some of the petitioners were operating offices prior to this time without having obtained certificates of occupancy for commercial purposes. Petitioners were put on notice of the requirements for commercial use. *See Dresser v. Sunderland Apartment Tenants Ass'n*, 465 A.2d 835 (D.C. 1983).

applications, including those of the initial petitioners. Counsel for petitioners filed a motion to compel issuance of an order approving petitioners' applications pursuant to the January 3, 1990 vote. The Board voted to deny this motion on September 7, 1994, and issued a written order to that effect on January 20, 1995.

On February 2, 1995, petitioners filed a motion to reconsider. The Board granted the motion to reconsider on March 1, 1995, and during a May 17, 1995 meeting re-examined the applications. In a written order dated October 1, 1995, the Board reaffirmed its opinion that the January 20, 1995 order was correct. Petitioners then filed a motion to withdraw the reconsideration order on October 11, 1996. The Board denied this motion in a written order dated February 3, 1997. Petitioners then appealed to this court.

Petitioners first contend that the decision to reopen their applications was improper because one of the Board members voting to reopen (Ms. Jewell) did not participate in the 1989 hearing and made no indication that she had read the record. While "[n]o person shall vote on any post-hearing motion unless the member participated in and voted on the original decision, or the member read the transcript of the hearings and reviewed the record." 11 DCMR § 3332.8. "We start from the premise that the agency's decision, like the decision of a trial court, is presumed to be correct, so that the burden of demonstrating error is on the appellant or petitioner who challenges the decision." *Cohen v. Rental Housing Comm'n*, 496 A.2d 603, 605 (D.C. 1985) (citation omitted). In this instance, petitioners have asserted "the record does not reflect that Ms. Jewell had read the record prior to voting to reopen the record." Petitioners have not affirmatively shown, however, that Ms. Jewel *did not* read the record. Accordingly, they have not met their burden to show the decision by the Board was in error.

Next, petitioners contend that the Board erred in failing to issue a written order in a timely fashion. A decision by the Board is not final until the Board has issued a written order. 11 DCMR § 3331.3. Further, the Board has the power on its own motion to reopen an application before the final order is filed. 11 DCMR § 3330.2. Because it voted to reopen the applications in order to consult with the Corporation Counsel, we find no error.

Petitioners also assert that the Board erred by failing to issue a proposed order pursuant to D.C. Code § 1-1509 (d) (1992 Repl.). We need not decide whether such a procedural defect occurred, as we are satisfied that petitioners suffered no prejudice. *See* D.C. Code § 1-1510 (b) (1992 Repl.); *Robinson v. Smith*, 683 A.2d 481, 490 (D.C. 1996). Petitioners filed a subsequent motion to reconsider which the Board granted. After re-examining the record, the Board reaffirmed its initial order. Petitioners had ample opportunity to convince the Board that its initial order was erroneous, and failed to do so.

Finally, petitioners maintain that the decision by the Board is arbitrary and capricious. *See Neighbors on Upton St. v. District of Columbia Bd. of Zoning Adjustment*, 697 A.2d 3, 6 (D.C. 1997). Specifically, they contend that when an application meets all of the requirements for a special exception, the Board ordinarily must grant the application. *See Glenbrook Road Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 605 A.2d 22, 30 (D.C. 1992); *Wheeler v. District of Columbia Bd. of Zoning Adjustment*, 395 A.2d 85, 89 (D.C. 1978); *Stewart v. District of Columbia Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973). They offer two specific arguments in support of this claim.

First, petitioners assert that the proposed use is "in harmony with existing uses and structures on neighboring property." 11 DCMR § 508.3. They argue that the Board erred in considering only the residential uses within the Lauren, stating, "even if other units within the Building constituted 'neighboring property,' the proposed uses are

in harmony with their existing use." The Board concluded, however, that the existing uses of condominium units for offices within the Lauren could not be considered:

> [R]egardless of the length of time any of the existing uses have operated in the subject building, they were never legally established and, therefore, cannot be construed to be "grandfathered" upheld the previous SP District regulations. The Board finds that the only existing legitimate use of the structure would be for residential purposes.

We concur in this conclusion, and find no error in the Board's determination that petitioners failed to satisfy their burden of proof. *Cf. Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 398 A.2d 13, 15-16 (D.C. 1979)(failure of neighbors to challenge prior illegal use for more than ten years will not support the granting of a zoning variance which would make that use legal) .

Second, petitioners contend that "each individual owner [of a condominium unit] should have the right under the law to seek zoning relief for his or her property without reference to other units and without the participation of the Condominium Association." Because a condominium involves not just ownership of the condominium unit, but also an ownership interest in the undivided whole of the common elements of the building, D.C. Code § 45-1802 (6) (1990 Repl.), it was not an error to require the participation of the Condominium Association. Those owners of condominium units who did not apply for the special exceptions still had an interest in the proceedings by virtue of their shared interest in the common areas.

*Affirmed.*