Levine School
04574/002

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 15984 of the Carnegie Institution of Washington, as amended, pursuant to 11 DCMR 3108.1, for a special excetpion under Section 206 to convert an existing nonconforming structure into a private music school and to allow the addition of a performance wing to the existing sturcture in an R-1-B District at premises 2801 Upton Street, N.W. (Square 2049, Lot 809).

HEARING DATES: November 9, 1994, January 11 and February 22, 1995
DECISION DATES: April 5, 1995

DISPOSITION: By Order dated November 1, 1995, the Board **GRANTED** the application by a vote of 4 – 0 (Jerrily R. Kress, Susan Morgan Hinton, Laura M. Richards and Craig Ellis to grant; Angel F. Clarens not participating, not voting, having recused himself).

FINAL DATE OF ORDER: November 1, 1995

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MOTION ORDER

The Board granted the application by its order dated November 1, 1995 to allow the applicant to convert an existing nonconforming structure into a private music school and to allow for the addition of a performance wing to the existing structure. The structure was to be occupied by the Levine School of Music (Levine). For the purpose of clarification in this order, the Levine School will be considered the applicant or movant, as opposed to the Carnegie Institute, the actual owner of the property.

REQUEST FOR REVOCATION OF THE BOARD'S ORDER:

By letter dated July 8, 1997 the Lower Forest Hills Neighborhood Associations (the Associations) requested that the Board revoke the order granting the application. The Associations stated that on June 29, 1994, Levine submitted the application seeking a special exception to convert an existing nonconforming structure at 2801 Upton Street into a private music school and to allow the addition of a so-called performance wing to that existing structure in an R-1-A zone. By order dated November 1, 1995, the Board granted the application. Three of the neighborhood associations appealed that order in the District of Columbia Court of Appeals (Neighbors on Upton Street, *et. al.* v. Board of Zoning Adjustment, No. 95-AA-1630). The appeal was denied on June 12, 1997. In the instant motion the Associations request that the Board revoke the order granting the application because Levine has blatantly violated material

BZA
Case No. 16846
Exhibit No. 10

Board of Zoning Adjustment
District of Columbia
CASE NO.16846
EXHIBIT NO.10

conditions of the order. The motion stated that Levine has willfully disregarded some of the conditions during the course of renovation of the site. While the motion summarized the problem areas, reference was made to documents attached to the motion wherein more detailed discussions were set forth. The Association requested revocation of the order based on the following:

1. Condition No. 18 – Parking. As discussed in detail in a letter to the Director of the Department of Consumer and Regulatory Affairs (DCRA), dated June 19, 1997 and attached to the motion, Levine has constructed only 50 percent of the parking spaces required by the order.

2. Condition No. 19 – Landscaping. Instead of maintaining a natural and constructed border along the northern property line near the Netherlands Embassy, Levine has clear cut this portion of the property.

3. Condition No. 16 – Construction. Levine has disregarded its construction plans submitted to the Board and HPRB by placing three huge unsightly air-handling units on top of the roof ridge of the Carnegie Laboratory building.

4. Condition No. 17 – Traffic Management. Levine has unilaterally modified the traffic management plan in the same manner that it has radically changed and reduced the parking spaces on the site.

5. Levine is also implementing the Board order in phases, which is not authorized or contemplated by that order and its conditions.

The Associations argued that it would be irreparably injured by Levine's unlawful actions set forth above. Levine has totally disregarded the objections of the Associations and is racing to finish its construction so that it can move into its new building as soon as possible, then force the neighborhood to evict it. This should not, and must not, be allowed to happen. They argued that Levine should not be allowed to violate the Board's order without consequence.

The Associations stated that all of the above changes have been unilaterally implemented by Levine without prior approval and authorization by the Board. Levine did not submit a request for modification of its plans within six months after the date of the written order approving the application as required by Subsection 3335.3 of the Board's Rules. Therefore, Levine has no legal authority to implement these changes without filing a totally new application and receiving Board approval.

The Association was of the view that Levine should return to the Board to obtain any material changes desired. This is the only way that the Associations' due process rights of notice and public comment can be protected. Finally, the Associations urged the Board to revoke the order.

On August 20, 1997, the Board received a response from the Levine School. In the response, Levine stated that the motion to revoke is not ripe for decision by the Board because the Associations have not properly sought enforcement proceeding against Levine through the

Office of the Zoning Administrator. The proper procedure for the Associations to follow would be to appeal the decision of the Zoning Administrator to issue the building permit and/or a certificate of occupancy to the Board through the proper channels. Instead of taking the proper appeal, the Associations through innuendo and misstatement of facts, improperly seek Board revocation without the requisite proof that would be necessary in an appeal proceeding.

In conclusion, Levine stated that it is ludicrous that the Associations seek revocation of the Board's order because Levine is not building the performance wing, soon enough, construction to which they all objected strenuously. Further, Levine argued, without citing any authority, the Associations claim that the Board does not have the legal authority to allow Levine to build in phases. This is clearly not the case and, in fact, the Board has permitted many projects to be built in phases.

In light of the request for revocation, the response and applicable rules, the Board concluded that the order should not be revoked. The Board is of the view that its orders are subject to revocation when it has been demonstrated that the Board erred in making a decision to issue an order. An order is not subject to revocation in instances where the applicant has failed to comply with the order. In such circumstances, the redress is with the Enforcement Branch of DCRA. The Associations have failed to demonstrate that the Board has erred, therefore the Board determined not to revoke its order dated November 1, 1995, granting the application.

REQUEST FOR WAIVER OF THE SIX-MONTH FILING REQUIREMENT:

By letter dated July 29, 1997, counsel for the applicant requested that the Board waive the six-month filing requirement to allow for the filing of a motion for a modification of plans. With regard to the waiver request, Levine stated that the Board rendered an oral decision to approve the application with a series of conditions on April 5, 1995. The order was issued as final on November 1, 1995. Under Subsection 3335.3 of the Board's Rules, any modification request should have been filed on, or before, April 30, 1996. Three parties in opposition at the Board's proceeding, sought timely review of the Board's order in the Court of Appeals. The Court undertook its review of the Board's order and unanimously affirmed the Board's decision. Unfortunately, the Court did not render its final decision until June 12, 1997, over two years after the Board's oral decision in this matter and almost three years from the filing of the application. Levine argued that since the Court of Appeals did not rule until June 12, 1997, the Board's order, while finalized by the Board in November 1995, was not "final" as a legal matter until June 1997. Thus Levine's request for modifications to the approved plans is being filed within the intent of the Regulations, that is, within six months of a court order rendering a final decision on the application.

By letter dated August 14, 1997, Advisory Neighborhood Commission 3F responded to the motions filed by Levine School. The ANC made no specific statements about the waiver request.

On August 8, 1997, the Neighborhood Associations submitted a response in opposition to the motion to waive rules. The Associations stated that Levine seeks to waive the six-month filing requirement pursuant to Subsection 3301.1 of the Zoning Regulations which provides that

"The Board may, for good cause shown, waive any of the provisions of this chapter, if in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law." The Associations stated that Levine seeks the waiver on three grounds: (a) a final appellate court decision upholding the Board order was not issued until June 12, 1997, (b) Levine must vacate its current premises no later than August 31, 1997, and (c) "the need to proceed with construction on Upton Street in an expeditious manner." The Associations opposition to the waiver is summarized below.

1. Filing the motion for modification of plans within six months of *the court decision* does not meet the intent of the Zoning Regulations. The Regulations intend for motions to be filed within six months of the Board's decision, at a time when the case is still fresh in the minds of the Board members who decided the case. This interpretation is consistent with Subsections 3335.6 and 3335.7 of the Regulations. Under Subsection 3335.6, only Board members who participated in and voted on the original decision shall vote on the modification request, and under Subsection 3335.7, modifications shall be limited to minor modifications that do not change the material facts the Board relied upon in approving the application.

2. Levine made changes to the plans presented to the Board and the Historic Preservation Review Board (HPRB) without giving the community the benefit of hearings on those changes. Levine also violated a number of the conditions in the Board's order and now wants approval of these violations. The Board should not waive the rules and reward such conduct.

3. Levine only sought these modifications after the community raised the issues by requesting cease work orders on June 19, 1997 and a revocation of the Board's order on July 8, 1997.

4. The circumstances giving rise to the motions are of Levine's own making. Levine was aware as early as 1994-95 that it was losing its lease and would need to move out of its current premises around 1997. By the spring of 1996, Levine had informed the National Endowment for the Arts (NEA) that "construction of a performance training wing was no longer an imminent goal of the school." Levine was aware at this time that the Board had not approved construction of its projects in phases. By September 1996, it was clear that the performance center could not be build for another five years and the plans approved by the Board could no longer be implemented before Levine had to vacate its existing premises.

5. Granting the waiver would prejudice the due process rights of the parties to the application contrary to Subsection 3301.1. The Associations have invested over $50,000 to obtain the protection provided by the conditions in the Board's order. These conditions cannot now be revoked without requiring Levine to submit a new application with notice to all concerned as required in Sections 3317.1 *et. seq.,* and a new evidentiary hearing to allow affected parties the opportunity to object.

Ultimately, the Associations argued that Levine has not met the requirements for the granting of a waiver because Levine has failed to show good cause, and granting the waiver would prejudice the rights of the parties.

Upon consideration of the request, the responses and the applicable rules, the Board noted that the case was taken to the Court of Appeals before this motion was filed. The Board concludes that it is customary for it to grant waivers for cases where parties are awaiting the decision of the Court. The Board is of the opinion that it is reasonable for Levine to want to wait until the appeal is decided in court before coming before the Board with a modification request. The Board concludes that good cause has been shown and that the waiver would not prejudice the rights of any party. Therefore, the Board granted the waiver request.

THE MOTION FOR MODIFICATION OF APPROVED PLANS:

In its correspondence to the Board dated July 29, 1997, Levine requested a modification of approved plans in the application. Levine requested that the Board approve the following:

1. An interim site plan, which locates a temporary parking lot on the portion of the site that will ultimately be where the performance wing (addition) will be built;

2. A temporary reduction in the total parking on the subject site from 114 to 82 spaces (63 self-park and 19 tandem). (This would be until the addition is built. This addition represents approximately one-half of the gross floor building area approved by the Board.); and

3. A further acknowledgment from the Board that the project may be built in two phases, with construction of the addition to begin within five years of occupancy of the facility by the Levine School.

The Levine School stated that each of the above modifications relates to the interim status of the project. They do not alter the design, appearance or site plan of the ultimate build-out of the site, nor do they alter the overall impact of the School's occupancy of the site on the community or the neighborhood. On the contrary, the requested modifications significantly reduce the amount of tree area that needs to be disturbed by the parking facility for the interim period. Further, the interim parking lot is located in an area that was identified in the Board's original case as delineated by the HPRB, as a noncontributing element of the site. More importantly, the applicant stated, the interim plan provides for two-thirds of the Board-required parking, while only building approximately one-half of the gross floor area permitted by the Board.

Levine noted that interim building plans of this type are typical for phased projects, especially for large projects for non-profit organizations. Levine stated that the need to develop this site in two phases was reinforced by the loss of Levine's existing leased facility in August 1997.

Levine pointed out that in granting the original application, the Board concluded, as a matter of law, that the proposed application was in harmony with the general purpose, intent and integrity of the Zoning Regulations and could be granted without substantial detriment to the public good. The movant argued that the requested clarifications do not alter or affect this conclusion in any way. In fact, because the proposed modifications are only "interim," they do not ultimately change the Board approval at all. The requested modifications, however, will enable Levine to proceed with development in rational steps that will be sensitive to the subject site and the surrounding neighborhood. Based on the foregoing, Levine requested that the motion for modification be approved.

The Associations submitted a response in opposition to the motion for modification of plans. Their opposition is based primarily on the following:

1. The motion does not involve minor modifications. The original and modified plans are radically different in parking location, number of spaces, grading, retaining walls, landscaping and numerous other aspects. This is a very major change in the plans.

2. The request for a five year period of approval is also not a minor change. Given the types of changes proposed, Levine needs to return to the Board for a further hearing or for a new application.

3. The Board should not require the neighbors in the community to be subject to the adverse conditions for five years before the requirements mitigating these conditions are implemented.

4. Levine is currently violating many of the conditions in the order, however, these conditions were not mentioned in the motion. The Board should not reward Levine for these violations by approving a modification of plans.

5. There are no guarantees that Levine will ever construct all of its future projects and if it does not, the interim plans will become the *de facto* permanent plans. In addition, it would be improper for the Board to authorize construction five or seven years from the date of the Board's order based on conditions and evidence existing in 1994 and 1995, when those conditions may have radically changed by the date of future construction.

Finally, the Associations argued that the Board does not have the authority to approve a request to allow phased implementation of Levine's plans. For the reasons stated, the Associations requested that the motion for modification be denied.

By letter dated August 14, 1997, Advisory Neighborhood Commission 3F responded to the motions filed by Levine School. In this letter, the ANC neither supported nor opposed the motions, but rather asked that the Board carefully review them in light of the impact that granting the modification would have on the community. The ANC also asked that the Board make the meetings between Levine and other parties open to the public.

Upon consideration of the motion, the responses and the applicable law, the Board concludes that the movant has met the burden of proof for a motion for modification of plans. The Board noted that the performance wing was the portion of the project generating the need for the high number of parking spaces. If the performance wing is not built for a period of time, the need for parking spaces is greatly reduced. The Board is of the opinion that reducing the number of spaces and relocating the parking lot to the performance wing site temporarily will not have a substantial impact on the area in terms of parking or traffic congestion because the performance would not be in use until it is built. The Board also noted that the location of the parking lot in the modified plans is farther away from the adjacent residential properties and it allows for the preservation of the existing trees. The Board is of the opinion that under the modified proposal, the community would be impacted less than with the originally approved proposal. The Board concludes that the temporary nature of the request and the reduced impacts make this a minor modification.

On the issue of construction and timing, the Board noted that in approving an application, the Board does not direct applicants to begin construction by a certain time. The Board only requires that the applicant apply for the building permit within a specified time. Therefore, in this case, it is not a matter of the Board's jurisdiction if the performance wing is not constructed by a certain time, as long as the applicant has applied for the building permits in a timely fashion.

Accordingly, it is hereby **ORDERED** that the six month filing requirement be **WAIVED**, that the **MOTION for REVOCATION** be **DENIED** and the **MOTION for MODIFICATION of APPROVED PLANS** be **APPROVED, SUBJECT to the CONDITION** that approval of the modified plans shall be for a period of five years from the date of this order.

DECISION DATES: **September 3 and October 1, 1997**

Vote: 3 – 0 (Susan Morgan Hinton and Laura M. Richards to waive the six-month filing requirement; Jerrily Kress to waive by absentee vote; Sheila Cross Reid and Betty King not voting, not having heard the case).

Vote: 3 – 0 (Susan Morgan Hinton and Laura M. Richards to deny the motion to revoke the order; Jerrily to deny by absentee vote; Sheila Cross Reid and Betty King not voting, not having heard the case).

Vote: 5 – 0 (Betty King, Susan Morgan Hinton, Sheila Cross Reid and Laura M. Richards to approve the modification of plans; Jerrily Kress to approve by absentee vote).

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

ATTESTED BY Madeliene H. Dobbins
MADELIENE H. DOBBINS
Director

FINAL DATE OF ORDER: MAR 31 1998

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR § 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT.

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

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