BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application of The Tudor Place
Foundation for a Special Exception
under Section 217 to operate a museum
in an R–B-1 District at 1644 31st Street, N.W.

BZA No. 16974
Hearing Date: April, 29, 2003
ANC 2E

MEMORANDUM OF LAW ON THE QUESTION OF WHETHER THE SINGLE FAMILY HOME AT 1670 31ST STREET NW CAN SERVE AS AN "ACCESSORY USE" FOR THE NEIGHBORING SINGLE FAMILY HOME AT 1644 31StREET NW.

I. Background.

In 1999, the Tudor Place Foundation, a non profit corporation, applied for a Special Exception under § 217 of the Zoning Regulations to occupy Tudor Place. We nearby neighbors fully supported the heart of that Special Exception which was to make Tudor Place available to the public for historical and educational tours. The nearby neighbors opposed only two aspects of the proposed special exception: (1) repetition of the highly disruptive "special events" the foundation had sponsored over the preceding five years, and (2) the foundation's proposal to annex the single-family home next door as an auxiliary venue for parties, lectures, or meetings for up to 50 people.

At its decision meeting on December 1, 1999, the BZA members did not discuss any of the hotly disputed legal issues concerning the "special events" or the annexation of 1670 31st Street. See the transcript of the December 1, 1999 decision meeting. While the board members used the terms "outrageous" and "horror stories" to describe the adverse impacts of those past events, they all voted, nonetheless, to grant the foundation's application in full for a three-year "experimental" period. *Id.* The Board then adopted the proposed "Decision and Order" submitted by the Wilkes Artis law firm – verbatim – as its own. As a result, the disputed interpretations of the Zoning Regulations contained in

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that Decision and Order were not actually those of the Board, reached after careful review, but those of the foundation's lawyers – Wilkes Artis.[1]

In May and June, 2000, the foundation hosted various special events pursuant to the newly issued BZA order which, as we predicted, created major adverse impacts on the nearby neighbors. See, e.g., the exhibits and testimony concerning the "Glickman Wedding."

In July, however, after a new executive director was appointed, all future special events were canceled. As a result, our neighborhood mercifully reverted to its previous peaceful state.

On July 8, 2002, the Court of Appeals issued its decision, concluding that the BZA had not exceeded its authority in adopting the challenged provisions of the Wilkes Artis Order. That opinion is published at 802 A.2d 359 (D.C. 2002). In light of that opinion, the foundation has once again changed course and now asks the BZA for permission to reinstitute those special events at both Tudor Place and the single-family home next door at 1670 31st Street. The nearby neighbors, in turn, have presented new evidence of the adverse impacts from those special events, and again ask the BZA not to allow those events at either location.

This time around, we sincerely hope that the Board members will carefully review each of the contested provisions in the foundation's Proposed Order and decide this case strictly on the basis of whether the provision is or is not permitted by the Zoning Regulations. If this legal analysis is performed, we are confident that the Board will conclude that the Zoning Regulations to not permit the disruptive "special events" either at Tudor Place or at 1670 31st Street.

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[1]A group of residents then appealed to the D.C. Court of Appeals, contending that the BZA had exceeded its statutory authority by adopting the Wilkes Artis Order.

II. Legal Issues Raised By The Proposed Use of 1670 31st Street NW As An "Accessory Building" And "Accessory Use" For 1644 31st Street NW

A. Overview of the Wilkes Artis Proposal To Annex 1670 31st Street, NW Into The Special Exception For Tudor Place.

In the last exception proceeding, the foundation's attorneys presented a complex four-part legal theory to justify the unauthorized "rental events" the foundation had been conducting at 1670 31st Street, N.W.. According to the Wilkes Artis theory: (1) The BZA could authorize the foundation to operate Tudor Place as museum. (2) The "museum, " in turn, could be operated as a venue for various private parties and other functions because such uses were "customarily incidental to the principal museum use." (3) The unlawful events previously held at 1670 31st Street could be legitimized by annexing that separate property into the Special Exception as an "accessory building" to the "museum use". (4) Even though both homes were on separate real property lots, the law firm said it could get around that legal problem by getting the Tax Assessor to create a new "tax lot" encompassing both properties.

B. The Wilks Artis Legal Theory Is Based Upon Five Erroneous Assumptions Which Should Be Rejected By This Board.

As shown below, each of the five legal presumptions upon which the Wilks Artis legal theory rests, is without basis in either fact or law and should be rejected by this Board.

First Erroneous Legal Presumption: ***The BZA Has Authority To Establish A Museum In The R-1 District.*** Museums, however, are not permitted in the R-1 zone which

> is designed to protect quiet residential areas now developed with one-family detached dwellings and adjoining vacant areas. . . [and] intended to stabilize the residential areas and to promote a suitable environment for family life. For that reason, only a few additional and compatible uses shall be permitted.

11 DCMR §§ 200.1 and 200.2.

The Board may search the R-1 regulations in vain for any mention of a "museum" use.[2] This is because a "museum" is first permitted in the Mixed Use District pursuant to § 601.1 (q). Moreover, § 3104 does not authorize the BZA to establish a museum in any zone by special exception.

If the Board concludes that it has no authority to allow the foundation to establish a museum in the R-1 zone, then Tudor Place will be limited to the residential functions intended by Mr. Peter, i.e., that "Tudor Place be kept as I shall leave it, and that it be considered **not as a period museum but as a house lived in and loved by generations of our family**." See Peter Will Article 11, ¶ 15. Like any other home owner, the foundation may allow this historic home and its gardens to be opened for tours by the public.[3] Like any other home owner, it may not rent the home for wedding receptions and corporate shindigs. Such events are permitted only at hotels, resorts and restaurants where they do not adversely impact nearby residential neighborhoods.[4]

If the members of the BZA have any doubt that the Board lacks authority – in the course of this Special Exception proceeding – to permit a museum use in an R-1 zone, this critical legal issue should be referred to the Zoning Commission. Because the requested ruling would, as a practical matter, effect an amendment of the Zoning Regulations, it should be decided by the Zoning Commission only after it considers the potential impacts such a new definition of the term "lot" may have on other areas of the regulatory scheme.

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[2]There are undoubtedly some old museums in our residential neighborhoods, such as the Phillips, that were established prior to the imposition residential zoning. Those uses, of course, are grand-fathered.

[3]Georgetown residents regularly open their homes and gardens to the public for both private tours and the well publicized Georgetown house and garden tours which take place each spring.

[4]The Zoning Regulations also do not permit non profit corporations to hold fund raisers in the R-1 zone. That use is first authorized in the R-5 zone and then only in a hotel with more than 100 rooms. 11 DCMR § 351.1(b).

Second Erroneous Legal Presumption: ***The BZA Has Authority To Extend A Special Exception Under § 217 To A Neighboring Home That Does Not Meet the 10,000 Square Foot Requirement.*** In an ordinary case under § 217, the BZA may rightly assume that an application applies only to the parcel of real property or "lot" upon which the 10,000 square foot home is sited.

In the previous proceeding, however, the foundation asked the BZA to annex the single-family home at 1670 31st Street into the Special Exception even though it was on a separate real property lot. There were two procedural problems with that novel proposal. First, a request to combine two separate properties must ordinarily be addressed in the first instance to the Zoning Administrator. If the Zoning Administrator permits the request to combine the properties, there is no need for BZA action. If the request is denied, the BZA has the benefit of the Zoning Administrator's rationale on any subsequent appeal. Wilkes Artis by-passed this step because it had no intention of creating a single lot that met the requirements of the Zoning Regulations.[5]

Second, § 3104 does not vest the BZA with authority to make interpretive rulings in the course of this exception proceeding. To the contrary, the BZA has jurisdiction to decide only those issues specified in § 3104 and "accessory uses" are not among those specified issues.

The D.C. Court of Appeals has held that:

> The Board's discretion to grant special exceptions is limited to a determination whether the exception sought meets the requirements of the regulation. The burden of showing that the proposal meets the prerequisites enumerated in the particular regulation pursuant to which the exception is sought rests with the applicant. In sum, the applicant must make the requisite showing, and once he has, the Board ordinarily must grant his application. *Robey v. Schwab*, 307 F.2d 198, 201 (D.C. Cir. 1962); *Hyman v. Coe*, 146 F. Supp. 24, 27, 32 (D.D.C. 1956).

Stewart v. BZA, 305 A.2d 516 (D.C. 1973).

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[5]As shown, *infra*, the scenic easement precludes any enlargement of the Tudor Place property.

In this case, the BZA's authority is limited to determining whether or not the foundation carried its burden of proving – by substantial evidence – that the Tudor Place property meets each of the requirements of § 217. Those requirements are: (1) the single-family home is a historic landmark; (2) it has more than 10,000 square feet; (3) the proposed non profit use "shall not adversely affect the use of neighboring properties"; (4) the "amount and arrangement of parking shall be adequate"; and (5) no goods or chattels shall be created or sold. These are strictly factual determinations that require no interpretation of other sections of the Zoning Regulations.

No provision of either § 3104 or § 217 authorizes the BZA to determine that a neighboring single-family home, which does not meet the requirements of § 217, may be annexed into an exception for a larger home as an "accessory use" or and "accessory building." Accordingly, we submit the prior BZA erred in adopting an order prepared by the Wilkes Artis law firm which found that 1670 31st Street could be an "accessory building" for the Tudor Place.

Third Erroneous Legal Presumption: ***1644 and 1670 31st Street NW are on the same "lot."*** Any "accessory use" must be on the same "lot" as the primary use. 11 DCMR § 199 [definition of "Use, accessory']. *See, e.g., Hilton Hotels Corp. v. BZA,* 363 A.2d 670 (D.C. 1976) and *National Cathedral Neighborhood Ass'n v. BZA,* 753 A.2d 984, n.3 (D.C. 2000). At the previous hearing, the opponents pointed out that 1644 and 1670 are on separate real property lots. They also pointed out that the specific terms of the scenic easement deeded to the National Park Service prohibit the foundation from combining the Tudor Place property with any other property, including 1670 31st Street. See Deed to National Park Service.

In an attempt to avoid this obvious regulatory obstacle, the Wilkes Artis law firm told the BZA that it could get the tax assessor to create a new single "tax lot."[6] That solution, however, created a legal conundrum. If the tax lot designation actually created a consolidation of the two separate properties for purposes of the Zoning Regulations, that consolidation would necessarily violate the express terms of the restrictive easement. If, on the other hand, the tax lot designation had no legal impact on the restrictive scenic easement because it did not change the legal boundaries of the property, *1670 31st Street* cannot be an accessory use because it is still on a separate real property lot. The foundation, we submit, cannot have it both ways and the BZA should not adopt such a contradictory and illogical interpretation of the Zoning Regulations.[7]

Fourth Erroneous Legal Presumption: ***Museums May Use Neighboring Single Family Homes For "Accessory Museum Uses":*** The foundation has submitted no evidence to support its bare contention that a "museum" may use a neighboring single-family home as an "accessory use" in any zone, much less the R-1 zone.

11 DCMR § 202.11 permits "accessory uses customarily incidental to the uses permitted in the R-1 District." There is, of course, no evidence that using a single-family home as a venue for parties, lectures, and conferences is "customarily incidental" to a museum use, much less, a residential use. Therefore, even if we assume that the Board may authorize Tudor Place to operate as a museum, there

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[6]The foundation apparently forgot about its subsequent transaction with the Tax Assessor because both its application for the instant Special Exception and its postings on the property referred only to the two prior existing tax lots (827 and 830).

[7]In upholding the Wilkes Artis Order, the Court of Appeals merely ruled that the BZA had authority to interpret the term "lot," as defined in the Zoning Regulations to include tax lots. The wisdom of that ruling and its potential effects on other aspects of the Zoning Regulations was not addressed. Again, we submit that an interpretation of the term "lot" should be made only by the Zoning Commission after considering its potential ramifications on other sections of the regulations.

is no evidence whatsoever that the use of nearby homes as a venue for parties, lectures, and conferences, are "customarily incidental" to a museum use.

Because the Board has no basis upon which it could find that museums customarily use neighboring homes as accessory buildings, much less as party venues, the proposal to annex 1670 31st Street into the Special Exception should be denied.

Fifth Erroneous Legal Assumption: ***One Single-Family Home May Serve As An Accessory Building To Another Single-Family Home.*** The proposition is also foreclosed by the Zoning Regulations which expressly provide that an accessory building "may not exceed one (1) story or fifteen feet (15') in height." 11 DCMR § 2500.4. Since the three-story home at 1670 31st Street is at least 30 feet high, it cannot be an accessory building in the R-1 zone. Moreover, the D.C. Court of Appeals has held that a "second house is not accessory use even though smaller than main residence, where it is a "dwelling with adequate facilities for occupancy apart from any other structure." *Davidson v. BZA,* 617 A.2d 977, 981 (D.C. 1992). Accordingly, even if we assume that both houses are now on the same "lot," 1670 31st Street still cannot serve as an "accessory" building for Tudor Place. Instead, it may be used only as a single-family home.[8]

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[8] The evidence in the record shows that the foundation would not suffer any harm if 1670 31st Street reverts to its only lawful use. In the first place, the foundation's income tax return for 2001 shows that its revenues exceeded its expenses by $60,000 during the time in which it had no revenue from special events. [As the Chairman noted, financial need is not a legitimate consideration in a Special Exception proceeding] In any event, the rental of 1670 31st Street to a single family would generate substantial revenue for any purpose such as enlarging its staff or making necessary improvements to Tudor Place. That five bedroom home, which has a large fenced back yard and a three car garage, could easily rent from 8,000 to $10,000 per month. ($96,000 to $120,000 per year). That amount would exceed all of the extra revenue generated by the foundation from its disruptive commercial events in 1999. See 1999 financial statements. That way, the foundation would get the extra revenue it says it needs and we residents would get our continued peace and quiet.

III. Summary

Tudor Place is but one of many single family homes in our quiet historic Georgetown neighborhood. When Mr. Peter donated the scenic easement to the United States in 1966, it was not his intention to change the neighborhood **but to preserve it**. To achieve that purpose, Mr. Peter directed that the foundation "**shall not** give, sell, **rent** or mortgage Tudor Place." Peter Will, Article 8. Unfortunately, the foundation has thus far failed to respect the wishes and directives of Mr. Peter. By **renting** Tudor Place out for the disruptive weddings and corporate events, the foundation has violated one of his primary directives. The BZA should not assist the foundation in its attempt to convert Tudor Place and 1670 31st Street into a bustling party, conference, and fund raising center.

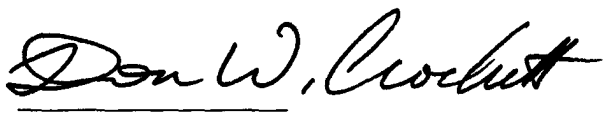
In our view, the BZA's primary duty is to insure the integrity of the R-1 zone and to protect the rights of the surrounding home owners to enjoy the "quiet residential areas" established by the Zoning Regulations.[9] The BZA can perform this duty simply **by deciding this case in strict conformance with the five prerequisites set forth in § 217.** If this is done, the foundation may continue to occupy the Tudor Place residence and conduct historical and educational tours of the property. Tudor Place cannot operate as a "museum" because that use is not permitted in the R-1 zone. It follows that the foundation may not use the single-family home at 1670 31st Street, NW as an "accessory museum use" or for any purpose other than as a single family home.

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[9]Section 3104 specifically requires that "the special exception will be in harmony with the general purpose and intent of the Zoning Regulations. In this case, the general purpose and intent of sections 200.1 and 200.2 is to "protect quiet residential areas" and to "promote a suitable environment for family life." That intent and purpose is not achieved by allowing an historic single-family home to become a venue for parties, conferences, and corporate events.

Finally, 1670 31st Street cannot serve as an "accessory building" or an "accessory use" to the Tudor Place single-family home for three additional reasons: (1) The two buildings are not on the same real property "lot." (2) One single family home cannot be an accessory use to another single family home in the R-1 zone. (3) 1670 31st Street exceeds the one-story or 15 foot height limitation for accessory buildings imposed by § 2500.4.

Respectfully submitted,



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Party In Opposition

May 6, 2003