BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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

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D.C. OFFICE OF ZONING

REPLY MEMORANDUM ON THE QUESTION OF WHETHER THE SINGLE FAMILY HOME AT 1670 31ST STREET CAN SERVE AS AN "ACCESSORY BUILDING" FOR THE NEIGHBORING SINGLE FAMILY HOME AT 1644 31ST STREET

A. This Is A New Special Exception Application Which Cannot Be Supported By The Record For The Previous Exception Which Expired On January 14, 2003.

In its Response, the Tudor Place Foundation (foundation) suggests that this Board should not "revisit" any of the issues resolved in the earlier special exception proceeding. Response, p. 1. As we pointed out, however, the final opinion and order in that proceeding, which was prepared by the foundation's self-interested lawyers and adopted by that Board verbatim, expired by its own terms on January 14, 2003. As the Chairman correctly noted, "this is not a renewal, but rather a brand new, stand alone special exception." TR 4/15 p. 69.

The foundation also argues that "the Board should, in making its decision in the present case, take into consideration the record and rulings in the previous proceeding." Response, n.2. There is no authority for that proposition and the foundation has cited none. To the contrary, the Board's sole duty under § 3104, is to review the evidence introduced by the parties to determine whether the applicant has met its burden of proving entitlement to the new special exception it has applied for. *Stewart v. BZA*, 305 A.2d 516 (D.C. 1973). The foundation cannot meet that burden by vague references to evidence introduced in some other proceeding.

The legal rulings in the prior order are, of course, legal precedent which the Board may or may not adopt in this case. If the Board chooses not to follow the legal precedents established in the prior order, it need only "supply a reasoned analysis indicating the prior policies and standards are being

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deliberately changed, not casually ignored. *Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 852 (D.C. Cir. 1971).

In support of its theory, the foundation claims that "[t]hroughout this proceeding . . . the opponents have cited the record of the proceeding related to the special exception granted to the Applicant in 1999." Response p.1, n.2. This is untrue and the Board may search the record in vain for any reference by the opponents to the record in the 1999 proceeding. We have, of course, referred to the contested final order which the foundation placed in the record of this case. We have also introduced certain evidence in this proceeding that was introduced in the previous proceeding. Other than that, we have made no references to the "record" in the previous proceeding, as the foundation incorrectly alleges.

The only matter now pending before this Board is the foundation's new application for a special exception which presents new facts and many new legal issues. Like any other case, this one must be decided by this Board pursuant to the criteria set forth in §§ 3201 and 217. This time, we sincerely hope the Board will exercise its own independent judgment and decide these critical legal issues on the basis of the Zoning Regulations themselves and not simply adopt the previous legal opinions of a self-interested applicant which were accepted without careful review by either the Board or the Zoning Administrator.

B. Section 3104 Requires The Board To Find That The Requested Exception Will Be In Harmony With The General Purpose And Intent Of The Zoning Regulations. This Obviously Encompasses §§ 200.1 and 200.2.

As the foundation correctly notes, the Court of Appeals affirmed the Wilkes Artis order which provided that §§ 200.1 and 200.2 are "merely precatory and do not contain the standards by which the application should be judged." That legal conclusion is, nonetheless, wrong and should not be ratified by this Board.

The foundation argues that the "relevant standards for the special exception being sought by the Applicant are contained in 11 DCMR § 217." Response, p. 2. That statement is only partially correct because it ignores § 3104 which sets forth the general standards by which all applications must be judged. One of those standards is that "the special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps." The general purpose and intent of the R-1 zone is set forth in §§ 200.1 and 200.2. It follows, therefore, that any special exception in the R-1 zone must be in harmony with the general purposes set forth in §§ 200.1 and 200.2.

C. The BZA Has No Authority To Approve A Museum Use In The R-1 Zone.

The foundation first argues that the opposing parties have cited no authority for the proposition "that the 'purposes of the non-profit organization' do not include, in this case, the operation of Tudor Place as a house museum." Response at 3. This statement is incorrect. The opponents introduced Mr. Peter's Last Will and Testament which left Tudor Place to the foundation and also set forth the purposes of the foundation. In particular, Mr. Peter specified 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**." Peter Will Article 11, ¶ 15.

Moreover, the only reason for designating Tudor Place as a "museum" was to justify renting it out for "special events."[1] Mr. Peter, however, directed that the foundation "**shall not** give, sell, **rent** or mortgage Tudor Place." Peter Will, Article 8. Accordingly, the only authoritative evidence in the record demonstrates that the operation of a museum with its associated "special events"is **not** among the purposes of this non-profit corporation.

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[1]Organizations often claim to be something they are not in order to obtain special exceptions. *See, e.g.,Legislative Study Club v. BZA* 359 A.2d 153 (D.C. 1976) (non profit organization was not a private club entitled to use building in an R-4 zone); *Stewart v. BZA*, 305 A.2d 516 (D.C. 1973) (organization was not a neighborhood group but a private club).

Moreover, the notion that the BZA may approve non-profit uses under § 217 that are otherwise prohibited the R-1 zone would be a slippery slope with no limits. For example, a non-profit corporation who's purpose is to further the acceptance and distribution of pornographic magazines and videos, copies of which are kept in its library for public use, should not be permitted in the R-1 zone because sexually oriented businesses, whether or not for profit, are not permitted in that zone. Similarly, museums, whether or not for profit, are not permitted in the R-1 zone. The foundation, of course, has cited no authority to the contrary. The Zoning Regulations clearly provide that a museum use may be established only in the Mixed Use District and less stringent districts. § 601.1(q).

The purpose of § 217 is to preserve large historic single family homes that may otherwise fall into disrepair. *Monaco v. BZA*, 461 A.2d 1049, 1052 (D.C. 1983). The contemplated use of such homes, temporarily, by non-profit corporations as small offices is theoretically compatible with single-family neighborhoods. When such office use threatens adverse impacts on the surrounding neighbors, however, the BZA has not hesitated to restrict such use to normal business hours. *See, e.g., French v. BZA*, 658 A.2d 1023, 1028 (D.C. 1996) (meetings and conferences by non-profit corporation required to be held elsewhere). Similarly, the use of a single-family home as a museum is not compatible with the R-1 zone under any circumstances.

D. The BZA Has No Authority To Annex Neighboring Properties Into A Special Exception For Non-Profit Use Of A Qualifying Single-Family Home.

The foundation advances a single argument for the proposition that the BZA has authority to annex neighboring properties into an exception under §217, namely, that the BZA did it last time and its order was upheld by the Court. Response, p.3. Once again, however, the foundation's argument is without basis. The authority of the BZA to issue an interpretation of the term "lot" in an exception proceeding was not raised on the appeal of the Wilks Artis order and, accordingly, was neither considered nor approved by the Court, as the foundation incorrectly suggests.

In reviewing the foundation's new application, we ask the BZA to carefully examine its own limited authority under §§ 3104 and 217. In our view, § 3104 of the Zoning Regulations vests the BZA with the authority only to make the six findings required by §§ 3104 and 217, namely, that: (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"; (5) no goods or chattels shall be created or sold; and (6) that the exception "will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps."

While the foundation once again asks the Board to include 1670 31st Street in the special exception for 1644 31st Street, it proffers no authority for that proposition. It is, of course, clear that a special exception may encompass any accessory buildings such as the garage and garden sheds on the property. *Davidson v. BZA*, 617 A.2d 977, 981 (D.C. 1992).

What the foundation now asks this Board to do, however, is to issue an interpretation of the Zoning Regulations (or more precisely, adopt the interpretation crafted by Wilkes Artis in the previous order) holding that buildings on neighboring properties may be annexed into the special exception when the applicant acquires a single tax lot designation for those properties. If this Board approved that procedure, the foundation could theoretically buy up other single family homes on the block, obtain a single tax lot designation, and include all of them in the special exception for Tudor Place. That result does not comport with our view of § 217. Nor does it further the sole purpose of § 217 which is to prevent the deterioration of large unoccupied homes.

As we pointed out in our initial briefs, the regulatory scheme is designed to require a ruling by the Zoning Administrator on such interpretative issues in the first instance. If the Zoning Administrator agreed with the opposing parties that accessory uses must be on the same "real property lot" and that tax lot designations are irrelevant, the foundation could appeal to this Board. On such an appeal, the Board

would have a record from the Zoning Administrator on which to base its decision. Absent such an appeal, the BZA has no jurisdiction to render such interpretations.

E. Accessory Uses Must Be On The Same Real Property Lot.

As the foundation correctly points out, the Court of Appeals held that the BZA's adoption of the Wilkes Artis definition of the term "lot" order did not exceed the Board's authority. The question still remains, however, whether that interpretation is correct. We submit that the interpretation is not correct and could create serious difficulties in other unforseen applications of the Zoning Regulations. Because the interpretation would, in reality, effect an amendment of the Zoning Regulations, it should be considered and decided only by the Zoning Commission after consultation with the Zoning Administrator.

F. All Accessory Buildings Are Subject To The One Story, Fifteen-Foot Height Limitation of § 2500.4.

The foundation first claims that there is a distinction between the construction of an accessory building and the accessory use of an existing building. It then argues that the construction of an accessory building is "what § 2500.4 addresses." Response, p. 5 -6. That argument is without basis. There is nothing in the statutory language of § 2500 that could justify such an interpretation. Section 2500.4 provides that "An accessory building in any zone district shall not exceed one(1) story or fifteen feet (15 ft.) In height." There is no mention of "new construction" much less any distinction between "new construction" and existing buildings" as the foundation incorrectly contends. To the contrary, § 2500.1 clearly encompasses "accessory uses" as well as "accessory buildings" and applies to existing buildings as well as new construction.[2]

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[2]Nor can the foundation find any support for its "new construction" argument in *Davidson v. BZA*, 617 A.2d 977 (D.C. 1992). In that case, the reconstructed pool house met all of the physical requirements of Section 2500.4 for an "accessory building." The BZA held, however, that it could not serve as an accessory building because "it can reasonably be expected to duplicate the functions of the main building rather than in fact serving as incidental to those uses." *Id.* at 992.

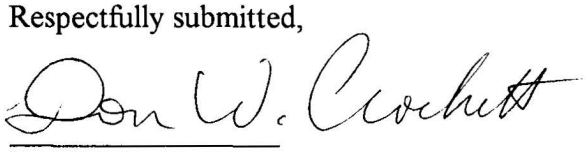
In our view, § 2500.4 precludes the foundation's claim that the single family home at 1670 31st Street may become either an "accessory use" or an "accessory building" for Tudor Place simply because the Tax Assessor has now included both homes in a single new tax lot. The home at 1670 31st Street simply cannot qualify as an "accessory building" under § 2500.4 because it has three-stories and is more than 15 feet high. Therefore, it must retain the only use permitted in the R-1 zone, i.e., that of a single-family home.

In the previous proceeding, the opponents, who are not zoning specialists, were unaware of § 2500.4 and, therefore, failed to raise that issue. The preeminent zoning firm of Wilkes Artis, on the other hand, must have been aware of § 2500.4 but ignored it in the order prepared for the Board's signature. Accordingly, this is an issue of first impression for this Board. Once again, however, we note that such contested interpretations of the Zoning Regulations should be decided in the first instance by the Zoning Administrator and entertained by the BZA only on appeals from his initial decisions. The fact that the previous order authorized an accessory use at 1670 31st Street without consideration of the restrictions in § 2500.4, underscores the need to follow proper procedures so that the BZA has the benefit of the Zoning Administrator's expertise.

G. Museums May Not Use Neighboring Single-Family Homes As "Accessory And Incidental Uses" To The Primary Museum Use.

The foundation did not contest the proposition that there is no evidence in the record to show that neighboring single-family homes are customarily and incidentally used by museums as venues for parties lectures, and conferences. Accordingly, the Board should deem this issue as conceded.

Respectfully submitted,



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