ARNOLD & PORTER LLP

Cynthia A. Giordano
Cynthia_Giordano@aporter.com

202.942.5840
202.942.5999 Fax

555 Twelfth Street, NW
Washington, DC 20004-1206

September 23, 2005

Geoffrey Griffis
Chair
Board of Zoning Adjustment
441 Fourth Street, N.W.
Suite 210-S
Washington, DC 20001

Re: BZA Application No. 17355;
Post-Hearing Submission Of Party in Opposition

Mr. Chairman and Members of the Board:

The following is the post-hearing submission of the party in opposition to Application No. 17355, the 1645 31st Street Personal Residence Trust (the "Adjacent Owner").

THE APPLICATION DOES NOT MEET
THE CRITERIA FOR SECTION 223 OR SECTION 3104

As testified to at the hearing by the Adjacent Owner and the undersigned urban planner, the proposed application does not meet the criteria set forth in Section 223 because it will adversely affect the use and enjoyment of the abutting property owned by the Adjacent Owner. Further, it does not meet the applicable general criteria for special exceptions set forth in Section 3104 (i.e., special exceptions must be "in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps" and "not tend to affect adversely the use of neighboring property."

Although applicants for a special exception under 11 DCMR § 3104.1 do not have to demonstrate an exceptional constraint inherent in the property as do those seeking a zoning variance, the underlying assumption of the Zoning Regulations favors matter-of-right construction. A building complying with all use and dimensional requirements (a matter-of-right building) is deemed to be a compatible building. Conversely, a building which deviates is presumed to have the potential to adversely impact neighboring properties. A key objective of the public hearing process for deviations is to solicit the opinion of affected neighbors and such views should be given serious consideration by the Board.

BZA
CASE No. 17355
EXHIBIT No. 34

Board of Zoning Adjustment
District of Columbia
CASE NO. 17355
EXHIBIT NO. 34A1

Massive Addition on Property Line and Complete Elimination of Side-Yard Area: The proposed west-side addition is 49 feet long and 10' 7" wide. A substantial structure by itself, it would occupy the entirety of existing side-yard area in a manner clearly contrary to the intent of the R-1-B District. This zone classification allows detached houses (and conforming additions) and imposes an 8-foot side-yard requirement. The Stettinius addition is as offensive to zoning requirements as it is to the Adjacent Owner.

Privacy: As to the degree of encroachment on the Friendlys' privacy, Mr. Horsey contended that "four players on the tennis court" did not warrant serious consideration. That disdain distorts the importance of the tennis court as a daily source of activity and social intercourse deserving the same degree of protection as a swimming pool such as the one Mr. and Mrs. Stettinius and their two children and friends enjoy. Section 223 does not distinguish between types of property to be accorded its protection. A postage-stamp patio has the same right to privacy as a croquet lawn; a flower bed is as much in need of light and air as any room in an adjoining house.

Matter of Right Option: The attached page of comparison photographs (Exhibit "A") illustrates the availability of a matter-of-right alternative to the side-yard addition Mr. Stettinius proposes. The 2002 aerial photograph taken from page 6 of the Office of Planning's report to the Board, shows two nearly identical houses: Mr. Stettinius' and, to the east of it, Mr. Robert Gabriel's. As the September 2005 photograph shows, Mr. Gabriel has built a very large rear addition since 2002, constructed directly behind the main house and apparently providing required setbacks.

This background reemphasizes Mr. Gross's point in testimony at the public hearing that Mr. Stettinius should first look to a matter-of-right addition, for which he has ample land area and options. Such a course of action would also conform to the legislative history of § 223. It includes the concept that "homeowners should look first to the matter-of-right addition" and only apply for the special exception in the case of significant need for deviation from setback requirements.

REBUTTAL POINTS/RESPONSE TO MISREPRESENTATIONS OF FACT ASSERTED BY APPLICANT'S ARCHITECT AT HEARING

Reason for Withdrawal of Previous Contract for Sale of Property: The Applicant's architect dismissed as misleading "hearsay" the Adjacent Owner's testimony

indicating that a previous buyer voided its contract to purchase the Adjacent Owner's abutting property because of the impact of proposed addition on the abutting property. For the record, the undersigned legal counsel for the Adjacent Owner has confirmed with the Friendly's legal counsel for the aborted sale that the primary reason provided by the contract purchasers was their perception that the proposed addition would materially adversely impact their contemplated use and enjoyment of the Friendly property. Attached hereto as Exhibit "B" are two letters which document this fact and should also be regarded by the Board as additional evidence of the potential adverse impact that the proposed addition would have on the Friendly property. Indeed, the fact that the contract purchasers opted to forfeit a sizeable portion of their deposit rather than purchase the property under the shadow of the proposed addition speaks for itself.

Previous Negotiations Between the Parties: In his rebuttal comments September 13, Mr. Horsey referred several times to an "agreement" between the Friendlys and Mr. Stettinius. Both parties did try to reach an accord in May 2005 prior to the Friendlys' appreciation for the full impact of the proposed addition on their property. The Friendlys met their obligations. Mr. Stettinius did not honor the terms of the bargain and thus rendered it void.

On May 26, 2005, after meeting with Alfred Friendly and Lucinda Murphy, Mr. Stettinius wrote Mr. Friendly:

> Per our conversation today, it appeared that we had adequately addressed those [drainage] concerns provided we give you an assurance that we would hold you, *as well as a subsequent owner of your property,* (emphasis added) harmless for any damage that might be sustained to our property by water from your property as a result of our proposed solution to the existing drainage issue. In exchange for your support of our proposed addition, we will provide that indemnity.

The next day Mr. Friendly gave Mr. Stettinius a statement to submit to the ANC and Old Georgetown Board, assenting to the application "[b]ased on the assurances received and anticipated" relating to drainage design and indemnification. Not until July 7 did Mr. Stettinius send Mr. Friendly the anticipated assurance -- but only in the form of an e-mail rather than a notarized, binding document. In the e-mail, Mr. Stettinius wrote:

> [t]his letter shall serve to indemnify and hold you harmless for any water damage to our property resulting from the change in drainage patterns occasioned by the

> construction of our proposed addition. *Assuming that subsequent owners of your property continue the same level of cooperation and communication that you have, we would also extend this same protection to them.* (emphasis added)

Such subjective condition would invalidate even a formal indemnification. The Friendlys' perception was that Mr. Stettinius had gone back on his word.

The windows: Mr. Horsey indicated that the Friendlys suggested putting windows in the Stettinius' proposed western wall. He did not disclose that in the May 26 conversation noted above, Mr. Stettinius indicated the windows being discussed were to be of fire brick, a translucent material, since the wall on a property line would be a fire wall. Contrary to that information, the design before the BZA includes transparent windows, an unacceptable invasion of the Friendlys' privacy. BZA members should note that the ANC2E resolution of August 30 supports the Stettinius application ***only*** on the condition that the applicant remove the windows on the wall facing the property on the western side [to] address the privacy issues.

Restoring vines either on the Stettinius' new wall or the Friendlys' chain-link fence is not a practicable remedy to insure privacy. Ivy will neither grow healthily in the clay soil of the tennis court nor spread without adequate light and air – both of which the Stettinius addition would unduly diminish.

The fence: In the May 26 letter to Mr. Friendly noted above, Mr. Stettinius wrote

> [S]ince the fence and [retaining] wall will be unnecessary if the wall of our addition is built, we have proposed to remove the fence and wall at our expense from our garage to where our addition would end. We would then build our new addition wall "face on line" onto the property line so that it would align with our garage wall and retain your tennis court.

At the ANC2E August 30 hearing, Mr. Horsey indicated in response to a suggestion from ANC Commissioner Skelsey that ivy could be grown on the new wall to soften its appearance, but at the September 13 BZA hearing, he stated that the current intent is to leave the fence in place and have the building wall come virtually up against the fence. A reversal of previous positions, such an expedient has the virtue of recognizing that the fence is the Friendlys' property. The proposal, however, would create a highly unattractive façade, an ungainly combination that would virtually paste a chain-link fence onto the building wall. As the illustration submitted to the record shows,

the proposed building wall is aggressive and unaesthetic compared to the existing vine-covered screening fence and 10' 7" open space behind it.

Drainage system: Questioning Mr. Friendly on September 13, Mr. Horsey contended that a new drain in the southeast corner of the Friendly property is meant to deal with the problems the Stettinius addition would cause if built. The Friendlys, however, have installed the drain on their property in order to perfect their title to it by removing an unrecorded covenant created when the previous owner of the Stettinius property put a drain into the tennis court's retaining wall in order to pipe rainwater runoff through it and across his property to Avon Lane.

The Friendlys' new drain will carry rainwater from the garage roof gutter above it and from elsewhere on the property. It is not, though, designed to handle water that is expected to back up on and under the surface of the court if the footings of the Stettinius addition block existing patterns of underground drainage at the same time that air and light are cut off and when – as can reasonably be expected – hard-to-maintain gutters on the proposed new, two-story wall overflow onto the Friendlys' property.

Architect's Claim of Need to Occupy Entire Side-Yard to Avoid Illegal Court is Disingenuous: A special exception for relief from the court requirements is provided by Section 223 -- the same section from which the Applicant is currently seeking relief.

Other distortions: Contrary to Mr. Horsey's contention, the Friendly and Stettinius garage walls abut but are not common. Contrary to Mr. Horsey's report of Mr. Stettinius' advice that the Friendlys eliminate drainage problems by watering the tennis court less often, the court is lightly watered only in dry weather, generally just before matches are played.

THE PREVIOUS CONSTRUCTION OF IMPROVEMENTS ON THE SUBJECT PROPERTY WITHOUT PERMITS IS RELEVANT AND SHOULD BE RECONSIDERED BY THE BOARD

The fact that the Applicant recently completed several improvements on the subject property without permits and has made no attempt to file for such permits and allow for proper inspections by the D.C. Government is relevant to this matter and should be considered by the Board. Further, the Applicant architect's stated intention to file a

permit application will be filed when the permit application for the addition is filed should have been addressed by the Board. Is the Applicant asserting that compliance will be forthcoming only if the Board grants them the exception they have requested?

As stated at the hearing, the Board has a responsibility to protect the public interest in ensuring lawful property development in the District of Columbia. The doctrine of unclean hands has been applied by this Board in prior cases. Notwithstanding their inexperience in this area and difficulties posed by the BZA indexing system, Adjacent Owners were able to pull several BZA orders which document the Board's application of "unclean hands" in denying requested BZA relief. Special exception relief is a form of equitable relief and the BZA should apply the doctrine of unclean hands and deny the requested relief as it has in previous cases. The BZA orders are attached hereto as Exhibit "C".

Further, the D.C. Code Section 6-641.09 (a copy of which is attached hereto as Exhibit "D") which mandates a building permit for new construction also provides that a neighboring property owner who would be specially damaged by a violation of this requirement may institute any "appropriate action or proceeding to correct or abate such violation." Accordingly, the Adjacent Owner requests that the Board encourage the Applicant to correct the uncontroverted violation of Section 6-641.09 by denying or withholding further consideration of their application until a permit application is filed.

We note that the Citizen's Association of Georgetown (correspondence attached as Exhibit "E") concurs with us on this point, imploring the Board not to reward improper development with new exceptions. Finally, just yesterday the Historic Preservation Review Board took a similar position with respect to a violation brought to their attention by staff (Exhibit "E").

CONCLUSION

In conclusion, based upon all of the foregoing, the Adjacent Owner has made a substantial case that the proposed elimination of the side-yard and new construction

occupying the entirety of this required set-back area will have a substantial, undue impact on the Adjacent Owner's property and therefore should be denied.

Sincerely,

ARNOLD & PORTER

Cynthia A. Giordano

Nathan Gross, AICP

Before the Board of Zoning Adjustment, D.C.

PUBLIC HEARING - February 9, 1972
Appeal No. 11064 Anthony Adams, appellant.
THE ZONING ADMINISTRATOR OF THE DISTRICT OF COLUMBIA, appellee.
On motion duly made, seconded and unanimously carried,
the following Order of the Board was entered a t the meeting of
February 15, 1972.
ORDERED :
That the appeal for a variance from the provisions of
Section 7502.3 to permit garage with a t t i c space not to
exceed 17 feet in height a t 518 Oglethorpe Street, NE., Lot
197, Square 3733, be DENIED.
FINDINGS OF FACT:
1. The subject property is located in a R-2 ~ i s t r i c t .
2. The property is presently used as a single family
residential structure.
3. The appellant received a permit to build a 15 foot
high garage pursuant to plans drawn by an architect.
4. After receiving a permit to build a 15 foot high
garage, the owner requested the contractor to add additional
height to the garage which the contractor did without getting
a new permit or getting permission from the Board of Zoning
Adjustment to do so.
5. The permit granted to the appellant was for a 15
foot high construction. The existing construction is now in
excess 16.4 feet.
6. As a result of the additional construction, the
appellant now request a variance to allow the garage with a
l o f t not to exceed the 17 foot height.
Appeal No. 11064
June 6, 1972
PAGE 2
7. A t the public hearing there was opposition to the
granting of t h i s appeal. The neighbors object to the appeal
based upon the following reasons:
"(a) The construction is an eyesore and w i l l certainly
adversely affect the surrounding properties
and the neighborhood overall.
(b) If t h i s type of construction is allowed to
remain, it w i l l most definitely be extremely
d i f f i c u l t to deny similar construction on
other properties, thus causing a rapid deterioration
of the neighborhood and loss of property
value, t h i s we do not want."
OPINION :
The Board f e e l s t h a t the request for a variance not to
exceed the 17 foot height requirements should be denied. Our
action is, in part, based upon the appellant's knowledge
prior to construction that any construction beyond the 15 feet
permitted by the Department of Licenses and Inspection Branch

would need a new permit or permission from the Board of Zoning

Adjustment . The appellant proceeded with the additional height construction knowing that they did not conform to the plans as previously approved and as a result, the additional construction was done with the knowledge that the additional height would need approval and could possibly not be granted. The Board is of the opinion that appellant has not proven a hardship within the meaning of the variance clause of the Zoning Regulations and that a denial of the requested r e l i e f w i l l not r e s u l t in peculiar and esceptional practical d i f f i c u l t i e s and undue hardship upon the owner. Further, we hold that the requested r e l i e f cannot be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and i n t e g r i t y of the zone plan as embodied in the Zoning Regulations and Map.

It is therefore our opinion that the garage should'not exceed the 15 foot height l i m i t and that appellant's hardship was of his own making. For he who claims equity must have clean hands.

The Board is cognizant that its rules of procedure a t the time of the hearing on t h i s matter did not specifically provide for cross-examination but that there was no specific request for an opportunity to cross-examine made or denied. If any person participating in thisproceeding believes that he has been prejudiced by the lack of an opportunity to crossexamine, the Board is disposed to entertain a motion to re-open t h i s case to permit corss-examination. Such a motion should be made within fifteen (15) days from the date of t h i s f i n a l decision. The motion should identify the witnesses to be cross-examined, as well as that portion of his testimony to be subjected to cross-examination. Specific reference to the transcript of proceedings w i l l be helpful. Copies of the transcript are available for inspection by the public in the Offices of the Zoning Commission, District Building, Room 11A, 14th and E Streets, **NW.** between 8:15 a.m. and 4:45 p.m. The motion should be forwarded to the Board in care of t h i s address. The motion should also be served upon a l l other persons appearing in proceedings. Opposition to the motion should be f i l e d and served on a l l other persons to the proceedings no l a t e r than five (5) calendar days a f t e r receipt of the motion.

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMEN...T. . . . I ;', ..,.
ATTESTED:
By :



A. GROGAJY

Secretary of the Board

GOVERNMENTO F THE DISTRICTO F COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 13112, of Woodley Park Community Association, pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of the Zoning Administrator to issue a construction permit for a hotel/convention center in violation of the Zoning Regulations in the R-5-B and R-5-C Districts at the premises 2660 Woodley Road, N.W., (Square 2131, Lot 32).

HEARING DATES: January 30, February 6 and April 2, 1980 and January 14, 1981

DECISION DATES: November 5, 1980 and April 1 and May 6, 1981

FINDINGS OF FACT:

The Findings of Fact in this order are divided into the following parts:

A. Introduction and Setting (Findings 1-20)
B. The Sheraton's Motion to Dismiss (Findings 21-24)
C. The Appellant's Response to the Motion to Dismiss (Findings 25-28)
D. The Appellant's Arguments on the Merits (Findings 31-62)
Height (Findings 32-37)
Roof Structures (Findings 38-39)
Convention Center Use (Findings 40-41)
Parking Spaces (Findings 42-56)
Parking Plan (Findings 57-58)
Accessibility and Convenience of Parking (Findings 59-62)
E. The Zoning Administrator's Arguments on the Merits (Findings 63-82)
Height (Findings 64-66)
Roof Structures (Finding 67)
Convention Center Use (Findings 68-72)
Parking Spaces (Findings 73-80)
Parking Plan (Finding 81)
Accessibility and Convenience of Parking (Finding 82)

F. The ANC Report (Findings 84-85)
G. The Board's Findings on the Merits (Findings 86-91)

A. Introduction and Settina

1. The subject property is located between Woodley Road and Calvert Street, west of 24th Street and Connecticut Avenue, N.W. The premises are known as 2660 Woodley Road, N.W. and consist of an irregularly shaped site comprising approximately sixteen acres.

2. Most of the site is zoned R-5-B, with the portion of the property lying within 175 feet of Calvert Street

zoned R-5-C.
3. The subject property is owned by the Washington Sheraton Corporation, hereinafter referred to as the Sheraton. Pursuant to Section 1.151 of the Supplemental Rules of Practice and Procedure before the BZA which were in effect prior to August 27, 1982, and which govern the subject appeal, the Sheraton is an intervenor and party to this matter.
4. On December 16, 1976, the Sheraton Corporation, parent corporation of intervenor herein, announced plans for the redevelopment of the old Sheraton Washington Hotel which had been in existence on the subject site since the 1920's. The plans called for the demolition of portions of the existing building and their replacement with new hotel construction, including guest rooms and convention and exhibit space.
5. In August of 1977, plans for the rebuilding of the Sheraton Washington and a building permit application were submitted to the Zoning Regulations Division of the Department of Housing and Community Development of the District of Columbia Government.
6. In late November or early December, 1977, representatives of the Woodley Park Community Association, hereinafter referred to as the appellant, met with the Zoning Administrator to discuss several zoning issues regarding the proposed new construction.
7. The December, 1977, meeting was summarized by a letter dated December 5, 1977, marked as Exhibit No. 16 of the record, from William H. Carroll, President of the appellant, to James J. Fahey, Zoning Administrator. In the letter, the appellant asserted that:
a. The proposed hotel complex is a nonconforming structure which does not comply with the setback provisions of Paragraph 3201.24, the

rear yard requirements of Section 3304 and the height regulations for the R-5-B District.
b. Use of the structure for convention and exhibit purposes is a primary use which is not permitted as a matter of right.
8. The original plans proposed a total of 1,502 rooms or suites of rooms. Of that total, 306 units were to be in the Wardman Tower, 214 were in the Motor Inn, and 982 were to be in the newly constructed portion of the hotel.
9. Between August of 1977 and April, 1978, revised plans were submitted to the Zoning Administrator. These plans showed a decrease in the number of rooms or suites of

rooms from 1,502 to 1,366, a reduction of 136 rooms or suites of rooms. The revised plans provided 209 units in the Wardman Tower, 212 units in the Motor Inn and 945 in the newly constructed portion of the hotel.

10. By April 27, 1978, the Chief of the Zoning Review Branch made computations from the revised plans for the Sheraton and determined that the proposed structure complied with all provisions of the Zoning Regulations. While the computation sheet dated April 27, 1978, reflected 1,502 sleeping rooms or suites, these plans had been previously revised and the Chief of the Zoning Review Branch had reviewed and approved the revised plans which contained a total of only 1,366 sleeping rooms or suites.

11. During this time period, Sheraton was issued a foundation permit No. B258259 for the new addition on March 2, 1978, and ground breaking occurred in the spring of 1978.

12. The Sheraton subsequently received a full building permit, No. B264384, from the Building Regulations Division issued on October 6, 1978. Several partial building permits were issued prior to that.

13. Construction continued on the building through the end of 1978 and the first half of 1979. The building was under roof, with the exterior shell completed in July of 1979.

14. On August 16, 1979, the Sheraton applied for a Certificate of Occupancy for a portion of the subject building. On August 17, 1979, that application was approved as complying with the Zoning Regulations.

15. In August of 1979, the Sheraton submitted plans which revised the plans which had been approved as part of the original full building permit.

16. On September 6, 1979, Gleason Wilson, the technician in the Zoning Administrator's office who worked on the project, prepared and signed a revised computation sheet. That sheet accurately reflected the development approved in April of 1978. It showed 1,366 rooms or suites of rooms, 579 parking spaces required and 595 parking spaces provided.

17. Pursuant to the application filed on August 16, 1979, Certificate of Occupancy No. B115883 was issued on September 12, 1979 for "Hotel-Restaurants (lobby level) front desk area Specialty restaurant Kitchen and guest rooms, S.W. &N.E. Wings; 2 passenger elevators-3 service elevators (320 rooms)."

18. The appellant filed the subject appeal on October 12, 1979.

19. Additional certificates of occupancy were issued to the hotel on November 6 and December 31, 1979.
20. Between November, 1976, and October 1979, the appellant and the Sheraton conducted many meetings and exchanged a great deal of correspondence and telephone calls in discussion over the proposed hotel, with most of the attention directed at the number of parking spaces, access and circulation. While there are conflicting views of much of those contacts by the respective parties, it is clear that no final written agreement was ever reached between the appellant and the Sheraton.
B. The Sheraton's Motion to Dismiss
21. On January 23, 1980, the Sheraton moved to dismiss the appeal. The Sheraton argued that the Board lacked jurisdiction to consider the matter because:
a. The appeal herein was not 'timely' filed as required by the rule of special applicability as set forth in Section 2.21 of the Supplemental Rules of Practice and Procedure.
b. The appeal was barred by the doctrine of laches.
c. The District of Columbia was barred from revoking the Sheraton's building permit at this time by the doctrine of estoppel.
22. In support of the motion, the Sheraton argued that the instant appeal came too late. The Zoning Administrator's calculations that are the subject of this appeal were completed on April 28, 1978. On January 6, 1978, the first permit, for excavation, was issued and on March 3, 1978 a foundation permit was issued. Subsequently,

on October 6, 1978, the overall building permit was issued. Yet, the appellant delayed its appeal until October 12, 1979, more than eighteen months after the building permit. At the time of the appeal, construction had proceeded sufficiently for certificates of occupancy to be issued for 320 of the 945 new hotel units. A reasonable time for bringing the appeal had long since passed.
23. As to laches, the Sheraton arsued that the appellant's unreasonable delay in bringini this appeal gives rise to the defence of laches. In Goto v. Board of Zonina ~djustment,4 23 ~ . 2 d9 17 (D.C. App., 1980)-, the District Gf
Columbia Court of Appeals held that the doctrine of laches was applicable in zbiing appeals. Goto reaffirms the rule that the two elements of laches are: (1) unreasonable delay in bringing the appeal; and (2) prejudice to the party -- asserting laches. The court held that:

"Laches will bar the claim of [Appellants] if they delayed unreasonably in bringing their appeal to the Board to [Appellee Is] prejudice. "The principal element in applying the doctrine of laches is the resulting prejudice to the defendant, rather than the delay itself" (423 A. 2d at 925)."

The original computation sheet dated April 27, 1978, provided substantially the same basis for appeal as the revised ruling from which the appeal was taken. The Sheraton expended a very large amount of money in reliance upon the approvals given pursuant to the April 27, 1978, ruling that the proposed building complied with the Zoning Regulations. The Sheraton argued that the appellant delayed unreasonably in filing the appeal.

24. As to estoppel, the Sheraton argued that the Government of the District of Columbia is estopped from revoking intervenor's building permit because the Sheraton, in good faith, has made a substantial change of position in reliance on the permit. It is well established that the doctrine of equitable estoppel applies to the enforcement of Zoning Regulations. Rathkopf, The Law of Zoning and Planning, 67-16 to 67-17, Volume 4 (4th Ed. 1978); Yokley, Zoning Law and Practice, 514-2, Volume 2 (4th Ed. 1978); District of Columbia, v. Cahill, 60 U.S. App. D.C. 342, 54 F . 2 d r i c t of Columbia Board of Zoning ~djustment,-d 356 (D.C. App. 1975); Wieck v. District of Columbia Board of Zoning Adjustment, 383 A.2d 7 (D.C. App. 1978). The effect of the doctrine is to bar challenges to good faith actions taken pursuant to approvals by properly empowered public officials. In Wieck, supra, the elements of estoppel are set forth as follows:

"
. . . a party (1) acting in good faith, (2) on affirmative acts of a municipal corporation, (3)makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party invoking the doctrine. . . . Furthermore, the reliance of the party must be justifiable."

The Sheraton argued that it met all procedural and substantive requirements in good faith in obtaining all issued permits for the construction and occupancy of the building. The Sheraton assumed it was proceeding in full conformity with the Zoning Regulations. All required plans were filed, such plans were reviewed and determined to be in compliance, permits were obtained and substantial expenditures incurred as a result of that reliance. The

Sheraton expended over $45 million. The Sheraton further argued that the instant appeal, if upheld by the Board, would cause the revocation of building permits for a ten story structure after it had been completed and was under roof, all of which was done with the appellant's full knowledge since May, 1977. The appellant waited while the Sheraton changed its position to its substantial detriment. If the appellant had timely filed the appeal, the issues raised in the appeal could have been resolved before the Sheraton made substantial expenditures and prior to the issuance of a full building permit on October 6, 1978. The Sheraton lastly argued that its reliance in this case was justifiable because the persons who approved the building permit as to zoning compliance were the properly empowered administrative officials to make such a decision.

C. The Aw~ellant's Res~onse to the Motion to Dismiss

25. The appellant opposed the motion to dismiss, arguing that the defenses of timeliness, laches and estoppel were without merit.

26. As to timeliness, the appellant argued that it filed the appeal thirty-seven days after the Zoning Administrator's revised computation sheet was prepared on September 6,1979. Regarding the original decision made on April 27, 1978, and the subsequent permit issued, the appellant argued that the governing rule must be that the time for an appeal must run from the time when the party aggrieved was chargeable with knowledge of the decision from which it appeals. The appellant argued that it was not until the Zoning Administrator's decision of September 6, 1979, that the appellant became aware of the extent to which the Sheraton's revised building and parking plan fell short of the requirements specified in the Zoning Regulations. The appellant could not have been expected to appeal that plan prior to its approval by the Zoning Administrator and knowledge on the appellant's part of the existence of the revised plans. Accordingly, the appellant believed that

September 6, 1979, marked the date of the decision from which the appellant rightfully appeals.

27. As to the defense of estoppel, the appellant argued that the equitable defense of estoppel. will lie only when the party asserting it has "clean hands" or is innocent of wrongful, deceptive, or unconscionable acts. In zoning cases, the defense of estoppel is not favored. The appellant argued that the record it laid out establishes that the indispensable element of good-faith is not present. The appellant argued that: (a) The equities are not with Sheraton. (b) There is no evidence of reliance. (c) Even

if there were, this reliance plainly would not have been justified. At best, Sheraton can only urge that the appellant was lulled into inaction by its own misrepresentations. (dl To the extent that Sheraton relied upon the building permit of October 6, 1978, this reliance was based upon a permit secured on the basis of incomplete, misrepresented and untrue facts. The structure did not include, as represented in its plans, 1501 habitable rooms, there were not 784 existing parking spaces, etc.

28. As to the defense of laches, the appellant cited the D.C. Court of Appeals in Wieck v. District of Columbia Board of Zoning Adjustment, 383 A.2d 7 (D.C. App., 1978): "A claim of laches in the zoning context is not judicially favored and is rarely applied except in the clearest and most compelling circumstance^.^

The defense of laches is available only to a party who in good faith and without misstating, failing to disclose, or misrepresenting facts, has acted in reliance upon another's acquiescence. The appellant argued that the record indicated that Sheraton did not act in good faith and did misrepresent the facts, thereby barring proper use of laches.

29. The Zoning Administrator, the appellee in this matter, took no position on the motion to dismiss.

30. At its public meeting held on April 1, 1981, the Board denied the motion to dismiss on all three grounds discussed above, for the reasons set forth in the conclusions of law, below at pages 22 and 23.

D. The Awwellant's Arcmments on the Merits

31. As the basis for the appeal, the appellant argued that the Zoning Administrator erred in approving the building permit application for zoning purposes because:

a. The building exceeds the maximum height permitted in the R-5-B and R-5-C Districts.

b. The roof s t r u c t u r e s exceed the maximum height permitted.

c . The convention center use of the property is not an accessory u s e t o t h e h o t e l but r a t h e r is a p r i n c i p a l use and thus n o t p e r m i t t e d .

d. The number of parking spaces provided is less than the number required.

e. There was no v a l i d parking plan submitted.

f . The parking spaces a r e not reasonably a c c e s s i b l e and convenient t o users.

32. As t o the b u i l d i n g h e i g h t , the a p p e l l a n t argued t h a t t h e building height exceeds the maximum height permitted by the Act of 1910. Sub-section 7609.1 of the

Regulations requires buildings to comply with the provisions of that Act. The Act of 1910 limits the height of buildings in a residence district to the width of the street less ten feet. Since Woodley Road is only ninety feet wide, the building should not exceed eighty feet in height. The building is approximately ninety feet in height, and thus is in violation.

33. The appellant further argued that the building exceeds the permitted height as specified in the Regulations.

34. In Section 1202, "building, height of" is defined as:

"The vertical distance measured from the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet; ..."

35. Sub-section 3201.1 of the Regulations provides a maximum building height in feet of sixty feet in the R-5-B District and ninety feet in the R-5-C District.

36. Paragraph 3101.24 of the Regulations provides that:

"A building or other structure may be erected to a height not exceeding 90 feet, provided such building or structure is removed from all lot lines of its lot for a distance equal to the height of such building or structure above the natural grade."

37. From the provisions cited in Findings 34, 35 and 36, the appellant argued that if the height of the building were measured from the natural grade rather than the curb, in order to achieve a height of ninety feet, the building would be required to be set back ninety feet from all lot

lines. Since the building abuts the lot line in two places on the south, the building does not meet the setback mandated by Paragraph 3201.24, and thus violates the height requirements.

38. As to the roof structure height, the appellant argued that the pertinent part of Paragraph 3201.26 requires that all roof structures in excess of ninety feet must be "set back from all lot lines of the lot upon which such structure is located a distance equal to their respective heights above the roof of the top story." The two penthouses on the south side of the new construction are located on the lot line, and thus do not meet the setback requirement.

39. The appellant further argued that since the roof structures do not meet the setback requirements, they cannot be considered penthouses and must therefore be considered a part of the main building. If they are part of the main

building, the height of the building would be considerably greater than ninety feet.
40. As to the convention center use, the appellant arqued that an accessory use is one which is incidental to the principal use. he- appellant cited Yokley, Zoning Law and Practice, 8-2, 8-3:
"
. . . incidental uses have always been authorized when they are customary and do no violence to the plain intent of the ordinance. Incidental means that the use must not be the primary use of the property, but one which is subordinate in minor significance incorporating the concept of reasonable relationship with the primary use."
The appellant argued that the convention and exhibit facilities clearly exceed this concept. Such facilities contain approximately 200,000 square feet of floor area and can accommodate approximately 24,000 people. The appellant argues that the convention-exhibit facilities provide the financial life blood of the Sheraton's business and, are of paramount importance to the overall business conducted at the premises. There are over three acres of convention-exhibit space at the premises. The convention facilities alone are expected to attract more than 400,000 convention delegates annually to Washington, D.C. Most of the hotel's room bookings are generated by the assembly use. Over and above the convention business, the facility also regularly attracts large crowds of persons at banquets and other special social functions. These, too, play a large role in the financial life of the Sheraton. The appellant argued that most of the persons drawn to this facility are not hotel guests, that service to these persons comprises the paramount, dominant business conducted at these

premises, and that the presence of these persons is not "subordinate" and "incidental" to the hotel business. The number of persons regularly accommodated is not "minor" in relationship to the hotel business.
41. The appellant further argued that the Zoning Administrator also plainly erred by looking exclusively to the ratio of square feet in the convention-exhibit area to the total area of the entire complex. His calculation, made without reference to whether the use is "subordinate" or "incidental," excluded consideration of common hotel-assembly use support space, such as kitchens, lobbies, and dining areas, and of support space exclusively devoted to the convention-exhibit facilities such as the enormous convention lobby.

42. As to the number of parking spaces required for the subject property, the appellant argued that the Zoning Administrator erred in two respects. First, he did not require the Sheraton to provide parking as specified in prior Orders of the BZA and the Zoning Commission. Second, he excluded from the computation of required parking spaces the rooms in the Wardman Tower.
43. In BZA Appeal No. 5420, by Order dated March 18, 1959, marked as Exhibit No. 87 of the record, the Board granted variances "from the height, court and yard requirements of the R-5-B District to permit a ballroom addition to the then existing Hotel and for erection as a part thereof a parking garage to accommodate approximately 281 automobiles." As a part of the reasons for granting the appeal, the Board stated:
"The hotel will provide a parking garage to accommodate 281 automobiles. Although there is no requirement in the regulations for the additional parking spaces requested in this appeal, the request was made to provide additional parking for the increased facilities, namely the ballroom addition for the Hotel."
44. In BZA Appeal No. 6564, by Order dated December 18, 1961, marked as Exhibit No. 86 of the record, the Board granted a variance from the provisions of Section 3201.24 to permit an addition to the Sheraton Park Hotel.
45. By Order dated April 17, 1962, the Zoning Commission rezoned a portion of the subject property from R-5-B to R-5-C.
46. In BZA Appeal No. 6750, by Order dated December 5, 1962, marked as Exhibit No. 85 of the record, the Board granted a variance from the setback requirements of Section 3201.24 to permit an addition to the Sheraton Park Hotel and

approved roof structures in accordance with Section 3308. As a finding of fact in that Order, the Board stated:
"A traffic report relating to the proposed addition...was made part of the record before the Zoning Commission [in the above cited case]. This report disclosed that the existing off-street parking spaces totalling 564 will be increased to 898 and that the present hotel rooms, excluding permanent suites, will be increased from 910 to 1100 rooms."
Approval of the application was subject to the condition that :
"a. The building shall be erected substantially in accord with revised plans marked "Exhibit A - William E. Chase" dated December 5, 1962 and filed for the record on that date to comply with verbal

instructions issued to the appellant by this Board immediately following the hearing of the case."
47. The appellant further cited testimony and evidence in the record of the above-cited zoning applications that indicated that the hotel would be providing parking that would total 898 spaces.
48. The appellant thus argued that the previous decision of the BZA requires that the Sheraton now provide at least 898 parking spaces and that the Zoning Administrator was in error in approving plans that showed any number of spaces less than 898.
49. As to the Wardman Tower, the computation sheet prepared on September 6, 1979, by the Zoning Administrator's office indicated that no parking was required for that portion of the building, since it was built prior to 1958.
50. Sub-section 7201.1 of the Regulations requires that:
"All structures erected on or after the effective date of these Regulations [May 12, 19581 shall be provided with parking spaces to the extent specified in Section 7202, ..."
51. Sub-section 7201.2 of the Regulations provides that:
"When the use of a structure is changed to another use which requires more parking spaces then required for the use existing immediately prior to such change, ..., parking spaces shall be provided for the additional requirement in the amount necessary to conform to Section 7202, ..."

52. Sub-section 7201.3 of the Regulations provides that :
"When the intensity of use of a structure existing before the effective date of these regulations is increased by an addition or additions of em-p lo-y ees, dwelling units, qross floor area, seating capacity or other unit of measurement specified in Section 7202, . . . , parking spaces shall beL provided for such addition ..."
53. Paragraph 7201.31 of the Regulations provides that parking is required for an increase in intensity of use only when the increase exceeds twenty-five percent in the aggregate.

54. Paragraph 7201.34 of the Regulations provides that: "The determination of the increase of intensity of use shall be based on the total increase in intensity of use such structure undergoes on or after the effective date of these regulations whether such total increase occurs at one time or in successive stages."
55. The appellant argued that the exclusion of the Wardman Tower from the computation of the required parking was based on the Sheraton's representation to the Zoning Administrator that the number of rooms decreased from 310 to 209.
56. A representative of the appellant testified that it was his best information and belief, citing a 1969 newspaper article, that the Wardman Tower contained sixty units in 1958. The appellant thus argued that parking should therefore be required for any number of units in excess of seventy-five, which is twenty-five percent more than sixty, and that the Zoning Administrator was in error in not requiring some parking for 209 rooms in the Wardman Tower.
57. As to the submission of a valid parking plan, Paragraph 7201.11 of the Regulations provides that: "No application for a building permit for a structure to be erected on or after the effective date of these regulations shall be approved unless there is included with the plans for such structure a parking plan showing the location, dimensions, and grades of all required parking spaces and approache; thereto in accordance with the provisions of this article."
58. The appellant argued that the Sheraton did not submit a plan meeting the above-cited requirements. The drawings submitted by the Sheraton in support of its building permit application plainly failed to specify the

location, dimension,
actually provided or
provided were wholly
required information
and grades of the parking spaces
to be provided. Instead, the drawings
inaccurate and furnished none of the
in respect to the garage spaces. With
respect to most of the spaces, the Sheraton furnished only written lists of the numbers of spaces allegedly found within existing garages.
59. As to the issue of the location, accessibility and convenience of the parking spaces, the appellant asserted that the Regulations require the spaces to be located in such a way that they are reasonably accessible and

convenient. The appellant argued that the spaces proposed did not meet that test.
60. The appellant lastly argued that the building permit was invalidly issued because the Zoning Administrator was not authorized to permit a reduction in the number of spaces existing at the subject premises. As the basis therefore, the appellant cited Sub-section 7206.2, as follows:
"Parking spaces shall not be reduced in total extent after their provision except upon approval of the Board of Zoning Adjustment and then only after proof that the parking spaces provided are no longer needed by reason of a reduction of employees, seats, gross floor area, dwelling units, or any other unit of measurement, provided the Board of Zoning Adjustment may impose any condition it shall deem necessary to assure the addition of parking spaces in case of a subsequent increase in employeeL, seats, qross floor area, dwelling units, or any other unit of measurement."
61. The appellant, through various citations to material in the record of previous BZA appeals, argued that there were at least 678, 898 or 784 parking spaces in existence at the site in the past. The appellant argued that the spaces could not be eliminated without BZA approval.
62. The appellant introduced some evidence and attempted to present further evidence and testimony on the adverse impact of the hotel on the surrounding neighborhood, particularly in terms of parking and traffic. Many letters were submitted to the Board on that subject.
E. The zoning Administrator's Arguments on the Merits
63. The Zoning Administrator presented testimony and evidence in support of his decision to approve the building permit for the hotel as far as compliance with zoning was concerned. Part of the material presented by the Zoning Administrator to the Board during the course of the hearings

included the actual plans which he reviewed and approved. Those plans are the official records of the Department of Consumer and Regulatory Affairs, are physically in the possession of that Department, and thus are not in the files of the BZA.
64. As to the first issue on appeal, the height of the building, the Zoning Administrator argued that the building as approved meets the height requirements. The property is split between the R-5-B and R-5-C Districts. The table in Sub-section 3201.1 permits a maximum height of buildings of sixty feet in the R-5-B District and ninety feet in the

R-5-C District. As to the R-5-C portion of the site, ninety feet is thus permitted as-of-right with no setback.
65. The Zoning Administrator testified that all of the paragraphs under Sub-section 3201.2, including the setback requirements of Paragraph 3201.24, apply only to the extent that a building or structure is proposed to exceed the normal limits set forth in Sub-section 3201.1.
66. The Zoning Administrator testified that that portion of the subject building at issue which is located in the R-5-B District and has a height in excess of sixty feet is set back from all lot lines at least ninety feet. That portion of the building that is in the R-5-C District need not be set back to reach a ninety foot height.
67. As to the second issue on appeal, the roof structures, the Zoning Administrator noted that the roof structures for the subject building were approved by the Board in Application No. 12949, by Order dated October 22, 1979. That application requested relief as to the requirement to enclose all roof structures in one enclosure. All of the roof structures for the subject building were shown on the plans submitted in that application, and the roof structures actually constructed on the building are those as shown on the plans approved by the Board.
68. As to the third issue on appeal, the convention center as accessory use, the Zoning Administrator cited as the basis for his ruling the decisions of the BZA in Appeals No. 9655 and 11018.
69. In Appeal No. 9655, by Order dated October 4, 1968, marked as Exhibit No. 91 of the record, the Board stated in its Order:
"There seems to be no question that a hotel may book conventions, as such conventions are merely the exercise of guests, whether registered or not, of the right to meet for the discussion of matters of common interest. Further, there seems to be no question that others having a relation to the interests of those

convening may exhibit their wares and services as an adjunct to the convention and within the hotel. The taking of orders and the making of incidental, casual sales by the exhibitors is, in our opinion, embraced within the broad language of Section 3105.53 of the Zoning Regulations which permits "--accessory uses--customarily incident to the uses permitted in R-5 Districts under the provisions of this Section."
Accessory uses contemplated by this Section do not require Board approval under Section 3105.4."
70 In Appeal No. 11018, by Order dated June 5, 1972,

marked as Exhibit No. 92 of the record, the Board stated:

"The Board ... on proceeding to the merits decides the exhibition hall is permitted by the Zoning Regulations and by previous decisions of the Board of Zoning Adjustment ..."

71. The Zoning Administrator testified that the total gross floor area of the hotel was 1,205,312 square feet. The function rooms occupied 118,846.61 square feet of that total, or 9.86 percent of the gross floor area. Even comparing the total square footage of the function areas, 165,212 square feet, to the total gross floor area, the function rooms comprised only approximately thirteen percent of the total space of the hotel.

72. The Zoning Administrator testified that the convention center use is located on the same lot as the hotel, another requirement for an accessory use.

73. As to the fourth issue on appeal, the number of parking spaces, the Zoning Administrator testified that the revised plans submitted before the permit was issued provided for 1,366 rooms or suites of rooms, as set forth in Finding No. 9. Parking for a hotel is required on the basis of one space for every two sleeping rooms or suites. For the Motor Inn, with 212 rooms or suites of rooms, 106 parking spaces are required. For the new construction, with 945 rooms or suites of rooms, 473 parking spaces are required. For the Wardman Tower, with 209 rooms or suites of rooms, no parking was required because the Wardman Tower was built prior to the requirement for parking and the Zoning Regulations are not retroactive. According to the Zoning Administrator, the parking required is thus 579 spaces.

74. The computation sheet dated September 6, 1979, which reflected the development approved in 1978, shows that 595 parking spaces are provided, including 144 on the surface, 310 in the Motor Inn and 141 in the Cotillion garage.

75. The Zoning Administrator testified that prior to the issuance of any certificates of occupancy for the new construction, he had been advised by a representative of the appellant that an on-site inspection had revealed that the Sheraton was not providing and could not provide all of the parking spaces shown on the plans. The Zoning Administrator advised the Sheraton through counsel that he would not approve any requests for certificate of occupancy unless the parking was provided. He also advised the Sheraton that he

had reason to believe that there were obstructions of spaces that did not appear on the plans.
76. As a result of this communication from the Zoning Administrator, the Sheraton remeasured and revised the parking plan for the garage, which was field checked by the Zoning Administrator's office prior to the issuance of the partial certificate of occupancy. This parking plan was the plan submitted in August of 1979.
77. The Zoning Administrator testified that the final parking plan provides for 615 spaces, including 116 spaces on the surface, 360 in the Motor Inn and 139 spaces in the garage on the west side of the property.
78. As to the Wardman Tower, the Zoning Administrator further testified that it was built prior to 1942, at a time when the Regulations required no parking. He testified that he was unable to determine through official records what use the building was built for, when the building first received a certificate of occupancy for hotel use or how many units were in the building in 1958. As to the last point, the Zoning Administrator testified that he had checked the records of the Fire Marshall's office, the Building Inspector's office and the Housing Inspector's office in the Department of Housing and Community Development, the Permit Branch and the License Branch of the Department of Licenses, Investigations and Inspection and the Assessors office in the Department of Finance and Revenue. None of those available records contained information as to how many units were in the Wardman Tower in 1958. The Zoning Administrator further testified that there were no city records regarding any renovation of the building which may have occurred in 1976. The Zoning Administrator concluded that he had no basis to determine whether there was an increase in intensity of use of the Wardman Towers and if so, what that increase had been. Consequently, he did not require any parking for that portion of the hotel.
79. The Zoning Administrator further testified that no plans for renovation of the Wardman Towers were submitted with the original plans for the hotel in 1977. The original count of 306 units was a proposal by the applicant that was subsequently reduced in the approved plans to 209 rooms or suites.

80. As to the effect of the prior Orders of the Board, the Zoning Administrator testified that he carefully reviewed the orders cited in Findings 43, 44, 45 and 46. He further testified that all of the references to the number of parking spaces in those orders were either findings of fact or opinions, and that none of the orders contains a

specific condition requiring the hotel to provide a specific number of parking spaces. The Zoning Administrator further testified that the consistent policy of his office, based on advice from the office of the Corporation Counsel, had been that statements of the BZA contained as findings or conclusions or opinions but not specifically enumerated as a condition on the granting of an application were not enforceable. The Zoning Administrator further noted that the BZA cases at issue were for variances regarding height and setback provisions, and were not for parking.

81. As to the fifth issue on appeal, the submission of a parking plan, the Zoning Administrator testified that the plans originally approved for zoning purposes did contain a plan showing the location of parking spaces. The revised plans submitted in August of 1979, showing 595 spaces, was drawn to scale, and showed the location and dimension of all parking spaces. Those plans were displayed to the Board at the public hearings on February 8 and April 2, 1980.

82. As to the last issue on appeal, the reasonable and convenient location of parking spaces, the Zoning Administrator testified that the provisions of Paragraph 7205.33, wherein the requirement for reasonable and convenient location is stated, apply only to applications for special exceptions under Sub-section 7205.3. The Sheraton did not seek such relief, and the requirement is therefore not applicable.

83. The Sheraton supported the testimony and position of the Zoning Administrator as set forth above.

F. The ANC Rewort

84. Advisory Neighborhood Commission 3C, by letter dated January 28, 1980, supported the appeal. The ANC noted its specific concern with the number of parking spaces provided, the ingress and egress to the site and the presence of the convention center/exhibit hall space as a principal use. The ANC, through the testimony of two specific witnesses, played an active role in the presentation of the appellant's case.

85. The Board finds that the first and third concerns cited by the ANC are integral to the appellant's case, and will be addressed as part thereof. The second concern, as to ingress and egress is not a zoning matter. It is not

controlled by the Zoning Regulations, and is not a part of the subject appeal.

G. The Board's Findings on the Merits

86. As to the appeal on the height of the building, the Board finds as follows:

a.

b.
c.
d.
87.
f i n d s as
a.
b.
The Act of 1910, when read i n combination with the Zoning R e g u l a t i o n s , allows t h e s e l e c t i o n of one street t o be used f o r the purpose of measuring the height of t h e building and another street t o be s e l e c t e d f o r t h e purpose of determining t h e height r e l a t e d t o t h e width. Consequently, t h e Zoning Administrator committed no e r r o r i n allowing the height t o be measured on t h e Woodley Road side and allowing the building t o take a s the width of the street the width of Calvert S t r e e t .
The p l a i n language of Sub-section 3201.1 allows a building i n an R-5-C D i s t r i c t t o have a height of ninety f e e t with no setback requirements.
The language of Sub-section 3201.2 c l e a r l y s t a t e s t h a t the following paragraphs, including Paragraph 3201.24, apply only t o t h e e x t e n t t h a t t h e height exceeds t h a t s p e c i f i e d i n the t a b l e i n Sub-section 3201.1.
The setback requirements of Paragraph 3201.24 apply o n l y t o t h a t portion of the building i n t h e R-5-B D i s t r i c t , where the height exceeds t h e s i x t y f e e t s p e c i f i e d i n t h e t a b l e . A l l p o r t i o n s of the building located i n t h e R-5-B portion of t h e site a r e set back t h e a p p r o p r i a t e d i s t a n c e .
A s t o the appeal on t h e roof s t r u c t u r e s , t h e Board follows:
In a p p l i c a t i o n No. 12949, the Board had before it t h e q u e s t i o n o f t h e l o c a t i o n of t h e roof s t r u c t u r e s , p a r t i c u l a r l y i n r e l a t i o n t o whether such s t r u c t u r e s would be contained i n one enclosure. The plans contained i n the record of t h a t case, s p e c i f i c a l l y including Sheet A-9, show t h e l o c a t i o n marked i n red of a l l of t h e roof s t r u c t u r e s on the portion of t h e h o t e l t h a t is new c o n s t r u c t i o n .
By Order dated October 29, 1979, t h e Board approved Application No. 12949.

c. The roof structures constructed on the building are in accordance with the plane approved by the Board in application No. 12949.

d. The Zoning Administrator was within his authority to approve the construction plans as the Board had approved the plans.
e. Representatives of the appellant and ANC 3C submitted letters to the record in Application No. 12949, indicating that they had questions and issues concerning the hotel then under construction. The evidence of record in that application indicates the appellant had the full opportunity to know and determine the location of roof structures on the new hotel building.
88. As to the appeal on the convention center as an accessory use, the Board finds as follows:
By virtue of the previous rulings of the Board, the convention center and exhibit hall space are legitimate accessory uses to the principal hotel use.
The relatively small percentage of the gross floor area of the building occupied by the convention center and exhibit halls is indicative of their position as accessory to the principal hotel use.
The Zoning Administrator committed no error in failing to consider the proportion of the business generated by the convention center use. Such information would be based on projections by the Sheraton, and would be speculative, unreliable and not subject to precise determination.
As to the appeal on the number of parking spaces, the Board finds as follows:
a. Review of the previous Orders of the Board and the Zoning Commission noted by the appellant reveal no legal requirement to provide a specified number of spaces. The Zoning Commission Order rezoned the property, and cannot be read to apply any conditions other than to permit what is allowed and required under R-5-C zoning. The BZA Orders are vague, very short and do not specifically require a set number of spaces. In one case, the Order referenced instructions given outside the context of the hearing and not found in writing anywhere.

b.
c.
d.
e.
90.
The construction permitted by the Orders cited was

for additions to a building which no longer exists. The main portion of the previous hotel building was demolished after the construction of the new portion of the hotel. Even if any requirements had been imposed as a result of the previous orders, those requirements cease to be applicable when the building to which they were attached was substantially demolished.

The building now at issue consists of portions which were in existence and are to remain and new construction. The total parking requirement must be based on the application of the present regulations to the structure as it is now proposed to exist.

Under Sub-section 7203.1 of the Regulations, the increase in intensity of use of the Wardman Tower must be considered in determining the number of required parking spaces. The Board understands the Zoning Administrator's difficulty in determining what the intensity of use was in 1958, given the lack of official District of Columbia records on the matter. Further, the evidence before the Board is also conflicting. Evidence introduced by the appellant suggests that the Tower had only sixty units in 1958. The nomination form for landmark status introduced by the Sheraton indicates that the building was originally constructed with 350 rooms and has remained "remarkably unaltered. " However, that form states no specific information as to the number of rooms on May 12, 1958. The most reliable information seems to be that the Wardman Towers had sixty permanent residential units in 1958.

Given the requirement to provide one parking space for every two units or thirty parking spaces in 1958, and 105 parking spaces for 209 units in the present proposed arrangement, the Zoning Administrator was wrong in not requiring the incremental difference of seventy spaces for the Wardman Towers.

As to the appeal on the parking plans, the Board finds as follows:

a. The Sheraton submitted scaled and accurate plans showing 615 parking spaces.

b. Such plans met the requirements of Paragraph 7201.11 of the regulations.

c. Such plans did not constitute a valid parking plan because they did not show a sufficient number of parking spaces to meet the requirements of the Zoning Regulations. As set forth in Finding No. 89, seventy spaces should have been provided for the Wardman Towers. The total number of parking spaces required is 649, including 106 for the Motor Inn, 473 for the new construction and seventy for the Wardman Towers. The parking plan submitted shows only 615 spaces. The plan is thus insufficient to meet the requirements of Article 72.

91. As to the appeal on the location of the parking spaces, the Board finds as follows:

a. The Regulations regarding the size, location, access, maintenance and operation of parking spaces are set forth in Sections 7204, 7205 and 7206. Location is specifically provided for in Sub-sections 7205.1 and 7205.2. Sub-section 7205.3 specifically provides for the BZA to approve as a special exception a location of parking spaces other than those specified in Sub-sections 7205.1 and 7205.2.

b. For the subject building, there is no allegation that the spaces are not located as required, and there is no application pending before the Board under Sub-section 7205.3. Consequently, the "reasonable and convenient" test of Paragraph 7205.33 is not applicable to the subject hotel.

92. Prior to the conclusion of the hearing and the decision on this appeal, on October 8, 1980, the appellant filed a "Petition to Refer Legal Issues to D.C. Corporation Counsel for Advisory Opinions." The Sheraton opposed the request by response filed on October 31, 1980. At its November 5, 1980, public meeting, the Board determined that it alone would make the determination of whether and when to seek advise of its counsel, and denied the request as an intrusion in the prerogatives of the Board.

93. Immediately following the Board's meeting date of April 1, 1981, at which the case was voted upon, the appellant filed a motion for reconsideration. Pursuant to Section 5.41 of the Supplemental Rules of Practice and Procedure before the BZA then in effect, such a motion may be filed within ten days of a decision having become final. A decision is final upon issuance of a written order. Consequently, at the May 6, 1981, meeting of the Board, the Chairman denied the motion as prematurely filed.

CONCLUSIONS OF LAW AND OPINION:
The subject case is before the Board as an appeal of the decision of the Zoni.ng Administrator. The case is one of the most complicated appeal cases presented to the Board in some time. In these conclusions of law and opinion, the Board will address the following issues:
1. The motion to dismiss the appeal filed by the Sheraton.
2. The roof structures as related to BZA Application No. 12949.
3. The negotiations between the appellant and the Sheraton.
4. The impact of the Hotel on parking and traffic in the neighborhood.
5. The merits of the appeal.
6. The actions directed by the Board.
The Board is first presented with the motion to dismiss the appeal filed by the Sheraton. The basis of the motion as set forth in the Findings of Fact is that the appeal is barred by laches, estoppel and timeliness. The arguments in favor and against the motion are set forth earlier in the Findings. The key question in all the elements of the motion to dismiss revolves around the nature of negotiations and relations between the appellant and the Sheraton. Both parties presented their views of those negotiations and relations during the course of the hearings. It is clear from the record that those views differ. What is also clear from the record is that while the parties may have been negotiating and communicating, the nature of the discussions was such that neither side clearly understood the position of the other. The long series of communications and meetings back and forth reveal a history of misunderstood positions, changing positions and confusion over who would do what next. It is difficult for the Board to determine whether either party was not acting in good faith.
The merits of the motion to dismiss are further complicated by the state of the permit approval granted by the District. The computation sheet of record prepared by the Zoning Administrator's office in April of 1978 reflects a proposal which had been revised, which no longer existed and for which approval had not been granted. The zoning approval granted April 27, 1978, was not for a hotel of 1,502 rooms as the computation sheet stated, but was for only 1,366 rooms. The plans on file with the permit, as explained by the Zoning Administrator at the hearings,

clearly showed the number of rooms to be 1,366. However,

the computation sheet, the record of approval maintained by the Zoning Administrator's office, still showed 1,502 rooms and 751 parking spaces required.
The Zoning Administrator maintained that he had explained the various aspects of the actual approval to the appellant, but the fact remains that the computation sheet record was not revised until September of 1979. That sheet also recognized and incorporated the amended parking plan filed in August of 1979. The subject appeal was filed on October 12, 1979, approximately one month after the preparation and sign-off of the revised computation sheet.
The Board concludes that the appellant reasonably asserted its rights, and filed the appeal in a timely manner. The appellant expected that it would be satisfied by the Sheraton as to the number of parking spaces, which was its principal concern. Upon discovering that the District of Columbia was on record as stating that only 579 parking spaces were required, and only 595 spaces were to be provided, the appeal was promptly filed. The appellant is not barred by either laches or timeliness. The defense of laches is not favored in zoning actions, . and the Sheraton has not demonstrated that "the clearest and most compelling circumstances" exist to justify invoking that doctrine.
As to the estoppel issue, the Sheraton must demonstrate the elements of estoppel set forth by the Court of Appeals in the Wieck case, as cited in Finding No. 5.
There is no question that the District acted affirmatively to approve the permits at issue, that the Sheraton made extensive and permanent improvements in reliance upon those permits, and that the reliance was justified. What is not clear is whether the Sheraton was acting in good faith and whether the equities strongly favor the Sheraton. Given that the defense of estoppel is also not favored in zoning actions, the Board concludes that the Sheraton has not sufficiently demonstrated that it acted completely openly, above-board and in good faith to justify dismissal of the appeal on the basis of estoppel. Furthermore, the Board concludes that there are equities on the side of both parties, and there is no clear showing that the equities "strongly favor" the Sheraton.
Thus in all three respects, the Board concludes that there is insufficient basis to grant the motion to dismiss. The motion is therefore hereby denied, and the Board will address the merits.
One of the points raised in the merits of the appeal is that the Zoning Administrator approved roof structures in violation of the Zoning Regulations and the Act of 1910. As set forth in the Findings, the plans for the roof structure

were approved by the Board in Application No. 12949. The plans approved by the Zoning Administrator and the roof structures actually constructed are identical to those approved by the Board. The appellant and the ANC both submitted letters to the Board, and a representative of the ANC who testified on behalf of the appellant appeared at the hearing.

Evidence in the form of a statement from an architect and testimony of the architect at one of the hearings was received by the Board. That evidence and testimony is partially addressed in the findings herein. However, the Board concludes that the doctrine of res judicata governs this issue of the appeal. The doctrine applies where a judgement has been rendered on the same issues in a prior action involving the same parties. The Board concludes that the same parties, assuming different roles, participated in the earlier application No. 12494 before the Board. The Board concludes that, even though the relief requested was as to the construction of multiple roof structures, the plans clearly show the construction of the roof structures now alleged to be in violation of the Regulations. The appellant clearly had the opportunity to raise objection to those roof structures. In fact, the appellant noted that it was concerned about all aspects of the hotel then under construction. Yet, no mention was made of any possible violation for the roof structures. The Board concludes that the appellant may not now raise as an appeal of the Zoning Administrator's decision an issue that the Board has already judged and disposed of.

The Board notes that extensive discussions occurred between the appellant and the Sheraton concerning the nature of the hotel to be constructed on the subject property. These discussions occurred from roughly the end of 1976 until shortly before the subject appeal was filed. The discussions were primarily aimed at the design of the subject site, the number of parking and loading spaces and the access and circulation elements of the proposed hotel. The discussions did not lead to any formal agreement between the parties on those issues. On several occasions during the course of the proceedings on the subject appeal, the Board urged the parties to resume discussions which might lead to a development proposal for the subject site which was acceptable to both the appellant and the Sheraton. Discussions between the parties were resumed, but again no agreement was reached. The Board notes that its purpose in urging the parties to see if they could negotiate their differences was to see if an accommodation could be reached that would be satisfactory to all. The Board was prepared

to decide the appeal. However, the Board anticipated that such a decision based on the strict interpretation of the Zoning Regulations would likely please no one, and hoped to

avoid that result by virtue of a negotiated agreement between the parties. The failure to reach such an agreement leads to the decision stated herein.

The appellants attempted to raise as an issue the impact of the hotel on parking and traffic in the subject area. Many letters were submitted to the Board asserting damage to the Woodley Park area that was occurring and would continue if the hotel did not provide sufficient parking spaces. The Board concludes that the assertions and the issue as to neighborhood impact are not relevant to the subject appeal. The Board must decide whether the Zoning Administrator correctly applied the relevant portions of the Zoning Regulations. The Zoning Administrator cannot apply other standards, and the Board in reviewing the Zoning Administrator's decision is limited to determining whether the Administrator correctly applied the Regulations.

The Board notes that the Zoning Commission has the full authority to adopt and amend the Zoning Regulations and Maps. The Board further notes that subsequent to the decisions made by the Zoning Administrator and the filing of this appeal, the Zoning Commission amended the Regulations to prohibit the construction of new hotels in residential districts. That prohibition addresses generally the problems noted by the appellant, but does not apply to the subject existing hotel or the rulings at issue in this appeal.

In addressing the merits of the appeal, the Board concludes that the Zoning Administrator committed no error in determining the height of the building. As set forth in the findings, the property is split zoned. Different requirements apply to the different portions of the buildings in accordance with the regulations for each district. The hotel as approved did not exceed the permitted height.

As to the convention center use, the Board concludes that such use is accessory to the proposed use of the hotel. The Zoning Administrator committed no error in allowing such use in the subject building. The Zoning Administrator followed past rulings and interpretations of this Board. He further determined that the convention center use occupied a relatively small percentage of the building. The Zoning Administrator did not err in not considering the proportion of the Sheraton's business that related to the convention center use. To do so, would have required a decision based

on speculative and unverifiable information provided by the Sheraton, and would have exceeded the scope of the authority vested in the Zoning Administrator to apply the Regulations. As to the accessible and convenient location issue, the Board concludes that the appellant is in error. Paragraph

7205.33 was in no way applicable when the Zoning Administrator
reviewed the permit application, and he was not in error when he did not impose that standard of review on the application.

The key question for resolution is whether the Zoning Administrator correctly applied the parking requirements to determine how many parking spaces should be provided. The Board concludes that the one area where the Zoning Administrator did err was in not requiring some parking spaces to be provided for the Wardman Tower portion of the hotel. The Zoning Administrator testified that he had no basis in District of Columbia records to determine how many units existed in that Tower in 1958, and that he could thus not make the required computation. The Board understands the dilemma in which the Zoning Administrator found himself. Further, the record before the Board itself contains conflicting and contradictory evidence as to how many units were in the Wardman Tower in 1958. However, the Board concludes that the most reliable data suggests there were sixty units in the building. Consequently, the Zoning Administrator was in error in not requiring parking for the difference between sixty units and the number proposed.

The other allegations about the number of parking spaces to be required are without merit. The prior orders of the Board are vague and confusing, and do not impose any condition that requires that a specified number of spaces be provided. The prior orders were for applications for relief which did not relate to the parking requirement at all. Furthermore, all those orders relate to a hotel which does not now exist, the major portion of that building having been demolished following completion of the hotel under appeal. Even though portions of the building remain, including portions of the building for which relief was granted, the context of those orders must be viewed as related to the entire building which then existed. The Zoning Administrator was limited to dealing with a building including existing portions to remain and new construction, as proposed in 1977. He correctly applied the 1977 standards to that building, except as to the Wardman Tower already noted above.

Additionally, the appellant 's conf usion over how many rooms were to be provided derives at least in part from the failure of the Zoning Administrator's office to revise its computation sheet prior to approving the permit application. It is clear from the record that the plans as to the number of rooms were revised before the zoning sign-off was given in April of 1978.

As to the submission of a parking plan, the Board concludes that the plans submitted for the permit did contain sufficient information required by Paragraph

7205.11, for the Zoning Administrator to properly rule that a plan was submitted. However, given the Board's determination that the Zoning Ad.ministrator did not correctly establish the number of spaces which should have been required, the plans on file do not show enough parking spaces to meet the requirements. The plans therefore are not valid because they do not contain sufficient spaces to meet the requirements of Article 72.

Finally the Board must address the question of what is to be done next. The hotel is built, is in operation, and was so at the time this case was filed and heard. It is not reasonable for the Board to direct revocation of the entire building or occupancy permits at this time. The Board will, by Order herein, direct that the Sheraton provide a minimum of 649 parking spaces on the subject property in a timely fashion as set forth herein. Failure to do so should result in revocation of the Sheraton's right to occupy at least that number of units for which parking has not correctly been provided.

The Board concludes that it has accorded to the ANC the "great weight'' to which it is entitled by statute.

In consideration of all of the findings of fact and conclusions of law set forth herein, it is therefore hereby ORDERED

1.
2.
3.
4.
5.
6.

that:

The appeal as to the height of the building is DENIED, and the decision of the Zoning Administrator is UPHELD.

The appeal as to the roof structures is DENIED, and the decision of the Zoning Administrator is UPHELD.

The appeal as to the convention center use is DENIED, and the decision of the Zoning Administrator is UPHELD.
The appeal as to the accessibility and convenience of parking spaces is DENIED, and the decision of the Zoning Administrator is UPHELD.
The appeal as to the number of parking spaces is GRANTED, to the extent that the Zoning Administrator did not require parking spaces to be provided for the Wardman Tower. In all other respects, the appeal as to parking is DENIED and the decision of the Zoning Administrator is UPHELD.
The appeal as to the filing of a parking plan is GRANTED, to the extent that the plan did not show

a sufficient number of parking spaces to meet the requirements of Article 72.
7. The Zoning Administrator shall require that 649 off-street parking spaces be provided for the 1,366 hotel rooms or suites of rooms proposed.
8. Within sixty days of the final date of this Order, the Sheraton shall submit to the Zoning Administrator revised plans showing where and how the 649 parking spaces are to be provided. These plans are to be reviewed through the normal permit review process for compliance with the Zoning Regulations. Upon determining compliance with all applicable requirements, the Zoning Administrator shall approve said plans as part of the building permit originally issued on October 6, 1978.
9. If no parking plan is filed, or upon determination by the Zoning Administrator that the parking plan submitted does not meet the requirements set forth above, the Zoning Administrator, in conjunction with the other responsible agents of the District of Columbia Government, shall take appropriate action to see that the Sheraton shall not operate or occupy more rooms or suites of rooms than the number for which it has provided sufficient parking in accordance with the requirements of the Zoning Regulations as set forth in this Order.
Votes of the Board taken at the April 1, 1981 meeting:
To DENY the Sheraton's Motion to DISMISS as to laches: 4-1 (Walter B. Lewis, William F. McIntosh, Charles R. Norris and Connie Fortune to DENY the Motion; Leonard L. McCants OPPOSED to the Motion).
To DENY the Sheraton's Motion to DISMISS as to

timeliness: 3-2 (Walter B. Lewis, William F. McIntosh and Charles R. Norris to DENY the Motion; Connie Fortune and Leonard L. McCants OPPOSED to the Motion).
To DENY the Sheraton's Motion to DISMISS as to estoppel: 5-0 (Walter B. Lewis, William F. McIntosh, Connie Fortune, Leonard L. McCants and Charles R. Norris to DENY the Motion).
To DENY the appeal and UPHOLD the Zoning Administrator as to the height of the building: 5-0 (Walter B. Lewis, William F. McIntosh, Connie Fortune, Leonard L. McCants and Charles R. Norris to DENY the Appeal).
To DENY the appeal and UPHELD the Zoning Administrator as to the convention center use: 5-0 (Walter B. Lewis,

William F. McIntosh, Connie Fortune, Leonard L. McCants and Charles R. Norris to DENY the Appeal).
To GRANT the appeal and REVERSE the Zoning Administrator as to the parking for the Wardman Tower: 4-1 (Walter B. Lewis, Connie Fortune, William F. McIntosh and Charles R. Norris to GRANT the Appeal; Leonard L. McCants OPPOSED to the Motion).
To GRANT the appeal and REVERSE the Zoning Administrator as to the filing of a proper parking plan: 4-1 (Walter B. Lewis, Charles R. Norris, Connie Fortune and William F. McIntosh to GRANT the appeal; Leonard L. McCants OPPOSED to the Motion).
To DENY the appeal and UPHELD the Zoning Administrator as to the parking required by previous Board Orders: 5-0 (Walter B. Lewis, Connie Fortune, Leonard L. McCants, William F. McIntosh and Charles R. Norris to DENY the Appeal).
ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
ATTESTED BY:
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: OCT 2 1 1983

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS, "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 ."

GOVERNMENTO F THE DISTRICTO F COLUMBIA
BOARD OF ZONING ADJUSTMENT
Appeal No. 13112, of Woodley Park Community Association, pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of the Zoning Administrator to issue a construction permit for a hotel/convention center

in violation of the Zoning Regulations in the R-5-B and R-5-C Districts at the premises 2660 Woodley Road, N.W., (Square 2131, Lot 32).
HEARING DATES: January 30, February 6 and April 2, 1980 and January 14, 1981
DECISION DATES: November 5, 1980 and April 1 and Play 6, 1981
DISPOSITION: Appeal Denied in part and Granted in Part
FINAL DATE OF ORDER: October 21, 1983
ORDER
By Order dated Octoher 21, 1983, the Board decided the subject appeal, denying in part and granting in part the appellant's request that the decision of the Zoning Administrator to issue a construction permit for the Washington Sheraton Hotel be reversed. The order was filed in the record on October 21, 1983. The order was served on the intervenor, the Sheraton Washington Corporation, hereinafter referred to as the Sheraton, by hand on October 21, 1983. The order was served by mail on the appellant, the Woodlev Park Community Association, Advisory Neighborhood Commission 3C and the Zoning Administrator. Even though the order was deposited in the mail on October 21, 1983, evidence of record indicates that the order was received by the original counsel for the appellant on Octoher 27, 1983, and by the former and present Presidents of the appellant on October 29, 1983.
As set forth in Finding of Fact No. 3 of the original order, the case is governed by the Supplemental Rules of Practice and Procedure before the BZA which were in effect prior to August 27, 1982. Concerning reconsideration, those Rules state in pertinent part:
5.41 A motion for reconsideration, rehearing or reargument of a final decision may be filed by a party

within ten (10) days. It shall be served upon all other parties or representative parties pursuant to designations made under 5.21.2.
A motion for reconsideration, rehearing, or reargument shall state specifically the respects in which the final decision is claimed to be erroneous, the grounds of the motion, and the relief sought. Within seven (7) days after a motion has been filed and served, any other party may file an answer in opposition to or in support of the motion.
On October 31., 1983, the Sheraton filed a Motion for Reconsideration, Rehearing or Reargument, alleging that:
The Board erred in finding that the Wardman Tower structure contained only sixty residential units as of May 12, 1958. The preponderance of the evidence shows that the Wardman Tower had 209 units at that time.

As a result of the error set out in paragraph 1 above, the Board erroneously concluded that the Sheraton is required to have 649 spaces for the existing Sheraton facility and that the Sheraton did not have on file a valid parking plan.
3. The Board erroneously denied Sheraton's Motion to Dismiss on the grounds of lack of timeliness, laches and estoppel.
Copies of the Motion were served on representatives of the appellant.
On November 29, 1983, William H. Carroll filed an "Answer in Opposition to Intervener's Motion for Reconsiderations, Rehearing and Reargument." Also included in that document was a Plotion for Reconsideration, Rehearing or Reargument on behalf of the appellant. Mr. Carroll was President of the appellant at the time of hearings on the appeal, and appeared as a witness at the hearings. He signed the Motion as "Counsel for Appellant." The appellant's
Answer argued that the Sheraton's Motion was devoid of new evidence and that the Motion merely stated that the Sheraton disagreed with certain aspects of the Board's decision.
In its own Motion, the appellant alleged that the Board erred in:
1. Not considering all evidence of the building's violation of height restrictions.

2. Not considering the appellant's evidence showing that the doctrine of res judicata did not preclude the Board from deciding the appellant's argument that the roof structures are in violation of the Zoning Regulations and the Act of 1910.
3. Determining that the public assembly use of the property was not a primary use by relying on prior orders of the Board, by not considering all relevant square footage ratios and by not allowing testimony on the impact on the neighborhood.
4. Not considering evidence as to business generated by the convention use.
5. Determining that prior orders of the Board did not require 898 parking spaces to be provided.
Copies of the Answer and Motion were served on counsel for the Sheraton.
On December 2, 1983, the Sheraton filed a motion to strike the appellant's Answer and Motion because:
1. The Answer and Motion were not timely filed.

2. Mr. Carroll may not appear as both witness and counsel for the appellant in the same proceeding.

In consideration of the various Motions and responses, the Final Order, the applicable Rules and the record itself in this matter, the Board finds as follows:

1. The Sheraton's Motion was timely filed.

2. The appellant's response to the Sheraton's Motion was not timely filed. Under Section 1.62 of the Rules, when service is made by mail, two days shall be added to the time provided. The deadline for response to the Motion was thus November 9, 1983. The response was filed on November 29, 1983, twenty days late.

The appellant's Motion was untimely filed. Even assuming that the time for filing a motion for reconsideration should be calculated on the basis of the delayed receipt of the original order by representatives of the appellant, the appellant had only until November 8, 1983, to file such a motion. The Motion was filed on November 29, 1983, twenty-one days late.

4. Mr. Carroll's filing of the Motion is inconsistent with the provisions of the American Bar Association Code of Professional Responsibility.

5. There is no basis to grant either of the Motions to reconsider or rehear. Neither motion presents or proffers new evidence which could not reasonably have been presented at the original hearings. Neither motion raises any new issues which were not completely and comprehensively raised in the record and which were disposed of in the original order. Both Motions merely restate issues and positions already considered and decided. As to the appellant's allegation that it was denied due process in consideration of the effect of prior orders of the Board, that subject was extensively discussed at the hearing and in the briefs of the parties. The basis of the Board's decision is explicitly addressed in the order. It is clear in the record that the appellant disagrees with the Board's decision on this issue, but it presents no different evidence or argument to compel the Board to change its decision.

The Board concludes that it has committed no error of fact or law in deciding this Appeal. Accordingly, it is therefore ORDERED that the Motions for Reconsideration,

Rehearing o r Reargument f i l e d by t h e Sheraton and t h e
a p p e l l a n t a r e denied. The a p p e l l a n t ' s request t h a t the
Board d i r e c t revocation of the occupancy permit is t h e r e f o r e
moot.

DATE OF DECISION: December 7 , 1983

VOTE: 4-0 (Walter B. Lewis, William F. McIntosh and Carrie
L. Thornhill t o deny, Charles R. Norris t o deny
by proxy, Douglas J. Patton a b s t a i n i n g) .

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

ATTESTED BY:
STEVEN E. SHER
Executive Director

s'. .?> (3 7:47 J i b &#. L53 FINAL DATE: OF ORDER:

UNDER SUB-SECTION 820 4.3 OF THE ZONING REGULATIONS, "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

ADJUSTIIENT . "

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No.13766 of Delores T. Conrad, pursuant to Sub-section 8207.2 of the Zoning Regulations, for a special exception under Paragraph 3101.41 to continue the operation of a day-care center and to modify condition three of BZA Order No. 13244 by increasing the enrollment from thirty to sixty children and six staff in an R-2 District at the premises 3940 Pennsylvania Avenue, S.E., (Square 5520, Lot 11).

HEARING DATE: June 9, 1982
DECISION DATE: June 9, 1982 (Bench Decision)
FINDINGS OF FACT:

1. The subject property is located on the north side of Pennsylvania Avenue betwween Fort Davis Street and 40th Street, S.E. and is known as 3940 Pennsylvania Avenue, S.E. It is in an R-2 District.

2. The subject site is 5,250 square feet in area and is improved with a two story and basement single family dwelling. There is a garage located on the west side of the property.

3. The subject day care center was first established by BZA Order No. 10643, dated March 11, 1971. Its continuance has subsequently been approved by the BZA for three year terms.

4. The day-care center is now operating under permission of the BZA under Order No. 13244 which expires March 22, 1983. Condition No. 3 of that Order limited the maximum enrollment to thirty children.

5. On March 17, 1982 the applicant filed the subject application to continue the operation of the day-care center and to modify condition No. 3 of the Board's prior Order by increasing the enrollment to sixty students.

6. The Office of Planning and Development, by report dated June 4, 1982, advised the Board that the applicant has been operating the subject day care center since 1977 without having obtained a license for child care facilities from the Department of Human Services. Both of the last two Orders of the Board, Orders No. 12186 dated March 22, 1977, and Order No. 13244, dated August 25, 1980, each for

a period of three years, limited the enrollment to thirty children. Inspection by DHS evidenced that the enrollment was greater than thirty. The DHS refused to issue a license since the applicant was not in compliance with the BZA Orders.

7. The Board did not entertain any further issues in

the OPD report.
8. The Board on its own motion DENIED the application for failure of the applicant to comply with the two previous Orders of the Board and for the applicant's failure to obtain a license from the Department of Human Services.
CONCLUSIONS OF LAW AND OPINION:
The Board concludes that it will not hear the subject application on its merits. The Board admonished the applicant to obtain without delay the necessary license to continue the present use. Upon obtaining the license, the applicant will legally be able to continue operating the subjet facility for a maximum of thirty students until March 22, 1983, pursuant to BZA Order No. 13244. The Board is of the opinion that the applicant does not now come before it with clean hands in requesting an increase in the enrollment of students by thirty. The Board does not treat lightly the apparent indifference of the applicant to the Board's Orders. Accordingly, it is ORDERED that the present application is DENIED.
VOTE : 3-0 (Connie Fortune, Lindsley Williams and Charles R. Norris to deny, Douglas J. Patton and William F. McIntosh not present, not voting).
BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
ATTESTED BY:
STEVEN E. SHER
Executive Director
UNDER SUB-SECTION
DECISION OR ORDER
DAYS AFTER HAVING
RULES OF PRACTICE
ADJUSTMENT.
8204.3 OF THE ZONING REGULATIONS, "NO
OF THE BOARD SHALL TAKE EFFECT UNTIL TEN
BECOME FINAL PURSUANT TO THE SUPPLEMENTAL
AND PROCEDURE BEFORE THE BOARD OF ZONING

A

Photo Comparison



Photo 1: Stettinius and Gabriel properties:
View from the fourth-floor rear of 1657 31st Street, September 15, 2005

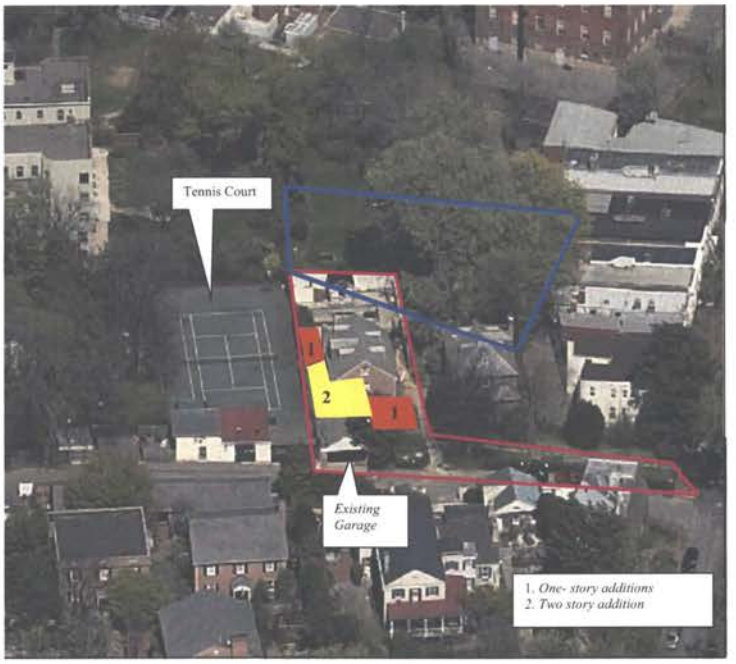


Photo 2: OP report, page 6, 2002 aerial photo of Gabriel, Stettinius, Friendly and adjacent properties;
Area outlined in blue corresponds to Photo #1

B

LAW OFFICES
GROSSBERG, YOCHELSON, FOX & BEYDA, LLP
2000 L STREET, NW
SUITE 678
WASHINGTON, D.C. 20036-4907

C. RICHARD BEYDA
LAWRENCE A. MILLER
GERALD F. GROSSBERG
STEVEN G. FRIEDMAN
RICHARD F. LEVIN
LINTON W. HENDRREN
BRETT D. ORLOVE
MICHAEL D. RAVITCH
BARBARA L. PORTMAN
LEONARD M. COHEN
EVAN D. HARMS

TELEPHONE
202 [redacted]
FACSIMILE
202 [redacted]
WEBSITE
www.gyfb.com

SOLOMON GROSSBERG (1905-1994)
IRVING R. YOCHELSON (1908-1983)

July 18, 2005

VIA HAND & FACSIMILE

Mr. Nicholas Friendly, Trustee
Mr. Jonathan Friendly, Trustee
Ms. Lucinda F. Murphy, Trustee
1645 31st Street, N.W. Personal Residence Trust
1645 31st Street, N.W.
Washington, D.C. 20007

Re: ***Contract:*** ***Regional Sales Contract ratified June 29, 2005***
Seller: ***1645 31st Street, N.W. Personal Residence Trust***
Purchasers: [redacted]
Property: ***1645 31st Street, N.W., Washington, D.C.***
(Lot 277, Square 1282)

Dear Trustees:

I am writing to you on behalf of our clients [redacted] (the "Purchasers") under the above referenced Contract (the "Contract") to advise you that they are hereby exercising their right under paragraph 16 of the Contract to declare the Contract void because we have determined that there are certain unrecorded covenants, conditions and agreements affecting the Property and title to the Property that were not disclosed to the Purchasers and which are unacceptable to us. These objectionable conditions are more fully set forth below. Accordingly, this letter shall serve as our termination notice and we are hereby demanding that the Deposit posted with the Escrow Agent under the Contract be immediately returned to the Purchaser.

The facts underlying this matter are as follows:

1. On June 25, 2005 the Purchasers signed the Contract; and on June 27 & 29, 2005 two (2) trustees of the Seller counter-signed the Contract to evidence acceptance of the Contract.

2. Sometime during the week of July 5, 2005 the Purchasers learned from their own architectural historian (not from the Seller) that there were some pending plans for a major addition to the adjoining property located at 3051 Avon Lane, N.W. (the "Adjoining Property") owned Joseph and Regina Stettinius (collectively called "Stettinius"). This matter came to the Purchasers' attention through the efforts of the Purchaser's consultant and without any information being provided by the Seller even though the Seller was well aware of those plans. On or about July 14, 2005 the Purchasers became aware of certain agreements that the Seller had previously entered into with Stettinius regarding the proposed addition to the Adjoining Property. Under those agreements the Trustees and Seller agreed not to object to (and in fact agreed to support) an Application for Special Exception (the "Special Exception") that Stettinius submitted to the District of Columbia Board of Zoning Adjustment (the "BZA").

3. In that Special Exception application, Stettinius is seeking BZA approval to violate the side yard requirement for the Adjoining Property and allow a large side addition to the existing house located on the Adjoining Property. If approved by the BZA that side yard addition would result in the existing 10 foot side yard that serves as a buffer between the Adjoining Property and the Property being eliminated, and the west wall of the large new addition would abut directly on the Property line and the tennis court located on the Property.

4. From documents only recently provided to us we have learned that (a) there is and has been in effect some sort of "*drainage arrangement at the southeast corner of the tennis court*" between the Seller and Stettinius, (b) that the Seller and Stettinius have agreed to modify that "*drainage arrangement*", and (c) the modification of that arrangement requires Stettinius to install certain new drainage facilities on the Property. This information was never disclosed to the Purchasers prior to the execution of the Contract. This agreement was detailed in a letter dated May 26, 2005 from Stettinius to Alfred Friendly, Jr. That letter is dated more than one month prior to the date the Contract was signed, but it was never given to or brought to the attention of the Purchasers.

5. In a letter dated May 26, 2005 Stettinius noted the Seller's concern over a certain drainage problem regarding run-off from the tennis court on the Property and proposed a new "*heavier duty version of the current solution*" (which clearly indicates that there was some sort of unrecorded agreement between the parties regarding run-off from the tennis court and the accessory buildings located on the Property). In that letter Stettinius agreed to install a trench drain on the Property connected to two large pipes, which would run through the Stettinius property and empty onto Avon Lane, N.W. To do this work, Stettinius would obviously have to enter onto the Property and perform certain construction work on the Property that would require some excavation of the tennis court. The letter also specifies that the existing fence for the tennis court located on the Property would be permanently removed. In addition, Stettinius promises to indemnify the Sellers "*as well as any future owners of the Property*" against any water damage that the Adjoining Property owned by Stettinius might sustain as a result of runoff from the Property. Clearly this agreement was meant to be binding upon the Seller and their successors

and assigns, which would include the Purchasers; but the Seller did not disclose this agreement to the Purchasers even though it predated the Contract by more than a month.

6. In exchange for remedying the drainage problem, Stettinius requested a letter of support addressed to the Georgetown Advisory Neighborhood Commission (ANC) for the construction of a side addition to their property. Seller acceded to the request and referenced the unrecorded agreement with Stettinius in a May 27, 2005 letter of support to the Georgetown ANC for the Stettinius addition. In a letter dated July 7, 2005 to the Seller, Stettinius acknowledged the unrecorded agreement affecting the Property. Once again, this May 27th letter of support was not disclosed to the Purchaser even though it predated the Contract by more than a month.

7. After a request by the Purchaser, in an email dated July 8, 2005 from Alfred Friendly to Seller's Broker, Friendly referenced and disclosed the agreements between Seller and Stettinius.

8. The multiple references to the Stettinius "solution" in the May 26th and May 27th letter clearly shows the Seller was fully aware of the intent of Stettinius to build a large side addition to their property and that the Seller had entered into various agreements with Stettinius in connection with the Special Exception application filed with the BZA. These letters also indicate that Seller consented to such an unrecorded agreement affecting the Property before the Seller signed the Contract with Purchaser. Nevertheless, Seller never disclosed any of this information and the existence of these agreements or knowledge of Stettinius BZA application or plans to build a side addition on the Adjoining Property.

9. The proposed construction on the Adjoining Property and its effects on the Property are material to the Purchasers because one of the primary attributes that caused them to enter into the Contract was the private tennis court. The proposed changes on the Adjoining Property will permanently affect the privacy of and view from the tennis court. The construction is also likely to encroach upon and damage the tennis court itself. These factors are material to the Purchasers and would severely limit the Purchasers' use and enjoyment of the Property in respects they could not possibly have anticipated when they signed the Contract, since the Sellers did not disclose their knowledge of, and consent to, the plans for construction on the Adjoining Property.

10. It is our understanding that there is currently a hearing before the BZA scheduled for Tuesday September13, 2005 and it has been (or will be) represented to the BZA that the owner of the Property is in support of the application for Special Exception filed by Stettinius. If approved, that would allow Stettinius to construct the large side yard addition that has been proposed. To undertake that construction, Stettinius would obviously have to excavate a portion of the tennis court and have its contractor use a portion of the tennis court for staging and other activities during the course of the construction of the addition. Purchaser has no

knowledge of what agreements or arrangements (if any) the Seller has made with Stettinius regarding these construction activities.

All of this information and the agreements with Stettinius were material facts that should have been disclosed by the Seller to the Purchaser prior to execution of the Contract. Whether the failure to disclose this information and these agreements was intentional or unintentional is irrelevant at this point. What is relevant is that they should have been disclosed and were not.

Paragraph 16 of the Contract specifically states "*Title is to be good and marketable, and insurable by a licensed title insurance company with no additional risk premium. Title may be subject to **commonly acceptable easements, covenants, conditions and restrictions of record**, if any; otherwise, the Purchaser may declare this Contract void, unless the defects are of such character that they may be remedied within 30 Days beyond the Settlement Date*" (emphasis added). The agreements between Stettinius and Seller are neither "commonly acceptable easements, covenants, conditions or restrictions" and they are not "of record" in that they were never recorded in the public land records. These agreements and arrangements between the Seller and Stettinius amount to an unrecorded easement, covenant and/or conditions which, under paragraph 16 of the Contract, is grounds for declaring the Contract void.

Accordingly, we are hereby terminating the Contract and demanding that the Deposit be returned to the Purchasers by the Escrow Agent immediately. If you have any questions regarding this matter, please contact me.

Very truly yours,

Steven G. Friedman

cc: David A. Deckelbaum, Esq, - SettlementCorp. - Escrow Agent
[redacted]
Beth S. Kaufman, Esq.
Giselle Theberge – Washington Fine Properties
Marylyn Paige – Washington Fine Properties
Jean Smith – Re/Max Allegiance
David M. Kanter, Esq.

SETTLEMENTCORP

WASHINGTON, D.C./MARYLAND/VIRGINIA

July 15, 2005

DELIVERED BY MAIL AND FACSIMILE

Mrs. Marilyn Paige
Mrs. Giselle Theberge
Washington Fine Properties
3201 New Mexico Avenue, N.W.
Suite 220
Washington, D.C. 20016

Re: 1645 31st Street, N.W.
Washington, D.C. 20007

Ladies:

As you know, Settlementcorp was designated as the settlement attorney in connection the the sale and purchase of the above referenced property pursuant to the Regional Contract of Sale dated June 25, 2005.

The purchasers, [redacted] the "purchasers"), have expressed their concern regarding the proposed plans of the owner of the adjacent property to construct additional improvements to their property. The plans, copies of which were supplied to the purchasers by your office pursuant to their request, propose to construct improvements that abut the property line, would require the use of 1645 31st Street for construction, and may materially affect the purchaser's use of 1645 31st Street.

The purchasers contend that the sellers had knowledge of the neighbor's plans and failed to disclose this information to the purchasers prior to execution of the aforesaid Contract.

Accordingly, they have requested that the settlement date, set forth in the Contract to be on or before August 1, 2005, be extended until such time that the purchasers have met with the neighbors and resolved their concerns regarding the affects of the planned construction on their use of the subject property.

Sincerely,

David A. Deckelbaum

cc: [redacted]
Jean Smith

CHEVY CHASE PLAZA • 5301 WISCONSIN AVENUE, N.W.
SUITE 710 • WASHINGTON, D.C. 20015
(202) 537-0005 • FAX (202) 537-1899
DDECKELBAUM@SETTLEMENTCORP.COM
TDECKELBAUM@SETTLEMENTCORP.COM