

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Further Proceedings in the Application No. 12531, of Oliver T. Carr, Jr., and George H. Beuchert, Jr., trustees, pursuant to Sub-section 8207.2 of the Zoning Regulations, for a special exception under Paragraph 4502.32 to allow parking in excess of the maximum specified in Sub-section 4505.1 in the CR District at the premises 2555 Pennsylvania Avenue, N. W.

HEARING DATE: October 8, 1980  
DECISION DATE: January 7, 1981

FINDINGS OF FACT:

1. This case was originally heard by the Board on December 23, 1977 and January 4 and April 19, 1978. The Board, in BZA Order No. 12531, dated May 17, 1978, granted the application subject to the condition that all parking spaces up to the maximum number of parking spaces required by the Zoning Regulations must be nine feet in width and nineteen feet in length and that spaces provided beyond the maximum may be smaller in size.

2. Certain of the parties in opposition filed a petition for review of the Board's decision with the District of Columbia Court of Appeals. By opinion dated March 31, 1980, in Brown v District of Columbia Board of Zoning Adjustment, 413 A.2d 1276, the Court remanded the case to the Board for further proceedings. The Court stated as follows, 413 A.2d at 1282:

The question before the BZA on remand is whether intervenors' counsel violated the American Bar Association's Disciplinary Rule 9-101(B), which states that in order to avoid even the appearance of impropriety, "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." The BZA first must decide whether either the height litigation in CA 4122-75 or the discussion of parking referred to in the October 1975 letter involved the same "matter" as the parking special exception at issue here. If so, the next question is whether either Mitchell or Murphy had substantial responsibility for either of the previous matters. If Mitchell or Murphy were to be found to violate the ethics laws by

representing Carr here, the Board must then decide whether the disqualification extends to the Wilkes and Artis firm as a whole, or whether instead the Corporation Counsel provided a satisfactory waiver and Mitchell and/or Murphy were effectively screened so as not to disqualify the entire firm. ABA Formal Opinion No. 342 (1975).

The opponent challenged the Board's Order on other grounds. The Court found it unnecessary to consider the other grounds in view of its disposition of the case.

3. The Court, in its opinion, recited the factual situation as follows, 413 A.2d at 1278-9 :

"Oliver T. Carr applied for a special exception under Zoning Regulations Paragraph 4502.32 to increase the number of off-street parking spaces at the Westbridge, a proposed residential and commercial complex in the new commercial-residential (CR) zone in the West End section of the city. At the public hearing on July 5, 1978, (sic) counsel for petitioners moved that the firm of Wilkes and Artis, applicant's counsel, be disqualified for a conflict of interest. As a reason for objection, petitioners pointed out that two Wilkes and Artis attorneys, Mr. Francis Murphy and Mr. Iverson Mitchell, had formerly served as Corporation Counsel and Assistant Corporation Counsel, respectively, while negotiations between Carr and the zoning authorities had taken place with respect to the Westbridge. Mitchell's name appeared on the statement of applicant, and his signature appeared on a motion to reopen the record and conduct further hearings. Murphy did not appear to actively represent Carr in the special exception application, but was merely a partner in Wilkes and Artis.

The record does not establish the exact dates of Mitchell's or Murphy's tenure in the Corporation Counsel's Office or the extent of their contact with Carr while they were in government service. However, petitioners pointed to two previous encounters between the attorneys and Carr. One involved Carr's court challenge to 60 foot height restrictions on the Westbridge site and the other involved subsequent negotiations on the legality of the proposed Westbridge condominium, referred to in a letter from Carr's counsel to then Corporation Counsel Murphy.

Carr first became involved in promoting the CR District in 1973, through an organization called West End Planning, Inc. The proposed CR area was to include Carr's property, the old Sealtest Dairy site at 26th and Pennsylvania Avenue, N.W. Carr developed one plan for the new district, as did the Office of Planning and Management (OPM), and two citizens groups. A final proposal, which called for a 90-foot height throughout the district, was reviewed in a number of public hearings. The review process culminated in the Zoning Commission's adoption of a text and map amendment on December 23, 1974. The new Zoning Regulations included the parking restrictions at issue here. The text and map as adopted allowed a 90 foot building height in most of the CR zone, although height was restricted to 60 feet on all property within 220 feet of Rock Creek Park.

Carr challenged the 60 foot height restriction as it applied to his building site in Superior Court Civil Action No. 4122-75. Iverson Mitchell as Assistant Corporation Counsel defended the Zoning Commission's Order restricting height. Plaintiff Carr won this case in mid-1975. Petitioners cite Mitchell's direct, personal involvement in CA 4122-75 as evidence of conflict of interest. Petitioner's counsel did not allege Mr. Murphy's personal participation in CA 4122-75, apparently relying simply on the supervisory position of then Corporation Counsel Murphy during the litigation.

Somewhat later in 1975, Carr again had dealings with the Corporation Counsel's office with respect to his proposed Westbridge complex. These dealings are evidenced by a letter dated October 24, 1975, from Carr's counsel to Murphy as Corporation Counsel. The letter refers to an October 21 meeting where Carr's counsel sought the opinion of Mitchell and other Corporation Counsel lawyers about the legality of their air rights condominium. The letter contained a brief reference to the proposed building's conformance to the CR parking regulations. Petitioner's counsel relied on this letter as further evidence of a conflict of interest in either Mitchell or Murphy now representing Carr in the application for a parking special exception.

Mr. McCants, Chairman of the BZA, denied petitioners' request to disqualify the firm of Wilkes and Artis on the grounds that the BZA is

not a proper forum to raise an alleged violation of the disciplinary rules of the American Bar Association, ...

4. The Board held public hearings to consider all of the issues, that is, identity of matter, substantial responsibility, extension of disqualification to the firm of Wilkes and Artis, waiver by the Corporation Counsel and screening by Wilkes and Artis. The Board will address these issues in order. On the part of the applicant there was testimony from William Joseph H. Smith, Esq., Iverson O. Mitchell, III, Esq., Robert O. Carr, Semi Feuer, Esq., C. Francis Murphy, Esq., Louis P. Robbins, Esq., and Norman M. Glasgow, Jr., Esq. On the part of the opposition there was testimony from Philip J. Brown, Sylvia L. Kohn and Christine Garner.

5. In April, 1975, the applicants, represented by Stohlman, Beuchert, Egan and Smith, brought suit in the United States District Court for the District of Columbia to enjoin "the enforcement, operation and execution of Section 4503.2 of Order No. 108" and to have such Section declared null and void. The complainant alleged that there was no rational basis for the sixty foot height restriction and that it did not have "a reasonable relationship to the public health, safety, morals or general welfare" thereby rendering it an arbitrary and capricious taking of property without due process of law and in violation of the Fifth Amendment.

6. The complaint was first reviewed by Mr. Robbins, then Principal Assistant Corporation Counsel, who assigned it directly to the Environmental and Consumer Affairs Section of the Office of the Corporation Counsel. Mr. Mitchell, then an Assistant Corporation Counsel Trial Attorney in that Section, was assigned first line responsibility for the handling of the litigation. Mr. Mitchell, consistent with the practice of the Office of the Corporation Counsel, filed an appropriate motion to have the action dismissed for lack of federal question jurisdiction over the question. The motion was granted and an identical complaint was filed in Superior Court.

7. In the Superior Court, following pretrial discovery by the plaintiffs, the matter was heard by the court in a consolidated hearing on both the motion for preliminary injunction and the merits. The entire record of the Zoning Commission proceedings was filed with the court and Mr. Mitchell defended the Zoning Commission action on the basis of that record. Following the hearing, the parties submitted proposed findings of fact and conclusions of law. The Court ruled in favor of the plaintiffs, adopting their proposed findings and conclusions. Nothing in the record

herein demonstrates that any of the issues in the height litigation related to the subject of parking.

8. Mr. Robbins advised the Zoning Commission of the court's decision and of the time limits for appealing the case. Upon being asked for his advice, Mr. Robbins recommended that the appeal not be taken. The Zoning Commission decided not to appeal.

9. Mr. Smith, of the firm of Stohlman, Beuchert, Egan and Smith, was the trial attorney for Carr in the court litigation, Carr et al.v. District of Columbia Zoning Commission, et al., Superior Court, Civil Action No. 4122-75 (1975) and the firm of Wilkes and Artis had no role in that litigation. The sole issue was the sixty foot height restriction and there was no reference to parking issues. The Court incorporated the plaintiff's Findings of Fact and Conclusions and there was no reference therein to the question of parking and number of spaces. Mr. Mitchell represented the Zoning Commission.

10. Mr. Smith met with Messrs. Robbins, Mitchell and Feuer of the Corporation Counsel's Office and Messrs. White and Sher of the Municipal Planning Office to discuss the proposed development of an air rights condominium. The firm of Wilkes and Artis was not involved with this matter and did not meet with the Corporation Counsel's office on this issue. At that time, the building contemplated was a single building covering all of the property owned by the applicants, now known as Lots 70 and 68, a total of 70,233 square feet. The contemplated building would have had commercial, retail and residential condominium use and an underground parking garage serving both the residential and commercial uses. As a result of that meeting, Mr. Smith wrote a letter dated October 24, 1975 to the Corporation Counsel requesting an opinion as to whether an air rights condominium would be permitted in the District of Columbia under the then effective condominium law. Zoning related issues were not central to this question. A second question was whether such a condominium, if legal, would in any respect violate the CR zoning.

11. The October meeting and letter dealt solely with the concept of an air rights condominium. Neither the meeting nor the letter dealt with or had any relation to parking. Although a draft response was prepared, no response was ever received by Mr. Smith to his letter of October 24, 1975. The air rights condominium was abandoned by the Carr Co. because of various obstacles in proceeding to timely construction. None of these problems related to the height litigation issues or to the parking exception issues. It was not until 1977 that the development which is the subject of BZA Application No. 12531 was defined. In Mr. Smith's view, the litigation and the request for the

Corporation Counsel opinion were not the same matter as the subject Application No. 12531. Parking was not an issue in either the litigation or the condominium question.

12. Mr. Mitchell was employed by the D.C. Corporation Counsel's Office from February 16, 1971 to July 1976. He joined the firm of Wilkes and Artis on September 1, 1976. Mr. Mitchell did not solicit the position from Wilkes and Artis. The offer was initiated by Wilkes and Artis. While employed by the Corporation Counsel, Mr. Mitchell was, as aforementioned, assigned to defend the subject height litigation matter. Mr. Mitchell never attended the Zoning Commission public hearings on the CR District issue, nor its meeting when the subject sixty foot height restriction was adopted. He did not advise the Zoning Commission not to appeal the Court decision. It was the decision of the Zoning Commission not to appeal. Mr. Mitchell defended the suit on the basis of the record the Zoning Commission had made.

13. Mr. Mitchell was present at the meeting of October 21, 1975 on the air rights condominium issue. No question of parking was discussed. He was assigned no responsibility for drafting the subject letter in response to the inquiry of Mr. Smith, nor did he discuss it with Mr. Feuer, who drafted the response. Mr. Mitchell had not seen the draft response until he was preparing for these BZA proceedings on remand.

14. As to the issue of the subject application for a special exception, Mr. Mitchell did not participate in the preparation or filing and never saw the pleadings. His name appeared on the application because it was the practice at that time in the firm of Wilkes and Artis for all attorneys working on zoning matters to have their names on the pleadings. Mr. Mitchell did not sign the pleadings, but as a matter of practice the junior attorney affixed the names of all zoning attorneys to the papers. The Zoning Division of the firm of Wilkes and Artis had periodic meetings on zoning matters when he joined the firm. There was no consultation on the strategy to be followed. As to any relations with Mr. Murphy when he was the Corporation Counsel, Mr. Mitchell never consulted with Mr. Murphy on the West End section matters, but worked with Mr. Robbins or Mr. John Salyer, his immediate supervisor.

15. Mr. Semi Feuer, of the Office of the Corporation Counsel, testified as to the meeting of October 21, 1975 and confirmed the testimony of Mr. Smith as to the matter discussed. He prepared the subject draft response to the inquiry of October 21, 1975 since the matter was assigned to him.

16. Mr. Murphy, was employed by the firm of Wilkes and Artis on January 2, 1976, having worked immediately prior as the Corporation Counsel for the District of Columbia Government. He personally did not participate in the height litigation. Mr. Robbins reviewed incoming litigation and assigned it. He did not see the letter of inquiry regarding the air rights condominium until the remand proceedings. Mr. Murphy did not participate in the BZA special exception application, nor did he have, as Corporation Counsel, any access to information that would have been of benefit to the applicant. Further testimony corroborated the testimony of Mr. Mitchell as to the periodic meetings of the zoning division of Wilkes and Artis. Wilkes and Artis had no manuals or written procedures regarding screening prior to March of 1980, the time of the subject remand.

17. Mr. Robbins joined the firm of Wilkes and Artis on August 1, 1979. He had rejoined the Corporation Counsel office on January 10, 1972 and resigned on June 29, 1979. Mr. Robbins was aware of the height litigation, because such matters came before him in the Corporation Counsel's office and also, since June of 1972, he had primary responsibility in the Office of the Corporation Counsel for legal matters concerned with zoning. Mr. Robbins also regularly sat with the Zoning Commission during 1974 and 1975. Mr. Robbins advised the Zoning Commission that the office of the Corporation Counsel could and would defend anticipated litigation challenging the sixty foot restriction. He did not state that such could be done successfully. Mr. Robbins recommended to the Zoning Commission that it not appeal the Superior Court decision. It was his opinion that the litigation had been diligently pursued and that with the amount of discretion that the Court had, he saw no grounds for reversing other than argumentative grounds. Mr. Robbins' testimony corroborated the testimony of Mr. Smith concerning the details of the aforementioned meeting on the air rights condominium issue. Mr. Robbins directed Mr. Feuer to draft a response to the inquiry of Mr. Smith. Mr. Robbins further confirmed that there were no written procedures regarding screening when he joined the firm of Wilkes and Artis.

18. Wilkes and Artis, principally through Norman M. Glasgow, Sr., represented Oliver T. Carr during the period of time that the CR zoning was before the Zoning Commission in 1973 and 1974. The opposition alleged that while so representing Carr, Mr. Glasgow met with Mr. Murphy during 1973 and 1974, who gave advice and consultation to Mr. Glasgow on how best to obtain approval of the CR Zone from the Zoning Commission. The Board finds that, even assuming those contacts, there is no relationship, factual or legal, between the public hearings on the CR zoning issues and the subject special exception.

19. The opposition alleged that the litigation action was not vigorously defended by the Corporation Counsel's Office, represented by Mr. Mitchell who was supervised by Mr. Robbins. The opposition argued that the Corporation Counsel's Office took no depositions, no discovery, and tendered no witnesses at the trial. Further, the Office recommended that an appeal not be filed, even though it believed that the Zoning Commission's actions were correct and that there was a legal basis for said actions in the Zoning Commission's records. The Board does not so find. First, the position of the Corporation Counsel in the trial court was based on the record that the Zoning Commission had compiled and was appropriate and reasonable strategy to be employed in the defense of quasi-legislative action, with respect to which the scope of judicial review is limited. Further, with respect to the appeal, it was the opinion of Mr. Robbins that an appeal would be futile, because of the findings of fact of the trial court and the discretion that the trial court is entitled to exercise.

20. Messrs. Murphy and Mitchell attended the bi-weekly meetings or team meetings of the Zoning Division of Wilkes and Artis from the time of their employment through the present time. Mr. Robbins also attended said Wilkes and Artis zoning meetings from the time of his employment in August, 1979, to the present time. The opposition alleged that at the Wilkes and Artis zoning team meetings, the status of all zoning cases pending at Wilkes and Artis was reviewed, and specific questions about certain specific cases were sometimes discussed at these meetings. The opposition further alleged that there was no screening of Mr. Mitchell and Mr. Murphy by the Wilkes and Artis law firm, after they became employed by Wilkes and Artis. There was no screening until approximately July of 1980, when screening procedures were first implemented. Therefore, Messrs. Mitchell, Murphy and Robbins were not screened by the Wilkes and Artis law firm from participating in the subject BZA Application No. 12531. The Board finds that, while the procedures of the firm of Wilkes and Artis for screening new employees left much to be desired, both Messrs. Murphy and Mitchell were effectively screened as a practical matter with respect to participation in the subject special exception.

21. The Office of the Corporation Counsel did not grant a waiver to Wilkes and Artis to represent the applicants in this proceeding.

22. At the end of the public hearing of October 8, 1980, the opposition argued that the applicant had not produced the records requested. The Board noted that it had no subpoena power. The opposition's counsel was given the opportunity to review the records that the applicant had

brought to the public hearing and to have copies made available to him.

23. On October 24, 1980, the opposition filed a motion to reopen the record and conduct a further hearing calling further witnesses. At the public meeting of November 5, 1980, the Board denied the Motion, on the grounds that the Motion contained no new issues or evidence that the Board had not entertained before and that all parties had sufficient time to present their cases and cross-examine.

24. The Board finds that the application before the Board was for a special exception brought under the provisions of Paragraph 4502.32 and Sub-section 8207.2 of the Zoning Regulations. As such, the Board's jurisdiction is limited to determining whether the applicants demonstrated that they met the requirement of those portions of the Regulations.

25. The Board finds that the issues presented by the special exception are in no way connected to the height litigation or the opinion concerning an air rights condominium. None of the standards which the Board was required to apply in deciding the special exception have any bearing at all on the issues to which were presented by the height litigation or the air rights condominium question. Neither the same facts, events, nor transactions were at issue in the three proceedings. Nor does any common core of relevant facts or principles render the matter identical.

26. The Board finds that the fact that the same property was involved is not a sufficient connection to create an identity of issues and render the three matters as the "same matter."

27. The Board finds that the coincidental fact that the result of the decision by the Superior Court allows a larger development and thus more parking on the site is also not sufficient to create a "same matter" connection. The standards for the special exception have to be met, and the Board finds no information present in the two earlier proceedings which would have aided the applicant in the subject cases before the Board.

CONCLUSIONS OF LAW AND OPINION:

The entire record has been reviewed. The burden of proof is on the opposers as the moving parties on the motion to disqualify. The Board concludes that the opposers have not met their burden. The Court's first directive was that the Board determine whether the subject application is the same matter as earlier proceedings involving the District Government. The Board concludes that, for the reasons stated in Findings of Fact 24 through 27, the subject

application is not the same matter as either the height litigation or the October, 1975 meeting and letter.

Having concluded that there is no "same matter" connection at issue, the Board is not required to determine the further issues of substantial responsibility, extension of disqualification to the firm of Wilkes and Artis, waiver by the Corporation Counsel and screening by Wilkes and Artis. The Board notes that neither Mr. Murphy nor Mr. Mitchell received any information from the height litigation, the October, 1975 meeting or the October, 1975 opinion request which would have been helpful to the applicants in seeking the subject special exception from the Board. The Board further notes that Mr. Robbins did not join the law firm of Wilkes and Artis, until after the issuance of the Board's Order of July 10, 1978. The Board recognizes that the pleadings bearing Mr. Mitchell's name raise a rebuttal presumption that he did participate in the proceedings. However, the record is clear that Mr. Mitchell did not sign the pleadings and the evidence demonstrates that he had no participation. Lastly, the Board notes that Wilkes and Artis had no representation in or connection with the height litigation or the October, 1975 meeting and letter.

The Board concludes that the individual attorneys and the law firm of Wilkes and Artis had no conflict of interest, either real or apparent and that neither the individuals nor the firm are disqualified from participating in the subject application.

Accordingly, it is ORDERED that the MOTION to DISQUALIFY is DENIED.

- VOTES:
- (5-0) That the subject application and the height litigation concerning the CR District are not the same matter (William F. McIntosh, Connie Fortune, Leonard L. McCants, Charles R. Norris and Theodore F. Mariani in FAVOR).
  - (5-0) That the subject application and the requested Opinion of the Corporation Counsel concerning condominiums are not the same matter (William F. McIntosh, Theodore F. Mariani, Connie Fortune, Leonard L. McCants and Charles R. Norris in FAVOR).
  - (5-0) That the individual attorneys and the law firm of Wilkes and Artis had no conflict of interest, either real or apparent and that neither the individuals nor the firm are disqualified from

participating in the subject application  
(Theodore F. Mariani, Charles R. Norris,  
Connie Fortune, Leonard L. McCants and  
William F. McIntosh in FAVOR).

- (5-0) That there was no appearance of wrong-  
doing by counsel for the applicant and that  
there was no inside information in the  
possession of the individual attorneys  
or conveyed to the firm of Wilkes and  
Artis such as to result in their  
disqualification for participating in the  
subject case (Connie Fortune, William F.  
McIntosh, Theodore F. Mariani, Leonard L.  
McCants and Charles R. Norris in FAVOR).

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

ATTESTED BY: Steven E. Sher  
STEVEN E. SHER  
Executive Director

FINAL DATE OF ORDER: 12 NOV 1981

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 SUPPLEMENTAI  
RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING  
ADJUSTMENT."