

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 13572, of Bradford Brothers Construction Corp., Trustees for M&S Associates Joint Venture, pursuant to Paragraph 8207.11 of the Zoning Regulations, for a variance from the prohibition against allowing an addition to a non-conforming structure which now exceeds the allowable percentage of lot occupancy (Paragraph 7107.21) for a proposed addition to an eighteen unit apartment house which is a non-conforming structure in an R-5-C District at the premises 1901 - 16th Street, N.W., (Square 190, Lot 127)

HEARING DATE: September 30, 1981
DECISION DATE: September 30, 1981 (Bench Decision)

ORDER

1. The subject application was scheduled for public hearing on September 30, 1981. By letter dated September 29, 1981, counsel for the applicant requested a postponement on the grounds that the two principal witnesses for the applicant were unable to appear on September 30, 1981 because of their observance of a religious holiday. At the public hearing, counsel for the applicant further stated that both witnesses, the architect and the structural engineer, were out of town. He further stated that he had been retained by the applicant only two days before the hearing, and he had been unable to consult with the witnesses prior to that day.

2. One of the principals of M and S Associates testified that she had been advised by her architect that he would not be available only ten days before the hearing. She testified that she had sought to retain a consulting architect to appear on her behalf but she was unable to do so.

3. There was opposition present at the hearing, including the owner of adjacent property and representatives of the Dupont Circle Citizens Association and the 1500 T Street Block Council. The persons in opposition objected to the request for postponement, on the grounds that they were present and prepared to go forward, and that the applicant had had sufficient time to be prepared to present her case.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17830

EXHIBIT NO. 20

No. 17830

The Board finds that the applicant and her representatives were not diligent in prosecuting the case before the Board. The architect and the applicant were notified by letter from the Board on August 28, 1981 that the case was scheduled for September 30, 1981. The date of the religious observance was fixed a long time before. The applicant and architect should have taken steps to avoid the conflict before the day of the hearing. The applicant retained counsel only two days before the hearing. The net results of these actions and the postponement, if it was granted, would be to seriously inconvenience the opposition and disrupt the orderly consideration of applications by the Board.

It is therefore ORDERED that the request for postponement is DENIED, and the application is DISMISSED for failure of the applicant to diligently prosecute the application before the Board.

VOTE: 5-0 (Walter B. Lewis, Charles R. Norris, Connie Fortune, William F. McIntosh and Douglas J. Patton to DISMISS).

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

ATTESTED BY:


STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 14 OCT 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 SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



January 5, 1982

Application No. 13618, of Eric Rudd, pursuant to Paragraph 8207.11 of the Zoning Regulations, for a variance from the use provisions (Section 3105) to use all floors of the subject premises for law and CPA offices in an R-5-B District at the premises 2201 N Street, N.W., (Square 49, Lot 23).

HEARING DATE: December 9, 1981

DECISION DATE: December 9, 1981 (Bench Decision)

ORDER

The subject application was scheduled for the Public Hearing of December 9, 1981. By letter of November 19, 1981 the applicant requested a continuance of the Public Hearing on the grounds that the applicant would be out of Washington on December 9, 1981 and that he was unable to change his plans. The same request was made by an agent of the applicant at the Public Hearing. The Board notes that the applicant was first advised of the Public Hearing date on November 6, 1981. The Board finds that the request for a continuance is not based on good cause and that without further explanation, which the applicant failed to provide, the request is based solely on the applicant's convenience.

Upon consideration of the foregoing facts, it is ORDERED that the request for a continuance is DENIED and the application is DISMISSED for failure of prosecution.

VOTE: 5-0 (Lindsley Williams, William F. McIntosh, Douglas J. Patton, Charles R. Norris and Connie Fortune to deny continuance and dismiss).

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

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

FINAL DATE OF ORDER: JAN 18 1982

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."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 13995, of Gary Schuman, pursuant to Paragraph 8207.11 of the Zoning Regulations, for a variance from the use provisions (Sub-section 3104.3) to use the first floor of the subject premises as a "drop facility for written and telephone communications - office space" in an R-4 District at premises 621 C Street, N.E., (Square 865, Lot 824).

HEARING DATE: July 20, 1983
DECISION DATE: July 20, 1983 (Bench Decision)

ORDER

By letter dated June 15, 1983, the applicant requested that the public hearing on the subject application, scheduled for July 20, 1983, be postponed because he was scheduled to teach an out-of-town seminar from July 18 thru July 21, 1983. A representative of the applicant was present at the public hearing to request a continuance. The applicant's representative testified that the premises were presently occupied without a valid certificate of occupancy for approximately two years. The applicant's representative testified further that the applicant was seeking commercial office space in which to relocate the facility and that the operation was expected to relocate to such commercial space some time between September of 1983 and January of 1984. The applicant's representative stated that she was not prepared to present evidence in support of the requested variance relief.

A representative of Advisory Neighborhood Commission 6A and a representative of the Capital Hill Restoration Society were present at the public hearing in opposition to the application. Neither objected to the requested continuance.

Upon consideration of the foregoing, the Board concludes that the applicant was aware of the conflict in scheduling well in advance of the public hearing and further that a re-scheduling of the seminar or the designation of a representative prepared to present evidence in support of the requested variance would have been a more prudent action on the part of the applicant than the request for continuance.

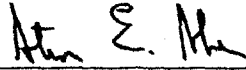
In addition, the Board notes that the applicant is presently operating an illegal use and concludes that the granting of the requested postponement could result in the

illegal use continuing for an additional period of time. Accordingly, it is ORDERED that the application is DISMISSED for lack of diligent prosecution.

VOTE: 5-0 (Carrie Thornhill, Lindsley Williams, William F. McIntosh, Douglas J. Patton and Charles R. Norris to DISMISS).

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

ATTESTED BY:


STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: AUG 15 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."

13995order/BETTY7

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17585 of Darshan Shah, pursuant to 11 DCMR § 3103.2, for a variance from the use provisions of § 320.3 to allow the conversion of a single-family row dwelling to a three (3) unit apartment building in the R-3 District at premise 2113 S Street, N.W. (Square 2532, Lot 45).

HEARING DATES: April 3, 2007 and April 24, 2007
DECISION DATE: April 24, 2007

DISMISSAL ORDER

On November 16, 2006, Mr. Darshan Shah ("Applicant") filed Application No. 17585 seeking a variance from 11 DCMR § 320.3 in order to convert a single-family row dwelling to a three (3) unit apartment building.

Pursuant to 11 DCMR § 3113.13, notice of the April 3, 2007 hearing was sent to the Applicant, owners of property within 200 feet of the site, Advisory Neighborhood Commission ("ANC") 2D, and the District of Columbia Office of Planning.

ANC 2D Chair Sandra Perlmutter and two individuals who had requested party status, Mr. Tim McFeeley and Ms. Linda Bumbalo, filed written submissions with the Board requesting that the April 3, 2007 hearing be postponed because the ANC lacked a quorum at its March 19, 2007 meeting, preventing it from voting on the Applicant's project. The submissions also stated that even if a quorum had existed, the Applicant had failed to present sufficient evidence for the ANC Commissioners to take a position. It was also noted that April 3 was a religious holiday and several interested parties would be unable to attend the BZA hearing.

The Board granted the postponement and rescheduled the Applicant's hearing to April 24, 2007. In a letter to the Board dated April 24, 2007, ANC 2C advised that the Applicant did appear at its publicly noticed meeting on April 16, 2007, but with insufficient information for the ANC to take a position. The ANC extended the Applicant the opportunity to return to the ANC with more information, but the ANC heard nothing further from him.

441 4th Street, N.W., Suite 200/210-S, Washington, D.C. 20001

Telephone: (202) 727-6311

Facsimile: (202) 727-6072

E-Mail: dcoz@dc.gov

Web Site: www.dcoz.dc.gov

At the April 24 hearing, the Applicant failed to appear when his case was called. The Board instructed the Office of Zoning ("OZ") staff to contact the Applicant by telephone to determine the reason for his absence. The Board also adjusted the order of cases to be heard to grant the Applicant more time to appear.

The Office of Zoning staff finally reached the Applicant by telephone. The Applicant was in New York at the time, and after speaking with the Office of Zoning staff, faxed the Board a request for continuance at 2:23 p.m. In his fax, the Applicant stated, "I need additional meetings with the ANC and am stuck in NY."

The Board deliberated concerning the Applicant's last-minute request for a continuance, the grant or denial of which falls squarely within the discretion of the Board. *See, e.g., King v. D.C. Water and Sewer Authority*, 803 A.2d 966, 968 (D.C. 2002). After deliberating, the Board decided to deny the request for continuance, and instead dismissed the application. The Board has "broad authority and reasonable latitude to perform its function," including, when necessary, authority to dismiss an application for failure of the Applicant to prosecute his case. *See, e.g., Coumaris v. D.C. Alcoholic Beverage Control Board*, 660 A.2d 896, 903 (D.C. 1995). ("It would seem implicit, if not expressly written, that the Board has the authority to dismiss a petition.") (Pryor, J., concurring). *See also, Stancil v. D.C. Rental Housing Comm'n.*, 806 A.2d 622 (D.C. 2002). Although the denial of the continuance and the dismissal are two separate actions, the reasoning behind them is intertwined, and is set forth below.

In addressing the Applicant's request for a continuance, the Board considered all the surrounding circumstances, including "the reasons for the request for continuance, the prejudice that would result from its denial, the part[y's] diligence in seeking relief, any lack of good faith, and any prejudice to the opposing party." *King, supra*, at 968, citing *Murphy v. Beiro Constr. Co.*, 679 A.2d 1039, 1043 (D.C. 1996). The Applicant's stated reason for the requested continuance was that he needed "additional meetings with the ANC." His hastily hand-written and faxed request, however, provides no support for this reason. Rather, the evidence in the record tends to show that the Applicant failed to take advantage of the opportunity to meet with the ANC prior to the hearing. The case had already been postponed once and the ANC letter dated April 24, 2007 shows that the Applicant failed to pursue meetings with the ANC and/or failed to be sufficiently prepared for such meetings during the time provided by the first postponement. The Applicant not only failed to make a sufficient presentation to the ANC and failed to show up for the hearing, but the paltry amount of documentation in the case file tended to show a lack of diligence in seeking relief.

No particular prejudice results from the denial of a continuance and simultaneous dismissal because the Applicant has the right, after 90 days, to re-file his application. 11

DCMR § 3113.11. Further, although a continuance of the case may have prejudiced, or at least inconvenienced, the opposing parties by forcing them to appear before the Board for a third time in the same case, a dismissal removes this prejudice or inconvenience, while, again, leaving the door open for the Applicant to re-file. Lastly, although the Board does not find a lack of good faith on the part of the Applicant, the Board notes that his cavalier handling of the request for continuance displays a lack of seriousness in his prosecution of the case, and perhaps, a lack of respect for the Board's procedures, as well as a disregard for the other participants in this case.¹

Finally, the D.C. Administrative Procedure Act, which this Board is bound to follow, specifically authorizes disposal of a contested case, such as that of the Applicant, by default. D.C. Official Code §

2-509(a). Default normally applies to a defendant or opposition party, but its functional equivalent for an applicant would be dismissal. *See, e.g., Digital Broadcast Corp. v. Rosenman & Colin, LLP*, 847 A.2d 384, 388 (D.C. 2004). Default includes failure to appear for a properly-noticed proceeding and the Applicant's failure to appear for the hearing supports dismissal of the case. *See, e.g., Pelkey v. Endowment for Community Leadership*, 841 A.2d 757 (D.C. 2004).

The Applicant's case was a contested case, therefore, the Board, in addressing the case, attempted to address the circumstances as a court would. *See, e.g., Mullin v. D.C. Rental Housing Comm'n.*, 844 A.2d 1138, 1142 (D.C. 2004), citing *Radwan v. D.C. Rental Housing Comm'n.*, 683 A.2d 478, 480 (D.C. 1996). ("Absent a regulation specifically governing the exercise of the Commission's discretion, it is not unreasonable for the agency to look to factors relied upon by courts under a similar rule and similar circumstances.")² After examining the circumstances surrounding the Applicant's application, lackluster prosecution of the case, and failure to appear, and the lack of real prejudicial effect, the Board concludes that there is no "good cause shown" to postpone the case. *See*, 11 DCMR § 3117.2. The Board further concludes that dismissal of the case without prejudice is warranted.

¹While Applicant failed to attend his hearing because he was in New York, one witness who did attend said she had twice driven from Florida to testify in this case.

²While no particular regulation mandates the Applicant's attendance at a hearing, the rules of practice require a public hearing on every application and clearly assume the Applicant's or the Applicant's representative's participation in the hearing. The Applicant failed to comply by not attending the hearing, either in person or through an authorized agent, without leave of the Board. The Board notes 11 DCMR § 3113.11, which authorizes dismissal of a case for failure of an applicant to comply with procedural requirements.

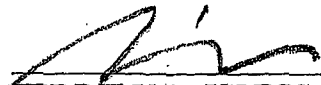
BZA APPLICATION NO. 17585
PAGE NO. 4

It is therefore **ORDERED** that Applicant's request for continuance or postponement is **DENIED** and this application is **DISMISSED**.

VOTE: **5-0-0** (Curtis L. Etherly, Jr., Anthony J. Hood, Marc D. Loud,
 Ruthanne G. Miller, and John A. Mann II to approve the motion)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member approved the issuance of this order.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning 

FINAL DATE OF ORDER: JAN 24 2008

UNDER 11 DCMR § 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPLICATION NO. 17585

As Director of the Office of Zoning, I hereby certify and attest that on **JANUARY 24, 2008**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

Darshan Shah
c/o Michael Shah
845 United Nations Plaza
New York, NY 10017

Timothy McFeeley
on behalf of The S and Bancroft St. Neighbors
2115 S Street, NW
Washington, D.C. 20008

Chairperson
Advisory Neighborhood Commission 2D
P.O. Box 53342
Washington, D.C. 20007

Single Member District Commissioner 2D02
Advisory Neighborhood Commission 2D
P.O. Box 53342
Washington, D.C. 20007

Matthew LeGrant, Zoning Administrator
Dept. of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capitol Street, N.E., Suite 2000
Washington, D.C. 20002

441 4th Street, N.W., Suite 200/210-S, Washington, D.C. 20001

Telephone: (202) 727-6311

Facsimile: (202) 727-6072

E-Mail: dcoz@dc.gov

Web Site: www.dcoz.dc.gov

BZA APPLICATION NO. 17585
PAGE NO. 2

Jack Evans, City Councilmember
Ward Two
1350 Pennsylvania Avenue, N.W., Suite 106
Washington, D.C. 20004

Jill Stern, Esquire
General Counsel
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E., Suite 9400
Washington, D.C. 20002

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

TWR