

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18400-A of The Jewish Primary Day School of the Nation's Capital pursuant to 11 DCMR §§ 3103.1 and 3104.1 for a variance from the off-street parking requirements under § 2101.1 and a special exception under § 206 to expand a private school by increasing the maximum student enrollment and number of faculty and staff in the R-1-B and R-5-A Zone Districts at premises 6045 16th Street, N.W. (Square 2726, Lots 825, 831).

HEARING DATE: September 25, 2012

DECISION DATE: January 15, 2013

ORDER DATE: April 11, 2013

RECONSIDERATION DATE: May 7, 2013

ORDER DENYING RECONSIDERATION

This proceeding concerns an application submitted April 24, 2012 by the Jewish Primary Day School of the Nation's Capital ("JPDS" or "Applicant") seeking (i) a special exception under 11 DCMR §§ 206 and 3104.1 to expand an existing private school use at 6045 16th Street, N.W. by increasing the maximum student enrollment from 275 students to 300 students and the maximum number of faculty and staff from 56 individuals to 72 individuals, and by expanding the campus to include property purchased by the Applicant at 6017 16th Street, N.W.; and (ii) a variance under 11 DCMR § 3103.1 from the requirement to provide 48 parking spaces for the expanded private school use where the Applicant would provide 24 zoning-compliant spaces as well as stacked parking for a total of 45 spaces on the subject property. The Board held a public hearing on the application on September 25, 2012, and voted 4-0-1 at its decision meeting on January 15, 2013 to grant the application subject to conditions.

The Applicant and Advisory Neighborhood Commission ("ANC") 4A were automatically parties in this proceeding. The Board granted a request for party status in opposition to the application submitted by Dr. Frances Cress Welsing, the owner and resident of a dwelling abutting the Applicant's property.

On April 24, 2013, the party in opposition submitted a request for reconsideration and rehearing of the Board's decision. (Exhibits 50 and 51.) The motion asserted that (i) JPDS "has never

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

Board of Zoning Adjustment
District of Columbia
ZONING COMMISSION
CASE NO. 18400A
District of Columbia
EXHIBIT NO. 11
CASE NO. order-18400A
EXHIBIT NO.

BZA APPLICATION NO. 18400-A
PAGE NO. 2

been in compliance with the conditions under which the school was initially granted the variance by BZA to build a playground” next to the party’s house, especially with respect to landscaping and noise mitigation.¹ According to the party in opposition, “[t]here is no justification for the approximately 10% increase in student population,” which would “escalate the oppressive noise level” in her home, where a “bombardment of noise has negatively impacted” her health. The party in opposition disputed the Applicant’s noise mitigation plan, seeking instead “complete and total elimination of noise in [her] home and on [her] property.” (Exhibit 51.)

In requesting reconsideration, the party in opposition also contended that (i) the Board’s order approving the application failed to make findings of fact on each material contested issue of fact; (ii) several of the “critical findings of fact” were not supported by substantial evidence on the record viewed as a whole; (iii) BZA “omissions” resulted in several legally deficient conclusions of law; and (iv) the Board’s order as a whole was “arbitrary, capricious, and not in accordance with prevailing law,” citing the District of Columbia Human Rights Act and the federal Americans with Disabilities Act. Specifically, with regard to the first claim of error, the party in opposition alleges that the Board’s order did not sufficiently address the “two most important contested issues in this case”: that is, the issue of JPDS’s compliance with the Board’s order in Application No. 17700, and the issue of the effect of the current level of noise from the playground on the health of the party in opposition. Instead, the party in opposition claims to have provided “conclusive evidence that the failure and refusal of the JPDS to make any effort to protect her from the noise coming from the new playground had an adverse effect on her health.”

With regard to the second claim of error – that several “critical findings of fact” were not supported by substantial evidence – the party in opposition challenges the finding that the Applicant’s proposed increase in the student enrollment cap would not create a substantial objectionable increase in the amount of noise on the subject property that could not be mitigated with sufficient measures. The party in opposition asserted that the Board failed to address “undisputed evidence” regarding “the amount of noise ... already coming from the playground” and challenged evidence submitted by the Applicant, including an acoustical study, in arguing that the Board lacked evidentiary support for its finding that a fence proposed by the Applicant would mitigate noise impacts.

The party in opposition’s third claim of error was that the Board’s conclusion of law pertaining to the lack of objectionable conditions arising from the requested increase in enrollment “fails for lack of an evidentiary predicate.” The party in opposition cites “noise control ordinances which

¹ A private school was first allowed at the subject property in 1948 as the Hebrew Academy of Washington. See BZA Appeal No. 2069 (1948), BZA Appeal No. 2320 (1949), and BZA Appeal No. 2561 (1949). The Hebrew Academy constructed a two-story building at the site in 1950 and enrolled more than 350 students. The site was subsequently used by the Owl School and was acquired by the Applicant in 2002. In 2008, the Board granted special exception approval, subject to conditions, allowing JPDS to operate a private school for a maximum of 275 students and 56 staff and to expand the campus to provide an outdoor playing area, as well as a variance from the access requirements for parking. Use of the outdoor playing area was made subject to several conditions of approval, including a landscaping requirement, a limit of 65 students permitted at one time on the play area, and restrictions on when the play area could be used. See BZA Order No. 17700-A (May 13, 2008).

BZA APPLICATION NO. 18400-A
PAGE NO. 3

apply to the JPDS” and claims “undisputed evidence on the record” that noise coming from the JPDS playground was objectionable to the party in opposition.

Finally, the party in opposition alleges that the Board’s order is “arbitrary, capricious and not in accordance with law” because “undisputed medical evidence” demonstrated that the party in opposition “had been diagnosed with several medical conditions which qualify as disabilities” under the Americans with Disabilities Act and the District of Columbia Human Rights Act. The party in opposition contends that “the noise from the JPDS playground has had an adverse impact” and so that the party has “requested a wall as the means of accommodating her disability.” According to the party in opposition, the Board “cannot rule on the application of the JPDS for zoning relief until and unless it has made a determination as to Dr. Welsing’s requested reasonable accommodation.”

In a response submitted May 1, 2013, the Applicant opposed the motion for reconsideration and rehearing on the ground that the party in opposition had not presented any new evidence that was not available at the time of the public hearing held on the application. According to the Applicant, the party in opposition’s “grievances rest on the Findings of Fact and Conclusions of Law of Case No. 17700, which became effective in February 2008” and were the subject of a determination letter issued by the Zoning Administrator on September 14, 2012, before the public hearing on the instant application. The Applicant sought dismissal of the motion on the basis that it did not comply with § 3126 of the Zoning Regulations.

CONCLUSIONS OF LAW

Pursuant to § 3126.2 of the Zoning Regulations, any party may file a motion for reconsideration or rehearing of any decision of the Board. A motion for reconsideration must state specifically all respects in which the final decision is claimed to be erroneous, the grounds of the motion, and the relief sought. (11 DCMR § 3126.4.) The Board will not consider a request for rehearing unless new evidence is submitted that could not reasonably have been presented at the original hearing. (11 DCMR § 3126.6.)

The Board concurs with the Applicant that the party in opposition has not presented any new evidence that could not reasonably have been presented at the original hearing. Accordingly, the motion for rehearing is denied.

With respect to the motion for reconsideration, the Board finds that the party in opposition has not stated specifically all respects in which the final decision is claimed to be erroneous and the grounds of the motion. Rather, the party in opposition attempts to reargue matters already considered by the Board and addressed in its order approving the application.

With regard to the first claim of error, the Board notes that the Applicant’s compliance (or any failure to comply) with conditions of approval in a prior order was not at issue in this

BZA APPLICATION NO. 18400-A
PAGE NO. 4

proceeding.² The allegations of noncompliance have been the subject of enforcement action initiated by the party in opposition and are outside the scope of this proceeding. Accordingly, the Board finds no basis for reconsideration of its decision arising from the party in opposition's claims of noncompliance by JPDS.

Similarly, the Board finds no merit in the other claims of error made by party in opposition. The motion for reconsideration attempts to present the same allegations and arguments already considered by the Board, without stating any specific claim of error other than that the Board was not persuaded by the party in opposition and instead approved the application on the basis of the evidence and testimony presented by the Applicant, the Office of Planning, the District Department of Transportation, and ANC 4A.

The opposition claims that the Board's order was "not in accordance with law," specifically mentioning the federal Americans with Disabilities Act ("ADA") and the District of Columbia Human Rights Act. As to the ADA, the party in opposition appears to seek a reasonable accommodation from JPDS on the basis of alleged adverse impacts, especially related to noise, associated with the Applicant's use of its playground. Assuming the ADA is applicable to the facts in this case, the BZA does not have authority to grant the requested ADA relief.

As to the Human Rights Act, the party in opposition has failed to demonstrate how the Board's grant of the relief requested by the Applicant will result in any form of prohibited discrimination. The fact that the Board has concluded that granting the Application as conditioned will not tend to adversely affect the use of neighboring properties is compelling evidence that no such discrimination will result.

The Board's decision in this proceeding was supported by substantial evidence in the record, and the party in opposition has not provided sufficient basis to warrant the Board's reconsideration or rehearing of the decision. For the reasons discussed above, the Board concludes that the motion submitted by the party in opposition has not satisfied the requirements for reconsideration or rehearing of the Board's decision under § 3126. Accordingly, it is hereby **ORDERED** that the

² Without making any finding with respect to whether JPDS is in compliance with conditions of approval adopted in Application No. 17700-A, the Board notes that it does not condone any lack of compliance with conditions of approval adopted by the Board. However, the Board's discretion in reviewing an application for a special exception under § 206 is limited to a determination of whether an applicant has complied with the requirements of §§ 206 and 3104.1 of the Zoning Regulations. If an applicant meets its burden, the Board ordinarily must grant the application. See, e.g., *Stewart v. District of Columbia Board of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973); *Washington Ethical Society v. District of Columbia Bd. of Zoning Adjustment*, 421 A.2d 14, 18-19 (D.C. 1980); *First Baptist Church of Washington v. District of Columbia Bd. of Zoning Adjustment*, 432 A.2d 695, 698 (D.C. 1981); *Gladden v. District of Columbia Bd. of Zoning Adjustment*, 659 A.2d 249, 255 (D.C. 1995). The scope of the Board's authority is defined by statute. (See D.C. Official Code § 6-641.07 (2008).) Where permitted by the Zoning Regulations, the Board may grant a special exception "subject to appropriate principles, standards, rules, conditions, and safeguards set forth in the regulations." (D.C. Official Code § 6-641.07(d) (2008) (emphasis added).) Accordingly, the Board properly deliberated on the merits of the instant application relative to the requirements specified in §§ 206 and 3104.1.

BZA APPLICATION NO. 18400-A
PAGE NO. 5

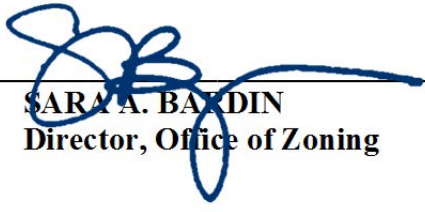
motion for **RECONSIDERATION** and **REHEARING** is **DENIED**.

VOTE: **3-0-2** (Lloyd J. Jordan, S. Kathryn Allen, and Anthony J. Hood (by
absentee vote) voting to deny the motion; Jeffrey L. Hinkle and
one Board member not participating.)

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

A majority of the Board members approved the issuance of this order.

ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: August 28, 2013

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT
UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.