

SULLIVAN & BARROS, LLP

Real Estate | Zoning | Litigation | Business Law

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March 4, 2013

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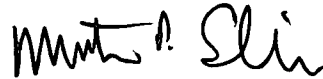
Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

Re: Motion for Reconsideration, Rehearing, and Stay; BZA Order No. 18477; 1400-1404 14th Street, NW

Dear Chairman Jordan and Members of the Board,

Enclosed please find a Motion for Reconsideration and Rehearing of, and a Request to Stay, BZA Order No. 18477, including exhibits and an authorization letter.

Sincerely,



Martin P. Sullivan, Esq.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18477

EXHIBIT NO. 42

Gelman Management Company
2120 L Street, NW
Washington, DC 20037

March 1, 2013

D.C. Board of Zoning Adjustment
One Judiciary Square
441 4th Street NW
Suite 210S
Washington, DC 20001

**Re: Authorization Letter; Motion for Rehearing of BZA Application No. 18477;
1400-1404 14th Street, NW; Square 210, Lots 82, 102, 800**

Dear Chairman Jordan and Members of the Board:

Gelman Management Company (the "Company"), as the owner of the property located at 1415 Rhode Island Avenue, NW, adjacent to the above-referenced property which was the subject of BZA Application No. 18477, hereby authorizes Sullivan & Barros, LLP, to represent it in all proceedings before the D.C. Board of Zoning Adjustment concerning BZA Application No. 18477.

Sincerely,

Gelman Management Company

By: Michael Miller

Name: Michael Miller

Title: Authorized Agent

**DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT
BZA APPLICATION NO. 18477 OF ABDO 14TH ST LLC**

**MOTION FOR REHEARING AND RECONSIDERATION
OF BZA APPLICATION NO. 18477 and MOTION TO STAY THE EFFECTIVENESS
OF BZA ORDER NO. 18477**

Hearing and Decision Date: January 8, 2013.

**BZA Order No. 18477 Issued on January 30, 2013; Serve on February 19, 2013; Copy
Received by Movant on February 21, 2013.**

I. Introduction.

The Board of Zoning Adjustment approved Application No. 18477 (the “Application”) by Order dated January 30, 2013, granting variance relief from building height setback requirements under subsection 1902.1(b), a variance from the off-street parking requirements under subsection 2101.1, and special exception relief from the rear yard requirements under subsection 774.2, at premises 1400-1404 14th Street, N.W. (Square 210, Lots 82, 102, and 800) (the “Applicant’s Property”).

To the west (rear) and the south (side), the Applicant’s Property abuts the Newport West Apartments, an apartment building located at 1415 Rhode Island Avenue, NW (Square 210, Lot 126) (the “Apartment Building”). The Apartment Building was built in 1967, and has many long-term tenants. The Apartment Building property is owned by a trust controlled by the Gelman Management Companies (the “Apartment Owner”). The north side wall of the Apartment Building is approximately eight (8) feet from the Applicant’s Property in the specific areas of the requested relief for height setback and rear yard. As such, the Apartment House is substantially negatively impacted by the grant of such relief. In fact, the Apartment House is effectively “ground zero” for the negative impacts of this Application, and is certainly the most impacted of all adjacent properties.

Despite these obvious facts, the Applicant did not submit sufficient evidence to prove that the height relief would not be a substantial detriment to the Apartment Building, or that the special exception requirements necessary for rear yard relief were satisfied. Furthermore, the Apartment Owner did not have notice of the Application until it received a copy of the final BZA Order on February 21. Therefore, because the Apartment Owner was not aware of the Application, it had no opportunity to submit any evidence or argument in this case. Likewise, the Board did not have an opportunity to evaluate the primary - and considerable - negative impacts of the Application on the Apartment Building. Because the Apartment Owner was not aware of the Application, such evidence could not reasonably have been presented at the original hearing. For the same reason, the Apartment Owner could not have applied for party status in the Application or participated in the original hearing.

II. Requests.

(1) Requests for certain waiver of requirements to allow the Board to accept and consider this filing, as provided below.

(2) Because the Apartment Owner did not receive notice of the Application prior to its receipt of the final Order on February 21, and because the Apartment Owner did not have actual notice of the Application prior to February 21, the Apartment Owner hereby requests a rehearing of the Application, so that the Board will have the benefit of all information necessary to issue a fully informed, sound decision.

(3) Because the Apartment Building is so clearly negatively impacted by the granted relief, a fact that was not considered at the hearing or in the Summary Order, the Apartment Owner requests that the Board reconsider its decision and find that granting relief in this case is

likely to cause a substantial detriment to the public good because of its direct and substantial negative impact on the Apartment Building.

(4) For reasons stated in more detail herein, the Apartment Owner requests that the BZA grant a stay of its approval in BZA Order No. 18477.

III. Request for Waiver of Certain Requirements.

(A) Because the Apartment Owner did not receive notice that this Application existed, had no knowledge of this case until February 21, 2013, and - for those reasons – was not able to apply for party status, the Movant respectfully requests that the Board waive the requirement under Section 3126.2 that only a party to the proceeding may file a motion for reconsideration or rehearing. Had the Apartment Owner been aware of the Application, it certainly would have filed for party status in opposition, since the requested relief so directly impacts the Apartment Building. The Movant believes this may be a case of first impression for the Board, regarding these particular facts. In one prior case, the Board, in Application No. 13128, denied a Motion for Reconsideration from a neighbor that had moved into the neighborhood after the application was filed. In that case, the movant was found to have had actual knowledge of the Application prior to the hearing. In this case, the Apartment Owner did not have actual notice. As a manager of many properties, the Apartment Owner did not have cause to visit the Apartment Building in the posting time period, and therefore did not see such notice, and did not otherwise become aware of the Application until February 21, 2013. Also, the Apartment Owner asserts that the Board should consider the likelihood, and permanence, of substantial negative impacts on the Apartment Building when considering whether to waive this requirement.

(B) Request for Waiver of Requirements in § 3126.2 for Timeliness and in § 3110.3 for Party Status. The Apartment Owner received a copy of the Application from the Office of Zoning on February 21, 2013. This copy was mailed on February 19, 2013. The 10-day period to file a Motion for Reconsideration and Rehearing begins on the date the Order was served, February 19. In addition, pursuant to § 3110.3, “[w]henever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper, and the paper or notice is served upon the party by mail, three (3) days shall be added to the prescribed period.” So the filing deadline for a party to file a Motion for Reconsideration and Rehearing of Order No. 18477 would be March 6, 2013, thirteen days after the Order was mailed. To the extent the Board disagrees with this timeliness analysis, the Movant respectfully requests that the Board waive the requirements of § 3126.2 and accept and consider this filing as if timely filed. Also, the Movant respectfully requests - in conjunction with the waiver for party status above - that the Board waive the requirement under § 3110.3 that the three additional days relates only to a party that has a right to file these Motions, since the Movant was unable to be a party in the original hearing.

IV. Motion for Rehearing.

The Apartment Owner did not receive notice of the Application until well after the hearing was completed and a decision was granted. On February 21, 2013, the Apartment Owner received notice that the Application had been granted. While, according to the file at the Office of Zoning, the Apartment Owner’s address of 2120 L Street was included in the Application, the Apartment Owner did not receive the notice from the Office of Zoning. Attached is an affidavit from the receptionist at the Gelman Companies, Shannon Kenny, who is responsible for opening

and distributing the mail and deliveries received by the Gelman Companies at 2120 L Street, NW. Also included hereto as Exhibit B is an affidavit from the property manager responsible for the Apartment Building, Peter J. Kelly, to whom Ms. Kenny would have distributed any BZA notice relating to the Apartment Building. In these affidavits, Ms. Kenny and Mr. Kelly testify that they did not receive notice of any kind about the Application.

The Apartment Owner is managed by the Gelman Management Company, a sophisticated, experienced real estate company. If notice had been received at 2120 L Street, NW, the Apartment Owner would certainly have acted quickly to file a party status application in opposition and participate fully in the original hearing. When it did finally become aware of the Application, the Apartment Owner moved forward in hiring counsel and timely filing these Motions.

The record in this case does not show that the Applicant took any steps to contact or engage the Apartment Owner or the Gelman Companies. Although such contact is not required, it is highly unusual - for a request of this degree - that an Applicant would not contact the one neighbor most directly burdened by the requested relief. It is also unusual that the Board would not inquire as to the whether or not the Applicant had contacted the Apartment Owner.¹

In deciding on a Motion for Rehearing based on the failure of notice, the Board should balance the interests of the Applicant with the potential detriment to the party that was unaware of the BZA application. In this case, if the Board decides to rehear the case with the benefit of the evidence presented by the Apartment Owner, it will have little impact on the Applicant, other than a relatively short delay in time. If, however, the Board does not grant the request for a

¹ In the transcript (p. 43-44), the Applicant touted the fact that they had "been in touch" with the property owner to the north. But the neighbor to the north is arguably unaffected by the specific relief being granted here. In contrast, the Apartment Building is much more directly affected by the specific relief; still, the Applicant chose not to contact the Apartment Owner.

rehearing, the Apartment Owner will be denied the opportunity to have any comment at all into zoning relief which, while being a great economic benefit to the Applicant, will have a substantially detrimental and permanent impact on the Apartment Owner.

While the Applicant may not be *legally* responsible for the Apartment Owner's incognizance of the Application, it should bear some *actual* responsibility therefor. This would not be true in every case, of course; but in this particular case, where the degree of relief is so significant, and where the relief requested will so directly and substantially burden one specific property, and where the Applicant made attempts to reach out to several other less-affected neighbors, the interests of the public would have been better served if the Applicant had engaged the Apartment Owner as it engaged other more favorably-situated neighbors.

The most equitable way for the Board to allocate that responsibility in this case would be to rehear the case and allow the Apartment Owner to participate, and to then make a decision based on evidence that *should have been* available to the Board in the original hearing.

V. Motion for Reconsideration.

BZA Order No. 18477 was a summary order and the Board in its deliberation did not discuss specific aspects of either the variance relief or the special exception relief. This makes it difficult to understand the rationale for the approval. Regardless, the Apartment Owner asserts that the decision is in error, on its face, as follows:

(i) Regarding the height setback variance relief approved, such relief allows the Applicant to build its building straight up to a height of seventy-five (75) feet, as opposed to the permitted fifty (50) feet with a 45 degree setback after that, in an area that is a mere eight (8) feet from existing residential apartment windows in the Apartment Building.

The Applicant states that the reason for the required setback in § 1902.1(b) is only to protect shorter residential properties in less dense zones. But § 1902.1(b) includes no such qualifier. Rather, it seems much more likely that the setback rule (which applies only in the more dense C-3-A zones) is meant to protect *taller* residential buildings in dense residential zones, such as the Apartment Building.

Because of the height of the Apartment Building in conjunction with the § 1902 relief, there are an additional three stories of residential apartments in the Apartment Building which will no longer enjoy the specific protection mandated by § 1902.1(b). The loss of light and air to these apartments – not to mention the apartments below – is on its face a substantial negative impact to these residents and to the Apartment Building.

The Applicant claims that because the Apartment Building is taller than its proposed building, granting the requested height relief will not adversely impact the Apartment Building. The reality is actually the opposite: it is because of the Apartment Building's height – which is matter-of-right -- that so many of its residents will be so negatively impacted by the grant of the height (and rear yard) relief.

Finally, the Applicant claims that it is actually the Apartment Building that will have an adverse impact on *its* proposed building. But the Applicant, not the Apartment Owner, is requesting zoning relief. The issue before the Board in this case is whether or not granting the requested zoning relief will cause substantial detriment to the Apartment Building, and clearly it will.

(ii) Regarding the special exception rear yard relief under § 774.2, the reduction of the rear yard, particularly when granted in conjunction with the height setback variance, will tend to

affect adversely the use of the Apartment Building, and therefore does not satisfy the general requirements of § 3104.1.

The Applicant attempts to address this criterion by focusing solely on property (or lack thereof) to its west, and simply ignores the fact that the reduction of the rear yard has a substantial negative impact on the light and air of the property to its south, the Apartment Building. Rear yard restrictions exist not only to protect properties to the rear of a property, but also to provide open space between neighboring properties on the side of a property. The reduction of the rear yard directly impacts the light and air of the Apartment Building, and this is multiplied by the fact that every foot of additional building in the required rear yard is also granted height setback relief as well.

(iii) The Application does not satisfy certain specific requirements under §§ 774.3 and 774.4. The Apartment Owner asserts that a distance of eight (8) feet is less than what is required to satisfy these special exception criteria. In BZA Order No. 17604, for instance, an applicant was granted this relief, but it was critical in that case that the two buildings were separated by a 14-foot alley and that both buildings were non-residential. In BZA Case No. 17933, an applicant was granted such relief, but again, there were no residential buildings adjacent to the subject building. It is also important to note that in this case, the Board reviewed the potential impacts on all three sides adjacent to the rear yard, not just the area to the rear of the subject property. The Apartment Owner would like a reasonable opportunity to present evidence, and additional precedent, to show that the Applicant does not satisfy the special exception requirements.

VI. Motion for Stay of BZA Order No. 18477.

To prevail on a motion for stay, the party seeking the stay must demonstrate that it is likely to prevail on the merits, that irreparable injury will result if the stay is denied, that the opposing parties will not be harmed by a stay, and that the public interest favors the granting of a stay. *See Kuflom v. District of Columbia Bureau of Motor Vehicle Services*, 543 Ad.2d 340, 344 (D.C.1988) (administrative agency required to consider the four specified factors in considering a motion for stay). Where the last three factors strongly favor temporary relief, only a substantial showing of likelihood of success, not a “mathematical probability,” is necessary for an agency to grant a stay. *See Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987).

In this case, the Apartment Owner asserts that it meets the four criteria referenced above:

(i) The Apartment Owner is likely to prevail on the merits of this Motion for Stay of BZA Order 18477 primarily because of the palpable and adverse effects of the relief in question. In the event that the Apartment Owner had in fact received notice of Applicant’s request, it would have taken the necessary steps to protect its interests, including filing a party status application, and would have presented critical evidence of the substantial negative impact on the Apartment House, including the impact on the light, air, and privacy of its residents.

(ii) Irreparable injury is indeed likely to result from a decision to deny these Motions for Reconsideration and Rehearing and Stay of BZA Order 18477, due to the nature of the relief granted to the Applicant and its direct impact on the Apartment Owner. Given the permanence and severity of the change of building height by the Applicant, the Apartment Building tenants will suffer a substantial decrease in air and light and privacy on all stories from the 8th Floor and below, particularly in the floors along the area of relief from a height of fifty to seventy-five feet. In addition, the Apartment Owner is likely to suffer a significant devaluation of particular

apartment units and Apartment Building as a whole, considering the fact that light and air and reasonable privacy are two qualities that tenants currently enjoy and place substantial value in.

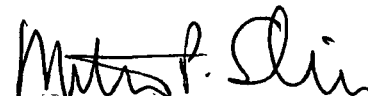
(iii) The Applicant will not be harmed by the granting of a stay primarily because of Apartment Owner's swift action to provide the Board with detailed information as to the potential negative effects of Applicant's granted relief. Granting a Stay would only cause Applicant a minor delay, whereas the denial of a Stay could cause the Apartment Owner to suffer permanent, unjust, and adverse consequences due merely to a lack of notice of Applicant's initial request for relief.

(iv) Lastly, the public interest favors the granting of a Stay. The public interest is generally best served when the BZA makes decisions with all available information, especially regarding an adjacent neighbor so directly impacted as in this case. It is also in the public interest that Applicants asking for such significant relief engage affected adjacent property owners. The Applicant engaged many other neighbors to garner support, but never contacted the Apartment Owner, the most negatively affected neighbor.

VII. Conclusion.

For the reasons stated above, the Movant respectfully requests that the Board grant the requested actions.

Respectfully Submitted,

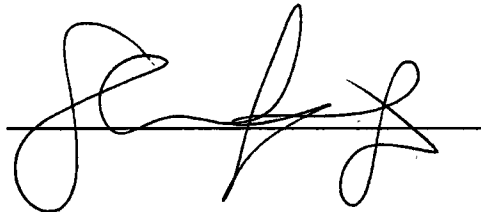
 3/4/13

Martin P. Sullivan
Sullivan & Barros, LLP

**AFFIDAVIT OF Shannon Kenny RECEPTIONIST FOR THE GELMAN
COMPANIES AT 2120 L STREET, NW WASHINGTON, DC 20037**

1. My name is Shannon Kenny am over 18 years of age and I am competent to testify to the matters contained in this affidavit which are based on my personal knowledge.
2. I am the receptionist for the Gelman Companies (the "Company"), and in that position I am the person responsible for receiving and distributing mail and deliveries addressed to the Company at 2120 L Street, NW, Washington, DC 20037.
3. Prior to February 21, 2013, I received no notice of any kind from any individual, organization, or government agency regarding Board of Zoning Adjustment ("BZA") Application No. 18477 (the "Application").
4. I had no actual knowledge of the Application until I received a copy of BZA Order No. 18477 on February 21, 2013.
5. To my knowledge, no other person at the Gelman Companies received any notice of the Application prior to February 21, 2013, nor had any actual notice of the Application prior to February 21, 2013.

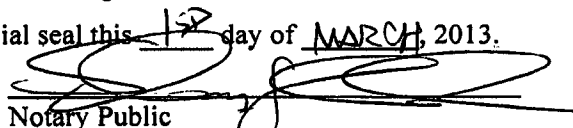
I hereby swear or affirm under penalties of perjury that the foregoing statements are true.



DISTRICT OF COLUMBIA) ss:

I, GREGORY KOZLOWSKI, a Notary Public in and for the jurisdiction aforesaid do hereby certify that SHANNON KENNY, who is personally well known to me as the person named as the receptionist for the Gelman Companies at 2120 L Street, NW, personally appeared before me in the jurisdiction aforesaid and acknowledged said instrument to be her act and deed.

WITNESS my hand and official seal this 15 day of MARCH, 2013.


Notary Public

[Notarial Seal]

My commission expires: 10/14/2016



**AFFIDAVIT OF PETER J. KELLY, EMPLOYED BY THE GELMAN COMPANIES
AS THE PROPERTY MANAGER FOR THE NEWPORT WEST APARTMENTS
LOCATED AT 1415 RHODE ISLAND AVENUE, NW, WASHINGTON, DC 20005**

1. My name is PETER J. KELLY I am over 18 years of age and I am competent to testify to the matters contained in this affidavit which are based on my personal knowledge.
2. On behalf of the Gelman Companies, owner of the Newport West Apartments located at 1415 Rhode Island Avenue, NW (the "Apartment House"), I am the person responsible for reviewing and processing all mail and deliveries to 2120 L Street, NW, concerning the Apartment House.
3. Prior to February 21, 2013, I received no notice of any kind from any individual, organization, or government agency regarding Board of Zoning Adjustment ("BZA") Application No. 18477 (the "Application") involving variance relief for the property adjacent to the Apartment House, located at 1400-1404 14th Street, NW (the "Adjacent Property").
4. I am responsible for multiple properties, and as such was not in a position to view, nor did I view, any postings on the Adjacent Property.
5. I had no actual knowledge of the Application until I received a copy of BZA Order No. 18477 on February 21, 2013.
6. To my knowledge, no other person at the Gelman Companies received any notice of the Application prior to February 21, 2013, nor had any actual notice of the Application prior to February 21, 2013.

I hereby swear or affirm under penalties of perjury that the foregoing statements are true.

Peter J. Kelly

DISTRICT OF COLUMBIA) ss:

I, GREGORY KOZLOWSKI, a Notary Public in and for the jurisdiction aforesaid do hereby certify that PETER KELLY, who is personally well known to me as the person named as the DIR. RES. P.M. for the Newport West Apartment House and employed by the Gelman Companies personally appeared before me in the jurisdiction aforesaid and acknowledged said instrument to be his act and deed.

WITNESS my hand and official seal this 15 day of MARCH, 2013.

[Signature]
Notary Public

[Notarial Seal]

My commission expires: 10/14/2016

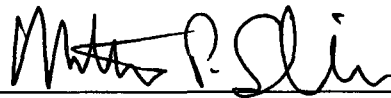


CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2013, a copy of this Motion for Reconsideration was mailed by U.S. Mail or delivered via e-mail to the following:

Allison Prince
Goulston Storrs
1999 K Street, NW, Suite 500
Washington, DC 20006

ANC 2F
5 Thomas Circle, NW
Washington, DC 20005

A handwritten signature in black ink, appearing to read "Martin P. Sullivan", written over a horizontal line.

Martin P. Sullivan