

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18477 of Abdo 14th St LLC, pursuant to 11 DCMR §§ 3103.2 and 3104.1, for a variance from the building height setback requirements under subsection 1902.1(b), a variance from the off-street parking requirements under subsection 2101.1, and a special exception from the rear yard requirements under subsection 774.2, in the ARTS/C-3-A District at premises 1400-1404 14th Street, N.W. (Square 210, Lots 82, 102, and 800).

HEARING DATE: January 8, 2013

DECISION DATE: January 8, 2013

FINAL ORDER DATE: January 30, 2013

RECONSIDERATION

DECISION DATE: April 9, 2013

ORDER DISMISSING
MOTION FOR RECONSIDERATION, REHEARING, AND STAY

The order of the Board of Zoning Adjustment (“Board”) approving the application of Abdo 14th St LLC (“Applicant”) was issued on January 30, 2013 (“Order”). On March 4, 2013, a motion for a waiver of the Board’s rules for reconsideration and rehearing and for a stay of the Order (“Motion”) was filed by Gelman Management Company (“Gelman”), which had not requested party status. The motion itself does not indicate the time period for which a stay is requested. As will be explained, the Board concludes that the stay is sought during the pendency of the requested rehearing.

The waivers sought are from two preconditions to filing a motion for reconsideration and rehearing, namely that the motion must be filed by a party and must be filed within ten days after a final order is issued. The Applicant filed an Opposition to the Motion (“Opposition”) on March 14, 2013.

For the reasons set forth below, the Board found that Gelman failed to establish good cause to waiver either of these requirements and voted to dismiss the portion of the motion that requested reconsideration and rehearing. Since the motion only sought to stay the effectiveness of the order during the rehearing and since no rehearing will occur, the Board also dismissed the portion of the motion requesting the stay relief.

The Request for Waivers

Pursuant to § 3126.2 of the Board's Rules of Practice and Procedure (Chapter 31 of Title 11 DCMR):

Any party may file a motion for reconsideration or rehearing of any decision of the Board, provided that the motion is filed with the Director within ten (10) days from the date of issuance of a final written order by the Board.

As noted, the Order was issued¹ on January 30, 2013. Therefore, any party² who wished to file a motion for reconsideration was required to do so by February 11, 2013.³ A non-party could not file such a motion at all.

Gelman filed its motion for reconsideration and rehearing on March 4, 2013, well after this period had expired and, as noted, Gelman was not a party.

Pursuant to § 3100.5 of the Board's Rules, the Board may, for good cause shown, waive many of its rules, including the party and timelines requirements of § 3126.2. Gelman's claim of "good cause" for the Board to waive its prohibition against non-parties filing motions for reconsideration and rehearing is that it did not receive mailed notice of the hearing, and therefore was unable to avail itself of the opportunity to request and receive party status. The good cause claimed for waiving the ten day filing rule is based upon this same claimed lack of notice.

The Board concludes that Gelman received mailed notice of the hearing within the time period prescribed by the Board's rules and that even had it not, notice was given through the other forms of notice required by §§ 3113.13 through 3113.15.

Subsections 3113.13 through 3113.15 prescribe several different means by which notice of a Board public hearing is given. One of these is that the Director of the Office of Zoning must give such notice not less than forty days before the date of the hearing by "mailing the notice to the applicant and to the owners of all property within two hundred feet (200 ft.) of the property involved in the application." Gelman claims not to have been given this form of notice. The Board concludes otherwise.

¹ The Board rejects Gelman's contention that this time period started when it received a copy of the Order from the Office of Zoning. The language of the rule plainly calls for the ten day period to commence upon the "issuance" of a final order. The Board's rules cannot plausibly be read as allowing the time for filing a reconsideration motion to restart whenever the Office of Zoning responds to a request for a copy of a final order.

² No requests for party status were received by the Board. Therefore the only parties to this proceeding were the Applicant and ANC 2F.

³ The tenth day fell on a Saturday. When this is the case, the § 3110.2 of the Board's rules provide that a time period is extended to the next business day, which in this case was Monday February 11.

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First, the Board finds that the notice was mailed to Gelman's address. The Order states as much. Moreover Gelman does not deny that its correct name and address was provided by the Applicant to the Office of Zoning (Motion at 4) and the Board has no reason to doubt that the notice was mailed to that address. Gelman's claim that this did not occur is based solely upon two affidavits; one by an affiant "responsible for receiving and distributing mail" addressed to Gelman and the other by an affiant "responsible for reviewing and processing" such mail. Both claim to have "received no notice of any kind" about the application, yet neither offer any objective evidence to support these assertions, such as logs of mail received, processed, distributed, or reviewed. Therefore this attempt to prove a negative appears based only upon a lack of recollection. The Board concludes that the notice of the hearing was mailed to Gelman and that there is no credible evidence to suggest otherwise.

Even if the mailed notice was not sent, the Board concludes that Gelman was given notice of the hearing through the other applicable forms of notice required by §§ 3113.13 through 3113.15 including, but not limited to, the posting of the notice on the subject property "in plain view of the public", publication of the notice in the District of Columbia Register, and the mailing of the notice to Advisory Neighborhood Commission 2F, which hosted multiple meetings involving presentations by the Applicant, held a properly noticed hearing on the application, and ultimately voted in support of the Application. Contrary to the assertion made in the Motion, this is not "a case of first impression." Rather, the Board has on at least two occasions ruled that the absence of mailed notice does not warrant the continuation of a hearing when the other forms of notice were given. *See Application 16412 of Florida Avenue Partnership* (1999); *Application 15825 of David Dale* (1993).

Gelman does not dispute that the other notice requirements of §§ 3113.13 through 3113.15 were met. Instead, the Motion attempts to downplay the significance of the posting of the notice through the affidavit of Gelman employee Peter Kelly who states he is "responsible for multiple properties" and therefore was not in a position to view" and did not view "any posting on the adjacent property." The Board agrees with the Applicant that this statement is not credible given the large bright orange signs posted in plain view of the public.

The Board therefore finds that Gelman was given notice of the public hearing. Since the claimed lack of notice is the basis of the two waivers sought, both are denied.

The Request for to Stay

As noted, the motion to stay does not identify the proceeding to which the stay relates. The Board is aware that a petition for review of the Order was filed in the Court of Appeals on March 3, 2013 and that the proceeding has been held in abeyance pending the issuance of this decision. However, Gelman does not claim that this motion was filed pursuant to Court of Appeals Rule 18(a)(2)(ii), which provides that a "petitioner⁴ must ordinarily move first before the agency for a stay pending review of its decision or order." In addition, the Motion does not claim that a stay

⁴ Gelman is not the Petitioner.

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is warranted because the petition for review will succeed on its merits, but rather that Gelman will succeed on the merits of the Motion before the Board. For these reasons the Board concludes that the requested stay was predicated upon the Board's grant of a rehearing and was intended to remain in place during its pendency. Since the Board has dismissed the request for a rehearing, the associated stay request has been rendered moot and is also dismissed.⁵

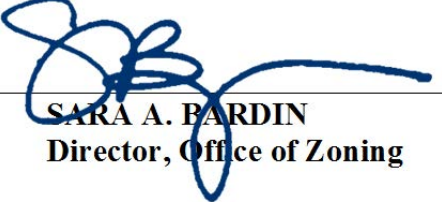
For the reasons stated above, it is **ORDERED** that the motion for reconsideration, rehearing, and stay is **DISMISSED**.

VOTE: **4-0-1** (Nicole C. Sorg, Jeffrey L. Hinkle, Lloyd J. Jordan (by absentee ballot), and Marcie I. Cohen (by absentee ballot) to Dismiss; No other Board member participating.)

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

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

ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: September 26, 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.

⁵ Even if the stay was requested for the duration of the petition for review, the Applicant has demonstrated that Gelman has failed to meet the standard for the Board to grant such relief. See Opposition at pages 12-14.