

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 18681-A on the Motion for Rehearing and Reconsideration in the Application of Shirley H. Cox, pursuant to 11 DCMR § 3104.1, for a special exception to establish a child development center (15 children and 3 staff) under § 205 (last approved under BZA Order No 18074¹) in the R-2 District at premises at premises 3008 K Street, S E (Square 5482, Lot 8)

HEARING DATE: December 17, 2013

DECISION DATE: December 17, 2013

ORDER DATE: December 19, 2013

**DECISION DATE FOR MOTION
FOR RECONSIDERATION**

AND REHEARING: February 4, 2014

**ORDER DISMISSING MOTION FOR REHEARING
AND RECONSIDERATION**

On December 19, 2013 the Board of Zoning Adjustment (the "Board") issued an order (the "Order") granting the application of Shirley Cox (the "Applicant") Specifically, the Order granted the Applicant's request for a special exception allowing the conversion of a one-family dwelling to a child development center ("CDC"), with a maximum of 15 children and three staff The site is located within the jurisdiction of the Advisory Neighborhood Commission ("ANC") 7B, and the ANC received notice of the Board hearing For reasons to be explained later, the ANC did not file a written report with the Board nor did a representative attend the hearing. On January 10, 2014, the ANC filed a letter with attachments (the "Motion"), requesting a rehearing and reconsideration of the matter, as well as an "extension of time" for filing the Motion (Exhibit 30) On January 17, 2014, the Applicant filed a letter opposing the Motion, stating she would suffer a significant hardship if the case were reopened (Exhibit 33) For reasons explained below, the Board voted on February 4, 2014 to deny the requested extension and to dismiss the ANC's Motion as untimely

Subsection 3126.2 of the Board's Rules of Practice and Procedure (Chapter 31 of Title 11 DCMR) provides that a motion for reconsideration or rehearing of any Board decision be filed

¹ The caption in the Board's Summary Order, BZA Order No 18681, incorrectly identifies the case number in the previous Order as 18079 instead of 18074

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within 10 days from the date of issuance of the final written order reflecting that decision (hereafter, "the filing requirement") The Board's Order was issued on December 19, 2013 and was sent that day to the ANC by first class mail Subsection 3110.3 of the Board's Rules of Practice and Procedure provide that "[w]henver 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 days shall be added to the prescribed period " That would result in the Motion being due on January 1, 2014, which was a holiday Therefore, pursuant to § 3110.2, the motion was due by the end of the next business day, which was January 2 The motion was not filed until January 10

Mindful of its late filing, the ANC requested that the Board grant an "extension of time" The Board treats the ANC's request for an "extension of time" as a request to waive the 10 day filing requirement embodied in § 3126.2 Subsection 3100.5 authorizes the Board to waive most provisions of its Rules of Practice and Procedure including § 3126.2, provided there is "good cause" for the request to waive, and the waiver will not prejudice another party

The Board finds that the ANC has not established the "good cause" that is required to waive the Filing Requirement The ANC's explanation for its late filing is somewhat confusing First, the motion states that the ANC's staff receives its mail at the ANC's office, but then later states that its mail arrives at its meeting space and is picked up by its Secretary It is not clear why the ANC's staff did not receive the Motion on December 24th, which according to the ANC would have been the first opportunity to do so, or why the ANC's Secretary did not pick up the mailed Order even before that. The inclement weather complained of occurred in early January well after the mailed motion should have been received Finally, the fact that the ANC's Executive Committee's meeting was postponed from New Year's Day to January 8 is not relevant As a party to a contested case, the ANC should have designated a representative who was authorized to make decisions of this kind The Board is not required to extend its deadlines to accommodate an ANC's meeting schedule *See e.g. Neighbors on Upton Street v District of Columbia Bd of Zoning Adjustment*, 697 A.2d 3, 10-11 (D.C. (1997) (ANC not entitled to greater time to respond to submissions)

Furthermore, the Board finds that allowing the belated consideration of the Motion would result in prejudice to the Applicant On January 17, 2014, the Applicant filed a timely Response to the ANC's Motion (*See*, 11 DCMR § 3126.5) The Applicant states therein that she is a small business owner who is attempting to get the CDC "up and running", and she describes the various steps she must take to do so, for instance, obtaining a certificate of occupancy, and submitting an application to the Office of the State Superintendent for Education ("OSSE") She asserts that preparing for rehearing or reconsideration would interrupt these steps.

The Board has no doubt that the Applicant would be prejudiced were the Board to entertain the Motion at this late date

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Since the ANC has demonstrated neither good cause nor the absence of prejudice, the Board cannot grant a waiver to the Filing Requirement and therefore must dismiss the Motion as untimely

However, even had the motion been timely filed, it states no basis for a rehearing or reconsideration

As to the request for rehearing, § 3126.6 provides that no request for rehearing shall be considered unless new evidence is submitted that could not reasonably have been presented at the original hearing. No such evidence has been submitted

The ANC essentially requests that the Board now consider its undated “Resolution” in opposition to the continuation of the CDC.² The ANC notes that the resolution was approved on November 21, 2013, but was inadvertently sent to the Office of Planning rather than the Office of Zoning. The ANC did not present the resolution at the hearing because it mistakenly thought the hearing date was on December 18 instead of December 17. Thus there is nothing “new” about the evidence. In fact, OP and the Applicant advised the Board that the ANC opposed the application. (Hearing Transcript of December 17, 2014, pgs. 57 – 66.) Thus, the Board was mindful of the ANC’s position, but granted the application based upon the case presented by the Applicant, along with support from OP, OSSE, and the Department of Transportation. Although the Board understands why the ANC was not able to present the resolution, its explanation does not form a basis for the Board to rescind its vote and grant a new hearing.

Similarly, the ANC has not stated any basis for its request for reconsideration. Subsection 3126.4 of the Board’s Rules of Practice and Procedure requires that 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.” On its face, the ANC motion alleges no error in the Board’s decision. The ANC acknowledges its *own* errors in connection with the missed hearing date and the failure to submit its Resolution in Opposition. But these errors in no way amount to errors made by the Board in reaching its decision.

For the reasons stated above, it is **ORDERED** that the Motion for Rehearing and Reconsideration is **DISMISSED**.

VOTE: **4-0-1** (Lloyd J. Jordan, S. Kathryn Allen, Jeffrey L. Hinkle, and Michael G. Turnbull to Dismiss the Motion, one Board seat vacant)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order

² A copy of the Resolution is attached to the Motion. (Exhibit 30)

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ATTESTED BY:  _____ *for*
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: August 22, 2014

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