ROBINS, KAPLAN, MILLER & CIRESI LLP

ATTORNEYS AT LAW

SUITE 1200
1801 K STREET, N.W.
WASHINGTON, D.C. 20006-1307
TEL: 202-775-0725 FAX: 202-223-86(
www.rkmc.com

RICHARD B. NETTLER
JEANNINE RUSTAD
(202) 775-0725

July 23, 2004

BY HAND
Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, DC 20001

Re: Application of the Mark Lee Phillips, BZA Application No. 17079
Opposition to Motion for Reconsideration
417 A Street, SE
Our File No. 092229.0000

Dear Mr. Griffis:

For the following reasons, Mark Phillips, the applicant in the above-referenced matter, opposes the Request for Reconsideration of Gene Berry:

The Request is Untimely. Section 3126.1 of the zoning regulations permits a party to file a motion for reconsideration within ten (10) days from date of issuance of a final written order by the Board. Such motion must be served upon all other parties. 11 D.C.M.R. § 3126.3.

Mr. Berry's request is untimely given the fact that he failed to serve his request[1] on the parties to this proceedings within ten (10) days of the issuance of the final order. There is no provision in the zoning regulations for filing a paper and then serving it almost three (3) months later. Moreover, to date, Mr. Berry has failed to serve both the ANC and Office of Planning, both of which are parties to this matter.

Mr. Berry Offers No New Evidence. Section 3126.6 provides that "[n]o request for rehearing shall be considered by the Board unless new evidence is submitted that could not reasonably have been presented at the original hearing." Mr. Berry offers no new evidence to the Board.

---

[1] As evidenced by the lack of compliance with section 3111.4 of the zoning regulations in each of his filings, Mr. Berry has consistently failed to serve the parties in this matter with any of his pleadings. Previous filings by Mr. Berry prior to the final decision in this matter were only obtained by counsel for Mr. Phillips through regular checking of the file at the Office of Zoning. The instant filing was only discovered by happenstance when counsel for Mr. Phillips checked the Board's public meeting scheduled for July 6, 2004 to see where another matter she was to attend the meeting for was on the agenda. Much to her surprise, she noticed that the Board would be considering a Motion for Reconsideration in the instant matter.

Word 45652714.1

BZA
Case No. 17079
Exhibit No. 89

Board of Zoning Adjustment
District of Columbia
CASE NO. 17079
EXHIBIT NO. 89

The Board Afforded the ANC's Position "Great Weight". Mr. Berry alleges that the Board merely paid the ANC "lip service" and failed to give the ANC's position great weight.[2] To the contrary, the Board gave the ANC the deference required by law.

It is well settled that in giving the ANC its required "great weight", the Board must:

> "elaborate, with precision, its response to the ANC issues and concerns," and . . . "articulate why the particular ANC itself, given its vantage point, does -- or does not -- offer persuasive advice under the circumstances." . . . While *the agency is not required to defer to the ANC's views* . . . failure to address ANC concerns with particularity is for a remand . . . .

Watergate West, Inc. v. District of Columbia Board of Zoning Adjustment, 815 A.2d 762, 769 (D.C. 2003), *citing, Levy v. District of Columbia Board of Zoning Adjustment*, 570 A.2d 739, 746 (D.C. 1990) (citations omitted). Simply put, the Board must address the ANC's concerns in its order, but need not adopt the ANC's point of view.

In the instant matter, the ANC was primarily concerned with parking. Accordingly, in its order the Board stated:

> The Board was not persuaded by ANC 6B or by the party in opposition that expansion of the existing bed and breakfast home occupation to four sleeping rooms would create adverse impacts on neighboring property. The ANC expressed concern about the effect of the expanded B&B operation on parking, but the Board does not find that the addition of two sleeping rooms would adversely affect the supply of parking in the neighborhood, particularly since a large proportion of guests will arrive at the subject property by taxi or public transportation or on foot. The Board credits DDOT's conclusion that the requested special exception would not adversely affect parking in the neighborhood of the subject property.

The Board, with regard to the great weight it accorded the ANC, explained that:

> However, ANC 6B did not offer persuasive advice that would cause the Board to find that the proposed bed and breakfast home occupation with

---

[2] Mr. Berry further complains that the Board ignored the Capitol Hill Restoration Society's ("CHRS") opposition to the application. However, the Board is not required to give any weight to the opinions of non-party submissions. Even if the Board were required to give any deference to non-party opinions, given that CHRS's basis for opposing the application was traffic and parking – the same issue as the ANC raised – the Board adequately addressed why traffic and parking would not be adversely affected by the granting of the application.

> four sleeping rooms is contrary to the Zoning Regulations and would adversely affect the use of neighboring property.

In making these statements in its order, the Board has satisfied its obligations pursuant to D.C. Code § 1-309(d)(3).

It is of particular note that the Board credited DDOT's conclusion as to parking, as DDOT's conclusions supported Mr. Phillips's testimony and evidence that the increase in sleeping rooms would not adversely affect the surrounding neighborhood. Thus, contrary to Mr. Berry's accusations, the evidence presented by Mr. Phillips was not "uncorroborated."[3]

A review of the transcript of the Board's public meeting during which it decided the instant matter makes it clear that the Board considered the ANC's position, as well as the complaints from the parties in opposition. Feb. 3, 2004 TR. at 92-102. For example, Board member Zaidain stated, with regard to traffic that "the impacts, in my mind, would be no different than a single-family residence." Feb. 3, 2004 TR. at 95. Board member Miller elaborated on this issue instated that:

> I think parking was the biggest adverse impact that was addressed, and I don't think the opponents had anything really substantial. There were concerns that parking is difficult, but there wasn't anything to grab onto as to that this increase to two more bedrooms would cause much more difficulties for parking.
>
> ANC characterized it as one of the potentially most disruptive elements of a B&B with more than two rooms. Well, it's potentially, but there really wasn't any evidence there that that was really going to happen. Whereas, *on the other side we had Department of Transportation, whose job it to assess this kind of impact, reviewing the application and determining that the proposed increase would not adversely impact parking in the neighborhood.*

Id. at 95-96 (emphasis added). Similarly, with regard to the issues of noise and commercialization raised by the ANC and parties in opposition, Board member Miller stated that:

> And with respect to other types of adverse impacts, we heard the next door neighbor complained about luggage going upstairs or being asked directions or sounds from party walls, and that does not, to me, rise to the level of adverse impacts that the regulations contemplate. And there was

---

[3] Mr. Berry's description of the evidence in support of the application is further lacking, in that Mr. Berry fails to address the testimony of Ms. Jaclyn Reed, the president of the Bed & Breakfast Society. Clearly, Ms. Reed had nothing to gain from her testimony.

> also a concern about commercialization, but there wasn't really any evidence that it was going to increase commercialization.

Id. at 96.

Even a cursory review of the Order and February 3, 2004 transcript illustrate that, contrary to Mr. Berry's allegations, the Board did review the entire record in rendering its decision.

Conclusion

Mr. Phillips respectfully requests that the Board deny Mr. Berry's request for reconsideration as (1) the request is untimely and Mr. Berry has failed to serve all parties to this matter; (2) Mr. Berry fails to proffer any new evidence that could not have been presented at the hearing; (3) the Board fulfilled its obligations regarding the ANC's concerns; and (4) as set forth in the Board's order and the record of this matter, Mr. Phillips met his burden of proof for the requested relief.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Richard B. Nettler
Jeannine Rustad

cc: Mark Lee Phillips (by hand)
ANC 6B
Jacqueline Eiting (107 5th Street, S.E.)
Eugene Berry, Jr. (100 5th Street, S.E.)
William Martin (409 A Street, S.E.),
Christopher Andres and Aaron Schuham (415 A Street, S.E.)
Travis Parker, Office of Planning (by hand)