

Holland & Knight

2099 Pennsylvania Avenue, N.W., Suite 100 | Washington, DC 20006 | T 202.955.3000 | F 202.955.5564
Holland & Knight LLP | www.hklaw.com

Wayne S. Quin
202 663 7274
wayne.quin@hklaw.com

July 9, 2009

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17837

EXHIBIT NO. 59

VIA HAND DELIVERY

D.C. Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210-S
Washington, DC 20001

2009 JUL 10 PM 11:06
OFFICE OF THE CLERK
BOARD OF ZONING ADJUSTMENT
DISTRICT OF COLUMBIA

Re: Board of Zoning Adjustment Application No. 17837
Applicant's Response to Motion for Reconsideration or Rehearing
(Robin Marlin)

Dear Members of the Board:

By order dated June 23, 2009, the Board of Zoning Adjustment ("BZA" or the "Board") approved the above-referenced application for special exception and variance relief to allow the construction of a new residential development on property located along Southern Avenue between Branch Avenue, S.E. and Naylor Road, S.E. On July 6, 2009, Robin H. Marlin, the Advisory Neighborhood Commission ("ANC") 7B commissioner responsible for the single-member district in which the subject property is located, filed a motion for reconsideration or rehearing of the Board's decision in BZA Case No. 17837.¹ That motion must be denied for a number of reasons.²

I. Ms. Marlin Was Not Authorized to File the Motion on ANC 7B's Behalf

Section 3126.2 provides that a "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." 11 DCMR § 3126.2. The Board's procedural rules define a "party" as the applicant, the ANC for the area in which the subject property is located, and any "other person granted party status by the Board pursuant to § 3106.3." 11 DCMR § 3199.1 ("party"). Although ANC 7B was automatically a party to the

¹ On July 2, 2009, the Office of Zoning received a motion for reconsideration or rehearing from Julius Fleischman, who was granted party status in the original proceedings on the application. The Applicant has responded to that motion in a separate letter to the Board.

² With respect to Ms. Marlin's characterization of the public hearing on the application, the Applicant believes that the transcript of the public hearing speaks for itself. See BZA Case No. 17837 Public Hearing Transcript (November 18, 2008).

original proceedings on the application, Ms. Marlin has presented no evidence that she was authorized by the ANC to file the motion for reconsideration or rehearing on its behalf. Indeed, there is no indication in the letter that she received such authorization. Because Ms. Marlin was not individually granted party status during the public hearing on the application, her motion is not properly before the Board and must be denied.

II. The Motion for Rehearing Does Not Meet the Requirements of Section 3126.6

Section 3126.6 of the Zoning Regulations 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." 11 DCMR § 3126.6. Ms. Marlin's motion does not even address whether she has any new evidence that could not reasonably have been presented during the public hearing on the application. The motion for rehearing must therefore be denied.

III. The Motion for Reconsideration Fails to Meet the Burden of Section 3126.4

Section 3126.4 of the Zoning Regulations provides that a "motion for reconsideration shall state specifically all respects in which the decision is claimed to be erroneous, the grounds of the motion, and the relief sought." 11 DCMR § 3126.4. Because Ms. Marlin has failed to identify any errors that would provide a sufficient basis for reconsideration of the Board's decision, her motion for reconsideration must be denied.

Ms. Marlin first takes issue with Finding of Fact 28, which states that a number of the theoretical building sites and dwellings within the proposed residential project require variance relief from certain area requirements, but do not require such relief from the maximum lot occupancy or maximum height limitations of the R-1-B District. In other words, that finding simply notes that the theoretical building sites and dwellings within the proposed development, as presented in the application, complied with the maximum height and lot occupancy limitations but did not comply with a number of other requirements (i.e., number of stories, lot area and width, rear yard, side yard, and front yard). The Board clearly committed no error in making that finding.

Next, Ms. Marlin appears to argue that Findings of Fact 44 and 45 are not supported by substantial evidence in the record because the proposed extension of Southern Avenue was not discussed during the public hearing. That claim is incorrect. The proposed extension of Southern Avenue was discussed extensively during the public hearing, in the Applicant's prehearing statement, in the Applicant's traffic impact study, and in the reports filed by the Office of Planning and the District Department of Transportation ("DDOT"). In fact, Ms. Marlin cross-examined the Applicant's witnesses about the impact of the Southern Avenue extension on access to the adjacent Marlborough House apartment building. *See, e.g.,* BZA Public Hearing Transcript (November 18, 2008), at 209-11. In addition, Ms. Marlin's unsubstantiated claim that DDOT does not support the proposed extension is belied by the report that was filed by that agency on the application. Findings of Fact 44 and 45 are supported by substantial evidence in the administrative record.

Finally, Ms. Marlin takes issue with Findings of Fact 62 through 70, which provide support for the Board's conclusion that the strict application of the Zoning Regulations would result in practical difficulties for the Applicant. In response to those findings, however, Ms. Marlin simply claims that it would be possible to develop the subject property in conformity with the Zoning Regulations, and that any practical difficulties in the development of the subject property are self-imposed because the Applicant was aware of the topographical challenges of the site prior to its acquisition of the property. Those arguments are without merit.

First, the standard for the approval of an area variance is not, as Ms. Marlin implies, "physical impossibility." Rather, the Board must simply determine that the strict application of the Zoning Regulations would result in a practical difficulty in the development of the property. *See Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 540-41 (D.C. 1972)(noting that "area variances have been allowed on proof of practical difficulties only while use variances require proof of hardship, a somewhat greater burden"). An applicant experiences practical difficulties when compliance with the Zoning Regulations would be "unnecessarily burdensome." *See Washington Canoe Club v. D.C. Zoning Commission*, 889 A.2d 995, 1001 (D.C. 2005). The Board concluded that the strict application of the Zoning Regulations would result in practical difficulties for the Applicant in light of the site's development constraints, and that conclusion was predicated on findings of fact that were based on substantial evidence in the record.

Second, the self-created hardship doctrine is not applicable to the approval of an application for an area variance. *See, e.g., Russell v. D.C. Board of Zoning Adjustment*, 402 A.2d 1231, 1236 n.7 (noting that the D.C. Court of Appeals "has held that the self-created hardship doctrine does not apply to an application for an area variance"); *Washington Canoe Club v. D.C. Zoning Commission*, 889 A.2d 995, 1001 n.4 (D.C. 2005)(holding that "the rule of self-created hardship does not apply to a grant of area variances"). The fact that the Applicant may have been aware of the topographical constraints of the site prior to purchasing the property is irrelevant to the regulatory standards for an area variance.

More generally, the mere fact that Ms. Marlin disagrees with the Board's resolution of a particular factual issue does not provide a sufficient basis for reconsideration of its decision. The D.C. Court of Appeals has consistently held that an "agency, as a finder of fact, may credit the evidence upon which it relies to the detriment of conflicting evidence, and need not explain why it favored the evidence on one side over that on the other." *United Unions, Inc. v. D.C. Board of Zoning Adjustment*, 554 A.2d 313, 315-16 (D.C. 1989). In short, the Board is not required to provide an extensive explanation for its decision to credit the evidence presented by the Applicant instead of the conflicting evidence presented by Ms. Marlin.

The Board was confronted with conflicting testimony on a number of material issues in this case and was required to make factual findings based solely on the evidence submitted into the record by the parties. The Board made six findings of fact on the issue of the property's uniqueness, eleven findings of fact on the issue of practical difficulty, and six findings of fact on the issue of detriment to the public good and zone plan. Each of those factual findings was based on substantial evidence in the administrative record.

IV. Ms. Marlin Was Afforded the Prescribed Time under the Zoning Regulations in Which to File Her Motion

Ms. Marlin's motion claims that the "ANC *was not* afforded the opportunity to have ten (10) days to respond to the final decision as is specified in DCMR Title 11 Section 3126.2," but she provides no further explanation of how the ANC was denied a sufficient period of time in which to file a motion for reconsideration or rehearing. Section 3126.2 provides that a party may file a motion for reconsideration or rehearing within ten days of the date on which a final written order is issued by the Board. 11 DCMR § 3126.2. Section 3110.3 further provides that when "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." 11 DCMR § 3110.3. Because the Board's order was mailed to ANC 7B, the ANC was entitled to thirteen days in which to file a motion for reconsideration or rehearing. Ms. Marlin's motion was filed on July 6, 2009, which is exactly thirteen calendar days after Board's order was mailed to the ANC. The ANC was afforded the prescribed time under the Zoning Regulations in which to file its motion.

In short, there is simply no basis upon which to grant Ms. Marlin's motion for reconsideration or rehearing. First, Ms. Marlin was not authorized by ANC 7B to file the motion on its behalf, and she was not individually granted party status during the public hearing on the application. Second, she has failed to present any new evidence that would warrant a rehearing on the application. Finally, Ms. Marlin has failed to identify any errors in the Board's decision that would provide a basis for reconsideration. The Board should therefore deny her motion.

Sincerely,

HOLLAND & KNIGHT LLP


Wayne S. Quin

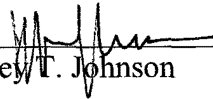
CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2009, a copy of the foregoing response was served via first-class mail on the following:

Commissioner Robin Marlin
Single Member District 7B05
Advisory Neighborhood Commission 7B
3350 Erie Street, S.E.
Washington, DC 20020

Julius Fleischman
2901 Branch Avenue, S.E.
Washington, DC 20020

Advisory Neighborhood Commission 7B
3200 S Street, S.E.
Washington, DC 20020



Jeffrey T. Johnson