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July 9, 2009

VIA HAND DELIVERY

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

BOARD OF ZONING ADJUSTMENT District of Columbia

CASE NO. 17837
EXHIBIT NO. 60

2009 JUL 10 PM 1:05
DC OFFICE OF ZONING

**Re: Board of Zoning Adjustment Application No. 17837
Applicant's Response to Motion for Reconsideration
(Julius Fleischman)**

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 2, 2009, Julius Fleischman filed a timely motion for reconsideration of BZA Order No. 17837.¹ Because Mr. Fleischman has failed to demonstrate that the Board's decision was erroneous in any way, the Board should deny the motion for reconsideration.

I. The Motion Does Not Meet the Requirements of Section 3126.4

The motion for reconsideration is legally insufficient on its face. 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 (emphasis added). Mr. Fleischman's motion, however, fails to cite any specific legal or factual errors in the Board's decision that would warrant its reconsideration. The motion does not allege, for example, that any specific finding of fact in the Board's order was not supported by substantial evidence in the record. Nor does Mr. Fleischman claim that the Board's decision was arbitrary or capricious, based on an unreasonable interpretation of the Zoning Regulations, or otherwise not in accordance with law. To the

¹ On July 6, 2009, the Office of Zoning received a motion for reconsideration or rehearing from Robin H. Marlin, the Advisory Neighborhood Commission ("ANC") 7B commissioner for the single-member district in which the subject property is located. The Applicant has responded to that motion in a second letter to the Board.

contrary, the motion is nothing more than an attempt to resurrect arguments that were already considered but not accepted by the Board during the public hearing on the application. Because Mr. Fleischman has not specifically identified any errors that might provide a legal or factual basis for reconsideration of the Board's decision, the motion must be denied.

II. The Board's Order Approving the Application Is Legally Sufficient

In approving or denying any application for variance or special exception relief, the Board is required to issue a written order containing findings of fact and conclusions of law in support of its decision. 11 DCMR § 3125.3. The factual findings presented in the order must be supported by reliable, probative, and substantial evidence in the administrative record, and its legal conclusions must flow rationally from those predicate findings of fact. *See Dietrich v. D.C. Board of Zoning Adjustment*, 320 A.2d 282, 285 (D.C. 1974). As discussed below, the Board's order in this case meets each of those requirements.

In his motion for reconsideration, Mr. Fleischman does not claim that the Applicant failed to meet the specific requirements for a special exception under Section 2516 of the Zoning Regulations. Instead, the motion focuses on whether the evidence presented by the Applicant satisfied the three-part test for variance relief. In granting an application for an area variance, the Board must determine that: (1) the subject property is affected by an exceptional or extraordinary situation or condition; (2) the strict application of the Zoning Regulations would result in a practical difficulty; and (3) the requested variance relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Zoning Map. *See* 11 DCMR § 3103.2; *French v. D.C. Board of Zoning Adjustment*, 658 A.2d 1023 (D.C. 1995). The Board's order approving the application includes findings of fact on each of those issues, and those findings were supported by substantial evidence in the administrative record.

The Board was confronted with conflicting testimony on a number of material issues in this case and was required to make factual findings based only 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. The gravamen of Mr. Fleischman's motion for reconsideration is that the Board should have accepted his testimony on those issues and rejected the contrary testimony and evidence presented by the Applicant.

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 contrary evidence presented by Mr. Fleischman.

In addition, the factual findings presented in the order are supported by record testimony from witnesses who were qualified as experts by the Board. During the public hearing on the application, the Applicant presented testimony from five expert witnesses. Although the Board is not required to explain its reasons for crediting the testimony of particular lay witnesses over others, it must provide some justification for rejecting expert testimony:

While agencies are not always bound to accept expert testimony over lay testimony, the opinions of qualified experts are not to be lightly disregarded and the probative value of lay opinions is also highly doubtful. In any event, some indication in the findings as to the reasons for rejecting the expert testimony in favor of that of lay witnesses was certainly required if judicial review is to be meaningful.

Shay v. D.C. Board of Zoning Adjustment, 334 A.2d 175, 178 n.10 (D.C. 1975). In other words, the testimony of expert witnesses is generally viewed as more reliable and probative than the testimony of lay witnesses. Mr. Fleischman did not present any expert testimony in opposition to the application, nor did ANC 7B.

Finally, the recommendations of the District of Columbia Office of Planning are entitled to "great weight" in the Board's consideration of an application for variance or special exception relief. See D.C. Code § 6-623.04 (2001) (providing that the "Office of Planning shall review and comment upon all zoning cases, and the ... Board of Zoning Adjustment shall give great weight to the recommendation of the Office of Planning"). The Office of Planning recommended approval of the application in this case and submitted an extensive report addressing the Applicant's compliance with each of the requirements for the requested zoning relief. In addition, representatives of the Office of Planning provided testimony at the public hearing on the application and were subject to cross-examination by Mr. Fleischman and ANC 7B. While the Office of Planning is the only District agency whose recommendations are entitled to "great weight" in the Board's deliberations, it is also important to note that the application was supported by the District Department of Transportation, the District Department of the Environment, and the Department of Fire and Emergency Medical Services. Each of those agencies conducted its own independent evaluation of the application for variance and special exception relief and reached the same conclusion as the Board.

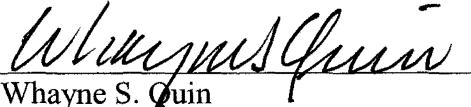
Based on its findings of fact, the Board reasonably concluded that the subject property was affected by an exceptional condition, that the strict application of the Zoning Regulations would result in practical difficulties in light of that exceptional condition, and that the requested variance relief would not result in a substantial detriment to the public good or undermine the purpose, intent, or integrity of the Zoning Regulations or Zoning Map. In other words, the Board's legal conclusions flowed rationally from its predicate findings of fact.

In short, there is simply no basis upon which to grant the motion for reconsideration. Mr. Fleischman was afforded a full and fair opportunity to present testimony and other evidence in opposition to the application during the public hearing in this case. He was allowed to cross-examine the Applicant's witnesses and the representatives of the Office of Planning. The Board

made factual findings on every material contested issue of fact, those factual findings were based upon substantial evidence in the record, and the Board's legal conclusions flowed rationally from its factual findings. Mr. Fleischman's mere disagreement with the Board's approval of the application is an insufficient basis for reconsideration, and his attempts to reargue points already made and not accepted should be rejected. The Board should therefore deny his motion.

Sincerely,

HOLLAND & KNIGHT LLP

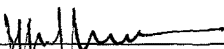

Wayne S. Quin

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:

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