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June 22, 2012

Board of Zoning Adjustment for the
District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

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2012 JUN 22 AM 10:37

RE: BZA Case No. 18272
Opposition to Motion for Reconsideration

Dear Board Members:

Introduction

On behalf of KS FBC, LLC, the applicant in the above-referenced case, we hereby move for dismissal of Ms. Kay Marlin's Motion for Reconsideration for lack of standing. Pursuant to section 3126.2 of the Zoning Regulations, only parties to a proceeding may file motions for reconsideration and Ms. Marlin was not a party to BZA Case No 18272. Even if Ms. Marlin had participated as a party, the motion for reconsideration should be denied because Ms. Marlin has failed to allege any error in the decision rendered by the Board of Zoning Adjustment ("Board" or "BZA"), as required by section 3126.4 of the Zoning Regulations.

Lack of Standing

The Board should dismiss Ms. Marlin's Motion for Reconsideration because she was not a party to BZA Case No. 18272 and thus lacks standing to bring her motion. The Board received requests for party status in Application No. 18272 from three persons or groups: (i) The Richmond Group; (ii) Ms. Helen A. White; and (iii) Ms. Stephanie Swerling. See BZA Order No. 18272 at 2. At the hearing, the Board granted party status to the Richmond Group and Ms. White, on behalf of the Richmond Condominium, but denied party status to Ms. Swerling. *Id.* While Ms. Marlin testified at the hearing as a witness for The Richmond Group, she neither requested nor was granted party status. See Transcript in BZA Case No. 18272, November 15, 2011, ("Tr."), 15-17; 133-48. Ms. Marlin herself acknowledges that she was not a party to the proceeding and has filed her motion for reconsideration as an individual. See Marlin BZA Form 153, June 14, 2012.

Section 3126.2 of the Board's rules provides that only parties to a proceeding may file motions for reconsideration:

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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.

11 DCMR 3126.2 (emphasis added).

The D.C. Code, the Zoning Regulations, and the District's courts all distinguish between "persons" and "parties", and their respective rights. The term "person" includes "individuals, partnerships, corporations, associations, and public or private organizations of any character other than the Mayor, the Council, or an agency." D.C. Official Code § 2-502 (9) (2001 ed.). In contrast, the term "party" "includes the Mayor and any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any proceeding before the Mayor or an agency." D.C. Code § 2-502 (10).

This distinction between persons and parties is found throughout the Zoning Regulations. For example, both persons and parties may participate in BZA cases, but only parties may file proposed findings of fact or conclusions of law. 11 DCMR § 3106.1 ("[i]n a proceeding before the Board, any *person* or *party* may appear on that person's or party's own behalf." (emphasis added)); 11 DCMR § 3121 ("*parties* are encouraged to file with the Office of Zoning proposed findings of fact and conclusions of law....")(emphasis added); *see also York Apartments Tenants Association v. District of Columbia Zoning Comm'n*, 856 A.2d 1079 (D.C. 2004), fn. 2 (comparing the definition of "person" and "party" in a zoning proceeding).

Here, the regulations governing reconsideration plainly limit the right to file such motions to parties and not to persons. Because Ms. Marlin was not a party to the proceeding and seeks redress only on an individual basis, she lacks standing to bring her motion for reconsideration. Her motion should therefore be dismissed.

Failure to State Error in BZA Order

Even if Ms. Marlin had standing to bring her motion, it should nevertheless be denied for failure to state with specificity the alleged error in the Board's decision. Section 3126.4 provides that a "motion for reconsideration shall state specifically all respects in which the final decision is claimed to be erroneous, the grounds of the motion, and the relief sought." The Board has interpreted this provision to mean that a party seeking reconsideration must allege that a specific finding of fact or conclusion in the order is erroneous. It is insufficient to simply re-argue facts and legal conclusion with which the movant simply disagrees. See, for example, BZA Order Nos. 17837-A, 17850-A and 17724-A.

Here, without presenting any new evidence of error, Ms. Marlin merely re-argues the claim that the proposed building will harm the public gardens adjacent to The Richmond through "damaging shadows." She simply claims that the Board made the wrong decision and asks the Board to re-examine the evidence. Without more, however, Ms. Marlin does not meet the rigorous standard of section 3126.4. In fact, the Board thoughtfully reviewed all the evidence, including the shadow studies presented by both parties, and concluded that each study showed that the new building would have no appreciable effect on the garden, particularly when

compared to a matter-of-right development. BZA Order No. 18272 at 7 (Finding of Fact No. 23).

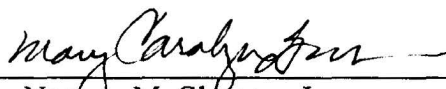
Ms. Marlin also claims that the applicant should have sought relief from the parking requirements so the building size could be reduced. This argument also fails. First, as the Board has noted in numerous cases over the years, an applicant decides the scope of the relief it intends to seek, not the Board. While the Board, the Office of Planning, or members of the community might suggest that an applicant pursue different areas of relief, the nature of the case ultimately rests with the applicant. Second, Ms. Marlin had the opportunity to argue this point at the hearing but failed to do so. Such an omission cannot now be recast into any alleged error on the part of the Board.

Conclusion

Because Ms. Marlin does not have standing to request reconsideration of BZA order, her motion should be dismissed. Even if Ms. Marlin did enjoy party status, the motion should fail because it simply re-argues the case and only provides conclusory list of alleged errors in the Board's decision. Consequently, BZA Order No. 18272 should be affirmed.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 
Norman M. Glasgow, Jr.
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cc: service list attached

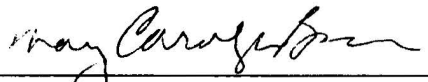
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 22, 2012, a copy of the foregoing letter was served by electronic mail on the following:

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