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Real Estate | Zoning | Business Law | Litigation

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Via Email

Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001
bzasubmissions@dc.gov

Re: Response to Motion for Rehearing; BZA Case No. 20135

Dear Members of the Board:

On behalf of the Applicant in BZA Case No. 20135, I am writing in response to Party Opponent Melinda Roth's ("Opponent") Motion for Rehearing (the "Motion"). The Motion should be denied. Opponent offers four claims of "new evidence" in support of the Motion. The first claim, an allegation of ANC corruption, is not probative or relevant evidence, and is so inconsequential in nature as to clearly have no impact on either the ANC's position or the Board's decision. The other three claims refer not to "newly discovered" evidence that existed at the time of the Application; but rather, to random subsequent events which took place after the Board's decision, and which otherwise have no relevance or probative value to the Board's decision.

Subtitle Y § 700.5 provides that "any party in a zoning appeal or a variance or special exception proceeding may make a motion to request that the Board re-open the record and rehear the application or appeal, in whole or in part, to permit the party to present newly discovered evidence which, by due diligence, could not have been reasonably presented to the Board prior to the issuance of the Board's final order." A party requesting a rehearing shall state specifically: (a) The newly discovered evidence; (b) The reason the newly discovered evidence could not have been reasonably presented to the Board prior to the issuance of the Board's final order; and (c) The relief sought.

I. Opponent's Claim of ANC Bias. Opponent claims that because the Applicant donated $50 to the campaign of one ANC Commissioner, that that Commissioner should have been required by the ANC to "recuse" himself from consideration of the Application. First, if this were an issue of some type of impropriety on the part of the ANC (and we assert it clearly is not), it would not be an issue for the Board to consider and determine. Second, Opponent fails (necessarily) to mention that the ANC vote was 6-2 in favor of the Application. Without the accused Commissioner, the vote would have been 5-2 in favor of the Application; *i.e.,* the removal of this Commissioner's vote would have no impact on the ANC decision to support the Application.

II. Opponent's Citation of Subsequent Events.

Opponent is claiming that events which took place at a time after the Board's decision can be brought back into to the case for retroactive consideration. Opponent confuses the term "newly-discovered evidence" with evidence that did not even exist prior to the closing of the record. At any rate, none of these following events or circumstances are relevant or probative to the Board's decision, for timing alone, among other reasons, and do not justify a rehearing.

(a) Call Your Mother ("CYM") new location.

Opponent claims as "newly-discovered" evidence the operations of CYM at another location. Again, this is not "newly discovered" evidence which existed prior to the closing of the record. This is an event which took place after the Board's decision. For this reason alone, it is not relevant or probative. But substantively, the separate operation of CYM at another location, in a completely different neighborhood, under completely different circumstances, has no relevance to the Georgetown CYM operation or the Board's decision.

(b) Pandemic-Saxby's.

Opponent claims that the establishments known as Saxby's and Wisemiller's are "teetering on bankruptcy"; and that this "fact" is somehow relevant to the Board's decision. Opponent attempts to obfuscate in making this claim, by conflating the Applicant's request for area variance relief from U-254.6(g) with a never-made U-254.15 waiver request from the restrictions of U-254.6 (b) and (c). The Applicant self-certified that the proposed use will not violate U-254.6(b) and (c) and therefore did *not* seek relief therefrom.[1] Now Opponent claims to have new evidence to argue that the Application does not meet the waiver conditions of U-254.15(b), a section which the Applicant is not required to meet, as it is *simply not asking* for a U-254.15 waiver. Therefore, the negative impact "on the economic viability or vitality of an area zoned MU or NC" was never an issue before the Board. So *even if* the "new evidence" were relevant, probative, substantive, *and* completely on point and persuasive, it would be meaningless in the current context, since the Board was not asked for, nor did it consider, relief under the waiver allowance of U-254.15.[2]

(c) Social Distancing.

Opponent claims that current social distancing guidelines reach back in time to retroactively influence the Board's decision in this case. Again, this is not "newly discovered" evidence, but a change in circumstances. And it is a change which is mean to affect all currently approved and operating businesses equally. What Opponent asserts, effectively, is that the Board should be able to open up any special exception approvals to evaluate impacts resulting from social distancing guidelines. The Board does not have the authority to do that, nor would it be

[1] A position that the D.C. Office of Planning agreed with (Conclusion of Law #30).
[2] Opponent also misrepresents the fact that "Saxby's" never even testified at the BZA hearing. Opponent claims that "the very businesses that would be impacted (Saxby's…)…testified on December 11, 2019." In fact, Ms. Vogel, an employee or partner of Saxby's landlord, testified on behalf of that landlord. Saxby's did not testify. At any rate, the impact on Saxby's or Wisemiller's is irrelevant, as detailed above.

practical. As it is now a lawfully approved use, CYM will be subject to the same COVID requirements and restrictions as other similar businesses.

For the above reasons, the Applicant respectfully requests that the Board deny Opponent's Motion for Rehearing.

Respectfully Submitted,

Martin P Sullivan

Martin P. Sullivan

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2020, a copy of the attached Response to the Motion for Rehearing was delivered via electronic mail to the following:

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