

MOTION TO VACATE THE BOARD'S MAY 24, 2023 ORDER REOPENING THE RECORD

Friends of the Field (“Friends”), the Party in Opposition in the Board of Zoning Adjustment (“BZA” or the “Board”) case number 20643, by undersigned counsel and pursuant to the BZA Rules of Practice and Procedure, files this Motion to Vacate the Board’s May 24, 2023 Order Reopening the Record.

At a Decision Meeting on May 24, 2023, the Board voted unanimously to grant a waiver under Title 11 Y §700.9 to reopen the record to allow the Applicant, Maret School, to respond to the Party in Opposition’s Motion for Reconsideration. However, Friends, has never filed any Motion for Reconsideration. The Board ruled to allow Maret to respond to a motion by Friends that does not exist. For this reason alone, the Board must vacate its May 24 decision granting Maret’s Motion to Reopen the Record.

The timeline is as follows:

- **April 12, 2023** - the Board issued its final Order granting Maret’s application
- **April 18, 2023** - Friends of the Field, the Party in Opposition, filed a Petition for Review in the DC Court of Appeals, which the Court of Appeals docketed as “pending.”
- **April 21, 2023** - Maret filed a Motion for Clarification/Reconsideration of the Conditions of BZA Order No. 20643 (“Maret’s Motion for Clarification/Reconsideration”), pursuant to Subtitle Y, Subsection 700.02.
- **April 26, 2023** - Friends filed an Opposition to Maret’s Motion for Clarification/Reconsideration.
- **April 28, 2023** - Friends re-filed its Petition for Review.¹
- **May 2, 2023** - Maret filed a Motion to Reopen the Record to Allow a Reply to Friends Opposition
- **May 4, 2023** - Friends filed an Opposition, not docketed until May 25, to Maret’s Motion to Reopen the Record.
- **May 19, 2023** – Friends filed a Motion to Stay
- **May 22, 2023** - the Board issued a notice setting a May 24 meeting to hear “**Motion to Reopen the Record.**”
- **May 26, 2023** Maret filed a Response to Motion for Stay

On May 24, 2023, the Board considered Maret’s May 2 Motion to Reopen the Record. The Board proceeded by unanimous voice vote to reopen the record to allow Maret to respond to Friends’ Motion for Reconsideration. However, **Friends has not filed any Motion for Reconsideration.** The Board unnecessarily reopened the record to hear Maret’s argument on a non-existent motion. It was not necessary to reopen the record and was error to do so.

The following was stated at the Board’s May 24 Decision Meeting:

Chair Hill: I know everyone has read everything. And this is my proposal: I would like to have an opportunity to look at everything concerning this Application, and come back when Chairman Hood is with us and actually decide on some of the motions. **The one Motion that is before us right now is whether or not to grant a waiver for Y 700.9 to allow Maret to file what I think is a response to the Party’s In Opposition’s Motion for Reconsideration.**

¹ The Court of Appeals docketed Friends’ April 18, 2023 Petition for Review as “pending.” Friends refiled its Petition for Review on April 28. It is uncontested that the Court of Appeals accepted Friends’ Petition for Review.

So, if we did do this, then I would say that we'd go ahead and schedule a Decision Meeting for when I think Chairman Hood is back before us on June 14. And then we could go ahead and do the different issues that are before us still in terms of the motions. And then, I believe, if I am correct, that if we did, and this is where I guess Legal can help me, if we did allow this into the record per the waiver that the Applicant is asking us, then the Party's in Opposition I think would have an opportunity to respond to whatever is put into the record. But I am a little unclear on that. But regardless, I would like to have everything into the record and then decide what we think about the motions on June 14, as we all are aware, this is currently under appeal at the Court of Appeals. So, this Order, that is.

I'm going, I think it's Ms. Nagelhout, did I miss anything? Does that sound relatively correct?

Ms. Nagelhout: You did not miss anything. It does sound correct. And the parties will have seven days to respond to the Applicant's Motion to Re-open the Record.

Chair Hill: OK, so I will go ahead and make a motion then to...does anyone have any comment before I make a motion? I'm going to go ahead and make a motion then to approve the waiver request under Y 700.9 to allow Maret to file **what I believe again is a response to the Friends' Opposition**, I'm sorry, **the Party's in Opposition's Motion for Reconsideration**. And ask for a second. Chairman Hood?

Chairman Hood: Thank you, Mr. Chairman. I will second that motion.

[Board of Zoning Adjustment Public Meeting & Hearing of May 24, 2023 \(champds.com\)](#), at 7:21 through 9:59 (emphasis added).

Despite its legal counsel having just stated "that the parties will have seven days to respond to the Applicant's Motion to Re-open the Record," the Board proceeded to vote unanimously to grant the Applicant's request for waiver, to allow Maret to respond to **the Party in Opposition's Motion for Reconsideration** – a motion that does not exist.

These compound errors alone provide a sufficient basis for the Board to vacate its decision to reopen the record; however there are other reasons that the Board's decision to re-open the record must be vacated.

Despite the Chair's statement that "everyone has read everything," the Board did not read or consider Friends' Opposition to Maret's Motion to Reopen the Record, prior to making its decision on May 24. Friends' Opposition was docketed on May 25 (after the Decision Meeting), three weeks after it was filed. Friends filed that Opposition on May 4. [Attachment 1](#). For unknown reasons, it was not promptly docketed.² Friends' counsel contacted the BZA to alert them that Friends' Opposition did not appear on the docket, and requested that Friends receive the same treatment from the Board as Maret, all of whose filings have been promptly docketed by the Board. Only after a second call from Friends' counsel did the Board finally docket Friends' Opposition on May 25, a full 3 weeks after Friends filed it. The DC

² In accordance with BZA Rules: **§206.10** All filings submitted through IZIS on or before 11:59 p.m. shall be recorded as being received on the same day. **§206.11** All e-mail filings sent between 12:01 a.m. and 5:00 p.m. on any Office of Zoning business day shall be recorded on the date it was received.

Office of Zoning included a note: “It is now in the record.”³ Attachment 2, May 25 email from DCOZ. This lapse in process was prejudicial to Friends. The Board issued its May 24 decision without considering Friends’ Opposition.

There was and is no legal basis to grant a waiver of Subtitle Y, Section 101.9, and the Applicant did not demonstrate good cause to reopen the record, or lack of prejudice to Friends.

In its May 2 Motion to Reopen the Record to Allow a Reply to Friends Opposition Filing, Maret sought a waiver from Subtitle Y, Section 700.9, which does not allow replies to answers to motions for reconsideration. Subtitle Y, Section 700.9 states in pertinent part that: “replies by other parties to the aforementioned answers will not be accepted into the record.”

Under Subtitle Y, Section 101.9, with certain exceptions, the Board may, **for good cause shown**, waive any of the provisions of [subtitle Y] if, in the judgment of the Board, **the waiver will not prejudice the rights of any party** and is not otherwise prohibited by law. Subtitle Y, Section 101.9 (emphasis added). Under Subtitle Y, Section 602.6, any supplemental material received by the Board after the close of the record that bears upon the substance of the application or appeal shall be returned by the Director and not accepted into the files of the Board. However, **if the materials are accompanied by a separate request to reopen the record, the request shall be accepted and presented to the Board for consideration. The request must demonstrate good cause and the lack of prejudice to any party.** Such requests may be granted by the presiding officer and, if granted, the supplemental materials shall be entered into the record.

In this case, the Board did not require good cause to be shown under either Section 101.9 or under Section 602.6. Maret’s May 2 Motion to Reopen the Record asserts that the record must be open to allow Maret to “[p]rovide the Board with relevant and necessary information regarding the actual timing of the appeal filed by [Friends] with the DC Court of Appeals.” However, there is no dispute on this factual issue, and the actual timing is a matter of public record. There is no need to reopen the record in this case. With no finding of good cause shown, the Board simply waived the requirement of Subtitle Y, Section 700.9, in violation of the Board’s rules. See, Concerned Citizens of Brentwood v. DC Board of Zoning Adjustment, 634 A. 2d 1234 (DC 1993)(broad discretion accorded the BZA in the application of its own rule to allow or disallow a party to intervene “for good cause shown” must be exercised reasonably, not arbitrarily or capriciously). MacCauley v. DC Taxicab Comm’n, 623 A. 2d 1209 (1993)(agencies must adhere to their own regulations).

The Board also failed to consider whether granting the waiver and allowing the record to be reopened would prejudice the rights of Friends of the Field. Under Section 602.6, the burden is on Maret to demonstrate that reopening the record will not prejudice Friends. In its May 2 Motion to Reopen the Record, Maret states that “granting the waiver will not prejudice the rights [of Friends], it will simply provide the Board with all of the information required to undertake a thoughtful and well-reasoned analysis of the Application’s Motion for Clarification/Reconsideration.” Maret’s assertion – with no factual support – that the rights of Friends would not be prejudiced by reopening the record, did not

³ In contrast, on May 24, 2023, after granting Maret’s Motion to Reopen the Record, the Board immediately docketed Maret’s Reply to the Friends of Field’s Opposition to Motion and Supplemental Material from Applicant-Maret School.

demonstrate the lack of prejudice to any party as required by Section 602.6. It is uncontested that Friends’ April 18, 2023 Petition for Review to the DC Court of Appeals was “pending” on April 18, though it had not yet been served on the Parties. It is uncontested that the Parties have been served, and that there is an appeal of BZA Order No. 20643 presently pending. The Board’s decision to reopen the record to allow Maret to continue to litigate uncontested facts that are a matter of public record – at Friends’ expense - is highly prejudicial to the rights of Friends. Prejudice to the rights of Friends is clear, as has been stated in its Motion for Stay. Maret has commenced pre-construction activities at the site, has removed and destroyed over 60 trees, and has re-graded the decimated grounds of the former school. Not only did Maret fail to demonstrate lack of prejudice or harm—it cannot do so.

Granting the waiver also violated Subtitle Y, Section 700.5

Under Subtitle Y, 700.5: 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.

There is no “newly discovered evidence”. There is not even an allegation of newly discovered evidence. All information “regarding the actual timing of the appeal filed by [Friends] with the DC Court of Appeals” is a matter of public record.

Reopening the record was not necessary for the Board to adjudicate Maret’s Motion for Clarification/ Reconsideration.

On April 26, Friends filed an Opposition to Maret’s Motion for Clarification/ Reconsideration. BZA Exh. 299. Subtitle Y, Section 700.4 clearly states as follows:

No party may file a motion for reconsideration or rehearing after a petition to review an order granting or denying a special exception or variance application or affirming or reversing a decision on appeal has been filed with the District of Columbia Court of Appeals and any pending motion for reconsideration or rehearing shall be dismissed if such a petition is filed.

In this case, Friends filed a Petition for Review of BZA Order No. 20643 with the District of Columbia Court of Appeals on April 18, 2023; while that submission was noted in the Court of Appeals docket as “pending,” Friends refiled its Petition for Review on April 28. But even if Friends’ Petition for Review was filed **after** Maret’s April 21 Motion for Clarification/Reconsideration, the timing is irrelevant. Under Rule 700.4 **any** pending motion for reconsideration or rehearing shall be dismissed if such a petition is filed. Subtitle Y, § 700.4. The Board’s rules could have included a provision stating that a motion for reconsideration filed under 11 Y § 700.2 tolls the time for a party to file an appeal; but they do not. See also, US v. Stephenson, 891 A. 2d 1076 (DC 2006)(in the absence of specific authority, a motion for reconsideration does not toll the time for noting an appeal; once a notice of appeal has been filed, a trial court no longer has jurisdiction over a motion for reconsideration).

In its May 2 Reply to Friends’ Opposition to Maret’s Motion for Clarification/Reconsideration (and again in its May 24 Reply), Maret states that it filed its Motion for Clarification/Reconsideration “before the Order became effective.” There is no dispute that BZA Order No. 20643 became effective as of April 22. This is also irrelevant. Maret’s Motion for Clarification/Reconsideration did not impact the effective date of the Board’s Order, which is presently in effect. The Board’s Order was final on April 12, 2023. See,

Subtitle Y, Section 604.7: for purposes of this subtitle, a final order shall become final upon its filing in the record and service upon the parties, the date of which shall be stated at the conclusion of each order.

For each of the foregoing reasons, the Board's May 24 Order reopening the record in this case must be vacated.

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2023, I sent a copy of the FRIENDS OF THE FIELD'S MOTION TO VACATE to counsel for the Applicant, Paul Tummonds, via electronic mail to ptummonds@goulstonstorrs.com, to ANC 3/ 4G Chair Lisa Gore, via electronic mail to 3G01@anc.dc.gov, and to the Office of Planning, via electronic mail to jennifer.steingasser@dc.gov.

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