



June 19, 2019

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Frederick L. Hill, Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Suite 200S
Washington, DC 20010

**Re: BZA Case No. 19659
Motion to Waive Subtitle Y §§ 700.2, 700.4**

Chairperson Hill and Honorable Members of the Board:

On behalf of Sheridan Kalorama Neighborhood Council (“SKNC”) and Sheridan Kalorama Historical Association (“SKHA”) (collectively the “Neighbors”), parties-in-opposition to the above-referenced case, please find enclosed a Motion to Waive Subtitle Y § 700.2 and Subtitle Y § 700.4. This Motion is filed in conjunction with a Motion For Rehearing, Reconsideration, or, in the alternative, to Stay (the “Motion for Rehearing”) the Board Order in BZA Case No. 19659 entered on October 30, 2018 (the “Order”). The Neighbors request a waiver of Subtitle Y §§ 700.2, 700.4 so that the Board can receive new information (which only became available in May-June 2019) and consider the Neighbors’ Motion for Rehearing because the new evidence establishes that the building does not qualify for the relief granted to the Applicant, Federation of Statement Medical Boards, Inc. (“FSMB”) by the Board.

Accordingly, SKNC and SKHA respectfully request that the Board waive Subtitle Y §§ 700.2, 700.4 for the good cause explained herein. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

BY: SAMANTHA MAZO

LEGAL\41664048\1

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June, 2019, a copy of the foregoing Motion to Waive Subtitle Y §§ 700.2, 700.4, was served, via electronic mail, on the following:

District of Columbia Office of Planning
c/o Anne Fothergill
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Anne.fothergill@dc.gov

Advisory Neighborhood Commission 2D
c/o David Bender, Chair
2126 Connecticut Avenue NW, Apt. 34
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Advisory Neighborhood Commission 2D02
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Samantha Mazo

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

BZA CASE 19659

**FEDERATION OF STATE
MEDICAL BOARDS, INC**

MOTION TO WAIVE SUBTITLE Y §§ 700.2, 700.4

I. INTRODUCTION

Sheridan Kalorama Neighborhood Council (“SKNC”) and Sheridan Kalorama Historical Association (“SKHA”) (collectively the “Neighbors”), parties-in-opposition to this application, respectfully request that the Board of Zoning Adjustment (the “Board”) waive Subtitle Y § 700.2 and Subtitle Y § 700.4 of the Zoning Regulations. The Board is authorized to waive these regulations for good cause shown, provided the waiver does not prejudice the right of any party. *See* Subtitle Y § 101.9.¹

The Neighbors request a waiver of Subtitle Y §§ 700.2, 700.4 in order to seek rehearing and reconsideration of the Board’s order of approval more than 10 days after entry of the order and during the pendency of an appeal to the D.C. Court of Appeals. As set forth in the companion Motion for Rehearing, the Neighbors request that the Board reconsider and void the order of approval due to newly discovered evidence that the application does not qualify for special exception relief, and variance relief is necessary.

II. BACKGROUND

The Federation of State Medical Boards, Inc. (“FSMB”) applied for special exception relief under Subtitle U § 203.1(n) in order to use an existing residential building as a non-profit office building at 2118 Leroy Place NW (Square 2531, Lot 49) (the “Property”) in the R-3 zone. FSMB’s

¹ The Board must determine waiver requests on a case-by-case basis. As demonstrated herein, the existence of an express condition to the Board’s approval is unique to this case and warrants a waiver of Subtitle Y §§ 700.2 and 700.4.

office use could only be approved if FSMB demonstrated that the special exception standards of Subtitle U § 203.1(n)(1-6) had been satisfied. Condition No. 2 requires that the existing building be 10,000 sq. ft. in gross floor area in size (the “10,000 GSF Condition”). *See* Subtitle U § 203.1(n)(2). During the underlying proceedings, the Neighbors presented evidence challenging whether the Property qualifies for special exception because the existing building (the “Building”) is smaller than 10,000 GSF.

On April 18, 2018, the Board approved FSMB’s application at a decision meeting. On October 30, 2018, the Board entered its written order of approval (the “Order”). A copy of the Order is attached at **Tab A**. In the Order, the Board expressly requires a confirmation by the Department of Consumer and Regulatory Affairs (“DCRA”) during permitting that the Building meets the 10,000 GSF Condition. Specifically, the Board concluded that it must **“accept the Applicant’s self-certification”** as to the 10,000 GSF Condition **“and defer to the eventual determination of the Zoning Administrator on this point.”**² *See* **Tab A**, pg. 16. The Board noted that the Neighbors “retain the ability to challenge the eventual GFA determination by DCRA.” *See* **Tab A**, pg. 16. To enhance the Neighbor’s opportunity to challenge this issue, the Order is expressly conditioned on FSMB giving “notice and a copy of [permit] plans to [the community liaison – which has never been established], the ANC, the SKNC, the SKHA and the two abutting neighbors whose properties abut the site and to Mr. Guinea.” *See* **Tab A**, pg. 27, BZA Condition No. 14.

On November 28, 2018, the Neighbors appealed the Order to the D.C. Court of Appeals in case 18-AA-1260 (the “Appeal”). Briefing has been completed in the Appeal, but the Court’s decision is pending.

² In the Appeal, the Neighbors argue that the Board erred by relying on FSMB’s self-certification. The Neighbors expressly preserve all of the arguments in the Appeal, and the statements in the current filing should not be construed as the Neighbors’ waiver of any argument made in the Appeal.

On May 7, 2019, FSMB filed a demolition permit application to DCRA (D1900697) seeking extensive interior demolition to the Building's three above-grade and one below-grade stories. A copy of the permit application tracker is attached at **Tab B**. This permit was issued on or about June 13, 2019 (the "Demolition Permit"). The Demolition Plans filed with the Building Permit show that the Building is **only 9,928 GSF**, which is **72 GSG** smaller than the 10,000 GSF size expressly required for a Building to be eligible for special exception relief. A copy of the Demolition Plans is attached as **Tab C**.

III. ARGUMENT

A. There is Good Cause to Waive Subtitle Y § 700.2 Because the 10,000 GSF Condition Could Not Be Confirmed Within 10 Days of the Order

There is good cause to waive Subtitle Y § 700.2 because the Order expressly directs DCRA to confirm the Building's compliance with the 10,000 GSF Condition *after* the Board's approval. The Order is also clear that the Neighbors retain the ability to challenge DCRA's decision as to the 10,000 GSF Condition. However, FSMB did not file for the Demolition Permit until May 7, 2019, more than seven months after the Board entered the Order on October 30, 2018. It was not issued by DCRA until June 13, 2019.

Therefore, strict application of Subtitle Y § 700.2 would render the Order toothless as to the 10,000 GSF Condition. DCRA could not have determined compliance with the 10,000 GSF Condition within 10 days of the Order because FSMB did not file for a permit until May 2019, and the Demolition Permit was not issued until June 2019. Consequently, the Board's direction in the Order would be meaningless if the Neighbors are not permitted to file a Motion for Rehearing more than 10 days after entry of the Order. Absent a waiver, there is no avenue to present the Board with newly discovered evidence that is germane to a material contested issue in this application.

A waiver of Subtitle Y § 700.2 will not prejudice any other party to this matter. A waiver of Subtitle Y § 700.2 allows for an efficient method of resolving this material contested issue. The Order is clear that the Neighbors retain the right to challenge DCRA's decision as to the 10,000 GSF Condition. Further, a condition of the approval is that FSMB would give notice of the Demolition Plans to the Neighbors and the ANC. *See* Exhibit A, pg. 27. FSMB failed to comply with this condition, but even if it had, the Neighbors could only have become aware of the sub-standard Building size identified in the Demolition Plans in June 2019 when the Demolition Permit was issued by DCRA. Failure to waive this provision would negatively delay the Neighbors' ability to challenge the Building size until *after* the Building Permit is issued - which could be months (or even years) away. Requiring either party to wait for an unknown period of time to have this important, material issue resolved would be prejudicial, especially when this evidence is available for review today.

B. There is Good Cause to Waive Subtitle Y § 700.4 Because the 10,000 GSF Condition Could Not Be Confirmed Within the Statutory Period to File an Appeal of the Order

Similarly, there is good cause to waive Subtitle Y § 700.4 because the 10,000 GSF Condition could not be confirmed within the 30-day appeal period following entry of the Order. Under the D.C. Court of Appeals Rules, Rule 15(a)(1), an appeal of an administrative agency's decision must be filed no more than 30 days after notice of the decision. Here, the statutory timeframe for an appeal expired on or about November 30, 2018. Yet, FSMB, which alone dictated when it would file its permit applications, chose not to file for the Demolition Permit until May 2019. Accordingly, it would have been impossible for the Neighbors to have known that FSMB was submitting information to DCRA establishing that the Building was smaller than the 10,000 GSF (and, therefore, did not qualify for the special exception) before the Neighbors needed to file the Appeal.

This request is for good cause. If Subtitle Y § 700.4 is not waived, then the Neighbors would be forced to choose between enforcing an express condition in the Order or filing an appeal of the Order. This would be a perverse result that undercuts the purpose and intent of the Zoning Regulations and the underlying rationale for the ability to appeal a contested case under the D.C. Administrative Procedures Act.³ The Neighbors exercised their right to appeal the Order, challenging a myriad of issues, including the 10,000 GSF Condition. Also, the newly discovered evidence as to 10,000 GSF Condition is not on review by the Court of Appeals because it is not in the exclusive record. Thus, if the Neighbors are not permitted to file a Motion for Rehearing during pendency of the Appeal, then FSMB could essentially avoid any enforcement as to the 10,000 GSF Condition.

A waiver of Subtitle Y § 700.4 does not prejudice any party to this matter. Since the Order is being challenged on Appeal, any actions taken by FSMB to alter or add to the Property are “at risk” while the Appeal is pending. As noted above, FSMB was fully aware that the Neighbors are entitled to review DCRA’s confirmation as to the 10,000 GSF Condition, and allowing the Neighbors to do so now and explain to the Board that the Demolition Plans establish that the Building is smaller than 10,000 GSF would not be prejudicial to FSMB. Also, waiving Subtitle Y § 700.4 enhances judicial efficiency because it could allow the Board to review and grant the Motion for Rehearing in the near term, which could allow the Appeal to be dismissed as moot. Finally, FSMB notes that this is a unique situation because (1) the 10,000 GSF Condition is an enumerated requirement Special Exception, and if it is not satisfied a variance is required; (2) the Board expressly said it would “defer to the eventual determination of the Zoning Administrator on [whether the Building was 10,000 GSF in size]” *See Tab A*, pg. 16; and (3) the Demolition Plans

³ It would be plainly prejudicial to the Neighbors if they were required to wait until DCRA issues a building permit before challenging the Building size when indeed the Board itself stated that it would “defer to the eventual determination of the Zoning Administrator on [whether the Building was 10,000 GSF in size].” *See Tab A*, pg. 16.

showing that the Building is only 9,928 GSF (the information presented to DCRA to show the Building size) are *new* information that was not *even* filed until May 2019. As such, there is no concern that granting this waiver would “open the floodgates” to other parties to request rehearing or reconsideration during the pendency of an appeal.⁴

To ensure the credibility of the process, the public and surrounding neighbors must be able to rely on the accuracy of information presented to the Board and DCRA. To force the Neighbors to choose between filing the Appeal, which concerns multiple issues, or to wait for FSMB to submit a permit to DCRA showing the *actual* Building size would be contrary to the purpose and intent of the Zoning Regulations and the BZA process.

IV. CONCLUSION

The Neighbors respectfully request that the Board waive the requirements of Subtitle Y §§700.2 and 700.4 so that the Neighbors may request the Board’s reconsideration of newly discovered evidence that is germane to material contested issues in this application. The 10,000 GSF Condition could not have been confirmed until FSMB submitted a permit application, which FSMB chose to do in May 2019 – well beyond the 10-day requirement for reconsideration or the 30-day timeframe to submit an Appeal. Accordingly, good cause exists and neither party would be prejudiced by all allow the Neighbors to file a Motion for Reconsideration more than 10 days after entry of the Order and during the pending Appeal.

⁴ All BZA cases need to be reviewed on their own specific facts.

Respectfully submitted,

COZEN O'CONNOR

A handwritten signature in blue ink, appearing to read "Samantha Mazo", written over a horizontal line.

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