

January 28, 2020


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VIA IZIS

Frederick Hill, Chairperson
Board of Zoning Adjustment
441 4th Street NW Suite 210S
Washington, DC 20001

**Re: BZA Appeal No. 20183
DGS' Reply to Opposition to Motion to Postpone Hearing on the Merits with
Motion for Leave, if Applicable**

Dear Chairperson Hill and Members of the Board:

On behalf of the Intervenor DC Department of General Services (“DGS”), please consider the following reply to the Appellant’s opposition to DGS’ Motion to Postpone the Hearing on the Merits (“Motion”). DGS filed the Motion on January 23, 2020 – one day after retaining counsel - requesting a short postponement of the Board’s hearing on the merits of this appeal to allow counsel to adequately prepare for the appeal and ensure the availability of a key witness, Director Laura Zeilinger. *See* BZA Ex. 43. Appellee DC Department of Consumer and Regulatory Affairs consents to the postponement. *See* BZA Ex. 56.

I. The Motion was Timely Filed, But, Even if Untimely, a Motion to Waive the Seven-Day Requirement is Warranted

In its opposition, Appellant argues the Motion was not timely because it was filed less than seven days before the hearing on January 29, 2020. Under Subtitle Y § 302.17, an intervenor must file all information with the Board “no later than seven (7) days before the public hearing.” Importantly, the Zoning Regulations establish that the last day on which a period of time is prescribed shall be *included* in order to compute a filing deadline. *See* Subtitle Y § 204.3. If January 29th, the day of the hearing, is *included* as the seventh day in calculating the period under Subtitle Y § 302.17, then the filing is timely.

If Subtitle Y § 204.3 is not interpreted as proposed above, then under Subtitle Y § 302.19, the Board may waive the seven-day requirement of Subtitle Y § 302.17 for good cause shown. A Motion for Leave to Late File is attached hereto at **Tab A**. There is good cause to grant DGS a less than 24-hour delay in filing its appearance and the Motion. As the owner/manager of the subject property, DGS is automatically a party to this appeal and is entitled to adequate service of process. *See* Subtitle Y § 501.1. Despite extensive past correspondence between Appellant’s counsel and the Ward 1 Short-Term Family Housing project manager at DGS, the Appellant did not serve the project manager, nor general counsel for DGS. Instead, the Appellant served DGS by sending the appeal filing to an *incorrect* generic mailing address. *See* Affidavit of Kristen Walp, Senior Assistant General Counsel at DGS attached at **Tab B**; *see also* BZA Exs. 1, 16 attached with Tab B. In its certificate of service, Appellant claims to have served DGS at 1250 “O” Street NW. *See* **Tab B**. However, DGS is located at 1250 U Street NW, not 1250 O Street NW. *See* **Tab B**. Additionally, in the initial Form 125, Appellant lists DGS’ email incorrectly as “dsg@dc.gov.” *See* **Tab B**.

As a result, DGS staff working on the Ward 1 project did not learn of its ability to challenge the appeal until a few weeks before the hearing. *See* **Tab B**. Thereafter, DGS immediately began its internal process to retain counsel. *See* **Tab B**. On January 22nd, DGS hired counsel. *See* **Tab B**. One day later, on January 23rd, counsel expeditiously filed the Motion. Accordingly, there is good cause to allow a 24-hour delay.

Furthermore, Appellant's counsel was given the professional courtesy of oral notice of DGS' Motion five hours earlier than the actual filing. Indeed, Appellant filed an opposition to the Motion five days later, demonstrating Appellant is not prejudiced by a motion to waive the seven-day requirement under Subtitle Y § 302.17. There is good cause to waive the seven-day requirement and permit the filing of the Motion on January 23, 2020.

II. There is Good Cause to Grant DGS' Motion to Postpone Hearing on the Merits

This reply is filed in response to arguments made by Appellant to deny the request to postpone the hearing on the merits. There is good cause to grant the Motion because a short postponement of a hearing on the merits will avoid a conflict for DGS' witness, Director Laura Zeilinger of DC Department of Human Services, and will allow DGS' counsel adequate time to prepare for the hearing, including filing a prehearing statement on the merits. Appellant filed an opposition to the Motion, which it did not serve on DGS' undersigned counsel,¹ arguing that Director Zeilinger's testimony is not necessary and DGS' prehearing statement would be duplicative of Appellee DCRA's prehearing statement. We disagree.

Contrary to Appellant's assertions, DGS and its counsel should be entitled to adequately prepare for this appeal by determining key witnesses to defend its case and substantively briefing the Board on the issues at hand. To that end, Laura Zeilinger is the Director of the DC Department of Human Services, the District agency that programs and administers the Short-Term Family Housing shelters. Director Zeilinger is uniquely qualified to testify as to the policy background and development of the Ward 1 Short-Term Family Housing shelter, including the proposed apartment-style units that are the crux of this appeal. In 2017, Director Zeilinger testified extensively during the Board's hearings on zoning appeals concerning Short-Term Family Housing shelters in Wards 3, 5, and 6. *See* BZA Case Nos. 19450, 19451, and 19452. Appellant argues that the Ward 1 Short-Term Family Housing shelter is the same use as the other shelter buildings approved by special exceptions because "all the buildings authorized by the HSRA are "facilities to provide temporary shelter for families experiencing homelessness," and fall within the term 'emergency shelter' as that use is defined in the Zoning Regulations. *See* BZA Ex. 33, pg. 8. Director Zeilinger's testimony is directly relevant and can illustrate the difference in the proposed uses between previous Short-Term Family Shelter projects that required special exception approval, and the Ward 1 building, which is a by-right use.

DGS and its counsel should also be afforded adequate time to prepare for the merits of this appeal, which concerns a vital public service for District residents experiencing homelessness. Appellant's argument that DGS cannot offer additional information beyond DCRA's prehearing statement is self-serving and incorrect. DGS and DCRA are completely separate agencies with differing priorities. DGS is entitled to defend appeals concerning property it manages, and there is no equitable basis to handicap DGS' ability to do so. This is particularly true where a short, 15-30 day postponement, will not otherwise prejudice the Appellant.

To that end, Appellant argues the Motion should not be granted because its own witnesses have rearranged their schedules to be at the hearing on January 29th. First, Appellant's witnesses may still be

¹ DGS is an automatic party to this matter and entered its appearance on January 23rd. Accordingly, DGS was entitled to service of Appellant's opposition.

needed to testify on the critical question of timeliness during the January 29th hearing. DGS has *not* requested a postponement on this preliminary issue and is prepared to proceed. The proposal to bifurcate a threshold jurisdictional question from the merits follows case law and proper jurisprudence. “The timely filing of an appeal with the BZA is mandatory and jurisdictional.” *See Mendelson v. D.C. Bd. of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). Thus, Appellant’s witnesses will be needed on January 29th regardless of whether the Motion to postpone the hearing on the merits is granted.

Second, Appellant’s claim of prejudice are hypothetical because it does not know when the hearing would be rescheduled to. The parties can work directly with the Board to find a new hearing date that will ensure *all* witnesses can appear with no conflicts. Thus, a postponement would not prejudice Appellant because its witnesses will be able to appear at the continued hearing date, shall one be needed on the merits. Whereas, there is good cause to grant the Motion because a short postponement will allow Director Zeilinger to appear and testify at a hearing and will allow counsel adequate time to brief the Board on the merits and prepare for a hearing.

As such, DGS respectfully requests the Board grant the Motion to Postpone a hearing on the merits. We thank you for your attention to this matter.

SINCERELY,

COZEN O’CONNOR



Meridith H. Moldenhauer

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2020 a copy of the foregoing DGS' Reply to Opposition to Motion to Postpone Hearing with Motion to Waive was served, via electronic mail, on the following:

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