

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Application No. 13398, Motion for Reconsideration, filed May 22, 1981, in the application of Francis S. Murphy, pursuant to Sub-section 8207.2 of the Zoning Regulations, for a special exception under Paragraph 3101.41 to use the first floor of the subject premises as a day nursery consisting of twelve children in an R-2 District at the premises 3938 McKinley Street, N.W., (Square 1747, Lot 50).

HEARING DATE: December 17, 1980  
DECISION DATES: February 4 and March 4, 1981

DISPOSITION: The Board DENIED the application by a vote of 4-0 (John G. Parsons, William F. McIntosh and Douglas J. Patton to DENY; Charles R. Norris to DENY by PROXY; Connie Fortune ABSTAINED).

FINAL DATE OF ORDER: May 12, 1981

ORDER

The applicant filed a timely Motion for Reconsideration of the Board's Order denying the application. The applicant requests that the Board reconsider its decision and enter an Order granting the application or in the alternative to grant a Rehearing to hear new evidence not available at the public hearing of December 17, 1980. The Motion requests that the Board reconsider its decision for the FOLLOWING REASONS:

First, the Board based its decision on a restrictive covenant contained in the deed to 3938 McKinley Street, N.W., which is wholly irrelevant to a determination of whether to grant a special exception under Sections 8207.2 and 3101.41 of the Zoning Regulations. Second, the Board did not give Mrs. Heintz, the lessee, and other interested parties notice that the validity and effect of the restrictive covenant would be at issue in the application hearing and denied Mrs. Heintz an opportunity to submit evidence and argument addressing the covenant, in violation of D.C. Code § 1-1509(a) and Board rule 4.71. Third, the Board never reached the merits of the application in its deliberations; several members stressed that their votes concerning the application addressed only the Board's authority to grant an exception for a use that appeared to violate a restrictive covenant and did not reach the merits of the application. Accordingly, the conclusions of law concerning the impact of the Shoe on the neighborhood set forth in the May 12 decision were never reached by the Board.

Fourth, the Board's conclusions of law do not flow rationally from its findings and are contradicted by substantial and probative evidence in the record.

Upon consideration of the applicant's Motion and the opposition's response thereto, the Board concludes that as to the first alleged error, its decision was not based solely on the restrictive covenant contained in the deed to the subject site as evidenced in Paragraphs three and four of its Order. It is not sufficient that the applicant comply with the requirements of Paragraph 3101.41 of the Zoning Regulations. The applicant must also meet the burden of proof for Sub-section 8207.2. The Board concluded that the applicant had not.

As to the second alleged error, Section 1-1509(a) of the D.C. Code requires that, in a contested case, the notice of hearing "shall state the time, place and issues involved." The notice of public hearing in this case sets forth the portions of the Zoning Regulations which govern the application. Any party may submit evidence regarding those standards for the Board to use in deciding an application. The restrictive covenant became an issue for the first time at the public hearing, when it was introduced by a neighbor. There was nothing in the record as to its existence prior to that time. Even if the issue had been raised prior to the public hearing, the Board is not obligated in any sense to alert any parties of how it will address issues. The record is a public record and available to all citizens to examine. As to the opportunity for the applicant to address the covenant, the Chair advised counsel for the applicant that the Board would be advised by its own counsel, the Corporation Counsel, in the matter of an interpretation of the restrictive covenant, applicant's brief notwithstanding. As to Section 4.71 of the Supplemental Rules of Practice and Procedures, the Board concludes such section is irrelevant to the issues raised.

As to the third and fourth alleged errors, the Board concludes that the merits of the application were stated throughout the Findings of Fact and Paragraphs two, three and four of its Conclusions of Law and Opinion and that such conclusions flow rationally from its findings. The Board further concludes that no materially different evidence has been submitted in support of the motion for Reconsideration/Rehearing that the Board had not considered previously. Accordingly, it is ORDERED that the Motion for Reconsideration/Rehearing is DENIED.

VOTE: 3-0 (Douglas J. Patton, William F. McIntosh and Connie Fortune to DENY; Charles R. Norris not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:



STEVEN E. SHER  
Executive Director

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UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."