

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



ORDER DISMISSING APPLICATION  
NO. 14557

Application No. 14557 of the Government of Austria, pursuant to Article 46 of the Zoning Regulations, (11 DCMR, Chapter 10) for permission to expand a chancery and pursuant to Paragraph 8207.11 of the Zoning Regulations, (11 DCMR 3107.2) for variances from the lot occupancy requirements (Sub-section 3303.1; 11 DCMR 403.2), the side yard requirements (Sub-section 3305.1; 11 DCMR 405.9), from the number of stories limitation and the height requirements (Sub-section 3201.1; 11 DCMR 400.1) to renovate and construct an addition to a chancery in a D/R-1-B District at premises 2343 Massachusetts Avenue, N.W., (Square 2517, Lots 47 and 48).

HEARING DATE: February 25, 1987 and April 1, 1987  
DECISION DATE: April 1, 1987

The Government of Austria ("Applicant") filed this application with the District of Columbia Board of Zoning Adjustment (the "Board") on December 17, 1987. The Applicant sought two forms of relief: (1) expansion of its chancery use, pursuant to Article 46 of the Zoning Regulations (11 DCMR, Chapter 10); and (2) four area variances to expand the structure which houses the chancery. The Board provided due and timely notice that the application would be heard on February 25, 1987.

On January 8, 1987, the United States Department of State ("Department") submitted a letter, dated January 7, 1987, from James E. Nolan, Jr., Director, Office of Foreign Missions. Mr. Nolan wrote, in part, "In supporting the Austrian application before the Board Zoning Adjustment, the Department also endorses the Embassy's request for a special review by the Board as required under the Foreign Missions Act". (Exhibit No. 19 of the Record).

This application came before the Board for hearing on February 25, 1987. As a preliminary matter, the Board stated that its intended to employ a bifurcated procedure in hearing the action, that is, the Board would decide the approval of the expansion of the chancery use under the standards and rulemaking procedures of the Foreign Missions

Act and 11 DCMR, Chapter 10; and, with respect to the Applicant's request for variance relief, the Board would conduct contested case proceedings in accordance with the applicable provisions of the Zoning Regulations. The Department objected to the proposed procedure and requested that the Board enter a specific ruling on the propriety of the bifurcated procedure, in light of the Foreign Missions Act, 22 U.S.C. 4301 et. seq., (the "Act"). The Department asserted that the Act required that the application be heard entirely under the rulemaking procedures, and subject only to the standards set forth in Section 206(d) of the Act. The Applicant submitted that the only "real" difference between the rulemaking and the contested case proceedings was that of cross-examination. The Applicant stated that it would permit cross-examination, but noted that the practice of the Board had been not to require swearing of any witnesses in a rulemaking proceeding or of members of a diplomatic mission under any circumstances. The Board determined to postpone the proceedings, in order to request an opinion of the District of Columbia Office of the Corporation Counsel ("Corporation Counsel"). The hearing was continued until April 1, 1987.

On April 1, 1987, the continued hearing again came before the Board. The Board was informed that the Corporation Counsel had advised the Board that a bifurcated proceeding was appropriate under the circumstances of the instant case. The Corporation Counsel reasoned that the Act does not deprive a foreign government of the right to file a request for an area variance pursuant to the Zoning Act and Regulations. Moreover, the Foreign Missions Act does not divest the Board of its original jurisdiction to grant relief procedurally and substantively under the standards of the Zoning Regulations. Pursuant to that advice, the Board ruled that when, as here, an applicant files pursuant to and seeks relief under Paragraph 8207.11 of the Zoning Regulations (11 DCMR 3107.2) and also seeks relief under the Act, and requests bifurcated proceedings, the Board may so proceed.

The Board also adopted the position of the Corporation Counsel that the phrase "six months of filing an application" commences to run on the date on which an application is properly filed with the Board.

The Department reasserted the position that the Act required that the application be heard in its entirety as a rulemaking proceeding solely under the standards of the Act. The Department further stated that it had never granted the Applicant the authority to request a bifurcated proceeding. The Department's position in this respect is grounded upon several doubtful premises: (1) that the Department has absolute control over the relief the applicant may request; (2) that the Department would never have authorized a request for a process which is contrary to Department

policy; and (3) that, because the Department contends the Board has no jurisdiction to conduct a contested case proceeding, a request for or an authorization of a request for, such a proceeding, would, therefore have been absolutely void. It is not as clear to the Board as the Department asserts it to be that the Foreign Missions Act vests the Department with absolute control over every aspect of an application. Independently of that question, the Board is more persuaded by the plain language of the application and the Department's letter approving the application. The application clearly requested a bifurcated proceeding, and the Department unambiguously supported the application.

The Board is also persuaded that the Applicant and the Department were simply unwilling, for whatever reason, to accept the responsibility and consequences, as they perceived them, of requesting the Board for leave to amend the application, and to hear the case exclusively as a rulemaking proceeding. The Board notes that such a request on the day of the hearing would have presented a significant notice question.

The Board must exercise control over its proceedings. No applicant may direct the Board how to conduct hearings. In this case, the Board ruled that it would conduct the bifurcated proceeding which the applicant had requested. The applicant's attorney announced that the applicant would proceed exclusively under the Foreign Missions Act, and would not proceed under its variance request. The applicant's attorney did not, however, withdraw the applicant's request for approval of expansion of the structure. The clear effect of the applicant's position is that the applicant may unilaterally determine to amend the standards under which its application would be considered. The Board has not allowed applicants such control over cases. Granted, an applicant may, without Board approval, abandon a request for relief; or the Board may rule that an applicant who requests to have its application for relief considered under a different provision, and different standards, may do so, if the changes will not prejudice other persons or parties.

In this application, the applicant has not attempted to follow either of the two acceptable courses. Moreover, the Applicant did not move, and explicitly declined and refused to move, for leave to amend its application.

The applicant's statement that it would not proceed in accord with the Board's ruling required the Board to choose whether to allow the applicant to govern the Board's proceedings or to dismiss the application for want of prosecution. Such a "choice" is no choice at all. The only reasonable result of an applicant's election not to proceed pursuant to the Board's decision is dismissal of the application.

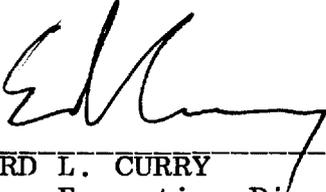
The Applicant has left the Board no reasonable alternative other than to dismiss this application for failure to prosecute.

Accordingly, it is ORDERED that the application is DISMISSED for want of prosecution.

VOTE: 3-0 (Charles R. Norris, Carrie L. Thornhill and John G. Parsons, to dismiss; Paula L. Jewell and Reginald Griffith abstaining).

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

ATTESTED BY:

  
EDWARD L. CURRY  
Acting Executive Director

FINAL DATE OF ORDER: JUN 17 1987

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