

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 16071 of the Washington International School, as amended, pursuant to 11 DCMR 3107.2, for a variance from the use provisions (Subsection 320.3) to allow the alteration and conversion of a school building into a 14-unit apartment house in an R-3 District at premises 2735 Olive Street, N.W. (Square 1215, Lot 806).

HEARING DATE: September 20, 1995
DECISION DATES: December 6, 1995 and May 7, 1997

DISPOSITION: The Board **GRANTED** the application by a vote of 5-0 (Susan Morgan Hinton, Maybelle Taylor Bennett, Angel F. Clarens and Laura M. Richards to grant; Craig Ellis to grant by absentee vote).

FINAL DATE OF ORDER: March 26, 1997

FURTHER DISPOSITION: The Board **DENIED** the Motions for Reconsideration filed by Keshet Israel Congregation and by the opponents by a vote of 4-0 (Angel F. Clarens and Susan Morgan Hinton to deny; Laura M. Richards and Maybelle Taylor Bennett to deny by absentee vote; Sheila Cross Reid not voting; not having heard the case).

FINAL DATE OF ORDER: August 15, 1997

SECOND RECONSIDERATION ORDER

By its order dated March 26, 1997, the Board granted the application to allow the conversion of the school building into a 14-unit apartment house. At the public hearing of September 20, 1995, the Board granted party status to Keshet Israel Congregation ("Keshet") and five neighboring residents in opposition to the application.

By its order dated August 15, 1997, the Board denied two separate Motions for Reconsideration filed by Keshet and by the five neighboring residents in opposition. Subsequently, on August 28, 1997, Keshet and the five neighboring residents in opposition (jointly referred to herein as Opponents), filed a Joint Motion for Reconsideration, which seeks a rehearing or reconsideration of the Board's August 15, 1997 denial of the first Motions for Reconsideration filed by Keshet and by the neighboring residents in opposition. The Opponents' Joint Motion also seeks a second reconsideration of the March 26, 1997 Order which reflects the

BZA APPLICATION NO. 16071

PAGE NO. 2

Board's 5-0 vote to approve variance relief to allow the alteration and conversion of the school building into 14-unit apartment house. Finally, this motion seeks a rehearing of the application.

After the Joint Motion for Reconsideration was filed, but prior to the Board's disposition of the Joint Motion for Reconsideration, a number of other documents were filed as follows:

- Response to Joint Motion for Reconsideration;
- Opponents' Joint Motion to Strike, and Opposition Thereto;
- Applicant's Motion to Strike Opponents' Joint Motion, and Opposition Thereto.
- Opponents' Second Joint Motion to Strike;
- Opponents' Third Joint Motion to Strike;
- Letter of September 16, 1997 from Olive Street Limited Partnership (Olive Street), the successor owner of the property which is the subject of this application, authorizing its counsel to act on its behalf with regard to the pleadings and responses set forth above;
- Letter of September 26, 1997 from Counsel for Olive Street;
- Letter of September 29, 1997 from Counsel for the Opponents.

Party Status for Olive Street

The first issue decided by the Board was the issue of Olive Street's party status. Olive Street is the successor owner of the property which is the subject of this variance application. Applying the Board's own rules and the laws and regulations that they are intended to supplement, including the D.C. Administrative Procedure Act, the Zoning Enabling Act, and the Zoning Regulations themselves, this Board has consistently and repeatedly interpreted its rules of procedure on numerous occasions to allow a successor owner of the property which is the subject of a particular application to participate as a matter-of-right, as the successor party in interest during the proceedings before the Board, including post-hearing and post-decision motions. Olive Street is the successor party in interest to the original applicant, Washington International School. The Board therefore admits Olive Street as a party in this application.

Disposition of Motions to Strike

The Board noted that in this case, a number of the pleadings filed subsequent to the Joint Motion for Reconsideration were captioned as Motions to Strike. To grant such motions would require the Board to remove documents from the record. In order that there would be a full record for review in this case, the Board denied the Motions to Strike, and allowed the merits of the arguments in each of those pleadings to be available for consideration in the disposition of this case.

Request to Postpone Decision on Pending Motions

By letter dated September 29, 1997, counsel for the Opponents notified the Board that the Opponents had requested that the Court of Appeals remand this case to the Board to permit it to decide all of the above-referenced pending undecided motions. In that letter, the Opponents requested that this Board postpone a decision on the pending motions until the Court of Appeals remanded the case to the Board with instructions to decide these motions. The Board noted that

BZA APPLICATION NO. 16071

PAGE NO. 3

the September 29, 1997 letter from counsel for the Opponents and the Opponents' Third Joint Motion to Strike were both served on counsel for Olive Street by mail two days prior to the Board's consideration of these matters. Counsel for Olive Street was given an opportunity to respond orally to those documents at the Board's public meeting of October 1, 1997. Counsel for Olive Street informed the Board that Olive Street waived its right to respond to the issues raised in those documents.

With regard to this request, the Board noted that the movants were entitled to seek court review, as appropriate. The Board was not persuaded that the Opponents had indicated sufficient good cause in their arguments in support of this request. The Board noted that the Opponents initiated this series of motions, and did not withdraw their Joint Motion for Reconsideration or the various other motions following that pleading. Further, the Board had not received an order from the Court of Appeals directing the Board either to proceed or not to proceed with a decision on these motions. The Board is of the view that it was not required to await the decision of the Court before it could act on motions properly before it, therefore, the Board denied the request for deferral of its decision and proceeded with disposition of the pending motions.

**RECONSIDERATION OF JOINT MOTION FOR RECONSIDERATION
(AND REHEARING)**

The Issue of Timeliness:

The Joint Motion for Reconsideration is dated August 28, 1997. Pursuant to 11 DCMR 3332.2, "[a] motion for reconsideration or rehearing may be filed within ten (10) days of the filing and service of the written order of the Board." The written order from which reconsideration was initially sought was the order denying reconsideration dated August 15, 1997. As to this order, the Board determined that the instant motion was timely.

However, it was apparent that the movants wished to have the Board reconsider its *initial* decision to grant the application. This decision is memorialized in the order dated March 26, 1997. The Board noted that the only way to effectuate the reconsideration of the original decision was for the Board to grant the reconsideration of *the reconsideration order* because the instant motion had been filed more than five months after the final date of *the initial order* of March 26, 1997. Therefore, the instant motion would be untimely as to the initial order since no waiver was requested or granted. It follows therefore, that if the Board denies the instant motion for reconsideration, it cannot reconsider the initial decision. It also follows that if the Board denies the instant motion for reconsideration, the issue of rehearing is moot, as the request for rehearing was not submitted within 10 days of the decision to grant the application (for which a hearing was held).

The Motion for Reconsideration

In the Joint Motion for Reconsideration dated August 28, 1997, the movants requested that the Board reconsider the decision in its Order dated August 15, 1997 which denied reconsideration of the Board's final Order dated March 26, 1997 granting the application.

Motions for reconsideration are governed by 11 DCMR 3332.4 which provides as follows: "A motion for reconsideration shall state specifically the respects in which the final decision is claimed to be erroneous, the grounds of the motion and the relief sought." Applying this provision to the instant motion, the movants were first required to state specifically how the Board erred in denying *the motion for reconsideration* of the initial decision.

The Board noted that the movants' submission constituted a motion for reconsideration in caption only, for the body of the document did not address the standard set forth in Subsection 3332.4. Because the motion failed to state the basis of the Board's error in denying the *motion for reconsideration*, the Board concluded that the *instant motion for reconsideration* should be denied.

The Motion for Rehearing

The Joint Motion submitted by the movants was, in substance, a request for a rehearing of the application. Because the Board had determined to deny the motion for reconsideration, the issue of rehearing was moot. The Board was of the view that the motion for rehearing did not logically relate to the first *motion for reconsideration* because motions are not the subject of hearings generally. It is apparent that the instant request for rehearing relates to the *initial decision* of the Board to grant the application. However, because the Board did not herein grant the motion to reconsider its *reconsideration order*, the motion for rehearing cannot be applied to the *initial decision*, and is therefore moot.

The Board noted preliminarily that this is the first time in the memory of both the Board and the staff that there has been a second Motion for Reconsideration filed in a case, requesting reconsideration of a denial of reconsideration and requesting a second reconsideration of an order. The Board is charged with the duty of administering and interpreting its own Supplemental Rules of Practice and Procedure, codified at 11 DCMR Chapter 33. The Board noted that it does not interpret those rules to provide for the filing of unlimited successive Motions for Reconsideration, nor do the rules reasonably contemplate "reconsiderations of reconsiderations." Such a practice would unduly impose upon the resources of the Board, and would unfairly prejudice the prevailing party to an application, whether it is the applicant or the opposition. This practice would also create confusion and uncertainty as to whether the Board's decision is ever really "final" in a case. This case was heard and decided in 1995. There is a need for certainty and finality of Board decisions.

The Board takes this opportunity to admonish future parties that the Board's interpretation of its own rules allows for the filing of only one Motion for Reconsideration. If that Motion is denied, the affected party is entitled to seek a remedy in the D.C. Court of Appeals. In this case, however, to avoid the possibility of a remand from the court on this procedural question, the Board reviewed and ruled upon the pleadings and documents filed.

The Joint Motion for Reconsideration filed by the Opponents lists three arguments in support, which are summarized as follows:

- The property, which is the subject of this variance application, was sold by the Washington International School to Olive Street in order to undertake the development which was made possible by the grant of variance relief from this Board.
- Other private schools in the District of Columbia have offered bids on surplus public school buildings.
- One of the applicant's witnesses was quoted in a newspaper regarding the District's sale of surplus school buildings.

Requests for reconsideration and rehearing on applications are governed by 11 DCMR Section 3332. Section 3332.2 allows a motion for reconsideration or rehearing of a final decision to be filed by a party within 10 days after the filing and service of the written order of the Board. Section 3332.4 states that a motion for reconsideration "shall state specifically the respects in which the final decision is claimed to be erroneous, the grounds of the motion and the relief sought." As for a motion for rehearing, Section 3332.6 states that no such request shall be considered by the Board "unless new evidence is submitted which could not reasonably have been presented at the original hearing."

The Joint Motion for Reconsideration requested reconsideration of both the Reconsideration Order of August 15, 1997, and the original Order of the Board dated March 26, 1997. The Joint Motion for Reconsideration was filed within 10 days of the date of the Reconsideration Order, but was filed more than five months after the March 26, 1997 Order. Moreover, the Opponents each individually filed a separate motion for reconsideration of the March 26, 1997 Order, and those motions were previously decided by this Board. The Board is empowered to waive any of its own rules "for good cause shown." No good cause was shown for waiving the ten-day rule to allow reconsideration of the March 26, 1997 order, especially in light of the fact that the Board had already reconsidered that Order upon two separate motions of the Opponents in their individual capacities.

The Motion did not state specifically the respects in which the final decisions of either March 26, 1997 or August 15, 1997 were claimed to be erroneous. Rather, the motion attempted to raise new evidence which was not the subject of the previous motions for reconsideration. A motion for reconsideration must be based upon the record before the Board. Facts, circumstances and allegations which are beyond the scope of the record considered and acted upon by the Board are not the proper subject of a motion for reconsideration.

Moreover, the evidence proffered by the Opponents was not the type of reliable, probative and substantial evidence which would cause the Board to reconsider either its August 15, 1997 Reconsideration Order, or the original March 26, 1997 Order approving the variance. As to the first proffered item of evidence, it was clear to the Board during the proceedings on the merits of the application, and it should have been clear to the Opponents, that the Washington International School is not a developer and was not going to itself perform the renovation work necessary to turn the obsolete school building into a 14-unit apartment house. The fact that the property had been sold to a developer to undertake that work was not sufficient evidence for the Board to change its original determination in any way.

With regard to the second and third proffered items of evidence listed above, the Opponents relied only upon newspaper articles to support their positions. Those newspaper articles deal with the District's decision to sell surplus public school buildings. The articles make no mention of the prices offered for the public school buildings, nor do they mention whether and to what extent any of the bids were accepted. The articles indicated that the "bidders" had not even submitted final offers on those properties.

The Joint Motion for Reconsideration also requested a rehearing of the Board's August 15, 1997 Order denying the separate motions for reconsideration filed by the Opponents. Such requests are governed by Section 3332.6 of the Zoning Regulations. By definition, there can be no "rehearing" of a denial of reconsideration, because the original reconsideration was not the subject of a hearing. Moreover, even if a denial of reconsideration was the proper subject matter of a hearing, for the reasons set forth above, the evidence proffered by the Opponents is not the type of reliable, probative, and substantial evidence which would support a rehearing. Although the sale of the property to Olive Street occurred after the issuance of the March 26, 1997 order, and although the newspaper articles proffered as evidence were also published after the date of that order, there has been no evidence presented which is of sufficient substance to warrant the scheduling of a rehearing on those issues in this variance application. The granting of a rehearing is extraordinary relief, and requires more than a mere proffer of post-dated information. The information must be reliable, probative and substantial enough to justify a revisitation of the particular issues raised in order for a new public hearing to occur. In the opinion of the Board, the proffered information did not justify a rehearing.

CONCLUSIONS OF LAW AND OPINION:

The Board concludes that the Opponents have failed to meet the burden of proof for reconsideration or rehearing of the Board's August 15, 1997 Reconsideration Order or for a second reconsideration of the Board's March 26, 1997 order. The Board is of the opinion that it did not err in granting the variance application or in denying the Motions for Reconsideration. The evidence proffered by the Opponents is not the type of reliable, probative and substantial evidence which would support either the Motion for Reconsideration of both the March 26, 1997 order and the August 15, 1997 Reconsideration Order or the Motion for Rehearing of the August 15, 1997 Reconsideration Order. Moreover, the Motion for Reconsideration of the March 26, 1997 order is untimely, and no good cause was shown for a waiver of the rules. In addition, by definition there can be no rehearing of the August 15, 1997 Reconsideration Order, because there was no hearing on the original Motions for Reconsideration which were the subject of that order. Therefore, for the reasons as set forth above, the Board hereby **ORDERS** that the Joint Motion for Reconsideration be **DENIED**.

Upon review of the arguments presented in the remaining Motions to Strike and the responses thereto, as well as the matters contained in the correspondence listed above which have not already been addressed in this order, the Board concludes that the substance of those motions and requests relates to the Joint Motion for Reconsideration which the Board has denied. Therefore, the Board hereby **ORDERS** that the substance of the motions and requests contained

BZA APPLICATION NO. 16071

PAGE NO. 7

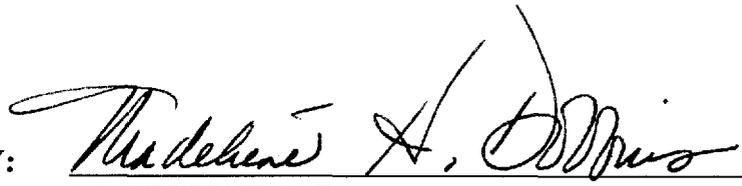
in the various Motions to Strike and the correspondence submitted by the parties is **DISMISSED** as **MOOT**.

DECISION DATE: May 7, 1997

VOTE: **3-0** (Laura M. Richards, Maybelle Taylor Bennett and Susan Morgan Hinton to deny; Sheila Cross Reid and Betty King, not voting, not having heard the case).

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

ATTESTED BY:



MADELIENE H. DOBBINS
Director

Final Date of Order: **MAR 20 1998**

UNDER 11 DCMR § 3103.1, "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.

ORD16071/TWR

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 16071

As Director of the Board of Zoning Adjustment, I hereby certify and attest that on MAR 20 1998 a copy of the order entered on that date in this matter was mailed first class postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

Christopher H. Collins, Esquire
Wilkes, Artis, Hedrick and Lane
1666 K Street, N.W., Suite 1100
Washington, D.C. 20006

Anne-Marie Pierce
Washington International School
3100 Macomb Street, N.W.
Washington, D.C. 20008

Charles R Braun, Esquire
3816 Windom Place, N.W.
Washington, D.C. 20016

Robin B. Hayes, Esquire
Stohlman, Beuchert, Egan and Smith
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Fran Goldstein, Chairperson
Advisory Neighborhood Commission 2E
3928 Highwood Court, N.W.
Washington, D.C. 20007

Attested By:

A handwritten signature in black ink, appearing to read "Madeliene H. Dobbins", written over a horizontal line.

MADELIENE H. DOBBINS
Director

DATE: MAR 20 1998