

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



**Application No. 16072** of the John Hancock Mutual Life Insurance Company, pursuant to 11 DCMR 3107.1, for a variance from the prohibition against increasing the gross floor area of an existing hotel [Paragraph 350.4(d)] in an R-5-B and R-5-D Districts at premises 2660 Woodley Road, N.W. (Square 2132, Lot 32).

**HEARING DATES:** December 20, 1995 and February 21 and March 6, 1996  
**DECISION DATE:** May 1, 1996

**DISPOSITION:** The Board **DENIED** the application by a vote of 3-2 (Laura M. Richards, Susan Morgan Hinton and Maybelle Taylor Bennett to deny; Angel F. Clarens and Sheila Cross Reid opposed to the motion).

**FINAL DATE OF ORDER:** March 17, 1997

**RECONSIDERATION ORDER**

**PROCEDURAL BACKGROUND:**

The Board denied the application for variance relief at its public meeting of May 1, 1996. On May 24, 1996, the applicant filed a motion to reopen the record. A response in opposition to that motion was filed on May 31, 1996 by the Woodley Park Community Association ("WPCA" or "opponents"). At the public meeting of June 5, 1996, the Board considered the motion to reopen the record. However, the Board determined that because the written order had not yet been issued, the motion was untimely.

On March 17, 1997, the applicant filed a motion for reconsideration of the Board's oral decision of May 1, 1996. The final order was also issued on March 17, 1997. A statement in opposition to the motion for reconsideration was filed on March 27, 1997 by the WPCA. At the public meeting of April 9, 1997, the Board deferred consideration of the motion for reconsideration until May 7, 1997.

On April 8, 1997, WPCA, through counsel, submitted a letter raising two preliminary issues to be considered by the Board. First, the opponent requested that the Board Members be asked whether they were contacted, *ex parte*, by any official of the District of Columbia government.

The second issue raised by WPCA was an objection to Mr. Clarens' participation in the decision on the motion for reconsideration. It was pointed out that his term expired at the end of

December 1996. His term was extended for another 90 days until March 30, 1997. By Mayor's Order 97-65, dated April 3, 1997, Mayor Barry ordered that Mr. Clarens serve as a member of the Board in an acting capacity for 90 days, effective on March 30, 1997.

On April 9, 1997, the Chairperson of ANC 3C, Phil Mendelson, submitted a statement in opposition to the motion for reconsideration and a statement agreeing with WPCA that Mr. Clarens should not participate in the decision in this matter.

By letter dated May 6, 1997, ANC-3C adopted a resolution ratifying the positions taken by Mr. Mendelson in his letter dated April 9, 1997.

At the public meeting of April 9, 1997, the Board considered the preliminary matters before deciding the motion for reconsideration.

***Ex parte Communications:***

The Board members made the following statements on the matter of *ex parte* communications: Chairperson Hinton and Mrs. Reid stated that they had not had *ex parte* communications with any government official or party. Mrs. Richards and Mr. Clarens adopted these remarks. Ms. Bennett stated that she had been contacted by an individual, but that she render a decision based on the record in the case and the Zoning Regulations. In light of these statements, the Board determined that the issue of *ex parte* communications would not be a bar to deciding the substantive motion.

**Participation by Mr. Clarens:**

In challenging the authority of Mr. Clarens to render a decision on the motion before the Board, WPCA argued that, pursuant to D.C. Code Subsection 1-633.7(d)(2)(B), Mr. Clarens was permitted to hold over for no longer than 180 days after his term expired in 1996. The hold-over period expired on March 31, 1997. The WPCA noted the Mayor's April 3, 1997 appointment of Mr. Clarens in an acting capacity for 90 days. With regard to this action, WPCA stated that the provision relied on by the Mayor, D.C. Code Subsection 1-633.7(d)(2)(A), does not apply to Mr. Clarens and cannot be used to effectively extend the hold-over period. The WPCA argued that the Mayor's hold-over authority was changed to hold the government to the confirmation process and to limit the authority of the Mayor to circumvent that process. The WPCA stated that this provision cannot be interpreted in a way that expands the Mayor's authority. If the Mayor wanted to reappoint Mr. Clarens, he would have to have done so within the 180-day period, not after it expired. Finally, they stated that since Mr. Clarens' nomination was not pending before the Council when the Mayor appointed him for a 90-day period, the appointment is invalid.

In his letter of April 9, 1997, Mr. Mendelson acknowledged that WPCA was challenging Mr. Clarens' authority and expressed agreement with their views. In the May 6, 1997 letter from ANC-3C, Mr. Mendelson discussed the intent of the Confirmation Act, the improper nature of the Mayor's action and he objected to Mr. Clarens involvement in the subject case.

At the public meeting on this matter, the Board stated that it received advice from the Corporation Counsel's office. Based on that advice, the Mayor had authority to make the acting appointment and Mr. Clarens may participate in the decision.

**THE MOTION FOR RECONSIDERATION:**

In the document filed March 17, 1997 from the applicant, "movant" herein, there is a request for a waiver to allow for reconsideration of the Board's oral decision to deny the application prior to issuance of the final order. Because the written decision was issued on the same day that the motion was received, the issue of waiver was rendered moot.

In the motion for reconsideration, the movant argued that the Board evaluated this area variance application apparently using a higher standard than the Zoning Regulations or case law permits. The applicant stated that this may have led to a vote in which a majority of the Board members appeared to agree that the applicant had met the statutory test for a variance, but denied the application nevertheless.

The movant noted that the Board denied WPCA's request to classify the case as a use variance application. However, the movant argued, it appears that two of the Board Members, both of whom voted against granting the application, added additional standards to the statutory and case law burdens placed on an applicant seeking an area variance. In support of this argument, the movant noted the following comment by Chairperson Richards made at the decision meeting: "I think it is an area variance. The wording of the Regulations calls for heightened scrutiny of the second and third clause of the area variance test." (Emphasis added, Public Meeting Transcript, p.5). Addressing this comment, the movant argued that neither the Zoning Regulations nor the case law direct the Board to evaluate an area variance with "heightened scrutiny."

Next, the movant noted that Ms. Bennett, in her discussion, went through the three-prong test for area variance relief and found that the Hotel had met all three prongs, but she struggled with with how to vote on the application. The movant offered that her hesitance was because of testimony indicating that the Hotel's convention facilities had grown over time (albeit as a matter-of-right) and her focus on the intent of Zoning Order No. 314, which in her view, must have been to prevent this continuing spread. The movant argued that while this may or may not have been the intent of the Zoning Order 314, neither, the zoning order nor any section of the Regulations extend the requirements of a variance test beyond those articulated in the Zoning Regulations as sustained by the District of Columbia Court of Appeals. The movant believes that if the Board evaluated this application pursuant to the traditional three-prong variance test, the record amply supports the granting of its application.

Finally, the movant argued that it had no opportunity to address this higher standard in this case when the record was open. Consequently, for a full and fair decision based on the record, the movant requested that the Board reconsider a decision in the application. The movant also submitted a memorandum addressing the legality of the additional zoning variance test allegedly created by the Board in this case.

By letter dated March 27, 1997, the Woodley Park Community Association opposed the motion for reconsideration. The WPCA stated that the applicant's motion essentially argues that the findings made in the decision are not consistent with oral statements by Board Members and that the Board has not properly applied and interpreted the provisions of the Zoning Regulations dealing with variance requests. The WPCA maintains that neither argument has merit because the motion fails to address the major component of the Board's decision – that the variance requested is simply not consistent with the intent of the Zoning Regulations.

The opponents argued that motions for reconsideration may be filed only after the issuance of the final order in the application. Because the Board's written decision constitutes the formal decision of the Board, only requests for reconsideration which challenge the reasoning of the Board's written decision are properly before the Board. Requests that seek reconsideration based on oral statements of the Board simply are not permissible. Furthermore, given the length of the decision, the careful analysis by the Board and the fact that the Board has had an opportunity to review the written decision before it was issued, any contention that the decision does not reflect the Board's view is simply not supportable.

The opponents further argued that the movant misconstrued the Board's reasoning. The Board did not apply a different type of standard to the variance requests before it. The Board essentially determined that the applicant was not entitled to an area variance because the relief could not be granted "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map." This finding by the Board gives due regard to the Zoning Commission's action in adopting an amendment to the Zoning Regulations that restricted the expansion of hotels in residential areas. The opponent pointed out that in making this determination, it was entirely appropriate for Board Members to reference the decision of the Zoning Commission and the grounds for its decision. An understanding of the basis for the Zoning Commission's action served to place the Regulations in their appropriate context.

Finally, the opponent stated that on the issue of uniqueness, the Board's findings are supported by the record. The applicant failed to make a showing that the factors considered unique have a nexus to the renovation plan proposed since, *inter alia*, a variety of the improvements requested could be accomplished without the need for any relief from the Board. The opponent argued that the movant is asking the Board to ignore the fact that Subsection 3107.2 seeks to ensure that variances granted do not have the effect of "substantially impairing the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map." The Board cannot ignore this requirement. Therefore, the opponent requested that the motion for reconsideration be denied.

In the letter of April 9, 1997, filed by Mr. Mendelson and subsequently ratified by ANC 3-C, the ANC stated that the movant's objections focus on the Board's oral discussion and are therefore misdirected. The real reasoning of the Board is embodied in the written order. Therefore, the motion should be denied.

No other responses were filed in support of or in opposition to the motion.

**CONCLUSIONS OF LAW AND OPINION:**

Motions for reconsideration must be reviewed based on the standards set forth in the Board's Rules at 11 DCMR 3332.4 which 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." Upon consideration of the Board's Rules, the motion, the response and the record in this case, the Board concludes that the movant has failed to meet the standard for granting requests for reconsideration.

First, the Board notes that the motion barely makes reference to the written decision of the Board, but rather focuses on the oral decision of individual Board members.

With regard to the statements made by Ms. Richards, the Board notes that she did not intend to impose additional standards for granting variance relief, as alleged by the movant. Instead she was pointing out how the hotel's proposed expansion needed to be reviewed very carefully to determine if it fell within the narrow area of permissible activity of renovations, repairs, etcetera. This careful examination of the proposal was what Mrs. Richards was referring to when she used the words "heightened scrutiny." Her choice of words was not an attempt to create a more stringent standard for variance relief in this case.

The Board is of the opinion that the motion is based on the applicant's view that the Board's decision is not reflected in the discussion and that the Board Members did not understand what they were voting on. To the contrary, the Board notes that often times matters are not crystal clear in difficult, complicated cases. This is the reason that Board Members engage in a discussion. The Board Members hear the testimony, read the record and then come together to discuss the case, expressing what they heard, what they think is important and how they should decide. The Board believes that perhaps, in this case, the discussion was overly extensive, however, the Board's conclusion is very clear, and the written order is likewise very clear. The Board is of the opinion that the motion is, in part, an attempt to have the Board re-weigh the evidence. However, the Board does not believe that it erred in deciding to deny the variances in this case based on the evidence in the record. Accordingly, the Board hereby **ORDERS** that the **MOTION FOR RECONSIDERATION** be **DENIED**.

**DECISION DATE: May 7, 1997**

**VOTE: 3 - 2** (Susan Morgan Hinton, Laura M. Richards and Maybelle Taylor Bennett to deny; Sheila Cross Reid and Angel F. Clarens opposed to the motion).

**BY ORDER OF THE BOARD OF ZONING ADJUSTMENT**

**ATTESTED BY:**



**MADELIENE H. DOBBINS**  
**Director**

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

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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.

ORD16072/TWR

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



**BZA APPLICATION NO. 16072**

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:

Phil T. Feola, Esquire  
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Phil Mendelson, Chairperson  
Advisory Neighborhood Commission 3C  
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Washington, D.C. 20008

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