

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17585 of Darshan Shah, pursuant to 11 DCMR § 3103.2, for a variance from the use provisions of § 320.3 to allow the conversion of a single-family row dwelling to a three (3) unit apartment building in the R-3 District at premise 2113 S Street, N.W. (Square 2532, Lot 45).

HEARING DATES: April 3, 2007 and April 24, 2007
DECISION DATE: April 24, 2007

DISMISSAL ORDER

On November 16, 2006, Mr. Darshan Shah (“Applicant”) filed Application No. 17585 seeking a variance from 11 DCMR § 320.3 in order to convert a single-family row dwelling to a three (3) unit apartment building.

Pursuant to 11 DCMR § 3113.13, notice of the April 3, 2007 hearing was sent to the Applicant, owners of property within 200 feet of the site, Advisory Neighborhood Commission (“ANC”) 2D, and the District of Columbia Office of Planning.

ANC 2D Chair Sandra Perlmutter and two individuals who had requested party status, Mr. Tim McFeeley and Ms. Linda Bumbalo, filed written submissions with the Board requesting that the April 3, 2007 hearing be postponed because the ANC lacked a quorum at its March 19, 2007 meeting, preventing it from voting on the Applicant’s project. The submissions also stated that even if a quorum had existed, the Applicant had failed to present sufficient evidence for the ANC Commissioners to take a position. It was also noted that April 3 was a religious holiday and several interested parties would be unable to attend the BZA hearing.

The Board granted the postponement and rescheduled the Applicant’s hearing to April 24, 2007. In a letter to the Board dated April 24, 2007, ANC 2C advised that the Applicant did appear at its publicly noticed meeting on April 16, 2007, but with insufficient information for the ANC to take a position. The ANC extended the Applicant the opportunity to return to the ANC with more information, but the ANC heard nothing further from him.

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At the April 24 hearing, the Applicant failed to appear when his case was called. The Board instructed the Office of Zoning (“OZ”) staff to contact the Applicant by telephone to determine the reason for his absence. The Board also adjusted the order of cases to be heard to grant the Applicant more time to appear.

The Office of Zoning staff finally reached the Applicant by telephone. The Applicant was in New York at the time, and after speaking with the Office of Zoning staff, faxed the Board a request for continuance at 2:23 p.m. In his fax, the Applicant stated, “I need additional meetings with the ANC and am stuck in NY.”

The Board deliberated concerning the Applicant’s last-minute request for a continuance, the grant or denial of which falls squarely within the discretion of the Board. *See, e.g., King v. D.C. Water and Sewer Authority*, 803 A.2d 966, 968 (D.C. 2002). After deliberating, the Board decided to deny the request for continuance, and instead dismissed the application. The Board has “broad authority and reasonable latitude to perform its function,” including, when necessary, authority to dismiss an application for failure of the Applicant to prosecute his case. *See, e.g., Coumaris v. D.C. Alcoholic Beverage Control Board*, 660 A.2d 896, 903 (D.C. 1995). (“It would seem implicit, if not expressly written, that the Board has the authority to dismiss a petition.”) (Pryor, J., concurring). *See also, Stancil v. D.C. Rental Housing Comm’n.*, 806 A.2d 622 (D.C. 2002). Although the denial of the continuance and the dismissal are two separate actions, the reasoning behind them is intertwined, and is set forth below.

In addressing the Applicant’s request for a continuance, the Board considered all the surrounding circumstances, including “the reasons for the request for continuance, the prejudice that would result from its denial, the part[y]’s diligence in seeking relief, any lack of good faith, and any prejudice to the opposing party.” *King, supra*, at 968, citing *Murphy v. Beiro Constr. Co.*, 679 A.2d 1039, 1043 (D.C. 1996). The Applicant’s stated reason for the requested continuance was that he needed “additional meetings with the ANC.” His hastily hand-written and faxed request, however, provides no support for this reason. Rather, the evidence in the record tends to show that the Applicant failed to take advantage of the opportunity to meet with the ANC prior to the hearing. The case had already been postponed once and the ANC letter dated April 24, 2007 shows that the Applicant failed to pursue meetings with the ANC and/or failed to be sufficiently prepared for such meetings during the time provided by the first postponement. The Applicant not only failed to make a sufficient presentation to the ANC and failed to show up for the hearing, but the paltry amount of documentation in the case file tended to show a lack of diligence in seeking relief.

No particular prejudice results from the denial of a continuance and simultaneous dismissal because the Applicant has the right, after 90 days, to re-file his application. 11

DCMR § 3113.11. Further, although a continuance of the case may have prejudiced, or at least inconvenienced, the opposing parties by forcing them to appear before the Board for a third time in the same case, a dismissal removes this prejudice or inconvenience, while, again, leaving the door open for the Applicant to re-file. Lastly, although the Board does not find a lack of good faith on the part of the Applicant, the Board notes that his cavalier handling of the request for continuance displays a lack of seriousness in his prosecution of the case, and perhaps, a lack of respect for the Board's procedures, as well as a disregard for the other participants in this case.¹

Finally, the D.C. Administrative Procedure Act, which this Board is bound to follow, specifically authorizes disposal of a contested case, such as that of the Applicant, by default. D.C. Official Code § 2-509(a). Default normally applies to a defendant or opposition party, but its functional equivalent for an applicant would be dismissal. *See, e.g., Digital Broadcast Corp. v. Rosenman & Colin, LLP*, 847 A.2d 384, 388 (D.C. 2004). Default includes failure to appear for a properly-noticed proceeding and the Applicant's failure to appear for the hearing supports dismissal of the case. *See, e.g., Pelkey v. Endowment for Community Leadership*, 841 A.2d 757 (D.C. 2004).

The Applicant's case was a contested case, therefore, the Board, in addressing the case, attempted to address the circumstances as a court would. *See, e.g., Mullin v. D.C. Rental Housing Comm'n.*, 844 A.2d 1138, 1142 (D.C. 2004), citing *Radwan v. D.C. Rental Housing Comm'n.*, 683 A.2d 478, 480 (D.C. 1996). ("Absent a regulation specifically governing the exercise of the Commission's discretion, it is not unreasonable for the agency to look to factors relied upon by courts under a similar rule and similar circumstances.")² After examining the circumstances surrounding the Applicant's application, lackluster prosecution of the case, and failure to appear, and the lack of real prejudicial effect, the Board concludes that there is no "good cause shown" to postpone the case. *See*, 11 DCMR § 3117.2. The Board further concludes that dismissal of the case without prejudice is warranted.

¹While Applicant failed to attend his hearing because he was in New York, one witness who did attend said she had twice driven from Florida to testify in this case.

²While no particular regulation mandates the Applicant's attendance at a hearing, the rules of practice require a public hearing on every application and clearly assume the Applicant's or the Applicant's representative's participation in the hearing. The Applicant failed to comply by not attending the hearing, either in person or through an authorized agent, without leave of the Board. The Board notes 11 DCMR § 3113.11, which authorizes dismissal of a case for failure of an applicant to comply with procedural requirements.

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It is therefore **ORDERED** that Applicant's request for continuance or postponement is **DENIED** and this application is **DISMISSED**.

VOTE: 5-0-0 (Curtis L. Etherly, Jr., Anthony J. Hood, Marc D. Loud, Ruthanne G. Miller, and John A. Mann II to approve the motion)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member approved the issuance of this order.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning 

FINAL DATE OF ORDER: JAN 24 2008

UNDER 11 DCMR § 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
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As Director of the Office of Zoning, I hereby certify and attest that on **JANUARY 24, 2008**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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ATTESTED BY:


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Director, Office of Zoning

TWR