

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 18866-A on the Motion for Reconsideration and Rehearing of the Application of Planned Parenthood Association of DC, pursuant to 11 DCMR § 3103.2 for variances from court (§ 536) and parking (§ 2101.1) requirements, and pursuant to 11 DCMR § 3104.1 for a special exception for office use (§ 508), to allow a new mixed-use residential and commercial office building in the SP-2 District at premises 1108 16th Street, N.W. (Square 183, Lot 111).

HEARING DATE: December 2, 2014 and January 27, 2015

DECISION DATE: January 27, 2015

**RECONSIDERATION
DECISION DATE:** November 10, 2015

ORDER DENYING RECONSIDERATION AND REHEARING

By summary order issued February 4, 2015, (“Order”) the Board of Zoning Adjustment (“Board”) granted the application of Planned Parenthood Association of DC (“Planned Parenthood”) for the above-captioned relief. On October 15, 2015, Lesser Atlantic, LLC (“Lesser Atlantic”), the owner of property adjacent to the subject property at 1112 16th Street, N.W., filed a motion for reconsideration and rehearing (“Motion”). (Exhibit 45.)

The Motion claims that Lesser Atlantic did not receive notice of the public hearings on the application. The Motion states that the notice mailed pursuant to § 3113.13(b) never reached Lesser Atlantic and instead was returned and marked, “vacant, unable to forward.” According to Lesser Atlantic, the address to which the notice was sent was incomplete because it lacked a suite number. The Motion asserts that the Board should have conducted further investigation when the notice was returned. Lesser Atlantic further argues that the notice posted on the subject property pursuant to § 3113.15 was insufficient because that section requires posting at the property’s street frontage and on the front of each building, whereas, in this case, only the street frontage was posted. Lesser Atlantic contends that these deficiencies provide good cause under § 3100.5 for the Board to waive the requirements of § 3126.2. Under that provision, only a party may file a motion for reconsideration or rehearing, and such a motion must be filed within 10 days of the issuance of the Board’s written order. Neither requirement is met in this case. Lesser Atlantic asserts that the alleged notice deficiencies deprived it of its right to participate in the Board’s hearing or request party status, and prevented it from filing a timely motion.

Accordingly, Lesser Atlantic requests a waiver and asks the Board to reopen the record and schedule another hearing to allow Lesser Atlantic to present its objections to the project.

On October 22, 2015, Red A&W 1, LLC (“Red A&W”) ¹ filed an opposition to the Motion (“Opposition”). (Exhibit 47.) Red A&W argues that waiver of the party status requirement and 10-day filing deadline is not merited because there was sufficient notice of the application and because Red A&W would be prejudiced by a waiver as it had spent several months preparing to implement the approved project. The Opposition contends that the notice mailed to Lesser Atlantic was sufficient because, pursuant to the instructions on Office of Zoning Form 120, notice was mailed to the address for Lesser Atlantic on file with the D.C. Office of Tax and Revenue (“OTR”), which did not include a suite number. Red A&W argues that the most likely explanation for the notice being returned is not the lack of a suite number but that representatives for Lesser Atlantic were absent when the notice was mailed. Red A&W further argues that requiring additional investigation whenever a hearing notice is returned would impose an undue burden on the Board.

With respect to posted notice, Red A&W argues that, per longstanding Office of Zoning practice, only one notice was posted because the property has only one street frontage and is improved with only one building. Red A&W also contends that Lesser Atlantic should have been aware of the application because of media coverage of the project and notice posted for a hearing before the Historic Preservation Review Board (“HPRB”). Further, Red A&W asserts that an agreement that the prior owners of the two properties entered in 1940 grants Red A&W the right to increase the height of its building, as proposed by the project. Lastly, Red A&W argues that Lesser Atlantic’s Motion presents no objections to the Board’s Order on the merits and, thus, does not satisfy the standard for motions for reconsideration under § 3126.4.

On October 30, 2015, Lesser Atlantic filed a supplemental memorandum in support of its Motion, reiterating its argument for waiver and raising new arguments regarding the merits of the Board’s Order. (Exhibit 46.) On November 2, 2015, Red A&W submitted a response to Lesser Atlantic’s supplemental memorandum. (Exhibit 48.) On November 9, 2015, Lesser Atlantic filed a second supplemental memorandum in support of its Motion. (Exhibit 49.)

At a public meeting on November 10, 2015, the Board voted to deny Lesser Atlantic’s Motion.

CONCLUSIONS OF LAW

Under 11 DCMR § 3126.2, a party may file a motion for reconsideration or rehearing of a Board decision within 10 days after a final written order is issued. Here, Lesser Atlantic is not a party to the application, and it filed its Motion well beyond the 10-day deadline. Accordingly, Lesser Atlantic requests a waiver of the party status requirement and filing deadline under § 3100.5, which permits waiver “for good cause shown” if it “will not prejudice the rights of any party and is not otherwise prohibited by law.” The Board finds that the notice deficiencies Lesser Atlantic claims do not constitute good cause to support a waiver in this case.

¹ Red A&W purchased the subject property after the Board issued its Order. At its public meeting on November 10, 2015, the Board formally recognized Red A&W as a party to the case as the owner of the subject property.

First, mailed notice was sufficient. Subsection 3113.13(b) states, in relevant part, “[n]otice of the public hearing shall be given by . . . [m]ailing the notice to . . . the owners of all property within two hundred feet (200 ft.) of the [subject] property” Lesser Atlantic argues that mailed notice was inadequate in this case because it was sent to an incomplete address that lacked a suite number and was, thus, returned to the Office of Zoning and marked, “vacant, unable to forward.” Evidence in the record supports that the notice was mailed to an address with no suite number and was returned, as Lesser Atlantic alleges. (Exhibit 26, Returned Public Hearing Notice.) Lesser Atlantic contends that, upon discovering that the notice had been returned, the Board should have conducted further investigation into the matter. Red A&W argues that, pursuant to the instructions on Office of Zoning Form 120, notice was mailed to the address for Lesser Atlantic on file with OTR, which did not include a suite number. Red A&W further argues that requiring additional investigation whenever a hearing notice is returned would impose an undue burden on the Board.

The Board finds that § 3113.13(b) was satisfied in this case by mailing notice to the address for Lesser Atlantic on record with OTR, which did not include a suite number. (Exhibit 47, Attachment 5 to Addendum 3, OTR Online Record.) It is appropriate for the Board to rely on OTR records when providing mailed notice, and it is Lesser Atlantic’s responsibility to maintain an accurate address with OTR. Further, even if notice had not been properly mailed, Lesser Atlantic was given adequate notice through the other means provided under §§ 3113.13 through 3113.15, including posting notice on the subject property “in plain view of the public,” publishing notice in the *D.C. Register*, and mailing notice to Advisory Neighborhood Commission 2B. See *Application No. 18477 of Abdo 14th St. LLC* (2013); accord *Application No. 18732-A of WSD Capital LLC* (2014).

Second, there is not good cause to waive the requirements of § 3126.2 based on the notice posted on the subject property. Subsection 3113.15 requires posting “at each street frontage on the property involved and on the front of each building.” Lesser Atlantic argues that posted notice was inadequate because only the subject property’s street frontage was posted, not the building, as indicated in the record. (Exhibit 29, Aff. of Posting, Nov. 13, 2014; Exhibit 32, Aff. of Maintenance, Nov. 26, 2014; Exhibit 38, Aff. of Posting, Jan. 8, 2015.) Red A&W contends that the posting conformed to longstanding Office of Zoning practice when a property has only one street frontage and one building. In any event, Red A&W argues, Lesser Atlantic should have been aware of the application because of media coverage of the project and notice posted for an HPRB hearing. However, media coverage of the project and notice of an HPRB hearing are irrelevant to whether proper notice was given of the Board’s hearing. Regardless, the Board concludes that any posting deficiency was harmless in this case because it is unlikely that posting on the building would have alerted an interested passerby who missed the more prominent posting on the property’s street frontage. Further, as stated above, adequate notice was provided through other means as well. Accordingly, failure to post on the building does not constitute good cause to waive the party status requirement and 10-day filing deadline in this case.²

² Lesser Atlantic also argues that the alleged notice deficiencies violated its constitutional due process rights. However, the Board has no jurisdiction to decide constitutional questions. *Application No. 17504 of JMM Corporation* (2007).

Having denied the request for waiver, the Board need not reach the merits of the Motion.³

For all of these reasons, the Board hereby **ORDERS** that the motion for **RECONSIDERATION** and **REHEARING** is **DENIED**.

VOTE: 3-0-2 (Marnique Y. Heath, Frederick L. Hill⁴; and Peter G. May, voting to DENY; Jeffrey L. Hinkle absent; one Board seat vacant.)

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

A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____


SARA A. PARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: February 12, 2016

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

³ The Board did not consider the supplemental submissions filed by Lesser Atlantic and Red A&W. These submissions constitute reply and sur-reply briefs, which are not permitted in the Board's Rules of Practice and Procedure without the Board's leave, not requested here. *Application No. 17789-A of Walgreen Eastern Co. (2010)*.

⁴ Board member Hill read the full record in order to participate in the case and vote.