

**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

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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.

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
BOARD OF ZONING ADJUSTMENT**

Application No. 17620 of Leon and Peggy Robbins, pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements under section 772, and a variance from the off-street parking requirements under subsection 2101.1, and pursuant to 11 DCMR § 3104.1, a special exception from the rear yard requirements under section 774, and floor area ratio requirements under section 1323, to allow the construction of a three story mixed-use building in the HS (H Street N.E. Neighborhood Commercial Overlay)/C-3-A District at premises 1383-85 H Street, N.E. (Square 1027, Lot 846).

SUMMARY ORDER

HEARING DATE: June 12, 2007, January 15, 2008

DECISION DATE: January 15, 2008

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 6A and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6A, which is automatically a party to this application. ANC 6A submitted a report in conditional support of the application. The Office of Planning (OP) submitted a report in support of the application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for a special exception under section 774 and 1323, and variances pursuant to § 3103.2 from the requirements of sections 772 and 2101.1. No parties appeared at the public hearing in opposition to this application. Accordingly a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP report, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1, 774 and 1323, that the requested relief can be granted, being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

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Based upon the record before the Board, the Board further concludes that the applicant has met the burden of proving under 11 DCMR §§ 3103.2, 772 and 2101.1, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can 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.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application (pursuant to Exhibit 29 – Architectural Plans) be **GRANTED**.

VOTE: 4-0-1 (Ruthanne G. Miller, Michael G. Turnbull, Shane L. Dettman and Mary O. Walker to Approve, Marc D. Loud abstaining, not having read the record).

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

Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: JAN 17 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 SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR

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ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 17704 of Michael Walker, pursuant to 11 DCMR § 3104.1, for a special exception to construct an addition to an existing garage serving a one-family row dwelling under section 223, not meeting the lot occupancy requirements (section 403), in the R-4 District at premises 1811 Kenyon Street, N.W. (Square 2599, Lot 54).

HEARING DATE: January 15, 2008
DECISION DATE: January 15, 2008 (Bench Decision)

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 1D and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 1D, which is automatically a party to this application. ANC 1D submitted a report in support of the application. The Office of Planning (OP) also submitted a report in support of the application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for a special exception under section 223. No parties appeared at the public hearing in opposition to this application. Accordingly a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1 and 223, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

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Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED**.

VOTE: 4-0-1 (Ruthanne G. Miller, Shane L. Dettman, Marc D. Loud and Mary Oates Walker to approve; Gregory N. Jeffries participating, not present to vote)

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

Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: JAN 17 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 SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR,

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RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

TWR

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 17710 of Richard and Elaine Sullivan, pursuant to 11 DCMR § 3104.1, for a special exception to allow a rear deck addition to an existing one-family row dwelling under section 223, not meeting the rear yard (section 404) requirements in the R-3 District at premises 3810 W Street, N.W. (Square 1314, Lot 154).

HEARING DATE: January 22, 2007

DECISION DATE: January 22, 2007 (Bench Decision)

SUMMARY ORDER

REVIEW BY THE ZONING ADMINISTRATOR

The application was accompanied by a memorandum from the Zoning Administrator certifying the required relief.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 3B and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 3B, which is automatically a party to this application. ANC 3B submitted a report in support of the application. The Office of Planning (OP) submitted a report in support of the application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for special exception under section 223. No parties appeared at the public hearing in opposition to this application. Accordingly a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, and having given great weight to the OP and ANC reports, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1 and 223, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application (pursuant to Exhibit No. 7 – Plans) be **GRANTED**.

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VOTE: 5-0-0 (Ruthanne G. Miller, Marc D. Loud, Mary O. Walker, Anthony J. Hood and Shane L. Dettman to Approve)

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

Each concurring member approved the issuance of this order.

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 SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

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TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN