

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17791 of DRM and Associates, Inc., pursuant to 11 DCMR §3104, for a special exception to continue operation of a child development center (50 children, infant to 12 years, and 9 staff) under § 205, and a variance from the off-street parking requirements under § 2101.1, in the R-4 district, at premises 728 F Street, N.E. (Square 891, Lot 49).¹

HEARING DATES: July 8, 2008 and March 17, 2009
DECISION DATES: April 14, 2009 and May 19, 2009

DECISION AND ORDER

BACKGROUND

This self-certified application was submitted on February 19, 2008 by DRM and Associates, Inc., (“Applicant”), the owner of the property which is the subject of this application (“subject property”). The application, after several modifications to the requested relief, finally requested a special exception to continue the operation of a child development center (“CDC”) on the subject property, and a variance to not provide the required parking for the CDC use.

The Board of Zoning Adjustment (“BZA” or “Board”) began a hearing on the application on July 8, 2008, but postponed it for several months because Board Order No. 16446 was valid for another year -- until July 3, 2009 -- and permitted the CDC to care for children under two years

¹The application was originally also advertised for a special exception to establish a community service center, and several area variances which would have been necessary to permit construction of an addition to the building on the subject property. On June 18, 2008, the Applicant amended his application to omit all the requested relief except that necessary for the continued operation of an already-existing child development center. Exhibit No. 26.

There was also some question as to whether parking relief was needed. The Board of Zoning Adjustment Order first permitting the child development center on the subject property had granted the Applicant a variance to provide the two required parking spaces off-site. *See*, Board Order No. 15456 (1991), at 2-3 and at 7, Condition #4. The most recent Order continued this arrangement. Exhibit No. 8, at 3, Condition #6 (Board Order No. 16446 (1999)). During the pendency of this proceeding, the two off-site parking spaces became unavailable. The Applicant proffered two spaces in a new location, but, because these new spaces were located within the H Street Overlay Zoning District, one of the goals of which is to restrict surface parking lots, the Office of Planning recommended a term of five years on the use of these spaces. Exhibit No. 49. In response to the Office of Planning’s recommendation, the Applicant amended his application to request a variance to not provide any parking at all, on-, or off-site. Exhibit No. 50.

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of age. This would have been prohibited by the then-definition of CDC in the Zoning Regulations if a new order had been issued prior to the definition being changed. Therefore, the Board continued the hearing to await the issuance of a Zoning Commission Rulemaking which would change the definition of “child development center” to correct the oversight which prohibited such centers from caring for children under two years of age.² The Zoning Commission took final action on the text amendment to change the definition of child development center on February 9, 2009 and the hearing on this application was completed on March 17, 2009. (See, Zoning Commission Order No. 08-16/08-16A).

The Board scheduled a decision meeting for April 14, 2009. At the decision meeting, the Board requested additional information because (1) both the interested Advisory Neighborhood Commission (“ANC”) and the opposing party had expressed their opposition before the Applicant had greatly reduced the amount and nature of relief he was seeking and (2) the Board had been informed by the Applicant that the opposition party had withdrawn his opposition. The Board, therefore, re-scheduled the decision meeting for May 19, 2009, to permit these two entities time to reconsider their positions and make any change known to the Board.

The day before the decision meeting, that is, on May 18, 2009, the Applicant submitted a letter finally requesting a variance in order to not provide any parking, prompted by the Office of Planning’s (“OP”) recommendation of a five-year term for the H Street parking spaces. The Board took this letter into account in making its decision on May 19, 2009, and decided, by a vote of 3-0-2, to grant the special exception relief for the continuation of the CDC and the variance relief to permit the CDC to provide no parking.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated February 22, 2008, the Office of Zoning (“OZ”) sent notice of the filing of the application to the D.C. Office of Planning (“OP”), the D.C. Departments of Health (“DOH”) and Transportation (“DDOT”), ANC 6C, the ANC within which the subject property is situated, Single Member District 6C06, and the Council Member for Ward 6. Pursuant to 11 DCMR 3113.13, OZ published notice of the hearing in the *D.C. Register*, and on April 18, 2008, sent such notice to the Applicant, ANC 6C, and all owners of property within 200 feet of the subject property.

Request for Party Status. ANC 6C was automatically a party to this application, and although originally in opposition (Exhibit No. 25), reversed its position to one of support after the Applicant reduced the relief requested and the ANC received more information concerning the operation of the existing child development center. Exhibit No. 46.

Vincent Morris, who owns the building next door to the subject property, requested, and was granted, opposition party status. His request for party status was filed before the reduction in

²The subject CDC had traditionally cared for children under two, and the Applicant indicated his intention to continue to do so.

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requested relief. Exhibit No. 23. Mr. Morris appeared at the hearing on July 8, 2008, but did not appear at the continued hearing date of March 17, 2009. It appears that by the latter date, Mr. Morris' opposition had largely abated, and at the March 17, 2009 hearing, the ANC representative stated that Mr. Morris no longer opposed the application, although Mr. Morris himself was not present to corroborate this. Exhibit No. 41.

Applicant's Case. Mr. Donald Madden, the representative of DRM and Associates, testified on behalf of the Applicant at the hearing. He explained that the Applicant had been operating the CDC for many years at the subject property without significant problems and that it provides a needed service to the local community. He stated that the center was operating pursuant to Board Order No. 16446, which had imposed a 10-year term on the center, and requested that no term be included in this Board Order. Mr. Madden also explained that he used to own the property at 600 9th Street, N.E., where the CDC's two off-street parking spaces had been located, but that he had sold the property, and these spaces were no longer available. After trying to come to a workable arrangement for new parking spaces, the Applicant requested a variance to not provide any parking.

Government Reports. The Office of Planning submitted three reports to the Board recommending approval of the continued operation of the child development center. Exhibits Nos. 27, 38, and 49. In the first report, dated July 8, 2008, OP discussed each provision of 11 DCMR § 205 in turn and determined that the application met them all. In this report, OP recognized that the Applicant had been providing the required two parking spaces off-site, and recommended that this practice continue. OP's second report, dated March 10, 2009, was filed after the decision of the Zoning Commission in Case No. 08-16 (and 08-16A) expanded the definition of child development center to include infants. The Supplemental Report again recommended approval of the CDC, with specific conditions, including the continuation of the off-site parking arrangement.

OP's third report addressed only the Applicant's request to relocate its two off-site parking spaces from 9th Street to H Street. Exhibit No. 49. OP was not opposed to this relocation, but recommended a "time limit" of five years. It is not entirely clear from the OP report whether this "time limit" went only to the location of the parking spaces, or to the CDC use itself, but a five-year restriction on the parking could have the effect of putting a five-year restriction on the use. Even if the restriction were intended to apply only to the location of the spaces, if, in five years, the CDC could not provide the required parking, it could not meet the special exception requirements, and would have to come back before the Board. The Applicant interpreted OP's recommended five-year restriction as putting a five-year term on the use, prompting him to amend his application to request a variance to not provide any parking.

The D.C. Department of Health submitted a report to the Board dated June 3, 2008 recommending approval of the special exception for the continuation of the CDC, but indicated that the center had had "licensure issues" in the past. Exhibit No. 24.

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ANC Reports. ANC 6C's initial report opposed all aspects of the application. Exhibit No. 25. This report, filed June 19, 2008, and reflecting ANC action taken at a June 11, 2008 meeting, was written before the application was amended to eliminate all relief requests but those for continuation of the CDC and for parking. The second ANC report, dated March 13, 2009, requested an extension of time until April 10, 2009, within which to reconsider the application, as it had changed significantly since the first time the ANC had addressed it. Exhibit No. 45. The third ANC report was filed on April 10, 2009, after the ANC had reconsidered the application and had had the benefit of working further with the Applicant. This third report, Exhibit No. 46, supports the application to continue operation of the CDC. None of the ANC reports addressed the Applicant's request for a variance to not provide any parking, as that request was not finally made until May 18, 2009.

FINDINGS OF FACT

1. The subject property is located at address 728 F Street, N.E. at the intersection of 8th and F Streets, N.E., in an R-4 zone district in Square 891, Lot 49.
2. Lot 49 has an area of approximately 1,520 square feet and is improved with a two- story brick row dwelling with a one-story portion at its rear.
3. The building on the subject property was constructed in approximately 1900 and occupies 100% of the lot.
4. There is no alley behind the subject property and the rear wall of the subject building abuts the side of another building fronting on 8th Street.
5. The neighborhood is developed predominantly with moderate density row dwellings, interspersed with garden apartments and neighborhood-serving commercial establishments.
6. A child development center has been operating on the subject property since 1991, when it was first permitted by Board Order No. 15456.
7. The CDC use on the property was re-authorized in 1999 for a 10-year term by Board Order No. 16446. Order No. 16446 was issued on June 23, 1999, making it effective on July 3, 1999, and thus making the end of the 10-year term on July 3, 2009.
8. Pursuant to Order No. 16446, the Applicant had been providing "two leased parking spaces for staff use at 600 9th Street, N.E." See, Board Order No. 16446, at 3, Condition No. 6.
9. The two off-site parking spaces serving the CDC use became unavailable, and the Applicant requested a variance to not provide any parking for the use.

The Special Exception for the CDC

10. The CDC use has been licensed and operating at the subject property since 1991. 11 DCMR

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§ 205.2.

11. The CDC has a maximum of nine staff members and a maximum of 50 children and its hours of operation are from 7:00 a.m. to 7:00 p.m., Monday through Friday. See, Board Order No. 16446, at 3, Conditions #2 & #3.
12. Most of the students who attend the CDC walk there or arrive by public transportation. 11 DCMR § 205.3.
13. Those children who arrive by vehicle are dropped off and picked up at the F Street front of the subject building within a DDOT-designated loading area and adults escort the children between the vehicles and the CDC. 11 DCMR § 205.3.
14. An on-site outdoor play area is provided for the children on the fenced-in roof of the one-story portion of the building. 11 DCMR § 205.5.
15. The solid fence surrounding the rooftop play area provides both a visual and an auditory screen of the activities occurring there. 11 DCMR § 205.5.
16. Other than the outdoor play, all other CDC activities occur indoors, so there is no significant noise or activity of children outside the building. 11 DCMR § 205.5.
17. The CDC has no obtrusive outdoor lighting and its exterior is clean and well-maintained. 11 DCMR § 205.5.
18. The CDC's trash is stored in a covered container under the stairway landing and its trash and recyclables are picked up three times a week. Exhibit No. 43.
19. Two off-site play areas are also used by the CDC's children, both of which are approximately two blocks from the subject property and can be reached without crossing a major intersection. 11 DCMR § 205.7.
20. Both off-site play areas are established recreational facilities and children from the CDC attend in groups of a maximum of 12, attended by at least four adults. 11 DCMR § 205.7.
21. There is no other child development center within 1,000 feet of the subject property. 11 DCMR § 205.8.
22. A CDC use, as it is permitted in this R-4 zone, is considered compatible with that zone, as long as it meets the applicable provisions of the Zoning Regulations. 11 DCMR § 3104.1.
23. The subject CDC provides a needed service to its community and has operated at this location for 18 years with no serious incident. 11 DCMR § 3104.1.

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The Parking Variance

24. With nine staff members, the CDC requires two parking spaces. 11 DCMR § 2101.1.
25. The subject property has no rear alley access.
26. Although in an R-4 zone, where only 60% lot occupancy is permitted for a row dwelling, the subject building occupies 100% of the lot, so no parking spaces can be accommodated on site. (*See*, 11 DCMR § 403.2).
27. The establishment of the H Street Overlay nearby, with its goal of restricting surface parking, has hindered the Applicant's ability to provide off-site parking spaces to fulfill the parking requirement.
28. The CDC on the subject property has operated for many years with no on-site parking spaces.
29. The lack of on-site parking spaces has not resulted in any significant adverse parking or traffic impacts on the neighborhood.
30. Drop-off and pick-up of children at the CDC have been handled successfully for years without any on-site parking area.

CONCLUSIONS OF LAW

Special Exception Relief

Pursuant to § 3104 of the Zoning Regulations, the Board is authorized to grant special exceptions where, in its judgment, the relief will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property. Certain special exceptions must also meet the conditions enumerated in the particular sections pertaining to them. In this case, along with the general requirements of § 3104, the Applicant also had to meet the requirements of § 205 with regard to the continuation of the CDC use.

Relief granted through a special exception is presumed appropriate, reasonable, and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the relief requested are met. In reviewing an application for special exception relief, “[t]he Board’s discretion … is limited to determining whether the proposed exception satisfies the … requirements” of the regulations and “if the applicant meets its burden, the Board ordinarily must grant the application.” *First Washington Baptist Church v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. D.C. Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)).

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The subject CDC has been licensed by the District of Columbia for many years and will be able to continue to meet applicable code and licensing requirements, thus fulfilling the mandate of 11 DCMR § 205.2. There is no evidence in the record concerning negative impacts on the neighborhood due to the drop-off/pick-up arrangement currently in place at the CDC. Nor is there any evidence of negative impacts due to traffic caused by the CDC. The record is devoid of any complaints concerning either of these issues, which are often of great concern to neighbors of CDC's. The Board, as well, can find nothing objectionable concerning the traffic and/or drop-off/pick-up at the CDC, and concludes that § 205.3 is satisfied.

The CDC provides an enclosed outdoor play space on top of the rear one-story portion of its building. The rooftop space is screened by a high fence or wall and appears to have its own external stairway access to the street. *See, Exhibit No. 44.* The CDC children are also escorted to two off-site play areas close by, but only in groups of up to 12, with an adult-to-child ratio of 1:3. No major intersections need to be crossed to reach these off-site playgrounds, and the Board concludes that 205.7 is also satisfied.

Other than outdoor play, all CDC activities occur within the building, keeping external noise to a minimum. The CDC has a contract with a private trash hauler and its trash and recyclables are picked up three times a week. As depicted by Exhibit No. 44, the exterior of the CDC building is clean and well-maintained, and the Board concludes that the CDC will cause no objectionable impacts to adjacent or nearby properties, as required by §§ 205.5 and 3104.1. On the contrary, the CDC provides a valuable service to the community and the use is in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps. Lastly, § 205.8 is satisfied as well, as there is no other CDC within 1,000 feet of the subject CDC.

Variance Relief

The Board is authorized to grant variances from the strict application of the Zoning Regulations to relieve difficulties or hardship where “by reason of exceptional narrowness, shallowness, or shape of a specific piece of property … or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition” of the property, the strict application of the Zoning Regulations would “result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of the property....” D.C. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2. The “exceptional situation or condition” of a property can arise out of the structures existing on the property itself. *See, e.g., Clerics of St. Viator v. D.C. Board of Zoning Adjustment*, 320 A.2d 291, 293-294 (D.C. 1974). Relief can be granted only “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.” D.C. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2.

A showing of “practical difficulties” must be made for an area variance, while the more difficult showing of “undue hardship,” must be made for a use variance. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). The Applicant in this case is requesting an area

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variance, therefore, he had to demonstrate an exceptional situation or condition of the property and that such exceptional condition results in a practical difficulty in complying with the Zoning Regulations. Lastly, the Applicant had to show that the granting of the variance will not impair the public good or the intent or integrity of the Zone Plan and Regulations.

The subject property is beset with two exceptional conditions – it has no alley access and the building occupies 100% of the lot. The building, constructed in 1900, long before the current Zoning Regulations permitted a maximum 60% lot occupancy for a row dwelling in an R-4 zone, was constructed to cover the entire lot area. Other nonconforming row dwellings in the District of Columbia abut a rear alley to facilitate access, but such is not the case here. Because there is no way for a vehicle to access the lot and nowhere on the lot to store, *i.e.*, park, one, let alone two, vehicles, the provision of the two required on-site parking spaces poses practical difficulties for the Applicant in meeting §§ 205.4 and 2101.1 of the Zoning Regulations.

Granting the Applicant a variance from providing the two required parking spaces will not cause a substantial detriment to the public good nor impair the intent or integrity of the Zone Plan and Regulations. At the time of the hearing, the subject CDC had eight staff members, only one of whom drove to the site. Transcript of March 17, 2009 hearing, at 407. This could, of course, change, but the Applicant indicated that the staff has traditionally walked or used public transportation to reach the site, and there does not appear to be any reason to foresee a sudden change from this pattern. There is a Metrobus stop at the same corner where the CDC is located, literally, several feet from the building, so there is convenient access by public transit.

The Board concludes that the application meets the three prongs of the area variance test and that granting the requested parking variance will permit the long-operating CDC to continue its successful operation and its beneficial service to the community.

The Board is required to give “great weight” to the issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Great weight means acknowledgement of the legally relevant issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive.

The Office of Planning twice recommended approval of the special exception to continue the operation of the CDC and the Board agrees with this recommendation. OP did not address the variance to provide no parking in writing, but at the hearing on March 17, 2009, the OP representative stated several times that OP would most likely support such a variance. Transcript of March 17, 2009 hearing, at 418-420. Again, the Board agrees with the position expressed by the OP representative.

ANC 6C also recommended granting the special exception to continue the CDC and the ANC representative testified positively with respect to the CDC at the March, 17, 2009 hearing. The Board agrees with the ANC’s recommendation. The ANC did not express an opinion as to the

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parking variance;³ therefore, with respect to the variance request, there is nothing to which the Board can accord great weight.

For all the reasons stated above, the Board concludes that the Applicant has satisfied the burden of proof with respect to a special exception pursuant to §§ 3104.1 and 205, to continue operation of a child development center at the subject property, and with respect to a variance from the § 205.4 and § 2101.1 parking requirement associated with the child development center use. Accordingly, this application is hereby **GRANTED, SUBJECT TO THE FOLLOWING CONDITIONS:**

1. The number of children at the child development center shall not exceed 50. The number of staff shall not exceed nine.
2. The hours and days of operation of the child development center shall be from 7:00 a.m. to 7:00 p.m., Monday through Friday.
3. Drop-off and pick-up of children shall be from the street in front of the main entrance to the center.
4. Staff or volunteers shall escort children between the center building and vehicles during all hours that drop-off and pick-up of children occur.
5. The Applicant shall maintain a solid or baffled-wood fence around the deck play area to minimize the noise created by the on-site outdoor play area.
6. Trash shall be stored in a covered container under the existing stairway landing. Trash pick-up shall occur during the hours the child development center is not in operation.

VOTE: 3-0-2 (Marc D. Loud, Shane L. Dettman, and Anthony J. Hood to APPROVE; two Board members (vacancies), not participating)

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

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

ATTESTED BY:


JAMISON L. WEINBAUM
Director, Office of Zoning

³The possibility of a variance to provide no parking was discussed at the hearing, and the Board left the record open for both the ANC and the opposition party to file further submissions between the first decision date of April 14, 2009, and the second decision date of May 19, 2009. Such further submissions could have addressed the parking variance, but neither party filed anything with the Board.

FINAL DATE OF ORDER: NOVEMBER 25, 2009

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.

PURSUANT TO 11 DCMR 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE 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, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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As Director of the Office of Zoning, I hereby certify and attest that on NOV 25 2009, 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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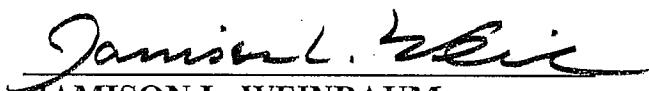
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