

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 18095-A Motion for Reconsideration of Order No. 18095 of Ronald McDonald House Charities of Greater Washington, D.C. The original application was pursuant to 11 DCMR § 3104.1, for a special exception to operate a religious group residence for 96 persons, under § 215, in the R-1-B District at premises 1326 Quincy Street, N.E. (Square 3968, Lot 17).

HEARING DATE: September 14, 2010

DECISION DATE: September 14, 2010

**DATE OF LIMITED
HEARING ON**

RECONSIDERATION: November 30, 2010

**DATE OF DECISION ON
RECONSIDERATION:**

January 11, 2011

ORDER DENYING RECONSIDERATION

Procedural Background

This application was filed in May 2010, at which time Ronald McDonald House Charities was the owner of the property that is the subject of the application ("subject property"), which is located at 1326 Quincy Street, N.E. Ronald McDonald House has since sold the subject property to a religious order, Servants of the Lord and the Virgin of Matara, Inc. ("Applicant"), to whom the Board of Zoning Adjustment ("Board") granted a special exception to use the subject property as a religious group residence, pursuant to 11 DCMR § 215, by Order No. 18095, dated September 17, 2010.

Order No. 18095 contains two conditions, one of which imposes a term of five years on the special exception use, beginning on the date on which the Order became final. On September 27, 2010, the Applicant filed a timely motion with the Board requesting reconsideration ("motion"), and removal of this, or any, time limitation¹ on the special exception use,² because

¹The phrases "term limit[ation]" and "time limit[ation]" are used interchangeably herein.

²Reconsideration of the other condition, which states that no more than 96 individuals shall reside on the property, was not requested.

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there was no evidence of adverse impacts in the record. Although the motion did not specifically request a rehearing, the Board determined that a further hearing, limited to the question presented by the reconsideration, was warranted. Therefore, on November 30, 2010, the Board held a limited hearing on the motion for reconsideration, and allowed the Applicant to present legal argument as to whether evidence of adverse impacts is a necessary underpinning for the imposition of a time limitation on a special exception and any evidence of potential harm to the Applicant if the time limitation were retained.

At the limited hearing, the Applicant's attorney argued that the Board did not have authority to impose the time limitation because there was no evidence in the record tending to show that the special exception use would have adverse impacts on nearby properties or on the neighborhood. The attorney stated his legal opinion that such a showing was necessary to authorize the Board to impose a condition, and that without such a showing, the Board is without authority to impose a condition, specifically here, a term of years. The Applicant also offered somewhat limited testimony, and no documentation, as to claimed potential "harm" it would suffer if the time limitation is not removed.

At the close of the limited hearing, the Applicant's counsel offered to brief the issue of the Board's authority to impose the time limitation in question, and the Board accepted his offer, allowing him until January 4, 2011 to file a brief/legal memorandum. The Board also scheduled a decision on the motion for January 11, 2011.

Through a letter dated January 4, 2011, counsel for the Applicant submitted his legal memorandum. The Board also received guidance from the Office of the Attorney General.

After considering the submissions and legal arguments provided, the Board deliberated on the motion for reconsideration at its public meeting on January 11, 2011. At the end of those deliberations, the Board voted 4-0-1 to deny the motion for reconsideration.

The Merits of the Reconsideration Request

The crux of the Applicant's argument for reconsideration can be summed up in a sentence from the conclusion of its January 4, 2011 submission, to wit:

The imposition of a time limit which does not relate to the zoning relief being requested, and does not relate to specific findings which are based upon substantial evidence, is clearly beyond the Board's statutory authority. (Emphasis in original.)

(Exhibit 40 at 4.)

The Applicant therefore claims that the five-year time limit imposed in Order No. 18095 does not relate to the special exception relief requested (and granted), and is not based upon substantial evidence of potential adverse impacts from the granting of the relief, but needs to be

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so based in order to be viable. Although the Applicant correctly states the analysis to be utilized, the Board disagrees with the conclusion drawn.

The term limit does relate to the special exception relief granted.

All special exceptions, by virtue of being “special exceptions,” are pre-deemed compatible with the zone district(s) in which they are allowed. And, any conditions on the approval of a special exception must relate directly to, and be incidental to, the proposed use, and not to the manner of operation of the particular use. *See, e.g., Summit School v. Neugent*, 442 N.Y.S.2d 73, 76 (Sup. Ct. App. Div. 2nd Dept. 1981). *See also, National Black Child Development Institute v. D.C. Bd. of Zoning Adjustment*, 483 A.2d 687, 691 (D.C. 1984). (“Personal conditions impermissibly regulate the business conduct of the owner, rather than the use of the property, and are unlawful *per se*.”)

Most conditions imposed on a special exception relate directly to the special exception use in an obvious way in that they regulate the operation of the use which has been granted the approval. Conditions are usually imposed on a use to mitigate its potential adverse impacts on surrounding properties. They must be complied with immediately, or as soon as they are applicable, and may control the use’s day-to-day operation to some extent. A term limit, however, imposes no requirement of compliance, and has no effect on day-to-day operation of a use, except in the abstract, for example, a term limitation may affect long-term financial plans. A term limit, however, also relates directly, and perhaps even more fundamentally, to a special exception use, because it goes to the underlying question of *whether or not a use should be operating* at a certain location, whereas other conditions beg that question and go to *how that use is operating*.

A term limit is somewhat different from other conditions because of its different purpose. The purpose of a term limit is not to mitigate adverse impacts, but to allow the Board to re-assess its approval and the circumstances surrounding it at some point in the future, when those circumstances, or the use itself, may have changed. *See, e.g., Woodbury v. Zoning Board of Review of City of Warwick*, 82 A.2d 164, 167 (R.I. 1951). (A two-year term imposed, at the end of which, “the board would be in a position, according to the facts then appearing, either to renew the exception if requested, or to permit the property to again be used as a tourist home.”) Or, as succinctly stated by a New York court, in the context of a term limitation on a variance, the reason for such a limitation “is to insure that in the event conditions have changed at the expiration of the period prescribed the board will have the opportunity to reappraise the proposal by the applicant in the light of the then existing facts and circumstances.” *In re Goodwin*, Sup. Ct. N.Y., N.Y.L.J., July 5, 1962, as quoted in 3A. Rathkopf’s, *The Law of Zoning and Planning* § 38.06[2] (4th ed. 1979). *Accord, Monaco v. D.C. Bd. of Zoning Adjustment*, 407 A.2d 1091, 1097-1098 (D.C. 1979).

The fact that a term limit is different from other conditions does not mean, however, that it relates any less directly to the use it terms. Different types of uses are assigned different term lengths depending on the Board’s assessment of the possibility of the advent of adverse impacts in the future. In some cases, there is evidence of current adverse impacts, causing the Board to

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impose both specific mitigating conditions and a term, such as in *Application No. 16974 of Tudor Place* (2004) (Full Order with 15 conditions tailored to mitigate known/expected adverse impacts and term of five years for house museum). In other cases, there is no evidence of current adverse impacts, but the use is a “new” use at its location, causing the Board to impose a term as well as general conditions. See, e.g., *Application No. 18036 of Newcomb Child Development Center* (2010) (Summary Order imposing general conditions and term of three years for new child development center, with no discussion of potential adverse impacts).

By virtue of granting a special exception to such a “new” use, the Board is making the determination that the use will likely not have adverse impacts on its neighborhood, but to ensure that this determination proves correct, the Board may impose a term. The term provides the special exception applicant a time period within which to create a positive “track record” in the neighborhood and the term’s expiration then provides the applicant the opportunity to return to the Board, demonstrate this “track record,” and request that the special exception be renewed, possibly with no term.

The five-year term limit imposed on the Applicant’s religious residence is directly related to the facts of the case. Because it is a new use at the location, whose impact on the neighborhood should be re-addressed in the future to ensure its continuing compatibility, it was given a term. But, because it will likely be a relatively quiet use, and there is no evidence of current adverse impacts, it was given a relatively long term of five years.

Imposition of a term limit need not be based on evidence of adverse impacts to be mitigated.

A term limit is the Board’s tool to try to guard against *unforeseeable* adverse impacts that may arise in the future, either due to the use itself, or due to changes in the neighborhood outside the control of the special exception applicant. The Board attempts to address evidence of current or *foreseeable* adverse impacts through conditions to mitigate such impacts. The existence of an immitigable adverse impact would require denial, but the Board cannot mitigate against an impact which is wholly unforeseen, hence the utility of a term limit. Without a crystal ball to see into the future, a term limit allows the Board to “hedge its bets” that its prediction of no adverse impacts will prove correct. As aptly expressed by a New Jersey court when ruling on the validity of a five-year term on a special use permit for a new use, the term “would provide an escape-hatch if the board concluded that continuance of the [use] thereafter was not consistent with the public good.” *Houdaille Construction Materials, Inc. v. Bd. of Adjustment of Tewksbury Township*, 223 A.2d 210 (N.J. Super. App.Div. 1966).

A term limit for a new use with no evidence of adverse impacts in need of mitigation is not a “remedial measure,” or in excess of the Board’s statutory authority, as claimed by the Applicant. (Exhibit 40 at 3-4.) Instead, it is based on the Board’s duty to see to it that every special exception granted must meet the twin objectives of 11 DCMR § 3104 – harmony with the purpose and intent of the Zoning Regulations and Maps and no tendency to adversely affect neighboring property. These objectives apply prospectively and they apply irrespective of whether there is evidence of adverse impacts in the record. One way to try to ensure that these

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two goals are met, particularly with a new use, is to impose a time limitation. Therefore, imposition of a time limitation in order to try to ensure no adverse impacts on neighboring property in the future may be based on the need to meet the general mandates of § 3104.

The imposition of a term was based upon substantial evidence in the record.

The fact that there need not be evidence of adverse impacts requiring mitigation does not mean that the Board may impose a term limit based upon whim or conjecture. Rather, there must indicia about the nature of the use proposed, uncertainties about the nature of that use, or known characteristics of the neighborhood, including the potential for a change in those characteristics, that warrant the need for a subsequent review. In the instant case, the certificate of occupancy for the subject property was for “58 people total” (Exhibit 11), whereas the Applicant plans on a total of 96 individuals residing at the residence. This is a significant increase in the maximum number of people on-site and could result in currently-unpredictable adverse impacts on the surrounding properties.

The Applicant’s Statement states that the building on the subject property would be “a center of activity . . . frequently host[ing] guests during special events and ceremonies” as well as “weekend and day retreats for lay people.” (Exhibit 5 at 3.) The Applicant’s representative testified that a core group of between 25 and 40 sisters would reside on the property, but Order No. 18095 would allow up to 96 individuals to reside there. (Hearing Transcript of September 14, 2010, p. 115, lines 15-22 and 116, lines 1-3.) And, while Order No. 18095 limits the number of individuals “residing” at the property to 96, it does not limit the number of individuals who may attend the “special events and ceremonies” or “retreats” held at the property. Advisory Neighborhood Commission (“ANC”) 5A, although it recommended granting the special exception, displayed a sensitivity to the possibility of impacts of events held on the property when it requested that the Applicant “inform the community in a timely manner . . . when a large gathering of the community is planned” at the property. (Exhibits 28 and 37.) And, as the Applicant noted in its statement (Exhibit 5, at 4) and the Board pointed out in its deliberations on January 11, 2011, the Applicant’s religious order is not a “contemplative” one, but an active one, whose members will be abroad in the community. These facts and possibilities may or may not lead to adverse impacts on neighboring properties, but in order to ensure that if such impacts do develop, they are brought before the Board’s attention, the Board has imposed a five-year term on the use.

When determining whether to impose a time limitation, the Board should consider potential harm to an applicant. For example, in *National Black Child Development Institute, supra*, 483 A.2d 687, 692 (D.C. 1984), the Court explained that, before imposing what it called “generic” (as opposed to “personal”) conditions on a variance, such as restricting the transfer of the granted variance to another nonprofit use, the Board “must hear evidence from the [nonprofit applicant] regarding the impact upon it of those conditions and must weigh that evidence in making its determination.” Any real harm demonstrated could be relevant to the reasonableness of the term or to its length.

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The Board allowed the Applicant a further hearing in order to present its arguments on reconsideration and to present evidence as to the potential harm to the Applicant if the term limit were retained. At the limited hearing on November 30, 2010, the Applicant's representative testified that the time limitation could have negative financial repercussions on the Applicant, and could render uncertain its plans to make internal changes to the building. (Hearing Transcript of November 30, 2010, p. 198, lines 16-22 and 199, lines 1-22.) The financial repercussions to the Applicant, however, are no different and no more egregious than the financial repercussions to all Applicants whose zoning relief is termed. Nor does the five-year term limit prevent the Applicant from making internal modifications to the building, which it owns.

The Applicant explains that stability is one of its crucial concerns. (Exhibit 33, at 5.) But, the five-year term limit does not mean that the special exception will necessarily end in five years. It means only that the Applicant must return to the Board prior to the expiration of the term to request renewal of the special exception. Since the Applicant appears confident that no adverse impacts will result from its operations, it should be equally confident that a new application will be granted.

Great weight

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning ("OP"). D.C. Official Code §§ 1-309.10(f) and 6-623.04 (2001). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive. OP was in favor of granting Application No. 18095, but did not participate in the reconsideration process.

ANC 5A filed a report with the Board in support of the application, without mention of a term limit, (Exhibit 28) and filed a second report in support after the Applicant moved for reconsideration, recommending a 10-year term. (Exhibit 37.) The ANC explained that the residential/institutional use to which the subject property would be put is "common" in the area, and no new construction or change in parking facilities was being requested by the Applicant. The ANC also opined that there would be no increase in local traffic because members of the Applicant's religious community will not have personal vehicles, but will be transported off-site in eight vans.

Based on its observations and opinions, the ANC recommended a 10-year term, but the ANC does not draw a specific nexus between those observations and opinions and the length of the term. Nor does it explain why a five-year term is not sufficient. To the Board's thinking, if adverse impacts do arise with the Applicant's use, these should be brought back before the Board in five years, not in a decade. And, if no such adverse impacts arise within the first five years of the use, it is likely that they will not arise at all. Therefore, the Board cannot agree with the ANC's suggestion of a 10-year term.

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The ANC also recommends imposition of two conditions,³ neither of which the Board agrees with. These conditions may explain why the ANC first supported the application without a term and then supported a 10-year term. The first ANC condition, "that the increase in occupancy should not be transferable to any subsequent purchaser," is a personal condition that the Board has no authority to impose. *National Black Child Development Institute, supra*, 483 A.2d at 692. (Personal conditions are unlawful *per se*.) The second, that the subject property not be used for anything other than a religious residence, is unnecessary. Because the special exception is granted pursuant to 11 DCMR § 215 for a religious group residence, during the term of the special exception, it cannot be used for anything else, other than a matter-of-right use in this R-1-B Zone.

The Board therefore agrees with the ANC's support for the application, but does not agree with its requested conditions or with its recommended term of 10 years.

CONCLUSION

The decision to impose a term limit was related to the special exception granted and based upon substantial evidence in the record. It is therefore the judgment of the Board that the five-year time limitation imposed in Application No. 18095 should be retained. Accordingly, it is **ORDERED** that the Applicant's motion for reconsideration is **DENIED**.

VOTE: **4-0-1** (Meridith H. Moldenhauer, Nicole C. Sorg, Jeffrey L. Hinkle,
and Michael G. Turnbull to Deny; No other Board member
(vacant) 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

FINAL DATE OF ORDER: APR 28 2011

³ In both its reports to the Board (Exhibits 28 and 37), ANC 5A stated the same two conditions. The first report was filed before the reconsideration proceedings and the second was filed during the reconsideration proceedings. Summary Order No. 18095 did not address the ANC's two requested conditions, but as they were reiterated by the ANC during the reconsideration proceedings, the Board addressed them during its deliberations on the motion for reconsideration. (See, Hearing Transcript of January 11, 2011, p. 6, lines 8-22 and 7, lines 1-6.)

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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.

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As Director of the Office of Zoning, I hereby certify and attest that on April 28, 2011, 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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