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

**APPEAL OF JOAN EVELYN KINLAN**

**BZA APPEAL NO. 18827**

**STATEMENT OF APPELLANT**

This is the Statement in Support of the Appeal of Dr. Joan Evelyn Kinlan ("**Appellant**") to the Board of Zoning Adjustment ("**BZA**" or "**Board**") of a decision made by the District of Columbia Zoning Administrator on May 16, 2014, to allow the continued illegal use of a child development center at 3855 Massachusetts Avenue, NW, Square 1816, Lot 824 (the "**Subject Property**"). In addition, the Appellant is challenging the Zoning Administrator's decision to allow the continued use of the Subject Property as a religious or clerical residence for at least thirty (30) persons without a certificate of occupancy, and without the required special exception or variance relief, and to allow the use of the Subject Property as a residence by a non-clerical family. These decisions were communicated via a letter to the Appellant's attorney, Arnold D. Spevack, of Lerch, Early & Brewer, on May 16, 2014 (the "**May 16 Letter,**" attached hereto as Exhibit A). The May 16 Letter was written in response to a letter from Mr. Spevack to various D.C. officials asking for an investigation into the possibility of the Subject Property being used without the requisite permissions under the Zoning Regulations..

## I. JURISDICTION

The Board has jurisdiction over this appeal pursuant to 11 DCMR §§ 3100.2 & 3200.2. This appeal is timely filed under 11 DCMR § 3112.2(a), having been filed within 60 days from the date the Appellant had notice or knowledge of the decision complained of. On May 16, the Appellant became aware of the decision by the Zoning Administrator to not revoke the existing

illegally-issued certificate of occupancy for the child development center and the decision to not halt the residential and religious/clerical use on the Subject Property, for which there is no certificate of occupancy.[1]

## II. STANDING OF APPELLANT

The Appellant owns and resides in the property located at 3843 Massachusetts Avenue, NW (Square 1816, Lot 47) ("**Appellant's Property**"). The Appellant's Property is directly adjacent to the Subject Property, to the southeast. The use of the Subject Property for a very large – and growing - child development center and religious/clerical residence results in a substantial and direct adverse impact on the Appellant's use and enjoyment of her home and property, due to noise, traffic, parking, and other dangerous and unsafe conditions resulting from the illegal use. Accordingly, Appellant is "aggrieved" pursuant to § 3112.2 of the Zoning Regulations and has standing to file this appeal.

## III. DESCRIPTION OF THE SUBJECT PROPERTY AND USE

The Subject Property is owned by an organization known by the District's tax records as "Embassy Church." The Subject Property is improved with a building with a gross floor area of approximately 33,338 square feet (the "**Building**"). Certificate of Occupancy # CO1002760 (copy attached as Exhibit B) purports to authorize use of the Building for a "Child Development

[1] The illegal issuance of a certificate of occupancy is invalid and can be revoked at any time and shall not be construed as an approval of a violation of the Zoning Regulations. See *Gorgone v. D.C. Bd. of Zoning Adjustment*; 973 A.2d 692,694 (2009).

Center" for 88 children despite the fact that a Child Development Center is not permitted as a matter-of-right in the R-1 zone district.[2]

The Child Development Center is apparently operated by an entity calling itself the St. Albans Early Childhood Center, according to the certificate of occupancy. The certificate notes a population of 88 children and a maximum occupant load of only 88 persons. No staff number is listed, although plans provided to DCRA by the Owner's property manager note a staff of 40 persons. The certificate notes the "Approved Zoning Code Use" as "Child development center" and also identifies the "type of Application" as "New Building." The Certificate of Occupancy was preceded by Building Permit No. B1105058, which authorized Christ Church of Washington to "CONVERT SCHOOL TO CHILD CARE CENTER…". The Zoning Administrator determined in the May 16 Letter that the Child Development Center use was merely a continuation of the previously existing public charter school use on the Subject Property, and was not a change of use. Such a determination is patently incorrect, and it fails to consider the fact that charter schools and child development centers are two wholly distinct and separate uses under the Zoning Regulations. Each use is separately defined, and the uses have distinct and unrelated restrictions and conditions; *i.e.*, charter school use is permitted as a matter-of-right in this zone and child development center use is not.

In addition to the operation of the Child Development Center, the Property is also used to house a second family in addition to the church pastor. According to the May 16 Letter, the Zoning Administrator made a determination that this particular use is permitted based on the belief that the residence was occupied by the pastor of the church. It has come to the attention of the Appellant, however, that there is another family occupying the Subject Property. Therefore,

[2] The Appellant has witnessed the child development center rapidly increasing in enrollment apparently beyond the high number ostensibly permitted on the illegitimate C of O.

the error by the Zoning Administrator involves approving the use without any apparent investigation. This use also does not have a certificate of occupancy.

Finally, the Property is also being used by at least thirty (30) "youth missionaries" who reside, play, and undertake other activities on the Subject Property. On this point, the Zoning Administrator relied solely on the Owner's false representation that these persons are restricted to a portion of the Property which represents only 10% of the floor area of the Building. Such a representation is not only improbable, it is known by the Appellant to be patently false. The owner's representation makes no mention of the use of the outside space on the Property by the "missionaries", an activity that the Appellant is all too aware of. Moreover, the owner's representation, if true, would mean that the "missionaries" are effectively restricted into a few small classrooms in the Building, with absolutely no access to the church sanctuary and other parts of the Building or Property.

In any event, there is no basis in a case such as this for the Zoning Administrator to determine that such an intensive 24-hour a day use by thirty (30) full-time residents is merely accessory to a church use that takes place a few hours a week. Also, there are no certificates of occupancy for the church use or for the use by the "missionaries." The missionary use would fall under the zoning use category either of "clerical and religious group residence" or a "church program," both of which would require special exception relief in this situation.

## IV. ERROR IN INTERPRETING THE ZONING REGULATIONS

The Zoning Administrator has erred in finding that a Child Development Center use is not a change of use from a Charter School use, in violation of 11 DCMR §199.1 (definitions of Child Development Center and Public School), 11 DCMR §205 (requiring special exception

relief for child development centers), 11 DCMR §201.1 (listing matter-of-right uses permitted in R-1; that list not including child development centers, religious group residences under 15, or church programs), 11 DCMR §216 (requiring special exception relief for church programs), and 11 DCMR §101.5, which provides that "[n]o building, structure, or premises shall be used, and no building, structure, or part of a building or structure shall be constructed, extended, moved, structurally altered, or enlarged except in conformity with this title."

## V. ARGUMENT

A. Child Development Center ("CDC") Use is Not Permitted as Matter-of-Right in the R-1 Zone.

The R-1 District is designed to protect quiet residential areas now developed with one-family detached dwellings and adjoining vacant areas likely to be developed for those purposes. (11 DCMR §200.1.) The provisions of this chapter [R-1 Residence District Use Regulations] are intended to stabilize the residential areas and to promote a suitable environment for family life. For that reason, only a few additional and compatible uses shall be permitted [emphasis added]. (11 DCMR §200.2.)

No building, structure, or premises shall be used, and no building, structure, or part of a building or structure shall be constructed, extended, moved, structurally altered, or enlarged except in conformity with this title. (11 DCMR § 101.5.)

Except as provided in chapters 20 through 25 of this title, in any R-1 District, no building or premises shall be used … except for one (1) or more of the uses listed in this chapter. (11 DCMR §200.4.)

Based on the above cited regulations, it is well established that a use is not permitted in a particular zone district unless specifically provided for in the Zoning Regulations. *Child Development Center* use is permitted in the R-1 zone in three situations only:

(i) if it is "located in a District of Columbia public school or a public recreations center operated by the D.C. Department of Parks and Recreation;" (§201.1(c)).;

(ii) if it is "located in a building owned by the District of Columbia that formerly served as the location of a public school;" (§201.1(w)(4)); and

(iii) by special exception approval pursuant to Section 205.

The CDC at 3855 Massachusetts Avenue, NW, does not fit within any of those three situations and therefore is not permitted as a matter-of-right under the Zoning Regulations. It is an illegal use.

The position of the Zoning Administrator, from the May 16th letter, appears to create a fourth scenario in which a CDC may be created – and in doing so takes the apparent position that once an education use of any kind is established, then any *other* educational use can be continued on that property, without regard to the use classifications provided in the Zoning Regulations, and even if the first use is permitted and the second use is prohibited.

The Zoning Administrator concludes that: "the child care facility and the charter school use are described on the permit and the certificate of occupancy as education for six or more children over the age of 2-1/2 years. Therefore, special exception approval for the child care facility was not required."

The problem with this conclusion is that it does not follow logically from the premise, and is not supported by any authority in the Zoning Regulations. The position in the May 16

letter essentially provides that all "education" related uses are inter-changeable, and once an educational use of any kind is established on a property, then any category of educational use may follow, whether it is permitted by the Zoning Regulations or not.

If that is in fact the position of the Zoning Administrator, then one can imagine the surprise of this Board, and the many residents familiar with land use battles for child development centers, private schools, and colleges, to discover that one need only place a charter school on a property and then education use of any kind is permitted, without BZA approval and without conditions (including term limits, enrollment caps, and traffic procedures).

B. Public School and Child Development Center are Not the Same Use.

Public School is defined in the Zoning Regulations as:

> **School, public** - A building or use within a building operated or chartered by the District of Columbia Board of Education or the District of Columbia Public Charter School Board for educational purposes and such other community uses as deemed necessary and desirable.(53 DCR 9580)

Child Development Center is defined in the Zoning Regulations as:

> **Child/Elderly development center** - a building or part of a building, other than a child development home or elderly day care home, used for the non-residential licensed care, education, counseling, or training of individuals under the age of fifteen (15) years of age and/or for the non-residential care of individuals age 65 or older, totaling seven (7) or more persons, who are not related by blood or marriage to the caregiver and who are present for less than twenty-four (24) hours per day. This definition encompasses facilities generally known as child care centers, pre-schools, nursery schools, before-and-after school programs, senior care centers, elder care programs, and similar programs and facilities. A child/elderly development center includes the following accessory uses: counseling; education, training, and health and social services for the person or persons with legal charge of individuals attending the center, including, but not limited to, any parent, spouse, sibling, child, or legal guardian of such individuals. (46 DCMR 8286 and 53 DCR 10085)

These two definitions are completely separate use classifications under the Zoning Regulations. They are separately defined, and have separate requirements for their permitted use. Specifically, a public school (including a charter school) is permitted in the R-1 zone as a matter-of-right, and a child development center is not. There is nothing in the Zoning Regulations that gives the Zoning Administrator the authority to allow a child development center use as a supposed continuation of an existing public school use. If there was, there would be language specifically providing that CDC use is permitted as a continuation of a public school use. Instead, there is specific language granting CDC use in an *existing* public school building or in a building owned by the District of Columbia. By this language, the Zoning Commission has made it clear that CDC's are permitted in very specific and limited situations, the present case not being one of those situations.

In granting the CDC use and also in failing to revoke the CDC use, the Zoning Administrator has apparently broadened the definitions of "public school" and "child development center" so as to make the definitions interchangeable, based on the premise that both use categories involve "education." But the Zoning Administrator has no authority to so broaden these two distinct use classifications, as the D. C. Court of Appeals ruled in *Chagnon v. D.C. Bd. of Zoning Adjustment* (844 A.2d 345,348)(2004), stating:

> "Although the BZA and the Zoning Administrator contend that … they may interpret defined uses in the Zoning Regulations to encompass other uses that are functionally comparable even if they are outside the definition, they cite no authority for that position and we cannot agree with it."

C. The Continuation of a Use Authorized by a C of O is Only Permitted if the Subject Use Remains Within the Same Use Classification Established by the Zoning Regulations.

Section 3203.8 provides that:

> "[a]ny use that is authorized by a certificate of occupancy may be established and continued pursuant to the terms of the certificate and the provisions of this title in effect on the date that the certificate is issued, subject to the following conditions:
> (a) The use shall be designated on the certificate of occupancy in terms of a use classification that is established by this title;"
> (b)…; and
> (c) any amendment of the use authorized by the certificate shall comply with the provisions of this title in effect on the date that the certificate is amended."

This section provides that a use on a certificate of occupancy must be defined in terms of a "use classification established by the Zoning Regulations." The use listed on the C of O must be a use classified by the Zoning Regulations, such as "Prepared Food Shop" or "Child Development Center" or "Public School," either as defined in the Zoning Regulations or provided in the list of permitted uses for any particular zone district.

It follows therefrom that authorization under one classification does not authorize use for a separate classification, even if there may be some aspect of their use in common. A public school use does not authorize use as a child development center or a university or a private school, just as a restaurant use does not authorize a subsequent use as a prepared food shop or a fast food establishment. Furthermore, as subsection (c) provides, any amendment of the use must comply with the Zoning Regulations. Therefore, for a change to a child development center, the use must comply with the Zoning Regulations in effect at the time of such change. As described above, this child development center use does not comply with the Zoning Regulations because it requires special exception relief to operate in the R-1 zone.

This becomes even more clear in the present case, where the change in use is from one that is permitted as a matter-of-right without condition (public school), to a use that is not permitted as a matter-of-right.

D. The Church Building Use Does Not Alter the Analysis.

The fact that the Embassy Church holds itself out as a church does not mean that the child development center use is permitted. The Zoning Regulations provide, beginning in the R-4 zone, situations in which a church building is granted an exclusive ability to house a child development center. The Use Provisions of the R-4 zone provide:

330.5 The following uses shall be permitted as a matter of right in an R-4 District:

(a) Any use permitted in R-3 Districts under § 320.3;

(b) Child/Elderly development center located in a building that was built as a church and that has been used continuously as a church since it was built; provided, that all of the play space required for the center by the licensing regulations shall be located on the same lot on which the center is located;

(c) Child/Elderly development center or adult day treatment facility; provided, that the center shall be limited to no more than sixteen (16) individuals;

So, by comparison, the R-4 zone is the first zone that permits CDC use as a matter-of-right because the use is provided in an existing church building. This is evidence of the clear intent of the Zoning Commission that unless you are in the R-4 zone or higher, CDC's located in church buildings are not distinguished from non-church buildings. Subsection (c) shows the great gap between the intent of the Zoning Regulations, and the decision being appealed here. In the R-4 zone, CDCs are permitted as a matter-of-right but limited to only sixteen (16) individuals. In the present case, 3 zones below the R-4 zone, the decision of the Zoning Administrator has

allowed the continued illegal use of a CDC for eighty-eight (88) individuals, with no apparent limit at all to that number, according to the May 16th letter.

E. Affirming the Decision Would Have Ridiculous Consequences.

The precedent the Zoning Administrator has set with his May 16th letter will lead to ridiculous consequences. First, any building in the District used by a charter school for any length of time can be converted for use as a child development center, a private school, a university, or an adult education facility, without regard to the prohibitions and restrictions on those use classifications.

There is one example of this already: In February, 2013, the BZA issued Order No. 18399, granting special exception relief to the Jewish Primary Day School to use the property located at 4715 16th Street, NW as a private school for 130 children. The use approved in this Order was subject to ten (10) very specific and targeted conditions, created through the cooperation of the applicant, the ANC, the neighbors, the Office of Planning, and the BZA. This is a process which has been undertaken numerous times in the District, both for private schools and for child development centers.

At the time JPDS was pursuing and receiving its required special exception approval, 4715 16th Street was being used as a public charter school by none other than the Washington Latin Public Charter School, late of the Embassy Church building (Finding of Fact #20).

If the Zoning Administrator's decision is affirmed here, then the JPDS will also be permitted to operate in its former Washington Latin Charter School space as a matter-of-right, and would no longer be subject to any of the ten (10) conditions adopted by the BZA in that special exception case, including enrollment cap, hours of operation, DDOT monitoring, etc.

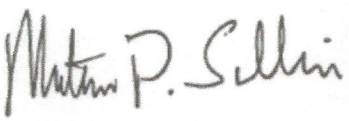
This is just one of the unintended consequences that would flow from this decision. The larger picture is that private schools and CDCs, and other educational organizations, including for-profit enterprises, will be searching for space formerly occupied by a charter school, to use these sites as CDCs, private schools, and other uses, without regard to the restrictions which formerly accompanied such uses in the residential zones.

The precedent of this decision would not be limited solely to educational uses. The position being advocated by the Zoning Administrator is that uses within a larger general use category are interchangeable, even if one use is permitted and the other is not. So, for instance, a restaurant use, once established as a matter of right in the C-1 or C-2 zone, may be converted to a fast food establishment use, even though such use is not permitted in those zones.

## VI. CONCLUSION

The decisions made in the May 16 Letter to not revoke the existing certificate of occupancy and to not halt the illegal uses taking place on the Subject Property were made in error and in clear violation of the Zoning Regulations. Such decisions have had a substantial and direct adverse impact on the Appellant. The Appellant therefore respectfully requests that the Board grant this Appeal and require DCRA to cause the illegal uses described above to cease immediately and to revoke the ongoing child development center use.

Respectfully Submitted,



Martin P. Sullivan

September 23, 2014