BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

APPEAL OF JOAN EVELYN KINLAN

BZA APPEAL NO. 18827

SUPPLEMENTAL STATEMENT IN RESPONSE TO DCRA'S TIMELINESS ARGUMENT

I. Introduction.

In a brief dated October 1st, 2014, Respondent DCRA argued that this appeal was not timely filed because the certificate of occupancy mistakenly issued to the operator of the challenged Child Development Center was issued in 2011. In the prehearing statement, the Appellant presented its substantive position in favor of granting the appeal, and only briefly noted the timeliness question. DCRA, in its brief, did not address the substantive issue regarding the child development center use, but only asserted a lack of timeliness. The Appellant therefore requests leave to file this Supplemental Statement as a response to DCRA's timeliness assertion.

Regarding the timeliness question, the decision being appealed is not the original issuance of Certificate of Occupancy # CO1002760 (the "Certificate of Occupancy"). The decision being appealed is the Zoning Administrator's refusal to revoke the Certificate of Occupancy after being made aware of the mistake and learning of the tremendous negative impacts resulting from that mistake.

The Zoning Regulations, Building Code, and Court of Appeals case law all provide that an illegal use is not made legal by the unlawful issuance of a certificate of occupancy and that a certificate of occupancy for an illegal use that was issued by mistake can be revoked at any time.

To allow the illegal use to continue is a clear violation of law, and as such is an appealable decision under Section 3100 of the Zoning Regulations.

Furthermore, in any appeal, pursuant to 11 DCMR § 3100.4, the Board shall have all the powers of the officer or body from whom the appeal is taken. As the Zoning Administrator clearly has the authority to revoke the mistakenly issued Certificate of Occupancy, then the Board also has such authority. The Board of Zoning Adjustment, as the gatekeeper for child development centers in the R-1 zone districts, must not let an 88-student child development remain without it going through the same special exception process that countless other private schools and child development centers must go through.

Finally, an illegal use operates in violation of the Zoning Regulations not just on the date that a C of O is mistakenly issued; the violation continues until such illegal use ceases, until it is stopped by the Zoning Administrator, or until it is granted a special exception approval by this Board, if applicable.[1]

DCRA cites *Basken* as its primary authority for its timeliness argument. But *Basken* related to a "building project" that was already completed, not to a continuing illegal use. Furthermore, if it is the District that has made the mistake of allowing the child development center, and the child development center that relied on that mistaken approval, then the City, and not the Appellant, should bear the burden of that mistake. In addition, the CDC operator and the owner, presumed to be knowledgeable on the Zoning Regulations relating to CDC's, must also be held responsible. Instead, the City has decided to allow the use to continue, in punishment of Ms. Kinlan and her home-bound husband, simply because DCRA will not admit and correct an

[1] On that point, the Appellant has never demanded that the Child Development Center not exist at all. The Appellant would gladly partake in a reasonable discussion involving special exception conditions that would mitigate the extremely harmful current situation. In fact, the Appellant provided a considerable amount of money to the Church to relocate the CDC's playground away from their property. The Church merely held the money, did nothing, and only returned the money when pressed a year later.

egregious, albeit no doubt honest, mistake. The Appellant is the ultimate innocent bystander to DCRA's mistake, and the Board can amend this injustice simply by requiring the Child Development Center to follow the same rules that apply to every other child development center in a residential zone.[2]

The BZA special exception process, for the large majority of private school and child development center cases, leads to conditions which allow residents and schools to peacefully co-exist. Rather than stop the illegal use and initiate that process (which is clearly within its authority to do), DCRA has forced Ms. Kinlan to go through this appeal process to beseech the Board to correct what everyone seems to understand was a mistake.

For these reasons, the timeliness requirement of Section 3112 is either not applicable, or it applies to the May 16th refusal to halt the illegal use. The Board has the authority to right that wrong and order the child development center to cease its illegal use and/or file a special exception application if it wishes to become a legal use.

II. An Illegal Use is Revocable at Any Time.

The D.C. Court of Appeals has ruled that "[i]ssuance of a certificate of occupancy shall not be construed as an approval of a violation of the provisions of the applicable Construction Codes, Zoning Regulations or other laws or regulations of the District." *Gorgone v. D.C. BZA* 973 A.2d 692 (D.C., 2009), citing *Kuri Brothers, Inc. v. D.C. BZA*, 891 A.2d 241 (D.C., 2006). In a statement that could apply directly to the situation in this Appeal, the Court of Appeals in Kuri noted that "[i]f the C of O were construed to authorize such a use without the required

[2] We would suggest that DCRA has effectively admitted that the original issuance of the C of O was in error, as in its brief it offered no substantive defense.

special exception, it would have been invalid and subject to revocation as having been issued in error." *Kuri*, footnote 6.

The D.C. Building Code (Supplement) provides that "Issuance of a certificate of occupancy shall not be construed as an approval of a violation of the provisions of the applicable *Construction Codes*, *Zoning Regulations* or other laws or regulations of the District."(12A DCMR 110.1.) The Court of Appeals has noted that "[a] certificate of occupancy is an "enforcement tool" that is used by administrative officers "to check proposed uses, as well as proposed structures, against the [applicable] ordinances." *Gorgone v. BZA*, citing American Law of Zoning §1.03[4][d], 1-54 (5th ed. 2008) (a CO "construed to authorize … a use" that is not permitted by the zoning laws is "invalid and subject to revocation as having been issued in error").

The Board noted in Appeal No. 15315 a concept that is regularly repeated by the Board and the Court of Appeals: "the strict regulation of nonconforming uses is of paramount importance in the overall public interest in the operation of the Zoning Regulations. This is particularly so….in a case that involves the approval of non-residential uses in a residential zone district."

It is these above regulations and rulings that the Appellant asked DCRA to effect by correcting the mistake of allowing an 88-student child development center. DCRA has refused to do so, and that decision is in error.

III. BZA Has Authority of The Code Official.

In an appeal, the Board may, in conformity with the Zoning Act, D.C. Official Code § 6-641.07(g)(4) "reverse or affirm, wholly or partly; or may modify the order, requirement,

decision, determination, or refusal appealed from; or may make any order that may be necessary to carry out its decision or authorization; and to that end shall have all the powers of the officer or body from whom the appeal is taken."

The Zoning Administrator has the authority to halt the illegal CDC use at any time. He has neglected to do so in this situation of "paramount" importance. The Appellant therefore respectfully requests that the Board exercise the powers of the code official and require the CDC operation to undergo this Board's special exception process and provide the protections of the law to Ms. Kinlan.

IV. Basken Not Applicable.

Basken is distinguishable because it related to an *area* zoning violation involving significant construction . The apartment house use was not at issue – it had already been established. The distinction here is that a C of O mistakenly issued for an illegal use may be revoked at any time, and it follows that once he is notified of the obvious error, the Zoning Administrator is obligated to revoke an unlawfully issued certificate of occupancy, pursuant to the plain language of the Zoning Regulations and Building Code, as well as the clear guidance from the Court of Appeals.

V. Conclusion.

The mistake made by DCRA in allowing the subject child development center use without special exception approval can and must be corrected DCRA and this Board both have the authority and obligation to do so. The Appellant respectfully requests that the Board dismiss DCRA's timeliness assertion and allow this Appeal to be heard, and further, that it halt the illegal child development center use and require special exception approval for it to continue.

Respectfully Submitted,

Martin P. Sullivan

October 10, 2014

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2014, a copy of this Supplemental Statement was delivered to the following, via e-mail:

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