GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 18827 of Dr. Joan Evelyn Kinlan, pursuant to 11 DCMR §§ 3100 and 3101, from a May 16, 2014 decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs to allow child development center and religious or clerical residence use in the R-1-B District at premises 3855 Massachusetts Avenue, N.W. (Square 1816, Lot 824).

HEARING DATE: October 21, 2014
DECISION DATE: December 16, 2014

ORDER DISMISSING APPEAL AS UNTIMELY IN PART AND REVERSING THE DETERMINATION OF THE ZONING ADMINISTRATOR IN PART

This appeal was submitted on July 11, 2014 by Dr. Joan Evelyn Kinlan (the "Appellant") to challenge a decision of the Zoning Administrator, at the Department of Consumer and Regulatory Affairs, made May 16, 2014, that an existing child development center and other uses not permitted as a matter of right in the R-1 zone may continue on the subject property, a church building located at 3855 Massachusetts Avenue, N.W. (Square 1816, Lot 824). Following a public hearing, the Board of Zoning Adjustment ("Board") voted on December 16, 2014 to dismiss the appeal in part as untimely and to reverse the determination of the Zoning Administrator in part.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated July 11, 2014, the Office of Zoning provided notice of the appeal to the Zoning Administrator, at the Department of Consumer and Regulatory Affairs ("DCRA"); the Office of Planning; the Councilmember for Ward 3; Advisory Neighborhood Commission ("ANC") 3C, the ANC in which the subject property is located; and Single Member District/ANC 3C07. Pursuant to 11 DCMR § 3112.14, on July 23, 2014 the Office of Zoning mailed letters providing notice of the hearing to the Appellant; the Zoning Administrator; Embassy Church, the owner of the property that is the subject of the appeal; and ANC 3C. Notice was published in the *D.C. Register* on July 25, 2014 (61 DCR 7421).

Party Status. Parties in this proceeding are the DCRA, ANC 3C, and Embassy Church, the

owner of the property that is the subject of the appeal ("Property Owner" or "Church"). There were no other requests for party status.[1]

Appellant's Case. The Appellant challenged the decision of the Zoning Administrator to allow the alleged "continued illegal use of a child development center" at the subject property as well "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." (Exhibit 4.) The Appellant owns and resides in a dwelling adjacent to the subject property and asserted that use of the subject property as a child development center and religious/clerical residence for a youth missionary program and related staff "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."

According to the Appellant, the decisions of the Zoning Administrator not to revoke a certificate of occupancy issued for the child development center and not to "halt the illegal uses taking place at the Subject Property were made in error and in clear violation of the Zoning Regulations." The Appellant asserted that the appeal was timely filed within 60 days of the date when the Appellant had notice or knowledge of the decision complained of, since the Appellant became aware on May 16, 2014 of the Zoning Administrator's decision not to revoke the existing certificate of occupancy for the child development center or to halt other uses on the property that do not have separate certificates of occupancy.

DCRA. The Department of Consumer and Regulatory Affairs argued that "the challenge to the Child Development Center is over a year too late" and that the Appellant's "other arguments are without merit because the uses at issue are valid uses of church property." (Exhibit 18.)

Property Owner. The owner of the subject property was represented by Dave Owens, pastor of Embassy Church. He described the use of the subject property by the church, including its youth ministry program and related staff housing, and by the child development center.

ANC Report. By resolution adopted by a vote of 7-1 at a public meeting on July 21, 2013, with a quorum present, ANC 3C "strongly" encouraged the Board to grant the appeal and to require the owner of the subject property to "discontinue the child development center use, the religious/clerical use, and the additional family dwelling use, unless and until the Owner obtains special exception or variance approval from the BZA for such uses." According to the ANC, the property owner had caused the property to be used for certain operations that were not matter-of-right uses in the R-1-B zone, including a child development center that "is not associated with

[1] Embassy Church, represented by Pastor Dave Owens, submitted a request for party status. (Exhibit 16.) However, Embassy Church was not required to seek party status because parties to an appeal include the "owner … of the property involved in the administrative decision, if not the appellant." (11 DCMR § 3199.)

the Embassy Church" and "a housing program with significantly more than fifteen (15) residents." The ANC contended that the Zoning Administrator's decision to consider the child development center a "mere continuation of a previous charter school use on the Subject Property" was "clearly in violation of the use provisions of the Zoning Regulations," and that the lack of a certificate of occupancy to authorize the other uses taking place on the subject property also violated the Zoning Regulations. ANC 3C stated that "the immediate neighbors," not limited to the Appellant, were "significantly adversely impacted by the operation of the [child development center] and the multiple residences, in addition to other actions of the Owner." (Exhibit 15.)

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 3855 Massachusetts Avenue, N.W. (Square 1816, Lot 824). The property is zoned R-1-B and is improved with a building that is owned by Embassy Church and is used as a place of worship and for other purposes.

2. The building has a gross floor area of between 33,000 and 38,000 square feet.[2] The building area includes a sanctuary, which seats approximately 800 people, a chapel that seats approximately 300, offices, bathrooms, a two-bedroom apartment that houses four staff members, a child development center with five classrooms, and accommodations for a youth missionary program that include a kitchen, a lounge, and shower facilities as well as dormitory space used by participants and staff.

3. The subject property is also used for: "church services (weekly), various Life Group meetings (weekly), bible studies (weekly), bible and life training classes (weekly), English conversation classes (periodic), health screenings (periodic), holiday services and events (seasonal), and weddings, funerals and worship programs (as scheduled)." In addition, the church "engages in outreach related initiatives and activities in the neighborhood, throughout Washington, D.C., and internationally including meal service and distribution, education, counseling, disaster relief, missions support and projects, unity walk, nursing home and assisted care facility outreach, and prayer ministry." (Exhibit 18.)

4. A certificate of occupancy (No. CO0800311) was issued September 16, 2008 to authorize a "DC public charter school [with] accessory cafeteria (250 Students, 5-8th Grade, with 40 Staff)" at the subject property. The certificate of occupancy was issued to the Corporation of Washington Latin School and allowed the charter school use in 18,856 square feet on the first and second floors of the church building. The occupant load specified on the certificate of occupancy was 200 persons. The charter school use ended at the subject property by mid-2011 or before.

[2] The Appellant estimated the size of the building at approximately 33,338 square feet, while DCRA's estimate was approximately 38,000 square feet.

5. A building permit, No. B1105058, was issued on August 12, 2011 for a child development center at the subject property.

6. Embassy Church leases a portion of the first and second floors of the church property to the St. Alban's Early Childhood Center for the operation of a child care facility. A certificate of occupancy (No. CO1002760) ("COO") was issued September 1, 2011 to authorize a "child development center, (37) children ages 0-2½ years, (51) children ages 2½ to 5 years, 88 children total" at the subject property. The certificate of occupancy was issued to St. Albans Early Childhood Center, Inc. and allowed the child development center use in 2,500 square feet on the first and second floors of the building. The occupant load specified on the certificate of occupancy was also 88 persons.

7. The Appellant admitted they knew in 2011 the new childhood center had been issued its COO. The Appellant stated they did not challenge the COO in 2011 because they thought the new childhood center would operate at the same level of the previous Charter School. However, after two years of the childhood center operating, the Appellant realized the childhood center use was more intense, causing a disruption to their peaceful enjoyment of their property. In 2013, they hired an attorney to inquiry about the child development center.

8. By letter dated May 16, 2014 (the "May 16 letter") to the Appellant's attorney, the Zoning Administrator responded to zoning issues raised by the Appellant with respect to the use of the subject property. The letter noted the Appellant's complaints that "the child care facility operating at the church was not granted special exception approval by the Board of Zoning Adjustment and that the residential use and activities by religious organizations other than Embassy Church are occurring on the Church Property without a certificate of occupancy."

9. With regard to the child development center, the May 16 letter stated that immediately prior to the child care facility use, the same area of the church property (i.e. a portion of the first and second floors of the church property) was occupied by the Washington Latin Charter School for students in 5th through 8th grades. According to the May 16 letter, the building permit issued in August 2011 had indicated that the then existing use of the space by the charter school was the same as the use being proposed by St. Alban's: education for six or more children over the age of 2½ years. The Zoning Administrator concluded that "[i]t appears, based on the information provided when the building permit and the certificate of occupancy were issued, it was determined that the child care facility did not constitute a change of use from the prior charter school use on the Church Property. Both 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 2½ years. Therefore, special exception approval for the child care facility was not required."

10. With regard to residential use on the church property, the May 16 letter stated the Zoning Administrator's "understanding that there is an occupied two-bedroom apartment unit in the

back corner of the church, above the church offices. It is well accepted that a dwelling unit for the pastor or minister of a church is deemed to be a typical, appropriate accessory use to a church." The Zoning Administrator concluded that a certificate of occupancy was not required for the occupancy of the apartment unit on the church property because a rectory is permitted in the R-1 District as a matter of right under § 201.1(1) of the Zoning Regulations, and the apartment unit on the church property constituted a one-family dwelling that was exempted from the requirements of a certificate of occupancy under § 3203.1.

11. The two-bedroom apartment at the subject property is occupied by two staff couples, including two pastors, who are directors of the youth ministry program. The residents share the apartment's common space, which includes a living room, dining room, and kitchen. The couples pay $15 per day for lodging but have not signed leases.

12. With regard to missionaries staying at church property and the use of church property by other religious organizations, the May 16 letter stated the Zoning Administrator's "understanding that the 'Youth With a Mission' program is currently operating at the Church Property." Through this program, Embassy Church houses approximately 30 youth who stay at the church in intervals of approximately three months…. [T]he occupied area of the Church Property for this use is 4,568 square feet, or 10.63% of the building." The May 16 letter stated the Zoning Administrator's determination that the "Youth With a Mission" program was "an allowable accessory use of the Embassy Church and is, therefore, permissible under the Zoning Regulations…. [R]eligious activities at the church by other organizations would be allowable accessory uses to the church use that do not require a separate certificate of occupancy."

13. The youth missionary program "provides ministry training and outreach activities for young adults in the US and around the world. The ministry training includes instruction and mentorship in prayer, worship, Bible instruction, communication of Christian love and faith, community development, missions, and various and numerous community service projects." Trainings for groups of approximately 30 students typically last up to three months; the students have classroom training in the morning and participate in ministry activities, typically off-site, in the afternoons and evenings. Participants contribute $15 per day for meals and lodging. (Exhibit 18.) The youth ministry activity is not limited to Embassy Church but is part of a local, national, and international program. Participants elsewhere are not necessarily housed in church properties. (Hearing Transcript of October 21, 2014, ("Tr."), p. 74.)

14. The May 16 letter concluded that (a) the building permit and the certificate of occupancy for the child care facility were properly issued because it was determined that the conversion of the church space from the charter school to the child care facility did not constitute a change in the use of the subject property; (2) pursuant to § 3203.1 the apartment unit on the church property did not require a certificate of occupancy; and (3) missionary programs and other similar activities by Embassy Church and other religious organizations are permitted as

accessory uses to the primary church use and do not require separate certificate of occupancy.[3]

15. The appeal was filed July 11, 2014, less than 60 days after the Appellant learned of the Zoning Administrator's determination stated in the May 16 letter. The appeal asserts that

> 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."

CONCLUSIONS OF LAW AND OPINION

The Board of Zoning Adjustment ("Board" or "BZA") is authorized by § 8 of the Zoning Act to "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal" made by any administrative officer in the administration or enforcement of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2012 Repl.). *See also* 11 DCMR § 3100.2.) Appeals to the Board of Zoning Adjustment "may be taken by any person aggrieved, or organization authorized to represent that person, … affected by any decision of an administrative officer…granting or withholding a certificate of occupancy…based in whole or part upon any zoning regulations or map" adopted pursuant to the Zoning Act. D.C. Official Code § 6-641.07(f) (2008 Repl.). (*See also* 11 DCMR § 3200.2.) In an appeal, the Board may "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." (11 DCMR § 3100.4.)

With regard to timeliness, the Appellant asserted that the appeal was 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"; that is, the decision of the Zoning Administrator as conveyed in the May 16 letter. (Exhibit 4.) The Appellant emphasized that the decision being appealed was not the original issuance of the certificate of occupancy but "the Zoning

[3] The May 16 letter also noted that the Appellant had raised several concerns relating to the use of public space by the church, including "the placement of the childcare playground." The letter stated that those concerns had been referred to the Public Space Regulation Administration for investigation.

Administrator's refusal to revoke the Certificate of Occupancy after being made aware of the mistake…." (Exhibit 20.) According to the Appellant, 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," citing *Gorgone v. D.C. Board of Zoning Adjustment*, 973 A.2d 692, 694 (D.C. 2009).

DCRA countered that the certificate of occupancy was issued September 1, 2011 – that is, more than 60 days before the appeal was submitted – and that the May 16 letter from the Zoning Administrator was not an appealable decision because it was not the first issuance of notice that the Zoning Administrator would issue a certificate of occupancy for a child development center at the subject property.

The Board concurs with DCRA and concludes that, with respect to the child development center, the appeal must be dismissed as untimely. The zoning decision to allow the child development center use at the subject property was made with the issuance of the building permit on August 12, 2011 and reaffirmed by the issuance of the certificate of occupancy on September 1, 2011. The Appellant knew or could have known of the zoning decision to permit a child development center at the subject property at that time. The Appellant admitted knowledge of both the 2011 building permit and the certificate of occupancy. The Appellant admits they chose not to challenge the issuances of the certificate of occupancy in 2011, believing they would not be affected by the child development center. It was not until two years later, 2013, that the Appellant hired an attorney to challenge the child development center. Additionally, the permit was posted at the property. (Tr., p. 50.) Nevertheless, this appeal was filed well past the 60-day deadline for a timely challenge to the Zoning Administrator's decision to issue a certificate of occupancy for the child development center, and therefore must be dismissed.

The Board heard testimony that the permit was posted at the property, and the Appellant conceded knowing "a couple of years ago" both that the charter school was not continuing at the church property and, soon thereafter, that a child development center had opened there. (Tr., p. 50.) Nevertheless, this appeal was filed well past the 60-day deadline for a timely challenge to the Zoning Administrator's decision to issue a certificate of occupancy for the child development center, and therefore must be dismissed.

The Board also concurs with DCRA that the May 16 letter was not appealable with respect to the issuance of a certificate of occupancy for the child development center because the letter did not provide "the first notice from which an aggrieved person knew or 'reasonably should have … know[n]' … of the resolution or decision that the certificate represents…." *Basken v. D.C. Board of Zoning Adjustment*, 946 A.2d 356, 367 (D.C. 2008). The May 16 letter merely reaffirmed the Zoning Administrator's decision that a child development center was permitted at the subject property, as already reflected in the issuance of the building permit and certificate of occupancy almost three years earlier. The May 16 letter did not "start another sixty-day appeal period as to any and all DCRA zoning decisions affecting a project that preceded issuance of the [letter]." *Id.*

The Appellant contends that the appeal challenges not the issuance of the certificate of occupancy but the Zoning Administrator's alleged refusal to revoke a mistakenly issued certificate "after being made aware of the mistake." However, the Zoning Administrator has not found any mistake with respect to the issuance of the certificate of occupancy for the child development center. The Zoning Administrator's reasoning was explained in the May 16 letter, which did not state any mistake in the rationale.

As to the merits of the remaining issues, the Board first concludes the use of the apartment to house the staff of the youth missionary program is not a standalone matter of right residential use but is part of the youth ministry program. The May 16 letter described the Zoning Administrator's "understanding that there is an occupied two-bedroom apartment unit" in the church building and that "a dwelling unit for the pastor or minister of a church is … a typical, appropriate accessory use to a church."

However, in this proceeding, the church pastor described the apartment as being used to house two couples who serve as directors of the youth missionary program. This apartment on the church property goes beyond merely providing a residence for the pastor of the church and therefore cannot be considered a matter of right parsonage/rectory use pursuant to 11 DCMR § 201.1 (l). Nor can the apartment be considered a lawful "one-family dwelling" as the Zoning Administrator seems to have suggested. Only detached one-family dwellings are permitted in an R-1 zone. (11 DCMR § 201.1 (k).) This apartment is not detached but contained within the church building. Permitting a parsonage/rectory in a church building is therefore an exception to the general rule that matter of right residential uses in the R-1 district must be in detached dwellings. And because it is an exception, the interpretation of what constitutes a parsonage/rectory must be narrowly construed.

Because the staff housing on the church property extends beyond merely providing a residence for the pastor, as contemplated by the matter-of-right church use, use of the church property to house the staff of the youth ministry program should be considered to be part of that program and analyzed together as a single use. Therefore, for the purposes of this Order, all further references to "youth missionary program" includes the program as separately described in the record as well as the housing provided in the form of an apartment for two families who serve as the program's directors.

Second, the Board finds no merit in DCRA's claim, raised for the first time in its pre-hearing statement (Exhibit 18), that the youth ministry program is an integral operation of the Church and therefore inseparable from that matter of right use. DCRA cites the Board's decision in Application No. 18418 (*Pilgrim Baptist Church*; order issued May 7, 2013) and claims that "any operations conducted by a church that are performed in support of the church's mission are allowed in the R-1 through R-5 zones as a matter of right." The Board concludes that the facts in *Pilgrim Baptist Church* are distinguishable from those presented in this appeal.

In *Pilgrim Baptist Church* the applicant proposed to expand its administrative functions to provide offices for up to five employees of the church as well as meeting rooms and storage space for files and equipment. All of the activity proposed for the expanded administrative space would be "in support of the Church's operations and all administrative offices [would] be operated by Church employees." In dismissing the application for special exception approval as a church program under § 216, the Board concluded that no zoning relief was needed because the administrative functions were "in integral part of the Church's operations" that could operate as a matter of right as part of the church use.

The Board does not find that the youth missionary in operation at Embassy Church is an integral part of the church use in the same way as the administrative support function at issue in the *Pilgrim Baptist* case. The program, as described by the pastor and by DCRA, is not an inherent aspect of a church use but is carried out at Embassy Church in addition to the typical operation of a church as a place of worship. The youth ministry program involves the participation of approximately 30 people who live on the premises and carry out activities both on the church property and elsewhere. The participants are not permanent members of the congregation but attend the program for periods of up to three months. The pastor acknowledged at the public hearing that participants in similar programs in other locations do not necessarily live at a church property. The nature of the youth missionary program distinguishes the activity from the typical use of a church or other place of worship.

Finally the Board rejects the Zoning Administrator's original contention, now DCRA's fallback position, that even if the youth missionary program was not allowed as part of the church use, those uses would be allowed as accessory to the church use. the Appellant disputed the rationale stated in the May 16 letter that the program was permitted as accessory to the principal church use since the activity was limited to not more than 10% of the floor area of the church building. The Appellant challenged the likelihood that program participants were "restricted to a portion of the Property which represents only 10% of the floor area of the Building" as "not only improbable, [but] known by the Appellant to be patently false" based on the Appellant's observations. The Appellant disputed 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."

The Appellant is correct. Contrary to DCRA's premise, the percentage to which a use occupies a structure is not dispositive of the issue as to whether the use is subordinate. The Zoning Regulations define an accessory use as "a use customarily incidental and subordinate to the principal use, and located on the same lot with the principal use." (11 DCMR § 199.1.) The definition does not rely on a specific percentage of floor area to determine whether a given use is in fact accessory to a principal use, and thus a use is not necessarily "accessory" even if it is limited to 10% (or any other percentage) of gross floor area. For the reasons stated above, the youth missionary program and the related staff housing are not "customarily incidental" to a church or other place of worship.

For these reasons, the Board concludes that the youth missionary program including the housing for its staff is not a matter of right use in the R-1-B zone. Although the Board is not required to suggest what form of zoning relief might be available, it believes that the use could be characterized as a residence for clerical groups or religious denominations in excess of 15 people, subject to special exception approval under § 215, or a program conducted by a church congregation or group of churches that is subject to special exception approval under § 216.

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001)).) In this case, ANC 3C adopted a resolution encouraging the Board to grant the appeal and to require Embassy Church to "discontinue the child development center use, the religious/clerical use, and the additional family dwelling use, unless and until the Owner obtains special exception or variance approval from the BZA for such uses." For the reasons discussed above, the Board determined that the appeal must be dismissed as untimely with respect to the challenge relating to the child development center, but, with respect to the youth missionary program and the residential use of the subject property, the Board concurs with the ANC that the Zoning Administrator's determination should be reversed and the uses require review and approval by the Board.

Based on the findings of fact and conclusion of law, the Board concludes that the Appellant has satisfied the burden of proof with respect to the claim of error in the decision of the Zoning Administrator that a youth missionary program and related staff housing are allowed as a matter of right at a property devoted to church use, but not with respect to the claim of error in the issuance of a certificate of occupancy for a child development center at that property, located in the R-1-B zone at 3855 Massachusetts Avenue, N.W. (Square 1816, Lot 824). Accordingly, it is therefore **ORDERED** that the Zoning Administrator's determination is **SUSTAINED in part and REVERSED in part.**

For the reasons discussed above, the Board does not agree with DCRA's assertion that the residential use by staff members is permitted as a matter of right as part of the church use.

VOTE: **4-0-1** (Lloyd J. Jordan, S. Kathryn Allen, Marnique Y. Heath, and Jeffrey L. Hinkle voting to Dismiss, as untimely, the appeal with respect to the child development center; Marcie I. Cohen not present, not voting).

VOTE: **5-0-0** (Lloyd J. Jordan, S. Kathryn Allen, Marnique Y. Heath, Jeffrey L. Hinkle, and Marcie I. Cohen (by absentee vote) to Reverse the determination of the Zoning Administrator with respect to the use of the subject property for a youth ministry program and related staff housing).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: June 1, 2015

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.