

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

APPEAL OF JOAN EVELYN KINLAN

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

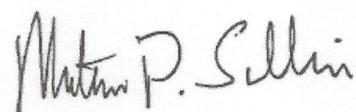
The Zoning Administrator has erred in finding that a Child Development Center use is not a change of use from a Charter School use, in violation of 11 DCMR §199.1 (definitions of Child Development Center and Public School), 11 DCMR §205 (requiring special exception

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. 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 current child development center certificate of occupancy.

Respectfully Submitted,



Martin P. Sullivan

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR



May 16, 2014

VIA FIRST CLASS MAIL

Arnold D. Spevack, Esq.
Lerch Early & Brewer
3 Bethesda Metro Center, Suite 460
Bethesda, MD 20814

RE: Zoning Issues for Property 3855 Massachusetts Avenue, NW

Dear Mr. Spevack:

This letter serves as a partial response to your correspondence dated September 13, 2013, regarding the Embassy Church located at 3855 Massachusetts Avenue, NW, which is in the R-1-B District (the "Church Property"). The scope of this response is limited to those issues in your letter governed under the Title 11 of the District of Columbia Municipal Regulations (the "Zoning Regulations") and within my purview as Zoning Administrator for the District of Columbia.

It is my understanding that your firm represents Dr. Joan Kinlan and Leo Boucher who own and reside next door to the Church Property at 3843 Massachusetts Avenue, NW, and have several complaints about the use of the Church Property, including 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. Following is my response to these matters.

Approval for Child Care Facility

Embassy Church leases a portion of the first and second floors of the Church Property to the St. Alban's Early Childhood Center ("St. Alban's") for the operation of a child care facility. Immediately prior to the child care facility use, the same area of the Church Property was occupied by the Washington Latin Charter School ("Washington Latin") for students in 5th through 8th grades.

On August 12, 2011, the District issued a building permit to St. Alban's for certain improvements for the child care facility space. Said building permit (Permit No. B1105058, which is attached as Exhibit A), indicates that the then existing use of the

1100 4th Street, SW 3rd Floor Washington, D.C. 20024
Phone: (202) 442-4576 Fax: (202) 442-4871

Exhibit A

space by Washington Latin was the same as the use then being proposed by St. Alban's -- education for six or more children over the age of 2-1/2 years.

On September 1, 2011, the District issued a certificate of occupancy to St. Alban's for the child care facility. According to the certificate of occupancy, said use is limited to a total of 88 children between the ages of 2-1/2 to 5 years of age. A copy of the certificate of occupancy (Permit No. C01002760) is attached as Exhibit B. According to the certificate of occupancy for Washington Latin, the charter school use was limited to 250 students in 5th through 8th grades, with 40 staff persons. (See Permit No. CO0800311 attached as Exhibit C.)

It 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 2-1/2 years. Therefore, special exception approval for the child care facility was not required.

Residential Use on Church Property

It is our 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. Further, pursuant to Section 201.1(1) of the Zoning Regulations, a rectory is permitted in the R-1 Districts as a matter of right.

The apartment unit on the Church Property constitutes a one-family dwelling, which is defined in Section 199 of the Zoning Regulations as a "dwelling use exclusively as a residence for one (1) family". Under Section 3203.1, a one-family dwelling is exempt from the requirements of a certificate of occupancy. That provision specifically reads:

"Except as provided in §§ 3203.7, 3203.8, 3203.9, or the second section sentence of this subsection, no person shall use any structure, land, or part of any structure or land for any purpose until a certificate of occupancy has been issued to that person stating that the use complies with the provisions of this title and the D.C. Construction Code, Title 12 DCMR. *The requirements of this subsection shall not apply to:*

(a) *A one-family dwelling; or*

(b) *A community based residential facility to be occupied by six (6) or fewer persons with a handicap plus residence supervisors, as permitted by right in residence and commercial districts pursuant 11 DCMR §§ 201.1(f) and 330.5(d)."*

(Emphasis added.)

Based on the foregoing, a certificate of occupancy is not required for the occupancy of the apartment unit on the Church Property.

Missionaries Staying at Church Property and Use of Church Property by Other Religious Organizations

It is my understanding that the "Youth With a Mission" program is currently operating at the Church Property. Through this program, the Embassy Church houses approximately 30 youth who stay at the church in intervals of approximately three months. In addition, the occupied area of the Church Property for this use is 4,568 square feet, or 10.63% of the building. This office has determined, based on prior similar cases, that the "Youth With a Mission" program is an allowable accessory use of the Embassy Church and is, therefore, permissible under the Zoning Regulations. Similarly, religious 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.

In light of the foregoing, I find: (1) 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 Property; (2) pursuant to Sec. 3203.1, the apartment unit on the Church Property does 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.

District Department of Transportation's Public Space Regulation Administration Concerns

There were several concerns raised in the correspondence about the Church Property that relates to the use of public space, including the placement of the childcare playground. Our office referred these concerns to the District Department of Transportation's ("DDOT") Public Space Regulation Administration ("PSRA") for investigation and follow up with your office. I believe that you initially received communication from Matthew Marcou, Deputy Director of the PSRA, on December 26, 2013 informing you that the public space matters were being investigated by their office. Please feel free to follow up with DDOT, if they have not provided you with a current update on their inspection and enforcement efforts.

Please do not hesitate to contact me if you have any additional questions or concerns.

Sincerely,



Matthew LeGrant
Zoning Administrator

Cc: Melinda Bolling, Esq., General Counsel, DCRA
Pastor Dave Owens, Embassy Church
Leila M. Jackson Batties, Holland & Knight

Government of the District of Columbia
Department of Consumer and Regulatory Affairs

1100 4th Street SW
 Washington DC 20024
 (202) 442-4400
 dcra.dc.gov

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CERTIFICATE OF OCCUPANCY

PERMIT NO. CO1002760

Issued Date: 09/01/2011

Address: 3855 MASSACHUSETTS AVE NW		Zone: R-1-B	Ward: 3	Square: 1816	Suffix: 0824	Lot: 0824
Description of Occupancy: CHILD DEVELOPMENT CENTER, (37) CHILDREN AGES 0 - 2 1/2 YEARS, (51) CHILDREN AGES 2 1/2 TO 5 YEARS, 88 CHILDREN TOTAL						
Permittee is Herby Granted To: St. Albans Early Childhood Center, Inc.	Trading As: ST. ALBANS EARLY CHILDHOOD CENTER	Floor(s) Occupied: OCCUPY 1ST AND 2ND	Occupant Load: 88 No. of Seats: 88			
Property Owner: Christ Church Of Washington	Address: 3855 MASSACHUSETTS AVE NW WASHINGTON, DC 20016-5102	BZA/PUD Number: 0	Occupied Sq. Footage: 2800 PERMIT FEE: \$83.60			
Building Permit Number (if applicable)	Type of Application: New Building	Approved Building Code Use: Other - Specify Approved Zoning Code Use: Child development center				
Conditions/ Restrictions: THIS CERTIFICATE MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS MAIN ENTRANCE, EXCEPT PLACES OF RELIGIOUS ASSEMBLY. Use complies with DCMR Title 11 (Zoning) and Title 12 (Construction).						
Director (Code Official): Nicholas A. Majell	Permit Clerk: <i>Erika King</i>	Expiration Date:				
TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL, CALL THE DC INSPECTOR GENERAL AT 1-800-521-1639						



Exhibit B