DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

In the Matter of:	)	BZA APPEAL 16752
	)	
5511 14th Street, NW	)	

ZONING ADMINISTRATOR'S PRETRIAL STATEMENT

I. BACKGROUND

On or about May 7, 2001, the Zoning Administrator ("ZA") issued a Certificate of Occupancy ("C of O") for 5511 Fourteenth Street ("14th"), NW to Metro Day Treatment Center, Inc, ("Metro") to use the site for a "day program for mentally retarded persons."[1] The applicant conducts a development program for mentally-challenged adults. Many but not all of the participants are elderly. The program involves eleven staff members and 36 clients. The clients are incapable of driving and are bussed to and from the building at 5511 14th Street, NW. The site has three parking spaces under construction.[2] The ZA has classified the use as analogous to a child/elderly development center. Under Section 2101.1, a child/elderly development center requires one parking space for each four teachers and other employee.

On or about June 6, 2001, the Advisory Neighborhood Council ("ANC") for area 4A appealed the ZA's issuance of the C of O.[3] In its appeal, the ANC charged that the C of O was issued in direct violation of the "Rule of the Case set by BZA order November

[1] BZA 16752 Ex. 6.
[2] According to the applicant, Herman Bromfield, these spaces will be available by December 15, 2001.
[3] BZA 16752 Ex. 1.

BZA Case No. 16752 Exhibit No. 30

Board of Zoning Adjustment
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EXHIBIT NO.30

25, 1997." The rule of the case that the ANC refers to is the decision of the BZA in Appeal 16066, June 5, 1996.

II. THE PRIOR APPEAL

On June 5, 1996, the Board of Zoning Adjustment ("BZA") reversed the ZA's issuance of a C of O for 5511 14th Street.[4] BZA Appeal 16066 at 7. The BZA reversed the C of O because:

> the certificate was issued on the basis of the use being for general office. However, the Board concludes that a change of use occurred at the site. Finally, the Board concludes that the day treatment program activities that are engaged in by the Psychological Development Association, Inc., do not comport with what normally occurs in a general office. Therefore, the Board concludes that the Acting Zoning Administrator be reversed.

BZA Appeal 16066, at 7.[5] This case involved an appeal by FZC, Inc., a nonprofit corporation, of a C of O issued by Acting ZA Gladys Hicks to Better Treatment Program to operate a day treatment program. The program was similar to the program in the instant case in that it provided education and training to mentally-challenged adult students.[6] In the decision, the BZA made the following findings of fact:

> 1. There were a number of errors and omissions in the certificate of occupancy application related to the actual property affected, the square footage t be used, etc.
>
> 2. The Acting Zoning Administrator failed to clarify these erroneous matters prior to deciding to issue the occupancy permit.

[4] By BZA Rule, 11 D.C.M. R. § 3103.1, the decision was effective on November 25, 1997.
[5] BZA 16752 Ex. 4, at 7.
[6] BZA 16752 Ex. 4, a7 4.

3. While the Acting Zoning Administrator issued an occupancy permit for a day treatment program, a use that is not defined in the Zoning Regulations she considered the use to be that of a general office.

4. The activities that take place at PDA's day treatment program include educating and training mentally challenged students. These activities are not considered normal for a general office use.

The owner of 5511 14th Street, Janet Stein, petitioned the Court of Appeals to review the reversal of the C of O by the BZA. By *per curiam* order of April 16, 1999, the Court of Appeals dismissed both the property owner's appeal of the BZA order and the BZA's reversal of the Acting ZA's issuance of the C of O. As a result, there is no judgment left in Appeal 16066.

III. ARGUMENT

A. The Principle of *Res Judicata* Does Not Apply to Appeal 16752

The Court of Appeals for the District of Columbia has addressed the question of when *res judicata* applies to a matter that is brought before the Board of Zoning Adjustment. In *Towles v. District of Columbia Bd. of Zoning Adjustment*, 578 A.2d 1128, the Court stated:

> Generally, once a claim has been finally adjudicated, the doctrine of [**6] claim preclusion, or *res judicata,* prevents the same parties from relitigating the same claim, including any issue that either was or might have been raised in the first proceeding, and the doctrine of issue preclusion prevents the same parties from relitigating an issue actually decided in a previous, final adjudication, whether on the same or a different claim. *Rhema I,* 515 A.2d at 193. When a special exception is denied and the applicant, after a required waiting period, resubmits the same or a substantially similar application, the applicant must demonstrate either that there has been a material change in conditions, such that the reasons for the previous denial no longer apply, or that the application does not involve the same claim. *Id.* at 194. The court explained:
> When a material change of circumstances affecting the

> merits of the application has not occurred [and] the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition. If it were otherwise, there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners seeking to uphold the zoning plan.

Id. at 194 (quoting *Fisher v. City of Dover,* 120 N.H. 187, 412 A.2d 1024, 1027 (1980)).

In Appeal 16752, the predicate circumstances for asserting *res judicata* are missing. First, the parties are not the same parties that were in the previous litigation. The appellant in Appeal 16066, FZC, Inc., is a defunct corporation. The applicant in Appeal 16066, PDA, has no relationship to the present applicant, Metro. There is no privity or legal tie between the two entities. Second, the issue of whether Metro qualifies as a child/elderly development center was not litigated in the earlier proceeding. Thus, the issue in Appeal 16752 is not the issue that was litigated in the earlier matter. Third, there has been a change in the law since the decision was rendered in Appeal 16066. Fourth, the judgment upon which the Appellant based *res judicata* has been vacated by the Court of Appeals. Accordingly, there is no basis for the appellant to assert that the ZA's consideration of Metro's C of O application is barred by the doctrine of *res judicata.* The requirements of the same parties, the same issues, and a prior litigation simply are absent.

B. Metro Has No Duty to Provide Parking Spaces at 5511 14th Street

Title 11, Section 2100.1 of the D.C. Municipal Regulations requires that all buildings erected after May 12, 1958 provide parking spaces to the extent specified in section 2101.1 Section 2101.1 of Title 11 sets forth the schedule of parking requirements for zoning uses according to a table. Section 2100.2 states that no application for a

building permit shall be approved unless the application includes a parking plan. Section 2100.4 of Title 11 states:

> Except as provided in § 2100.5 [historic landmarks], when the use of a building or structure is changed to another use which requires more parking spaces than required for the use existing immediately prior to the change or, if the building or structure is vacant, the use which existed immediately prior to the vacancy, parking spaces shall be provided for the additional requirement in the amount necessary to conform to § 2101.

Section 2100.10 of Title 11 states:

> In the case of a building or structure for which Zoning Regulations now require more parking spaces than were required when the building or structure was built, the following shall be required:
>
> (a) If the existing number of parking spaces now provided is less than or equal to the minimum number of parking spaces now required by this chapter, the number of parking spaces cannot be reduced, and
> (b) If the existing number of parking spaces now provided is more than the minimum number of parking spaces now required by this chapter, the number of parking spaces cannot be reduced below the minimum number of parking spaces required by this chapter.

Section 2100.4 plainly states that when there is a change of use in a building or a structure, the applicant for a C of O must provide parking for the difference between the parking required by the previous and the parking required by the new use. In other words, the applicant has a credit for the parking spaces previously required. Section 2100.10 provides that if the building never provided the parking required by the previous use because the building predates the 1958 zoning law, the applicant seeking a C of O for a change of use has a credit consisting of the parking spaces that were required in 1958 based on the use of building or structure in 1958.

The building located at 5511 14th Street, NW predates 1958. In 1955, a C of O was issued for "office & retail sales of vacuum cleaners." This use is consistent with a general office. Under Section 2101, the building at 5511 14th Street, NW would have had to provide 3 parking spaces for a general office. Thus, 5511 14th Street, NW has a parking credit of three parking spaces. Based on the parking requirements of Section 2101.1, Metro must provide a parking space for each four staff members. Because Metro has eleven staff members, it must provide three parking spaces. With the credit of three parking spaces, Metro is relieved of any obligation to provide any parking spaces. That not withstanding, Metro has provided three parking spaces.

IV. CONCLUSION

For the foregoing reasons, the ZA respectfully requests that the BZA deny the request of the ANC 4A to reverse the issuance of the C of O to Metro.

Respectfully submitted,

ROBERT R. RIGSBY
Corporation Counsel

SHARON STYLES-ANDERSON # 412158
Senior Deputy Corporation Counsel

CHARLOTTE W. PARKER # 186205
Acting Deputy Corporation Counsel

Raouf M. Abdullah (Bar No. Pending)
Special Assistant Corporation Counsel

Office of the Corporation Counsel
441 4th Street, NW, Room 450 North
Washington, DC 20001
(202) 727-4171

CERTIFICATE OF SERVICE

hereby certify that on this 14th day of November 2001, a copy of the foregoing Zoning Administrator's Pretrial Statement was mailed first class, postage prepaid to John J. Chagnon, ANC 4A07, ANC Commissioner, Advisory Neighborhood Commission 4A, 5603 – 14th Street, NW, Washington, DC 20012.

Raouf M. Abdullah
Assistant Corporation Counsel