

FAX TRANSMISSION

JOHN J. CHAGNON
5603 - 14TH STREET, NW
WASHINGTON, D.C. 20036
202-722-5025
FAX: 202-347-4401

To: Beverly A. Bailey **Date:** June 17, 2002
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From: John J. Chagnon, ANC 4A07
Subject: BZA Appeal 16839

Transmitted for filing is the appellant's proposed findings of fact and conclusions of law.

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BZA
Case No. 16839
Exhibit No. 31

Board of Zoning Adjustment
District of Columbia
CASE NO.16839
EXHIBIT NO.31

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Appeal No. 16839 of ANC 4A pursuant to 11 DCMR and §3105.1 and §3200.2 of the Zoning Regulations of the District of Columbia was filed relative to the administrative decision of Michael Johnson, Acting Zoning Administrator to issue a certificate of occupancy to Metro Day Treatment at the premises located at 5507 14th Street, N.W., in a C-2-A district for use as a Day Treatment Program.

Hearing Date: March 2002
Decision Date: July 2002

ORDER

Summary of Evidence of Record

1. A certificate of occupancy was issued on or about August 30, 2002 to Metro Day Treatment, hereinafter "MDT" for a use as Elderly Development Center at 5507 14th Street, N.W. The site is zoned C-2-A.
2. The subject site is actually located at 5507 - 5511 14th Street, N.W. as evidenced by Department of Finance and Revenue records and testimony of the appellant. However, the District of Columbia has failed to produce to the Board any application that identifies the site occupied.
3. The Board over the objection appellant proceeded with the appeal hearing when it was determined that the District of Columbia could produce no application for which certificate of occupancy was issued.
4. Municipal Regulations mandate that no certificate of occupancy shall be issued without an application and the payment of a filing fee.
5. ANC 4A has submitted written and oral testimony in opposition to the issuance of a certificate of occupancy at the subject site for a Day Treatment Program and a Day Treatment Program operating as an Elderly Development Center.
6. The plain language of the Municipal Regulations need not be examined when there is no confusion or ambiguity as to its meaning. The municipal regulations provide special dispensation for the citing "Child" and "Elderly" Development Centers. The Regulations clearly with no ambiguity separate "Elderly" from all adults. The fact that special categories

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for the population, Children and the Elderly, specifically excludes all others who do not meet the criteria of being a Child or Elderly. The regulations are quite specific and unambiguous as to the focal point of the limited population to receive special treatment; the "Elderly". The appellant, ANC 4A, presented testimony, citing the municipal regulations and Webster's dictionary defining the term "elderly".

7. Testimony was presented by the appellant and the Acting Zoning Administrator that the use of the subject site is not for the benefit of the elderly.

8. The Acting Zoning Administrator testified that the services provided at the site are similar to the services provided at an "Elderly" Development Center.

9. DCMR §2101.1 provides that when a use is undefined the parking requirements are one space for every 600 square feet of occupancy. Since Elderly and Child development centers are defined uses, other development centers (centers not for children or the elderly) must necessarily meet the parking requirements for other uses.

10. The District stated that they made no representation to the Board that the services provided by MDT were for the "Elderly".

11. The Municipal Regulations define the use of Child and Elderly Development Centers; accordingly any Development Center that is not specifically within the defined use must necessarily be an undefined use or other use. Development Centers that provide identical services to the population with the focal point of such services provided that are not targeted to Children or the Elderly fail meet the criteria for special treatment for parking under the municipal regulations.

12. The position advanced by the Acting Zoning Administrator is that if the services provided are similar to an Elderly Development Center, it makes no difference whether the recipients of the service are elderly or not in that DCMR provides that like uses can be extended to a defined use.

13. The appellant testified that the Acting Zoning Administrator was wrong and that he had no authority to create legislation or municipal regulations. Under the Zoning Administrator's interpretation any "Development Center" could and would be treated for parking purposes to be an "Elderly" Development Center. The logic applied by the Zoning Administrator is flawed and misplaced. There is no foundation in the Municipal Regulations to extend special treatment to groups within the population who are not "Elderly". Day treatment programs and development centers exist for alcoholics, drug abusers, the homeless, jobless, unskilled workers, reentry programs for convicted criminals, family services, mentally retarded, learning disabled, physically disabled, mentally disabled, among others and some are called clinics, schools, offices, training centers, churches, etc. There is a simple reason these programs are not called "Elderly Development Centers" is that they are not. They may

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provide rehabilitative services or life skill services but they are not targeted to benefit the elderly.

14. The appellant testified that the Day Treatment Program operated by MDT is not an Elderly Development Center.

15. Appellant testified that 5507 - 14th Street was built prior to 1959 and had approximately 1500 square feet of space, since the square footage was less than the amount needed for the requirement of parking, no grand fathered space was available. Appellant testified 5509 14th Street was built in 1987 and does not receive any grand fathered parking spaces. Appellant testified that 5511 - 14th Street had a prior certificate of occupancy for 2,800. Square feet and was entitled to one grand fathered parking space. There are no on or offsite parking spaces provided. The Acting Zoning Administrator has credited parking space for the use of the site that do not currently exist based on a building permit. Further, to the degree the Acting Zoning Administrator credits the applicant with more than one grand fathered parking space is in error.

16. The applicant does not have sufficient parking spaces to operate at the level approved by the certificate of occupancy issued per the testimony of the Appellant even if operated as a true Elderly Development Center. Based on the one grand fathered parking space no more than four employees would be allowed. An Elderly Development Center requires one parking space for each four employees. Since no parking is provided onsite at all, the subject site as an Elderly Development Center would be limited to the credit for one space. The Acting Zoning Administrator had no authority to issue a Certificate of Occupancy prior to the existence of the required on site parking spaces. It is noted that the parking spaces the Acting Zoning Administrator counted still do not exist. The Acting Zoning Administrator's parking assessment indicates that three on site spaces are required with eleven employees; inexplicitly the Acting Zoning Administrator has ignored the requirement for on site parking and issued a certificate of occupancy with no on site parking.

17. DCMR 11, §2100 et seq clearly establishes that no certificate of occupancy shall be issued for the use of any structure built after May 12, 1958 that does provide the required parking space for the structure and the use thereof. Unrebutted testimony was entered into the record that no parking facilities exist of any kind on or off-site for the use of the structures. DCMR 11, §2100.4 requires that when a use change takes place to a use that requires additional parking such parking spaces shall be provided in accordance with DCMR 11, §2101.

18. The appellant presented credible testimony as to: the lack of parking, change in use of the structure(s), intensity of use of the structures, the use of the structures prior to the issuance of a certificate of occupancy, square footage occupied, inconsistency of use with a Elderly

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Development Center and the new construction of one of the structures occupied by MDT,

19. MDT presented no testimony.

20. Council Member for Ward 4 submitted a letter in support of the appeal of the Acting Zoning Administrator's decision to issue and sent Jason Washington as his representative who testified in support of the Appeal advanced by ANC 4A.

FINDINGS OF FACT:

Based on the evidence in the record, the Board finds the following:

1. There has been a change in use of the property from a home improvement contractors office to a day treatment program characterized as an Elderly Development Center.

2. A day treatment program use as operated by MDT is not consistent with the use as an "Elderly Development Center".

3. Any use of that portion of Lot 9 of Square 2800 which is not utilized as a home improvement contractors office or exceeds the occupancy of 2800 square feet must provide parking in accordance with 11 DCMR, §2101.

4. A structure erected after May 12, 1958 is required to provide on-site parking in accordance with DCMR 11, §2100. 5509 14th Street was built in 1987 and must provide on-site parking.

5. DCMR 11, §2118.7 requires the aggregation of individual uses to determine the parking spaces required. Accordingly, the subject site is entitled to only one grand fathered parking space.

6. No parking spaces are provided for the use of 5507, 5509 or 5511 14th Street, N.W.

7. The structures occupied are non-conforming structures

8. The appellant's testimony was credible.

9. The Acting Zoning Administrator's actions in failing to notify the Board that a new certificate of occupancy was issued for a changed use while the original certificate of

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occupancy was under appeal calls into question his judgement and lack of candor with the Board. The counting of parking spaces that do not exist towards required parking spaces is inappropriate and wrong. DCRA's failure to maintain a copy of the certificate of occupancy application, if one exists, is inexcusable.

10. The Acting Zoning Administrator did not fulfill his duties and obligations to adequately investigate and inspect the proposed use at the subject site in light of the known facts at the time the certificate of occupancy was issued particularly in light of the BZA case precedent relative to the BZA decision in Psychological Development Associates, BZA Case 16066.

11. An "Elderly Development Center" by definition must be for the principal benefit to the "Elderly". The fact that the term "Elderly" is not identified by an age specific range does not in and of itself open the definition to accommodate any development center that provides similar services. In order to qualify as an "Elderly" development center the focal point of the assistance and services provided must be targeted for the benefit of the "Elderly".

12. The BZA has accorded ANC 4A "Great Weight" and accepts the findings and recommendation of the ANC as part of the BZA record.

CONCLUSIONS OF LAW AND OPINION

Based on the evidence of record, the Board concludes that the appellant, ANC 4A, seeks the rescission of the certificate of occupancy issued to Metro Day Treatment for the use as an Elderly Development Center in a C-2-A District.

It is the Board's view that ANC 4A has demonstrated the errors of the Acting Zoning Administrator and that Certificate of Occupancy No. is hereby rescinded and declared null and void.

A Day Treatment Program is not a defined use under the Municipal Regulations. We find sufficient evidence in the record to conclude that a Day Treatment Program as operated by Metro Day Treatment is not an Elderly Development Center. The Acting Zoning Administrator had sufficient information available to him to conclude that the intended use was inconsistent with a use as an Elderly Development Center. The Board was also persuaded by the analysis and decision of the ANC which also concluded that a Day Treatment Program is not consistent with a use as an Elderly Development Center.

A change in use requires that parking spaces required under the Municipal Regulations be provided based upon the increase in required spaces to accommodate the new use. No parking spaces have been provided and the intensity of use dictates that additional parking

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space are mandated.

The subject site is a combination of three non-conforming structures. One structure was built in 1987 and has never been granted a certificate of occupancy. The subject site in its present configuration has no off-street parking. The Municipal Regulations provide detailed authoritative guidance to operators and the Acting Zoning Administrator as to the off-street parking requirements.

No special exception has been applied for or allowed relative the construction or use of the subject site.

The Board need not address the failure of the District to produce an application for the issuance of a certificate of occupancy as we have ruled in favor of the appellant for more substantive reasons. However, the Municipal Regulations mandate the filing of an application for a certificate of occupancy. The District's failure to produce an application for a certificate of occupancy can and must be resolved in the favor of an appellant since it is the District's burden to maintain such records in the ordinary course of business. The District had knowledge of the missing document(s) for months and only disclosed to the Board at the scheduled Appeal hearing that the application was not available. The District can and should have revoked the lost application and the product of the application being the C of O issued. Accordingly, on appeal matters, if an application for a Certificate of Occupancy can not be reviewed in the District's files or within 10 days of a timely request for such application, it shall be presumed that no application exists and the product of such an application shall be nullified.

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It is hereby Ordered this _____ Day of _____, 2002 that the Certificate of Occupancy issued to Metro Day Treatment is revoked, null and void.

The Board of Zoning Adjustment

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IN THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

ANC 4A

Appellant,

v.

DISTRICT OF COLUMBIA, DEPARTMENT
OF CONSUMER AND REGULATORY AFFAIRS

Appellee,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th Day of June, 2002 a copy of the foregoing
Proposed Findings of Fact and Conclusions of Law was delivered via first class mail to:

Raouf M. Abdullah
Special Assistant Corporation Counsel
441 4th Street, NW, Room 450 North
Washington, D.C. 20001

