

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Mr. John Chagnon
5603 14th Street, N.W.
Washington D.C., 20011

BZA
Case No. 16839
Exhibit No. 41

August 19, 2004

Re: Board of Zoning Adjustment Appeal No. 16839 of Advisory Neighborhood Commission 4A

Dear Mr. Chagnon,

The Office of Zoning is in receipt of your letter of August 16, 2004 relating to the subject matter of reference. In the letter, you state your belief that the Board of Zoning Adjustment had taken no action in furtherance of the Court of Appeals remand order, as it substantively affects a previous decision of the Board in the matter of the referenced appeal above.

For your convenience and perusal, the Office of Zoning has attached, herewith, a copy of its July 9, 2004 letter, in which all relevant dates of the Board's retroactive and prospective actions relating to the Court of Appeal's remand order are outlined. As the letter reflects, the Board has set a September 14, 2004 date for public hearing. The letter also reflects that the Board requested of the Zoning Administrator, a determination as to whether the Metro Day Treatment Center's use qualifies as a use permitted as a matter of right in the underlying C-2-A zone district, if deemed a different use classification other than a child/elderly development center.

Notwithstanding the deadline date of July 27, 2004 set by the Board for the submission of the determination, the Office of Zoning has not received a response to the Board's request. Please be advised that, pursuant to § 3100.4, the Board has the power to make this determination independently and that the lack of response from the Zoning Administrator does not foreclose its authority to conduct the public hearing of the subject case at the September 14, 2004 date that the Board has set in the attached letter.

The records of Appeal No. 16839 confirm that you filed the original appeal on behalf of Advisory Neighborhood Commission 4A, based on an ANC authorization letter of January 4, 2001, designating you as its representative in the appeal before the Board of Zoning Adjustment. As the attached attestation sheet confirms, a copy of the attached letter was sent to the party you were authorized to represent. The current chairperson of ANC 4A has confirmed receipt of the subject letter. Therefore, to the extent you may not have been sent a courtesy copy in your individual capacity, please accept the Office of

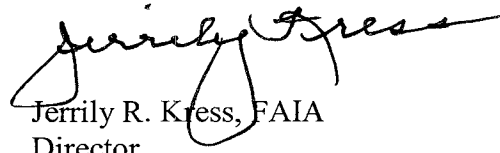
Board of Zoning Adjustment
District of Columbia
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Zoning's apology. However, be advised that if you wish or intend to participate in the scheduled public hearing as the designated representative of the appellant, ANC 4A, attended to this remand case, it is imperative that you submit a new letter of authorization designating you as their representative. In the absence of the authorization letter, you may wish to request of the Board permission to intervene, pursuant to § 3112.15, Title 11, DCMR.

Please contact Richard S. Nero Jr., Chief, Support Services and Quality Control at (202) 727-2806, if you have any questions relative to the foregoing.

Sincerely,

A handwritten signature in black ink, appearing to read "Jerrily R. Kress", written over a horizontal line.

Jerrily R. Kress, FAIA
Director
Office of Zoning

Enclosure (1)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



July 9, 2004

Denzil Noble
Acting Zoning Administrator
Department of Consumer & Regulatory Affairs
2nd Floor
941 North Capitol Street, N.E.
Washington D.C. 20001

Participates in BZA Appeal No. 16839
(See attached attestation sheet)

Re: BZA Appeal No. 16839 (D.C. Court of Appeals Remand) Chagnon

Dear Mr. Noble:

At its public meeting of July 6, 2004, the Board of Zoning Adjustment (Board) deliberated on the above-referenced matter and scheduled further proceedings on this issue on Tuesday, September 14, 2004.

You will recall that BZA Order No. 16839, dated October 15, 2002 (attached), denied the appeal of Advisory Neighborhood Commission 4A to the effect that the Zoning Administrator erred in issuing a certificate of occupancy to Metro Day Treatment Center Inc., to operate an elderly Development Center for thirty (30) persons, ages 22-85 and seven (7) staff in a C-2-A District, at premises 5511 14th Street N.W. (Square 2800, Lot 9). The D.C. Court of Appeals (DCCA) remanded (attached) the Board's decision.

In furtherance of the DCCA remand opinion, the Board requests a determination from you as to whether Metro Day Treatment Center Inc.'s program is eligible for a certificate of occupancy permit under a different use classification in the underlying C-2-A zone district, other than an Elderly Development center. The Board has set a deadline of July 27, 2004, to receive your written response. The Board has also set a deadline of September 7, 2004, for any responses to your written determination from any participant in the appeal case. The Board has scheduled a public hearing on this matter on Tuesday, September 14, 2004. Please

BZA APPEAL NO. 16839

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be advised that this letter serves as notice of the Board's proposed hearing action to all participants in this matter.

Please contact Richard S. Nero, Jr., Chief, Support Services and Quality Control at (202) 727-6311, if you have any questions relative to the foregoing.

SINCERELY,



JERRILY R. KRESS, FAIA
Director, Office of Zoning

Attestation Sheet

rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPEAL NO. 16839 (REMAND)

As Director of the Office of Zoning, I hereby certify and attest that on **JUL - 9 2004** a copy of the letter entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Denzil Noble, Acting Zoning Administrator
Building and Land Regulation Administration
Department of Consumer and Regulatory Affairs
941 N. Capitol Street, N.E.
Washington, D.C. 20002

Chairperson
Advisory Neighborhood Commission 4A
7600 Georgia Avenue, N.W.
Washington, D.C. 20012

Commissioner 4A07
Advisory Neighborhood Commission 4A
7600 Georgia Avenue, N.W.
Washington, D.C. 20012

Pamela Coleman
4200 Wisconsin Avenue, N.W.
Washington, D.C. 20016

Herman Broomfield
Metro Day Treatment Center, Inc.
5507 - 14th Street, N.W.
Washington, D.C. 20060

Adrian Fenty, City Councilmember
Ward Four
1350 Pennsylvania Avenue, N.W.
Suite 506
Washington, D.C. 20004

BZA APPEAL NO. 16839

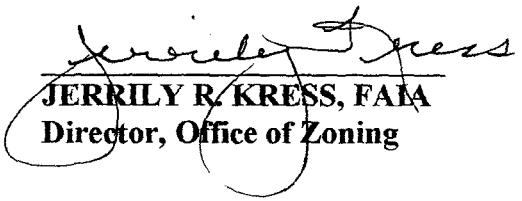
PAGE NO. 2

Ellen McCarthy, Deputy Director
Office of Planning
801 North Capitol Street, N.E.
4th Floor
Washington, D.C. 20002

Alan Bergstein, Esq.
Office of Corporation Counsel
441 4th Street, N.W., 6th Floor
Washington, D.C. 20001

rsn

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 02-AA-1279

JOHN J. CHAGNON, PETITIONER,

v.

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT, RESPONDENT.

Petition for Review of an Order of the
District of Columbia Board of Zoning Adjustment
(BZA - 16389)

(Argued January 8, 2004)

Decided March 11 2004)

John J. Chagnon, pro se.

William J. Earl, Assistant Corporation Counsel, *Arabella W. Teal*, Interim Corporation Counsel, and *Charles L. Reischel*, then Deputy Corporation, at the time the brief was filed, were on the brief, for the respondent.

Before SCHWELB and GLICKMAN, *Associate Judges*, and KERN, *Senior Judge*.

GLICKMAN, *Associate Judge*: Petitioner John J. Chagnon, representing Advisory Neighborhood Commission 4A, challenges a decision of the District of Columbia Board of Zoning Adjustment (BZA) approving the issuance of a certificate of occupancy to Metro Day Treatment

Center (“Metro Day”).¹ We agree with Chagnon that the BZA erred in concluding that Metro Day is entitled to the certificate of occupancy as a “child/elderly development center.” Accordingly, we vacate the BZA’s order and remand without reaching the other issues that Chagnon raises in his petition for review.

On August 31, 2001, the Zoning Administrator issued a certificate of occupancy to Metro Day for the stated purpose of operating a “child/elderly development center, serving 30 persons, 22-85 years of age” at 5507 14th Street, N.W. The subject property is located in a C-2-A zoning district, where a child/elderly development center is a use permitted as a matter of right. The ANC appealed the Zoning Administrator’s decision to the BZA.

The Zoning Commission amended the Zoning Regulations in 1999 to define the term “child/elderly development center” as:

a building or part of a building, other than a child development home or elderly day care home, used for the licensed care, education, counseling or training of individuals fifteen (15) years of age or less and/or for care of elderly individuals, totaling six (6) or more persons, who are not related by blood or marriage to the caregiver and who are present for less than twenty-four (24) hours per day. This definition encompasses facilities generally known as child care centers, preschools, nursery schools, before-and-after school programs, senior care centers, elder care programs, and similar programs and facilities. A child/elderly development center includes the following accessory uses: counseling, education, training and health and social services of the parents or principal guardians of children attending the center.

¹ Neither Metro Day nor the owner of the subject property elected to participate in the proceedings before the BZA or this court.

11 DCMR § 199.1.² As the term “elderly” is not defined,³ the Zoning Regulations provide that it is to be accorded the meaning given in Webster’s Unabridged Dictionary. *See* 11 DCMR § 199.2 (g).

In its decision and order of October 15, 2002, the BZA found that Metro Day provides care and training for mentally retarded adults, only “some” of whom “are ‘elderly’ as that word is defined

² In its Notice of Final Rulemaking, the Zoning Commission explained the impetus for the 1999 amendment as follows:

Over the past several years, the Board of Zoning Adjustment (BZA) has been requested to approve special exceptions for a number of child development centers (CDCs) with programs and uses not previously accommodated in CDCs, which typically provide various types of day care for children under 15 years of age. Those additional uses have included adult education, adult counseling, parenting classes, and senior day care in individual and group sessions. These programs, either coupled with CDC activities or housed in CDC facilities, are not specifically identified in the Zoning Regulations. To accommodate these new use combinations, the Board of Zoning Adjustment (BZA) has requested the Zoning Commission to review and amend the Zoning Regulations, as appropriate, to permit these new uses, presumabl[y] with BZA approval in residential zone districts.

46 D.C. Reg. 8284 (October 15, 1999). The Zoning Commission added that it combined proposed definitions of “child development center” and “elderly day care center” into a single definition in order “to simplify the amendments as initially proposed which would have created two entities that provided for the same set of uses.” *Id.* at 8285.

³ The Zoning Commission’s Notice of Final Rulemaking states that the Office of Corporation Counsel had suggested that it “may wish to define the term ‘elderly’ in order to avoid misinterpretations of the Commission’s intent and encouraged a definition that is specific to age rather than descriptive of the characteristics of the elderly.” 46 D.C. Reg. at 8285. The Commission did not explain why it did not follow this recommendation.

in the dictionary,^[4] [while] others [of whom] are young and middle-aged adults.”⁵ Notwithstanding this finding, however, the BZA further found that a day treatment center for mentally retarded adults such as Metro Day is similar to the kinds of facility encompassed within the definition of a child/elderly development center in terms of “the nature of the use – the care, education, counseling, training, and other social services provided – and impacts of the use on the public.”⁶ Reasoning that the Zoning Regulations “cannot realistically identify every potential use of property,” the BZA concluded that Metro Day qualified as a “similar program and facility” within the meaning of the second sentence of the definition.⁷

Chagnon argues that “elderly” means elderly and not “young and middle-aged” adults, and that the Zoning Administrator and the BZA have no authority to shoehorn an adult day treatment program that is not principally for children or the elderly into the “child/elderly development center” classification merely because the program and its clients share similar characteristics.

⁴ The BZA quoted the definitions of “elderly” in *Webster’s Third New International Dictionary (Unabridged)* (1986) as “somewhat old: rather advanced in years: past middle age” and “of, relating to, or characteristic of one past the prime of life.”

⁵ “Most” of Metro Day’s clients, the BZA stated, “are well over age 40 and severely physically handicapped.”

~~⁶ The BZA credited the testimony of the Zoning Administrator that the traffic and parking impacts of Metro Day’s adult day treatment program would be similar to those of a child or elderly development center.~~

⁷ Likewise, the Zoning Administrator testified that in reviewing applications involving uses that are not specifically listed in the Zoning Regulations, the Office of the Zoning Administrator applies a concept called “like use.” That is, the Zoning Administrator applies “standards of compatibility and likeness to determine the use category.”

“When the BZA’s decision turns on its interpretation of a regulation that agency is charged with implementing, that interpretation must be upheld unless it is plainly erroneous or inconsistent with the regulation.” *Watergate W. v. District of Columbia Bd. of Zoning Adjustment*, 815 A.2d 762, 765 (D.C. 2003) (quoting *Dupont Circle Citizens Ass’n v. District of Columbia Bd. of Zoning Adjustment*, 749 A.2d 1258, 1262 (D.C. 2000) (internal quotation marks and citations omitted)). The agency has considerable scope in construing language in a regulation that may be ambiguous. By the same token, however, it is our duty to reject an interpretation by the agency “which contradicts the plain language of the regulation itself.” *Dell v. District of Columbia Dep’t of Employment Servs.*, 499 A.2d 102, 106 (D.C. 1985) (citing *Dankman v. District of Columbia Bd. of Elections & Ethics*, 443 A.2d 507, 513 (D.C. 1981) (en banc)); see also *Corridor H Alternatives, Inc. v. Slater*, 331 U.S. App. D.C. 240, 245, 166 F.3d 368, 373 (1999) (“While deference is normally due an agency’s interpretation of its own rules, that is not the case where ‘an alternative reading is compelled by the regulation’s plain language.’”) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504–512 (1994)).

We are constrained to agree with Chagnon that the BZA misconstrued the plain language of the pertinent regulation in this case. The first sentence of the definition that the Zoning Commission promulgated provides plainly that a “child/elderly development center” must serve (principally) “individuals fifteen (15) years of age or less” and/or “elderly individuals.” Contrary to the BZA’s reading, the reference to “similar programs and facilities” in the second sentence of the definition does not dispense with that requirement; it merely confirms that other facilities serving children or the elderly *like those specifically listed* (“child care centers, preschools, nursery school, before-and-

after-school programs, senior care centers, elder care programs”) will come within the definition if they meet the requirements of the first sentence. *See Zenian v. District of Columbia Office of Employee Appeals*, 598 A.2d 1161, 1164 (D.C. 1991) (quoting 2A NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION §§ 47.17, at 166 (4th ed. 1984) (footnotes omitted) (“Where general words follow [or precede] specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding [or following] specific words.”)).

The BZA recognized, and it is undisputed, that Metro Day does not principally serve either children or the elderly. The term “elderly” cannot fairly be read to include adults from 22 to 85 years of age (to quote the certificate of occupancy that Metro Day received) just because they share some characteristics with the elderly. That really is the end of the inquiry. Although the BZA and the Zoning Administrator contend that, in the interests of efficient administration, they may interpret defined uses in the Zoning Regulations to encompass other uses that are functionally comparable even if they are outside the definition, they cite no authority for that position and we cannot agree with it. Rather, even if an agency charged with implementing a regulation – which in this case, we note, is *not* the agency that wrote it – perceives it to be deficient or imperfect, it is not the agency’s (or this court’s) prerogative “to rewrite the statute [or regulation], or to supply omissions in it, in order to make it more fair.” *Moore v. Gaither*, 767 A.2d 278, 285 (D.C. 2001) (internal punctuation omitted) (citing *1841 Columbia Rd. Tenants Ass’n v. District of Columbia Rental Hous. Comm’n*, 575 A.2d 306, 308 (D.C. 1990)). “[R]egulations cannot be construed to mean what an agency intended but did not adequately express.” *L.R. Willson & Sons, Inc. v. Donovan*, 222 U.S. App. D.C.

214, 225, 685 F.2d 664, 675 (1982) (internal quotation marks and citation omitted).⁸

Although Metro Day does not qualify as a “child/elderly development center,” it may yet be eligible for a certificate of occupancy under a different use classification. Thus, in vacating the order of the BZA, we remand for further proceedings not inconsistent with this opinion.

So ordered.

⁸ In this case, moreover, there is no reason to think the Zoning Commission intended, or even would have wanted, its definition of a “child/elderly development center” to encompass facilities serving non-elderly adults. In its Notice of Final Rulemaking, see note 2, *supra*, the Commission demonstrated that its focus was on only two kinds of facilities – those principally serving either children or the elderly – rather than adult education, counseling or day care facilities generally.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



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Appeal No. 16839 of Advisory Neighborhood Commission 4A, pursuant to 11 DCMR §§ 3100 and 3101 from the decision of the Zoning Administrator, for the issuance of a certificate of occupancy (#18366, dated August 31, 2001) for an elderly development center serving 30 persons, ages 22 – 85 years old and 7 staff, in a C-2-A District at premises 5511 – 14th Street, N.W. (Square 2800, Lot 9).¹

HEARING DATE: March 26, 2002

DECISION DATES: June 4, 2002; July 2, 2002

DECISION AND ORDER

Advisory Neighborhood Commission (ANC) 4A filed an appeal with the Board of Zoning Adjustment on January 4, 2002, alleging that the Zoning Administrator erred in approving the issuance of Certificate of Occupancy Number 18366 dated August 31, 2001, to Metro Day Treatment Center, Inc., for a child/elderly development center for 30 persons, ages 22-85 years old, and 7 staff members, at 5507 – 14th Street, N.W. (Square 2800, Lot 10), in a C-2-A Zone District.

ANC 4A is represented in this appeal by ANC 4A07 Single-Member District Commissioner John J. Chagnon. Assistant Corporation Counsel Ra'ouf M. Abdullah represented the Zoning Administrator. Neither the owner of the subject property, Pamela Coleman, nor the lessee and facility operator, Metro Day Treatment Center, Inc., elected to participate in these proceedings.

The appellant argues first that given the ages of the individuals served, the facility is not a "child/elderly development center," a use permitted as a matter of right in the C-2 District; and, second, that the facility, which currently lacks parking spaces, does not comply with the zoning regulations requiring the provision of off-street parking spaces. After a public hearing, the Board denied the appeal, determining that the definition of the phrase "child/elderly development center" in 11 DCMR § 199.1 encompasses "similar programs and facilities"; and that Metro Day Treatment Center, which provides care and training for mentally retarded adults, qualifies as a "similar program and facility." The Board also concluded that the appellant had not met its burden of proving that the Zoning Administrator erred in determining that the property is entitled to a "parking credit" or

¹ The address, as stated on Certificate of Occupancy No. 18366, is 5507 – 14th Street, N.W. (Square 2800, Lot 10).

the grandfathering of three parking spaces, such that no additional spaces for the center (which, as a child/elderly development center, would otherwise require two spaces) are required.

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Appeal and Notice of Public Hearing. By memoranda dated January 14 and 15, 2002, the Office of Zoning advised ANC 4A, the appellant; the Zoning Administrator, the appellee; the Office of the Corporation Counsel; Pamela Coleman, the owner of the property that is the subject of the appeal; Herman Broomfield, Metro Day Treatment Center, the lessee and operator of the facility that is the subject of the appeal; ANC 4C, a potentially affected ANC; the Ward 4 Councilmember; and the D.C. Office of Planning of the filing of the appeal.

The Office of Zoning scheduled a hearing on the appeal for March 26, 2002. Pursuant to 11 DCMR § 3113.14, the Office of Zoning on February 11, 2002, mailed ANC 4A and the Zoning Administrator notice of hearing. Ms. Coleman was copied on the Zoning Administrator's notice. Notice of hearing was also published in the *D.C. Register* on February 8, 2002, at 49 DCR 1088.

"Motion to Dismiss" Certificate of Occupancy. At the public hearing, the appellant requested the Board to "dismiss" the certificate of occupancy since the application for the certificate could not be found in Department of Consumer and Regulatory Affairs (DCRA) records. The regulations relating to an application form for a certificate of occupancy are found in the Construction Codes, 12A DCMR § 118.2. Under 12A DCMR § 122, any person aggrieved by DCRA's interpretation of the Construction Codes may appeal to DCRA. Since the Board's jurisdiction in an appeal is limited to determining whether there is an error in the decision of an administrative official in carrying out or enforcing the Zoning Regulations, Title 11 DCMR, the Board denied the motion. *See* § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799; D.C. Code § 6-641.07(g)(1) (2001)).

Appellant's Case. In its report dated March 25, 2002, ANC 4A identified the following issues and concerns: (1) the Zoning Administrator failed to follow the Board's order in BZA Appeal No. 16066; (2) the Zoning Administrator erred in issuing a certificate of occupancy for an elderly development center when he had specific information that the operator did not operate as an elderly development center; (3) the Zoning Administrator erred in approving the issuance of a certificate of occupancy as an elderly development center, since the facility provides services to persons who are not elderly; (4) the Zoning Administrator failed to calculate the required parking spaces for the facility, with the site approved on the basis of no change in use at the site; (5) the Zoning Administrator failed to require off-street parking; (6) the Zoning Administrator failed to require that the

subject site be properly inspected for change in use from general office use; and (7) the Zoning Administrator failed to require proper inspections for the site's conversion from office and warehouse use to a new use that would require fire sprinkler systems. ANC 4A requested the Board to reverse the Zoning Administrator's decision to approve the issuance of Certificate of Occupancy No. 18366.

ANC 4A argued that a day treatment center does not fall within the use category "child/elderly development center," and that by approving the center as a matter-of-right use, the Zoning Administrator was creating law. The ANC argued that as an undefined use, the facility would require one parking space for every 600 square feet. The ANC also argued that Zoning Administrator's determination that a certain number of parking spaces were grandfathered was not based on sufficient information; specifically, the extent to which the building was constructed after the effective date of the 1958 Zoning Regulations. The ANC asserted that at best, one parking space could be considered grandfathered.

The appellant's case included testimony and arguments from ANC Commissioner John J. Chagnon, as well as testimony from Ana Escobar, Mr. Chagnon's wife and neighborhood resident, and Jason Washington, from Councilmember Adrian Fenty's staff.

Zoning Administrator's Case. Toye Bello, Acting Zoning Administrator, testified on behalf of the Office of the Zoning Administrator. He stated that based on the nature of its operations and traffic and parking impacts, Metro Day Treatment Center was properly categorized for purposes of zoning as a child/elderly development center. He based the parking space requirement on the child/elderly development center use category, and provided the Board with copies of DCRA's records relating to prior use of the property to substantiate his determination that the property was entitled to a parking credit of three spaces.

Closing of the Record. The record closed at the conclusion of the public hearing on March 26, 2002, with the exception of the following materials specifically requested by the Board from the Zoning Administrator: (1) Mr. Bello's resume; (2) a copy of the definition of the word "elderly" from *Webster's Dictionary*; (3) copies of the Notices of Infraction issued to the facility operator for alleged zoning violations; and (4) copies of previous certificates of occupancy issued for the subject property or a statement that would substantiate the Zoning Administrator's verification of the previous and/or predominant use of the site. The Zoning Administrator filed the requested materials on May 13, 2002. Also, the Board provided the appellant the opportunity to supplement the record with extracts from the records in BZA Appeal Nos. 16066 and 16752, related appeals;² however, the appellant did not file any materials. The Board, therefore, has not incorporated any documents from Appeal Nos. 16066 and 16752 into the record of this

² These appeals are discussed below in the Findings of Fact, under "Pertinent Zoning History of the Property."

appeal, other than the copies of documents already filed with the Board prior to the public hearing.

Decision Meeting. At the conclusion of the public hearing, the Board scheduled a decision meeting for June 4, 2002. At the appellant's request and with the appellee's concurrence, the Board postponed its decision meeting to July 9, 2002. On July 9, the Board, voting 3 – 0 – 2, with two members not voting, not having heard the case, denied the appeal.

FINDINGS OF FACT

Pertinent Zoning History of the Property

1. The property that is the subject of this appeal consists of the first and second floors of the building at 5507 – 14th Street, N.W. (Square 2800, Lot 10), located in a C-2-A District.
2. A portion of the building was erected before May 12, 1958, the date the current Zoning Regulations became effective. Neither party provided definitive evidence regarding the size or use of the building prior to May 12, 1958.
3. The oldest record provided to the Board is a copy of Certificate of Occupancy No. B-79833, dated February 7, 1972, for the first floor and lot at 5507 – 14th Street, N.W. (Square 2800, Lot 8), for a "used car lot and display – no junk – no repairing." The application for this certificate indicates that the property was previously used as a gasoline station.
4. On May 5, 1995, the Zoning Administrator approved the issuance of Certificate of Occupancy No. B171610 to Marvin Stein, then owner of the subject property, on behalf of Psychological Development Associates, to allow use of the property as a "day treatment program." The Zoning Administrator had approved the use as general office use.
5. John J. Chagnon, on behalf of FZC Corporation, appealed the Zoning Administrator's decision with respect to Certificate of Occupancy No. B171610. On November 25, 1997, the Board, in BZA Appeal No. 16066, determined that the Zoning Administrator erred in approving the issuance of the certificate, finding that the day treatment program, which provided education and training for mentally challenged students, did not comport with general office use.
6. Mr. Stein then petitioned the District of Columbia Court of Appeals in Case No. 97-AA-2022 for review of the Board's order. Psychological Development Associates

subsequently ceased operations and vacated the premises. The Court therefore, on April 16, 1999, dismissed the petition as moot and vacated the Board's order in BZA Appeal No. 16066. The Court remanded the case to the Board, with instructions to take appropriate action in compliance with the Court's order. On November 29, 2001, the Board dismissed BZA Appeal No. 16066 as moot, since the recipient of the disputed certificate of occupancy, Psychological Development Associates, Inc., had long since ceased operations and vacated the premises.

7. Meanwhile, on October 15, 1999, the zoning regulations relating to "child/elderly development centers" became effective. As a result, 11 DCMR § 721.1 permits use as a child/elderly development center in the C-2 District as a matter of right. *See* 46 DCR 8284, 8288 (1999). The regulations define the phrase "child/elderly development center" in 11 DCMR § 199.1, 46 DCR at 8286.

8. On May 7, 2001, DCRA issued Metro Day Treatment Center, Inc., Certificate of Occupancy No. 190720, allowing use of the first and second floors of the premises at 5511 – 14th Street, N.W. (Square 2800, Lot 9), for purposes of a "day program for mentally retarded persons, adult development, not sexually oriented."

9. ANC 4A appealed the issuance of Certificate of Occupancy No. 190720 to the Board in BZA Appeal No. 16752. On August 31, 2001, DCRA issued Metro Day Treatment Center Certificate of Occupancy No. 18366 to replace Certificate of Occupancy No. 190720. When DCRA issued Certificate No. 18366, Certificate of Occupancy No. 190720 became void by virtue of its own terms. In its final order dated December 21, 2001, the Board therefore dismissed Appeal No. 16752 as moot. At its public decision meeting on August 6, 2002, the Board denied the Appellant's motion to reconsider the dismissal.

10. On January 4, 2002, in the instant case, BZA Appeal No. 16839, ANC 4A appealed the issuance of Certificate of Occupancy No. 18366.

Certificate of Occupancy No. 18366

11. Certificate of Occupancy No. 18366 permits Metro Day Treatment Center to use 7,552 square feet on the first and second floors of 5507 – 14th Street, N.W., as a "child development center." It identifies both the previous use and the approved use as a "child development center," which is further described on the certificate as a "child/elderly development center / 30 persons / ages 22-85 years old and 7 staff members."

12. The Zoning Administrator testified that in reviewing applications involving uses that are not specifically listed in the Zoning Regulations, the Office of the Zoning Administrator applies a concept called "like use." That is, the Zoning Administrator

applies “standards of compatibility and likeness to determine use category.” Tr. at 277 (Mar. 26, 2002).

13. While the subject facility is designated as a “day treatment program” for purposes of Medicaid and Medicare, the Zoning Administrator categorized the facility as a “child/elderly development center” for purposes of zoning.

14. Metro Day Treatment Center provides care and training for mentally retarded adults.

15. Most of the clients served by the facility are well over age 40 and severely physically handicapped. They are unable to drive themselves to the facility.

16. The Zoning Regulations do not define the word “elderly.” In its Notice of Final Rulemaking relating to child/elderly development centers, the Zoning Commission specifically declined to adopt a definition of the word “elderly.” See 46 DCR 8284, 8285 (1999).

17. *Webster’s Third New International Dictionary* (1986) defines the word “elderly” as “somewhat old; rather advanced in years; past middle age” and “of, relating to, or characteristic of one past the prime of life.”³

18. The Zoning Administrator testified that he made a judgment call, based on the dictionary definition of the word “elderly” and the fact that the Zoning Commission had for some reason refused to define the elderly by age, that the Metro Day Treatment Center use is most like the use category, “child/elderly development center.”

19. The Zoning Administrator testified that he found the day treatment center to be a facility similar to a child/elderly development center in that it provides care and services to individuals who typically do not drive. He stated that Metro Day Treatment Center’s operations would therefore be comparable to a child/elderly development center in terms of traffic and parking impacts.

20. The Board finds that the use in question by Metro Day Treatment Center is similar to the programs and facilities specifically identified in the definition of the phrase “child/elderly development center” in § 199.1, both as to the nature of its operation in providing care and training for a segment of the population that typically does not drive and the likely impacts of its operations, particularly with regard to traffic and parking.

³ The Zoning Regulations provide in 11 DCMR § 199.2(g) that words not specifically defined in § 199 shall have the meanings given in *Webster’s Unabridged Dictionary*.

The Parking Space Requirements

21. Since the Board has determined that the Metro Day Treatment Center is appropriately categorized for purposes of zoning as a child/elderly development center, the Board also concludes that its parking requirement is based upon the child/elderly development center use category. As noted by the Zoning Administrator, basing the parking space requirement on number of employees and staff rather than gross floor area is appropriate, given that none of the clients served by the center drive.

22. Under § 2101.1, a child/elderly development center requires one parking space for every four staff. With seven staff as permitted by the certificate of occupancy, the Board concludes the facility requires two parking spaces.⁴

23. The Zoning Administrator determined that the premises are entitled to a credit of three parking spaces. The Zoning Administrator based his calculations on DCRA's records which indicate that the property had a history of retail use, using 7,600 square feet as the approximate gross floor area attributable to retail use.

24. While the appellant argued that the parking credit would be less if the building had been used for office purposes and if the amount of gross floor area used for office purposes before May 12, 1958, was less than 7,600 square feet, the appellant did not introduce any reliable evidence regarding the use of the building before May 12, 1958.

25. The Board finds that while records provided by DCRA relating to this property do not extend back to May 12, 1958, the Zoning Administrator's parking calculations are not unreasonable given the records that do exist.

26. On October 31, 2001, DCRA issued Metro Day Treatment Center Building Permit No. B439818 to "divide existing space to create lounge and parking for three vehicles" per submitted plans.

27. As of the date of the hearing on this appeal, the three parking spaces that were to be provided on the site pursuant to Building Permit No. B439818 were not yet accessible due to a barrier at the Colorado Avenue entrance.

CONCLUSIONS OF LAW AND OPINION

⁴ The Zoning Administrator testified that with 11 employees, the provision of the three spaces would meet the parking requirement for the category of use, child/elderly development center. However, the certificate of occupancy limits the facility to seven employees.

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799; D.C. Code § 6-641.07(f) and (g)(1) (2001)), to hear and decide appeals where it is alleged by an appellant that there is error in any decision by an administrative officer in the carrying out or enforcement of the Zoning Regulations. This appeal is properly before the Board pursuant to 11 DCMR §§ 3100.2, 3101.5, and 3200.2. The notice requirements of § 3112 for the public hearing on the appeal have been met.

The Child/Elderly Development Center Use

The subject property is located in the C-2-A District, the medium-density Community Business Center District. As described in 11 DCMR §§ 720.2 – 720.5, the C-2-A District is designed to provide facilities for shopping and business needs, housing, and mixed uses for large segments of the city outside of the central core. Areas zoned C-2-A are located in low and medium-density residential areas with access to main highways or rapid transit stops, and include employment centers, shopping centers, and medium bulk mixed-use centers. Matter-of-right uses in the C-2 District include dwellings, certain community-based residential facilities, various types of retail and service establishments, office uses, colleges and universities, private schools, hotels and inns, assembly halls, auditoriums, public halls, and theaters. *See* 11 DCMR § 721.

A “child/elderly development center” as defined in § 199.1 is also permitted in the C-2 District as a matter of right pursuant to § 721.1, which incorporates by reference any use permitted as a matter of right in the C-1 District under § 701. Subsection 701.2 in turn incorporates by reference any use permitted as a matter of right in the SP District under § 501, which includes under § 501.1(g), use as a child/elderly development center. *See* 46 DCR 8284, 8288 (1999).

The Zoning Regulations define the phrase “child/elderly development center” in 11 DCMR § 199.1 as:

a building or part of a building, other than a child development home or elderly day care home, used for the licensed care, education, counseling, or training of individuals fifteen (15) years of age or less and/or for care of elderly individuals, totaling six (6) or more persons, who are not related by blood or marriage to the caregiver and who are present for less than 24 hours per day. This definition encompasses facilities generally known as child care centers, pre-schools, nursery schools, before-and-after school programs, senior care centers, elder care programs, *and similar programs and facilities*. A child/elderly development center includes the following accessory uses: counseling, education, training and health and social services for the parents or principal guardians of children attending the center.

46 DCR 8284, 8286 (1999) (emphasis added).

The Metro Day Treatment Center offers care and training for mentally retarded adults. While some of the adults are “elderly” as that word is defined in the dictionary, others are young and middle-aged adults. Notwithstanding the age of the clients served, the Board concludes that Metro Day Treatment Center constitutes a “similar program and facility” to the programs and facilities specifically identified as encompassed within the definition of “child/elderly development center.”

The Zoning Regulations cannot realistically identify every potential use of property. A day treatment center for mentally retarded adults is similar to the programs and facilities encompassed within the definition of a “child/elderly development center,” both with respect to the nature of the use – the care, education, counseling, training, and other social services provided – and with respect to impacts of the use on the public. The Board in particular credits the testimony of the Zoning Administrator that the traffic and parking impacts of a day treatment center and a child or elderly development center would be similar, in that the clients served by these facilities typically do not drive themselves to the facility and park, but rather are dropped off and picked up. Accordingly, the Board concludes that the Zoning Administrator did not err in approving the issuance of a certificate of occupancy to Metro Day Treatment Center for use as a child/elderly development center.

The Parking Space Requirements

Since Metro Day Treatment Center is a child/elderly development center, the schedule of requirements for parking spaces in 11 DCMR § 2101.1 (without taking into account any “parking credits” or “grandfathering”) requires the provision of two parking spaces. To the extent that Metro Day Treatment Center is entitled to a parking credit, the credit derives from the long-standing administrative interpretation of §§ 2100.1 and 2100.4. Subsection 2100.4 provides that if the use of a building is changed to another use that requires more parking spaces than were required for the use existing immediately prior to the change, parking spaces shall be provided for the additional requirement in the amount necessary to conform to the schedule of required parking spaces in § 2101.1. Subsection 2100.1 requires that all buildings erected on or after May 12, 1958, be provided with the number of parking spaces specified in § 2101.1. Read together, these subsections provide a “parking credit,” the amount of which is based upon the use existing immediately prior to May 12, 1958.

The record is not clear as to the use existing before May 12, 1958. The appellant relies upon parking space calculations for general office use. However, the oldest records that DCRA was able to provide indicate that in 1972, DCRA issued a certificate of occupancy

for use as a "used car lot and display." None of the records indicate office use prior to May 12, 1958. The Zoning Administrator testified that based on the history of retail use, the property would be entitled to a parking credit of three spaces. While the history of use and the square footage involved is not as complete as might be desired, the Board concludes that the appellant has not met its burden of proving that the Zoning Administrator erred in approving the issuance of the certificate of occupancy without first requiring the provision of additional parking spaces. However, even if the Zoning Administrator erred in calculating a parking credit of three spaces, Metro Day Center's subsequent provision of three parking spaces will more than satisfy its obligation under § 2101.1 to provide two spaces. The reversal of the Zoning Administrator's decision under such circumstances is not warranted.

Finally, since the Court of Appeals vacated the Board's decision in BZA Appeal No. 16066, rendering it of no legal effect, the Zoning Administrator did not err in failing to follow the Board's decision that a day treatment center use should not be classified for purposes of zoning as general office use. To the extent the appellant has raised concerns about the inspection of the facility and its fire sprinkler system, those concerns, which involve the interpretation and application of the Construction Codes, Title 12A DCMR, fall within DCRA's purview. Any appeal of these issues must be addressed to DCRA pursuant to 12A DCMR § 122.

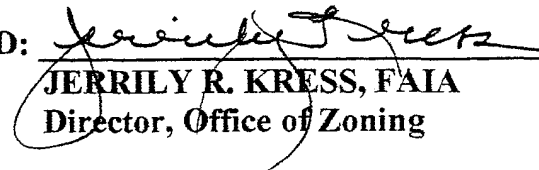
For the reasons stated above, it is hereby **ORDERED** that the appeal is **DENIED** and that the decision of the Zoning Administrator to approve the issuance of Certificate of Occupancy No. 18366 is **AFFIRMED**.

VOTE: 3 - 0 - 2 (Geoffrey H. Griffis, John G. Parsons, and Anne M. Renshaw, to affirm; Curtis L. Etherly, Jr., and David A. Zaidain, not voting, not having heard the case)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: OCT 15 2002

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND 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.