

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 16132 of The Penn-Branch Civic Association, et al, pursuant to 11 DCMR 3105, 3106, and 3200.2, from the administrative decision of Hampton Cross, Director, Department of Consumer and Regulatory Affairs, made on December 12, 1995, to the effect that Certificate of Occupancy No. B172700 was issued for a child development center in an R-5-A District at premises 2910 and 2916 Pennsylvania Avenue, S.E. (Square 5546, lots 5 and 13).

HEARING DATES: July 24 and September 11, 1996
DECISION DATES: November 6 and December 4, 1996

ORDER

INTRODUCTION:

1. The appeal was filed on behalf of Walter Peacock, The Penn-Branch Civic Association, and The Dupont Park Civic Association, hereinafter collectively referred to as the Appellants.

2. The appeal challenges the administrative decision of Hampton Cross, Director ("Director") of the Department of Consumer and Regulatory Affairs ("DCRA"), made on December 12, 1995, "...to the effect that the House of Ruth's (d/b/a KIDSPACE) application, receipt, and use of Certificate of Occupancy ("C of O") No. B172700 for 2910 and 2916 Pennsylvania Avenue, S.E., and any and all alteration, construction, modification and conversion of, and structures and land located and situated on, the two lots is in violation of the District's municipal zoning regulations and statutes."

3. The House of Ruth is the property owner of 2910-2916 Pennsylvania Avenue, S.E. (the Property or Subject Property), and intervened in the appeal. At the public hearing on the appeal, the Board recognized the House of Ruth as an intervenor to the appeal under 11 DCMR 3399, the Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment.

4. Other appropriate participants to the appeal were the Zoning Administrator and the DCRA, represented by Edgar T. Nunley; the appellees; and Advisory Neighborhood Commission (ANC) 7B, which, at the request of the Board, submitted a written report after the hearing.

5. The original hearing of July 24, 1996 before the Board was rescheduled because the Zoning Administrator failed to appear either personally or through a representative. The case was heard on September 11, 1996.

PRELIMINARY MATTERS:

6. The House of Ruth, by motion and statement to the Board argued that the Board lacks jurisdiction to hear the appeal and, therefore, should dismiss the appeal as untimely filed.

7. The House of Ruth obtained a C of O on August 30, 1995, for both buildings on the Subject Property.

8. Subsequent to the issuance of the C of O to the House of Ruth on August 30, 1995, Appellant Peacock filed a complaint and related correspondence with the Director, DCRA, on September 27 and October 5, 1995. (See Exhibit B to BZA Exhibit 25). Thus, Appellants had knowledge of the issuance of the C of O as early as September 27, 1995. (Tr.30)

9. On December 14, 1995, rather than file with the Board, Appellant Peacock filed a complaint and motion for preliminary injunction in the Superior Court. Appellant's complaint was dismissed by Order of the Court on March 22, 1996 (See BZA Exhibit 28)

10. After receiving the C of O for use of the Property as a child development center, the House of Ruth made preparations to occupy the premises and obtained building permits necessary to accomplish certain renovations to the building.

11. On January 4, 1996, a subsequent C of O was issued for 2910 Pennsylvania Avenue, S.E., as a child development center. On August 7, 1996, a subsequent C of O was issued for 2916 Pennsylvania Avenue, S.E., as a child development center. Neither of the two subsequent Cs of O changed the zoning basis for approval of the child development center use.

12. Appellants had the opportunity under Section 3101 of the Zoning Regulations to timely file an appeal with the Board based upon the issuance of the C of O on August 30, 1995. Appellants did not file their appeal until January 17, 1996, with an amended appeal filed on February 1, 1996.

13. If Appellants' appeal is not timely, then the Board is without power to consider it and must dismiss it for want of jurisdiction. Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917, 923 (D.C. 1980). Where, as here, there is no specific time limit governing when an appeal must be filed,

the D.C. Court of Appeals will and accordingly, the Board should, apply "a standard of reasonableness." Id. In Goto, supra, 423 A.2d at 924, the Court of Appeals approved the Board's interpretation of the statute and its regulations that an appeal to it had to be from a written decision or order as opposed to a mere oral determination. In Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment, 490 A.2d 628, 636 (D.C. 1985), the Court of Appeals held that "the time for filing an appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of."

14. Intervenor argued that, despite actual notice of the issuance of the C of O, more than four and one-half months passed before Appellants took any action to file an appeal with the Board. Such appeal is, therefore, not timely under past Board decisions. In BZA Orders 14054 and 14110, the Board examined the issues of timeliness of BZA appeals. In Appeal No. 14110, the Board found that an appeal filed approximately four and one-half (4.5) months after issuance of a challenged building permit was timely. In that case, the building permit was issued on September 12, 1983. The appeal was filed on February 3, 1984. By the time the appeal was filed, excavation work for the project was complete, the first tower crane was in place, 50 percent of the footage and the first slab on grade had been paved, and excavation of the elevator pit was underway. (Order 14110 at 2-3.) In its Conclusions of Law and Opinion, the Board stated:

In the subject appeal, the appellant was aware of the issuance of the building permit in September 1983, and was further aware of the beginning of construction on the proposed project in October, 1983. The subject appeal was not filed until February, 1984, approximately five months after the issuance of the building permit. The appellant's failure to determine that, in the appellant's opinion, the approved plans did not comply with the requirements of the Zoning Regulations until early 1984, does not lessen the impact that the passage of the time has had upon the construction taking place.

BZA Appeal No. 14110 at 8.

15. In Appeal No. 14054, the Board considered a case where an appellant (similar to the subject case) first made its challenge through DCRA, as well as the City Council and other D.C. agencies, rather than appeal to the BZA. In Order 14054, under Conclusions of Law and Opinion, at 4-5, the Board stated:

Under current rules, therefore, persons faced with the potential of filing appeals should act promptly to

preserve their rights.... The appellant's attempt to resolve the issues through other means was by his own choice.

* * *

The Zoning Act and Zoning Regulations clearly state where an appeal regarding administration or enforcement of the Zoning Regulations is to be taken. The appellant's choice of pursuing other possible remedies now forecloses his right to appeal to the Board. (Emphasis supplied.)

16. Appellants argued that the appeal was timely and that there was no issue with respect to laches and estoppel. (Tr. 14-27)

17. The Board finds that Appellants were timely. The Board determined that Appellants first knew by September 27, 1995, and, therefore, their appeal was filed within four months. (Tr.30-32; 35.) The Board also found that there was no issue as to laches and estoppel. (Tr. 32-35)

18. Intervenor also filed a supplemental motion to dismiss on August 22, 1996. (BZA Exhibit No. 40.) Intervenor argued that the Board had no jurisdiction since Appellants conceded in their July 22, 1996, response (BZA Exhibit No. 35) that the Property may be used as a child development center. Appellants' only issue is whether the Property is being used as a child development center and that is an enforcement issue.

19. The Board concluded that it has jurisdiction under Title 5, Section 424, D.C. Code to hear the appeal. (Tr. 42-45)

20. The Intervenor also filed a motion to limit the scope of the hearing to zoning issues under the zoning Act or Regulations. (Tr. 46-54). The Board voted to grant the motion in part and deny in part. (Tr. 54)

MERITS:

21. On August 30, 1995, the House of Ruth filed an application with the District of Columbia DCRA to obtain a C of O for the Property. This application was filed as an ownership change and not a use change because the House of Ruth was buying the Property from the prior owner and intended to use the Property consistent with the prior C of O. Specifically, the House of Ruth applied to use the Property as a child development center for 60 children. As indicated on the form completed by the Zoning Review Branch, DCRA, the prior use of the Property was for a child development center for 87 children. On August 30, 1995, the DCRA

issued C of O No. B172700 to the House of Ruth to occupy 2910-2916 Pennsylvania Avenue, S.E., as a child development center. Subsequently, separate Cs of O were issued for 2910 and 2916 Pennsylvania Avenue, S.E., as child development centers.

22. The Executive Director of the House of Ruth described the daily activities of the children that attend the child development center (Tr. 181-184; 184-185) and also described, in detail, the activities of the House of Ruth staff with regard to the children and with regard to the children's parents. Such activities included discussions with the parents regarding the children's attendance, parenting skills, and other issues related to the child's welfare (See Tr. 183-184; 185-187.)

23. The Executive Director of the House of Ruth testified that there were no on-site training or adult education programs for the parents, that there was no literacy lab, and that all contacts with the parents were directly related to the welfare of the children attending the child development center.

24. The Executive Director of the House of Ruth testified that the House of Ruth had listened to the concerns of the neighborhood. Any activities which had been discussed prior to the facility being opened which were beyond the scope of the child development center were not undertaken on the Subject Property. (Tr. 188, 191, 222-223.) The Executive Director stated that certain adult service programs for the parents are provided off-site. (Tr. 196) The Executive Director stated that there had been no complaints since the facility had been in operation. (Tr. 189.)

25. The Executive Director of the House of Ruth also described, in detail, the activities of the family advocate, noting that the family advocate essentially serves as a counselor to the staff and parents. The family advocate's job is focused on the children and ensuring that parents adequately address the needs of their children. She noted that this often entails providing the parents with referrals to other programs to address needs related to their children's welfare. (See Tr. 198-200, 212-214, 222, 224, 228-229, 235, 238-239.)

26. All of the activities proposed by the House of Ruth are related to the care, education or training of the children. There are no adult-specific programs offered by the House of Ruth at this facility. All programs are designed to support and benefit the children.

27. The House of Ruth's expert land planner presented uncontroverted testimony as to the prior zoning history of the site, its continuous use for over 40 years as a child development center and the fact that the House of Ruth may utilize the existing

facility as a child development center under a name change application without Board approval as long as the use was consistent with the prior 1984 C of O. (Tr. 244-247.)

28. The expert land planner testified that a child development center is permitted at both addresses on the basis of pre-1958 approvals and the most recent previous C of O from 1984. Neither previous Board approvals nor the Zoning Regulations specify or limit the number or age of students. (Tr. 245-246)

29. The expert land planner testified that the activities performed at the child development center were customary, subordinate and incidental to the child development center use and were in the nature typical of other child development centers across the region. Those uses, therefore, do not require additional approvals. (Tr. 247-251.)

30. The expert land planner stated that the activities being conducted are consistent with child development centers across the city and elsewhere. All activities at the subject site are oriented to children who attend the facility and their families. All services are related to maintaining the health and welfare of the children who are enrolled, including attendance, financial needs, medical and health needs, etc. Services are provided to children and families on an on-going basis through both daily and informal contacts with parents and through scheduled workshops, meetings and programs. No services are provided to adults or persons that are not incidental or related to the care of the children. The House of Ruth has other locations and facilities where services are provided to others. No services are provided at this location to persons who do not have a child enrolled at the center. Activities described are all customary for child development centers (see, for example, Mazique Parent and Child Center, approved by the Board in Case No. 15117, order dated August 9, 1989). (Tr. 217-249)

31. The expert land planner concluded that the child development center and permitted customary and subordinate accessory uses are permitted on the Subject Property as a matter-of-right; that the Zoning Administrator and DCRA properly followed the Zoning Regulations in issuing C of O No. B172700 (August 30, 1995); and that the two subsequent Cs of O were applied for at the direction of DCRA and merely divided the number of children into two programs in two buildings. Therefore, the subject appeal should be denied. (Tr. 250-251)

32. The subject appeal was filed on January 17, 1996, and amended on February 1, 1996. An amended appeal was subsequently filed on August 29, 1996.

33. Counsel for Appellants presented to the Board numerous exhibits prepared by the House of Ruth to demonstrate that the House of Ruth intended to use the premises for purposes beyond the scope of a child development center. All documents presented to the Board were prepared prior to the issuance of the C of O and the House of Ruth's actual occupancy of the building.

34. The Appellants raised a number of issues which they assert constituted error on the part of the Zoning Administrator and which were the bases on which they argued that the C of O should be revoked and the matter returned to the Zoning Administrator for further proceedings, as follows:

a. Adult Education: Appellants used documents provided by the House of Ruth to argue that adult literacy and tutoring services will be offered which is beyond the scope of a child development center.

b. Adult Services: Appellants used documents developed by the House of Ruth to argue that adult services, including substance abuse counseling, mental health counseling and related activities will be conducted on-site. (Tr. 69, 71, 74-75, 78-79)

c. Job Training and Employment Assistance: Appellants used documents developed by the House of Ruth to argue that job training and employment services will be provided on-site. (Tr. 71)

d. Appellants asserted that the House of Ruth will use the garages on the Property without Board approval. (Tr. 77-78)

Appellants argued that all of these activities are beyond the permitted scope of a child development center and, therefore, the Zoning Administrator erred in issuing the C of O and subsequent Cs of O. (Tr. 78-85)

35. Appellants presented Walter Peacock as a witness. Mr. Peacock, the adjacent neighbor to the House of Ruth facility, submitted petitions in opposition to the proposed facility. The Board notes that all such petitions were circulated and signed prior to the actual occupancy of the facility.

36. Mr. Peacock presented no evidence, even upon questioning by the Board, that the facility was actually being used as other than a child development center. (Tr. at 107-117, 122-123.) In fact, Mr. Peacock could point to no actual violation of the Zoning Regulations since the facility had been in operation. (Tr. 112-117)

37. ANC 7B was not present at the hearing. However, at the request of the Board, the ANC 7B submitted a report, dated October 16, 1996, in support of the appeal. The ANC report reiterated issues described by the Appellants at the hearing and noted that the position of the family advocate was beyond the scope of the child development center approval.

38. The representative of the Zoning Administrator testified that the House of Ruth had been issued a C of O for the facility based upon a prior C of O for the site. (Tr. 125-166) The representative noted that, as long as the use was consistent to the prior-approved use, no additional zoning review or enforcement action was required. The representative from the Zoning Administrator's Office stated that, to his knowledge and understanding, there is no substantive evidence that the Property is being used other than as a child development center. (Tr. 128-129)

39. At the request of the Board, the Zoning Administrator's office conducted a site inspection of the facility and filed a report, dated October 18, 1996. That report evaluates the physical premises and notes that he saw children and parents at the site. In addition, the Zoning Administrator's report attaches the position description for the family advocate but provides no evaluation of that position.

40. Intervenor, the House of Ruth, by letter dated October 30, 1996, responded to the ANC report and noted that the issue of the family advocate had been adequately addressed by the Board and the Executive Director of the House of Ruth at the September 11 hearing (see Tr. 198-200, 212-214, 222, 224, 228-229, 235, 238, 239). The Board concludes that the family advocate position is similar to a child development specialist or guidance counselor and is, therefore, within the scope of a child development center.

41. The jurisdiction of the Board to hear and decide appeals is set forth in the Zoning Act and in corresponding implementing provisions in the Zoning Regulations. The scope of review by the Board is limited to zoning issues.

42. At the conclusion of the public hearing, a decision date was set for the November 6, 1996 meeting. On November 6, 1997, a quorum of members who heard the case were not present and the decision was deferred until the December 4, 1996 meeting. The appeal was decided at the December 4, 1996 meeting and the Board decided the following additional motions:

a. Appellant's motion to reopen the record for issuance of an emergency stay.

b. Appellant's motion to reopen the record to establish prejury.

c. Appellant's motion to reopen the record based on newly discovered evidence in further support to establish perjured testimony.

The Board denied the motions regarding prejury based on its ability to determine the credibility of witnesses' testimony. Additionally, the Board declined to reopen the record noting that the record was complete.

FINDINGS OF FACT:

Based on the evidence of record, the Board finds as follows:

1. The Board finds that use of the Subject Property as a child development center is permitted consistent with the prior C of O and approval for the site.

2. Activities undertaken at the child development center by the family advocate and others are supportive of the children and are designed to further the child's welfare through parenting and other information to the parents. All activities are customary, incidental and subordinate to the child development center and are, therefore, permissible as the types of activities normally engaged in at a child development center.

3. The Board finds that the facility has no adult training programs on-site and, therefore, the facility is, and may continue to be used as a child development center.

4. The Board finds that all allegations of the Appellants regarding the potential use of the facility beyond the scope of a child development center are unfounded. Appellant's own witness Mr. Peacock, the adjacent neighbor, was unable to point to any zoning violations since the facility has been in operation. The Board notes that all of the documents used by Appellants to support their case were prepared by the House of Ruth prior to its actual occupancy of the facility. The Board finds that no matter what hopes the House of Ruth may have had for the facility, as long as the facility is used consistent with the purposes of a child development center, that meets the Zoning Regulations.

5. In this particular case there is a direct connection between the welfare of the child and the welfare of the parents.

6. To serve this particular segment of the population, the type of care the child requires, includes more direct involvement with the parents.

7. Referral information is not equivalent to providing services directly.

8. The Board finds the following to be permissible activity for a child development center:

a. The presence of a family advocate whose objective is the welfare of the child. The advice being given by this advocate in relation to vocational, education, and personal goals are in the context of development of the child, and in the form of referrals for assistance.

b. Psychosocial analysis of parents performed to ascertain the background of the child in order to provide more targeted and helpful services.

c. Referrals in the form of advice (as to where services can be found elsewhere in the system) to parents.

d. One-on-one counseling of parents on issues relating to their children's welfare.

e. All other activity not listed above from which a direct connection can be drawn between the necessary activity and the welfare of the child.

9. The Board finds the following to be impermissible activity for a child development center.

a. training and counseling not related to the welfare of the child.

b. referrals that go beyond simply giving advice to parents as to where services can be obtained.

c. performance of services related only to the welfare of the parents and not of the child.

d. financial services (i.e. classes) which are not connected with improving the welfare of the child.

e. psychoanalysis of the children's parents.

f. all other services, activities, etc, which are not directly related to the welfare of the child.

10. The Board finds that the Zoning Administrator's inspection report documents that the facility is designed and used as a child development center.

11. With respect to the issues and concerns of ANC 7B, the Board finds as follows:

a. As with the issues raised by the Appellants, the Property is permitted as a child development center and no evidence was provided that the Property is used in any other manner.

b. The functions of the family advocate have been addressed above.

CONCLUSIONS OF LAW AND OPINION:

The power of the Board to hear and decide appeals is set forth in the Zoning Act (D.C. Code, Section 5-424(f) (1988), which provides for appeals to the Board that are "based in whole or in part upon any zoning regulation or map." The Zoning Regulations (Section 3105.1) further provides that the Board may "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made ... in the administration or enforcement of this title." Both the Act and the Regulations refer to decisions made with respect to the Zoning Regulations, not other codes, regulations or laws.

The appellants in the subject case challenged the administrative determination of DCRA to issue a C of O for 2910-2916 Pennsylvania Avenue, S.E., based upon allegations that the Property would be used in a manner beyond the scope of a child development center, including for adult services and training. Appellants also dispute the role of the family advocate.

The Board concludes that all allegations raised by Appellants were based upon documents produced by the House of Ruth prior to occupying the premises. Appellants presented no testimony with respect to use beyond the scope of the C of O once the facility was in operation. In addition, the Board concludes that the role of the family advocate is necessarily a part of a child development center and that the services provided are directed at the children's well-being and education.

The Board concludes that, in addressing the issues and concerns of the Appellants, it has also addressed the relevant issues and concerns of the ANC. The issue before the Board is limited to determining whether the facility is being used within


the scope of the C of O for a child development center and whether the Zoning Administrator correctly ruled in this decision. The Board concludes that the decision of the Zoning Administrator was correct.

Therefore, in consideration of the above stated findings of fact and conclusions of law, it is ORDERED that the decision of the Zoning Administrator is UPHELD and the appeal is hereby DENIED.

VOTE: 3-1 (Angel F. Clarens, Jerrily R. Kress and Sheila Cross Reid to deny; Susan Morgan Hinton opposed to the motion; Laura Richards not voting, have recused herself)

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

ATTESTED BY:


MADELIENE H. DOBBINS
Director

FINAL DATE OF ORDER: JUN 30 1997

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT.

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 16132

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on JUN 30 1997 a copy of the order entered on that date in this matter was mailed first class postage prepared to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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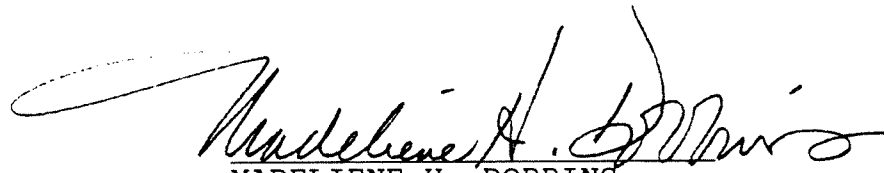
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MADELIENE H. DOBBINS
Director

Date: JUN 30 1997