

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



**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).<sup>1</sup>

**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

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<sup>1</sup> 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;<sup>2</sup> 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

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<sup>2</sup> 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.”<sup>3</sup>

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 operations 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.

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<sup>3</sup> 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.<sup>4</sup>

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**

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<sup>4</sup> 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 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.

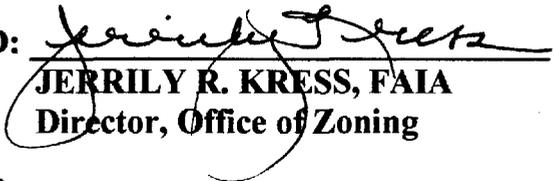
For the reasons stated above, it is hereby **ORDERED** that the appeal is **DENIED** and that the decision of the Zoning Administrator to approve the issuance of Certificate of Occupancy No. 18366 is **AFFIRMED**.

**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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



**BZA Appeal No. 16839**

As Director of the Office of Zoning, I hereby certify and attest that on OCT 15 2002, a copy of the Decision and Order 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 this matter and that is listed below:

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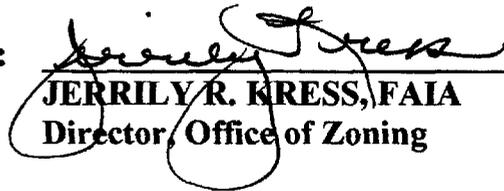
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**ATTESTED BY:**

  
**JERRILY R. KRESS, FAIA**  
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