

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17613 of Sonja Sweek, pursuant to 11 DCMR § 3104.1, for a special exception under § 205 to establish a child development center (68 children and 21 staff) and for variances from parking requirements under § 2101.1 and from the prohibition against enlarging a nonconforming building under § 2001.3 so as to construct a third floor addition to the existing building in the R-4 zone district at the premises 1359 C Street, S.E. (Square S-1039, Lot 801).¹

HEARING DATE: May 22, 2007
DECISION DATE: July 3, 2007

DECISION AND ORDER

This application was submitted January 11, 2007 by Sonja Sweek (“Applicant”), the owner of the property that is the subject of the application. By memorandum dated September 29, 2006, the Office of the Zoning Administrator indicated that the Applicant’s request for a certificate of occupancy to use the subject property as a child development center was disapproved due to the need for Board approval of a special exception under § 205 of the Zoning Regulations. As finally amended, the application requested a special exception under § 205 to establish a child development center for 68 children and 21 staff members, as well as variance relief from parking requirements under § 2101.1 and from the prohibition under § 2001.3 against enlarging a nonconforming building. This area variance was requested to allow the construction of a third-floor addition to the existing building on the subject property in the R-4 zone district at 1359 C Street, S.E. (Square S1039, Lot 801).

Following a public hearing and public meeting, the Board voted on July 3, 2007 to deny the application.

¹ The application originally requested only a special exception under § 205 to establish a child development center at the subject property for 100 children and 18 staff members. At the public hearing, the Applicant was permitted to amend the application to seek, in addition, variances from § 2101.1, concerning parking requirements, and from § 2001.3, concerning the enlargement of a nonconforming building. At the hearing, the Applicant also revised the application to reflect that the maximum enrollment at the proposed child development center would be 68 children, with 21 staff members.

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PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated January 16, 2007, the Office of Zoning provided notice of the application to the Office of Planning; the Department of Transportation; the Department of Health; the Councilmember for Ward 6; Advisory Neighborhood Commission (“ANC”) 6B, the ANC within which the subject property is located; and Single Member District/ANC 6BF06. Pursuant to 11 DCMR § 3113.13, on March 5, 2007 the Office of Zoning mailed letters or memoranda providing notice of the hearing to the Applicant, ANC 6B, and owners of property within 200 feet of the subject property. Notice was also published in the *D.C. Register* on March 16, 2007 (54 DCR 2336).

Party Status. In addition to the Applicant, ANC 6B was automatically a party in this proceeding. At the public hearing, the Board granted party status in opposition to the application to a group of residents living near the subject property known as the C Street Opponents. This party encompassed an individual, Frank Kulbaski, and two groups, Neighbors of the 14th and C Street S.E. Block and the Kentucky Courts Condominium Association Board, that had requested party status separately. The C Street Opponents were represented by Frank Kulbaski, a resident of Kentucky Courts, located at 1352 C Street, S.E.

Applicant’s Case. The Applicant described the proposed child development center use of the subject property, asserting that the addition of a third floor to the existing building was needed to allow for a higher enrollment, which was necessary to make the business economically viable. The planned third-floor addition would be set back from the existing building so as to occupy approximately 60 percent of the lot size. The maximum height of the building with the addition would be approximately 38 feet.

As proposed, the child development center would operate from 7:00 a.m. to 7:00 p.m., Monday through Friday. Upon enrolling a child in the child development center, parents would be required to sign a “traffic agreement” indicating their agreement to the Applicant’s drop-off and pick-up procedures. The Applicant indicated that employees of the child development center would assist in the drop-off of children from vehicles arriving at the subject property on 14th Street. Deliveries would also be made from 14th Street.

The Applicant estimated that half of the children would be dropped off at the subject property by car; the remainder would arrive from the nearby neighborhood on foot. There would be no outdoor play area at the subject property, but the children attending

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the child development center would be taken daily to parks in the vicinity, supervised by the center's staff.

In 2006 the Applicant entered into a use agreement with an elementary school across the street from the subject property that would allow the staff of the child development center to use six parking spaces in the school's parking lot on weekdays. The use agreement had an initial term of one year, and was renewable. The Applicant planned to offer a transit subsidy to employees to encourage the use of public transportation to the subject property, which was located three blocks from the Potomac Avenue Metrorail station and in the vicinity of Metrobus routes.

In a supplemental filing dated June 8, 2007, the Applicant asserted that the requested variances should be granted because (i) the scale and historically commercial or mixed use of the building represented an exceptional condition; (ii) hardship would otherwise result, given the cost of refurbishing the decrepit building and the need for a third-floor addition to increase the capacity of the child development center and make it a viable business, since much of the first floor of the building would be devoted to code-compliant egress and life safety measures; and (iii) the increase in building height as a result of the addition would not make the building incompatible with the heights of other buildings in the vicinity, including the adjacent Kentucky Courts condominiums and the elementary school. With regard to parking, the Applicant noted that the subject property had never provided any off-street parking spaces.

Government Reports. By memorandum dated May 9, 2007, the Office of Planning ("OP") indicated that a child development center at the proposed location would be in harmony with the general purpose and intent of the Zoning Regulations and Map, but recommended a reduction in the maximum enrollment of 100 children originally proposed by the Applicant before approval of the requested special exception.² According to OP, the application had "the potential to meet the requirements of § 205," but the enrollment of 100 children at the subject property would result in "an unacceptable level of impact" on the surrounding community.

By supplemental report dated June 18, 2007, the Office of Planning indicated that the proposed reduction in the number of children enrolled at the child development center from 100 to 68 was sufficient to alleviate OP's concerns, provided that drop-offs and pick-ups would be limited to the 14th Street frontage and managed during peak hours by employees of the child development center. OP concluded that approval of the requested

² The report also indicated OP's belief that the Applicant's proposal required variance relief from § 2101.1 with respect to parking and from § 2001.3 to enlarge the nonconforming building on the subject property.

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special exception would not cause unduly negative impacts on the surrounding community.

OP also recommended approval of the parking variance, stating that the subject property was subject to an exceptional condition in that “there is no ability to provide extra parking on the site,” and that the practical difficulty associated with the inability to provide parking would apply to any future use in the building. However, OP was “unable to find sufficient reason to recommend in favor of a variance” necessary to add a third floor to the building, because the Applicant’s claim of practical difficulty was based on an economic rationale related to the proposed child development center and because the building had been previously devoted to residential use as an apartment house.

By memorandum dated May 18, 2007, the District Department of Transportation (“DDOT”) indicated no objection to the application for approval of a child development center with 100 children and 18 staff at the subject property. DDOT noted that the Applicant anticipated that “a large percentage” of children using the child development center would “reside in the immediate area” and would be dropped off by parents walking to the site, and that the Applicant would have staff available to supervise drop-off activities for those arriving by car. DDOT concluded that the proposed child development center would not create objectionable or dangerous traffic conditions or significantly affect the available supply of on-street parking.

By supplemental report dated June 28, 2007, DDOT reiterated its lack of objection to the Applicant’s proposal. According to DDOT, the reduction in planned enrollment from 100 to 68 children and the Applicant’s proposed drop-off and pick-up procedures would “improve the operations of the center and overall safety.”

ANC Report. At a regularly scheduled and properly noticed meeting on May 8, 2007, with a quorum present, ANC 6B voted 9-1-0 to oppose the Applicant’s request for a special exception to establish a child development center with 100 children and 18 staff at the subject property, “without prejudice to a future application.” By letter dated May 30, 2007, the ANC indicated its belief that the requested special exception failed to meet zoning requirements because (i) the proposed child development center would cause adverse traffic impacts for area residents that would not be mitigated by the Applicant’s proposed traffic plan; (ii) the Applicant’s lease of six parking spaces at a nearby elementary school would be insufficient for staff and visitors of the child development center; and (iii) the proposed child development center would be located in close proximity to similar facilities – an elementary school, which was expected to increase its enrollment due to program changes in the near future, and another child development

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center – that already generated “considerable traffic” in the vicinity of the subject property.

Party in Opposition to the Application. The C Street Opponents contended that the requested special exception – whether for 100 or 68 children, with 18 or 21 staff – would violate § 205.3, in that the proposed child development center would create objectionable traffic conditions and unsafe conditions for picking up and dropping off children, particularly with respect to the lack of a loading zone on 14th Street and the likelihood that vehicles dropping off or picking up children at the site would obstruct access by emergency vehicles, block the driveway to the Kentucky Courts condominiums, and interfere with the bicycle lane on 14th Street. The C Street Opponents also asserted that the proposed child development center would increase demand for a limited number of on-street parking spaces, especially in light of the proximity of the elementary school and another child development center a block from the subject property, and objected that the Applicant’s use agreement allowing staff parking at the elementary school could be canceled after 30 days notice at the convenience of the school system.

In a response to the Applicant’s supplemental submission, filed June 25, 2007, the C Street Opponents objected to the Board’s consideration of variance relief for the Applicant, arguing that the Applicant had not filed applications for variances or paid filing fees for variance applications, and that no public notice was given indicating the need for variance relief. According to the C Street Opponents, some persons “not oppose[d] to the establishment of a child development center of a reasonable size would oppose the addition of a third story to the building” if they knew of the need for variance relief. The C Street Opponents also objected to their lack of opportunity to cross-examine the Applicant and the Office of Planning on their post-hearing submissions, especially with respect to OP’s recommendation of approval of the requested parking variance, and to the ANC’s lack of opportunity to participate in the decision regarding whether the variances should be granted.

The C Street Opponents argued that the variance needed to add a third story to the building should not be granted because (i) the Applicant had not shown that the subject property was not subject to an exceptional condition, because the lot was rectangular and not exceptionally narrow or shallow, and most neighboring properties were also improved with two-story buildings; (ii) the Applicant’s ability to increase the profitability of the proposed child development center was insufficient to establish that a practical difficulty would arise from the denial of a variance permitting construction of a third-floor addition; and (iii) a third-story addition would harm the public good and the zone plan by permitting a child development center at a level of enrollment that would adversely affect safety, traffic, and parking in the neighborhood and would create undue

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noise. The C Street Opponents also argued that the requested parking variance should be denied, asserting that the subject property was not unique in its inability to provide off-street parking, and that the parking arrangement negotiated by the Applicant with the elementary school was not an adequate substitute, in part because cancellation of the agreement “could result in as many as 21 staff members with nowhere to park except on the street, thereby presenting an extreme burden on the neighborhood.”

Persons in Support of the Application. The Board heard testimony or received letters in support of the application from several persons living in the vicinity of the subject property, who principally cited the need for day care for children living in the neighborhood.

Persons in Opposition to the Application. The Board also heard testimony or received letters in opposition to the application from several persons living in the vicinity of the subject property. The persons in opposition generally asserted that the Applicant’s planned child development center would have a potential adverse impact on the residential character of the neighborhood and would create objectionable conditions arising from the proposed enrollment of 100 children, especially with respect to traffic and parking impacts associated with vehicles dropping off or picking up children at the subject property and with respect to potential hazardous conditions involving emergency vehicles and a bicycle lane along 14th Street. The Board received a letter in opposition to the application from the zoning committee of the Capitol Hill Restoration Society, which stated that the proposed child development center would create objectionable traffic and parking conditions as well as unsafe situations associated with travel to and from off-site play areas, and would adversely affect the neighborhood due to the cumulative effects of child development centers and elementary schools in the vicinity.

FINDINGS OF FACT

The Subject Property and Surrounding Area

1. The subject property is located at 1359 C Street, S.E., at the southwest corner of the intersection of 14th and C Streets, S.E. (Square S-1039, Lot 801) and is zoned R-4.
2. The site is improved with a two-story building built in 1908, twelve years before the establishment of zoning in the District of Columbia. It is currently configured as four apartments. The building historically has also contained some commercial uses on the ground floor.

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3. The building on the subject property is nonconforming in that the site has a lot occupancy of more than 90 percent, where 40 percent is permitted as a matter of right for a child development use. *See* 11 DCMR § 403.2. The subject property has no area that could be used to provide off-street parking spaces.
4. The subject property is located in a triangular parcel defined by 14th Street, C Street, and Kentucky Avenue. The building is 25 feet wide along the C Street frontage and 75 feet long along the 14th Street frontage. The building is attached to the building on the adjoining property to the west on C Street, and has a side yard on the east side facing 14th Street. The building has entrances on both 14th and C Streets.
5. Much of the area in the vicinity of the subject property is developed with two-story single-family row dwellings. A public elementary school is located across 14th Street from the subject property. A fire station is located nearby, at 1520 C Street, S.E.
6. The Kentucky Courts condominium, containing 38 residences, is located across C Street from the subject property. The driveway to the condominium's parking lot is located on the north side of C Street near the intersection with 14th Street.
7. On-street parking in the vicinity of the subject property is subject to residential parking restrictions. Street parking is limited to two hours between 7 a.m. and 8:30 p.m. from Monday through Friday, except for holders of Zone 6 permits. Parking is permitted on both sides of 14th Street in the vicinity of the subject property.
8. A portion of 14th Street, including the frontage along the subject property, has been designated a bicycle lane.

Applicant's Proposal

9. The Applicant proposed to operate a child development center at the subject property for children ages six weeks to eight years. The maximum enrollment would be 68 children, including up to 13 infants (ages six weeks to two and half years). The child development center would have a staff of 21 persons.
10. The Applicant proposed to construct a new third story on the existing building, primarily so as to increase the number of children who could attend the child development center. (The floor area of the child development center is one factor

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in determining its maximum enrollment.) The addition would also provide an indoor play area for children attending the child development center. The exterior of the building would otherwise remain unchanged, except for the replacement of fire stairs at the rear of the building.

11. Another child development center is currently in operation on 15th Street less than 1,000 feet from the subject property.
12. The Zoning Regulations require the proposed child development center to provide four parking spaces; that is, five spaces for 18 staff members, with a credit of one space based on the prior use of the building as four apartment units requiring one parking space.
13. In late 2006 the Applicant entered into a use agreement with the elementary school across the street from the subject property that would allow the staff of the child development center to use six parking spaces in the school's parking lot between 7:00 a.m. and 8:00 p.m., Monday through Friday. The use agreement had an initial term of April 2, 2007 to March 31, 2008, and was renewable unless the principal of the school had an objection to the arrangement. The use agreement could be canceled after 30 days notice at the convenience of the school system.

Harmony with Zone Plan

14. The subject property and surrounding area are zoned R-4. The R-4 district is designed to include areas developed primarily with row dwellings, where a substantial number of dwellings have been converted into dwellings for two or more families. 11 DCMR § 330.1. The primary purpose of the R-4 district is the stabilization of remaining one-family dwellings. 11 DCMR § 330.2.
15. The uses permitted in the R-4 district as a matter of right include a child development center, provided that the center is limited to no more than 16 individuals. 11 DCMR § 330.5 (d).
16. Except in the case of certain public recreation and community centers, an enlargement or addition may be made to a nonconforming structure only when the structure conforms to percentage of lot occupancy requirements. 11 DCMR § 2001.3(a).

CONCLUSIONS OF LAW

The Applicant seeks a special exception under § 205 to establish a child development center for 68 children and 21 staff members, a variance from parking requirements under § 2101.1, and an area variance from the prohibition against enlarging a nonconforming building under § 2001.3 to allow construction of a third-floor addition to the existing building on the subject property in the R-4 zone district at 1359 C Street, S.E. (Square S1039, Lot 801). The Board is authorized under § 8 of the Zoning Act to grant variance relief where, “by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property,” the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. *See* 11 DCMR § 3103.2.

As a preliminary matter, the Board finds no merit in the arguments by the C Street Opponents that the Board should not consider variance relief for the Applicant. The Applicant amended the application at the hearing to include variance relief after OP noted that such relief may be necessary. All parties, including the ANC, had an adequate opportunity to address the variance requests at the public hearing and in post-hearing submissions.

Based on the findings of fact, and having given great weight to the recommendations of the Office of Planning and to the issues and concerns of ANC 6B, the Board concludes that the Applicant has not satisfied the requirements for variance relief relating either to parking or the enlargement of the nonconforming structure. The Board is unable to find, based on evidence in the record, that the subject property faces any “exceptional topographical conditions or other extraordinary or exceptional situation or condition” or that practical difficulties will result to the Applicant in this case due to the strict application of the Zoning Regulations.

The Board was not persuaded by the Applicant’s assertion that the subject property is subject to an exceptional condition or circumstance due to its scale or to the historically commercial or mixed use of the building. Neither factor gives rise to a finding that the subject property faces an extraordinary or exceptional situation or condition. The scale of the two-story building on the subject property is consistent with the two-story row dwellings that predominate in the immediate neighborhood, which also contains a

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relatively large multi-family building, the Kentucky Courts condominium, and institutional buildings, including the elementary school across the street. The Board was also not persuaded that the scale or former commercial use of part of the building on the subject property were unusual or exceptional circumstances that would warrant the requested variance relief.

Nor was the Board persuaded, based on evidence in the record, that the strict application of the Zoning Regulations would result in peculiar or exceptional practical difficulties to the Applicant. As noted by the Office of Planning, the Applicant's claim of practical difficulty was based on an economic rationale related to the proposed child development center. The Applicant's perceived need for an enlargement to the nonconforming building was based on the Applicant's projected feasibility of the proposed child development center use, which the Applicant claimed could not succeed as a viable business with fewer than 68 children. While the Applicant submitted some financial information, the Board was not persuaded that a smaller child development center, not requiring a third-floor addition, was not possible. The Board was also not persuaded that any practical difficulty would result from the strict application of the prohibition against enlarging the nonconforming building on the subject property, particularly since the building has recently been devoted to residential use as an apartment house.

The Board concludes that the Applicant did not satisfy the first two prongs of the three-prong test for variance relief with respect to either the request for a variance from parking requirements under § 2101.1 or for a variance from the prohibition against enlarging a nonconforming building under § 2001.3 to allow construction of a third-floor addition. In light of this decision, the Board declines to address the third prong, pertaining to the potential for substantial detriment to the public good or impairment of the intent, purpose, and integrity of the zone plan, or the merits of the Applicant's request for a special exception under § 205, since the Applicant indicated that the third-floor addition was an essential component of the proposed child development center.

For the reasons stated above, the Board concludes that the Applicant has not satisfied the burden of proof with respect to the request for a special exception under § 205 to establish a child development center for 68 children and 21 staff or the requests for variance relief from parking requirements under § 2101.1 and from the prohibition against enlarging a nonconforming building under § 2001.3 to allow construction of a third-floor addition to the existing building on the subject property in the R-4 zone district at 1359 C Street, S.E. (Square S1039, Lot 801). Accordingly, it is therefore **ORDERED** that the application, as finally amended, is **DENIED**.

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VOTE: 3-0-2 (Ruthanne G. Miller, Curtis L. Etherly, Jr., and John A. Mann II voting to deny; Marc D. Loud and John G. Parsons not present, not voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member approved the issuance of this order.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: MAR 13 2008

PURSUANT TO 11 DCMR § 3125.6, THIS 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.

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As Director of the Office of Zoning, I hereby certify and attest that on **MARCH 13, 2008**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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Chairperson
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Director, Office of Zoning

TWR