

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17867 of Baby Land Development Center, pursuant to 11 DCMR § 3104.1, for a special exception for a child development center (15 children and 5 staff) under section 205, in the R-2 District at premises 4628 H Street, S.E. (Square 5359, Lot 328).¹

HEARING DATE: January 13, 2009
DECISION DATES: March 3, May 5, June 2, 23, and 30, 2009

SUMMARY ORDER

REVIEW BY THE ZONING ADMINISTRATOR

The Application was accompanied by a letter, dated August 26, 2008, from the Zoning Administrator stating that the Applicant's Certificate of Occupancy application to use the subject premises as a child development center for 15 children and 4 staff was denied due to the need for Board of Zoning Adjustment approval. (Exhibit 5)

The application was amended over the course of the proceedings as to the maximum number of children at the child development center. The Applicant was operating a child development home for up to 5 children and, in her application to the Zoning Administrator, was seeking to expand the number of children who would be enrolled in what would become a child development center, to 15.

The request as to the number of children to be enrolled was ambiguous and fluctuated during the course of the proceedings. In the end, the Board granted the number first asked of the Zoning Administrator, that is, 15 children and 5 staff. The Applicant mentioned several times in her testimony and in her presentation before the Advisory Neighborhood Commission (ANC) that she expected to enroll up to 15 children. The

¹ The Board ended up granting relief for 15 children and 5 staff, as the application changed from the advertised relief of 40 children and 6 staff.

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Board cited to that evidence in its deliberations. (See, Transcript (Tr.) June 30, 2009, at 9 – 11).

However, in the burden of proof statement accompanying the application, the Applicant described this application as one for a maximum of 50 children and 6 staff. But even that statement was not definitive. What the Applicant said in the burden of proof statement that accompanied the application was that she anticipated that the child development center would commence operations with up to two classes of fewer than 16 children, two teachers and two teacher's aides, but she modified that statement by adding that "Applicant may be able to establish a child development center but it would be limited to no more than sixteen (16) individuals." Later in the same submission, she said that she anticipated future expansion, to a maximum of "24" or "fifty" children. (Exhibit 4) Also, at one point in the proceedings the Applicant spoke to there being up to 38 children. (Tr. January 13, 2009, at 130)

The application was advertised for a maximum of 40 children and 6 staff. Despite stating that she expected to start with no more than 15 children, the Applicant requested approval for the maximum she estimated ever would be allowed under the licensing requirements to avoid coming back to the BZA if the number of children enrolled went over 15. That request for a larger enrollment figure as a cushion – which was expressed as 24, 38, 40, or 50 -- was derived from an estimate of the number of children who could be permissibly enrolled based on the computations of required square footage per child under applicable licensing requirements. Nevertheless, the Applicant acknowledged that she would not be able to enroll children based on that estimate until she had received approval from the Board. (Tr. January 13, 2009 at 129 - 132) Finally, the Applicant had her traffic engineers analyze the impacts of a child development center for 25 children and they found that at that level, the proposed use would not be likely to cause adverse conditions with respect to drop-off or pick-up activities. (Exhibit 29). So, the Board had requests for relief before it of 15, 25, 38, and 40 as well as 24 and 50, at different times. Due to the ambiguity and confusion caused by the varying numbers of children requested, the Board opted to grant approval for 15 children. Based on the record, the Board concluded that at 15 children, there would not be significant adverse impacts, whereas at a greater number, there may be such impacts.

The Board provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission (ANC) 7E and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 7E, which is automatically a party to this application.

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At a meeting on December 9, 2008, ANC 7E, with a quorum present, voted to oppose the application. The vote was 4 against, 1 in favor, and 1 abstaining. Nevertheless, the ANC in its report of December 22, 2008 also noted that a poll of nearby neighbors was taken and of 35 neighbors polled, 20 were in support, 10 were opposed, and 5 took no position. (Exhibit 23)² A letter of support for the application for a child development center was submitted by the D.C. Office of the State Superintendent of Education (OSSE). (Exhibit 20)

The Office of Planning (OP) submitted its report, dated January 13, 2009, indicating that several issues needed to be addressed before it could make a recommendation. During the hearing, however, OP testified that all its concerns except one had been adequately addressed by the Applicant. The only area left open for additional study was traffic management, specifically drop-off and pick-up at peak hours. OP noted that the Applicant had provided letters of support from her immediate neighbors who had stated that they did not object to the current drop-off and pick-up arrangement. Nevertheless, this, together with traffic concerns, was the one area that OP suggested needed further study, leading the Board to request a DDOT analysis and report. (Tr. January 13, 2009, 158-168). At the hearing, OP also suggested consideration of a “trial period” to test the impacts of the size of the client population and the traffic management system. (Tr. January 13, 2009 at 169-173).

At the conclusion of the hearing, the Board left the record open for a report from DDOT about the impact of traffic, and for responses from OP, the ANC, or the Applicant. The Applicant submitted a professionally prepared assessment of the potential traffic impact associated with the proposed child development center. The Applicant’s traffic consultant concluded that “the proposed increase in activity is not likely to cause adverse or objectionable traffic and parking conditions.”³ (Exhibit 29) After reviewing the consultant’s analysis and conclusions, DDOT submitted its report, dated June 26, 2009, in support of the Applicant’s request, concluding that “[i]f the BZA prohibits daycare employees from parking in front of or adjacent to the Applicant’s property, DDOT sees no indication that the level of drop-off or pick-up activity would have a significant adverse impact on the community.”⁴ (Exhibit 31)

² Another ANC report, dated December 12, 2008, outlining the same ANC vote in opposition was submitted by the ANC Commissioner for the Single Member District that borders the SMD in which the Applicant’s property is sited. That report also contained a petition from 19 residents in opposition. (Exhibit 25)

³ As mentioned, the traffic consultant’s report and finding of no adverse impact were based on an application for 25 children.

⁴ DDOT’s analysis contained several other recommendations, many of which the Board has incorporated into the conditions in this order.

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As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for special exception relief under section 205. Other than the ANC, no parties appeared at the public hearing in opposition to this application.

The Board is required to give “great weight” to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive. The Office of Planning indicated that it needed more information about traffic impacts, particularly the impact of children being picked up and dropped off at peak hours. To address these concerns, the Board requested a report from DDOT. DDOT reviewed the Applicant’s professional traffic consultant’s analysis, indicating that there would not be adverse impact, and upon review of that traffic analysis, DDOT indicated its support of an application for a child development center for 15 children and 4 staff. Although OP never made a definitive recommendation, the Board was persuaded by DDOT’s support and the traffic consultant’s analysis that the Applicant met the burden of proof.

In its deliberations, the Board gave the ANC’s report great weight, but ultimately decided in favor of the Applicant. In so doing, the Board noted that the rationale for the ANC’s opposition was not entirely clear, both as to the number of children to be enrolled and as to the Applicant’s plan to address potential traffic impacts. Both of these issues evolved over the course of the case. First, the ANC based its objection on a child development center for 40 children. (Exhibits 23 and 25) Second, the ANC, at the time of its vote and report, did not have the benefit of, or thereafter consider, the reports from the traffic engineers and DDOT, which concluded that a child development center for 15 children would not adversely impact traffic. The Board cited as persuasive the evidence presented by the traffic engineer and DDOT, but mindful of the ANC’s opposition, conditioned its approval with a term of 3 years to allow the Applicant and community a specific time period in which to study the effects of the child development center. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1 and 205, and that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to

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affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED**, **SUBJECT TO THE FOLLOWING CONDITIONS:**

1. This approval shall be for three (3) years from the date of issuance of this order.
2. The maximum number of children enrolled at the child development center shall not exceed 15 and the maximum number of staff at the center shall not exceed 5.
3. The hours of drop-off shall be 7:00 a.m. to 10:00 a.m. and the hours of pick-up shall be 3:00 p.m. to 6:00 p.m.
4. The staff shall assist with the escorting of the children during drop-off and pick-up.
5. The Applicant shall prohibit employees from parking on the street in front of, or adjacent to, the child development center.
6. At the end of the first year of operation, the Applicant shall provide transportation data and a report about the facility's daily experience of client and visitor drop-off and pick-ups to Advisory Neighborhood Commission 7E. The information shall be provided to the ANC annually thereafter and shall include the number of clients that are dropped off and picked up at the child development center.

VOTE: 3-0-2 (Marc D. Loud, Shane L. Dettman, Peter G. May, to APPROVE AS CONDITIONED. Two mayoral appointees (vacant), not participating, not voting.)

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

A majority of the Board members approved the issuance of this order.

ATTESTED BY:


RICHARD S. NERO, JR.

Acting Director, Office of Zoning

FINAL DATE OF ORDER: JULY 31, 2009

UNDER 11 DCMR 3125.9, "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 FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, STATUS AS A VICTIM OF AN INTRAFAMILY OFFENSE, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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As Acting Director of the Office of Zoning, I hereby certify and attest that on July 31, 2009, 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 and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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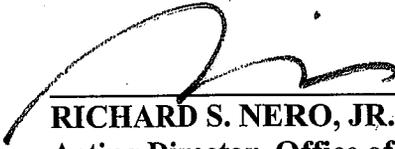
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ATTESTED BY:



RICHARD S. NERO, JR.
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