

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Board of Zoning Adjustment**



**Order No. 18138-A Motion for Reconsideration of Order No. 18138 of St. Paul's Episcopal Church**, pursuant to § 3126 of the Zoning Regulations. The original application was pursuant to 11 DCMR § 3104.1, for special exceptions to allow a private school and a child development center (120 students, ages 2.5 through 12 years, and 18 regular staff members) under sections 205 and 206, in the R-3 District at premises 210 Allison Street, N.W. No new construction is proposed. (Parcel 0111/0037).

**HEARING DATE:** November 30, 2010

**DECISION DATE:** December 14, 2010

**DATE OF RECONSIDERATION:** February 1, 2011

**ORDER PARTIALLY GRANTING AND PARTIALLY DENYING RECONSIDERATION**

**BACKGROUND**

This application was filed on August 6, 2010 by St. Paul's Episcopal Church, Rock Creek Parish, ("Applicant"), the owner of the property that is the subject of the application ("subject property"). The application requested two special exceptions, one pursuant to 11 DCMR § 205, to permit a child development center ("CDC"), and one pursuant to § 206, to permit a private school, both to be operated within the existing buildings on the subject property. The Board of Zoning Adjustment (the "Board") heard the application on November 30, 2010, and decided, by a vote of 4-0-1, to grant the application at its decision meeting on December 14, 2010.

The Board imposed five conditions on the grant of the special exceptions, two of which are the subject of a motion for reconsideration timely filed by the Applicant on January 3, 2011 ("motion"). (Exhibit 40.) The first condition was a term of five years on both special exception uses, and the fifth condition – the other one for which reconsideration was requested – states that the entrance to be used by the two special exception uses shall be on Rock Creek Church Road, and the exit shall be on Allison Street.

## **THE MERITS**

### **Partial Grant of Reconsideration**

The Applicant points out in its motion that the fifth condition is technically incorrect. It was proffered by the Applicant, and agreed to by the Board, that the Applicant's entrance would be on Webster Street, not on Rock Creek Church Road. The Board grants the motion for reconsideration with regard to the change requested for this condition, and a proper condition is set forth at the end of this order.

### **Partial Denial of Reconsideration**

The motion makes two arguments against the condition imposing a term of five years on the special exception approvals. The motion argues that the Board did not have the authority to impose the term because there was no evidence of potential adverse impacts in the record to support the imposition of a term. The motion also argues that the term will impose a significant financial burden on the Applicant, and, because the imposition of a term was not addressed during the hearing, the Applicant did not have the opportunity to demonstrate to the Board the existence and effect of this financial burden.

The Board disagrees with the Applicant and finds that issues arose during the proceedings on the application concerning potential adverse impacts. For example, Allison Street is a residential street which dead-ends at the subject property. It is the only means of egress that the new private school and CDC will be using. Although the Board was satisfied that these circumstances would not tend to affect adversely the use of neighboring property, that is only a prediction. Similarly, the report filed by the District Department of Transportation ("DDOT") stated that DDOT had significant concerns regarding the use of the Webster Street entrance to the subject property. Although the DDOT representative ultimately testified that its concerns did not rise to the level at which it would recommend against the special exception, the Board was not required to simply hope for the best.

Instead, the Board felt the need to impose a condition that would allow it to see whether its prediction of no adverse impact withstood the test of time. The five-year term represented a balance between the Applicant's understandable desire for stability and the Board's intent that it retains the ability to mitigate harm resulting from any faulty prediction of no adverse impacts.

Moreover, even had there been no evidence of potential adverse impacts in the record, a term would be appropriate here, where not one, but two new uses will be begun simultaneously. It is the Board's duty to see to it that every special exception granted meets the twin objectives of 11 DCMR § 3104 – harmony with the purpose and intent of the Zoning Regulations and Maps and no tendency to adversely affect neighboring property. These objectives apply prospectively and they apply irrespective of whether there is evidence of adverse impacts in the record. One way to try to ensure that these two goals are met, particularly with new uses, is to impose a time

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limitation. Therefore, imposition of a time limitation to try to ensure no adverse impacts on neighboring property in the future may be based on the need to meet the general mandates of § 3104.

Because every special exception granted by the Board, particularly a first-time use, contains an element of uncertainty, the purpose of a term limit is not to mitigate adverse impacts, but to allow the Board to re-assess its approval and the circumstances surrounding it at some point in the future, when those circumstances, or the use itself, may have changed. A term limit provides an antidote to the inherent uncertainty in granting a first-time special exception. *See, e.g., Woodbury v. Zoning Board of Review of City of Warwick*, 82 A.2d 164, 167 (R.I. 1951). (A two-year term imposed, at the end of which, “the board would be in a position, according to the facts then appearing, either to renew the exception if requested, or to permit the property to again be used as a tourist home”). Or, as succinctly stated by a New York court, in the context of a term limitation on a variance, the reason for such a limitation:

is to insure that in the event conditions have changed at the expiration of the period prescribed the board will have the opportunity to reappraise the proposal by the applicant in the light of the then existing facts and circumstances.

*In re Goodwin*, Sup. Ct. N.Y., N.Y.L.J., July 5, 1962, as quoted in 3 A. Rathkopf, *The Law of Zoning and Planning* § 38.06[2] (4<sup>th</sup> ed. 1979). *Accord Monaco v. D.C. Bd. of Zoning Adjustment*, 407 A.2d 1091, 1097-1098 (D.C. 1979).

Without a foreknowledge of the future, a term limit allows the Board to “hedge its bets” that its prediction of no adverse impacts, or that predictable adverse impacts can be mitigated, will prove correct. As aptly expressed by a New Jersey court when ruling on the validity of a five-year term on a special use permit for a new use, the term “would provide an escape-hatch if the board concluded that continuance of the [use] thereafter was not consistent with the public good.” *Houdaille Construction Materials, Inc. v. Bd. of Adjustment of Tewksbury Township*, 223 A.2d 210 (N.J. Super. App.Div. 1966).

The Applicant also argues in its motion that the term limit imposes a significant financial burden on it, which it had no opportunity to address before the Board. The financial burden is claimed to arise due to the costs associated with returning to the Board in five years to renew the special exceptions. The motion states that, in addition to the fee imposed by the Office of Zoning, the Applicant will again have to pay attorney’s fees and engage its traffic expert to prepare an updated traffic analysis and report, the latter of which will cost an estimated \$7,500 to \$10,000. (Exhibit 40, at 3.)

The Board is aware that the Applicant and its lessee, which will operate the two new uses, are non-profit organizations with, perhaps, limited means, but they are no more financially affected by the five-year term than any other similar entity would be. Accepting the Applicant’s

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argument would amount to the Board accepting a *de facto* prohibition of term limits. The Board must balance the effect on the Applicant with the potential for adverse effects on the neighborhood due to two new, vehicle-intensive uses. *Glenbrook Road Ass'n. v. D.C. Bd. of Zoning Adjustment*, 605 A.2d 22, 25 (D.C. 1992). (With special exceptions, the Board must “determine whether a reasonable accommodation has been made between the [use] and the neighbors.”) After carrying out this balancing test, the Board saw fit to grant the special exceptions, thereby determining that they will not “tend to affect adversely the use of neighboring property,” per § 3104, but added the “safety valve” of a five-year term. The Board has now also considered the Applicant’s arguments on reconsideration, and again concludes that the five-year term is appropriate and must be retained.

**Great Weight**

The Board is required to give “great weight” to issues and concerns raised by the affected Advisory Neighborhood Commission (“ANC”) and to the recommendations made by the Office of Planning (“OP”). D.C. Official Code §§ 1-309.10(f) 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.

OP was in favor of granting Application No. 18138, but did not participate in the reconsideration process. Its views were given great weight by the Board as to the original grant of the application, but as it had no input into the reconsideration process, there is nothing more to which the Board can accord great weight.

ANC 4D is the ANC within which the subject property is located. ANC 4D was properly notified of the filing of this application (Exhibit 15) and was also properly notified of the date of the hearing on the application (Exhibit 22), but did not file a report with the Board. The Applicant served ANC 4D with its Motion for Reconsideration (Exhibit 40), but the ANC did not participate on the proceedings on reconsideration; therefore, there is nothing to which the Board can accord great weight.

**CONCLUSION**

That part of the Applicant’s motion for reconsideration requesting an elimination of, or change to, the five-year term limit is **DENIED**. That part of the motion requesting that Condition No. 5 be changed to reflect that the entrance to be used to gain access to the two new special exception uses will be on Webster Street is **GRANTED, AND CONDITION NO. 5 IS CHANGED TO READ AS FOLLOWS:**

5. Access to the entrance of the subject property for the purposes of the private school and child development center shall be on Webster Street and access to the exit from the subject property for these purposes shall be at Allison Street.

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**VOTE:**        **3-0-2**        (Meridith H. Moldenhauer, Nicole C. Sorg, and Gregory M. Selfridge by absentee vote, to Partially Deny and Partially Grant; Jeffrey L. Hinkle not participating; No other Board member (vacant) participating)

**BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**  
A majority of the Board members approved the issuance of this Order.

**ATTESTED BY:** *Jamison L. Weinbaum*  
**JAMISON L. WEINBAUM**  
Director, Office of Zoning

**FINAL DATE OF ORDER:**   **MAY 05 2011**  

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

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**MAY 05 2011**

As Director of the Office of Zoning, I hereby certify and attest that on \_\_\_\_\_, 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:

Kinley R. Bray, Esq.  
Arent Fox, LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036

Chairperson  
Advisory Neighborhood Commission 4D  
143 Kennedy Street, N.W.  
Washington, D.C. 20011

Single Member District Commissioner 4D05  
Advisory Neighborhood Commission 4D  
143 Kennedy Street, N.W.  
Washington, D.C. 20011

ANC 4C  
P.O. Box 60847  
Washington, D.C. 20039-0847

Muriel Bowser, Councilmember  
Ward Four  
1350 Pennsylvania Avenue, N.W., Suite 406  
Washington, D.C. 20004

Melinda Bolling, Esq.  
General Counsel  
Office of General Counsel  
Department of Consumer and Regulatory Affairs  
1100 4<sup>th</sup> Street, S.W., 5<sup>th</sup> Floor  
Washington, D.C. 20024

ATTESTED BY:

A handwritten signature in black ink, appearing to read "Jamison L. Weinbaum", is written over a horizontal line.

**JAMISON L. WEINBAUM**  
Director, Office of Zoning

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441 4<sup>th</sup> Street, N.W., Suite 200/210-S, Washington, D.C. 20001

Telephone: (202) 727-6311

Facsimile: (202) 727-6072

E-Mail: [dcoz@dc.gov](mailto:dcoz@dc.gov)

Web Site: [www.dcoz.dc.gov](http://www.dcoz.dc.gov)