

Address: 346 Commerce Street
Zone: CD/Commercial Downtown Zone
Appellant: JS & Family, LLC
Issue: Appeal of a Determination by the Director

Summary of Case on Appeal

This case concerns the requirement for all day care centers to submit a drop-off and pick-up plan for review and approval by staff to ensure compliance with section 4-507(E) of the Zoning Ordinance. The appellant's arguments are set forth in the attached letter. The City addresses the matters raised in the appeal in three general categories including 1) requirement for a pick-up and drop-off plan; 2) prohibition of pick-up and drop-off at the playground and 3) responsibility for compliance with the Zoning Ordinance requirements.

Background

City Council approved Special Use Permit (SUP) #2007-0064 on October 2, 2007 for J S & Family, LLC (appellant) for a daycare center in the Commercial Downtown/CD zone at 1447 Duke Street, 346 Commerce Street and 211 Commerce Street. The next year, daycare operations in the CD zone became permitted uses through City Council approval of Text Amendment (TA #2008-0004).

The daycare center operates within a building located at 1447 Duke and 346 Commerce Streets and uses the lot at 211 Commerce Street as an accessory private playground. Condition 9 of the SUP required the appellant to provide "a comprehensive plan for the management of drop-offs and pick-ups to the satisfaction of the Director of Planning and Zoning...." On September 17, 2007, in an SUP application addendum, the appellant represented its drop-off and pick-up plan as a four-space loading zone in front of the daycare center at the west end of Commerce Street. Child drop-offs are scheduled from 7 a.m. to 9:30 a.m. and pick-ups occur between 3:30 p.m. and 6 p.m. The City Council approved the drop-off and pick-up plan as part of the SUP approval on October 2, 2007.

A lack of conformance with the drop-off and pick-up plan was brought to City staff's attention through several complaints beginning in the fall of 2017. Complaints and affidavits continued to be submitted to staff through the summer of 2018. The complainant stated that the daycare center parents caused traffic hazards and were violating "no parking" regulations along the 200 block of Commerce Street as they picked up children in the afternoons and early evenings from the playground at 211 Commerce Street. Staff advised the appellant that it was required to adhere to

the drop-off and pick-up plan submitted on September 17, 2007 or to submit an alternative plan for staff review.

On July 13, 2018, Karl Moritz, Director of Planning & Zoning, sent a determination letter in response to the appellant's appeal of June 22, 2018, informing the appellant that although the SUP for the daycare use was no longer needed, as Text Amendment (TA #2008-0004) changed day care uses in the CD Zone to permitted uses; section 4-507(E) of the Zoning Ordinance required daycare centers to provide adequate drop-off and pick-up facilities so as to create minimal impact on pedestrian and vehicular traffic. Staff administrative approval of a drop off and pick-up plan is required to ensure that Section 4-507(E) is met. Mr. Moritz explained that the appellant's approved drop-off and pick-up procedures were to comply with the plan submitted on September 17, 2007 in order to comply with this requirement.

Discussion/Argument

A. Section 4-507(E) and the Drop-off and Pick-up Plans

As part of the City Council's decision in 2008 to add day care as a permitted use in commercial zones, City Council enacted Zoning Ordinance Section 4-507(E). The purpose of this provision was to ensure that adequate drop-off and pick-up areas were provided by day care centers. Zoning Ordinance Section 4-507(E) states that, "A day care center shall provide adequate drop off and pick up facilities so as to create minimal impact on pedestrian and vehicular traffic."

To effectuate this section and since the enactment of the ordinance, the City has required that any proposed day care use in a commercial zone submit and obtain administrative approval of a drop-off and pick-up plan before the day care operation commences. When a plan is submitted to the City, the Departments of Planning and Zoning and Transportation & Environmental Services (T&ES) Department review the plan to make sure that it is safe for the patrons of the business and the public generally.

Day care centers that previously required a SUP but have not needed one since the 2008 Zoning Ordinance text amendment have two options: (1) to continue operating under the drop-off and pick-up plan that was part of the earlier approved SUP or (2) apply for administrative approval of a new plan. Therefore, in order to maintain compliance with section 4-507(E), the plan that was part of the earlier SUP approval remains in effect.

B. Use of Playground as a Drop-Off or Pick-up Location

The appellant alleges that drop-off and pick-up from the playground is not prohibited by the earlier SUP or the language in the Zoning Ordinance. That is because the Zoning Ordinance establishes a performance standard ("minimal impact on pedestrian and vehicular traffic") rather than spell out specific drop-off/pick-up actions that are prohibited or allowed. In order to determine if the applicant will meet the performance standard, it is a reasonable standard procedure for staff to require an applicant to submit their plan to ensure compliance with the ordinance.

The purpose of a pick-up and drop off-plan is for staff to determine whether the day care is in compliance with Section 4-507(E) of the Zoning Ordinance. Having a plan that shows the pick-up and drop-off sets expectations for the daycare and its patrons to make sure they are complying with this requirement and provides a more efficient way to administer compliance with the Zoning Ordinances. Also, the Zoning Ordinance is written generally because all day care centers drop-off and pick-up facilities are unique and this allows for the examination of the facilities individually. Thus, the Zoning Ordinance does not specifically state that drop-off and pick-up are not permitted at certain locations, including playgrounds, and it should not, due to the unique facilities of each day care center. In this specific case, the current pick up and drop off plan does not allow use of the playground for drop-off or pick-up.

In early 2018 the appellant provided an alternative pick-up and drop-off plan proposal which included 211 Commerce Street (the playground). The request was to add a loading zone in front of 211 Commerce Street for the afternoon and evening pick-up of children. The T&ES Department determined that it would not support the appellant's proposal for a loading zone as it would negatively impact vehicular traffic on the 200 block of Commerce Street. The north side of the street was not suitable for a loading zone as the "no parking" limitation was to be maintained due to the narrow width of the street. In addition, a loading zone on the south side of the block could not be accommodated because of several existing curb cuts and few available parking spaces.

Therefore, use of the playground as a pick-up or drop-off location does not comply with the requirements of Zoning Ordinance Section 4-507(E) because professional staff has determined that a loading zone cannot be added in this location and without a loading zone, pick-up and drop-off cannot be accomplished without impact on pedestrian and vehicular traffic.

C. Violation of the City Zoning Ordinance and Who is Responsible

Zoning is intended to "strike a deliberate balance between private property rights and public interests." *Bd. of Sup'rs of Fairfax Cnty. V. Snell Constr. Corp.*, 214 Va. 655, 657, 202 S.E.2d 889, 892 (1974).

Under the City Charter, ". . . the council shall have the power to adopt by ordinance a comprehensive zoning plan designed to lessen congestion in streets, secure safety from fire, panic and other danger, promote health, sanitation and general welfare, provide adequate light and air, prevent the overcrowding of land, avoid undue concentration of population, facilitate public and private transportation" CITY CHARTER § 9.09. City Council enacted Zoning Ordinance 4-507(E) in accordance with its zoning powers under City Charter § 9.09.

The Zoning Ordinance states that, ". . . any use of any building or land which is conducted, operated or maintained contrary to any of the provisions of this ordinance . . . shall be a violation of this ordinance and the same is hereby declared to be unlawful." ZONING ORDINANCE § 11-203(A). Generally, the City takes enforcement action against the owner or operator of a business since enforcement action can result in a business not being allowed to operate. *See* ZONING ORDINANCE § 11-203(C). Thus, if a business is required to provide a plan to comply with the

Zoning Ordinance that business should be held responsible for violation of that plan even if the patrons are causing the noncompliance since it is ultimately the business that could be shut down if there is a violation of the Zoning Ordinance. If the operator cannot be held responsible for the actions of its patrons in situations like this, then this section of the Zoning Ordinance which is intended to ensure the safe drop-off and pick-up of children and minimize impacts on the general public would be useless. Further, it is common for SUPs to contain conditions that guide patrons' behavior, such as encouraging the use of public transportation through promotional materials and directing patrons to park at preferred locations to reduce vehicle and pedestrian impacts.

D. Standard of Review

The Alexandria Zoning Ordinance gives the authority to the Director of Planning and Zoning to administer the Zoning Ordinance. ZONING ORDINANCE § 11-101. Among other duties, the Director of Planning and Zoning is tasked with "Interpret[ing] the provisions of this ordinance to ensure that its intent is carried out;" ZONING ORDINANCE § 11-102(F).

Decisions by the BZA on appeals ". . . shall be based on the board's judgment of whether the director was correct. The determination of the director shall be presumed to be correct." ZONING ORDINANCE § 11-1205(C). The ". . . appellant has the burden of proof to rebut such presumption of correctness by a preponderance of the evidence." ZONING ORDINANCE § 11-1205(C).

The Virginia Supreme Court has clearly indicated that "A consistent administrative construction of an ordinance by officials charged with its enforcement is entitled to great weight." *The Lamar Company, LLC v. Board of Zoning Appeals, City of Lynchburg*, 270 Va. 540, 547, 620 S.E.2d 753, 757 (2005) quoting *Masterson v. Board of Zoning Appeals*, 233 Va. 37, 44, 353 S.E. 2d 727, 733 (1987). Deference to the interpretation of the person charged with administering the zoning ordinance whose role and expertise it is to provide the relationship between the zoning ordinance text and the local governments plan for zoning is essential in order to have a uniform application of the ordinance. See *Lamar* at p. 547. See also *Trustees of Christ and St. Luke's Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 382, 641 S.E. 2d 104, 107 (2007). The Board of Zoning appeals should only reverse the Director's decision if "the board determines that the decision is contrary to the plain meaning of the ordinance and the legislative intent expressed therein". *Higgs v. Kirkbride*, 258 Va. 567, 575, 522 S.E.2d 861, 865 (1999).

Additionally, under settled principles of administrative law, the interpretation given a legislative enactment by public officials charged with its administration and enforcement is entitled to be given significant weight by the courts. See *Payton v. Williams*, 145 S.E.2d 147 (1965). In Virginia, it is settled law that a presumption of correctness attaches to the actions of state and local officials. See *Hladys v. Commonwealth*, 366 S.E.2d 98 (1988). Such actions are presumed to be valid and will not be disturbed by a court absent clear proof that the action is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals or general welfare. See *County of Lancaster v. Cowardin*, 391 S.E.2d 267, 269 (Va. 1990); *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525 (2003) (discussing the presumption of reasonableness attached to the Board's legislative acts).

Given the foregoing, the Board of Zoning Appeals should apply deference to the decision of the Director of Planning and Zoning in order to continue the necessary consistency in the application of the Zoning Ordinance; unless the Board determines that the appellant has shown by a preponderance of the evidence that Director's decision was contrary to the plain meaning of the ordinance and was made without reasonable basis.

Conclusion

For the above reasons, the Director respectfully requests that the Board of Zoning Appeals deny the appeal and uphold the Director's determination.

Staff:

Christina Zechman Brown, Assistant City Attorney, christina.brown@alexandriava.gov
Tony LaColla, Division Chief, Planning and Zoning, tony.lacolla@alexandriava.gov
Mary Christesen, Zoning Manager, Planning and Zoning, mary.christesen@alexandriava.gov
Ann Horowitz, Non-Development Case Manager, Planning and Zoning,
ann.horowitz@alexandriava.gov

Attachments

- A. Appeal
- B. Determination letter, July 13, 2018
- C. Section 4-507(E) of the Alexandria Zoning Ordinance
- D. SUP2007-00064



N

0 15 30 60 Feet



APPEAL APPLICATION BOARD OF ZONING APPEALS

BZA Case # 208-0016

Identify the order, requirement, decision or determination that is the subject of the appeal. Attach one copy to the application.

Letter from Karl Moritz

On what date was the order, requirement, decision or determination made?

July 13, 2018

*The appeal must be filed within 30 days from the date that the order, requirement, decision or determination was made.

PART A

1. Applicant: ☒ Owner ☐ Contract Purchaser ☐ Agent

Name J S & Family, LLC

Address 346 Commerce Street/1447 Duke Street

Daytime Phone 703 548 0110 (David Chamowitz, Agent)

Email Address dchamowitz@chamlaw.com

2. Property Location 346 Commerce Street

3. Assessment Map # 073.02 Block 07 Lot 26

Zone CD

4. Legal Property Owner Name J S & Family, LLC

Address 1447 Duke Street, Alexandria, VA 22314

5. If property owner or applicant is being represented by an authorized agent, such as an attorney, realtor or other person for which there is a form of compensation, does this agent or the business in which they are employed have a business license to operate in the City of Alexandria, Virginia?

- ☒ Yes, Provide proof of current City business license.
☐ No, Said agent shall be required to obtain a business license prior to filing application.

THE UNDERSIGNED HEREBY ATTESTS that all of the information herein provided including the site plan, building elevations, prospective drawings of the projects, etc., are true, correct and accurate. The undersigned further understands that, should such information be found incorrect, any action taken by the Board based on such information may be invalidated. The undersigned also hereby grants the City of Alexandria permission to post placard notice as required by Article XI, Division A, Section 11-301(B) of the 1992 Alexandria City Zoning Ordinance, on the property which is the subject of this application. The applicant, if other than the property owner, also attests that he/she has obtained permission from the property owner to make this application.

APPLICANT OR AUTHORIZED AGENT:

David Chamowitz

Print Name

August 13, 2018

Date


Signature

Pursuant to Section 13-3-2 of the City Code, the use of a document containing false information may constitute a Class 1 misdemeanor and may result in a punishment of a year in jail or \$2,500 or both. It may also constitute grounds to revoke the permit applied for with such information.

OWNERSHIP AND DISCLOSURE STATEMENT

Use additional sheets if necessary

1. Applicant. State the name, address and percent of ownership of any person or entity owning an interest in the applicant, unless the entity is a corporation or partnership, in which case identify each owner of more than ten percent. The term ownership interest shall include any legal or equitable interest held at the time of the application in the real property which is the subject of the application.

	Name	Address	Percent of Ownership
1.	Terry Pnevmanikos	1416 Duke Street, Alex	50%
2.	Susan Pnevmanikos	1416 Duke Street, Alex	50%
3.			

2. Property. State the name, address and percent of ownership of any person or entity owning an interest in the property located at 346 Commerce / 1447 Duke (address), unless the entity is a corporation or partnership, in which case identify each owner of more than ten percent. The term ownership interest shall include any legal or equitable interest held at the time of the application in the real property which is the subject of the application.

	Name	Address	Percent of Ownership
1.	Terry Pnevmanikos	1416 Duke Street, Alex	50%
2.	Susan Pnevmanikos	1416 Duke Street, Alex	50%
3.			

3. Business or Financial Relationships. Each person or entity indicated above in sections 1 and 2, with an ownership interest in the applicant or in the subject property are require to disclose **any** business or financial relationship, as defined by Section 11-350 of the Zoning Ordinance, existing at the time of this application, or within the 12-month period prior to the submission of this application with any member of the Alexandria City Council, Planning Commission, Board of Zoning Appeals or either Boards of Architectural Review. **All fields must be filled out completely. Do not leave blank. (If there are no relationships please indicated each person or entity and "None" in the corresponding fields).**

For a list of current council, commission and board members, as well as the definition of business and financial relationship, click [here](#).

	Name of person or entity	Relationship as defined by Section 11-350 of the Zoning Ordinance	Member of the Approving Body (i.e. City Council, Planning Commission, etc.)
1.	Terry Pnevmanikos	### None	None
2.	Susan Pnevmanikos	None	None
3.			

NOTE: Business or financial relationships of the type described in Sec. 11-350 that arise after the filing of this application and before each public hearing must be disclosed prior to the public hearings.

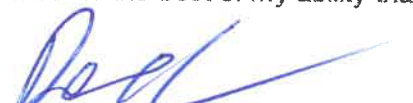
As the applicant or the applicant's authorized agent, I hereby attest to the best of my ability that the information provided above is true and correct.

August 13, 2018

Date

David Chamowitz

Printed Name



Signature

BZA Case # _____

PART B

1. Why do you believe the order, requirement, decision or determination is incorrect? Explain the basis for the appeal, beginning in the following space and using additional pages, if necessary.

SEE ATTACHED

CHAMOWITZ & CHAMOWITZ, P.C.

ATTORNEYS AND COUNSELLORS AT LAW

118 NORTH ALFRED STREET
ALEXANDRIA, VIRGINIA 22314

MICHAEL J. CHAMOWITZ[†]
mchamowitz@chamlaw.com

TELEPHONE (703) 548-0110

FAX (703) 836-8857

DAVID L. CHAMOWITZ
dchamowitz@chamlaw.com

[†] ALSO ADMITTED IN D.C.

August 13, 2018

Karl Moritz
Director, Planning & Zoning
301 King Street, Suite 2100
Alexandria, VA 22314

Dear Mr. Moritz:

Thank you for your letter of July 13, 2018, in which you state that Zoning Tickets #5023 and #5030 issued to my client, J, S, & Family, LLC, arising from the operation of the Blue Bird Cay Care Center have been rescinded in light of the fact that SUP 2007-0064 is no longer in effect.

You also asserted in the that "Staff administrative approval of a drop off and pick-up plan is required to ensure that [Zoning Ordinance] Section 4-507(E) is met," and that J, S, & Family, LLC would risk notices of violation with civil penalties if parents picked their children up at the playground located at 211 Commerce Street.

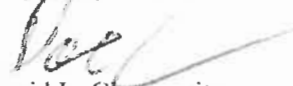
J, S, & Family, LLC responds as follows:

- 1) There is no provision in the Alexandria Zoning Ordinance applicable to my client's operations which requires approval of a Pickup/Dropoff Plan. Further, §4-507(E) makes no mention of a Pickup/Dropoff Plan, and does not tie compliance with its terms to approval of such plan.
- 2) You assert that my client's former SUP is no longer applicable, but that there is an "approved, existing drop off and pick-up plan" that remains applicable to my client's operation. The "plan" referred to appears to be correspondence between P&Z Staff and my client's former counsel. I have found nowhere in which that correspondence was "approved." Rather, it appears to have been incorporated into Conditions 7-9 of the SUP, which you asserted is no longer in effect.
- 3) As previously asserted in the BZA appeal, pickup/dropoff at the playground is not prohibited. There are no restrictions or prohibitions on the pickup of children from the playground found anywhere, whether the now-defunct SUP nor any generally-applicable ordinance. Therefore, it is no violation for parents to pick their children up there. Blue Bird children may be picked up anywhere that is not prohibited.

- 4) As previously asserted, no business can be found to have violated any City ordinance or other requirement due to the behavior of its customers. If a parent arrives to pick up his or her child while the child is at the playground, Blue Bird cannot refuse, and "kidnap" the child by detaining them against their parent's wishes. Blue Bird cannot tell a parent that they cannot have their child back unless and until they have driven to the end of Commerce Street and waited there for the child to walk the two blocks. Whatever Blue Bird wishes its parents would do, it is not responsible for the independent acts of adults not under its control.

In your letter, you invite me, on behalf of my client, to revise our BZA appeal application. Please consider the foregoing to be such a revision, and the grounds for our appeal.

Very Truly Yours,



David L. Chamowitz



DEPARTMENT OF PLANNING AND ZONING

301 King Street, Room 2100
P.O. Box 178

Alexandriava.gov

Phone (703) 746-4666

July 13, 2018

J S & Family, LLC
c/o David Chamowitz
346 Commerce Street and 1447 Duke Street
Alexandria, VA 22314

RE: Bluebird Day Care Center Appeal of SUP enforcement ticket

Dear Mr. Chamowitz:

I am responding to your Board of Zoning Appeals (BZA) appeal application received on June 22, 2018 requesting an appeal of the SUP violation ticket #5023 issued on May 24, 2018. The ticket was issued for a violation of Condition 9 of SUP #2007-0064.

At the time of approval on September 6, 2007, day care center uses required SUP approval. On October 18, 2008, City Council approved a Text Amendment (TA #2008-0004) to change day care uses in the CD Zone to be permitted uses without a special use permit. As a result, SUP #2007-0064 is no longer in effect because an SUP is no longer needed for the day care use. Therefore, ticket # 5023, as well as ticket # #5030 (issued for the same violation on June 7), have been rescinded.

Nonetheless, Section 4-507(E) of the Zoning Ordinance requires day care centers to provide adequate drop off and pick-up facilities so as to create minimal impact on pedestrian and vehicular traffic. Staff administrative approval of a drop off and pick-up plan is required to ensure that Section 4-507(E) is met. The approved, existing drop off and pick-up plan was submitted on September 17, 2007 (attached) and states that drop off and pick-up occurs in the four loading zone spaces in front of the day care center at 346 Commerce Street. The drop off hours are 7 a.m. to 9:30 a.m. and the pick-up hours are 3:30 – 6 p.m. This plan is still in effect and all drop off and pick-up activities associated with the Bluebird Day Care center at 346 Commerce Street and 1447 Duke Street must occur within the parameters of the existing drop off and pick-up plan to ensure compliance with Section 4-507(E).

As you know, staff has received several complaints and affidavits related to afternoon pick-up activity at the 211 Commerce Street playground. Pick-up by parents at this location is a

violation of the current approved plan. Please be advised that any pick-up and drop off activity that deviates from the current approved plan will result in the issuance of notices of violation with civil penalties.

As the subject of your appeal to the BZA, ticket #5023, has been rescinded, please let us know if you want to withdraw or revise your appeal application.

This determination is based on the attachments of your letter of appeal dated June 22, 2018, the approved pick-up and drop off plan and the Zoning Ordinance. The determination may be void if any of the information provided is incorrect.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Karl Moritz', with a stylized flourish at the end.

Karl Moritz
Director, Planning and Zoning

Please be advised that this notice of violation, written order, requirement, decision or determination of the Director may be appealed to the Board of Zoning Appeals by any person aggrieved by the decision of the Director or any officer, department, board, commission or agency of the City affected by the decision of the Director within thirty (30) days from the date of the decision. The decision is final and unappealable if not appealed within thirty (30) days. The cost for such appeal is \$385.00 and additional information regarding how to file the appeal may be found in Zoning Ordinance Section 11-1200.

Enclosures:

Letter of Appeal

Approved pick-up and drop off plan

CC: File
Mary Christesen
Christina Brown
Travis MacRae

4-507 - Use limitations.

- (A) All operations shall take place within a completely enclosed building except that a permit for the sale and/or display of plants, flowers or produce in conjunction with and on the same lot as an existing permitted use may be granted by the director and the permit shall indicate the location, size, duration and purpose of the accessory outdoor use.
- (B) Appliance sales, repair and rental shall be limited to small appliances only, such as televisions, radios, lawnmowers, kitchen counter and small electronic appliances and like items which do not exceed one horsepower in size.
- (C) No use shall be conducted in any manner which would render it noxious or offensive by reason of dust, refuse matter, odor, smoke, gas, fumes, noise, vibration or glare.
- (D) A day care center, commercial school or massage establishment shall obtain all state, federal and local licenses and certificates required prior to opening its place of business.
- (E) A day care center shall provide adequate drop off and pick up facilities so as to create minimal impact on pedestrian and vehicular traffic.