



# City of Dayton

## Board of Zoning Appeals

### Minute Record

April 27, 2021

#### 1. BZA CASE # 2021-00054; 184 Salem Avenue

An Appeal of a Zoning Administration determination that a zoning application at 184 Salem Avenue (R72 07408 0024) for 100 foster care children constitutes a Residential Facility, while the Applicant contends that it is a Congregate Care Facility. The underlying zoning district is MNC Mature Neighborhood Commercial, in which a Residential Group Home is not a permitted use and a Congregate Care Facility is a Conditional Use. The property is also located in Planned Development-150.

**Applicant:** Griffin Academy LLC  
3901 E. Third Street  
Dayton, OH 45403

**Owner:** 4 The Kids LLC  
3901 E. Third Street  
Dayton, OH 45403

**Existing Land Use and Zoning:** Vacant building; MNC/PD-150

**Surrounding Land Use and Zoning:** North: Senior Resource Connection; MNC  
South: surface parking lot; MR-5/PD-150  
East: auto sales/repair; MNC  
West: Residential; MR-5 PD-109

**Land Use Board :** NorthCentral

**Planning District:** Dayton View

**Planning Staff Contact:** Tony Kroeger

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Mr. Kroeger presented the staff report via power point presentation. He explained the requested, described the site, made a staff recommendation and presented the board alternatives. The associated report is below.

### STATUTORY AUTHORITY

150.120.1 Appeals to the Board of Zoning Appeals

(A) An appeal from a decision of the Zoning Administrator with respect to the interpretation or application of this Zoning Code, except for decisions regarding site design plans, may be taken to the Board of Zoning Appeals (BZA) by any person aggrieved, or by any officer, department, board, bureau, or any governmental agency or body affected by the decision of the Zoning Administrator.

**150.120.7 Decision of the BZA (Appeals or Variances)**

The procedures for rendering a decision on appeals or variances are as follows:

(A) Where it is alleged there is an error in any order, requirement, decision, interpretation or determination (all hereinafter referred to collectively as “decision”) made under this Zoning Code by the Zoning Administrator, except for decisions regarding site design plans that are to be appealed to the Plan Board, the Board of Zoning Appeals may reverse or affirm, wholly or in part, the decision being appealed. The BZA may affirm, reverse or remand, in whole or part, a denial by the Landmark Commission as regulated by Section 150.345.21. In making its decision to reverse or affirm, the BZA may direct the issuance of a permit or certificate.

**PLANNING STAFF ANALYSIS**

This Appeal case was continued at the March 23, 2021. There was a desire to allow for the submission of written materials to reflect the testimony that was introduced at the meeting. As such, on March 26, 2021 the City of Dayton Department of Law sought specific information from the applicant team. On April 20, 2021, a letter and a list of accepted disabilities were provided. Additionally, petitions in support of the project were introduced.

Staff notes that while there were several individuals who reached out to staff not in support of the project, those individuals were asked to provide relevant testimony to this appeal at the public Board of Zoning Appeals meeting, rather than provide correspondence outside of the meeting.

Staff was invited to attend a Griffin Academy board meeting on April 7, 2021, but staff had conflicting meetings, as well as questions regarding the appropriateness of attending a such a board meeting when there is an active appeal underway.

The subject property is located at 184 Salem Avenue. It formerly contained the Richard Allen Academy charter school. Previously, it contained offices for the United Way. In association with the use of this building, the applicant proposes parking in the lot to the south, across Edgewood Avenue. It is a 64,888 square foot building, completed in 1955.

The property is also in Planned Development-150. That Planned Development, while originally envisioning a school at this site, maintains the same list of permitted and conditional use as the underlying zoning district. So, from a use classification perspective, there is not an impact.

The applicant has submitted an Appeal for a facility described in the application as “a facility that provides for the needs of disabled individuals (foster care children) as an ODJFS licensed Children’s Residential Center for 100 youth. Independent Living Services will consist of residential dwelling units, common social, recreational, dining and food preparation facility. Facility will provide personal and medical assistance including nursing care.” The applicant concludes that the use is a Congregate Care Facility, and therefore has applied for such. A Congregate Care Facility is a Conditional Use in the underlying zoning district, Mature Neighborhood Commercial.

However, based on the submitted information regarding the proposed land use, the Zoning Administrator issued a Zoning Administration Refusal, stating that the proposed use constitutes a Residential Facility. A Residential Facility is neither a Permitted nor Conditional Use in the underlying zoning district.

The zoning code stated purpose of the MNC District is as follows:

**150.325.1 Purposes.**

The Commercial districts (MNC, ENC, SNC, MGC, EGC, SGC) and their regulations are established in order to achieve the following purposes:

- (A) To provide for orderly growth and development in the City of Dayton.
- (B) To provide sufficient areas, in appropriate and convenient locations, for business activities and the exchange of goods and services.
- (C) To reflect and reinforce the existing density and pattern of development while accommodating the need for future growth.
- (D) To provide certainty to property owners, developers and neighbors about the limits of what is allowed in a Commercial district.

The zoning code definitions (**150.200**) for Congregate Care Facilities and Residential Facilities are as follows:

**Congregate care facility.** A residential facility that provides for the needs of individuals who are elderly or disabled. The facility shall consist of residential dwelling units or rooms designed specifically for the elderly or disabled, and may have common social, recreational, dining and/or food preparation facilities. The facility may be for independent living and/or may provide the residents with a range of personal and medical assistance including nursing care.

**Residential facility.** A facility that provides room, board, personal care, supervision, habilitation services and mental health services to developmentally disabled persons and/or foster children, as defined in this Zoning Code, in a family setting. These facilities shall be licensed by a state or federal agency. Facilities providing the services and functions of Emergency Housing, Protective Care Facilities, or Transitional Housing as defined in this code shall not be considered Residential Facilities. There are three size categories of residential facilities:

(a) A residential facility that provides the services listed above for five (5) or fewer developmentally disabled persons and/or foster children.

(b) A residential facility that provides the services listed above for six (6) to eight (8) developmentally disabled persons and/or foster children.

(c) A residential facility that provides the services listed above for nine (9) to sixteen (16) developmentally disabled persons and/or foster children.

The applicant, believing that the use is a Congregate Care Facility, submitted to the Department of Planning and Community Development an application for a conditional use. However, a corresponding Zoning Administration Refusal is a required component of the application, and such an associated Refusal does not exist because Zoning Administration has determined that the use is a Residential Facility--not a Congregate Care Facility.

There are a number of items in the definition for Residential Facility that have led Zoning Administration to make this determination. First that the Residential Care Facility definition specifically calls out the residency of foster children. The Congregate Care Facility definition does not. Furthermore, many other elements in the Residential Care Facility definition are consistent with the submitted description of the use, such as:

<b>Program Services in Submitted Materials</b>	<b>Corresponding Element of Residential Facility Definition</b>
Case Management Services	"habilitation services and mental health services"
Vocational Training	"personal care, supervision"
Room and board facilities	"room, board"
Crisis management/conflict resolution	"personal care, supervision" / "habilitation services and mental health services"
GED/College prep courses	"personal care, supervision"
Stress, anger, behavior management	"personal care, supervision" / "habilitation services and mental health services"
<b>Characteristics of Operations</b>	<b>Corresponding Element of Residential Facility Definition</b>
Licensed through ODJFS	"Licensed by state agency"
Comprehensive services for foster care youth between 15 and 17	"Foster children as defined in the zoning code"
Building will house up to 100 males	"Room, board" / "personal care" / "supervision"

The Residential Facility definition in the zoning code has been modified at times in the past, through Zoning Code Text Amendments, to clarify what it encompasses. Most recently, in 2019, the definition of Residential Facility was modified to read as it currently reads. In 2019, the phrase "*and/or foster children, as defined in this Zoning Code*" was added to the definition of Residential Facility to give a clear indication that applications for land uses that accommodate foster children are to be classified in this category of Residential Facility, not a different classification such as Congregate Care Facility. Additionally, for further clarification, "*and/or foster children*" was added to each of the classifications of this type of use.

The current definition for Foster Child is below:

**Foster child.** “Foster child” means a person under twenty-one (21) years of age who is placed in a dwelling unit or a residential facility by an institution or agency, licensed or approved by an appropriate State-regulating agency to place foster children.

The definition for Residential Facility includes three classifications, depending on the number of residents. There is not a classification that includes 100 individuals. The Zoning Code, therefore, encourages Residential Facilities to be smaller in nature, due to the potential land use impact of these facilities. Although Residential Facilities are not permitted in this specific zoning district, they are permitted in many areas throughout the City. Those districts are indicated in the following table:

	5 or fewer	6 to 8	9 to 16
SR-1 (single family res.)	Permitted	Permitted	(not permitted)
SR-2 (single family res.)	Permitted	Permitted	(not permitted)
ER-3 (single family res.)	Permitted	Permitted	(not permitted)
ER-4 (single family res.)	Permitted	Permitted	(not permitted)
MR-5 (single family res.)	Permitted	Permitted	(not permitted)
SMF (multi-family res.)	Permitted	Permitted	Permitted
EMF (multi-family res.)	Permitted	Permitted	Permitted
MMF (multi-family res.)	Permitted	Permitted	Permitted
T (Transitional)	Permitted	Permitted	Conditional
MX (Mixed-Use)	Permitted	Permitted	Conditional
CI (Campus-Institutional)	Permitted	Permitted	Permitted*
* = Conditional if within 150' of district boundary			

Residential facilities of eight or fewer residents are permitted by right in over 18,000 acres of the city. For nine to sixteen residents, they are permitted or conditional uses in over 3,000 acres of the City. In the city of Dayton, there is ample land that is zoned for facilities that house foster children, and the zoning code is very intentional in how they are allowed, and the scale of the facilities that the City desires.

Staff of the Department of Planning and Community Development is in agreement with Zoning Administration that the proposed use is a Residential Facility. Staff recommends upholding the zoning decision based on the definitions set forth in the City of Dayton Zoning Code, notably that the Residential Facility definition specifically refers to housing for foster children, and also the Zoning Administration documentation of the similarities between the submitted materials and the description of a Residential Facility.

After Mr. Kroeger concluded his remarks, Carl Daugherty the Zoning Administrator for the City of Dayton spoke next.

Mr. Daugherty began to speak of his perspective. He examined the services being proposed, and the definitions for proposed uses.



At this point, Eric Blaine, attorney for the applicant with an address of 130 West Second Street, Dayton, OH, (Greg Gantt Law LPA) said that the materials being presented by the zoning administrator were not included in the staff materials, and he therefore objected to their use. Mr. Daugherty then proceeded. Mr. Daugherty continued with his presentation of the definitions of residential facility and congregate care facility, and how they came to be. He reinforced that he felt the proper classification for the proposed use is a residential facility and described how he came to that conclusion. Mr. Daugherty then examined the site plan and building plan to further his analysis. Mr. Bement asked if there was a definition for “family setting” in the zoning code. There is not, Mr. Daugherty said. He explained the residential districts where residential facilities are permitted. Mr. Bement asked if there were regulations for open space requirements. Mr. Daugherty explained that large scale facilities of this nature are not typically permitted, so regulations for such do not exist. Ms. Patterson asked about the floor plans, and how much square footage was devoted to certain uses.

### **Public Testimony**

Theresa Darr, CEO of the Griffin Academy at 3901 East Third Street, said that invitations were sent to City staff to attend a meeting, and staff did not attend. She introduced her applicant team. She explained the intent of the facility. It is intended for disabled children without parents. The building, she said, is perfect for the proposed use. She revisited the discussion of the proposed use, and how it pertains to definitions in the zoning code. She said it is not about interpreting a word in the zoning code. She said the building is necessary to provide services to foster youth.

Eric Blaine of Gregory M. Gantt Co. LPA at 130 West Second Street Ste 310, Dayton, Ohio spoke in support of the appeal. He reiterated his objection to the materials presented by the zoning administrator. He refuted some of the points made by the zoning administrator and felt that the use is a congregate care facility and explained why. He said that it was an arbitrary decision to reclassify the application, and went through the definition for congregate care facility, and compared it to the definition for residential facility. Mr. Blaine explained various disabilities, and how they would be classified. He asked the Board to reverse the decision of the Zoning Administrator. Mr. Ciani asked what percentage would be disabled. He referred to Ms. Darr but believed the answer would be 100 percent.

Rick Holmes of the Architectural Group at 135 North Main Street, Dayton, OH spoke on the application. The layout and density are dictated by ODJFS. That agency provided minimum square footages. For the facilities that Ms. Patterson mentioned, the proposed design exceeds ODJFS directives. He said that there are indeed windows in all of the dormitories. Mr. Holmes said that there has been an attempt to address disabilities. He was troubled by the analysis in the staff report that examined definitions and the proposed use and provided his perspective. He didn't agree that the proposed use is a residential facility.

Doris Edelman who worked at Montgomery County Children's Services for over 30 years, explained her background. Her address is 5149 Stonemont Ct., Yellow Springs, OH, 45387. She said that Family First Prevention Services Act is intended to help disabled children remain with

family when possible. It dictates that children remain in a family setting. She spoke more about the Act and how it applies. The goal is to maintain a family setting. Ms. Darr responded by explaining the goal of the proposed facility of giving children a chance to make a good living. This facility will serve children who don't have options that are more residential in nature. A discussion ensued about the classification of the facility.

Fred Holley of 563 Superior Ave., Dayton, OH, 45402 and who is the Dayton View Association President, and a Salem Avenue Peace Corridor member supports the zoning administrator's interpretation of the code. He felt that the children would be given a disservice by labeling them as disabled. He explained what his neighborhood groups are trying to accomplish. He thought the petition signatures were deceptively acquired. He feels there has been a lack of engagement with the neighborhood. He questioned the proposed staffing level, which was later said to be a submittal error.

Steve Makovec, President Salem Avenue Peace Corridor of 23 Dayton Avenue, personal address 6533 Pond Ridge Drive, Centerville, OH, spoke about his perspective. He felt proper engagement has not occurred. There was a discussion of a previous land use case, and what one should know before they purchase a property. He asked the board to affirm the determination of the zoning administrator.

Cheryl Bates of 221 Belmonte Park East, Dayton, OH, 45405 and President of Grafton Hill Community Development Corporation spoke next. She has some questions about the site plan and floor plan. She supports the zoning administrator's determination. She brought a variety of concerns about the proposed facility.

Mr. Ciani asked where referrals will come from. Will 100 percent be disabled, and who determines that? Ms. Darr replied that the children are from the State of Ohio, and 100 percent will be disabled. The disability classification would be done by the social worker or a doctor. Ms. Darr noted an error in the materials she submitted – it should have said 69 employees, not 19.

Ms. Darr said that they have not spoken with the neighborhood because that is something city staff would arrange through the formal process, which would come later after this appeal issue is over.

Mr. Blaine reiterated that this is an appeal, and the opportunity for input would come later. He asked for the board to overturn the zoning administrator, so that neighborhood engagement can occur through a Conditional Use process.

Mr. Holmes reiterated the previous points that engagement has not occurred because of where the request currently stands. It is a congregate care facility, not a residential group home, in his view.

### **Board Discussion**

Mr. Martin said that the decision the board faces is strictly a zoning question. It is not about the capability of the provider to provide services. Any decision has to be made on the basis of the zoning code. Others on the board agreed. Mr. Bement noted that, indeed, it is about the words on a page. Mr. Brand agreed with the fact that they can only base their determination on the words in the zoning code. He noted that congregate care discussed elderly or disabled, while the residential facility definition specifically mentioned foster children – and that is what they are asking for. So, he felt it closest meets the definition of a residential facility. Mr. Patterson said after listening and reading the packet, she feels that it is a residential facility. Mr. Martin, looking at the words in the zoning code, noted the words “disability” in congregate care facility and “foster children” in residential facility cause some confusion. Because of the ambiguity, one must look at the overall context -- because foster children are specifically mentioned in the residential facility definition, it fits that definition better.

**Board Decision:**

A motion was made by Ms. Tingle and seconded by Ms. Patterson and carried to uphold the determination of the zoning administrator that the proposed use constitutes a Residential Facility.

Minutes approved by the Board of Zoning Appeals May 25, 2021.

Mr. Bement	Yes	Ms. Tingle	Yes
Mr. Brand	Yes	Ms. Patterson	Yes
Ms. Graham	Abstained	Mr. Ciani	Yes
Mr. Martin	Yes		



Board of Zoning Appeals  
Secretary