

**BEFORE THE BOARD OF ZONING ADJUSTMENT  
OF THE DISTRICT OF COLUMBIA**

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Appeal of Van Ness South Tenants' Association

BZA Appeal No. 18151

Hearing Date: January 4, 2010

**PRE-HEARING STATEMENT OF THE UNIVERSITY OF THE DISTRICT OF  
COLUMBIA**

At issue in this appeal is whether the Department of Consumer and Regulatory Affairs ("DCRA") erred in approving the issuance of building permits that authorized the construction of minor interior improvements to 21 existing apartment units in an existing apartment building.

The appellant, Van Ness South Tenants Association ("Van Ness South") asserts error because the permit allegedly authorized improvements that changed the use of units from an apartment house use to a dormitory use. Van Ness South's claims fail for two reasons.

- 1) The interior alterations failed to change the use of the 21 units, which continue to be "apartment" units under the Zoning Regulations because they contain kitchen facilities, are under the exclusive control of the occupants, and provide accommodations on a monthly or longer basis.
- 2) Even if the interior alterations had changed the use of the units to a dormitory use, it is well-settled that a dormitory use is permitted as a matter of right in the R-5-D Zone District when it is not located within the boundaries of an approved campus plan.

The remaining claims of error raised by Van Ness South in its appeal are not within the Board's jurisdiction and should therefore be dismissed. Section 3100.2 of the Zoning Regulations permits the Board of Zoning Adjustment ("Board") to hear and decide appeals only regarding errors in the administration and enforcement of the Zoning Regulations. Errors regarding building and construction codes, housing and business license process, or the completion of the permit application itself are not within the jurisdiction of the Board.

**I. Background**

The property that is the subject of this appeal includes two apartment buildings, known as Van Ness West and Van Ness South ("Apartment Buildings"), which are located at 3003 Van Ness Street NW ("Property"). The Property is located in the R-5-D Zone District.

Briefly, on August 13, 2010, DCRA issued building permit B1009105 (Permit) pursuant to its authority under 12 DCMR Section 104.2. The Permit authorized the construction of 21 interior walls in 21 units ("Work") in the Apartment Buildings. Plans illustrating the location of the proposed walls were included with the permit ("Plans"). The work was undertaken. On October 15, 2010 DCRA conducted an inspection as required under 12 DCMR Section 104.4 and approved the completed work.

The 21 units, which are scattered throughout both buildings, are occupied by students who attend the University of the District of Columbia ("UDC"). UDC, which rents the units from the owner, is the lessee of the property involved, and is automatically a party to the appeal. See 11 DCMR § 3117.11(a)(3).

## **II. The Units Are Still Apartment Units Under the Zoning Regulations**

### **A. Overview of the Definition of "Apartment" Under the Zoning Regulations**

The Apartment Buildings were constructed as an apartment house under the Zoning Regulations, and each apartment contains separate bathroom and cooking facilities. The Apartment Buildings have a total of approximately 625 units.

Section 199 of the Regulations defines an "apartment" as a "habitable room with kitchen and bathroom facilities exclusively for the use of and under the control of the occupants of those rooms in a building containing three or more apartments." 11 DCMR § 199 (emphasis added). An "apartment house" is a building that contains three or more apartments and provides accommodation "on a monthly or longer basis." 11 DCMR § 199 (emphasis added).

Apartments are a subset of the universe of "dwelling units," which are defined in Section 199 as "one or more habitable rooms forming a single unit that is used for living and sleeping purposes, that may or may not contain cooking facilities." The definition of "dwelling unit" states that it includes "apartments" but not "rooming units." "Rooming units" are defined as "one or more habitable rooms forming a single habitable unit used or intended to be used for living or sleeping purposes; but not for the preparation or eating of meals."

Based on the foregoing, what distinguishes an apartment from a rooming unit and other housing units is that an apartment has kitchen facilities, is exclusively for the use of and controlled by its occupants, and permits stays on a monthly or longer basis.

### **B. The Units Continue to Meet the Definition of "Apartment"**

Here, the Work did not change the use of the units under the Zoning Regulations, and the units continue to meet the definition of "apartment" for the following reasons.

1. The Zoning Regulations do not limit the number of bedrooms within an apartment. The Work created additional walls in order to create a second bedroom within each unit. Nothing in the Zoning Regulations limits the number of bedrooms in an apartment and, as a matter of practice, apartment buildings regularly contain a mix of one, two, and even three or more bedroom units.

To the extent that the Work permitted a greater number of beds in each unit, such a change does not constitute a change in use. Nothing in the Zoning Regulations indicates a limit on the number of persons permitted to live in a multiple dwelling unit. Even if the limits that apply to one-family dwellings applied to multiple dwellings, the units will still comply because they house less than six unrelated persons.

2. The units continue to contain kitchen facilities. The Work did not alter the bathroom or kitchen facilities in each unit; each unit continues to have a separate bathroom and kitchen. This distinction is important, because the presence or absence of kitchen facilities is what distinguishes an apartment from other residential uses, such as rooming units.
3. The units are under the exclusive control of the occupants, and those occupants stay on a monthly or longer basis. Here, UDC is the primary tenant for each unit under a standard one-year lease. Each unit is occupied by up to four UDC students, who stay in the unit for a period greater than one month.

**C. The Units Do Not Meet the Definition of Dormitory**

The layout and location of the units do not meet the definition of “dormitory.” The term dormitory, while used in the Regulations as a distinct category of use, is not defined in Section 199. Accordingly, the Regulations turn to the dictionary definition. According to *Webster’s 3<sup>rd</sup> New International Dictionary*, a dormitory is “a residence hall providing separate rooms or suites for individuals or for groups of two, three, or four with common toilet and bathroom facilities but usually without housekeeping facilities.”

Here, the units are, by definition, apartment units under the Zoning Regulations because they contain individual bathroom and kitchen facilities. The definition of dormitory provided above further supports this understanding, because it distinguishes dormitories as units in which the bathrooms and in particular the kitchens would be shared facilities (assuming such kitchen facilities even exist in the building).

Furthermore, the definition of dormitory presumes that the entire building is a residence hall configured the same way. Here, the Work was completed on less than 3.5% of the units in the Apartment Buildings, and therefore could not have changed the use of the buildings into a residence hall. The Apartment Buildings continues to remain as apartment buildings under the Regulations because the units are under the exclusive use and control of their occupants.

Indeed, the units in question are not located adjacent to each other or even concentrated on the same floor; rather, they are distributed throughout the Apartment Buildings. This further supports the understanding that the units are not a dormitory, because there is no element of shared use among the units. The only thing that distinguishes the units from other apartments is the identity of the occupants as UDC students.

**D. The Identity of the Occupants as Students Does Not Preclude Categorization as an Apartment Use.**

The occupancy of the units by UDC students does not change the use of the units under the Zoning Regulations. Nothing in the Zoning Regulations indicates that mere use of an apartment unit by a college or university student, by itself, constitutes a change in use to a dormitory use.<sup>1</sup> Rather, under the Regulations it is layout of the unit itself, control over the unit,

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<sup>1</sup> Note also that, much like the definition of “apartment,” the definition of “dormitory” does not rely on the identity of the occupant. While dormitories are certainly associated with college or university students, they are also

and duration of stay—and not the identity of the occupant—that defines whether the unit is an apartment unit. Furthermore, the D.C. Human Rights prohibits such discrimination against students as a class. See D.C. Code § 2-1401.01 (prohibiting discrimination on the basis of “matriculation”).<sup>2</sup>

This is, of course, is unsurprising to anyone who lives in an apartment building in the District of Columbia. Many apartment buildings – and in particular apartment buildings located in near proximity to any one of the many colleges and universities that call the District home – include units that are rented out to students. Indeed, given the close proximity of the Apartment Buildings to other area institutions (including Howard University’s law school, also located nearby, and American University, located one stop away on the Red Line), it is likely that other college students have lived – or currently live – in the Apartment Buildings. There is no reason for UDC students to be treated any differently.

### **III. Even the Units Were Considered a Dormitory, It is Well Settled that Such Use is Permitted Under the Zoning Regulations**

Assuming for the sake of argument that the Work constituted a change in use to a dormitory, such use would still be permitted as a matter of right. In *Watergate West, Inc. v. D.C. Bd. of Zoning Adjustment*, the D.C. Court of Appeals confirmed that dormitories are permitted as a matter-of-right in the R-4 and R-5 zones so long as they are not located within the boundaries of an approved campus plan. 815 A.2d 762, 766-67 (D.C. 2003). In *Watergate West*, The George Washington University converted an off-campus hotel in the R-5-E zone into a dormitory, and the Court held that such use did not require special exception approval under Section 210 because the building was located outside of the campus boundaries.

Here, the Apartment Buildings are located in the R-5-D zone and are not within the boundaries of any approved campus plan for UDC or any other college or university. Accordingly, such use is clearly permitted as a matter of right.

### **IV. The Use of the Units is Not Disruptive**

Notwithstanding the fact that UDC students have the absolute right to live in the Apartment Buildings, the University has worked closely with the building management in order to ensure that their presence is not disruptive to other building residents. UDC takes its responsibility to the neighborhood very seriously, and makes sure that student occupants of the apartments are good neighbors and follow all applicable rules. The building management refers

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used as housing for other groups (e.g. as housing for a religious order). This further supports the clear intent of the Regulations, which is that the identity of the occupants of a residential building does not, by itself, define whether or not the use is a multiple dwelling or a dormitory or other kind of use.

<sup>2</sup> The provisions of the Human Rights Act are, of course, cited by the Board of Zoning Adjustment and Zoning Commission in agency orders.

all complaints to UDC's Office of Residential Life, which documents and follows up on each complaint. There have been just a handful of complaints over the course of the semester, most of which pertain to noise issues that are common in any apartment complex with wood floors, and the University has worked with its students to ameliorate the situation and ensure a more harmonious living environment for all residents.

Because the use of the units continues to be a conforming apartment use, such noise issues are not directly within the purview of the Board. In general, college or university uses are permitted in residential zone districts as a special exception under Section 210 of the Zoning Regulations. Under the standards applicable to campus plans reviewed under Section 210, issues related to "noise" and "number of students" are considered by the Zoning Commission in its review and approval of the campus plan. To the extent that the university's location in a residential zone creates noise impacts that are perceived to be objectionable by some, such impacts should be addressed in the review and processing of the UDC campus plan under Section 210. The University is currently undertaking preparing such a plan, which will be submitted to the Zoning Commission in early 2011. Note that campus plans are exclusively within the jurisdiction of the Zoning Commission. See 11 DCMR § 3035.

**V. The Remaining Issues Do Not Involve Zoning Issues and are Therefore Beyond the Jurisdiction of the Board.**

The appellant's remaining contentions in this appeal do not relate to errors in the administration and enforcement of the Zoning Regulations and are therefore outside the Board's jurisdiction under the Zoning Act and Zoning Regulations. See 11 DCMR § 3100.2. The appellant contends that the building permit was defective because of allegedly incorrect information contained thereon and because of an alleged failure to identify certain elements of the project. These are clearly issues concerning DCRA's administrative procedures regarding the preparation and completion of the building permit application, which are not zoning issues for the Board. Further, the appellant contends that the permits were incorrectly issued because the plans allegedly did not meet standards set forth in the construction codes applicable to construction in the District of Columbia. Again, the interpretation and application of these codes do not pertain to the Zoning Regulations, and are therefore not within the jurisdiction of the Board.

In addition, to the extent that any of the above errors arguably failed to permit DCRA to evaluate the question of whether the Work constituted a change in use, such errors are harmless because the use of the units have, in fact, not changed.

**VI. Conclusion.**

For the reasons set forth above, the Board should affirm the issuance of the Permit and use of the units as a continued apartment use that is permitted as a matter of right, and deny the portion of the appeal alleging the issuance of the permit violated the Zoning Regulations. All other issues are outside of the Board's jurisdiction and should therefore be dismissed.

Respectfully submitted,

GOULSTON & STORRS, PC

A handwritten signature in dark ink, appearing to read "David Avitabile", is written over a horizontal line.

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Date: December 29, 2010

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Pre-Hearing Statement of the University of the District of Columbia was served by electronic mail and by first-class mail, this 29<sup>th</sup> day of December, 2010, upon the following:

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