DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington D.C. 20001

Appeal of Senior Dwelling, Inc. Appeal No. 18820

DCRA'S PRE-HEARING STATEMENT

The Zoning Administrator ("ZA") has moved to revoke the certificates of occupancy for 223-225 56th Place N.E. ("the premises.") Appellant Senior Dwelling Inc. has appealed arguing that the premises are being operated as a "rooming house" in compliance with the certificates. Because the premises are actually being used as a "community based residential facility," the appeal should be denied.

FACTS

Rosemary Ogbenna, the owner of Senior Dwelling Inc., has a long history of operating community based residential facilities in the District. In 2001, she opened two such facilities at 4910 First Street N.W. and 5033 North Capital Street N.E. Exhibit A, Affidavit of Mebane, ¶ 3, p. 1.[1] However, in 2009 she surrendered the licenses for these facilities after the District identified numerous deficient practices. *Id.* At around the same time, Ms. Ogbenna established Senior Dwelling Inc. and obtained licenses and

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[1] Ms. Mebane's affidavit and other Exhibits filed with this statement have been redacted to remove the identifying information of patients. This is done to comply with privacy laws.

The authors of the investigative reports and Ms. Mebane will be available for questioning at the hearing.

certificates of occupancy to operate rooming houses at 223 and 225 56th Place N.E.[2] Exhibit H, C of Os. The premises are connected by a cut in the wall that allows access between 223 and 225 56th Place N.E. Exhibit B, Report of Meredith, p. 3.

From nearly the day the premises opened, there have been complaints about the way it operates. Most notably, two tenants have died while living in the premises. The first occurred in July 2012. The DC Fire Department found an unresponsive individual in an extremely hot room in a bed covered with food and fecal matter. Exhibit A, at ¶ 5, p. 2. The home health aide who had been caring for the patient "neglected to call 911 when the patient complained of fainting and blacking out due to heat in his bedroom. The aide left the resident unattended to go to [the] store, and when she returned, the resident was unresponsive." *Id.*

A little more than a year later, in September 2013, another tenant was found deceased in his room. *Id.* at ¶ 5, p. 3. A complaint was filed alleging that the deceased had been missing for four days prior to the discovery of his body. *Id.* "The complainant alleged that the resident's money was missing and the resident served non-nutritious foods. Additionally, the complainant further alleged that Senior Dwelling. Inc, misrepresented their services by indicating that they could provide the care and health services necessary to support the deceased." *Id.*

Numerous complaints about the premises led to investigations by DCRA and the Department of Health. *Id.* at ¶ 5, pp. 2-5. The investigations discovered that Ms. Ogbenna solicited tenants from nursing homes and hospitals. *Id.* at ¶ 5, p. 2; Exhibit C,

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[2] 223 and 225 56th Place N.E. are zoned R-2. Rooming houses are not allowed in R-2 zones. However, it is not necessary to consider whether the certificates should be revoked on this basis because even accepting that the certificates were valid when issued, they should be revoked because the actual use differs from what is provided in the certificates.

Report of Walker of Follot, p. 14. She presented her business as an assisted living residence or group home that provides 24 hour staffing. Exhibit A at ¶ 5, p. 2; Exhibit C, p. 14.

Interviews of the premises' tenants revealed that they had trouble communicating and often did not know who was responsible for managing their finances or how their food or personal belongings were purchased. Exhibit C, pp. 2-10. Many of the tenants had special needs requiring in home management plans. Exhibit A at ¶ 5, p. 3; Exhibit C, pp. 2-10. The tenants had conditions such as schizophrenia, heart disease, generalized weakness, and end stage renal disease. Exhibit C, pp. 3, 5, 7, 9. They had health aides who administered medication, assisted with hygiene, cooked meals, and escorted them to their medical appointments, though it was determined that the aides were not fully implementing the home management plans. Exhibit A at ¶ 5, p. 3-5; Exhibit C, pp. 2-10; Exhibit D, Statement of Deficiencies. The walls of the premises were posted with notices labeled "Senior Dwelling Cleaning Instructions for the Nursing Aides," Nursing Aide Grouping Category," "Weekly Schedule," and "Senior Dwelling Rules and Regulations." Exhibit B, p. 2. There was also a staff member at the premises who served as a "night sitter." Exhibit A at ¶ 5, p. 3. And Ms. Ogbenna was listed as the emergency contact person for a number of the tenants. Exhibit A at ¶ 5, p. 4. It appears that the premises provided these services in exchange for the residents signing over their social security checks to Ms. Ogbenna. Exhibit A at ¶ 5, pp. 2, 4; Exhibit C, pp. 5, 8-10.

Following the investigations, it was determined that the premises are not being operated as a rooming house. Exhibit B, p. 1; Exhibit C, p. 15; Exhibit E, Cease and Desist Notice. Because the certificates of occupancy for the premises are for a "rooming

house,"[3] the Zoning Administrator moved to revoke the certificates of occupancy. The Zoning Administrator has determined that the premises are a "community based residential facility" under the zoning regulations because the numerous investigations revealed that the tenants have serious health conditions and share a common need for treatment, rehabilitation, assistance, or supervision in their daily living. Exhibit F, Affidavit of LeGrant. Appellant has appealed that decision.[4]

ARGUMENT

The issue in this case is whether the Zoning Administrator properly moved to revoke the certificates of occupancy for the premises. The Zoning Regulations provide that "no person shall use any structure, land, or part of any structure or land for any purpose until a certificate of occupancy has been issued to that person *stating that the use complies with the provisions of this title.*" 11 DCMR § 3203 (emphasis added). The impact of this regulation on this case is that if the premises are being used for a different purpose than stated in the certificates of occupancy, then the premises are operating illegally and the Zoning Administrator's decision to revoke the certificates should be affirmed. See *Kuri Bros., Inc. v. DC BZA*, 891 A.2d 241, 244 (D.C. 2006)(proper to revoke certificate of occupancy when building not being operated as provided for in certificate).

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[3] It can be speculated that the reason Ms. Ogbenna sought rooming house certification is that there is less regulation of rooming houses. Specifically, the Department of Health does not oversee the operation of rooming houses. In fact, Ms. Ogbenna herself has stated that "the rooming home provided her with more freedom to do other things." Exhibit A, at ¶ 5, p. 5.

[4] DCRA has also moved to revoke the premises' business license. That case is pending at the Office of Administrative Hearings, though the OAH case has essentially stayed the case pending a decision in this case.

So the question is whether, for zoning purposes, the premises are actually being used as a "rooming house," which is what is provided for in the certificates, or as a "community based residential facility" which is what the Zoning Administrator concluded. The Zoning Regulations define "rooming house" as "a building or part thereof that provides sleeping accommodations for three (3) or more persons who are not members of the immediate family of the resident operator or manager, and in which accommodations are not under the exclusive control of the occupants. A rooming house provides accommodations on a monthly or longer basis." 11 DCMR § 199.

Admittedly, this is a broad definition that could sweep in many different types of facilities, from rehabilitation homes to nursing homes to assisted living facilities. But it seems that the Zoning Commission was aware of this fact because it put a limit on the definition. Importantly, the Zoning Regulations provide that "[i]f an establishment is a community-based residential facility as defined [by the Zoning Regulations], it shall not be deemed to constitute any other use permitted under the authority of these regulations." 11 DCMR § 199 (definition of "community-based residential facility.") It follows that if a facility is a "community based residential facility" then it cannot be a "rooming house" for zoning purposes.

As defined by the Zoning Regulations, a "community based residential facility [is] a residential facility for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living." 11 DCMR § 199; see also *Williams v. DC BZA,* 535 A.2d 910, 911 (D.C. 1988)("CBRFs are facilities 'for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living.'")

The key language in this definition is "common need for treatment,... assistance, or supervision." It means that if the residents of a facility have a common need for treatment, assistance or supervision, than the facility is a "community based residential facility," as opposed to a "rooming house" under the zoning regulations. See Exhibit G, *Appeal No. 17043 of the Stanton Park Neighborhood Association* (2004)("a rooming house or boarding house provides accommodations and possibly housekeeping services, but it does not provide any specialized supervision, therapeutic services, or medical care.").

Here, the District Government investigated the premises and discovered that the tenants of the premises are elderly, unwell individuals who are often confused. Many of the tenants present during the investigations had health plans requiring the assistance of health aides who administered medication, assisted with hygiene, cooked meals, and accompanied them to medical appointments. The tenants had conditions like schizophrenia, heart disease, generalized weakness, and end stage renal disease. The walls of the premises were posted with notices labeled "Senior Dwelling Cleaning Instructions for the Nursing Aides," Nursing Aide Grouping Category," "Weekly Schedule," and "Senior Dwelling Rules and Regulations," indicating that Appellant was aware of the medical services provided to the tenants and even oversaw the services. There was also a staff member who served as a "night sitter," apparently to monitor the tenants' well being at night. And the owner of the premises, Ms. Ogbenna, was listed as the emergency contact person for many of the tenants, a fact that illustrates that the relationship between Ms. Ogbenna and the tenants exceeded the normal landlord-tenant relationship of a rooming house.

Based on the numerous investigations, the Zoning Administrator determined that the residents of the premises shared a common need for care and, therefore, the facility qualifies as a "community based residential facility." So the Zoning Administrator moved to revoke the certificates of occupancy. This reasonable action, which is amply supported by the facts, should be affirmed.

Appellant's response is that 223-225 56th Place is not a "community based residential facility" because 3rd party nurse contractors, not employees of the premises, provide the required care for the tenants. But this fact is irrelevant because, for zoning purposes, it makes no difference who provides the care. Rather, as explained above, what matters is that the tenants are "persons who have common need for treatment,... assistance, or supervision."[5] So the focus is on the residents of the facility and whether they share a need for treatment. The focus is not on who provides the services to the residents. As explained above, there can be little doubt that the tenants of the premises share a common need for treatment, assistance, and supervision.

Appellant also seems to argue that because the District decided that the premises were being operated as a rooming house in 2010, the District is estopped from not moving to revoke the certificates. That is false for a couple of reasons. First, the determination Appellant points to was made by the Department of Health, not the

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[5] It is also worth pointing out that the zoning regulations provide that the "community based residential facility" definition "includes, but is not limited to, facilities covered by the Community Residence Facilities Licensure Act." So "community residence facilities" are essentially a subset of "community based residential facilities." The DC Code defines "community residence facility" as "a facility that provides a sheltered living environment for individuals who desire or need such an environment because of their physical, mental, familial, social, or other circumstances, and who are not in the custody of the Department of Corrections." DC Code 44-501. This definition is satisfied here since the tenants of the premises have physical or mental conditions that necessitate a sheltered living environment.

Zoning Administrator. It is the Zoning Administrator who administers the zoning regulations. Second, just because the District decided that the premises were in compliance four years ago does not mean that the District cannot re-evaluate if conditions change. And, as has been explained in detail, the investigations performed by the District revealed that the premises are being operated as a "community based residential facility."

CONCLUSION

Because the premises are being operated as a "community based residential facility," the certificates of occupancy are invalid. And contrary to Appellant's position, the Zoning Regulations simply do not require that the treatment be provided by employees of the facility for the facility to qualify as a "community based residential facility."[6] Therefore, this appeal should be denied.

Respectfully Submitted,

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Date: 9/16/14

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[6] This makes sense because if Appellant's argument was accepted, a facility, such as a drug rehabilitation home, could avoid qualifying as a community based residential facility simply by using contractors instead of employees to provide the services.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September 2014, a copy of the foregoing Brief was served to:

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