

**DRAFT FINDINGS OF FACT AND CONCLUSIONS OF LAW
PREPARED BY DCRA**

October __, 2014

Appeal No. 18820 of Senior Dwelling, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from a April 21, 2014 decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs to revoke rooming house Certificates of Occupancy Nos. 169076 and 169061, in the R-2 District at 223 and 225 56th Place, N.E. (Square 5248, Lots 112 and 113).

HEARING DATE: September 23, 2014

DECISION DATE: October 21, 2014

ORDER DENYING APPEAL

This appeal was submitted to the Board of Zoning Adjustment (“**Board**” or “**BZA**”) by Senior Dwelling, Inc. (the “**Appellant**”). The appeal challenges a decision made by the Zoning Administrator (“**ZA**”) to revoke rooming house Certificates of Occupancy Nos. 169076 and 169061 (“**Certificates**”) for 223 and 225 56th Place, N.E. (Square 5248, Lots 112 and 113) (“**Property**”). The ZA moved to revoke on the basis that the Property was not being operated as provided for in the Certificates. The Appellant alleges that the ZA erred in moving to revoke the Certificates because the Property is actually being operated as a rooming house.

Based on the evidence in the record, including the prehearing submissions and testimony received at the public hearing, and for the reasons set forth below, the Board denies the appeal as without merit.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing for September 23, 2014. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 7C (the ANC in which the property is located), the property owner, and DCRA. (Exhibits 9-11.)

Parties

Appellant is Senior Dwelling, Inc., the owner of 223-225 56th Place, N.E. DCRA is the Appellee, as the “person” whose administrative decision is the subject of the instant appeal, pursuant to 11 DCMR § 3199.1(a)(2). The ANC did not participate in the case.

Pre-Hearing Submissions

The Board received prehearing materials from the Appellant on September 9, 2014, pursuant to 11 DCMR § 3112.10 (Exhibits 12 and 12A-I). DCRA submitted its prehearing statement and exhibits on September 16, 2014 and September 22, 2014 (Exhibits 15, 15A-H and 17). A neighbor of the Property, Joy Cottman, also filed a witness statement in the matter on September 19, 2014. (Exhibit 16).

Appellant’s Case

In its prehearing statement, the Appellant argued that the Property is in full compliance with all zoning and construction code regulations. It contended that the Property is operated as a rooming house. Appellant also argued that the District has previously determined that the Property was being operated as a rooming house, the proper venue for resolving any issues that may exist is the Office of Administrative Hearings where another case is currently proceeding, and that the District government has engaged in a campaign to harass Appellant.

At the hearing, the Appellant moved to dismiss this case arguing that the proper venue was the Office of Administrative Hearings. Appellant also presented testimony from Rosemary Ogbenna, the owner of the Senior Dwelling, Inc., and April Brent, a former discharge manager for Thomas Moore Nursing Home.

Ms. Ogbenna testified that Appellant did not provide medical services directly to any residents. She also stated that the Property's residents are capable of independent living, some of the residents do not require the assistance of health aides, and Appellant would not accept as residents any individual who required 24 hour care and has rejected potential residents based on their medical conditions. However, Ms. Ogbenna testified that two residents have died while living at the Property, one of whom had pancreatic cancer while the other had problems with alcohol. And under cross-examination, Ms. Ogbenna admitted that numerous current and past residents of the facility have had health aides to assist the residents, that health aides visit the Property every day of the week, that she has been listed as the contact person for residents, that she has been the social security payee for residents whereby she directly received the residents' social security checks, that she solicited nursing homes and hospitals for residents, and that at one time she employed a “night sitter” to be present after the health aides left and whose job it was to monitor a resident’s safety. She also admitted that the walls of the Property 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.”

Ms. Brent testified that while employed at Thomas Moore Nursing Home she was involved in discharging patients from Thomas Moore to Appellant. She stated that she visited the Property and concluded that it was a rooming house. She also testified that the patients discharged to Appellant were capable of independent living. But Ms. Brent admitted that she considered Ms. Ogbenna a friend and that every patient who was discharged to Appellant was also prescribed a home health aide.

DCRA’s Case

In its prehearing statement, DCRA argued that the ZA properly moved to revoke the Certificates of Occupancy because the Property is being operated not as a rooming house but as a community based residential facility (“**CBRF**”). DCRA stated that the Property so qualified because the residents share a common need for treatment, assistance, or supervision. As support for this position, DCRA offered as exhibits numerous reports that were prepared by the District government after investigating the Property.

At the hearing, DCRA responded to the motion to dismiss by arguing that this case is properly before the Board because it involves the interpretation of the Zoning Regulations. DCRA also presented the testimony of Sharon Mebane, Program Manager for the Department of Health, Rolland Follet, Sanitarian for the Department of Health, and Matthew LeGrant, Zoning Administrator.

Ms. Mebane testified that Ms. Ogbenna had previously operated CBRFs in the District but surrendered her license for these facilities after she was issued an order to correct deficient practices. Ms. Mebane stated that she became aware of the Property after numerous complaints were filed regarding its operation including the deaths of two residents. She stated that the District had attempted to investigate the Property in 2009 but was unable to get inside the premises. But the Property was investigated on numerous occasions in 2013. The investigations concluded that many of the residents required the assistance of health aides, the safety of residents without aides was at risk, there were residents with health plans prescribing 24 hour care, Ms. Ogbenna signed admission records for some residents making her responsible for the care of the residents when health aides were not present, the Property employed a night sitter to be present after the health aides left for the day, the Veteran’s Administration had removed residents from the facility for safety reasons, and an organization that supplied health aides (T&N) terminated its services after finding out that the Property did not provide the 24 hour care that Appellant had represented was provided.

Mr. Follet testified that he personally investigated the Property. In the course of his investigation, he spoke to residents, health aides, reviewed clinical records, and spoke to third

parties such as social workers. After interviewing the residents, his general impression was that the residents were not capable of independent living. And some of the residents did not know how their finances were handled or how their groceries were purchased. One resident stated that she was not allowed out of the house. Mr. Follot also discovered that food was prepared by health aides, the resident director who was an employee of the Property prepared food for residents without a health aide, and the resident director was involved in giving out medication. Interviews of the health aides indicated that they assisted residents with daily living activities. Follot also testified that in numerous of the health plans that he reviewed there was information indicating that the residents resided in a group home that provided 24 hour care. In addition, during his conversation with Vera Oberg, Director of Nursing for T&N Reliable, which provided nurses for various residents, Ms. Oberg stated that the residents could not function independently which is why they lived at the Property.

The final witness, ZA LeGrant, was accepted as an expert on zoning matters. He testified that he had reviewed the Certificates of Occupancy for the Property as well as the various investigative reports. Based on the information contained in the investigative reports, he determined that Property was operated as a CBRF. He based this conclusion on the fact that the residents were not living independently and necessitated assistance in their daily living.

Closing of the Record

At the end of the hearing the Board deferred its decision on the merits of the case and closed the record, except to receive enlarged copies of the photographs of the notices posted on the Property walls and a copy of the plans of care referred to at the hearing, as well as proposed findings of fact and conclusions of law from all parties by October 14, 2014. DCRA provided the requested documents on October __, 2014. The Board scheduled the case for decision on October 23, 2014, at which time it considered the merits of the case and voted ____ to deny the appeal.

FINDINGS OF FACT

The Property

1. The property that is the subject of this appeal is located at 223 and 225 56th Place, N.E. (Square 5248, Lots 112 and 113).
2. The Property is zoned R-2.
3. 223 and 225 56th Place, N.E. are connected on the first floor level by a cut in the wall that allows access between the properties.
4. The layout of both 223 and 225 56th Place, N.E. is identical. The first level has a living room, laundry area, bathroom, and kitchen. The second level has an office, bedroom, and

bathroom. The third level consists of two bedrooms and a communal bathroom. The fourth level has four bedrooms and a communal bathroom.

Activities on the Property

5. Certificates of Occupancy Nos. 169076 and 169061 permit the Property to be used as a rooming house.
6. Since the Property commenced operations under the Certificates, various complaints have been made regarding its operations.
7. Two tenants have died while living on the Property. 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. 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.
8. In September 2013, another tenant was found deceased in his room. A complaint was filed alleging that the deceased had been missing for four days prior to the discovery of his body. The complainant alleged that the resident's money was missing and the resident served non-nutritious foods. Additionally, the complainant alleged that Senior Dwelling, Inc. misrepresented their services by indicating that they could provide the care and health services necessary to support the deceased.
9. In response to the various complaints, the District government investigated the Property. However, the first attempted investigation, which occurred in December 2009, was unsuccessful because the investigator was unable to get inside the Property.
10. In 2013, the District was able to enter and investigate the Property on numerous occasions. The Board credits the findings of those investigations as stated in the various investigative reports which are part of the record (Exhibits 15B, 15C, and 15D) and as explained in the testimony of Ms. Mebane and Mr. Follot. The Board concludes that Ms. Mebane and Mr. Follot presented credible testimony and accepts their testimony as factually accurate. The Board also notes that the investigative reports and testimony are backed up by the post-hearing documents provided by DCRA, which the Board also credits as including accurate information. (Exhibits ____).

Specifically, the Board concludes that:

- a. The District has attempted to investigate the Property on numerous occasions. The District investigator was unable to enter the Property in 2009. However, the District was able to investigate the Property in 2013.

- b. Ms. Ogbenna has solicited residents for the Property from nursing homes and hospitals.
- c. Every patient that has been discharged from at least one of the nursing homes, Thomas Moore, to the Property has been prescribed a home health aide.
- d. Numerous residents of the Property have 24 hour health plans.
- e. Many of the Property's residents have suffered from medical conditions, such as schizophrenia, heart disease, generalized weakness, and end stage renal disease, requiring the assistance of health aides in their daily living.
- f. Health aides visit the Property every day of the week.
- g. An organization that supplied health aides for the Property's residents terminated its services after finding out that the Property did not provide the 24 hour care that Appellant had represented was provided.
- h. The Property has employed a night sitter to monitor safety after the health aides leave for the day.
- i. Ms. Ogbenna has served as the social security payee for residents. In this capacity, the social security checks are sent directly to Ms. Ogbenna.
- j. For numerous residents, Ms. Ogbenna has been listed as the responsible party for health issues. As a result, she is responsible for these residents' health care after the aides leave for the day.
- k. The walls of the Property are posted with notices labeled "Senior Dwelling Cleaning Instructions for the Nursing Aides," "Nursing Aide Grouping Category," "Weekly Schedule," and "Senior Dwelling Rules and Regulations." These notices indicate that Appellant takes a role in directing the activities of the health aides.
- l. The resident director for the Property prepares food for residents without a health aide and is involved in handing out medications.
- m. The Department of Health concluded that the safety of residents without health aides was at risk.
- n. The Veteran's Administration has removed residents from the Property for safety reasons.

CONCLUSIONS OF LAW

The Board is authorized by the Zoning Act, D.C. Official Code § 6-641.07(g)(2), to hear and decide appeals when it is alleged by the appellant that there is an error in any decision made by any administrative officer in the administration of the Zoning Regulations. (11 DCMR §§ 3100.2, 3200.2.) In an appeal, the Board may reverse or affirm, in whole or in part, or modify the decision appealed from. (11 DCMR § 3100.4.)

Based on the findings of fact, the Board is not persuaded by the Appellant that the ZA erred in moving to revoke the Certificates of Occupancy.

This Case is properly before the Board

At the hearing, Appellant argued that the proper venue for this case is the Office of Administrative Hearings. The Board rejects that argument since the issue in this case is whether the Certificates of Occupancy properly list the use of the Property as a rooming house for zoning purposes. Issues involving the interpretation of the zoning regulations fall within the jurisdiction of the Board of Zoning Adjustment, not the Office of Administrative Hearings. 11 D.C.M.R. § 3100.2.

The Property is being operated as a CBRF

The zoning question in this case is whether the Certificates of Occupancy list the actual use of the Property.¹ 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. This language means that if premises are being used for a different purpose than as stated in the certificate of occupancy, the premises are operating illegally and the certificate should be revoked. 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).

In this case, the Certificates of Occupancy for the Property allow it to operate as a rooming house. The ZA decided that the Certificates should be revoked because the Property is actually a CBRF. So the question is whether for zoning purposes, the premises are 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.

¹ To the extent Appellant attempts to raise non-zoning issues in this proceeding, such as alleged compliance with Construction Code and supposed harassment by the District, the Board lacks jurisdiction to consider these issues. *Appeal No. 18239 of ANC 6A* (2011) ("As the Board has held several times, the Board has no authority to hear an appeal that is not based upon an interpretation of a zoning regulation").

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 (definition of “rooming house.”) This is broad definition. It is limited, however, by other parts of the Zoning Regulations. Specifically, 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; *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.’”) See also *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.”).

Based on the specific facts of this case, the Property falls within the terms of the CBRF definition because the evidence establishes that the Property’s residents could not live independently but rather necessitate assistance with their daily life activities. Ms. Ogbenna herself has admitted that she solicits residents from nursing homes and hospitals. It is logical to conclude that individuals transitioning from a hospital or nursing home will need assistance in doing so. Ms. Ogbenna also admits that numerous residents have required the assistance of health aides, health aides visit the property every day, she has employed a “night sitter” to monitor a resident’s safety, and the walls of the Property are posted with notices directing the activities of the health aides. Each of these facts indicate that Appellant is not only aware that many of the residents have a need for medical treatment, supervision, and assistance in their daily living, but that Appellant is directly involved in providing that care, supervision, and assistance. In addition, Ms. Ogbenna directly receives the social security checks for some residents. This is an arrangement that is much more typical for nursing homes than it is similar to the landlord-tenant relationship present in most rooming houses.

The District government investigations also revealed additional facts including that Ms. Ogbenna has represented that Appellant provides 24 hour care and that numerous residents have had 24 hour care plans. This evidence indicates that there are residents of the Property that need constant care and that Ms. Ogbenna has represented that the Property can provide such care. Other facts discovered by the District during the investigations are that Ms. Ogbenna has been

listed as the responsible party for numerous residents' medical care, that Appellant is responsible for those residents for which Ms. Ogbenna has signed admission forms, and that the Property's resident director is involved in preparing food and handing out medication. These facts show that the Property has taken a role in providing the necessary care to residents.

When the totality of the facts is considered, it becomes apparent that the operations of the facility far exceed what is provided in a typical rooming house. Rather, the actual operations of the Property are those of a CBRF since the evidence establishes that many of the Property's residents have a need for treatment, assistance, or supervision in their daily living.²²

In arguing that the Property is actually operating as a rooming house, Appellant has made numerous arguments, none of which are convincing. Appellant seems to believe that because the health aides who provide services at the Property are not directly employed by Appellant, the Property is a rooming house. But the definition of CBRF focuses on whether the residents of the facility have a common need for treatment, assistance, or supervision, not on who actually provides the care. And this makes sense because otherwise a facility could avoid qualifying as a CBRF simply by using 3rd party contractors instead of employees. Thus, it is irrelevant that the health aides are contractors, not employees. Furthermore, as explained above, Appellant actually does play a role in the provision of treatment, supervision, and assistance for the Property's residents.

Appellant also puts much weight on the fact that in 2010 the District government concluded that the Property seemed to be operating as a rooming house. However, this finding was based on an incomplete investigation since the investigator never entered the premises. In addition, even if that finding was based on a full investigation, it does not prohibit a later different conclusion if new facts are discovered, which is exactly what happened here.

Finally, in its closing argument at the hearing, Appellant argued that because some residents of the Property have not required the assistance of health aides, the Property cannot be a CBRF. But Appellant's proposed inquiry is too narrow. The focus is on the overall operations of the facility, not on whether every single resident utilized the services of a health aide. If Appellant's position was accepted a facility could avoid being found to be a CBRF by allowing one independent person to live among a large number of patients who require assistance in their daily living. Such a result makes no sense. An interpretation that makes no sense will not be

²² It should also be noted that the Zoning Regulations provide that there are five sub-categories of CBRFs. One of those sub-categories is "community residence facility." 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.

adopted. Also, the facts of this case indicate that all of the residents of the facility very well may require assistance in their daily living. After all, the Department of Health concluded that the safety of residents without aides was at risk so it appears that even these residents need assistance in their daily living.

DECISION

Based on the findings of fact and conclusions of law, the Board concludes that the Appellant has not satisfied its burden of proof with respect to the claims of error regarding the Zoning Administrator's decision to revoke rooming house Certificates of Occupancy Nos. 169076 and 169061. Accordingly, it is therefore ORDERED that the appeal is DENIED.