

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18820 of Senior Dwelling, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from an 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.W. (Square 5248, Lots 112 and 113).

HEARING DATE: September 23, 2014
DECISION DATE: October 21, 2014

ORDER

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) (the “Property”). The ZA moved to revoke on the ground that the Property was not being operated as a rooming house, as provided for in the Certificates. The Appellant alleges that the ZA erred, and that the Property is used 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 affirmed the decision of the Zoning Administrator.

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, Advisory Neighborhood Commission (“ANC”) 7C (the ANC in which the property is located), the property owner, and DCRA. (Exhibits 9-11.)

Parties

The Appellant is Senior Dwelling, Inc., the owner of 223-225 56th Place, N.E. Ms. Rosemary Ogbenna is the sole owner of Senior Dwelling, Inc. DCRA is the Appellee, as the “person” whose administrative decision is the subject of the instant appeal. (See, 11 DCMR § 3199.1(a)(2).) The ANC was an automatic party, but did not participate in the case.

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FINDINGS OF FACT

1. The subject Property is located at 223 and 225 56th Place, N.E. (Square 5248, Lots 112 and 113) in the R-2 zone.
2. The Property is comprised of two buildings: the 223 56th Place building and the 225 56th Place building.
3. The layout of the two buildings is identical. The first level has a living room, laundry area, bathroom, and a kitchen. The second level has an office, bedroom, and a bathroom. The third level consists of two bedrooms and a communal bathroom. The fourth level has four bedrooms and a communal bathroom.
4. Certificates of Occupancy (“C of O”) Nos. 169076 and 169061 were issued to allow the Property to be used as two rooming houses.
5. Several of the persons living at the Property come directly from nursing homes (including St. Thomas Moore Nursing Home) and hospitals.
6. Many of these persons have suffered from serious medical conditions, such as schizophrenia, heart disease, and end stage renal disease, and have required the assistance of health aides in their daily living.
7. Every patient who was discharged to the Property from the St. Thomas Moore Nursing Home was prescribed a home health aide.
8. There are home health aides visiting the Property every day of the week.
9. Numerous residents at the Property have 24-hour health plans.
10. The Appellant has employed a “night sitter” to monitor at least one of the residents after the health aides had left for the day.
11. The resident director for the Property at times prepares food for the residents and is involved with handing out medications to the residents.
12. Ms. Ogbenna has served as the social security payee for various residents. In this capacity, the social security checks are sent directly to Ms. Ogbenna.
13. For various 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.
14. The Appellant gives instructions to the daily nursing aides who visit the Property.

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15. The walls of the Property are posted with notices labeled “Senior Dwelling Cleaning Instructions for 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.
16. The Appellant charges residents \$1,000.00 per month for each room. This amount is high for a room without services, and suggests that the rental amount correlates with costs beyond the cost of a room.
17. Based upon Findings of Facts 8 through 17, the Zoning Administrator determined that the buildings were not used as rooming houses, but were used as a type of community based residence facility (“CBRF”).
18. DCRA then issued a Notice to Revoke the Certificates.
19. This appeal was filed on June 20, 2014.

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 and 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.)

Preliminary Matters.

The Appellant moved to stay the appeal pending the outcome of a case also involving the Appellant before the Office of Administrative Hearings (“OAH”). The Board denied Appellant’s motion because the proceedings before OAH and the Board are two entirely different matters. The OAH case is not (and could not be) a zoning case but pertains to the revocation of Senior Dwelling’s business license. The issue in this appeal concerns the proper use classification for the Property, *i.e.*, whether the Property is used as a “community based residential facility”, as that term is defined in the Zoning Regulations. To the extent the Appellant’s assertions in this proceeding that do not involve an interpretation of the Zoning Regulations, such as alleged harassment by District officials, the Board lacks jurisdiction to consider these issues. *Appeal No. 18239 of ANC 6A* (2011) (Board lacks authority to hear an appeal that is not based to some degree upon the interpretation of a zoning regulation).

The Merits of the Appeal

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 means that if premises are being used for a different purpose than as stated in the C of O, the premises

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are operating illegally and the certificate should be revoked. *See Kuri Bros., Inc. v. District of Columbia Bd. of Zoning Adjustment*, 891 A.2d 241, 244 (D.C. 2006).

In this case, the C of Os for the Property only authorize a rooming house. The ZA decided the C of Os should be revoked because the Property is actually operating as a CBRF. The Zoning Regulations provide that if an establishment is a CBRF, it “shall not be deemed to constitute *any other* use permitted under the authority of these regulations”. (11 DCMR §199 (definition of CBRF).) It follows that, for zoning purposes, if this property is being used as is a CBRF it is operating as a different use than the rooming house use identified on its certificates of occupancy and therefore those certificates were properly revoked.

As defined by the Zoning Regulations, a “[CBRF is] a residential facility for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living.” Based on the facts of this case, the use occurring on the Property falls within the terms of the CBRF definition. The evidence establishes that many of the residents cannot live independently and require assistance with their daily activities. Several residents came to the facility directly from nursing homes and hospitals. It is logical to conclude that these individuals require some assistance in their daily living. Ms. Ogbenna also admits that numerous residents have required the assistance of health aides, that health aides visit the Property every day, that on at least one occasion she has employed a “night sitter” to monitor a resident’s safety, and that the walls of the Property are posted with notices directing the activities of the health aides. Further, Ms. Ogbenna receives social security checks from some of the residents, as payment for their rooms. This arrangement is customarily found in nursing homes and the cost per room is consistent with such facilities. The evidence here therefore demonstrates the need of the Property’s residents for specialized care.

Appellant’s arguments to the contrary are not persuasive.

First, Appellant claims that because the home health aides are not directly employed by her, the Property is not a CBRF. However, the CBRF definition focuses on the *common need* for treatment, assistance, or supervision, not on who actually *provides* the care. In any event, as explained above, Appellant does play a role in the provision of treatment, supervision, and assistance for the Property’s residents.

Lastly, Appellant claims that the Property does not qualify as a CBRF because some of the residents have not required the assistance of home health aides. Even if true, there is nothing in the CBRF definition that requires that every single resident require such assistance. The issue is what the primary use of the property is, and that use is clearly that of a CBRF.

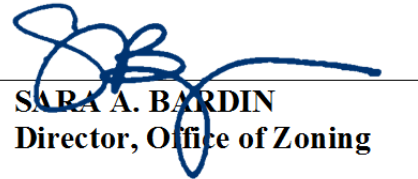
For the reasons stated above, the Board concludes that the Appellant has not satisfied its burden of proof with respect to claims of error regarding the ZA’s decision to revoke the Certificates. Accordingly, the decision of the Zoning Administrator to revoke the certificates of occupancy is affirmed.

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VOTE: **4-0-1** (Lloyd J. Jordan, Marnique Y. Heath, Jeffrey L. Hinkle, and
Anthony J. Hood, voting to affirm the Zoning Administrator; S.
Kathryn Allen not participating.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: September 9, 2015

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT
UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.