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IN REPLY REFER TO:

July 14, 1997

MEMORANDUM

TO: Jill C. Dennis
Director, Office of Planning

THROUGH: Maria Holleran Rivera
Deputy Corporation Counsel
Government Operations Division

FROM: James Randall
Chief, Land Use Section

SUBJECT: Georgetown Overlay Zone Petition

By memorandum of June 20, 1997, you requested legal advice concerning a petition (hereinafter the "Petition") from Advisory Neighborhood Commission 2E and several neighborhood associations. The Petition proposes the creation of a Georgetown Overlay Zone, which would reduce the number of unrelated persons who can occupy single-family dwellings from 6 to 3 in the neighborhoods around Georgetown University and west of Wisconsin Avenue, N.W. You asked whether the proposed regulation (hereinafter the "Regulation") would violate the District of Columbia Human Rights Act, D.C. Code §1-2501, et seq. (hereinafter, "DCHRA").

For the reasons hereinafter set forth, we have concluded that the Regulation may be inconsistent with the DCHRA, but that it is the Zoning Commission, in the first instance, that determines whether its regulations are consonant with District of Columbia law. We recommend modifying the Regulation to address the issue of overcrowding, but without flagging the issue of students' rights. Suggestions to this effect are included.

BZA
Case No. 16566
Exhibit No. 148

Board of Zoning Adjustment
District of Columbia
CASE NO.16566
EXHIBIT NO.148

STATUTORY ANALYSIS UNDER THE DCHRA

The proposed overlay may be inconsistent with the DCHRA and the Comprehensive Plan, because the Petition on its face repeatedly indicates that one of its purposes, and arguably its principal purpose, is to reduce the number of Georgetown University students renting property in the affected neighborhoods. This purpose may be impermissible, because students are a protected class under the DCHRA and commitment to fair housing under the DCHRA is cited as one of the major policies of the Comprehensive Plan. D.C. Code §§1-2501 (one of purposes of DCHRA is to end discrimination based on, among other factors, matriculation), 1-2502(18)("*matriculation*" defined as the condition of being enrolled in a college, or university), and 1-2515(a)(1) (unlawful real estate practice to refuse any transaction in real property or to require different terms based on status of matriculation); 10 DCMR §300.7 (1995)(commitment to fair housing under the DCHRA is a major policy of the Comprehensive Plan); 10 DCMR §300.8 (1995)(eliminating discriminatory barriers to availability of housing is a major goal of the Comprehensive Plan). Zoning regulations are required to be consistent with the Comprehensive Plan. D.C. Code §5-414 (1992); see Citizens Ass'n. of Georgetown v. Zoning Com. of District of Columbia, 392 A.2d 1027 (D.C. 1978).

The issue presented is whether a regulation that has the effect of imposing an obstacle to the availability of housing for Georgetown University students is inconsistent with two of the thirteen enumerated "Major Policies" of Chapter 3 (Housing) of the Comprehensive Plan. Specifically, is the proposed Georgetown Overlay regulation contrary to §§300.7 and 300.8 of the Comprehensive Plan, which recite, respectively, that the District is committed to fair housing under the DCHRA and that eliminating discriminatory barriers to the availability of housing is a major goal of the Plan. 10 DCMR §§300.7 and 300.8 (1995).

The determination of these issues lies within the sole province of the Zoning Commission, because it has exclusive authority to determine whether zoning regulations are inconsistent with the Comprehensive Plan. Tenley & Cleveland Park Emergency Committee v. District of Columbia Bd. of Zoning Adjustment, 550 A.2d 331, 341 (D.C. 1988), cert. denied, 489 U.S. 1082, 109 S. Ct. 1539 (1989). The Zoning Commission's determination is reversible only if a court finds it to be arbitrary, unreasonable, and having no substantial relationship to the general welfare. Citizens Ass'n of Georgetown v. Zoning Comm'n, 477 F.2d 402 (D.C. Cir. 1973); Lewis v. District of Columbia, 190 F.2d 25 (D.C. Cir. 1951).

The intent of the Council of the District of Columbia in enacting the DCHRA was to "secure an end in the District of Columbia to discrimination for any reason other than that of individual merit . . . ." D.C. Code §1-2501 (1992). To achieve this end the Council created numerous protected classes, including a class based on matriculation, i.e., students. Id. Matriculation is defined as the condition of being enrolled in a college or university. D.C. Code §1-2502(18) (1992).

The DCHRA outlaws discrimination in enumerated areas of life, including employment, education, public accommodations, and of particular bearing on the proposed overlay, the area of

real estate transactions. It proscribes the refusal to conduct any real estate transaction or the restriction of any real estate transaction, if that refusal or restriction is based on, among other reasons, the matriculation status of one of the parties. D.C. Code §§1-2515(a)(1) and (2) (1992). Moreover, it prohibits any practice that has the effect or consequence of refusing to conduct or restricting any real estate transaction with students. See D.C. Code §1-2532 (1992); Hessey v. Burden, 615 A.2d 562, 579 (D.C. 1992) (D.C. Code §1-2532 bans discriminatory practices which bear disproportionately on members of a protected class).

Although the proposed overlay is in the form of a regulation rather than a practice, it would tend to authorize practices that might otherwise be impermissible under the DCHRA. The proposed overlay regulation does not directly prohibit landlords in Georgetown from entering into transactions with students, but its intended effect appears to be to reduce the number of such transaction available to students in the affected area. The Petition is replete with references to students and student housing as being the essence of the "problem"necessitating the overlay. It defines the problem as one of the "destabilization of the indicated neighborhoods by the unprecedented conversion of single-family housing in the areas around Georgetown University . . . into rental housing for groups of four or more unrelated individuals." Petition to Zoning Commission for Adoption of Georgetown Area Overlay District, p. 1. It enumerates the number of students residing in the Burleith neighborhood, purportedly the area most affected by the conversions, and comments that the figures ". . . are generally considered by residents familiar with the situation to have grossly undercounted the number of students actually living in the affected area . . . ." Id. [Emphasis added.] Again, adverting to the "problem," the Petition states that "Clearly, these figures show that the problem of conversion of single-family housing to student rental is not confined to Burleith alone." Petition, p. 2. [Emphasis added.] Throughout the Petition "students" is the only class of persons specifically referenced as being subsumed under the category explicitly addressed in the proposed regulation, that of unrelated persons living together in a single house-keeping unit.

These references to students in the proposed overlay regulation are noteworthy because, not only do they tend to demonstrate an adverse and disproportionate effect on students, but more importantly, they tend to evince a discriminatory intent. And whereas effect is significant when analyzing practices, statutes or regulations under the DCHRA, intent appears to be absolutely critical. Discriminatory intent usually proves to be fatal. See Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040 (1976)(the purpose of a challenged statute is more important a factor than the impact); Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849 (1971)(practices are unlawful if they bear disproportionately on a protected class and are not independently justified for some nondiscriminatory reason); Gay Rights Coalition of Georgetown University Law Center v. Georgetown University, 536 A.2d 1 (D.C. 1987)(the Council imported into the DCHRA, by way of the "effects clause," §1-2532, the concept of disparate impact discrimination developed in Griggs v. Duke Power Co.).

The issue at this juncture of the inquiry, assuming discriminatory intent is clear, becomes whether the DCHRA can prohibit the Zoning Commission from promulgating a regulation amending the

definition of family, if that amendment would disproportionately and adversely affect a class protected by the DCHRA. The courts have found that not every discriminatory practice is prohibited, even when intent is clear and the class is protected by the DCHRA. See Evans v. United States, 682 A.2d 644, 648 (D.C. 1996) (age-based peremptory jury strikes not prohibited by DCHRA); Dean v. District of Columbia, 653 A.2d 307, 319 (D.C. 1995) (sex-based discrimination in issuance of marriage licenses not prohibited by DCHRA); NOW v. Mutual of Omaha Ins. Co., 531 A.2d 274, 277-278 (D.C. 1987) (gender distinctions in actuarial pricing policies not prohibited by DCHRA). In each of these cases the court found the challenged practice to involve well understood rights of longstanding that were specifically permitted by pre-existing statutes. Evans, supra, 682 A.2d at 648. In order to proscribe such practices the court required that the DCHRA reflect specific language expressing an intent to overcome distinctions elsewhere permitted by statute. Id. at 648.

For example, the court in Dean concluded that the issuance of marriage licenses to heterosexual couples only did indeed discriminate against homosexual couples. But because of the age-old nature of this practice, i.e., "a well understood right of longstanding," the court refused to alter it in the absence of a clear, explicit injunction in the DCHRA to do so. The courts applied the same type of reasoning to age-based peremptory jury strikes in the Evans case and actuarial pricing policies by insurance companies in the NOW case.

The proposed overlay regulation does not appear to fit into the category of court approved discriminatory practices against classes otherwise protected by the DCHRA, nor does it correspond to the exceptions expressly permitted by the DCHRA. Restriction of single-family occupancy to no more than 3 persons is not a well understood right of long-standing, nor is it a distinction permitted by a previously existing statute. The only express exceptions relating to real estate transactions are for owner-occupied buildings, D.C. Code §1-2518(a), and, significantly, for any restrictions on occupancy contained in previously enacted statutes or regulations, D.C. Code §1-2518(b).

The current restriction in the zoning regulations limiting occupancy in single-family households to 6 unrelated persons, 11 DCMR 199 (1995), would be exempt from challenge under the DCHRA, because of the exemption in §1-2518(b) for previously existing statutes. It was promulgated in 1958, and therefore pre-dates the enactment of the DCHRA, which was enacted in 1977. See §§ 1201 and 1202 of Zoning Regulations of the District of Columbia, effective May 12, 1958. Moreover, the current family definition is of general applicability and would apply to students in their real estate transactions throughout the District of Columbia, whereas the proposed regulation focuses only on neighborhoods surrounding a college campus. As indicated, this focus may be evidence of discriminatory intent against students.

The DCHRA is directly applicable to District of Columbia executive agencies, but not to the Zoning Commission. See D.C. Code §§1-2543 (1992), 5-427 (regulations of Mayor or Council must be consistent with zoning regulations); §492(c) of the District of Columbia Self-Government and Governmental Reorganization Act (Zoning Commission to exercise all the powers and

perform all the duties with respect to zing in the District of Columbia). Section 1-2543 requires the Mayor to establish rules and procedures for the investigation of complaints against "District government agencies, officials and employees alleging violations of this chapter." The Zoning Commission, however, is not an executive agency, and there are no cases, statutes, or regulations indicating that the Mayor is empowered to investigate or make rules for it. See Tenley & Cleveland Park, 550 A.2d 331. Therefore regulations promulgated by the Zoning Commission are not directly subject to challenge under the DCHRA, because the DCHRA does not purport, on its face, to regulate the rulemaking functions of the Commission. They are, however, subject to indirect attack, because commitment to the DCHRA is a major goal of the Comprehensive Plan. See 10 DCMR §§300.7 and 300.8 (1995).

CONSTITUTIONAL ANALYSIS

Nevertheless, the proposed Regulation is problematical, even under traditional equal protection analysis for constitutionality. Such a standard would be less rigorous than statutory analysis under the DCHRA, because the constitutional categories of protected classes are much more restrictive than the bountiful formulations under the DCHRA. Understandably, the Petition relies heavily on the Supreme Court case of Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536 (1974). In that case a zoning ordinance that limited single-family occupancy to 2 unrelated persons was upheld under the traditional test for assessing economic and social legislation. Simply stated, the test is whether the legislation is reasonable, rather than arbitrary, and if so, whether it bears a rational relationship to a "permissible" state objective. Id., 416 U.S. at 8, 94 S. Ct. at 1540. With regard to the overlay, there is little doubt that seeking to reduce density and its attendant aggravations is a legitimate goal. Belle Terre establishes that pursuing this objective through a more restrictive definition of family constitutes a rational means. However, the language in which the Petition is couched flags the issue of permissibility in the overlay Petition, which on its face sets forth the objective of reducing the availability of student housing in the affected neighborhoods. In light of the DCHRA this may not constitute a permissible "state" objective in the District of Columbia.

The circumstances surrounding the overlay proposal are distinguishable from the facts of Belle Terre in other ways. The town of Bell Terre was a small village of only 700 inhabitants living exclusively in one-family dwellings. Belle Terre, supra, 416 U.S. at 2, 94 S. Ct. At 1537. Thus single family dwellings comprised the essence of the town. To threaten or dilute that concept was to undermine the very nature of the village of Belle Terre.

That claim cannot be made for the area around Georgetown University. Indeed, Georgetown University and its students are an integral part of the concept of Georgetown as an area. Moreover, while the Belle Terre ordinance applied uniformly throughout the village, the proposed overlay applies only to a small section of the District of Columbia and does not affect even all students in the District of Columbia equally.

OTHER STATES

Belle Terre established that zoning ordinances that restrict the number of unrelated persons who may live together in a residential zone do not violate equal protection standards under the constitution, and most state courts have followed its lead. See City of St. Joseph v. Preferred Family Healthcare, 859 S.W.2d 723 (Mo. App. 1993); Hayward v. Gaston, 542 A.2d 760 (Del. 1988)(upheld restriction of 4 unrelated persons); Macon Ass'n. for Retarded Citizens v. Macon-Bibb County Planning & Zoning Comm'n., 252 Ga. 484, 314 S.E.2d 218 (1984)(4 unrelated); Kirsch v. Prince George's County, 92 Md. App. 719, 610 A.2d 343 (Md.App. 1992)(upheld ordinance controlling detrimental effect caused by college students in "mini-dormitories"), rev'd, remanded, 331 Md. 89, 626 A.2d 372 (1993), cert. denied, 510 U.S. 1011 (1993); Ass'n. for Educ. Dev. v. Hayward, 533 S.W.2d 579 (Mo. 1976)(rebuffed challenge by clergyman and eight lay members of religious organization); Durham v. White Enterprises, Inc., 115 N.H. 645, 348 A.2d 706 (1975).

The Kirsch case, 92 Md. App. 619, 610 A.2d 343, is noteworthy because it involved an ordinance aimed at students in neighboring Prince George's County, Maryland. It also involved a challenge based on alleged violation of the Prince George's County Human Relations Act, Prince George's County Code, 1987 Edition, as amended, §§2-185, et seq. (hereinafter, "PGHRA"). The PGHRA created many protected classes, including "occupation," which included students. Nevertheless, the Court of Special Appeals, an intermediate state appellate court, held that the protected classes under the PGHRA were entitled to no more protection than they would receive under the Fourteenth Amendment of the United States Constitution, i.e., no more than the Supreme Court afforded in the Belle Terre case. Id. at 729, 610 A.2d at 349. Apparently, the legal tradition in Maryland has been to treat all equal protection claims, whether emanating from the United States Constitution, the Maryland Constitution, or the PGHRA "in like manner and to the same extent as the Equal Protection Clause" of the United States Constitution. Id., citing Murphy v. Edmonds, 325 Md. 342, 353, 601 A.2d 102 (1992)(quoting Attorney General v. Waldron, 289 Md. 683, 704-705, 426 A.2d 929 (1981). Accordingly, the court applied the same traditional rational basis test as applied by the Supreme Court in Belle Terre. And just as in Belle Terre, the students lost, at least temporarily.

Subsequently, the case was reversed by the highest Maryland appellate court, which applied a stricter standard, requiring a more substantial relationship between the method used in the challenged zoning ordinance and the goal. Kirsch v. Prince George's County, 331 Md. 89, 626 A.2d 372 (1993)(hereafter, Kirsch II). The Kirsch II court determined that "classifying rental property on the basis of the occupations pursued by the lessees away from their residence" was arbitrary and irrational. Id. at 104-105, 626 A.2d at 379-380. The court indicated that a differentiation in the zoning ordinance based on the use of the property, as in Belle Terre (single-family use), rather than on the occupation of the occupants, would have been permissible. Under that standard, the Georgetown Overlay would be valid, because its terms apply only to single-family households, and the restriction applies to all persons, students and non-students alike. Thus, even though the Kirsch II court struck down the regulation aimed at students, the reasoning it employed, if applied to the Georgetown Overlay, would support a decision upholding it.

The traditional rational basis test, the one used in the Belle Terre case, requires merely a finding of a rational relationship between the classification in the ordinance and any permissible governmental objective. If this most minimal of standards is applied to the Georgetown Overlay, then it will be of no consequence that the adverse impact of the Regulation falls most heavily on students. The only significant inquiry would be whether the reduction of unrelated persons in a household from 6 to 3 bears a rational relationship to the legitimate goals of reducing, traffic, noise, parking, and maintaining the residential character of the neighborhoods. And, of course, it does.

The most salient criterion on which the DCHRA differs from the PGHRA involves the breadth it is accorded in construction. The DCHRA appears to warrant more consideration in its own right, rather than as a mere redundancy to the Equal Protection Clause of the Fourteenth Amendment. The District of Columbia courts have recognized it as a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds . . . ." Evans, 682 A.2d at 648, quoting Dean, 653 A.2d at 319. As previously indicated, the Georgetown Overlay does not appear to fit into any of the exceptions thus far enumerated by the local courts.

A minority of states have struck down ordinances establishing numerical limits on the number of unrelated persons who may live together. Most of these rulings were premised on state laws or constitutional standards that were found to supplement, rather than duplicate, federal constitutional protections. See Santa Barbara v. Adamson, 27 Cal.3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980)(stricter test applied than in Belle Terre based on right to privacy amendment to state constitution); State v. Baker, 81 NJ 99, 405 A.2d 368 (1979)(finding Belle Terre to be inconsistent with state constitutional provisions); McMinn v. Oyster Bay, 105 N.Y. App. Div.2d 46,, 488 N.E.2d 1240, 482 N.Y.S.2d 773 (1984)(violated due process of state constitution); Easton v. Easton, 53 Pa. Commw. Ct. 216, 417 A.2d 830 (1980)(legitimate interest of population density control not advanced by exclusion of foster children); Kirsch Holding Co. v. Manasquan, 59 N.J. 241, 281 A.2d 513 (1971)(rejected as over inclusive). In light of the deference given the DCHRA in District law, its application to the proposed Georgetown Overlay regulation could very conceivably produce an outcome similar to that of these cases. In essence, the courts could find that the DCHRA supplements traditional constitutional protections, and therefore imposes a higher, stricter standard than the flaccid standard of Belle Terre.

FAIR HOUSING ISSUES

In addition to its numerical restriction on unrelated persons living together as a single housekeeping unit, the proposed overlay regulation limits to 7 the number of persons living in a group home protected by the Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. §§3601-19 (hereinafter, "FHA"). This limitation becomes problematical in view of the Supreme Court's decision in City of Edmonds v. Oxford House, 514 U.S. 725, 115 S. Ct. 1776 (1995). In that case the Court invalidated the application of a city ordinance in Edmonds, Washington to a group of 10-12 persons qualifying as handicapped under the FHA. The ordinance defined family as no more than 5 unrelated persons living together. The Court held

that the only numerical restrictions exempt from the FHA were those based on health and safety, which restricted the number of occupants in accordance with the physical space available. Id.

Moreover, the District is currently negotiating with the United States Department of Justice to more closely tailor its regulations to the dictates of the FHA. Regulations are being drafted to provide a process by which those qualifying under the FHA can seek exemptions from certain regulatory restrictions, such as numerical limits on unrelated persons living together.

In view of these developments, I would advise removing the reference to any specified numerical limit. The phrase in the Regulation, "a group home for not more than seven (7) individuals living together in a housekeeping unit," could be deleted and replaced by the phrase, "group homes eligible for reasonable accommodation treatment under the Fair Housing Act."

CONCLUSION

Precedential support exists for a decision in favor of and against promulgation of the proposed Georgetown Overlay regulation. On the one hand, a Supreme Court decision removes constitutional obstacles to support of the Regulation. But the DCHRA presents an imposing obstacle to adoption, permitting the Zoning Commission to find that reducing student housing opportunities is not a permissible objective. Other states, including California, have moved in this direction, finding protections in their state laws to supplement the basic protections under the Equal Protection Clause of the Fourteenth Amendment. Whichever way the Commission decides will be crucial, because its determinations are entitled to such great weight. As you most likely are aware, a decision in either direction is likely to encounter a robust challenge.

Consequently, you may wish to attempt a more conciliatory course at the outset. Rather than courting the invidious line-drawing that numerical restrictions appear to engender, I would advise that the Regulation be tailored to a less intrusive proportion before submitting it to the Zoning Commission. If the problem to be addressed is one of overcrowding, as indicated in several places in the Petition (". . . lots are small . . ."; ". . . it would reduce overcrowding in these small houses."; "Putting so many people in these houses . . . creates a safety hazard . . .", Petition, pp. 2-3), then, as suggested in the New Jersey Kirsch case, Kirsch Holding Co. v. Manasquan, 59 N.J. at 254, 281 A.2d at 520, consideration might be given to limiting the number of occupants in reasonable relation to sleeping and bathroom facilities or habitable floor space. Such a resolution has received the approbation of courts on both sides of the divisive issue of numerical restriction. See City of Edmonds, 514 U.S. 725, 115 S. Ct. 1776; Kirsch Holding Company, 59 N.J. 241, 281 A.2d 513. Ideally, such an approach could reduce the potential conflict surrounding the Regulation.