GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 19441 of Richardson Place Neighborhood Association, pursuant to 11 DCMR §§ 3100 and 3101, from decisions made on September 27, 2016 and October 20, 2016 by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permits No. B1611469 and B1611470, and subsequently to issue Certificates of Occupancy No. CO1700955 and CO1700918, to allow two adjacent flats in the R-4 District at premises 410 and 412 Richardson Place, N.W. (Square 507, Lots 101 and 102).[1]

HEARING DATE: March 22, 2017
DECISION DATE: May 17, 2017

ORDER GRANTING APPEAL

This appeal was submitted on December 16, 2016 by James J. Wilson on behalf of the Richardson Place Neighborhood Association (the "Appellant"), a non-profit citizens' association comprising owners of approximately ten residences on or adjacent to Richardson Place, N.W., to challenge the decision of the Department of Consumer and Regulatory Affairs ("DCRA") to issue two building permits and two related certificates of occupancy that allowed two flats on adjacent lots in the R-4 Zone.[2] Following a public hearing, the Board of Zoning Adjustment ("Board" or "BZA") voted to grant the appeal and to reverse the determination of the Zoning Administrator ("ZA").

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated January 30, 2017, the Office of Zoning provided notice of the appeal to the Zoning Administrator at the Department of Consumer

[1] This order refers to provisions and zone districts in effect under the Zoning Regulations of 1958 when the decision was made. The 1958 Regulations were repealed as of September 6, 2016 and replaced by the 2016 Regulations; however, the repeal and adoption of the replacement text has no effect on the validity of the Board's decision in this case or of this order.

[2] On the motion of the Department of Consumer and Regulatory Affairs, the Board amended the appeal at the public hearing to include the certificates of occupancy in light of the Appellant's stated intention to appeal their issuance and its willingness to consolidate the two matters. (Exhibit No. 33.) The Property Owner "concede[d] that the issues regarding the issuance of the Certificates of Occupancy for the properties are identical to the issues outlined [by the Property Owner]. As a result, this appeal should include the question of whether the Certificates of Occupancy were properly issued by DCRA." (Exhibit No. 32)

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and Regulatory Affairs; the Office of Planning; the Councilmember for Ward 5 as well as the Chairman of the Council and the four At-Large Councilmembers; Advisory Neighborhood Commission ("ANC") 5E, the ANC in which the subject property is located; and Single Member District/ANC 5E06. The Office of Zoning mailed letters, dated January 30, 2017, providing notice of the hearing to the Appellant; the ZA; Oaktree Development LLC, doing business as OTD 410-412 Richardson Place LLC, the owner of the property that is the subject of the appeal; Common Living, Inc., the tenant for the commercial operation of the property; the Councilmember for Ward 5; and ANC 5E. Notice was published in the *D.C. Register* on February 3, 2017 (64 DCR 1036).

Party Status. Parties in this proceeding were automatically the Appellant, DCRA, ANC 5E, and Oaktree Development LLC ("OTD" or the "Property Owner"). There were no requests for party status.

Appellant's Case. The Appellant argued that the building permits and certificates of occupancy for Oaktree's development at 410 and 412 Richardson Place, N.W. were improperly issued because, notwithstanding Oaktree's assertion that the development would comprise two flats, Oaktree actually intended to use the development as an apartment house, rooming house, or tenement operated by its lessee, Common Living, Inc., and therefore the development should have been limited to 40%lot occupancy rather than the 60% permitted as a matter of right for a flat in R-4. The Appellant objected that "Oaktree constructed a building covering 60% of the lot, representing that it was building two adjacent '2 family flats'" when in fact the Property Owner and its lessee were "on the cusp of opening a newly-constructed, 24-unit dormitory for young professionals on two adjoining, formerly vacant parcels." (Exhibit No. 9.)

DCRA. DCRA asserted that the ZA correctly approved the building permit at issue as compliant with the Zoning Regulations because the permit applications and plan "depicted buildings that complied with the [zoning] definition of two-family flats based on the layout of each unit in each flat as composed of six bedrooms with private baths and shared kitchen, dining, and living areas." (Exhibit No. 33.)

ANC 5E. At a public meeting on February 21, 2017, ANC 5E voted to adopt a resolution in support of the appeal without stating any issues or concerns. (Exhibit No. 28.) At a public meeting on March 22, 2017, ANC 5E adopted another resolution indicating its support for the appeal. (Exhibit No. 36.)

Property Owner. Oaktree Development LLC, dba OTD 410-412 Richardson Place LLC argued that the appeal was without merit because the Property Owner had obtained building permits for, and had completed construction of a flat on each lot of the subject property. The Property Owner asserted that each flat contained two dwelling units, each of which would be occupied by no more than six residents, for a total maximum of 12 residents in each building.

FINDINGS OF FACT

1. The property that is the subject of this appeal is two adjoining lots located at 410

Richardson Place, N.W. (Square 507, Lot 102) and 412 Richardson Place, N.W. (Square 507, Lot 101).

2. The properties were zoned R-4, which was designed to include those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of the dwellings into dwellings for two or more families. The primary purpose of the R-4 District was "the stabilization of remaining one-family dwellings." (11 DCMR §§ 330.1, 330.2.) The R-4 Zone "shall not be an apartment house district…." (11 DCMR § 330.3.)

3. The maximum lot occupancy permitted as a matter of right in the R-4 Zone was limited to 60% for a row dwelling, flat, church, or public school, and 40% for all other structures. (11 DCMR § 403.2.)

4. In 2005, Wilbur Mondie, then the owner of the subject property, submitted an application for area variances to allow the construction of four flats at 410, 412, 414, and 416 Richardson Place, N.W. (Square 507, Lots 810, 812, 814, and 816). (*See* BZA Application No. 17404.) After a public hearing, the Board declined to vote on a motion to deny the application when the applicant indicated an intent to withdraw the application. (*See* BZA Public Hearing Transcript of February 7, 2006 at 79.) The application was subsequently withdrawn.

5. Building Permit No. B1002882 (an "Original Permit") was issued on August 31, 2011 to Wilbur Mondie with a description of work as "Build a Three Story + Cellar Flat" at 412 Richardson Place. The permit was later extended and the Property Owner filed for revised permits to reflect a change in ownership.

6. Building Permit No. B1214832 (also an "Original Permit") was issued on April 22, 2013 to Wilbur Mondie for 410 Richardson Place. The description of work was "New 54 Ft. x 26.5 Ft. 3-Story Flat, Row Dwelling and One Required 9 Ft. x 16 Ft. Automobile Parking Space on the Lot. The Width of the Proposed Structure [Shall] Span the Complete 26.5 Ft. Lot Width. Conversion to a Two Family Flat." The permit was later extended and the Property Owner filed for revised permits to reflect a change in ownership.

7. By early 2014 the parcel "was an empty foundation with a dug-out basement. There was no structure in place apart from the foundation walls." In late August 2014, Wilbur Mondie "trucked in 12 prefabricated, shipping-container-shaped housing units and stacked them on top of the existing foundation." According to the Appellant, no further development occurred, except for the installation of a chain-link construction fence, before the property was sold to the current owner in April 2016. (Exhibit No. 2.) The Property Owner stated that, when OTD purchased the subject property, "the majority of the flats were already constructed" pursuant to the two Original Permits issued to Wilbur Mondie. (Exhibit No. 32.)

8. Building Permit No. B1611470 was issued to the Property Owner on September 27, 2016 for 412 Richardson Place, with the description of work as "Completion of an existing 2 family flat to include minor reconfiguration of space, finish material changes, building system revisions to accommodate reconfiguration …." The existing and proposed use of the property were both shown as "Flat (Two Family)" in a three-story building.

9. Building Permit No. B1611469 was issued to the Property Owner on October 20, 2016 for 410 Richardson Place, with the description of work as "Completion of an existing 2 family flat to include minor reconfiguration of space, finish material changes, building system revisions to accommodate reconfiguration…." The existing and proposed use of the property were both shown as "Flat (Two Family)" in a three-story building.

10. The Appellant described meeting with a representative of the Property Owner, on October 31, 2016, for the purpose of learning more about the planned operation of the new construction. The Property Owner indicated that Oaktree Development LLC would enter into a master lease of the subject property with Common Living, Inc., which would operate the buildings as a total of 24 living units, each with a bathroom, and four common areas. Each of the living units would be individually leased in an arrangement known as "co-living." One of the units would be leased to a representative of Common Living, who would act "as a sort of superintendent of the entire property." (Exhibit No. 9.)

11. This appeal was submitted on December 16, 2016.

12. Certificate of Occupancy No. CO1700918 was issued February 2, 2017 to authorize a "Flat (Two Family Dwelling)" at 412 Richardson Place.

13. Certificate of Occupancy No. CO1700955 was issued February 13, 2017 to authorize "A Two-Family Flat With (2) Off-Street Parking Spaces" at 410 Richardson Place.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by § 8 of the Zoning Act to "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal" made by any administrative officer in the administration or enforcement of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2008 Repl.).) *See also* 11 DCMR Subtitle Y § 100.4. Appeals to the Board of Zoning Adjustment "may be taken by any person aggrieved, or organization authorized to represent that person, … affected by any decision of an administrative officer … granting or withholding a certificate of occupancy … based in whole or part upon any zoning regulations or map" adopted pursuant to the Zoning Act. (D.C. Official Code § 6-641.07(f) (2008 Repl.); *See also* 11 DCMR Subtitle Y § 302.1.)

Pursuant to Subtitle Y § 302.2, a zoning appeal must be filed within 60 days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever

is earlier. A zoning appeal may be taken only from the first writing that reflects the administrative decision complained of to which the appellant had notice; no subsequent document, including a building permit or certificate of occupancy, may be appealed unless the document modifies or reverses the original decision or reflects a new decision. (Subtitle Y § 302.5.) The Board may extend the 60-day deadline for the filing of a zoning appeal only if the appellant demonstrates that (a) exceptional circumstances, outside of the appellant's control and that could not have been reasonably anticipated, substantially impaired the appellant's ability to file a zoning appeal to the Board; and (b) the extension of time would not prejudice the parties to the appeal. (Subtitle Y § 302.6.)

The Property Owner argued that the "first writing" that reflected the administrative decision of the Zoning Administrator to allow the construction of flats at the subject property were the permits issued in 2011 and 2013, both of which identified the use of the two lots as flats. The Property Owner also asserted that no subsequent permit or certificate of occupancy altered the administrative decision made in those original permits to allow flats at the subject property. According to the Property Owner, the Appellant reasonably should have had notice of the ZA's administrative decision underlying the original permits as early as July 2014 "when James J. Wilson, the President of the RPNA, purchased his home at 415 Richardson Place, N.W., which is directly across the street from the Properties, and saw an empty foundation with a 'dug-out basement.'" (Exhibit No. 32.) For the same reasons argued by the Property Owner, DCRA also contended that the appeal should be dismissed as untimely.

The Appellant argued that the appeal was timely because it was filed within 30 days of the time when the Appellant learned, on October 31, 2016, of the Property Owner's plan to lease the property to Common for use as "co-living space." According to the Appellant, that date was the earliest time that an appeal could be filed to challenge the Property Owner's intended use of the subject property as something other than a two-family flat – that is, the Property Owner's failure to indicate on its permit applications the "use that most accurately describes the intended use." The Appellant also argued that the Property Owner's misrepresentation of the intended use was an event outside the Appellant's control that would justify the filing of an appeal more than 60 days after issuance of permits that allowed the Property Owner to complete construction that had begun almost two years before the property was acquired by Oaktree.

The Board concludes that the appeal was timely filed because exceptional circumstances, which were outside of the Appellant's control and could not have been reasonably anticipated, substantially impaired the Appellant's ability to file an appeal with the Board within 60 days of the issuance of the revised permits in 2016. While some members of the Appellant association could have known that the Original Permits were issued in 2011 and that construction was subsequently undertaken at the subject property, the Appellant's representative who filed the appeal did not yet live in the neighborhood in 2011.[3] The Appellant could not have known of the "co-living" arrangement, and how that might affect the purported use of the property as flats, until

[3] James Wilson purchased his house on Richardson Place in July 2014. (Exhibit No. 2.)

the meeting of the Appellant's representative with the Property Owner on October 31, 2016. The Board finds no prejudice to any party resulting from an extension of time allowed for the appeal because the Property Owner was able to complete construction of the buildings as permitted.

With respect to the merits, the Appellant challenged the issuance of the 2016 building permits based on the Property Owner's statement of the intended use of the property, where the permitted lot occupancy was 60%, as two flats when "the actual intended use of the property … is as [a] single, commercially operated 24-unit apartment, rooming, or tenement house, whose units are individually leased to occupants" or as a "co-living facility," a use not recognized in the Zoning Regulations. According to the Appellant, the Property Owner's actual intended use was not permitted as a matter of right in the R-4 Zone and should have been limited to 40% lot occupancy. The Appellant argued that issuance of the permits was arbitrary and capricious in light of the intent of the R-4 Zone not to become an apartment house zone.

The Board agrees with the Appellant that the proposed use of the subject property as a "co-living facility" was not consistent with the Property Owner's stated intention to use the buildings as two flats.[4] As the Appellant notes, "co-living" is not a use designation contained in the Zoning Regulations. Accordingly, the Zoning Administrator should not have relied on the statement of intended use, as two flats, made by the prior owner of the property when issuing the Revised Permits to the Property Owner.

The Zoning Regulations defined a "flat" or "two-family dwelling" as "a dwelling used exclusively as a residence for two families living independently of each other," where "family" was defined as "one or more persons related by blood, marriage, or adoption, or not more than six persons who are not so related, including foster children, living together as a single house-keeping unit, using certain rooms and housekeeping facilities in common …." (11 DCMR § 199.1.) The Appellant provided evidence showing that the planned co-living use potentially would not be established and operated consistent with a two-family flat as that use is defined in the Zoning Regulations; for example, a group of unrelated people living together might not constitute a single house-keeping unit, or the control of the premises by Common might negate the required characteristic of residences functioning independently of each other. In addition, the "co-living" arrangement could potentially alter the character of the neighborhood in a manner inconsistent with the R-4 zoning designation of the subject property by introducing a use inconsistent with the zoning definition of "flat" as a two-family dwelling.

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001).).) In this case, ANC 5E adopted a resolution indicating its support for the appeal as a means "to ensure that …

[4] The Board finds no merit in the Appellant's contention that the two buildings at issue should be considered one building since the Property Owner's use would function as one facility. Each building is located on a separate record lot, and the Appellant provided no evidence that any communication would exist between the two structures, or that they are not separated from the ground up or from the lowest floor up. (*See* 11 DCMR § 199.1, definition of "building.")

developments are given a public hearing so that our community's input maybe included" when "developers may seek to avoid [community] input by pursuing 'as a matter of right' development for uses that are not clearly and unambiguously allowed by our zoning code." The ANC "recognize[d] that the community concerns expressed before the BZA in the first iteration[5] of this project – specifically, that the projects' density is out of conformity with both the neighborhood and the purposes of an R-4 Zone – have not been mitigated by the 410-412 OakTree development …." (Exhibit No. 36.) For the reasons discussed in this order, the Board shares the ANC's concerns about a co-living use that is not "clearly and unambiguously allowed" by the Zoning Regulations and its conformity with the purposes of the R-4 District.

Based on the findings of fact and conclusion of law, the Board concludes that the Appellant has satisfied the burden of proof in its claims of error in the decision of the Zoning Administrator to issue Building Permits No. B1611469 and B1611470 and issue Certificates of Occupancy No. CO1700955 and CO1700918 to allow two adjacent flats in the R-4 District at 410 and 412 Richardson Place, N.W. (Square 507, Lots 101 and 102). Accordingly, it is therefore **ORDERED** that the **APPEAL** is **GRANTED** and the Zoning Administrator's determination is **REVERSED**.

VOTE: **3-1-1** (Frederick L. Hill, Lesylleé M. White, and Anthony J. Hood to GRANT the appeal and REVERSE the determination of the Zoning Administrator; Carlton E. Hart opposed; one Board seat vacant).

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

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: February 4, 2019

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO § 110.5.3.2 OF THE CONSTRUCTION CODES, 12-A DCMR, WHEN A WRITTEN ORDER OF THE BOARD OF ZONING ADJUSTMENT CONCLUDES THAT A

[5] The "first iteration" presumably refers to Application No. 17404, which concerned a different proposal at the subject property prior to its subdivision into two record lots, and is not related to the development that is the subject of this appeal.

CERTIFICATE OF OCCUPANCY WAS ISSUED IN ERROR, THE CERTIFICATE OF OCCUPANCY SHALL BE REVOKED EFFECTIVE TEN DAYS AFTER THE BOARD OF ZONING ADJUSTMENT ORDER BECOMES FINAL PURSUANT TO THE PROVISIONS OF THE ZONING REGULATIONS.

PURSUANT TO § 110.6.1 OF THE CONSTRUCTION CODES, NO APPEAL MAY BE TAKEN TO THE BOARD OF ZONING ADJUSTMENT WHEN A GROUND FOR THE REVOCATION IS A BOARD OF ZONING ADJUSTMENT ORDER FINDING THAT THE CERTIFICATE OF OCCUPANCY WAS ISSUED IN ERROR. THE REVOCATION IN SUCH CASES MAY BE APPEALED TO THE DISTRICT OF COLUMBIA COURT OF APPEALS PURSUANT TO D.C. OFFICIAL CODE § 2-510.