GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 20183 of The Residences of Columbia Heights, a Condominium, pursuant to 11 DCMR Subtitle Y § 302, from the decision made on September 30, 2019 by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1908601 to permit a new building with 50 residential apartments for Short Term Family Housing (STFH) in the MU-5A Zone at 2500 14th Street, N.W. (Square 2662, Lot 205).

HEARING DATES: January 29 and February 26, 2020
DECISION DATE: May 6, 2020

PROPOSED ORDER DENYING APPEAL

This appeal was submitted on October 24, 2019 on behalf of The Residences of Columbia Heights, a Condominium (the "Appellant") to challenge a decision made September 30, 2019 by the Zoning Administrator, at the Department of Consumer and Regulatory Affairs ("DCRA"), to approve issuance of a building permit authorizing construction of a new building in the MU-5A zone at 2500 14th Street, N.W. (Square 2662, Lot 205).[1] Following a public hearing, the Board voted to deny the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda and letters dated December 9, 2019, the Office of Zoning provided notice of the appeal and of the public hearing to the Appellant, the Department of General Services ("DGS"), on behalf of the District of Columbia as the owner of the subject property, the Zoning Administrator, Advisory Neighborhood Commission ("ANC") 1B, the ANC in which the subject property is located, and to Single Member District ANC 1B06, the Office of Planning, the Office of Advisory Neighborhood Commissions, and to the Chairman and the four at-large members of the D.C. Council as well as the Councilmember for Ward 1, the ward in which the subject property is located. Notice was published in the *D.C. Register* on November 22, 2019 (66 DCR 15413).

Party Status. Pursuant to Subtitle Y § 501.1, the Appellant, DCRA, DGS, and ANC 1B were automatically parties in this proceeding. There were no requests for intervenor status.

Appellant's Case. The Appellant represented the owners of a 36-unit residential condominium building located on a lot abutting the subject property. The Appellant argued that the building

[1] As of October 1, 2022, the zoning functions formerly performed by the Department of Consumer and Regulatory Affairs were assumed by the new Department of Buildings. *See* D.C. Official Code § 10-561.01 *et seq*.

permit issued for the new construction at the subject property violated zoning requirements with respect to rear yard, parking, and loading, and improperly authorized an emergency shelter use that was not permitted as a matter of right but required approval by the Board as a special exception under Subtitle U § 513.1(b).

DCRA. The Department of Consumer and Regulatory Affairs asked the Board to deny the appeal because the building permit was consistent with applicable zoning requirements. According to DCRA, the project at the subject property met the zoning definition of "apartment house," a use permitted as a matter of right at the subject property, and was not an "emergency shelter." DCRA contended that the project satisfied zoning requirements with respect to parking and loading for an apartment house, as well as the rear yard requirement because the new construction would constitute an addition to the existing building at the site in light of the planned connection between the two portions of a single building. (Exhibit No. 33.)

DGS. The Department of General Services initially argued that the appeal should be dismissed as untimely. In support of its argument that the appeal should be denied, DGS provided testimony from Laura Zeilinger, the director of the Department of Human Services, the agency that would operate the project and an expert in homelessness and shelter programming for families with minor children. (Exhibits 42, 63.)

FINDINGS OF FACT

1. The property that is the subject of this appeal is a rectangular corner lot on the west side of 14th Street, N.W. with frontage on Chapin and Clifton Streets in addition to 14th Street (Square 2662, Lot 205).[2] The lot area is approximately 41,099 square feet.

2. The southern portion of the subject property is improved with a two-story building used as a community center, the Rita Bright Family and Youth Center. The northern portion of the lot is paved and used as a parking lot with 13 vehicle parking spaces.

3. The Department of General Services and the Department of Human Services ("DHS") undertook the development of new short-term family housing in each ward of the District of Columbia in accordance with the Homeless Shelter Replacement Act of 2016 ("HSRA"), D.C. Law 21-141, 63 D.C. Reg. 8453 (effective July 29, 2016), and the Homeless Shelter Replacement Amendment Act of 2018 ("HSRAA"), D.C. Law 22-167, 65 D.C. Reg. 13693 (effective October 30, 2018).

4. Pursuant to HSRAA § 2(1)), the Mayor was "authorized to use funds appropriated for capital project HSW01C – Ward 1 Shelter to construct a facility to provide temporary shelter for families experiencing homelessness containing 35 2- and 3-bedroom apartment-style units on District-owned land at 2500 14th Street, N.W., Square 2662, Lot 205;

[2] The Zoning Regulations define a "corner lot" as "A lot fronting on two (2) or more streets at their junction, with the streets forming with each other an angle of forty-five degrees (45°) up to and including one hundred thirty-five degrees (135°). (Subtitle B § 100.2.)

provided, that the contract for the construction of the facility shall be awarded pursuant to a request for proposals to be issued by the Department of General Services; provided further, that the site may also be used to locate 15 units of permanent supportive housing, as defined in section 2(28) of the Homeless Services Reform Act of 2005, effective October 22, 2005 (D.C. Law 16-35; D.C. Official Code § 4-751.01(28)), for seniors and the Rita Bright Recreation Center." (Exhibit 38.)

5. According to a document entitled "Short-term Family Housing in Ward 1 / Questions and Answers" published by the Executive Office of the Mayor, short-term family housing "provides dignified, service-enriched temporary housing for families with minor children who are experiencing homelessness." The publication stated that the number of short-term family housing units planned at the subject property was "driven by the needs of the homeless services system," noting that "District law… requires that the Department of Human Services have in their inventory a minimum of 121 apartment-style shelter units" in addition to emergency shelter units. (Exhibit 46.)

6. On May 21, 2018, DGS issued a request for proposals ("RFP") for "a design-build project/Ward 1 Short Term Family Housing Facility" (Solicitation No. DCAM-18-CS-0085). The RFP called for the provision of "50 Apartment Style[3] site based Short Term Family Housing units (19 two bedroom, 11 three bedroom units) … and 15 one bedroom Permanent Supportive Housing[4] units" and specified that "[e]ach STFH dwelling unit in the building will have two or three bedrooms, kitchen, bathroom and living/dining area." (Exhibit 48.)

7. The scope of work stated in the RFP specified that the facility must provide:
   (a) 35 apartment-style living units (STFH) with the following requirements:
      - An open-plan kitchen / living / dining room of at least 350 square feet, with a "clearly defined dining space with dining table";
      - Two-bedroom apartments with one bathroom and tub or three-bedroom apartments with two bathrooms with at least one tub and shower; and
      - Six units that are ADA compliant (four two-bedroom units and two three-bedroom units), at least one per floor.

   (b) 15 apartment-style living units (PSH) with the following requirements:

[3] "Apartment style" means a housing unit with:
(A) Separate cooking facilities and other basic necessities to enable families to prepare and consume meals;
(B) Separate bathroom facilities for the use of the family; and
(C) Separate sleeping quarters for adults and minor children in accordance with the occupancy standards of Title 14 of the District of Columbia Municipal Regulations (Housing). (D.C. Official Code § 4-751.01(3).)

[4] "Permanent supportive housing" means a program that provides rental assistance and supportive services for an unrestricted period of time to assist individuals and families experiencing chronic homelessness, or at risk of experiencing chronic homelessness, to obtain and maintain permanent housing and to live as independently as possible. (D.C. Official Code § 4-751.01(28).)

- An open-plan kitchen / living / dining room of at least 250 square feet, with a "clearly defined dining space with dining table";
- One-bedroom apartments with one bathroom and tub; and
- Five ADA-compliant units.

(c) Administrative space for four case managers on the first floor, including work stations, filing space, a conference room for private client meetings, a staff lounge with lockers, and separate restrooms for the public and the staff.

(d) A security desk within 10 feet of the main entrance to control access to the building.
- All residents and guests would be required to use the main entrance.
- All exterior doors would be controlled by swipe cards.

(e) A security desk on each floor with a line of sight to all public areas. (Exhibit 48.)

8. The RFP specified the furniture, fixtures, and equipment ("FF&E") for each living unit in the facility as two single beds per bedroom, one side locker per bed, one chest of drawers per bedroom, a four-person dining table and chairs for the two-bedroom units and a six-person dining table and chairs for the three-bedroom units, a built-in closet with rail and shelf per bedroom and at least eight square feet of general storage near each apartment entrance, and a three-person couch, two single chairs, one coffee table, a side table, and one television stand in each living area. (Exhibit 48.)

9. Other elements specified in the RFP included laundry rooms on each floor, a community room with direct access to an outdoor play area with play equipment designed for children ages five through 12 and a seating area for adults, at least 24 vehicle parking spaces (with 13 spaces reserved for the existing community center), bicycle parking, and a trash room at the street level. (Exhibit 48.)

10. On March 14, 2019, the Zoning Administrator met with land use counsel to discuss aspects of the project at the subject property. By email sent March 25, 2019, the Zoning Administrator confirmed agreement with the counsel's analysis and conclusions; specifically that:
(a) The new short-term family housing facility would be constructed on the same lot as the existing community center.
(b) The project would be considered one building for zoning purposes because the new construction would be connected to the community center via a ground-floor connection.
(c) The planned connection would satisfy the requirements of Subtitle B § 309.1 because:
(i) the connection would be entirely above grade, as was reflected in drawings showing that the area of connection would be included in the calculation of gross floor area using the grade-plane method in Subtitle B § 304.5,
(ii) the connection would be entirely inside the building and therefore would be enclosed,

(iii) the connection would be heated and artificially lit, and

(iv) the connection would allow free and unrestricted passage (other than doors required by the Construction Codes) between the parking area within the short-term family housing facility and the community center, given that the parking reserved for the community center would be located in the new construction.

(d) Because both buildings would be connected and considered a single building for zoning purposes, under Subtitle B § 318.8 the depth of the rear yard could be measured from the center line of the street abutting the lot at the rear of the building. Thus, the required 15-foot rear yard for the proposed building could be measured to the center line of Chapin Street. (Exhibit 5.)

11. The Zoning Administrator's March 25, 2019 email included a disclaimer stating that "This email was issued in reliance upon, and therefore limited to, the questions asked, and the documents submitted in support of the request for a determination…. This email is NOT a "final writing"… nor a final decision of the Zoning Administrator … but instead is an advisory statement of how the Zoning Administrator would rule on an application if reviewed as of the date of this email based on the information submitted for the Zoning Administrator's review. Therefore this email does NOT vest an application for zoning or other DCRA approval process … which may only occur as part of the review of an application submitted to DCRA." (Exhibit 5.)

12. By memorandum dated April 18, 2019, the Appellant's counsel provided a "zoning compliance analysis" to the board of directors of the condominium association. The analysis was based on a zoning summary table included in the plans as Plan Sheet No. A0.11. The Appellant's counsel found "a number of significant deficiencies in the conclusions expressed in the Table," many of which "flow[ed] from a fundamental mischaracterization of the use proposed for the subject property…." The memorandum noted that the plans characterized the addition "as an apartment building and, hence, a residential use that is a matter-of-right use under [Subtitle U § 512.1]."[5] However, according to the memorandum, the "simplistic analysis" stated in the project narrative – that the new building would contain 50 residential apartments – "ignored … the details that what is involved are two quite distinct use categories"; that is, 35 units for "families in need of short term emergency housing (STFH)" and "the remaining residential units … for individuals in need of Permanent Supportive Housing (PSH)." The memorandum assumed that the PSH units were permitted as a matter of right but concluded that approval as a special exception under Subtitle U § 513.1(b) was required to allow the STFH units because they would constitute an emergency shelter use, noting that "the other shelters that are a

[5] The MU-5-A zone is included in MU-Use Group E. (Subtitle U § 500.2.) Pursuant to Subtitle U § 512, "Matter of Right Uses (MU-Use Group E)," the uses permitted as a matter of right in the MU-5-A zone generally include any use permitted as a matter of right in any Residential House (R), Residential Flat (RF), and Residential Apartment (RA) zone as well as all uses permitted as a matter of right in MU-Use Group D (with certain exceptions not applicable in this case). (Subtitle U § 512.1(a).) The uses permitted as a matter of right in RA zones (except RA-1 and RA-6) include "Multiple dwellings provided that in an apartment house, accommodations may be provided only to residents who stay at the premises a minimum of one (1) month." (Subtitle U § 401.1(d)(1).)

product of the Homeless Shelter Replacement Act of 2016 ('HSRA') were all reviewed and approved by the BZA under the 'emergency shelter' development standards in the Zoning Regulations." (Exhibit 6.)

13. The memorandum from the Appellant's counsel concluded that the "advisory statement" provided by the Zoning Administrator, in the email of March 25, 2019, was "legally erroneous" in its conclusion that the planned connection between the new construction and the existing community center building would be sufficient to create one building for zoning purposes.[6] According to the memorandum, the email's reliance on a rule of measurement (that is, Subtitle B § 304.5) "effectively rewrites" the connection requirement of Subtitle B § 309.1 by allowing a connection that would not be fully above grade. Instead, the memorandum noted that "it appears from the Plans that the main connection between the Community Center and the new building is in the P1 floor level, which is below grade." (Exhibit 6.)

14. The memorandum cited another "fundamental problem" related to Subtitle B § 309.1 – that is, "conflict with the general rule stated in [Subtitle A § 301.3] prohibiting more than one principal structure on one lot of record" – since "there is no doubt that the structure to be added to the Property is a distinctly different principal use than the pre-existing community center use." According to the memorandum, "the plain intent of [Subtitle B § 309.1] is to allow two buildings on the same lot only when they are going to operate as a single functional unit." (Exhibit 6.)

15. The memorandum stated that the project would not comply with zoning requirements for vehicle parking because the plans contained a calculation based on the purported apartment house use and the proposed number of spaces would not meet the higher requirement for an emergency shelter use. (Exhibit 6.)

16. The memorandum stated that the project would not comply with zoning requirements for loading, because the plans projected that no loading facilities were needed for the existing community center or the purported apartment house use but the emergency shelter use would create a loading requirement. (Exhibit 6.)

17. By letter dated May 3, 2019, counsel for DGS wrote to the Appellant's counsel, providing "a comprehensive response to the Memorandum" and asserting that "the Project complies with all zoning requirements." The letter addressed matters including the differences between the project at the subject property and emergency shelters approved in other wards, why the project would constitute an "apartment house" and not an "emergency shelter," for zoning purposes, the planned connection between the new construction and the existing community center building so as to create one building, and zoning requirements pertaining to rear yard, vehicle and bicycle parking, and loading facilities. (Exhibit 7.)

[6] The memorandum referred to the March 25, 2019 email as the "Zoning Administrator's preliminary advisory statement [that] should be re-evaluated in a final decision that could be appealed to the BZA." (Exhibit 6.)

18. By letter dated May 8, 2019 to the Zoning Administrator, counsel for the Appellant indicated his disagreement with the assertions contained in the May 3, 2019 letter from counsel for DGS. The Appellant's letter to the Zoning Administrator reflected that a copy of the memorandum to the board of directors of the condominium (Exhibit 6) was previously provided to the Zoning Administrator and that the Appellant and their counsel were expected to meet with the Zoning Administrator on the following Friday (i.e. May 10, 2019). (Exhibit 8.)

19. On June 3, 2019, DCRA issued a foundation permit (No. FD1900028) and a sheeting and shoring permit (No. SH1900029) to DGS for the project. (Exhibit 45.)

20. On September 30, 2019, DCRA issued Building Permit No. B1908601 to the District of Columbia for construction at the subject property. The description of work was stated as: "DGS New building with 50 residential apartments for Short Term Family Housing (STFH). 35 will be 2 and 3 bedroom apartments. The remaining units will be 1 bedroom apartments for Permanent Supportive Housing (PSH). Staff parking (9-12 spaces) is located on one level, partially below grade in the new building. The building will be one partially below grade parking level and five above grade levels including residential units, parking and building services, community rooms, and administrative space. The site will also include outdoor recreation space, a courtyard playground for use by residents of the STFH program and a terrace for the PSH residents. The building is expected to achieve a LEED for Homes Gold rating with sustainable features such as high efficiency systems and fixtures, green roofs, and a continuous thermal envelope." The proposed use was stated as "Apartment Houses – R-2." (Exhibit No. 9.)

21. The project at the subject property will have five floors above a parking level and will contain approximately 80,000 square feet of gross floor area including residential units, parking and building services, community rooms, and administrative space. The residential units will be provided in approximately 68,000 square feet of contiguous space. (Exhibits 13, 48.)

22. The new construction will be configured as a total of 50 residential units, comprising 35 "apartment-style units" for families experiencing homelessness (the Short-Term Family Housing or STFH units) and 15 units of "permanent supportive housing" for seniors (the PSH units). The building will have separate entrances to the STFH units and the PSH units, on 14th Street and Clifton Street, respectively.

23. In addition to 21 vehicle parking spaces, the parking level will contain a lobby, an office for a case manager, a conference room, and a lounge. (Exhibits 63F1, 63F2.)

24. The first floor will also provide a lobby as well as STFH units, a community room, and a trash room. An outdoor "play terrace" will be provided at the ground level. (Exhibits 63F1, 63F2.) The second through fifth floors will contain STFH units and PSH units.

25. The building will not provide a communal dining room.

26. The 35 STFH units will be configured as 26 two-bedroom units and nine three-bedroom apartment-style units. Each unit will have a kitchen and bathroom as well as living space separate from the sleeping area. (Exhibits 38C, 38D, 63F1.)

27. The 15 PSH units in the project at the subject property will each have one bedroom as well as a kitchen, a bathroom, and living space separate from the sleeping quarters. (Exhibits 38B, 38C, 38D, 63F1.)

28. Residents of the new building will not pay rent but will sign written "residency agreements" with DHS (or an entity selected by DHS), before occupying their units. The agreements state program rules, establish the conditions for occupancy, and give the residents the exclusive right to occupy and control their assigned unit with limited intervention from staff for safety measures and room inspections in the event of emergency.

29. Each unit will be assigned to one household and will not be shared with other persons who are not part of that household.

30. Access to the residential units will be controlled by keys or keycards. Residents will be able to control entry to the units.

31. The subject property exhibits a slope such that the northern portion of the site is at a higher elevation than the south portion. (Exhibit 38F.)

32. The new construction will be sited to the north of the existing community center building, with an existing plaza remaining near the center of the site. The plaza contains steps from 14th Street, providing access to the building.

33. A hallway at the P1 level will provide access between the community center building and the parking area in the new construction. Because of the change in grade at the subject property (shown as a solid red line on Exhibit 38F), the hallway will be located entirely above grade.[7] The hallway was designed with interior doors to provide a passage between the new construction and the existing building. An exterior door from the hallway will provide outdoor access at the plaza level. (Exhibit 63F2.)

34. Vehicle parking spaces for the new building and for the community center will be provided on one level in the new project. Some vehicle parking spaces will be reserved for the community center use; the remainder will be available for employees in the new project. Vehicle parking will not be provided for residents.

[7] The dotted red line shown on Exhibit 38F depicted the grade used for in the calculation of gross floor area. (Transcript of February 26, 2020 at 170.)

35. The streets abutting the subject property to the north (Clifton Street) and to the south (Chapin Street) are 50 and 65 feet wide, respectively.

36. The subject property is located in a Mixed Use (MU) zone, MU-5A. Uses permitted as a matter of right in the MU-5A zone include "[m]ultiple dwellings provided that in an apartment house, accommodations may be provided only to residents who stay at the premises a minimum of one (1) month." (See Subtitle U §§ 401.1(d), 500.2, 512.1.)

37. The Zoning Regulations define an "apartment" as "One or more habitable rooms with kitchen and bathroom facilities exclusively for the use of and under the control of the occupants of those rooms. Control of the apartment may be by rental agreement or ownership." (Subtitle B § 100.2.)

38. For zoning purposes, an "apartment house" is defined as "Any building or part of a building in which there are 3 or more apartments, providing accommodation on a monthly or longer basis." (Subtitle B § 100.2.)

39. Uses permitted in MU-5A, if approved by the Board as a special exception, include an "emergency shelter," subject to specific requirements. (Subtitle U § 513.1(b).)

40. An "emergency shelter" is defined in the Zoning Regulations as "A facility providing temporary housing for one or more individuals who are otherwise homeless as that arrangement is defined in the Homeless Services Reform Act of 2005, effective October 22, 2005 (D.C. Law 16-35; D.C. Official Code §§ 4-751.01 et seq.); an emergency shelter use may also provide ancillary services such as counseling, vocational training, or similar social and career assistance." (Subtitle B § 100.2.)

41. The use categories defined in the Zoning Regulations include the following:

    (a) Lodging:

        (1) A use providing customers with temporary housing for an agreed upon term of less than 30 consecutive days; any use where temporary housing is offered to the public for compensation, and is open to transient rather than permanent guests;

        (2) Examples include, but are not limited to: hotels, motels, inns, hostels, or bed and breakfast establishments; and

        (3) Exceptions: This use category does not include uses which more typically would fall within the emergency shelter or residential use categories. (Subtitle B § 200.2(t).)

    (b) Residential:

        (1) A use offering habitation on a continuous basis of at least 30 days. The continuous basis is established by tenancy with a minimum term of one (1) month or property ownership;

(2) This use category also includes residential facilities that provide housing and supervision for persons with disabilities, which may include 24-hour on-site supervision, lodging, and meals for individuals who require supervision within a structured environment, and which may include specialized services such as medical, psychiatric, nursing, behavioral, vocational, social, or recreational services;

(3) Examples include, but are not limited to: single dwelling unit, multiple dwelling units, community residence facilities, retirement homes, rooming units, substance abusers' home, youth residential care home, assisted living facility, floating homes, or other residential uses; and

(4) Exceptions: This use category does not include uses which more typically would fall within the lodging, education, or community-based institutional facility use categories. (Subtitle B § 200.2(aa).)

42. By order issued August 30, 2017, the Board granted an application submitted by DGS to allow an emergency shelter in Ward 3 in a new six-story building in the RA-1 zone at 3320 Idaho Avenue N.W. (Square 1818, Lot 849). Among other relief, the Board approved a special exception under Subtitle U § 420.1(f) for the new emergency shelter use. (Application No. 19450; August 30, 2017), *affirmed, Neighbors for Responsive Government v. District of Columbia Bd. of Zoning Adjustment*, 195 A.3d 35 (D.C. 2018).

43. The emergency shelter approved in Ward 3 "was designed to comply with the statutory requirements and to incorporate standards and guidelines devised by the Interagency Council on Homelessness and the Department of Human Services based, inter alia, on research including studies of best practices."[8] As a result, (a) the emergency shelter would

[8] By statute, the Mayor was authorized to provide shelter to a family in a private room meeting certain minimum standards and constructed for the purpose of closing the D.C. General family shelter. The private rooms were referred to as "DC General Family Shelter replacement units," a term defined as "a private room that includes space to store and refrigerate food and is constructed by or at the request of the District for the purpose of sheltering a homeless family." (D.C. Official Code § 4–751.01(11A).)

A "private room" was defined as a part or division of a building that has: (A) Four non-portable walls that meet the ceiling and floor at the edges so as to be continuous and uninterrupted, provided that the room may contain a window if the window comes with an opaque covering, such as blinds or shades; (B) A door that locks from both the inside and outside as its main point of access; (C) Sufficient insulation from sound so that family members sheltered in the room may have a conversation at a normal volume and not be heard from the exterior; (D) Lighting within the room that the occupants can turn on or off as desired; and (E) Access to on-site bathroom facilities, including a toilet, sink, and shower. (D.C. Official Code § 4–751.01(28A).)

Buildings composed of D.C. General Family Shelter replacement units ("Replacement Units") must include, at minimum, a private bathroom – including a toilet, sink, and bathtub or shower – in at least 10 percent of the Replacement Units. One private, lockable bathroom that includes a toilet, sink, and bathtub and is accessible to all residents must be provided for every five Replacement Units. At least two multi-fixture bathrooms must be provided per floor, with multiple toilets, sinks, and showers. (D.C. Official Code § 4-753.01(d)(3).)

The Mayor was directed to maintain a minimum supply of both D.C. General Family Shelter Replacement Units and Apartment-Style units. (D.C. Official Code § 4–753.01(d)(4-5).)

provide 50 sleeping units, (b) the number of sleeping units per floor was limited to 10, with common rooms on each floor, (c) each floor was designed to provide a direct line of sight down the floor's single central hallway, (d) the emergency shelter would not use congregate, dormitory-style bathrooms but would provide bathrooms that would accommodate only one person at a time, with at least one private bathroom for every two family units and some rooms having en-suite private bathrooms to accommodate families with special needs.

44. The Ward 3 emergency shelter was designed to provide 50 residential units, with a capacity of approximately 185 beds, in a six-story building containing approximately 45,345 square feet of gross floor area. The building would also contain space for related services and functions, including a dining area, administrative offices, recreational areas for residents, and private meeting space for the provision of "wrap-around" services designed to assist residents in obtaining permanent housing more quickly. The emergency shelter would be operated consistent with the Short-Term Family Housing programs administered by the Department of Human Services for the purpose of providing immediate support to families experiencing homelessness.

45. Floors two through six of the new building in Ward 3 would each contain 10 residential units accessed by a single central corridor as well as a community room with laundry facilities and a microwave, and a study room. The residential units would be arranged so that two units would have private bathrooms and the other eight units would share four bathrooms. Two pairs of units would have adjoining doors to accommodate larger families when needed.

46. Each unit in the Ward 3 emergency shelter would have its own small refrigerator. Meals would be prepared off-site and delivered twice daily in vans.

47. The Board concluded that, for zoning purposes, the Ward 3 facility would constitute an emergency shelter, even though DHS had "publicly referred to the facility as 'short-term family housing' to avoid use of the term 'shelter' and to convey that the facility is intended to provide 'a supportive program for residents that is respectful and harmonious with the variety of housing types in the surrounding community.'" The Board was not persuaded by the party in opposition that the planned use of the facility was not as an "emergency shelter," but would constitute another, unspecified use due to the size of the facility.

48. By order issued July 5, 2016, the Board granted an application submitted by 5th Street Partners LLC on behalf of the District of Columbia to allow a short-term family housing facility in Ward 4 in an existing five-story building in the C-2-A zone at 5505 5th Street, N.W. (Square 3260, Lot 54). The application requested zoning relief under the 1958 Zoning Regulations, including a special exception under § 732.1 to allow an emergency shelter. (Application No. 19289; July 5, 2016.)

49. As designed, the Ward 4 facility would "provide short-term housing with administrative offices, common areas, recreation space," and vehicle parking. The building, as enlarged,

would contain "49 residential family units with a total of 148 beds and approximately 24,752 square feet of gross floor area." The first through fifth floors would contain "private room-style units for families" with two to four beds in each unit, with "[b]athrooms, shower facilities, and support features … located on each floor." The ground floor would have some "residential units" as well as space for staff and the provision of wrap-around services.[9] The cellar level would provide a "dining room/indoor recreation area and a warming kitchen to store and serve prepared meals that are delivered to the facility." (Exhibit 36 in Application No. 19289.)

50. By order issued February 23, 2018, the Board granted an application submitted by DGS to allow an emergency shelter in Ward 5 as an addition to an existing building in the MU-4 zone at 1700 Rhode Island Avenue, N.E. (Square 4134, Lot 800). The application requested zoning relief including a special exception under Subtitle U § 513.1(b) to allow an emergency shelter use. (Application No. 19452; February 23, 2018), *affirmed*, *Citizens for Responsible Options v. District of Columbia Bd. of Zoning Adjustment*, 211 A.3d 169 (D.C. 2019).

51. The emergency shelter facility approved in Ward 5 "was designed to comply with the statutory requirements and to incorporate standards and guidelines devised by the Interagency Council on Homelessness and the Department of Human Services based, inter alia, on research including studies of best practices." As a result, (a) the emergency shelter would provide 46 sleeping units, (b) the number of sleeping units per floor was generally limited to 10, with common rooms on each floor, (c) each floor was designed to provide a direct line of sight down the floor's single hallway, (d) the emergency shelter would not use congregate, dormitory-style bathrooms but would provide bathrooms that would accommodate only one person at a time, with at least one private bathroom for every two family units and some rooms having en-suite private bathrooms to accommodate families with special needs.

52. The Ward 5 emergency shelter would contain 46 units, space for support services, administrative offices, and recreational space and other common areas for the residents. The emergency shelter would be operated consistent with the Short-Term Family Housing programs administered by DHS for the purpose of providing immediate support to families experiencing homelessness.

53. The ground floor of the Ward 5 emergency shelter would be used primarily for a large multipurpose room for dining and for group meetings, conference rooms, a computer room for residents, work stations and other areas for employees, and private meeting space for the provision of "wrap-around" services designed to assist residents in obtaining permanent housing more quickly. The upper floors would each contain eight to 11 residential units

[9] The applicant described the facility as providing "safe and dignified temporary accommodations to families in private rooms." (Exhibit 36 in Application 19289.)

as well as common areas accessible to residents with laundry facilities, microwave ovens, storage space, and study rooms.

54. Meals for residents of the Ward 5 emergency shelter would be prepared off-site and delivered to the dining facility twice daily in vans.

55. The Board concluded that, for zoning purposes, the Ward 5 facility would be operated as an emergency shelter, even though DHS had "publicly referred to the facility as 'short-term family housing' to avoid use of the term 'shelter' and to convey that the facility is intended to provide 'a supportive program for residents that is respectful and harmonious with the variety of housing types in the surrounding community.'" The Board was not persuaded by the party in opposition that the proposed facility "stretche[d] the contemplated scope of the special exception in [Subtitle] U § 513.1(b) beyond the breaking point" because of the potential number of residents, such that a use variance should be required so as to allow another, unspecified use.

56. The Board also was not persuaded by the party in opposition that the proposed Ward 5 emergency shelter would have an adverse impact on the neighborhood due to "the number of similar facilities in the area." The Board concluded that the entities cited by the party in opposition were not "similar" for purposes of Subtitle U § 513.1(b)(4) because they were not facilities that provided temporary emergency shelter to families experiencing homelessness or closely related services. Rather, the party in opposition listed multi-family residential buildings that contain some affordable units, including a building providing permanent housing for seniors, and organizations that "provide housing support, medical support, educational support for disadvantaged individuals while they are homeless or they are seeking income assistance for housing or other assistance." These properties included apartment houses and organizations providing social services, but were not "similar" to the Ward 5 proposal in that they offered permanent, rather than emergency, housing, or they were non-residential and offered a variety of social services, not necessarily related to the types of "wrap-around" services proposed in connection with the new Ward 5 emergency shelter.[10]

[10] The purportedly "similar" facilities cited by the party in opposition included the Violet Project at 1515 Rhode Island Avenue, N.E. "a 23 unit residence now under construction, which will include at least 3 low-income units"; a multi-family residential building at 1545 Girard Street, N.E. "advertised as 25 'affordable luxury apartments for seniors,' but which housed '10 formerly chronically homeless individuals'"; three multi-family residential buildings that "all participate in DC's Section 8 and housing voucher programs," the Franklin, at 1511 Franklin Street, N.E., "54 units (unknown number of affordable units)," the Edwards Apartments at 1530 Rhode Island Avenue, N.E., "44 units (unknown number of affordable units)," and the Carrolton, 1515-1525 Franklin Street, N.E., "75 units (unknown number [of affordable units])"; the Veterans Administration Community Resources and Referral Center at 1500 Franklin Street, N.E.; the National Center for Children and Families at 1438 Rhode Island Avenue, N.E., "a referral facility which serves 'homeless families, victims of domestic violence, and children and adolescents'"; Brookland Manor at 1331 Rhode Island Avenue, N.E., "a 20 acre, 19-building site with 535 low-income housing units, soon to be replaced by 1,760 residential units, including 200 senior plus 265 low-income housing units as developers set aside not 10%, but 20%, 'affordable units'"; and the Department of Aging at 18th and Evarts Street, N.E. According to information provided by DGS, the building at 1545 Girard Street, N.E. was a "25-unit senior community" for persons

57. By order issued October 4, 2017, the Board granted an application submitted by the District of Columbia to allow an emergency shelter in Ward 6 in a new seven-story building in the RF-1 zone at 850 Delaware Avenue, S.W. (Square 590E, Lot 800). The application requested zoning relief including a special exception under Subtitle U § 320.1(a) to allow an emergency shelter with more than 15 persons. (Application No. 19451; October 4, 2017.)

58. The Ward 6 emergency shelter was designed to comply with statutory requirements and to incorporate standards and guidelines devised by the Interagency Council on Homelessness and the Department of Human Services. As a result, the emergency shelter would provide 50 sleeping units; the number of sleeping units per floor was limited to 10; each floor was designed to provide a direct line of sight down the floor's single central hallway; and the emergency shelter would not use congregate, dormitory-style bathrooms but would provide bathrooms that would accommodate only one person at a time, with at least one private bathroom for every two family units and some rooms having en-suite private bathrooms to accommodate families with special needs.

59. The Ward 6 facility would be operated consistent with the Short-Term Family Housing programs administered by the Department of Human Services for the purpose of providing immediate support to families experiencing homelessness. The emergency shelter would provide 50 residential units, with a capacity of up to 166 persons, in a seven-story building containing approximately 51,791 square feet of gross floor area devoted to the emergency shelter use (plus approximately 2,121 square feet of cellar floor area). In addition to the residential units, the building would provide space for services and functions in support of the emergency shelter use, including a dining area, administrative offices, and recreational areas for residents.

60. Common areas in the Ward 6 emergency shelter would include a dining and food serving area as well as private meeting space for the provision of "wrap-around" services. Floors two through seven of the new building would each contain residential units accessed by a central corridor. The residential units would be arranged so that two units would have private bathrooms and the other units would share "family" bathrooms. Each unit would provide two, three, or four beds. The sleeping units and common areas in the emergency shelter would be fully furnished.

61. The new Ward 6 emergency shelter building would not have a kitchen for food preparation on-site. Instead, meals would be delivered by van twice each day.

62. By order issued July 5, 2016, the Board granted an application submitted by DGS under the 1958 Zoning Regulations to allow an emergency shelter in Ward 7 in a new four-story building in the R-5-A zone at 5004 D Street, S.E. (Square 5322, Lot 32). The Board

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aged at least 55 years who earn less than 30 percent of the area median income, some of whom may be formerly homeless, and the Community Resource and Referral Center, at 1500 Franklin Street, N.E., was an element of the Washington DC Veterans Affairs Medical Center that provides services, such as employment assistance and counseling, to "homeless and at-risk" veterans but is "not a shelter."

approved zoning relief including a special exception under § 360.1 for the emergency shelter use. (Application No. 19287; July 5, 2016.)

63. The Ward 7 emergency shelter was designed to accommodate "short term, family housing for 35 families or up to 116 persons," providing 35 units – referred to variously as "sleeping units" or "living units" – that were intended for stays not exceeding 90 days. The 34,700-square-foot building would provide shared and private bathrooms, dining and conference rooms, and space for support services. Meals would be prepared off-site and served in shifts. (Exhibits 26, 32 in Application No. 19287.)

64. By order issued July 1, 2016, the Board granted an application submitted by DGS for zoning relief needed under the 1958 Zoning Regulations to allow a short-term family housing facility in Ward 8 in a new six-story building in the R-5-A zone at 4225 6th Street, S.E. (Square 6207, Lots 53-56).[11] The application requested zoning relief including a special exception under § 360.1 to allow an emergency shelter use. (Application No. 19288; July 1, 2016.)

65. The Ward 8 emergency shelter was designed to contain "50 residential family units" providing approximately 178 beds, space for on-site wrap-around services, and administrative offices. The number of "family units" – also called "sleeping units" or "living units" – would be limited to 10 per floor, with each floor having common space, including shared laundry and bathroom facilities. Meals would be prepared off-site, delivered by van, and served to families in a dining room in shifts. (Exhibits 29, 32 in Application No. 19288.)

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.).) 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* Subtitle Y § 302.1.

Timeliness. As a preliminary matter, DGS argued that the appeal should be dismissed as untimely because the Appellant knew about zoning decisions "regarding the matter of right processing of DGS's project" at the subject property "for substantially more than 60 days" before the appeal was filed, in violation of Subtitle Y § 302.2. DGS argued that the Appellant had prior actual notice of zoning decisions made about the project, including with respect to the issues raised in the appeal

[11] The application anticipated that the new address of the subject property would be 4200 6th Street, S.E.

of the building permit, based on the issuance of foundation and sheeting and shoring permits after zoning review and approval, a series of events in "public review dating back to December 7, 2017," the beginning of construction with "a well-publicized groundbreaking event held on July 1, 2019," and the Appellant's actions in raising questions of zoning compliance with DGS and the Zoning Administrator.[12] (Exhibit 42.) According to DGS, the 60-day deadline for the filing of a timely appeal began, at the latest, with the issuance of the foundation permit because the Appellant was already aware of the project and the plans associated with that permit characterized the project as "Ward 1 STFH & PSH" and therefore the Appellant was on notice that the project could be developed as a matter of right.

DCRA joined the motion by DGS to dismiss the appeal as untimely for the reasons stated in the motion and its supporting documentation. (Exhibit 56.) In opposing the motion, the Appellant argued that the appeal was timely filed within 60 days of the issuance of the building permit. (Exhibit 59.)

As noted above, any person aggrieved by a decision made by an administrative officer in the administration or enforcement of the Zoning Regulations may file a timely appeal with the Board. (Subtitle Y § 302.1.) A zoning appeal generally must be filed within 60 days from the date the appellant 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. (Subtitle Y § 302.2.) A zoning appeal may be taken only from the first writing that reflects the administrative decision complained of to which an appellant had notice, and 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.)

Ordinarily, the building permit is the document that reflects a zoning decision about whether a proposed structure and its intended use as described in the permit application conform to the zoning regulations. *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356, 364 (D.C. 2008) (citations omitted), affirming Appeal No. 17411 (Appeal of Paul Basken and Joshua Meyer; March 23, 2006). However, "the zoning statute and regulations do not tie the time for appealing to the BZA to the issuance of a specified type of notice." *Basken* at 366.

According to DGS, the 60-day period for filing a timely appeal began at least by the date of

[12] The events listed by DGS included a press release describing an announcement by the Mayor on December 7, 2017 that the subject property would be the site of the "Ward 1 Short-Term Family Housing" program, providing "35 short-term family housing apartment-style units to support families experiencing a housing crisis [and] 15 units of permanent supportive housing for seniors," with "[construction at the site … slated to begin in January 2019" (Exhibit 45), a document entitled "Short-term Family Housing in Ward 1 Questions & Answers" issued by the Executive Office of the Mayor (Exhibit 46), a resolution adopted by ANC 1B at a public meeting on December 7, 2017 expressing support for "a facility to provide temporary shelter for families experiencing homelessness containing no less than 35 2- and 3-bedroom apartment-style units on District-owned land at 2500 14th Street, N.W., Square 2662, Lot 205 … provided that the site may also be utilized to locate permanent supportive housing units for seniors and the Rita Bright Recreation Center" (Exhibit 15), public meetings including presentations made at meetings of ANCs 1A and 1B as well as the launch meeting of the Ward 1 Advisory Team on March 28, 2018 (Exhibit 47), information available on the website of the Deputy Mayor for Health and Human Services, and the request for proposals issued for the project (Exhibit 48).

issuance of the foundation and sheeting and shoring permits, because the "Building Permit was not the first writing informing the Appellant, stakeholders, and community that the Project would not need BZA special exception review, was a single building, provided the proper rear yard setback, and complied with parking and loading requirements." (Exhibit 42.) The Board does not agree, because the "zoning decisions," claimed by DGS as having provided actual notice and constructive knowledge to the Appellant that the project could proceed as a matter of right, were not in fact written determinations made by zoning officials in the administration of the zoning regulations. The Appellant had general knowledge about the planned construction at the subject property and knew that DGS believed that the project did not require zoning relief, but that information did not reflect a decision by a zoning official in the administration of the zoning regulations.[13] The Appellant obtained a copy of the email sent March 25, 2019 in which the Zoning Administrator agreed that the new STFH facility would be considered part of one building because of the nature of its connection to the existing community center building, but reasonably relied on the disclaimer stating that the email was an advisory statement that did not reflect a final decision about zoning issues associated with the project. The foundation permit plans reflected DGS's characterization of the project but did not reflect a determination by the Zoning Administrator that the planned use, as short-term family housing (not a phrase used in the Zoning Regulations), would constitute an apartment house and not an emergency shelter use, or that the planned connection between the new construction and the existing building would be sufficient to create one building for zoning purposes, because the above-grade connection was not reflected in the plans approved in connection with the foundation permit. The residents of the Appellant's condominium building were likely aware when construction began, in July 2019, but the building permit, which reflected a written determination about the permitted use by the Zoning Administrator, was not issued until later, on September 30, 2019.

Under the circumstances, the Board concludes that the building permit was the first writing of an appealable "zoning decision" that put the Appellant on notice that the Zoning Administrator had made a determination that the planned use of the new construction was an apartment house, a use permitted as a matter of right at the subject property, and that the new construction, along with the existing community center building, would be considered one building for zoning purposes. The Board does not agree that the appeal was untimely because DGS did not demonstrate that any writing before the building permit, including the foundation permit, reflected the administrative decisions complained of by the Appellant; that is, the determinations by the Zoning Administrator pertaining to the permitted structure and use at the subject property.

The merits of the appeal. The Appellant's principal claim of error was that the Zoning Administrator erred by not requiring DGS to obtain approval by the Board, as a special exception under Subtitle U § 513.1(b), for the 35 units of "short term family housing" that allegedly

[13] Similarly, the Board did not agree with DGS that the 60-day period for a timely appeal might have started before the foundation permit was issued, perhaps May 3, 2019 (the date of a letter from counsel for DGS to Appellant's counsel) or May 10, 2019 (the date when Appellant's counsel met with the Zoning Administrator) (See Exhibit 42.) Neither event represented a written decision by a zoning official made in the administration of the zoning regulations.

constituted an emergency shelter use.[14] In support of its contention that the 35 units were an "emergency shelter" and not an "apartment house," the Appellant argued that the 35 units were authorized by the Homeless Shelter Replacement Act (HSRA) and that special exception approval had been obtained "for the other Wards for which shelters were authorized by HSRA 'to provide temporary shelter for families experiencing homelessness.'" (Exhibit 14.) The Appellant acknowledged that the internal configuration of the 35 "apartment style" STFH units would be materially different from the "D.C. General Family Shelter replacement units" constructed in other wards, but argued that the distinction was immaterial because "all seven HSRA authorizations are encompassed within the statutory authorization for each to 'construct a facility to provide temporary shelter for families experiencing homelessness.'" Citing "numerous city documents" that "clearly equate a facility deemed as a Short Term Family Housing (STFH) as an 'emergency shelter,'" the Appellant asserted that "regardless of the internal configuration of its units – single rooms or 'apartment-style' units – all the buildings authorized by the HSRA are 'facilities to provide temporary shelter for families experiencing homelessness' and all fall within the term 'emergency shelter' as that use is defined in the Zoning Regulations." (Exhibits 14, 33.) According to the Appellant, the zoning definition of "emergency shelter" "encompasses all facilities providing temporary shelter to the homeless [and] makes no distinction among these facilities according to the internal configuration of the units within the facility." (Exhibit 14.)

The Board was not persuaded by the Appellant's claim of error, because the wording of the statutes cited by the Appellant did not alter or negate the zoning provisions applicable to the project at the subject property. The findings of fact reflect that statutes and other written materials pertaining to the project used a variety of terms to describe the project. However, phrases such as "short term family housing" and "temporary shelter for families experiencing homelessness" are not used in the Zoning Regulations and therefore do not describe a specific use for zoning purposes.[15]

The Board credits the testimony of the Zoning Administrator that "all the units in the proposed building constitute apartment … a type of dwelling unit." The Board agrees with the Zoning Administrator that the "key aspects" of the difference between an emergency shelter and an apartment "have to do with the duration of stays and the type of facility providing the service," recognizing the differences in the zoning definitions of each use. (See, Transcript of February 26, 2020 at 161.)

The Zoning Administrator reasonably concluded that the 35 STFH units at the subject property would be "apartments" for zoning purposes because they would be configured as habitable rooms

[14] The Appellant acknowledged that the "PSH portion of the building is an uncontested matter-of-right 'apartment house' use" but argued that "that does not make the 35 STFH units part of it, regardless of whether the STFH units are single rooms or apartments." (Exhibits 14, 33.) For the reasons discussed in the order, the Board concluded that both the STFH units and the PSH units would constitute "apartments" as defined in the Zoning Regulations, that the STFH units would not constitute an "emergency shelter," and that the building would contain a single use, "apartment house."

[15] Similarly, the Board notes the variety of phrases used in the emergency shelter applications for projects in Wards 3 through 8 to describe both the emergency shelter facilities and the individual rooms intended for use by persons in need of the emergency shelters. With respect to the project at the subject property, the Zoning Administrator appropriately based zoning determinations on the definitions and use categories contained in the Zoning Regulations, irrespective of terminology used for other purposes in statutes and public documents.

with a kitchen and bathroom facilities exclusively for the use and under the control of the occupants of those rooms. The Board credits the Zoning Administrator's testimony that the STFH units, as shown in Exhibit 38C, would be considered apartment for zoning purposes because each unit would have its own kitchen (with a stove, counter, and sink) and full bathroom facilities, separate from the bedrooms, and each unit would be "its own space, so it's not shared with other residents in the building." (Transcript of February 26, 2020 at 165.) Similarly, the Zoning Administrator reasonably concluded that the PSH units would constitute apartments for zoning purposes because, as shown in Exhibit 38B, each unit would have a kitchen (including a stove, sink, and counter) and a full bathroom with toilet, sink, and bathing facility, "separated from any other spaces where somebody resides," such that the unit would have "all the necessary components of a dwelling unit." (Transcript of February 26, 2020 at 164.)

With respect to the duration of the occupants' stay in the project at the subject property, the Board credits the Zoning Administrator's testimony that the representation made in the building permit application "was that the tenure … of the residents will be on a monthly or longer basis." (Transcript of February 26, 2020 at 166.) The Board agrees that the expected tenure longer than 30 days indicates that, for zoning purposes, the STFH and PSH units will constitute an apartment house use.[16]

Appeal No. 18151. The Board's conclusion with respect to the apartment house use of the project at the subject property is consistent with its prior decision in Appeal No. 18151 (Van Ness South Tenants' Association; September 6, 2011.) In that case, the Board denied an appeal that challenged a building permit authorizing a building owner to construct partition walls in 21 apartment units in an existing 625-unit apartment house, where the 21 apartments would be leased to a nearby university and occupied by its students. The appellant contended that the permit improperly allowed use of the 21 units as a "dormitory" or a "rooming house."

The Board's findings of fact included that the 21 apartment units were not contiguous and were located on different floors throughout the building. The partition walls were not load-bearing but were used to create an additional bedroom in each unit in a manner that "did not change the size of the units, create new units, or change the footprint of the building." The university had executed one-year leases with the building owner for 21 apartments, each occupied by up to four university students who would "stay in the unit for a period greater than one month." Each of the 21 units retained its "own kitchen and bathroom facilities for the use of the occupants of that unit only. The occupants of each unit can lock the door to the hallway, thereby excluding other residents from using their bathrooms and kitchen."

The university "allowed students to occupy the 21 units pursuant to an 'Occupancy Agreement For Off-Campus Student Housing,'" under which the "students agree[d] to various conditions of occupancy." The conditions included that the university "will close the off campus housing during the winter break, … may deny room or roommate changes and may require a student to move from

[16] Director Zeilinger testified that, based on DHS research, residents of the project at the subject property were expected to stay "for at least 90 days" and "current data in apartment style shelters has some families staying for as long as five years." (Transcript of February 26, 2020 at 218, 221.)

one unit to another during the year, as necessary." The occupancy agreement also specified that "overnight guests must complete … registration forms [provided by the university] and that [the university] has the right to enter the units for various purposes."

The Board concluded that the partition walls within the 21 units did not convert the apartment house use into either a dormitory or a rooming house, noting that the differentiation among apartment house, rooming house, and dormitory – all of which were permitted in the zone where the apartment house was located – was "generally speaking the nature of the occupancy" as reflected in the definitions of each use.[17] In light of the "key" elements in the definition of "apartment" – that the unit (a) must provide kitchen and bathroom facilities and (b) must be under the exclusive use and control of the occupants – the Board concluded that DCRA had a reasonable basis to conclude that issuance of a building permit for partition walls so as to create an additional bedroom in each unit would not alter the first element of the definition since "the units would retain their kitchen and bathroom facilities."

With respect to the second element, whether the units would be in the exclusive control of the occupants, the Board found no error by DCRA in issuing the permit because the "21 units remain under the exclusive control of the occupants of each unit, inasmuch as the occupants control the locks to their individual units, and are thereby able to exclude other residents from the units." While the appellant contended that the occupancy agreement meant that the student occupants did not have "exclusive use and control" of their units, the Board described that assertion as an "overly broad" reading of "control" and concluded instead that "none of the restrictions [contained in the occupancy agreement] affects the long term control of the occupant so long as they are allowed to remain on the premises." The Board noted that the restrictions had "nothing to do with their rights to control the premises while [they are] lawfully there" and that the "occupants retain the rights to exclude all others, except [the university], and the circumstances under which [the university] may enter the unit are defined." The Board held that the 21 units did not meet the definition of "rooming house" because they would be under the control of the occupants. Nor did the units meet the definition of "dormitory," because they were not intended solely as sleeping accommodations and

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[17] The 1958 Zoning Regulations defined an "apartment" as "one (1) or more habitable rooms with kitchen and bathroom facilities exclusively for the use of and the control of the occupants of those rooms." (§ 199.)

Because "dormitory" was not defined in the 1958 Zoning Regulations, the Board utilized the meaning given in Webster's Unabridged Dictionary (see, 11 DCMR § 199.2(g)) and found that, according to Webster's 3rd New International Dictionary, a "dormitory" is "a residence hall providing separate rooms or suites for individuals or for groups of two, three, or four with common toilet and bathroom facilities but usually without housekeeping facilities."

The 1958 Zoning Regulations defined a "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. The term 'rooming house' shall not be interpreted to include an establishment known as, or defined in [the 1958 Zoning Regulations] as, a hotel, motel, inn, bed and breakfast, private club, tourist home, guest house, or other transient accommodation." A rooming house was allowed as a matter-of-right in the R-5-D zone, where the apartment house at issue in the appeal was located, so long as cooking facilities were not provided in any individual unit. (§§ 330.6(d) and 350.4(a).)

they did not "collectively constitute a 'residence hall'" given their non-contiguous locations throughout the building.

Control of units. The Appellant in this proceeding argued that Appeal No. 18151 was inapplicable because the zoning definition of "apartment" had changed since that decision with the addition of a second sentence: "Control of the apartment may be by rental agreement or ownership." According to the Appellant, the STFH units would "not be 'owned' by their temporary occupants" or "leased to occupants by rental agreements." The Appellant contended that "the concept of 'control' is not about the exclusiveness of physical occupancy, but rather about legal responsibility for the property, as evidenced by either ownership or leasehold." (Exhibit 33.) DCRA and DGS disagreed, citing the use of "may" (rather than "shall") in the relevant sentence and the written agreements that occupants of the STFH units will be required to enter into with DHS.

The Board was not persuaded by the Appellant in this regard. The zoning definition of "apartment" does not require a rental agreement or ownership, but reflects that an apartment may be held in either status; that is, an apartment may be provided as a rental unit or a condominium, for example. As in Appeal No. 18151, the Board considers the Appellant's characterization of "control" as overly broad. In this case, the Board concludes that the units in the project at the subject property will be under the control of the occupants because the units will be offered and utilized subject to a written residency agreement spelling out the conditions of occupancy and stating that access to each unit will be controlled by the occupants, with certain exceptions that are not unusual in an apartment-house setting. Pursuant to the residency agreement, access to each unit will be limited to and controlled by the residents of that unit consistent with the zoning definition of "apartment."

Emergency shelter use. The Appellant argued that the 35 STFH units constituted an "emergency shelter," as defined in the Zoning Regulations, because of the temporary nature of the use as well as the statutory basis for the project. According to the Appellant, the zoning definition of "emergency shelter" "encompasses all facilities providing temporary shelter to the homeless [and] makes no distinction among these facilities according to the internal configuration of the units within the facility." (Exhibit 14.)

The Board disagrees, and concludes that the Zoning Administrator reasonably approved the building permit at issue in this proceeding based on a determination of "apartment house" use for the reasons discussed above. The Board credits the Zoning Administrator's testimony that the planned use of the 35 STFH units would not constitute an "emergency shelter" use because of the configuration of the units and the duration of residents' occupancy of the units. The Zoning Administrator recognized the significance of "30 days" in the descriptions of "lodging" and "residential" use categories and described a long-standing practice of distinguishing a residential use from a transient or temporary residential use based on "whether the tenure or residency is 30 days or more" because of the wording of the relevant use categories. (Transcript of February 26, 2020 at 163.) The Zoning Administrator reasonably determined that the project at the subject property would constitute an "apartment house," and not an "emergency shelter" use, in part on the basis of determinations that the occupants would live in individual units with stays of more than 30 days and that the occupants would not be sharing the sort of common areas, including kitchen and bathroom facilities, that are common in an emergency shelter.

The fact that other projects in other locations were developed as emergency shelters does not require a different result. The Board did not agree with the Appellant that the configuration of the units was irrelevant for zoning purposes; instead, the configuration of a unit would be essential in the Zoning Administrator's determination of whether a given use would constitute temporary lodging or an apartment in residential use. The "emergency shelter" facilities approved by the Board as special exceptions in Wards 3, 4, 5, 6, 7, and 8 all involved buildings with significantly different configurations than the project at the subject property. The emergency shelters were designed to provide 35 to 50 furnished rooms – variously labeled "sleeping units," "living units," "residential units," "private room-style units," "family units," and short-term family housing – that would contain beds but not kitchen facilities or separate living areas and, in most cases, were without private bathrooms. The emergency shelter buildings were designed to provide common areas including a dining room for meals that would be prepared off-site and delivered to the facility, rather than separate kitchen and dining facilities within each unit.

Residents at the emergency shelters were expected to stay at the facility less than 90 days. As part of the "Homeward D.C." initiative to replace the D.C. General shelter with smaller facilities, the emergency shelters in Wards 3 through 8 were intended to provide a short-term "crisis response system" for persons in need of immediate shelter until they could arrange access to permanent housing. (Testimony of Laura Zeilinger, director of DHS in support of the Ward 3 facility, Application No. 19450; Transcript of March 1, 2017 at 93-94); see also, e.g., a statement submitted by DGS in support of the Ward 8 application ("The goal will be to provide temporary housing for families for a transitional period of 60–90 days. The ideal length of stay for families in short-term housing is fewer than 90 days."). (Exhibit 28 in Application No. 19288.)

As described in the emergency shelter applications, an emergency shelter is not a form of lodging offered to the public for compensation but constitutes a temporary arrangement for persons in immediate need of shelter, with a goal of providing a transition to permanent housing. The Board agrees with DCRA and DGS that the project at the subject property would not constitute an emergency shelter in light of the configuration of the units, with separate kitchen and bath facilities, under the control of occupants who have entered into an agreement for the use of the units, as well as the expected duration of occupancy at the STFH units as permanent housing, not a temporary response to a crisis situation.

Parking and loading. For the reasons discussed above, the Board concludes that the project at the subject property will contain only one use: apartment house. Accordingly the Board was not persuaded by the Appellant's claims that DCRA erred in issuing a building permit for a project that would not meet zoning requirements with respect to vehicle parking or loading for an emergency shelter use. The Appellant did not demonstrate, or allege, that the project would fail to meet zoning requirements for parking and loading for an apartment house. The Board agrees with DCRA and DGS that the project will meet zoning requirements for vehicle parking and loading for an apartment house use.[18] The planned 21 vehicle parking spaces at the subject

[18] According to DCRA, the vehicle parking requirement for the 50-unit apartment house use was eight spaces as calculated in accordance with Subtitle C §§ 701.5 and 702.1(c)(7), and no loading facilities were required, pursuant to Subtitle C § 901, because the apartment house would not contain more than 50 dwelling units. (Exhibit 38.)

property will include a sufficient number reserved to meet the vehicle parking spaces required by the existing community center use.

Building connection. The Appellant argued that the project at the subject property would not result in a single building because the new construction would not have a connection to the existing community center building sufficient to satisfy the requirements of Subtitle B § 309. According to the Appellant, the planned connection, shown in the plans as the P1 level, would not be fully above grade, citing the Zoning Administrator's reference to Subtitle B § 304.5 in the email sent March 14, 2019 (see Exhibit 5). The Appellant acknowledged that the planned connection would be enclosed but contended that other requirements would not be met because the parking level would not be heated, the connection would not constitute common space accessible to users of all portions of the building, and the space would not provide unrestricted passage between separate portions of the building because "safety and security rules prohibit unrestricted access" (Exhibit 74.)

The Board does not agree, concluding that the Appellant incorrectly considered the entire P1 level as the building connection rather than the hallway identified by DCRA and DGS. Pursuant to Subtitle B § 309.1, structures that are separated from the ground up by common division walls or contain multiple sections separated horizontally, such as wings or additions, are considered separate buildings for zoning purposes.[19] However, structures are considered parts of a single building if they are joined by a connection that is (a) fully above grade, (b) enclosed, (c) heated and artificially lit, and (d) serve either as (1) common space shared by users of all portions of the building, such as a lobby or recreation room, loading dock or service bay or (2) space that is designed and used to provide free and unrestricted passage between separate portions of the building, such as an unrestricted doorway or walkway.

The Board does not agree with the Appellant that the Zoning Administrator incorrectly based a determination – that the planned connection would be above grade – on the application of a rule of measurement. That rule, Subtitle B § 304.5, specifies the method required for use when calculating the gross floor area of a semi-detached or attached building, applicable "for the portion of a story below the finished floor of the ground floor and partly above adjacent natural or finished grade." The Zoning Administrator's email indicated agreement with the statement that the planned connection would be entirely above grade, noting that drawings reflected that the connection would be included in GFA consistent with the rule of measurement for the portion of a story that would be below the ground floor but also partly above grade. In this case, the P1 level would be below the finished floor of the ground floor of the new construction and partly above adjacent natural or finished grade in portions of the site due to the slope of the subject property. The Zoning Administrator's email plainly stated that the connection itself would be entirely above grade (as

[19] See also the zoning definition of "Separate Building": "Structures that are separated from the ground up by common division walls or contain multiple sections separated horizontally, such as wings or additions, are separate buildings. Structures or sections shall be considered parts of a single building if they are joined by an enclosed connection that is fully above grade, is heated and artificially lit; and either a common space shared by users of all portions of the building, such as a lobby or recreation room, or space that is designed and used to provide free and unrestricted passage between separate portions of the building, such as an unrestricted doorway or walkway. (Subtitle B § 100.2.)

well as counted toward GFA, since the space would be above grade). Nothing in Subtitle B § 309 requires the entire floor that contains a connection to be located entirely above grade.

The Zoning Administrator reasonably determined that the planned connection would meet the requirements of Subtitle B § 309.1(a), (b), and (c) because the plans reflect that the proposed hallway connection would be fully above grade, enclosed, and heated and artificially lit. As shown in the plans (Exhibit 38F), the hallway connection at the P1 level would be enclosed within the structure and therefore would also be heated and artificially lit. The planned connection would be fully above grade, even though portions of the structure that provide access to the connection would not themselves be fully above grade. The Board credits the Zoning Administrator's determination that nothing in the Zoning Regulations requires that "the entire path of travel" to a building connection "has to be above grade." (See, Transcript of February 26, 2020 at 170.)

With respect to Subtitle B § 309.1(d), the Zoning Administrator determined that the hallway connection would not serve as common space shared by users of all portions of the building but would satisfy the requirement of Subtitle 309.1(d)(2) by serving as space that is designed and used to provide free and unrestricted passage between separate portions of the building, such as an unrestricted doorway or walkway. The Board agrees, because the hallway will provide access via interior doors to both the new project and the existing community center building, as well as an exterior door to a plaza. In particular, the hallway connection will provide access between the existing community center building and the parking spaces in the new project.

The Board does not find that the use of doors, even if locked, would render the hallway incapable of use as free and unrestricted passage. All persons who are issued the requisite key fob would have access to and the ability to use the hallway, and the key fobs would be issued to users of both portions of the building as appropriate to facilitate access between the two aspects of the building. The Board concludes that the Zoning Administrator reasonably decided that the Zoning Regulations require a connection designed for and capable of providing unrestricted access, and that whether the operator of a given facility opted to restrict access was a programmatic decision that would depend on the circumstances of the specific building connection. The Zoning Administrator testified about a long-standing practice not to require "doorways [that] would allow any person at any time to travel to and from" areas accessible via a building connection. Instead, the zoning inquiry focused on whether persons using the facilities "would have access to be able to go through … those separate doors" using the connection. The Zoning Administrator has "never taken the view that [the doors in a connection] have to be open and unlocked doors," but allowed "a programmatic decision of the operator … as to the extent of those users and residents to be able to use … those doors." (Transcript of February 26, 2020 at 177.)

The Board's decision with respect to grade and unrestricted passage in this case is consistent with its holding in Appeal No. 19550 (Appeal of Advisory Neighborhood Commission 6C; August 11, 2021), which challenged building permits issued for a rear addition to a row dwelling for use as a flat (two principal dwellings).[20] In that case, the appellant argued that the planned connection

[20] The Board's findings of fact included that the new construction would provide for a one-story "breezeway" attached to both units (that is, the existing dwelling and the new construction in the rear yard), located in a closed court created

would not meet the requirements of Subtitle B § 309 because a portion of the connection would be below grade and because the connection would utilize a corridor providing access, in opposite directions, to the locked door of a single dwelling unit, and therefore would not serve as either common space shared by users of all portions of the building or as a space designed and used to provide free and unrestricted passage between separate portions of the building.

In denying Appeal No. 19550, the Board held that the planned connection was sufficient to create one building for zoning purposes, even though access to the connection would be provided in part via two below-grade corridors, because the connection itself would be fully above grade, enclosed, and heated and artificially lit. The Board upheld the Zoning Administrator's determination that the planned connection would serve as common space shared by users of all portions of the building, in the nature of a lobby, notwithstanding the locked doors at the entrance to each dwelling unit, which would not negate the shared nature of the use of the connection. The Board also agreed with the Zoning Administrator that the breezeway could be considered space designed and used to provide free and unrestricted passage between separate portions of the building.

Rear yard. The MU-5 zone requires a rear yard of at least 15 feet. (Subtitle G § 405.2.) In the case of the subject property – as a corner lot abutting three or more streets – the depth of the rear yard may be measured from the center line of the street abutting the lot at the rear of the structure. (Subtitle B § 318.8.) The Board agrees with DCRA and DGS that the rear yard setback requirement was satisfied at the subject property, whether the rear yard is measured from Chapin or Clifton Street.[21] Given the widths of those abutting streets, the setback measured from the center line would be at least 25 feet.

Great weight. The Board is required to give "great weight" to the issues and concerns raised by an 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)(3)(A) (2012 Repl.)).) In this case, ANC 1B submitted a letter dated February 5, 2020 that expressed support for "the need to close DC General and construct smaller, service-enriched short-term housing across the city" and asserted that the "facility best fitting the needs in Ward 1 is apartment-style family housing with 2 and 3 bedroom units." (Exhibit 84.) The ANC's letter did not specifically mention this appeal or state any issues or concerns to which the Board can give great weight.

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between the two units. Access to the breezeway would be provided via two below-grade corridors leading from either the sidewalk or the rear alley to a set of stairs up to the court.

The breezeway, approximately 3.5 feet wide and extending 23 feet between the two units, would be above grade, enclosed, heated, and lit. The Board upheld the Zoning Administrator's determination that the planned breezeway connection satisfied the requirement of Subtitle B § 309.1(d)(1) as a common space shared by users of all portions of the building, such as a lobby. The Board noted that the breezeway would function as a common space that occupants of each unit could use to reach the front or rear of the building, which otherwise would not be possible without a long detour around the block, given the absence of side yards. The Board agreed with the Zoning Administrator that the presence of locked doors at the individual units would not negate the shared nature of the use of the breezeway.

[21] See the zoning definition of "Street Frontage," which provides that "…When a lot abuts upon more than one (1) street, the owner shall have the option of selecting which is to be the front for purposes of determining street frontage." (Subtitle B § 100.2.)

Exceptions to the Proposed Order. Because a majority of the Board members participating in the issuance of this order did not personally hear the evidence in this appeal, a proposed order was provided to the parties to afford them an opportunity to present written exceptions, in accordance with D.C. Official Code § 2-509(d).

Based on the findings of fact and conclusion of law, the Board finds no error in the decision made on September 30, 2019 by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1908601 to allow a new building with 50 residential apartments, including Short Term Family Housing (STFH) units, in the MU-5A zone at 2500 14th Street N.W. (Square 2662, Lot 205). Accordingly, it is therefore **ORDERED** that the **APPEAL** is **DENIED** and the Zoning Administrator's determination is **SUSTAINED.**

VOTE: 3-0-2 (Frederick L. Hill, Carlton E. Hart, and Peter A. Shapiro voting to deny the appeal; Lorna L. John not participating; 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: _____