DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington, D.C. 20001

Appeal by Residences of Columbia Heights, A Condominium BZA Appeal No. 20183

D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' PRE-HEARING STATEMENT

The D.C. Department of Consumer and Regulatory Affairs ("DCRA") respectfully requests that the Board of Zoning Adjustment (the "Board") deny this Appeal and states as follows:

Appellant, Residences of Columbia Heights, a Condominium ("RCH"), claims that the Zoning Administrator erred in approving building permit B1908601 (the "Permit") for a building project at 2500 14th Street N.W., (Lot 205, Square 2662) (the "Property") located in Ward 1 of the District (collectively referred to as the "Ward 1 Project").

RCH claims that the Zoning Administrator erred in the following respects:

1) the Permit was issued absent a "special exception" under subtitle U § 513.1(b) as the construction constitutes an "emergency shelter" under subtitle B §100.2;
2) the Ward 1 Project fails to provide a "rear-yard setback" of 15 feet, under G § 405.2;
3) The Ward 1 Project's parking and loading requirements are not met as it is an "emergency shelter".[1]

However, all of Appellant's arguments fail. First, contrary to RCH's assertions, the Ward 1 Project is an "apartment house" under the zoning regulations and not an "emergency shelter." Furthermore, an "apartment house" is permitted as a "matter of right" in the subject zone under subtitle U § 512.1(a). Second, the project is considered "single building" for zoning purposes and it satisfies the rear yard setback requirements. Third, as an "apartment house," the Ward 1 Project

[1] BZA Appeal 20183 Exhibit 33 - Appellant's Revised Pre-Hearing Statement, p. 2.

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has the appropriate number of parking spaces for the use and loading berth requirements under the applicable regulations. Thus, the Appeal must be denied.

FACTUAL AND PROCEDURAL BACKGROUND

The Department of General Services ("DGS") has partnered with the Department of Human Services ("DHS") to design and build new Short-term Family Housing in all eight Wards of the District.[2] The building projects are authorized by the Homeless Shelter Replacement Act of 2016 ("HSRA"), D.C. Law 21-141, 63 D.C. Reg. 8453 (eff. July 29, 2016), and the Homeless Shelter Replacement Amendment Act of 2018 ("HSRAA"), D.C. Law 22-167, 65 D.C. Reg. 13693 (eff. Oct. 30, 2018).[3]

The HSRA and the HSRAA draw clear distinctions between the other construction projects in Wards 3 through 8 versus the project at issue in this Appeal. In particular, the HSRAA provides, in relevant part:

> The Mayor is 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**; 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.

(See, HSRAA, D.C. Law 22-167, § 2(1)) (emphasis added).

In conformity with the HSRAA, DGS's building project in Ward 1 includes 35 "apartment-style units" for families experiencing homelessness ("STFH Units") and 15 units

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[2] See https://dgs.dc.gov/page/short-term-family-housing-construction-projects1-0

[3] For a background of HSRA see *Neighbors for Responsive Government, LLC v. District of Columbia Board of Zoning Adjustment*, 195 A.3d 35 (D.C. 2018).

of "permanent supportive housing" for seniors ("PSH Units") at 2500 14th Street N.W. (Lot 205, Square 2662) (the "Property"). The Property is in the MU-5A zone. The project will utilize the existing Rita Bright Recreation Center on the premises and also construct the new apartment house with a "meaningful connection" between the two structures. (See, DCRA Exhibit 1, Architectural Site Plan). The Property is a corner lot with frontage on three streets: Clifton Street on the North, 14th Street on the East, and Chapin Street on the South.

On September 30, 2019, DCRA issued building permit B1908601 to DGS.[4] The Permit provides the construction of:

> . . . 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.[5]

On October 24, 2019, RCH filed this Appeal and its Pre-Hearing Statement.[6] On January 8, 2020, RCH filed a "Revised Pre-Hearing Statement." [7]

ARGUMENT

I. The Zoning Administrator Did Not Err in Approving the Building Permit as the Project is an "Apartment House," Which May be Built as a Matter of Right in the Zone.

The Appellant erroneously characterizes the Ward 1 Project as an "emergency shelter" subject to a "special exception" under 11 - U DCMR §513.1(b). The Appellant rests its argument on two flawed propositions: 1) because DGS sought a "special exception" for the other short-term housing projects in Wards 3 through 8, it must *de facto* seek a "special exception" in this instance; and 2) although the PSH units are permitted as a "matter of right" within the zone, the STFH Units

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[4] BZA Appeal 20183 Exhibit 9 - Building Permit B1908601.
[5] BZA Appeal 20183 Exhibit 9 - Building Permit B1908601.
[6] BZA Appeal 20183 Exhibit 14 - Appellant's Pre-Hearing Statement.
[7] BZA Appeal 20183 Exhibit 33 - Appellant's Revised Pre-Hearing Statement.

are predominately an "emergency shelter," which compels the property owner to obtain BZA relief.[8] Appellant is incorrect on both counts.

Appellant's first argument—that DGS is required to obtain BZA relief because it obtained "special exceptions" for projects in Wards 3 through 8—is meritless. The Appellant fails to provide any support for its claim, and the argument flies in the face of the zoning regulations. Furthermore, the Appellant glosses over terms of the HSRAA and fails to recognize the clear differences that distinguish the Ward 1 project from those in Wards 3 through 8.[9] Moreover, the mere fact that DGS obtained BZA relief on a separate building project in other zones for different uses does not dictate that similar relief is required in any subsequent building project, such as the property at issue here.

Appellant's second claim is likewise meritless. The Ward 1 Project consists of 15 PHS Units and 35 STFH Units. As explained below, both types of units fall within the definition of an "apartment" use. Therefore, both types of units are allowed as a "matter of right." The Appellant concedes that the 15 PHS Units qualify as an "apartment" use but, in essence, argues that the 35 STFH Units do not by arguing cryptically that the 35 STFH Units are not part of the overall project (". . . that does not make the 35 STFH units part of it. . ."),[10] that the STFH Units somehow transform the entire project into an "emergency shelter," and that the alleged "emergency shelter" use is a "dominant use" requiring a "special exception."[11] The Appellant fails to provide any legal

[8] BZA Appeal 20183 Exhibit 33 - Appellant's Revised Pre-Hearing Statement, p. 7-9.
[9] Appellant does not contest the statutory basis of the Ward 1 project under the HSRAA. (See, Appellant's Revised Pre-Hearing Statement, p. 4).
[10] BZA Appeal 20183 Exhibit 33 - Appellant's Revised Pre-Hearing Statement, p. 7.
[11] BZA Appeal 20183 Exhibit 33 - Appellant's Revised Pre-Hearing Statement, p. 8-9.

justification for these assertions, and the suggestion by the Appellant that there is a "dominant use" is irrelevant, without support, and unfounded in the zoning regulations.

Contrary to RCH, the project is an "apartment house" for zoning purposes. The zoning regulations define the terms "apartment" and "apartment house" as follows:

> Apartment: One (1) 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.
>
> Apartment House: Any building or part of a building in which there are three (3) or more apartments, providing accommodation on a monthly or longer basis.

(11 D-DCMR § 101.2).

Here, all of the units, both STFH Units and PHS Units, each have its own bedroom(s), kitchen and bathroom. (DCRA Exhibit 2, PHS Unit 1 A89.11; Exhibit 3, STFH Unit 3B A8.06; Exhibit 4, 2nd & 4th Floor Plan). It is abundantly clear that that the individual units constitute an "apartment" under subtitle D § 101.2 and the entire project is an "apartment house" as there are more than three (3) apartments (35 STFH Units and 15 PHS Units). (See, 11 D-DCMR § 101.2).

Moreover, the residents of the Ward 1 Project will be signing written agreements with DHS giving the residents exclusive right to occupy their assigned unit. Furthermore, each resident will be given keys to control entry to the units as well.

The BZA ruling in Appeal 18151 (decided April 5, 2011) is instructive.[12] The appeal challenged the DCRA's issuance of a building permit. The University of the District of Columbia leased 21 units in an apartment building for student housing. An apartment owner challenged the permit claiming that the project converted the apartment building into a "dormitory." The evidence

[12] BZA Appeal 20183 Exhibit 7- Letter from Cozen and O'Connor on Behalf of DGS, Tab B.

showed that the 21 units retained their "own kitchen and bathroom facilities for the use of that occupants of that unit."[13] Further, the BZA found that the "occupants of each unit can unlock the door to the hallway, thereby excluding other residents from using their bathrooms and kitchen."

In examining the definition of "apartment," the BZA found that two elements are key: 1) the unit must provide kitchen and bathroom facilities; and 2) the unit must be under the exclusive use and control of the occupants.

In affirming the issuance of the permit, the BZA held:

> 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. . . The fact that an occupant may need to vacate the unit during school breaks, not have the roommate of their choice, not have unfettered rights to an overnight guest, or be required to move to another unit has nothing to do with their rights to control the premises while he or she is lawfully there. The occupants retain the rights to exclude all others, except UDC, and the circumstances under which UDC may enter the unit are defined. Since the Board has concluded that the 21 units would be "exclusively for the use of and control of the occupants", it must reject the Appellant's claim that these were to become rooming units, which by definition provide accommodations that are "not under the control of the occupants". Nor are these units intended to be merely sleeping accommodations, which leads to the Appellant's claim that a dormitory was to be established.[14]

BZA Appeal 18151 is directly on point and applicable here. The STFH and PHS Units each have their own kitchen and bathroom. (DCRA Exhibit 2, PHS Unit 1 A89.11; Exhibit 3, STFH Unit 3B A8.06; and Exhibit 4, 2nd & 4th Floor Plan). All the units have a living space that is separate and district from the sleeping quarters. (DCRA Exhibit 2, PHS Unit 1 A89.11; Exhibit 3, STFH Unit 3B A8.06; and Exhibit 4, 2nd & 4th Floor Plan). The units are designed so that only the occupant can access the unit, which is key-controlled.[15] The occupants will have exclusive

[13] BZA Appeal 20183 Exhibit 7 - Letter from Cozen and O'Connor on Behalf of DGS, Tab B, p. 4.
[14] BZA Appeal 20183 Exhibit 7 - Letter from Cozen and O'Connor on Behalf of DGS, Tab B, pp. 6-7.
[15] BZA Appeal 20183 Exhibit 7 - Letter from Cozen and O'Connor on Behalf of DGS, p. 2.

control over their own space, and occupants will be able to exclude all other residents form their unit.[16]

In contrast, the facilities in Wards 3 through 8 are different and distinct from the Ward 1 Project at issue here. The facilities in Wards 3 through 8 do not feature kitchen facilities within the units; most bathrooms are shared, with only a limited number of rooms having private bathrooms;[17] the rooms are open spaces without separate living and sleeping quarters;[18] and the rooms are not under the exclusive control of the occupants, but there are security monitoring desks on each floor.[19] Therefore, the design features at the housing in Wards 3 through 8 differ substantially from the Ward 1 Project at issue in this appeal.[20] (See, DCRA Exhibit 5, Summary of BZA Cases in Wards 3 through 8 with reference to the Exhibits with respect to Architectural Design and Specifications).

Lastly, the Appellant states that the Zoning Regulation's definition of "apartment" was "modified" since BZA Appeal No. 18151 was decided.[21] However, the change in the definition of "apartment" merely added the following language (in italics):

> Apartment: One (1) 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.*

(ZR 2016 11-D-DCMR §101.2) (bold emphasis added).[22]

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[16] BZA Appeal 20183 Exhibit 7 - Letter from Cozen and O'Connor on Behalf of DGS, p. 2.
[17] BZA Appeal 20183 Exhibit 7- Letter from Cozen and O'Connor on Behalf of DGS, p. 2.
[18] BZA Appeal 20183 Exhibit 7 -Letter from Cozen and O'Connor on Behalf of DGS, p. 3.
[19] BZA Appeal 20183 Exhibit 7 - Letter from Cozen and O'Connor on Behalf of DGS, p. 3.
[20] BZA Appeal 20183 Exhibit 7 -Letter from Cozen and O'Connor on Behalf of DGS, p. 3.
[21] BZA Appeal 20183 Exhibit 33 - Appellant's Revised Pre-Hearing Statement, p. 9.
[22] ZR 58 11-D DCRM § 199.1 definition of apartment as follows: "Apartment - one (1) or more habitable rooms with kitchen and bathroom facilities exclusively for the use of and under the control of the occupants of those rooms."

As a result of the italicized addition, the Appellant further argues that the concept of "control" has been abandoned and the definition adopts "legal responsibility of the property by either ownership or leasehold."[23] Curiously, the Appellant fails to cite to any case law or BZA ruling to support its claim.

Contrary to the Appellant's unsupported interpretation, the added language of "may" to the definition of "apartment" is *permissive* not mandatory. (See, *Stockard* v. *Moss*, 706 A.2d 561, 566 (D.C. 1997) ("The word 'may' is permissive rather than mandatory"). More importantly, zoning regulations control **use**, not ownership of property. *Watergate West, Inc. v. District of Columbia Board of Zoning Adjustment*, 815 A.2d 762, 767 (D.C. 2003). Thus, under the current regulations, "control" may be established by a rental agreement or ownership, but those are not the exclusive means of demonstrating "control." And there is more than sufficient support in the record to demonstrate that all units in the Ward 1 Project will be exclusively for the use of and under the control of the designated occupants of those units. On this basis alone, the Board must dismiss the Appeal.

II. The Zoning Administrator Did Not Err in Approving the Building Permit as the Project Is a "Single Building" That Conforms to the Rear Set Back Requirements of 11-G DCMR § 405.2.

Appellant argues that the project violates the "rear set back" requirements as the Appellant maintains that there are two buildings on the site under subtitle C § 302.4. However, the project is considered a "single building" under 11-B DCMR § 309.1. The Rita Bright Recreation Center and the proposed structure will be joined by a meaningful connection compliant with subtitle B §309.1. (See, DCRA Exhibit 6, Connection Level P1 GFA).

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[23] BZA Appeal 20183 Exhibit 33 - Appellant's Revised Pre-Hearing Statement, p. 9.

Subtitle B § 309.1 states:

> For purposes of this chapter, 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 a connection that is:
>
> (a) Fully above grade;
> (b) Enclosed;
> (c) Heated and artificially lit; and
> (d) Either:
> (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.

(11-B DCMR § 309.1)

The connection between the Rita Bright Recreation Center and the apartment house satisfies all the requirements of subtitle B § 309.1. (See, DCRA Exhibit 6, Connection Level P1 GFA). Here, as required by the regulations, the **connection** between the two buildings is entirely above the adjacent grade. (See, DCRA Exhibit 6, Connection Level P1 GFA).

In addition, the connection is a common hallway that is fully enclosed, heated and artificially lit, meeting the requirements of subtitle B § 309.1(b) and (c). Moreover, the common hallway is designed and used to provide free and unrestricted passage between the new the addition and the Rita Bright Recreation Center, in conformity with subtitle B § 309.1(d)(2), with interior doors serving both the housing and Rita Bright Recreation Center portions of the single building.

Recently, in BZA Appeal 19950, the Board affirmed the Zoning Administrator's interpretation of a "meaningful connection" under subtitle B § 309.1 in an analogous building

project.[24] In BZA Appeal 19950, as in this case, DCRA issued a building permit allowing for the construction of a "common hallway" between two buildings.[25] The connection itself was fully above grade; nevertheless it had stairs and a landing which were partially "below grade" under RCH's interpretation of the zoning regulations. The appellant challenged the permit arguing, *inter alia* that the common hallway failed to satisfy subtitle B § 309.1. However, contrary to the appellant's contention, the common hallway satisfied every requirement of subtitle B §309.1(a)-(d) as it was fully above grade, enclosed, artificially lit, and used to provide free and unrestricted passage between separate portions of the building; despite the fact that certain elements were partially "below grade."[26] In denying the appeal, the Board affirmed the Zoning Administrator's interpretation finding that the common hallway was a "meaningful connection," satisfying subtitle B § 309.1 and that the project constituted "single building" for zoning purposes.[27]

In this instance, the Ward 1 Project is considered a "single building" for zoning purposes, and the Property is a "corner lot" abutting three (3) streets. (See, DCRA Exhibit 7, D.C. Zoning Map). In an MU-5A zone, for a single building, the rear yard set-back is 15 feet. (11-G DCMR § 405.2). Under subtitle B § 318.8, if there is a "corner lot abutting three (3) or more streets," then "the depth of rear yard may be measured from the center line of the street abutting the lot at the rear of the structure." (11-B DCMR § 318.8). The Ward 1 Project meets this rear yard requirement whether the rear yard is located on Chapin Street or Clifton Street, which are 65' and 50' in width respectively. (See, subtitle B § 100.2 Street Frontage: When a lot abuts upon more than one (1)

[24] BZA Appeal 19550 (decided December 19, 2018).
[25] BZA Appeal 19550 (decided December 19, 2018).
[26] BZA Appeal 19550 (decided December 19, 2018).
[27] BZA Appeal 19550 (decided December 19, 2018).

street, the owner shall have the option of selecting which is to be the front for purposes of determining street frontage).[28]

III. The Zoning Administrator Did Not Err in Approving the Building Permit Because the Parking and Loading for the Ward 1 Project Conforms to the Regulations.

Appellant's final objections, with respect to parking and loading requirements, also fail because the Ward 1 Project: 1) does not constitute an "emergency shelter" (see *supra*), and 2) constitutes a "single building" for zoning purposes. Moreover, the Appellant accepts both parking and loading requirements if the project is deemed a single building: "**Similarly I have no reason to take issue with the DGS's analysis of compliance with these criteria [parking and loading] as tied to its view that the 35 units are not an emergency shelter**" (emphasis added).[29]

Under the Appellant's interpretation, the parking requirements are "different for the two uses being added to the property."[30] However, as has been previously stated, a building may have more than one use. The Ward 1 Project is a residential apartment use, and is subject to the "residential, multiple dwelling unit" use category for parking purposes.

At 50 apartment units, the Ward 1 Project's parking requirements is 16 spaces (subtitle C § 701.51 "1 per 3 dwelling units in excess of 4" units—40-4=46 Units/3=25.44). However, it is entitled to a 50% reduction in its parking requirement due to the proximity within .25 miles of the priority bus route on 14th Street. (See, 11-C DCMR § 702.1(c)(7)). Thus, the overall parking requirements is 7.66 or 8 spaces. Nevertheless, the Ward 1 Project will provide 21 spaces, which

[28] The Appellant expressly admits that if the project is deemed to be a "single building" then the rear set back requirements are satisfied. "**DGS and I are in apparent agreement that if the Project properly becomes a single building fronting on Clifton Street, N.W. then the setback from Chapin Street, N.W. is sufficient for meeting the year yard requirement.**" See, BZA Appeal 20183 Exhibit 8- Letter from Knopf & Brown Re: Discussion Points for Meeting May 10, 2019, p.4 (emphasis added).

[29] BZA Appeal 20183 Exhibit 8- Letter from Knopf & Brown Re: Discussion Points for Meeting May 10, 2019, p.4.

[30] BZA Appeal 20183-Exhibit 33 – Appellant's Revised Pre-Hearing Statement.

exceeds the parking requirement (whether or not the above-noted 50 % reduction is applicable). Despite the demonstrated parking capacity in compliance with the zoning regulations, Appellant's mathematics hinge on the project's use as an "emergency shelter," which it is not.

Lastly, Appellant insists that the project does not comply with the loading requirements. However, that argument too relies on the Ward 1 Project being an "emergency shelter." As a single building, "apartment house" load berth is only required when a residential apartment exceeds 50 dwelling units. 11-C DCMR Section 901.1. The Ward 1 Project has 50 units exactly, and therefore loading is not required.

CONCLUSION

For the foregoing reasons, DCRA respectfully requests that the Board deny this Appeal.

Respectfully submitted,

/s/ Esther Yong McGraw
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Date: 1/22/20

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