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DAVID W. BROWN

SOLE PRACTITIONER (2017)

May 8, 2019

Via Email Only - matthew.legrant@dc.gov

Mr. Matthew Le Grant
Zoning Administrator
Office of the Zoning Administrator
Department of Consumer and Regulatory Affairs
1100 4th St SW
Washington, D.C. 20024

Re: **2500 14th Street, N.W. - Development Proposal**
Discussion Points for Meeting on Friday, May 10, 2019

Dear Mr. Le Grant:

This letter follows up on my email to you of April 19, 2019, in which I forwarded to you an April 18, 2019 Memorandum I prepared for the Columbia Heights Condominium Association (the "Association") discussing zoning compliance issues relating to the proposed development at 2500 14th Street, N.W., Lot 205, Square 2662 (the "Property"). Members of the Association's Board of Directors and I are scheduled to meet with you to discuss their concerns this Friday at 10:30 am. We welcome that opportunity. My Memorandum was forwarded to counsel for the Department of General Services ("DGS"), who has responded to me in a letter of May 3, 2019. In case you have not seen that letter, a copy is attached. My purpose here is to express in advance of our meeting my reasons for giving little credence to the claims of DGS counsel.

1. Use

DGS disagrees with my conclusion that the 35 units reserved for families experiencing homelessness constitute an "emergency shelter" as that term is used in the Zoning Regulations. DGS claims that those units and the 15 Permanent Supportive Housing ("PSH") units qualify as an "apartment house" under B-100.2, because the structure will contain three or more "apartments" providing accommodations on a monthly or longer basis. DGS further claims that I have ignored the key fact that the Homeless Shelter Replacement Act (HSRA) and the 2018 HSRA Amendment relating to Ward 1 "draw a clear distinction between the emergency shelter units in other wards and the planned apartment-style units at the Property." DGS Letter at 1-2.

DGS's arguments are wrong. The 2018 HSRA Amendment changed the location of the facility authorized by the HSRA for Ward 1, but it left unchanged its nature and purpose: "to construct a facility to provide temporary shelter for families experiencing homelessness containing 35 2- and 3-bedroom apartment style units . . ." That language is the same in both enactments. In Wards 3-8, the HSRA general purpose is identical—"to construct a facility to provide temporary shelter for families experiencing homeless," but instead of "apartment style units" in Wards 3-8, they are to be "D.C. General Family Shelter replacement units."

DGS argues that this distinction among the units means that even though all the Ward 3-8 facilities are properly deemed "emergency shelters" under the Zoning Regulations, the facility in Ward 1 is not an "emergency shelter," despite being for the same purpose—i.e., "to provide temporary shelter for families experiencing homelessness." This argument has no foundation in the Zoning Regulations. In B-100.2, "emergency shelter" is defined at "A facility providing temporary housing for one (1) or more individuals who are otherwise homeless as that arrangement is defined in . . . D.C. Official Code §§ 4-751.01 *et seq.* . . ." There is no dispute that the 35 units in the Ward 1 "temporary shelter for families experiencing homelessness" will be occupied by individuals that meet the statutory criteria for such temporary housing, as set forth in D.C. Official Code §§4-751.01 et seq.[1] Thus, the 35 units identified for Ward 1 unquestionably meet the definition of "emergency shelter" in the Zoning Regulations, just as the BZA found in the Ward 3-8 cases. *E.g.,* BZA Order 19450 at 21 ("The Board concurs with the Applicant that the planned use of the subject property is as a facility providing temporary housing under the Homeless Services Reform Act and fits wholly into the [emergency shelter] zoning definition. . ."). This definition makes none of the distinctions among different features of temporary shelters DGS claims are pivotal to the use category "emergency shelter": separate cooking facilities, separate bathroom facilities and separate sleeping quarters for adults and children.

DGS's argument is further eroded by its flawed attempt to recharacterize the use as "residential apartment use" instead of "emergency shelter" use. Its argument that the use is "apartment house" is grounded in its claim that the 35 units for "temporary shelter for families experiencing homelessness" are themselves "apartments." They meet this definition, DGS claims, because the units are "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." DGS Letter at 2. DGS argues, citing a 2011 case, BZA Appeal 18151, that "control" means control of the locks to the individual units, enabling occupants to exclude others and to have exclusive control over their own space. But whatever the validity of this BZA analysis under the 1958 Zoning Regulations, apparently never tested in the Court of Appeals, it has been effectively repudiated by an amendment to the

[1] The "emergency shelter" definition further states that "an emergency shelter use may also provide ancillary services such as counseling, vocational training, or similar social and career assistance," but whether such ancillary services are provided is plainly optional, and thus not material to meeting the basic elements of the definition.

"apartment" definition in the 2016 Zoning Regulations. The current provision added to the 1958 "apartment" definition the following: "Control of the apartment may be by rental agreement or ownership." Plainly, however, the units at issue here are not "owned" by their temporary occupants, and DGS does not purport to lease them to the occupants by rental agreement, nor are they required to pay rent to be eligible for occupancy of the temporary housing. The main eligibility requirements are homelessness and D. C. residency. D.C. Code § 4-753.02(a). Indeed, anyone with an ownership or leasehold interest in safe housing is **not** eligible for occupancy. § 4-753.02(a)(a-4).

The 2016 Zoning Regulations thus clarify that for an apartment, 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 a leasehold. A leasehold, rather than ownership, is sufficient under the Zoning Regulations because the District, from the perspective of zoning policy, properly recognizes that apartment lessees should be regarded as indistinguishable from owner occupants of apartments and other residential living units allowed in the residential zones. But this is where the line has been drawn between permanent and transient occupancy of living units. This is clearly expressed in the principal distinction drawn in the Regulations between "hotel" and "apartment house." A "hotel" is for "transient guests who rent the rooms or suites," and the definition explicitly states that "[t]he term 'hotel' shall not be interpreted to include an apartment house. . . ." B-100.2. Tellingly, the "hotel" use is not allowed by right or by special exception in the various R zones, including the RA residential apartment zones. The only hotels allowed in the RA zones are those that were in existence on May 16, 1980, and they cannot be expanded. U-401.1(d)(2). This reflects a clear and strong policy disfavoring transient living units in the residential zones, subject to clearly stated and limited exceptions, one of them being "emergency shelter." DGS cannot properly do an end-run evasion of this policy by giving the transient occupants of the "apartment-style units" keys and locks, but not the traditional rights and responsibilities found in landlord-tenant leases that would make the facility an "apartment house."

2. Single Building

DGS's analysis of its compliance with the single building requirements of B-309.1 does not withstand scrutiny. First, DGS claims that the internal connection is fully above grade by application of the grade-plane method. DGS Letter at 3. But this just ignores the adjective "fully." If something is "fully above grade" there is no need for the grade-plane method, with is needed only to determine if a structural element partly below and partly above grade is to be counted in an FAR or number-of-floors calculation. In other words, resort to the grade-plane method is an admission the "fully above grade" requirement in B-309.1(a) is not met. Second, DGS argues that the "internal connection" is fully above grade, even if the "common space or passageway that satisfies subsection (d)," DGS Letter at 3, is not fully above grade. This is an unjustified reading of B-309.1. All of the subsections –(a) through (d) -- are modifiers of the "connection" that joins the two buildings together. For subsection (d), one of two alternatives must be met. In this case, the intention is to meet (d)(2), i.e., that the "connection" be "[s]pace that is designed and

used to provide free and unrestricted passage between separate portions of the building . . . ." But (a) – (d) are in the conjunctive, which means that the "space" referred to in (d) must also meet (a) –(c), to include being "fully above grade." In short, **all** of the two buildings' connective tissue must be "fully above grade." There is no ambiguity in "fully."

Nor is DGS's dismissal of A-301.3 persuasive. DGS treats B-309.1 as, in essence, an overruling of A-301.3 whenever the prohibition of more than one principal structure on a lot of record can be evaded by construction of a connection between them that passes muster under B-309.1. DGS cites no evidence that B-309.1 was intended to function as some sort of exception to the general rule of A-301.3. That intention is belied by the fact that A-301.3 itemizes seven exceptions to the general rule, and connecting two principal buildings pursuant to B-309.1 is not one of them. That alone is reason enough to discredit DGS's interpretation, under the maxim *expressio unius est exclusio alterius. See Howard Univ. Hosp. v. DCDOES*, 952 F.2d 168, 174 & n.4 (2008) ("When a legislature makes express mention of one thing, the exclusion of others is implied . . .). Further, if the two provisions were properly regarded as potentially conflicting, the courts would work to reconcile the conflict by ruling, absent clear contrary legislative history, that the two provisions are compatible, providing that the two principal structures will be functioning as essentially one, not as two quite distinct uses—exactly the opposite of what is envisioned here.

3. Setbacks

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 rear yard requirement. DGS Letter at 4. Beyond that, there is little agreement on setback requirements. DGS claims without explanation that the Property qualifies as a "through lot." It cannot be a through lot because through lots are interior lots and the Property is a corner lot, not an interior lot. B-100.2. DGS does not dispute my analysis of the yard requirements for the new structure if not deemed a single building. Instead, DGS simply reiterates its claim to single-building entitlement. Similarly, DGS does not deny my assertion that the reason DGS has employed the single-building artifice of joining two mutually independent uses at the hip was to avoid reductions in the size and scale of the new structure—reductions that would otherwise be necessary to comply with setback requirements.

4. Parking and Loading

DGS's response to my analysis of compliance with the requirements for motor vehicle parking, bicycle parking, and loading, DGS Letter at 4, does not take issue with my analysis as tied to the view that the new structure, even if an apartment building as to the PSH Units, is an emergency shelter as to the remaining 35 units. Similarly, I have no reason to take issue with DGS's analysis of compliance with these criteria as tied to its view that the 35 units are not an emergency shelter. The parking and loading issues, therefore, are simply derivative of the larger question of what the use is, as detailed above.

5. Timeliness

DGS volunteers the analysis that any challenge to the project by the Association is time-barred under Y-302.2, apparently because it has been more than 60 days since it was on notice of DGS's intention to build a by-right apartment house, a use characterization with which you allegedly agreed. DGS Letter at 5. I am unaware of any determination letter from you on the use issue, nor is the Association aware of any such document.[2] I ask that if it exists, you provide me a copy at our meeting this Friday, which will be the first meeting with you on the Project by either me or anyone from the Association. To my knowledge, DGS has not shared (or even make known) any such written decision with anyone in the affected community. The notion that an appeal of any such final administrative decision by you under Y-302.2 is untimely is spurious.

Even further afield, DGS appears to argue that its "decision" to pursue the project as a by-right apartment house, ostensibly communicated to the community at official ANC1B meetings, can no longer be the subject of a timely appeal under Y-302.2. This is nonsense. That provision refers to an "administrative decision," and Y-302.1 clarifies that this means a decision "made by an administrative officer or body . . . in the administration or enforcement of the Zoning Regulations . . ." This plainly does not apply to DGS personnel, who have not acted as administrators or enforcers of the Zoning Regulations in deciding how they will proceed with the Project. The time for appeal in this case, if any is made, would begin when either you make a final determination on a zoning question raised in this case or DCRA issues the building permit.

Finally, DGS cites *Woodley Park Community Ass'n v. BZA*, 492 A.2d 628, 637 (1985) as precedent for faulting the Association on timeliness grounds. This argument borders on the ridiculous. In that case, the appeal was filed **after** the building permit was issued, making it completely irrelevant in this pre-permit context. Moreover, the appeal to the BZA was filed **more than a year** after permit issuance, during which time the permitted construction work "was commenced and substantially completed." 492 A.2d at 637.

[2] If, parallel to your action on the single building issue, you provided a non-appealable "advisory statement" to DGS on this issue, that would obviously not trigger any untimeliness claim here.

CONCLUSION

I look forward to the opportunity to discuss these issues with you on Friday morning. You can count on our complete cooperation in providing you available information that you consider relevant.

Very truly yours,

David W. Brown

David W. Brown
Attorney for Columbia Heights
Condominium Association

/enclosure