

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

OCTOBER 21, 2014

+ + + + +

The Regular Public Meeting convened in the Jerrily R. Kress Memorial Hearing Room, Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 9:39 a.m., Lloyd Jordan, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

LLOYD JORDAN, Chairperson
S. KATHRYN ALLEN, Vice Chairperson
MARNIQUE HEATH, Board Member
JEFF HINKLE, Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

MARCIE COHEN, Vice Chairperson

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
JOHN NYARKU, Zoning Specialist

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D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

The transcript constitutes the minutes from the Public Meeting held on October 21, 2014.

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P-R-O-C-E-E-D-I-N-G-S

(9:39 a.m.)

CHAIRPERSON JORDAN: Good morning.

Will you please come to order?

Today is October 21, 2014, and we're here for the meeting of the Board of Zoning Adjustment of the District of Columbia.

We're located at 441 4th Street, Northwest, at the Jerrily R. Kress Memorial Hearing Room on the second floor.

My name is Lloyd Jordan, Chairperson. To my right is S. Kathryn Allen, Vice Chair; to her right, Jeffrey Hinkle, member of the Board; to my left is Marnique Heath, member of the Board. To her left is Marcie Cohen, member of the Zoning Commission, sitting in as a member of the Board of Zoning Adjustment for today.

Today's meeting is being webcast live and also being recorded by a Court Reporter. So, therefore, I'm going to ask you to refrain from any disruptive noises here in

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the Hearing Room. It's a good time now to silence any devices that may ring or buzz loudly.

If you're not familiar with the process and procedures, how we operate here at the Board, to the door to my left in the back should be some pamphlets or a document indicating how we operate the Board. Feel free to get that.

If you plan to provide any testimony, statement, read a statement to the Board, be a witness, or present any evidence to the Board today, I'm going to need you to do two things. The first thing I'm going to need you to do, each person who is going to present testimony to the Board or a statement to the Board, I need you to complete two witness cards per person. That's two witness cards per person.

And prior to you giving your testimony or your statement, to give that -- those two cards to the Court Reporter who is

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seated to my right. So that=s two cards to be completed by each person and given to the Court Reporter prior to testifying or providing a statement.

The second thing I=m going to need you to do is to now stand -- if you=re going to provide a statement or testimony to the Board, I=m going to need you to now stand and take the oath being given by Mr. Moy.

MR. MOY: Good morning. Do you solemnly swear or affirm that the testimony you are about to present in this proceeding is the truth, the whole truth, and nothing but the truth? Ladies and gentlemen, you may consider yourselves under oath.

CHAIRPERSON JORDAN: Very good. Any preliminary matters, Mr. Moy?

MR. MOY: Yes. Good morning, Mr. Chairman, members of the Board. Three announcements for the record. First, on the docket, the decision for 18738 of Kassani has been postponed to December 16th. Two of the

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hearing cases, 18790 of Jefferson-11th Street LLC has been postponed to November 18th. And Case Number 18815 of Amanda Bennett and Donald Graham has been rescheduled to November 18th also.

CHAIRPERSON JORDAN: Okay. Thank you. Then, let=s go -- handle our public meeting cases. Go ahead and call the first one, please.

MR. MOY: On the expedited review calendar, there is one application. It is Application Number 18854 of Conrad J. DeWitte, Jr. This is for a special exception relief under Section 223, Mr. Chairman.

CHAIRPERSON JORDAN: Very good. Is the Board ready to deliberate on this case?

I think the only issue that comes up is the additional request for relief of 401. The applicant requested relief from 401, but it=s my understanding that OP and ZA indicates that it=s not necessary, this additional relief. But let=s -- I would think it=s -- let=s be

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safe for the applicant and move to grant the relief requested by the applicant in 18854.

VICE CHAIRPERSON ALLEN: Allen.

CHAIRPERSON JORDAN: Motion made and second. Any additional discussion on readiness? All those in favor of the motion signify by saying aye.

(Chorus of ayes.)

Those opposed, nay. The motion carries.

MR. MOY: Staff would record the vote as five to zero on the motion of Chairman Jordan to approve the application for the relief requested. Seconding the motion is Ms. -- Vice Chairperson Allen, also in support Ms. Cohen, Ms. Heath, and Mr. Hinkle. Motion carries five to zero, Mr. Chairman.

CHAIRPERSON JORDAN: Okay. Then, let's call the next one.

MR. MOY: Would that be a summary order, sir?

CHAIRPERSON JORDAN: Yes.

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Summary, please.

MR. MOY: Thank you. The next and last case for decision on the public meeting session is Appeal Number 18820 of Senior Dwelling, Inc. As the Board will recall, this appeal was heard on September 23, 2014, where the Board completed all the testimony, closed the record, and scheduled its decision today, October 21st.

The Board requested proposed findings of fact and conclusions of law, and those exhibits, Mr. Chairman, are -- from all the parties are in your case folders.

CHAIRPERSON JORDAN: Okay. Thank you. Is the Board ready to deliberate on this case? I know that -- no, she is not here. You're not part of this case. We do have an absentee ballot, I believe, from Anthony Hood, who was -- he was sitting, so -- and then, Vice Chair was not -- did not sit on that case also. So I think we have enough to make a decision, certainly. We have at least one,

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two, three, four, considering what=s in the --

MR. MOY: That=s correct, sir.
You have four.

CHAIRPERSON JORDAN: Okay. All right. This is an appeal that was -- to a decision of the Zoning Administrator to revoke a rooming house certificate of occupancy. I think there was two different certificates of occupancy on property 223/225 56th Place, Northeast.

The Board conducted a -- in addition to reviewing all of the documents that have been pre-submitted, as the Board normally does, the Board held a hearing -- I guess it was about two hours -- and it took evidence and additional documents and testimony in this case. In fact, again, I looked at it the other day, too, Sunday again.

I guess I didn=t have anything else to do. Football game really wasn=t making me happy, so looked at it again.

So this matter is before the Board

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to deliberate, and I think we're ready to do that. What's in question is the Zoning Administrator's decision to revoke the two certificates of occupancy, where the Zoning Administrator has determined that this is a community-based residential facility and not a rooming house.

Based upon -- I would offer -- well, I reviewed the findings of fact offered by the DCRA and offered by the appellant in this matter, kind of consolidated and made some additional findings for this Board. I felt that the findings of fact offered by DCRA was compelling and also sat in to -- it blended in what my -- my findings of facts and discussion and thought process was reviewing -- well, going through the hearing and then reviewing the tape subsequently.

There has been -- as a finding, I would offer that there have been various complaints on this properly, and D.C. Government attempted to investigate this

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property in 2009, but was not able to successfully complete their investigation on this property.

There was a number of occasions in 2013 that the District did enter this property, various agencies of the District of Columbia entered this property, and conducted investigations. And we have in our record Exhibits 15B, 15C, and 15D, that provide support for the findings and the testimony offered by the District of Columbia investigators who were here, who I find that their testimony was very credible and accept their testimony as factually accurate.

The investigator=s reports and testimony backed up the post-hearing submission documents by DCRA, and I would give great credit to the testimony given by the government officials.

And, to the contrary, I don=t find credible, or at times truth worthy, the evidence given by the appellant in this

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matter. And I think that was pretty important for me as looking at the demeanor, the responses, and the interest of the appellant in this matter, that helped make a decision for me regarding findings.

The appellant regularly solicits residents for her property from nursing homes and hospitals. She said she -- and she also, by her own admission said, AWell, I don=t take severely -- people with severe health issues,@ which acknowledges that others not as severe are taken, and we have had some testimony that there were people clearly there that had health issues and need and would not be there but for the appellant agreeing with the -- either the nursing homes or the hospitals that this person would be under their care, under the -- I think it=s the planned care -- the planned care plan, which has been utilized numerously by the appellant who cannot now claim that she was not aware, although she says that, AWell, their name is on all these

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numerous patient care plans because they just needed her telephone number,@ because they didn=t have a telephone. Didn=t find that credible at all.

And some of those patient care plans, the exit plans require 24-hour coverage, care, although there are particular times during the day that outside nursing care would come in, but when they left then it -- certainly, the evidence showed that the appellant would supplement that kind of support that was needed. Numerous residents had 24-hour care plans.

One of the things that came up during this particular hearing is that the appellant was trying draw the line, AWell, not everybody there needs health plans, need health care.@ But that=s not the issue.

The property also employed, at least at one time, another -- a person who was particularly assigned to sit all night for a patient who has more severe issues that some

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of the other tenants. Found it also very peculiar that the appellant receives Social Security direct pay for these people who also have special care needs.

I'm trying to think, what else is there? And then the other thing that the appellant did, although it was the appellant's attempt to negate it, that she actually gave instruction -- instruction is given to the nursing care personnel who come to the facilities during the day as to schedule of activities, how to operate within the property, and et cetera. And posted throughout this property are the notices to instructions on nursing care, aid group categories, weekly schedules, rules and regulations for the property.

Department of Health conducted numerous inspections and found that some of these residents were at risk. The rent charged for this property, for these one-room, 400 square feet or something, properties is

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\$1,000 a month at 56th Place, which also raises a bit of concern about a regular room, someone who is in a rooming house, paying \$1,000 a month certainly raises some issues and concerns in my eyes.

And, as I said before, I did not find credible the testimony given by the appellant. And so, therefore, my conclusion is that based upon the totality of the -- totality of the facts, that this is clearly not a rooming house, but it is a community-based residential facility. And that under the law, although the law requires for a community-based residential facility, that there is a common need for treatment, rehabilitation, assistance, and supervision.

The law doesn't say that every person in this place has to have this treatment and rehabilitation need or assistance. In fact, if you interpret the regulations that way, and the D.C. Code that way, then it becomes a nullity because it

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becomes a real shell game, because you might have room for 10 people and you say, AOkay. I=ve got nine that need care, but the tenth one didn=t need it. So, therefore, I=m a rooming house and I=m not a community-based residential facility.@

I just think that we really get into deep trouble here as a government and that was not the intent by the Zoning Board or the -- by the Zoning Commission nor by others in D.C. Government enacting the various provisions that control and deal with the community-based residential facility.

As I talked about the evidence that support this general conclusion, they -- also, there is a common practice that this appellant recruits her tenants from the hospitals and nursing homes and has a great relationship with these other supporting or supplying institutions.

But, basically, that is my thought on this matter. I would vote to sustain the

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decision of the Zoning Administrator in this matter. That=s just my thought.

Anyone else? Yes? Don=t have to make a motion, but does anybody else have any discussion?

MEMBER HEATH: I would agree with you, Mr. Chairman. I was particularly struck by the plans of care, which definitely indicated that these people -- there are quite a few people within what has been called a rooming house who need a significant amount of care.

And during the testimony, during the hearing, there was discussion of people living there who were in wheelchairs on upper floors, which I found particularly troubling, and people who needed someone to be with them 24 hours a day.

I am in agreement with you that this is -- this -- what we=ve heard here signifies that this does not constitute a rooming house. So I would support --

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CHAIRPERSON JORDAN: Anybody else?
Mr. Hinkle?

MEMBER HINKLE: Yes. Thank you, Mr. Chair. I tend to agree with your analysis as well and your conclusion. I just wanted to note that, really, what was compelling for me was the testimony of Ms. Mebain as well as Mr. Follett, who, you know, are experts working for the Department of Health, and they truly have the knowledge and experience to, you know, make the determination as to how this facility was operating.

And I think they both provided some incredible testimony in terms of how the District investigates and what they found in those investigations. So for me that was helpful testimony.

And, you know, just to make this short, I also agree with DCRA's agreement that the definition of a CDRF focuses on whether the residents of the facility have a common need for treatment, assistance, or

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supervision, and not who actually provides that care.

And we heard testimony on both sides regarding the number of health aides at the property, both throughout the day and the week, including someone, as you mentioned, that actually stayed overnight. And for me, that=s really sufficient enough to meet the definition of a CDRF.

So I agree with you in terms of perhaps denying the appeal.

CHAIRPERSON JORDAN: Well, actually, I think our motion should be -- I would move that we sustain the decision of the Zoning Administrator --

MEMBER HINKLE: Okay.

CHAIRPERSON JORDAN: -- in this matter, revoking the C of Os.

MEMBER HEATH: Second.

CHAIRPERSON JORDAN: Motion made and second. Any additional discussion? All those in favor of the motion signify by saying

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aye.

(Chorus of ayes.)

Those opposed, nay.

Mr. Moy, do you want to --

MR. MOY: Yes, sir. Thank you.

As you mentioned earlier, we do have -- I do have in my hands an absentee vote from Mr. Hood, who also participated on this appeal, and his decision is to uphold the ZA=s decision to revoke the two C of Os.

So with his vote, that would give a total vote of four to zero on the motion of Chairman Jordan to sustain or affirm the decision of the ZA to revoke two of the rooming house certificates of occupancy. Seconded the motion, Ms. Heath; also in support, Mr. Hinkle, and of course Mr. Hood.

CHAIRPERSON JORDAN: Then, the motion carries.

(Whereupon, the above-entitled matter went off the record at 9:57 a.m.)

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