

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18151 of Van Ness South Tenants' Association pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Department of Consumer and Regulatory Affairs ("DCRA") in the issuance of Building Permit No. B1009105, allowing the construction of walls within 21 apartment units in an existing apartment house¹ located at 3003 Van Ness Street, N.W., in the R-5-D District (Square 2049, Lot 0806).

HEARING DATES: January 4, 2011, February 1, 2011, and March 15, 2011
DECISION DATE: April 5, 2011

DECISION AND ORDER

This appeal was filed on October 12, 2010, with the Board of Zoning Adjustment (the "Board") by the Van Ness South Tenants' Association. The appeal challenged DCRA's decision to issue a building permit that authorized the property owner (the "Owner") to erect partition walls in 21 units within an existing 625-unit apartment house. The Owner leased these 21 units to the University of the District of Columbia ("UDC"), so that the units could be occupied by UDC students. The Appellant claims that the permit was unlawful for several reasons, the primary ones being that the permit improperly authorized either a "dormitory" use or a "rooming house" use within a residential apartment house. After allowing the parties an opportunity to be heard, the Board found that the permit had been properly issued and that the appeal should be denied. A full discussion of the facts and law supporting this conclusion follows.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on January 4, 2011. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, Advisory Neighborhood Commission ("ANC") 3F (the ANC in which the subject property is located), the property owner, and DCRA.

¹ The caption originally referred to an apartment building, but the actual term used in § 199.1 of the Zoning Regulations is "apartment house."

Parties

The Appellant in this case is the Van Ness South Tenants' Association (hereafter "the Appellant" or the "Association"). Under its Articles of Incorporation, the Association is a non-profit corporation which is organized, in part, to organize tenants at the 3003 Van Ness apartment house (the "apartment house"), and is also authorized to bring legal actions. (Exhibit 2.) The Association was represented during the proceedings by Brian Lederer, Karen Perry, and David Wilson.²

As the owner of the subject property, Smith Property Holdings Van Ness, L.P. (referred to hereafter as "Archstone"³ or the "Owner"), requested intervenor status in opposition to the appeal. However, the request was unnecessary because Archstone is automatically a party under 11 DCMR § 3199.1(a)(3). Archstone was represented during the proceedings by the law firm of Greenstein DeLorme & Luchs, PC, by John Patrick Brown, Jr., Esq. and Kate Olson, Esq. UDC, which rents 21 units from Archstone, is the lessee of the property involved, and is also an automatic party to the appeal. (11 DCMR § 3199.1(a)(3).) UDC was represented by the law firm of Goulston & Storrs, Allison Prince, Esq. and David Avitabile, Esq. UDC and Archstone participated in all aspects of the public hearing and will be collectively referred to as the "Parties in Opposition."

DCRA appeared during the proceedings and was represented by Assistant Attorney General Jay Surabian, Esq.

Continuances and Pre-Hearing Statement

As noted, the public hearing was first set for January 4, 2011. However, the Board granted the Appellant's continuance request over the opposition of the Parties in Opposition, and the matter was continued until February 1, 2011. The Appellant had not filed a pre-hearing statement by the deadline of 14 days prior to the hearing and the Parties in Opposition expressed their concern that the Appellant might do so at any time prior to the continuance date. In response the Board gave the Appellant until January 14th to file a pre-hearing statement together with a request to waive the deadline. On February 1, the Appellant sought a second continuance of the hearing and an extension to file its pre-hearing statement. Because the Board did not have a quorum on that date, the public hearing was continued to March 15, 2011. On the March 15th date, the Board accepted the Appellant's Pre-Hearing Statement and Parties in Opposition opposition thereto, and conducted the public hearing.

² Although Mr. Lederer is an attorney, he did not act as counsel for the Association. He, Ms. Perry, and Mr. Wilson each also testified as witnesses during the public hearing.

³ Archstone Communities, LLC is the property manager of the apartment house.

FINDINGS OF FACT

The Property

1. The subject property is improved with an 11-story, 625-unit apartment house located at 3003 Van Ness Street, N.W. in the R-5-D Zone District.
2. The property is operated under a certificate of occupancy that was issued by DCRA to the Owner in 1996 for a 625-unit rental apartment house.

Events Leading Up to the Issuance of the Permit

3. During August, 2010, residents at the building complained to DCRA regarding possible illegal construction at the property.
4. DCRA inspectors investigated the complaints and found that UDC had constructed partition walls inside of 21 apartment units in the building. The apartment units are not contiguous and are located throughout the building and on different floors.
5. The non-load bearing partition walls were added to create an additional bedroom inside of each unit. The addition of the walls did not change the size of the units, create new units, or change the footprint of the building.
6. On August 11, 2010, DCRA issued a Stop Work Order and a Notice of Infraction for working without building permits.⁴
7. David Naples, DCRA's Deputy Chief Building Official, also inspected the property to determine whether there were any fire and safety issues and whether the construction complied with the Building Code. Finding no violations, the only remaining compliance issue was the requirement to obtain a building permit.

The Building Permit

8. On August 13, 2010, Archstone and UDC applied for a building permit to add "21 walls to 21 apartment units". In the application field titled "proposed use," the applicant wrote that the building would remain an "apartment building".
9. Because Archstone/UDC sought only to do interior renovation work at the building, and no change in use was proposed, DCRA did not refer the permit application for zoning review by the Zoning Administrator (the "ZA").

⁴ Construction work is not allowed without a building permit under 12A DCMR § 105A.

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10. Because of the limited non-structural nature of the work, and because Deputy Chief Naples determined that plans were not required,⁵ DCRA was able to issue the building permit on the same day that it was applied for.

The Appeal

11. The Appellant filed this appeal on October 12, 2010, challenging DCRA's decision to issue the building permit. The appeal alleges that DCRA erred because: (a) the construction converted the building into a "dormitory"; (b) the building permit, itself, is defective because it contains errors and is incomplete; and (c) the permit may be in violation of the building code. In later submissions, the Appellant alleged alternatively, that the construction created an unlawful "rooming house." (Exhibit 29, Pre-Hearing Statement.)

Evidence Adduced at the Hearing

12. Sometime in August, 2010, Archstone leased 21 apartment units to UDC. The leases each run from August 15, 2010 through August 14, 2011.
13. Each unit is occupied by up to four UDC students, who stay in the unit for a period greater than one month.
14. The 21 units retained their 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.
15. UDC allowed students to occupy the 21 units pursuant to an "Occupancy Agreement For Off-Campus Student Housing" (the "Occupancy Agreement"), which is part of the record. (Exhibit 29, Tab 3.) Under the Occupancy Agreement, the students agree to various conditions of occupancy, some of which were alleged by the Appellant to be pertinent to its claims. For instance, the Occupancy Agreement provides that UDC will close the off-campus housing during the winter break. It provides that UDC may deny room or roommate changes and may require a student to move from one unit to another during the year, as necessary. It also provides that overnight guests must complete UDC registration forms and that UDC has the right to enter the units for various purposes.

CONCLUSIONS OF LAW

The Board is authorized by § 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(2) (2008 Repl.), to hear and decide appeals where it is alleged that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations. The Board's review of such decisions is not limited to the documents presented to the

⁵ DCRA's code official may accept permit applications without plans when the work involved is of a "sufficiently limited scope". (12A DCMR § 106.1.)

administrative decision-maker. Rather, as it did in this appeal, the Board conducts a full evidentiary hearing. Parties were permitted to present and cross examine witnesses and introduce evidence, and the Board has carefully considered the testimony and evidence that was presented. However, error may only be found based upon what the District official knew or reasonably should have known at the time he or she made the decision complained of.

The threshold question is to identify the administrative decision that is challenged and the alleged zoning error. The appeal in this case relates to the issuance of the building permit. The alleged zoning error was DCRA's determination that the construction of partition walls within the 21 units did not convert the apartment house use within those units to a different use. The Appellant disagrees and maintains that the permit authorized a "dormitory" or, in the alternative, a "rooming house" use within those units. However, as will be explained below, the Board concludes that the construction of partition walls within the 21 units did not convert the apartment use into either a dormitory use or a rooming house use.

The Proposed Construction of Partition Walls Did Not Authorize a Change in Use

The R-5-D District allows for several types of multiple unit buildings, including apartment houses, rooming houses, and dormitories. What differentiates one from the other are generally speaking the nature of the occupancy, as the following definitions show:

Apartment

Section 199 of the Zoning Regulations defines 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."

Dormitory

The term "dormitory" is not defined in the Zoning Regulations. Therefore, the Board is directed to the meaning given in *Webster's Unabridged Dictionary*. (See, 11 DCMR § 199.2(g).) 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."

Rooming house

Section 199 of the Zoning Regulations defines 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 this title as, a hotel, motel, inn, bed and breakfast, private club, tourist home, guest house, or other transient accommodation.

Pursuant to §§ 330.6(d) and 350.4(a) of the Zoning Regulations, a rooming house is allowed as a matter-of-right in the R-5-D Zone District, so long as cooking facilities are not provided in any individual unit.

From looking at the permit application before it, DCRA had no reason to believe that the construction of the partition walls would result in a conversion from an apartment house to one of these other uses. The applicant stated that the units would remain apartments and there was absolutely nothing in the application to suggest otherwise. According to the definition for “apartment” in the Zoning Regulations, 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. The permit application stated that the only work proposed was the addition of partition walls to add a second bedroom to the 21 units. Thus, DCRA had a reasonable basis for concluding that the units would retain their kitchen and bathroom facilities and would, therefore, continue to satisfy the first element of the definition. Whether or not the units would be in the exclusive control of the occupants was not something that would be revealed in the application process, and DCRA was not obligated to investigate whether that element was met. This was not a situation in which DCRA knew or should have known of circumstances that would suggest that an applicant was being less than honest. In the absence of any indication on the application that a different use was intended, DCRA correctly issued the building permit.

The Additional Evidence Provided by the Appellant Did Not Prove a Change in Use.

The issue of control was not before DCRA when it issued the building permit. The Board nevertheless permitted the Appellants to argue the issue, but concludes that this element of the definition of apartment house was satisfied as well. 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 Appellant asserts that the occupants do not have “exclusive use and control” of their units, citing the restrictions contained in the UDC Occupancy Agreement. The Board believes that the Appellant’s reading of the “control” language is overly broad. While UDC does retain certain rights and privileges under the Occupancy Agreement, the Board finds none of the restrictions affects the long term control of the occupant so long as they are allowed to remain on the premises. 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.

It is clearly stated in the *Webster’s* definition that a dormitory is “usually without housekeeping facilities.” As mentioned above, the 21 units have retained their housekeeping facilities. Therefore, the units would not be consistent with this element of the “dormitory” definition. In addition, these units are not contiguous, and so it cannot be said that they collectively constitute a “residence hall”.

It is worth noting that even if the Board found that a dormitory use was to be established, the use would have been lawful. As UDC correctly points out, the D.C. Court of Appeals confirmed that dormitories are permitted as a matter-of-right in the R-4 and R-5 zones, so long as they are not located within the boundaries of an approved campus plan. *Watergate West, Inc. v. D.C. Bd. of Zoning Adjustment*, 815 A.2d 762 (D.C. 2003). Here, the apartment house is located in the R-5-D Zone and is not within the boundaries of any campus plan for UDC. Accordingly, even if the construction converted the use to a dormitory use, it would be permitted as a matter of right. If that had been the case, the Board would simply have required DCRA to amend the face of the building permit to indicate a dormitory use, but the use would not be disallowed.

Appellant’s Other Claims

The Appellant has alleged several defects in the body of the building permit and has also alleged violations of the Building Code, found in Title 12 of the DCMR. However, these claims are outside the scope of the Board’s jurisdiction because they do not derive from alleged zoning errors. The Zoning Act clearly limits the Board’s jurisdiction to actions taken by District officials in carrying out and enforcing the Zoning Regulations. *See, Appeal No. 17329 of Georgetown Residence Alliance*, 53 DCR 5932 (2006). Therefore, these portions of the appeal must be dismissed.

ANC

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-9.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations, which in this case is ANC 3F. However, ANC 3F did not submit a report with any recommendations or participate in the public hearing of this appeal.

For reasons discussed above, it is hereby **ORDERED** that the appeal is **DENIED**.

Vote taken on April 5, 2011.

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VOTE: **4-0-1** (Meridith H. Moldenhauer, Nicole C. Sorg, Jeffrey L. Hinkle, and Gregory M. Selfridge voting to Deny; No other Board member (vacant) participating)

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

ATTESTED BY:



RICHARD S. NERO, JR.
Acting Director, Office of Zoning

FINAL DATE OF ORDER: SEP 06 2011

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.