

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

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Appeal of Friends of Francis Field

Appeal No. 18029

DISTRICT OF COLUMBIA'S PRE-HEARING STATEMENT

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("Appellee" or "DCRA"), by and through undersigned counsel, respectfully submits its pre-hearing statement in opposition to the appeal filed by Appellant, Friends of Francis Field. The appeal alleges that DCRA's Zoning Administrator erred by issuing Certificate of Occupancy no. CO0903586 on September 25, 2009 (the "September 25 CO") to Vornado/Charles E. Smith ("Vornado") for 1255 25th Street, NW ("the Property"). The issuance of this CO should be upheld because 1) the bases of this appeal are or will soon be moot; and 2) the Zoning Administrator's decision to issue the CO prior to the completion of construction of the Francis Field amenities was reasonable and was consistent with prior decisions of the Board of Zoning Adjustment ("the Board").

THE ISSUE ON APPEAL

The September 25 CO permitted partial occupancy of floors B-1, 1, 2, 3, and 4 of 1255 25th Street, NW. *See* Exhibit A. The language on that CO states that it is "subject to PUD Order 06-35." A partial CO was issued at that time, because the construction of the remaining floors was not yet complete. After construction was finished, DCRA issued CO no. CO1000665 on December 21, 2009 (the "December 21 CO"), which superseded the September 25 CO. *See*

BOARD OF ZONING ADJUSTMENT

CASE NO.

18029

EXHIBIT NO.

17

Board of Zoning Adjustment
District of Columbia
CASE NO. 180299
EXHIBIT NO. 17

Exhibit B. The December 21 CO is a conditional CO, conditioned on fulfillment of Zoning Commission Order no. 06-35 and has an expiration date of June 30, 2010.

In its appeal, Appellant alleges that DCRA should not have issued a certificate of occupancy because Vornado failed to comply with conditions 10(b) and 10(c) of Zoning Commission Order no. 06-35 (“ZC Order 06-35”), which approved the redevelopment of the Property as a Planned Unit Development (“PUD”). Specifically, Appellant contends that ZC Order 06-35 required the property owner to fully complete construction of the amenities set forth in conditions 10(b) and (c), before obtaining a certificate of occupancy.

The issue for the Board to consider is whether in construing ZC Order 06-35 and applicable law, the Zoning Administrator erred in issuing a conditional certificate of occupancy to Vornado.

The relevant conditions state:

10. No certificate of occupancy for any building approved by this Order shall be issued until the following amenities have been provided:

b. Francis Field: contribution of design, materials, and labor for improvements to Francis Field to (1) prepare a landscape plan for Francis Field that includes the addition of trees, park lighting, furniture, trash receptacles, and a drinking fountain and (2) following approval by DPR, install the improvements, consistent with the Memorandum of Understanding included with Exhibit 40 of the record, valued at \$150,000.

c. The landscape and streetscape improvements to 25th Street, NW, in accordance with the plans marked as Exhibits 27, 31, and 40 of the record. These improvements shall include, subject to approval by the appropriate District agency or agencies, the removal of the existing chain-link fence along the west side of 25th Street, NW and replacement with an ornamental metal fence.

ARGUMENT

I. The Board Must Dismiss the Appeal as Moot

Under the Zoning Regulations, the Board is obligated to avoid consideration of moot questions. *See* 11 DCMR § 3100.7. As argued by the property owner in its Pre-Hearing Statement and as further argued here, the question of whether DCRA erred by issuing the September 25 CO is (or will soon be) moot.

DCRA understands that Vornado has entered into a contract for the construction of the park improvements and fence, that construction is slated to begin prior to the hearing date for this matter, and that all of the improvements will be complete by May 2010. Additionally, the design plan for the park improvements has been approved by all of the required District and federal agencies and DCRA has issued a permit to complete the work. Upon the completion of construction, the issue of this appeal is rendered moot.

Furthermore, the current CO for the Property, the December 21 CO, is a conditional CO that expires on June 30, 2010. By issuing a conditional CO, DCRA has retained the ability to deny an application for a final, permanent CO if the conditions of ZC Order 06-35 are not fully met. Unless DCRA issues a final, permanent CO for the Property, this appeal will be moot upon the expiration of the December 21 CO.

II. The Board Must Dismiss the Appeal because the Zoning Administrator's Decision to Issue the CO was Justified

The Board must also dismiss this appeal because the Zoning Administrator's decision to issue a certificate of occupancy for the Property was reasonable and was consistent with prior decisions of the Board.

Precedent exists which permits DCRA to issue a certificate of occupancy where strict compliance with a condition of a Zoning Commission order is frustrated or delayed. In Appeal

No. 16950, the Board upheld the issuance of a certificate of occupancy to The George Washington University, where the university deviated from the terms of a condition in a Zoning Commission order. *See* BZA Appeal No. 16950 of the West End Citizens Association (March 4, 2003). In that case, the university was required by a Zoning Commission order to make a contribution to a feeding program; however, when the university was ready to apply for its CO, the feeding program had not yet been established. In that case, the university deposited the required funds into an escrow account to be given to the feeding program after it was established. DCRA found this to be sufficient compliance with the Zoning Commission's order and issued the university a CO. In the ensuing appeal, the Board agreed with DCRA and found that depositing the required contribution in an escrow account was a "reasonable attempt" to comply with the Zoning Commission order and was not a violation of the condition. *Id.* at 9.

Here, the Zoning Administrator was justified in finding that the efforts of Vornado to comply with ZC Order 06-35 constituted a "reasonable attempt," that was sufficient for him to issue a conditional certificate of occupancy.

In making the decision to issue both the September 25 and December 21 COs, the Zoning Administrator considered a number of factors. First, the Zoning Administrator was provided a copy of Vornado's escrow agreement, which provided the funds required by ZC Order 06-35 to complete the improvements set forth in conditions 10(b) and (c) in full. Second, Vornado had already completed some elements of conditions 10(b) and (c). These elements include the completion of the streetscape improvements to the east side of 25th Street required by condition 10(c); the creation of the landscape plan for the Francis Field improvements as required by condition 10(b)(1); and approval of that plan by the Department of Parks and Recreation as required by condition 10(b)(2). Third, the Zoning Administrator considered the extensive and

unforeseen delays that Vornado encountered. These delays included the review of the landscape plan by the Commission of Arts, questions of jurisdiction over the park raised by the National Park Service, and the work WASA performed on the water main under the park. *See* Pre-Hearing Statement of the Owner, Exh. A (explaining the delays in greater detail). Additionally, the December 21 CO, was only issued after Vornado had applied for and obtained a building permit from DCRA to complete the work required by conditions 10(b) and (c).

After considering these circumstances and the Board's decision in Appeal No. 16950, the Zoning Administrator reasonably and justifiably issued Vornado a conditional CO. In light of the delays encountered by the property owner, the Zoning Administrator found that Vornado was moving forward in good faith and that its efforts constituted a "reasonable attempt" to comply with the Zoning Commission order. *See* BZA Appeal No. 16950, at 9. By issuing a conditional CO and giving the CO an expiration date, the Zoning Administrator acted reasonably by retaining oversight of Vornado's progress to ensure that all of the requirements of conditions 10(b) and (c) would be completed.

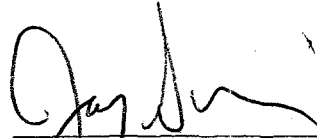
For the reasons set forth above, the Zoning Administrator did not err in issuing Vornado either the September 25 or the December 21 Cos.

Respectfully Submitted,

PETER J. NICKLES
Attorney General
for the District of Columbia

MELINDA BOLLING
Acting General Counsel

February 5, 2010



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CERTIFICATE OF SERVICE

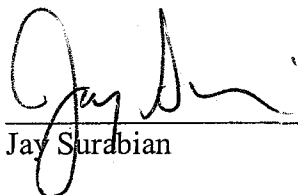
I hereby certify that a copy of the foregoing Pre-Hearing Statement was served by first class mail, postage prepaid, this 5th day of February, to the following:

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Jay Surabian

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Permit Operations Division

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Washington DC 20002

Tel. (202) 442 - 4589 Fax (202) 442 - 4862

TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442 9557

EXHIBIT

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CERTIFICATE OF OCCUPANCY

THIS CERTIFICATE MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS MAIN ENTRANCE

PERMIT NO. CO0903586

Date: 09/25/2009

Address of Use: 1255 25TH ST NW		Zone: 2	Ward: 2	Square: 0024	Suffix:	Lot:
Description of Occupancy: PARTIAL OCCUPANCY CERTIFICATE FOR THE FOLLOWING FLOORS ONLY : B-1- 18 PARKING SPACES; FIRST FLOOR - 20 DWELLINGS; SECOND FLOOR - 32 DWELLINGS; THIRD FLOOR- 32 DWELLINGS; FOURTH FLOOR - 32 DWELLINGS; FOR A TOTAL OF 116 DWELLNG UNITS. SUBJECT TO PUD ORDER 06-35						
Permission Is Hereby Granted To: 1229-1231 25th Street, Llc		Trading As:		Floor(s) Occupied B-1, 1, 2, 3, 4	PERMIT FEE: \$540.12	
Property Owner: Rh 1229-1231 25th Street Llc		Previous Use(s):		Occupant Load 116	BZA Number:	
Type of Occupancy: Partial Occupancy	Occupied Sq. Footage: 127782	Approved Use(1): Apartment Houses - R-2				
Conditions/ Restrictions: As a condition precedent to the issuance of this Certificate, the owner agrees to conform with all conditions set forth herein, and to maintain the use authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all spaces whose use is authorized by this Certificate and to require any changes which may be necessary to ensure compliance with all the applicable regulations of the District of Columbia.						
Director: Linda K. Argo		Permit Clerk: Lucretia Hackney		Expiration Date: 01/31/2011		
TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL, CALL THE DC INSPECTOR GENERAL AT 1-800-521-1639 FOR CONSTRUCTION INSPECTION INQUIRIES CALL (202) 442-9557 TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557.						

Department of Consumer and Regulatory Affairs

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Washington DC 20002

Tel. (202) 442 - 4589 Fax (202) 442 - 4862
TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442 9557

EXHIBIT

B

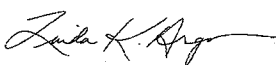
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CERTIFICATE OF OCCUPANCY

THIS CERTIFICATE MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS MAIN ENTRANCE

PERMIT NO. CO1000665

Date: 12/21/2009

Address of Use: 1225 - 1255 NW 25TH ST NW		Zone:	Ward: 2	Square: 0024	Suffix:	Lot: 0885
Description of Occupancy: CONDITIONAL CERTIFICATE OF OCCUPANCY FOR MULTI-FAMILY RESIDENTIAL BUILDING - 283 UNITS. 2 LEVEL PARKING GARAGE WITH 233 SPACES AND 19 VALET PARKING SPACES. CONDITIONED UPON FUFILLMENT OF PUD ORDER 06-35 CONDITION 10(b); EXPIRES 6/30/2010.						
Permission Is Hereby Granted To: Mitchell Shear	Trading As: WEST END 25		Floor(s) Occupied HRU 10TH, PENTH	PERMIT FEE: \$794.39		
Property Owner: Rh 1229-1231 25th Street Lic	Previous Use(s): Office - B		Occupant Load: 283	BZA Number:		
Type of Occupancy: New Building	Occupied Sq. Footage: 323380	Approved Use(1): Apartment Houses - R-2				
Conditions/ Restrictions: As a condition precedent to the issuance of this Certificate, the owner agrees to conform with all conditions set forth herein, and to maintain the use authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all spaces whose use is authorized by this Certificate and to require any changes which may be necessary to ensure compliance with all the applicable regulations of the District of Columbia.						
Director: Linda K. Argo 	Permit Clerk Stacie Williams		Expiration Date: 06/30/2010			
TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL, CALL THE DC INSPECTOR GENERAL AT 1-800-521-1639 FOR CONSTRUCTION INSPECTION INQUIRIES CALL (202) 442-9557 TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557.						