

March 11, 2011

Ms. Meridith Moldenhauer
Chairperson, D.C. Board of Zoning
Adjustment
441 4th Street NW, Suite 210
Washington, DC 20001

RECEIVED
BOARD OF ZONING
ADJUSTMENT
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**Re: BZA Appeal No. 18151 – Opposition to Appellant's Untimely
Prehearing Statement**

Dear Chairperson Moldenhauer and Members of the Board:

After a delay of almost three months, Van Ness South Tenants' Association (“**Van Ness South**”) filed an untimely Prehearing Statement on March 2, 2011. Under the Board's Rules, that statement was due on December 14, 2010, and the University of the District of Columbia (“**UDC**”) strongly urges the Board to reject this statement as untimely. If the Board decides to accept this statement into the record, UDC reiterates that the majority of issues raised by Van Ness South are beyond the Board's jurisdiction.

The only relevant zoning issue in this case—whether the use of 21 units in the apartment building as housing for students at UDC is permitted under the Zoning Regulations—is clearly established as a permitted use as a matter of law. The units continue to operate as apartment units, as that term is understood under the Zoning Regulations. Even if the use by UDC constituted a change to dormitory use, that too is a permitted use in the R-5-D Zone District, as has been affirmed by this Board and the D.C. Court of Appeals.

Van Ness South's real issue is with the alleged objectionable impact associated with this otherwise permitted use, and the Zoning Commission has exclusive jurisdiction over the evaluation of the impacts of college and university uses through the campus plan process.

I. The Prehearing Statement Should Not Be Accepted Because It Is Untimely.

UDC objects to the Prehearing Statement of Van Ness South Tenants' Association because it was filed only after the Appellant missed not one, but two deadlines. The Appellant neglected to file a prehearing statement before the originally scheduled hearing date of January 4, 2011. Further, despite the Board's clear instruction that it should file its statement by January 14, 2011, the Appellant did not file its statement by that second

deadline. Van Ness South finally provided its pre-hearing statement on March 2, 2011, less than two weeks prior to the now-thrice-rescheduled hearing date.

In explaining the extreme delay in the filing, Van Ness South conceded that “we have no good excuse for this late submission.” While admirably candid, this admission alone greatly compromises this Board’s ability to make a finding of good cause required for the grant of a waiver under Section 3100.5. The Board should also consider, however, the lack of candor previously demonstrated by the original representative for Van Ness South, who filed the original request for continuance less than one week prior to the hearing, six weeks after his conflicting professional responsibility arose and after all of the other parties had submitted their legal statements.

This delay has prejudiced the rights of UDC and the other parties to have the appeal heard in a timely fashion, which imposes additional costs and other burdens on the parties of interest. Van Ness South’s late prehearing statement comes five months after its initial notice of appeal, and two months after the originally-scheduled hearing date. During that time, UDC and the other parties defending the District’s decision have had to expend considerable time and cost preparing timely written submissions during the winter holidays and attending two scheduled hearings as well as monitoring the status of the case.

Finally, the Regulations express a clear intent to “reduce uncertainty and litigation over the timeliness of Board of Zoning Adjustment appeals.”¹ While Van Ness South technically met the 60-day time period for filing the initial appeal (filing on the last possible day), they should not be permitted to virtually extend that period of time by delaying out the hearing date once their appeal is accepted. Challenges to the administration and enforcement of the Zoning Regulations must be heard and resolved in a timely manner in order to avoid prolonged periods where the parties’ property rights are unsettled.

II. The Units At Issue Are Clearly Apartments.

Van Ness South’s interpretation of the Zoning Regulations is incorrect. It ignores clear definitions and established precedent that make it clear the use of an apartment building for housing by university students—even when administered directly by the university through its housing office—does not by itself constitute the conversion of said units to a “dormitory” use. If the function of the units and the duration of stay spelled out in the clear definition of “apartment” are met, they continue to be an apartment use.

¹ See Z.C. Order No. 02-01 (2003), which amended Section 3112.2 to narrowly define the time period within which a party must bring an appeal to sixty days from the date of the aggrieved decision.

A. The Units Are Under the Exclusive Use and Control of the Occupants, as That Phrase is Interpreted Under the Zoning Regulations

Van Ness South advances a crabbed reading of the definition of “apartment” that ignores the clear language of the text as well as the use of similar language in other definitions. The term apartment is defined in Section 199 of the Zoning Regulations as:

One or more habitable rooms with kitchen and bathroom facilities exclusively for the use of and under the control of the occupants of those rooms.

The language regarding use and control is intended to distinguish apartments from rooming and boarding houses, where the accommodations are not under the exclusive control of the occupant. (The other important distinction between apartment and rooming units, of course, is the presence of separate kitchen and bathroom facilities.) Here, the units in question provide UDC students with exclusive use of and control of these units as that phrase is understood in the Regulations, and the units have the requisite kitchen and bathroom facilities. Accordingly, the units continue to be apartments.

UDC’s retention of certain rights and privileges to these units does not destroy the students’ “use and control” of the units. When UDC students agree to move into and reside in the furnished units, they agree to comply with the terms and conditions of the housing agreement. This is no different than a tenant agreeing to the terms and conditions of any other lease or occupancy agreement. Similarly, just as a landlord typically reserves a right to enter the unit for maintenance and other purposes, UDC also retains similar rights. And it is counterproductive for Van Ness South, which has expressed concern with the impacts associated with the use of these units by UDC students, to then argue that UDC’s efforts to manage these impacts somehow alters their status as apartments. It is not in the interest of any party to this case for UDC to relinquish this important role.

Read literally, Van Ness South’s expansive interpretation of the “exclusive use and control” requirement would effectively exclude most units otherwise considered to be apartments from the definition in Section 199. No tenant ever enjoys “exclusive use and control” of their leased property because the landlord always retains some sort of residual right to the use of the property. Indeed, the same is true even for most condominium units, where the bank likely retains some right to use of the property if the terms and conditions of the mortgage are not met. Therefore, it is clear that the Regulations should not be construed as prohibiting other parties in interest from exercising reasonable rights, obligations, and limitations on the residents of an apartment unit or use, and the exercise of those limits does not alter the fact that the units are “apartments.”

B. The Regulations Do Not Require that Apartments be Rental Units, Nor Are the Rental Housing Laws and Regulations Relevant.

In defining what constitutes an apartment house, the Zoning Regulations focus not only on the functional layout of the space, but the length of stay of the occupants, requiring “accommodation on a monthly or longer basis.” Again, this language is intended to distinguish apartments from transient accommodations such as hotels, which do not have such a minimum stay requirement. This duration of stay is the only other required characteristic of the occupant of the unit.

Since the term “apartment” is clearly defined in the Zoning Regulations, there is no need to turn to the Rental Housing Act or other laws and regulations for further examination into the character of the occupant, as the Appellant would suggest.² Moreover, provisions applicable to rental housing only could not apply to the definition of “apartment” or “apartment house” because those terms do not assume a landlord-tenant relationship. Rather, the terms apply equally to rental as well as owner-occupied units such as condominiums and cooperatives and yes, even units provided by a university for its students, provided that the units meet the functional and durational requirements of the definition. (Note the words “landlord” and “tenant” do not appear in the Zoning Regulations.)

Therefore, so long as the university provides a student or group of students with (1) use and control of a unit (2) that includes kitchen and bathroom facilities (3) on a monthly or longer basis, that unit is an apartment.

C. It is Well-Established that Universities Provide “Apartments” as Student Housing Under the Zoning Regulations.

There is clearly established precedent involving universities that have rented blocks of units in apartment buildings while those units have remained “apartments” under the Zoning Regulations. For example, American University (“AU”) has a master lease for a block of units in the Berkshire Apartments at 4201 Massachusetts Avenue NW near the university, which are then provided to students as housing through the University’s housing system and subject to its housing policies. This is very similar to UDC’s arrangement, where notwithstanding AU’s use of a portion of the building as housing for its students, the building continues to be an “apartment” according to its certificate of occupancy.

Similarly, The George Washington University (GW) has master leases for both the Aston at 1129 New Hampshire Avenue NW and City Hall at 950 24th Street NW. While the units are made available through GW’s housing system and subject to its

² Similarly, the allegations regarding violations of these provisions are beyond the jurisdiction of this Board and related commentary regarding the University’s financial motives are baseless and unfounded.

housing policies, both buildings are apartment houses according to their certificates of occupancy. Copies of all three COs referenced above are attached to this letter.

III. Even if the Units Are a Dormitory Use, Such Use is Still Permitted.

It is well settled that a dormitory use is clearly permitted in the R-5-D Zone District under *Watergate West, Inc. v. D.C. Bd. of Zoning Adjustment*, 815 A.2nd 762, 766-67 (D.C. 2003). Indeed, dormitories are actually considered the less burdensome use under the progressive Euclidean zoning scheme articulated in Chapter 3 of the Zoning Regulations. Dormitories are first permitted in the R-4 Zone District, the more restrictive zone district, while apartment uses are not permitted as a matter of right until the R-5 Zone Districts.

Nothing in *Watergate West*, nor in the Regulations themselves, suggests that the use of only a portion of the building as a dormitory, rather than the whole building, would yield a different outcome. The Zoning Regulations are clear that an apartment house need not occupy the entire building – by definition, an apartment house is “any building or part of a building” that contains apartments. Assuming for the sake of argument that UDC’s use is a dormitory use, that use could exist in conjunction with the apartment use within a single building, just as an apartment building may also contain retail or office uses in a mixed-use arrangement. Again, clearly established precedent supports this understanding. The AU example cited above would constitute another acceptable arrangement.

IV. The Remaining Issues Do Not Involve Zoning Issues and are Therefore Beyond the Jurisdiction of the Board

As stated in our Prehearing Statement, the Appellant's remaining contentions in this appeal do not relate to errors in the administration and enforcement of the Zoning Regulations and are therefore outside the Board's jurisdiction under the Zoning Act and Zoning Regulations. See 11 DCMR § 3100.2. The Appellant contends that the building permit was defective because of allegedly incorrect information contained thereon and because of an alleged failure to identify certain elements of the project. These are clearly issues concerning DCRA's administrative procedures regarding the preparation and completion of the building permit application, which are not zoning issues for the Board. Further, the Appellant contends that the permits were incorrectly issued because the plans allegedly did not meet standards set forth in the construction codes applicable to construction in the District of Columbia. Again, the interpretation and application of these codes do not pertain to the Zoning Regulations, and are therefore not within the jurisdiction of the Board.

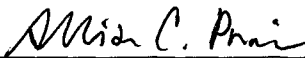
In addition, to the extent that any of the above errors arguably failed to permit DCRA to evaluate the question of whether the work constituted a change in use, such errors are harmless because the use of the units have, in fact, not changed.

V. Conclusion

For the reasons set forth above, the Board should affirm the issuance of the Permit and use of the units as a continued apartment use that is permitted as a matter of right, and deny the portion of the appeal alleging the issuance of the permit violated the Zoning Regulations. All other issues are outside of the Board's jurisdiction and should therefore be dismissed.

Respectfully submitted,

GOULSTON & STORRS, PC



Allison C. Prince



David Avitabile *DA*

Counsel for the University of the
District of Columbia

Date: March 11, 2011

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Opposition of the University of the District of Columbia to Appellant's Untimely Prehearing Statement was served by hand, this 11th day of March, 2011, upon the following:

Mr. Matthew LeGrant
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
1100 4th Street, S.W.
Washington, D.C. 20024

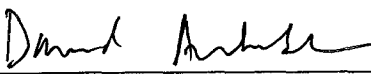
Melinda M. Bolling, Esq.
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Washington, D.C. 20024

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Washington, D.C. 20008

Chairperson
Advisory Neighborhood Commission 3F
4401-A Connecticut Ave, NW Box 244
Washington, DC 20008-2322

Ms. Karen Perry, ANC 3F02
3003 Van Ness St., NW
Washington, DC 20008



David Avitabile 

Department of Consumer and Regulatory Affairs
 Permit Center
 341 North Capitol Street NE room 2100
 Washington DC 20002
 Tel: (202) 442-4889

Government
 of the District
 of Columbia
 DCA 944

C of O

CERTIFICATE OF OCCUPANCY

PERMIT NO.

CO 155728

THIS PERMIT IS VALID ONLY FOR THE PREMISES
 OF THE PROJECT ADDRESS

DATE: 11/8/2007

ADDRESS:	FLOOR(S):	PRCLID:	WARD:	ZONE:
4201 MASSACHUSETTS AVE NW #175	1ST THRU 11TH FLR.	(square)		(ft)

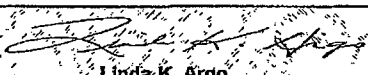
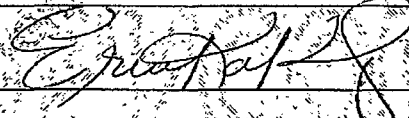
PERMISSION IS HEREBY GRANTED TO:	TRADING AS:
CORPORATION: BERKSHIRE APARTMENTS, LLC	BERKSHIRE APARTMENT, LLC
ID No.: L00577	

APPROVED USES:	PREVIOUS USES:
APARTMENT BUILDING	APARTMENT BUILDING

TYPE:	BZA NO.	OCCUPIED SQ. FOOTAGE:	OCCUP. LOAD:	EXPIRATION DATE:
CHANGE OF OWNERSHIP		941,000	779	NONE

DESCRIPTION OF USE:	FEE:
APARTMENT BUILDING, 779 UNITS	\$1,598.00

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, VALID ONLY for the premise at the above address or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

Director:	PERMIT CLERK:
 Linda K. Argo	 ADEMOLA SHITTU

Department of Consumer and Regulatory Affairs
 Building and Land Regulation Administration
 441 North Capitol Street N.E. room 2100
 Washington D.C. 20002
 Tel (202) 442-4470 Fax (202) 442-4862

Government
 of the District
 of Columbia
 BLRA94A

C of O

CERTIFICATE OF OCCUPANCY

PERMIT NO.

CO 35225

THIS PERMIT IS VALID ONLY FOR THE PREMISES
 OF THE PROJECT ADDRESS

DATE : 6/7/02

ADDRESS : 950 24TH ST NW	FLOOR(S): BASEMENT G1, G2, 1ST. THROUGH 10TH. FL.	PRCLID : 0028 (square) WARD : 2	-0000- 2471 (lot) ZONE : R5D
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PERMISSION IS HEREBY GRANTED TO :

CORPORATION : THE GEORGE WASHINGTON UNIVERSITY
 ID No.: **X00314**

TRADING AS :

THE GEORGE WASHINGTON UNIVERSITY

APPROVED USES :

APARTMENT BUILDING

PREVIOUS USES :

APARTMENT BUILDING

TYPE : CHANGE OF OWNERSHIP	BZA NO. :	OCCUPIED SQ. FOOTAGE: 15,985	OCCUP. LOAD: 197	EXPIRATION DATE: NONE
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DESCRIPTION OF USE

APARTMENT BUILDING UNITS 197

FEE :

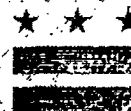
\$101.00

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, VALID ONLY for the premise at the above address or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

David A. Clark
 DIRECTOR

PERMIT CLERK :

THINGOC MACXOAN



Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
1101 North Capitol Street N.E. room 2100
Washington D.C. 20002
Tel: (202) 442-4470 Fax: (202) 442-4862

Government
of the District
of Columbia
BLRA94A

C of O

CERTIFICATE OF OCCUPANCY

PERMIT NO.

CO 35563

THIS PERMIT IS VALID ONLY FOR THE PREMISES
OF THE PROJECT ADDRESS

DATE : 6/13/02

ADDRESS :	FLOOR(S) :	PRCLID : 0072 (square)	-0000-	0007 (lot)
1129 NEW HAMPSHIRE AVE NW	1 THROUGH 10 FL.	WARD : 2	ZONE : R5D	

PERMISSION IS HEREBY GRANTED TO :	TRADING AS :
CORPORATION : GEORGE WASHINGTON UNIVERSITY ID No.: X00314	THE GEORGE WASHINGTON UNIVERSITY

APPROVED USES :	PREVIOUS USES :
APARTMENT BUILDING	APARTMENT BUILDING

TYPE :	BZA NO. :	OCCUPIED SQ. FOOTAGE :	OCCUP. LOAD :	EXPIRATION DATE :
CHANGE OF OWNERSHIP		79,000	124	NONE

DESCRIPTION OF USE APARTMENT BUILDING 124 UNITS	FEE : \$324.00
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THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, VALID ONLY for the premise at the above address or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

David A. Clark DIRECTOR	PERMIT CLERK: THINGOC MACXOAN
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