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September 3, 2003

Mr. Geoffrey H. Griffis, Chairman
Board of Zoning Adjustment
441 4th Street, N.W.
Washington, D.C. 20001

Re: BZA Case #17044: Rosan submission of August 22, 2004

Dear Mr. Griffis:

This is a response, on behalf of the Kalorama Citizens Association, to some of the comments by the Rosans' submission of August 22nd and attachments thereto. I have enclosed two letters that relate to the issue the Applicants raised in that submission about an ostensible change in their occupancy permit status through Mr. Noble's office.

1. Comment by Applicants: "1987 – DCMR Title 11 - Rooming house definition does not specify minimum nor maximum stay for guests."

Response: It is uncontested that prior to 1988 the definition of "rooming house" did not specify a minimum stay, and that transient guests were thus permitted. **The relevant point is that as of 1988 and thereafter to the present the rooming house definition requires rentals to be on a monthly or more basis, thus precluding stays on a daily basis. Any operation as a transient accommodation business by the previous owner would have been a non-conforming use.** Furthermore, a rooming house cannot be a "hotel, motel, inn, bed and breakfast, private club, tourist home, guest house, or other transient accommodation."

2. Comment by Applicants: "1987 – DCMR Title 11 – [the Zoning Commission} ADOPTED a Definition of Transient Accommodation where as, Transient Accommodation was permitted if a property was subject to the 'District of Columbia Hotel Occupancy and Surtax on Corporations and Unincorporated Business Tax Act of 1977', which this property was since 1979."

Response: The current definition, having dropped the reference to the now-repealed Hotel Occupancy Tax that appears in the 1988 definition cited by the applicants, is as follows:

> *"Accommodation, transient. A structure or building, other than a private club, one-family or two-family dwelling, apartment house, boarding house, rooming house, and tenement house, within which structure or building units are used for transient guests from time to time. The accommodations may include, but not be limited to, bed and breakfast accommodations, guesthouses, guest quarters, hotels, inns, motels, and tourist homes."*

This definition makes a transient accommodation with a rooming house certificate of occupancy that preceded its enactment, non-conforming. In fact, the 1988 definition cited by Applicants did not, as they assert, declare that if a property was subject to the Hotel Occupancy Tax Act, a transient accommodation was permitted, but merely incorporated the definition of "hotel" in that Act into the Zoning Regulations' definition of "transient accommodation". The result was that *if* a

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EXHIBIT NO. 44

building qualified as a "hotel" under the Act, it qualified as a "transient accommodation" under the Zoning Regulations. This leaves unresolved the issue in the present case as to whether the previous owner was indeed legally subject to the Hotel Occupancy tax, a proposition the Applicants have yet to establish. They have presented evidence, in the form of a letter from the Office of Tax and Revenue (see below), tending to show merely that he was registered for this tax in 1979 and that he paid the tax in 1998, but have yet to provide evidence of a continuous lawful operation as a transient accommodation from a time before the use became non-conforming to a time later than three years from the present. (Kalorama Citizens Association, pursuant to the request of the Board, sought comprehensive payment/nonpayment information for the entire relevant period from the Office of Tax and Revenue, and was denied.)

3. Comment by Applicants: "8/19/03 – Acquired letter from Mr. W. Bowie, Disclosure Attorney, Office of General Counsel, Office of Tax and Revenue, evidencing Sale and Use Tax payments by Mr. Bird since 1979 until 2001."

Response: The does not state that Mr. Bird paid these "since 1979 until 2001". It states merely that Mr. Bird was "registered" for these two taxes in 1979, and, as to payments, that he paid the Hotel Occupancy Tax in 1998 and the Sales and Use Tax in 2001. It provides no information as to whether either of these taxes was paid in any other relevant year, and indicates, moreover, that Mr. Bird's account was delinquent in the payment of various taxes. Additionally, it provides no information as to other business-related taxes that should be taken into account. By itself, it is not sufficient evidence of Mr. Bird's continual and lawful operation as a transient accommodation before and after adoption of the new rules regarding transient accommodations. Mr. Bowie's letter concludes: *"Until this taxpayer's delinquent status is rectified, this Office will not be able to sign-off on any license or permit that is sought regarding this business with any District agency pursuant to the Clean Hands law."*

4. Comment from Applicants: "7-2003 – Public hearing - Great opposition by neighbors. No chance of being granted a Use Variance. We mentioned at the hearing that we were not seeking an Use Variance but we were seeking to be grandfathered because the previous owner was running a Transient Business before the DC law/regulations changed." And another related comment: "We hereby request to be grandfathered into the transient business which was being run at the above referenced property since even before 1979. The previous owner, Mr. Richard Bird was running a Hostel/Guesthouse business known as Columbia Guesthouse, or 2005 Columbia Guesthouse and he offered private and dormitory rooms to tourists on a daily basis."

Response:

First, an Applicant cannot, simply because the evidence may not support a favorable outcome in a Board of Zoning Adjustment variance case after the case is initiated, in midstream cause the case to mutate into an entirely different case based on different claims of entitlement and raising entirely different issues of law and fact. Applicants filed a use variance application that is subject to the standards of D.C. Code, Section 5-424(g)(3) for such a variance, and it is on those grounds that the case must be decided.

The granting of a use variance confers presumptively long-term rights and is quite different from any determination about a non-conforming use, which is expected to "wither away" over time, and the two are treated entirely distinctly in the law and regulations. If

the Applicants wished to assert grandfathered rights to a nonconforming use as a transient accommodation, they were required to appeal the determination of the Zoning Administrator that they were not entitled to a Certificate of Occupancy for such a use.

Second, the Applicants failed to file an Appeal of the Zoning Administrator's determination, and there are Zoning Commission rules that preclude such an Appeal now. On September 9, 2002, prior to the Rosans' purchase of 2005 Columbia Road, the Zoning Commission passed Order No. 02-01 as an outgrowth of Z.C. Case No. 02-01, regarding adoption of amendments to Pre-Hearing Procedures for Appeals of the decisions of the Zoning Administrator and other administrative officials before the Board of Zoning Adjustment which amended Section 3112.2 of the Board of Zoning Adjustment Rules of Practice and Procedure to state ((3112.2(a)*):*

> ***"An appeal shall be filed within sixty (60) days from the date the person filing the appeal had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier."***

The ruling became effective on February 7, 2003 with its publication in the D.C. Register. This ruling was directly related to difficulties dealt with in the District of Columbia Court of Appeals, which in one such case cited by the ZC Order, Waste *Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment*, 776 A.2d 1117, 2233 (D.C. 2001), stated: *"In the absence of exceptional circumstances substantially impairing the ability of an aggrieved party to appeal—circumstances outside of the party's control—we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness."*

The Board may extend the sixty day (60) day deadline for the filing of an appeal only if the appellant demonstrates ((Section 3112.2(d)) that:

> ***"(1) There are exceptional circumstances that are outside of the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) The extension of time will not prejudice the parties to the appeal, as identified in Section 3199.1."***

We would contend that there is no valid reason justifying the Applicants' failure to file an appeal in a timely fashion and that they have lost this right of appeal of the Zoning Administrator's decision.

It is also important to note that if they had intended to appeal the decision as to the nonconforming use being grandfathered, that grandfathered right would have extended at most only to the 8 units authorized by Mr. Bird's certificate of occupancy, or less if the actual transient usage was less. There is some evidence that the actual transient use may have been less than 8 rooming units, as indicated by Mr. Bird's submission to the Rental Accommodations Office requesting an exemption from rent control, indicating that he had three permanent residents plus five transients. When Mr. Bird obtained a certificate of occupancy in 1969, rooming houses could have both permanent residents and transients, which is no longer possible in 2003, so one cannot infer the extent of actual transient usage, if any, merely from the certificate of occupancy.

The use would remain as a non-conforming use. A non-conforming use is prohibited from expanding within the structure, on the theory is that it will eventually be replaced by a use allowed by right or by special exception. The use variance for an inn—which all parties now seem to agree is not allowable--is a different matter altogether. We

assume that the Rosans applied for a use variance because of their desire to operate a larger transient facility for up to 15 rooming units rather than concentrating their efforts to secure an 8 room non-conforming transient accommodation within the 8 room limitation of the previous owner's occupancy permit. All parties agree that the Rosans indicated that a smaller transient operation would not be economically feasible.

5. Comment by Applicants: "8/2003 - Met with Mr. Noble and Ms. Ogunneye. Mr. Noble approved a C. of O. for a 14 unit Rooming House."

Response: Mr. Noble has denied to Ann Hargrove that such an occupancy permit was granted and asserted that the Rosans still have an occupancy permit for an 8 unit rooming house (see letters to Mr. Noble attached).

This submission, as with others to the Board, has been hand delivered to the Rosans at 2005 Columbia Road, N.W. and to other parties through e-mail. Additionally, the Rosans are being sent a mailed copy of this submission. Thank you for your attention.

Sincerely,



Ann Hughes Hargrove, Zoning Chairman
Kalorama Citizens Association, Kalorama Station, P.O. Box 21311, Washington, D.C. 20009
Enc: Letters to Mr. Noble

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August 30, 2003

Mr. Denzil Noble, Administrator
Building and Land Administration
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Washington, D.C. 20002 **VIA FAX: 442-4863**

Second letter

Re.: 2005 Columbia Road, N.W.

Dear Mr. Noble:

Thank you for meeting with me on Friday, August 29th, regarding this property and the contention of the Kalorama Citizens Association that Mr. and Mrs. Claudio Rosan, new owners of this property, are engaged in a zoning defined expansion of a non-conforming use. We appreciate as well your indicating the following in that meeting:

1. **A stop work order will be placed on the premises pending resolution of the zoning situation.**
2. **The Rosans have an occupancy permit for an 8 unit rooming house, contrary to the assertion that they made in an August 22nd submission to the Board of Zoning Adjustment that you recently granted them an occupancy permit for a 14 unit rooming house.**
3. **The Rosans have been asked to resubmit building permit plans for an 8 unit rooming house.**

Previous owner's license. After discovering that Mr. R.W. Bird, the previous owner, eventually was able to obtain a license for a 15 unit rooming house, we inquired of the DCRA license branch how this could have happened. We were afforded no explanation, but were given assurance that the Rosans will be given a license for whatever is specified on their occupancy permit, assuming compliance with all applicable codes. The previous owner had an occupancy permit for an 8 unit rooming house.

Prohibition against expansion of a non-conforming use within a building or structure.

According to the Zoning Act of 1938, as amended, Section 12, the most restrictive municipal regulation applies in situations involving differences among municipal codes regarding the same subject matter, and this requirement is applicable to the issue of expansion of a non-conforming use.[1] When this requirement is read in conjunction with that of the Zoning Regulations (Sections 2002.3 and 2002.4), a nonconforming use cannot be allowed to expand within a building.[2]

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[1] "Wherever the regulations made under the authority of this Act require a greater width or size of yards, courts, or other open spaces, or require a lower height of buildings or smaller number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in or under any other statute or municipal regulations, the regulations made under authority of this Act shall govern."

[2] Section 2002.3: "A nonconforming use shall not be extended to portions of a structure not devoted to that nonconforming use at the time of enactment or amendment of this title, or to another structure."

Nonconforming use expansion reflected in the Plan submitted for building permit. The Rosans are engaged in structural alterations on the building in contravention of the prohibition on such alterations because they are installing walls to partition rooms into additional rooms and multiple bathrooms beyond what would normally be expected for a non-transient rooming house, apartment building, or single family residence. Even if such activity were not to be regarded as structural alteration in all instances because it may not involve load bearing walls, the owners are nonetheless in violation of the prohibition regarding expansion of a non-conforming use, for their stated purpose in undertaking these alterations is to achieve an expanded transient accommodation. They have indicated that they are doing this in spite of the possibility that a decision on the variance case may be to deny their request for a 15 room "inn". As you know, they failed to appeal DCRA's zoning determination that they would have to apply for a use variance. If they had attempted to press the claim with DCRA that they were entitled to grandfathered non-conforming rights to a transient accommodation, they would have been limited to 8 rooming units, since a non-conforming use cannot be expanded. The variance case is to be decided on the grounds applicable to a variance.

Previous use and layout of house compared with alterations underway. The extent of this expansion is made especially evident by the nature of the occupancy of the previous owner who resided on premises and who also had at least two non-transient occupants who lived in the house, one of whom assisted with the business and lived upstairs. Mr. Bird had at most 9 sleeping rooms on the 2nd, 3rd, and 4th floors as reflected on the permit plans supplied by the Rosans, and he and the two residents obviously occupied some of the space in the house. There were no rooming units on the first floor. (He had already apparently partitioned the front room between the curved window wall on floors 2, 3, and 4 into rooming units at some point, thus adding 3 units to his house for the 9 sleeping room total for the upper floors.) His occupancy permit for an 8 unit rooming house was about right, considering his own occupancy of the premises. The new owners are adding very small bathrooms on each of these upper floors for the use of each of the sleeping roomettes and are subdividing the back rooms on the 2nd and 3rd floor, for a total of 11 sleeping roomettes upstairs with 11 bathrooms upstairs. The basement alteration is especially interesting. Having been turned down for two basement suites (one of which would have lacked a window), the configuration nonetheless suggests that a partition wall could be added later to convert the area into two suites. Please note that two new baths open into the one large suite area, which in turn has inadequate lumens in its inner reaches, with one bath facing into it directly from the front of the room and another bath facing into it from the back. There is a hall running down the length of this room, providing doors at each end of the room, thus providing the possibility of access from each end should the room be divided in the future. Instead of an 8 rooming unit rooming house that had been approved for the former resident owner, the Rosans are converting the residence into a building with 12 sleeping rooms with no resident owner and have asked for more rooms (presumably on the 1st floor, which lacks a full bath, currently having the usual rowhouse configuration of a living room, dining room, kitchen, and half bath).

Section 2002.4: "Ordinary repairs, alterations, or modernizations may be made to a structure or portion of a structure devoted to a nonconforming use. Structural alterations shall not be allowed, except those required by other municipal law or regulation; provided, that structural alterations shall be permitted to a lawfully existing nonconforming flat or apartment house located within a Residence district."

It will not be acceptable for the Rosans simply to relabel any of these areas that are presently being configured to provide additional sleeping rooms and baths as something else, such as an office, in order to circumvent the requirement to present a revised Plan showing a reduced number of sleeping rooms. This possibility came up in the course of our conversation. It is agreed on all sides that the Rosans would prefer to complete alterations on the house to 14 or 15 sleeping room units (their Plan layout for the present building permit suggests a total of 12 rooming units). They have said at hearing that they are continuing with these alterations for the purpose of providing a large transient accommodation, and they are actively attempting to complete these changes as quickly as possible.

Transient occupancy in relation to the filed Plan. Since the occupancy permit relates to rooming units rather than number of occupants, it is relevant to explore the extent of the expansion in terms of numbers of people who may occupy the house. The Rosans acknowledged at the hearing that there could be as many as 26 guests staying at the property. With an open-ended and expanded facility, and with no limit on numbers of those who could be transient or non-transient staying in the building, a large number of people could be crowded in, especially in the basement, although at least one room upstairs would qualify for only one occupant under the Housing Code because of its small size. Any new certificate of occupancy, if possible, should specify occupancy limits.

Clean Hands. We wish to make you aware of a letter from Mr. William Bowie, Disclosure Attorney, Office of General Counsel, Office of Tax and Revenue (enclosed), which was attached to the August 22nd submission by the Rosans to the Board of Zoning Adjustment. Mr. Bowie asserts that there is an outstanding tax liability from Mr. Bird's operation "for multiple tax types" and concludes: *"Additionally, until this taxpayer's delinquent status is rectified, this Office will not be able to sign-off on any license or permit that is sought regarding this business with any District agency pursuant to the Clean Hands law."* This would seem to indicate that any building and related permits granted the Rosans, who claim the right to continue the previous owner's transient accommodation business, cannot be granted for the use of the property as a continuation of the business operation on its premises until the tax matter is cleared up. A stop work order for the work underway under the current building permit and its revocation as well as placing any occupancy permit that might allow a continuation of a rooming house or transient rooming house business on hold appears warranted in view of Mr. Bowie's letter regarding the applicability of the Clean Hands law to this situation.

Thank you once again for your attention to this matter.

Sincerely,

Ann Hughes Hargrove

Ann Hughes Hargrove, Zoning Chairman
Kalorama Citizens Association, P.O. Box 21311, Kalorama Station, Washington, D.C. 20009
Cc: Mr. Chen, Structural Engineer
Ms. Ogunneye, Zoning Reviewer
Enc: letter from Mr. Bowie of August 19, 2003

Ann Hughes Hargrove 1827 Belmont Road, N.W. Washington, D.C. 20009-5164
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August 26, 2003

Mr. Denzil Noble, Administrator
Building and Land Administration
Department of Consumer and Regulatory Affairs
941North Capitol Street, N.E.
Washington, D. C. 20002 **VIA FAX: 442-4863**

URGENT ATTENTION REQUESTED

Re: 2005 Columbia Road, N.W.; Mr. and Mrs. Claudio Rosan; BZA Case #17044

Dear Mr. Noble:

I am writing you on behalf of the Kalorama Citizens Association, which I am representing as the Zoning Chairman in this case. For reasons explained below, we have been informed, through a submission the Rosans made to the Board of Zoning Adjustment on August 22nd, that a new certificate of occupancy was issued to Mr. and Mrs. Claudio Rosan in August. We maintain that this issuance is in error. We therefore ask that it be revoked immediately, pending resolution of Board of Zoning Adjustment Case #17044 , and that you take additional remedial action with a stop work order to halt expansion of a non-conforming use within the house.

Mr. and Mrs. Rosan purchased this R-5-D zoned rowhouse in 2003 from a Mr. Richard Walter Bird, who died in early 2002. Mr. Bird had a certificate of occupancy for an eight room rooming house dating back to 1969 and is alleged to have operated this house as a transient facility (in 1969 rooming houses could be transient accommodations, but in 2003 they cannot be). Therefore the house either was not so operated, or if it was, it was for a maximum of 8 rooms, which would be the only claim to grandfathered rights that the new owners would be able to make. The Rosans operate two such transient facilities in neighboring Virginia, and were granted a certificate of occupancy for an 8 unit rooming house in March of 2003.

The Zoning Administrator informed the Rosans that they were not entitled to a certificate of occupancy for a 15 room inn and that they would have to file a request for a *use* variance with the Board of Zoning Adjustment. They did not file an Appeal of this decision, but instead filed for a use variance for a 15 room transient inn facility. The case is still before the BZA, and a public hearing was held on July 29, 2003. At that hearing, the Applicants indicated that they could not operate a home occupation bed and breakfast, which they could do lawfully for six rooms in a residentially zoned historic district (the house is in the Kalorama Triangle Historic District). They also indicated that they were in the process of converting the house to a multi-room facility for transient occupants and were doing so notwithstanding the fact that the house would have to be sold if they were not granted the right to operate this business. They responded to questioning that they could not afford to operate a small transient accommodation, nor could they afford to operate a non-transient rooming house. The opponents pointed out that there is a good market in this area for houses at good prices for use as residences. Any claim of hardship the Rosans may claim or have claimed as a result of their investing in the purchase and alteration of a house for an intended use not permitted by the Zoning Regulations is therefore self-inflicted.

The parties in opposition include neighboring houses and apartment houses, the Kalorama Citizens Association, and ANC-1-C. There are no parties in support. The Kalorama Citizens Association made a submission on August 22rd, pointing out that it was improper to raise arguments about grandfathered rights in a use variance case, and all parties in opposition had directed their arguments and evidence

toward defeating a use variance for a 15 room transient facility. It is clear, and the Rosans now apparently agree, that their proposed use variance cannot meet the use variance standards of the Zoning Regulations, so the Rosans have asked the Board to change the case into one about grandfathered rights in their August 22nd submission to the Board. If this is to be considered a formal request for withdrawal of the variance case, then any new case cannot be filed for consideration for 90 days unless the Board rules otherwise (Z.C. Regulations 3113.10), and the Board may well inform the applicants that they will have to formally apply for a challenge to the Zoning Administrator's ruling as an Appeal in order to raise the issue of grandfathered rights. Opponents will not be particularly happy about this income, for the general view is that the Rosans had an opportunity to file an Appeal in a "timely" manner in accordance with the Regulations.

However this may be, one thing is clear: as the Zoning person for DCRA undoubtedly advised, the grandfathered transient facility rights, if they are recognized by the Board, can be for only 8 transient room units, since a non-conforming use is prohibited from expanding within a conforming or nonconforming structure.[1] Additionally, the Regulations now do not allow a mix of transient and non-transient uses within a rooming house. Since the Rosans are apparently withdrawing from the variance case and it appears virtually certain that they would lose it, they also will not be granted a variance to operate a 15 room inn. Therefore, an enlarged transient operation in accordance with the Zoning Regulations is impossible.

Yesterday, I met with Mr. Chen, Structural Engineer, on the plans because of my concern about the Rosan expansion activities in the house of a non-conforming use, problems with the plans and permits, and the relevance of the current Board of Zoning Adjustment case in relation to any actions by the Building and Land Administration. The plans I had with me were submitted to the Board of Zoning Adjustment regarding their proposed changes in the building and alleged to be the plans submitted to your department in order to receive a building permit. They do have a building permit "as per plans" (if the plans in the record are the correct plans) but at the moment have not posted a plumbing and electrical permit, although there is a permit to change the water service. They are quite busy changing up the house with added partitions and bathrooms at a speedy pace. I explained to Mr. Chen that there was a pending decision on this variance case, and that the applicants had admitted at the hearing that they were cutting the house up to enable them to operate a 15 room facility for transients, not an expanded use internally for a non-transient rooming house. He agreed that there was a problem, with both the plans and their intentions, and indicated, after checking with other authorities, that the Rosans would be required to submit new plans for an 8 room rooming house or face a Stop Work order within a day. This seemed a good response to the problem, and I appreciated the promise of prompt action by DCRA.

However, this morning I saw for the first time the rather garbled August 22nd submission the Rosans made to the Board of Zoning Adjustment referred to above. They allege that you personally granted them a rooming house certificate of occupancy for 14 rooming units in August as a replacement for their certificate of occupancy for an 8 room rooming house (the previous owner had a certificate occupancy for an 8 rooming unit rooming house). This would clearly be an expansion of a non-conforming use, for the applicants have stated their intent at the public hearing before the Board of Zoning Adjustment that the changes they are making are to enable them to operate an inn. Your office had official notice of their intent through conversations that they have had with your office regarding their intentions to operate a

[1] 11DCMR, Section 2002.3 states: "A nonconforming use shall not be extended to portions of a structure not devoted to that nonconforming use at the time of enactment or amendment of this title, or to another structure." Section 2002.4 continues: "Ordinary repairs, alterations, or modernizations may be made to a structure of portion of a structure devoted to a nonconforming use. Structural alterations shall not be allowed, except those required by other municipal law or regulation; provided, that structural alterations shall be permitted to a lawfully existing, nonconforming flat or apartment house located within a Residence District."

large transient facility and the fact that they are before the Board of Zoning Adjustment in pursuit of this objective.

We therefore urge you to revoke this expanded certificate of occupancy immediately as having been issued in error, until this issue is resolved through the Board of Zoning Adjustment. Before more work is undertaken, we urge also that a stop work order be placed on the house along with a requirement for submission of plans for an 8 room rooming house as Mr. Chen indicated would be done. Any unwarranted work, including added bathrooms and partitioning of larger rooms into additional rooms to expand the number of rooms in the house--should be required to be removed if the Rosans are not granted their request for a transient facility beyond an 8 room transient rooming house by the Board of Zoning Adjustment. Please move on this issue promptly before the situation is made worse, and let us know what will be done. These renovations are particularly unfortunate as the house may well have to be sold, and these renovations will not be especially helpful in marketing it for a variety of possible residential alternative uses, including that of a single-family restoration as has been done right next door within the last year. Opponents had made this point to the Rosans both before and during the hearing.

I know you are overwhelmed with work, and I regret to have to bother you with this problem, but prompt action is essential. Please have someone notify me quickly as to what is being done.

Thank you for your assistance.



Ann Hughes Hargrove
Cc: Mr. Chen, Structural Engineer
Ms. Ogunneye, Zoning Reviewer