Holland + Knight

Tel 202 955 3000
Fax 202 955 5564

Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
WA, D.C. 20006-6801
www.hklaw.com

Douglas J. Patton
202 828 1893
douglas.patton@hklaw.com

August 31, 2004

VIA HAND DELIVERY

Board of Zoning Adjustment
Government of the District of Columbia
One Judiciary Square, Suite 210-South
441 Fourth Street, NW
Washington, D.C. 20001

Re: BZA Case No. 17197: Commentary as to Applicability of Federal Fair Housing Act to Elements of the Program and Design Proposed by Applicant in the Case

Honorable Members of the Board:

Enclosed please find an original and twenty (20) copies of this firm's analysis of the provisions of the Federal Fair Housing Act, specifically accessibility requirements, to certain outdoor areas proposed for common use by the building's resident owners or tenants. The Board indicated its interest in this question and determined it would allow a submission from Applicant's counsel on the topic, hereby provided. The Board also indicated that, lacking authority to render decisions outside of those allowed by the Zoning Regulations, it would not factor the submission into its decision on the case.

If you have any questions, please contact me directly at the above postal or email address or the above telephone number. You may also contact my colleague Lindsley Williams, at the above address, via email (LWilliams@hklaw.com) or telephone ((202) 828-1873). Thank you.

HOLLAND & KNIGHT LLP

Douglas J. Patton, Esq.

Enclosure.

cc: Parties to the Case

BZA
Case No. 17197
Exhibit No. 37

Board of Zoning Adjustment
District of Columbia
CASE NO. 17197
EXHIBIT NO. 37

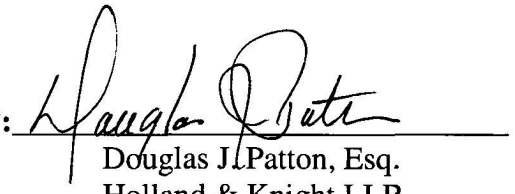
CERTIFICATE OF SERVICE:

I hereby certify and attest that on August 31, 2004, a copy of this letter and its enclosure was mailed first class postage prepaid or delivered by courier or other means to each party or public agency who or which appeared or participated in the public hearing of July 20, 2004 concerning BZA Case No. 17197 as listed below:

Chairperson
Advisory Neighborhood Commission 2F
P. O. Box 9348
Washington, D.C. 20009

Ms. Andrea Doughty
1417 Q Street NW
Washington, D.C. 20009

Ms. Ellen McCarthy or Mr. Travis Parker
Office of Planning
801 North Capitol Street, NE
Washington, D.C. 20001

ATTESTED BY: 

Douglas J. Patton, Esq.
Holland & Knight LLP

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Accessibility Requirements to Areas of Common Use under the Fair Housing Act:
A Supplemental Filing to the Board of Zoning Adjustment for BZA Case No. 17197

As allowed by the Board of Zoning Adjustment ("BZA") during its hearing on BZA Case No. 17197 July 20, Holland & Knight LLP expands on and supports the client's architect's statement during the hearing on the case that day that the overall project is both subject to and complies with the pertinent provisions of the Federal Fair Housing Act ("FHA"), its implementing regulations and guidelines.

For context, it is important to clarify that the Americans with Disabilities Act ("ADA"), which is often confused with the FHA, does not apply to the majority of this Project, clearly not to its common residential areas, the apartment units themselves, or other "private" areas such as the garage. Only places of "public accommodation" such as the areas on the first floor dedicated to a sales office (if there were one) or designated as "Commercial" would be deemed public accommodations necessitating compliance with Title III of the ADA as these are the only areas of the building open to members of the public beyond residents and their guests.

The remaining question is whether all areas of common use to the residential component project must be fully accessible. In this Project, the only such common areas outside of the parking garage, lobby, interior hallways and trash closets are three areas of residential recreation space *within* the building (all of which are, in fact, fully accessible) as well as three recreation areas located *outdoors*, two of which are fully accessible. (The lobby, hallways, trash closets, and garage levels are fully accessible.)

In our view, since two of the three outdoor recreation areas are fully accessible and have a combined square footage of 1,234 versus no more than 675 for the third area (which would not be fully accessible), this means that two-thirds of the specific areas and nearly two-thirds of the total outdoor area (64.6 percent) are fully accessible. Accordingly, we conclude the Project as designed fully complies with FHA. In other words, since outdoor residential recreation space areas that are fully accessible exceed both half the number and half the total area, the Project as planned complies with FHA and the Applicant is neither required to arrange for full access to that last area by elevator or other changes to its design nor under any obligation to remove the roof deck from the Project.

The FHA Design and Construction Requirements (24 CFR 100.205) ("the FHA Requirements") state simply that "all covered multifamily dwellings . . . shall be designed and constructed in such a manner that the public and common areas are readily accessible to and usable by handicapped persons . . . ." (24 CFR 900.205(c)(1)).

The FHA Requirements do not offer any further guidance regarding the requirements for accessibility where more than one common use area is provided. However, the U.S. Department of Housing and Urban Development ("HUD") has also issued Fair Housing Accessibility Guidelines ("FHA Guidelines")(56 Fed. Reg. No. 44, 9472-9515 (Mar. 6, 1991)) that provide more guidance to the industry on this and many other questions raised by the FHA Requirements. The FHA Guidelines "are intended to

provide a safe harbor for compliance with the accessibility requirements of the [FHA]." (Section 1, FHA Guidelines.)

The FHA Guidelines define the "common use areas" mentioned in the FHA Requirements as "rooms, spaces, or elements inside or outside of a building that are made available for the use of residents of a building or the guests thereof. These areas include hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas and passageways among and between buildings." The FHA Guidelines further state that, if recreational areas are provided, that there be "sufficient accessible facilities of each type to assure equitable opportunity for use by persons with handicaps."

To further aid the multifamily housing industry understand the accessibility requirements of the FHA, HUD has also issued the FHA Design Manual, last updated by HUD in 1998. The 1998 FHA Design Manual qualifies the "accessible facilities of each type" as follows: "where multiple recreational facilities are provided, the Guidelines do not require that each amenity be accessible, but rather that 'sufficient numbers' be accessible to provide equitable use by people with disabilities." FHA Design Manual, Section 2.3 (1998).

In the case of this Project, there are approximately 1909 square feet of hardscaped exterior common space within the area of its lot, available for use only by residents and their guests. The first of these areas, approximately 439 square feet, is located on the first floor below grade and is fully accessible through the Party Room and the elevator serving that level. The second of these common/recreational areas is also fully accessible (by the same elevator) on the ground floor and is approximately 795 square feet. The last of these areas is located on the roof and is approximately 675 square feet in area. It is not accessible within the meaning of the FHA. However, it makes up only 35% of the total exterior common/recreational areas provided in the Project. The other two thirds of these areas are fully accessible.

Disabled residents and/or guests are reasonably accommodated within the meaning of the FHA by having full access to nearly two thirds of the exterior common/recreational spaces provided in the Project. Neither the FHA, the FHA Requirements, the FHA Guidelines, nor the FHA Design Manual explicitly require that every square foot of common/recreational space be accessible. A sufficient number of this type of amenity – here two of the three exterior hardscaped spaces available only to residents and guests – has been provided with full accessibility.