BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of Richardson Place Neighborhood Association — Appeal No. 19441
Hearing Date: March 22, 2017

OWNER'S PREHEARING STATEMENT IN OPPOSITION TO APPEAL

I. INTRODUCTION

This Statement is submitted on behalf of OTD 410-412 Richardson Place LLC ("OTD"), the owner of the properties that are the subject of this appeal. OTD is automatically a party to this appeal, pursuant to Subtitle Y § 501.1(c) of the Zoning Regulations of 2016 ("ZR16").[1] The appeal is subject to the procedural requirements of ZR16; however, the building permit applications at issue in this appeal were filed and accepted as complete by the Department of Consumer and Regulatory Affairs ("DCRA") prior to the enactment of ZR16. Thus, in accordance with Subtitle A § 102.2 of ZR16, since the building permit plans are consistent with the 1958 Zoning Regulations ("ZR58") the project is a vested project under ZR58.

For the reasons stated more fully below, this Appeal is untimely, without merit, and should be denied.

II. ALLEGATIONS OF THE APPEAL

This appeal was filed by the Richardson Place Neighborhood Association ("RPNA" or the "Appellant") on December 16, 2016. As identified in the Appellant's Notice of Appeal the appeal raises only four issues:

1. Whether DCRA erroneously issued alteration-and-repair building permits to applicant OTD Development, LLC, where the applicant indicated the intended use of the property, which covers 60% of the lots, as "two, two-family flats (4 units)."

[1] Pursuant to Subtitle Y § 302.17 of ZR16, this Statement is submitted no later than seven days prior to the public hearing.

2. Even if the proposed project is not an apartment, tenement, or rooming house, whether DCRA properly permitted the project as "flats," given the intended use of the property.

3. Whether DCRA's issuance of the building permits was arbitrary and capricious, given the prior owner's alleged, proposed use of the property.

4. Whether OTD's intended use is consistent with the permitted uses as defined in the Zoning Regulations.

Pursuant to Subtitle Y § 302.13 of ZR16, an appeal may not be amended to add issues not identified in the statement of the issues on appeal unless the appellee impeded the appellant's ability to identify the new issues identified. Since the Appellant makes no assertion that the Appellee impeded its ability to identify new issues, the appeal is limited to the four issues identified above. OTD concedes that the issues regarding the issuance of the Certificates of Occupancy for the properties are identical to the issues outlined above. As a result, this appeal should include the question of whether the Certificates of Occupancy were properly issued by DCRA. As set forth in more detail below, the appeal should be dismissed as being untimely, or in the alternative, the appeal should be dismissed since:

1. DCRA properly issued the building permits at issue in this case since the plans included with the building permits demonstrate that the buildings comply with all applicable zoning and building code requirements, as further confirmed by the issuance of a Certificate of Occupancy for each building.

2. The buildings have been designed and constructed as "flats," as defined in the Zoning Regulations, and will be operated as "flats" in accordance with all applicable D.C. laws and regulations.

3. OTD's intended use of each property is consistent with the definitions of those uses as defined in the Zoning Regulations.

4. The Appellant has not submitted any evidence to support its position that the buildings as designed do not meet the definition of a "flat," nor has the Appellant submitted any evidence indicating that the buildings will not be operated in accordance with applicable D.C. laws and regulations.

5. The crux of Appellant's argument is that despite the fact that the buildings have been constructed in accordance with the approved building permits and plans, and have been inspected by DCRA and determined to be in full compliance with all applicable zoning and building code requirements the BZA should nonetheless revoke the properly issued building permits and certificates of occupancy based upon Appellant's concerns about how the property ***might, hypothetically*** be operated in the future and that the buildings ***might, hypothetically*** exceed their permitted occupancy in the future. However, the only evidence of record is that the buildings have been constructed and will be operated in compliance all District of Columbia laws and regulations, including the applicable Zoning Regulations. See, Affidavit of Simon Jawitz. Moreover, the appropriate remedy for potential violations of law if they ever occur in the future is via DCRA's enforcement division, not by asking the BZA to revoke properly issued permits.

III.
BACKGROUND OF THE PROJECT AND PROPERTY

The properties subject to this appeal consist 410 Richardson Place, N.W. (Square 507, Lot 102) and 412 Richardson Place, N.W. (Square 507, Lot 101) (collectively the "Properties"). The square is bounded by Rhode Island Avenue to the Northwest, Florida Avenue to the Northeast, 4th Place to the east, R Place to the south, and New Jersey Avenue to the west, all in the northwest quadrant of the District. The square is bisected by Richardson Place and includes a public alley system.

The Properties are zoned R-4 under ZR58. Flats are permitted as a matter of right in the R-4 District. 11 DCMR § 330.5(f).[2] As a result, each flat is allowed a lot occupancy of 60%. 11 DCMR § 403.2.

The Properties were purchased by OTD on April 20, 2016.[3] When OTD purchased the Properties the majority of the flats were already constructed on the Properties pursuant Building Permit No. B1002883, issued on August 31, 2011, which authorized construction to "Build A Three Story + Cellar Flat" at 412 Richardson Place, N.W. (the "Original Building Permit for 412 Richardson")[4] and Building Permit No. B1214832, issued April 22, 2013, which authorized construction to build a "3-Story Flat" at 410 Richardson Place, N.W. (the "Original Building Permit for 410 Richardson").[5] The Original Building Permit for 412 Richardson is attached hereto as Exhibit A, and the Original Building Permit for 410 Richardson is attached hereto as Exhibit B.

Subsequent to purchasing the Properties in 2016, OTD received additional building permits to complete the already-started construction of the buildings and to complete the interior of the buildings. Specifically, OTD was issued Building Permit No. B1611470, issued on September 27, 2016, which authorized "Completion of an existing 2 family flat" at 412

[2] All citations are to ZR58 unless otherwise noted.

[3] The Appellant references Board of Zoning Adjustment Case No. 17404 and transcripts from the hearing on the application as evidence that the adjacent flats require a variance. The variance application was ultimately withdrawn by the Properties' previous owner Wilbur Mondie and a different project was built. See, Appellant's Memorandum in Support, Exhibit E. The Appellant admits that instead of "proposing to build four adjacent, single-family row homes—as he had in his variance application—he proposed to build 2, two-family flats" and thus any previous testimony in the Board of Zoning Adjustment case is irrelevant. See, Appellant Memorandum in Support, pg. 7.

[4] The Original Building Permit for 412 Richardson was subsequently extended and OTD filed for revised permits to reflect the change in ownership.

[5] The Original Building Permit for 410 Richardson was subsequently extended and OTD filed for revised permits to reflect the change in ownership.

Richardson Place, N.W. (emphasis added) (the "Revised Building Permit for 412 Richardson") and Building Permit No. B1611469, issued October 20, 2016, which authorized "Completion of an existing 2 family flat" at 410 Richardson Place, N.W. (emphasis added) (the "Revised Building Permit for 410 Richardson"). The Revised Building Permit for 412 Richardson is attached hereto as Exhibit C, and the Revised Building Permit for 410 Richardson is attached hereto as Exhibit D.

OTD was subsequently issued Certificate of Occupancy No. CO1700955 dated February 13, 2017 for 410 Richardson Place, and Certificate of Occupancy No. CO1700918, dated February 2, 2017, for 412 Richardson Place. Both Certificates of Occupancy are attached as Exhibit E. The legal effect of issuance of the Certificates of Occupancy for each flat is that as of the date of issuance of the Certificates of Occupancy, all construction involving the flats covered by the Certificates of Occupancy was performed and completed in accordance with the applicable codes and regulations and in compliance with the Building Permit drawings. See, D.C. Construction Codes Supplement, 12-A DCMR § 110.1.6. The Certificates of Occupancy are legally binding upon the District of Columbia government and the holder of a Certificate of Occupancy may lawfully occupy the premises for the uses permitted under the Certificate of Occupancy. See, *Id.* "After the code official inspects [a] building or other structure and finds no violations of the provisions of the Construction Codes, the Zoning Regulations or other laws that are enforced by the Department, the code official shall issue a certificate of occupancy." *Id.*

OTD was permitted to, and has completed construction of, a flat on each property. Each flat contains two units. Each unit will be occupied by no more than six residents. Thus, the total number of residents that will occupy each building is 12 residents. DCRA has inspected the buildings and found no violations of the provisions of the Construction Codes, the Zoning

Regulations or other laws that are enforced by the Department, as evidenced by the District's recent issuance of the Certificates of Occupancy for each building.

IV.
THE APPEAL DOES NOT MEET THE JURISDICTIONAL REQUIREMENT FOR TIMELINESS

Pursuant to Subtitle Y § 302.2 of ZR16, "a zoning appeal shall be filed within 60 days from the date the person appealing the administrative decision 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." In addition, "a zoning appeal may only be taken from the first writing that reflects the administrative decision complained of to which the appellant had notice. No subsequent document, including a building permit or certificate of occupancy, may be appealed unless the document modifies or reverses the original decision or reflects a new decision." 11-Y DCMR § 302.5 of ZR16.

The "first writing" that reflects the administrative decision of the Zoning Administrator to allow the construction of flats on the Properties are the Original Building Permit for 412 Richardson issued on August 31, 2011 (i.e., six years before the filing of this appeal), and the Original Building Permit for 410 Richardson issued on April 22, 2013 (i.e., three years before the filing of this appeal), both of which identify the use of the Properties as flats. Indeed, by the Appellant's own admission, these building permits are the basis for the permits being appealed. The Appellant states in its Notice of Appeal that Building Permit No. B1611469 issued for 410 Richardson Place is "**based on original permit No. B1214832**," and Building Permit No. B1611470 issued for 412 Richardson Place is "**based on original permit No. B1002883**." (Emphasis added). See, Appellant's Notice of Appeal, pg. 3.

Even if the Appellant was not aware of the issuance of the original building permits in 2011 or 2013, based upon the own Declarations included with the Notice of Appeal, the Appellant should have had notice of the Zoning Administrator's administrative decision as early as July 2014, and as late as July 2016. No subsequent documents (i.e. Building Permit Nos. B1611469 and B1611470 or Certificate of Occupancy No. CO1700955 and Certificate of Occupancy No. CO1700918) modify or reverse the original decision of the Zoning Administrator that the buildings on the lots are flats, and the issuance of the building permits authorizing construction of the buildings. The Appellant alleges that they did not have actual "knowledge of OTD's intent to change the property's use from "flats" …until October 31, 2016" and thus the filing of the appeal is timely. See, Appellant's Notice of Appeal, pg. 4. However, at no time has OTD changed the use of the Properties; the use was approved as "flats" in 2011 and 2013, and OTD intends to operate the buildings as "flats". Thus, this appeal was filed substantially beyond the 60 day appeal period.

There is no requirement for an Appellant to have actual knowledge of the first writing. The Zoning Regulations explicitly state that the appeal shall be filed within 60 days of the date the Appellant "reasonably should have had notice." 11-Y DCMR § 302.2 of ZR16. By the Appellant's own admission, they reasonably should have had notice of the first writing on any of the following occasions:

1. In July 2014, when James J. Wilson, the President of the RPNA, purchased his home at 415 Richardson Place, N.W., which is directly across the street from the Properties, and saw an empty foundation with a "dug-out basement." See, Declaration of James J. Wilson, ¶¶ 1-3;

2. In May 2016, when Mr. Wilson had a meeting with Peter Stuart, a Partner at OTD, and Mr. Stuart stated he intended to complete construction of the flats. See, Declaration of James J. Wilson, ¶¶ 9-11;
3. On May 16, 2016, when OTD stated in their Email correspondence with the Appellant that OTD has no intent to change the use, or use the Properties as anything other than a flat. See Appellant's Memorandum in Support, Exhibit A; and
4. In July 2016, when Appellant saw that OTD's "supervision began in earnest" and "contractors began installing the façade and refurbishing the interior. See, Declaration of James J. Wilson, ¶ 14.

Other members of the RPNA should have had notice as well. In the Declaration of Steven Bible, Mr. Bible states in April 2016, he "noticed one or two permits… posted on the windows of the first floor of the property." See Declaration of Steven Bible ¶ 5. The posting of these permits and the construction activities occurring at the Properties provided *actual* notice to Mr. Bible. Although Mr. Bible claims that he was unable to read the permits, nothing stopped him from searching for the issued Building Permits on DCRA's website, or from requesting a copy of the permits from either OTD or DCRA.

As a result, RPNA and its members "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" as early as July 2014 and as late of July 2016, both of which far exceed the 60 day period for filing an appeal.

Accordingly, the appeal should be dismissed as untimely since it was filed more than 60 days after the Appellant had notice or should have had notice of the issuance of the Building Permits. [6]

V.
THE APPEAL IS WITHOUT MERIT AND SHOULD BE DENIED

Pursuant to Subtitle X § 1101.2 of ZR16, the Appellant has the burden of proof to justify the granting of the appeal. As described in detail below, the Appellant has not met its burden of proof and the appeal should be denied.

A. Each Building Is A "Flat" as Defined in the Zoning Regulations

The Appellant argues that since "co-living" is not defined in the Zoning Regulations, the issued building permits should be revoked since the structures are not separate flats, but rather should be treated as a single apartment house, tenement house, or rooming house. See, Appellant's Memorandum in Support, pg. 2. The Appellant further argues that "the use that most closely matches the intended use is the use that must govern for purposes of the zoning regulations." See, Appellant's Memorandum in Support at pg. 11, *citing* 11-B DCMR § 202.[7] However, the approved design, layout and use of each building fits squarely within the definition of a "flat" under ZR58 and there is no need to look at any other definition.

[6] Pursuant to Subtitle Y § 302.3(a), "no zoning appeal shall be filed later than ten days after the date on which the structure or part thereof in question is under roof…the phrase 'under roof' means the stage of completion of a structure or part thereof when the main roof of the structure or part thereof, and the roofs of any structures on the main roof or part thereof, are in place." Since the flats were "under roof" in April 2016, and the appeal was filed more than ten days after the date thereof, the appeal should be dismissed as untimely.

[7] This rule of interpretation is only applicable when there are multiple uses on a site. While there is only one use on the Properties – in this case, the use is clearly a flat by definition – 11-B DCMR § 202 has no application.

As shown on the excerpt of the building permit plans submitted with the Revised Building Permit for 410 Richardson (Exhibit F) and the Revised Building Permit for 412 Richardson (Exhibit G), each building is a "flat" by definition. A flat is defined as a "two family dwelling". 11 DCMR § 199.1.[8] A two family dwelling is defined as "a dwelling used exclusively as a residence for two families living independently of each other." *Id.* "Family" is further defined as "one or more persons related by blood, marriage, or adoption, or not more than six persons who are not so related, including foster children, living together as a *single housekeeping unit, using certain rooms and housekeeping facilities in common*…" *Id.* (emphasis added).[9]

1. Each Building Includes Two Separate Units

As shown on the excerpt of the building permit plans submitted with the Revised Building Permit for 410 Richardson (Exhibit F) and the Revised Building Permit for 412 Richardson (Exhibit G), each building includes two separate dwellings. 410 Richardson is divided into two units, with "Unit A" compromising the cellar and first floor of the building, and "Unit B" compromising the second and third floor of the building. 412 Richardson is similarly divided into two units, with "Unit A" compromising the cellar and first floor of the building, and "Unit B" compromising the second and third floor of the building. Each unit in each building is separate and distinct as evidenced by the separate addresses, separate entrances, separate mailboxes, separate utility meters, and separate electric panels. Thus, each flat includes two separate units.

[8] The Appellant erroneously cites the definition of "flat" under ZR16.

[9] OTD concedes that the residents of each unit will likely not be related by blood, marriage, or adoption.

2. Each Unit's Residents Will Constitute a Single Housekeeping Unit Using Certain Rooms And Housekeeping Facilities in Common

The Appellant argues that the residents of each unit cannot be a single housekeeping unit since the flats will be occupied by "24 unrelated persons living together in private rooms with en-suite bathrooms" and the property manager "takes care of the chores and duties that might otherwise suggest a collective group of unrelated people are 'living together as a single house-keeping unit.'" See, Appellant's Memorandum in Support, pg. 14. However, the evidence of record demonstrates that this is not the case.

As detailed in the Affidavit of Simon Jawitz, CFO and Head of Real Estate Acquisition of Common Living ("Common"), attached hereto as Exhibit H, there will be a single lease for each unit, and each unit will have a maximum occupancy of six residents. Pursuant to the lease, the residents of each unit will be:

1. responsible for choosing their bedroom within the unit;
2. jointly and severably liable for rent, which includes the costs for utilities (gas, water, electricity, internet), cleaning services, and furniture;
3. jointly responsible for the conduct of other residents in their unit such as loud and objectionable noises, sights, and odors;
4. jointly responsible for maintenance and upkeep of their respective units including day to day cleaning, trash disposal, and ordinary repairs;
5. jointly responsible for protecting the unit from theft or robbery; and
6. allowed to use and occupy the common areas and facilitates of their respective unit such as the kitchen, study, powder room, laundry facilities, and dining room.

See, Affidavit of Simon Jawitz, ¶ 6(f). As a result, each unit's residents will live as a single housekeeping unit, and will jointly be responsible for the upkeep of their unit. Residents of each unit only have access to their individual unit and will not have access to any of the other adjacent units, or any of Common's other properties. See, Affidavit of Simon Jawitz, ¶ 6(h).

The Zoning Regulations further qualify what it means to be a single housekeeping unit by stating that the residents must use "certain rooms and housekeeping facilities in common." 11 DCMR § 199.1. In this case, the common areas of each unit will be shared among residents of that unit, and these common areas include a common kitchen, powder room, study, laundry facilities, and dining room all as shown on the respective building permit plans attached as Exhibits F and Exhibit G, and the photographs attached as Exhibit I.

The Appellant argues that the Zoning Regulations state that the residents must use all rooms and housekeeping facilities in common. Appellant's Memorandum in Support, pg. 15. However, the Zoning Regulations merely state "certain rooms and housekeeping facilities in common." 11 DCMR § 199.1. Thus, having an interior lock on a bedroom door and having an en-suite bathroom does not mean that the buildings are not flats. There is no requirement in the Zoning Regulations that each resident must have access to each of the other five bedrooms in the unit. In addition, as shown in the photographs attached as Exhibit I, the bedroom doors only lock from the interior, similar to an ordinary bedroom door in a house, and unlike a door used for commercial uses.

The Appellant generally relies on judicial decisions of courts outside the District of Columbia, which construe zoning codes or the common law of those jurisdictions and thus are not controlling authority to this proceeding. Nonetheless, Appellant's reliance on Armstrong v. Mayor and City Council of Baltimore, 410 Md. 426 (2009) actually affirms that the residents of each unit in this case are in fact a single housekeeping unit. In its Memorandum in Support, the Appellant asserts that the use in this case cannot be a flat since the tenants in Armstrong "had "the exclusive right to th[e] entire four bedroom unit" and because each tenant was "equally responsible for the care and maintenance of the apartment unit." See, Appellant's Memorandum

in Support, pg. 15. In fact, in Armstrong the landlord rented out individual bedrooms, with individual leases, to unrelated individuals who only shared the common areas of the apartment. The tenant's individual leases explicitly stated that the tenant has the "sole use" of their bedroom and the "shared use and occupancy of the bathroom(s), kitchen and living/dining areas of the apartment in which she or he resides. "*Id*. at 453. Since the tenants were responsible for the pro rata share of damages to the common areas, the Maryland Court of Appeals concluded that the tenants were "equally responsible for the care and maintenance of the apartment unit." *Id.*

In this case, the residents of each unit are equally responsible for the care and maintenance of their respective unit to a greater degree than the tenants in Armstrong. Residents jointly pay their pro rata share for utilities, maintenance, and upkeep of their unit. Moreover, residents of each unit have shared access to and use of a common kitchen, powder room, study, household supplies, laundry facilities, and dining room in their unit.

In Armstrong, the Maryland Court of Appeals detailed the history regarding the definition of term "single housekeeping unit" in various jurisdictions and even discussed the case In re Appeal of Miller, 511 Pa. 631 (1986), cited by the Appellant. In In re Appeal of Miller, the Pennsylvania Supreme Court reasoned that a homeowner, who allowed unrelated elderly and handicapped persons to live with her constituted a single housekeeping unit because the evidence established that they lived and cooked together, shared meals together, and shared access to all areas of the premises. *Id.* Similarly, the Court of Appeals of Kentucky held that a group of twenty nurses who rented a large house together constituted a "single housekeeping unit" since the nurses had "joint use of the home's parlor and 'limited kitchen facilities' although each nurse was responsible for furnishing her own food. *Id.* at 451, *quoting* Robertson v. W. Baptist Hospital., 267 S.W.2d 395 (Ky. 1954). Courts in various jurisdictions have made it a point not to

determine exactly what must be jointly shared between resident, but merely that the residents are all jointly responsible for some aspects of the living arrangement. See, Armstrong, 410 Md. 426 at p. 12-14; see also, 3 Edward H Zeigler, Jr. et al., Rathkopf's the Law of Zoning and Planning, pg. 23-33, which states that "in the past courts have interpreted the phrase 'single housekeeping unit' in a rather elastic way, generally ruling that **any** living arrangement which makes use of unified house-keeping facilities satisfies such an ordinance."

As evidenced by the photographs attached as Exhibit I, the residents of each unit will (i) share common televisions since there are no individual television hookups in the unit's individual bedrooms; (ii) share kitchen supplies such as pots, pans, dishes, utensils; (iii) share and have joint use of certain rooms and laundry facilities in common as stated above; and (iv) have the ability to cook and share meals together, all of which are intended to promote communal living among the residents of each unit.

Thus, when one applies the rationale of Armstrong, and the survey of cases cited in Armstrong and in Rathkopf's the Law of Zoning and Planning, the only conclusion to reach in this case is that the residents of each unit constitute a single housekeeping unit since the residents of each unit will be personally, financially, and jointly responsible for the upkeep, care, and maintenance of their individual unit, and since the residents of each unit will use certain rooms of their unit in common. As a result, each building is a "flat" by definition.

3. The Appellant's Reliance on Common Living's Advertising is Not Relevant

The Appellant references Common's advertising regarding Common's other properties in New York and San Francisco as prima facia evidence that the buildings in this case are not flats.[10] However, as detailed in the Affidavit of Simon Jawitz, the Properties are being offered

[10] In Armstrong v. Mayor and City Council of Baltimore, 410 Md. 426 (2009), the court found unpersuasive Petitioner's use of advertisements as evidence of the properties ultimate use.

for occupancy[11] as flats and the use will comply with all District of Columbia laws and regulations, including the applicable Zoning Regulations. See, Affidavit of Simon Jawitz, ¶ 6. In addition, Common's website marketing the Properties clearly states that the Properties consist of two flats, each with two units, with a maximum of six members in each unit. See, Common's Website (https://www.common.com/).

Thus, the only evidence of record is that each building will comply with all applicable laws and regulations, and there is no evidence to support the Appellant's argument that the flats will "consistently exceed [their] lawful occupancy." See, Appellant's Memorandum in Support, pg. 21. As a result, the Appellant has not met its burden of proof and the appeal should be dismissed.

B. The Proposed Use is Not An Apartment House

The Appellant argues that the two seperate flats constitute a single apartment house[12] since the proposed building manager intends to "operate the building as a single structure". See, Appellant's Memorandum in Support at pg. 12. However, as described below, each building has been designed and constructed as separate buildings, and each unit within each building will be operated as a separate unit. The only evidence provided by the Appellant that the two buildings allegedly constitute one apartment house is the definition of "structure". The Appellant states that the Zoning Regulations define a "structure" to "encompass multiple buildings" and since

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[11] Appellant cites both ZR16 and ZR58 and concludes that the definition of "use" is the same under both sets of regulations. This is not correct since the term "use" is not a defined term under ZR58.

[12] An apartment house has a different use code under the District of Columbia Building Code as well. As shown on the Certificates of Occupancy, the Buildings are Residential Group 3 buildings, which are buildings that contain no more than two dwelling units. They are not Residential Group 2 buildings, which are apartment houses.

"[a]ny combination of commercial occupancies separated in their entirety, erected, or maintained in a single ownership shall be considered as one structure." *Id.*[13]

However, this is not true. The buildings in this case are in fact two separate buildings. A building is defined as "a structure having a roof supported by columns or walls for the shelter, support, or enclosure of persons, animals, or chattel. When separated from the ground up or from the lowest floor up, each portion shall be deemed a separate building…the existence of communication between separate portions of a structure below the main floor shall not be construed as making the structure one building." 11 DCMR § 199.1. As shown on building permit plans submitted with the Revised Building Permit for 410 Richardson (Exhibit F) and the Revised Building Permit for 412 Richardson (Exhibit G), the buildings are completely separated and have no connection or communication between them. The buildings each have separate addresses, separate entrances, separate utility meters, separate HVAC systems, separate means of emergency egress, separate building permits, and separate certificates of occupancy. There are also separate electric panels and separate mail boxes per unit. Thus, each building is clearly a separate building, and the Appellant has not submitted any evidence to support its contention that the separate structures meet the Zoning Regulation's definition of a single building.

Moreover, an apartment house is defined as "any building or part of a building in which there are three or more *apartments*, or three or more apartments and one or more bachelor apartments, providing accommodation on a monthly or longer basis." 11 DCMR § 199.1 (emphasis added). An apartment is defined as "one or more habitable rooms with kitchen and

[13] The Appellant cites BZA Case No. 16791 as evidence that the two separate buildings should be considered one building, yet in that case the Board was tasked with the very narrow issue of whether four youth residential care home buildings constituted a "facility". The Board concluded that a group of buildings constituted a "facility" based on the explicit definition of "facility" in the Zoning Regulations. Since the term "facility" is not included in any of the definitions at issue, the conclusion by the Board is inapplicable to the appeal at hand.

bathroom facilities exclusively for the use of and under the control of the occupants of those rooms." *Id.* In this case, each building has two units, and each unit includes six bedrooms. Thus, each building does not include three units, as required to constitute an apartment building. Moreover, despite the Appellant's contention there are 24 apartments, each bedroom is not an apartment since the bedrooms do not contain kitchens exclusively for the use of and under the control of the occupants of the bedroom. The kitchen is shared among the six residents of each unit. As a result, there are two separate buildings/flats, each of which includes two separate units.

The Appellant cites the Fair Housing Act as evidence that the buildings should be considered an apartment house under the Zoning Regulations. However, the Zoning Regulations and the D.C. Building Code, not the Fair Housing Act, governs the definition of uses for the purposes of building permits and certificates of occupancy.

C. The Proposed Use is Not a Rooming House or Rooming Unit

The Appellant argues that the use of the separate buildings is a rooming house or rooming unit, since the residents will not have exclusive control of their unit. See, Appellant's Memorandum in Support, pg. 18. In addition, the Appellant argues that OTD will operate the flats for profit, which in turn makes them a rooming house. *Id.* [14] A "rooming unit" is defined as "one or more habitable rooms forming a single, habitable unit used or intended to be used for living or sleeping purposes; but not for the preparation or eating of meals." 11 DCMR § 199.1. A rooming house is defined as "a building or part thereof that provides sleeping accommodations

[14] The Appellant relies on In re Appeal of Miller, 511 Pa. 631 (1986) to support this assertion. However, the court In re Miller the court was specifically determining whether a relationship between residents in which one resident in the unit acted as the landlord and the other residents were paying rent directly to that resident was a single housekeeping unit. In any event, the Supreme Court of Pennsylvania determined that the residents at issue were a single housekeeping since "[t]he mere fact that a member of the unit pays a fee for belonging to the unit does not transform the relationship…" *Id* at 638.

for three 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." 11 DCMR § 199.1.

The facts in this case demonstrate that the buildings and units do not constitute a rooming house or rooming unit. In each flat, the units are under the exclusive control of the occupants. As described above, the residents of each unit will sign a lease for the unit, and the lease will grant them control over the unit. See, Affidavit of Simon Jawitz, ¶ 6(a). Moreover, the units within each flat are not "rooming units" since each unit has a kitchen that can be used for the preparation or eating of meals. Finally, the definition of a "rooming house" does not include any references to ownership or profit by a landlord. Thus, the payment of rent is not dispositive of any type of use. A single family home may be rented to a single family in exchange for the payment of rent and this would not change the use of the property.

D. The Proposed Use Is Not a Tenement House

The Appellant argues that the flats are a tenement house since OTD is "individually leasing out 24 bedrooms in an apartment house which is broken into 4 distinct 6-bedroom units." See, Appellant's Memorandum in Support, pg. 20. However, the facts in this case do not support this contention.

A tenement house is defined as "a building or part of a building containing three or more tenements, or any building or part of a building containing any combination of three or more tenements and apartments." 11 DCMR § 199.1. A "tenement" is defined a "one or more habitable rooms in an apartment house, under the exclusive control of the occupant of the apartment house." *Id.* As described above, since the buildings are not an apartment house, the

individual bedrooms are not tenements, and thus neither of the flats meet the definition of a tenement house since each flat contains two separate units.

VI.
ANC AND COMMUNITY REPORTS

The Board shall only give "great weight" to the written report of the Advisory Neighborhood Commission ("ANC") if the report meets the requirements of Subtitle Y § 503.2 of ZR16. The ANC report must contain "the issues and concerns of the ANC about the appeal, as related to the standards against which the application shall be judged." 11-Y DCMR § 503.2(e) of ZR16.

ANC 5E's resolution merely states that they support the appeal and that the ANC may provide further recommendation. See, Exhibit 28 of the Record.[15] The ANC resolution does not state any particular issues or concerns, as related to the standards against which the appeal is judged, that should be given "great weight" since there is no discussion of the merits of the appeal, or why the Building Permits and Certificates of Occupancy were allegedly improperly issued.

The Appellant also relies on a resolution from the Bates Area Civic Association in its Motion to Supplement. As evidenced by the Email submitted as Supplemental Exhibit 2 (S-2) of the Appellant's Motion to Supplement, OTD was never given notice of that Bates Area Civic Association meeting. Notice was only provided to people who oppose the project such as Mr. Wilson, Mr. Seigel, and Commissioner McClelland. As shown in the Email correspondence and

[15] The resolution was presented to the ANC and signed by Commissioner Katherine McClelland, who is also listed on the Appellant's witness list as a member of RPNA and resident of Richardson Place. See, Appellant's Notice of Appeal, pg. 8. As a member of RPNA, which is pursuing this appeal, Commissioner McClelland should have disclosed that she is a member of RPNA, or she should of recused herself from presenting and then voting on the resolution to support the appeal.

the attached Civic Association Agenda, the only party that presented was the Appellant. Thus, OTD did not have an opportunity to present its case to the Civic Association. Moreover, Mr. Wilcox drafted the resolution that was voted on. Finally, the resolution does not address why any of the issued Building Permits or the Certificates of Occupancy were allegedly improperly issued, or how the project does not comply with the law. Thus, the Board shouldn't give this resolution any weight.

VI.
EXHIBITS

Exhibit A – Original Building Permit for 412 Richardson

Exhibit B – Original Building Permit for 410 Richardson

Exhibit C – Revised Building Permit for 412 Richardson

Exhibit D – Revised Building Permit for 410 Richardson

Exhibit E – Certificates of Occupancy

Exhibit F – Excerpt of Building Permit Plans for 410 Richardson

Exhibit G – Excerpt of Building Permit Plans for 412 Richardson

Exhibit H – Affidavit of Simon Jawitz, CFO and Head of Real Estate Acquisition of Common Living

Exhibit I – Photographs of the Properties

VII.
WITNESSES

1. Peter Stuart, Partner, OTD 410-412 Richardson Place LLC
2. Shane Dettman, expert in Zoning and Land Use
3. Simon Jawitz, CFO and Head of Real Estate Acquisition of Common Living

VIII.
CONCLUSION

The appeal should be dismissed as untimely since it was not filed within 60 days from the date the Appellant should have had knowledge of the issuance of the original Building Permits. However, even if the appeal is not dismissed as untimely, the Appellant has not its burden of proof since it has not provided any evidence demonstrating that the issued Building Permits, and the approved use, are illegal or inaccurate. OTD intends to operate the Properties in full compliance with all applicable D.C. laws and regulations. If OTD's Properties are not in compliance with the Zoning Regulations or any District of Columbia laws at some point in the future, DCRA provides methods of enforcement for such violations. The Appellant's conclusory allegations that OTD may violate D.C. laws or regulations at some point in the future is not evidence that the buildings on the Properties are anything other than properly designed, permitted, and constructed flats. As a result, the Appellant has not met its burden of proof and the appeal should be dismissed since the issued Building Permits and Certificates of Occupancy were procedurally and substantively correct, and consistent with the application of the Zoning Regulations. As a result, this appeal is without merit, and should be dismissed.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 

Kyrus L. Freeman
Joseph O. Gaon

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Prehearing Statement in Opposition to the Appeal was filed electronically with the Office of Zoning and was sent by first-class mail and electronic mail, this 14th day of March, 2017, to the following:

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