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

Appeal of Richardson Place Neighborhood Association BZA Appeal 19441

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**DCRA'S PRE-HEARING STATEMENT,**
**MOTION TO AMEND APPEAL TO SUBSTITUTE THE CERTIFICATES OF OCCUPANCY FOR THE BUILDING PERMITS,**
**AND MOTION TO PERMIT LATE FILING**

Appellant alleges that the Zoning Administrator (the "**ZA**") erred in approving the following building permits:

- B1611469, issued on October 10, 2016 (the "**410 Permit**") to reconfigure an existing two family flat located at 410 Richardson Place, N.W. (the "**410 Building**"), known for assessment and taxation purposes as Lot 102 in Square 507; and
- B1611470, issued on September 27, 2016 (the "**412 Permit**", and collectively with the 410 Permit, the "**Permits**" ), to reconfigure an existing two family flat located at 412 Richardson Place, N.W. (the "**412 Building**", and collectively with the 410 Building, the "**Buildings**"), known for assessment and taxation purposes as Lot 101 in Square 507 (collectively with Lot 102, the "**Lots**").

The Buildings are located in the R-4 Zone District under the 1958 Zoning Regulations under which the Permit was issued.[1] Specifically Appellant alleges that the ZA erred in approving the Permits because the Owner's "intended" use is for "a 24-unit co-living facility", this "intended" use conflicts the R-4 Zone District's principles as not an "apartment house district as contemplated under the General Residence (R-5) Districts", and the Permit Holder provided no guarantee of the number of residents.

DCRA asserts that the ZA correctly approved the Permits as compliant with the Zoning Regulations because the applications and plans submitted with each of the Permits depicted buildings that complied with the definition of a two family flats in the Zoning Regulations based

[1] All references to "Section" herein shall be to the 1958 Zoning Regulations unless specified otherwise.

on the layout of each unit in each flat as composed of six bedrooms with private baths and shared kitchen, dining, and living areas.

## MOTION TO AMEND APPEAL TO SUBSTITUTE THE CERTIFICATES OF OCCUPANCY FOR THE BUILDING PERMITS,

DCRA further asserts that the appeal of the Permits is untimely filed, as the Permits are revisions to permits issued on August 31, 2011 (B1002883 for 412 Richardson Place) and April 20, 2012 (B1214832 for 410 Richardson Place) and Appellant has not presented evidence that its alleged violations were due to any changes made by the Permits from those original 2011 and 2012 permits. Moreover, Appellant's alleged violations relate to the use of the Buildings, which are more relevant to the certificates of occupancy for the Buildings, which were issued as CO1700955 on February 13, 2017 for 410 Richardson Place and CO1700918 on February 2, 2017 for 412 Richardson Place (collectively, the "**CofOs**").

Since Appellant has indicated it plans to appeal the CofOs and is willing to consolidate into this Appeal, DCRA, in the interest of judicial economy, respectfully requests that the Board of Zoning Adjustment (the "**Board**") amend the Appeal to substitute the CofOs for the untimely-appealed Permits as the subject of the Appeal.

On that basis, DCRA asserts that the CofOs were correctly issued for two family flats according to the definitions in the Zoning Regulations based on the layout of each unit and the single lease for each unit that limits the number of residents to 6 unrelated individuals in accordance with the definition of "family". DCRA also asserts that contrary to Appellant's assertions that the proposed use should be more properly classified as a "rooming house", the CofOs authorize a use in which the occupants will have the exclusive control of the accommodations under the terms of the lease, unlike a "rooming house".

DCRA thus respectfully requests that the Board affirm that Appellant failed to meet its burden of proof that the ZA erred in approving the CofOs (or the Permits) as compliant with the Zoning Regulations, and that the Board therefore deny the Appeal.

## MOTION TO ACCEPT LATE FILING

DCRA respectfully requests that the Board grant DCRA's Motion to Permit Late Filing pursuant to Section Y-302.19 to waive Section Y-302.17's requirement to file all responsive

briefs no later than seven (7) days prior to the public hearing. DCRA apologizes for the delay in filing and requests this waiver due to delays caused by the inclement weather and preparation for Council's oversight hearing of DCRA.

## APPELLANT'S ALLEGATIONS

Appellant alleges that the ZA made the following four errors in classifying the proposed use for the CofOs as a "two-family flat":

1. The "intended use" of the Buildings is a 24-unit apartment, rooming or tenement house;
2. The "intended use" does not meet the definition of "flat";
3. The ZA ignored the principle statement in Section 330.5 [*sic* – 330.3] that the R-4 zone "shall not be an apartment house district" and consider the prior request for relief from the Board that was denied; and
4. The actual use of the Buildings will "invariably exceed" the limit of 6 unrelated residents because the Owner has not stated that it will enforce that limitation.

## ARGUMENT

DCRA asserts that the ZA correctly approved the CofOs for "two-family flats" and that for each of these allegations Appellant has failed to meet its burden of proof that the ZA erred as required by Section 3119.2 of the 1958 Regulations, which has been adopted without change as Subtitle X, Section 1102.1 of the 2016 Regulations:

> "In all appeals and applications, the burden of proof shall rest with the appellant or applicant. If no evidence is presented in opposition to the case, the appellant or applicant shall not be relieved of this responsibility.

### 1. The CofOs were properly issued for "two-family flats" as the proposed use is not an apartment house, rooming, or tenement house

DCRA will address Appellant's first and second allegations together as they are effectively two aspects of the same issue. The ZA determined that the Buildings are each a two-family dwelling as defined by Section 199.1:

> "**Dwelling, two-family** - a dwelling used exclusively as a residence for two (2) families living independently of each other. A two-family dwelling is a flat."

Each of the Buildings has two family units, each of which has a shared kitchen, half-bath, living and dining room, lounge room, washer/dryer, and HVAC, electric, and plumbing systems. These shared facilities meet the definition of "family" in Section 199.1:

> "**Family** - one (1) or more persons related by blood, marriage, or adoption, or not more than six (6) persons who are not so related, including foster children, living together as a single house-keeping unit, using certain rooms and housekeeping facilities in common; provided, that the term family shall include a religious community having not more than fifteen (15) members."

Contrary to Appellant's assertion, "housekeeping", as defined by Merriam-Webster (per Section 199.2(g) since this is not defined in the Zoning Regulations) is not limited to cleaning, but covers a broad range of activities including cooking, laundry, maintenance as well as cleaning:

> "1) the management of a house and home affairs,
> 2) the care and management of property and the provision of equipment and services (as for an industrial organization),
> 3) the routine tasks that must be done in order for a system to function or to function efficiently."

Moreover, house cleaning is often contracted out by single-family homeowners without challenging their identity as a single family. If the hiring of contractors to clean homes would declassify an otherwise-compliant flat and render it an apartment, a majority of flats in the District would likely be non-compliant.

Under the definition of "family", up to six (6) unrelated residents (but no limitation on the number of related residents) may share "certain rooms and housekeeping facilities". Each of the family units in the Buildings has only six bedrooms, each with its own bathroom, which in combination with the shared dining, cooking, and living facilities classifies each family unit as a such. Since each of the Buildings has just two family units, therefore each of the Buildings is a "two-family dwelling" or a "flat" – precisely what the ZA determined in approving the CofOs.

The ZA's approval of the CofOs only authorized the use of the Buildings as a "two-family flat" which limits the number of residents in each family unit to no more than six unrelated individuals. If the Owner, or tenant, violates that provision, the ZA will take appropriate enforcement action, which can include the revocation of the CofOs. In this case, the Owner's property manager has submitted a sworn affidavit stating that "each [family] unit will have a maximum occupancy of six residents per [family] unit" as well as providing a form of the lease

which has a provision establishing this six resident maximum for each family unit.[2] Thus there is no evidence on which the ZA could deny the CofOs, as the layout of each of the family units and of the Buildings complies with the definitions of "family" and as the Owner has put on record its intent to comply with the limitations of a "two-family flat" per the Zoning Regulations.

Appellant asserts that the Buildings should be considered in the aggregrate, as a single project, and that this aggregate should be classified as an "apartment house", a "tenement house" or a "rooming house". But the Buildings are on separate lots of record, with separate building permits and certificates of occupancy – and it is these separate permit and certificate applications that the ZA had to review and determine compliance with the Zoning Regulations. As elaborated above, each of the Buildings has only two family units, and therefore cannot be classified as an "apartment house" or "tenement house" as both of these require a minimum of three (3) family units. Nor can the Buildings be classified as a "rooming house" as the "accommodations" in the Buildings are under the "exclusive control of the occupants" under the terms of the lease [see definitions in Attachment A].

Therefore this allegation is without merit and should be dismissed.

**2. The ZA's approval of the CofOs was not "arbitrary and capricious" because the R-4 Zone District does allow apartment houses in certain circumstances and because the ZA is not authorized to consider the prior attempt to obtain relief from the Board**

Appellant alleges that Section 330.5 [actually Section 330.3] – of the Zoning Regulations bars apartment houses, but Appellant failed to provide the full text of that provision, which is more nuanced as followed:

> 330.3 The R-4 District shall not be an apartment house district as contemplated under the General Residence (R-5) Districts, since the conversion of existing structures shall be controlled by a minimum lot area per family requirement. [portion not quoted by Appellant underscored]

The R-4 zone does allow apartment houses under certain circumstances. Moreover, as discussed above, the Buildings are not apartment houses.

As regards the previous failed requests to obtain zoning relief for the Lots, the ZA is not authorized to consider such requests in evaluating the compliance of a building permit application. The ZA's authority is limited to determining whether an individual building permit

[2] BZA Appeal 19441, Exhibits 32H1 and 32H2 (Owner's Prehearing Statement, Tabs H1, p. 1 and Tab H2, p. 3.

application complies with the Zoning Regulations. Since the Lots did not receive the requested zoning relief, the ZA evaluated the building permit applications for the Buildings for compliance with the Zoning Regulations without any relief. The ZA's approval of the CofOs was therefore not "arbitrary and capricious" – indeed, had he denied the CofOs, as Appellant would prefer, that would have been "arbitrary and capricious" as not based on any law or regulation.

Therefore this allegation is without merit and should be dismissed.

**3. The Owner has stated it will not allow more than 6 unrelated residents in each unit**

The Owner has provided an affidavit from its property manager stating that "each unit will have a maximum occupancy of six residents per unit" and attached a copy of the form of the lease that includes a provision establishing this six resident maximum per unit.[3] Therefore, the ZA correctly issued the CofOs as limited to a single "family" of no more than 6 unrelated residents per unit. If the actual operation under the CofO ceases to abide by this limit, then the ZA will take enforcement action – but at this point the only decision made by the ZA that can be appealed is the approval of the CofO.

Therefore this allegation is without merit and should be dismissed.

## CONCLUSION

For the reasons stated above, DCRA asserts that the allegations stated in the Appeal are without merit and that Appellant failed to meet its burden of proof to establish that the ZA erred in approving the Permits. DCRA therefore respectfully requests that the Board affirm that the ZA correctly applied the Zoning Regulations to approve the CofOs as compliant with the R-4 Zone District standards as two-family flats, and that the Board therefore deny this Appeal.

Respectfully submitted,
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General Counsel
Department of Consumer and Regulatory Affairs

Date: 3/16/17

/s/ Maximilian L.S. Tondro
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[3] BZA Appeal 19441, Exhibits 32H1 and 32H2 (Owner's Prehearing Statement, Tabs H1, p. 1 and Tab H2, p. 3.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of March 2017, a copy of the foregoing Pre-Hearing Statement was served via electronic mail to:

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# ATTACHMENT A

Relevant definitions from Section 199.1 of the Zoning Regulations

"**Dwelling, two-family** - a dwelling used exclusively as a residence for two (2) families living independently of each other. A two-family dwelling is a flat."

"**Dwelling unit** - one (1) or more habitable rooms forming a single unit that is used for living and sleeping purposes, that may or may not contain cooking facilities. The term dwelling unit shall include a dwelling, apartment, bachelor apartment, or tenement, but shall not include a rooming unit."

"**Family** - one (1) or more persons related by blood, marriage, or adoption, or not more than six (6) persons who are not so related, including foster children, living together as a single house-keeping unit, using certain rooms and housekeeping facilities in common; provided, that the term family shall include a religious community having not more than fifteen (15) members."

"**Flat** - a two-family dwelling."

"**Apartment house** – any building or part of a building in which there are three (3) or more apartments, or three (3) or more apartments and one (1) or more bachelor apartments, providing accommodation on a monthly or longer basis."

> "**Apartment** – one (1) or more habitable rooms with kitchen and bathroom facilities exclusively for the use of and under the control of the occupants of those rooms."

"**Rooming house** - a building or part thereof that provides sleeping accommodations for three (3) 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. A rooming house provides accommodations on a monthly or longer basis. The term "rooming house" shall not be interpreted to include an establishment known as, or defined in this title as, a hotel, motel, inn, bed and breakfast, private club, tourist home, guest house, or other transient accommodation."

"**Tenement house** - a building or part of a building containing three (3) or more tenements, or any building or part of a building containing any combination of three (3) or more tenements and apartments."