RICHARDSON PLACE NEIGHBORHOOD ASSOCIATION, Appellant, v. D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS, And OAKTREE DEVELOPMENT, LLC, d/b/a/ OTD 410-412 RICHARDSON PLACE LLC, Applicant.	BZA Appeal No.: 19441 Hearing Date: March 22, 2017

APPELLANTS REPLY TO DCRA'S AND OWNER'S PRE-HEARING STATEMENTS AND CONSENT TO AMEND APPEAL

Appellant Richardson Place Neighborhood Association (RPNA) hereby files the following reply to the prehearing statements of (a) D.C. Department of Consumer and Regulatory Affairs, and (b) owner and applicant OTD 410-412 Richardson Place LLC. Because OTD's tenant, Common Living, Inc., is also relevant to this appeal, we refer to the applicant throughout as either "OTD-Common" or "Common." Given the short time period between the submission of this reply and the hearing date, RPNA provides a brief overview of its Reply:

- **Part I** addresses RPNA's consent to modify the appeal to challenge the C of O.
- **Part II** addresses RPNA's timeliness.
- **Part III** addresses why the subject property may not be considered a "flat"
- **Part IV** addresses DCRA's decision to grant certificates of occupancy.

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OTD-Common's response to RPNA's appeal can be boiled down to a single, faulty syllogism: Flats are permissible as of right in R-4 zones. We are a flat. Therefore we are permissible in an R-4 zone. The major premise is correct: R-4 zones permit the construction of

flats as of right to 60% lot coverage. But the minor premise depends entirely on OTD-Common's say-so. But the public statements, publications, blog-posts, and advertisements of its lessee, Common, prove otherwise, and Common's own sworn affidavit raises far more questions than it answers. Zoning approvals require DCRA to undertake an independent examination of all relevant facts to decide whether the use intended by an applicant is permissible; here, even a cursory examination of the facts shows that it is not.

I. Consent to Amend Appeal to Include Challenge to Certificates of Occupancy

OTD-Common argues in its Pre-Hearing Statement that "this appeal should include the question of whether the Certificates of Occupancy were properly issued by DCRA." OTD Prehearing Statement in Opposition ("Opp.") at 2. DCRA agrees, arguing that the Board "amend the Appeal to substitute the [Certificates of Occupancy]." DCRA Prehearing Stmt. at 2. Appellant consents to modify the scope of the appeal to include a challenge to DCRA's issuance of Certificates of Occupancy for the subject property. *See* Opp. Exh. E (including copies of the C of Os). The merits of RPNA's challenge to the Certificates of Occupancy mirrors the merits of its challenge to the building permits..

II. The Appeal is Timely

Whether considered as an appeal of the building permits or an appeal of the recently-issued Certificates of Occupancy, the appeal is timely.[1] OTD-Common's sole argument that the appeal is untimely is that RPNA failed to file its appeal within 60 days of the "first writing" reflecting the Zoning Administrator's decision to approve the construction of flats. *See* Prehearing Statement in Opposition ("Opp.") at 6. Because RPNA filed no appeal within 60 days

[1] DCRA does not dispute—and OTD-Common cannot dispute—that the challenge to the Certificates of Occupancy is timely. The certificates were issued on February 2 and 13, 2017, respectively. *See* Opp., aE (Attaching certificates of occupancy). This appeal falls within the permissible 60-day window. *See* 11-Y D.C.M.R. § 302.5.

of either August 31, 2011 (for 412 Richardson Pl.) or April 22, 2013 (for 410 Richardson Pl.), respectively, it believes that the appeals are untimely under 11-Y D.C.M.R. § 302.5.

As a preliminary matter, OTD-Common simply ignores—and thus does not dispute—RPNA's argument in favor of its timeliness, which is that RPNA had no cause to appeal until it learned on October 31, 2016, that the "use" listed on the permits did not reflect the *actual, intended* use of the property. *See* Notice of Appeal, BZA Appeal No. 19441 Exh. 2 at p. 4-5. For this simple reason, RPNA's appeal qualifies for the exception that appeals normally must follow 60 days from the "first writing" unless "[t]here 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 the extension will not prejudice relevant parties. 11 D.C.M.R. § 3112.2 (2015); 11-Y D.C.M.R. § 302.6 (2016) (same).

OTD-Common does not dispute that October 31, 2016, was the first time that RPNA or any of its members learned that the subject property would be occupied by a heretofore unknown "co-living" startup. It does not dispute that Appellant had no constructive knowledge of its intended use at any point prior to that date. It does not argue that it would suffer any prejudice from an extension of the standard 60-day timeliness rule. And it does not even attempt to respond to RPNA's invocation of Kalorama Citizens Association, BZA Appeal No. 17109, (Nov. 8, 2005), in which the Board excused an otherwise untimely appeal because the neighborhood association "could not file a good faith appeal until it had some reason to believe the Zoning Regulations were violated." *Id.* at 7.

OTD-Common's only potential argument—though not made in its argument against timeliness—is its unsubstantiated claim that a permit may *never* be appealed based on a material

change in the intended use of the property.[2] In other words, even if a neighbor learns that a developer clearly *intends* to use the property in an impermissible manner, the only remedy is to rely on DCRA's enforcement apparatus to show *actual* violations. *See* Opp. at 3. But OTD-Common offers no citations to support this novel proposition, and for good reason: none exists.

On the contrary, the Board has expressly considered an appeal in RPNA's precise posture in Logan Circle Community Association, BZA Appeal No. 16002 (Jan. 4, 1995). There, the developer had obtained a permit for an apartment house; a community association challenged the permit on the grounds that the developer intended the building would be used as a "community-based residential facilit[y] rather than an apartment building as proposed." *Id.* at 2. While the Board ultimately ruled in favor of the developer, *id.* at 10, it nevertheless permitted the appeal to proceed on the merits, despite the fact that the sole basis for the appeal was a discrepancy between the proposed use as represented in the permit application and the intended use as demonstrated through extrinsic evidence. *Id.*

OTD-Common's argument would also yield absurd consequences. Consider the following: a developer obtains a permit to build a 6-unit apartment. Sixty-one days later, and before construction begins, the developer publicly represents that it will be opening DC's newest "micro hotel." Under OTD-Common's theory, no appeal would ***ever*** be possible, even if the developer made a sworn statement that he intended to open a hotel. The Board should not entertain such an absurd result, which would eviscerate the right of appeal afforded by the Zoning code, and would render meaningless the obligation of a permittee to indicate on its applications the use "that most accurately describe[s] the intended use." Appeal of Eugene A. Thompson, BZA Appeal No. 15264, at 10 (May 2, 1990); *see also* D.C. Code § 6-641.09

[2] DCRA makes the same unsubstantiated claim, which we refute in Section IV *infra.*

(making it "unlawful" for a developer to "erect", "maintain", or "use" any building in violation of the zoning code).

RPNA is also timely under the facts of Appeal of Geraldine Rebach and Jeffrey Schonberger, BZA Appeal No. 17414 (Feb. 21, 2006). There, the Board permitted an otherwise timely appeal to proceed where construction under the original building permits had ground to a halt, and where new "completion" permits issued to a subsequent owner years after the original building permit had been filed. When the new building owner re-started construction, the Board permitted an appeal to proceed, even though the appeal was well-past the 60-day deadline. The lengthy cessation of construction, coupled with the reactivation of construction two years later, provided "unanticipated exceptional circumstances" that warranted extending the timeliness of the appeal. The same is true here, where the original property lay fallow for several years before it was sold to OTD-Common, which applied for and received permits in the fall of 2016.[3]

III. The Subject Property Will Not Be Operated as "Flats"

As RPNA demonstrated in its opening memorandum and in its supplemental filing, OTD-Common's and Common's intended use of the subject property is anything other than a "single family" use, which is necessary for the use to be considered a "flat." Although OTD-Common asserts that "the only evidence of record is that the buildings have been constructed and will be operated in compliance all [*sic*] District of Columbia laws and regulations," Opp. at 3, it refuses to address RPNA's evidence showing that Common's operating model squarely conflicts with both the letter and spirit of single-family use. More damning still is the evidence OTD-Common ***itself*** provides—*i.e.*, the two-page affidavit from Common's Chief Financial Officer Simon

[3] RPNA notes that neither DCRA nor OTD-Common dispute that RPNA was unable to view, access, or otherwise review the two modification-and repair-permits that DCRA purportedly issued on September 27, 2016 (Permit No. B1611470) and October 20, 2016 (Permit No. B161149), respectively, until November 2016. *See* Notice of Appeal, at 5. Also, OTD-Common does not dispute that the permits were not publicly posted and visible until that time.

Jawitz and the sample lease—whose omissions speak volumes about Common's unwillingness to fully disclose how its tenants use their residences. *See* Opp. Exhs. H & H(A). Whether the use OTD-Common intends is that of a rooming house, apartment house, tenement house, or some other form of single-room occupancy (SRO), it is crystal clear that the use cannot be considered a "single family" use, which is what it must be to be permissible.

Before diving in, a brief word on evidence. Rather than address the evidence RPNA provided in its opening brief and motion to supplement—consisting largely of representations that ***Common itself makes*** in advertising its operating practices to prospective tenants—OTD-Common astonishingly asserts that all of RPNA's evidence is "not relevant." Opp. at 14.[4] OTD-Common does not argue that the representations Common made are inaccurate; it does not deny that they are inapplicable to the subject property; and it does not deny that the representations will govern how Common operates the subject property. The Board should treat all of Common's statements and marketing materials, including those attached to this reply, as conceded by Common to be accurate representations of how the property will be used.

A. The Zoning Code Defines Use by Looking Beyond Structural Elements

OTD-Common first elevates form over substance by arguing that because the drawings show a two-flat configuration, the building will be operated as a flat. *See* Opp. at 9-10. This is a pure tautology, and it is wrong. The zoning code requires the Zoning Administrator to look beyond the joists and beams of a property to decide its use. *See*, *e.g.*, 11-B D.C.M.R. § 201.6 (defining a property's use as consisting of its "activities, functions, physical characteristics, and impacts"); 11 D.C.M.R. § 199.2(f) (2015) (defining "use" as how a property is "intended,

[4] OTD-Common suggests that advertising materials are "unpersuasive" in deciding a property's use. *See* Opp. at 14 n.10. The D.C. Court of Appeals has held the opposite. *See* Kuri Bros. v. D.C. Bd. of Zoning Adjustment, 891 A.2d 241, 248 (D.C. 2006) (relying in part on advertisements in determining that a building's use did not comply with its certificate of occupancy).

arranged, or designed to be used or occupied, [or] offered for occupancy"); Kuri Bros. v. D.C. Bd. of Zoning Adjustment, 891 A.2d 241, 248 (D.C. 2006) (considering advertising materials, signage, and other non-physical manifestations of use in deciding whether property exceeded permissible use on its Certificate of Occupancy).[5]

Even a cursory look at the uses contemplated by DC's zoning code show that the structure alone does not determine a property's use. For instance, under the 1958 rules, a "book store" is a permissible as-of-right structure in a C-1 district. *See* 11 D.C.M.R. § 701.4(f). But if its books are sexually explicit, then it becomes a "Sexually oriented business establishment," 11 D.C.M.R. § 199, which cannot be built as-of-right in a C-1 district. It is thus clear that, when faced with evidence showing that the property owner will not *use* the property as represented on its permit application, the structure alone will not suffice to determine the property's use.

B. Common's Operating Practices Preclude a Finding of Single-Family Use

The applicant argues, as it must, that the property will be operated as four, atomistic, self-governing, single-family units. But the use OTD-Common contemplates cannot be considered "single family" without depriving the term of all meaning. Its arguments to the contrary all fail.

i. Common's Own Lease Disproves the Existence of a Single Family

Attempting to show that each unit will contain only "six (6) [unrelated] persons . . . living together as a single house-keeping unit, using certain rooms and housekeeping facilities in common," 11 D.C.M.R. § 199, Common leans primarily on the existence of a lease. It argues that the lease shows that "each unit's residents will live as a single housekeeping unit" because the leases will make all 6 residents "jointly and severally liable" for rent, maintenance, and

[5] OTD-Common incorrectly states that "'use' is not a defined term under ZR58," Opp. at 15 n.11, despite the fact that 11 D.C.M.R. § 199.2(f) defines the word expressly.

upkeep. Opp. at 11.[6] But no statute, rule, or precedent supports the proposition that a shared lease is determinative of whether six unrelated people constitute a family. And, more importantly, Common's representations about the nature of its lease show that the lease is only part of the story, as residents' obligations to each other and to Common are also defined by a separate document—a membership agreement / code of conduct—that Common fails to include with its filing.

To begin, the sample lease Common attaches to its Opposition shows that ***two legal documents***, not one, govern the relationship of each tenant with Common. The lease's merger clause shows that the "entire agreement" consists of: (a) the lease, **and** (b) the "membership agreement." Sample Lease, Opp. Exh. H(A) at 19. It continues, noting that a default under the lease shall count as a default under the membership agreement and vice versa. *Id.* In other words, the lease terms may contractually be subordinated to whatever terms are included in the membership agreement. For this reason, Common's claim that the lease is the only relevant document in determining the units' use is simply wrong. Instead, the lease must be considered alongside the membership agreement, which is an agreement between Common and ***each resident as an individual***. *See Id.* at 3 (noting that tenants agree to abide by group lease and "each membership agreement"); *see also* Mot. to Supp., Exh. S-6, at 2 ("After being interviewed and accepted, one of the first experiences a member has with Common is the onboarding process — where they choose a suite, electronically sign membership agreements and make their first payment.").

[6] RPNA very much doubts that the attached lease is, in fact, the lease Common intends to use, given a few obvious errors. *See* Opp., Exh. H(A). For instance, the lease requires tenants and their guests to obey the alcohol laws of "New York," not D.C., and directs that tenants shall not leave property in the elevators and on the fire escapes, neither of which exist in the subject property. *See id.* at 12, 26.

Although OTD-Common conspicuously fails to provide a copy of the *membership* agreement, we may hypothesize its contents based on key terms that are missing from the sample lease. Even worse, some of Common's representations about **its own sample lease** are flatly contradicted by both the lease's own terms and Common's public representations.

First, although the lease purports to include a fixed "term" duration (currently showing blank spaces), this is squarely in tension with Common's own advertising, which offers prospective *individual* residents a choice between "6 and 12 month stays at Richardson, with a minimum stay of 6 months." Landing Page for Common.com "Richardson" Residence (Attached as Exh. A to this Reply). Common does not advertise that the entire unit is available for lease, but rather advertises that each "room" is available to let. In an advertisement on Craigslist.com, for instance, Common invites prospective tenants to "Choose a 6 or 12 month lease" for renting a "**private bedroom** in a furnished flat." *See* Craigslist.com Advertisement for Richardson (Mar. 17, 2017) (Attached as Exh. B to this Reply) (emphasis added).

Second, the lease contains no fixed sum of rent for the entire unit. Again, this would be impossible, because, according to Common's advertising, the terms of each resident's rent vary depending on the length of his or her stay. As Common explains, "we . . . incentivize our members to commit to longer term stays by giving them lower monthly rates in exchange for their commitments." *See* Danielle Robin, How Common Does Pricing, at 5 (Attached as Exh. C to this Reply); *see id.* (chart explaining that price changes depending on whether tenant commits to a duration of 12, 6, 3, or 1 month(s)). Although the lease purports to show a monthly "base rent," it acknowledges that the amount of rent is "subject to any addendum hereto," which, given the merger clause, includes the Membership Agreement. *See* Sample Lease at 1, 19.

Third, and contrary to Common's sworn affidavit stating that residents are "jointly and severally liable for rent," Jawitz Aff. at ¶ 6.f, the lease itself expressly provides that "Landlord **will not seek to hold any individual Tenant liable for more than their Allocable Portion of the Monthly Rent** for any month or portion of a month in which that Tenant has legal occupancy of the Premises," as long as the tenants do not "refuse" to accept a new roommate that Common sources. Sample Lease at 6 (emphasis added); *see also* Nathan McAlone, The Truth About the 'Dorms For Adults' That $16 Billion WeWork Is Betting its Future On, BusinessInsider.com (Jul. 29, 2016) ("In Common, you are living with roommates you likely don't know when you move in. But even though you are all signing the same lease, Common has complicated terms that guarantee that if one of you drops out, then Common will be responsible for filling the room. This means that when you sign up to stay for six months, ***it's just between you and Common***.") (emphasis added).[7]

Fourth, the lease shows that tenants have no power to pick their own roommates. Rather, Common maintains the sole power to select its residents. As the lease itself states, "In the event of a Tenant Loss or multiple Tenant Losses, Landlord may, **at its sole option**, select another Tenant to fill any of the open Tenant contract slots in this Lease Agreement, and such new Tenant will hereinafter be referred to as a 'Replacement Tenant.'" *Id.* (emphasis added). An article published just two months ago explains, "Instead of picking roommates — except in the case of couples who want to share a room — residents are placed wherever there's an opening." Alexandra Leon, Play Roommate Roulette at This New 'Co-Living' Residence in Boerum Hill, DNAInfo.com (Jan. 26, 2017)[8]; *see also* Exh. A to this Reply ("[I]f a member moves out at an

[7] *Available at* http://www.businessinsider.com/co-living-startups-turn-normal-2016-7.

[8] *Available at* https://www.dnainfo.com/new-york/20170126/boerum-hill/common-coliving-roommate-595-baltic-street.

awkward time – such as over the holidays – we may not have a new member ready to move in immediately.").

Fifth, the lease contains no mention of Common's advertised perks of permitting its members to "have **access to community spaces at each Common home**," meaning that a member can "move throughout the homes and visit other suites for movie marathons, happy hours, or other casual pop-up events." *Private, Shared & Community Spaces*, Common.com Blog post (Feb. 11, 2016), Mot. to Supplement, Exh. S-4, at 2-3. Presumably perks like this are included in the membership agreement, though RPNA cannot know for sure unless Common is willing to provide a copy for inspection.

Sixth, the lease contains no provision permitting tenants to evict one of their own roommates even though Mr. Jawitz asserts (without citing anything in the lease) that all six residents are "jointly responsible for the conduct of [other] residents." Jawitz Aff. at ¶ 6(f).

Seventh, and relatedly, Common itself in fact takes responsibility for resolving intra-tenant disputes. As Common CEO Brad Hargreaves explains, tenants must abide by the terms of the membership agreement, which gives Common the power to decide whether someone should stay or go:

> Common homes are governed by our Membership Agreement and Code of Conduct. This agreement lays out the rules of the road to avoid conflicts, resolve disputes, and ensure our members have the best possible Common experience. . . . [M]any of those rules are ultimately at the discretion of each suite of Common members . . . [b]ut if someone in the suite complains, the rules enable **us** to assess the situation and help **manage the conflict if necessary**.

See Brad Hargreaves, Five Learnings from Common's First Coliving Home, Medum.com (Mar. 21, 2016). [9] Common also advertises positions for "community leaders" whose job

[9] *Available at* https://medium.com/hothouse/five-learnings-from-common-s-first-coliving-home-241b948d043e.

responsibilities include "resolving member disputes." Job Posting for Community Leader at Common (Attached as Exh. D to this Reply); *see also* Diana Ransom, Forget Renting; This Is the Next Big Thing in the Sharing Economy, Inc.com ("Hargreaves claims the house rules -- yes, there's a code of conduct -- are common sense and not unlike what you'd have set up informally with roommates.").[10]

Eighth, Common can almost assuredly evict a single person without affecting the remainder of the six-person tenancy. Nothing in the lease says that a single member's breach of his or her membership agreement constitutes a breach of the collective lease. Indeed, Common would likely breach its own commitments to its members if it evicted all six residents based on the transgressions of a single one.

Ninth, Common has the "sole discretion" to decide whether a person may allow his or her boyfriend or girlfriend to spend the night, and for how long. *See* Lease Agreement at 22 ("Tenant is permitted overnight guests for so long as the maximum number of residents at is no more than six (6) unrelated individuals. *The determination as to whether any individual is a resident is in the sole discretion of Landlord*.").

Tenth, members are permitted to "[m]ove to any other Common home within just 24 hours [sic] notice," meaning Common permits an individual roommate to vacate the premises without imposing any burdens on the roommates left behind. *See* Opening Br., Tab H at 3; *see also* Dave Lerner Interview with Brad Hargreaves, 11:44–12:15 (Mar. 15, 2016) ("One thing we're rolling out once we have multiple buildings is the ability to move ***from building to building*** within the Common network at 24 hours notice. So if you want to move . . . ***from a city***

[10] *Available at* http://www.inc.com/diana-ransom/common-brad-hargreaves-co-living-space-in-new-york.html.

to a city, as long as there is an open room in a Common building, [with] 24 hours notice you can just pack up and move.").[11]

Eleventh, and finally, Common's own CEO has indicated his belief that Common is "disintermediating the lease," which he defines as meaning that each of its members "can sign one membership agreement with us, and they live wherever they want." *Id.* at 11:35–58; *accord* Lizzie Widdicombe, *Happy Together* (May 16, 2016) ("Instead of signing a lease, [Common] residents sign up for a 'membership.'").

ii. The Case Law Shows that Common's Operating Model Fails any Definition of a Family

Taking all of these facts together, it is clear that the units will not operate as four atomistic, self-governing "families." RPNA knows of no definition of family that outsources dispute resolution to a landlord, whose members may be individually disciplined and subject to removal, who cannot choose who is a member, and whose decisions are not made collectively but rather are subject to override by the landlord. Despite Common's unsubstantiated claims, this mode of operation simply cannot be said to "simulate the dynamics and functioning of a natural family." Open Door Alcoholism Program, Inc. v. Bd. of Adjustment of City of New Brunswick, 200 N.J. Super. 191, 197 (App. Div. 1985).

Even a cursory survey of caselaw show that Common's use conflicts with the definition of a "family." In Salahuddin v. Zoning Hearing Board of West Chester, for example, A Pennsylvania appeals court affirmed a trial court's application of the term "single housekeeping unit" that is for all relevant purposes identical to how that term is used in DC's zoning code.[12]

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[11] *Available at* https://www.davelerner.com/latest-episodes/2016/12/28/episode-21-brad-hargreaves-common-general-assembly-maveron-angel-investor.

[12] The ordinance defines family for relevant purposes as "no more than four unrelated individuals living together as a single nonprofit housekeeping unit in a single-family dwelling . . . ." Borough of West Chester, Zoning Ordinance, Ch. II § 112-D.

See Salahuddin, No. 72 C.D. 2014 (Pa. Cmmw. Ct. Nov. 13, 2014).[13] The trial court concluded that four unrelated people living together did not constitute a "single housekeeping unit" because (a) each person lived in their own private bedroom, (b) each tenant had individual lease terms, (c) "the lease g[ave] each occupant the right to use a private room without specifying the exact location of the room," (d) "each occupant typically pays his or her rent separately," and (e) the landowner advertised the property as "rooms for rent." *Id*.

The same is true here. Each resident occupies his or her own private bedroom. *See* Opening Brief, Tab H at 3 (advertising "private bedroom"). Common does not specify which room each resident will occupy. *See* Jawitz Aff. ¶ 6(f) (residents are "responsible for choosing their bedroom"). Each resident pays his or her rent separately. *See* Mot. to Supp., Exh. S-6, at 2–4 (describing online payment system for each individual member). And Common advertises the property as ***individual*** rooms for rent for 6 or 12-month lease terms. *See* Exhs. A and B to this reply (advertising the subject property for rent on a per-room basis for 6 or 12 month terms).

Also relevant is whether the "makeup" of the unit is determined by the members themselves, or if it is decided by a third-party landlord. In Commonwealth v. Jaffe, the Massachusetts Supreme Court held that eight unrelated individuals living together were not a family where "each [individual may] be evicted by their lessor without affecting the tenancy of the other tenants on the lease." 398 Mass. 50, 55 (1986). And in Armstrong v. Mayor & City Council of Baltimore, the Maryland Court of Appeals stated clearly that "[t]he fact that a tenant may be removed by the landlord from the purported housekeeping unit certainly weighs against a determination that the group of tenants comprises a 'single housekeeping unit.'" 410 Md. 426, 456 (2009). Some jurisdictions have gone so far as to codify that a single housekeeping unit is

[13] *Available at* https://casetext.com/case/salahuddin-v-zoning-hearing-bd-of-w-chester-borough-of-w-chester-2.

necessarily one "whose makeup is determined by the members of the unit rather than by the landlord or property manager." *See*, *e.g.* Guadalupe Muni. Code, § 18.08.302. In this case, it is clear that Common exerts full control over who comes and who goes. And nothing in Common's lease suggests that the group tenancy of all 6 lessees will be affected by an individual members' breach of the Membership Agreement/Code of Conduct. *See* Sample Lease at 19 (describing lease as consisting of both the lease and the "membership agreement"); Hargreaves, Five Learnings, link at *supra* n.9 (describing Common's role in enforcing "Membership Agreement and Code of Conduct").

The average length of stay is also an important factor, and Common's admission that they will have lease terms of either 6 or 12 months suggests a level of transience that has been determinative in other cases that a group home was not a "family." In Act I, Inc. v. Bushkill Township, a group home was deemed not to satisfy the definition of a "family" where the length of the residents' average stay was eight to nine months, which the court deemed as too "transient" to be considered a true family use. *See* 704 A.2d 732, 734 (Pa. Commw. Ct. 1997). And in Open Door, a halfway house was deemed not to be a single family where the average stay of residents was six months, meaning it was insufficiently stable and permanent to be considered a single family. *See* 491 A.2d at 22.

Most important in determining whether a living arrangement counts as a "family," however, is whether the unit operates like a legitimate, stable, integrated familial unit.[14] In Danaher v. Joffe, for instance, seven college students and baseball-team members were deemed

[14] DCRA's suggests that the only relevant definition in deciding what counts as a "family" is that of "housekeeping." *See* DCRA Stmt. at 4. DCRA of course ignores that housekeeping is merely a term used to define the word "family," meaning it must be construed alongside definitions of the word "family." *See* Burke v. Groover, Christie & Merritt, P.C., 26 A.3d 292, 303 (D.C. 2011) (applying interpretive cannon of *noscitur a sociis—i.e.*, a word is known by the company it keeps—to determine a statutory term's meaning).

not to be a "family" for purposes of a restrictive covenant (which did not define the word family). *See* Danaher, 184 N.C. App. 642, 647 (2007). Even though the students submitted affidavits showing that "they share common household duties and expenses," nothing in the record "indicat[ed] that the students considered themselves to be a 'family' or anything more than close personal friends and teammates." Similarly, in Dinan v. BZA of Town of Stratford, the Connecticut Supreme court concluded that a group home was not a "single family" residence where each individual had a direct rental relationship with the landlord: "the separate rental arrangements that the plaintiffs make with each tenant indicate a lack of cohesion within both five person groups that negates the claim that each group constitutes a *family* of five unrelated individuals." Dinan, 220 Conn. 61, 73, (1991). The same is true with Common. The individuals do not come together because they want to live with those particular people. They come together because Common places them where an opening is available. And the rooms are rented to individuals, not to a group of people, as is the case with group homes.

In sum, Common's lease, advertisements, and public statements all show that the use Common intends for the subject property cannot be considered single "family" use. And because it is not single "family" use, the use is by definition not that of a "flat."[15] OTD-Common's intended use therefore falls outside the use that was permitted by DCRA in both the building permits and the Certificates of Occupancy. While non-flat uses are permitted in an R-4 zone, they must either be limited to 40% lot occupancy or must first obtain a variance. 11 D.C.M.R. § § 403.2 (2015).

[15] Instead, the most analogous use is that of single-room occupancy, which the D.C. Code defines as "rental housing accommodation comprised of rental units, each of which is intended for occupancy and is occupied by a single adult either living alone or living with not more than 1 child of age 6 years or younger, and that may, but is not required to, contain sanitary and food-preparation facilities." D.C. Code § 42-3501.03(33).

C. What Common Intends to Operate is an Apartment House, a Rooming House, or a Tenement House, but is Not a Flat

While it is clear that Common's intended use falls well outside the scope of what may be considered single "family" use, the zoning code provides several use categories that provide a more comfortable fit with the type of living arrangement Common proposes for the property: a rooming house, an apartment house, or a tenement house.

i. Common Will Operate a Rooming House

The closest use to what Common intends is a rooming house. As RPNA explained in its opening brief, a rooming house is "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." 11 D.C.M.R. § 199.1 (2015). Here, there can be no doubt that the accommodations are not under the exclusive control of each 6-bedroom unit. Common exerts extensive control over the units in numerous ways: by deciding who will be a resident, whether a resident will be asked to leave, who will get to be a replacement roommate, and in determining who has access to the residents' common spaces. *See* Section III.B.i *supra*; *accord* Common CEO Brad Hargreaves, Interview on 33Voices.com, 2:45–3:00 ("[W]e provide this services layer, and then we work with real estate investors and partnership [sic] with those investors, and then we have **actual space that we control** that we can then offer to our membership community") (emphasis added).

These attributes demonstrate that the occupants do not have exclusive control over the premises. Meyers v. Zoning Board of Appeals of the Town of Groton is instructive on this point.

See No. CV 95 053 55 47 (Conn. Super. Ct. June 3, 1997).[16] There, a Connecticut court affirmed a zoning board's decision that two side-by-side houses of no more than six individuals, both of which were administered together, was a rooming house and not two single-family residences.[17] The Board concluded (and the Court agreed) that, looking at how both houses were used, they were more appropriately an assembly of separate individuals rather than two separate families:

> The unchallenged evidence before the board is clear. [The owner] did not rent either premises as a whole to a group keeping house together. Rather, at each house there were multiple lettings by [the owner] to several individuals; the letting to each individual was for a bedroom with the concomitant privilege to use common areas, e.g., hallways, bathroom, kitchen, and living room, etc. Each individual's length of stay varied. Each was relatively short term. And, this use of the houses generated income perhaps twice the going rate for the rental of comparable single family houses. These factors are entirely consistent with the use and operation of 'rooming houses.'

Id. The use proposed by Common shares the same attributes that the court in Meyers found determinative of the property's being classified a rooming house. Although Common's residents share access to common spaces, each has a distinct relationship with Common that governs their tenancy, including rent and the duration of stay. In addition, Common's $1,700 monthly per-room cost, resulting in a total estimated revenue of $10,200 for each 6-bedroom unit, is consistent with the Meyers' court's observation that the living arrangement there generated double the income for comparable units were they being leased as a whole, rather than on a per-room basis. *See* Common.com Facebook Advertisements, Mot. to Supp., Exh. S-7, at 1-2

[16] *Available at* https://www.courtlistener.com/opinion/3348968/meyers-v-zoning-board-of-appeals-no-cv-95-053-55-47-jun-3-1997/ .

[17] Under the local zoning code, a "family" was defined as "A group of not more than four persons keeping house together" as a "single housekeeping unit." A "rooming or boarding house" was defined as "Any dwelling in which at least three persons but less than 12 persons are housed or lodged for hire or otherwise without separate kitchen facilities, with or without meals."

(advertising that it can help property owners "Beat [the] Market [by] up to 50%" and "Raise Your [net operating income] up to 50%").

Also relevant in Meyers was the fact that each tenant, as is the case here, agreed to abide by a code of conduct, whose violation was cause for terminating the tenancy. *See* Meyers, No. CV 95 053 55 47 ("Meyers prescribed rules and regulations of conduct for the occupants. Each occupant signed a contract to abide by same."). As the court explained, this use was not consonant with the notion of single-family use:

> Normally, a group keeping house together like a family would determine its own rules for its governance. But this is not the case here; each person lodging at [the owner's] houses signed a contract with [the owner] which bound that person to abide by [his] rules. If a house were rented to a group keeping house together like a family, the landlord could not place a 'house supervisor' or 'house mom' in the house.

Id. The same is true here. Each Common resident agrees to abide by a code of conduct. *See* Hargreaves, Five Learnings, link at *supra* n.9 ("Common homes are governed by our Membership Agreement and Code of Conduct"). And Common hires individual "community leaders" whose job responsibilities include "resolving member disputes." Exh. D to this Reply. This intrusive management of tenants' affairs may be good for keeping the peace, but it is not consistent with the notion of a self-governing housekeeping unit that manages its own affairs.

Finally, as RPNA noted above, the residents do not have exclusive control over the units' common spaces, which, according to Common's representations, other members from other cities may use when they are in town. Although Common represents in its affidavit that "Residents of other Common facilities [in other cities] . . . will not have *occupancy* rights in any of the units in either 410 or 412," Jawitz Aff. ¶ 6(h), that says nothing over whether those other residents will have *visiting* rights. ***Any*** ability to access a units' common spaces, no matter how

temporary, makes it clear that Common's "accommodations are not under the exclusive control of the occupants." 11 D.C.M.R. § 199.1. On the contrary. The right to exclude—a central right in the bundle of sticks that makes up a tenants' property rights—would be severely constrained.

Nor, for that matter, do members have access to their other roommates' "private bedrooms." *See* Opening Brief, Tab H at 3 (advertising "private bedroom"). Common attempts to deny this fact by claiming to install door locks that only lock from the inside. *See* Opp. at 12**.** But the presence of such a lock says nothing about whether entering another members' room would constitute a violation of Common's Membership Agreement/Code of Conduct and serve as grounds for breach. Furthermore, Common acknowledges that its use of door locks is a "legal hoop" it must jump through to avoid being classified in New York as a Single Residence Occupancy facility.[18] *See* Nathan McAlone, The Truth About the 'Dorms For Adults' That $16 Billion WeWork Is Betting its Future On, BusinessInsider.com (Jul. 29, 2016) ("***Beyond the lease***, there are ***other legal hoops*** that co-living startups have to jump through because of SRO rules as well, Hargreaves says. For instance, Common can't have exterior locks on its bedroom doors, although suite doors and closets have exterior locks and rooms have interior ones.").[19] The Board should give no weight to the hardware Common uses as evidence that its residents are permitted to enter other members' private bedrooms.

ii. As an Alternative, Common Will Operate an Apartment House

Common's only argument that the subject property constitutes two separate flats rather than a single building (comprising four units) is that the houses are structurally disconnected.

[18] In New York City, the presence of "key locking" devices on interior doors creates a "rebuttable presumption" that individuals living in distinct bedrooms are not living together as a single housekeeping unit, meaning the use is properly classified as single-residence occupancy. *See* NYC Administrative Code § 27-2004(4)(iv) ("A common household is deemed to exist if every member of the family has access to all parts of the dwelling unit. Lack of access to all parts of the dwelling unit establishes a rebuttable presumption that no common household exists.").

[19] *Available at* http://www.businessinsider.com/co-living-startups-turn-normal-2016-7.

This argument ignores longstanding precedent by DC's zoning bodies to consider separate structures as a single building if there is a "meaningful connection" between them. *See, e.g.*, Zoning Commission Order No. 08-34*, Center Place Holdings, LLC* (2011); Z.C. Order No. 05-36, *First Stage & Consolidated PUD* (2006). Here, a meaningful connection exists in two ways. First, as shown in the plans, the two buildings share a trellised portico that provides the only means of front entry and egress into both buildings. *See* Opp., Exh. F (building plans showing trellised entry-way on the lot for 410 Richardson). This alone constitutes a meaningful connection. *See* BZA Appeal No. 18253-B, *Application of Stephanie and John Lester*, at 11 (Nov. 8, 2011) (trellised walkway constitutes meaningful connection). Second, the only way residents of the structure at 412 Richardson may enter their building is via the same trellised walkway, which necessarily requires an easement over the lot of 410 Richardson Place. *See* Opp., Exh. G (showing only means of front entry/egress for 412 Richardson is by way of trellised walkway on 410 Richardson).

Quite apart from any physical or property-based connection, however, is the possibility that Common views the four units as part of a single residence, with all Common members equally entitled to use the units' four respective common spaces. Mr. Jawitz purports to address this point in his affidavit, but his language is somewhat confusing and strained. On the one hand he says that "Residents of each unit will only have *access* to their individual unit." Jawitz Aff. ¶ 6(d). On the other, however, he says "they will not have *occupancy* rights to any other unit within 410 or 412 Richardson Place." *Id.* And then he defines "occupy" as equivalent to the phrase "live in." *Id.* At bottom, it's unclear whether this means that residents of Unit A will have access to the common spaces of Unit B, C, and D, and vice versa. More importantly, it stands in conflict with Common's own advertising materials, which state the opposite: that "Members

have access to community spaces at each Common home." Mot. to Supplement, Exh. S-4, at 2-3; *see id.* ("While members live in their own suites, they often ***move throughout the homes*** . . .").

DCRA cannot turn a blind eye to the actual way that Common intends to use its property when deciding whether a permit properly issued; doing so is, as the Board has previously found, arbitrary and capricious. As the Board stated in *Southeast Citizens for Smart Development*:

> To determine whether the proposed use of the property was a matter of right or whether it required special exception approval, the Zoning Administrator should have evaluated the applications to determine whether the proposed use consisted of a series of small, independent group homes that coincidentally happened to be located side by side, or whether the proposed use was a single facility with all the operational characteristics of a single, larger group home.

BZA Appeal No. 16791, at 22 (May 7, 2002). In that case, DCRA issued separate building permits (each deriving from four separate applications) for the construction, on four adjacent lots, of four "Residence Housing . . . Youth Residential Care" facilities, each containing "6 youths [and] 2 adults." *Id.* at 10. At the time the applications were filed, the Zoning Administrator knew that the buildings were contiguous and owned by the same person, but gave no consideration to whether the buildings were part of a "larger project." *Id.* The Board disagreed, finding that these four separate structures, when evaluated holistically and in light of the manner in which the owner intended to use them, was a single, community-based residential facility whose construction was not permissible as a matter of right. *Id.* at 12, 15. There, as here, the buildings the applicant proposed were on separate lots. But because they share common ownership, common leasing, and common administration, the Zoning Administrator should have evaluated their proposed use together, finding the building to be a single structure constituting an apartment house.

iii. Common Will Operate a Tenement House

Common's only argument that it is not a tenement house is that it is not an apartment house. But because Common will operate an apartment house, this argument lacks merit.

IV. DCRA's Decision to Grant Certificates of Occupancy Was Arbitrary and Capricious

DCRA defends its decision to grant OTD-Common's certificates of occupancy (C of O) primarily on the grounds that the "the layout of each of the family units and of the Buildings complies with the definitions of 'family.'" DCRA Stmt. at 4-5. Even if the layout appears to show a structure that *could* be used as a single-family use, that layout alone is not determinative; DCRA is required by regulation to consider not just the layout, but also how the building is "intended, arranged, or designed to be used or occupied, [or] offered for occupancy." 11 D.C.M.R. § 199.2(f) (2015); *see* Appeal of Eugene A. Thompson, BZA Appeal No. 15264, at 10 (May 2, 1990) (Zoning Administrator is "responsible for examining the requirements in the Zoning Regulations and making a ***sufficient inquiry*** about the ***proposed use*** to allow for an informed decision about the appropriateness of the use") (emphases added).

In this case, the Zoning Adminisrator failed to do just that. RRNA had already filed its appeal at the time DCRA was reviewing OTD-Common's application for a C of O. In its opening brief, RPNA offered voluminous evidence showing Common's business model, how it runs its units, and how it advertises to its tenants. DCRA addresses **none** of that evidence.

Instead, in support of its decision, it cites the Jawitz affidavit and example lease as demonstrating that "the Owner has put on record its intent to comply with the limitations of a 'two-family flat' per the Zoning Regulations." DCRA Stmt. at 4-5. But neither of those documents were before DCRA when it made its decision to grant the C of O, and the agency

cannot rely on "post hoc rationalizations' of its counsel" to support its decision. Walsh v. D.C. Bd. of Appeals & Review, 826 A.2d 375, 379 (D.C. 2003).

Indeed, the only documents DCRA had before it were OTD-Common's application and RPNA's appeal, which created a disputed fact about whether Common did, indeed, intend to operate the buildings in compliance with the zoning code. But DCRA makes no attempt to address any of the evidence RPNA submitted. And "[a]n agency fails to base its decision on substantial evidence in the record when it ignores material evidence in the record." Darden v. District of Columbia Dep't of Emp't Servs., 911 A.2d 410, 416 (D.C. 2006). That is precisely what happened here.

Even if DCRA could have properly relied on the Jawitz affidavit as proof that Common will abide by occupancy limitations, its reliance is misplaced. *See* DCRA Stmt. at 6 (taking at face value "Owner['s] . . . state[ment that] it will not allow more than 6 unrelated residents in each unit"). While Jawitz does indeed "state" that "each unit will have a maximum occupancy of six residents per unit," Jawitz Aff. ¶ 6(b), Jawitz offers no explanation of the capaciousness of the term "occupancy." Does it mean a girlfriend who stays with her member boyfriend every Thursday through Sunday counts as an occupant? Or is she merely a guest? A close reading of the lease, moreover, shows that Common reserves ***to itself*** the discretion to decide whether overnight visits count as occupancy or not. *See* Sample Lease at 22 ("Tenant is permitted overnight guests for so long as the maximum number of residents at is no more than six (6) unrelated individuals. *The determination as to whether any individual is a resident is in the sole discretion of Landlord*.") (emphasis added).

Even worse, Common's CEO has openly acknowledged that they knowingly flout occupancy laws, and that they view such violation as a calculated risk. At a presentation at the

2016 Durst Conference at Columbia University, Hargreaves was asked about the regulatory challenges Common faces. Regarding New York City's "three unrelated individuals" rule—a reference to the city's definition of "family" [20]—Hargreaves said the following:

> From our perspective, there's, you know you mentioned the three unrelated individuals rule. You know. Our viewpoint on that, you know, in some cases we do have more than that, in some cases we don't. An identical rule was struck down by the New York state Supreme Court in 1989. Its been unenforced since then. So, there's certain ways you can look at some of this stuff. It's, you know, really about the risk you're willing to take, and the risks you're not willing to take. Anything around the safety of our members, anything around illegal or un-permitted construction, obviously, we do not do. But yeah, there are obviously regulatory challenges.[21]

Not only does Hargreaves acknowledge Common's violation of the Housing Code, he incorrectly states that the "three unrelated individuals" rule is no longer enforced. Not so. In 2012, New York's Environmental Control Board enforced that very provision against a city landlord who permitted four unrelated individuals to reside together rather than three. *See* New York v. Irene Leung, ECB Appeal No. 1101110, at 3 (Feb. 16, 2012) (Attached as Exh. E to this Reply), *aff'd sub nom.* Leung v. N.Y. City Dep't of Bldgs., 123 A.D.3d 1032 (2014), *appeal dismissed for want of constitutional question*, 2015 N.Y. Slip Op 72193 (N.Y. 2015).[22] In short, there is more than ample evidence to discount Common's representations that it will abide by 6-person occupancy limitations.

---

[20] New York City's Housing and Maintenance Code defines a non-biological family as "not more than three unrelated persons occupying a dwelling unit and maintaining a common household." HMC § 27-2004(4)

[21] Presentation of Brad Hargreaves, 2016 Durst Conference, YouTube Transcript at 3:37:07–55 (Jul. 15, 2016), *available at* https://youtu.be/w35I0GBndL0?t=3h37m24s.

[22] An article in *Crain's New York Business* corroborates Hargreaves statement, indicating that Common's living "arrangement may still run afoul of other sets of rules outlined in the city's Building Code and the Housing Maintenance Code. Under those statutes, no more than three unrelated people can live in the same household at the same time. And several of the apartments in Common's building have four bedrooms and occupants who are not related." Joe Anuta, *Is this Crown Heights co-living space illegal?* (Nov. 20, 2015), *available at* http://www.crainsnewyork.com/article/20151120/REAL_ESTATE/151119831/is-commons-crown-heights-co-living-rental-building-legal.

Finally, DCRA offers the unsupported assertion that RPNA's only remedy is to wait until Common actually violates its use limitations and then ask the Zoning Administrator to take enforcement action. But as RPNA noted above, DCRA and the Board may revoke a permit or certificate of occupancy if it is clear that the applicant did not accurately disclose its intended use in seeking the relevant permit. *See* Logan Circle Community Association, BZA Appeal No. 16002 (Jan. 4, 1995).

V. Conclusion

For the foregoing reasons, RPNA respectfully requests the Board to revoke the challenged alteration and repair permits and/or certificates of occupancy for 410/412 Richardson Place.

DATED: March 19, 2017

Respectfully submitted,

/s/ James J. Wilson
President, Richardson Place
Neighborhood Association
rpna@jamesjwilson.com

CERTIFICATE OF SERVICE

Pursuant to 11-Y D.C.M.R. §§ 205, 300.11, and 302.15, I hereby certify that on this 19th day of March 2017, I have served the foregoing Notice of Appeal upon the following by electronic mail and/or the Board of Zoning Adjustment's online Interactive Zoning Information System (IZIS).

***

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5E06@anc.dc.gov

Advisory Neighborhood Commission 5E
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common

Reply Exh. A

Richardson

We're opening a brand new home in
Shaw in 2017.
Experience living in community in the
nation's capital.

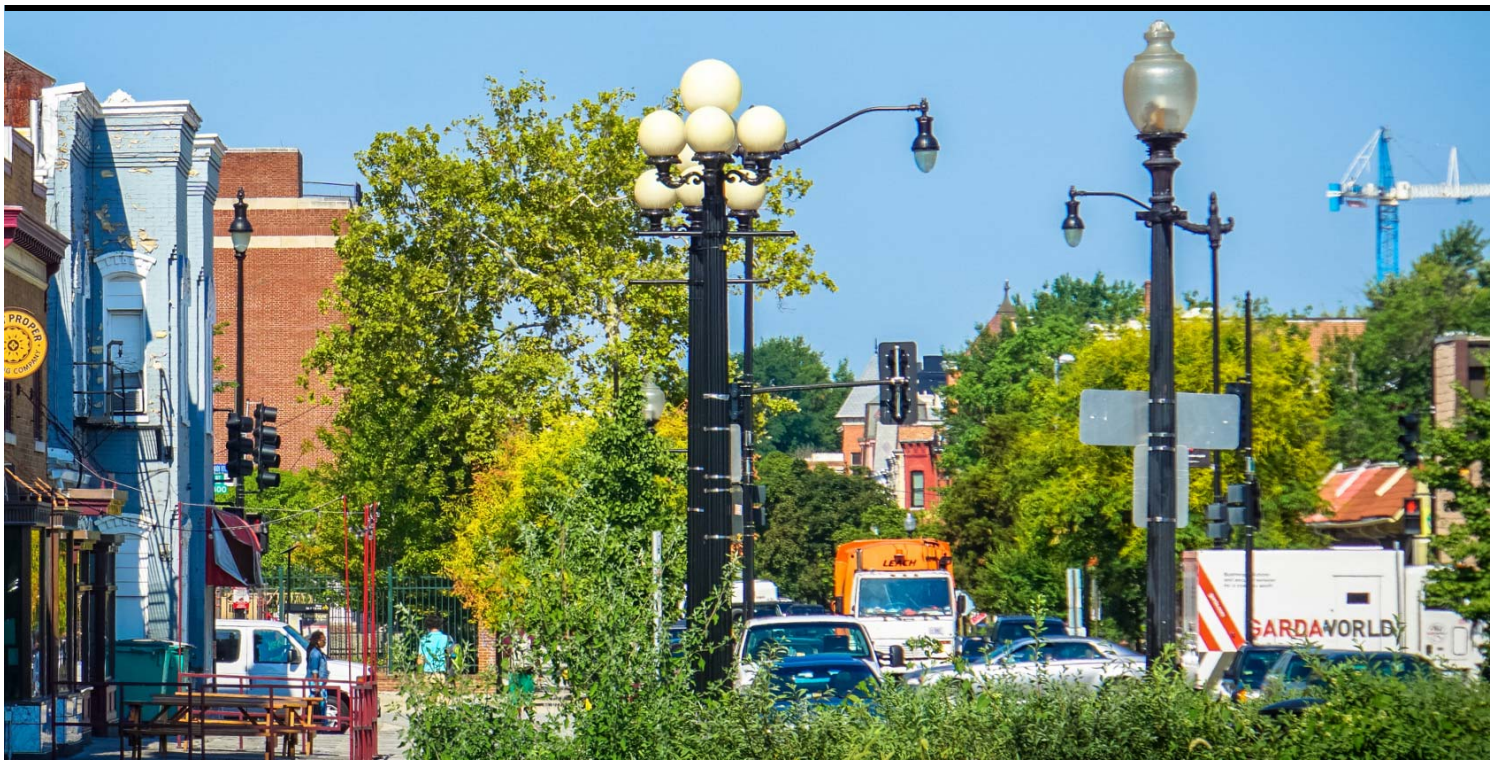
Enter your email address

JOIN THE WAITLIST

Immerse Yourself in Shaw

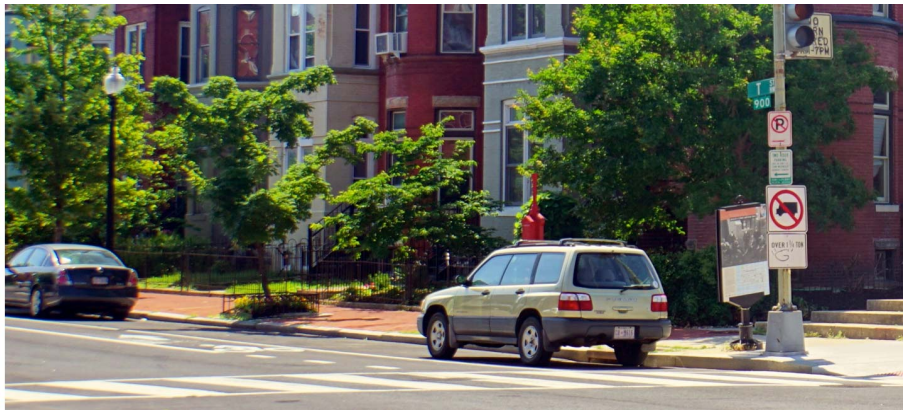
common

Reply Exh. A



A Dash of History

Mostly developed in the 1900s, Shaw is lined with little pockets of the past. Cobblestone streets are juxtaposed with modern coffee shops, stores, and nightlife.



common

Reply Exh. A

Colorful & Cozy

Experience Shaw's neighborly vibe with its humble residential streets and friendly, vibrant homes. Shaw's residents include both newcomers and families that span generations, creating a unique charm that you won't find in other parts of Washington, DC.

common

Reply Exh. A

Make yourself at home. Our newest DC residence will offer the same great experience you're used to. A cozy experience, spaces for cooking, dining and hanging make it the perfect place to create community.

Common Richardson consist of two flats, each with two units, with a maximum of six members in each unit.

We are only offering 6 and 12 month stays at Richardson, with a minimum stay of 6 months.

Common Richardson Pricing

12 month pricing starting at

$1,700/Month

✓ FURNISHED
✓ ALL UTILITIES INCLUDED
✓ NO EXTRA FEES

Richardson is Coming Soon

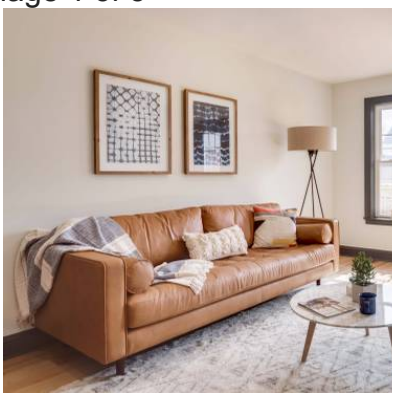
Reply Exh. B

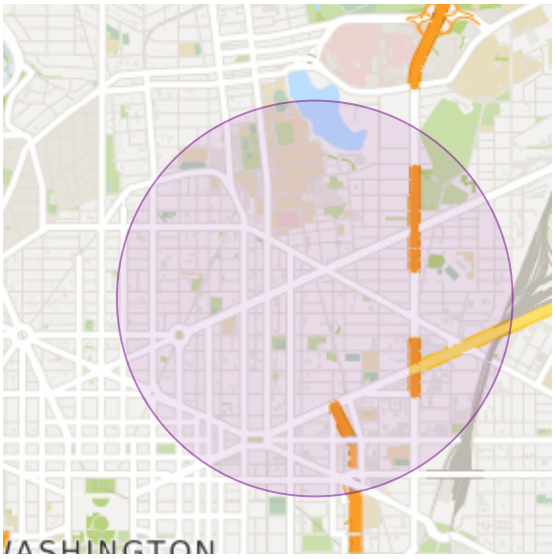
Posted 2 days ago on: 2017-03-17 1:44pm

Contact Information:

$1700 // Fully Furnished Suite with Full Amenities (Richardson)

image 1 of 5





furnished
available now
laundry in bldg
street parking
private bath
private room

QR Code Link to This Post

Our two brand new homes in Shaw feature:

- NO APPLICATION FEES.
- ALL utilities included in the price! Heat, water, gas, electric and super fast wifi!
- Choose your own bedroom with a private bathroom in a furnished flat. Includes a full-sized bed with luxury bedding and linens, and a West Elm dresser, night stand and more.
- Fully furnished spaces (including bathrooms, kitchen, living room) with weekly cleaning included
- All amenities included, such as weekly cleaning, free laundry in building, kitchen and bathroom supplies, and weekly community events.
- Living space, featuring work/lounge space
- Each home has a back patio.
- Choose a 6 or 12 month lease.
- Blocks from the Shaw-Howard Metro stop

Save up to $513/month by living at a Common Richardson home!

Common: Starting at $1,700/month.
Furniture: included. Utilities: included. Cable: included. Moving: $0. WiFi: included
---
Comparable Studio Rent: $1,900/month.

Furniture over 2 years: $2000/24 = $83/month. Moving: $200. Utilities: $100/month. Cable: $80/month. WiFi: $50/month

Reply Exh. B

Reply Exh. C

How Common Does Pricing

Posted February 9, 2016 by Danielle Robin

At Common, we're making the experience of living with people better. While there are a lot of angles to that, **getting pricing right** is a very big one.

For better or worse, the traditional rental apartment market has set a pretty low bar. Bait-and-switch tactics are everywhere, with many landlords requiring large sums of pre-paid rent or steep application and broker fees.

So we really needed to start from scratch. To do that, we sketched out four basic principles with which that any pricing system would need to align. Given our mission and experience with traditional rentals, we believe that Common's pricing must be:

Inclusive.

The rental apartment search is full of hidden fees. Broker fees, application fees, bait-and-switch tactics, and utilities can greatly increase the cost of a rental apartment beyond the quoted price. We wanted to eliminate all the hidden fees and quote one straightforward monthly price that includes everything we provide: all utilities, wifi, cleaning, free laundry, kitchen and bathroom supplies, and access to all our community events.

Transparent.

Common's pricing should not only be inclusive, it should be transparent. That is, the price of any Common room should be the output of its location, its size, and any special characteristics like a private bathroom or a particularly nice view.

Flexible.

The nature of work is changing. For instance, the mean job duration for someone in their 20s today is only 16 months, a trend that has had an impact on all age groups. Linear careers are far less common than they once were, with people switching between freelance roles, jobs, startups, and mid-career education at a faster pace than ever before.

Occasionally these changes involve moving, and we deserve flexible housing built for today's career paths. Traditional 12-month leases don't accommodate this, and we want to build a better product for the way people work today.

That said, we don't desire to serve transients, and we want to reward those who are a long-term part of the community. Our minimum stay is 30 days, and I'll discuss some of the ways we incentivize and reward long-term members below.

Comparable.

Reply Exh. C

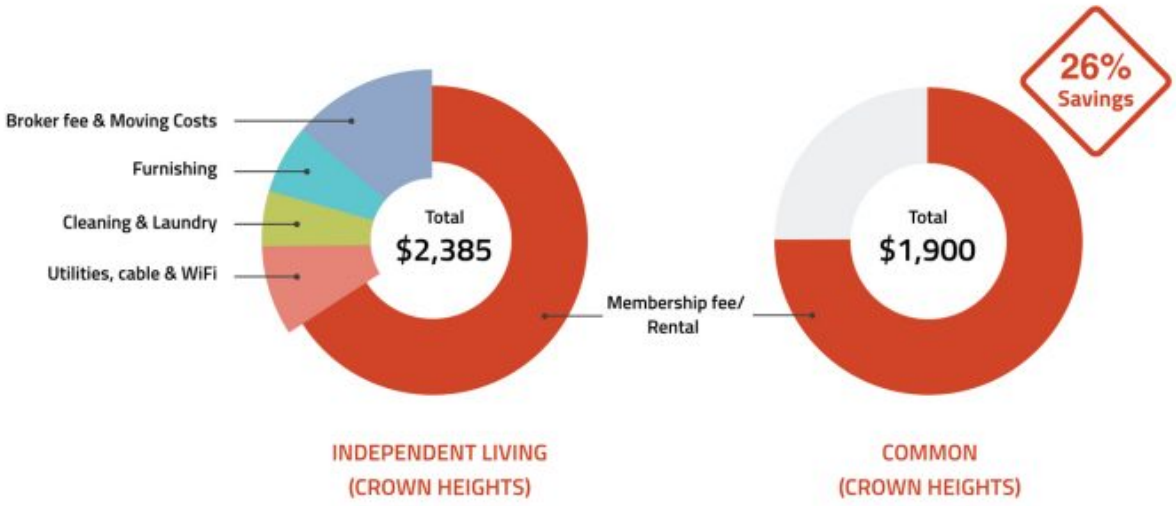
Our members aren't making a decision to move into Common in a vacuum. They're often looking at other options, especially getting a studio on their own in the neighborhood. Therefore, we need to be able to compare Common dollar-for-dollar with other local options and help prospective members weigh the pros and cons on each side.

Common Versus a Studio

We decided to build a product that could compete directly with a studio apartment in the neighborhood. While there are pluses and minuses for each, we wanted to make sure we were attracting customers who put value on the things that make Common unique rather than simply searching for the best deal.

While a studio offers more private space – and a small private bathroom and kitchen – Common provides much better shared spaces and a bundle of other benefits. Most notably, we include utilities in our all-in price, and we've eliminated the fixed costs that come with getting a studio – specifically broker fees and furnishing costs.

Reply Exh. C



Monthly cost comparison: Common versus a Studio Apartment in Crown Heights

Some people will always prefer to pay a bit more to live alone in the studio. And that's totally okay with us – there are 24 million people in the New York metro area, and not every one of them needs to live in Common. But we must make sure that the people who choose to live in Common are getting a great deal.

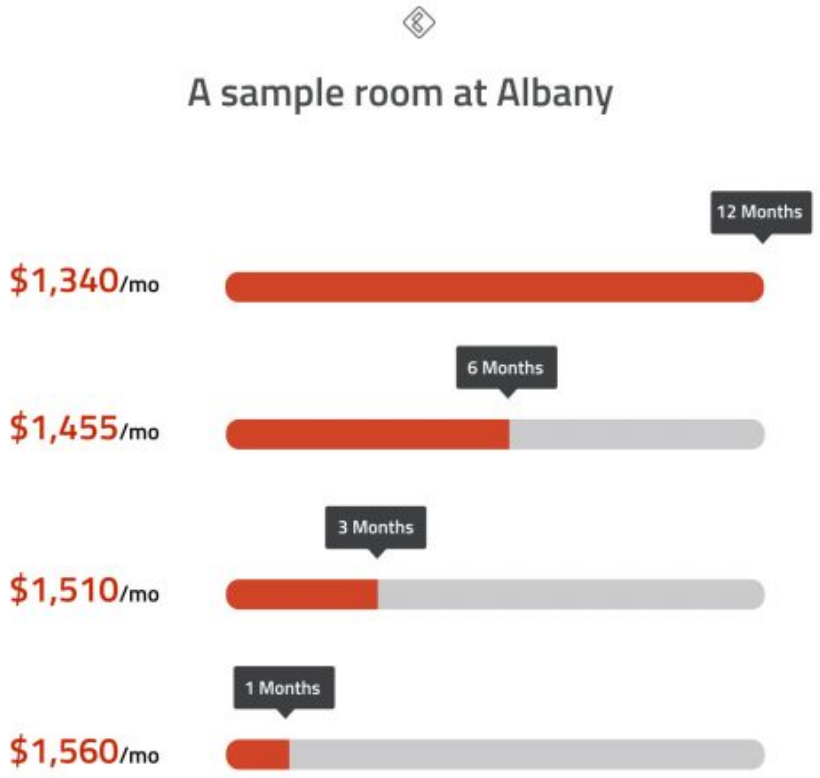
Pricing for Flexibility

Flexible lease terms are one of the most difficult things to get right. We always want to offer the option of moving out with 30 days notice, but offering this kind of flexibility has real costs for us, both monetary and social.

On the social side, it's close to impossible to create community if you're serving transients. While it's okay if some percentage of our members churn every month – they got a different job, decided to move in with their significant other, or they just wanted a change of pace –

On the monetary side, there are costs to turning over a room. One, we need to make sure the room is in tip-top shape for the next member. Two, if a member moves out at an awkward time – such as over the holidays – we may not have a new member ready to move in immediately. While both of these are negligible issues at our current size of 31 members, they could be major problems at 3000 members.

With all that in mind, we decided to incentivize our members to commit to longer term stays by giving them lower monthly rates in exchange for their commitments. Not only does this encourage members who are long-term aligned with our mission, it also makes Common an even more attractive option versus a studio.



Pricing tiers for a typical room at our Albany home in Brooklyn, NY

While the pricing tiers depend on the room, in general members receive approximately a 15% discount for a 12-month commitment, with smaller discounts for 3- and 6-month commitments

Reply Exh. C

All in all, pricing is a challenging question for a company offering a new product like Common. Comparables help, but none of them are perfect, and small changes can radically impact how our customers are incentivized to work with us. But as long as we make decisions in line with our principles of transparency, inclusiveness, flexibility, and transparency, we can only screw it up so badly.

Want to learn more? Apply now. (https://www.hicommon.com/blog/apply-form/)

Reply Exh. D

- Common
- Product
- Jobs
- Team
- Investors

Applied
Apply Now
Add a message to Common
(optional) Write a note to Brad Hargreaves at
Apply
Share

Community & Member Experience Manager at Common

New York City · Full Time
Applied
Apply to Common
Add a message to Common
(optional) Write a note to Brad Hargreaves at
Apply

Job Description

Common is seeking a Community Manager to manage our growing community of members in New York City. Community at Common is all about improving the member experience and encouraging our members to "live life in common."

About Common

Common offers flexible shared housing that makes it easy for people to find a place to live in major cities. Building a selective network of housing communities in top U.S. cities, Common connects vetted members with secure, flexible and inviting places to live within communities of their peers. Headquartered in New York City, Common was founded by General Assembly co-founder Brad Hargreaves in early 2015.

Common partners with real estate owners and investors to purchase whole vacant buildings in emerging neighborhoods, adapting them for flexible, higher-density use. By doing this, Common is addressing the fundamental supply and demand issues that underlie housing in major cities today. Common recently opened the doors for its largest Brooklyn property in Williamsburg in early May 2016.

About the Role

At Common, we're not here to dictate what the community looks like, but rather facilitate and support our members to create organic community among themselves. In this role, interpersonal skills are key, and tasks will include budget management, overseeing our NYC House Leaders (members in each of our homes who have taken on a leadership role), new member onboarding, high level programming and event support, resolving member disputes, and collecting and triaging feedback about the member experience.

This role will report directly to the Director of Community and will be our first NYC Community Manager. Our hope is that this person will be instrumental in helping us build out the NYC community team.

QUALIFICATIONS

You smile easily, hug warmly, and you put people at ease. Interpersonal skills are a must in this role.
You know how to create a welcoming, positive vibe. People should love spending time in your world.
You keep your cool in stressful situations and are not afraid to dig in and problem solve.
You are operationally savvy, with a knack for project management and planning.
You are not afraid to bring people together in creative and unique ways.
You know how to ask for help when you need it.
You have 3-5 years experience in hospitality, community organizing, and/or events management.

Compensation
$45K – $70K
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Respondent, premises owner, appeals from a recommended decision and order sustaining a Class 1 violation of Section 28-210.1 of the Administrative Code of the City of New York (Code) for alteration of a residence as a dwelling for occupancy by more than the legally approved number of families. In the notice of violation (NOV), the issuing officer (IO) stated that on December 20, 2010, he observed that the premises, legally approved as a two-family dwelling, had been converted into three single room occupancies (SROs) on the second floor. The IO stated further that two of the SROs had key-locking devices and that all had beds, personal items, and toiletries. He noted that he was unable to gain access to a fourth room. The IO indicated on the NOV that Petitioner, the Department of Buildings (DOB), was seeking per day penalties pursuant to Code Section 28-202.1.

At the hearing, Petitioner offered a certificate of occupancy for the premises showing that the first and second floors were authorized as dwelling units, and the cellar was authorized for storage. The IO affirmed his statements on the NOV. The IO testified that because he was unable to gain access to a fourth room with a key-locking device, he left an appointment card for reinspection.[1] He testified further that the occupants present in the apartment did not allow him to take photographs of the interior of the apartment.

In rebuttal, Respondent's attorney asserted that the second-floor apartment was leased to four students, who maintained a common household and did not live separately and apart. In support, Respondent offered a copy of the lease, which named the four students as tenants. Additionally, Respondent offered the testimony of one of the students, who appeared as a witness, and affidavits from the other three students.

The administrative law judge (ALJ) found that Respondent's evidence, including the testimony of the student, was insufficiently credible to refute Petitioner's case. Accordingly, the ALJ sustained the NOV and imposed per day penalties for the maximum period of 45 days. The main issue on appeal is whether Respondent's evidence was sufficient to show that the four students occupied the second floor apartment as a family maintaining a common household.

Code Section 28-210.1 makes it unlawful "to convert any dwelling for occupancy by more than the legally authorized number of families or to assist, take part in, maintain or permit the maintenance of such conversion."

Section 310.2 of the New York City Building Code (BC)[2] defines "family" to include "[n]ot more than three unrelated persons occupying a dwelling unit and maintaining a common household . . . ." That section also provides:

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[1] The IO's reinspection on January 14, 2011 resulted in the issuance of another violation of Code Section 28-210.1 for the conversion of the fourth room into an SRO.

[2] Found in Title 28 of the Code.

> A common household is deemed to exist if all household members have access to all parts of the dwelling unit. Lack of access to all parts of the dwelling unit establishes a rebuttable presumption that no common household exists.

On appeal, Respondent, by her attorney, argues that the presence of key-locking devices, absent any other indicia of separate living, was insufficient to prove the existence of SROs. Respondent reiterates that the apartment was occupied by four students living together as one family and maintaining a common household. For the first time on appeal, Respondent contends that Petitioner failed to make out a Class 1 violation of Code Section 28-210.1 by showing that the two-family residence had been altered for occupancy by more than four families. Respondent asserts that Petitioner only alleged the existence of three SROs, and therefore did not establish that the apartment was occupied by four families. Because Respondent did not make this argument at the hearing, the Board need not consider it. However, the Board notes that the conversion of the second floor apartment into three SROs, in conjunction with the first floor apartment, amounts to occupancy of the premises by four families.

Petitioner did not answer the appeal.

Whether the four students constituted a *common household*

On this record, the Board finds that Respondent failed to show that the four students occupied the second floor as a family maintaining a common household. At the hearing, the IO testified that he went to the premises on a complaint of illegal occupancy. He testified further that the second floor apartment had been converted into three SROs, two with key-locking devices and all containing toiletries and personal items. The IO also stated that a fourth room in the apartment was locked, and the occupants present during his inspection were unable to give him access. The IO asserted that the occupants would not allow him to take photographs. He submitted a sketch of the apartment indicating three SROs, with notations of toiletries, personal items and key-locking devices. Contrary to Respondent's assertion on appeal, Petitioner's evidence consisted of more than the IO's observation of key-locking devices and identified other indicia of separate living.

Respondent claimed that the second floor apartment was rented to four students, unrelated by blood or marriage, who attended St. John's University. In support, Respondent offered a lease showing the names of the four students. Shi Chun Yuan, one of the students, testified that he and three other students shared the kitchen and bathroom. Mr. Yuan testified further that on the date of the violation, he and two of his roommates were present. He did not dispute that three of the four rooms in the apartment had key-locking devices, but asserted that the students kept neither toiletries nor cooking utensils separately in their rooms. Mr. Yuan testified further that he collected money from the students and paid Respondent the rent due under the lease each month. Mr. Yuan's testimony was essentially reiterated in three affidavits given by the other three students, with the additional statement that the locks on the bedroom doors were for privacy.

Reply Exh. E

On appeal, as at the hearing, Respondent's attorney argues that the second floor was not occupied as SROs, but by a "family" of four students who maintained a common household. However, under BC Section 310.2, a "family" is defined as not more than three unrelated persons occupying a dwelling unit and maintaining a common household. Here, by Respondent's own admission, the apartment was occupied by four unrelated persons. Moreover, because of the presence of key-locking devices on three of the four rooms, the students did not have access to all parts of the apartment. Therefore, under BC Section 310.2, a rebuttable presumption was created that no common household existed. The ALJ did not credit the student's denial that he and the other students were living separately and apart, and the Board sees no reason to disturb this credibility finding. The Board notes that the three students present during the IO's inspection were unable to open the locked room of the fourth student, belying the claim that the students did not live separately and apart.

Accordingly, the Board affirms the ALJ's recommended decision and order.