Holland & Knight

800 17th Street, Suite 1100 | Washington, DC 20006 | T 202.955.3000 | F 202.955.5564
Holland & Knight LLP | www.hklaw.com

Kyrus L. Freeman
202.862.5978
kyrus.freeman@hklaw.com

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VIA IZIS

Board of Zoning Adjustment
of the District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: BZA Appeal No. 19441
Response in Opposition to Request to Reopen the Record

Dear Members of the Board:

On behalf of OTD 410-412 Richardson Place LLC ("OTD"), the owner of the properties that are the subject of the above-referenced appeal, we submit the following response in opposition to the motion to reopen the record, and the letter attached thereto, filed on April 13, 2017, by Councilmember Kenyan McDuffie (the "Motion").

The Motion fails to demonstrate good cause to justify reopening of the record and would prejudice OTD. Moreover, the substance of the letter accompanying the Motion contains several factual errors regarding the appeal, mischaracterizes the improvements constructed by OTD at the subject properties, and misstates the content of the post-hearing submission requested by the Board.

As the Board is aware, pursuant to 11-Y DCMR § 602.6, requests to reopen the record to allow supplemental materials not otherwise requested by the Board at the close of a public hearing must demonstrate good cause and lack of prejudice to any party. The Motion fails to demonstrate any good cause that would justify the Board reopening the record in this appeal and thus should be denied. Although the Motion relies upon Hotel Tabard Inn v. District of Columbia Dep't of Consumer and Regulatory Affairs to stipulate that "[g]ood cause depends upon the circumstances of the individual case, and a finding of its existence [or nonexistence] lies largely in the discretion of the officer or court to which the decision is committed," the Motion fails to provide the Board with any circumstance specific to this case that would warrant reopening of the record. Rather, the Motion simply notes the concerns already expressed by the Appellant, the Richardson Place Neighborhood Association ("RPNA"), regarding OTD's development, and also expresses concern regarding the issuance of a Certificate of Occupancy ("CO") to OTD without a supporting affidavit, which, as discussed below, is not required to permit issuance of a CO and is not the issue before the Board in this case.

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At the close of the hearing, as indicated in the following exchange, counsel for OTD specifically asked whether the Board wanted any additional information from any party other than DCRA, and the Board clearly stated that it did not:

MR. FREEMAN:	So, the record is closed, only for what they're [i.e., DCRA] going to submit. Okay.
CHAIRPERSON HILL:	Exactly.

(tr. at p. 438, lines 19-21).

Reopening the record to accept that reiterates RPNA's position, without the demonstration of any "good cause," would prejudice OTD, is contrary to the Board's clear instructions, and does not meet the standards of 11-Y DCMR § 602.6. Thus, the Board should deny the Motion.

However, should the Board find that the Motion adequately demonstrates good cause and will not prejudice any party, there are several factual errors in the Motion which mischaracterize the improvements constructed by OTD at the subject properties and incorrectly describe the content of the post-hearing submission requested by the Board.

The Motion mischaracterizes the improvements constructed by OTD at the subject properties. Specifically, the Motion restates RPNA's claim that "the development will materially change the character of the neighborhood" and that the development "exploits somewhat ambiguous language in the zoning code, and thus avoids community input." With respect to the character of the neighborhood, the buildings were constructed as a matter-of-right in accordance with all applicable provisions of the Zoning Regulations. The buildings did not require any zoning relief from the Board. As was clearly demonstrated by OTD in its pleadings and at the public hearing, the improvements constructed on the subject properties consists of two flats, a matter-of-right use under the Zoning Regulations, and will be operated as flats, as confirmed by OTD on its CO applications and further confirmed by OTD in the pleadings and at the public hearing. Thus, since the buildings were properly permitted and constructed as a matter-of-right use in full compliance with the Zoning Regulations the buildings are compatible with the character of the neighborhood. The fact that RPNA disputes that the Zoning Regulations were properly applied in this case does not render the regulations ambiguous.

Regarding the content of the post-hearing submission requested by the Board, at the close of the March 22, 2017 public hearing, Chairman Fred Hill closed the record except for the submission of additional information from the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") regarding the information the Zoning Administrator (the "ZA") had when reviewing the CO applications for the subject properties (tr. at p. 430 and p. 437). Specifically, Chairman Hill stated: "[t]he one thing that I would like to see from the Zoning Administrator if you could, kind of provide something to us that further clarifies the information that the Zoning Administrator had when determining the certificate of occupancy." (tr. at p. 430, lines 3-8). This is the only information requested by the Board. However, the Motion misconstrues the post-hearing

submission request by suggesting that the Board requested that DCRA "provide additional details regarding a certificate of occupancy issued to Oak Tree Development without an affidavit to support it." (emphasis added).

The manner in which the Board's request is characterized in the Motion suggests that an affidavit is required in order for DCRA to issue a CO, and that the Board required DCRA to provide additional details demonstrating how it could issue a CO to OTD in the absence of an affidavit. This is not at all the basis of the Board's post-hearing request. In fact, as shown on the attached "Certificate of Occupancy Checklist and Process" document published by DCRA (Exhibit A), an affidavit is not required in order for DCRA to issue a CO. So, there would be no factual or legal basis for the Board to ask the ZA why he would have issued a CO without an affidavit to support the CO. Moreover, although an affidavit is not required for the issuance of a CO, the ZA reviewed the information contained in OTD's CO applications, which, as shown in Exhibits B and C, each contain an attestation from OTD, affirming under penalty of law, that "all of the statements on this application are true to the best of my acknowledge and belief" and that OTD's use of the subject properties will "comply with all applicable laws and regulations of the District of Columbia." Thus, the claim made in the Motion that DCRA's issuance of a CO without a supporting affidavit undermined a process established to protect the community from undesirable projects is without merit, is not based on any actual legal requirement, and is unrelated to the question presently before the Board in this case.[1] In fact, the process followed by DCRA in issuing the attached COs to OTD is the exact same process followed for countless other projects. Thus, while RPNA may view OTD's development as undesirable, the only evidence of record before the Board in this case is that the buildings, as constructed and operated, are fully consistent with the Zoning Regulations.

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[1] Further supporting the fact that an affidavit is not required for the issuance of a Certificate of Occupancy, the Board has previously found that the ZA has broad discretion in what evidence is used to determine whether a building, structure, or land will actually be used in accordance with the Zoning Regulations and with what is stated on a CO. Specifically, the Board stated the following in Appeal No. 15588 of the Brookland Civic Association and Advisory Neighborhood Commission (ANC) 5A:

> "[f]inally, the Board must determine whether the Zoning Administrator properly accepted affidavits as evidence of the use. The Board notes that the Zoning Regulations do not make reference to the type of evidence that the Zoning Administrator should require in making decisions about land use. Absent such guidance from the Zoning Regulations, the Board is of the opinion that the Zoning Administrator has the discretion to accept whatever evidence he deems appropriate under the circumstances"

(Appeal No. 15588 order attached as Exhibit D)

Thank you for your consideration.

Respectfully submitted,

HOLLAND & KNIGHT LLP

Kyrus L. Freeman
Joseph O. Gaon

cc: James J. Wilson, Richardson Place Neighborhood Association (via E-Mail)
Matthew Le Grant, Zoning Administrator, Depart. of Consumer and Regulatory Affairs (via E-Mail)
Maximilian Tondro, Esq., Department of Consumer and Regulatory Affairs (via E-Mail)
Commissioner Katherine McClellan, ANC 5E06 SMD (via E-Mail)
Barbara Mitchell, Legislative Director, Office of Councilmember Kenyan McDuffie (via E-Mail)