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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 to Filings by the District of Columbia Department of Consumer and Regulatory Affairs and the Richardson Place Neighborhood Association

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 to the filing submitted by the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") on May 1, 2017 (Exhibit 40).

As a preliminary matter, OTD believes that the filing submitted by the Richardson Place Neighborhood Association ("RPNA") on May 4, 2017, (Exhibit 42) should be stricken from the record. However, should the Board decide to reopen the record to accept responses to DCRA's submission, then OTD requests that the Board also consider OTD's response below.

I. RPNA's Response Should be Stricken From the Record

RPNA's submission should be stricken from the record given the Board's very specific instructions at the close of the public hearing in this case. The Zoning Regulations state:

> The record shall be closed following the public hearing, except that the record may be kept open for a stated period for the receipt of specific exhibits, information, or legal briefs, as may be directed by the presiding officer.

11-Y DCMR § 602.1

At the close of the March 22, 2017 public hearing, Chairman Fred Hill closed the record except for the submission of information from DCRA regarding the information the Zoning Administrator had when reviewing the certificate of occupancy 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)(emphasis added).

Moreover, 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)(emphasis added).

Although 11-Y DCMR § 602.1 authorizes the Board to allow responses to submissions, 11-Y DCMR § 101.9 also authorizes the Board to waive any of the provisions of Subtitle Y of the Zoning Regulations if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law. The Board did exactly that when the Board stated that they were not accepting any responses to DCRA's submission. Reopening the record to accept RPNA's submission is a clear contravention of the Board's specific instructions. Thus, the Board should strike RPNA's submission.

II. DCRA Has Demonstrated That It Met All Applicable Legal Requirements For Issuing The Certificates of Occupancy For The Properties

DCRA properly issued the certificates of occupancy at issue in this case. "After the code official inspects [a] building or other structure and finds no violations of the provisions of the Construction Codes, the Zoning Regulations or other laws that are enforced by the Department, the code official **shall** issue a certificate of occupancy." 12-A DCMR § 110.1.6 (emphasis added). In this case, DCRA met this standard by relying upon the sworn information provided in OTD's certificate of occupancy applications and an actual zoning inspection of the properties prior to issuing the certificates of occupancy. DCRA also properly relied upon the oral confirmation on behalf of the property owner and the affidavit of the property manager as further confirmation that the properties will be used in accordance with all applicable laws.

The crux of RPNA's claim is that the certificates of occupancy should not have been issued since RPNA filed an appeal and that the internet postings from New York and other locations that RPNA included with its filing constitutes "evidence" that demonstrates that the properties will not be used in compliance with law. However, when RPNA's allegations are balanced against the required, sworn materials included with certificate of occupancy applications and the ther evidence noted in DCRA's filing, the Zoning Administrator had all of the required evidence necessary to issue the certificates of occupancy.

The Board has specifically determined 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.

See BZA Order No. 15588.[1]

Indeed, since the filing of the appeal until now, RPNA has not submitted any actual evidence that demonstrates that the properties were not constructed in accordance with the approved building permits, or that the properties will not be operated in accordance with all applicable District laws and regulations. RPNA's complaint has always stemmed from ***hypothetical*** concerns about how the

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[1] RPNA misquotes and improperly cites numerous cases in support of its assertion that the Zoning Administrator did not consider all required evidence when he approved issuance of the certificates of occupancy. For example, in *Ward 5 Imp. Ass'n v. BZA*, 98 A.3d 147 (D.C. 2014), the issue was whether the Zoning Administrator and BZA considered the Stadium Club's **actual operations** in determining whether to issue a second certificate of occupancy for the existing operations. Thus, the "all known evidence" cited by the Court in this case referred to actual operations, not hypothetical concerns as alleged by RPNA in this case.

Similarly, in BZA Order No. 17092, the Board overturned the Zoning Administrator's determination since the appeal was filed after the use was in operation, and the Zoning Administrator failed to examine the actual operations of the property after a temporary certificate of occupancy was issued.

In addition, RPNA cites *Bannum, Inc. v. BZA*, 894 A.2d 423 (D.C. 2006) for the proposition that the Court of Appeals "criticized" DCRA for issuing permits based on indicated uses. However, the Court never criticized DCRA, nor did the Court make any determinations regarding the specific type of evidence that must be considered by the Zoning Administrator.

RPNA also mischaracterizes the Court's language in *Sisson v. BZA*, 805 A.2d 964 (D.C. 2002) by only quoting a portion of the actual language. The complete quote states "the Zoning Administrator's decisions were not based on complete and accurate information about [Mr. Sissons's] property, reflecting all existing and planned improvements." *Id.* at 974. Mr. Sisson included incorrect information on his building permit applications (i.e. the zone district of his property was wrong), filed his applications in "piecemeal" fashion, and completed work before obtaining a permit. *Id.* at 966. Similar omissions and incorrect information were also provided by the Applicant in BZA Case No. 16066. However, in this case, OTD has provided complete and accurate information and has not made any misrepresentations in either its building permit or certificate of occupancy applications. Thus, DCRA had complete and accurate information in reviewing and issuing the building permits and certificates of occupancy at issue in this case. RPNA also cites language from certain pages in BZA Order Nos. 15264 and 16404, yet neither of the pages cited are part of the orders, and neither case supports the assertions made by RPNA.

properties will be used based upon internet postings about how the property manager operates in other jurisdictions. However, RPNA admitted during the public hearing that they did not provide any actual information indicating that the properties in this case will not be operated in accordance with DC laws. At the public hearing the following exchange occurred:

MR. FREEMAN: Mr. Wilson, you started with a citation from a YouTube video, and you followed a lot of articles about how Common operates in New York and California. Have you submitted anything about how Common will operate in D.C.? Do any of those articles relate to how Common will operate in D.C.?

MR. WILSON: **None of them indicate how Common will operate in D.C.**

(tr. at p. 242 lines 3-11)(emphasis added)

Thus, it would have been arbitrary and capricious for DCRA to not have issued the certificates of occupancy for the properties since the Building Code requires DCRA to issue a certificate of occupancy if DCRA "finds no violations of the provisions of the Construction Codes, the Zoning Regulations or other laws that are enforced by the Department," as required pursuant to 12-A DCMR § 110.1.6, and it would be arbitrary and capricious to revoke the certificates of occupancy without any evidence of any violation of the District law or regulations. In fact, the only actual evidence of record demonstrates compliance with all District laws and regulations. *See* Exhibits 32F, 32G, 32H1-H2, and 40-40C. Accordingly, RPNA's appeal should be dismissed

Thank you for your consideration.

Respectfully submitted,

HOLLAND & KNIGHT LLP

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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)