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 Decision Date: May 17, 2017 Order Date: February 4, 2019

RICHARDSON PLACE NEIGHBORHOOD ASSOCIATION RESPONSE TO MOTIONS FOR RECONSIDERATION AND OF PROPERTY OWNER TO STAY EFFECTIVENESS OF ORDER

Appellant Richardson Place Neighborhood Association (RPNA) hereby submits response to the *Motion for Reconsideration* and the *Motion of Property Owner to Stay Effectiveness of Order* submitted on 11 February 2019 by Holland and Knight LLP on behalf of Oak Tree Development (OTD), to the Board of Zoning Adjustment (BZA or the Board). Richardson Place Neighborhood Association respectfully requests that the BZA reject the motions because Oak Tree Development is rehashing the same arguments against which BZA ordered following review of extensive evidence submitted by RPNA, comprehensive live testimony at a day-long hearing, and rigorous deliberation leading up to the BZA decision on 17 May 2017.

The argument presented in the motions is premised on the view that RPNA's concerns were merely hypothetical and thus, not evidence; however, this is the same argument the BZA rejected in its original deliberations when it found that the evidence submitted by RPNA was competent,

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District of Columbia
CASE NO.19441
EXHIBIT NO.52

uncontested, and comprehensive representation: sufficient in factual information to enable the BZA to draw conclusions as to how OTD planned to use the properties. The Board elaborated in its *Order Granting Appeal* that

> *[t]he Appellant provided evidence showing that the planned co-living use potentially would not be established and operated consistent with a two-family flat as that use is defined in the Zoning Regulations;…*[1] and
>
> *[b]ased on the findings of fact and conclusion of law, the Board concludes that the Appellant has satisfied the burden of proof in its claims of error in the decision of the Zoning Administrator to issue Building Permits…and issue Certificates of Occupancy…to allow two adjacent flats in the R-4 District…*[2]

Furthermore, despite the 17 May 2017 Board decision to reject the Building and Occupancy Permits, following that decision, OTD continued its partnership with Common Living (Common), which shortly thereafter populated the buildings with residents, and based on internet postings and advertisements, observations of RPNA members, conversations with Common Living residents and a Common recruiter/building manager, has continued to operate both properties at full capacity. This abundance of information has proven that Common Living has been operating the OTD properties exactly as presented by RPNA in 2017 and consistent with RPNA's 'supposedly-hypothetical' evidence. RPNA specifically responds to each assertion in Oak Tree Development's motions below.

[1] *Order Granting Appeal*, Board of Zoning Adjustment, 17 May 2017, published 4 Feb 2019, p.6
[2] *Order Granting Appeal*, Board of Zoning Adjustment, 17 May 2017, published 4 Feb 2019, p.7

I. Oak Tree Development argues that in its Appeal, RPNA did not meet the burden of proof required to substantiate RPNA's argument and that its concerns were forecasting; and further, since the buildings were constructed in compliance with DC laws, they are therefore, by default, legal

Richardson Place Neighborhood Association submitted comprehensive and extensive evidence regarding Common's business and operating models, as well as its intended occupancy strategy. Importantly, ODT never rebutted the evidence submitted by RPNA as to how it would operate the properties, nor its intended occupancy; rather Common Living provided a vague affidavit from the chief financial officer, stating that ODT would comply with all laws.[3] Evidence of the Common Living business/operating model submitted by RPNA in 2017 was already clearly not in compliance with the Zoning Code definition of a 2-bedroom flat. The Board concluded that "the proposed use of the subject property as a 'co-living facility' was not consistent with the Property Owner's stated intention to use the buildings as two flats."[4]

Oak Tree Development's own evidence submitted as part of the appeal, demonstrates that OTD intended to operate in a manner noncompliant with the DC Zoning Code definition of a 2-family flat, which the Board also confirmed in its Order.[5] Interestingly, in its Motions, OTD makes no mention of the Common Living lease agreement as support that its operations are inconsistent with the RPNA claim, which further leads to the conclusion, that the lease supports the claim, and does not refute it. The *Appellant's reply to DCRA's and Owner's Pre-hearing Statements and Consent to Amend Appeal* lays out multiple points to this end, most importantly of which

- Common makes a binding arrangement between itself and each individual resident through a Membership Agreement, which essentially skirts evidence in the lease

[3] Exhibit H, Affidavit of Common Living in Support of Dismissal of the Appeal
[4] *Order Granting Appeal*, Board of Zoning Adjustment, 17 May 2017, published 4 Feb 2019, p.6
[5] *Ibid*.

agreement itself of RPNA's claims, but still leads to the same business model as RPNA originally asserted.[6]

- The lease does not contain a fixed sum for rent for total occupancy by all tenants, which as noted, would be impossible because Common allows for variable rental terms for each individual tenant, i.e. Common offers *individual* residents a choice between "6 and 12 month (*sic*) stays at Richardson, with a minimum stay of 6 months."[7]

Most importantly, as RPNA pointed out in the hearing, the suggestion by OTD that forecasting statements or predictions of intent are not valid evidence as a matter of procedure, even when supported by the mass of information provided by RPNA to the same, would make it virtually impossible for any affected party to file an appeal to BZA for any claim. Were OTD's assertion true, any developer could simply misrepresent its intended use of a property(s), secure building permits and certificates of occupancy, and then wait out the 60-day period for filing appeal, thereby nullifying any opportunity by potential (affected) parties to appeal granting of permits.

II. Oak Tree Development asserts that the Board's findings of fact do not support the Board's conclusions

This assertion is simply wrong. The Board laid out more-than-adequate findings of fact, and as stated earlier, confirmed in its Conclusions of Law and Opinion, that

> *[t]he Appellant provided evidence showing that the planned co-living use potentially would not be established and operated consistent with a two-family flat as that use is defined in the Zoning Regulations; for example, a group of unrelated people living together might not constitute a single house-keeping unit, or the control of the premises by Common might negate the required characteristic of residences functioning independently of each other.*[1] and

[6] *Appellant's reply to DCRA's and Owner's Pre-hearing Statements and Consent to Amend Appeal*, § B.i., 19 Mar 2017, p. 7-8
[7] Ibid. p. 9, and exhibit A attached to same

> *...the co-living arrangement [would] introduce[e] a use inconsistent with the zoning definition of "flat" as a two-family dwelling.*[8]

Additionally, OTD claims that "…the Order does not identify the proper use category of the buildings,…"; however, the Board is not required to indicate the proper use category, as this would be incumbent on the owner filing for building permits. The Board is only required to address the question as to whether the application supported a permit for 2-family flats. Because the application did not do so, the Board granted the Appeal.

III. Oak Tree Development again, asserts that the Board's "conclusions are erroneous since RPNA did not submit any actual evidence regarding how the properties would actually operate"

As already stated, RPNA submitted extensive and comprehensive evidence regarding Common, Common's 1) business model, 2) advertisements for tenancy in the District of Columbia, 3) statements as to how it operates its property(s), and a statement by Common CEO regarding his willingness to accept risk associated with violating existing regulations to operate as he sees fit. This litany of evidence supported RPNA's appeal; evidence that the Board concluded was sufficient to support its findings of fact, conclusions and order. The Board was also able to review a portion, but not all of Common's lease agreement, because Common omitted its membership agreement from its submission of evidence. As RPNA stated in its reply

> *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, arranged, or designed to be used or occupied,*

[8] *Order Granting Appeal*, Board of Zoning Adjustment, 17 May 2017, published 4 Feb 2019, p.6

> *[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).*[9]

As stated earlier, despite Common's insistence to adhere only to what can be observed as concluded, and forego inference of intended use from the evidence, the RPNA's assertion as to how Common intended to operate the properties in noncompliance with regulations, has in fact, come to fruition.

IV. Oak Tree Development complains that the Board's public deliberations do not support the order

Oak Tree Development cites no legal requirement(s) that the Board's public deliberations must reflect its final order, nor that the final order must flow from the public deliberations. Frankly, the Board may render any legal opinion it sees fit after deliberation to its satisfaction. It would be unreasonable to expect that the Board would consider anything less than all relevant positions and arguments in its deliberations, so to do any less than ensure it renders a sound and trustworthy decision. The Decision stands on its own.

V. Oak Tree Development makes the case that its evidence submissions demonstrated that the buildings would be operated legally

Here again, OTD dredges up the argument that it is not permitted for the Board or RPNA to inquire into the intended use of the properties beyond pure interpretation of the drawings, (which Oak Tree argues could resemble a 2-family flat, and therefore is a 2-family flat). As RPNA pointed out above under Oak Tree assertion III., this argument is contrary to well-established Board of Zoning Adjustment precedent, and DC regulations. Oak Tree Development elaborates

[9] *Appellant's reply to DCRA's and Owner's Pre-hearing Statements and Consent to Amend Appeal*, § III.A., 19 Mar 2017, p. 6

that its (self-serving) affidavit that it would operate in compliance with the law, should be sufficient to quell any concerns by RPNA or BZA, and no further inquiry into Common's business model or practices is warranted. But this is also wrong. The very purpose of the Board of Zoning Adjustment is to conduct fact finding, and legally resolve regulatory conflicts. The Board was free to make its own credibility determination of Mr. Jawitz's testimony at the public hearing. Moreover, regarding NYC regulations, Common's CEO expressed his willingness to violate regulations in a statement.

> *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. It's 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 unpermitted construction, obviously, we do not do. But yeah, there are obviously regulatory challenges.*[10]

VI. Oak Tree argues that the Orders should be estopped

The estoppel argument is frivolous. First, any estoppel argument relies on the premise that the (affected) party harmed by the policing power has acted in good faith. In this case, OTD was not, and has not been acting in good faith. Richardson Place Neighborhood Association demonstrated in its briefing and at the hearing, that OTD did not fully or honestly disclose its intended use of the properties in its permit applications, where the Board concludes in its order:

> *The Board agrees with the Appellant that the proposed use of the subject property as a "co-living facility" was NOT (for emphasis) consistent with the Property Owner's stated intention to use the buildings as two flats."* [11]

[10] Further discussed in *Appellant's reply to DCRA's and Owner's Pre-hearing Statements and Consent to Amend Appeal*, 19 Mar 2017, p. 25

[11] *Order Granting Appeal*, Board of Zoning Adjustment, 17 May 2017, published 4 Feb 2019, p.6

It is ridiculous for OTD to argue that while OTD misled the Government, which resulted in the Government issuing a building permit for what it thought at the time was a legal use; upon the Government's realization that OTD was actually planning illegal use of the property, that the Government should subsequently not be allowed to enforce the law.

Second, the timeline of events demonstrates that OTD inflicted harm on itself. At the time, (December 2016), when RPNA appealed OTD's building permits, OTD had not even filed for Certificates of Occupancy. Following the BZA decision in May 2017, revoking the building permits, OTD and Common Living knowingly and unethically proceeded with accepting Certificates of Occupancy and leased the buildings in a co-living manner, despite the BZA ruling to not do so. Third, while OTD makes a claim that it cannot recover expended costs if it cannot operate in a manner that is prohibited by the BZA Order, it could easily recuperate expenditures if it simply operated the subject properties in a manner compliant with the Zoning Code.

VII. Oak Tree Development motions for a stay of Order

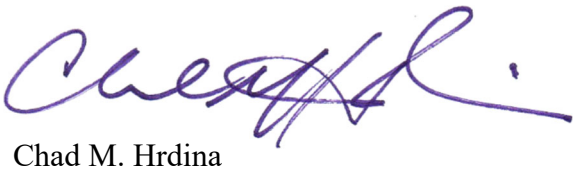
It has been nearly two years since the public hearing, and the Board decision to revoke the OTD building permits at the subject properties, and while the subject properties were unoccupied at the time of the BZA decision, since that time, OTD and Common have operated as though the decision did not even happen, subsequently populating the subject properties with tenants; a business decision that flew in the face of the BZA and its ruling. Because the standard for granting a stay is exceptionally high, and OTD has chosen to use its Motions for Reconsideration to effectively relitigate the case by rehashing exhausted arguments that BZA rejected nearly two years ago, rather than provide any sufficient (or new) evidence to support its complaints, RPNA does not see any grounds for sustaining either motion.

CONCLUSION

Regarding BZA case 19441, Richardson Place Neighborhood Association has laid out rationale accordingly, and respectfully requests that the Board of Zoning Appeals DENY both the Motion for Reconsideration and Motion of Property Owner to Stay Effectiveness of Order. Richardson Place Neighborhood Association would not be averse to a 30-day maximum Stay of Order to allow all residents who unknowingly leased with Common under this nearly two-year unethical operation (that Common Living full-well knew they would one day be mandated to close), and thus reside at the subject properties, to relocate within the month following the Order and forego as much harm as possible from Common's otherwise reckless occupancy scheme.

DATED: 19 February 2019

Very Respectfully,



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copies to Heath Miller – Director RPNA
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CERTIFICATE OF SERVICE

Regarding BZA Appeal No. 19441, I hereby certify that I have submitted the foregoing *Richardson Place Neighborhood Association Response to Motions for Reconsideration and of Property Owner to Stay Effectiveness of Order* to the Board of Zoning Adjustment via electronic filing in the Interactive Zoning Information System (IZIS) and transmitted copy via electronic mail to the following, this 19th day of February, 2019.

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Dated: 19 February 2019

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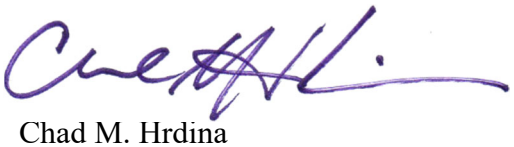

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