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Via IZIS

D.C. Board of Zoning Adjustment
441 4th Street, N.W., Suite 200S
Washington, D.C. 20001

RE: BZA Appeal No. 21007 of the Zoning Administrator Determination
Pertaining to Condition 2.c. in BZA Order No. 20308 for the CCRC
Use at 4865 MacArthur Blvd., N.W.

Appellant's Pre-Hearing Submission

Dear Members of the Board:

On behalf of 4865 MacArthur Landlord, LLC (“Appellant”), we submit the following supplemental information in support of the above-referenced appeal pursuant to Subtitle Y § 302.16 of the D.C. Zoning Regulations. The Appellant reasserts the arguments set forth in its initial appeal dated August 11, 2023, challenging the determination letter issued by the Office of Zoning Administration (“OZA”) dated July 3, 2023 (“OZA Letter”) regarding Condition 2.c. in BZA Order No. 20308.

1. Update on Current Status of Project Approved in BZA Order No. 20308

Construction of the approved project is nearing completion. All floors, exterior walls, cladding, roof, building systems have been constructed and installed. The Appellant is currently finalizing the interior building and finishes, which will be completed this fall, and opening scheduled for the beginning of 2025. The Appellant requires issuance of a certificate of occupancy (“C of O”) as soon as possible this fall in order to allow the Department of Health (“DOH”) to initiate the extensive licensing inspections required for the Continuing Care Retirement Community (“CCRC”) use. The inspection process is anticipated to take approximately three months, which will allow the Appellant to meet the scheduled opening in the beginning of 2025. The facility will provide a mix of independent living and assisted living units. The 53 independent living (“IL”) units are subject to the inclusionary zoning regulations, and six of the IL units (approximately 6491 square feet of space) will be set aside for households earning no more than 60 percent of the mean family income. The Appellant has diligently

pursued the completion of the project for the past three years and must deliver the building for occupancy by the beginning of 2025 to meet its legal and fiduciary obligations.

2. Impact of BZA Decision in Case No. 20308A on Applicant's Ability to Obtain C of O

On December 13, 2023, the BZA voted to amend Condition 2.c. of BZA Order No. 20308 to clarify that the Appellant is not required to “actively seek” and construct the public space improvements in that condition if approved by DDOT. Rather, the Appellant only needs to “actively promote,” orally and in writing to DDOT, the listed improvements. See transcript in BZA Case No. 20308A, December 13, 2023, at 15-20. Because the written order in BZA Case No. 20308A (“Modification Order”) is still pending, OZA and the Department of Buildings (“DOB”) have informed the Appellant that a C of O cannot be issued based on the modified conditions. Rather, until the written Modified Order is released, the Appellant must demonstrate compliance with the conditions of the *unmodified* BZA order (“Original Order”), pursuant to Item No. 4 of 12A DMCR § 110.5. That section of the D.C. Building Code provides that if a C of O application pertains to “a structure or use authorized by an order of the Zoning Commission or Board of Zoning Adjustment and the permission granted in that order was made subject to conditions, [the C of O applicant must provide] a copy of the Order and statement demonstrating compliance with the Order, including all conditions that were to be satisfied prior to issuance of a Certificate.” Because the only decision currently in effect is the Original Order, OZA/DOB advised that the Appellant must comply with unmodified Condition 2.c.

3. Appellant's Efforts to Develop Contingency Plan with OZA in the Absence of Written Modification Order.

Given the serious consequences of not obtaining a C of O by this fall, the Appellant attempted to develop a contingency plan with OZA/DOB to demonstrate compliance with the unmodified Condition 2.c. of the Original Order, notwithstanding the Appellant's objection to OZA/DOB's interpretation of that condition. Pursuant to the unmodified Condition 2.c., the Appellant would be required to construct certain public space improvements, but only if they are approved by the District's Department of Transportation (“DDOT”):

- c. [The Applicant shall] Actively seek, in writing and orally, the following safety improvements near the R-1-B Building's site, and *if approved by DDOT*, construct these improvements: ...

BZA Order No. 20308 at 12.

As set forth in the Appellant's statement in support of this appeal at page 6, the Appellant coordinated multiple times with DDOT regarding the Condition 2.c. improvements. Ultimately, however, DDOT determined that the Appellant was not authorized to construct these improvements. After this appeal was lodged last summer, DDOT filed its official report in the parallel BZA modification of significance matter (BZA Case No. 20308A), stating that the Appellant could not pursue the sidewalk improvements in Condition 2.c.vi. due to "significant challenges." Instead, DDOT stated that DDOT would fund and construct the improvements through its Sidewalk Gap Program:

[T]here are significant challenges to the Applicant constructing these, including large grade changes necessitating retaining walls, removal of trees and telephone poles, and removal of all items installed by adjacent property owners such as fences, staircases, gardens, and stone walls. This would require significant coordination with these neighbors.... DDOT will install the sidewalks in the future. DDOT's Sidewalk Gap Program, which prioritizes installation of missing sidewalks based on equity, proximity to schools, transit, and high injury network streets, and complexity of installation, estimates the sidewalks in this neighborhood will be installed in the 3-5 year timeframe. At that time, DDOT will lead the design, construction and coordination with the neighbors.

DDOT Report in BZA Case No. 20308A (Exh. 9), September 22, 2023 (copy attached as Exhibit A).

By email dated April 26, 2024, the Appellant requested OZA/DOB to update the OZA Letter to recognize the Board's oral vote in Case No. 20308A (as documented by the transcript) and acknowledge the official DDOT report stating that DDOT (and not the Appellant) would be responsible for the design and construction of the C.2. improvements. The Appellant stated that these changed circumstances should allow OZA/DOB to issue a C of O based on the unmodified Condition 2.c. By telephone call on May 13, 2024, OZA/DOB rejected this approach, finding that it was bound by the strict letter of Item 4 of Section 110.5 of the D.C. Building Code. OZA/DOB did not offer any explanation as to why DDOT's unequivocal official statement was insufficient to prove compliance with Condition 2.c., or what evidence would satisfy OZA/DOB.

OZA/DOB also indicated that Item 4 of Section 110.5 of the Building Code prevented it from even authorizing a temporary/conditional C of O pending issuance of the Modification Order, notwithstanding several similar examples cited by the Appellant. Most notably, OZA/DOB issued multiple temporary/conditional certificates of occupancy for the Ballpark

pending compliance with a PUD retail use condition.¹ OZA/DOB agreed to review whether the examples cited had precedential effect. Unfortunately, OZA/DOB advised that because the written decision is pending in the Modification Order, it was precluded from taking any action whatsoever. That is, OZA/DOB cast the Appellant into legal limbo: the Appellant is not allowed to demonstrate compliance with the unmodified Condition 2.c. based on DDOT's subsequent stance (and notwithstanding OZA's position regarding Building Code Section 110.5), and it cannot rely on the Modification Order, because the written decision has not been issued. In effect, OZA has repudiated the very determination letter that is the subject of this appeal but is not willing to take any action to advance this project despite legal precedent and evidence to the contrary.²

Such agency inaction, indecisiveness, and delay can and does have devastating impacts on projects, including this one. The Appellant respectfully requests the Board to grant the appeal to allow the timely issuance of a C of O this fall, which will allow for the necessary DOH inspections and occupancy of the building by the beginning of 2025. Alternatively, prompt issuance of an order in BZA Case No. 20308A will negate the need for this appeal, and the Appellant could withdraw this case prior to the hearing scheduled for July 31, 2024.

Respectfully submitted,

THE BROWN LAW FIRM PLLC

By: 
Mary Carolyn Brown

Counsel for the Appellant

cc: William Brewer, the Trammell Crow Company

¹ <https://www.washingtonpost.com/dc-md-va/2022/09/20/dc-nats-park-events-dc/>.

² Most recently, OZA has “paused” review of a building permit modification for the project to reconfigure the independent living units and the IZ units. OZA stated that, due to the pendency of the written decision in BZA Case No. 20308A, zoning review of the permit modification can only resume ten days after the final date of the written order in Case 20308A, even though the Modification Order in no way affects the unit configuration. It is unclear how this position advances the legal interests of the Appellant, the District or the public good.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **July 10, 2024**, a copy of the foregoing prehearing statement and attachment were served by email on the following:

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