DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
One Judiciary Square
441 4th Street, NW
Washington, DC 20001

BZA Appeal No. 21007

Appellant: MacArthur Landlord, LLC

D.C. DEPARTMENT OF BUILDING'S
MOTION TO DISMISS APPEAL AND PRE-HEARING STATEMENT

Appellee District of Columbia Department of Buildings ("DOB"), through its undersigned counsel, files this pre-hearing statement and moves to dismiss this appeal from MacArthur Landlord, LLC ("Appellant"). Case No. 21007 is moot due to the Board of Zoning Adjustment's ("BZA" or the "Board") modification of the condition that was the basis of the appealed determination in this matter. In Case No. 20308-A, the Board approved a modification of the very condition at the heart of this appeal. Now, with that modification, the appealed determination has been superseded by the Board's [date] oral ruling and forthcoming written Modification Order, and there is no live issue before the Board. In support of this motion, DOB states as follows.

I. Background

On May 20, 2020, the Appellant filed an application with the BZA in Case No. 20308. The purpose of the application was to obtain a Special Exception to the use provisions of Subtitle U § 203.1(g) of the Zoning Regulations to authorize a continuing care retirement community ("CCRC") use on the R-1-B zoned portion of the Property. A hearing was held on November 4, 2020. Both the Palisades Park Community Association (the "PPCA") and the Advisory Neighborhood Commission 3D (the "ANC") supported the application after negotiating a Memorandum of Agreement ("MOA") and Construction Management Agreement ("CMA") with the Appellant. The MOA contained various concessions including certain traffic and safety

improvements around the project site. *See generally*, MOA at Exhibit 2C. After the conclusion of the November 4, 2020, hearing, the Board voted to approve the relief subject to certain conditions in line with those set forth in the MOA.

On June 4, 2021, the Board issued its Decision and Order in Case No. 20308 approving the application with conditions. Among these conditions was the condition in paragraph 2.c ("Condition 2.c"), which stated that the Appellant must:

> c. 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:
>
> i. Three-way stop signs and cross walks at V Street and 48th Place, N.W.; at V and 49th Streets, N.W.; and at V and 48th Streets, N.W.;
>
> ii. A no-right-turn-for-trucks sign at the 48th Place and V Street, N.W. intersection for trucks exiting 48th Place, N.W.;
>
> iii. A crosswalk and a speed control measure on 48th Street near the intersection with U Street, N.W.;
>
> iv. 15 mph signs near the library on V Street, N.W.;
>
> v. A high-visibility crosswalk signal at U Street and MacArthur Boulevard, N.W.; and
>
> vi. Sidewalk extensions along all of V, 48th, and 49th Streets, N.W.

Importantly, Condition 2.c of the BZA's Order ("[a]ctively 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…") deviated from the MOA's condition language at paragraph 4.e.iii requiring Appellant to "[a]ctively promote with the District Department of Transportation both in writing and orally the following safety improvements near the Project's site…." *See* Exhibit 2C.

Approximately 21 months after the BZA order was issued, DOB was made aware of concerns raised by both the PPCA and the ANC regarding the Appellant's compliance with the

Condition and apparent lack of progress in that regard. A copy of the March 10, 2023, correspondence to DOB and the Acting Zoning Administrator is attached hereto as **Exhibit A**. The PPCA and the ANC asserted that Appellant was not only required to make the improvements but also pay for them.

DOB and Appellant discussed the PPCA and ANC concerns. Appellant initially took the position that Condition 2.c was fulfilled through Appellant's 311 request to DDOT. On June 14, 2023, Appellant was advised of DOB's disagreement with this position. A subsequent meeting was held on June 22, 2023, concerning Condition 2.c. The Office of Zoning Administration then issued the Determination Letter on July 3, 2023, a copy of which is located at Exhibit 2A, which determined that: (1) contrary to Appellant's position, Appellant had not actively sought, in writing or orally, DDOT's approval for improvements specified in Condition 2.c; and (2) contrary to the PPCA and ANC's position, Appellant was not responsible for the cost of construction; however, the language of the condition imposed an obligation to <u>construct</u> the improvements, if approved by DDOT. The Determination Letter advised that, prior to the issuance of a Certificate of Occupancy ("C of O") for the Property, the Appellant would need to demonstrate compliance with Condition 2.c.

On July 7, 2023, in response to additional correspondence from Appellant, OZA further clarified its position via e-mail. A copy of this correspondence is attached hereto as **Exhibit B**. Notably, this correspondence explicitly states that "the OZA does not agree with the position of ANC 3D that the Developer is required to pay for the improvements, but it is the position of this Office that the plain language of the Condition makes the Developer responsible for the construction of the improvements." **Exhibit B**.

The Determination Letter was not a denial of an application for a C of O. Rather, it was the determination that the Appellant was required to comply with the conditions imposed by the Board in its Final Order before a C of O would be approved, as required by the Zoning Regulations at 11-A DCMR §§ 303.3 and 303.4, as well as the Building Code at 12-A DCMR § 110.5. Nevertheless, on August 11, 2023, Appellant filed this Appeal of the Determination Letter.

Simultaneously with this Appeal, the Appellant sought a modification of the language of the Condition in BZA Case No. 20308-A to conform it to the language of the MOA. A hearing was held on November 29, 2023. On December 13, 2023, the Board voted 4-0-1 to approve the modification to the language of Condition 2.c sought by Appellant. In approving the modification, the Board accurately identified the specific portion of Condition 2.c that caused the Determination Letter to issue, "[b]asically tying [Appellant] to constructing those improvements." Case No. 20308-A, 12/13/23 Hearing Transcript at 16:19-20. A written Modification Order memorializing the exact language of the modified condition has not yet been issued in Case No. 20308-A.

II. Because No Effective Relief Can Be Granted, the Appeal Should Be Dismissed as Moot.

The Board's forthcoming Modification Order to Condition 2.c underlying the Determination Letter has rendered this Appeal moot. Pursuant to D.C. Code § 6-641.07(f), an Appeal to the Board of Zoning Adjustment may be taken from "any decision of the Director of the Department of Buildings granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or in part upon any zoning regulation or map adopted under this subchapter." Likewise, 11-Y DCMR § 302.1 allows an appeal by "[a]ny person aggrieved or any officer or department of the government of the District of Columbia or the federal government affected by an order, requirement, decision, determination,

or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations may file a timely zoning appeal with the Board." With the Board's modification of Condition 2.c, the Zoning Determination Letter has been superseded, Appellant is no longer aggrieved by it, and no effective relief can be granted through this Appeal. *See Settlemire v. D.C. Office of Emp. Appeals*, 898 A.2d 902, 907 (D.C. 2006) (upholding administrative determination dismissing case because no effective relief was available); *Thorn v. Walker*, 912 A.2d 1192, 1196 (D.C. 2006) (explaining that if "the appellate court can provide no effective relief, the case is moot"). Here, as in *Settlemire* and *Thorn*, an intervening change in circumstances—the Board's approved modification of the Condition in Case No. 20308-A—has rendered this Appeal moot. Therefore, the Appeal should be dismissed.

If the Board reversed the Determination Letter, that action would be of no effect given the forthcoming Modification Order in Case No. 20308-A approving the sought-after modification. Stated another way: the underlying basis for the Determination Letter has already been modified by the Board. The Statement of Appeal requests that the Board find that the Appellant has complied with the unmodified Condition 2.c, and that the Appellant is not required to pay for the improvements listed therein. Appellant's Statement of Appeal at Exhibit 2. Putting aside the fact that the Determination Letter did not find that the Appellant was responsible for funding the improvements – only that the language of Condition 2.c imposed an obligation to construct improvements if approved by DDOT – the modification of Condition 2.c by the Board makes Appellant's compliance or non-compliance with the unmodified Final Order immaterial to the issuance of a future Certificate of Occupancy. Only compliance with the Board's modified condition will fulfill the requirements.

Again, this Appeal is not from the denial or rejection of an application for a C of O. Appellant concedes that even today, it is not ready to apply for its C of O. *See* Appellant's Pre-Hearing Submission at Exhibit 15 ("The Appellant requires issuance of a certificate of occupancy ("C of O") as soon as possible *this fall*…") (emphasis added). Reversing the Determination Letter will not cause the issuance of a C of O. A C of O can only be issued when 1) work pursuant to a permit has been completed, 2) a satisfactory final inspection has been approved, 3) the construction conforms substantially to the permit including approved construction documents and to the provisions of the Construction Codes, the Zoning Regulations and other applicable laws and regulations, and 4) the owner has complied with the requirements of 12-A DCMR § 110.5. *See* 12-A DCMR 110.4.1.

12-A DCMR § 110.5 governs the application for and processing of Certificates of Occupancy. This regulation specifies the requirements of a C of O application as follows:

> All applications for a Certificate authorizing the use and occupancy of a premises or a portion thereof shall be filed with the Department on the prescribed forms provided by the code official, shall be accompanied by the prescribed filing fee paid at the time of the application, and shall include the following:
> 1. A list of permit number(s) for the valid, associated permit(s) that authorized the construction of the premises or portion thereof for which the Certificate is sought unless the code official determines that an associated permit is not required;
> 2. A copy of the final inspection approval per Section 109.3.8, unless the code official determines that no inspection is required pursuant to Section 110.5.1;
> 3. For premises located in a PDR zone, the "Standards of External Effects" application required by Section U-805 of the Zoning Regulations;
> 4. If an 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, a copy of the Order and a statement demonstrating compliance with the Order, including all conditions that were to be satisfied prior to the issuance of a Certificate;
> 5. Where the premises is located wholly or partially within a flood hazard area, the required elevation certificate or flood-proofing certificate as applicable with

evidence of review and approval of such certificate by the Floodplain Administrator; and

6. Any other information required by the code official.

12-A DCMR § 110.5. Just as DOB and the Office of Zoning Administration cannot ignore the Board's Orders and the conditions therein, the requirements of the regulations must also be given full effect. Notably, the fourth enumerated requirement pertains to circumstances where a use is authorized by the Board subject to conditions, as is the case here. The Building Code requires that an applicant provide "a copy of the Order and a statement demonstrating compliance with the Order, including all conditions that were to be satisfied prior to the issuance of a Certificate."

To the extent that Appellant argues in its pre-hearing statement that it should be able to obtain a Temporary or Conditional C of O, the requirements of 12-A DCMR § 110.5 still apply. *See* 12-A DCMR § 110.4.4 ("The code official is authorized to issue a Temporary Certificate of Occupancy, *subject to the requirements of Section 110.5*…") (emphasis added); *see also*, 12-A DCMR § 110.4.3 sub 4 (mandating compliance "with the requirements of Section 110.5" as a precondition to issuing a Conditional Certificate of Occupancy). Appellant will still need to demonstrate compliance with all requirements of 12-A DCMR § 110.5 to obtain any form of C of O.

The Appellant's stated goal is the issuance of a C of O at some future time when they can meet the remaining requirements for a C of O, such as completing construction and obtaining all final inspection approvals. Appellant's Prehearing Statement at Exhibit 15. Appellant claims that it has already complied with the Board's forthcoming Modification Order, but that will not allow the C of O to issue. To obtain the C of O, the Appellant will, among other things, be required to apply with a copy of the Board's Modification Order in Case No. 20308-A. The only effective relief that the Board can grant has already been granted in Case No. 20308-A. When the Board

issues the forthcoming Modification Order, and the Appellant is in a position to meet all other requirements, only then DOB will be able to determine whether a C of O can be issued.

III. Conclusion

For the foregoing reasons, DOB requests that the Board dismiss this appeal, as there is no effective relief that the BZA may grant under the specific facts and circumstances of this matter in light of the approved modification to Condition 2.c to be addressed in the Board's forthcoming Modification Order in Case No. 20308-A.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 24, 2024, a copy of the foregoing was sent via electronic mail and/or the electronic filing system to:

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